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IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1939

EN BANC

JOHN GILBERT,

Plaintiff in Error

-vs.-

L. R. HIGHFILL, et al, as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,

Defendants in Error

I, GUYTE P. McCORD, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing pages numbered One (1) to ________ inclusive, constitute a true copy of the transcript of record of the pleadings and all of the proceedings had in the Supreme Court of Florida in that certain cause wherein John Gilbert was plaintiff in error and L. R. Highfill, et al,, as the School Board; and Damon Hutzler, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, were defendants in error, on writ of error from the Supreme Court of Florida to the Circuit Court in and for Brevard County, Florida, and a true and correct copy of the transcript of the proceedings and pleadings filed in the Supreme Court of Florida by solicitors for plaintiffs in error to perfect their appeal from the Supreme Court of Florida to the Supreme Court of the United States; as all of said pleadings appear on file in my office as Clerk of the Supreme Court of Florida.

WITNESS my hand and the seal of the Supreme Court of Florida at Tallahassee, Florida, the Capital of the State, this 4th day of December, A. D. 1939.

Clerk of the Supreme Court
of Florida

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE SUPREME COURT OF FLORIDA

JUNE TERM A.D. 1939

JOHN GILBERT,
Plaintiff in Error,

-vs-

L. R. HIGHFILL, et al, as the School Board; and DAMON HUTTLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,
Defendants in Error.

PRAECIPE FOR TRANSCRIPT OF RECORD

The Clerk of the above styled Court will please prepare for us as counsel for plaintiff in error herein, the following papers to-wit:

1. Copy the transcript of the record filed herein in the Supreme Court of Florida on September 26, 1938.
2. Copy Opinion of the Supreme Court filed July 25, 1939.
3. Copy petition for rehearing filed herein.
4. Copy Denial of petition for rehearing, filed September 13, 1939.
5. Copy these Directions.

McGILL & McGILL

By S. D. McGill
Attorneys for Plaintiffs in Erro

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IN THE SUPREME COURT OF FLORIDA,

JUNE TERM A. D. 1939

WEDNESDAY, SEPTEMBER 13, 1939

JOHN GILBERT,	**	
Plaintiff in Error,	**	
-vs-	**	
L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,	** ** **	BREVARD COUNTY
Defendants in Error	**	
	**	

Counsel for Plaintiff in Error having filed in this Court a Petition for Rehearing and same having been duly considered; it is ordered by the Court that the said Petition be and the same is hereby denied.

A true Copy,

Test: (SEAL)

Guyte P. McCord

Clerk Supreme Court of Florida

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A.D. 1939.

JOHN GILBERT, Plaintiff in Error v. L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, Defendants in Error	BREVARD COUNTY

PETITION FOR REHEARING

COMES NOW the petitioner in the above entitled cause by his undersigned attorneys, and moves the Court to reconsider the transcript of the record in this cause now before the Court on writ of error, taken to this court, to ascertain if anything contained in said transcript was overlooked by the court or not fully considered, in view of the importance of the legal question involved in this cause, and to vacate and set aside the judgment heretofore entered in this cause upon the following grounds to-wit:

1. Because this court recognizes the principle of law urged by petitioner on the question of discrimination and the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, yet it denies that a discrimination against the petitioner and others of his race has been made to appear in this case. Paragraph IX of the petition follows:

> "The differentials in said salary schedule in the payment of teachers' salaries and the payment to petitioner and others of his race, of salaries less than those paid to white teachers with identical

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qualifications, experience and performing essentially the same duties, are <u>based solely on the ground of the race or color of petitioner and the</u> establishment and enforcement of the said salary schedule is unlawful and arbitrary and in violation of the Constitution and Laws of the State of Florida, and denies to petitioner and others of his race the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

It would appear that the allegations of fact in this paragraph like the other paragraphs of this petition, have been admitted or rather must be admitted for the purpose of this case. We are aware that racial discrimination such as is urged here must be proved or admitted and in this case, although it was not proved, it was admitted, there being no appearance and the Court based its judgment, denying the petitioner's relief, upon the petition alone. We have shown that the statutory provisions of this state and the constitution of the same, under which the Board of Public Instruction employs teachers of the public schools, do not discriminate against persons on account of their race or color and they do not authorize the Board of Public Instruction to make the discrimination in payment of salaries that they do. The statutes and constitution under which they act are valid but the question insisted upon here is that the action of respondent in making these differentials in the payment of salaries, based solely upon race or color, is in violation of the Constitution of the United States and the discrimination shown by this record is not to be found in the statutes but it is an actual discrimination nevertheless, by state officers and in such cases the discrimination is as much in violation of the Fourteenth Amendment as if it were written in the statutes.

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> "....Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not persumed. It must be proved or admitted...."
>
> Tarrence v. Fla., 188 U.S. 520, 23 S. Ct. 402
> 47 L. Ed. 572 (1902).

WHEREFORE, your petitioner moves this Honorable Court to reconsider its judgment herein, affirming the judgment of the court below in this cause, and to vacate the same as provided by law.

AND YOUR PETITIONER WILL EVER PRAY.

S. D. McGILL

McGILL & McGILL

THURGOOD MARSHALL

WILLIAM H. HARWICK

By S. D. McGill
Attorneys for Plaintiff in Error

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IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1939

EN BANC

JOHN GILBERT,

Plaintiff in Error

v.

L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,

Defendants in Error

BREVARD COUNTY

Opinion filed July 25, 1939

A Writ of Error from the Circuit Court for Brevard County, H. B. Smith, Judge.

S. D. McGill, McGill and Mc-Gill, Thurgood Marshall, William H. Harwick and Wm. S. Robinson, for Plaintiff in Error;

Leonard B. Newman, for Defendants in Error.

CHAPMAN, J.

On the 24th day of May, 1938, relator filed in the Circuit Court of Brevard County, Florida, his petition for an alternative writ of mandamus directed to the Board of Public Instruction and the Superintendent of Public Instruction of Brevard County, Florida. It was made to appear thereby that the petitioner was a qualified teacher and a member of the colored race and for eleven years had taught in the public schools of said county and at the time of filing the petition was teaching under a second grade certificate as principal of the Cocoa Junior High School, a colored school, and was supported by taxation. It was alleged that the respondents had adopted and were enforcing a schedule of salaries paid to teachers in Brevard County whereby negro teachers received a basic salary of $20.00; each unit value $2.00, minimum $50.00, and that white teachers received a basic salary of $50.00; each unit value $3.00, minimum $100.00, and that these differentials are based solely on

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race and color. A copy of the purported salary schedules of Brevard County is attached to and by appropriate language made a part of the petition.

The prayer of the petition is, viz:

"Wherefore, your relator prays, that a writ of mandamus issue to Damon Hutzler, Secretary of said Board and Superintendent of Public Instruction of Brevard County, Florida; L. R. Highfill, J. D. Pepper and W. J. Creel as members of the Board of Public Instruction of Brevard County, Florida, at their office in Titusville, Florida, requiring the said respondents to adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination on account of color of teacher or as to school taught and further, ordering and requiring such other and further relief and protection to relator in the premises as justice may require."

An Order was entered by the lower court denying the application for an alternative writ of manadamus and made certain recitals in the order which are pertinent and material to a decision of the case at bar. The order recites:

"This cause came on to be heard upon application of petitioner for alternative writ of mandamus in which the petitioner seeks to compel the respondent School Board "To adopt and establish salary schedules in Brevard County, Florida, without distinction or discrimination ---". The statute under which teachers are employed by the Board, directs the Board 'To employ teachers for every school in the county and to contract with and pay the same for their services---" The constitution provides that the Board shall establish and maintain 'A uniform system of public instruction---'. I do not find any law which requires the Board "To establish salary schedules'. The statute seems to contemplate individual contracts with teachers, and the constitutional provision for uniformity provides for the accomplishment of a result and not the details of the means by which the same shall be accomplished. It is, therefore; ORDERED, ADJUGED AND DECREED, That said application for Alternative writ be, and the same is, hereby denied."

From the order denying the alternative writ of mandamus a writ of error was taken and the denial thereof is assigned as error in this Court.

Section 1 of Article XII of the Constitution of Florida makes it a duty of the Legislature of Florida to provide for a uniform system of public free schools and to provide for the liberal maintenance of the same. Section 12 of Article XII of the Consti-

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tution provides that white and colored children shall not be taught in the same school but impartial provisions shall be made for both.

Section 493 C. G. L. provides for the establishment and maintenance of a uniform system of public instruction free to all youths residing in Florida between the ages of six and twenty-one years. The Board of Public Instruction of each County of Florida are charged with many constitutional and statutory duties. Sub-section 6 of Section 561 C.G.L. not only directs but makes it a duty of the Board to employ teachers for every school in the county and to contract with and pay the same for their services. It will be observed that the law does not fix the monthly sums to be paid teachers but makes it a duty of the Board to contract with and pay teachers. The amount to be paid by teachers is left to the business judgment and sound discretion of the members of the Board. It is reasonable to assume that some teachers are better prepared by education and otherwise qualified to teach than others and for this and other reasons the Legislature clothed members constituting the Boards of Public Instruction with broad powers so as to enable them to contract with the very best teachers obtainable for the funds at their disposal. It would be absurd to say that teachers of certain qualifications should receive the same monthly payments for services rendered when the members of a Board are acquainted or familiar with the preparation, scholastic attainments, natural talents and many of the different and material characteristics making the qualifications of a teacher, and these attributes are considered when entering into contracts with teachers and stipulating for their monthly payments.

We have not been supplied with citation of authorities to the effect that the Board of Public Instruction of Brevard County had the constitutional or statutory power or authority to adopt the salary schedule made a part of the petition. This Court has no power in a mandamus proceeding to control the discretionary authority conferred by statute on the respondents here. It is

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the duty of the relator to show that he has a clear legal right to the performance by the respondents of the particular duty in question. See State v. Florida East Coast R. Co., 69 Fla. 165, 67 So. 906; Merchants' Broom Co. v. Butler, 70 Fla. 397, 70 So. 383; Leatherman v. Schwab, 98 Fla. 885, 124 So. 459; State v. Greer, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298; Welch v. State, 85 Fla. 264, 95 So. 751; Myers v. State, 81 Fla. 32, 87 So. 80; Johns v. County Com'rs., 28 Fla. 626, 10 So. 96; Davis v. Crawford, 96 Fla. 438, 116 So. 41; State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L.R.A. (N.S.) 320, 12 Ann. Cas. 359; State v. Amos. 100 Fla. 1335, 131 So. 122.

We fully agree with counsel for relator and the authorities cited in their brief on the question of discrimination and an equal protection of the law as guaranteed by the 14th Amendment to the Constitution of the United States. We do not think that either of these questions is presented by this record.

