ORIGINAL

In the

Supreme Court of the United States

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v. No. 75-1278

FRED DOYLE,

Respondent.

Washington, D.C.
November 3, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner, v. FRED DOYLE, Respondent.	No. 75-1278

Washington, D. C.,

Wednesday, November 3, 1976.

The above-entitled matter came on for argument at 11:44 o'clock,a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PHILIP S. OLINGER, ESQ., 115 Fieldstone Drive, Terrace Park, Ohio 45174; on behalf of the Petitioner.

MICHAEL H. GOTTESMAN, ESQ., Bredhoff, Cushman, Gottesman & Cohen, 1000 Connecticut Avenue, N.W., Washington, D. C. 20036; on behalf of the Respondent.

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C O N T E N T S

[Afternoon session - pg. 15]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1278, Mt. Healthy School District against Doyle.

Mr. Olinger, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF PHILIP S. OLINGER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. OLINGER: Mr. Chief Justice, and may it please the Court:

Mt. Healthy School District is a small school district on the outskirts of Cincinnati. It has approximately 7600 students, and approximately 325 teachers.

In 1966, the Board of Education employed Fred Doyle, the respondent in this case. He was employed on three one-year contracts and then he was given a -- two two-year contracts. All of these contracts were non-tenured.

In 1971, in the spring of that year, the Board, as was its usual custom, reviewed the contracts of the non-tenured teachers and determined that year that ten of them should not be renewed. Mr. Doyle happened to be one of those teachers whose contract was not renewed.

He requested a reason, following his notice that he was not renewed, and the Superintendent sent him a letter. And in that letter the Superintendent stated that he was not renewed because it was felt that he lacked tact in handling professional

matters, and the Superintendent went on to cite two examples.

One was a telephone call that Mr. Doyle had made to a local disc jockey at a radio station to, oh, criticize a dress code that had been sent around to the teachers; and the secone example cited by the Superintendent was an obscene gesture that Mr. Doyle had made to some female students in the school.

After Mr. Doyle was aware that he was not going to be renewed at Mt. Healthy, he sought employment elsewhere. In fact, in June of 1971, he obtained a job at the Miami Trace local school district, which is fifty miles or so north of Mt. Healthy.

One month later, in July, he filed this suit along with two other school teachers, and he filed the suit against the five Board members in their individual and official capacity. He filed it against the Board itself as a political entity of the States. And he filed it against the Superintendent.

QUESTION: Let me ask you a question there, if I may, Mr. Olinger. And I will try not to be parochial, but I'm used to the Arizona organization of school boards; let me give you that and ask you if it's like Ohio's.

Where I practiced in Arizona there was a municipal corporation which was called a school district, and it was very much analogous to counties or cities and things like that. Then the board that administered that district was called the

School Board. It was not a suable entity in itself, it was just a collection of individuals.

Now, what is the situation in Ohio?

MR. OLINGER: In Ohio, Your Honor, there are different types of school districts. But the particular district that we are discussing here is what is known as a city school district. And, basically, it encompasses the district -- or the same boundary lines as the municipality of Mt. Healthy.

Now, however, in Ohio, school districts that are city school districts do not have to be confined to that precise municipal boundary. And I think you will find, for example, with the Mt. Healthy School District, it encompassed a larger amount of territory than the city itself, part of the township, and the same would be true, for example, with the Board of Education for the City of Cincinnati, which encompasses the City of Cincinnati.

QUESTION: What's the difference between the school district and the Board of Education?

MR. OLINGER: Oh. All right. I'm not sure I know there is a difference in Ohio. I think, for all intents and purposes, they have been treated as synonymous.

QUESTION: And both are regarded as municipal corporations?

MR. OLINGER: No, no. I have never heard a school district referred to as a municipal corporation. It has always

been referred to as a school district.

QUESTION: Or a Board of Education.

MR. OLINGER: Or a Board of Education; either one.

QUESTION: As, for example, the Cincinnati Board of Education is -- would be the defendant in a suit against the school district, wouldn't it? Probably?

MR. OLINGER: Yes, that is correct, Your Honor.

QUESTION: Well, supposing I have a contract claim against the school district, and name the proper parties, out of whose treasury does the -- is that judgment paid?

MR. OLINGER: That judgment would be paid out of the general fund of --

QUESTION: Of what?

MR. OLINGER: -- of the school district or the Board of Education. Whichever you prefer to -- as I understand it in Ohio, Your Honor, a school district is a --

QUESTION: Geographic area.

MR. OLINGER: -- geographic area. In Ohio -- for example, in this complaint, the respondent here in the initial lawsuit sued the Mt. Healthy City School District Board of Education.

Now, in the statute, it says that a board of education shall be a body politic capable of suing and being sued.

QUESTION: So they are really just almost synonymous for purposes of --

MR. OLINGER: As I understand it, that is correct, Your Honor.

QUESTION: Does the Constitution of Ohio provide for school boards or boards of education, as I think you called them?

MR. OLINGER: The Constitution of Ohio provides that there shall be a school system provided for in Ohio -- I can't recall the exact terms, Your Honor, and I --

QUESTION: School Board members in Virginia are constitutional officers. Is that true in Ohio?

MR. OLINGER: Your Honor, I don't believe they are.

QUESTION: I don't want to detain you on the point. I was just interested.

Your school boards do have authority to levy taxes? Or do they?

MR. OLINGER: In Ohio, Your Honor, there is what is known in Ohio as a ten-mill limitation. And that ten-mill limitation must be shared in this, let's say, in this particular case, between the municipality -- that would be the City of Mt. Healthy -- and shared with the County of Hamilton, in which the city resides, and also must then be shared with the Board of Education. And that's ten mills.

QUESTION: Right.

MR. OLINGER: Now, those ten mills can be levied without a vote of the people. But once you reach that ten-mill

limitation, then the only way you can then get a tax levy is by submitting the matter to the public.

And I might say that in Mt. Healthy, in the past six years, we have had five tax levies, they have all failed. Our most recent one was yesterday -- and we don't know the result of that yet.

QUESTION: Who levies it? The county? The city?

MR. OLINGER: No, the -- it would be the School Board itself, Your Honor. The School Board itself, --

QUESTION: Right.

MR. OLINGER: -- adopts a resolution to put a tax levy on the ballot. And if it's passed, then we can, you know, then have the --

QUESTION: That's the -- the voters are all the people in the school district.

MR. OLINGER: In the school district, that is true.

QUESTION: Which could be different from the county or the city or anything else, --

QUESTION: Could be.

QUESTION: -- boundary-wise.

MR. OLINGER: Yes. Boundary-wise, only the voters who are in the school district may vote on that particular issue.

QUESTION: Right. How about bond issues?

MR. OLINGER: The same thing is true.

QUESTION: That's what I thought. Is there any authority to issue bonds up to a limitation analogous to the ten-mill limitation, without a vote of the people or anything?

MR. OLINGER: Your Honor, I'm not sure on that, but I think that on bonds you have to put all bond issues to a general vote --

QUESTION: That's what I thought.

MR. OLINGER: -- the general electorate.

