THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-1078

JOE HAROLD WILLIAMS, MELVIN R. HAMILTON, EARL LEE, RON HILL, and the following named persons by and through their next friend, Joe Harold Williams: ANTHONY E. MC GEE, WILLIE LARK HYSAW, JEROME BERRY, IVY MOORE, LIONEL EARL GRIMES, JAMES ISAAC and ANTHONY GIBSON,
Plaintiffs-Appellants
vs .
LLOYD EATON, as Football Coach of the University of Wyoming; GLEN J. JACOBY, as Athletic Director of the University of Wyoming; The Trustees of the University of Wyoming, to-wit: GORDON BRODRICK, MRS. JOSEPH J. HICKEY, PAUL 0. HINES, CLIFFORD E. "JERRY" HOLLON, EPH JOHNSON, WILLIAM R. JONES, ROBERT W. MC BRIDE, JOHN C. OSTLAND, ALFRED M. PENCE, PATRICK J. QUEALY, JOSEPH B. SULLIVAN, H. A. TRUE, JR.; DR. WILLIAM D. CARLSON, as President of the University of Wyoming,
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

PREFACE

The Plaintiffs-Appellants, being eleven of the original 14 Plaintiffs, who were black members of the University

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of Wyoming football team, have appealed from the judgment of the United States District Court, Kerr, J., dismissing with prejudice their complaint in a civil rights action seeking injunctive and declaratory relief for alleged violations of their Federal constitutional rights by their dismissal from the University's football team. The former head football coach, the athletic director, the president and the members of the Board of Trustees of the University of Wyoming, were named as Defendants-Appellees, the State of Wyoming having been dismissed by this Court's decision herein filed on May 14, 1971, 443 F.2d 442, by which it was remanded for further proceedings.

The Plaintiffs-Appellants will be referred to herein as "Plaintiffs" or "Appellants", and the Defendants-Appellees will be designated as "Defendants" or "Appel1ees".

The record on appeal contains a reporter's transcript of the trial on September 27, 28, 1971, in two volumes, to which references herein shall be by "I" followed by the page number, indicating Volume I, and "II" followed by the page number, indicating Volume II. It also contains a reporter's transcript of hearing proceedings on Plaintiffs' application for a temporary restraining order and a three-judge court held on November 10, 1969, to which reference will be made by "ROT" (for Restraining Order Transcript) followed by the page number.

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STATEMENT OF THE CASE

The University of Wyoming football team was scheduled to play the football team of Brigham Young University at the stadium of the University of Wyoming at Laramie, Wyoming, on Saturday, October 18, 1969. In anticipation of the game (I, 89), the Black Student Alliance, a student organization sanctioned by the University and consisting of about 50 to 7 5 black students (I, 13-14, 34), met on Wednesday, October 15, 1969, to consider and approve distribution of a letter to President William D. Carlson, of the University of Wyoming, and Head Football Coach Lloyd Eaton (I, 16).

The Black Student Alliance's letter, dated Tuesday, October 14, 1969 (Defendant's Exhibit A, I, 15; ROT 106-107), stated that the Black Student Alliance opposed engagement by the University with teams of Brigham Young University because the "current practices and interpretations of scripture of the Church of Jesus Christ of Latter Day Saints . . . is racist . . ." The letter demanded that (1) University officials not use student monies and facilities ". . . to play host to and thereby in part sanction those inhuman racist policies of the Church of Jesus Christ of Latter Day Saints," (2) athletic directors in the Western Athletic Conference (WAC) refuse to play games with BYU as long as the LDS Church continues such policies, (3) black athletes in WAC protest any contest with BYU, and (4) all white people protest that policy,

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with a symbol of protest "a black arm band worn throughout any contest involving BYU." (ROT 106-107).

All of the Plaintiffs were members of the Black Student Alliance, and the majority of the 14 Plaintiffs were present at the meeting which approved distribution of this letter. The letter was fully read and discussed; and all of the Plaintiffs who were present at the meeting approved sending it (I, 38-39). The Plaintiffs met privately after the Black Student Alliance meeting and all decided that they were "in this together." (I, 58). The letter, which the Chancellor of the Black Student Alliance said correctly reflected their views that the Mormon Church (I, 32) was racist and was represented by the Brigham Young University team (I, 33-34), was delivered on Thursday morning, October 16, 1969, to the offices of President Carlson, Lloyd Eaton, Athletic Director Glen J. Jacoby, to the Laramie Boomerang, a newspaper, and to Phil White, editor of the school newspaper (I, 36). There was resultant publicity, which made all the campus aware that the Black Student Alliance had planned a protest (II, 342).

In conjunction with the Black Student Alliance's letter, the BSA also prepared a sheet of instructions for demonstrators, containing eight items for demonstrators at the game (Plaintiffs' Ex. 1, I, 17), and a sheet of instructions for marshalls (Plaintiffs' Ex. 2, I, 17), instructing marshalls in their duties inside and outside the stadium at the same demonstration. The Black Student Alliance's Chancellor, Willie Black, testified concerning the letter and the instructions, that "all these things were done as a group, a unit." (I, 17).

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At the time that Head Coach Lloyd Eaton received the Black Student Alliance's letter, his football team had the tenth winningest record in the nation (II, 276) and was after its fourth championship (II, 277). There were great prospects for the season (II, 278). His record as a coach had influenced recruitment of players, including the

Plaintiffs, who were interested in playing on a winning team (II, 111). The Plaintiffs came to the University on football scholarships (I, 134-136) and were for the most part interested in the opportunity to play professional football (ROT 40, 64, 67-68, 77-78). The relationship between the coaching staff and the 14 black athletes had been excellent, and the coaches had been able to communicate with the blacks no differently than any other athlete (II, 279). The 14 blacks, two of whom were junior college transfers (II, 277),had been given as an inducement to play, an athletic scholarship, which included tuition, books, board, room, study hall and tutoring assistance, an injury clause, and a ninth semester clause, all of the value of about $2,000 (II, 278). The players, at the time of recruitment, were required to sign a questionnaire, then various other agreements and, finally, a scholarship agreement, in the course of which the rules were called to their attention (II, 280). Those rules, including an oral coaching rule (II, 317) prohibiting participation by players in protests or demonstrations, had been read by the coaches to the players at the last session of spring practice in 1969 and again at the first session in the fall (II, 281, 287). There had also been a Vietnam Moratorium

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on campus scheduled for Wednesday, October 15, 1969, and on Tuesday night, October 14, 1969, the coaches had called the squad together and told them not to get involved in it (II, 287). The squad was told again of the rule against demonstrations on October 14, 1969 (II, 288).

Coach Eaton's reasons for the rule against group action in demonstrations or protests were based on other campus confrontations (II, 283). The coaching staff did not want their players in demonstrations because they would not be in class where they belonged (II, 283), it would be a reflection on the University, there was a danger of physical harm, and it breaks down morale when the unit is divided into groups (II, 284). He told them that it was not "Cowboy football" to protest or demonstrate, meaning that they should not deviate from the main group (II, 285-286). The rule did not prohibit a player from joining groups for activities outside of football (II, 329), or attending political meetings, evening forums (II, 335) and rallies, which were not demonstrations (II, 327).

At the time of receipt of the Black Student Alliance letter, Coach Eaton and his staff also were unaware of abuse his black players may have received in past Brigham Young University games (II, 331). Neither he nor the four varsity coaches had observed any so-called "cheap shots." (II, 331).

When the Black Student Alliance letter arrived, Eaton and his coaching staff were in session, and they read it and discussed its ramifications and what they would have to do (II, 288). That evening after football practice, Eaton asked Plaintiff, Joe Harold Williams, to remain. It was their policy

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to convey information to the squad through the captains (II, 288) The coaches knew that the majority of their black athletes were members of the Black Student Alliance (II, 290). Eaton felt that participation by members of the football team in protests or demonstrations would have an adverse effect on team unity (ROT, 108-109), so Eaton told Joe Williams, "In no way can you demonstrate against BYU." He further said to

him, "We cannot demonstrate against someone's faith or belief." (II, 291). Williams said that there would be no problem if Eaton would let them handle it in their own way, to which Eaton replied that there would not be any problem if they did not demonstrate (II, 291). Williams was observed afterward meeting with other black athletes in the Fieldhouse (II, 291). The Plaintiff, Joe Harold Williams, admitted that this meeting had transpired (ROT 48), although he contended that they had not decided whether or not they were going to wear arm bands on the field (ROT 49). Melvin Hamilton said he was aware of the Eaton-Williams meeting (I, 59).

At approximately 9:30 o'clock a.m., on Friday, October 17, 1969, the Appellants, wearing street clothes and black arm bands, walked as a group from the dormitory to the athletic Fieldhouse (II, 345). They were well-built, black athletes, well-known by the student body, and even in street clothes, would be recognized as football players (II, 343). It had been planned by the Black Student Alliance and their sympathizers that they would start wearing armbands that Friday morning as part of a general protest (I, 58), and Melvin Hamilton observed other students wearing armbands that morning

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(I, 58). Appellants confronted Head Coach Eaton and other members of the football coaching staff in the athletic Fieldhouse, each wearing armbands in protest of what they considered to be racist policies, which they associated with religious beliefs of the Church of Jesus Christ of Latter Day Saints and Brigham Young University (I, 89). Appellants considered the Mormon Church and Brigham Young University as one and the same (ROT 94; I, 89). The Appellants were aware that the Black Student Alliance letter, containing the sentence that "The symbol of protest will be the black armband worn through any contest involving BYU", had been delivered to Coach Eaton (I, 89-90).

