ORIGINAL



In the

# Supreme Court of the United States

Billy D. Cook, Loula Juanita Milton Adams, Mrs. W. P. Wright.

Petitioners,

v.

Roger W. Hudson, John Burt, James Sidney Warner, R. W. Mallory, Norman Wilton Griffin, Brooks Brasher, N. F. Hanson, Board of Education, Calhoun County, Mississippi.

Respondents.

75-503

Washington, D. C.
November 1, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

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| BILLY D. COOK. LOULA JUANITA MILTON ADAMS, MRS. W.P. WRIGHT, Petitioners, | : | |
| v. | : | No. 75-503 |
| ROGER W. HUDSON, JOHN BURT, JAMES SIDNEY WARNER, R. W. MALLORY, NORMAN WILTON GRIFFIN, BROOKS BRASHER, N. F. HANSON, Board of Education, Calhoun County, Mississippi, Respondents. | : | |

Washington, D. C.,

Monday, November 1, 1976.

The above-entitled matter came on for argument at 10:51 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:

GEORGE COLVIN COCHRAN, ESQ., School of Law, University of Mississippi, Oxford, Mississippi; on behalf of the Petitioners.

WILL A. HICKMAN, ESQ., P.O. Box 430, Oxford, Mississippi 38655; on behalf of the Respondents.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-503, Cook and others against Hudson and others.

Mr. Cochran, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEORGE COLVIN COCHRAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. COCHRAN: Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Cochran.

MR. COCHRAN: Members of the Court, I'd like to reserve ten minutes, please, for rebuttal.

My name is George Cochran. I represent the petitioners in this case. I have with me Mr. John B. Farese, an attorney from Ashland, Mississippi, who handled the case through the Northern District of Mississippi in the 5th Circuit Court of Appeals. Primarily due to Mr. Farese's efforts in this case you now have the record as it is presented to the Court, and which I will spend a great deal of time on this morning.

This case, of course, arises out of Calhoun County, Mississippi. And what occurred in Calhoun County is, the public school board there made the decision not to re-hire the petitioners in this case for the sole reason that they sent their children to a private, segregated academy also located in Calhoun County.

There is nothing in the record that indicates the

petitioners were nothing other than competent and respected by their students, fellow faculty members and the administration. Specifically, the only reason they were terminated was due to their decision to exercise what this Court has deemed to be a fundamental right in Runyon to send their children to a private, segregated academy.

Now, there are significant problems with the case as it now comes before you. One problem, I think, is the policy as stipulated. And to understand what happened in Calhoun County, I think, one has to understand that the policy -- understand the policy under which the school board was operating.

On page 9 of the record there is a stipulation made by Mr. Farese in cooperation with counsel for the opposing -- for the school board that this policy as applied was limited to teachers teaching in Calhoun County and living within the County. And if they met these two prerequisites, then they had to send their children to the public schools of that County. And this --

QUESTION: Does that mean that somebody could live just outside the County line and not be subject to the policy?

MR. COCHRAN: Mr. Justice Blackmun, that's what I'm getting to now. The policy that I have brought to the Court's attention in my brief on the merits is altered from what I had in the petition for certiorari. I have cited the Court

to page 298 of the record which is the answer filed by the respondents in the case as it began. The answer filed by respondents indicate that this policy has two prongs. The first is, if you're living in the County, then -- and teaching in the public schools -- then you must send your children to the public schools of Calhoun County. If you're living outside the County, then you must send your children to quote public schools. Not necessarily the schools in Calhoun County.

On page 32 of the record --

QUESTION: Well, your children might not be eligible to go to the schools in Calhoun County.

MR. COCHRAN: In Calhoun County. There would be that problem, yes.

QUESTION: They would be in another county.

MR. COCHRAN: Yes, yes.

On page 32 of the record, counsel for the respondent refers to the policy as stipulated and alters it somewhat. This time the policy is described to mean that if you teach in the public schools of Calhoun County then you have to send your children to quote public schools. So we have a difference in the record as to what teachers had to do to comply; that is, whether to send your children to the public schools of Calhoun County or to the public schools anywhere in the United States. This is kind of firmed up on pages 134

and 135, the final reference in the record to it. Mr. Farese is examining an expert witness, and he refers to the policy as applying to teachers having to send their children to public schools in the County. There's an objection made by opposing counsel, and the question is rephrased in the context of sending children to public schools.

I choose to say that the policy has two separate facets to it: one, sending your children to public schools in Calhoun County; and two, sending your children to quote public schools. And this dovetails, I think, quite nicely with what you have in the record with respect to teachers who were threatened not to be re-hired because they sent their children to schools that might not have been public.

QUESTION: Is your position the same as that taken by the Court of Appeals?