This proceeding is in mandamus, and the specific relief sought should be prayed for and the prayer must be supported by allegations legally sufficient to show that the particular Act sought to be enforced is a legal duty of the respondents, and that the relator has no other remedy and has a right to require the legal duty as alleged, to be enforced by mandamus.

If it is the duty of respondents to "adopt and establish salary schedules," such duty involves administrative discretion to be legally performed; and if the duty be illegally performed of record, the cancellation of such record may be enforced in appropriate judicial proceedings.

Even if it were sufficiently alleged that it is a legal duty of respondents to "adopt and establish salary schedules for teachers in Brevard County, Florida", which relator had a right to enforce, and that he had no other remedy than mandamus, it is not prayed that respondents be required to cancel and annul the alleged present schedule on the ground of alleged illegality.

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Careful consideration has been given to the record, briefs and authorities cited by counsel for the respective parties, and after hearing oral argument at the bar of this court, we are of the opinion that no errors appear in the record and the order appealed from should be and is hereby affirmed.

TERRELL, C.J., and WHITFIELD, BROWN, BUFORD AND THOMAS JJ., concur.

(C O P Y)

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR THE COUNTY OF BREVARD.
IN CHANCERY,

JOHN GILBERT,
Plaintiff,

VS.

L. R. HIGHFILL, et al,
SCHOOL BOARD,
Respondent.

ORDER OF COURT

This cause came on to be heard upon application of petitioner for Alternative Writ of Mandamus in which the petitioner seeks to compell the respondent School Board "To adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination - -". The statute under which teachers are employed by the Board, directs the Board "To employ teachers for every school in the county and to contract with and pay the same for their services - -". The constitution provides that the Board shall establish and maintain "A uniform system of public instruction -". I do not find any law which requires the Board "To establish salary schedules". The statute seems to contemplate individual contracts with teachers, and the constitutional provision for uniformity provides for the accomplishment of a result and not the details of the means by which the same shall be accomplished. It is, therefore:

ORDERED, ADJUDGED AND DECREED, That said application for Alternative Writ be, and the same is, hereby denied.

IT IS FURTHER ORDERED, That said petition be, and the same is, hereby dismissed.

DONE AND ORDERED, in Chambers at Titusville, Brevard County, Florida, this the 13th day of June, A.D. 1938.

M. B. SMITH
CIRCUIT JUDGE

The above order, together with petition, filed with the clerk this day.

M. B. Smith.

Judge.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR WRIT OF MANDAMUS

The petition of the State of Florida, upon the relation of John Gilbert, a teacher in the Public Schools of Brevard County, Florida, complains of L. R. Highfill, J. D. Pepper and W. J. Creel, as members of the Board of Public Instruction of Brevard County, and Damon Hutzler, Secretary of said Board and County Superintendent of Public Instruction of said County, the respondents, and the relator avers:

I.

That he is a resident of Brevard County, Florida, and over twenty-one years of age, a citizen of the United States and of the State of Florida, and a member of the Negro race; that he is a teacher in Brevard County, Florida, acting as principal of a ten teacher school (including relator) known as the Cocoa Junior High School, a colored public school maintained and operated by the Board of Public Instruction of Brevard County, Florida. Relator is a graduate of the Florida Memorial College for Negroes at Live Oak, Florida; has one year's college work to his credit at the Florida A & M College for Negroes at Tallahassee, Florida, and holds a second grade teachers' certificate issued to him by the State Department of Education of the State of Florida, and is in his eleventh year in teaching experience in the State of Florida.

II.

Your petitioner further represents that L. R. Highfill, J. D. Pepper and W. J. Creel are members of the Board of Public Instruction of Brevard County, Florida, and Damon Hutzler is Secretary of said Board and County Superintendent of Public Instruction of Brevard County, Florida. All of the above named parties held their respective offices at all times herein mentioned and are

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sued herein in their official capacities of the County Board of Public Instruction in and for Brevard County, Florida.

III.

The above named members of the County School Board of Public Instruction of Brevard County, Florida, and the County Superintendent, who is Secretary of said Board, were elected pursuant to the laws of the State of Florida, having supervision over the Bervard County Public Schools and the teachers of said schools, including the Cocoa Colored Junior High School and the teachers therein. The Board of Public Instruction of Brevard County, Florida, was created and exists pursuant to the laws of the State of Florida as an administrative department of the state and the members of said board were elected by the citizens of Brevard County, Florida.

IV.

The Board of Public Instruction of Brevard County, Florida, is directed, authorized, empowered and required by law, to maintain a uniform and effective system of free public schools for white and colored children who shall not be taught in the same school but impartial provisions shall be made for both. The said Board of Public Instruction has established two systems of public schools for white and colored children. All white children are required to attend schools taught by white teachers and all negro children are required to attend schools taught by negro teachers. The Florida Constitution provides that the county school funds shall be disbursed by the County School Board of Public Instruction of Brevard County, Florida, solely for the maintenance and support of public free schools. (Section 9, Article 12). The Board of Public Instruction of Brevard County, Florida, is directed and empowered to employ teachers for every school in the county and to contract with and pay the same for their services.

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V.

At all times herein mentioned it was and is the duty of the respondent Board of Public Instruction of Brevard County, Florida, to adopt scales of salaries for teachers in the public schools of Brevard County and to fix the salaries of said teachers; the said Board of Public Instruction adopted and instituted and is now enforcing a salary schedule for teachers in said county, copy of which schedule is filed herewith and marked Petitioner's Exhibit "A", and prayed to be read as a part hereof as though set out in full; petitioner and all other negro teachers in Brevard County are paid pursuant to that section of said salary schedule designated:

> "Negro teachers' Basic Salary $20.00; each unit value $2.00, minimum $50.00......"

while all white teachers are paid pursuant to the schedule designated:

> "White teachers' Basic Salary $50.00; each unit value $3.00, minimum $100.00....."

VI.

The said salary schedule provides a higher scale of salary for white teachers than for colored teachers with like qualifications and experience and performing essentially the same duties. The said differentials are based solely on the ground of race or color.

VII.

The Cocoa Junior High School is a ten (10) teacher school (including relator) maintained by the respondents for the education of negroes. All teachers in said school are negroes. Petitioner is acting as principal of the said school. He holds a second grade certificate issued by the Board of Education of the State of Florida and has been continuously employed as an elementary and Junior High School teacher in the public schools of the State of Florida since 1926, and thus, according to the method of evaluating teaching experience, in the State and in Brevard County, he is in the eleventh year in experience. He has been a regular teacher in the Brevard County Public Schools since 1926.

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VIII.

Pursuant to the aforementioned salary schedule, petitioner now receives Four Hundred Fifty ($450.00) Dollars in nine (9) equal instalments, payable monthly as a teacher, being the amount set out in said schedule for teachers in the colored schools holding a second grade certificate and in the eleventh year in experience. Petitioner receives, in addition to the amount allowed by said salary schedule, Two Hundred Eighty-eight ($288.00) Dollars per year, payable in nine (9) monthly instalments for his work as principal in said school. The said schedule provides for Nine Hundred ($900.00) Dollars per year payable in nine (9) monthly instalments for white teachers with second grade certificates in the eleventh year in experience and performing essentially the same duties as a teacher as the petitioner performs.

IX.

The differentials in the said salary schedule in the payment of teachers' salaries and the payment to petitioner and others of his race, of salaries less than those paid to white teachers with identical qualifications, experience and performing essentially the same duties, are based solely on the ground of the race or color of petitioner and the establishment and enforcement of the said salary schedule is unlawful and arbitrary and in violation of the Constitution and laws of the State of Florida, and denies to petitioner and others of his race the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

X.

Petitioner, by petition filed with the Board of Public Instruction of Brevard County on December 6, 1937, requested the said Board of Public Instruction to adopt and enforce a salary schedule providing for equal pay to all teachers with the same qualifications and experience and without any distinction being made as to race or color of teacher or school.

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XI.

The said Board of Public Instruction refused to consider said petition and thereby refused and continues to refuse to adopt a new salary schedule providing equal pay for teachers, without discrimination or distinction as to race or color of teacher or school; the said Board of Public Instruction is still enforcing the discriminatory schedule set out and referred to above; petitioner has exhausted all administrative remedies.

XII.

Unless this Honorable Court, by its Writ of Mandamus, shall secure, preserve and enforce the rights of petitioner in the premises, he will suffer irreparable injury and will be without redress or remedy.

WHEREFORE your relator prays that a writ of mandamus issue to Damon Hutzler, Secretary of said Board and Superintendent of Public Instruction of Brevard County, Florida; L. R. Highfill, J. D. Pepper and W. J. Creel as members of the Board of Public Instruction of Brevard County, Florida, at their offices in Titusville, Florida, requiring the said respondents to adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination on account of race or color of teacher or as to school taught and further, ordering and requiring such other and futther relief and protection to relator in the premises as justice may require.

____
Petitioner.

____

____
Attorneys for Petitioner.

STATE OF FLORIDA)
: SS
COUNTY OF DUVAL)

I HEREBY CERTIFY that on the 31st day of March, A.D. 1938, before me the subscriber, a Notary Public for the State of Florida at Large, personally appeared the above named JOHN GILBERT and made oath in due form of law and further says that he has read and understands the above and foregoing petition and that the allegations therein set forth are true.

Notary Public State of Florida at Large
My Commission Expires August [illegible], 1941.

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BREVARD COUNTY TEACHERS SALARY SCHEDULE

White Teachers: Basic Salary $50.00
Each Unit Value $3.00 - Minimum $100.00

Negro Teachers: Basic Salary $20.00
Each Unit Value $2.00 - Minimum $50.00

Education Units

4 Year High School	5
1 Year College	6
2 Years College	7
3 Years College	8
4 Years College	9
Master's Degree	11

Experience

1 Year	1
2 Years	2
3 Years	3
4 Years	4
5 Years	5
6 Years	6
All over 6 years	6

Certification Units

Third Grade	2
Second Grade	3
First Grade	4
Life 1st Grade	5
Primary	6
Life Primary	7
Special	8
Life Special	9
Graduate State - 2 Yrs.	8
Life Graduate State - 2 years	9
Graduate State - 4 Yrs.	11
Life Graduate State - 4 years	12

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BREVARD COUNTY TEACHERS' SALARY SCHEDULE

White teachers: Basic salary $50.00 Each unit value $3.00-Minimum $100.00
Negro teachers: Basic salary $20.00 Each unit value $2.00-Minimum $ 50.00

Name of teacher_______________________________

In case you hold a higher certificate than listed below, send it to me at once. If you have additional work in college, please have your college send me the credits. In case teachers do not have a Normal Diploma, or 4 year degree, 32 semester hours is equal to 1 year college work, provided you file in this office, such credits from institution rated as standard, by a national or regional accrediting agency. Credit can not be accepted unless filed in this office, direct from College. To secure credit for more than 4 years college work, you must have master degree.