QUESTION: I don't want to detain you on this particular subject, but while we are on it, does the record show, or do you know as a matter of public record, what percentage of the cost of operating the public schools in Ohio is borne by the State Treasury? In Rodriguez, that was before this Court a few years ago, I think the evidence showed, for example, that some 40-odd percent came from State funds. This may be relevant to the Eleventh Amendment issue in your case, which is why I asked the question.

MR. OLINGER: Your Honor, there was no testimony presented on that issue in the trial. I do have the figures if -- and they are --

QUESTION: Are they matters of public record?

MR. OLINGER: Yes. Yes, they are.

QUESTION: Well, what are they?

MR. OLINGER: In the 1971-72 school year the State of Ohio contributed 48 percent. In 1972-73 the State contri-

buted 51 percent. In 1973-74 it contributed 50 percent. In '74-75, it contributed 53 percent. And in '75-76 it also contributed 53 percent.

QUESTION: That's under the equalizing formula.

MR. OLINGER: Yes. Under the equal yield formula.

QUESTION: Right.

MR. OLINGER: I might say one other thing, Your Honor, these percentages of State contribution would have been higher except that in Ohio the State of Ohio is finding itself in a very financially embarrassed position; it has reduced the amount of equal yield to all the school districts in Ohio.

At the conclusion of the trial, the district court dismissed the Board members and the Superintendent, and found that the Board should -- was guilty, and should pay to Mr. Doyle something over 5,000 in wages, should pay something over 6,000 in attorney fees, assessed costs against the Board, and ordered Mr. Doyle to be reinstated in the Mt. Healthy School system on a tenured contract.

On appeal, the only thing the Sixth Circuit Court of Appeals did was to reverse the district court in so far as attorney fees, on the basis of the Alyeska vs. Wilderness Society holding that attorney fees are basically cost.

The evidence, I think, establishes beyond a doubt that Mr. Doyle's contract was not renewed because the Board members felt that he simply lacked the tact or, for use of

another word, maturity to be given a tenured contract in the Board of Education.

The Court in its opinion cites five examples, if you will, of Mr. Doyle's immaturity. And, as one Board member said, over the five years there appeared to be no improvement in this maturity or lack of tact problem.

Now, in fact, I think perhaps the most important thing that I can find in the judge's opinion was when he states: "In fact, as this court sees it and finds both the Board and the wuperintendent basically had ample reason not to grant Mr. Doyle a tenured contract, without regard to the First Amendment problem."

The Court also pointed out that four Board members and the Superintendent stated, without any denial or rebuttal, that they did not determine not to renew Mr. Doyle's contract because of a free speech problem.

QUESTION: Mr. Olinger, the first question presented in your Petition for Certiorari is whether the district court had jurisdiction in this action under Section 1331. Are you planning to discuss that soon?

MR. OLINGER: Yes, I am, Your Honor.

QUESTION: All right.

MR. OLINGER: In fact, I am --

QUESTION: I don't mean to order your argument for you, I just wanted to know if you did plan to discuss it.

MR. OLINGER: Oh, yes, I did, Your Honor. I may not have very much time, but I do want to discuss every point that I brought up.

The first point that I want to -- the first proposition of law that I'd like to present to the Court is that I don't really have any question if the Court wishes to accept the substantiality doctrine for the problem that is here today. That is, we have a situation where, obviously, there were a number of permissible reasons where the Board could have not -- could have used for not granting tenure. And then we have this one non-permissible reason.

There is some argument, all right, the Board didn't consider that, but I'm going to treat the matter as though the Board -- and which they did, they were certainly well aware of the WSAI phone call.

My position is is that, I think, as Judge Hogan -- who I am very fond of -- looked at the case, he saw that the Board had valid reasons not to renew the contract. But he saw the telephone call to WSAI and he felt under Pickering and, as he cites, Skehan, that he had no choice but, since there was a First Amendment problem in there, that he had to rule against the Board.

QUESTION: I suppose Mr. Doyle had no legal advice when he stated the reasons, did he?

MR. OLINGER: You mean the Superintendent, Your Honor?

QUESTION: Yes. Yes, the Superintendent.

MR. OLINGER: I did not represent the Board at that time, and they had another attorney, but he died, and I don't know whether he was alive or not at that particular time. I can't advise this Court on that particular problem, Your Honor.

There's one other thought I'd like to advance on that first theory, and that is, maybe it's similar to a reviewing court who will not set aside a trial court, even if the trial court decides a case for the wrong reasons but comes to the right result.

And then my final theory is that I think, under the -- what I am starting to understand is the doctrine of federalism, or comity between the federal system and the State system, that, you know, the matter of education is primarily a State concern, and therefore should be left to the State to handle its own affairs.

Now, my second argument, of course, involves jurisdiction.

QUESTION: And really, logically, that's your first argument, isn't it?

MR. OLINGER: Yes. Yes, I would say it is --

QUESTION: And if you're right about that, we never get to the merits; is that correct?

MR. OLINGER: Yes, that is correct, Your Honor.

The first argument involves jurisdiction. The -- Mr. Doyle brought his suit under, of course, 1983, which then brings into play 1343 and 1341.

QUESTION: 1331.

MR. OLINGER: 1331. In the first proposition in my brief, I say that under Monroe vs. Pape, City of Kenosha vs. Bruno, Moor vs. County of Alameda, and then this summer I believe, the case of Aldinger vs. Howard, that this Court has consistently held that a municipality in a county are not a person under 1983, and, consequently, the federal courts have no jurisdiction either for legal, that is damages, or equitable relief.

I am asking this Court today to extend that doctrine to Boards of Education.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock.

MR. OLINGER: Thank you very much.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Olinger.

ORAL ARGUMENT OF PHILIP S. OLINGER, ESQ.,

ON BEHALF OF THE PETITIONER -- Resumed

MR. OLINGER: If I recall correctly, we were discussing the 1983 issue in my brief. And I am not going to spend any more time on it. I believe that there is valid reason to take the position that boards of education are entitled to the same immunity that has been granted to both municipalities and counties in this particular area.

I would like to move on now to the 1331 argument.

QUESTION: Mr. Olinger, as you get into that, may I ask you this: Do you concede that if a bona fide claim of $10,000 or more is presented by this case that there is federal jurisdiction against this defendant?

MR. OLINGER: No.

QUESTION: Under 1331?

MR. OLINGER: No, Your Honor. I think I --

QUESTION: That wasn't clear to me from your brief. It's a little more clear, I think, from your Supplemental Brief.

MR. OLINGER: All right. When I -- when the brief was first prepared, when I prepared the Petition for Writ of

Certiorari, I was under the impression that that was the only issue left, Section 1331, the $10,000 amount.

QUESTION: Unh-hunh.

MR. OLINGER: The Respondent's brief brought up the subject in its brief, and later, after further research and looking at Bevins vs. The Six Unknown Federal Narcotics Agents, and Aldinger vs. Howard, I was -- I had to reverse myself and say, no, I don't think that resolved the issue.

QUESTION: That even if there is 1331, federal jurisdiction, nonetheless, your client is not a person under 1983.

MR. OLINGER: That is correct. And that --

QUESTION: Is that your position?

MR. OLINGER: Yes, Your Honor.

