In the

Supreme Court of the United States

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THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,

Petitioners,

v.

JEFF JACOBS, SUSAN CHANDLER, et al.,

Respondents.

No. 73-1347

Washington, D. C.
December 11, 1974

Pages 1 thru 48

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v.	:	No. 73-1347
JEFF JACOBS, SUSAN CHANDLER, ET AL., Respondents.	:	

Washington, D. C.

Wednesday, December 11, 1974

The above-entitled matter came on for argument at 10:42 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LILA J. YOUNG, ESQ., Bredell, Martin & McTurnan, 2430 Indiana National Bank Tower, Indianapolis, Indiana 46204, for the Petitioners.

CRAIG ELDON PINKUS, ESQ., 1125 Circle Tower Building, Indianapolis, Indiana 46204, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1347, Board of School Commissioners against Jacobs.

Mrs. Young.

ORAL ARGUMENT OF LILA J. YOUNG

ON BEHALF OF THE PETITIONERS

MRS. YOUNG: Mr. Chief Justice, and may it please the Court: I'm Mrs. Young, attorney for the petitioners, Indianapolis School Board, in this case.

The plaintiffs were high school students in the Indianapolis public schools, all minors, and they filed a class action for declaratory injunctive relief as well as damages against the Indianapolis School Board because school authorities said they could neither distribute nor sell in the Indianapolis schools a newspaper entitled the "Corn Cob Curtain."

We had two board rules at that time, both requiring prior approval for sale and for distribution of literature at schools. Approval was not given for the sale or distribution of the Corn Cob Curtain because it contains defamatory, obscene language.

QUESTION: Was the approval not given after distribution of the first issue?

MRS. YOUNG: No, it was not the first issue. There

had been several issues distributed, both in and outside of the school. Actually not very many copies had been distributed inside any of the high schools. There were two high schools at which some distribution had taken place.

QUESTION: There were five issues involved?

MRS. YOUNG: There were five issues over a period of a little over four months.

QUESTION: And it was after the publication of the fifth issue that its approval was not given?

MRS. YOUNG: By the superintendent, that's correct.

QUESTION: In what form was his approval not given?

MRS. YOUNG: Well, there had been some discussion with the high school administrators. They got together with the superintendent, and at that time he asked for copies and said it obtained obscene language and he could not give approval to the distribution of this in the school because he felt it was the duty of the school officials to discourage and prevent the use of this language by children in school.

QUESTION: Is this publication still being published?

MRS. YOUNG: No, it is not.

QUESTION: When was it discontinued?

MRS. YOUNG: Shortly after the decision in this case. There were a few copies distributed at a couple high schools or outside of those high schools after the decision, but the Corn Cob Curtain is no longer in existence.

QUESTION: Were any penalties imposed on the plaintiffs?

MRS. YOUNG: Absolutely none.

QUESTION: What interest remains? What's alive in this case today?

MRS. YOUNG: There is quite a bit alive in this case. We have submitted several sets of rules to the district court. First of all, we amended our original rules of prior restraint. These rules are no longer in existence. But the first amendment of our rules added procedural and substantive safeguards to these rules, but the district court said he could not give any approval to any form of prior restraint. So at that time he ordered us to again amend our rules which we did.

Our second amendment of our rules contained only subsequent restraint, and we had quite a few of those. The district court also declared those facially unconstitutional. He entered a permanent injunction against us, as well as declaring these rules facially unconstitutional, and this injunction was upheld in its entirety by the Seventh Circuit. So we have a permanent injunction against us. We also have a complete inability to have any rules or regulations of what is going to be distributed in our schools. So this issue is very much alive, even though the Corn Cob Curtain as a particular newspaper is no longer in existence.

QUESTION: Do I remember correctly that the publishers of the paper have graduated now from the school system?

MRS. YOUNG: I think virtually all of them have, of this particular paper.

There are basically five issues presented to this Court today. One is the validity of our rule of prior restraint, the rules adding the substantive and procedural safeguards that were suggested by the other circuits which had approved the principle of prior review of student literature prior to distribution in schools. Two of the issues concern the validity of our rules of subsequent restraint and whether the Court of Appeals erroneously applied principles in declaring these rules facially void.

A fourth issue is whether the district court errs in his complete refusal to apply the Federal Rules of Civil Procedure 17(c) simply because the instant plaintiffs in this case had raised a constitutional issue. So he totally ignored the mandate of that rule.

The fifth issue, which I plan to emphasize here today, is whether elementary and high schools can either prevent or discipline students who use gutter language in our elementary and high schools. Since we all know what these words are and they are printed in the appendix, I will prefer not to repeat them here today. They involve more than words;

they involve phrases and filthy cartoons.

Now, it's your decision whether or not children will be using gutter language in our elementary and high schools. If you decide that school officials can neither prevent nor discipline students who use this language in school, then many basic functions of our schools will be destroyed. One of these basic functions is to teach children how to use language properly and in socially acceptable terms. Now, this cannot be taught in our schools, and it will not be taught, if you decide that the school officials can do nothing about it and the students in our school say, well, it's O.K. for us to write and distribute this language because the Supreme Court says it's fine.

Now, a lot of time could be spent discussing what label we might attach to these words, whether they should be classified as legally obscene as to minors or as indecent. But the classification or label attached to this filth doesn't change the fact that it belongs in the gutter and not in our schoolhouses. Now, it's either right or wrong for children to be using and distributing this language in our schools. And if it's wrong, then our school officials should be able to do something about it. It seems incredible that the right to control the use of this language in our schools should even be questioned, let alone denied.

Our briefs discuss many harmful consequences of

allowing this type of language to be spread throughout our elementary and high schools.

QUESTION: I have the impression that this just involves high schools.

MRS. YOUNG: No, it definitely involves elementary schools. Our rules definitely cover all the Indianapolis public schools, and there are some 114 elementary schools as well as 11 high schools.