Education	Units	Certification	
4 years high school	5	3rd grade	2
1 year college	6	2nd grade	3
2 year college	7	1st grade	4
3 year college	8	Life 1st grade	5
4 year college	9	Primary	6
Master Degree	11	Life Primary	7
Experience		Special	8
1 year	1	Life Special	9
2 years	2	Graduate State, 2 yrs.	8
3 years	3	Life Graduate State, 2 yrs.	9
4 years	4	Graduate State, 4 yrs.	11
5 years	5	Life Graduate State, 4 yrs.	12
6 years	6		
All over 6 years	6	Total Units ________	
		Salary $________	

Name of Summer School Last Attended_______________________________

Date Attended_______________ Credits Earned__________ Credits must be submitted by official of school attended.

Mail contract to _______________________________

____

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File
Teachers Salary C.
Brevard County
Fla

PETITION OF JOHN GILBERT, PRINCIPAL
OF THE COCOA JUNIOR HIGH SCHOOL, COCOA, FLORIDA.

TO THE HONORABLES DAMON HUTZLER, L. R. HIGHFILL, J. D. PEPPER AND W. J. CREEL, composing the Board of Education for Brevard County, Florida:

JOHN GILBERT files this petition with your Honorable Board and thereupon respectfully shows:

1. That he is a teacher in Brevard County, Florida, acting as principal of a ten (10) teacher school known as the Cocoa Junior High School, a public school maintained and operated by the Board of Education of Brevard County, Florida.

2. Your petitioner says that he is a graduate of the Florida Memorial College for Negroes at Live Oak, Florida, with one year's college work at Florida A & M College, and holds a second grade certificate issued to him by the State Board of Education of the State of Florida.

3. Your petitioner has been employed as an elementary teacher in the public schools of the State of Florida continuously for more than eleven years and therefore, according to the method of your Honorable Board of evaluating teachers' experience in Brevard County, Florida, he is in the eleventh year in experience.

4. Your petitioner further showeth to your Honorable Board that he and other colored teachers and principals in Brevard County are paid salaries pursuant to the salary schedule adopted and enforced by the Board of Education of Brevard, County, Florida, a copy of which said schedule is attached hereto and prayed to be read as a part of this petition.

Your petitioner and all other teachers of the colored race teaching in colored public schools in Brevard County are paid pursuant to that section of said salary schedule marked "basic salaries for negro teachers." The remaining portion of the said schedule is for white teachers and will be referred to hereafter as the "basic salary for white teachers."

5. That pursuant to the aforesaid schedule your petitioner received a salary for the year 1935-1936 of $82.50 per month for eight months and in 1936-37 a salary of $85.00 per month for eight months and that he now receives a salary of Seven Hundred Thirty Eight ($738.00) Dollars in nine equal instalments payable monthly being the amount set out in said schedule for teachers in the colored schools holding a second grade certificate of the second class and in the eleventh year in experience.

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6. That the schedule for white teachers hereto attached provides a basic salary of $50.00 - each unit value $3.00 - minimum $100.00, while a negro teacher in Brevard County with the same qualifications and performing the same work receives a basic salary of $20.00 - each unit value $2.00 - minimum $50.00. That by said schedule, for each additional unit obtained the negro teacher's increase is only two-thirds of the white teacher's and the higher the qualifications the greater the difference in salaries between the white and colored teacher for example: suppose that a white teacher and a negro teacher have increased their qualifications by five units each. The white teacher's increase in salary would be $15.00 while the negro teacher's would be only $10.00.

Your petitioner further says that according to the report of the Honorable Damon Hutzler, Superintendent of Education for Brevard County, Florida, recently filed in the office of the State Superintendent of Public Instruction at Tallahassee, Florida, and published in the local press in Brevard County, Florida, August 27, 1937, it is revealed that the operating cost for white schools in Brevard County last year was $152,817.91 and the enrolment was 2213, making the average operating cost for white children according to this report, $69.05 per pupil. The operating cost for colored schools was $26,962.33 and the enrolment 997 or $27.04 average operating cost per colored pupil. The report further shows that the average attendance for white children was 1879 from which it will appear that the whites had an attendance of 84.9%. The colored schools on the other hand, for the same period, had an enrolment of 997 showing an average attendance of 85.9%, showing that the attendance in colored schools was 1% better than the whites and since the state issues funds to Brevard County, Florida, for school purposes upon the basis of attendance, it is evident that each colored child attending the public schools of Brevard County Florida, brought more money into the county from the state per school pupil than the white schools, yet the white child gets $69.05 benefit per pupil while the colored child gets only $27.04 per pupil.

7. That the entire schedule of teachers' salaries referred to in Paragraph Six hereof, provides a gross inequality in salaries paid white and colored teachers possessing like certificates, equally experienced in teaching and similarly employed for equivalent service.

8. Your petitioner further shows that the said salary schedule provides a

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gross inequality in that no salary schedule is provided for principals of colored elementary schools while for principals of white elementary schools there is provided a schedule of salaries higher than that provided for white elementary school teachers.

9. That the said salary schedule provides a gross inequality in that the schedule for white teachers basic salary is $50.00 - each unit value $3.00 - minimum $100.00, while that for negro teachers is basic salary $20.00 - each unit value $2.00 - minimum $50.00.

10. That your Honorable Board in enforcing the said schedule, has by means of the unjust discrimination mentioned above, according to the bi-annual report of the Superintendent of Public Instruction of the State of Florida for the two years ending June 30, 1936, paid white teachers in elementary schools of Brevard County, Florida, an average annual salary of $855.64 and at the same time has paid colored teachers an average annual salary of $441.40, despite the fact that the colored teachers in Brevard County perform substantially the same duties as white teachers and have substantially the same qualifications as white teachers.

11. That the Board of Education of Brevard County, in adopting and enforcing the salary schedule referred to ablve and in administering the said schedule and paying teachers salaries thereunder as mentioned above, has discriminated unjustly against your petitioner and others of his race similarly situated solely because of their race or color, in violation of the Constitution and Laws of the State of Florida, and has denied to this petitioner and others of his race similarly situated, the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

YOUR PETITIONER THEREFORE PRAYS:

(a) That the Board of Education of Brevard County will authorize the payment of and/or pay to petitioner a sum equal to the difference between the salary he has received and the salary provided for white teachers with wimilar qualifications and experience and performing the same duties.

(b) That a new salary schedule be adopted and enforced, equal as to all teachers with the same qualifications and experience and without any distinction being made as to race or color or teacher or school.

(c) That the petitioner and others of his race similarly situated be paid salaries equal to those paid white teachers with the same qualifications and experience and

and performing substantially the same service.

Respectfully submitted,

____
Petitioner.

BREVARD COUNTY TEACHER SALARY SCHEDULE

White teachers: Basic salary $50.00 Each unit value $3.00-Minimum $100.00
Negro teachers: Basic salary $20.00 Each unit value $2.00-Minimum $ 50.00

Education	Units	Certification	
4 years high school	5	3rd. grade	2
1 year college	6	2nd. grade	3
2 year college	7	1st grade	4
3 year college	8	Life 1st. grade	5
4 year college	9	Primary	6
Master Degree	11	Life Primary	7
Experience		Special	8
1 year	1	Life Special	9
2 years	2	Graduate State, 2 yrs.	8
3 years	3	Life Graduate State, 2 yrs.	9
4 years	4	Graduate State, 4 yrs.	11
5 years	5	Life Graduate State, 4 yrs.	12
6 years	6		
All over 6 years	6		

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Only Copy
JW

IN THE SUPREME COURT OF FLORIDA

IN THE CASE OF	)
JOHN GILBERT	:
	)
-vs-	:
L. R. HIGHFILL, ET AL, SCHOOL BOARD	)
	:

PETITIONER'S BRIEF

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PART ONE

STATEMENT OF QUESTIONS INVOLVED

QUESTION ONE

WHERE PETITION FOR WRIT OF MANDAMUS MEETS FORMAL REQUIREMENTS OF THE LAW AND ALLEGES IN SUBSTANCE THAT RELATOR, A NEGRO, IS A QUALIFIED TEACHER IN THE PUBLIC SCHOOLS OF BREVARD COUNTY, FLORIDA, EMPLOYED BY THE SCHOOL BOARD OF SAID COUNTY, BUT THAT SAID SCHOOL BOARD REFUSES TO PAY HIM AND OTHER TEACHERS OF HIS RACE AS MUCH SALARY AS WHITE TEACHERS IN THE COUNTY HAVING THE SAME QUALIFICATIONS AS RELATOR AND PERFORMING ESSENTIALLY THE SAME WORK, IS IT ERROR FOR THE CIRCUIT JUDGE TO REFUSE TO ISSUE THE ALTERNATIVE WRIT OF MANDAMUS AND DISMISS THE PETITION ON THE GROUND........."I DO NOT FIND ANY LAW WHICH REQUIRES THE BOARD TO ESTABLISH SALARY SCHEDULES.......?"

ANSWER ONE

The Court answered this question in the negative.

QUESTION TWO

DOES THE ENFORCEMENT OF THE PRESENT SALARY SCHEDULE AND THE PAYMENT TO PETITIONER AND OTHERS OF HIS RACE OF SALARIES LESS THAN THOSE PAID TO WHITE TEACHERS WITH IDENTICAL QUALIFICATIONS AND EXPERIENCE AND PERFORMING ESSENTIALLY THE SAME DUTIES, SOLELY ON THE GROUND OF RACE OR COLOR, DENY TO PETITIONER AND OTHERS OF HIS RACE THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

ANSWER TWO

The Court answered this question in the negative.

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PART TWO

HISTORY OF THE CASE

Petition for an alternative writ of mandamus was filed with the Circuit Judge of Brevard County, Florida, on May 24, 1938, and filed in the office of the Clerk of the Circuit Court, June 13, 1938. The Circuit Judge entered a final judgment denying the relief sought in and by said petition and dismissed said petition June 13, 1938. On the 25th day of August 1938, plaintiff filed his praecipe for writ of error from the final judgment of the Circuit Court of Brevard County, Florida, and writ of error issued as provided by law and on the same day - August 25, 1938 - plaintiff filed his assignments of errors and directions to the Clerk for making up the transcript of the record.

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PART THREE

ARGUMENT

The petition in this case for an alternative writ of mandamus was filed and sworn to by relator and in all respects, met the formal requirements of the common law in such cases. The petition shows the jurisdiction of the court, states the right of relator to the relief sought and the duty and power of respondent to perform. In some jurisdictions the petition serves as a pleading and becomes the foundation for all subsequent proceedings, but in Florida, we think, the petition only serves as a basis for the issuance of the alternative writ where the writ is issued, it takes the place of a declaration as in a law action. (See 13 Enc. of Pl. and Prac. page 674). Great particularity of statement in the petition is not required. Enough that the petition shows a prima facie right to the relief sought. 13 Enc. of Pl. & Prac. page 675.

