The Burger Court Opinion Writing Database

Hunt v. McNair

413 U.S. 734 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1973

PERSONAL

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I contemplate joining you and will do so for the record before Friday. I want to see how this case and your Nyquist affect my Levitt.

Regards,

WEB

Mr. Justice Powell

B

lfe

CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

June 12, 1973

Re: No. 71-1523 - Richard W. Hunt v. Robert E. McNair, et al

Dear Lewis:

Please join me.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Joined by TM

To: The Ch
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From:

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL

Circulated: 10-6

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

Recirculated:

No. 71-1523. Decided October —, 1972

MR. JUSTICE DOUGLAS, dissenting.

The dismissal of this appeal for want of a substantial federal question is a great break with our constitutional traditions. For South Carolina is allowed to finance a religious school through the use of state revenue bonds. Today the state finances a Baptist school. But the same principle would apply to Mormon schools, where Mormons are politically in control of a State, to Catholic schools where the Catholic voice is dominant, or to any other religious school whose sponsors have sufficient political "clout." The race will now be on with a bitter battle among religionists to obtain state aid for their private schools. The casualties will be not merely minority religious groups nor nonbelievers who fear the mixture of sectarian ideas and civil administration of state affairs but those who deeply believe that when a church becomes dependent on and involved with a State, the secularization of a creed may ensue. Financial control usually means pervasive control; and churches that seek state aid today may be whipsawed by state politics tomorrow.

These are problems that the Establishment Clause of the First Amendment was sought to avoid. As stated in *Walz* v. *Tax Commission,* 397 U. S. 664, 668, the "establishment" of a religion in the mind of the Framers "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Under the South Carolina Educational Facilities Authority Act the State's credit is employed in aid of private

WP

This may be granted. Attach to Cert Note

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

Circulated: _____

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

Recirculated: 10-12

No. 71-1523. Decided October —, 1972

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The dismissal of this appeal for want of a substantial federal question is a break with our constitutional traditions. For South Carolina is allowed to finance a religious school through the use of state revenue bonds. Today the state finances a Baptist school. But the same principle would apply to Mormon schools, where Mormons are politically in control of a State, to Catholic schools where the Catholic voice is dominant, or to any other religious school whose sponsors have sufficient political "clout." The race will now be on with a bitter battle among religionists to obtain state aid for their private schools. The casualties will be not merely minority religious groups nor nonbelievers who fear the mixture of sectarian ideas and civil administration of state affairs but those who deeply believe that when a church becomes dependent on and involved with a State, the secularization of a creed may ensue. Financial control usually means pervasive control; and churches that seek state aid today may be whipsawed by state politics tomorrow.

These are problems that the Establishment Clause of the First Amendment was sought to avoid. As stated in *Walz* v. *Tax Commission*, 397 U. S. 664, 668, the "establishment" of a religion in the mind of the Framers "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Under the South Carolina Educational Facilities Authority Act the State's credit is employed in aid of private

not so

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 7, 1973

Dear Lewis:

I have your memo on 71-1523, Hunt v. McNair. I see no reason whatsoever for your disqualification to sit in the case.

WOD

William O. Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1973

71-1523

Dear Lewis:

As respects your memo of June 4th relative to Hunt v. McNair I see no possible reason for you to recuse yourself. I voted the other way in the case. But I would be the last to say you had a "conflict".

William O. Dougals

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 15, 1973

Dear Bill:

Please join me in your dissent in 71-1523, Hunt v. McNair.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

To: The Ch[illegible]
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

Circulated: 10-6-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71-1523. Decided October —, 1972

MR. JUSTICE BRENNAN, dissenting.

I dissent from the dismissal because, contrary to the Court's holding, this appeal presents a substantial constitutional question.

The constitutional question presented is whether South Carolina's assistance to the Baptist College at Charleston under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible support by the State for this sectarian institution.* The test to which I adhere for determining such questions is whether the arrangement between the State

*This case was initially decided by the Court of Common Pleas for Charleston County, South Carolina, which upheld against First Amendment attack the validity of the South Carolina Educational Facilities Authority Act, whereby the State Budget and Control Board, acting as the Authority, is authorized to assist financing for institutions of higher learning by its issuance of revenue bonds secured by a mortgage on the project so financed. The judgment of that court was affirmed by the Supreme Court of South Carolina on October 22, 1970. *Hunt* v. *McNair*, 255 S. C. 71, 177 S. E. 2d 362 (1970). Appellant appealed to this Court and on June 28, 1971, we vacated the judgment of the Supreme Court of South Carolina and remanded for "reconsideration in light of this Court's decisions in *Lemon* v. *Kurtzman*, *Earley* v. *DiCenso*, and *Robinson* v. *DiCenso*, [403 U. S. 602]; and *Tilton* v. *Richardson*, [403 U. S. 672]." *Hunt* v. *McNair*, 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina again affirmed the judgment of the Court of Common Pleas, *Hunt* v. *McNair*, — S. C. —, 187 S. E. 2d 645 (1972), and today this Court dismisses appellant's appeal on the ground that the case does not present a substantial constitutional question.

