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TABLE OF CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, IN SUPPORT OF THE RESPONDENTS

I.

PRELIMINARY STATEMENT — AUTHORITY TO FILE

The Winston-Salem/Forsyth County Board of Education submits this brief, amicus curiae, in the hope that it may be of constructive assistance to the Court in its deliberations on this extremely important case.

All parties have consented to the filing of this brief. A copy of each consent, given by counsel for Petitioners and counsel for Respondents, respectively, is being filed with the Clerk simultaneously with the filing of this brief.

II.

POSTURE OF THE AMICUS CURIAE

The Amicus Curiae filing this brief, Winston-Salem/Forsyth County Board of Education, is defendant in a desegregation suit currently on appeal, by both parties, to the Court of Appeals for the Fourth Circuit.

Forsyth County is roughly rectangular in shape, its longest East-West dimension being about 26 miles and its longest North-South dimension about 20 miles. It comprises 424 square miles. The estimated current population of the County, according to the preliminary 1970 census figures, is 215,594, of whom approximately 22.5% are non-white. Winston-Salem, the principal city in Forsyth County, comprises 57.5 square miles and has an estimated current population, according to the preliminary 1970 census figures, of 133,820. Most of the black population of the County resides in the northern, eastern, and to some extent, southern portions of the City of Winston-Salem. Less than 10% of the County's population, outside of the City of Winston-Salem, is non-white.

The Winston-Salem/Forsyth County School System is a consolidated system, containing, in 1969, sixty-seven (67) schools and fifty thousand four hundred fifty-five (50,455) students. Of these students, thirty-six thousand five hundred twenty-one (36,521) are white, thirteen thousand eight hundred seventy-nine (13,879) are black. Like Charlotte-Mecklenburg and other consolidated city-county school systems throughout the North and South, Negro residences in Winston-Salem and Forsyth County are concentrated in certain urban areas. Unlike Charlotte-Mecklenburg, however, the Court in the Winston-Salem case (Scott v. Winston-Salem/Forsyth County Board of Education, No. 174-WS-68, M.D.N.C., June 25, 1970) found that:

> "The reasonable conclusion to be drawn from the evidence is that even though in times there has been some discrimination in the sale and rental of property, the concentration of the Negro population in the northeastern quadrant of the City has been caused by economic factors and the desire of blacks to live in the areas where they do live rather than in white or predominantly white areas. This conclusion is confirmed by the fact that in resettling displaced blacks as a result of public housing projects that without exception the blacks asked to be resettled in the same area where they lived, that is, in black or predominantly black areas even though other areas were open. The concentration of blacks cannot be fairly attributed

> to public and private discrimination, and it is concluded that the housing patterns are not the result of such discrimination. In any event, where de jure segregation has been eliminated and de facto segregation remains, there surely must come a time when the stigma of de jure segregation is removed, certainly so in this situation, particularly in those areas once populated by whites and now all-black or predominantly black."

The District Court upheld the assignment plan of the Winston-Salem/Forsyth Board except in the case of three all-black schools which were ultimately ordered to be clustered with five predominantly white schools. The plaintiffs appealed from the failure of the District Court to order the integration of all the schools in the system and the defendant School Board appealed from the order requiring the clustering of the eight schools.

It is quite apparent that the District Court found no discrimination in the operation of the Winston-Salem/Forsyth County School System and would not have ordered the clustering of the eight schools above referred to (which required the busing of approximately 2,000 pupils and was for the purpose of achieving a racial balance in those schools) had it not been for the compulsion imposed upon the Court by appellate decisions, particularly the decision in Charlotte-Mecklenburg. In Judge Gordon's order of August 17, 1970, he stated:

> "If this Court were writing on the proverbial 'clean slate', the clustering of the eight schools would not have been ordered initially, as it is believed that freedom to go to any school you wish is the ultimate in freedom. However, trial courts have a solemn obligation to follow appellate court decisions, and a fair reading of these decisions demands what has been ordered by this Court. If this Court is in error, it can and will soon be corrected on appeal."

III.

BRIEF STATEMENT OF ARGUMENTS SUPPORTED BY THIS AMICUS CURIAE, WHICH ARE, IN GENERAL, COVERED IN GREATER DETAIL IN OTHER BRIEFS FILED WITH THE COURT.

1. Decisions decreeing that there can no longer be any "white" schools or any "black" schools — but that there shall be "just schools", which are not racially identifiable as "black" or "white", *must* be construed to mean that schools shall be operated for all pupils within normal geographic areas which may be served by them — and that no person shall be deliberately or effectively excluded on account of race. If they purport to mean anything else, they are meaningless; first, because the great majority of Americans are white, and, second, because it would be impossible to require all schools or even a sizable percentage of all schools throughout the United States to include among their pupils 20%, or 15%, or 10%, or 5%, or even 1% black persons — unless this nation is prepared to control everyone's place of residence. So long as the black population in the District of Columbia remains at its present level, anyone visiting those schools will find most, if not all, of them to be "black" schools insofar as the racially identifiable appearance of the pupils is concerned, but this does not make them "black" schools in a legal sense. This does not mean that the District of Columbia is failing to operate a unitary system. Conversely, so long as the white population of Ashe County, North Carolina (or any one of thousands of other counties throughout the United States) remains at its present level, anyone visiting the schools of that county will find them to be "white" schools insofar as the racially identifiable appearance of the pupils is concerned. Again, this does not make them "white" schools in a legal sense; nor does it mean that they are failing to operate a unitary school system. The same is true, in varying degrees, according to the racial makeup of each community, throughout the nation.

2. The same law should apply North, South, East and West. Any distinction between "de jure" and "de facto" is not justifi-

able for two reasons: First, because racial residential patterns in areas (and particularly in urban areas) populated by both blacks and whites are substantially the same everywhere, regardless of whether their origin was "de facto" or "de jure"; and, second, because there is no longer any such thing as "de jure" segregation in a true legal sense. The laws which permitted it have been held unconstitutional, and anyone who considers himself to be a victim of racial discrimination in housing has a remedy at law.

3. The argument that if it was all right to bus blacks extreme distances, past white schools, to attend black schools, it is now all right to do the same in reverse to force a racial balance — is neither legally nor morally sound. It was wrong to do the former, and it is proper to right the wrong by saying that no child shall be discriminated against or required to attend any particular school because of race. But two wrongs do not make a right. To require pupils to travel extreme distances past nearby schools simply because of race for the sole purpose of forcing a prescribed racial balance is committing the same wrong decried in *Brown*. The only difference is that in the first instance it was to force a separation of the races, whereas in the latter instance it is to force a mixing of the races. The basic wrong in both instances is that persons are being *forced* to do an extreme, artificial act to accomplish a racially motivated objective.

4. The argument that since some pupils must be bused to school, others should not object to the same treatment is spurious. It is one thing to provide transportation for a pupil who lives one and one-half or more miles from the nearest school; it is quite another to force a pupil who lives within easy walking distance of the nearest school to attend a school located one and one-half or more miles from his home.

5. Where a child lives close enough to school to walk the distance in five or ten minutes, is it right to force him to spend an additional thirty minutes to an hour every morning and every afternoon, five days a week, nine months a year, traveling by bus to a distant school for the sole purpose of achieving a particular racial balance in that school? Childhood hours and

days are precious and few as it is — and certainly the Constitution should not be so construed as to force, unnecessarily, the loss of time for sleep, work or recreation. Sociological advantages to be gained from racial mixing in the public schools beyond that which results naturally from residential patterns should be a matter of choice — not legal compulsion.

6. How can it be right for the Constitution to be so construed as to result in the forcing of a black pupil whose family lives in a predominantly white residential neighborhood, near a public school, to be transported past that school to a much more distant school in a predominantly black neighborhood? This is one of the results that can and does occur with pairing or clustering and other artificial devices to achieve racial balance.

7. Both the Executive and Legislative branches of our Government (through the President's March 27, 1970, statement, and the Civil Rights Act of 1964 [78 Stat. 246, 248, 42 U.S.C. 2000c(b), 2000c-6(a)(2)] have supported the doctrine of *Brown*, without concluding that that doctrine requires an abandonment of the neighborhood concept. The President expressly disapproved "transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance". The Congress expressly provided that "desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance" and, further, that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."

IV.

FUNDAMENTAL POSITION OF AMICUS CURIAE

The fundamental position of the Winston-Salem/Forsyth County Board of Education in this brief is that the equal protection clause of the Fourteenth Amendment requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws", that this clause, when applied to pupil

assignment in public education, requires — and requires only — that pupils be assigned to public schools on a nondiscriminatory, non-racial basis, to the end that no person shall be effectively excluded from any school because of race or color.

Anything more than this; anything less than this; anything different from this — is contrary to the fundamental law of our land.

V.

FUNDAMENTAL PRINCIPLE OF BROWN — TRANSITION — FUTURE

The pertinent portion of the Fourteenth Amendment reads:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The fundamental question decided by the Court in *Brown I* was stated and answered by the Court as follows:

> "We come to the question presented: Does segregation of children in public schools *solely on the basis of race,* even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." (Emphasis added). *Brown* v. *Board of Educ.*, 347 U. S. 483, 493, 75 S. Ct. 753, 98 L. Ed. 873 (1954).

Having made that decision the Court called for further briefs and arguments to assist the Court in determining whether the Court should enter a decree

> "(a) . . . providing that, *within limits set by normal geographical school districting,* Negro children should forthwith be admitted to *schools of their choice,* or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system *not based on color distinctions?*" (Emphasis added). 347 U. S. at 495 n. 13.

Clearly, from both of the above quotations, the Court interpreted the equal protection clause as it related to pupil assignment in public education, to require the elimination of segrega-

tion by law solely on the basis of race and to require conversion "to a system not based on color distinctions." The Court quite clearly felt that the admission of Negro children "to schools of their choice" . . . "within the limits set by normal geographic school districting" would constitute compliance with the new doctrine enunciated by the Court.