QUESTION: Unh-hunh.

MR. OLINGER: Now, respondent says, well, you know, this Court has sua sponte jurisdiction to -- on its own, sua sponte, may raise the jurisdictional question. The respondent takes the position that that is not a jurisdictional question, and that's the only point I disagree with.

I did not bring this subject up in my original brief, I apologize for not being astute enough to recognize that as an issue at that particular time.

But, anyway, going to 1331 and the $10,000 issue: At the time that Mr. Doyle filed this lawsuit, he, of course,

had obtained employment elsewhere. And just for argument purposes, that salary is approximately $2,000 less than the salary that he would have received at Mt. Healthy.

If I understand what the federal courts are saying, is that when an employment question is involved, it's the salary of that particular job that establishes the $10,000 jurisdiction.

Well, I'm not sure exactly, you know, what the Court means by that, but if you're taking one year's salary -- and the salary at Mt. Healthy would have been a little bit more than $10,000 -- then, under Columbian Insurance Company vs. Wheelright, I suppose that this Court would say, well, that there was federal jurisdiction on the $10,000 issue.

But the point I'm trying to make is that if that is going to be the basis, if at the time he files the lawsuit he's got another position paying $8,000, the only distinction is really the $2,000 between the two salaries.

QUESTION: But, Mr. Olinger, isn't it true that under the Ohio statutory law, if he had been rehired, he would then have had tenure --

MR. OLINGER: That is correct.

QUESTION: -- for the rest of his life, subject to being terminated for cause?

MR. OLINGER: That is correct.

QUESTION: And -- so that's $10,000 a year for the

rest of his working life, isn't it?

MR. OLINGER: That is correct, Your Honor.

QUESTION: Discounted, and then mitigated by any other employment he might have had. So that that certainly, on its face, looks like more than $10,000, doesn't it?

MR. OLINGER: Well now, if you want to -- if you want to say he had $10,000 for the rest of his life, then I suppose you get into the question: Well, how long is the employee entitled to claim this $10,000? Is it $10,000 times the mortality rate for the rest of his life?

In other words --

QUESTION: You only need one $10,000.

MR. OLINGER: Oh, I know.

QUESTION: He needs one $10,000, in one sentence.

MR. OLINGER: I agree, Your Honor.

QUESTION: That's all he needs.

MR. OLINGER: I agree. What I'm pointing out is that if we're going to establish jurisdiction on the $10,000 amount on that basis, then we've got to think in terms of damages. Now, if we think in terms of damages, you're going to have to multiply $10,000, and Mr. Doyle, I'd say, was thirty years of age, and the mortality rate says he's going to live to seventy, we've got forty more years in there. And the federal district court could assess a $400,000 judgment against the Mt. Healthy Board of Education.

QUESTION: Well, that's kind of computation that a jury is asked to make in every negligence case, isn't it?

MR. OLINGER: Yes, Your Honor, that's basically true. There's no question about that.

I guess the point I'm trying to say, Your Honor, is that if you want to take $10,000 and multiply it over his life expectancy, then I think that the employer should be entitled to take $8,000 and multiply it over his life expectancy --

QUESTION: That still -- the total still comes out to well over 10,000.

MR. OLINGER: All right. Except one -- there's one problem there, Your Honor. And that is in educational -- in computing salaries, of course teachers are on steps, et cetera.

QUESTION: Yes.

MR. OLINGER: And they reach a maximum point at some level.

Now, the other -- we don't know what the Miami Trace maximum level is, but it could be greater than Mt. Healthy.

QUESTION: Of course, ordinarily, for ascertaining the substantiality of the jurisdictional amount, you don't try the damages issue and argue all the pros and cons. There is just kind of the idea, is it a colorable claim, isn't it?

QUESTION: Is it a bona fide colorable claim? That's the general test.

QUESTION: Or just something trumped up, really, to get you into federal court?

MR. OLINGER: Well, what I'm -- I just was -- all right. But what I'm saying is that if that's what -- if it's just a colorable claim, then, you know, I wonder why $10,000 is even in the statute. Because, you know, this --

QUESTION: Well, they could take it out of the statute.

MR. OLINGER: Well, yes, I --

QUESTION: It used to be $3,000.

MR. OLINGER: Right, it used to be $3,000, Your Honor.

QUESTION: It may not have been a very effective limitation, but that's the way this Court and other courts have read it.

QUESTION: Yes.

QUESTION: As being just "is it in good faith", more or less, don't you --

QUESTION: It's effective when you're talking about a liquidated claim, like on a contract action or something like that. But --

MR. OLINGER: Yes, in there it would mean something.

QUESTION: -- in this kind of claim --

MR. OLINGER: Here, you know, I really am almost trying to tell the Court what I think is the proper way to

handle the $10,000 jurisdictional question.

The only thing I am trying to say is that when Mr. Doyle initially filed his lawsuit, he honestly knew that the only difference between the job that he was going to have at Miami Trace and the job at Mt. Healthy, there was a difference of $2,000.

Now, if we're talking about money, that's what we're talking about. If --

QUESTION: No, he's talking about a whole lot of other things. I assume he's talking about he wanted to keep the job that he had, and I think he's talking about not being put out of that job. I think there's a whole lot than just dollars and cents.

MR. OLINGER: Okay, Your Honor.

Except that he did not -- at the time that he filed suit, he did not have a right to that job. This is not a case whether we have a tenured teacher, Your Honor. I mean, I guess that's the point I'm trying to make.

QUESTION: But -- but, if he is right on the merits, and therefore if the allegations in his complaint are sufficient, then if rehired -- and his claim is that he should have been rehired -- then he would have had tenure under Ohio law, wouldn't he?

MR. OLINGER: Yes, he would. There's no question about that.

QUESTION: All right.

QUESTION: When will he get tenure in his new job?

MR. OLINGER: He already has tenure, Your Honor. Tenure for Mr. Doyle would have occurred after three years.

QUESTION: After three.

QUESTION: In the new job, Miami Trace job?

MR. OLINGER: Yes. Right.

QUESTION: After three?

MR. OLINGER: Yes, Your Honor.

QUESTION: And three is --

QUESTION: So you don't say --

MR. OLINGER: I'm sorry, it's either three, two or three years; but he's got tenure now at Miami Trace.

QUESTION: Unh-hunh.

MR. OLINGER: He has tenure there.

QUESTION: But your --

QUESTION: So now he has no cause of action, according to you?

MR. OLINGER: Well, I --

QUESTION: Right?

MR. OLINGER: You're right, I'm saying not only does he not have --

QUESTION: He doesn't have any cause of action?

MR. OLINGER: That's correct, as --

QUESTION: That's your position?

MR. OLINGER: Yes, sir, Your Honor, that is.

QUESTION: Because your more basic claim, jurisdictional claim, is now, as I understand it, that even assuming that the amount in controversy exceeds $10,000, exclusive of interests and costs, and that therefore is federal jurisdiction under Section 1331, nonetheless, your client is immune by reason of 1983?

MR. OLINGER: That is correct.

And that -- that is correct, Your Honor.

QUESTION: Right.

