PHILIP J. MURREN
ATTORNEY AT LAW

BALL & SKELLY
511 N. SECOND STREET
HARRISBURG, PENNSYLVANIA 17108

TELEPHONE
232-8731
AREA CODE 717

NO. A -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM H. GREEN, Et Al.,

v.

DONALD T. REGAN, Secretary of the Treasury of the United States, Et Al.,

CLARKSDALE BAPTIST CHURCH, Applicant.

D.C. Circuit Docket No. 83-1831

APPLICATION FOR STAY PENDING APPEAL

September 2, 1983

* WILLIAM BENTLEY BALL
PHILIP J. MURREN

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Counsel for Applicant
Clarksdale Baptist Church

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Constitution:

Other Authorities:

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APPLICATION FOR STAY PENDING APPEAL

TO THE HONORABLE WARREN E. BURGER, THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT:

COMES NOW the Applicant, Clarksdale Baptist Church, Clarksdale, Mississippi, and applies to the Honorable, the Chief Justice of the United States Supreme Court, in his capacity as Circuit Justice for the District of Columbia Circuit, for a stay of an order of the United States District Court for the District of Columbia, pending an appeal now docketed in this matter in the United States Court of Appeals for the District of Columbia Circuit, and in support thereof states as follows:

HISTORY OF THE CASE

On June 30, 1971, a permanent injunction was entered in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd. sub nom. Coit v. Green, 440 U.S. 997 (1971), directing the Secretary of the Treasury to refuse to recognize the tax exemption of racially discriminatory educational institutions located in the State of Mississippi. The case had been brought by a group of parents of black children enrolled at that time in public schools in Mississippi.

Not satisfied with the enforcement procedures of the Internal Revenue Service under the 1971 injunction, the plaintiffs, on July 23, 1976, petitioned the United States District Court for the District of Columbia to reopen the Green case and grant further injunctive relief, seeking that Court to direct the implementation of more aggressive enforcement procedures. At the same time, another group of plaintiffs (represented by the same counsel) filed an additional suit, seeking the same relief sought in Green, but on a nationwide basis. This additional suit was then captioned Wright v. Simon (D.D.C. Docket No. 76-1426). The Green and Wright cases were thereafter consolidated for disposition by the district court.

During the pendency of the Green and Wright cases, the Internal Revenue Service dropped its opposition to the plaintiffs' claims, and sought to implement the relief requested by the plaintiffs by issuance of a new Revenue Procedure. Such a proposed Revenue Procedure was thus announced on August 22, 1978, and published at 43 Fed. Reg. 37296. After a storm of public protest, the Service withdrew its proposal and issued a substitute on February 13, 1979

(44 Fed. Reg. 9451). However, implementation of the proposed Procedure ("or any part thereof") was blocked by Congress by means of the "Ashbrook" and "Dornan" amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, P.L. 96-76, 93 Stat. 559, §§103 and 615 (1979).

Thus prevented from pursuing administrative implementation of their revised enforcement procedures, the plaintiffs and the Internal Revenue Service returned to the district court. On November 26, 1979, the district court separated the Green and Wright cases, dismissing the Wright case for, inter alia, lack of standing. Wright v. Miller, 480 F. Supp. 790. The district Court's Wright decision was subsequently reversed (Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981)), and this Court has now granted certiorari therein (Allen v. Wright, No. 81-757 and Regan v. Wright, No. 81-970). The district court retained jurisdiction over the Green (or Mississippi only) component of the previously consolidated case, and proceeded to issue an injunction decree on May 5, 1980, directing the Internal Revenue Service to follow detailed guidelines in assessing the eligibility of Mississippi schools for tax exemption. (See Appendix A hereto.) On June 2, 1980, the district court clarified its Order of May 5, 1980. (See Appendix B hereto.) The government defendants failed to file timely appeals from these two Orders. No church-operated or other private schools were represented before the district court in the Green litigation.

After unsuccessful attempts by church-operated schools in Jackson, Mississippi and Hattiesburg, Mississippi to intervene in the Green case subsequent to the district court's May-June, 1980 Orders, the Clarksdale Baptist Church