Upon the conceded facts, the petitioner in this case has been and is now deprived of his rights under the laws of Florida. The allegations of the petition for the writ of mandamus under oath, standing uncontradicted as they do, must be considered as true. The facts thus admitted are:

(a) That relator is a qualified teacher under the laws of Florida and a member of the Negro Race.

(b) That respondents compose the Brevard County School Board and they are required and empowered by law to maintain a free public school system for white and colored children who shall not be taught in the same school but said Board shall make IMPARTIAL PROVISIONS for both.

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(c) That said Board is empowered to employ teachers for every school in the county and to contract with and pay the same for their services.

(d) That respondents have adopted a schedule of salaries for teachers in the public schools of Brevard County which discriminates unjustly against the relator on account of his race or color.

(e) That said Board of Education, not regarding its duty in the matter, pays relator and other teachers of his race less salary than it pays white teachers having the same qualifications and performing essentially the same work, and that this difference in pay is based solely on race or color.

The trial court observes that relator "seeks to compel the respondents (School Board) To adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination" and then ....."I do not find any law requiring the Board to establish salary schedules."

It is true that there is no statute in Florida requiring the Board to establish salary schedules for teachers and it is not the object of this suit to compel the Board to establish such schedules. The petition shows that the Board has already established such schedules, (Tr. Exhibit "A"). The important matter insisted upon by this relator is that such salary schedules as are established by said board be without discrimination against the relator on account of his race or for any other reason; that said salary schedules should be impartial and without prejudice against the relator and others similarly situated. The statutes of this state on this question nowhere make any such racial discrimination in the payment of salaries of public school teachers and this Board is without authority to make such discrimination. Indeed, the Florida Constitution provides that impartial provisions shall be made for both white and colored children. The employment of teachers in the public schools of Brevard County is

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a part of the preparation provided by law in carrying on the work of the public school system. And it is important that such provision or arrangement be impartial. This Board without question, hires and pays white and colored school teachers who must be qualified in their professions, in the first instance, and it has no right or authority to pay one class of teacher having the same qualifications and performing essentially the same work, only one-half as much as it pays the other class and this soleoy on account of the other's race or color. Such conduct on the part of this Board is in direct conflict with the constitutional provision which provides that white and negro children shall not be taught in the same school but impartial provisions shall be made for both.

IMPARTIAL PROVISIONS

"Impartial" means not partial; not biased in favor of one party more than another; unprejudiced; while "provisions" means preparation or arrangement for something to be done or to be carried out. If the employment of teachers is one of the Impartial Provisions contemplated by the court, and we think it must be, then the School Board of Brevard County is without authority to enforce the salary schedule complained of in this case.

I.

THE ENFORCEMENT OF THE PRESENT TEACHERS' SALARY SCHEDULES WHICH PROVIDE FOR DIFFERENTIALS BASED ON RACE OR COLOR OF TEACHERS IS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF FLORIDA.

The Constitution and laws of the State of Florida establish certain general rules for the maintenance of the free public school system of the State. The control of the local public school system including the establishment of salary schedules and the payment of salaries to teachers is vested in respondents. However, this control is limited by the provision of the Constitution that, in the establishment of separate schools for white and colored children, impartial

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provision shall be made for both.

(A) Under the laws of the State of Florida the respondents are under a positive duty to fix the salaries of teachers and principals in Brevard County.

> Section 561, sub section sixth: "To employ teachers for every school in the county, and to contract with and pay the same for their services....."
>
> Florida Compiled General Laws (1927)

The latest acts of the Legislature of Florida place a duty upon local boards to establish salary schedules.

A school board has the power and duty to fix salaries of teachers and principals.

> Graham v. Joyce, 151 Md. 209 (1926)
> 56 Corpus Juris, Schools and School Districts, Sec. 313, p. 387.

(B) Under the Constitution and laws of the State of Florida the respondents are under a positive duty to establish salary schedules for teachers without discrimination as to color.

The Constitution of the State of Florida provides:

> "The legislature shall provide for a uniform system of public free schools and shall provide for the liberal maintenance of the same." (Underscoring ours)
>
> Article XII, Sec. 1
>
> "White and colored children shall not be taught in the same school, but impartial provision shall be made for both." (Underscoring ours)
>
> Article XII, sec. 12.

The laws of the State of Florida provide:

> Sec. 493: "Uniform system of public instruction, School Age--There shall be established and maintained a uniform system of public instruction free to all the youth residing in the State between the ages of six and twenty-one years as far as the funds will admit, as hereinafter provided. (Underscoring ours)

Florida Compiled General Laws (1927)

Petitioner and other teachers and principals of his race hold the same type of teaching certificates as those issued to white teachers. They have

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the same type of experience and perform essentially the same duties. Under these circumstances a salary schedule which provides less salary for petitioner and others of his race is not "uniform" and the payment to them of salaries less than white teachers violates the provisions of the constitution requiring that "impartial provision" be made for white and colored schools.

Under the present salary schedule in Brevard County (see petitioner's exhibit "A"), petitioner and all other Negro teachers in Brevard County are paid pursuant to that section of salary schedule designated:

> "Negro teachers' Basic Salary $20; each unit value $2, Minimum $50."

While all white teachers are paid pursuant to the schedule designated:

> "White teachers' Basic Salary $50; each unit value $3, Minimum $100.

Petitioner alleges that the sole basis of this differential in salary is the race or color of the teachers (see Petition, paragraph 6).

The word "uniform" as used in the Constitution and Laws of the State of Florida is further emphasized by the use of the word "impartial" mentioned in Article 12, Section 12. The entire school system of the State of Florida is based upon these sections of the Constitution and Laws of the State of Florida mentioned above.

The discretionary powers of the local Boards of Instruction are necessarily limited by the above-mentioned sections and also by the fact that their decisions, rules and regulations must not be arbitrary or unlawful.

In the case of State ex rel Pittman v. Barker, 113 Fla. 865, 152 So. 682, 94 A.L.R. 14881 (1934), the petitioners on three separate dates were nominated by trustees of Special Tax School District No. 6 of Orange County as teachers. They were on each occasion rejected on the grounds that they were married women with other means of support. The Supreme Court of Florida in granting relief to the petitioners in this case held:

> "Trustees are responsible for the supervision of the schools within their district, they are vested with other important duties pertaining to them as pointed out by the statutes herein listed and are prohibited from nominating a teacher who does not

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possess the statutory and other qualifications laid on her. In view of this state of the law we are impelled to the conclusion that the nomination of the trustees must mean something more than an empty gesture to be cast aside at the caprice of the Board of Public Instruction.

The Legislature has seen fit to safeguard the school system and the appointment of teachers with rigid impositions. Exceptional requirements are imposed on candidates to teach before they are eligible to pursue their profession. In addition to moral, educational, and other qualifications, they must demonstrate ability to teach, discipline and guide the youth if they would continue in their positions. The policy of the law is to remove the school system and the employment of teachers from political considerations and place the teacher and the school squarely on the merit system. Appointment of teachers is in no sense a reward for political favors as is sometimes the case of appointments to civil service.

From this it follows that the Board of Public Instruction may reject the nominee of the Trustees of a Special Tax School District but such rejection must be properly predicated, otherwise the nominee of the trustees should be approved. But failing in this, mandamus may be resorted to to enforce compliance."

Followed in State ex rel Pittman v. Barker, 118 Fla. 380, 160 So. 362 (1935).

See also Bronson v. Board of Public Instruction, 108 Fla. 1, 145 So. 833 (1933).

State ex rel Robinson v. Keefe, 111 Fla. 701, 149 So. 638 (1933).

One of the nearest cases in point on the limitations upon the powers of a local School Board is the case of Hutton et al v. Gill--Ind.--, 8 N.E. (2d) 818 (1937). This case is the case of a married female teacher of Michigan City, Indiana, who brought an action against the local School Board on the grounds that she had been discriminated against because of the fact that she was married. On May 1, 1933, the school trustees adopted a salary schedule. Section 4 of the schedule provided:

> "Salaries of married women teachers shall be the minimum salaries provided under this schedule and applicable to such teachers, no increase for years of service to be paid such teachers."

The Supreme Court of Indiana in holding this differential to be unreasonable and unlawful stated:

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"If the classification is arbitrary or capricious, and upon a basis having no relation to the kind or character of the work to be done, it would be void and unlawful, and in conflict with the statute. In the schedule adopted by appellants they made marriage of a female teacher the basis of classification of compensation. The compensation of appellee was fixed by the Board, partly at least upon the fact that she was married. This, in our judgment, was unlawful and arbitrary and formed no rational basis for a classification. It had no reasonable relation to the work assigned to her, as the fact that appellant was a married woman did not affect her ability to impart knowledge or perform her duties in the school room. It is conceded that her marriage status had no such effect, and if not, there could be no just or reasonable basis for the School Board classifying her as far as compensation is concerned, in a different and lower class than an unmarried female teacher having like qualifications and doing like work."

The petition in the instant case alleges that the differentials in the said salary schedule in providing salaries for Negro teachers less than those paid to white teachers with identical qualifications, experience, and performing essentially the same duties, are based solely on the ground of race or color of petitioner and are unlawful and arbitrary and in violation of the Constitution and Laws of the State of Florida.

A similar case is the case of Whitley, County Board of Education v. Rose, 267 Ky. 283, 102 S.W. (2d) 28, 1937). In this case the County Board of Education appointed a School Superintendent for four years at $2700. The Superintendent resigned after 8½ months and a new man was appointed to fill the unexpired term at $1800. The new man sued for the difference between $1800 and $2700.00. The defense was raised that the new man had contracted for and agreed to accept $1800. The Court of Appeals of Kentucky in granting relief to the plaintiff held:

"But the point is made that Rose's acceptance of the decreased salary estops him from claiming the salary fixed during the term. The question has been considered recently in the cases of City of Louisville v. Thomas, 257 Ky. 540, 78 S.W. (2D 767); City of Olive Hill v. Craig, 267 Ky. 38, 101 S.W. (2d. 198); and the defense of estoppel held unavailing as said in the last mentioned case, 'Were the rule otherwise, it would be comparatively an easy matter for the governing authorities to take advantage of an officer dependent on his salary for a livelihood, and virtually compel him to forego his constitutional right'."

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QUESTION TWO

DOES THE ENFORCEMENT OF THE PRESENT SALARY SCHEDULE AND THE PAYMENT TO PETITIONER AND OTHERS OF HIS RACE OF SALARIES LESS THAN THOSE PAID TO WHITE TEACHERS WITH IDENTICAL QUALIFICATIONS AND EXPERIENCE AND PERFORMING ESSENTIALLY THE SAME DUTIES, SOLELY ON THE GROUND OF RACE OR COLOR, DENY TO PETITIONER AND OTHERS OF HIS RACE THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

(A) The Fourteenth Amendment to the United States Constitution guarantees the equal protection of the laws to all United States citizens.

Section 1 of the Fourteenth Amendment to the Constitution provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction of the law."