MR. OLINGER: Now, --

QUESTION: But let's assume for the moment that your client is immune under 1983, --

MR. OLINGER: Yes, Your Honor.

QUESTION: -- suggestion is made by your opponent that the cause of action may lie through the Fourteenth Amendment to enforce First Amendment rights without regard to 1983. Would you respond to that?

MR. OLINGER: Well, I'm going to try, Your Honor, it's --

QUESTION: Right.

MR. OLINGER: I'm not going to say I understand the theory completely. But --

QUESTION: You have a lot of company on that.

MR. OLINGER: All right. I'm going to give it a try.

And let me start off by saying that in 1912 the -- there was a Constitutional Convention in Ohio. And at that Convention, they amended the Constitution. And the Constitution, after the amendment, read: Suits may be brought against the State in such courts and in such manner as may be provided by law.

And after that constitutional amendment was passed, the issue immediately arose whether or not the State of Ohio had abolished its sovereign immunity.

After numerous cases, particularly involving municipalities, the Supreme Court of Ohio said: Well, based on Hans vs. Louisiana, based on cases in other jurisdictions, we do not think that that provision in the Constitution is self-executing; that there must be a legislation enacted to carry out that permission that has been granted by that constitutional amendment.

QUESTION: And that legislation could or might not waive sovereign immunity; is that not so?

MR. OLINGER: That is correct, Your Honor.

Now, in the case of Aldridge vs. City of Youngstown, which was decided in 1922, as I said, it became clear that if the sovereign immunity of the State of Ohio was to be abolished, it had to be abolished by specific provision of the Legislature.

Now, trying to apply that theory to the Fourteenth Amendment theory and the First Amendment theory -- first of all,

if I understand the problem, under 1983 it provides a remedy and a method to carry out the Civil Rights provisions.

Now, the First Amendment, as I understand it, only provides that, you know, that there shall be no violation of the right to freedom of speech. But it doesn't provide a remedy, et cetera.

Now, under the Fourteenth Amendment, if I understand correctly -- and this is where I may be wrong -- the Fourteenth Amendment, under Section 5, provides that the Fourteenth Amendment can be -- would be implemented or required to be implemented by legislation passed by Congress.

Now, the problem I have is I presume that that language in the Fourteenth Amendment has to apply to the First Amendment because, if I understand correctly, the first eight Amendments apply to the States through the Fourteenth Amendment. And that, therefore, to carry out the First Amendment, there also has to be some sort of a congressional legislation in order to carry out, you know, the provisions of the First Amendment.

QUESTION: And that 1983 is such legislation added, and it imposed limits, i.e., that your client is not a person.

MR. OLINGER: That is correct, Your Honor.

In other words, that Congress did speak to the subject in the 1983 area. But they -- but because the Sherman Amendment was not adopted, the interpretation in this

Court has been that it does not then apply to political entities of the State.

Basically, that concludes my argument, and I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Olinger.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GOTTESMAN: Mr. Chief Justice, may it please the Court:

It's been said that the jurisdictional issues properly come first, and I will address them first. But in doing so I don't want to leave the impression that the First Amendment claim is to be decided on the facts as they have been described today by my colleague, Mr. Olinger. We think the facts are actually much more helpful to us, and I hope I am going to have time to get to the First Amendment issue and talk about those facts.

But, first, jurisdiction:

The complaint alleged jurisdiction on two separate statutory grounds, predicated on two separate causes of action. First of all, it alleged that the defendant's conduct had violated Section 1983, and the jurisdictional statute that was then available was 1343.

Separately, it alleged that there was a cause of

action directly under the Fourteenth Amendment -- not based on 1983, but brought directly under the Fourteenth Amendment. For which 1331 provided jurisdiction.

Now, let me --

QUESTION: But 1331 would also have provided jurisdiction on your 1983 action if more than $10,000 were involved, exclusive of interests and costs. Isn't that correct?

MR. GOTTESMAN: Well, I suppose it would, but, of course, the plaintiff did not need 1331.

QUESTION: You don't need it, but it would have also been a perfectly adequate jurisdictional statute upon which to rely.

MR. GOTTESMAN: Yes, it would, if, in fact, he could sue the school district under 1983. That is to say, it would only provide a jurisdictional basis for a 1983 action if he had a cause of action under 1983; and that turns on whether the school board is a person.

But, as we will see in a moment, our main point will be that the person's limitation of 1983 is not a limitation on a cause of action directly under the Fourteenth Amendment, but --

QUESTION: Now, where do you get his cause of action directly under the Fourteenth Amendment?

MR. GOTTESMAN: Well, if I may just defer that for one moment, it's going to be the central focus of my discussion

here.

QUESTION: Okay. Sure.

MR. GOTTESMAN: But I do want to just say one thing first, because if I don't say it first, I'm going to lose it. And that is that in so far as this is a suit for reinstatement -- let's forget the back pay for a moment -- there was clearly jurisdiction under 1983 and 1343, because this was a suit against the school board officials, in their official capacity, as well as against the school board.

And in so far as it's a suit against the school board officials, the court had authority. They are persons within the meaning of 1983. The court had authority to direct them to take the step of reinstating the plaintiff.

The jurisdictional predicate here is precisely the same as this Court has always used in all of the school desegregation cases.

QUESTION: You say that's like Ex Parte Young, basically?

MR. GOTTESMAN: Well, except that we're not concerned about the Eleventh Amendment theory, but it's the same kind of thing. You get relief, which the school board as an entity must in fact provide, by directing the officers of the school board to provide it.

And, indeed, I think a moment's though will make clear that all of the school desegregation cases, which result

in orders directing school boards to take certain actions, are 1983 actions in which the award is obtained, or the relief is obtained by directing it to the school officials. They are directed to take certain action.

QUESTION: Mr. Gottesman, here the trial court dismissed the claim against the individual defendants, and you did not appeal from that.

MR. GOTTESMAN: Well, we have a very peculiar problem, Justice Stevens, and, in a sense, we're going to have to ask for the Court's indulgence on it.

No jurisdictional issue was raised in the district court. It was never asserted by the defendants, that there was a lack of jurisdiction here.

As a result, when the district court found 1331 jurisdiction over the school board and provided all of the relief that was sought, while technically the plaintiffs should have cross-appealed from the court's failure to keep the school board individuals in. And undoubtedly would have done so, if there had been a jurisdictional issue raised in the district court. They were lulled into not cross-appealing by their belief that there were no jurisdictional issues confronting them down the road in this case.

Now, there have been a --

QUESTION: Why would there be an assumption, doesn't the jurisdiction remain in a case right straight through?

MR. GOTTESMAN: Well, of course, it does, Your Honor. And that's why I say we have to beg the Court's indulgence, if we lose on 1331 -- which I hope won't --

QUESTION: Mr. Gottesman, did you cite 1331 in your complaint?

MR. GOTTESMAN: Yes.

QUESTION: Yes.

MR. GOTTESMAN: It was actually cited as 1931, but it was a typographical error, and the district court --

QUESTION: What's what I want to know. Because that's the only reference I find is 1931.

MR. GOTTESMAN: Yes, it was understood by the district court as 1331, as it was noted.

If that's our only barrier, we're in good shape.