The Plaintiffs appeared before Coach Eaton for the purpose of insisting that they be permitted to wear black armbands on the playing field (ROT 98), or that they be permitted to display some other outward sign of protest on the playing field during the game (ROT 87).

Although the Fieldhouse confrontation is one of the few areas in which there was conflicting evidence, even here the versions of both sides are close, without serious disagreement (I, 148). Eaton said that when 13 of the players were seated on the bleachers, Joe Williams stood as their spokesman and said they would like to talk to Eaton about it, to which he replied that, "It is evident what you'd like to talk about --demonstrations and armbands." To that, Williams shrugged (II, 292). Eaton then said that he couldn't understand how they could demonstrate against a faith they knew nothing about, or how they could be forced into demonstrating against a church (II, 293). Tony McGee asked what they were supposed to do when

they were called niggers, and Coach Baker replied that the coaches should be notified when that happens. Eaton then suggested that if Brigham Young was cheap-shotting them, or there were things on campus they could not stomach, they had better think about going to an all-Negro school, naming two of them. He said that they were liable to lose their scholarships, and that when they had the ability to play football for scholarships, to

by-pass it was like Negro relief (II, 295). Eaton said he intended nothing derogatory by that remark (II, 295). Eaton concluded the meeting by saying that the group was off the football team (II, 293-294). Plaintiff, Melvin R. Hamilton, accused Eaton of making racial slurs about them, referring to their parentage, Negro relief, and Grambling State and Morgan State (I, 63), as did the Plaintiff Williams (ROT 39, 92), but these allegations were denied by Eaton (II, 308-309, 318-319).

President William D. Carlson and his administrative staff commenced a 10-hour, complete review and hearing of all matters involved in the dispute, immediately following the Fieldhouse confrontation (I, 146-149, 171). The coaching staff immediately reported to him, giving him and three vice-presidents a complete review of the events (I, 146), and advising that if the players would come back as individuals and not as a group, they could seek reinstatement (I, 147). Eaton expressed his concern over this protest being directed against a religion (ROT 110; I, 162). Following that, the black athletes with their spokesman, Willie Black, Black Students Alliance Chancellor, met with President Carlson and his staff from 11 o'clock a.m. until late afternoon (I, 148-149). Dr. Carlson testified

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that he had gone into Eaton's use of language thoroughly (I, 169), and said Eaton's words in the Fieldhouse confrontation had been discipline-type language (I, 170), but were not words that would have offended him (I, 167).

The players demanded to meet as a group with Eaton (I, 149). It was group action all the time (I, 222). However, Eaton was engaged in preparation for the game (I, 149; II, 301). He was not required to attend any meetings that afternoon (II, 302). They did meet with Athletic Director Jacoby, but were not satisfied with that meeting (I, 27, 65-66). The black athletes and Mr. Black expressed throughout this meeting their deep concern about the religious practices of the Mormon Church (I, 148). Their discussion primarily related to the Mormon Church (I, 171). They repeatedly said that they wanted to protest some way at that game-, they felt they needed to protest against the inhumanity of the Mormon Church (I, 182). They were advised that they could come back and play, if they would come as individuals (I, 148), but they insisted on acting as a group (I, 149); I, 173-174). It was during this meeting that the athletes complained of oral and physical abuse at the previous Brigham Young University game (I, 175), and the President and his staff assumed those accounts were true (I, 175) despite the fact that Coach Eaton and his coaching staff at no time had ever heard that a player had received any such abuse or observed it (II, 331).

Dr. Carlson and his staff were trying in these meetings to reach some point of reconciliation (ROT 114). Eaton, as a department head, had authority to make rules (I, 150

which administrative action was subject to review by President Carlson (I, 150-151; 186-187). Although Dr. Carlson could have decided the matter himself by administrative action (1-151-152), he determined that it should be referred to and determined by the

Board of Trustees of the University (ROT, 114; I, 152). C. E. Hollon, as President of the Board of Trustees, then called a Trustees meeting for that purpose (I, 150; II, 257).

The University Trustees' meeting convened at 8:00 o'clock p.m., on October 17, 1969, in the Board's conference room in Laramie, Wyoming (I, 154). A blizzard was in progress, making it difficult for several members of the Board to attend the meeting (Jones Deposition, 7; I, 153). Except for two members who were unavailable (I, 176), all Trustees were at the meeting or were in contact by a loud-speaker telephone and microphone arrangement through a telephone conference call, so that all persons present and absent board members could participate freely (I, 154; ROT 116-118). A quorum was present (I, 114). The purpose of the meeting was not to hold a trial, but to ascertain the facts (II, 366; Jones Deposition 35) and decide who had acted properly or improperly (Jones Deposition, 41). For that reason, Mr. Hollon felt that the Board should listen first to one side and then the other (II, 255), rather than to confront each other and sit and argue (II, 257).

The Board heard the Appellees, Lloyd Eaton and Glen J. Jacoby, and the entire football coaching staff first (I, 155). The Board next heard the black athletes, who were accompanied by Willie S. Black, as one of their spokesmen (I, 156), and who were all wearing armbands as a protest of

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the Mormon religion (II, 356). The players had had about two hours' notice of the meeting (I, 94). Although he later denied it, the Plaintiff Hamilton also testified that after they left Dr. Carlson's office, some of the players had talked to Mr. Knudson, a teacher in the law school (I, 85-86). Knudson, however, did not accompany them to the meeting (I, 95). Minutes of the meeting were not kept (I, 106). The Secretary of the Board was one of the absent members (II, 274). No tape recording of the meeting was made (I, 107). But, each of the blacks had the opportunity to speak and present their views (I, 28, 94, 206; II, 355) and nearly all expressed themselves to some extent (I , 157; II, 355).

The Appellants expressed to the Board their deep concern about the religious beliefs of the Mormon Church (I, 158) They discussed the inhumanity of the practices of that church (I, 156), because it discriminated against black people (Jones Deposition, 10), and because they did not allow blacks to become members of the priesthood (II, 356).

Trustee Jones, a lawyer, heard their spokesman, Willie Black, say that because of this, the athletes weren't going to participate in athletic contests against the Mormons unless they could show they were protesting by wearing black armbands (Jones Deposition, 10). Jones also heard three players, whom he identified, say they would not play again for Eaton and would not play without armbands (Jones Deposition, 22-23). Another Trustee and lawyer, Alfred M. Pence, was concerned over the conflict between the rights of the individual football players to protest and religious rights (I, 221). He was

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interested in whether they wanted to protest as individuals, or as official representatives of the University (I, 208), and asked specifically whether they would play if Eaton continued as coach (I, 208); several players, particularly the group around the head table,

said they would not play for Eaton again and no one registered a different opinion (1-207). He asked whether they would play without armbands, and at least five said they would not play without armbands (I, 208).

C. E. Hollon, President of the Board, testified that one of the big points of the entire discussion was whether or not they intended to wear armbands if they were a part of the team the next day, and that he himself asked this question three times (I, 241). The first time, Joe Williams and two others said that they intended to wear their armbands (I, 240). The second time Hollon got no response from anyone, but concluded from their looks that they intended to wear them the next day (I, 241). He characterized it as an ultimatum, that they were going to wear armbands at the game (II, 251). He said that he came to the conclusion that they demanded to wear armbands at the game to protest against Brigham Young University and the Mormon Church (II, 260) .

At the conclusion of the hearing before the Board, and in a last-ditch effort to reach a solution to the problem, Governor Stanley K. Hathaway and Dr. Carlson conferred separately with the Plaintiffs in Dr. Carlson's private office because the Governor was still in hopes that a common ground of understanding to avoid the confrontation could be reached (II, 357-358). Governor Hathaway faced the players in the crowded office (II,

358), could see them all clearly (II, 359), and asked if they would play in the game with Brigham Young University without demonstrating (II, 359). Several said they would not play without wearing black armbands, and none said that they would play without wearing the armbands (II, 359). Dr. Carlson remembered that the answers were, "No, no, no" and some shaking of heads; he did not see anyone say "yes" (I, 161). On this point, there was conflicting evidence because Joe Harold Williams testified just the opposite (ROT 100). The Governor then asked whether any of the Plaintiffs would play ball under Eaton, because he was interested in the outcome after the next game (II, 360). Four or five players said they would not play football if Eaton were to continue as coach, and none said they would play (II, 360). The Governor then told the black athletes that they were using the wrong issue, and were demonstrating against a religious freedom (II, 362).

Governor Hathaway and Dr. Carlson advised the Board of the results of the conference (II, 362), reporting that they wouldn't play unless they could wear armbands (Jones Deposition, 18). Trustee Pence made the motion that the Board sustain the coach, supporting his motion by the assertion that it was unthinkable that a state institution, exemplified by a football team, should protest (I, 211), or be intolerant of the religion of anyone (I, 212). Trustee Jones, too, was concerned about the propriety of permitting a State institution to participate in a protest against a religious belief (Jones Deposition, 18). Dr. Carlson concluded that there had been no change in their attitude all day (I, 183). Trustee Pence was persuasive

(I, 212), and they all voted in favor of the motion (I, 213). President Carlson said that he concluded that the entire protest was directed at the doctrine and practices of the Mormon Church (I, 158). The hearing concluded with a formal announcement of that decision at approximately 3:15 o'clock a.m. on October 18, 1969 (ROT, 152). The Board of Trustees

itself had the final authority, exercised it, and dismissed the Appellant black athletes (I, 192).

