No. 695

IN THE

Supreme Court of the United States

October Term, 1967

CHARLES C. GREEN, ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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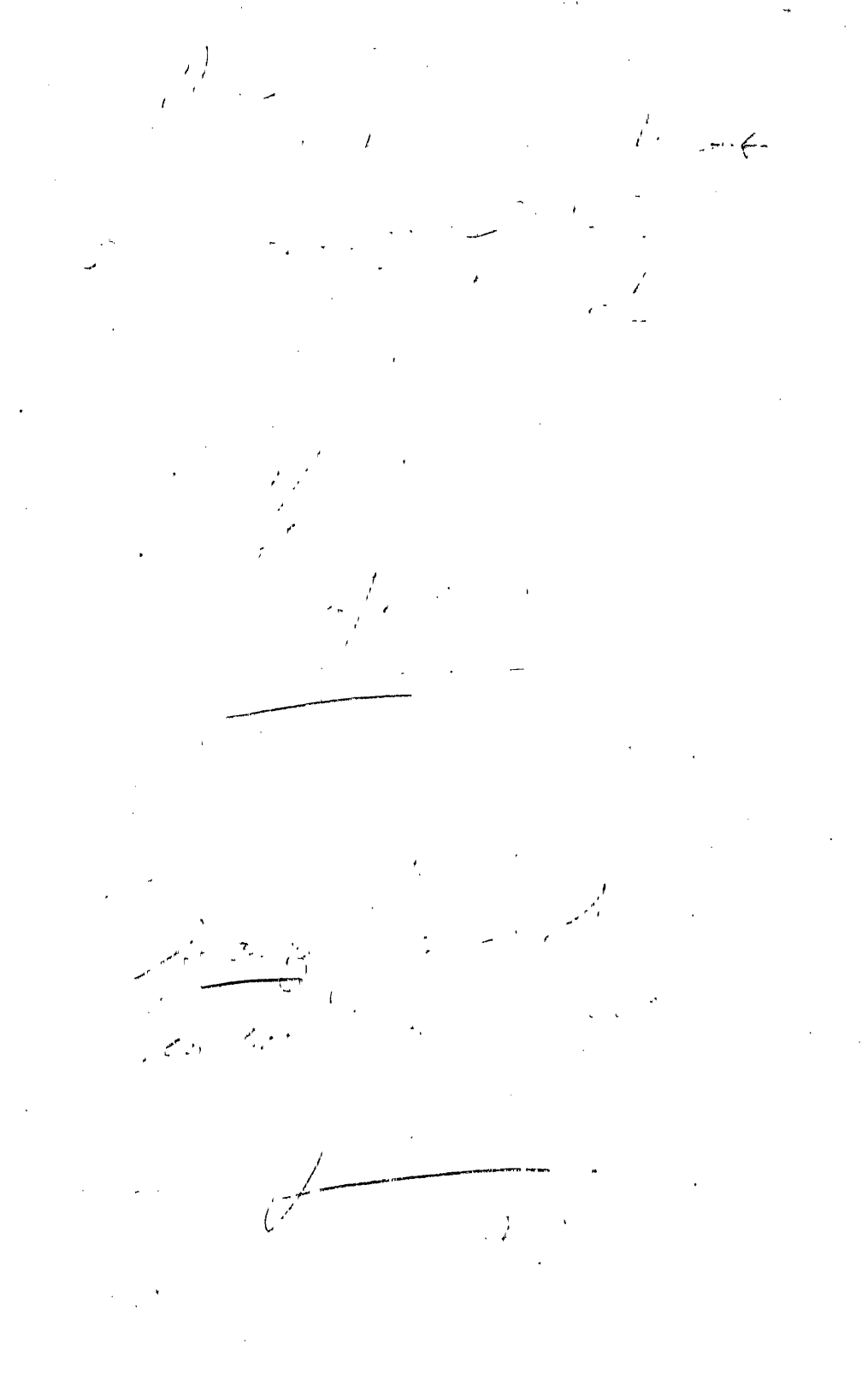

substantial deseg.

The county's atty, Frederick T. Gray of Chesterfield, said that under the freedom-of-choice plan, "students are given a privilege rarely enjoyed in the past--the opportunity to attend the school of their choice."

He added that "it was to fix just such right" that the Sup Ct handed down its school deseg decision of 1954.

New Kent, Va. Nov. 24 (AP)--New Kent County, in a brief filed w/ Scotus, has accused Negro plaintiffs of trying to pervert the rights granted Negro school children by the 1954 decision.

The Negro movement, the brief said, "which began to free the Negro from the inability to exercise a choice because of race, would now--for purely racial motives--deny him the choice."

The brief was in reply to a petition by the NAACP asking that New Kent's freedom-of-choice school deseg plan be declared unconstitutional.

The 4th Circuit has upheld the county's plan.

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QUESTION PRESENTED

Does a local school board offend the constitutional right of any of the petitioners when it administers its schools under a plan of operation by which each pupil, including each petitioner, each year attends the school of his choice and the petitioners admit that their annual right is unrestricted and unencumbered?

STATEMENT

On July 15, 1966 the United States District Court for the Eastern District of Virginia approved plans for the operation of the public schools in New Kent County, Virginia and Charles City County, Virginia. The Court of Appeals for the Fourth Circuit in *Bowman* v. *School Board of Charles City County, Virginia, No. 10793* and *Green* v. *School Board of New Kent County, Virginia, No. 10792,* reviewed the "freedom of choice" provisions of the two plans as they relate to pupil assignment and said

> "Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination."

As to the faculty provisions of the plan the Court said

> "Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.
>
> "These the District Court found acceptable under our decision in *Wheeler* v. *Durham City Board of Education,* 363 F. 2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the 'Indian school' and one Negro teacher had been assigned to a formerly all white school.
>
> "The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.
>
> "On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered

in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred, but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

"An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

"While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

"Quite recently, a panel of the Fifth Circuit Court of Appeals has required some progress in faculty integration for the school year 1967-68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967-68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical,

administrative and other problems, if any, remaining to be solved and overcome.

Remanded."

We respectfully submit that the Fourth Circuit's action was proper and, as the Court specifically noted, the remand of the case coupled with the District Court's retention of jurisdiction would have permitted the District Court to move expeditiously to determine what steps should be taken with respect to faculty and whether the freedom of choice plans were being administered in a proper manner. The remand would have permitted the record to be properly assembled and brought up to date rather than have the petitioners seek to bring to this Court statements and records not a part of the record below.

Thus, we submit, the only relevant facts before this court are the plans adopted by the school board which plans are set forth in the Appendix to the Petition pages 4a through 11a.

ARGUMENT

I

The Constitutionality of Freedom of Choice Plans Under the Brown Decisions

The petitioners apparently are having some difficulty finding their footing as they seek to establish the principle that a state or locality offends the constitutional right of someone if it provides that, "under a so-called freedom of choice plan of desegregation, students are given a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." (Petition, p. 13). Would it not be strange if the Constitution of the United States denies this

privilege? Prior to *Brown* it was denied in many areas. It was to establish just such right that *Brown* was brought and it was to fix just such right that *Brown* was decided.

Petitioners recognize difficulty in complaining of such privilege and thus seek on page 12 of the Petition to limit their attack so as not to urge the *per se* unconstitutionality of such plans but the operational unconstitutionality. It is at this juncture, we submit, that they concede the validity of the action of the District Court in approving the plan with the retention of jurisdiction in order that the operation of the plan could be observed and they also concede the wisdom of the Court of Appeals in remanding the case for the District Court to review and update the record and fashion proper remedial decrees.

The difficulty encountered by the petitioners is that while in Charles City and New Kent Counties a geographical plan of school zoning might result in a student body composition satisfactory to the advocates of compulsory integration a similar plan might not accomplish their goal in a different geographical context—thus in Hopewell, Virginia and Gary, Indiana they were not content with geographical plans.

