1958

August 25 - petition to City Park and Recreation Board to open Oak Park to Negroes

August 26 - denied petition

Answer: "No intention of opening parks to Negroes"

"close parks to avoid integration"

September 16 - petition by 120 Negroes to City Commission requesting a hearing on subject of desegregating parks.

September 17 - City Commission denied a hearing and vowed to close parks to avoid race mixing.

December 22 - Eight Negroes filed suit to end racial segregation in parks.

December 30 - City Commission orders parks closed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH JUDICIAL CIRCUIT OF THE

UNITED STATES

GEORGIA THERESA GILMORE, ET AL,

PLAINTIFF-APPELLEE,

v.

CITY OF MONTGOMERY, ET AL,

DEFENDANT-APPELLANT

NO. 72-1610

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Joseph D. Phelps
36 South Perry Street
Montgomery, Alabama 36104

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

MAY A MUNICIPALITY BE CONSTITUTIONALLY REQUIRED TO DENY TO PRIVATE, SOCIAL, EDUCATIONAL, CHARITABLE AND RELIGIOUS ORGANIZATIONS, ON THE BASIS OF THE RACIAL ADMISSIONS POLICIES OF THOSE ORGANIZATIONS, THE USE OF PUBLIC RECREATIONAL FACILITIES WHEN THE MUNICIPALITY IS OPERATING ALL SUCH FACILITIES ON A COMPLETELY NON-DISCRIMINATORY BASIS AND WHEN ALL SUCH FACILITIES ARE IN FACT OPEN TO ALL PERSONS REGARDLESS OF RACE OR COLOR?

STATEMENT OF THE CASE

The original decision in this case was rendered in Gilmore v. City of Montgomery, 176 F.Supp. 776, (M.D. Ala. 1959). The relief sought, which was granted by that decision, insured that Georgia Theresa Gilmore and the class which she represented would be given access to all public parks in the City of Montgomery without regard to race or color. The decision was modified by the Court of Appeals to provide that the District Court would retain jurisdiction of the cause. City of Montgomery, Alabama v. Gilmore, 277 F.2d 364 (5th Cir. 1960). The case now comes before this Court on appeal from a decision of the United States District Court for the Middle District of Alabama rendered on a Motion for Supplemental Relief filed by Gilmore, et al (Appellees here) (R. 1-11). The Motion asked that the practice of the City of Montgomery, et al (Appellants here) permitting private clubs, organizations, schools and other groups to use the public recreational facilities which are open to all on a non-discriminatory basis, be declared unconstitutional as a violation of the movants' constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment and that the City be enjoined from continuing to permit such usage. The City

answered, denying that their practices violated the movants' constitutional rights and pointing out that the motion was inconsistent with the original cause of action which required that the facilities be kept open to all on a non-discriminatory basis. (R. 29-31). The case was submitted on the pleadings, the interrogatories (R. 17-20) and the answers thereto (R. 23-28) and on a stipulated statement of facts (R. 33-37).

The District Court held that allowing the complained of usage of public recreational facilities was unconstitutional as applied to private schools or private school affiliated groups which schools or groups are racially segregated or have a racially discriminatory admissions policy, or as applied to private groups, clubs or organizations which have racially discriminatory admissions policies, and the Court enjoined the City from permitting such usage. (R. 38-46).

From that decision this Appeal is taken.

THE APPELLANTS' POSITION

The Court below enjoined the City of Montgomery from permitting certain groups to use municipal recreational facilities on the basis of the racial composition or policies of the groups. (R 38-46). The following groups fall within the broad scope of the injunctive order:

(1) All private groups including churches, civic clubs, social and charitable organizations which have a "racially discriminatory admissions policy."

(2) Private schools which have an open enrollment policy, but which have students of only one race, and

(3) Private schools which have a "published discriminatory admissions policy."

The City of Montgomery states in this Court as in the District Court that all recreational facilities are, in fact, open to all persons and groups of persons on a non-discriminatory basis without regard to race or color. This operational principle is in fact stipulated and agreed between the parties. (R. 37). The City respectfully submits that an open and non-discriminatory policy certainly meets all constitutional requirements. The Plaintiffs below sought to force all types of private groups, including social, charitable and

religious organizations to make a decision either to affirmatively adopt a racially open admissions policy or to forfeit their rights as municipal taxpayers to use municipally operated recreational facilities. The decree of the District Court in adopting such a position judicially invokes a far reaching pronouncement of constitutional law, and one which is unprecedented throughout the Nation as far as we are able to determine.