MR. COCHRAN: No. The Court of Appeals adopted Judge Keady's finding with respect to the policy, and that was, in essence, that if you taught in the public schools of Calhoun County you had to send your children to the public schools of that county. But it doesn't mesh with the record, because we have the Enochs, who are black teachers, and Hamblin, a white teacher, sending their children to schools outside of Calhoun County. And checks are made as to whether or not these schools are public or private. The indication is they would not have been re-hired.

QUESTION: But ordinarily if the District Court makes a finding and the Court of Appeals upholds it, we don't review that kind of evidentiary point.

MR. COCHRAN: On page 509 of Pickering -- no, I'm sorry, page 509 of Tinker, the Court very clearly says it will make an independent review of the record when First Amendment questions are at issue. And in Tinker you did make an independent review. You're almost to the point of saying, the District Court said the cow jumped over the moon. We won't review it.

QUESTION: You think that goes to a historical fact? I mean, just like who did what to whom? Or what happened at the dance?

MR. COCHRAN: I think it's critical in deciding the constitutional issue in this case. And it's part of constitutional facts as to what --

QUESTION: Well, do you think the constitutional facts are any facts that might be relevant to the ultimate decision on the constitutional question, including what days school opened in Calhoun County that particular year?

MR. COCHRAN: No, Mr. Justice Rehnquist, what I'm pointing to with this fact is that in order to understand the purpose and the thrust behind what the public school board in Calhoun County was doing, I think these facts are critical because we have a very articulately drawn policy and you have

to focus in on the thing to understand exactly what was going on in the County. That's the only point I'm trying to make.

And the other point is that if you don't construe the policy different -- differently than the Court of Appeals and the United States District Court, then you can't deal with these other teachers whose re-employment was threatened because they sent their children to, say, schools in Atlanta or Jackson, Mississippi. That's the only point I'm trying to make. I really don't think it's critical, except that there's a problem with the record on the basis of exactly how does this policy operate.

I believe that if you look at the record you can ascertain that -- fairly that the policy has three purposes. And the purpose that has been dealt with by the Courts below, of course, has been compliance with a desegregation order
146 entered by Judge Keady in 1968. The taking positive and affirmative steps to implement a unitary school system. I'll talk about that purpose later on.

I think there are also two other purposes that are clear from the record. One is, ensuring dedication by public school teachers to the public schools. And this is clear. All the expert testimony in this case indicates that one of the primary thrusts of the policy was to ensure loyalty on the part of the teachers, the theory being that

if you don't send you children to the public schools then you won't be loyal to schools in which you're teaching.

The record also bears out that this aspect of the poliy, that is, ensuring dedication, was carried out in fact by the persons responsible for it: Mr. Hudson, the school principal.

There are two parts of the record in which -- indicate or highlight instances of how the policy was implemented. You have the Enochs, who are black teachers, teaching in the Calhoun City School System. They sent their children to a school in Atlanta. And they were threatened with termination until it was found that these were indeed public schools. The same thing with Hamblin, who sent his children to the Magnolia School for the Deaf. And again his employment was threatened at that time.

QUESTION: Do you think it would make any difference to your case if the conduct of the school board here were pursuant to statutes enacted by the legislature in the State of Mississippi as distinguished from an ad hoc policy of the local board?

MR. COCHRAN: Mr. Chief Justice, that would be if the Mississippi State legislature passed a statute which in essence decreed that public schools could mandate that teachers teaching there had to send their children to the public schools?

QUESTION: No, not could, must.

MR. COCHRAN: Must. Clearly, there'd be First Amendment problems, Pierce v. the Society of Sisters, and a serious encroachment on the exercise of First Amendment rights by the teachers.

QUESTION: Well, what I'm trying to get at is the difference between these sporadic decisions by local school boards and a declared policy of the state by its legislature.

MR. COCHRAN: Well, but still, the difference between sporadic and policy by the state legislature, still you have First Amendment problems with the teachers involved.

QUESTION: Do you think there's any difference in degree?

MR. COCHRAN: You mean as to the empirical basis --

QUESTION: In the Mitchell case the Court held that certain First Amendment rights of public employees could be limited. And that's been reaffirmed from time to time.

MR. COCHRAN: Yes.

QUESTION: If just the particular governmental agency, the head of the agency, had made that decision ad hoc a policy of his own agency, do you think that would have made a difference?

MR. COCHRAN: Well, if it's an ad hoc decision rather than the historical data gathering that you had in

Mitchell you have the same problems because you're infringing First Amendment rights without a serious record finding that --

QUESTION: Where did you get a First Amendment problem in this case?

MR. COCHRAN: Well, the mere fact that the teachers are exercising their fundamental rights to send their children to a private, segregated school.

QUESTION: Okay, when you said fundamental right you said First Amendment right.

MR. COCHRAN: Right.

QUESTION: How do you spell out of the First Amendment a right on the part of the teachers to send their kids to a private school?

MR. COCHRAN: Well, you can read Pierce v. Society of Sisters would be a First Amendment case, but --

QUESTION: Well, that had some religious overtones to it. Here there are no religious overtones.

MR. COCHRAN: Well, there was a military school also involved in Pierce. But Runyon last term you all reaffirmed, in no certain terms --

QUESTION: The Court reaffirmed.

MR. COCHRAN: Yes, the Court reaffirmed that --

QUESTION: Pierce against the Society of Sisters involved also the Hill School, I think.

MR. COCHRAN: Yes, sir. It was a military school.

QUESTION: It was a companion case. Which was just a private, nonsectarian school.

QUESTION: Well, do you think Pierce rested entirely on the First Amendment?

MR. COCHRAN: No, I believe it's a substantive due process case. But in Runyon you did utilize that case to bolster the finding in Runyon that you have a fundamental right to send your child to a private, segregated school.

QUESTION: Well, that doesn't necessarily mean a First Amendment right.

MR. COCHRAN: No. The Court dealt at length with whether or not it really was a First Amendment right in Runyon.

QUESTION: And what did it say?

MR. COCHRAN: In part resting on the First Amendment and freedom of association, part on Pierce v. Society of Sisters.

QUESTION: And you fit both in?

MR. COCHRAN: Oh, certainly I do. I -- the point I'm trying to make is, I don't think there's any question whatsoever that these teachers were exercising a fundamental constitutional right, no matter how it's defined.

QUESTION: Well, why is this case different from the school board regulation that says you have to live within the school district if you're going to teach?

Certainly that could infringe your right of association too. Maybe you want to associate with people in the next county.

MR. COCHRAN: Well, as you know, these cases have been tried on -- most of these cases have been tried on the right to travel theory. And this Court last term reaffirmed in a short per curiam that regulations such as that are constitutional but did not point up to any fundamental constitutional right as being encroached by these regulations that would require you to live in the area where you teach or work.

QUESTION: You're speaking now of the policemen and firemen's cases?

MR. COCHRAN: Well, Kelley is one. But McCarthy --

QUESTION: Do you think those help you or hurt you here?

MR. COCHRAN: Well, Kelley certain doesn't hurt, simply because -- if we're going into Kelley, then hair length was not determined to be a fundamental right in Kelley. And if you're going into McCarthy v. Civil Service Commission, the short opinion last term, there is nothing in that opinion that indicates that a fundamental right was involved to be counterbalanced against the state's interest in making you reside where you live. All those cases are distinguishable on the basis that no fundamental

rights are involved. Here we do have a fundamental right being exercised, that is, the right to send your child to a private, segregated academy under Runyon and Pierce.

QUESTION: Pierce went off on liberty, didn't it?

MR. COCHRAN: Substantive due process liberty --

QUESTION: It said, liberty. It used the word liberty.

MR. COCHRAN: Yes.

QUESTION: Somewhere will you discuss the new Mississippi legislation?

MR. COCHRAN: I'd be certainly glad to take that up at this point, Mr. Justice Black. There is a new Mississippi statute passed after the United States District Court opinion which in essence says that school boards can no longer require public school teachers to send their children to the public schools. Under the United States District Court opinion, the 5th Circuit opinion, Mr. Justice, I have a serious doubt as to whether or not this statute is constitutional. The United States District Court said that part of implementing a court desegregation decree that postivie, affirmative steps would be taken, and one positive, affirmative step is, you cannot send you child to a private, segregated academy.

QUESTION: Well, the District Court didn't require the school district to impose such a condition, did it?

MR. COCHRAN: No, but on page 30 -- if you look at page 39(a) in the petition for certiorari, the last part of the opinion written by Judge Keady, he refers to what the school board has done as part of its affirmative duty. The Department of Justice takes the same position. On page 402 and 403 of the record you have a letter from David Norman of the Department of Justice when he comments on this policy, and he indicates that the Department of Justice position is that this is part of the duty under a court desegregation decree to take positive, affirmative steps. So therefore, if it's part of a court decree vis a vis implementing a unitary school system, then the statute is going to be unconstitutional as applied to teachers who send their children to private, segregated schools.

QUESTION: Well, but Judge Keady didn't have that question before him when he ruled, did he?

MR. COCHRAN: No, he did not. The statute was passed after Judge Keady entered his decree. The 5th Circuit, of course, did not take it up and footnote it away. There is no question, Mr. Justice Blackmun, that the statute is retroactive. We have an attorney general's opinion that indicates it's not retroactive. And again, my contention would be that the school board at this point cannot comply with that statute simply because it's under a 5th Circuit order that what they're doing is constitutional. So you have a conflict between the constitutional

requirements of the 5th Circuit and state statute.

QUESTION: Well, I don't believe the Court of Appeals held that the school board must have this policy, only that it could. I mean, if I'm right about that, then there's no real conflict.

MR. COCHRAN: Well, that's the problem. I -- in reading the 5th Circuit opinion it's difficult to really understand what the 5th Circuit is saying just because you have a complete split between Judge Coleman, Judge Roney and Judge Clark.

QUESTION: Yes.

MR. COCHRAN: But the opinion written by Judge Keady -- our clear reading of this opinion -- would indicate that as part of affirmative duty to implement a unitary school system this type of a decree should and must be implemented. That's the way I read Judge Keady's opinion. And he could -- he's adopting it as his own. That opinion says -- he starts off his opinion talking about his court order in 1968 to integrate the schools, positive, affirmative steps. Then in the later part of the opinion, he's approving this and making it part of the court order.

I still would say that the state statute is in constitutional jeapordy when read in the context of the lower court opinions.

QUESTION: Where's the text of the statute? I

can't -- I couldn't --

MR. COCHRAN: It's in footnote 5 of my brief on the merits.

QUESTION: Thank you.

MR. COCHRAN: Yes, a footnote. No, it's not. I'm awfully sorry.

QUESTION: No, I don't find that.

MR. COCHRAN: The new statute -- it would be found in the respondent's brief on the merits. And it is located on page 19.

QUESTION: Thank you.

MR. COCHRAN: Well first -- let me get back. That this school board in Calhoun County, one part of the thrust of the policy was to ensure dedication and loyalty on the part of the teachers. This is completely divorced from compliance with a court decree implementing a unitary school system.

Another factor which is clear in the record which motivated this decision is the private, segregated academy itself. You get testimony in the record such as that from John Burt, the superintendent, where he's speaking to the policy and speaking in terms of, we don't need a private, segregated school in Calhoun County.

In another portion of the record, you have Mallory, who is the school board president; on 218 he's questioned

on direct examination as to what influenced him or the board in passing this policy. And he puts into the record newspaper clippings showing fund raising activities on the part of the academy. It's obvious that part of the influence and part of the thrust behind what the school board was doing was to curtail competition on the part of the private, segregated academy, another aspect of the policy that has serious constitutional problems under Pierce v. the Society of Sisters.

The last part of the policy, and that which the lower courts have spoken to, is compliance with the court order to integrate the school. And in looking at this aspect, I think it's a correct thing to do to look at the history of what was going on in Calhoun County at the time this policy was passed in order to ascertain whether or not this policy was really needed in order to implement a unitary school system under the court decree.

Now Mallory, the school board president, testified that the policy had been under consideration for two or three years, which would mean, in essence, that the school board started thinking about this policy immediately after it was put under court order; that is, in the context that the United States District Court Judge had not gone far enough in his order, and that they should take independent steps beyond that which the United States District Court

ordered.

There are 2,400 students in the Calhoun County system. At the time the policy was passed, only eight teachers were involved sending their children to private, segregated schools. The school where petitioners were -- I'll continue on rebuttal. Save ten minutes. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hickman.

ORAL ARGUMENT OF WILL A. HICKMAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

That at the time that the Calhoun School Board was under a desgregated order, and pursuant to the mandates of this Court to take affirmative action to do what they felt necessary, whatever steps to be necessary, to accomplish elimination of segregation root and branch, this Board adopted a policy.

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The policy is as stated in A. 9 that prior to employment or re-employment of any teacher, the children of that teacher, living in Calhoun County, would attend the private -- public schools. That is the policy that was stipulated by counsel at the beginning of the hearing in the District Court.

We should keep in mind that this was an unwritten policy, and that it was only stipulated after some discussion

between members of the board, between counsels for the petitioners. And it was determined that that was the policy.

Now --

QUESTION: Are there any exceptions? Or any question o f hardship, or anything like that?

MR. HICKMAN: The policy, as it was drafted on the face, and as the District Court recognized, applied literally to all schools. But, as the District Court found, and from the evidence adduced at the hearing, there were no schools in Calhoun County other than this one racially discriminatory all-white private academy, which incidentally had obtained its charter for organization 19 days after the Court's desegregation order.

QUESTION: Was there any special school for handicapped children --

MR. HICKMAN: No, sir.

QUESTION: Suppose there had been.

MR. HICKMAN: The president of the board testified that would have been taken up at that time. I believe it's his words. Now in all candor the superintendent and the principal testified that it was a blanket policy.

Mr. Justice Blackmun, I would say that you would have to take the background of this rural county school board, the rural superintendent, the rural principal, in an area

where there are no special schools. And when they said it applied to all schools, and as Judge Keady found, we submit they were talking about the Calhoun Academy.

QUESTION: How many children, then, is that from Calhoun? Less than 200?

MR. HICKMAN: In the academy?

QUESTION: Yes.

MR. HICKMAN: Yes, sir.

QUESTION: And did this, in your estimation -- did it or did it not pose a threat to the functioning of the public schools?