Now, the plaintiffs were high school students. Two of them before the action had been commenced, before the complaint was filed, had actually graduated, but they were high school students. They had actually distributed only in two or around two high schools. But the injunction covers and clearly covers the elementary schools. The rules clearly cover the elementary schools. Our brief and everything covers elementary schools. We don't have separate rules for grade school children and high school children.

QUESTION: Do your colleagues on the other side agree?

MRS. YOUNG: At no time did they deny that these rules in the case involved only high schools, until we got up to the Seventh Circuit. And there, in response to questions by one of the Justices, they stated these rules apply only to high schools. But they do not. And the court's opinion, the district court's opinion, clearly is applicable as well as

the injunction is applicable to grade school students.

QUESTION: One of the bases of Judge Christensen's dissent in the Seventh Circuit, wasn't it, was that the majority failed to distinguish, in its opinion, between application to high schools and application to elementary schools?

MRS. YOUNG: That's correct. However, since the injunction was upheld in its entirety, it's very clear that we cannot apply these rules to elementary students. The rules were declared facially void, null and void. It would be bad faith for us to say, well, even though they specifically covered all the schools that we can go now and apply them to the grade schools.

QUESTION: Is there anything in these papers that could have led a reasonably careful reader to get the impression that only high schools were involved?

MRS. YOUNG: I doubt that because if you look even in --

QUESTION: That's not the claim of your adversary?

MRS. YOUNG: They claim that for the first time at the oral argument, but they never claimed that and they never denied the fact that the elementary students were involved when we were down in the lower courts.

QUESTION: How about here? Is there anything --

MRS. YOUNG: I am certain they will probably claim

it here.

QUESTION: And in their briefs and petition.

MRS. YOUNG: Right. But if you look at the transcript --

QUESTION: Then a reasonably careful or prudent reader might have gotten that impression.

MRS. YOUNG: I would disagree with that because there are many references to elementary schools. Their very complaint --

QUESTION: I mean the impression that the claim has made.

MRS. YOUNG: Impression that the --

QUESTION: That the claim is made by your adversaries that these rules apply to high schools and they are only talking about high schools.

Well, we will see what they say. But I just --

MRS. YOUNG: I don't believe they claim that the injunction --

QUESTION: I may have a misapprehension in that.

MRS. YOUNG: I don't think that they are claiming that the injunction or the rules apply only to or govern only high schools. I think their argument basically is that the class consisted only of high school students. But the students made it clear right in the evidentiary hearing that they planned to distribute this newspaper not only to high

school students, but to anyone else. And the relief sought was not confined solely to high schools.

QUESTION: Who were the plaintiffs of the class complaint?

MRS. YOUNG: They are -- who are remaining plaintiffs?

QUESTION: No, in the complaint. It was a class action, wasn't it?

MRS. YOUNG: Right. There were six named plaintiffs. Only two remain at the end of the case because the rest had graduated.

QUESTION: And now those two have graduated.

MRS. YOUNG: I'm not completely sure, but I think that's probably true.

QUESTION: Was there a declaration of certification of class action?

MRS. YOUNG: Yes.

QUESTION: And what was the class?

MRS. YOUNG: The class was the high school students in the Indianapolis public schools. The relief sought governed more than the high school students; it involved our suppression of distribution anywhere in the Indianapolis public schools.

As I said, the issue I wish to emphasize here today is the issue on the type of language and the basic reason for suppressing this distribution. If this Court decides that

minors may not be disciplined for using this language in school, how can it consistently justify its own rules in the Federal Rules of Civil Procedure that permit adult attorneys to be disciplined for inserting scandalous and indecent material in their briefs and pleadings? Surely the school officials have as much right to maintain a basic level of decency and a proper atmosphere in our schools so that learning can take place. An academic atmosphere is no less important in our schools than it is in our courts. And if respect and decency is destroyed in our schools, then it won't last much longer in the courtroom or anywhere else.

In balancing the public interest or the students' interest in expression against the many harmful consequences that we have stated in our brief and the justification for the regulation of this type of filth in our schools, I think the scales are very unevenly balanced. In fact, what possible value or benefit could be derived by permitting children to use and distribute this type of four-letter words and filth in our elementary and secondary schools?

Respondents argue that not every article is filthy and that the words are not used too many times. But if the number of times obscenities are used is to be the criterion for regulation in the schoolhouse, then this would be in effect telling children that it's O.K. to use these words just so long as you don't use them too many times.

QUESTION: Mrs. Young, I suppose you are going to get to what the minimum safeguards are that you think the board is entitled to impose in order to achieve what you think they should be able to achieve.

MRS. YOUNG: Well, I think there are two ways of approaching this. We originally approached it and we would like to still continue to approach it with a prior review of student literature in order to take --

QUESTION: Would that go to each publication or would they apply to you and say, "We want to put out a paper and please give us permission."

MRS. YOUNG: The procedures are set out in our rule of prior review. They would submit material that they desire to have a general distribution of in the schoolhouse. We have procedural safeguards set out --

QUESTION: That would be each issue, then?

MRS. YOUNG: That would be correct, each issue. And if filth and four-letter words were used in the publication, then the school officials would say that they do not think this is proper language to use and they would not allow the distribution unless that language would be removed. That's the issue of prior restraint.

QUESTION: Now, suppose the authorities just didn't agree with what was said.

MRS. YOUNG: There would be no regulation.

QUESTION: Besides -- what if there was criticism the way the school was run?

MRS. YOUNG: The rule specifically provides for allowing responsible criticism. It is stated right in the rules.

QUESTION: What is responsible? Who decides that?

MRS. YOUNG: Responsible criticism would be --

QUESTION: Who decides it?

MRS. YOUNG: Who decides it? Well --

QUESTION: The fellow criticized?