It is agreed between the parties that public schools are given preference in the use of the baseball, football and basketball facilities involved in these proceedings. (R. 33). When the schedule of publicly sponsored events or participation permits, private schools are allowed to use the municipal facilities without regard to the racial composition of the institution. A fee is charged on a uniform basis to cover the expense of operation. (R. 34). It is inconceivable that the City should be enjoined from permitting an "open enrollment" private school from participating with an integrated team on municipal facilities. In the first place, a private school cannot choose its students. There could be no possible way to enforce a racial balance in a private-tuition educational institution. From reading the decree of the District Court, it appears that one or two minority students would be sufficient to erase the onus imposed on private schools with open enrollment policies. This is true of

necessity since no racial balance could possibly be maintained or reasonably required in private-tuition institutions. There could be no way of knowing when such minority students might leave the City or choose another school. Of the private schools with open enrollment policies involved in these proceedings at least one (Montgomery Academy) has an open enrollment policy insofar as race is concerned. The validity of their policy is not questioned by the Plaintiffs or by the Internal Revenue Service. (R. 35). This private school, according to the stipulated facts before the Court, participates in the Alabama Athletic Association which by judicial decree (Lee v. Macon County Board of Education, 283 F.Supp. 194 [M.D. Ala., E.D. 1968]) is bound to racial non-discrimination in the scheduling of athletic events and in athletic participation. The futility of the District Court's decree is crystalized when it is seen that the Montgomery Academy is prohibited from participating with an integrated team on municipal facilities. When the municipality is prohibited from allowing such bi-racial and non-discriminatory participation, the posture of this case is indeed reversed from the original 1959 judicial mandate to open all facilities to all groups without regard to race or color. Additionally, since athletic events are scheduled on a "home and home" basis, open enrollment institutions such as the Montgomery Academy will be estopped from participating with integrated Alabama High School Association teams. The order of the District Court

even prohibits such institutions from participating with an integrated team on a municipally maintained field of that team. This result, though probably not intended by the District Court, is contrary to the spirit of desegregation and is contrary to the letter and spirit of the Fourteenth Amendment as we read it.

The City of Montgomery respectfully submits that when integrated public schools are given preference in the scheduling of athletic events, when all other groups such as white schools, black and white organizations and integrated organizations and other groups, integrated or not, are all given equal access to municipal facilities, then all reasonable constitutional mandates have in fact been met. It is not constitutionally permissible or right to utilize a park and recreation case in order either to affirmatively integrate the social, educational, charitable and religious organizations of an entire community or to compel these groups to forfeit their rights to use municipal recreational facilities.

ARGUMENT

I

THE CITY CANNOT REQUIRE A PRIVATE INDIVIDUAL TO CHOOSE BETWEEN TWO CONSTITUTIONALLY GUARANTEED RIGHTS.

The reasoning in the decision of the Court below, now before this Court on appeal, is concerned with the theory of state aid to private schools. However, the mandate of the District Court enjoins the City of Montgomery from permitting the use of public municipal recreational facilities by any private civic, social, fraternal, charitable, religious or other private organization which has a "racially discriminatory admissions policy." This requires the City to determine the admissions policies and thus the membership qualifications of all private organizations and groups before allowing them to use the public facilities and, based on that determination, to deny to certain organizations and groups the use of these facilities.

The Fourteenth Amendment has historically placed restraints on state action insofar as racial discrimination is concerned. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Equally well established is the right of the individual in a free society to choose his own associates.

This is an important consideration in the matter now before this Court. The Supreme Court of the United States in Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), specifically recognized the right of association as "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." 382 U.S. at 298. The right of an individual to associate with persons of his own choosing has been held inviolate as a cornerstone of American democracy. Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); United Mine Workers of America, Dist. 12 v. Illinois State Bar Association, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); N.A.A.C.P. v. State of Alabama, ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

Another constitutionally protected right is involved in this case. This is the right of an individual to have free access to a public municipal facility without discrimination. The obvious example of a case involving the protection of this right is the original decision in the present case, Gilmore v. City of Montgomery, Alabama, 176 F.Supp. 776 (M.D. Ala. 1959) modified and affirmed in City of Montgomery, Alabama v. Gilmore, 277 F.2d 364 (5th Cir. 1960). See also Tate v. Department of Conservation and Development, 133 F.Supp. 53,

(E.D. Va. 1955), aff'd 231 F.2d 615, cert. den. 352 U.S. 838, 77 S.Ct. 58, 1 L.Ed.2d 56. This right to such unlimited access to public facilities has been the subject of many cases and is clearly established.