of Clarksdale, Mississippi (the applicant herein) was permitted to intervene on May 14, 1981. On June 5, 1981, the Clarksdale Baptist Church (which operates a religious day school for grades K-9) filed a motion seeking the district court to modify its May-June Orders in light of issues, relating to the effects of the Orders on the liberties of church-operated schools, which had not previously been litigated. That motion, detailing the Church's challenges to the Orders, is included herein as Appendix C. The district court permitted testimony on this motion (and on a counter motion for summary judgment filed by plaintiffs) by deposition only, refusing to receive evidence in open court. On January 6, 1982, the district court stayed all proceedings, pending the outcome of the case of Bob Jones University v. United States, then pending in the Supreme Court (Docket No. 81-3).* After this Court's decision in the Bob Jones case (103 S. Ct. 2017) the district court vacated its stay herein, and, on July 22, 1983, entered summary judgment in favor of the plaintiffs, re-imposing its May-June, 1980 Orders. (See Appendix D hereto.) The district court, however, stayed enforcement of its Orders for a period of twenty days in order to permit the Clarksdale Baptist Church to seek a further stay from the United States Court of Appeals for the D.C. Circuit. (See Appendix D, page 3.) On August 11, 1983, an additional interim stay was ordered by the district court

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* Shortly thereafter, the plaintiffs moved the district court to vacate this stay and to grant further injunctive relief on a nationwide basis. The plaintiffs' motion was denied on February 4, 1982, and plaintiffs filed an appeal therefrom (D.C. Cir. No. 82-1134), as well as a petition to this Court to grant certiorari in advance of judgment by the Court of Appeals (Supreme Court Docket No. 81-1626). This Court denied the petition on April 19, 1982, sub nom. Green v. Regan, 456 U.S. 937.

(Appendix E hereto) which lapsed when the Church's motion for stay pending appeal was denied by the Court of Appeals on August 18, 1983. (See Appendix F hereto.)

REASONS FOR GRANTING THE STAY

This case tests the validity of court imposition of those "more aggressive [IRS] enforcement procedures", compelling racial nondiscrimination by church-schools, which this Court referred to, but did not pass upon, in Bob Jones University v. United States, 103 S. Ct. 2017, 2034 n. 27 (May 24, 1983).

I. THE ISSUE OF PLAINTIFFS-APPELLEES' STANDING TO SUE REMAINS OPEN

The plaintiffs in this case do not assert legal rights different from those asserted by the plaintiffs in the Wright case. See Wright v. Miller, 480 F.Supp. 790 (D.D.C. 1979), rev'd., 656 F.2d 820 (D.C. Cir. 1981). Respecting standing, the only difference between the Green case and the Wright case is that previous district court judges in the Green case had turned aside earlier challenges to the standing of the Green plaintiffs. But Clarksdale Baptist Church continually sought to have the district court reexamine that standing, and continued to maintain that it was fully within that court's power to do so. The court was not barred by any principles of res judicata or collateral estoppel, particularly with respect to a party which had not been represented in the case heretofore. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n. 7 (1979).

Now that the United States Supreme Court has granted certiorari in the consolidated cases of Allen v. Wright (No. 81-757) and Regan v. Wright (No. 81-970), substantial doubt has been thrown upon the legal standing of civil rights plaintiffs to litigate the tax liabilities of third parties.

Plaintiffs rest their standing upon a claimed IRS infringement of their equal protection rights under the Fifth Amendment. Clarksdale Baptist Church continues to believe that its tax liabilities are an issue between it and the Internal Revenue Service, and not between persons who have never been injured by any action of the Church. It is critical that at no point prior to this was the standing issue litigated in terms of the harm caused to the Green plaintiffs by granting tax exemption to schools which were founded out of religious motivation.

It is not enough for the plaintiffs to say (and indeed they have not) that someone in the class they purport to represent may have been injured by the Clarksdale Baptist Church's school. The named plaintiffs themselves must have suffered some cognizable injury in order to maintain the class action. As the Supreme Court has said, when class representatives "have not established their own standing to sue, 'they cannot represent a class of whom they are not a part'." Harris v. McRae, 448 U.S. 297, 320, n. 23 (1980).

Certainly a stay is requisite here, the plaintiffs' lack of standing being even more evident than that of the Wright plaintiffs, whose standing is today under Supreme Court review.

II. FUNDAMENTAL LIBERTIES OF THE CHURCH ARE IMMINENTLY THREATENED

BACKGROUND

As this litigation has proceeded, two concepts of the Church's mind and activity in founding its school - one fictional and one factual - have been apparent:

1. That of plaintiffs: The Church (and therefore its pastor, congregation, school, teachers and parents), fearing racial integration and being racist in outlook, decided in 1964 to start a school for the purpose of avoiding blacks and having "white only" education. The congregation hit upon a clever device for evading the law: to hide a racist school program behind the facade of religion. Moreover that was intentional discrimination. There are no black students or faculty. The Church refuses to go out and recruit blacks as either. That proves racial discrimination. As to the law: the Court need not review the Supreme Court decisions on religious liberty or on church-state entanglements. The Church's religious claims are patently phony.