MRS. YOUNG: A board of review that would be set up to look at this.

QUESTION: It might be itself criticized.

MRS. YOUNG: Who might be criticized themselves, that is correct. Our schools are not opposed to criticism. We receive a great deal of it, and I think they would receive a great deal more if they didn't have any rules or control of the conduct of the students in their schools.

QUESTION: You think it would just be unmanageable or just not effective if the school had the rules as to what could be in materials that are distributed but didn't have a pre-approval system, that you would just, if someone broke the rules and distributed filthy language in a newspaper, suspend them or punish them or do something.

MRS. YOUNG: That is called for in our rules of subsequent restraint which allow only subsequent punishment

after the fact.

QUESTION: I understand. But you apparently insist on wanting prior approval.

MRS. YOUNG: Right. We have two sets of rules. We would prefer prior approval.

QUESTION: I know you prefer. I'm trying to find out what your position is here as to what you are constitutionally entitled to do.

MRS. YOUNG: I think we are entitled to both sets of rules as they have been written.

QUESTION: And the reason you insist on the prior review is because the subsequent approach is ineffective, or what?

MRS. YOUNG: I don't think it is ineffective. I think it is less effective. We aren't interested in punishing students. We don't like to remove them from the schools. We are interested in teaching them to speak in socially acceptable terms and a newspaper that they would wish to print could be a good learning experience, but I think there has to be certain control. We would just like to take a peek at it and see what's coming into our schools. If we can't do that, then we would like to impose subsequent restraint because that's all that's left to us.

QUESTION: Yes.

MRS. YOUNG: The subsequent restraint would not

necessarily be expulsion. They range from a reprimand to expulsion, which is a last resort. We don't use expulsion that often. We try every other means first. But we would like to avoid punishment, and I think prior review would set up more of a learning experience rather than waiting and saying, "Distribut it and see what the consequences are."

QUESTION: But I take it either way you go that one thing you would insist on and that is that the publishers can't be anonymous.

MRS. YOUNG: I think this is more important for the rules of subsequent restraint. I think it is absolutely essential in that area because that is the only means for determining who is abusing the system. If articles are sent in to a post office box like they were in the Corn Cob Curtain and they will print whatever was sent in to them with absolutely no editing, we must assume that they would allow pornography or anything else that was sent in.

QUESTION: Even on the licensing approach you would insist that only students or faculty members be allowed to publish in the school system.

MRS. YOUNG: I don't believe in our rule of prior restraint that we limit it. We do on the anonymous part. But we would prefer a student newspaper in either situation to be written by students, simply because outsiders have no right to come into the school and distribute their wares and

literature, and we do not wish this basic principle to be subverted by having children distribute it for them. The school is a place where many children are forced to attend. It constitutes a large captive audience. There are many outsiders that are interested in reaching this captive audience. This is a serious problem, not only with salesmen but with anybody who wants to reach the thousands of students in the school. At Tech High School, one of the schools involved in this case, we have over 5,000 students. This is quite a vulnerable captive audience. So this is why we wish to have the school used only for educational purposes and not for non-school purposes.

I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Young.

Mr. Pinkus.

ORAL ARGUMENT OF CRAIG ELDON PINKUS

ON BEHALF OF THE RESPONDENTS

MR. PINKUS: Mr. Chief Justice, and may it please the Court: I would like to begin first of all, aside from the hazards of argument, to address myself to what we regard as the issue that Mr. Justice Stewart was inquiring about, whether this case does indeed involve elementary students in any way whatsoever. We say most emphatically it does not involve elementary students in any way except that the injunction

which was issued by the district court does indeed go to rules which cover the entire system.

QUESTION: Since the colloquy, I've noticed the closing language of the Court of Appeals opinion.

MR. PINKUS: Precisely, Mr. Justice Stewart.

QUESTION: Which says, "Should the defendants apply to the district court to limit the injunction to high schools, nothing in this decision forecloses its consideration of the application on its merits.

MR. PINKUS: Which is exactly what we think they ought to have done.

QUESTION: Why shouldn't the petitioners -- why shouldn't they have been entitled to a reversal from the Seventh Circuit on that point rather than simply telling them to go back and move the district court to modify?

MR. PINKUS: We didn't argue that they were not entitled to reversal.

QUESTION: Well, then, you concede that the Court of Appeals in the Seventh Circuit was wrong insofar as it affirmed that portion of the district court's injunction?

MR. PINKUS: Well, we take the position that we have never represented elementary students. They have never been in our class. They have never been involved in the evidentiary proceedings, that we have never briefed or argued on their behalf. And we merely have no objection to this Court finding

that the Seventh Circuit was wrong insofar as it refused to rule on elementary students. We are here before this Court on behalf of a class of people from 13 to 20 years old --

QUESTION: Judge Steckler really gave you a broader injunction than you asked for.

MR. PINKUS: Indeed, he did, your Honor, and I would like to point to page 110 of the transcript. This is not in the appendix. But there in a colloquy with Judge Steckler I said the following to him: And we have prepared them in our prayer, I would agree with the Court, it is undoubtedly framed in language which would be overly broad. It's a sin lawyers often commit. I would say, however, that the reason for not presenting the Court with a tender in a temporary restraining order form was so that it would be possible perhaps to arrive in some joint fashion in terms of time, place and manner of distribution, which we endeavored to do from the beginning of our representation in this case.

So I think we made it clear from the beginning that we did use some broad language. This was the hearing on the temporary restraining order. Again, the citation is page 110 of the transcript.

QUESTION: What difference does it make whether it applies to elementary schools or not?

MR. PINKUS: We think that there's some emotional difference.

QUESTION: No legal difference.

MR. PINKUS: No, but we think there is some --

QUESTION: The first amendment would apply exactly the same way in elementary schools.

MR. PINKUS: I am not clear if it would or not.

