INDEX

PAGE

Opinions Below 1

Jurisdiction 3

Questions Presented 4

Constitutional Provisions Involved 4

Statement 4

1. Introduction 4
2. Proceedings Below 5
3. Proceedings Pending Certiorari 10
4. The Charlotte-Mecklenburg County School System in 1968-69 11
5. Two Schools in 1969-70 16
6. The Plan Ordered by the District Court in February, 1970 19
   a. High Schools 20
   b. Junior High Schools 21
   c. Elementary Schools 22
   d. Transportation 23
7. Other Elementary Plans Reviewed by the District Court in July, 1970 30
   a. The Majority Board Plan 30
   b. The HEW Plan 30
   c. The Finger Plan, the Board Minority Plan and the Preliminary Finger Plan 33

Summary of Argument 34

LoneDissent.org

PAGE

Argument—

I. The Public Schools of the Charlotte-Mecklenburg School System Are Racially Segregated in Violation of the Equal Protection Clause of the Fourteenth Amendment as the Result of Governmental Action Causing School Segregation and Residential Segregation 41

A. The Schools Are Organized in a Dual Segregated Pattern 41

B. Governmental Agencies Created Black Schools in Black Neighborhoods by Promoting School Segregation and Residential Segregation 46

II. The District Court Was Correct in Ruling That the Dual Segregated System in Charlotte-Mecklenburg Must Be Disestablished by Reorganizing the System So That No Racially Identifiable Black Schools Remained. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal 54

A. This Court's Decisions Require Complete School Desegregation 54

B. The Fourth Circuit's New Reasonableness Rule Makes the Goal of Desegregation Less Complete and Specific and Threatens to Undermine *Brown* v. *Board of Education* 58

C. The Goal of Integrating Each School in Charlotte Is Consistent With Federal Statutory and Constitutional Requirements 65

LoneDissent.org

PAGE

III. The District Court Acted Within the Proper Limits of Its Discretion by Ordering a Plan Consistent With the Affirmative Duty to Desegregate the Schools and the Objective of Preventing Resegregation 68

A. The Finger Plan Promises to Establish a Unitary System 68

B. The Court Ordered Plan Is Feasible 69

C. The Finger Plan Utilizes Appropriate Techniques to Achieve Pupil Desegregation 75

D. The Neighborhood School Theory Cannot Be Justified on the Basis of History and Tradition Because It Was Widely Disregarded in Order to Promote Racial Segregation 80

E. The Finger Plan Is Necessary to Accomplish the Constitutional Objective 83

F. The Court of Appeals Applied an Improper Standard for Appellate Review of the District Court's Discretionary Determination in Formulating Equitable Relief 84

Conclusion 87

Brief Appendix

Memorandum of Decision and Order, dated August 3, 1970 ..... Br. A1

Memorandum Decision, dated August 7, 1970 ..... Br. A39

Defendants' Report of Action Taken as Directed by the Court in Its Order of August 3, 1970 ..... Br. A40

LoneDissent.org

Table of Authorities

Cases: PAGE

Alexander v. Hillman, 296 U.S. 222 (1935) 86
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 7, 8, 40, 43, 64, 86
Andrews v. City of Monroe, No. 29358 —— F.2d —— (5th Cir., Apr. 23, 1970) 65

Barrows v. Jackson, 346 U.S. 249 (1953) 50
Baldwin v. New York, 26 L.ed 2d 437 (1970) 63
Bell v. Maryland, 378 U.S. 226 (1964) 35, 50
Bowman v. The School Board of Charles City County, 382 F.2d 326 (1967) 6
Bradley v. Board of Public Instruction of Pinellas County, No. 28639, —— F.2d —— (5th Cir., July 1, 1970) 76
Braxton v. Board of Public Instruction of Duval County, 402 F.2d 900 (5th Cir. 1968) 52
Brewer v. School Board of the City of Norfolk, 397 F.2d 37 (4th Cir. 1968) 52, 53, 76
Brown v. Board of Education, 347 U.S. 483 (1954) 35, 47, 54, 56, 59, 62, 64
Brown v. Board of Education, 349 U.S. 294 (1955) 54, 68, 75, 84
Brunson v. Board of Trustees of School District No. 1 of Clarendon County, No. 14571, —— F.2d —— (4th Cir., June 5, 1970) 59, 76
Buchanan v. Warley, 245 U.S. 60 (1917) 49
Buckner v. County School Board of Greene County, Va., 332 F.2d 452 (4th Cir. 1964) 82

Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970) 8, 65, 86

LoneDissent.org

PAGE

Clark v. Board of Education of Little Rock, No. 19795, —— F.2d —— (8th Cir., May 13, 1970), cert. pending No. 409 O.T. 1970 77
Continental Illinois Nat. Bank & Trust Co. v. Chicago R.I. & P. R. Co., 294 U.S. 648 (1935) 82
Cooper v. Aaron, 358 U.S. 1 (1958) 35, 46, 53, 54, 75
Corbin v. County School Board of Pulaski County, Va., 177 F.2d 924 (4th Cir. 1949) 82
Crisp v. County School Board of Pulaski County, Va. (W.D. Va. 1960), 5 Race Rel. L. Rep. 721 82

Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690 (5th Cir. 1968) 52, 76
Dowell v. Board of Education of the Oklahoma City Public Schools, 396 U.S. 269 (1969) 8, 86
Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla. 1965), *affirmed,* 375 F.2d 158 (10th Cir. 1967), *cert. denied,* 387 U.S. 931 (1967) 52, 65

Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496 (1930) 49

Goins v. County School Board of Grayson County, Va., 186 F. Supp. 753 (W.D. Va. 1960) 82
Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 6, 35, 36, 38, 39, 40, 43, 47, 54, 55, 57, 58, 64, 68, 69, 76, 86
Green v. School Board of the City of Roanoke, No. 14335 —— F.2d —— (4th Cir., June 17, 1970) 77
Griffin v. Board of Education of Yancey County, 186 F. Supp. 511 (W.D. N.C. 1960) 81
Griffin v. School Board, 377 U.S. 218 (1964) 37, 63, 75, 85

LoneDissent.org

PAGE

Hall v. St. Helena Parish School Board, 417 F.2d 801 (5th Cir. 1969), *cert. denied,* 396 U.S. 904 (1969)........ 76
Haney v. County Board of Education of Sevier County, Ark., 410 F.2d 920 (8th Cir. 1969)........ 82
Harvest v. Board of Public Instruction of Manatee County, No. 29425, —— F.2d —— (5th Cir., June 26, 1970) 76, 77
Henry v. Clarksdale Municipal Separate School District, 409 F.2d 682 (5th Cir. 1969)........47, 52
Holland v. Board of Public Instruction of Palm Beach County, 258 F.2d 730 (5th Cir. 1958) 52

Jackson v. Marvell School District No. 22, 425 F.2d 211 (8th Cir. 1970) 76
Jones v. School Board of Alexandria, Va., 278 F.2d 72 (4th Cir. 1960) 82

Katzenbach v. Morgan, 384 U.S. 641 (1966) 66
Kemp v. Beasley, 423 F.2d 851 (8th Cir. 1970) 76, 77
Keyes v. School District No. One, Denver, 303 F. Supp. 289 (D. Colo. 1969), *stay granted,* —— F.2d —— (10th Cir. 1969), *stay vacated,* 396 U.S. 1215 (1969)..52, 65

Mannings v. Board of Public Instruction of Hillsbrough County, No. 28643, —— F.2d —— (5th Cir., May 11, 1970) 76
Monroe v. Board of Commissioners, 391 U.S. 450 (1968) 6, 35, 41, 43, 64
Moore v. Tangipahoa Parish School Board, 304 F. Supp. 244 (E.D. La. 1969) 66

Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th Cir. 1969) 8, 76
Northcross v. Board of Education, 397 U.S. 232 (1970) 41, 70

LoneDissent.org

PAGE

Phillips v. Wearn, 226 N.C. 290, 37 S.E.2d 895 (1946).. 49

Raney v. Board of Education, 391 U.S. 443 (1968) 6
Rogers v. Hill, 289 U.S. 582 (1933) 85