2. That found in the record: Church members, of fundamentalist Christian faith, unhappy over the decision of the Supreme Court in the Schempp case (1963), and intensely desiring a pervasively religious education for their children, founded a school. The school was founded at precisely the time the fundamentalist school movement was starting to found schools in Vermont, Maine, South Dakota

and all over the United States. The school was founded solely out of sincere religious motivation. It is open to persons of any race. If blacks do not attend the Church's school, let it be remembered that neither do they attend the Amish schools of Pennsylvania or Hassidic schools in Brooklyn. To go to either, parents and children must step into a distinct religious culture, (here) accept fundamentalist morality, Calvinist discipline, and intense Bible-centered indoctrination. The Church rejects racism because it is unbiblical therefore sinful.*

1. The Nature of the School. The Church operates the school as "an integral part of the religious mission" of the Church. See Lemon v. Kurtzman, 403 U.S. 602, 616 (1971), that mission being "the only reason for the school's existence" (Meek v. Pittenger, 421 U.S. 349, 366 (1975)), whose "affirmative, if not dominant, policy is to assure future adherents to a particular faith by having control of their education at an early age." (Tilton v. Richardson, 403 U.S. 672, 685-686 (1971)); whose teachers advance the religious mission of the church-related school in which they

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* The idea that the foregoing collision of factual and legal contentions could properly be resolved on a motion for summary judgment is breathtaking. Summary judgment amounted to saying that the Church witnesses were all liars, knowingly perpetrating a hoax. Summary judgment is especially inappropriate in constitutional cases, except where the constitutional issue is no longer an open one in light of previous decisions. See generally 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.15[8]. A prerequsite in Religion Clause cases is a factual determination of the "sincerity and centrality" of religious claims. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Thomas v. Review Board, 450 U.S. 707, 716 (1981). Obviously "intentions and motives" are of critical importance here, both as to religious and racial issues. See 10A WRIGHT & MILLER, FEDERAL PRACTICE, 341-342.

serve (Public Funds For Public Schools v. Marburger, 358 F. Supp. 29, 40-41, aff'd., 417 U.S. 961 (1974)); whose technical training "goes hand in hand with the religious mission", so that within the school, "the two are inextricably intertwined." Meek, supra, at 366.

The foregoing facts were erroneously ignored by the court below, and thus their close relevance to Free Exercise issues and to non-entanglement under the Establishment Clause (see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 503 (1979)) was also erroneously ignored.

2. The 1980 Orders of the District Court. On May 5, 1980 (and by clarifying order June 2, 1980) the original injunction in this case (Green v. Connally, 330 U.S. 1150 (D.D.C. 1971)) was broadened expressly to include church-schools. Previously no church-school had been involved in the case, and the court's opinion had expressly declined to consider issues pertaining to tax exemption of religious bodies. Green, supra, at 1168-1169. Clarksdale Baptist Church - a religious body - therefore sought, and was granted, intervention by the district court.

The aforesaid 1980 orders of the district court had established "an inference of present discrimination against blacks" as to any school which had been established or expanded at a time subsequent to a public school desegregation decree. To overcome such a presumption of guilt, the school would have to present clear and convincing evidence through "objective acts and declarations establishing that such is not proximately caused by such school's policies and practices." It was the contention of the Church that the orders could not constitutionally be imposed upon it:

(a) There was no need to speak of any "inference" of racial discrimination: the Church was ready to prove, through record evidence, that it is in fact nondiscriminatory and, indeed, Scripturally mandated so to be. Nor should a court direct a government agency to presume anything about the motivation behind the founding of a sincerely religious school, other than that it was founded for religious reasons.

(b) Several of the "objective acts and declarations" listed by the court, as the clearly inferred means by which Churches could get out from under the presumption, directly imposed upon their religious liberty in violation of the Free Exercise Clause, and created excessive entanglements between government and a church in violation of the Establishment Clause.

Hence the Church, on June 5, 1981, moved for modification of the injunction. Here it showed precisely how the court's 1980 orders would irreparably harm the Church. As but one example*:

> "(a) The Order (paragraph 2) enjoins the Internal Revenue Service to require inter alia that, as a condition of their being accorded recognition of their granted tax exemption, church schools must give proof of 'active and vigorous recruitment programs to secure black students or teachers.' Clarksdale Baptist School was established solely for its stated religious purposes, and no child may be admitted to enrollment except upon a religious basis. And only those persons may teach in Clarksdale Baptist School who are committed to the faith and teachings of the Clarksdale Baptist School and who are approved by the Trustees. The requirement to conduct recruitment of students and teachers not necessarily of its religious faith is a direct denial of fundamental rights of the Church protected by the Free Exercise of the First Amendment.