The Appellants then filed suit in the United States District Court for the District of Wyoming on October 29, 1969, naming the Appellees in their official capacities as head football coach, athletic director, president and members of the Board of Trustees of the University of Wyoming. The Appellants sought a three-judge court, restraining orders returning them to the football team, a declaratory judgment that the actions of the Appellees violated their constitutional rights of free speech, and damages. An evidentiary hearing was held on November 10, 1969 upon the Appellants' demand for a three-judge court and a temporary restraining order. This hearing resulted in the evidentiary transcript, herein called the Restraining Order Transcript (ROT), of which the trial court took judicial notice (II, 377). The temporary restraining order was denied, and afterward on March 25, 1970, a judgment of dismissal was entered upon the motion to dismiss or for summary judgment of the Appellees. That judgment was reversed by the decision of this Court of May 14, 1971 (443 F.2d 422), in which the cause was remanded for further proceedings on the Appellants' claims for equitable and declaratory relief.

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Trial of this cause was before the Honorable Ewing T. Kerr, Judge of the United States District Court for the District of Wyoming, on September 27 and 28, 1971, after which Findings of Fact and Conclusions of Law generally favorable to the Appellees were filed herein and a Judgment of Dismissal with prejudice entered on October 18, 1971 (333 F.Supp. 107 (1971)).

We note in passing that at the close of the evidence in this matter, the Appellants' counsel agreed that this was not a class action (II, 382), and further stated that he was not serious in contending that the Court could reinstate the Appellants on the team when they were not in school at the time of the trial (II, 387). Also, while there were originally 14 black Plaintiffs, their number was reduced to 11 when three of them elected to talk individually to Coach Eaton and they returned to the team, after the rest of the squad had voted upon it (II, 314). The Court thereafter granted a motion to dismiss as to them.

STATEMENT OF ISSUES

The foregoing statement of facts and the Appellants Brief present the following issues for the consideration of this Court:

I. Whether the trial court's findings (a) that there was no merit in Appellants' allegation that the armband display was to protest against alleged cheap-shots and name calling by Brigham Young University players, that (b) the Appellants refused to participate in the game unless they could

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demonstrate against the beliefs of the Mormon Church by wearing armbands on the playing field, and that (c) Appellants refused to play football for Wyoming unless Coach Eaton was removed as head coach, were clearly erroneous and unsupported by the record.

II. Whether the members of the University's football team were official representatives of a State-supported institution so that the University Trustees could not allow them to use its State facilities, including uniforms, equipment, playing field and stadium, in protest of the religious beliefs of the Mormon faith.

III. Whether the University coaching staff's rule prohibiting football players from engaging in protests and demonstrations was constitutionally valid, particularly when applied to prohibition of a protest against the religious beliefs of Mormons.

IV. Whether the Appellants have a right to reinstatement as members of the University of Wyoming football team, in view of the conclusive showing of their ineligibility under the rules of the N.C.A.A. and the Western Athletic Conference.

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ARGUMENT

I. THE TRIAL COURT'S FINDINGS THAT (a) THERE WAS NO MERIT IN APPELLANTS' ALLEGATION THAT THE ARMBAND DISPLAY WAS TO PROTEST AGAINST CHEAP-SHOTS AND NAME CALLING BY BRIGHAM YOUNG UNIVERSITY PLAYERS, THAT (b) THE APPELLANTS REFUSED TO PARTICIPATE IN THE GAME UNLESS THEY COULD DEMONSTRATE AGAINST THE BELIEFS OF THE MORMON CHURCH BY WEARING ARMBANDS ON THE PLAYING FIELD AND THAT (c) APPELLANTS REFUSED TO PLAY FOOTBALL FOR WYOMING UNLESS EATON WAS REMOVED AS HEAD COACH, WERE NOT CLEARLY ERRONEOUS AND HAVE AMPLE SUPPORT THROUGH THE ENTIRE RECORD

Appellants in their Brief have questioned only the trial court's Finding Nos. 14 and 15, which read:

"14. That, taking all of the evidence and facts adduced by the parties into consideration, the Court finds that there is no merit in the contention raised by the Plaintiffs in their complaint filed herein that one of the purposes of the black armband display was that of protesting against the alleged cheap-shots and name-calling charged to members of the Brigham Young University football team; on the contrary, the Court finds that such allegation is without merit and that the sole and only purpose in the armband display was that of protesting against alleged religious beliefs of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, and Brigham Young University, which the Plaintiffs considered one and the same, and the Court further finds that each of the Plaintiff football players refused to participate in the football game with Brigham Young University as members of the football team of the University of Wyoming unless they were permitted to demonstrate against the religious beliefs of the Mormon Church by wearing black armbands upon the playing field.

"15. That, taking all of the evidence and facts adduced by the parties into consideration, the Court finds that each of the Plaintiffs refused to play football as a member of the University of Wyoming football team unless and until the Defendant, Lloyd Eaton, was removed from his position as Head Football Coach of the University of Wyoming."

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They urge the Court to make its own examination of the record on which these findings were based and to set them aside.

Appellants correctly note that Guzick v. Drebus, 431 F.2d 594 (1970, C.A., 6th), provides that when dealing with questions of constitutional magnitude, the reviewing court must make its own examination of the material from which the decision is made. In

passing, we note also that the Court in Guzick did what we urge this Court to do, review the record and conclude that the trial court position was right. The rule that the reviewing court is not bound by the conclusions of the lower court and may re-examine the evidentiary basis on which those conclusions were founded, as enunciated in Feiner v. New York, 340 U.S. 314, 71 S.Ct. 303, 95 L.ed. 267 (1951), nevertheless does not mean that in doing so, the other rules of appellate review become inapplicable. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A., provides that in an action tried without a jury, the findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. This Court has held in Fuller v. C.M.& W. Drilling Co., 243 F.2d 862, that appellate courts are required to accept findings of fact if supported by substantial evidence and not clearly erroneous. If, from established facts, reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court. Federal Security Ins. Co. v. Smith, (C.A. 10), 259 F.2d 294. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Superior Ins. Co. v. Miller,

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(C.A. 10), 208 F.2d 700. The record in the case at bar contains substantial evidence to support each of the findings of fact of the trial court.

The findings to which objection is taken should be viewed in their context of 14 other unchallenged findings of fact The Court made findings that 10 of the Plaintiffs failed to appear and offer evidence (No. 2), that when the Plaintiffs confronted Coach Eaton in the Fieldhouse wearing black armbands, Eaton had received the Black Student Alliance's demand letter and had warned Tri-Captain Joe Williams that there would be no protests or demonstrations (No. 4), that the Plaintiffs were aware of the coaching rule prohibiting protests (No. 5), that the Plaintiffs were wearing armbands in specific protest against claimed religious beliefs of the Mormon Church and Brigham Young University and were each then a member of the University football team arid were in violation of the coaching rule, and were then using properties of the University and, therefore, the State of Wyoming in a protest demonstration against the Mormon Church (No. 6), that the coaching staff and the athletes met with the University President, his staff, and the Board of Trustees (Nos. 7, 8, 9, 10, 11), that the Board of Trustees sustained the action of the coach dismissing the Plaintiffs from the team on the ground that should the University of Wyoming permit the Plaintiffs, as representatives of it, to appear on the playing field wearing black armbands in protest-demonstration of claimed religious beliefs of the Mormon Church and Brigham Young University, the State would be in violation of the mandate requiring complete neutrality relating to

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religion and non-religion (No. 12). To those findings, particularly those of Finding No. 12, the Appellants took no exception.

Appellants claim the trial court erred in Finding No. 14 to the effect that there is no merit in Plaintiff's contention that one of the purposes of the black armband display was that of protesting against the alleged cheap-shots and name-calling charged to members of the Brigham Young football team. They say that the allegation of cheap-

shots was not something dreamed up after their dismissal (Brief,7), thus tacitly admitting that one could believe that it was. They say there was testimony concerning cheap-shots. It is true that Plaintiff Melvin Hamilton implied that cheap-shots and use of the word "nigger" had occurred in Brigham Young University games (I, 87), and that Joe Harold Williams testified that the Brigham Young University team made them feel inferior and subjected them to cheap-shots after the whistle, name-calling and the extra kick (ROT, 88). It is also true that this is slightly corroborated by Dr. Carlson's testimony (I, 175) that when he met with the players after their dismissal, they complained of oral and physical abuse at the previous Brigham Young University game.

