IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2184

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DR. NEIL SOLOMON, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the District of Maryland

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The briefs of the defendants and the States of Texas, Pennsylvania and Connecticut as amici curiae do not alter the issues as presented in the opening brief of the United States, i.e., despite the district court's casting its opinion in terms of the Attorney Generals "authority," little can be said to suggest that the Attorney General does not have authority to represent the "interests" of the United States in court, and whether this suit will lie depends upon the presence of governmental interests sufficient to provide standing.

NO ACT OF CONGRESS HAS TAKEN AWAY THE ATTORNEY GENERAL'S AUTHORITY TO REPRESENT THE INTEREST OF THE UNITED STATES

The thrust of defendants extensive recitation of the history of civil rights legislation is that Congress, because it granted certain power to the Attorney General and withheld others must have intended to forestall all suits by the Attorney General in the broad category of "civil rights" not specifically covered by the enacted legislation. (Brief, pp. 5-27)

Undoubtedly, Congress did not want to grant the Attorney General power to bring suits against "any acts or practices which would give rise to a cause of action pursuant to [42 U.S.C. 1985]."_/ Such a grant of power would allow suits by the United States, inter alia, against conspiracies "...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws..."_/ But, to refuse such sweeping authority is not the same as taking away the long recognized authority of the

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_/ Defendants' brief, p. 9, fn. 2, Part III of proposed Civil Rights Act of 1957.

_/ 42 U.S.C. 1985 (3).

the Attorney General to represent the interests of the United States in Court. 28 U.S.C. 516, 518(b) and 519. Kern River Co. v. United States, 257 U.S. 147, 155 (1921).

The various acts described in defendants brief are important parts of Congress' efforts to enforce the Fourteenth Amendment, but they represent, primarily, an effort to establish and enforce a national policy toward ending racial discrimination in various areas, some of which are Thirteenth and Fourteenth Amendment matters, e.g. public school desegregation, public facilities, and some of which are not, e.g. private employment, public accommodations and federally financed programs. They have nothing to do with "due process" rights, Eighth Amendment rights, the right to treatment of mentally retarded persons or suits to enforce those rights. They could not, therefore, cast any light on Congressional intentions about the Attorney General's authority in these areas.

Defendants apparently recognize this in Part I B, pp. 28-29, and in Part II, p. 42, of their brief where it is implicitly conceded that the authority of the Attorney General to bring non-statutory suits on behalf of the United States depends upon whether there are "interests" which supply standing, not upon the legislative history of defeated bills, or Acts and amendments on an unrelated subject.

THE UNITED STATES HAS STANDING TO BRING THIS SUIT

Plaintiff would not attempt to restate the important governmental interests which give it standing to prosecute this suit which are detailed in its opening brief. However, several points in reply should be made.

First, despite the arguments to the contrary by defendants and the states amici, there is, as to the issues in this case, no distinction between a suit based upon the power granted to Congress to regulate interstate commerce, and a suit based upon the power granted to Congress to enforce the Thirteenth and Fourteenth Amendments, assuming both involve the interests of the "public at large," In Re Debs, 158 U.S. 564, 586 (1895). Even though Defendants and amici insist on construing the complaint as one solely to enforce individual rights, it is more than that. Admittedly, the suit is one to protect the constitutional rights of a class of persons. But it is a class of persons in whose rights the United States has a

direct interest,_/ and that interest has been injured by the acts of defendants which defeat the legislated intent of Congress to provide for the treatment of the mentally retarded as well as injure our fundamental law. This suit seeks to require that treatment.

Second, defendants concede that enforcement of the terms of the federal grants which they have received would provide sufficient standing to bring suit. Brief, p. 43. The terms of the grants they receive relating to the treatment of the mentally retarded persons in this case are found in 42 C.F.R. §249.12 (reproduced in Addendum B of opening brief), regulations authorized by 42 U.S.C. 1396d(d) which requires treatment and certain standards for the operation of Rosewood.