QUESTION: Well, would it or not?

MR. PINKUS: I would say that I can imagine under the Ginsberg concept that a careful delineation of age groups would be constitutional under the first amendment. I simply don't know how precisely those groups must be delineated. And that's the answer that I must give you. And we accept the Ginsberg concept.

QUESTION: You don't accept it down to age 13. I mean anything from 13 up you say is out of that.

MR. PINKUS: No, sir. On the contrary, we would be pleased to live with the New York statute in Ginsberg in this case. We would be very pleased to have that have been in the statute. Agreed. But it did contain --

QUESTION: You don't mean that, then, do you, that you could be sent to prison for --

MR. PINKUS: No, I mean that it contains some definitions.

QUESTION: Wasn't the age in Ginsberg -- it's been a while since I have seen it -- wasn't the age there 17?

MR. PINKUS: Seventeen, your Honor. Yes.

QUESTION: What do you mean you would be willing to live with the --

MR. PINKUS: It contains definitions of what obscenity is to have some specificity. Here the board rule which is found both in the appendix and in the appendix of the petition for certiorari, 1.1.1 says "obscene".

QUESTION: You're not going to the age limitation of --

MR. PINKUS: No, sir. I'm talking specificity in light of the Court's newer and related cases.

QUESTION: Let's assume that the board eliminated all -- well, didn't eliminate the prohibition of obscenity, but it added something that says, In these papers you will not use the following words,and listed them, and no others of the same kind. Now, what about some of the four-letter words you think the school board is not entitled in high school to forbid the use of those words in a newspaper.

MR. PINKUS: Yes. Sir, I believe they are not entitled to forbid any of the words they are complaining about before this Court in high school publications per se, and I want to make it clear they have focused upon words --

QUESTION: You mean, Mr. Pinkus, that as far as they can go constitutionally is to prohibit only that which by constitutional definition is obscene?

MR. PINKUS: I think that they can fashion an

obscenity rule with respect to the age group involved that is more restrictive than the rule that would apply to adults.

QUESTION: But may not go so far as to prohibit the use of specific words.

MR. PINKUS: Regardless of context. The important point --

QUESTION: Where do we go then? In between specific words and -- what kind of rule would be fashioned?

MR. PINKUS: We believe, sir, that there must, to be covered in any way by the obscenity concept, there must be something erratic in the material involved.

QUESTION: That's undoubtedly true about obscenity. But this isn't an obscenity case, is it? This is quite different.

MR. PINKUS: Well, sir, it was framed as an obscenity case. The original answer filed by the school stated that the publications were obscene. That's in the appendix at page 3A, I believe. The statement of Mr. Kalp, the superintendent who said, You may not distribute this publication any longer. In the record it was, "It is obscene." The briefs of the school board have said that it's obscene.

QUESTION: What about the rules. What is involved here is the rules, isn't it?

MR. PINKUS: Yes, sir. And 1.1.1 says that distributable literature excludes that which is obscene. It is

not in our brief.

QUESTION: Why would a rule like that be unconstitutional on its face?

MR. PINKUS: I think, sir, for several reasons. First --

QUESTION: In the first place the Court of Appeals didn't hold it obscene on its face. Neither did the district court.

MR. PINKUS: I think they did find it overbroad, as I understand the opinion, your Honor.

QUESTION: That was a particular provision?

MR. PINKUS: Yes.

QUESTION: You mean just in its application?

MR. PINKUS: Because, well, there is imprecision here, I grant. What the Seventh Circuit did was concentrate on the breadth provided by Tinker, the variable obscenity concept --

QUESTION: You wouldn't say that just a rule that forbade a newspaper to publish obscenity would be unconstitutional on its face.

MR. PINKUS: No, sir, I would not. We are only talking about earthy words in this case. That's what I wish --

QUESTION: We are talking about the rule.

MR. PINKUS: Yes, except that the board is contending that the earthy words violate these rules.

QUESTION: There is some place here where all the rules are set out seriatum.

MR. PINKUS: Yes, sir. They are in two locations. One is in the beige bound volume and --

QUESTION: The appendix.

MR. PINKUS: Yes, the appendix. The other is at page 33A in the appendix to the petition for certiorari.

QUESTION: What you are saying, I take it, is that the students in the high schools may say, express anything say, express, or depict with pictures anything unless it violates the Miller, Adult Paris Theater line of cases of a year ago.

MR. PINKUS: No, Mr. Chief Justice. We believe that more restrictive standards than those that are applicable to adults under Miller and related cases can be acceptable in --

QUESTION: I thought you were turning this entirely on obscenity.

MR. PINKUS: I didn't understand that, sir.

QUESTION: A few minutes ago you were responding to Mr. Justice White that this was an obscenity case.

MR. PINKUS: Well, we do not believe that the words in their context have anything to do with obscenity or lewdness, and the court has agreed---

QUESTION: (Inaudible) and we might agree with you, but that isn't in the case, is it?

MR. PINKUS: No, sir. But I'm attempting to respond to the board's argument. The board has characterized The Corn Cob Curtain as an obscene publication. There is simply no question about that. And I am attempting to respond to their argument. I am glad to agree with any of the Justices that obscenity is not properly before this Court. It is our position that there is nothing obscene about the Corn Cob Curtain under any standards, and that's what I meant when I was saying I would be glad to apply the Ginsberg type definitions.

QUESTION: You go further and say that since there is nothing obscene, even variably obscene under Ginsberg, the school board can't prohibit the use of particular specified words that are just regarded as being in very bad taste in public conversation around the dinner table.

MR. PINKUS: That is correct, Mr. Justice Rehnquist. That is our position.

QUESTION: What is your basis -- what case should this Court rely on for that?