But we would, on the point that Justice Stevens raised, there have been a number of Court of Appeals decisions recently, because the jurisdictional problems in this area are so complex, that it held that a plaintiff, if he appears to have a valid jurisdictional basis, even if he didn't plead it in the complaint, is entitled to have a remand so that he can in fact so do, and so that his relief for the violation of his constitutional rights is not forever denied him because of the complexities of charting one's way through this jurisdictional thicket.

QUESTION: Well, is that a pleading point basically,

Mr. Gottesman, that you don't have to plead jurisdiction if it's apparent from the facts?

MR. GOTTESMAN: It's not as broad as that. What the Courts have essentially done is created a special -- it's not pleading. They say: You've brought this suit and you've asserted the wrong jurisdictional provision; you could technically be barred forever.

But, given that this is a Civil Rights action, given that we have found a violation of your constitutional rights, given that we believe there is an adequate jurisdictional basis upon which this action could have been predicated, we're going to remand and allow you to amend the complaint.

They are not saying the complaint, in its present form, suffices to actually raise this jurisdictional point, even though you haven't recited the section by its terms.

QUESTION: That's not quite the same thing, though, as saying that parties dismissed and is against whom the dismissal has become final can be reinstated after that point.

MR. GOTTESMAN: Well, it's not quite the same. There have been two Fifth Circuit decisions, where they have allowed a remand to amend the complaint to bring in additional parties, in a context where only the entity was sued and the court concluded that the suit should have been brought against the individuals.

QUESTION: There you don't have the res judicata

problem.

MR. GOTTESMAN: Well, that's right. Well, we don't have one here, either, if this Court allows the remand, because we're still in the same cause of action, I think.

QUESTION: But, Mr. Gottesman, if we allowed a remand, you really wouldn't have to amend your complaint. Your complaint is perfectly all right.

MR. GOTTESMAN: The complaint is perfect. The problem is that --

QUESTION: What we would have to be doing is remanding to let you take an appeal you didn't take.

MR. GOTTESMAN: In essence. And that's why I say we beg the Court's indulgence on it. Because, obviously, we don't have a right to that.

But let me go on, because there are obviously more basic --

QUESTION: Under that position, then, you can't seek reinstatement.

MR. GOTTESMAN: I suppose we are in the position that we cannot proceed to seek reinstatement under 1983 against the school officials in their official capacities, for want of an appeal having been taken.

I think that's where we are at. And, assuming we are right on the merits, a teacher who was in fact right, who brought this lawsuit, who secured complete relief in the

district court, and who presumptively, for the moment, is going to have it on the merits affirmed, if only the Court will recognize the jurisdictional basis, will go without relief, reinstatement.

But let me go on, because I think we avoid the problem if we are right that there is jurisdiction against the school board.

Now, neither the district court nor the Court of Appeals has decided either of the 1983 "person" questions, which would have to be decided if the Court were going to say that relief cannot be obtained under 1983. And those two questions are the following:

No. 1, --

QUESTION: You mean you could not get an order, even though you don't have a reinstatement against the school board?

MR. GOTTESMAN: That's what this Court held in City of Kenosha. Under 1983, if the school board is not a person, which has not yet been decided; but if the school board is not a person under 1983, and if there's not 1331 jurisdiction, then --

QUESTION: Even for injunctive relief?

MR. GOTTESMAN: That's what City of Kenosha squarely held.

QUESTION: If you equate the school board with a

municipality, --

MR. GOTTESMAN: That's correct, if you do that.

QUESTION: -- then Kenosha holds you cannot get injunctive relief against it under 1983.

MR. GOTTESMAN: That is correct, Your Honor.

QUESTION: Can't get any relief?

MR. GOTTESMAN: Any relief.

QUESTION: No relief.

MR. GOTTESMAN: Any relief.

QUESTION: It's immune from liability under 1983.

MR. GOTTESMAN: Well, it's not -- Your Honor, it is not an immunity. It is simply that Congress did not create a cause of action against them.

QUESTION: Well, because the statute doesn't create a cause of action against a municipality.

MR. GOTTESMAN: That's correct. And it's important that it's not an immunity, as I will get to in a moment.

Now, --

QUESTION: It doesn't fit under the word "person".

MR. GOTTESMAN: Right.

Now, neither the district court nor the Court of Appeals has decided whether this school district is a person in the same sense that a municipality is. We have not briefed that question, because neither court reached it. It was our view that if this Court found jurisdiction was improper under

1331, that the appropriate step would be a remand for the district court to decide an issue which neither it nor the Court of Appeals ever reached. Particularly so because the issue may turn-- not necessarily but may turn -- upon the precise status of school districts in Ohio.

QUESTION: Now, Mr. Gottesman, on page 14a of the Petition for Certiorari, in paragraph (9), the court, district court, said: "This Court has not stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that this case is properly here as a 1331 case, as well as a 1983 case."

MR. GOTTESMAN: Yes. Well, --

QUESTION: And so they -- you think that's clear enough that they didn't reach the 1983 question, but --

MR. GOTTESMAN: All right. It's clear. I think what he said is he states no conclusion on the Monroe-Kenosha problem, when he means to --

QUESTION: So the only decision has been on 1331?

MR. GOTTESMAN: That's right. I think the reference to 1983 was, it was clearly a proper 1983 case against the school officials.

QUESTION: Unh-hunh.

MR. GOTTESMAN: And he ruled on the merits that as individuals they would not have to pay the judgment, because they had not engaged in that bad faith, et cetera, that Wood v.

Strickland would dictate, entitling liability.

QUESTION: Isn't the district court mixing apples and oranges in that paragraph (9) that my brother -- to which my brother White has just referred? Because 1331 is a jurisdictional statute and 1983 is a substantive statute.

MR. GOTTESMAN: Well -- but they both are sort of shorthands for a combination of a cause of action and a jurisdictional predicate. When one refers to 1983 commonly in the lower courts, when they refer to 1983, they refer to it as jurisdictional; when, of course, it's a cause of action which provides jurisdiction under 1343, or for which jurisdiction is provided.

QUESTION: Yes.

MR. GOTTESMAN: Similarly, a lot of --

QUESTION: But it also assumes that 1983 is separate from -- has no connection with 1331.

QUESTION: Yes.

QUESTION: And I take it you're going to reach that.

MR. GOTTESMAN: I am going to reach that right now.

QUESTION: It contrasts the two.

MR. GOTTESMAN: That's right.

Let me come now to that.

In Bivens, this Court held that one could bring a cause of action for damages directly under the Fourth Amendment.

QUESTION: Directly under the Fourth Amendment, not the Fourteenth?

MR. GOTTESMAN: Directly under the Fourth, that's correct.

QUESTION: Against federal, personal.

MR. GOTTESMAN: Directly under the Fourth Amendment against federal officials, --

QUESTION: And there is no federal analog of 1983.

MR. GOTTESMAN: That's correct.

But the point was that the Fourth Amendment itself, coupled with the jurisdictional power granted by 1331, which enabled the federal courts to decide all questions arising under the Constitution, was sufficient to allow a cause of action for damages.

