

285

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF ALABAMA, EASTERN DIVISION

FILED

ANTHONY T. LEE, ET AL.,)
)
 Plaintiffs,)
)
 UNITED STATES OF AMERICA,)
)
 Plaintiff-Intervenor)
 and Amicus Curiae,)
)
 vs.)
)
 MACON COUNTY BOARD OF EDUCATION,)
 ET AL.,)
 Defendants.)

NOV 3 - 1967
 R. C. DOBSON, CLERK
 By _____
 Deputy Clerk

CIVIL ACTION NO. 604-E

Before RIVES, Circuit Judge, and GROOMS and JOHNSON, District Judges.

RIVES, Circuit Judge:

On September 5, 1967, this Court issued a temporary restraining order enjoining the defendants and all persons in active concert and participation with them from enforcing the provisions of Act No. 285 of the State of Alabama, approved by the Governor on September 1, 1967, commonly known as the choice of teacher act, a copy of which is attached as an appendix to this opinion. On September 16, after hearing the evidence and oral arguments and receiving briefs, this Court took under submission the motion of the plaintiffs and the motion of the United States for a preliminary injunction against the enforcement of said Act No. 285.

That Act requires "all students, acting through their parent or guardian . . . to exercise a choice . . . of the race of the teacher desired," and in the implementation of said Act prescribed choice forms for such a purpose are to be executed prior to the beginning of the 1967-68 school year. Further, Act No. 285 authorizes the Governor of the State of Alabama to "take such steps as are necessary to see that no state funds are made available" to local school boards that do not require their students to choose the race of their teachers, and to "take such

administrative action as is deemed necessary to accomplish the requirements of this Act."

In this Court's decree of March 22, 1967, we directed that "The State Superintendent of Education shall develop a detailed program for assisting and encouraging faculty desegregation in the local school systems throughout the State for implementation prior to the 1967-68 school year." In the opinion supporting that decree, we said:

"It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan—not because of teachers' employment rights, but because students are entitled to a nonracial education, and assignment of teachers to students on the basis of race denies students that right. See *Bradley v. School Board of City of Richmond*, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); *Rogers v. Paul*, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965); *Singleton v. Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir. 1966); *Wheeler v. Durham City Board of Education*, 363 F.2d 738 (4th Cir. 1966); *Davis v. Board of School Commissioners of Mobile County*, 364 F.2d 896 (5th Cir. 1966)." 267 F.Supp. at 472.

We adhere to that opinion and decree and cannot permit their frustration by the expedient of Act No. 285.

That Act is clearly unconstitutional. As late as June 12, 1967, the Supreme Court of the United States declared:

"Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * * * "

Loving v. Virginia, 1967, 388 U.S. 1, 11.

No legitimate purpose free from invidious racial discrimination can justify the classifications in Act No. 285. The Assistant

Attorney General of Alabama suggested that a means whereby the Act might be upheld as constitutional was "that there may be a situation whereby the Fourteenth Amendment to the Constitution of the United States has been complied with in faculty desegregation, and above that point, the parents * * * may have a choice in the selection of * * * teachers." ^{1/} In reply to questioning from the Court, he conceded that there was no indication in the Act that it should not operate until that possible point had been reached. ^{2/} Indeed, we think that precisely the contrary is indicated by the open threat contained in the Act to cut off state funds from local school boards which do not require their students to choose the race of their teachers.

In our opinion of March 22, 1967, we had collected many authorities to support our statement that, "It is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." 267 F.Supp. 475, 476. Act No. 285 constitutes nothing less than affirmative state enforcement of private racial discrimination. Cf. Reitman v. Mulkey, 1967, 387 U.S. 379; Gomillion v. Lightfoot, 1960, 364 U.S. 339.

Race is the only factor upon which Act No. 285 operates. Its involvement promotes and encourages discrimination which is sufficient to make the Act invalid. Anderson v. Martin, 1964, 375 U.S. 399, 404. Act No. 285 on its face violates the equal

^{1/} A similar suggestion was made by the Attorney General of Alabama on page 7 of his brief.

^{2/} "Possible" is used with some reservation, for it is highly improbable that Alabama schools will attain a degree of faculty desegregation in excess of that required by the Fourteenth Amendment.

protection clause of the Fourteenth Amendment. The motions for a preliminary injunction against its enforcement are therefore GRANTED.

DECREE


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Act No. 285 of the 1967 Session of the Alabama Legislature violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and is therefore void and of no effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their officers, agents, servants, employees and successors in office, and all those who are acting or may act in concert or participation with them are hereby restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act No. 285 of the 1967 Session of the Alabama Legislature.

This Court retains jurisdiction of this cause to amend or modify this decree or to issue such further orders as may be necessary and appropriate.

The costs incurred in this proceeding to date are hereby taxed against the defendants.

ORDERED this 3rd day of November, 1967.


UNITED STATES CIRCUIT JUDGE


UNITED STATES DISTRICT JUDGE


UNITED STATES DISTRICT JUDGE

A P P E N D I X

ACT 285

"Enrolled, An Act, To amend Section 6, Act No. 367, Acts of Alabama, 1957, Title 52, Section 61 (6), Code of Alabama, 1940 (Recompiled, 1958), relating to the assignment and transfer of teachers in the schools of the state. Be it enacted by the Legislature of Alabama: Section 1. Section 6, Act No. 367, Acts of Alabama, 1957, Title 52, Section 61 (6), Code of Alabama, 1940 (Recompiled, 1958), is hereby amended by striking said Section 6 and inserting in lieu thereof the following: 'Section 6. Subject to the provisions of law governing tenure of teachers, local boards shall have the authority to assign and reassign or transfer all teachers in schools within their jurisdiction; provided, however, all students, acting through their parent or guardian, shall be required to exercise a choice prior to the beginning of the School Year 1967-68 or within two weeks after the effective date of this act, whichever is sooner, and prior to the beginning of school each year thereafter of the race of the teacher desired on a form substantially as follows:

Name of Child _____
Address _____
School Attending _____
Grade _____

I (We) prefer that my (our) child shall be taught by a
teacher of the following race:

White _____

Negro _____

Other (Specify) _____

Date

Signature of Parent
or Guardian

"No child shall be required to have a teacher of a race different from the one preferred by his or her parent or guardian except when the preference made does not represent the majority will of the parents or guardians of students similarly situated. The preference shown by the parent or guardian for the race of the teacher may be considered by the local boards of education in making assignments of such students to any particular school within the system.' Section 2. It shall be the responsibility of the local boards of education to carry out the requirements of this Act, and the failure or refusal of any local board of education to carry out such requirements shall be grounds for the withholding of state funds from such local board of education. If the Governor is convinced upon reasonable proof that the requirements of this Act have not been carried out by any local board of education, the Governor shall, after giving notice to the local board, and affording such board an opportunity to be heard, take such steps as are necessary to see that no state funds are made available to such local board unless and until the requirements of this Act are met. The Governor shall also have the authority to take such administrative action as is deemed necessary to accomplish the requirements of this Act, or may direct the Attorney General of the State to take such administrative action as the Governor deems necessary to carry out the provisions of this Act. Section 3. All laws or parts of laws in conflict with this Act are hereby repealed. Section 4. If any section or part of this Act is declared to be unconstitutional, such declaration shall not affect the part which is not declared to be unconstitutional. Section 5. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

APPROVED Sept 1 1967

Time: 11:44 a.m.

/s/ Lurleen B. Wallace
Governor"