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* See Appendix C for full statement of the Church's objections to the orders.

> "(b) But if the obligation to conduct 'recruitment programs' be viewed, not as thus imposing an obligation upon a church in violation of its Free Exercise rights, but rather as an obligation to seek black students and teachers simply for its religious purposes, then the effect of this civil court's Order is to impose upon a Church an obligation to evangelize. The Order, so interpreted, is in plain violation of the Establishment Clause of the First Amendment."

Irrespective of the ultimate resolution by this Court of the constitutional issues raised by Clarksdale Baptist Church, those issues have hitherto not been litigated in this Court. They center upon two vital areas:

(a) A broad spectrum of Free Exercise issues, including parental rights in religious education (see Pierce v. Society of Sisters, 268 U.S. 510 (1925), West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), Wisconsin v. Yoder, supra); the right to evangelize (see Murdock v. Pennsylvania, 319 U.S. 105 (1943)); the right to maintain religious schools (Pierce, supra, Board of Education v. Allen, 392 U.S. 236 (1968)); the liberty of churches for self-governance (see Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)); freedom to pursue a religious vocation as teacher; liberty of the child to be instructed in religious faith.

(b) Basic Establishment Clause issues pertaining to non-entanglement of government with churches. The Supreme Court has held that substantial involvement of government in church-schools is violative of the church-state separation principle. Lemon, supra. Thus it has condemned governmental relationships with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize," or which can lead to "confrontations and conflicts" between governmental bodies and churches. Walz v. Tax Commission, 397 U.S. 664, 674 (1970). The plaintiffs, in

the district court, sought to bypass the entanglement issue by creating the impression that the 1980 orders call merely for "supplying information". This masks the fact that the "information" in question is simply evidence of compliance with the recruiting and other provisions of Paragraph 2 of the May 5, 1980, order. As in Surinach "the gathering of information is not viewed as an end in itself. To the contrary, it is merely a first step. . ." Surinach v. Pesquera de Busquets, 604 F.2d 73, 75 (1st Cir. 1979). And see NLRB v. Catholic Bishop, supra, at 502. The next step is governmental monitoring and evaluation of the "objective acts and declarations" respecting, e.g., faculty, recruiting, etc. These place the government well inside the Church ministry.

It would be an extreme injustice both to the Church and to the public interest for the Court to permit enforcement of the 1980 orders at this stage, prior to full briefing and mature consideration of the issues.

III. IRREPARABLE HARM TO THE CHURCH, BUT NONE TO THE PLAINTIFFS-APPELLEES OR TO THE PUBLIC, WILL RESULT FROM THE GRANT OF STAY HEREIN

Clarksdale Baptist Church has moved vigorously, from the date it was granted intervention, May 14, 1981, to the present to secure adjudication of its rights.* Destruction of its tax-exempt status would cause the congregation, teachers, parents, Church and children the greatest and most obvious harm. On the record, the Church has been engaged in

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* As noted, the 1971 decree herein did not pertain to churches; this small Church had not any staff whose obligation it was to monitor legal developments or to do anything other than carry out, with limited resources, their ministry to the children.

but a single activity so far as this case is concerned: carrying out what it considers to be an apostolate to children. If ethnic prejudice is an evil, that very prejudice is the heart of the plaintiffs' insistence in destroying tax exemption for Clarksdale Baptist Church: by accident of geography it exists in Mississippi. Regardless of what the record proves, the Church, in the plaintiffs' view, must be condemned for that - unless, of course, the Church will undertake programs and activities which religious principle precludes its undertaking. That presents to the Church precisely the kind of cruel choice which the Supreme Court, in Yoder and Sherbert*, held could not be imposed.

By contrast, no harm will result to the plaintiffs (whoever, today, 1983, they may be) who, remote from the Church, never have had, or sought, any relationships with the Church, or any other church-school in Mississippi.

As a result of the district court's May-June, 1980 Orders, the anomalous situation now exists in which a federal agency (with jurisdiction over all 50 states) applies one set of guidelines to schools in one state, and a separate set to schools in the remaining 49. Such a distinction is without rational justification, and, since church-schools and their First Amendment liberties are involved, certainly without any compelling societal interest.

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* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that a stay be entered pending disposition of this case.