The decision of the District Court now on appeal would require all private civic, social, fraternal, charitable and religious organizations to adopt an affirmative open admissions policy insofar as race is concerned prior to being permitted to exercise their rights to fully utilize public facilities. The members of the groups are therefore required to make a choice of either adopting a prescribed qualification for membership in their group or being denied their right of access to public municipal recreational facilities. We submit that it is fundamental that a state cannot be constitutionally required, under the guise of civil rights litigation, to make a distinction between private groups when the distinction in effect forces private individuals in the groups to forfeit one of their constitutionally protected rights -- either the right to fully participate in public recreational facilities, or the right to associate with persons of their own choosing.

There is no unconstitutional state action presented in this appeal. The reasoning of the District Court in apparently finding invidious state action by virtue of the choice of associates made by private persons is indeed fallacious.

II

A PRIVATE SCHOOL WHICH HAS AN ESTABLISHED OPEN ADMISSIONS POLICY MAY NOT BE CONSTITUTIONALLY DENIED ACCESS TO PUBLIC FACILITIES ON THE BASIS OF THE RACIAL COMPOSITION OF ITS STUDENT BODY OVER WHICH THE SCHOOL HAS NO FURTHER CONTROL.

Another effect of the appealed order of the lower Court is to deny the use of the public recreational facilities to private schools which have established open admissions policies, but which do not have racially mixed student bodies. One such private school is the Montgomery Academy. This school has an all white student body; however, it is without contest that the school has an open admissions policy on a racially non-discriminatory basis to which it is committed both by its bylaws and by public announcement. It has been given a certificate of tax exemption by the Internal Revenue Service based upon its non-discriminatory racial policies. (R. 35). The School is a member of the Alabama High School Athletic Association, which association includes both public and private schools and which requires as a condition of membership that the member schools have a non-discriminatory racial enrollment policy and an open admissions policy. Members of the Association schedule games only with each other and the Academy schedules games with both public and private

member schools, whose teams and student bodies are integrated. The playing field, gymnasium and facilities of the Academy are used as well as the playing fields, gymnasiums and facilities of other members of the Association. (R. 35-36). Yet the District Court's injunction will prohibit this school from using public facilities solely because the school is private and the student body is all white.

In Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F.Supp. 784 (M.D. Ala., N.D. 1968), affirmed 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969), the Court recognized that there were "significant differences" between the elementary and secondary public schools and the institutions of higher learning -- such differences as the fact that public elementary and secondary schools are traditionally compulsory and tuition free, while higher education is neither free nor compulsory. We submit that these differences are also present when comparing public primary and secondary schools to private primary and secondary schools. Like colleges, private-tuition schools are neither free nor compulsory. The private schools may have established open enrollment policies, but they have no control over the decisions of individuals to attend or not to attend.

Not only do some of the schools have open enrollment policies, but they also engage in athletic events with schools having integrated student bodies and integrated teams. The

Montgomery Academy, for example, belongs to an athletic association which requires that its members have an open admission policy. These athletic events are played on a "home and home" basis which means that integrated teams play at the Montgomery Academy and, in turn, the Academy plays on the public facilities at the integrated public schools.

We recognize that state, county and city governments have an affirmative duty to desegregate public schools and public school activities. Yet the order of the lower Court in the present case will deny to schools such as the Montgomery Academy the right to play teams from integrated public schools at those public schools' facilities. The private schools involved could not meet "home and home" requirements of the desegregated Alabama High School Athletic Association. The denial of the District Court, therefore, can only encourage private schools to play private schools which are not members of the desegregated Association and thus uniracial schools to associate solely with uniracial schools.

III

THE ACTIONS OF THE CITY HAVE NOT VIOLATED ANY CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS.