But, such evidence is not substantial; it really only establishes a basis for the trial court's finding, namely, that the allegations of cheap-shots and name-calling was an after-thought. The first time it was mentioned was after the Fieldhouse dismissal. The next time it was brought up was during the Trustees' meeting (ROT, 120). And, the third time it was mentioned was in their complaint. But, not one word in the Black Student Alliance demand-letter refers to "cheap-shots" or

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name-calling. Coach Eaton testified that none of the Plaintiffs had ever said anything to him about such cheap-shots (II, 331), and that neither he nor his coaching staff had ever observed them. Coach Eaton did say that during the Fieldhouse confrontation, he told the blacks that if there were conditions on the campus they could not stomach, or "if BYU is cheap-shotting you," the blacks should consider another school (II, 294-295). But, it was he, not they, who mentioned it. Eaton also said that there was a little of that in all ball games when they become heated (I, 299-300). Eaton concluded, "They were demonstrating against a church, a faith of which a good portion of our population in Wyoming practices. . ."

On the other hand, the record is replete with nearly countless references to the sole and main focus of the protest-demonstration, which went to the religious beliefs of the Mormon Church. Plaintiff, Melvin Hamilton, himself admitted that the black armbands were to signify individual and group protest of the racist policy of the Mormon religion (I, 89) Plaintiff, Joe Harold Williams, said that they were protesting the racial policies of Brigham Young University, because a black man could not rise to high office in the Mormon Church or bless the sacrament (ROT, 42, 92). And, Willie Black, their spokesman, who authored the Black Student Alliance letter (Ex. A), admitted that they were protesting a racist view by a religious group (I, 34). Governor Hathaway said that in the Trustees' meeting, it was made very clear that the armbands were worn as a demon-stration concerning the Mormon religion (II, 356). Finally, President Carlson testified, "The entire protest was directed

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at the doctrine or the practices of the Mormon Church, whereby the Black Man is not allowed to participate in certain sacraments or to rise to certain levels within the church." (I, 158). We suggest that the sum of this clearly relevant evidence is such that a reasonable mind might accept it as adequate to support the trial court's conclusion that the real thrust of the protest was aimed at the Mormon religion and not any name-calling or "cheap-shots" in the Brigham Young University games.

Next, Appellants argue that it isn't true that all of the Plaintiffs refused to play against Brigham Young University unless they could wear black armbands; some of the Plaintiffs, they argue, were silent and consequently the record is devoid of evidence to show which ones refused and which ones kept silent. Yet, Appellants in their Brief (page 5) acknowledge that their armband protest was "part of the general student protest." Their demand letter, Defendant's Exhibit A, accused the Mormon Church of inhuman racist policies, called for a protest by white people with their black fellows, athletes included, of these policies, and said that the symbol of protest would be the black armband worn throughout any contest involving Brigham Young University (ROT, 107). The black athletes were present when this letter was read and considered by the Black Student Alliance (I, 38), which approved it without any dissenting votes (I, 38). They were aware that it had been delivered to Coach Eaton (I, 90). They had been warned by Coach Eaton, through Tri-Captain Williams, after receipt of the Black Student Alliance letter, that there would be no protests or demonstrations of the type contemplated in the letter (II, 291).

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But, in the words of Melvin Hamilton, they wore black armbands on Friday, October 17, 1969, to signify their detest and dislike of the racist policy of the Mormon religion (I, 89). We consider their acts were part of a general scheme to embarrass or harass Mormon believers.

President Carlson and his staff met with them throughout the day and far into the night, during which he observed that their position didn't change (I, 183). C. E. Hollon said three times he asked whether they would play in the game without armbands, and he said their principal speakers insisted on it (II, 251) and concluded that their silence could not have been taken any other way except a negative answer (II, 249). He called it an ultimatum (II, 251). Trustee, Jones, when asked what the Plaintiffs' attitude was (Jones Deposition, 13), said they definitely were not going to play against Brigham Young unless they could wear armbands to demonstrate. Trustee, Pence, asked and heard at least five of them say they would not play without armbands (I, 208). Governor Hathaway, seeking a solution, asked at the end of a long night what he considered the two basic questions, one of which was whether they would play without armbands to demonstrate (II, 359), to which no one said "yes" and several said "no" or shook their head negatively (II, 359; I, 161, 178).

These questions were critical. The Plaintiffs knew that. Before asking them, the Governor told them that we've got to establish one thing first before we can come to any agreement, and then he asked his questions (I, 178). Silence by any of the Plaintiffs was assent; it amounted to

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"Yes, we insist on wearing armbands." When their spokesman said they would not play without armbands, they each supported their leaders by their silent affirmation of their leaders' position. Under no stretch of imagination can the "clearly erroneous" rule be applied to the trial court's findings in this respect.

Finally, the Appellants question the trial court's finding that each of the Plaintiffs refused to play football as a member of the Wyoming football team unless Eaton was removed as head football coach, urging that none of the defense witnesses could say that

all the Plaintiffs had so refused. The record contains substantial evidence to show that this finding was not clearly erroneous. This was the second of the two critical questions asked by Governor Hathaway, who testified that at least four or five said they would not play if Eaton continued as coach, and none took the opposite view, none disputed what the four or five had said, and none said they would play (II, 360). Even Willie Black, a witness for the Plaintiffs, remembers there were some "no" responses to the question, although he claimed the response was mixed and couldn't name anyone who said "yes." (I, 28). Plaintiff, Hamilton, admitted that he had heard the question, but didn't say anything (I, 99). Dr. Carlson remembered that some said verbally that they would not play with Eaton, while others said "no, no, no," and he didn't see anyone nod affirmatively or say "yes." (I, 162). Trustee, Pence, heard several players, particularly the group around the head table, say they would not play for Eaton again, and heard none register a different opinion. (I, 207). Throughout the long day of conferences with the University officials

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and Trustees, the Plaintiffs had had spokesmen, Willie Black, Willie Hysaw and Joe Williams, who did most of the talking (II, 357). When those leaders and others said they would not play again under Eaton, those who did not agree had a duty to speak or else deceive their hearers, misleading them into the belief that they too acquiesced in that position. The trial court properly concluded that the Plaintiffs refused to play football again under Coach Eaton.

II. THE MEMBERS OF THE UNIVERSITY OF WYOMING FOOTBALL TEAM WERE OFFICIAL REPRESENTATIVES OF THE STATE-SUPPORTED INSTITUTION, SO THAT THE UNIVERSITY TRUSTEES COULD NOT ALLOW THEM TO USE ITS STATE FACILITIES, INCLUDING UNIFORMS, EQUIPMENT, PLAYING FIELD AND STADIUM, IN THE PROTEST OF THE RELIGIOUS BELIEFS OF THE MORMON RELIGION.

Appellants next complain that the First Amendment, prescribing the making of laws respecting an establishment of religion or prohibiting the free exercise thereof, relates only to governmental action, not the actions of private persons. The wall between church and State is blurred and indistinct, they say, and the issue of academic freedom in a University community overrides other considerations. Religion is not immune from criticism, they say, as they try to paint a picture of these black athletes as just plain students indulging only in silent protest of an ecclesiastical policy in the highest traditions of free inquiry and exchange of ideas. Finally, we are asked to believe that these black athletes, as mere students, would not have been official representatives of the University on its playing field and whose actions were not those of the

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State University or its governing board. Appellants blind themselves to the plain facts.

The University of Wyoming is funded by appropriations from the State Legislature of the State of Wyoming (Ch. 201, Session Laws, 1969, §45). Intercollegiate

football is an integral part of the educational system at Wyoming (Appellants' Brief, 25). The control and responsibility for the conduct of intercollegiate athletics must be exercised by the University itself, and by the Western Athletic Conference, under the provisions of Article 3, §2, National Collegiate Athletic Association Constitution (Defendants' Ex. C, 5, Record V). The Western Athletic Conference Constitution, Article 101, also provides that the intercollegiate athletic programs shall be incorporated into the educational programs (Defendants' Ex. D, V, 5). The Western Athletic Conference rules containing extensive provisions relating to the scheduling and conduct of football games, and the recruitment and training of football players (Def. Ex. D, V). University (and therefore State) officials sit upon the councils of the Western Athletic Conference as well as the National Collegiate Athletic Association. Official State action has been necessary to provide the football stadium, parking facilities, team travel, athletic dormitory, Fieldhouse, ticket sales, coaching staff, uniforms, equipment and scholarships. Enthusiastic sports fans, by the legion, throughout Wyoming, call it "our team" and follow its every move with avid, keen interest. The games which the football teams play result only from many official acts by officials of the State of Wyoming in scheduling and conducting them. Thus, football is an official function of the University of Wyoming. There's no

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gainsaying the fact that in the eyes of all, the football team is a representative of the University of Wyoming and the State of Wyoming.

The Plaintiffs, as black football team members, were not mere students. They had been recruited by members of the University of Wyoming coaching staff to play football (II, 279). Just as their athletic prowess caused them to be selected, so also they selected the University of Wyoming because of its winning record, its athletic program (II, 277) and the opportunity that they had by playing football to attract attention of professional football scouts to themselves in the hopes of obtaining professional football contracts. Indeed, they have even asked damages in this litigation for deprivation of their opportunity to perform in front of and to make contacts with "pro" football scouts (ROT, 40, 41, 50, 56). Most of them hoped to play professional football after graduation (ROT 40, 56-57, 68-69). Thus, the Plaintiffs came to Wyoming to play football; they obligated themselves contractually to do so (II, 279-280; ROT, 61). They were not mere students, but as individuals they could and did undertake greater responsibilities and obligations when they accepted football scholarships and joined the football team. They agreed to abide by the National Collegiate Athletic Association and Western Athletic Conference rules and promised adherence to the coach's rules (II, 280), and agreed to represent the University of Wyoming in football games which are scheduled by its officials many years in advance. As mere students, the black athletes were free to engage in outside activities, political rallies or evening forums of a peaceful nature (II, 325-327), and, of

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course, they would be responsible individually for their conduct in such activities. But, as members of the football team, they were generally subject to the coach's rules, which do not apply to all other students. They were required to observe training rules, a dress code (II, 340-341), and devote substantial time to daily practices and football, while other

students were free to pursue academic or other activities. Thus, the black athletes were expected to be both football players and students--a demand-i ng task at the 1 east.