Respectfully submitted,

William Bentley Ball

Philip J. Murren

Philip J. Murren

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Counsel for Applicant
Clarksdale Baptist Church

Of Counsel:

James Edward Ablard, Esq.
Sedam & Herge, P.C.
Suite 1100
8300 Greensboro Drive
McLean, Virginia 22102

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al., Plaintiffs, v. G. WILLIAM MILLER, et al., Defendants.	Civil Action No. 69-1355

ORDER AND PERMANENT INJUNCTION

This matter having come before this Court on plaintiffs' motion for an order to enforce the decree in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), and for further declaratory and injunctive relief, and the plaintiffs having moved for summary judgment, and the defendants having moved for summary judgment, and this Court having considered the entire record including depositions, answers to interrogatories, requests for admissions. pleadings, and other documents submitted by the parties, and oral argument thereon, and it appearing to this Court that there is no genuine issue of material fact, and it further appearing to this Court that the defendants have not violated the order of June 30, 1971, but that said order requires supplementation and modification, it is hereby

ORDERED, that the permanent injunction entered by this Court on June 30, 1971 remains fully in effect but is supplemented and modified as follows:

Defendants G. William Miller, as Secretary of Treasury, and Jerome Kurtz, as Commissioner of Internal Revenue, their agents, servants, employees, attorneys, and successors, are enjoined and restrained from according tax-exempt status to, and from continuing the tax-exempt status now enjoyed by, all Mississippi private schools or the organizations that that operate them, which:

(1) which have been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.

(2) The existence of conditions set forth in Paragraph (1) herein raises an inference of present discrimination against blacks. Such inference may be overcome by evidence which clearly and convincingly reveals objective acts and declarations establishing that such is not proximately caused by such school's policies and practices. Such evidence might include, but is not limited to, proof of active and vigorous recruitment programs to secure black students or teachers, including students' grants in aid; or proof of continued, meaningful public advertisements stressing the school's open admissions policy; or proof of meaningful communication between the school and black groups and black leaders within the community concerning the school's nondiscrimination policies, and any other similar evidence calculated to show that the doors of the private school and all facilities and programs therein are indeed open to students or teachers of both the black and white races upon the same standard of admission or employment.

In order to ensure that defendants have information upon which they can make a preliminary judgment as to whether a private school is actually practicing racial discrimination, the following modifications are made to this Court's 1971 Permanent Injunction:

(3) Provision II(A)(2) of the Permanent Injunction is amended to require that printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circulation serving the area from which the school draws its student body.

(4) Provision II(A)(2)(a) is further amended to require that any radio advertisements used by a school to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority community. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission; the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(5) Provisions (II)(B)(1)-(3) are amended to require that the information required must be supplied by each school as set forth in Paragraph (1) herein on an annual basis for a period of three (3) years. The IRS shall not approve or continue the tax-exempt status of any such Mississippi private school which fails to supply any of the required data or other information.

(6) Provisions II(B)(1)-(3) are further amended to require that the following information be supplied on an annual basis for a period of three (3) years:

(a) the race of board members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in Paragraph (1) herein unless the showing and information required by the Permanent Injunction as amended shall be made and supplied within 120 days from the date of this Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in Paragraph (1) herein, including all such church-related schools, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

(9) The defendants are enjoined to take all reasonable steps to determine which, if any, church-related schools in Mississippi would come under Paragraph (1) herein.

(10) The defendants are further enjoined to make annual reports to this Court specifying the steps taken to implement the injunctive decree. The first report is to be made at the expiration of six (6) months from the date of this order, and thereafter on July 1 of each succeeding year for a period of three (3) years. It is further,

ORDERED, that, except for the modifications herein, the plaintiffs' motion for summary judgment be, and the same hereby is, denied; and that the defendants' motion for summary judgment be, and the same hereby is, denied.

George L. Hart, Jr.
UNITED STATES DISTRICT JUDGE

Dated: MAY 5- 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 2 1980
JAMES F. DAVEY, Clerk

WILLIAM H. GREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 69-1355
	)	
G. WILLIAM MILLER, et al.,	)	
	)	
Defendants.	)	

ORDER CLARIFYING AND AMENDING COURT'S ORDER AND PERMANENT INJUNCTION OF MAY 5, 1980

Upon consideration of defendants' motion for clarification of this Court's Order and Permanent Injunction of May 5, 1980, and it now appearing that such clarification is appropriate, this Court states that it was its intention that the Order and Permanent Injunction should apply only to Mississippi private schools or the organizations that operate them, which have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating. It was not this Court's intention to include in its Order Mississippi private schools which had not been determined in adversary or administrative proceedings to be racially discriminatory, or which were established or expanded prior to the time the public school districts in which they are located or which they serve were desegregating. In order to make clear the Court's intention paragraphs (1), (3), (4), (6), (7) and (8) are amended to read as follows:

> (1) which have in the past been determined in adversary or administrative proceedings to be racially discriminatory; or were established or expanded at or about the time the public school districts in which they are located or which they serve were desegregating, and which cannot demonstrate that they do not racially discriminate in admissions, employment, scholarships, loan programs, athletics, and extra-curricular programs.
>
> (3) Provision II(A)(2) of the Permanent Injunction is amended to require that as to schools set forth in paragraph (1) printed notices must be published on a regular basis no less than four (4) times annually for a period of three (3) years in a newspaper of general circulation serving the area from which the school draws its student body.