MR. HICKMAN: It did.

QUESTION: By sheer numbers?

MR. HICKMAN: Well, no, sir, I would not say in the numbers, I would say that -- that this board was under the order of the court. And in order for it to obtain the support that it had to have in this community it had to make sure that the teachers, that the administration, did support their action in carrying out the District Court's order to eliminate all pervasive influences of the lingering remnants of segregation, both root and branch. And that by this teacher being in the classroom, and as evidence adduced at the trial indicate, that I'm standing in the public classroom, I'm paid from state tax money, I'm sending my child to a private school. The student could perceive

a rejection on the part of the teacher, and say, all right, this school is inferior. My child is not going to this school. I don't think the school is good enough --

QUESTION: Did you prohibit the teacher from making a speech against it?

MR. HICKMAN: Could we prohibit the teacher?

QUESTION: Yes, sir.

MR. HICKMAN: Justice Marshall, the presence of the teacher in the classroom without saying anything --

QUESTION: I said, if the teacher made a public speech outside the classroom, could she be denied employment because she made a speech outside the class calling for segregated schools and opposed to integrated schools?

MR. HICKMAN: Your honor, during this transition period, and while under the Court order, I would say, yes.

QUESTION: She could do that?

MR. HICKMAN: Yes. I would say that during the transition period --

QUESTION: Oh, that the school board could deny her employment?

MR. HICKMAN: I would say that during the transition period that if the teacher went on a crusade, and took action contrary to this court's order --

QUESTION: I said, she made a speech in which she said she was in favor of segregation and opposed to the court

order and opposed to integration, one speech.

MR. HICKMAN: I would not think just one speech, no, sir.

QUESTION: How many?

MR. HICKMAN: Well, I think it would depend on the effect that it would have. I think that it would depend on where the speech was made. I think that if it was made in a part of Calhoun County where a lot of the people heard it --

QUESTION: Made in the public square in the County seat.

MR. HICKMAN: Your honor, during the transition period, and while this board was under court order, if that speech was made in Calhoun County, Mississippi, on the public square, I would say that the board would have the right to curtail --

QUESTION: The freedom of speech guaranteed by the First Amendment?

MR. HICKMAN: That's correct.

QUESTION: And they would have the right to do that?

MR. HICKMAN: I would say that under that circumstance -- at that point in time, maybe temporarily -- and let me make this point -- I think that this is a temporary action. We do not contend, your honor, that this action is a permanent action. It may well be that in another area in the same

school a teacher could apply and have a child in the public school, and it wouldn't have the same effect. But during this transition period -- this is the problem area. When the board is under the court order to bring about the desegregation-- take affirmative steps. When statements such --

QUESTION: During that period freedom of speech goes by termporarily?

MR. HICKMAN: I say temporarily. Very temporarily.

QUESTION: Yes. You just give it up temporarily.

MR. HICKMAN: And I would say this, your honor --

QUESTION: And which case do you rely on for that?

MR. HICKMAN: Well, I rely on the Korematsu case, I rely on the --

QUESTION: On which case?

MR. HICKMAN: Korematsu. Korematsu. It's a case involving during the Japanese internment.

QUESTION: Korematsu.

MR. HICKMAN: Korematsu, yes, sir.

QUESTION: Oh, I see.

QUESTION: War powers.

QUESTION: Yes, that's war powers, yes, sure.

MR. HICKMAN: And then --

QUESTION: Got any other ones?

MR. HICKMAN: Pardon?

QUESTION: Got another one? Nearer at home?

#503.5 MR. HICKMAN: Well, I would rely on the case, yes.

QUESTION: Which one? I mean the case that said that temporarily you can be denied your First Amendment rights.

MR. HICKMAN: Well, we have a 5th Circuit Court,

#509 Lee v. Macon County, under the Singleton case where teachers have applied for their jobs, and in order to obtain the ratio certain teachers were not able to get their jobs back. In fact, they lost their jobs because of complying with the order of the court.

QUESTION: The First Amendment was in that case? I'm talking about freedom of speech. It's a very simple point. Well, I've got your position.

QUESTION: Let me suggest an activity a little less than making the speech that Justice Marshall has suggested.

Suppose the public school teacher served on the board of directors or board of trustees, without pay so that there was no moonlighting problem -- served on the board of trustees of the segregated academy. Do you think that would be grounds for termination?

MR. HICKMAN: I would think that in this transition period, and with the history of this academy being formed within 19 days after the court desegration order, that with a teacher on the board of directors in Calhoun County on the private school, that the board would have the right to

temporarily curtail --

QUESTION: Well, Mr. Hickman, let's try to put this thing perhaps in a little broader context. Suppose that during the height of the Vietnam War somebody on the South East Asia desk in the State Department made a public statement saying that he thinks the government's policy is entirely wrong in South East Asia, do you think that the government would have a right to fire him from that position?

MR. HICKMAN: No, sir. I think that -- now, is this person employed by the government?

QUESTION: Yes.

QUESTION: In the State Department.

QUESTION: He's working on the implementation of the government's policy presumably.

MR. HICKMAN: Well, I would think that that right could be curtailed.

QUESTION: Mr. Hickman, is the policy involved in this case unique to Calhoun County in Mississippi?

MR. HICKMAN: Yes, sir.

QUESTION: The only County in the State?

MR. HICKMAN: Yes, sir.

QUESTION: Did this policy cause the legislature in 1974 in Mississippi to adopt a statute that --

MR. HICKMAN: That's correct, sir.

QUESTION: How important is this case, then, generally?

MR. HICKMAN: I beg your pardon?

QUESTION: Well, does this case have any importance then beyond --

MR. HICKMAN: No.

QUESTION: -- beyond the individual claimants involved?

MR. HICKMAN: No, sir. And --

QUESTION: They are claiming damages?

MR. HICKMAN: Yes. Now the District Court limited, of course, the policy, and the 5th Circuit through Judge Roney limits the policy.

QUESTION: There are, perhaps, other counties and cities in the State of Mississippi that are subject to desegregation decrees.

MR. HICKMAN: That's correct.

QUESTION: Mr. Hickman, I couldn't hear the Justice's question. Was it directed to the '74 legislation?

MR. HICKMAN: Yes, sir.

QUESTION: And what -- even though it involves repetition, would you state for me the -- what comments you have upon the effects of the new legislation upon this case?

MR. HICKMAN: Well, the -- certainly this present statute prohibits the action that this board took. I would

think that perhaps this action of the legislature was prompted by this action that this board took in Calhoun County.

QUESTION: Are you saying that because of the passage of the new legislation, this case should be dismissed as improvidently granted?

MR. HICKMAN: I would think that that has merit.

QUESTION: You haven't argued it.

MR. HICKMAN: No, sir, I have not.

QUESTION: YOu didn't suggest it in your --

MR. HICKMAN: I did not.

QUESTION: -- opposition to the petition for certiorari.

MR. HICKMAN: I did not, sir.

QUESTION: Why?

MR. HICKMAN: We felt that the limiting of the thrust of the policy by Judge Keady, and by the 5th Circuit, was sufficient for the reason for the court to affirm its decision. But after submitting our briefs and going into that area we frankly feel that that does have merit.

QUESTION: In any event, you agree the case is not moot?

MR. HICKMAN: Yes, sir.

QUESTION: Would you hire those teachers?

MR. HICKMAN: Would we? We'd certainly take

applications. In fact, the record does not show that these teachers have made an application. They made no application

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QUESTION: But you admit it's moot?

MR. HICKMAN: Yes, sir.

QUESTION: Not moot.

MR. HICKMAN: Well, it would be moot -- it would -- in fact the statute would govern now until the determination was made --

QUESTION: I don't see how you -- you didn't mean moot when you said, damages?

MR. HICKMAN: No, sir.

If you review, as I say, the background, you will find that the comments that had been made in the community, that there was actually brother versus brother. The brother of the president of the school board attended this school at this particular point in time. There were references made to derogatory statements about those that send their children to school with certain individuals. And this was the background when this policy was adopted.

We submit that the finding of the District Court, findings of fact -- and it was upheld by the 5th Circuit -- would be the proper disposition of this case. But in any event, we do think that there is basis for the case to be dismissed for the reason of the writ of certiorari being

improperly granted.

QUESTION: Let me ask you one more question. Suppose we have a situation in neighborhood schools -- we don't have that anymore, but suppose we did. And the board said that the teacher in this particular school must live within the district. Do you think that would be a valid restriction?

MR. HICKMAN: Well, I believe that the courts have approved the employees living within the district of the city where they work. And on that basis I would think so.

QUESTION: And --

MR. HICKMAN: Yes, sir.

QUESTION: So any children that they have would have to go to the neighborhood schools required in the residency --

MR. HICKMAN: Well, if they were -- in a neighborhood schools, yes, it would be --. Now, I don't think that would apply on exceptions.

But again I think that in this particular area that at that point in time that these particular facts -- and as I say, this may be a short time that this had to be done -- but we do not contend, and little did we realize that when this action was taken that it would become involved to this extent. The -- this was -- is a temporary action. It may well be that this action is not required, had the statute not been passed. Which, of course, now prohibits it.

And for these reasons we feel that this matter should be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Cochran.

REBUTTAL ARGUMENT OF GEORGE COLVIN COCHRAN

ON BEHALF OF PETITIONERS

MR. COCHRAN: Yes, sir. A couple of points.