B

Page 1.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

Circulated: _____

Recirculated: 10/12/72

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71-1523. Decided October —, 1972

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I dissent from the dismissal because, contrary to the Court's holding, this appeal presents a substantial constitutional question.

The constitutional question presented is whether South Carolina's assistance to the Baptist College at Charleston under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible support by the State for this sectarian institution.* The test to which I adhere for determining such questions is whether the arrangement between the State

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WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 17, 1973

LFP
I shall await the
dissent of Bill Brennan
before voting in this case
ZHB

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I plan to write a dissent in this case. I am inclined, however, to think it is related to the Religion Clause cases argued this week and also to the Levitt cases, No. 72-269, et al. I,therefore, will defer writing the dissent until after I know what the outcome of the other cases will be. I hope that this doesn't mean I'll have to hold you up too long.

Sincerely,

WJB

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 7, 1973

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I can see no possible reason for your disqualifying yourself in the above for the reason mentioned in your memorandum of May 4.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1973

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I see no reason whatever for you to recuse yourself.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

WJB Please join me in your dissenting opinion TM

1st DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 71-1523

From: Brennan, J.

Circulated: 6-11-73

Reciculated:

Richard W. Hunt, Appellant, v. Robert E. McNair, Governor of South Carolina, et al. } On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

MR. JUSTICE BRENNAN, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charlestown under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to secure governmental ends, where secular means would suffice." *Abington School District* v. *Schempp*, 374 U. S. 203, 294–295 (1963) (BRENNAN, J., concurring); *Walz* v. *Tax Commission*, 397 U. S. 664, 680–681 (1970) (BRENNAN, J., concurring); *Lemon*

[1] No one denies that the Baptist College at Charlestown is a "sectarian" institution—*i. e.*, one "in which the propogation and advancement of a particular religion are a function or purpose of the institution." *Tilton* v. *Richardson*, 403 U. S. 672, 659 (1971) (separate opinion of BRENNAN, J.).

B
1

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

No. 71-1523

Circulated: _____

Recirculated: 6-15-73

Richard W. Hunt, Appellant, v. Robert E. McNair, Governor of South Carolina, et al. | On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charlestown under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

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[1] No one denies that the Baptist College at Charlestown is a "sectarian" institution—*i. e.*, one "in which the propogation and advancement of a particular religion are a function or purpose of the institution." *Tilton* v. *Richardson*, 403 U. S. 672, 659 (1971) (separate opinion of BRENNAN, J.)

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-1523

Recirculated: 6-19-73

Richard W. Hunt, Appellant, v. Robert E. McNair, Governor of South Carolina, et al. } On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charlestown under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to secure governmental ends, where secular means would suffice." *Abington School District* v. *Schempp,* 374 U. S. 203, 294–295 (1963) (BRENNAN, J., concurring); *Walz* v. *Tax Commission,* 397 U. S. 664, 680–681 (1970) (BRENNAN, J., concurring); *Lemon*

[1] No one denies that the Baptist College at Charlestown is a "sectarian" institution—*i. e.,* one "in which the propogation and advancement of a particular religion are a function or purpose of the institution." *Tilton* v. *Richardson,* 403 U. S. 672, 659 (1971) (separate opinion of BRENNAN, J.).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1973

Re: No. 71-1523, Hunt v. McNair

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 7, 1973

No. 71-1523, Hunt v. McNair

Dear Lewis,

Based upon the information contained in your thoughtful memorandum of May 4, I see no reason whatever why you should disqualify yourself in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1973

Re: No. 71-1523, Hunt v. McNair

Dear Lewis,

I see no reason why the opinion should be reassigned in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I join your opinion in this case. I may write a concurrence but shall await the dissent before deciding to do so.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 11, 1972

Re: No. 71-1523 - Hunt v. McNair

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

WB
WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 19, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I shall await the dissent of Bill Brennan before voting in this one.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I see no reason why you should disqualify yourself in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

This is in response to your memorandum of May 4.

I see no reason why you should disqualify in this case.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

LFP

I see no reason why you should disqualify yourself in this case

LFP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

This is in response to your note of June 4. I see no reason for the opinion to be reassigned.

Sincerely,

H.A.B

Mr. Justice Powell

Copies to the Conference

M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

Please join me in your opinion.