(4) Provision II(A)(2)(a) is further amended to require that as to schools set forth in paragraph (1) any radio advertisements used by a school to publicize its policy of nondiscrimination must be broadcast with sufficient frequency to be reasonably designed to reach its intended audience in the minority community. A school employing this method of publicizing its nondiscriminatory policy must supply the IRS with the dates and times of transmission; the radio station used; the tape and a written transcript of the announcement; and both the number of times the message was broadcast on a particular day and the number of times it was broadcast during the year.

(6) Provisions II(B)(1)-(3) are further amended to require that as to schools set forth in paragraph (1) the following information be supplied on an annual basis for a period of three (3) years:

(a) the race of board members;

(b) the grades served by the school from its inception to the present;

(c) the date the school opened for the first time and grades served upon opening;

(d) the dates additional grades were added;

(e) whether the school is presently recognized as exempt from federal income taxes;

(1) the date on which the exemption was granted;

(f) whether the school received textbooks from the State of Mississippi under the State's textbook program;

(1) whether the school ever withdrew from such program or whether it was held ineligible to receive textbooks in any judicial or administrative proceeding;

(g) whether any tuition due the school has been waived;

(1) if so, the number of students, by race, granted such waiver during each school year.

(7) The defendants are enjoined from continuing in effect any ruling recognizing tax-exempt status of any Mississippi private school as set forth in paragraph (1) herein unless the showing and information required by the Permanent Injunction as amended shall be made and supplied within 120 days from the date of this Clarification Order, or such additional period, not to exceed 120 days, as defendants may provide on cause shown in order for the school to make the showing or supply the information required hereunder.

(8) The defendants are further enjoined to conduct a survey of all Mississippi private schools as set forth in paragraph (1) herein, including all such church-related schools which come under said paragraph, obtaining the information required by the permanent injunction, as amended, described herein, which shall be collected and maintained on an annual basis for each school for a period of three (3) years.

UNITED STATES DISTRICT JUDGE

DATED: JUN 2 - 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al., Plaintiffs	:	
v.	:	CIVIL ACTION NO.
DONALD T. REGAN, et al., Defendants	:	69-1355

MOTION TO MODIFY INJUNCTION

COMES NOW Intervenor-Defendant Clarksdale Baptist Church, and, pursuant to F.R.Civ.P. 60(b), moves the Court to modify its injunctive orders of May 5, 1980, and June 2, 1980 herein, and in support thereof states as follows:

1. Intervenor hereby incorporates, by reference, the allegations set forth in its Motion to Intervene (with supporting affidavits and exhibits) filed herein on April 16, 1981.

2. Clarksdale Baptist Church operates, as an integral and inseparable part of its religious ministry, the Clarksdale Baptist School. Church and School are part of the same religious mission: the continuing ministry of Christ through His Church.

3. The Order of May 5, 1980, in this case, as clarified on June 2, 1980, irreparably harms the Church:

(a) The Order (paragraph 2) enjoins the Internal Revenue Service to require inter alia that, as a condition of their being accorded recognition of their granted tax exemption, church schools must give proof of "active and vigorous recruitment programs to secure black students or teachers." Clarksdale Baptist School was established solely for its stated religious purposes, and no child may be admitted to enrollment except upon a religious basis. And only those persons may teach in Clarksdale Baptist School who are committed to the faith and

and teachings of the Clarksdale Baptist School and who are approved by the Trustees. The requirement to conduct recruitment of students and teachers not necessarily of its religious faith is a direct denial of fundamental rights of the Church protected by the Free Exercise Clause of the First Amendment.

(b) But if the obligation to conduct "recruitment programs" be viewed, not as thus imposing an obligation upon a church in violation of its Free Exercise rights, but rather as an obligation to seek black students and teachers simply for its religious purposes, then the effect of this civil court's Order is to impose upon a Church an obligation to evangelize. The Order, so interpreted, is in plain violation of the Establishment Clause of the First Amendment.

(c) The Order's requirement respecting advertising is a government requirement that Clarksdale Baptist Church incur expenses and engage in a public activity in no way germane to its purposes, which are religious. Since the Church's School was established solely to accomplish the religious mission of the Church, and to serve the community only insofar as the religious formation of practicing doctrinal adherents of the Clarksdale Baptist Church may be said to serve the community, any advertising of its School, placed by the Church, would necessarily constitute an appeal to obtain adherents to the Baptist faith as practiced by the Church. But a civil court's Order requiring a church thus to evangelize is at once a violation of Free Exercise rights of that Church and a violation of the Establishment Clause.