The purpose of the enactment of the Fourteenth Amendment has been clearly set out by Mr. Justice Strong of the Supreme Court of the United States in the case of Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

> "If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (Evidently referring to the newly made citizens, who being citizens of the United States are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The

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words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race-- the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment which are steps towards reducing them to the condition of a subject race."

(B) The prohibitions of the Fourteenth Amendment apply to the members of the Board of Public Instruction of Brevard County and the county superintendents.

The Fourteenth Amendment applies to the acts of **all** State Officers including the acts by the legislative, executive, and judicial authorities.

"We have said the prohibitions of the Fourtteenth Amendment are addressed to the States. They are, 'No state shall make or enforce a law which shall abridge the privileges of immunities of citizens of the United States, ...Nor deny to any person within its jurisdiction the equal protection of the lwas.' They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state or of the officers or agents by whom its powers are asserted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power his act is that of the state. This must be so, or the constitutional prohibition has no meaning then the state has clothed one of its agents with power to annul or to evade it."

Ex parte Virginia 100 U.S. 303, 26 L. Ed. 864 (1879).

(C) The Fourteenth Amendment is in general terms and does not enumerate the rights it protects.

"The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection either for life, liberty or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution."

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Strauder v. West Virginia, Supra.

One of the leading cases on this question of discrimination by a subdivision of a state is the case of Yick Wo. v. Hopkins, 118 U.S. 356, 39 L. Ed., 220 (1886). The City of San Francisco in 1880 passed an ordinance making it unlawful for any person or persons to maintain a laundry within the City of San Francisco without having first obtained the consent of the Board of Advisors unless the building was constructed either of brick or stone. Of the 320 laundries in the City, 250 were owned by Chinese--of the 320 laundries about 310 were constructed of wood. All Chinese applicants for license from the Board of Advisors were refused and all others were accepted except one. One Chinese was arrested for violation of the ordinance and applied for a writ of habeas corpus. The Supreme Court of the United States in declaring the imprisonment of the petitioner invalid stated:

> ".....Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to and rights, the denial of equal justice is still within the prohibition of the Constitution."

> ".....The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioner belongs, and which in the eye of the law is not justified. The discrimination is therefore illegal and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioner is, therefore illegal and he must be discharged."

(D) The protection of the Fourteenth Amendment has been applied in numerous types of cases.

A statute providing a different mode of taxation for persons and railroad corporations has been held to deny the equal protection of the laws.

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"The fourteenth amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all powers of the state which cannot touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws is meant equal security under them to every one on similar terms, --in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burden or charges than such as are equally imposed upon all others under like circumstances.

"Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kinds similarly situated, at different rates; where, for instance, one may be taxed at 1 percent on the value of his property, another at 2 or 5 percent; or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

Railroad Tax Cases 13 Fed. 722, 733 (1892).

A franchise tax against foreign corporations but not placed against domestic corporations is invalid.

"The inhibitions of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

Southern Railway Co. v. Greene, 216 U.S. 400, 412 (1910)

A statute of Texas which provided that railroad corporations which did not pay claims within a certain time would be assessed an attorney's fee was declared to be a violation of the equal protection clause of the Fourteenth Amendment.

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"But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of denial of equal protection. While, as a general proposition, this is undoubtedly true.....yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed,......"

Gulf C. and S.F.R. R Co. v. Ellis, 165 U.S. 150, 41 L. Ed. 666 (1896).

A Pennsylvania statue which taxed each employer three cents per day for each foreign born unnaturalized employee was declared to be in violation of the Fourteenth Amendment.

"The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now the equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burden or charged other than such as are equally laid upon all others under like circumstances."

Juanita Limestone Co. v. Fegley, 187 Pa. 193, 42 L.R.A. 442 (1898).

A Philippine statute which prohibited merchants from keeping account books except in English or Spanish language, or in a local dialect was held to deny the equal protection of the laws to Chinese keeping their books in Chinese.

"Of course, the Philippine government may make every reasonable requirement of its taxpayers to keep proper records of their business transactions in English or Spanish or Filipino dialect by which an adequate measure of what is due from them in meeting the cost of government can be had. How detailed these records should be, we need not now discuss, for it is not before us. But we are clearly of the opinion that it is not within the police power of the Philippine legislature, because it would be oppressive and arbitrary to prohibit all Chinese merchants for maintaining a set of books in the Chinese language, and in the Chinese characters and thus prevent them from keeping advised of the status of their business and directing its conduct.....Without them such merchants would be a prey to all kinds of fraud and without possibility of adopting any safe policy."

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Yu Cong Eng. v. Trinidad, 271 U.S. 508, 525, 46 S. Ct. 620, 71 L. Ed. 1063 (1925)

The inhibitions of the Fourteenth Amendment prevent a denial of the equal protection of the laws to Negroes.

The Supreme Court of the United States in the case of Ex parte Virginia 100 U.S. 339 (879) declared:

> "One great purpose of the Amendment was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of all the States. They were intended to take away all possibility of oppression by law because of race or color....."

1. The protection of the Fourteenth Amendment has been held to prevent the unlawful exclusion of Negroes from grand and petit juries.

Where a discrimination has been made against persons because of race or color in a state statute or in any action of officials thereunder, in selecting, summoning or empaneling jurors, any person of the race so discriminated against who is to be tried on a criminal charge by such jurors may by proper proceedings duly taken for that purpose have the statute or the action taken thereunder annuled by the Court as being a denial by the state to the person so being tried of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. This rule is the law of the land as determined by the Supreme Court of the United States. See:

Montgomery v. State, 53 Fla. 97, 45 So. 879 (1908)

See also:

Strauder v. West Virginia, supra
Ex Parte Virginia, supra
Neal v. Delaware, 103 U.S. 389, 26 L. Ed. 467 (1880)
Norris v. Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935)
Hollins v. Oklahoma, 293 U.S. 394, 55 S. Ct. 784, 79 L. Ed. 1500 (1935)

> "An actual discrimination against a Negro, on account of his race, by officers intrusted with the duty of carrying out the law, is as potential in creating a denial of equality of rights as a discrimination by law."

Tarrence v. Fla. 188 U.S. 520, 23 S. Ct. 402, 47 L. Ed. 572 (1902)

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2. A Statute banning Negroes from participating in primary elections held in the state for the nomination of candidates for senator and representatives in Congress, and state and other offices, violates the Fourteenth Amendment.

A statute of Texas provided:

> "Every political party in the state through its executive committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party....."

Acting under this statute, and not under any authorization from the convention of their party, the executive committee of the Democratic Party in Texas adopted a resolution that only white Democrats should participate in the primary elections, thereby excluding Negroes. It was held that the power of the party as a voluntary organization but came from the statute. The committee's action was therefore state action within the meaning of the Fourteenth Amendment. The resulting discrimination was held to violate that amendment. See:

Chaires v. City of Atlanta, 164 Ga. 755, 139 S.W. 559 (1927)

A denial to Negroes of Pullman accomodations in a trial pursuant to a state statute has been held to be a violation of the Fourteenth Amendment.

A statute of Oklahoma provided for separate but equal accomodations on trains and further provided that nothing contained in the act should be construed to prevent railway companies from hauling sleeping cars, dining and chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly. Five negroes brought suit in equity to restrain the companies from making any distinction in service on account of race. The railroad company demurred and contended they were not obliged to furnish separate but equal accomodations where there were only a few negroes who desired pullman service. The Supreme Court held:

> "This argument with respect to volume of traffic seems to us to be without merit. It makes the Constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the Constitutional right is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned

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upon there being a reasonable demand therefor, but, if facilities are provided, substantially equality of treatment of persons travelling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his Constitutional privilege has been invaded."

McCabe v. Steilson, Topeka and Santa Fe Ry. Co. 235 U.S. 151, 160, 35 S. Ct. 69, 59 L. Ed. 169 (1914)

The Fourteenth Amendment guarantees to Negroes the equal protection of the laws in the administration of public schools.

"White and colored pupils must be treated the same in expenditure of public funds, and, in accordance with the principle that any system of taxation for school purposes which discriminates with respect to race or color as to the application of the fund thereby raised is unconstitutional and void. Where separate schools are provided for white and colored pupils the apportionment and distribution of school taxes a revenue for the separate support and maintenance of such schools should be made without discrimination or prejudice to either race....."

56 C.J. Schools and School Districts, Sec. 888 p. 750

There are two cases from the Supreme Court of the United States concerning the equal protection of the laws in the administration of public schools. In the case of Cumming v. County Board of Education, 175 U.S. 528, 44 L. Ed. 262 (1889) it appeared that the Board of Education of Richmond County, Georgia, had levied a tax for the establishment of a white high school but had not provided for the establishment of a negro high school. Certain taxpayers applied for an injunction to prevent the establishment of the white school. The Supreme Court held that the granting of the injunction to stop the white high school would not benefit the colored children, but also held that:

"If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the board of education, out of funds in its hands or under its control, to establish and maintain a high school for colored children, and it appeared that the board's refusal to maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the State Court."

175 U.S. 528, 545

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In the case of Cong Lum v. Rice, 275 U.S. 78, L. Ed. 172 (1927), a Chinese father filed a petition for a writ of mandamus in the Circuit Court of Mississippi to obtain the admission of his daughter into the white school of her district. The Supreme Court of the United States held the petition should not have been granted because the Chinese girl could be compelled to attend the colored school of her district. The petition did not allege that there were no colored schools in the district. Mr. Chief Justice Taft stated:

> "If it were otherwise, the petition should have contained an allegation showing it. Had the petition alleged specifically that there was no colored school in Martha Lum's neighborhood to which she could conveniently go, a different question would have been presented, and this, without regard to the State Supreme Court's construction of the State Constitution as limiting the white schools provided for the education of children of the white or caucasion race. But we do not find the petition to present such a situation."
>
> 27 U.S. 78, 84

In the case of Williams v. Board of Education, 45 W. Va. 199 (1898), the Board of Education of Fairfax County, West Virginia ruled that the white schools should be open eight months and the colored schools for five months. A colored teacher refused to close her school at the end of five months but taught the full eight months. She filed suit for the three months salary. The Supreme Court of Appeals of West Virginia upheld the right of this teacher to her full salary for eight months.

It has been uniformly held by courts throughout the United States that educational opportunities offered by the public school system must be equal. See:

Piper v. Big Pine School District, 193 Cal. 664 (1924)
Ward v. Flood, 48 Cal. 36, 17 Am. R. 405 (1874)
State v. Duffy, 7 Nev. 342, 8 Am. R. 713 (1872)
U.S. v. Buntin, 10 Fed. 730 (C.C. Ohio) (1882)
Corey v. Carter, 48 Ind. 327 (1874)
Williams v. Bradford, 158 N.C. 36, S.E. 154 (1911)
Clark v. Board, 24 Iowa 266 (1868)
S. Ruling Case Law, 596 Sec. 20
11 C.J. Civil Rights, Sec. 10 p. 805
Cooley on Torts (Penn. Ed) sec. 236

The Court of Appeals of Maryland in the case of Pearson v. Murray, 169 Md. 478, 182A 590, 103 A.L.R. 706 (1936) held that:

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"As a result of the adoption of the Fourteenth Amendment to the United States Constitution, a state is required to extend to its citizens of the two races substantially equal treatment in the facilities it provides from public funds..."