I have been troubled about what you define on page 12 as the "closer issue," namely, the possible involvement in day-to-day financial and policy decisions. I was tempted to consider the rate and fee power as unconstitutional and to remand to have the state court consider severability. What you have done, however, seems about all that can be done on this sparse record. Thus, with some uneasiness, I join.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[April —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22-41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Earley* v. *DiCenso*, 403 U. S. 602 (1971); *Robinson* v. *DiCenso*, 403 U. S. 602 (1971); and *Tilton* v. *Richardson*, 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 4, 1973

71-1523 HUNT v. McNAIR

TO THE CONFERENCE:

It came to my attention today that in 1972, after I came on the Court, the Virginia legislature adopted an "Educational Facilities Authority Act" which is quite similar (if not substantially identical) to the South Carolina Act involved in this case. This Virginia enactment was not a surprise as the new Constitution, effective July 1, 1971,* contained a provision (Article 10, Section 11) authorizing the legislature to "provide for a state agency or authority" to assist educational institutions in borrowing money for construction of educational facilities, provided that the primary purpose of the institution is "not to provide religious training or theological education" and provided further that "the Commonwealth shall not be liable for any debt created by such borrowing."*

I did not know until today, however, that Washington and Lee University (of which I am a Trustee) had any interest in borrowing money through the use of such a state-created authority. In a talk with the Assistant to the President there, I was informed that there have been some recent discussions of financing a proposed new dormitory complex in this manner. This is still in the "discussion stage," no decision has been made, and indeed the Virginia Authority is not yet a functioning entity.

Washington and Lee University is strictly non-sectarian, although many years ago it was of Presbyterian origin. Its board of trustees is self-perpetuating, it is privately endowed, it derives no support from any religious faith or organization, has no religious requirements

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*I served on the constitutional revision commission.

*Virginia has a very strong "Establishment" clause in its Constitution, Section 16 of the Virginia Bill of Rights having been attributed primarily to Thomas Jefferson.

as to courses, students, or faculty members. It does offer some courses in religion, on an elective basis, as a part of a broad, liberal arts curriculum.

As the only issue before us in Hunt v. McNair is the challenge to the South Carolina Act on the ground that it infringes the Establishment Clause of the First Amendment, our decision in McNair would not be applicable to Washington and Lee University. I suppose it could be said, nevertheless, that the similarity of the new Virginia statute and the possible interest of Washington and Lee in revenue bond financing of a new dormitory thereunder, might give me a bias in favor of this type of legislation even with respect to a Baptist college such as that involved in Hunt v. McNair.

I personally do not feel disqualified to participate in this case. But I bring these facts to the attention of the Conference, and would welcome and abide by the views of my Brothers. As I do not have a Court yet, there is no possibility of this case coming down prior to our next Conference. I can receive your views and we can discuss this further, if need be, at the May 11 Conference.

Sincerely,

L. F. P.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1973

No. 71-1523 Hunt v. McNair

MEMORANDUM TO THE CONFERENCE:

This supplements my note to the Conference of May 4.

At a recent meeting of the Board of Trustees of Washington and Lee University, the possibility of financing several campus buildings through the Authority created under the Educational Facilities Authority Act of Virginia was discussed. The proper officers of the University were authorized to continue discussions with the Authority with the view of determining whether financing in this manner is feasible and advantageous to W. & L. If the answers prove to be affirmative, I think W. & L. will - perhaps by next fall - utilize the Authority.

In other respects, the situation outlined in my note of May 4 remains the same. I was in error, however, in saying that W. & L. was at one time of "presbyterian origin". I am now informed that it always has been strictly independent of church and state.

I regret bothering the Conference with what essentially is my problem. As McNair comes to us only because of the Establishment Clause issue, I see no conflict. Yet, especially in view of the Court's division in this case, I would respect and defer to any differing view. If any Justice would prefer that the opinion be reassigned, I will recuse myself.

L. F. P., Jr.

lfp/ss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

Circulated: _____

Recirculated: JUN 12 1973

SUPREME COURT OF THE UNITED STATES

No. 71-1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.
} On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22-41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

It sounds as if Washington and Lee's borrowing under the Virginia Act which you describe in your memorandum of May 4th would not, even under the most sweeping arguments of the proponents of the Establishment Clause argument, violate that clause. The only conceivable argument as to Washington and Lee's interest in the outcome of this decision, then, would be that if Virginia cannot make this aid available to "sectarian" as well as to "non-sectarian" colleges, it might repeal it altogether. This is so speculative and remote that I certainly don't feel you should disqualify yourself.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I certainly see no reason why you should disqualify yourself in this case.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference