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C. J. in making
the announcement

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous.—October Term, 1947.

Ada Lois Sipuel Fisher, Petitioner, *v.* The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge, Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof.

[February 16, 1948.]

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in *Sipuel* v. *Board of Regents,* January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13–A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451–457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
>
> 'with advantages for education substantially equal to the advantages afforded to white students,'
>
> is established and ready to function at the designated time applicants of any other group may hereafter

apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:

(1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or

(2) not enroll any applicant of any group in said class until said separate school is established and ready to function.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.

"The cost of this case is taxed to defendants.

"This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that the District Court of Cleveland County did not depart from our mandate.

The petition for certiorari in *Sipuel* v. *Board of Regents,* did not present the issue whether a state might not satisfy

the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance. The manner in which, or the method by which, Oklahoma may have satisfied, or could satisfy the requirements of the mandate of this Court, as applied by the District Court of Cleveland County in its order of January 22, 1948, is not before us.

Motion for leave to file petition for writ of mandamus is denied.

MR. JUSTICE MURPHY is of the opinion that a hearing should be had in order to determine whether the action of the Oklahoma courts subsequent to the issuance of this Court's mandate constitutes an evasion of that mandate.

Mr. Justice Rutledge

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Revised page 4

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous.—October Term, 1947.

Ada Lois Sipuel Fisher, Petitioner, *v.* The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge, Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof.

[February 1, 1948.]

16

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in *Sipuel* v. *Board of Regents,* January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13–A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451–457.
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> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is furthered stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
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> 'with advantages for education substantially equal to the advantages afforded to white students,'
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> is established and ready to function at the designated time applicants of any other group may hereafter

apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:

(1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or

(2) not enroll any applicant of any group in said class until said separate school is established and ready to function.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.

"The cost of this case is taxed to defendants.

"This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that it has been followed.

The petition for certiorari in *Sipuel* v. *Board of Regents* did not present the issue that a state might satisfy the equal protection clause of the Fourteenth Amend-

Old p. 4 killed

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that the District Court of Cleveland County did not depart from our mandate.

The petition for certiorari in Sipuel v. Board of Regents did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance. The manner in which, or the method by which, Oklahoma may have satisfied, or could satisfy the requirements of the mandate of this Court, as applied by the District Court of Cleveland County in its order of January 22, 1948, is not before us.

Motion for leave to file petition for writ of mandamus is denied.

February 13, 1948

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CHAMBERS OF THE CHIEF JUSTICE

MEMORANDUM FOR THE CONFERENCE:

Re: No. 325 Misc. - Fisher v. Hurst, et al.

I desire that the following be added at the end of the Court's opinion in this case:

MR. JUSTICE MURPHY is of the opinion that a hearing should be had in order to determine whether the action of the Oklahoma courts subsequent to the issuance of this Court's mandate constitutes an evasion of that mandate.

Frank Murphy

Circulated 3/13/48 -

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous--October Term, 1947

Ada Lois Sipuel Fisher, Petitioner v. The Honorable Thurman S. Hurst, Chief, Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof

[ ]

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. Board of Regents, January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13-A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451-457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
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> > 'with advantages for education substantially equal to the advantages afforded to white students,'
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> is established and ready to function at the designated time applicants of any other group may hereafter apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:
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> (1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or
>
> (2) not enroll any applicant of any group in said class until said separate school is established and ready to function.
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> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.
>
> "The cost of this case is taxed to defendants.
>
> "This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that it has been followed.

The petition for certiorari in Sipuel vs. Board of Regents did not present the issue that a state might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. In oral argument, we understood counsel for petitioner to concede that it was not an issue in the case. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file writ of mandamus is denied.

~~The Chief Justice.~~

Circulated 3/1?/48

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous--October Term, 1947

Ada Lois Sipuel Fisher, Petitioner v. The Honorable Thurman S. Hurst, Chief, Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof

[ ]

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. Board of Regents, January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13-A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451-457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

SUPREME COURT OF THE UNITED STATES

No. 325, MISC.—OCTOBER TERM, 1947.

Ada Lois Sipuel Fisher, Petitioner, *v.* The Honorable Thurman S. Hurst, Chief Justice et al.	On Motion for Leave to File Petition for Writ of Mandamus.