Where separate schools are maintained Negroes are entitled to have a fair share of the funds raised by taxation applied to the maintenance of the negro schools. In the case of Claybrook v. City of Owensboro, 16 Fed. 297 (D.C. Ky.) (1883), the General Assembly of Kentucky passed an act authorizing a municipal corporation to levy taxes for school purposes and to distribute taxes from white people to the white schools and taxes from the colored people to the colored schools. Residents of the City of Owensboro filed a petition for an injunction in the Federal Court restraining the distribution of the taxes. The Federal Court in granting the injunction held that:

> "The equal protection of the laws guaranteed by this Amendment means and can only mean that the laws of the states must be equal in their benefit as well as equal in their burdens, and that less would not be 'equal protection of the laws.' This does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis."

16 Fed. 297, 302 See also:

Davenport v. Cloverport, 73 Fed. 689, (D.C. Ky.) (1896)
Pruitt v. Commissioner Gaston County, 94 N.C. 709, 55 Am. R. 638 (1896)

MANDAMUS IS THE PROPER REMEDY IN THIS CASE

Where a local board of education or board of public institutions pays one group of teachers less salary than another group of teachers with equal qualifications and experience and performing essentially the same duties, mandamus will lie to compel the board to establish a salary schedule without discrimination.

A. Mandamus is the proper remedy to compel a board of education to maintain its schools on a constitutional basis.

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".....If the board or its successors shall refuse to establish and maintain the school upon a constitutional basis and in accordance with the constitutional provisions, the courts have power, by the writ of mandamus, to compel them to do so."

Lowery v. Board of Trustees, 52 S.E. 267 (N.C.--1905)

See also:

Pearson v. Murray, 169 Md. 478, 182 A. 590, 103 A.L.R. 706 (1936)

MANDAMUS WILL LIE TO COMPEL A BOARD TO ESTABLISH SALARY SCHEDULES

".....She was a teacher in the service of the city and it was the duty of the controllers to fix her salary with reference to the salaries of all other teachers, so that the appropriation to teachers' salaries would be adequate to pay every teacher as well as herself. Until this was done, she had no right of action against the city. But if the Controllers neglected to perform their duty she might perhaps hold them liable in damages--she might certainly have the mandamus of the courts to stir them into obedience to duty."

Johnson v. City of Philadelphia, 47 Pa. 382 (1864)

The respondents are officers and agents of the State of Florida, entrusted with the conduct of the public schools of Brevard County, including the Cocoa Colored Junior High School. They are required to so do without violating the statute and constitutional laws of the State or United States by discriminating against petitioner in the matter of payment of salary on account of his race or color. As has been pointed out, the teadher is required to stand a certain test to demonstrate his qualifications to teach school in the State of Florida before he is appointed. His position, is not one to be filled at the discretion or caprice of some appointing power as a means of recompense or favoritism.

We respectfully submit that the petition filed herein does not make out a case justifying the issuance of an Alternative Writ of Mandamus as therein prayed, and the judgment entered in this cause should be reversed and the cause remanded with directions from this Honorable Court.

Respectfully submitted,

McGill & McGill, Thurgood Marshall
William H. Harwick & William S. Robinson

By____________________

Attorneys for Petitioner

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IN THE SUPREME COURT OF FLORIDA.

JOHN GILBERT,

VS.

L. R. HIGHFILL, ET AL,

SCHOOL BOARD

-T R A N S C R I P T-

THEREIN LATELY PENDING.

LAW OFFICES:

McGILL & McGILL
ATTORNEYS AT LAW
610 W. DUVAL STREET
JACKSONVILLE, FLORIDA

Legal News Co.

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-T R A N S C R I P T-

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT

IN THE CASE OF

JOHN GILBERT

VS.

L. R. HIGHFILL, ET AL,
SCHOOL BOARD

LAW NO. 2763

THEREIN LATELY PENDING

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PETITION FOR WRIT OF MANDAMUS

was filed before the Judge of the Circuit Court the 24th day of May 1938 and filed in the office of the Clerk of the Circuit Court on June 13, 1938 in the words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE CIRCUIT COURT IN AND FOR BREVARD COUNTY, FLORIDA.

PETITION FOR WRIT OF MANDAMUS

The petition of the State of Florida, upon the relation of John Gilbert, a teacher in the Public Schools of Brevard County, Florida, complains of L. R. Highfill, J. D. Pepper and W. J. Creel, as members of the Board of Public Instruction of Brevard County, and Damon Hutzler, Secretary of said Board and County Superintendent of Public Instruction of said County, the respondents, and the relator avers:

1.

That he is a resident of Brevard County, Florida, and over twenty-one years of age, a citizens of the United States and of the State of Florida, and a member of the Negro race; that he is a teacher in Brevard County, Florida, acting as principal of a ten teacher school (including relator) known as the Cocoa Junior High School, a colored public school maintained and operated by the Board of Public Instruction of Brevard County, Florida. Relator is a graduate of the Florida Memorial College for Negroes at Live Oak, Florida; has one Year's college work to his credit at the Florida A & M College for Negroes at Tallahassee, Florida, and holds a second grade teachers' certificate, issued to him by the State Department of Education of the State of Florida, and is in his eleventh year in teaching experience in the State of Florida.

II.

Your petitioner further represents that L. R. Highfill, J. D. Pepper and W. J. Creel are members of the Board of Public Instruction of Brevard County, Florida, and Damon Hutzler is

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Secretary of said Board and County Superintendent of Public Instruction of Brevard County, Florida. All of the above named parties held and now hold their respective offices at all times herein mentioned and are sued herein in their official capacities of the County Board of Public Instruction in and for Brevard County, Florida.

III.

The above named members of the County School Board of Public Instruction of Brevard County, Florida, and the County Superintendent, who is Secretary of said Board, were elected pursuant to the Laws of the State of Florida, having supervision over the Brevard County Public Schools and the teachers of said schools, including the Cocoa Colored Junior High School and the teachers therein. The Board of Public Instruction of Brevard County, Florida, was created and exists pursuant to the laws of the State of Florida as an administrative department of the state and the members of said board were elected by the citizens of Brevard County, Florida.

IV.

The Board of Public Instruction of Brevard County, Florida, is directed, authorized, empowered and required by law, to maintain a uniform and effective system of free public schools for white and colored children who shall not be taught in the same school but impartial provisions shall be made for both. The said Board of Public Instruction has established two systems of public schools for white and colored children. All white children are required to attend schools taught by white teachers and all negro children are required to attend schools taught by negro teachers. The Florida Constitution provides that the county school fund shall be disbursed by the

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County School Board of Public Instruction of Brevard County, Florida, solely for the maintenance and support of public free schools, (Section 9, Article 12). The Board of Public Instruction of Brevard County, Florida, is directed and empowered to employ teachers for every school in the county and to contract with and pay the same for their services.

V.

At all times herein mentioned it was and is the duty of the respondent Board of Public Instruction of Brevard County, Florida, to adopt scales of salaries for teachers in the public school of Brevard County and to fix the salaries of said teachers; the said Board of Public Instruction adopted and instituted and is now enforcing a salary schedule for teachers in said county, copy of which is filed herewith and marked Petitioner's Exhibit "A" and prayed to be read as a part hereof as though set out in full petitioner and all other negro teachers in Brevard County are paid pursuant to that section of said salary schedule designated:

> "Negro teachers' Basic Salary $20.00; each unit value $2.00, minimum $50.00.................."

while all white teachers are paid pursuant to the schedule designated:

> "White teachers' Basic Salary $50.00; each unit value $3.00, minimum $100.00................."

VI.

The said salary schedule provides a higher scale of salary for white teachers than for colored teachers with like qualifications and experience and performing essentially the same duties. The said differentials are based solely on the ground of race or color.

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VII.

The Cocoa Junior High School is a ten (10) teacher school - including relator - maintained by the respondents for the education of negroes. All teachers in said school are negroes. Petitioner is acting as principal of said school. He holds a second grade certificate issued by the Board of Education of the State of Florida and has been continuously employed as an elementary and Junior High School teacher in the public schools of the State of Florida since 1926, and thus, according to the method of evaluating teaching experience, in the State and in Brevard County, he is in the eleventh year in experience. He has been a regular teacher in the Brevard County Public Schools since 1926.

VIII.

Pursuant to the aforementioned salary schedule, petitioner now receives Four Hundred Fifty ($450.00) Dollars in nine (9) equal instalments, payable monthly as a teacher, being the amount set out in said schedule for teachers in the colored schools holding a second grade certificate and in the eleventh year in experience. Petitioner receives, in addition to the amount allowed by said salary schedule Two Hundred Eighty Eight ($288.00) Dollars per year, payable in nine (9) monthly instalments for his work as principal in said school. The said schedule provides for Nine Hundred ($900.00) Dollars per year payable in nine (9) monthly instalments for white teachers with second grade certificates in the eleventh year in experience and performing essentially the same duties as a teacher as the petitioner performs.

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IX.

The differentials in the said salary schedule in the payment of teachers' salaries and the payment to petitioner and others of his race, of salaries less than those paid to white teachers with identical qualifications, experience and performing essentially the same duties, are based solely on the ground of the race or color of petitioner and the establishment and enforcement of the said salary schedule is unlawful and arbitrary and in violation of the Constitution and Laws of the State of Florida, and denies to petitioner and others of his race the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

X.

Petitioner, by petition filed with the Board of Public Instriction of Brevard County, on December 6, 1937, requested the said Board of Public Instruction to adopt and enforce a salary schedule providing for equal pay for himself and to all teachers with the same qualifications and experience and without any distinction being made as to race or color or teacher or school.

XI.

The said Board of Public Instruction refused to consider said petition and thereby refused and continues to refuse to adopt a new salary schedule providing equal pay for teachers, without discrimination or distinction as to race or color or teacher or school; the said Board of Public Instruction is still enforcing the discriminatory schedule set out and referred to above; petitioner has exhausted all administrative remedies.

XII.

Unless this Honorable Court, by its Writ of Mandamus,

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shall secure, preserve and enforce the rights of petitioner in the premises, he will suffer irreparable injury and will be without redress or remedy.

WHEREFORE, your relator prays, that a writ of mandamus issue to Damon Hutzler, Secretary of said Board and Superintendent of Public Instruction of Brevard County, Florida; L. R. Highfill, J. D. Pepper and W. J. Creel as members of the Board of Public Instruction of Brevard County, Florida, at their offices in Titusville, Florida, requiring the said respondents to adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination on account of color of teacher or as to school taught and further, ordering and requiring such other and further relief and protection to relator in the premises as justice may require.