It becomes apparent then that the sole point presented by the petition is whether or not the Brown decisions require compulsory integration in schools, although as a preliminary question one might inquire who it is that is aggrieved by the freedom of choice plan since each petitioner is free to choose—what petitioner is denied what constitutional right?

Unless the "freedom of choice" principle approved in *Bradley* v. *School Board of the City of Richmond,* 345 F. 2d 310, vacated and remanded on other grounds 382 U.S. 103 (1965) is now to be declared invalid the admission of the petitioners that there exists an "unrestricted choice" would

seem to bring the case squarely within the language of *Bradley*

> "A system of free transfers is an acceptable device for achieving legal desegregation of schools."

The Court of Appeals for the Fourth Circuit speaking further in *Bradley* said:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . .There is no hint (in *Brown*) of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal rights of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend."
>
> "Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . .The other means (in addition to geographic zoning) of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and,

> administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils."

Under the freedom of choice plan involved here a 15 day choice period is provided, all activities of the schools are covered, transportation is without regard to race and no person may be subjected to penalty or favor because of the choice made.

No real attack was made upon the operation of the plan in the courts below. The only attack made was upon the principle of free choice. The movement which began to free the Negro from the inability to exercise a choice because of race would now—for purely racial motives—deny him the choice. The Petitioners say in effect there can be no free choice—there must be intermixture. The desire of parents must fall before the desire of those who would require "immediate total desegregation."

In spite of the fact that every Petitioner in this law suit admits the existence of an "unrestricted choice" they would have the Court *force* others to do what they are *free* to do already.

It is difficult to envision this as a bona fide action if the parents are merely asking the Court to do for others that which they can do by a mere application to the School Board. This argument flys in the teeth of the very type relief which was originally asked in the school cases. For example, it was argued before this Court in the District of Columbia case on April 11, 1955:

> "Now, it would seem to me that this also could be of assistance to the Court in dealing with the question if, in a situation where the Court has as wide a supervisory power as in this, the Court directed the courts

below here to enter a decree which is in effect, Mr. Justice Frankfurter, this judgment reversed and cause remanded to the District Court for proceedings not inconsistent with this Court's opinion, and entry of a decree containing the following provisions:

"(1) All provisions of District of Columbia Code or other legislative enactments, rules or regulations, requiring, directing or permitting defendants to administer public schools in the District of Columbia on the basis of race or color, or denying the admission or petitioners or other Negroes similarly situated to the schools of their choice within the limits set by normal geographic school districting on the basis of race or color are unconstitutional and of no force or effect;

"(2) Defendants, their agents, employees, servants and all other persons acting under their direction and supervision, are forthwith ordered to cease imposing distinctions based on race or color in the administration of the public schools of the District of Columbia; and are directed that each child eligible for public school attendance in the District of Columbia be admitted to the school of his choice not later than September, 1955 within the limits set by normal geographic school districting;

"(3) The District Court is to retain jurisdiction to make whatever further orders it deems appropriate to carry out the foregoing;"*

We shall point out later herein that the Court embodied that free choice principle in its whole reasoning.

In *Brown* v. *Board of Education,* 347 U.S. 483 after holding that there is doubt that the Fourteenth Amendment was intended to apply to public education at all but that

* See Page 75, Vol. I Transcript in Supreme Court of the United States, April 11, 1955, Bolling v. Sharpe, 347 U.S. 497.

under today's conditions it must be applied, the Court reached the heart of its reasoning:

> "In *Sweatt* v. *Painter* (U.S.) supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637, 94 L. ed. 1149, 70 S. Ct. 851, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'
>
> "Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson,* this

> finding is amply supported by modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected."

So it was legally enforced segregation which the Court struck down—*not freedom of choice.* Indeed the Court answers our question vividly in the fourth of five questions which it had propounded for counsel to reargue. It asked for still further argument on question 4 which was:

> "4 Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be *admitted to schools of their choice,* or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?" (Emphasis added)

Clearly all that concerned the Court was shall *free choice* be granted *now* or can there be a *gradual adjustment*—? Gradual adjustment to what? A school with racial balance? No!—"to a system not based on color distinctions." Indeed the Court invited freedom of choice by the very nature of the relief it was considering.

When one considers that the Court had difficulty determining that the 14th Amendment forbade compulsory segregation—it is hard to understand how the Petitioners so easily find that it forbids free choice!

In attempting to understand the law as it has developed in public school field, it is important to define the term "segregation" and the term "desegregation." Petitioners use

the term "segregation" as though it means any situation in which all pupils in a particular school are of one race. They apparently contend that even so defined segregation is unconstitutional. If that be true it is unconstitutional for Colonial Heights, Virginia, to engage in public education at all for its entire population is white. Obviously then, a wholly white or a wholly colored school does not necessarily violate the Constitution. The missing ingredient is someone who is denied admission—someone who is *discriminated* against. Thus we come to the meaning of the term just as Webster defines it.

In Webster's New Collegiate Dictionary the terms *segregate* and *segregation* are defined as follows:

> *segregate*—Set apart; separate; select. To separate or cut off from others or from the general mass; to isolate; seclude.
>
> *segregation*—Act of segregating or state of being segregated; separation from a general mass or main body; specif., isolation or seclusion of a particular group of persons.

We submit that when the State stops acting, segregation no longer exists: for segregation is the result of action—a setting apart, separation or selection.

Desegregate is defined in that same work as follows:

> *desegregate*—To free (itself) of any law, provision, or practice requiring isolation of the members of a particular race in separate units, esp. in military service or in education.

Under that definition our schools are desegregated!

On remand to the District Court the original *Brown* case resulted in the following statement by that Court:

"Desegregation does not mean that there must be an intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color." 139 Fed. Supp. 470)

Surely freedom of choice is constitutionally acceptable.

II

The Decisions of the Various Circuits Do Not Require Action by This Court

Having reviewed the decision of the Court of Appeals for the Fourth Circuit we would point out that the decisions of other Circuits are not inconsistent.

In *Clark* v. *Board of Education of Little Rock,* 369 F. 2d 661 rehearing denied 374 F. 2d 569 (1967) the Court of Appeals for the Eight Circuit reached the same conclusion. The Tenth Circuit in *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (1964) cert. den. 380 U.S. 914 held that "although the Fourteenth Amendment prohibits segregation, it does not command integration of the races * * *." So, too, with the First Circuit in *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1965) and the Seventh Circuit in *Bell* v. *School, etc., City of Gary,* 324 F. 2d 209, (1963) cert. den. 377 U.S. 924 (1964).

The decision of the Fifth Circuit in *Jefferson County Board of Education,* 372 F. 2d 836 (1966) is not in conflict. There the decision was based upon local resistence and the Court admitted that it had not had to deal with "non-racially motivated de facto segregation." Clearly that decision would not declare unconstitutional a *fairly administered* freedom of choice plan.

CONCLUSION

We respectfully submit that the record racial unrest which has swept this country dictates that the proper course of action in these cases is to permit or require the States and localities to shape and operate non-discriminatory plans under the guidance of the District Court. It certainly does not indicate that a concept should be outlawed which is gaining orderly acceptance, is totally non-discriminatory, is resulting in markedly increased integration and is giving "a privilege rarely enjoyed in the past—the opportunity to attend the school of their choice." (Petition, p. 13.)

Respectfully submitted,

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Appeals Court Reviews 2 Desegregation Cases

By Ellen Hoffman
Washington Post Staff Writer

RICHMOND, Jan. 9—Two school desegregation cases argued before the Fourth U.S. Circuit Court of Appeals today may have far-reaching implications for the pace of school desegregation in Virginia and other states under the court's jurisdiction.

The cases, involving New Kent and Charles City Counties, could provide the first opportunity for a second court to affirm the Fifth U.S. Circuit Court of Appeals' Dec. 29 decision to uphold HEW desegregation guidelines and replace "tokenism" with effective desegregation.