MR. PINKUS: Well, we think that in the sense that the question on this issue is whether a public high school is more like a jail or the United States Army with Parker and Adderley in mind, which has been relied upon by the board, or is more like a university in Papish. Now, we think that the principal matter that we would like to argue about the position

of these words per se -- and I urge the Justices and the Court to read these publications because they are so infrequent.

QUESTION: I think you can assume that we have read them.

MR. PINKUS: Yes.

QUESTION: Now, what is your answer to Mrs. Young's hypothetical. If she hadn't raised it, I would have. Do you concede that this Court has the power to proscribe language that is used in this courtroom?

MR. PINKUS: I do, and I heard --

QUESTION: So, then, do you contend that a court has greater control of the speech of mature lawyers than a school does over the speech of teenagers?

MR. PINKUS: I think they are much different environments, and I think -- I heard language here from Mr. Clancy yesterday in the Pursue, Ltd. case that undoubtedly would have been equally as objectionable if it had been contained in the Corn Cob Curtain, which it was not. I think the context is the very vital thing.

QUESTION: The difference is that he was using it because he was repeating it out of the record in a case before the Court. There may have been some question about his good taste in judgment in using it instead of letting us read it, but he wasn't using that language in the sense Mr. Justice Blackmun is talking about.

MR. PINKUS: Well, sir, I am arguing that context is extremely vital and that to simply pick out the words and say this word is always inappropriate in a student publication goes very, very far beyond what the first amendment should be permitted to tolerate.

I would like to stress that we have quite a double standard. These words are in dictionaries, they are in the New York Times, they are in the Wall Street Journal, reporting comments from Presidential tapes. These words are in novels that are in the libraries of our schools like Catcher in the Rye. All of this is conceded. And we don't understand why if these words appear in a completely non-erotic context but they are in a non-official student publication that they must be proscribed when they are in the dictionaries, in the newspapers and magazines and books. That's our position.

QUESTION: You wouldn't carry it over to elementary schools.

MR. PINKUS: Well, I really don't know the position on that, Justice Rehnquist, because quite frankly I've never dealt with the elementary school context in this litigation and I incidentally --

QUESTION: You had an order that covered it.

MR. PINKUS: Yes, and we continue to agree that we would be willing to have that limited. We are not prepared to argue the elementary context.

I would like to make a point about maturity. There is some reason, I think, reading the Court's opinion in Wisconsin v. Yoder, footnote 15 pointed out the fact there that we still have many States in this nation where eighth grade education is the final grade that is required, that people of the age that begins high school can be excused in several States, and that footnote notes that Indiana is one of those States. In Indiana a person who is a freshman in high school can be excused to go to work. So we recognize that there is a dividing line there, and we think the State's labor scheme recognizes a dividing line there. We are simply not prepared to say what the standards ought to be for people below that dividing line. We are here only dealing with people who are above that dividing line. And we've tried as carefully as possible to limit our actions.

QUESTION: What (inaudible) the issue dividing line A little while ago you spoke about age 13, which is the seventh grade normally. Are you speaking to junior high, now?

MR. PINKUS: No, sir. I was quoting the testimony from now Superintendent Kalp when he was characterizing the age range attending the high schools in Indianapolis, Indiana. And he stated that the age range was from 13 to 20. And that is at page 47A.

QUESTION: That is the scope of your submission, 13 to 20.

MR. PINKUS: Yes, sir.

QUESTION: So put another way, it's from the ninth through the twelfth grades.

MR. PINKUS: Yes, sir. To the extent that I indicated that 14 was the cut-off, I would grant that there may be one confused year in there, but we are talking about the elementary versus the high school student.

QUESTION: Did you take the position before the Court of Appeals that the Ginsberg approach to obscenity for younger people survive Miller?

MR. PINKUS: Yes.

QUESTION: Well, the Court of Appeals didn't seem to think so, did it? They seemed to think that the rules were bad because they didn't specify the conduct stated in Miller. They wouldn't have to if Ginsberg survives.

MR. PINKUS: Well, Justice White, I'm inclined to think you may be correct. I think what the Seventh Circuit was saying there was that to the extent that the Ginsberg case relied upon pre-existing --

QUESTION: (Inaudible)

MR. PINKUS: Yes.

QUESTION: Coming back to the age group, in your response to Mr. Justice White, Mr. Justice Stewart, that it is essentially from the ninth grade through the twelfth, what if 13 is an age where you have relatively few 13-year olds in

high school normally, relatively few, you concede that, as you have relatively few 20-year-olds. Those were the two extremes. Suppose you have got a group of 13-year-olds, 13 and 14 in grade school and they publish some of this kind of material for a grade school publication, you say they are protected then under your 13 to 20 range, their first amendment rights can't be interfered with.

MR. PINKUS: Mr. Chief Justice, that's really not quite our position. We are talking about --

QUESTION: But it is, if it's 13.

MR. PINKUS: It's 13-year-olds in high school, sir, to be as accurate as I can be. We have only --

QUESTION: Is that what the injunction says, 13-year-olds in high school?

MR. PINKUS: No, it does not, and it should be narrowed and we agreed before the Seventh Circuit that it should be narrowed, and I agreed before the trial court that the complaint was broad in the statements of the relief prayed for, and I still take that position, sir. We just are only interested in the high school environment, and if there are --

QUESTION: Regardless of age.

MR. PINKUS: Well, that would be -- yes, regardless of age. That was the environment in which the publication was distributed, it was done by high school students, and to the

extent there are precocious people able to get into high school at the age of 13, they are included.

I'd like to briefly respond to the question earlier, the citation to Ginsberg in the Seventh Circuit's opinion is at 29A of the opinion which is found in the petition for the writ of certiorari's appendix, and there,Mr. Justice White, they do quote,the top paragraph, they say they don't have to speculate about the exact effect of Miller on the variable obscenity concept by Ginsberg, and then they go on to say what is really our --

QUESTION: (Inaudible)

MR. PINKUS: Well, I think their point is that no matter what kind of names we use, we are not talking about obscenity here; we are talking about words that bother some people in some context. We are talking about vulgarity, perhaps.