[February —, 1948.]

MR. JUSTICE RUTLEDGE, dissenting.

I am unable to join in the Court's opinion or in its disposition of the petition. In my judgment neither the action taken by the Supreme Court of Oklahoma nor that of the District Court of Cleveland County, following upon the decision and issuance of our mandate in No. 369, *Sipuel* v. *Board of Regents,* decided January 12, 1948, is consistent with our opinion in that cause or therefore with our mandate which issued forthwith.[1]

It is possible under those orders for the state's officials to dispose of petitioner's demand for a legal education equal to that afforded to white students by establishing overnight a separate law school for Negroes or to continue affording the present advantages to white students while denying them to petitioner. The latter could be done either by excluding all applicants for admission to the first-year class of the state university law school after the date of the order or, depending upon the meaning of that order, by excluding such applicants and asking all first-year students enrolled prior to that order's date to withdraw from school.

Neither of those provisions, in my opinion, would comply with our mandate. It plainly meant, to me at any

[1] The mandate reversed the Oklahoma Supreme Court's judgment and remanded the cause to it "for proceedings not inconsistent with this opinion."

rate, that Oklahoma should end the discrimination practiced against petitioner at once, not at some later time, near or remote. It also meant that this should be done, if not by excluding all students, then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction.

Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school. Nor could the necessary time be taken to create such facilities, while continuing to deny them to petitioner, without incurring the delay which would continue the discrimination our mandate required to end at once. Neither would the state comply with it by continuing to deny the required legal education to petitioner while affording it to any other student, as it could do by excluding only students in the first-year class.

Since the state court's orders allow the state authorities at their election to pursue alternative courses, some of which do not comply with our mandate, I think those orders inconsistent with it. Accordingly I dissent from the Court's opinion and decision in this case.

The Chief Justice
from
Rutledge, J.
2/13/48

SUPREME COURT OF THE UNITED STATES.
No. 325, Misc.--October Term, 1947.

Fisher v. Hurst. On Motion for Leave to File Petition for Writ of Manda.

[February 9, 1948.]

Mr. Justice Rutledge, dissenting.

I am unable to join in the Court's opinion or in its disposition of the petition. In my judgment neither the action taken by the Supreme Court of Oklahoma nor that of the District Court of Cleveland County, following upon the decision and issuance of our mandate in Sipuel v. Board of Regents, No. 369, decided January 12, 1948, is consistent with our opinion in that cause or therefore with our mandate which issued forthwith.[1]

It is possible under those orders for the state's officials to dispose of petitioner's demand for a legal education equal to that afforded to white students by establishing overnight a separate law school for Negroes or to continue affording the present advantages to white students while denying them to petitioner. The latter could be done either by excluding all applicants for admission to the first-year class of the state university law school after the date of the order or, depending upon the meaning of that order, by excluding such applicants and asking all first-year students enrolled prior to that order's date to withdraw from school.

Neither of those provisions, in my opinion, would comply with our mandate. It plainly meant, to me at any rate, that Oklahoma should end the discrimination practiced against petitioner at once, not at some later time, near or remote. It also meant that this should be done, if not by excluding all students, then by affording petitioner the advantages

1. The mandate reversed the Oklahoma Supreme Court's judgment and remanded the cause to it "for proceedings not inconsistent with this opinion."

of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction.

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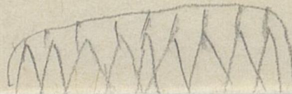
Since the state courts' orders allow the state authorities at their election to pursue alternative courses, some of which do not comply with our mandate, I think those orders inconsistent with it. Accordingly I dissent from the Court's opinion and decision in this case.

SUPREME COURT OF THE UNITED STATES.
No. 325, Misc.--October Term, 1947.

Ada Lois Sipuel Fisher, Petitioner, v. The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	On Motion for Leave to File Petition for Writ of Mandamus

[February 2, 1948.]

Mr. JUSTICE RUTLEDGE dissents, being of opinion that on petitioner's showing inconsistency exists between this Court's decision and mandate in No. 369, Sipuel v. Board of Regents, decided January 12, 1948, and the orders subsequently entered in that cause by the Supreme Court of Oklahoma and the trial court.



SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous--October Term, 1947

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CHAMBERS OF THE
CHIEF JUSTICE

Ada Lois Sipuel Fisher, Petitioner, v. The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof

[ ]

Per Curiam:

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. Board of Regents, January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

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> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
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> > 'with advantages for education substantially equal to the advantages afforded to white students,'
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> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.
>
> "The cost of this case is taxed to defendants.
>
> "This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on a petition for a writ of mandamus in a case such as this is whether or not our mandate has been followed. It is clear that it has. In the first place, the view taken in <u>Missouri ex rel. Gaines</u> v. <u>Canada</u>, <u>supra</u>, that a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, was not challenged in <u>Sipuel</u> v. <u>Board of Regents</u>. ~~By concession of counsel it was indeed expressly eliminated from the case.~~ In the second place, nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for a writ of mandamus if it were. The District ~~Judge~~ has retained jurisdiction to hear and determine any question arising under ~~his~~ order, and

whether or not ~~his~~ its order is followed is for ~~him~~ it to determine in the first instance.

The motion for leave to file a petition for a writ of mandamus is denied.

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous---October Term, 1947

Ada Lois Sipuel Fisher, Petitioner, v. The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	)	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof

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Per Curiam:

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. Board of Regents, January 12, 1948. We there said:

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>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

A. In the first place, it was not necessary in _Sipuel_ v. _Board of Regents_ to reach the question involved in _Missouri ex rel. Gaines_ v. _Canada_, _supra_, whether a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, because Oklahoma had not established such a school.

B. In the first place, the view taken in _Missouri ex rel. Gaines_ v. _Canada_, _supra_, that a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, was not before us in _Sipuel_ v. _Board of Regents_. Oklahoma had neither established a separate law school nor indicated its intention to do so, without a demand therefor first being made upon the Board of Regents.

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
>
> > 'with advantages for education substantially equal to the advantages afforded to white students,'
>
> is established and ready to function at the designated time applicants of any other group may hereafter apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:
>
> (1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or
>
> (2) not enroll any applicant of any group in said class until said separate school is established and ready to function.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.
>
> "The cost of this case is taxed to defendants.
>
> "This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on a petition for a writ of mandamus in a case such as this is whether or not our mandate has been followed. It is clear that it has been followed. ~~In the first place, the view taken in Missouri ex rel. Gaines v. Canada, supra, that a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, was not challenged in Sipuel v. Board of Regents. By concession of counsel it was indeed expressly eliminated from the case.~~ In the second place, nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for a writ of mandamus if it were. The Oklahoma District ~~Judge~~ court has retained jurisdiction to hear and determine any question arising under ~~his~~ its order, and

whether or not its order is followed is for it to determine in the first instance.

The motion for leave to file a petition for a writ of mandamus is denied.

Memo on No.325, Sip uel

Where the Supreme Court has entered a judgment in a case, and where the lower court upon remand has departed in any respect from the judgment of this court, the Supreme Court has held, in Gaines v. Rugg, 148 U. S. 228, 243, that it may issue a writ of mandamus to correct the error of the lower court. In that case, this Court ruled that "although it might have been admissible to raise the question by a new appeal to the proper court, yet in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper." Accordingly, it issued the writ of mandamus. While this Court refused to issue the writ of mandamus in the Blake case several years later, it did so because it ruled that in that particular case the remedy b y writ of error was entirely adequate.

In the case at bar, the time factor is of course of the essence, and accordingly it is obvious that petitioner's remedy by certiorari after further proceedings in the state courts is by no means adequate, and accordingly that mandamus or other relief - if relief is merited - should be deemed available.

In addition to a writ of mandamus, the Court has available to it such other alternatives as:

(1) clarification of its mandate

(2) modification of its mandate, as in Asselta last Term.

LFE

N.B. Pursuant to Sec. 237 of the Judicial Code, 28 USCA §344, this Court can "in its discretion, award execution or remand the cause to the court from which it was removed by the writ." Accordingly, if it were desired to modify the mandate of this Court, it could be modified so as to award execution of a more specifid ruling by this Court. Thus, in Williams v. Bruffy, 102 U.S.248 (1880), the Court ruled that once it has "acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the State, or to the inferior court whose judgment is reversed." In that case, the Supreme Court recalled a mandate which it had previously issued to the highest court of a State - since that highest state court found itself embarrassed in its action upon the S.Ct. mandate because of a state statute - a nd directed entry of final judgment in the Supreme Court reversing the judgment of the inferior state court and awarding judgment to the plaintiff.

