TABLE OF CONTENTS

	Page
Nature of Interest of Amicus	2
Questions Presented	2
Argument	2
Conclusion	4
Certificate of Service	5

TABLE OF AUTHORITIES

Case	Page
Alexander v. Holmes County Board of Education, 396 U. S. 19	2
Brown v. Board of Education I, 347 U. S. 483	2
Deal v. Cincinnati Board of Education, 369 F. 2d 55, cert. denied 389 U. S. 847, 88 S. Ct. 39, 19 L. Ed 2d 114	3
Ellis v. Board of Public Instruction of Orange County, 423 F. 2d 203	4
Graves v. Walton County Board of Education, 403 F. 2d 184	3
Green v. County School Board of New Kent County, 88 S. Ct. 1689, 391 U. S. 430	4
Jackson v. Marvell School District, 416 F. 2d 380	3
Swann v. Charlotte-Mecklenburg Board of Education, 369 F. 2d 29	3
United States v. Jefferson County Board of Education, 372 F. 2d 836, cert. denied *sub nom. Caddo Parish School Board v. United States*, 389 U. S. 840	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,
Petitioners

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,
Respondents,

Certiorari to the United States Court of Appeals for the Fourth Circuit

---

AMICUS BRIEF OF THE SCHOOL BOARD OF MANATEE COUNTY, FLORIDA

NATURE OF INTEREST OF AMICUS CURIAE

This brief is filed in behalf of the School Board of the County of Manatee, a political subdivision of the State of Florida, and is sponsored by the attorney for the School Board of Manatee County, Florida, the authorized law officer thereof, under Rule 42 (4) of the Rules of the Supreme Court of the United States.

The interest of the School Board of Manatee County arises because the Fifth Circuit Court of Appeals in *Caroline Harvest, et al. The Board of Public Instruction, Manatee County, Florida, et al., vs. Jerome Pratt, et al.*, 5 Cir. 1970 ---F. 2d.--- [No. 29,425, June 26, 1970], affirmed an order of the District Court, Middle District of Florida, entered on January 29, 1970, which order directed the pairing and clustering of certain elementary schools in a manner which achieved an artificial racial balance in all elementary schools. The same order, in effect, necessarily required the bussing of students from their neighborhood school areas to another neighborhood school area where classes were to be held, a condition which did not previously exist prior to the entry of the aforementioned orders.

QUESTIONS PRESENTED

1. Does the Constitution require substantial racial balance in the system?
2. Does the United States Constitution authorize a court to order a plan which, of necessity, requires bussing for its implementation?

ARGUMENT

The Constitution requires wholly non-racial public school systems. This Court has never ruled that a unitary school system is one in which substantial racial balance as to student body composition is required. There appears to be a subliminal theme in desegregation cases decided by this Court indicating that race must not be considered. This starts in *Brown v. Board of Education* I, 347 U.S. 483, and runs through *Alexander v. Holmes County Board of Education*, 396 U.S. 19. This Court in

Alexander held that a unitary system is one within which "no person is to be effectively *excluded* from any school because of race or color." (emphasis added). There is no requirement that a person be included because of race or color, and, in fact, to so require would result in an exclusion from another school solely on the basis of race or color.

The necessity or non-necessity of racial balance is an important question of federal law which should be settled by this Court. It is a question in which there is a conflict among the decisions of the Courts of Appeal in the several circuits. The Sixth Circuit in *Deal v. Cincinnati Board of Education,* 369 F. 2d. 55, cert. denied 389 U.S. 847, 88 S. Ct. 39, 19 L.Ed. 2d. 114 held that there is no constitutional duty on the part of a Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance. The Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F. 2d. 29, holds that substantial racial balance is not necessary. Other cases in other circuits have made similar rulings. The Fifth Circuit is unsettled but in recent cases has become extremely color conscious and has demanded racial balance. See *United States v. Jefferson County Board of Education,* 372 F. 2d. 836, cert. denied *sub nom. Caddo Parish School Board v. United States,* 389 U.S. 840.

Another question which arises, assuming this Court determines that substantial racial balance is required within a unitary system is whether or not each school within a system must have both black students and white students within its student body composition. It is obvious that the lower Court in this case ruled that there must be blacks and whites in every school whenever possible. The various Circuits are in conflict over this question. This problem appears in the Fifth Circuit case of *Graves v. Walton County Board of Education,* 403 F. 2d. 184, wherein the Court holds that if there are still all-Negro schools, the plan fails, as a matter of law, to meet constitutional standards established in the *Green* case. This theorem is carried forward in the Eighth Circuit in *Jackson v. Marvell School District,* 416 F. 2d. 380. The Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* holds that the presence of an all black school will not invalidate an

otherwise unitary system. The same conclusion is reached in the Sixth Circuit in the *Deal* cases and has also been reached in the Fifth Circuit in *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d. 203. The contradictory positions reached in the Fifth Circuit may be attributed to the fact that different panels sat in these cases.

Nothing in the Constitution of the United States permits, much less requires, the bussing of school children to achieve racial balancing. The direction (*Alexander v. Board of Education*, 396 U.S. 19) "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" forbids the result obtained below, which in fact excludes several hundred white children from the walk-in schools nearest their homes simply because admitting them there fails to achieve racial balancing within the entire system. Past discrimination in one direction does not justify present discrimination in another.

CONCLUSION

The issues are of concern throughout the country and the lack of answers and guidelines have caused confusion, endless litigation and inflamed emotions. The answers must be supplied and supplied now. Amicus urges the Court to set forth comprehensive guidelines and to hold that racial balance is not required for a unitary system; that neighborhood schools should be preserved and that education must be the primary concern in a unitary school system.

Respectfully submitted,

Kenneth W. Cleary
Dye, Dye, Smith, Cleary & Scott
P. O. Box 2480
Bradenton, Florida 33505
Attorney for the School Board
of Manatee County, Florida

CERTIFICATE OF SERVICE

This is to certify that copies of Amicus Brief of the School Board of Manatee County, Florida were served upon each of the attorneys named below by depositing the same in the United States mail, postage prepaid on this ____ day of _____, 1970.

William J. Waggoner
1100 Barringer Office Tower
426 North Tyron Street
Charlotte, North Carolina

Benjamin S. Horack
806 East Trade Street
Charlotte, North Carolina

Julius LeVonne Chambers
216 West Tenth Street
Charlotte, North Carolina

Jack Greenberg
10 Columbus Circle
New York, New York

Conrad O. Pearson
203 ½ East Chapel Hill Street
Durham, North Carolina

Jerris Leonard
Assistant Attorney General
U. S. Department of Justice
Washington, D. C.

Honorable Erwin N. Griswold
Solicitor General of United States
Department of Justice
Washington, D.C. 20530

Honorable Robert Morgan
Attorney General
State of North Carolina
Department of Justice
Raleigh, North Carolina

William C. Cramer, M.C.
2165 Rayburn Building
Washington, D. C. 20515

Stephen J. Pollak
Benjamin W. Boley
Richard M. Sharp
734 Fifteenth Street, N.W.
Washington, D. C. 20036

Gerald Mager
General Counsel to the Governor
The Capitol
Tallahassee, Florida

Kenneth W. Cleary