_/ We adhere to the view that governmental interests arise from all considerations described in the opening brief, including the criminal statutes, 18 U.S.C. 241 and 242, which cover the same subject matter as this case. Defendants' Brief, p. 38, misreads section 242 as applying only to "violations based on alienage, race or color." The statute applies, however, to willful "deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States" as well as to the separate offense of subjecting someone to different pains and penalties on account of race, color or alienage. See U.S. v. Classic, 313 U.S. 299 (1941).

Similarly, defendants give the Equal Employment Opportunity Act of 1972 its most restrictive possible interpretation, Brief, pp. 18-19, by saying the Attorney General's authority to file employment discrimination suits against state and local agencies exists only upon referral from the Equal Employment Opportunity Commission. Although, the issue is irrelevant here, the 1972 Act

(Footnote continued on following page)

It would be anomalous for the government to be able to sue to enforce these regulations, but unable to sue to enforce the constitutional rights that the regulations are designed to protect because it has no "interest" in the constitutional, as opposed to the regulatory, integrity of a particular grant program.

The complaint alleges: "the proper treatment and habilitation of mentally retarded individuals is a matter of direct concern to the United States as evidenced by ... Congressional enactments such as sections 1905(c) and (d) of Title XIX of the Social Security Act, as amended (42 U.S.C. 1396d(c) and (d))..." For the defendants to contend, in the face of these statutes and regulations relating to "treatment" that the United States has no governmental interest, or that the complaint is insufficient to allege an interest, in the right to "treatment" of the mentally retarded citizens of Rosewood defies all prior meaning given to the term "interest."

Moreover, the presence of Congressional acts applying to this subject matter put this case squarely within United States v. Arlington County, 362 F.2d 929 (C.A. 4 1964) which

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_/ (Footnote continued from preceding page)
added authority in Section 707 to file "pattern or practice" suits against state and local governments. Referral suits are covered by Section 706. Whether "pattern or practice" authority vis a vis governmental units transferred to EEOC, or disappeared, or requires a referral, is the subject of more argument than should be reproduced here.

defendants gloss over as a suit involving the exercise of governmental functions in the area of national defense. Brief, pp. 28, 34. In that case the court enforced by injunction the Soldiers and Sailors Relief Act relating to taxation of servicemen by local governments. The Act made no provision for injunctive suits by the United States. The act was passed by Congress pursuant to its power to "provide for the common Defense...; To raise and support Armies...; To provide and maintain a Navy; To make Rules for the Government and Regulation of land and naval forces,"_/ but this Court characterized it as a suit to enforce the government's "policies and programs" 362 F.2d at 932. Surely, the statutes and funding provided by Congress for the treatment of mentally retarded citizen are a program of the federal government subject to enforcement by suit.

Third, defendants are incorrect in stating, Brief p. 29, that "six of seven district courts which have considered the non-statutory authority of the United States to bring suit to enforce Thirteenth and Fourteenth Amendment rights have denied the government such authority." The only district court other than the one below to rule against the United States on

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_/ U.S. Constitution, Art. I, Section 8.

the governmental interest in the rights of institutionalized persons is the district court for the district of Montana, United States v. Mattson, Civ. No. 74-138, reproduced as an appendix to defendants' brief; that decision, resting solely on the authority of the opinion below, has been appealed. On the other hand, the district court for the eastern district of Texas has ruled that the United States may intervene as party plaintiff in Ruiz v. Estelle, Civil Action No. 5523 (opinion unreported, but was the subject of the attempted mandamus reported In Re Estelle, 516 F.2d 480 (C.A. 5 1975) cert. denied, 44 Law Week 5700), a case involving systemic deprivations of constitutional rights of inmates of a Texas prison. The district court for the eastern district of Pennsylvania denied a motion of the Commonwealth of Pennsylvania to dismiss the United States as plaintiff-intervenor in Halderman v. Pennhurst State School and Hospital, Civil Action No. 74-1345, November 30, 1976 (noted in us brief of Pennsylvania, p. 2.); a similar motion in Horacek v. Exon, (D. Neb.) Civil Action No. 72-L-299 was denied on January 4, 1977. Both of these cases involve the rights of institutionalized persons. The court in Alexander v. Hall, 64 F.R.D. 152, 157 (D. S.C. 1974) in permitting intervention as plaintiff by the United States in a suit such as this, ruled:

> The Federal government has long had an interest in the improvement of mental health facilities, the maintenance of adequate training for professional personnel, and the administration of proper treatment for mentally ill individuals. Substantial sums of federal money are expended annually in the area of mental health care under the Medicaid program, 42 U.S.C. §1396 et seq., the Medicare program, 42 U.S.C. §1395 et seq., and the Community Mental Health Center Act, 42 U.S.C. §2681 et seq.

and further said:

> The United States has nonstatutory authority to sue to remedy widespread and severe deprivations of constitutional rights. [citition omitted]

Thus, when the issue is stated more in terms of this case, the district court count would, arguably, be four to two against defendants. There are no appellate decisions on this issue.

The inclusion of the four school desegregation cases by defendant could not be more off the point. United States v. County School Board of Prince Georges County 221 F. Supp. 93 (E.D. Va. 1963); United States v. Biloxi Municipal School District, 219 F. Supp. 691 (S.D. Miss. 1963) and United States v. Madison County Board of Education, 219 F. Supp. 60 (N.D. Ala. 1963) were all attempts by the United States to require desegregation of school facilities operated by local authorities for children of military personnel under an alleged contract

which provided federal money to local school districts. On construction of the allged contract, the United States prevailed in the Prince Georges case and lost in the other two. United States v. School District of Ferndale, 406 F. Supp. 1122 (E.D. Mich. 1975) involved interpretation of legislation authorizing the Attorney General to sue to remedy discrimination in education. The government did not claim it had authority to remedy Fourteenth Amendment wrongs independent of the statutes. In each of these four cases, the statements of the district courts concerning the government's authority under the Fourteenth Amendment, are either unrelated to the principal issues in the cases or dicta. By way of contrast, United States v. Brand Jewelers, 318 F. Supp. 1983 (S.D. N.Y. 1970) is squarely and emphatically an opinion contrary to defendants' position.

The other standing cases cited by defendant and the states amici, e.g. Sierra Club v. Morton, 405 U.S. 727 (1972); Warth v. Seldin, 422 U.S. 490 (1975), add nothing to the standing issue here. The plaintiff does not argue that it can assert the rights of individuals, as such. This was made clear in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888), as defendant ably urges. Brief, p. 41. But the United States can, as was also made clear in San Jacinto, sue to protect the integrity of governmental functions.

Finally, the briefs of the states amici both raise a concern about the effect of this suit on federalism, as did the district court. Plaintiff agrees that this might be a consideration when the merits of the case are decided and the equities are balanced. It would be a distortion of this consideration, however, for it to control the pre-trial issue of standing to bring suit, and to defeat the interest of the United States before it can even be heard on the merits.

It would be an anomalous result if federalism would not defeat a suit by the United States to enjoin a local tax, Arlington County, supra, would not defeat a suit to enjoin a use of tolls over a toll bridge which would cost local authorities millions in revenues, United States v. Rock Island Centennial Bridge Com ion, 346 F.2d 361 (C.A. 7 1964), would not defeat a suit to enjoin use of Chicago's waste disposal system, Sanitary District of Chicago v. United States, 266 U.S. 405 (1925), but would defeat a suit to secure constitutional treatment for mentally retarded citizens that Congress has prescribed and paid for.

CONCLUSION

For the reasons stated herein and in the opening brief, the United States submits that the district court's judgment should be reversed and the case remanded for trial.

Respectfully submitted

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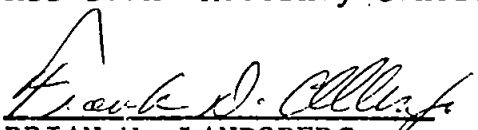

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CERTIFICATE OF SERVICE

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