QUESTION: But there is -- implicit in that paragraph of the Seventh Circuit's opinion certainly is the notion that Miller covered all aspects of obscenity and that if you can't tie Ginsberg into the language of Miller as written, Ginsberg didn't survive, don't you think?

MR. PINKUS: I think that that's quite possible, Mr. Justice Rehnquist.

QUESTION: Meaning you think they are wrong, don't you?

MR. PINKUS: Yes, We do not say that Ginsberg should

be abandoned, as I have tried to make clear. We are not arguing that position.

And I'd like to point out that the students who put this out have never argued that. The front page of the second issue of the Corn Cob Curtain is an article on student rights and it says, "Freedom of the press and the right of petition, the right to distribute circulars and publications on campus so long as there is no interference with school work or the rights of others and provided that the publication is not libelous or obscene." They printed this on their publication months before anyone told them to stop distributing it. And it's been our position all along. We don't feel that pornography is necessarily something that can be distributed to minors, and we think Ginsberg still viable.

I'd like to add a couple of notes to the facts in this case. The discussions of the administrators that led to the statement that this publication could not be distributed were inaugurated by Jeff Jacobs, one of the student plaintiffs. He heard an announcement over the public address system which put a doubt in his mind about whether he was entitled to distribute this. There is evidence in the record that he had previously talked to the vice principal, Mr. Wally Potter who said, well, he just didn't know for sure whether they could or not, but he didn't want to over-react to the situation and in the appendix is his testimony that he knowingly permitted

distribution of this publication in the high schools until the time that this young man, Jeff Jacobs, called the superintendent's office and said, "I heard an announcement over the public address system. Does it mean that I can't distribute the publication?" I think the Court should know that we are dealing with people who tried to resolve this matter lawfully, and that from the day he heard that announcement on the public address system until the day the court issued its injunction, this publication was suspended entirely.

QUESTION: Could I ask you a question? Suppose the board had a rule that by any definition of obscenity or bannable words you would agree described what could be banned clearly and you would think they could be banned. I take it your position is that even so the board must wait until the publication has occurred.

MR. PINKUS: Precisely.

QUESTION: And that the board may not say, "I want to check on this distribution here before it goes out to make sure that this bannable material is not in the paper.

MR. PINKUS: Precisely. Precisely.

QUESTION: And you think that rule against prior restraint would apply right across the board in high school.

MR. PINKUS: Yes, that is our position.

QUESTION: And you also insist on anonymity.

MR. PINKUS: No. We think that -- I would like to

make two points on that. First, the anonymity rule if read carefully is superfluous, because under their definitions once you get down to what's distributable, it can't be libelous, it can't be obscene. So the justification for anonymity is gone since there theoretically will be no libel actions and no obscenity prosecution.

QUESTION: Oh, I don't know. There are a lot of people who might like to criticize the school authorities without being known who they are, like to tell some teachers they are very bad, and they wouldn't like to know, especially if it was a member of that class, wouldn't like to know who's talking.

MR. PINKUS: We think that's a valuable right which should be protected and that high school journalism is not so different from grown-up journalism, if you will, that the New York Times is to be treated differently to the extent thatprior restraintsagainst its publications bear an extremely heavy constitutional burden, whereas they don't here.

I would like to mention on this matter of criticism, Justice White, at page 53A and following is the allegedly defamatory article about the football coach at Tech High School. Now, Jeff Jacobs himself was a football player of that high school and I'd like -- 53A of the appendix, the beige bound document. This did contain some criticism, but it's criticism, to my mind, of the most mild and, if you will, school spirited

variety. At the bottom of the first paragraph, for example, the student writer says, "When I was a freshman I wanted to prove them wrong. Mr. Kootz, assistant football coach last year, really put pride in me taught me the meaning. I really loved him for this but all he has taught me has been torn down by the coaches this year." Continuing on to 54A, the student writer says, "I was wrong. It took me four years to learn that I, and anybody thinking they are over the coaches head, are dead wrong."

QUESTION: Where is that?

MR. PINKUS: That is at 54A.

QUESTION: But where.

MR. PINKUS: At the bottom of the page.

QUESTION: Oh, yes.

MR. PINKUS: The very bottom. The sentence beginning, "I was wrong. It took me four years to learn." And then here is what I take to be the allegedly defamatory material. "They say that the coaches do not play the right people, he's prejudiced, he's outdated, and he's pigheaded. They might even say he is inhuman. Well this may all be slightly true except the latter" -- and they spelled it wrong. "If he makes these mistakes he's nothing but human. The athletes should realize this. I am not saying they are entirely wrong but that they, by arguing who is right and wrong, are destroying Tech's Athletic Program." And the whole

thrust of these articles is that a school with 5,000 students ought to have the best football team in Indiana, because it's the biggest school in Indiana. And they can't understand why they used to have good football teams but they don't have good football teams any more.

Now, I don't think there is anything defamatory in there, and if these articles are read, they convey a concept of concern, of interest in having the football team perform better on the field, then there is a lot of very positive talk in here. And that's the tenor of this publication.

QUESTION: How old was this growing young man, as it is signed, who wrote this? How old was he when he wrote it?

MR. PINKUS: I don't know. I don't know, Mr. Chief Justice. It is signed that way as an anonymous individual.

QUESTION: He is a high school student?

MR. PINKUS: Yes. The evidence --

QUESTION: Do you suppose these general activities that are under discussion here for now an hour have any relationship to the fact that he misspelled three very elementary words in there in one paragraph?

MR. PINKUS: With all due respect, there is testimony about the printing and reproduction processes here. They were rather primitive. There was not much money to work with. The

evidence --

QUESTION: What does that have to do with the spelling?