In *Brown II* the Court recognized the tremendous practical problems which would be encountered in effectuating the transition required under *Brown I*, and, applying equitable principles, directed that the transition be accomplished "with all deliberate speed." In *Brown II* the Court again made it clear that the doctrine of *Brown I* was *nondiscrimination:*

> "These cases were decided on May 17, 1954. The opinions of that date *declaring the fundamental principle that racial discrimination in public education is unconstitutional,* are incorporated herein by reference." (Emphasis added). *Brown v. Board of Educ.*, 349 U. S. 294, at 298, 74 S. Ct. 686, 99 L. Ed. 1083 (1955).
>
> "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis.*" 349 U. S. at 300.
>
> ". . . the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis,* . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems *and to effectuate a transition to a racially nondiscriminatory school system* . . . .
>
> ". . . and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees *consistent with this opinion* as are necessary and proper *to admit to public schools on a racially nondiscriminatory basis* with all deliberate speed the parties to these cases. (Emphasis added) 349 U. S. at 300-01.

Nowhere in either of these landmark decisions did the Court once suggest or even intimate that under the newly enunciated

doctrine of *Brown I* the Constitution required the achievement of any particular racial ratio in the schools or that boards of education might be required to force a balance if it did not result naturally. The terms the Court did use were terms such as "nondiscriminatory", "nonracial", "revision of . . . attendance areas into compact units", "racially nondiscriminatory", "a system not based on color distinctions", and admission of Negro children "to schools of their choice" . . . "within limits set by normal geographic school districting".

At that point — in 1955 — the clear mandate and teaching of the Supreme Court was that the goal which must be achieved in all public school systems was the assignment of pupils on a nondiscriminatory basis, without regard to race.

At that point — in 1955 — the Court also clearly recognized that because of the long-established tradition of dual school systems throughout the South the achievement of this goal would take time.

Now — looking back from 1970 — we look back upon fifteen years of transition.

Some have found the transition too slow, others have found it too fast. The fact remains that there *has* been a great change — there *has* been a transition from the former dual school systems to unitary school systems. And most systems, Charlotte-Mecklenburg and Winston-Salem/Forsyth included, are now operating unitary systems.

The difficulty now is that there are those who have lost sight of the fundamental, abiding principle of nondiscrimination laid down in *Brown* and are contending that cases which dealt only with what had to be done in particular school systems in order to "effectuate the transition" are the cases which must be followed on a continuing basis by all school systems in order to operate a unitary system, even after the transition has been effectuated.

Arguing largely from the "transition" cases and virtually disregarding *Brown* and the updating of Brown in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U. S. 19, 90 S. Ct. 29, 24 L. Ed. 2nd 19 (decided October 29, 1969), where the Court de-

fined a unitary system as one in which "no person is effectively excluded from any school because of race or color", such persons forsake principle and find ultimate solutions in terms of numbers and percentages, which they would have the Courts first sanction and then police and enforce.

If their contentions should find favor with the Court, the net result will be:

To keep the federal courts in the public school business ad infinitum; to have every district court retain jurisdiction over every school case; to have the court require every school to be "racially balanced", to require the submission of periodic reports on the racial composition of every school and to order a reshuffling of students every time changes in residential patterns upset the prescribed racial ratio in any school; to have the court pass judgment on the expansion of every exisiting school and the location of every new school; to have the court determine whether the employment and assignment of all staff members, principals and teachers upsets the prescribed racial balance or is racially motivated — in short, to have an interminable, intolerable court-operated "big brother" approach to public education.

We believe the idea of such a result is as abhorrent to the court as it is to school boards and to the vast majority of the public, but this is exactly the situation confronting Charlotte-Mecklenburg, and many, many other school boards, today and it bids fair to become a way of life — or death — for public education in the South if nothing is done by the Supreme Court to stop it.

The Court has already decreed that the time for effectuating the transition has run out. This being true, it would seem that it would now be appropriate for the Court to encourage the District Courts to review the school cases pending before them for the purpose of assuring that the school systems involved are now operating on a nondiscriminatory basis — i.e., that no person is being effectively excluded from any school because of race or color and that affirmative steps be taken toward the entry of final judgments as rapidly as each case will permit.

Finally, the Court should not misconstrue the absence of widespread boycotts or other disruptive or destructive acts in the Charlotte-Mecklenburg, or Winston-Salem/Forsyth County School Systems as an acceptance by the public of court-ordered, artificial measures to achieve racial balance. All this proves is that the public strongly supports education and that the paramount issue, for most whites, is not whether blacks and whites shall attend the same school. The public, generally, objects strenuously and deeply to court-imposed, artificial measures to force a racial balance, and to the application of standards for the South which are different from those applied in other parts of the Nation, for this is neither freedom nor equality. If the practice is continued the public will respond in the only ultimately effective way left open to them: They will fail to vote for school bonds needed for public education and will otherwise abandon their support of public education, in favor of private education. Historically, the South has supported public education, with rich and poor alike generally attending public schools. This has been healthy — and good sociologically as well as educationally. *Brown*, properly construed and applied, with blacks and whites accorded equal treatment without discrimination, can save and strengthen public education; *Brown*, improperly construed and applied, can destroy public education.

Respectfully submitted,

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