Now, for the moment, not against a municipality -- we will get to that in a moment. Was sufficient to allow a cause of action under 1331, even though Congress had not enacted any statute providing such a cause of action.

QUESTION: It was implied by the Court, was it not, in Bivens?

MR. GOTTESMAN: Well, that's right, the existence of the constitutional amendment implied that -- once Congress conferred federal jurisdiction under 1331, and said that questions arising under the Constitution could be heard by the federal courts, it was implied that there would be a cause of

action for damages from the Fourth Amendment itself, because otherwise the Amendment could not effectively be implemented.

If you take the words -- and let's forget for the moment the problem that we here have a municipality --

QUESTION: It wasn't -- it wasn't quite "even though" Congress had enacted no statute; it was "when" Congress has enacted no statute.

MR. GOTTESMAN: Well, it doesn't say that, Your Honor.

QUESTION: I know. Well?

MR. GOTTESMAN: What it says is that 13 -- that implicit in the Constitution is a cause of action for damages, provided Congress confers a jurisdiction.

QUESTION: Unh-hunh, Congress having enacted no statute.

It didn't imply that Congress, if it did enact a statute, could not have put limitations on it.

MR. GOTTESMAN: That's true.

QUESTION: That was what I -- that was the point of my question.

MR. GOTTESMAN: But I think we have to recall the chronology here. When the Fourteenth Amendment was passed or enacted in the late 1860's, there was no federal question jurisdiction in the federal courts. And so Section 5 of the Fourteenth Amendment, of necessity, had to say, as it did say, Congress will enact such legislation as will be necessary to

provide for the enforcement of this Amendment.

That was necessary because the whole predicate of the Amendment was there ought to be a federal cause of action, and there was no federal jurisdiction to enforce it.

Now, Congress's first response to that, to Section 5 of the Fourteenth Amendment, was the enactment of the Civil Rights Act of 1871, which contained both -- what are both now 1983 and 1343. The cause of action and the jurisdictional provision were enacted together, to provide a cause of action for damages under the Fourteenth Amendment.

Now, at that time, in 1871, Congress, taking its first tentative step in this area, made the judgment not to permit suits against municipalities, or at least so this Court held in Monroe v. Pape. There are many commentators who think that's a misreading of the legislative history, but we would accept that we are obviously bound by Monroe v. Pape.

In 1871, Congress said: We don't want to create this cause of action against the municipality itself, but only against the officials.

And if that's where things stood, there would be no predicate for bringing a suit in federal court against the municipality.

But four years later Congress enacted 1331. At that time it expressed none of the cautions that it had expressed in 1871. Indeed, as this Court has repeatedly commented in

discussing 1331, its intention was, with certain very specific exceptions, to invest the federal courts with the entire body of federal question jurisdiction, which constitutionally could be invested in them.

QUESTION: Well, how do you explain Bell vs. Hood's reservation of the point, ultimately decided in Bivens, if it's that clear?

MR. GOTTESMAN: Well, what Bell vs. Hood said was that when one -- and I think really this is all this Court needs to decide in this case, and I'll get to that in a moment -- Bell vs. Hood said, if a plaintiff comes into federal court and says "I claim a cause of action directly under an amendment of the Constitution", and he asserts that $10,000 is in controversy, the federal courts have jurisdiction to decide that claim on the merits.

Now, the Court, in Bell v. Hood, said there are a lot of questions the Court is going to have to decide on the merits. The first question it's going to have to decide on the merits is, is there such a cause of action directly under the Amendment?

But, as Bell v. Hood emphasized, that's a question on the merits, not a jurisdictional question.

And if the Court says, yes, there's a cause of action; then it's going to have to go on and decide the other merits questions, you know, Do you have a good claim under that cause

of action?

But it's our view, and we have a footnote in our brief to this effect, it's our view that, as the defendant has never, throughout these proceedings, challenged the existence of the cause of action under the Fourteenth Amendment as a merits issue, that that issue isn't properly here. It was not one of the questions presented. It has not been briefed by either party.

It may be the most important Civil Rights question that this Court is going to have to decide in the next decade. There have been --

QUESTION: Mr. Gottesman, let me just interrupt you again. Did you, in your complaint, identify the Fourteenth Amendment as the basis for legal recovery? I don't find it in your complaint.

MR. GOTTESMAN: Well, let me find the complaint.

QUESTION: Oh, I see, in paragraph 10 you do. I apologize. It's there, yes.

MR. GOTTESMAN: Okay.

QUESTION: Now, Mr. Gottesman, you --

MR. GOTTESMAN: It says: "in contravention of the Constitution and of Section 1983." So it does allege both.

QUESTION: I see it. Yes.

QUESTION: -- your position then would be, and perhaps it's right, is that a plaintiff, even though the -- in fact

you cannot sue a municipal corporation under 1331, because 1983 places limitations on it, and you have to -- that's the only way you can get into court because of that, even though 1331 is on the books. You would say that if the plaintiff says, "I have a claim under 1983" and nothing is raised about jurisdiction, the rest of it is a merits question?

MR. GOTTESMAN: Well, not a claim under 1983. A claim directly under the Fourteenth Amendment.

This complaint alleged a cause of action under the Fourteenth Amendment with jurisdiction on 1331. The defendant challenged jurisdiction, because he said -- he didn't even challenge that until the Court of Appeals, but there he said there wasn't $10,000 in controversy. But he never disputed the existence of a cause of action under the Fourteenth Amendment, which is a merits question, Bell v. Hood says.

He never disputed it in the district court, he never disputed it in the Court of Appeals, and he did not identify it as a question presented to this Court. And in our view, therefore, that merits question,is there such a thing as a cause of action directly under the Fourteenth Amendment, is not before the Court.

QUESTION: However, if you are wrong and it's in fact a jurisdictional question rather than a merits question, then I take it that the other view would prevail?

MR. GOTTESMAN: Yes. Clearly, if it is a jurisdictional question, it is before the Court.

I would urge the Court, if the Court were so minded, and I think Bell v. Hood is squarely to the contrary, that before the Court decides an issue of that import, it ought to have briefs, because this is an issue -- the lower courts are deciding this issue by the legions. You will have ample opportunity to decide it in a case when it's properly briefed. You can even direct further briefing in this case.

But I view with real trepidation that the Court would decide the issue without briefs. We have a lot we would like to say on that issue, but we didn't understand that issue to be properly before the Court.

Because, as we read Bell v. Hood, it was not a jurisdictional question but a merits question, which was not raised.

Well, the remaining jurisdictional question here is amount in controversy, and really, with my limited time, I'd like to go on to other issues. I think we dealt with that in our brief.

QUESTION: Let me just ask one other question on the person issue.

Do you agree that the issue of whether or not the school board is a person is a jurisdictional issue?

MR. GOTTESMAN: That's interesting. No, I guess --

it never occurred to me until Your Honor asked the question. But, obviously, for the same reason, the answer is no, it is not jurisdiction. Although jurisdiction does depend on it.

That is to say, if I allege a cause of action under 1983 saying that a school board is a person, that's a merits question: Is there such a cause of action? And yet jurisdiction -- I guess the mere allegation of it, in the same way that Bell v. Hood does, the mere allegation of that cause of action confers jurisdiction; but if the Court decides on the merits that the school board is not a person, then, on the merits you fail on your cause of action.