MR. PINKUS: Well, I don't think that it was necessarily his spelling, sir. The final reproduction of the paper need not necessarily --

QUESTION: Was this criticism the subject of any complaint in school, the faculty, the board, or anybody?

MR. PINKUS: No, not until this --

QUESTION: I hope not.

MR. PINKUS: Not until this whole matter began. In fact, Mr. Justice Brennan, the evidence shows that Karl Kalp, the superintendent, did not even know what the Corn Cob Curtain was until the day Jeff Jacobs got through to him on the telephone and asked, "May we distribute this publication?" And it had been distributed through the fifth issue. And I'd like to make clear that they only distributed 200 out of the fifth issue, and they printed approximately 3,000.

QUESTION: Superintendent of what? What it the principal of this school? Or the superintendent of all the Indianapolis schools?

MR. PINKUS: No, Mr. Justice Blackmun. The principal of Tech High School where Jeff Jacobs went to school said that he didn't know if it was all right, but that he should distribute it --

QUESTION: You called him superintendent. I am merely trying to focus on what he was. He was the principal of the school.

MR. PINKUS: No, sir. Karl Kalp was, at the time Jeff Jacobs called him, the assistant principal of the Indianapolis Public School System.

QUESTION: Why should an assistant principal of the whole system know whether a paper is being published in a particular school?

MR. PINKUS: Well, the record described that it was his job to keep track of these things, and he submitted numerous exhibits that showed various publications that he had prohibited. Furthermore, the rule that we originally litigated against said there shall be no distribution without the express prior approval of the general superintendent. The general superintendent had delegated this job to his assistant superintendent, Mr. Kalp, who is now the general superintendent of the school system. So it was his job, that's his testimony.

QUESTION: You've used a couple words kind of interchangeably, it seems to me, or perhaps I'm just -- Is it fair to say that generally the principal, an assistant principal are associated with individual high schools and the superintendent and assistant superintendent are associated with the school system as a whole?

MR. PINKUS: That's correct.

QUESTION: You have used them so interchangeably is why it's confusing.

MR. PINKUS: I appreciate that. I trust that it's now clear.

QUESTION: I take it from what you have been saying that you would agree that it would be appropriate for a school board to have some rules covering this area. As I understand your position, you visualize the first amendment as having three levels of application, one to people who are out of high school and above 20, one to people who are in high school, between 13 and 20, and the third application of the first amendment to people who are not in high school and who are under 13. We are talking about the high school intermediate level first amendment application. If you were the superintendent of schools, what recommendation would you make to the school board as to rules that would be constitutional?

MR. PINKUS: I would recommend an adoption of rules on the prohibition of obscenities, and I think I would be inclined to draw heavily on the definitions used in the Ginsberg case that involve descriptions of various conditions of nudity, descriptions of sexual acts in a degree of detail, none of which we have here. We only have one phrase that approaches that, and I would utilize that kind of an approach which I think would be acceptable and would be within the

Court's ruling in that area. Even though there would not be immediate criminal sanctions, there would be eventual criminal sanctions, as we have recognized, because if a person is expelled, that person is also subject to juvenile processes, a truant, and so on.

QUESTION: You would have no prior restraint, no prior consultation. The only limitation would be on obscenity as defined, and that definition would not be the Miller definition, but would be closer to what was said in Ginsberg.

MR. PINKUS: I think that's correct. We have never objected to rule against material which is libelous, either. I wish to make that clear. I do have some doubt in my mind about the way in which a public school would go about enforcing any kind of remedy if there were libel because I think it would be primarily an individual matter of vindication of personal rights with anyone who considered himself to have been libeled.

QUESTION: Would you apply the New York Times v. Sullivan libel limitation?

MR. PINKUS: I would, indeed.

QUESTION: You would.

MR. PINKUS: Yes.

QUESTION: You would reject, you would say that the first amendment forbids one of the things that Mr. Justice White suggested, namely, a list that could be drawn up of

proscribed words.

MR. PINKUS: Yes, regardless of their context.

QUESTION: And all other prior restraints you would reject.

MR. PINKUS: Yes, we would.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Pinkus.

Mrs. Young, I think you have used all your time, too.

QUESTION: No, no, she didn't.

MRS. YOUNG: No time?

MR. CHIEF JUSTICE BURGER: They haven't informed me correctly here. I'm not up to date. You have got 10 minutes left.

REBUTTAL ARGUMENT OF LILA J. YOUNG

ON BEHALF OF THE PETITIONERS

MRS. YOUNG: Thank you.

First of all, the validity of the rules on obscenity are not an issue in this case. The issue is whether, first of all, this type of language is obscene as to minors, and even if it could not be declared legally obscene as to minors, whether we have a right to do anything about it. And we have rules concerning indecent language, both prior restraint rules and subsequent restraint rules. We have always had them. Also we have a juvenile delinquent statute which defines a

juvenile delinquent as one who uses vulgar, obscene, indecent language. We also have statutes that say you cannot contribute to the delinquency of a minor. And if we have to set aside a time and place in our school for the distribution of this filth, then we are contributing to the delinquency of minors. Also, we have compulsory education under statutes until age 16 in Indiana. You don't have any choice about that. That is clear. Also, the ages of students in our high school is 14 to 17 -- 14, 15, 16, and 17. Those are the normal ages of high school students.

QUESTION: There must be some people who skip a grade.

MRS. YOUNG: That's right. And this is why we may have one 13 and we may have a few fail who reach 20.