School Board of Warren County, Va. v. Kilby, 59 F.2d 497 (4th Cir. 1958) 81
Shapiro v. Thompson, 394 U.S. 618 (1969) 63, 66
Shelley v. Kraemer, 334 U.S. 1 (1948) 15, 49, 51
Sparrow v. Gill, 304 F. Supp. 86 (M.D. N.C. 1969) 24
Swann v. Charlotte-Mecklenburg Board of Education, 243 F. Supp. 667 (W.D. N.C. 1965), *affirmed*, 369 F.2d 29 (4th Cir. 1966) 1, 41

Tillman v. Board of Public Instruction of Volusia County, No. 29180, — F.2d — (5th Cir., April 23, 1970) 65, 76, 77
Thompson v. County School Board of Arlington County, 166 F. Supp. 529 (E.D. Va. 1958) 83

United States v. Board of Trustees of Crosby Independent School District, 424 F.2d 625 (5th Cir. 1970) 65, 76, 77
United States v. Choctaw County Board of Education, 417 F.2d 838 (5th Cir. 1969) 52
United States v. Cook County, Illinois, 404 F.2d 1125 (7th Cir. 1968) 63
United States v. Corrick, 298 U.S. 435 (1936) 85
United States v. Greenwood Municipal Separate School District, 406 F.2d 1086 (5th Cir. 1969) 52
United States v. Indianola Municipal Separate School District, 410 F.2d 626 (5th Cir. 1969), *cert. denied*, — U.S. — (1970) 52

LoneDissent.org

PAGE

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United States v. Montgomery County Board of Education, 395 U.S. 225 (1969) 36, 40, 57, 67, 68, 86

United States v. School Dist. 151 of Cook County, 404 F.2d 1125 (7th Cir. 1968), *aff'g* 286 F. Supp. 786 (N.D. Ill. 1968) 52, 65, 76, 77

United States v. W. T. Grant, 345 U.S. 629 (1953) 40, 85

Valley v. Rapides Parish School Board, — F.2d — (5th Cir. 1970) 52

Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946) 49

Walker v. County School Board of Floyd County, Va. (W.D. Va. 1960), 5 Race Rel. L. Rep. 714 82

Whittenberg v. School District of Greenville County, C.A. No. 4396, D. S.C. (Feb. 4, 1970) 67

Youngblood v. Board of Public Instruction of Bay County, Fla., — F.2d — (5th Cir., No. 29369, July 24, 1970) 52

Statutes:

Civil Rights Act of 1964, §§ 401(b), 407 (A)(2), 42 U.S.C. §§ 2000c(b), 2000c-6(a) (2) 37, 66

28 U.S.C. § 47 4

28 U.S.C. § 1343 5

42 U.S.C. § 1983 5

N.C. Gen. Stat. § 115, 176.1 [1969 Supp.] 9

LoneDissent.org

PAGE

Other Authorities:

Abrams, *Forbidden Neighbors* (1955) 51

"NEA Brief *Amicus Curiae*" 63

"On the Matter of Bussing: A Staff Memorandum from the Center for Urban Education" (February 1970) 79

Racial Isolation in the Public Schools, A Report of the U. S. Commission on Civil Rights (1967) 45, 50, 51

Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970 62

Weaver, *The Negro Ghetto* (1948) 51

Weinberg, "Race and Place, A Legal History of the Neighborhood School" (U.S. Govt. Printing Office, 1967) 83

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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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the courts below are as follows:[1]

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (285a).
2. Order dated June 3, 1969, unreported (370a).
3. Order adding parties, June 3, 1969, unreported (374a).
4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (448a).

[1] Earlier proceedings in the same case are reported as *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

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5. Supplemental Findings of Fact, June 24, 1969, reported at 300 F. Supp. 1386 (459a).

6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (580a).

7. Order dated August 29, 1969, unreported (593a).

8. Order dated October 10, 1969, unreported (601a).

9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (655a).

10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (657a).

11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (698a).

12. Order dated December 2, 1969, unreported (717a).

13. Order dated February 5, 1970, reported at 311 F. Supp. 205 (819a).

14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (921a).

15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (922a).