Apparently, Mr. Justice Blackmun and others are referring to the Sioux City case as to whether or not this -- the decision below should be affirmed on the basis of opinion by the Court that the writ is improperly granted. I think there's a quantum difference between Sioux City and this case. This is not an isolated instance that will not reoccur again. What we have here --

QUESTION: Well, isn't it? Isn't it?

MR. COCHRAN: No.

QUESTION: Or is it because -- for two reasons: because of the statute now enacted by the Mississippi legislature, and also because of the Runyon case decideed in this Court. If -- unless --

MR. COCHRAN: Well, apparently the amicus brief by

#638-9 the National Educational Association

QUESTION: Well, I'm

MR. COCHRAN: Yes. And if -- I don't think that this Court can really agree with the amicus presentation that because of Runyon there won't be any more private

segregated schools.

QUESTION: Well, no.

MR. COCHRAN: That, on itself -- on its face, I think, is highly improbable. But --

QUESTION: But certainly in Mississippi there is this statute, then, now in effect?

MR. COCHRAN: Certainly there is, and there's also one of the most outstanding United States District Court judges in the country, Judge Keady, who has now utilized his judicial power to approve this type of regulation, or First Amendment --

QUESTION: Well, he simply said it was permissible.

MR. COCHRAN: Yes, but that opinion can and will be cited for the basic proposition that as part of a court order desegregating a school it is permissible to utilize the judicial power to curtail the right of teachers within public schools to send their children to private, segregated schools, and you can't read that decision any other way.

QUESTION: Well, but it's permissible. And now --

MR. COCHRAN: Not permissible: the power is there.

QUESTION: Now the Mississippi legislature has said it's impermissible.

MR. COCHRAN: Yes, but this --

QUESTION: And that's the answer. It's not a constitutional matter the way I read it.

MR. COCHRAN: No, I would contend that now the school board's order, or the school board policy, is now a part of the United States District Court's decree to implement a unitary school system in Calhoun County.

QUESTION: You really have to stretch to say that. That wasn't his holding.

QUESTION: No.

QUESTION: Certainly my brother Stewart's analysis is what the holding in the case was. And you really have to stretch to give your construction to it, don't you agree?

MR. COCHRAN: Then let's look at it another way. Take Judge Keady's opinion, take the 5th Circuit opinion. These opinions can and will be read by other school boards and by other United States District Courts that this type of action is permissible vis a vis unitary school systems.

#661 It's not like Rice v. Sioux City where this burial will never reoccur again, and whether or not the state could discriminate against Indians. That was an isolated instance.

QUESTION: When was the Court of Appeals' decision?

MR. COCHRAN: The decision below?

QUESTION: Yes, sir.

MR. COCHRAN: Mr. Justice Marshall, I don't understand the question.

QUESTION: Well, I wonder how many states have followed it since then.

MR. COCHRAN: Since then? You mean as to --

QUESTION: Because you say everybody's going to follow it if we don't do something with it. I want to know how many have already followed it.

MR. COCHRAN: Well, I have not briefed the issue of whether or not this case should be --

QUESTION: Well, can you assume that if some others had you would have cited them?

MR. COCHRAN: In -- on my brief on the merits?

QUESTION: Or now?

MR. COCHRAN: Or now? No, well -- that would be going outside. But I can tell you that I -- that the Memphis School System and we received word indirectly through just talking --

QUESTION: No, I'm not talking about gossip. I'm talking about --

MR. COCHRAN: I know it.

QUESTION: -- action of school boards. Action.

MR. COCHRAN: No, I cannot cite you any other school boards doing it. But I think that if you --

QUESTION: Well, that's all we got before us, school boards.

MR. COCHRAN: But if you give me six months I think I would be able to cite you United States District Court opinions incorporating a Cook v. Hudson decree curtailing

the right of public school teachers --

QUESTION: Well, I don't know of any decision this Court can make which will stop District Courts from deciding cases.

MR. COCHRAN: No, your honor. I'm not asking that the District Court stop deciding cases. What we are here is to protect the First Amendment rights of public school teachers, and to let them -- to no impediments whatsoever, judicial or otherwise.

QUESTION: Well, I assume that Judge Keady incorporated this in his decree. The case might have come out differently in the 5th Circuit. Judge Coleman's opinion certainly does not sound in terms of -- that this was necessary and desireable for the Court to do. It sounds in terms of, this is within the discretion of the school board,if they want to do it, fine, if they don't want to do it, fine.

MR. COCHRAN: Citing Adler and United Public Workers v. Mitchell. I have a great deal of difficulty in reading Judge Coleman's opinion and trying to ascertain exactly what he means other than that the exercise of power by school boards is subject to no judicial review whatsoever. He starts out his opinion saying no substantial federal question is raised. And quite obviously, I have a great deal of difficulty with that opinion. And I also have quite -- a

great deal of difficulty with the problem of whether or not this case should be dismissed as improvident grant in light of Rice v. Sioux City. And I think this case has nationwide importance -- if not nationwide, in the South.