(d) The Order (paragraph 2) enjoins the Internal Revenue Service to require, inter alia, that, as a condition of its recognizing the tax exemption of the Church and its School, the Clarksdale Baptist School must give proof of "meaningful communication between the School and black groups and leaders

within the community concerning the School's nondiscrimination policies . . . " The policies against racial discrimination enjoined upon its School by the Church are not secular policies nor policies derived from, or existing in response to, decisions of the civil courts in respect to racial discrimination. They are instead a matter of Christian doctrine, based upon the teachings of the Gospel. The provision of the Order requiring communication with groups and leaders of the secular community is per se violative of the Church's Free Exercise rights.

(e) Similarly, the provision of an Order requiring such communication is violative of the Establishment Clause in that it requires the Church to engage in public communication with respect to its doctrinal beliefs rejecting racial discrimination.

(f) Tax exemption has been held to be an expression of governmental neutrality toward religion. By virtue of the Order, the Church's School is required to disclose extensive information to a government agency to be used for the possible purpose of denying it tax exemption. Requiring such disclosure for such purpose constitutes a forbidden entanglement by government with religion, prohibited by the Establishment Clause of the First Amendment.

(g) The religious liberty of the Church, intimately related to its tax-exempt status, is made, by terms of the Order, to depend solely upon the will of secular governmental authorities under language giving those authorities unlimited subjective discretion with respect to, e.g.,

- evidence which "clearly and convincingly" (to I.R.S.) establishes that an inferred racial discrimination does not exist,
- proof of "objective" (in the view of the I.R.S.) acts and declarations,
- evidence which, though it includes, "but is not limited to" proof of various things,

- "evidence of active and vigorous" (in the view of the I.R.S.) recruitment programs,

- "meaningful" (in the judgment of the I.R.S.) public advertisements, "meaningful" (in the judgment of I.R.S.) communication with black groups and leaders,

- "other similar evidence."

The imposing of requirements thus broadly worded by the Internal Revenue Service is violative of the Church's Free Exercise rights.

(h) The Order denies due process of law to the Church in that it requires the Internal Revenue Service to exercise powers over the Church's educational ministry which are ultra vires, inasmuch as the Congress has forbidden the Internal Revenue Service to engage in such activities by enacting Section 7605(c) of the Internal Revenue Code.

(i) The Order creates a presumption that the Church through its educational ministry, is racially discriminatory and burdens the Church with having to prove that it is not. The presumption unconstitutionally harms the Church in that, without rational basis or justification, it damages the Church's good name and destroys the reverse and proper presumption: namely, that a church undertakes the religious activity of establishing a school on account of religious reasons.

(j) The Order unduly burdens the right of a wholly religious enterprise to conduct its religious ministry in education free from government direction, supervision, investigation and evaluation, all in violation of the Religion Clauses of the First Amendment.

(k) The Order denies both fundamental liberties and property rights of the Church, its pastor, the parents of students and the teachers in the school without due process of law, contrary to the Fifth Amendment, inasmuch as the requirement that a church-school adopt and publicize a policy of racial non-discrimination does not appear in, nor is fairly implied from, the provisions of the Internal Revenue Code.

the provisions of the Internal Revenue Code.

(l) The Order denies both fundamental liberties and property rights of the Church, its pastor, the parents of students and the teachers in the school without due process of law, contrary to the Fifth Amendment and to Article I, Section 9, Clause 7 of the Constitution, inasmuch as the Congress has denied to the Internal Revenue Service the authority to carry out the provisions of the Order by the enactment of the "Ashbrook Amendment," §103 of the General Appropriations Act of 1980 (P.L. 96-74), and the continuation of said Section by means of enactment of §101(a)(4) of House Joint Resolution 644 (96th Congress, Second Session, December 16, 1980, P.L. 96-536).

(m) The Order exceeds the power of the judicial branch of government under the Constitution, inasmuch as it directs the carrying out of activities for which Congress has denied funding, as set forth in subparagraph (l), above.

(n) The Order denies fundamental liberties of the Church without due process of law, contrary to the Fifth Amendment, inasmuch as plaintiffs lack the standing requisite to maintain this suit.

4. Intervenor requests that a hearing be scheduled on this Motion, and that, prior to such hearing, Intervenor be permitted to conduct such discovery as shall be necessary thereto. Intervenor further requests that a briefing schedule be adopted for implementation subsequent to hearing.