16. Supplementary Findings of Fact dated March 21, 1970, unreported (1198a).

17. Supplemental Memorandum dated March 21, 1970, unreported (1221a).

18. Order dated March 25, 1970, unreported (1255a).

19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (1259a).

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20. The opinions of the Court of Appeals filed May 26, 1970, not yet reported, are as follows:
    a. Opinion for the Court by Judge Butzner (1262a).
    b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (1279a).
    c. Opinion of Judge Bryan dissenting in part (1293a).
    d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (1295a).
21. The judgment of the Court of Appeals appears at 1304a.
22. The opinion of a three-judge district court in an ancillary proceeding in this case dated April 29, 1970, not yet reported, appears at 1305a.
23. The Memorandum of Decision and Order dated August 3, 1970, unreported of the district court entered following the further proceedings directed by the Court of Appeals (1278a-1279a) and authorized by this Court (1320a) is appended to this brief.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The petition for a writ of certiorari was filed in this Court on June 18, 1970, and was granted on June 29, 1970 (1320a).

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[2] The appendix to the brief containing the decision on remand is herein designated "Br. A——." The other matters, including all other previous opinions are printed in separate appendix volumes and are herein designated "——a."

The Memorandum dated August 7, 1970, unreported is printed at Br. A39.

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Questions Presented

1. Whether the trial judge correctly decided he was required to formulate a remedy that would actually integrate each of the all-black schools in the northwest quadrant of Charlotte immediately, where he found that government authorities had created black schools in black neighborhoods by promoting school segregation and housing segregation.

2. Whether, where a district court has made meticulous findings that a desegregation plan is practical, feasible and comparatively convenient, which are not found to be clearly erroneous, and the plan will concededly establish a unitary system, and no other acceptable plan has been formulated despite lengthy litigation, the Court of Appeals has discretion to set aside the plan on the general ground that it imposes too great a burden on the school board.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. *Introduction*

This Court has granted review[3] of an en banc[4] decision of the United States Court of Appeals for the Fourth Cir-

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[3] The defendants have filed a cross petition for writ of certiorari which is pending. (Oct. Term 1970, No. 349.)

[4] Prior to argument, Judge Craven entered an order disqualifying himself. He had decided the case as a district judge in 1965 (243 F. Supp. 667) and was of the opinion that this previous participation barred him from hearing the case as a circuit judge. 28 U.S.C. §47.

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cuit setting aside certain portions of an order of Judge James B. McMillan of the Western District of North Carolina which had required the complete desegregation of the Charlotte-Mecklenburg County public school system. Three members of the court, in a plurality opinion written by Judge Butzner, agreed with the lower court that the school board had an affirmative duty to employ a variety of available methods, including busing, to disestablish its dual school system and approved the portions of the order providing for the desegregation of the junior and senior high schools. As to the plan ordered for the elementary schools, however, they thought that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system (1271a)." Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate in all respects and would have affirmed the decision in its entirety (1279a, 1295a). Judge Bryan who would have reversed the entire order expressed disapproval of busing to achieve racial balance which he found the order to require for junior and senior high school students as well as elementary (1293a).[5]

2. *Proceedings Below*

Black parents and students brought this action in 1965 against the local school board to desegregate the consolidated school district of Charlotte City and Mecklenburg County, North Carolina pursuant to 28 U.S.C. §1343 and 42 U.S.C. §1983. The North Carolina Teachers Association, a black professional organization, intervened seeking de-

[5] This is essentially the position of the defendants as stated in their cross petition for writ of certiorari. See note 3, supra. They not only argue that the Court of Appeals erred in approving Judge McMillan's plan for junior and senior high schools, but also disagree with the Court's conclusion that the board's elementary plan is unconstitutional.

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segregation of the faculties on behalf of the black teachers in the school system. More recently, other defendants have been added, including the State Board of Education, the State Superintendent of Public Instruction and the individual members of the local board (464a, 374a, 901a). This current phase[6] of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,[7] reopened the case seeking the elimination of all vestiges of the dual system (2a).