SP?

QUESTION: Well, is Judge Keady --

MR. COCHRAN: And it's not -- I'm sorry.

QUESTION: Would Judge Keady's view sustain a statute or a state statute saying that parents must -- all parents -- no parent may send his child to a segregated school?

MR. COCHRAN: Judge Keady, on page 39a, the petition for certiorari, the reprint of his opinion, specifically limits his decision to public school teachers sending their children to private, segregated academies.

QUESTION: Do you see any difference in principle?

MR. COCHRAN: In what way, Mr. Justice?

QUESTION: Between applying the rule to just teachers or to parents generally?

MR. COCHRAN: You're talking about parents generally can't send their children? Well, no. Under Runyon, you have a clear right as a parent to send your child to a private, segregated school.

QUESTION: Well, that wasn't a holding in the case.

MR. COCHRAN: No. But I'm talking about the introduction. Part of Runyon, where you reaffirm the right, but then you go into the right of the school under 1981 not

to admit qualified blacks. But there's a difference between the 1981 obligation on the part of the school versus the right of a parent to send his child to a private school to promote racial segregation. And these two rights are separate. You can't impute the school's violation of the law with the parents who exercise their right to send their children there.

QUESTION: So your answer is that Judge Keady would not -- as you read the opinion, he would not have sustained a law applying to parents generally?

MR. COCHRAN: Not with a close reading of Runyon and Pierce v. Society of Sisters. The constitutional precedent is square there. It's just this problem of teachers in public schools. And Mr. Justice Blackmun, I'd
#715 like to go back to this again, this reliance on Rice v. Sioux City. To me, Rice is not at all applicable. Frankfurter's opinion in that case is limited to the fact that it will not reoccur again, and it's of no importance because of the new statute. This is not the case in Cook v. Hudson. The important issue -- there are law review article written about it continually -- is not moot; it's a damage suit, back pay. And this issue is going to come back sooner or later. And it's not an improvident grant case.

QUESTION: Mr. Cochran, I wonder if you'd respond to the question that Mr. Justice Rehnquist asked your opponent about a public employee working on the far Eastern

desk being discharged for making a speech against the policy of the employer.

MR. COCHRAN: The entire thrust of this case is the absence of the standards and the facts that you find in Tinker and Pickering, substantial disturbance, a lowering of professional ability to work within the institutional environment -- the man cannot be fired. And that's what we're working with in this case here.

QUESTION: Would you concede that he could be fired if there had been evidence that children were distressed, or parents were distressed, about the inconsistencies between his job as a teacher --

MR. COCHRAN: In Cook v. Hudson?

QUESTION: In this very case, yes.

MR. COCHRAN: Yes. In Cook v. Hudson, you have a public school teacher who is sending his child to a private segregated academy, and if you can show a linkage between that act and a lowering of his professional competency in the classroom, that is, that this act of sending a child to a private, segregated academy has influence the black students in such a way that he's no longer an effective teacher, out he goes.

QUESTION: So the question really turns largely on our view of the particular facts of this case?

MR. COCHRAN: Well, I think the facts are clear. The

only fact in this record as to disturbance in the school, on 201 you get references that you would hear talk, you know, hard to pin down. On page 217 you get -- you would hear a parent say that his kid said such and such. On 212 -- this is Mallory, the school board president talking -- on 212 he said you would hear teachers talk. This is on direct examination. The only evidence is, you would hear talk. Mr. Farese, on cross-examination -- if you go to 227 and 228 -- he's talking to the school board president, asked the school board president on 227, do you know anybody in the county? Yes, I do. On 228 he says, then who are these people making complaints? Well, he's still not sure. And you read on you finally get to the Simpson kids. The only thing in that record is the Simpson kids complain. On 229, asked, do you know anybody else that complained? No. That's the only disturbance in the county.

QUESTION: Well, does your case come down, then, to contending that the two lower courts were wrong in construing that as sufficient evidence to show a threat to carrying out --

MR. COCHRAN: There are no facts in this record which meet Tinker and Pickering standards. If you want to find where the commotion comes, I suggest, Mr. Justice, that you look on page 392 --

QUESTION: But does your claim require us to re-examine the facts? That's basically what I'm --

MR. COCHRAN: Yes, it certainly does. And under Tinker you have full power to. If you look on 392, which
753 is a school board attorney's letter to the Justice Department. He says in there that we have written -- we have told the teachers that they will be terminated for sending their children to private segregated schools. And we have caused quite a commotion in the county. I think the school board is the group that cause the commotion in the county, not the teachers sending their children to private, segregated schools.

It's clear that the 5th Circuit has to be reversed on this case, and it should not be dismissed as improvident grant. It is not Rice v. Sioux City.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 11:39 o'clock, a.m., the case in the above-entitled matter was submitted.]

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