Similarly in Tyler v. Magwire, 17 Wall.253,289, the Supreme Court entered a decree of its own - after reversing the state court decree - and directed the Marshal of the Supreme Court to put the plaintiff in possession of certain state land.

Appeal, Not Mandamus, Proper Remedy where State Court fails to follow Mandate of Supreme Court on prior Appeal:-----

"Where the contention is that the state court has failed or refused to follow the mandate of the Supreme Court upon a prior appeal, the remedy is by a second appeal and not by mandamus.(1) The Supreme Court has pointed out that the remedy by second appeal is entirely adequate, and that, regardless of the availability of mandamus as a remedy to compel obedience by lower federal courts to the mandates of the Supreme Court, the summary character of the proceeding by mandamus renders it inappropriate in dealing with the state tribunals.(2)

§12, Jurisdiction of the Supreme Court of the United States(Robertson and Kirkham).

(1) In re Blake, 175 U.S.114, 20 S.Ct. 42.
See also, Stanley v. Schwalby, 162 U.S. 255.
Ga.Ry & Elec. Co. v. City of Decatur, 297 U.S. 620.

(2) In re Blake, 175 U.S. 114.

Rider 3.

The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the District Court correctly understood our decision to hold that the equal protection clause permits no such defense.

February 13, 1948 RECEIVED

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CHAMBERS OF THE
CHIEF JUSTICE

Memorandum for the Conference

No. 325 Misc. Fisher v. Hurst
et al.

The memorandum suggesting changes in the circulated *per curiam* has come to hand and I am compelled to suggest the deletion of two sentences added to the proposed *per curiam*, to wit:

> "The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense."

I confess I do not understand what is to be gained by inclusion of these two sentences though I agree with their accuracy. I raise the question because these sentences may again invite discussion about the issue which Thurgood Marshall skilfully did not explicitly either accept or reject, namely is segregation constitutionally valid? Thurgood Marshall may use these two sentences as the basis for the claim that we have decided that no separate colored law school under the circumstances of this case will fill the bill. Have we decided that? I'm not suggesting the validity of the argument. I am suggesting that I have heard much less plausible arguments made at great length before this Court. It is to me plain that in the first round he was trying to win his case even on the assumption that the *Gaines* doctrine be accepted because he was confident that the State could not bring itself within it. To me it is highly undesirable for us to put anything in our *per curiam* that may lead to sophisticated controversy as to what we meant or did not mean by our January 12th opinion, or what is implied by what we meant or not implied. That is my reason for cutting the new *per curiam* to the very bone of relevance.

F. F.

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CHAMBERS OF THE
CHIEF JUSTICE

February 13, 1948

Memorandum for the Conference

No. 325 Misc. Fisher v. Hurst et al.

The aim of this memorandum is to avoid needless controversy in this case, within or without the Court:

1. I am of the view that the motion in this case should be disposed of in substance as outlined in the circulated per cur. I think it desirable, that is, to set forth as briefly and as unargumentatively as possible, as is the aim of the per cur, that on the basis of the facts in the petition before us our mandate of January 12th has not been disrespected by the Oklahoma courts.

2. But the per cur. should avoid every possibility of serving as a target for contention. The following two sentences on pages 2 and 3 of the circulated per cur. may, not unfairly, invite dispute:

> "The petition for certiorari in Sipuel v. Board of Regents did not present the issue that a State might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for negroes, the view taken by this Court in Missouri ex rel. Gaines v. Canada, supra. In oral argument, we understood counsel for petitioner to concede that it was not an issue in the case."

I do not question the accuracy of these sentences on the basis of my reading of the petition for certiorari and of my recollection of what Thorgood Marshall said at the bar, or my interpretation of what he meant to convey by what he said. But that is no insurance that others may not urge different interpretations, and it surely would be undesirable, if avoidable, to get into a snarl as to what was said or meant.

3. We would be on absolutely solid ground if the per cur. restricts itself to narration and avoids all interpretation. Specifically, for the above sentences which I have called into question, I would substitute the following:

> "The reason relied on for allowance for the writ of certiorari was: 'The decision of the Supreme Court of Oklahoma is inconsistent with and directly contrary to the decision of this Court in Gaines v. Canada.' It is for this reason that we granted the petition. It is on this basis that we rendered our decision and issued the mandate in accordance with that decision on January 12th."

4. I should like to raise reconsideration about another sentence on page 3:

> "Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were."

This sentence seems to me superfluous and I think every extra word in this _per cur._ is an undesirable word. Moreover, while I agree with the thought of the sentence, namely that any disobedience in Oklahoma of a proper direction by the Oklahoma courts on the basis of our mandate is a matter for the Oklahoma courts in the first instance, I think the sentence also lends itself to the kind of arguments that lawyers are not unaccumstomed to make. Since the sentence is merely a negation of what has been affirmatively put in the earlier part of the _per cur._, I suggest its deletion.

F. F.

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous--October Term, 1947

Ada Lois Sipuel Fisher, Petitioner v. The Honorable Thurman S. Hurst, Chief, Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.	Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof

[ ]

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in Sipuel v. Board of Regents, January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13-A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451-457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
>
> > 'with advantages for education substantially equal to the advantages afforded to white students,'
>
> is established and ready to function at the designated time applicants of any other group may hereafter apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:
>
> (1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or
>
> (2) not enroll any applicant of any group in said class until said separate school is established and ready to function.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.
>
> "The cost of this case is taxed to defendants.
>
> "This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on a petition for a writ of mandamus in a case such as this is whether or not our mandate has been followed. It is clear that it has been followed. The petition for certiorari in _Sipuel_ v. _Board of Regents_ did not present the issue that a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for negroes, the view taken by this Court in _Missouri ex rel. Gaines_ v. _Canada_, supra. In oral argument, we understood

counsel for petitioner to concede that it was not an issue in the case. Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not its order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file petition for writ of mandamus is denied.

No. 325 Misc.

To: Mr. Justice Burton

From: The Chief Justice

Circulated: FEB 12 1948
FEB 21 1948

Recirculated:

To Chief Justice 2/12

I am willing to join in this per cur.

HHB

IN THE SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 12, 1948.

No. 369 - October Term, 1947

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al, Respondents	)	On writ of Certiorari to the Supreme Court of the State of Oklahoma.

PER CURIAM.

On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. ______ Oklahoma __________, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

The mandate shall issue forthwith.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 369.—October Term, 1947.

Copy
Final draft
1-12-48
C.J.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al., Respondents	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January 12, 1948.

PER CURIAM.

On January 14, 1946, the petitioner, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. ______ Oklahoma ________, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 [1938].

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 369.--October Term, 1947.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al, Respondents	)	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January 12, 1948.

PER CURIAM.

On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. ______ Oklahoma ________, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337.

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion. The mandate shall issue forthwith.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 369.--October Term, 1947.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al., Respondents	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January 12, 1948.

PER CURIAM.

On January 14, 1946, the petitioner, comcededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

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The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337.

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 369.--October Term, 1947.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al, Respondents	)	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January 12, 1948.

PER CURIAM.

On January 14, 1946, the petitioner, a negro concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. ______ Oklahoma ________, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337. We have been advised by counsel for respondents that this is permissible under the laws of Oklahoma

Reed

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion. The mandate shall issue forthwith.

Reversed.

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

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CHAMBERS OF THE
CHIEF JUSTICE

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

February 13, 1948

Dear Chief:

1. I am, as you know, strongly of the view that the motion in the Fisher case, No. 325 Misc., should be disposed of per cur., and I would regard it as most unfortunate if the disposition were not to be made on Monday next.

2. I also think it desirable that the per cur. should set forth as briefly and as unargumentatively as possible that on the basis of the facts in the petition before us our mandate of January 12th has not been disrespected. In short, our per cur. should avoid every possibility of serving as a target for contention, either in the dissenting expression or by counsel for Fisher.

3. In the circulated draft there are two sentences which I think may fairly invite dispute. They are the following on pages 2 and 3.:

> "The petition for certiorari in Sipuel v. Board of Regents did not present the issue that a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for negroes, the view taken by this Court in Missouri ex rel. Gaines v. Canada, supra. In oral argument, we understood counsel for petitioner to concede that it was not an issue in the case."

I do not dispute their accuracy, with my reading of the petition for certiorari and with my interpretation of what Thorgood Marshall said at the bar. But that is no insurance that Wiley and Marshall will not insist on different interpretations. And nothing would seem worse to me than to get into a snarl, quite needlessly, as to what was said or meant.

4. I say "needlessly" because we are on absolutely fast ground if the per cur. will restrict itself to narration instead of to interpretation. Specifically,

for the bracketed sentences which I here call in question, I would substitute the following:

> "The reason relied on for allowance for the writ of certiorari was: 'The decision of the Supreme Court of Oklahoma is inconsistent with and directly contrary to the decision of this Court in Gaines v. Canada.' It is for this reason that we granted the petition. It is on this basis that we rendered our decision and issued the mandate in accordance with that decision on January 12th."

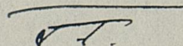
5. One minor sentence in the per cur. also seems to me undesirable, to wit:

> "Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, for could we consider it on this petition for writ of mandamus if it were." (p. 3)

This sentence seems to me to be at best superfluous and I think every extra word in this per cur. is an undesirable word. Moreover, while I agree with the thought of the sentence, namely that any disobedience in Oklahoma of a proper direction by the Oklahoma courts on the basis of our mandate is a matter for the Oklahoma courts in the first instance, I think the sentence also lends itself to the kind of arguments that lawyers are not unaccumstomed to make. Since the sentence is merely a negation of what has been affirmatively put in the earlier part of the per cur., I suggest its deletion.

If you think what I have said in this letter should be circulated as a memorandum to the Conference, please so advise me.

Faithfully yours,



The Chief Justice

325 misc.

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

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CHAMBERS OF THE
CHIEF JUSTICE

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

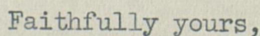
January 26, 1946

Dear Chief:

An examination, even with the limited reflection that I have thus far been able to give it, of the motion for leave to file a petition for writ of mandamus in No. 325, the Oklahoma Law School Case, reveals a number of serious questions, both on the merits and perhaps also of jurisdiction, at least in the limited sense of exercising jurisdiction. I assume that the normal course would be to issue a rule why this motion should not be entertained. Were we to issue such a rule on Monday next, considering the distance, we certainly would not give the Supreme Court of Oklahoma, or rather ~~their~~ its Justices, less than a week or ten days for response, and the matter would then be dragged out so that probably it would be perhaps not less than two weeks from next Monday that we would make disposition of the motion just filed.

It occurs to me that just as it was a very healthy thing for us to decide the case with the dispatch with which the *per curiam* was announced by you, it would be equally healthy to accelerate the disposition of the present petition. To that end what would you say to a telegraphic inquiry to the respondents in this motion, conveyed through our Clerk, regarding the desire of the respondents to make such response to the motion as they may desire not later than by a time fixed to be before us for the Saturday conference. I have not pretended to work out the details of this but merely wished to raise the question I have raised.

Faithfully yours,



Feb

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

Jany 12 1948

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CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief:

Re Oklahoma I am very happy - and warmly congratulate you.

Very sincerely

F.M.

February 13, 1948

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CHAMBERS OF THE CHIEF JUSTICE

MEMORANDUM FOR THE CONFERENCE:

Re: No. 325 Misc. - Fisher v. Hurst, et al

Substitution in the Per Curiam for the language following the judgment of the District Court on Page 2:

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that it has been followed.

The petition for certiorari in Sipuel vs. Board of Regents did not present the issue that a state might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. In oral argument, we understood counsel for petitioner to concede that it was not an issue ~~in the case~~ here. [here] The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file writ of mandamus is denied.

The Chief Justice.

To the Chief Justice
OK - HHB
But I suggest "here" instead of "in the case" - as more nearly what Thurgood Marshall conceded.
HHB

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CHAMBERS OF THE
CHIEF JUSTICE

MEMORANDUM FOR THE CONFERENCE:

Re: No. 325 Misc. - Fisher v. Hurst, et al

Substitution in the Per Curiam for the language following the judgment of the District Court on Page 2:

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that it has been followed.

The petition for certiorari in Sipuel vs. Board of Regents did not present the issue that a state might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On oral argument, we understood counsel for petitioner to concede that it was not an issue in the case. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file writ of mandamus is denied.

The Chief Justice.

To The Chief Justice 2/13
W.O.D.
(See note at foot of page)

To the Chief Justice
OK - HHB
But I suggest "here" instead of "in the case" - as more nearly what Thurgood Marshall conceded.
[illegible]

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 9, 1948.

Re: No. 325 Misc., Fisher v. Hurst

Memorandum to the Chief Justice:

I submit the following as substitutes for the present two sentences on page 2 of the proposed *per curiam* in this case. My preference is for A, although either A or B is wholly agreeable. The difficulty with the present draft is the statement that *Gaines* was not challenged in *Sipuel* v. *Board of Regents*. That was written in light of the petition for writ of certiorari and the concession on oral argument. But the brief on the merits does challenge *Gaines*. Hence, if the sentence to the effect that counsel conceded the problem was not here is omitted, the present draft leaves us in somewhat of an ambiguous position.

> A. In the first place, it was not necessary in *Sipuel* v. *Board of Regents* to reach the question involved in *Missouri ex rel. Gaines* v. *Canada*, *supra*, whether a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, because Oklahoma had not established such a school.
>
> B. In the first place, the view taken in *Missouri ex rel. Gaines* v. *Canada*, *supra*, that a State might satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes, was not before us in *Sipuel* v. *Board of Regents*. Oklahoma had neither established a separate law school nor indicated its intention to do so, without a demand therefor first being made upon the Board of Regents.

William O. Douglas

Supreme Court of the United States

Memorandum

RECEIVED, 1948

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CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief -

I do not think there is any merit in FF's criticisms of the per cur. in Fisher v Hurst. I agree with the per cur. as you have amended it.

WOD

Insert the following on Page 2 following the language quoted from the District Court's Opinion:

The only question before us on a petition for Writ of Mandamus in a case such as this is, Has our mandate been followed? Nothing which may have transpired since the orders of the Oklahoma Courts were issued is in the record before us, nor could we consider it on this Writ of Mandamus if it were.

The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order, and whether or not its order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file petition for Writ of Mandamus is denied.

SUPREME COURT OF THE UNITED STATES

No. 369.--October Term, 1947.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al, Respondents	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January 12, 1948.

PER CURIAM.

On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. _______ Oklahoma ________, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 [1938].

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

The mandate shall issue forthwith.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 369.--October Term, 1947.

Ada Lois Sipuel, Petitioner, v. Board of Regents of the University of Oklahoma, et al., Respondents	)	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

January , 1947.

PER CURIAM: On January 14, 1946, the petitioner, ~~concededly~~ qualified to receive the professional and legal education offered by the state, applied for admission to the School of Law of the University of Oklahoma supported and maintained by the taxpayers of the State of Oklahoma, the sole state institution for legal education. The application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. ____Okla.____. We brought the case here for review.

~~In our view~~ The petitioner is entitled to secure the legal education afforded by a state institution. Up to this time it has been denied her although many white applicants have been afforded legal education by the State. The state must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Missouri ex rel. Gaines v. Canada, 305 U.S. 337.

The judgment of the Supreme Court of Oklahoma is reversed & the cause is remanded to that Court for proceedings not inconsistent with this opinion.

Black

FEB 14 1948
Penil corrections

SUPREME COURT OF THE UNITED STATES

No. 325, Miscellaneous.—October Term, 1947.

Ada Lois Sipuel Fisher, Petitioner,
v.
The Honorable Thurman S. Hurst, Chief Justice; The Honorable Denver N. Davison, Vice Chief Justice; The Honorable Fletcher Riley, Wayne W. Bayless, Earl Welch, N. S. Corn, Ben Arnold, Thomas L. Gibson, and John Luttrell, Associate Justices of the Supreme Court of the State of Oklahoma; The Honorable Justin Hinshaw, District Judge, Cleveland County District Court of Oklahoma and the Board of Regents of the University of Oklahoma.

Motion for Leave to File Petition for Writ of Mandamus, Petition and Brief in Support Thereof.

[February —, 1948.]