The proposition that the Plaintiffs were not mere private persons when performing as members of the University of Wyoming football team, but were, in fact, official representatives of the University and through it, the State of Wyoming, squares with all of the usual tests of agency. The general requirements for existence of an agency consist of the right of control of the conduct of the agent by the principal, Restatement of the Law of Agency 2d, §14, a resultant benefit to the principal from the agent's actions, Restatement, §98, a manifestation of consent of both principal and agent to the agency, Restatement, § 7(b), and, finally, that the actions of the agent are binding upon the principal. Restatement, §12. Here, the University through its coaching staff certainly had continuous control of the actions of its teams and the members thereof; it controlled the time and place of the appearance of the team, the composition of the team, its plays, the color of uniform, the training of the players, the eligibility of the players to perform, the price of tickets, the hair and dress regulations to which the players were to conform, and the scholarship benefits which the

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players received for playing. Likewise, it can't be denied that the University received a benefit from the actions of the players; tickets were sold, the public was invited to attend the games, the proceeds of the games went into the University's general funds and not to the players, and it is certainly common knowledge that the proceeds of such events defray the costs of many other athletic programs of the University. Also, there was a clear manifestation of consent by both parties to this arrangement, not only in the very act of fielding a team, but also in the formal execution of the scholarship agreement (II, 280-281). Finally, the actions of the agent football players were certainly binding on the principal, for the scores they produced remain in official record books, and the University and its coaching staff are credited with their team's athletic prowess or faulted for the lack of it. While compensation for an agent's services is not required, Restatement of Agency, §441 (a), even here there is an element of consideration, in the form of scholarship benefits, which moved from the University principal to its player agents.

The situation of the Appellants, as agents of the State's university, is not unlike that of the Plaintiff in Jewel Tea Co. v. Industrial Commission, 6 I11.2d. 304, 128 N.E.2d 699 (1955), where an employee, while wearing a T-shirt on which the name "Jewel Food Stores" was printed, furnished by the employer, was injured while participating in a Softball game, in intra-company league competition, after working hours and off company premises, with balls and bats provided by the company, and was held to have been injured in the course of his
employment.

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The Illinois court, in finding that the employer-employee or agency relation existed, looked to the benefit that the employer-company got from such activities through stimulation of good will and an esprit de corps among employees, which redounded to the benefit of the employer. Appellees suggest that in the case at bar, the Court may properly consider the uniforms of the players, the wearing of the school colors, and the

sponsorship of the football team as creating a similar good will and an esprit de corps among both students and adult supporters of the University, all of which benefits redounded to the University as a result of the activity of its football-player agents. While we have discovered no specific cases in point on this issue, we submit that these black football players find themselves squarely within the application of the well-established rules of agency, and, therefore, would have been agents of the State of Wyoming at the time they demanded to enter upon its playing field with black armbands to protest the Mormon religious beliefs. To consider the proposed acts of the Plaintiffs as the acts of mere students belies the real facts; their threatened acts must be judged on the basis of their status as contractually obligated football players, officially representing the University of Wyoming on a State-owned playing field, with the support of State funds.

That the University of Wyoming is an arm of the State of Wyoming is certainly confirmed by Article 7, §15, of the Constitution, which provides:

> "The establishment of the University of Wyoming is hereby confirmed, and said institution, with its several departments,

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> is hereby declared to be the University of the State of Wyoming. . ."

Article 7, §17 of the Wyoming Constitution vests the management of the University of Wyoming, its lands and other property in the Board of Trustees of not less than seven members to be appointed by the Governor by and with the advice and consent of the Senate,and provides that the duties and powers of the Trustees shall be prescribed by law. The Supreme Court of Wyoming, in Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309, 222 P. 9, recognized that a suit against the board of trustees of the University as a board created by the State for governmental purposes, was a suit against the State.

Section 21-338, Wyoming Statutes, 1957, authorizes the faculty of the University of Wyoming to "censure students as they may deserve, and generally to exercise such discipline, in harmony with the said regulations, as shall be necessary for the good of the institution..." Section 21-353, Wyoming Statutes, 1957, authorizes the Board of Trustees of the University of Wyoming to confer upon the faculty the power to suspend or expel students. Thus, the power of suspension or expulsion of a student is vested by statute in the Board of Trustees, which clearly had the power and authority to hear and determine the dispute in the instant case, taking the official action of dismissing the Plaintiffs from the football team.

In its Conclusions of Law, the trial court found as a matter of law that had the Appellees, as governing officials of the University of Wyoming, an agency of the State of Wyoming, acceded to the demands of the Plaintiffs, such action

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would have been violative of the First Amendment of the United States Constitution, prohibiting the establishment of religion and mandating upon the States the requirement of complete neutrality (Conclusion No. 4). The Court also held (Conclusion No. 4) that such protest would have violated the Wyoming Constitution directing that no sectarian

tenets or doctrine shall be taught or favored in any public school or institution (Article 7, §12), a provision that guarantees perfect toleration of religious sentiment and provides that no inhabitant of Wyoming shall ever be molested in person or property on account of his or her mode of religious worship (Article 21, §25), and a Wyoming Constitutional provision which guarantees the free exercise and enjoyment of religious profession and worship without discrimination or preference (Article 1, §18).

By virtue of these provisions of the Wyoming Constitution, when considered in conjunction with the foregoing statutes and other provisions of the Wyoming Constitution, Wyoming has a strong, firm public policy directing separation of church and State, and mandating strict neutrality and noninterference, without molestation, preference or discrimination by or on behalf of the State.

It is unquestionably established that Appellants demanded to use University (and, therefore, the State) uniforms, on a State playing field, before an audience in a State-owned stadium, at a State-sponsored athletic event, for the purpose of protesting the beliefs of the Mormon religion. They refused to play without wearing black armbands. Coach Eaton had offered them the right to be reinstated on the team by coming to him as

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individuals (II, 297), like three later did (II, 313), but they adamantly refused to do so (II, 312-313). Their failure to accept the relief offer by Coach Eaton then placed the Board of Trustees between Scylla and Charybdis, for approval of the coach's action would break up a winning team, but reinstatement of the players not only would have meant firing the coach and permitting the demonstration, but also action by the Trustees would have constituted illegal State action in behalf of the protest against the religious beliefs of the Mormon Church. The Trustees opted to prohibit the Appellants from protesting with black armbands on the playing field by dismissing them from the team (I, 164), which the Appellants now argue was a wrongful interference with the right to wear armbands as symbolic free speech in an atmosphere of academic freedom.

The Plaintiffs concede that the acts of the Defendants in their official capacities are State acts (Brief, 25). In fact, they said in argument that the Wyoming Trustees could not enunciate a University policy supporting the blacks' position against the Mormon beliefs, because it would have constituted State action inhibiting the free exercise of religion (Brief, 24). We agree that the actions of the Defendant officials are State action. Thus, we are left only with the question of whether or not it would have violated the mandated neutrality of the State to have permitted the Plaintiffs to have worn armbands upon the playing field.

As stated by this Court in Wi11iams, et al. v. Eaton, et al., 443 F.2d 422 at 433 (C.A. 10, 1971):

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> "The First Amendment provisions would be implicated only if the State has been significantly involved by defendants' actions."

The Court suggested that after trial, the ultimate findings:

> ". . . may show that the plaintiffs were dismissed from the team because of their demands to wear the armbands during the game. And it may be found that permission therefor by the defendants would have been recognized as a significant involvement of the State officers in an expression of hostility to the religious beliefs of others." Ibid, 433, 434.

The trial court did, in fact, find (and, as we have heretofore shown, there was adequate evidence to support its finding) that the Plaintiffs were dismissed because of their demands to wear armbands during the game. The trial court, after observing the manner and demeanor of the witnesses, concluded that there was no merit in Plaintiffs' contention that they were protesting manifestations of racism that Plaintiffs saw in Brigham Young University and its football team. This finding, too, was well supported by the record. We have also seen that the Plaintiffs were, in fact, agents of the State as members of its football team. Therefore, it remains for us to examine the issue of whether or not permitting them to wear armbands on the playing field would have been a significant involvement of State officers violating their Constitutional mandate of religious neutrality.

The First Amendment to the United States Constitution forbids Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. This Amendment, however, has two parts. The first part thereof

"mandates governmental neutrality between religion and between religion and non religion" (Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.ed.2d 228; underlining supplied) and the second part guarantees freedom of speech and assembly.