S. D. McGill
W. H. Harwich
Attorneys for Petitioner.

JOHN GILBERT
Petitioner.

- - - - - - - - - - - -

STATE OF FLORIDA

COUNTY OF BREVARD.

I HEREBY CERTIFY that on the 7th day of May, A.D. 1938, before me the subscriber, a Notary Public for the State of Florida at Large, personally appeared the above named JOHN GILBERT and made oath in due form of law and further says that he has read and understands the above and foregoing petition and that the allegations therein set forth are true.

K. S. JOHNSON
Notary Public State of Florida
at Large. My Commission
Expires: 2/9/1942

(NOTARIAL SEAL AFFIXED)

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BREVARD COUNTY TEACHER SALARY SCHEDULE

White teachers: Basic Salary $50.00 Each unit value $3.00-Minimum $100.00

Negro teachers: Basic salary $20.00 Each unit value $2.00-Minimum $ 50.00

Name of teacher________________________________

In case you hold a higher certificate than listed below, send it to me at once. If you have additional work in college, please have your college send me the credits. In case teachers do not have a Normal Diploma, or 4 year degree, 32 semester hours is equal to 1 year college work, provided you file in this office, such credits from institution rated as standard, by a national or regional accrediting agency. Credit can not be accepted unless filed in this office, direct from College. To secure credit for more than 4 years college work, you must have master degree.

Education	Units	Certification	
4 years high school	5	3rd grade	2
1 year college	6	2nd grade	3
2 year college	7	1st grade	4
3 year college	8	Life 1st. grade	5
4 year college	9	Primary	6
Master Degree	11	Life Primary	7
Experience		Special	8
1 year	1	Life Special	9
2 years	2	Graduate State, 2 yrs.	8
3 years	3	Life Graduate State, 2 yrs.	9
4 years	4	Graduate State, 4 yrs.	11
5 years	5	Life Graduate State, 4 yrs.	12
6 years	6	Total Units______________	
All over 6 years	6	Salary $______________	

- -

Name of Summer School Last Attended________________________________

Date Attended____________Credits earned______________Credits must be submitted by official of school attended.

Mail contract to______________________

____

____

EXHIBIT "A"

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Filed before me this 24th day of May 1938.

M. B. SMITH,

Judge

FILED JUN 1? 1938

G. M. SIMMONS
Clerk Circuit Court
Brevard County.

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On the 13th day of June 1938 Order of Court Denying Plaintiffs Petition for Alternative Writ of Mandamus was filed for record which was duly recorded in Circuit Court Minute Book 16 Page 65 in the words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR THE COUNTY OF BREVARD.

IN CHANCERY,

JOHN GILBERT,

Plaintiff,

VS.

L. R. HIGHFILL, et al,

SCHOOL BOARD,

Respondent.

ORDER OF COURT.

This cause came on to be heard upon application of petitioner for Alternative Writ of Mandamus in which the petitioner seeks to compell the respondent School Board "To adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination - -". The statute under which teachers are employed by the Board, directs the Board "To employ teachers for every school in the county and to contract with and pay the same for their services - -". The constitution provides that the Board shall establish and maintain "A uniform system of public instruction -". I do not find any law which requires the Board "To establish salary schedules". The statute seems to contemplate individual contracts with teachers, and the constitutional provision for uniformity provides for the accomplishment of a result and not the details of the means by which the same shall be accomplished. It is, therefore;

ORDERED, ADJUDGED and DECREED, That said application for Alternative Writ be, and the same is, hereby denied.

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IT IS FURTHER ORDERED; That said petition be and the same is, hereby dismissed.

DONE and ORDERED, in Chambers at Titusville, Brevard County, Florida, this the 13th day of June, A.D. 1938.

M. B. SMITH,

Circuit Judge,

NO. 15717 FILED JUN 13 1938
AT 3 38 O'CLOCK P.M. RECORDED IN THE PUBLIC RECORDS OF BREVARD COUNTY, FLORIDA, IN THE BOOK AND PAGE NOTED ABOVE.

G. M. SIMMONS
Clerk Circuit Court

BY J. PAUL CONWAY
Deputy Clerk (CT. CT. SEAL)

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On the 25th of August 1938 Praecipe for Writ of Error was filed by the Plaintiff in words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE CIRCUIT COURT, NINTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND FOR THE
COUNTY OF BREVARD.

JOHN GILBERT, Plaintiff, vs L. R. HIGHFILL, et al, SCHOOL BOARD, Respondent.	I	PRAECIPE FOR WRIT OF ERROR

The Clerk of the above named Court will please issue a writ of error to the judgment dismissing plaintiff's petition herein on June 13, 1938, returnable to the Supreme Court of Florida on the 28th day of September, A.D. 1938.

S. D. McGILL
W. H. Harwick
Attorneys for Plaintiff.
Per S.D.M.

FILED AUG 25 1938

G. M. SIMMONS
Clerk Circuit Court
Brevard County.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

On the 25th day of August 1938 Writ of Error issued which was duly recorded in Circuit Court Minutes Book 16 Page 85 in the words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

WRIT OF ERROR

STATE OF FLORIDA--SS.

THE STATE OF FLORIDA TO THE JUDGE OF THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, GREETING:

Because in the record and proceedings and also in the rendition of judgment in a certain cause which is in our said Circuit Court before you, between John Gilbert as Plaintiff, and L. R. Highfill, et al, School Board as Defendants, manifest error hath happened, as it is said, to the great damage of the said John Gilbert as by his complaint appears,

We, willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein rendered, you distinctly and openly send the record and proceedings aforesaid with all things touching them, under your seal, together with this writ, to our Supreme Court of the State of Florida, so that you have the same at Tallahassee on the 28th day of September A. D. 1938, to our said Supreme Court to be then and there held, that inspecting the record and proceedings aforesaid, our said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law should be done.

WITNESS the Honorable William H. Ellis, Chief Justice of the said Supreme Court, and the seal of the said Circuit Court, this 25th day of August, in the year of our Lord one thousand nine hundred and Thirty-Eight.

G. M. SIMMONS

Clerk of the Circuit Court of
Brevard County.

(CT. CT. SEAL AFFIXED) By J. PAUL CONWAY, Deputy Clerk

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NO. 15873 FILED 8/25/1938
at 4 00 O'CLOCK P.M. RECORDED IN THE PUBLIC RECORDS
OF BREVARD COUNTY, FLORIDA, IN THE BOOK AND PAGE
NOTED ABOVE.

G. M. SIMMONS,
CLERK CIRCUIT COURT

BY J. PAUL CONWAY,
DEPUTY CLERK.

(CT. CT. SEAL AFFIXED)

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

On the 25th day of August 1938 the Assignment of Errors was filed in the words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR THE COUNTY OF BREVARD.

JOHN GILBERT,
Plaintiff,
vs
L. R. HIGHFILL, et al SCHOOL BOARD,
Respondent.

ASSIGNMENT OF ERRORS

Comes now the plaintiff by his undersigned attorneys, and says that in the record of proceedings and rendition of the judgment in the above cause, manifest error was committed by the Judge of said Court and files this, his Assignment of Errors herein and assigns the following errors in and to the rulings, decision and judgment of the said Court herein, that he intends to rely upon in the Supreme Court of Florida:

1. The Court erred in its order entered herein June 13, 1938, denying the plaintiff's application for alternatire writ of mandamus.
2. The Court erred in its judgment or decree entered herein on June 13, 1938, whereby the plaintiff's petition filed herein was dismissed.

S. D. McGILL

W. H. HARWICK

Attorneys for Plaintiff.
Per S.D.M.

FILED AUG 25 1938

G. M. SIMMONS
Clerk Circuit Court
Brevard County.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

On the 25th day of August 1938 Directions to the Clerk for making up the Transcript of Record was filed in the words and figures following:

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

IN THE CIRCUIT COURT, NINTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND FOR THE
COUNTY OF BREVARD.

JOHN GILBERT, Plaintiff, -vs- L. R. HIGHFILL, et al, SCHOOL BOARD, Respondent.	)	DIRECTIONS TO CLERK FOR MAKING UP TRANSCRIPT OF RECORD.

The Clerk of the above named Court will please begin making up the Transcript of Record in the above entitled cause on the 9th of September, A.D. 1938, and copy in full therein the following described papers:

1. Copy Petition for Writ of Mandamus, filed herein May 24, 1938.
2. Copy Order of Court entered herein June 13, 1938, denying Plaintiff's Petition for Alternative Writ of Mandamus and dismissing the same.
3. Copy Praecipe for Writ of Error.
4. Copy Record of Writ of Error.
5. Copy Assignments of Error.
6. Copy these Written Directions.
7. Copy any other papers filed in this cause.

S. D. McGILL

W. H. HARWICK
Attorneys for Plaintiff.
S.D.M.

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C E R T I F I C A T E

I, G. M. SIMMONS, Clerk of the Circuit Court in and for the County of Brevard, State of Florida, do hereby certify that the foregoing pages numbered from one to 21 , inclusive, contain a correct transcript of the record of the judgment in the case of JOHN GILBERT, plaintiff, against L. R. HIGHFILL, et al SCHOOL BOARD, defendants, and a true recital and copy of all such papers and proceedings in said cause, as appears upon the records and files of my office, that have been directed to be included in said transcript by the written demands of the said parties.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court, this 14th day of September, 1938.

s/ G. M. SIMMONS
Clerk of the Circuit Court for the County of Brevard.

(Official Seal)

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COPY

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A.D. 1939
EN BANC

JOHN GILBERT, Plaintiff in Error	*	
v.	*	
L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, Defendants in Error	*	BREVARD COUNTY

Opinion filed July 25, 1939

A Writ of Error from the Circuit Court for Brevard County, M. B. Smith, Judge.

S. D. McGill, McGill & McGill, Thurgood Marshall, William H. Harwick and Wm. S. Robinson, for Plaintiff in Error:

Leonard B. Newman, for Defendants in Error.

CHAPMAN, J.

On the 24th day of May, 1938, relator filed in the Circuit Court of Brevard County, Florida, his petition for an alternative writ of mandamus directed to the Board of Public Instruction and the Superintendent of Public Instruction of Brevard County, Florida. It was made to appear thereby that the petitioner was a qualified teacher and a member of the colored race and for eleven years had taught in the public schools of said county and at the time of filing the petition was teaching under a second grade certificate as principal of the Cocoa Junior High School, a colored school, and was supported by taxation. It was alleged that the respondents had adopted and were enforcing a schedule of salaries paid to teachers in Brevard County whereby negro teachers received a basic salary of $20.00; each unit value $2.00, minimum $50.00, and that white teachers received a basic salary of $50.00; each unit value $3.00, minimum $100.00, and that these differentials are based solely on race and color. A copy of the purported salary schedules of Brevard County is attached to and by appropriate language made a part of the petition.