But this injunction prohibits us from promulgating rules,for instance, that threaten any discipline against any student in any school in Indianapolis because of the reaction of any other student to the material. It just totally wipes out our ability to control any kind of disruption. Our disruption rule was declared facially void. So we are left really with nothing here. And I might point out, too, that we do not have any double standard in our school. We do not have any of these four-letter words in the Catcher in the Rye, in books of that nature either as required reading in the classroom or in any of our school libraries. And I submit that

respondents introduce not one shred of evidence to show that any of these books could be found in any of our schools. They did talk about the Catcher in the Rye. But it was --

QUESTION: That would be a different and more difficult case if that's brought here, if you keep books out of your library.

MRS. YOUNG: Well, it's not a matter of keeping them out, but we don't have required reading. We do choose books for reference.

QUESTION: This isn't essential for your submission, though.

MRS. YOUNG: All I am saying, though, is that no double standard exists in our schools, which they were saying. And I don't think its hypocritical to shield children from exposure to this language in school simply because other people use it. This argument would imply that everybody has to be reduced to the lowest common denominator anyway. It could be used also to justify any kind of misconduct. And I don't think we should have to list a bunch of four-letter words. I think that's a little suggestive for children to try to list exactly what they can and can't say. I think we have to teach basic levels of decency, and I think we have to have a little bit of trust and faith in our school administrators who deal with children every day, year after year. They have expertise. They should be able to teach what is right and wrong.

And they can't teach it if they can't have any control over it. It would be hypocritical and inconsistent to try to preach one thing in the classroom while the children are out in the halls distributing this type of language. And the children would recognize this inconsistency, too.

I think there are three crucial factors involving all of these issues that you have to keep in mind when you make these decisions. First of all, we are dealing with children. We are not dealing with adults. And for good reason the law -- all facets of the law -- have always been applied differently to children. I think this Court has recognized that.

Also, the second crucial factor is that we are not concerned with any regulation of conduct in the community at large, but only in the schoolhouse, in the elementary and high schools. These factors, you cannot equate the community at large to our elementary and high schools. The physically confining nature, the purposes and needs of the school, the fact that children are required to attend,all of these circumstances dictate far different regulations, regulations which might not be acceptable in the community at large, but they are very necessary in order to provide an atmosphere so that learning can take place in our school. And that's the purpose of our schools, to teach. And they can't teach unless they have rules.

Also, the third basic factor that underlies all of these rules and issues is that we are not here concerned with criminal statutes. There are no criminal penalties here attached. Students cannot be fined, they cannot be imprisoned, they cannot be subjected to probationary supervision, they cannot be disenfranchised. They can be subjected only to mild disciplinary measures. And I submit this is a fundamental difference. We are not here defining crime. We are defining what is proper conduct in the schoolhouse, not beyond the schoolhouse gates. We have no regulations concerning that. So I question the relevancy of many of these cases that concern the community at large and also concern criminal matters.

We shouldn't have to spend the time going down the elements and having hearings and everything because we have an inherent responsibility to provide an atmosphere where you have all these children grouped together, not by choice, and I think the parents have something to say about this, too. They set generally accepted standards to be adhered to by their children in the schools. And I think the State has a basic fundamental interest in requiring them to adhere to these acceptable standards of conduct because if they aren't going to be taught it in the schools, where are they going to be taught it?

QUESTION: These rules apply only inside the school, don't

they, in a Rule 11.05, for example, in a school. It does say in the school or on the campus.

MRS. YOUNG: That's right. And many of them, of course, would apply on campus which in a city school amounts to very little.

But I want to mention, too, about sales and solicitations. That's a very important issue in this case. And I think we have listed so many reasons in our brief why we need a rule prohibiting sales, and this, of course, applies to sales of all products, including literature. We didn't single out literature. We have always had a rule prohibiting sales and solicitations. Originally it was a rule of prior approval. Now it's a basic general rule prohibiting all sales to avoid charges of discrimination and other problems.

QUESTION: You would avoid sale of copies of the Constitution of the United States.

MRS. YOUNG: I would what?

QUESTION: You would proscribe or do proscribe the sale of copies of the Constitution of the United States.

MRS. YOUNG: That's right. We would --

QUESTION: And the Bible.

MRS. YOUNG: Right. We don't believe that this is a school purpose to turn it into a market place. And once you allow some sales of some products, where do you draw the line?

QUESTION: What do you suppose students should do to raise

their money to publish a paper of the kind that even your school would think was a good idea?

MRS. YOUNG: Well, we have an exception in our sales rule that if anything is for the school purpose, like the band or student newspaper, we do allow that type of sales. But that's the only exception that we make.

QUESTION: You wouldn't permit solicitation for contributions to support the school.

MRS. YOUNG: Not inside the school. They can do it beyond the schoolhouse gate.

QUESTION: But you would permit sale of the paper.

MRS. YOUNG: We would permit no sales of any products, including papers.

QUESTION: Well, then, how do you raise the money to support a student paper?

MRS. YOUNG: You mean the school student paper?

QUESTION: Yes.

MRS. YOUNG: Well, we have homeroom periods. It depends on the various schools. Not all schools --

QUESTION: But how are they supposed to pay for the cost of producing a student newspaper?

MRS. YOUNG: The school would pay the school student newspaper. How the students would develop their own private commercial enterprise would be up to them. They would have to do that outside of the school.

QUESTION: But they couldn't sell it.

MRS. YOUNG: That's correct, they could not have any actual sales transactions during school hours in the school. They would have to do that beyond the schoolhouse gates. And we did not make an exception for literature, and I don't believe this Court's decisions, for instance in Maybe v. White Plains? requires separate, special rules and exemptions for the product of literature.

I believe that the board should be allowed the flexibility and reasonable breadth that is necessary when it is prescribing rules of student conduct, and therefore I believe that all our rules should be upheld since they are vitally necessary to achieve basic educational objectives and achieve a proper atmosphere so that any learning can take place.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Young.

Thank you, Mr. Pinkus.

The case is submitted.

[Whereupon, at 11:44 a.m., the argument in the above-entitled matter was concluded.]