The amendment has been made applicable upon the states by virtue of the due process clause of the Fourteenth Amendment. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 10 L.ed.2d 844, 83 S.Ct. 1560; Engel v. Vitale, 370 U.S. 421, 8 L.ed.2d 601, 82 S.Ct. 1261, 86 ALR 2d 1285. The liberty protected by the due process clause of the Fourteenth Amendment includes the right to worship God according to the dictates of one's own conscience, Meyer v. Nebraska, 262 U.S. 390, 67 L.ed. 1042, 43 S.Ct. 625, 29 ALR 1446, and the right to refuse to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical. Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 ALR 841; Cline v. State, 9 Okla. Crim. 40, 130 P. 510. The Amendment embraces two concepts--freedom to believe and freedom to act; the first is absolute, but the second remains subject to regulation for the protection of society. Cantweli v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.ed 1213 (Underlining supplied)

While the neutrality doctrine and the prohibition against either the Federal or State government encroaching in the field of religion is an absolute prohibition, freedom of speech, guaranteed also by the First Amendment has no such absolute

guarantee. Freedom of speech is guaranteed only until a paramount interest prevails. It is circumscribed by the laws

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of slander and libel; it is not a "license to cry 'fire' in a crowded theatre" as Holmes observed, nor does it extend to advocacy of violent overthrow of the government. Cox v. Louisiana, 379 U.S. 536, 554 (1965); Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 247, 17 L.ed.149. Even in Tinker v. Des Hoines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.ed.2d 731, upon which Appellants place principal reliance herein, Justice Fortas, in holding that the wearing of black armbands by school students in protest of the Vietnam War was permissible because it did not interfere with the school's work, routine or discipline, recognized that such freedom of speech was permitted "at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline", and further held that conduct by a student which "materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."

Epperson v. Arkansas, *supra*, involved the constitutionality of Arkansas' "anti-evolution" statute prohibiting the teaching in public schools and universities that man evolved from other species of life. The Court held that the statute conflicted with the constitutional prohibition respecting the establishment of religion, saying,

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another

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> or even against the militant opposite. (Underlining supplied).
> "While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion."

The United States Supreme Court in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.ed.2d 601 (1962), a leading case, defined the distinction between the Establishment and Free Exercise Clauses of the First Amendment in this manner:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause,

> does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, thlT indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." 370 U.S. at 430-31, 82 S.Ct. at 1267, 8 L.ed,2d at 607-08. (Underling supplied)

The Court stated that the purposes of the Establishment Clause go further than merely preventing indirect coercive pressure upon religious minorities to conform to prevailing officially approved religion:

> "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally

> established religion, both in England and in this country, showed that whenever government had allied itself with one particular from of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion1 by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." 370 U.S. at 431-32. 82 S.Ct. at 1267, 8 L.ed.2d at 608.

In the case of School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.ed.2d 844 (1963), the Court concludes:

> "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a

> fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus as we have seen the two clauses may overlap." 374 U.S. at 222, 83 S.Ct. at 1571, 10 L.ed.2d at 858 (Underlining supplied).

The concluding remarks of the United States Supreme Court in Schempp were:

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> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment." 374 U.S. at 226, 83 S.Ct. at 1574, 10 L.ed.2d at 860-61. (Underlining supp1ied).

In the case of Everson v. Board of Education, (1947) 330 U.S. 1, 91 L.ed. 472, 67 S.Ct. 504, 168 ALR 1392, the United States Supreme Court upheld a statute authorizing reimbursement to parents of money expended for bus transportation of their children to and from schools other than those operating for profit, with particular reference to Catholic parochial schools. At 330 U.S., page 15, there appears this interesting language following an explanation of the historical background of the establishment clause of the First Amendment and the evils which necessitated it:

> "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." (Underlining supplied).

While the foregoing authorities clarify generally First Amendment rights, we still face the task of showing that the University's action in permitting these armbands to be worn on the field would have been a significant State involvement

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violating the constitutional mandate of religious neutrality. An important guidepost here is found in the case cited with approval by this Court in the Eaton case. In Reitman v. Mulkey, 387 U.S. 369, 380, 87 S.Ct. 1627, 18 L.ed.2d 830, a California constitutional provision was held invalid under the equal protection clause of the Fourteenth Amendment. That provision stated that the State could not deny, limit or abridge the right of any person to sell, lease or rent his real property, or to decline to do so, as he in his absolute discretion, might choose. The lower court had concluded that this provision established a purported constitutional right to privately discriminate on grounds which would be unavailable under the Fourteenth Amendment should state action be involved. The Supreme Court approved the lower court's conclusion that "significant state involvement" can be found "even where the state can be charged with only encouraging" rather than commanding discrimination. (Emphasis supplied).

For determining whether the State "in any of its manifestations" has become significantly involved in private discriminations, the Court in Rei tman quoted from Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.ed.2d 45, to this effect:

> "'"Only by sifting facts and weighing circumstances" on a case-by-case basis can a "non-obvious involvement of the State in private conduct be attributed its true significanc."'"

The Court points out that in Burton v. Wilmington Parking Authority, *supra*, which involved refusal of restaurant service to Negroes by the operator-lessee of a public restaurant located in a building owned by the State,

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> "Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had 'elected to place its power, property and prestige behind the admitted discrimination' and by 'its inaction. . . has. . . made itself a party to the refusal of service . . .' which therefore could not be considered the purely private choice of the restaurant operator." (Emphasis supplied)

Just as the Court in Reitman v. Mulkey, *supra*, and in Burton v. Wilmington Parking Authority, *supra*, which admittedly are equal protection cases, had to assess the potential impact of official action in determining whether the State had significantly involved itself in invidious discriminations, so here by analogy, this Court, in assessing the potential impact of the State's involvement, should find that prohibited State involvement could be found by inaction, that the State of Wyoming was unconstitutionally involved merely by placing its power, property and prestige behind those demonstrating against the Mormon

religion just by letting them do it. In such a case, to quote Justice Douglas in his concurring opinion in Reitman, ". . . the State is impliedly sanctioning what it may not do specifically."

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct 1598, 26 L.ed.2d 142, also concerned itself with a state's involvement in discriminatory practices. There, the white plaintiff had been refused restaurant service because she was accompanied by six Negro children. In holding that the plaintiff could show an abridgment of her equal protection rights if she proved refusal of service because of a state-enforced custom of segregating the races in public restaurants, the Court found that there was State involvement to a significant extent where

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there was a state-enforced custom of segregating the races at public eating places in Mississippi. The Court said, ". . .settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." Justice Frankfurter's statement that "Settled State practice. . . can establish what is state law," in Nashville, C.& St. L.R.Co. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.ed. 1254 at 1258, was relied upon in reaching that conclusion.

We submit that in the case at bar the State's action in permitting a protest demonstration on State-owned facilities by black armbands against the Mormon religion, before a large crowd gathered by the State for an athletic event, or rather its inaction by failing to stop the protest, would also have been a significant State involvement. Such action or inaction by the University of Wyoming would have been no less State action than was the State's acquiescence in the custom of racially segregated public eating places in Adiekes.

Finally, another word about the school-prayers cases: In Abinqton School Dist. v. Schempp, *supra*, readings from the Bible and recitation of the Lord's Prayer in the public schools pursuant to statute, were held to encroach, even though slightly, on the First Amendment's mandate of neutrality. Public property and the force of the public school could not be used for religious instruction. The Court said:

> "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'It is proper to take alarm at the first experiment on our liberties.'"

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In Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.ed. 954 (1951), which upheld the validity of a public school program of releasing children from school, at parents' request, for the purpose of religious instruction outside the school premises, Justice Douglas said:

> "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person." (Emphasis supplied).

We believe that the effect of permitting Plaintiffs to demonstrate on the playing field with black armbands would have been a State thrust of the Black Student Alliance upon the Mormons--a clear violation of mandated religious neutrality. If permitted once, would it have swelled to a torrent? Would a public figure, say, Billy Graham or Martin Luther King or Pope Pius, be hanged in effigy next? Or, would the Klu Klux Klan in white robes have used this public property to burn a cross? Would an incident or two become settled custom, and as in the Adickes case, develop into the efficacy of law?

While the Plaintiffs attempt to evade the issue of religious neutrality by likening the playing field to an academic forum in which free public debate should be permitted, the plain fact is that the playing field is not a classroom; it is not a public forum in the traditional academic sense, but is a showcase for a planned, State-sponsored, public activity, frequented by paying citizens, anticipating a sporting contest and not a debate, on tax-supported property open to public admission. State officials, who are put on notice of threatened activities, cannot avoid their obligation to prevent such

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activities, any more than they could avoid the constitutional mandates against promoting school prayers. In both cases, the State is required to act in order to assure that the "wall remains high", and that it is maintained with perfect neutrality and toleration. Here, inaction by the state officials under the circumstances would have constituted no less than State action by acquiescence, permission and consent in behalf of a protest against the religious beliefs of the Mormon Church and its members. Neither athletes nor any other sector of the academic community should ever be permitted to utilize the playing field at a State-sponsored athletic event, on property owned by the public and open to an admission-paying public, to display, symbolically or otherwise, a protest aganst any sect, any church, any religion, or any religious belief.

Although in Tinker v. Des Moines Independent School Dist., *supra*, Justice Fortas does indeed say that a student's rightsdo not embrace merely the classroom hours, but that when he is on the playing field or on the campus, he may express his opinions, it is nonetheless also stated,

> "But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech." (Emphasis supplied).