QUESTION: I'm just wondering who has the burden of proof. Because it doesn't seem to me that anybody really addressed himself to the problem in the district court, even in the pleadings.

MR. GOTTESMAN: Well, one of the terrible problems about this case, Your Honor, is that almost every issue that's before this Court, and there are all terribly important issues, is here without having been raised by the defendants in the district court, with no record, and a record would have been made both on jurisdiction and the Eleventh Amendment if they had been put in issue. I can assure the Court that we would have made one.

QUESTION: Well, of course, if they are jurisdictional issues, then it was the plaintiff's job to push them,

brief them, and make a record on them.

MR. GOTTESMAN: Well, that's always true, Your Honor. But I think the true meaning of Bell v. Hood is that a plaintiff who comes into federal court and says, "I have a cause of action, and this is my cause of action", and who cites the appropriate jurisdictional provisions which that cause of action would trigger, in fact has properly asserted jurisdiction. And it then lies with the defendant to challenge the existence of the cause of action or -- that's not really an accurate statement, it always lies with the plaintiff to establish his cause of action.

But if the defendant never disputes the existence of the cause of action, that's a merits question, and the defendant is going -- if the Court accepts that there is such a cause of action, the defendant is going to be stuck with it.

QUESTION: But if the defendant never disputes the existence of jurisdiction, --

MR. GOTTESMAN: No, the Court is always free to --

QUESTION: -- then the court is always free. And so it becomes very important whether or not this is a jurisdictional question or a merits question.

MR. GOTTESMAN: That's right.

Now, on both questions, this Court does not have briefing from the parties. Both questions are of -- I can't describe what great importance they are for school desegregation

cases, for this kind of case, for almost any kind of Fourteenth Amendment case, and I would -- I can't plead too strongly with the Court that if the Court is going to disagree with us, that it's not jurisdictional and therefore not properly before the Court, that we would request an opportunity to brief them. Because, you know, a great deal turns on this, and it should not be decided in a case where it's not before the Court, and where, really, neither side has briefed it.

Now, I've got about seven minutes remaining, by my count, and I've got a choice between getting into what is really a fascinating First Amendment issue and a fascinating Eleventh Amendment issue, and my instinct is to go to the First Amendment. And I say that because if anyone wants to ask questions about the Eleventh Amendment, I may and probably will not get to.

QUESTION: When was the Eleventh Amendment issue raised?

MR. GOTTESMAN: In the -- the Eleventh Amendment issue was raised in the opening appellate brief by the defendant --

QUESTION: In the Court of Appeals?

MR. GOTTESMAN: In the Court of Appeals.

This Court held, in --

QUESTION: So it's never really been addressed by any court below?

MR. GOTTESMAN: Well, the district court raised it on its own motion -- I think that's how the defendant discovered that it existed.

QUESTION: But it just said that it wasn't raised.

MR. GOTTESMAN: Well, no, it said it's been waived.

QUESTION: After that, in the same paragraph 9, Mr. Justice White.

QUESTION: Yes. But then it was never really discussed by any court at any --

MR. GOTTESMAN: No. It was briefed by both sides in the Court of Appeals, and the Court of Appeals affirmed without mentioning it, and so it's here again in this peculiar posture, that a terribly important issue on which -- on all of these issues, incidentally, all of the Courts of Appeals are ruling in our favor; that's obviously not controlling in this Court. But we would certainly like to bring to this Court's attention the analytical guidance that those lower courts have provided, before this Court rules on them.

But the Eleventh Amendment issue is terribly important. It has never been discussed by the lower courts in this case. If it had been raised in the district court, we would have made a record, we would have shown that there isn't any possible way that this judgment would have cost the State a penny, that there is an independent entity, the school board,

which is not the alter-ego of the State --

QUESTION: Of course, you know, from Ford Motor Company, that can be raised on appeal.

MR. GOTTESMAN: Well, we at least know it from Edelman, Your Honor. I'm not sure about --

QUESTION: Well, Edelman relied on Ford Motor Company, so --

MR. GOTTESMAN: Yes, it did. There's no question that it did.

QUESTION: -- you are under fair warning on that in the district court, I think.

MR. GOTTESMAN: Again, we are under fair warning, but it is a defense. And on that one this Court said, both in Edelman and in Sosna vs. Iowa, the Eleventh Amendment is a defense. It's a defense that they don't waive by failing to raise it in the district court. They can assert this defense for the first time in the Court of Appeals, or even in the Supreme Court. But it is, nonetheless, a defense.

And the plaintiff doesn't have the burden to come in and prove the nonexistence of an immunity which is not asserted by the defendant.

This Court, I believe in Sosna, said it was an affirmative defense. So I don't want to overstay.

In any event, had it been raised, and it is a defense, I think, had it been raised, we would have made a record. That

record would have shown beyond peradventure of doubt that an award in this case of back pay will not impact upon the treasury of the State of Ohio, that it would impact only on the treasury of the school board.

And beyond that, it seems to me, we had a further point to make, which we do make in our brief, which is: Even if for some reason we couldn't collect this from the school board, and the school board has been tendering suggestions to this Court that maybe they couldn't get the voters to approve a bond issue or a tax levy or whatever, even if we were unable to collect, that wouldn't implicate the State treasury. We wouldn't be the first plaintiffs who got a judgment that was uncollectible.

But it wouldn't give us a cause of action then against the State, to make the State pay it. It's a judgment against the school board. And if --

QUESTION: I would -- I, for one, would be interested in -- it's up to you, if you would like to spend your brief remaining moments in discussing the merits.

MR. GOTTESMAN: Okay. Thank you, Your Honor.

There are two merits questions. They are both fascinating.

The first one is: Was the school board entitled to rely on the phone call in making its decision not to renew this teacher's employment?

We think the answer to that is clearly that they were not entitled to rely on it. We brief that at some length, and I think as carefully as we could; and in my limited time I would like to reach the other question, which is really new to this Court.

And that is: How are the federal courts to deal with this situation, in which it's found that a school board or another public employer has relied on more than one reason in reaching its decision not to continue employment?

One of those reasons is an impermissible reason, upon which it had no right to rely; and the other one or more -- I think the district court fairly read found that there were only two reasons here -- the second reason was a reason upon which they could rely.

Does that mean automatically --

QUESTION: Well, one was the misconduct in the lunchroom, cafeteria --

MR. GOTTESMAN: Those things -- the letter they gave him, saying what was wrong, --

QUESTION: Well, you say two, then. One was the telephone call to WSAI --

MR. GOTTESMAN: The other was the gesture to the students in the lunchroom.

QUESTION: The obscene gesture to the students.

MR. GOTTESMAN: Characterized as obscene.

QUESTION: Well, an indelicate gesture.

MR. GOTTESMAN: Well, I'll accept it as obscene.

In any event, we do not assert that that's a First Amendment protected gesture, so --

QUESTION: So you concede that one was a proper foundation, and submit that the other was not.

MR. GOTTESMAN: That's right.

When we say -- we admit that the first would have been a proper foundation if that is in fact what would have actuated the board, alone, to decide not to renew.