The prayer of the petition is, viz:

> "WHEREFORE, your relator prays, that a writ of mandamus issue to Damon Hutzler, Secretary of said Board and Superintendent of Public Instruction of Brevard County, Florida; L. R. Highfill,, J. D. Pepper and W. J. Creel as members of the Board of Public Instruction of Brevard County, Florida, at their office in Titusville, Florida, requiring the said respondents to adopt

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and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination on account of color of teacher or as to school taught and further, ordering and requiring such other and further relief and protection to relator in the premises as justice may require."

An Order was entered by the lower court denying the application for an alternative writ of mandamus and made certain recitals in the order which are pertinent and material to a decision of the case at bar. The order recites:

"This cause came on to be heard upon application of petitioner for Alternative Writ of Mandamus in which the petitioner seeks to compel the respondent School Board "To adopt and establish salary schedules in Brevard County, Florida, without distinction or discrimination ---". The statute under which teachers are employed by the Board, directs the Board 'To employ teachers for every school in the county and to contract with and pay the same for their services ---". The constitution provides that the Board shall establish and maintain 'A uniform system of public instruction ---' I do not find any law which requires the Board 'To establish salary schedules'. The statute seems to contemplate individual contracts with teachers, and the constitutional provision for uniformity provides for the accomplishment or a result and not the details of the means by which the same shall be accomplished. It is, therefore; ORDERED, ADJUDGED AND DECREED, That said application for Alternative Writ be, and the same is, hereby denied."

From the order denying the alternative writ of mandamus a writ of error was taken and the denial thereof is assigned as error in this Court.

Section I of Article XII of the Constitution of Florida makes it a duty of the Legislature of Florida to provide for a uniform system of public free schools and to provide for the liberal maintenance of the same. Section 12 of Article XII of the Constitution provides that white and colored children shall not be taught in the same school but impartial provisions shall be made for both.

Section 493 C.G.L. provides for the establishment and maintenance of a uniform system of public instruction free to all youths residing in Florida between the ages of six and twenty-one years. The Board of Public Instruction of each County of Florida are charged with many constitutional and statutory duties. Sub Section 6 of Section 561 C.G.L. not only directs but makes it a duty of the Board to

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employ teachers for every school in the county and to contract with and pay the same for their services. It will be observed that the law does not fix the monthly sums to be paid teachers but makes it a duty of the Board to contract with and pay teachers. The amount to be paid teachers is left to the business judgment and sound discretion of the members of the Board. It is reasonable to assume that some teachers are better prepared by education and otherwise qualified to teach than others and for this and other reasons the Legislature clothed members constituting the Boards of Public Instruction with broad powers so as to enable them to contract with the very best teachers obtainable for the funds at their disposal. It would be absurd to say that teachers of certain qualifications should receive the same monthly payments for services rendered when the members of a Board are acquainted or familiar with the preparation, scholastic attainments, natural talents and many of the different and material characteristics making the qualifications of a teacher, and these attributes are considered when entering into contracts with teachers and stipulating for their monthly payments.

We have not been supplied with citation of authorities to the effect that the Board of Public Instruction of Brevard County had the constitutional or statutory power or authority to adopt the salary schedule made a part of the petition. This Court has no power in a mandamus proceeding to control the discretionary authority conferred by statute on the respondents here. It is the duty of the relator to show that he has a clear legal right to the performance by the respondents of the particular duty in question. See State v. Florida East Coast R.Co., 69 Fla. 165, 67 So. 906; Merchants' Broom Co. v. Butler, 70 Fla. 397, 70 So. 383; Leatherman v. Schwab, 98 Fla. 885, 124 So. 459; State v. Greer, 88 Fla. 249, 102 So. 739; 37 A.L.R. 1298; Welch v. State, 85 Fla. 264, 95 So. 751; Myers v. State, 81 Fla. 32, 87 So. 80; Johns v. County Com'rs., 28 Fla. 626, 10 So. 96; Davis v. Crawford, 95 Fla. 438, 116 So. 41; State v. Atlantic Coast Line R. Co. 53 Fla. 650, 44 So. 213, 13 L.R.A. (N.S.) 320, 12 Ann. Cas. 359; State v. Amos. 100 Fla. 1335, 131 So. 122.

We fully agree with counsel for relator and the authorities cited in their brief on the question of discrimination and an equal protection of the law as guaranteed by the 14th Amendment to the Constitution of the United States. We do not think that either of these questions is presented by this record.

This proceeding is in mandamus, and the specific relief sought should be prayed for and the prayer must be supported by allegations legally sufficient to show that the particular Act sought to be enforced is a legal duty of the respondents, and that the relator has no other remedy and has a right to require the legal

duty as alleged, to be enforced by mandamus.

If it is the duty of respondents to "adopt and establish salary schedules," such duty involves administrative discretion to be legally performed; and if the duty be illegally performed of record, the cancellation of such record may be enforced in appropriate judicial proceedings.

Even if it were sufficiently alleged that it is a legal duty of respondents to "adopt and establish salary schedules for teachers in Brevard County, Florida," which relator had a right to enforce, and that he had no other remedy than mandamus, it is not prayed that respondents be required to cancel and annul the alleged present schedule on the ground of alleged illegality.

Careful consideration has been given to the record, briefs and authorities cited by counsel for the respective parties, and after hearing oral argument at the bar of this Court, we are of the opinion that no errors appear in the record and the order appealed from should be and is hereby affirmed.

TERRELL, C.J. and WHITFIELD, BROWN, BUFORD AND THOMAS, JJ., Concur.

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IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A.D. 1939.

JOHN GILBERT,
Plaintiff in Error
v.
L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,
Defendants in Error

BREVARD COUNTY

PETITION FOR REHEARING

COMES NOW the petitioner in the above entitled cause by his undersigned attorneys, and moves the Court to reconsider the transcript of the record in this cause now before the Court on writ of error, taken to this court, to ascertain if anything contained in said transcript was overlooked by the court or not fully considered, in view of the importance of the legal question involved in this cause, and to vacate and set aside the judgment heretofore entered in this cause upon the following grounds to-wit:

1. Because this court recognizes the principle of law urged by petitioner on the question of discrimination and the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, yet it denies that a discrimination against the petitioner and others of his race has been made to appear in this case. Paragraph IX of the petition follows:

> "The differentials in said salary schedule in the payment of teachers' salaries and the payment to petitioner and others of his race, of salaries less than those paid to white teachers with identical

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qualifications, experience and performing essentially the same duties, are based solely on the ground of the race or color of petitioner and the establishment and enforcement of the said salary schedule is unlawful and arbitrary and in violation of the Constitution and Laws of the State of Florida, and denies to petitioner and others of his race the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

It would appear that the allegations of fact in this paragraph like the other paragraphs of this petition, have been admitted or rather must be admitted for the purpose of this case. We are aware that racial discrimination such as is urged here must be proved or admitted and in this case, although it was not proved, it was admitted, there being no appearance and the Court based its judgment, denying the petitioner's relief, upon the petition alone. We have shown that the statutory provisions of this state and the constitution of the same, under which the Board of Public Instruction employs teachers of the public schools, do not discriminate against persons on account of their race or color and they do not authorize the Board of Public Instruction to make the discrimination in payment of salaries that they do. The statutesand constitution under which they act are valid but the question insisted upon here is that the action of respondent in making these differentials in the payment of salaries, based solely upon race or color, is in violation of the Constitution of the United States and the discrimination shown by this record is not to be found in the statutesbut it is an actual discrimination nevertheless, by state officers and in such cases the discrimination is as much in violation of the Fourteenth Amendment as if it were written in the statutes.

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> "....Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not persumed. It must be proved or admitted...."
>
> Tarrence v. Fla., 188 U.S. 520, 23 S. Ct. 402 47 L. Ed. 572 (1902).

WHEREFORE, your petitioner moves this Honorable Court to **reconsider** its judgment herein, affirming the judgment of the court below in this cause, and to vacate the same as provided by law.

AND YOUR PETITIONER WILL EVER PRAY.

S. D. McGILL

McGILL & McGILL

THURGOOD MARSHALL

WILLIAM H. HARWICK

By S. D. McGill
Attorneys for Plaintiff in Error

IN THE SUPREME COURT OF FLORIDA,

JUNE TERM A.D. 1939

WEDNESDAY, SEPTEMBER 13, A.D. 1939

JOHN GILBERT,	**	
Plaintiff in Error,	**	
-vs-	**	
L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,	** ** ** **	BREVARD COUNTY
Defendants in Error.	**	

Counsel for Plaintiff in Error having filed in this Court a Petition for Rehearing and same having been duly considered; it is ordered by the Court that the said Petition be and the same is hereby denied.

A true Copy,

Test: (SEAL)

Guyte P. McCord

Clerk Supreme Court of Florida

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C O P Y

IN THE SUPREME COURT OF FLORIDA

JUNE TERM A.D. 1939

JOHN GILBERT, *

Plaintiff in Error, *

-vs- *

L. R. HIGHFILL, et al, as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, *

Defendants in Error. *

PRAECIPE FOR TRANSCRIPT OF RECORD

The Clerk of the above styled Court will please prepare for us as counsel for plaintiff in error herein, the following papers to-wit:

1. Copy the transcript of the record filed herein in the Supreme Court of Florida on September 26, 1938.
2. Copy Opinion of the Supreme Court filed July 25, 1939.
3. Copy petition for rehearing filed herein.
4. Copy Denial of petition for rehearing, filed September 13, 1939.
5. Copy these Directions.

McGILL & McGILL

By S. D. McGill
Attorneys for Plaintiffs in Error

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A.D. 1939

EN BANC

JOHN GILBERT, *

Plaintiff in Error *

-vs- *

L. R. HIGHFILL, et al, as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, *

Defendants in Error *

I, GUYTE P. McCORD, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing pages numbered One (1) to ______ inclusive, constitute a true copy of the transcript of record of the plaeadings and all of the proceedings had in the Supreme Court of Florida in that certain cause wherein John Gilbert was plaintiff in error and L. R. Highfill, et al., as the School Board; and Damon Hutzler, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, were defendants in error, on writ of error from the Supreme Court of Florida to the Circuit Court in and for Brevard County, Florida, and a true and correct copy of the transcript of the proceedings and pleadings filed in the Supreme Court of Florida by solicitors for plaintiffs in error to perfect their appeal from the Supreme Court of Florida to the Supreme Court of the United States; as all of said pleadings appear on file in my office as Clerk of the Supreme Court of Florida.

WITNESS my hand and the seal of the Supreme Court of Florida at Tallahassee, Florida, the Capital of the State, this 4th day of December, A.D. 1939.

Guyte P. McCord

Clerk of the Supreme Court of Florida.

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