Here, the Plaintiffs threatened a flagrant and hostile invasion of the rights of the persons of the Mormon faith. The Plaintiffs insisted upon wearing armbands before thousands of spectators to protest Mormon beliefs; that conduct was not immunized

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by the constitutional guaranty of freedom of speech, and the Defendants consequently had no alternative but to dismiss them from the team.

III. THE UNIVERSITY COACHING STAFF'S RULE PROHIBITING FOOTBALL PLAYERS FROM ENGAGING IN PROTESTS OR DEMONSTRATIONS WAS CONSTITUTIONALLY VALID, PARTICULARLY WHEN APPLIED TO PROHIBIT A PROTEST AGAINST THE RELIGIOUS BELIEFS OF OTHERS.

The validity of Coach Eaton's ruling against football players participating in protests or demonstrations should be given serious consideration, because there are valid grounds upon which its constitutionality can be sustained. If Tinker is one crutch on which the Plaintiffs' case leans, Dunham v. Pulsifer, 312 F.Supp. 411 (D.Ct. Vt. , 1970), is the other. The Plaintiffs rationalize, first, that under Tinker, the coaching rule is unjustified because here there was no finding of lack of discipline, boisterous conduct, violence or disruption, which it would have prevented, and, second, they contend that under Dunham that there was no reasonable relation between the football coaching rule and the objectives of the athletic program so the coaching rule must fall.

We disagree. Exceptions to the rule of freedom of expression were made by the Court in Tinker, and we believe that this case comes within them. In the Tinker case, the students had worn black armbands to their classes in school to publicize their objections to the hostilities in Vietnam. The Court first noted, in calling it closely akin to pure speech, that "the wearing of armbands in the circumstances of this case

was entirely divorced from actually or potentially disruptive conduct by those participating in it." The Court then found that the problem did not concern "aggressive, disruptive action or even group demonstrations." It said,

> "There is here no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the school or the rights of other students." Tinker v. Des Moines Community School District, *supra*", 21 L.ed.2d at 738.

The Court observed that only a few of 18,000 students wore the armbands, that no work or class was disrupted, and that there were no threats or acts of violence on the school premises. The Court, in reaching its conclusion that the student's rights to freedom of expression embraced more than classroom hours, pointed out that one of the activities of school is "personal intercommunication among the students" and held that a student may express his views, even on controversial subjects,if he does so "without materially and substantially interfering with appropriate discipline in the operation of the school" and without colliding with the rights of others. (Emphasis supplied)

In Burnside v. Byars, 363 F.2d 744, 748 (1966), on which the Court in the Tinker case relied to support its position that the controversial activity must not interfere with appropriate discipline or collide with the rights of others, a school regulation forbidding

the wearing of "freedom" buttons on school grounds was held to be arbitrary and unreasonable. Here, like in Tinker, the Court held that the wearing of the

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freedom buttons did not hamper the school in carrying on its regular schedule, and that the simple wearing of buttons did not distract the students and break down the regimentation of the classroom. But, the Court did say that,

> "Regulations which are essential in maintaining order and discipline on school property are reasonable. . . . Therefore, a reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system."

But, in Blackwell v. Issaquena County Board of Education, 363 F.2d 749, 753 (1966), the same panel of the Fifth Circuit, on the same day, reached the opposite result in a like case. It, too, involved the wearing of "freedom buttons" in a public school contrary to a school regulation, but the Court found that the facts demonstrated that during the time students wore freedom buttons to school, much disturbance was created by the students, and that there was a complete breakdown in school discipline.

The Burnside case contrasted with the Blackwel1 case illustrates the point made in Tinker, namely, that the guaranty of freedom of speech is not absolute, and that the wearing of a black armband cannot interfere with appropriate discipline or collide with the rights of others. This is the standard, then, by which we must judge the Eaton coaching rule.

The Plaintiffs argue that the black athletes wouldn't miss classes while wearing the armbands on the playing field, that there would be no increase in "normal violence" (Brief, 13), that the reflection on the University doesn't count, that there was really no danger of injury to the players

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from protesting, and that if there was. some dissension, it occurred after the black athletes were dismissed. But, those aren't the only tests for the rule. Both the Tinker case and the Dunham case stress the importance of the objectives of the rule. Coach Eaton clearly explained those objectives in his testimony. When asked to explain the reasons for the rule, he said:

> "Approximately three years prior to this date we began to have confrontations throughout the nation on campuses, and many of our sports people were involved. At that particular time our coaching staff knew that this was something that could spread, because it was getting to be quite a popular thing throughout the nation on campuses, so we said that we had better be prepared for it and we had better keep our young men out of it, that they are here to get an education, and if they are in demonstrations they are not in

> the classroom, and if they are not in the classroom they are violating one of the regulations, which is clearly stated in which they can lose their scholarships. So we had set up that we did not want our men in a demonstration, No. 1, they are out of the classroom where they belong, and the majority of them would be and, No. 2, it is going to be a reflection upon the University and, 3, there can be physical harm come through demonstrations, which we know has happened on campuses throughout the nation and, 4, it does breakdown the moral , because in such cases there is a small segment that will break off and do this work, and again it divides a group of a unit up where you are trying to have a unity of a team." (II, 283-284)

Then, he was asked why there was a specific rule against the formations of groups within the team and said:

> "Yes, sir, we did, and that would be a demonstration group, and we have always said this. This has always been clearly spelled out. A recruiter will say, 'You are an individual, and you have individual problems. Your individual problems will be treated as an

> individual, and someone on this campus can help solve these problems. There is no group action on the University of Wyoming football team. If there is group action the group will have to go.1 And that has been spelled out loud and clear long before the incident of the Black 14, sir. " (II, 284)

When asked to characterize "Cowboy Football", a phrase that he used in connection with the rule (II, 285), he said:

> "Of 'Cowboy Football,' which is a good solid sound program, athletic program. Any athletic program, any organization, I don't think can stand to be divided, be it football or anything else. This Ts the way we felt, that we must have a good sound organization." (Emphasis supplied) (II , 284-285)

Lastly, when asked to what extent unity is required for the performance of a team, Coach Eaton, certainly an expert on this by virtue of his tenth winningest record in the nation (II, 276), explained,

> "Any time that you are trying to get 11 men to explode on a split second reaction time, offensively or defensively, you have to be so geared mentally that you work and react together and move together." (Emphasis supplied) (II, 285)

Coach Eaton was interested in winning (II, 276-278), and so were his players (II, 277). By participating in bowl games and other contests, their prospects of playing professional football were enhanced (ROT 40, 52, 56-57, 68). It is surely one of the commonly acknowledged facts of at least a coach's life that the fans don't follow a losing team; the name of the game is "win". Coach Eaton said that a good football program can't be divided by groups--a reasonable objective of his coaching rule. He said that a winning team must have unity, and that

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to explode on split-second timing, the team must work together--another equally reasonable objective of his coaching rule.

Viewed in the light of these objectives, this case presents a situation of substantial interference with the approp riate discipline of the school—not the general discipline of the student body, but the discipline of the team. Eaton had a rule against the formation of groups and group demonstrations within his team, and the black athletes violated it and smashed their team asunder. Football teams have traditionally relied on discipline; teams have training rules, dress codes, practice rules, and even their plays follow a type of rule. Athletic contests themselves are governed by elaborate sets of rules, to which the teams and their players are disciplined in observance.

Football team discipline is something much different from mere classroom discipline. The coaching rule was intended to foster and maintain a peculiar aspect of being a football athlete, that is, the structuring of a team. The 14 black athletes all held scholarships and accepted such athletic scholarships knowing that they would be expected to accept such direction as deemed necessary by the coach in order that a competitive team could be produced. That the exercise of rights of free speech can materially and substantially interfere with the requirements of appropriate discipline necessary to the success of a football team, which is a part of the University's program, or even the conduct of the athletic contest, is obvious Are the players' rights of freedom of speech within the protected scope of the First Amendment during a game when he "tells off" a referee? What of the football player who, off

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the playing field, speaks scornfully about his team-mates? Isn't he subject to disciplinary action?

The question becomes one of the outer limits of team rules designed to maintain team discipline. Who indeed can be the judge of what conduct may be destructive of a team and its unity? Great weight must be given to the coach's determination, particularly where that coach had been successful in producing the winning record that Coach Eaton had. We should be mindful of the mischief that might ensue from the substitution of judicial opinion on the rules required for team success for that of a winning coach. As in

this Court's recent rulings on the length of a student's hair, Freeman v. Flake, 448 F.2d 258 (1971) and King v. Saddleback Junior College District, 445 F.2d 932 (1971), judicial interference should not be extended to matters that do not present substantial issues.

The football coaching rule against participation by athletes in protests or demonstrations was not aimed at the threat of disruption or violence on the campus, but instead was designed for the \iery purpose for which the Plaintiffs were brought to the University, the playing of football on a winning team, disciplined to react in unity, on a split-second basis. Plaintiffs' violation of the rule not only destroyed the team's discipline, but it also collided with the rights of others--the other players on the team who had a right to expect that the team would function as a unit and whose expectation and hopes of winning were dashed when the formation of this group was formed within the team. Even the rights of those loyal fans in the stands, who avidly followed a winning team, were interfered

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with by the Plaintiffs when their insistence on the wearing of armbands wrought the destruction of the team by the loss of its unity. These are the Tinker exceptions within which the rule falls.