The Fifth Circuit decision, handed down in New Orleans, said that "the only desegregation plan that meets constitutional standards is one that works. It implied that freedom-of-choice plans would no longer be acceptable to the courts unless they showed evidence of progress toward desegregation.

Both cases heard today involve small school systems operating under freedom-of-choice plans and opposed by the NAACP.

The NAACP brief in the New Kent County case explains that white children are bused from all over the County to attend New Kent high and elementary school, while all Negro children attend George W. Watkins school.

It calls for replacement of the freedom-of-choice plan with two geographical zones that would result in desegregation of both schools.

The Charles City County case revolves around the issue of faculty desegregation. The NAACP charges that three separate school systems—one each for whites, Negroes and Indians—are operated by the County.

NAACP attorney S. W. Turner argued that in Charles City County "the reluctance of individual teachers to transfer to a school staffed with teachers of the opposite race should not absolve the school board of responsibility for integrating the faculties in County schools.

He contended that without faculty desegregation, children are not truly given freedom of choice because of their alternatives are between segregated Negro and white schools.

Frederick T. Gray, counsel for the school boards, urged the court to defer its decision until the Counties have time to put their freedom-of-choice plans into effect.

He argued that the 1954 Supreme Court decision on school desegregation left it up to school boards to find the "best way" to integrate, and that integration had been delayed in New Kent and Charles City because of "the practical problems faced by the people who are operating the schools . . ."

The Dec. 29 New Orleans decision affected only the States in the Fifth Circuit. A decision by the Richmond court would affect school desegregation in Virginia, Maryland, West Virginia and North and South Carolina.

In Washington today, the Supreme Court refused to hear an appeal on a ruling by the Richmond court that cleared the way for a Negro school teacher, active in civil rights, to regain her job in a North Carolina school and collect damages.

NAACP Plans Appeal On Va. School Cases

Post 7/5/67

The NAACP Legal Defense Fund will appeal to the Supreme Court two Virginia school desegregation cases decided by the U.S. Fourth Circuit Court of Appeals in Richmond earlier this month.

Henry L. Marsh III, a Richmond lawyer who argued the cases, said this week that the Fourth Circuit decision will have little impact when school opens in the fall. Civil rights leaders had hoped for an opinion that would force a showdown on school desegregation in Virginia and other states in the circuit, which includes the Carolinas, West Virginia and Maryland.

The New Kent and Charles City County cases revolve around two issues: "freedom of choice" plans and faculty desegregation. Under "freedom of choice," one of the methods of desegregation provided for in Federal guidelines, a child's parents may enroll him in the school of their choice. This method has been criticized because intimidation often restricts the choice.

The Court heard the cases last January, shortly after the U.S. Fifth Circuit Court of Appeals in New Orleans handed down a strongly worded decision upholding the Federal school desegregation guidelines. Civil rights leaders hoped the Fifth Circuit decision, which called for an end to "tokenism and delay" in desegregation, would set a precedent for decisions in other circuits.

In the single opinion released to cover cases in the two Southside Virginia counties, the Court found no restriction in the operation of "freedom of choice" in the districts.

Chief Judge Clement F. Haynsworth wrote in the decision that faculty desegregation plans submitted by the school boards would be an "affirmative step" toward integration. He said that "involuntary reassignment of teachers to achieve racial blending of faculties . . . is not a present requirement."

Although he concurred in the opinion, the other judge, Simon E. Sobeloff, said that it does not go as far as the Fifth Circuit decision. Calling the opinion a "bland discussion," he spoke of what he called the "stark inadequacy" of the faculty desegregation plans submitted by the two counties.

Sobeloff noted that in New Kent County, where there are two schools, Negroes and whites are bused across the County to attend segregated schools under a "freedom of choice" plan. In Charles City County, Sobeloff wrote, the School Board operates separate schools for Negroes, whites and Indians.