Per Curiam.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate issued in *Sipuel* v. *Board of Regents,* January 12, 1948. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13–A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451–457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is furthered stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
>
> 'with advantages for education substantially equal to the advantages afforded to white students,'
>
> is established and ready to function at the designated time applicants of any other group may hereafter

apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to either:

(1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or

(2) not enroll any applicant of any group in said class until said separate school is established and ready to function.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al, be, and the same are hereby ordered and directed to not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.

"The cost of this case is taxed to defendants.

"This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that it has been followed.

The petition for certiorari in *Sipuel* v. *Board of Regents* did not present the issue that a state might satisfy the equal protection clause of the Fourteenth Amend-

ment by establishing a separate law school for Negroes. In ~~oral argument, we understood counsel for petitioner to concede that it was not an issue in the case~~. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance.

Motion for leave to file petition for writ of mandamus is denied.

Insert: On submission we were clear it was not an issue here.

The ~~manner in which~~, or the method by which, Oklahoma may have satisfied, or could satisfy the requirements of the mandate of this Court, as applied by the District Court of Cleveland County in its order of January 22, 1948, is not before us.

Sipuel

The manner in which, or the method by which, Oklahoma may have satisfied, or could satisfy the require-ments of the mandate of this Court, as applied by the District Court of Cleveland County in its order of January 22, 1948.

is not before us

Per Curiam

SUPREME COURT OF THE UNITED STATES

Chambers of the Chief Justice:

Ada Lois Sipuel Fisher

Petitioner

NO. 325 Misc. v.

OCTOBER TERM 19 47. The Honorable Thurman S. Hurst, et al

Respondent

To Mr. Justice:	CIRCULATION					
	1st. Draft 2/12		2d Draft		3r Draft	
	~~Date~~	~~Action~~	Date	Action	Date	Act
Black						
Reed						
Frankfurter						
Douglas						
Murphy						
Jackson	2/12/48	Agree*				
Rutledge	2/13/48	Dissent**				
Burton	2/12/48	Agree				

REMARKS:

* Made some Suggestions.

** Printed

the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.[17] Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[18]

We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws.[19] We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

Reversed.

[17] *Muschany* v. *United States,* 324 U. S. 49, 66 (1945). And see *License Tax Cases,* 5 Wall. 462, 469 (1867).

[18] *Kennett* v. *Chambers,* 14 How. 38 (1852); *Tool Co.* v. *Norris,* 2 Wall. 45 (1865); *Sprott* v. *United States,* 20 Wall. 459 (1874); *Trist* v. *Child,* 21 Wall. 441 (1875); *Oscanyan* v. *Arms Co.,* 103 U. S. 261 (1881); *Burt* v. *Union Central Life Insurance Co.,* 187 U. S. 362 (1902); *Sage* v. *Hampe,* 235 U. S. 99 (1914). And see *Beasley* v. *Texas & Pacific R. Co.,* 191 U. S. 492 (1903).

[19] Cf. *Gandolfo* v. *Hartman,* 49 F. 181, 183 (1892).

Nos. 290-291-

To: Mr. Justice Burton

From: The Chief Justice

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CHAMBERS OF THE
CHIEF JUSTICE

Changes marked -

To the Chief Justice

OK

HHB

4/29/48

the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.[16] Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[17]

We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to take action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws.[18] We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.

Reversed.

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[16] *Muschany* v. *United States,* 324 U. S. 49, 66 (1945). And see *License Tax Cases,* 5 Wall. 462, 469 (1867).

[17] *Kennett* v. *Chambers,* 14 How. 38 (1852); *Tool Co.* v. *Norris,* 2 Wall. 45 (1865); *Sprott* v. *United States,* 20 Wall. 459 (1874); *Trist* v. *Child,* 21 Wall. 441 (1875); *Oscanyan* v. *Arms Co.,* 103 U. S. 261 (1881); *Burt* v. *Union Central Life Insurance Co.,* 187 U. S. 362 (1902); *Sage* v. *Hampe,* 235 U. S. 99 (1914). And see *Beasley* v. *Texas & Pacific R. Co.,* 191 U. S. 492 (1903).

[18] Cf. *Gandolfo* v. *Hartman,* 49 F. 181, 183 (1892).

#290-291

To: Mr Justice Murphy
From: The Chief Justice
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CHIEF JUSTICE

I like very
much the
way this has
been done and
I agree
Murphy J.