WHEREFORE, Plaintiffs respectfully pray that this

Court modify its Orders of May 5, 1980 and June 2, 1980 herein.

Respectfully submitted,

OF COUNSEL:

BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

William B. Ball

Philip J. Murren

Charles J. Steele

WHITEFORD, HART, CARMODY
& WILSON
1828 L Street, N.W.
Washington, D.C. 20036
(202) 466-3930

James E. Ablard

Attorneys for Intervenors

DATED:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al.,
Plaintiffs,
v.
DONALD T. REGAN, et al.,
Defendants.

CIVIL ACTION NO. 1355-69

ORDER

All proceedings in this matter were stayed pursuant to the prior Order of January 6, 1982, awaiting the Supreme Court's decision in Bob Jones University v. United States and Goldsboro Christian Schools, Inc. v. United States, 51 U.S.L.W. 4593 (U.S. May 24, 1983). That stay of proceedings was vacated on June 15, 1983 and on July 8, 1983, the Court heard arguments of counsel for the parties upon (a) defendant-intervenor Clarksdale Baptist Church's Motion to Modify Injunction, and (b) plaintiffs' Motion for Summary Judgment with respect to the Church's claims. (These substantive motions were pending in this matter when the stay of proceedings was entered.)

Upon consideration of the arguments of counsel, the pleadings and evidence tendered in this cause, and after review of the entire record herein, it is ORDERED that plaintiffs' Motion for Summary Judgment in their favor with respect to the constitutional and statutory claims raised by intervenor's Motion to Modify Injunction is hereby GRANTED.

The Court further, and alternatively, rules directly upon intervenor's Motion to Modify Injunction, since intervenor contends that summary judgment is inappropriate. Upon the basis of all of the evidence (including specifically the deposition testimony of the witnesses for the intervenor), the Court finds that intervenor has failed to establish that application by the Internal Revenue Service of the procedures and standards contained in the Court's injunctive decree of May 5, 1980 (as amended June 2, 1980) to the Clarksdale Baptist Church or to church-connected schools in Mississippi, generally, violates any statutory or constitutional right of the intervenor. Accordingly, it is further ORDERED that the Motion to Modify Injunction filed by the Clarksdale Baptist Church is DENIED.

On July 13, 1981 the Court suspended application of its 1980 decrees as to church-connected schools in Mississippi, pending disposition of the claims raised by intervenor Clarksdale Baptist Church. The Court now having ruled upon those claims, it is further ORDERED that the previous Order of July 13, 1981 is VACATED, and defendants shall apply the May 5, 1980 and June 2, 1980 decrees of this Court to church-connected private schools in Mississippi.

Because application of the Court's prior rulings to church-connected schools was suspended for two years, it is further ORDERED that defendants shall file two additional annual reports with the Court (and serve copies thereof upon counsel for the parties), containing the information required by paragraph (10)

of the Court's Order of May 5, 1980, said reports to be filed on July 1, 1984 and July 1, 1985.

It is further ORDERED that the effectiveness of this Order shall be stayed for a period of twenty (20) days from the date of entry hereof, so that defendants or defendant-intervenor may have an opportunity to seek a further stay of this Court's rulings from the United States Court of Appeals for the District of Columbia Circuit, in connection with any appeal they may desire to prosecute.

Dated: July 22, 1983

George L. Hart, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM A. GREEN, et al.,

Plaintiffs,

v.

DONALD T. REGAN, et al.,

Defendants.

CIVIL ACTION NO. 1355-69

FILED

AUG 11 1983

JAMES F. DAVEY, Clerk

ORDER

This matter came on the Defendant-Intervenor Clarksdale Baptist Church's motion for Further Stay and over the opposition thereto by the plaintiffs.

Now therefore, it is ORDERED that this court's July 22, 1983, ORDER be further stayed for ten days from ~~[illegible]~~ August 11, 1983 or until the motions panel of the Court of Appeals rules on the pending Motion to Stay whichever is ~~[illegible]~~ sooner.

8/11/83

George L. Hart, Jr.
United States District Judge

IN1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1831 **September Term, 1982**

Civil Action No. 69-01355

William H. Green, et al.

v.

Donald T. Regan, Secretary of the Treasury of the U.S., et al.

Clarksdale Baptist Church,

Appellant

Before: Wright* and Bork, Circuit Judges
and Robb, Senior Circuit Judge

O R D E R

Upon consideration of appellant's motion for stay pending appeal, and the oppositions thereto, it is

ORDERED by the Court that the motion is denied. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

Per Curiam

*Circuit Judge Wright did not participate in the foregoing order.