QUESTION: Isn't that second ground something broader than just a single episode? Isn't it a --

MR. GOTTESMAN: Well, that's, I guess, --

QUESTION: -- broad question of his lack of maturity?

MR. GOTTESMAN: Well, there was a dispute between --

QUESTION: And then there are perhaps a dozen elements under that.

MR. GOTTESMAN: Well, at most, there are only five that were testified by witnesses, including the phone call. So there are four -- the two plus three others.

The critical piece of evidence upon which the district court appears to have relied, and certainly it supports the district court's finding, was the letter they gave to the teacher when he said, "Why did you deny me renewal?" And they

said, one-two.

But, be that as it may, whether it's two or five, we have a case --

QUESTION: In which one is valid?

In your submission.

MR. GOTTESMAN: All right.

Now, if we could only know what the school board would have done, but for the phone call, we would know how to, it seems to me, how to deal with this case. If we knew, for example, that but for the phone call the school board would have given him his contract, then it's clear that as a remedy he ought to get his contract.

On the other hand, if we knew that the other one or more incidents, standing alone, would have convinced them to deny him renewal, then it's clear that he ought not to get his contract as a remedy, or back pay.

But we can't know. Not only do we not know, we can't know. Because, as a result of the improper reliance on that one issue, the school board never made the decision it was supposed to make.

QUESTION: But that assumes the improper reliance.

QUESTION: There was reliance.

MR. GOTTESMAN: Yes, it assumes that there was reliance on this, which the district court found, and which --

QUESTION: Yes, but you have to assume it was improper.

MR. GOTTESMAN: We have to assume that this was -- that the first --

QUESTION: That the first question is thus in your favor.

MR. GOTTESMAN: Yes. That's right. And I have urged the Court that -- since I have now one minute -- we brief the proposition that it's improper, and I want to address the question of how does the Court remedy this --

QUESTION: But your argument has to be that you may not even rely on a phone call to show lack of tact.

QUESTION: Right.

MR. GOTTESMAN: In the facts of this case.

QUESTION: Because that's protected First Amendment activity.

MR. GOTTESMAN: Right. And because it's not -- he was not -- it was not a tactless phone call. They just put "tact" as a label on the fact that he made the phone call.

Now, our view is that guidance is provided in a number of areas, of what you do when you have a mixed motive, improper decision. Which is that you put the burden on the wrongdoer, as Judge Learned Hand said in a very similar NLRB case, to disentangle the consequences for which he is chargeable from those for which he is immune from responsibility.

It's his burden to persuade the trier of fact that even without this incident he would have reached the same

decision.

This Court applied that same standard under Title VII of the Civil Rights Act last year in Franks vs. Bowman Transportation, saying that where race was a factor in an employer's decision to deny employment to somebody, that doesn't mean that he might not have denied employment to him anyway, but the burden is going to be on the employer to show that he would have reached the same decision, even if race had not been a factor.

Now, these have all been statutory causes of action, where the violation of a statutory right shifted the burden to the defendant. And we submit that the rule surely must be at least the same when it's a violation of one's constitutional right, which has created this mixed motive dilemma; that the burden must be on the defendant.

And, as we explain in our brief, there was no evidence introduced in this case from which the court could have found, and indeed the court did not find, that the defendant met that burden.

QUESTION: Before you sit down -- excuse me, excuse me -- Before you sit down, just let me ask you this:

Wouldn't it be true that however we decided this case, it would, so far as future conduct went and future behavior on the part of school boards around the country, it would be almost meaningless, or else it would put them in a terribly bad

trap, because, let's assume that -- let's assume, that if we decide the case in your favor, thereafter, wouldn't it be true that any incompetent teacher, who knew that because of his incompetence or misconduct or bad behavior, he was not going to be rehired, could simply go out and make a speech, a very insulting speech against the school board, and if that were any part of their decision not to rehire him, then he would have to be rehired, despite his misconduct and incompetence, on the one hand?

And wouldn't it mean, on the other hand, that if we decide it in your favor, that any school board that could read, or whose lawyer could read, would know that when they failed to rehire a candidate, a teacher, all they had to do was not mention this speech; and then they could fail to rehire him.

So, aren't we just talking about meaningless words? It might win or lose your case, but from the point of view of future conduct, it would be meaningless?

MR. GOTTESMAN: I think not, Your Honor, any more than under Section 883 of the National Labor Relations Act, where -- which forbids discharges based on union activity or abstention from union activity. The Labor Board has been adjudicating for four decades, in which the parties knew that a mixed motive termination led to what Judge Learned Hand said it led to: a disentangling of the consequences and a remedy dependent on that.

For four decades, parties have developed a whole body of laws developed, which is used by analogy in these First Amendment cases.

Of course, the school boards rarely say, as this one so candidly did, we relied on this.

And yet you can find from other evidence, on occasions, that they did. You can find that disparate treatment, for example, ten people did this -- or ten people did the other things they are relying on, but --

QUESTION: But only one made a speech.

MR. GOTTESMAN: -- the only difference is this teacher made a speech. Out he goes.

QUESTION: Yes.

MR. GOTTESMAN: There are a variety of those.

The other side of the coin is, to us, more troublesome; which is, if we don't have a burden on the defendant in the mixed motive cases, every school board that wants to fire a defendant for a First Amendment reason will simply -- no teacher can teach for five years without having done something that somebody could find objectionable -- even though their motivation is solely the First Amendment reason, they will just tack on two or three other incidents that are just --

QUESTION: Without mentioning the First Amendment reason.

MR. GOTTESMAN: Well, either with or without. The

Court says that as long as there's a collection of reasons, --

QUESTION: Other good reasons, yes.

MR. GOTTESMAN: As long as, if it's a mixed decision, we're going to sustain it; then they can be perfectly candid and say, "Well, we don't like the fact that you made this First Amendment speech, but we also notice that two years ago you made an obscene gesture in the cafeteria, so, ha-ha, there's nothing you can do about it."

QUESTION: This is something like, has some resemblance, at least, to the harmless error rule, does it not?

MR. GOTTESMAN: It does, except -- well, I guess that's right. The burden is on the defendant to show that it was indeed harmless. And in that sense it's the same.

QUESTION: It's on the prosecution.

MR. GOTTESMAN: Well, the prosecution is the wrongdoer in that case.

QUESTION: To show that the error was harmless.

MR. GOTTESMAN: The burden is on the wrongdoer, if I can use that word. Wrongdoer is the wrong word for the prosecution. The burden is on the party --

QUESTION: Well, sometimes perhaps it's the right word, but --

[Laughter.]

MR. GOTTESMAN: Well, I didn't mean that.

The burden is on the party who wants to sustain the

result, even though one of the factors that led to the result is now going to be removed. To show that that factor was not critical to the result.

QUESTION: The other alternative is to give no reasons at all when they don't --

MR. GOTTESMAN: Well, and they are under no obligation to.

But that doesn't mean that it wouldn't be a First Amendment violation if we could find out independently that that was the reason that they didn't.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Olinger?

MR. OLINGER: No, I do not, sir.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:49 o'clock, p.m., the case in the above-entitled matter was submitted.]

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