But, Plaintiffs urge on the basis of Dunham v. Pulsifer, *supra*, that a coach may not demand obedience to a rule which does not in some way further proper objectives of participation and performance. We have already demonstrated on the basis of Coach Eaton's testimony that team unity was a legitimate and proper objective of his rule. The Dunham case involved players on a tennis team who were prevented from playing because they failed to comply with a grooming code prohibiting long hair. The Court observed that there was no evidence that hair length affected the competitive performance of the tennis players, nor that it created dissension among the team members. Consequently, the Court held that there was no reasonable relation between the dress code and the objectives of the high school tennis program.

But, Dunham is not the case at bar. An individual tennis player facing his opponent across a net is not subject to the same requirements of discipline and unity as eleven members of a football team who, to paraphrase Eaton's phrase, must explode in unison on a split-second basis. Tennis, or track, or boxing, are simply not the type of team sport that football is. The reasonable relationship of the dress code to the sport may have had no valid basis in Dunham, but it surely can't be doubted that there was a direct, reasonable and justifiable relationship between Eaton's rule and his objectives of winning football games.

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Appellants complain that the coaching rule was vague and, therefore, defective. However, Coach Eaton specifically and plainly interpreted the rule, before the Fieldhouse confrontation, and said that it applied to the announced demonstration against Brigham Young University. Coach Eaton told Joe Harold Williams that in no way could they demonstrate against Brigham Young University, and that there would not be any problems if they did not demonstrate against Brigham Young (II, 291). There was no equivocation in that message. It came through loud and clear, and the record shows that

the Plaintiffs received the message from their team-mate Williams (I , 39, 59; ROT 48-49).

We urge that the rule was judged by Coach Eaton as relevant to team unity and discipline. He abused no discretion He had a right, in preparing his team to meet Brigham Young's challenge, to do all that he could to achieve the greatest concentration by the team on its game and to avoid any divisive distractions of the type created by the Plaintiffs. This was, therefore, a legitimate rule, clearly within the exceptions to the Tinker doctrine.

Furthermore, the Appellants' argument overlooks another vital part of the record, namely, that after a full and complete emergency hearing, of which the Plaintiffs had ample notice (I, 42), and in which everyone had full opportunity to speak (II, 355), the Board of Trustees, as the highest governing authority for the University of Wyoming, reached its decision and dismissed the black players from the team. It was the Board of Trustees that made the final decision dismissing

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Plaintiffs (II, 259; I, 192). The Board had no coaching rule, but the Board ordered the dismissal of the Appellants from the football team. That decision constituted the considered judgment of the Board that the Appellants, as football players, could not use the State's playing field and its tax-supported Memorial Stadium, during a State-sponsored athletic contest, in which Wyoming was the host team, to attack the Mormon religion

The whole thrust of the Appellants' argument would stop with the Fieldhouse confrontation, because they attempt to confine this Court to a set of facts more favorable to their legal theories. They attempt to paint a picture of a bigoted coach, blindly supported by his Board of Trustees, bent upon denying mere students their fundamental constitutional rights. But that isn't what's in this record. We think it would be unusual and difficult to find a fact situation more perfectly depicting sacrifice and deep concern by high officials. Notwithstanding the adversity of weather conditions and time demands, the Plaintiffs were fully heard out by governing officials in an honest and sincere effort to resolve the matter. The whole effort by Governor Hathaway, President Carlson and the Board of Trustees was to arrive at some settlement. The Board certainly recognized the concern that was so eloquently expressed by the Black 14 that they had enrolled as students in order to play football in the presence of professional football scouts in the hope of winning lucrative professional football contracts. Even after dismissing them from the team, the concern of these officials was clearly evidenced by their requirement that each would be assured of continuing student status and financial aid

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with which to complete his education. By innuendo, the Appellants depict the Defendant officials as unappreciative or non-comprehending of the Constitution's commands. However, just the opposite is true. Those officials stood up and were counted on the side of the Constitution, in keeping with their deep-felt and abiding regard for the obligations placed upon them, when they concluded that the representatives of the State's university could not use State-owned facilities, uniforms, and a State-sponsored event for their

religious attack. If the time ever comes when athletes can use freely such facilities for those purposes, then it will be time for the Legislature and our State's officials to terminate such competitive athletic activities.

IV. THE PLAINTIFFS-APPELLANTS HAVE NO RIGHT TO REINSTATEMENT AS MEMBERS OF THE WYOMING FOOTBALL TEAM IN VIEW OF THE CONCLUSIVE SHOWING OF INELIGIBILITY OF THE PLAINTIFFS UNDER THE RULES OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE WESTERN ATHLETIC CONFERENCE.

At the conclusion of Plaintiffs' rebuttal of the Defendants' case, the Plaintiffs rested and the evidence was closed (II, 382). Whereupon the Court asked Plaintiffs' counsel if he was serious in contending that the Court could reinstate the Plaintiffs on the team, when they haven't been in school (II, 387). It was shown by the uncontradicted testimony of Joseph R. Geraud, Vice President of the Unitersity of Wyoming, who is one who determines the eligibility of an athlete to play based upon his scholastic standing (I, 140), that none of the

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Plaintiffs were listed and certified to as being eligible to participate in football during the fall of 1971, and none would be eligible to play next year (I, 140). None of the eleven would be eligible, because they were not enrolled as students, except for Melvin Hamilton (I, 141) who was not currently eligible because he had not reported to play football and Coach Eaton had not listed him to Dr. Geraud as a participant, so that Geraud could not certify Hamilton as being eligible (I, 143). It was in view of this testimony that Plaintiffs' counsel replied to the Court that he was not serious in contending that the Court could reinstate the Plaintiffs on the team.

The 1969 team, of which the Plaintiffs were members, is no more. They could never be reinstated on it. Moreover, such a remedy would appear to be ineffective from a practical standpoint, because it is, of course, impossible to impose team spirit, team morale and team unity by edict.

In the very recent decision of the United States District Court, Northern District of California, dated February 1, 1972, Curtis, et al. v. National Collegiate Athletic Ass'n., No. C-71-2088 ACW, ____ F.Supp. ____, the Court held that the actions of the National Collegiate Athletic Association in providing for regulation of intercollegiate athletics for its member institutions were deemed to be state actions.

The National Collegiate Athletic Association rules and the Constitution and rules of the Western Athletic Conference clearly require a person to be a student in a member institution in order to be eligible for intercollegiate athletics (N.C.A.A. Constitution, Art. 3, §§ 1 and 10; W.A.C. Constitution, Art. 101.1,

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208.21, 300.2, Defendants' Exhibits C and D). Section 10(a) of Article 3 of the N.C.A.A. Constitution provides that an institution shall not permit a student-athlete to represent it

in intercollegiate athletic competition unless he completes his seasons of participation within five calendar years from the beginning of the semester in which he first registered at that institution. None of the Plaintiffs are now eligible under the five-year rule (I, 137; Plaintiffs' Ex. 4). Only one of them is still a student at the University (I, 141). Some have graduated, and some are academically ineligible to continue in the University (Plaintiffs' Ex. 4; I, 133). Since the University is responsible for the control of its athletic program, under the N.C.A.A. rules, we submit that reinstatement of ineligible players on a football team would result only in the suspension of that team from intercollegiate play--an ineffective remedy at best.

For the foregoing reasons, we submit that the remedy of reinstatement to the University football team is ineffectual, unavailable, and impractical.

CONCLUSION

On the record before this Court, the judgment of the trial court dismissing the complaint of the Plaintiffs with prejudice can only be affirmed because:

(1) There is ample support in the record to show that the Plaintiffs refused to participate in a scheduled football game with Brigham Young University unless they could wear

black armbands on the playing field, not to demonstrate against manifestations of racism that Plaintiffs saw in Brigham Young and its football team, but to protest and demonstrate against the religious beliefs of the Mormon Church and its believers, and further support in the record appears for the finding that the Plaintiffs refused to play football again for the University of Wyoming unless Coach Eaton was removed as its head football coach. The issues of fact which concerned this Court when the case was previously before it have now been resolved.

(2) The Board of Trustees of the University was justified in its dismissal of the black athletes when they insisted that, as members of the University of Wyoming football team, and consequently representatives of the State, they be allowed to wear in the game on their uniforms black armbands to protest the religious beliefs of the Mormon religion and thereby violate the mandated religious neutrality of the First Amendment by using State facilities, including uniforms, equipment, playing field and stadium, at a State-sponsored athletic event, to demonstrate against the Mormon religion.

(3) The rule of the football coaching staff prohibiting football players from engaging in protests or demonstrations came within the exceptions to the Tinker doctrine and was, therefore, constitutionally valid, particularly when applied to prohibit the formation of groups within a team that did, in fact, finally impair and destroy the unityand discipline of the football team.

(4) The eleven black athletes, who are the remaining Plaintiffs in this action, are presently ineligible for reinstatement on the University of Wyoming football team.

Appellees respectfully request that this Court sustain the Judgment of Dismissal entered by the United States District Court for the District of Wyoming on October 18, 1971, and for such other relief as the Court may deem proper.

Dated at Cheyenne, Wyoming, this 17th day of April, 1972.

Respectfully submitted,

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