The lower Court also denied to private schools having closed racial admissions policies the use of public recreational facilities. That Court based its decision on the theory that the effect of the complained of usage was to supply unconsitutional City aid to private segregated schools. In this line, the Court referred to Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967), aff'd, 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 (1968); Griffin v. State Bd. of Education, 296 F.Supp. 1178 (E.D. Va. 1969); and Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969). It is important to note that all three of these cases involve decisions holding unconstitutional state statutes which provide for state money being paid specifically to help children go to private schools. In Poindexter, which is cited in both Griffin and Coffey and is relied on substantially in Griffin, the Court not only looked at the effect of the Louisiana Act in question, but also spent a considerable portion of its decision considering the purpose of the Act as well. The three judge Poindexter Court observed that the Act being considered "fitted into the long series of statutes the Louisiana legislature enacted for over a hundred years to maintain segregated

schools for white children". 275 F.Supp. at 835. Referring to public expressions by the Louisiana legislators concerning the Act, the Court noted that it was "interested in their public expressions indicative of the legislative purpose, as the legislators understood the purpose of the legislation". 275 F.Supp. at 837, 838. Surely these cases involving state statutes providing state money to be paid specifically to enable children to go to private schools concerns a situation far different from that in which a City merely opens its recreational facilities to all who wish to enjoy them, on a completely non-discriminatory basis.

The situation in the present case differs from that found in Wright v. City of Brighton, Alabama, 441 F.2d 447 (5th Cir. 1971). In Wright the court was concerned with the sale or exclusive lease of a municipal facility. Here there is no such sale or lease. In the present case no municipal facility is denied to any group or is exclusively made available to any group.

The complained of practice which is alleged to be City aid to private schools is not the sale of lands, the exclusive lease of lands, the paying of money to private schools or any other positive step taken by the City. Nor is the complained of practice the removal of facilities or other negative step such as the closing of swimming pools complained of in Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971).

In fact, the complained of practice is no active measure taken by the City at all; it is merely a passive position taken by the City in compliance with court orders, allowing everyone who desires to use the public, tax-supported recreational facilities to do so on a non-discriminatory basis.

In its decision in Palmer, the Court stated that the controlling question in cases of alleged racial discrimination is whether the state action is such as "denies the equal protection of the laws to Negroes." Justice Black, writing the decision, further noted that -- as is true here -- "this is not a case where whites are permitted to use public facilities while blacks are denied access." 91 S.Ct. at 1942. Justice Black ended his decision by observing: "Should citizens of Jackson or any other City be able to establish in Court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here." 91 S.Ct. at 1946.

The Plaintiffs do not contend that they nor any club or organization to which they belong has been denied access to and the use and enjoyment of the public recreational facilities of the City of Montgomery. They do not contend that any public recreational facility in the City is exclusively leased or exclusively made available to any other group so that the

facility would be unavailable to them. They have not shown that they have been deprived of anything either as a class or individually. They have not shown that any burden has been placed on them because of their race. To the contrary, they agree that "all municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color". (R. 37). Members of the class represented by the Plaintiffs do, in fact, use these public facilities. The Plaintiffs have not been denied constitutionally protected rights. Their constitutional rights have, in fact, been recognized and are being protected by the prior orders entered by the District Court and this Court in this matter.

IV

THE PRESENT ORDER OF THE LOWER COURT IS INCONSISTENT WITH AND REPUGNANT TO THE ORIGINAL ORDER IN THIS MATTER.

The original action in this matter, which commenced more than a decade ago, was brought by parties seeking equal access to the public parks in the City of Montgomery, Alabama. Gilmore, supra. The District Court held that, while the City was not required to open and operate any parks at all, if the parks (which had been closed) were reopened as public parks, "each must be available for the benefit of all the public regardless of race or color upon a non-discriminatory basis." 176 F.Supp. at 780.

The Motion for Supplemental Relief which resulted in the decision now before this Court, sought to prevent certain civic, social, educational, religious and other organizations the equal access to public recreational facilities because of the racial composition of such organizations. The resulting decision of the District Court, enjoined the City from permitting certain organizations to use the public facilities.

In short, the original proceedings were concerned with insuring that any public park owned and operated by the City would be used by all people on a non-discriminatory basis, while the order presently before this Court denies to certain

groups the right to use these public recreational facilties. We submit that the present action and the court order resulting therefrom are inconsistent with and repugnant to the original cause of action and the original court order in this matter.

CONCLUSION

The City of Montgomery respectfully submits that the order and decree of the District Court made and entered on January 18, 1972, is due to be reversed.

Respectfully submitted,

CITY OF MONTGOMERY, ET AL
APPELLANTS

By _____
ASSISTANT CITY ATTORNEY
ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a copy of the foregoing BRIEF FOR APPELLANTS on Honorable Morris Dees, Attorney of Record for Appellees, by depositing two copies of same, first class postage prepaid, in the United States Mail, properly addressed to him at his office in the Washington Building, Montgomery, Alabama, on this the 11th day of May, 1972.

Of Counsel