Judge McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 285a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the

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[6] The case was first tried in the summer 1965. (243 F. Supp. 667 (1965).) The plaintiffs challenged an assignment plan where initial assignments were made pursuant to geographic zones from which students could transfer to schools of their choice. Plaintiffs complained that many of the zones were gerrymandered and that the zones of ten rural and concededly inferior black schools which the board claimed would be abandoned within a year or two overlapped white school zones. They also attacked a free transfer policy which had resulted in the transfer of each white child initially assigned to black schools as had the previous policy allowing for minority to majority transfers. Also under attack was the board's policy looking to the "eventual" non racial employment and assignment of teachers. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active affirmative steps to integrate the schools.

The district court approved the assignment plan but required "immediate" non-racial faculty practices.

The court of appeals affirmed. (369 F.2d 29 (1966).) The decision noted that the 10 black schools were closed at the end of the 1965-66 school year. The court held, as it did the following year in *Bowman* v. *The School Board of Charles City County,* 382 F.2d 326 (1967), rev'd sub nom. *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), that the school board had no affirmative duty to disestablish the dual system.

[7] *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968); and *Raney* v. *Board of Education,* 391 U.S. 443 (1968).

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next twelve months.[8] He rejected the first plan submitted and called for another, found the second plan inadequate but "reluctantly" accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.[9] On December 1, 1969, following the court's patient but unavailing efforts to secure from the board an acceptable plan, the failure of the board to carry out its minimal interim plan for 1969-70 and the mandate of this Court[10] that schools are to be desegregated "at once", Judge McMillan decided to appoint an educational consultant to assist him in devising a desegregation plan (698a). The following day, the court appointed Dr. John A. Finger, Jr., a Professor of

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[8] Judge McMillan has provided an excellent summary of the proceedings in the district court prior to the decision of the court of appeals in his Supplemental Memorandum of March 21, 1970 (1221a).

[9] The first plan was rejected on June 20, 1969 (448a). The Court found that the board had sought from the staff a "minimal" and inadequate plan, that the staff produced such a plan and the board thereupon eliminated its only effective provisions before submitting it to the court.

The court found the second plan inadequate on August 15, 1969 (580a) but accepted it for the 1969-70 school year only because it promised some measure of desegregation and there did not appear to be sufficient time prior to the opening of the new school term for the development and implementation of a more effective plan. The failure of the board to accomplish what the plan had promised was determined on November 7, 1969 (657a).

The third "plan" was simply a statement of guidelines as to how the board intended to produce a plan. The guidelines promised no particular results and were thus rejected on December 1, 1970 (698a).

Judge Sobeloff traces this history in an extensive footnote (1291a, n. 9). He concludes "[T]he above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn."

[10] *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19.

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Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (717a). The board was again invited to submit another plan (698a).

On January 20, 1970, plaintiffs requested that Dr. Finger promptly present his plan so that the schools could be desegregated "at once" (718a).[11] The Finger plan (835a-839a) and a fourth board plan (726a) were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5 directing the desegregation of the students and teachers of the elementary schools by April 1, 1970, and of the junior and senior high schools by May 4, 1970 (819a).[12] The order was based upon the plans submitted by the board and Dr. Finger.

The school board appealed (904a) and sought a stay in the court of appeals. On March 5, 1970, the court of appeals

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[11] Plaintiffs' request followed the controlling decisions of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools,* 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970); and *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040 (4th Cir. 1969).

This was not the first request by plaintiffs for immediate relief. In September of 1969 the plaintiffs' motion for a finding of contempt and for immediate desegregation (596a) had led to the court's finding in November that the board had not accomplished, during the 1969-70 school year, what it had been ordered to do (655a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt (596a, 914a), objections to patently defective plans (e.g. 692a), a motion to enjoin school construction (324a), motions to vacate state court orders (see 925a), motions to add new defendants (840a, 906a) and motions to enjoin state officials from interfering with orders of the court (840a, 906a, 914a). Despite these and other efforts in the district court, the court of appeals and this Court, there has yet to be any more desegregation in the Charlotte-Mecklenburg school system than when this round of litigation commenced.

[12] The order was slightly modified on March 3, 1970 (921a).

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stayed a portion of the order relating to the elementary schools and directed that the district court make additional findings concerning the cost and extent of the bussing required by the February 5 Order (922a). The plaintiffs applied to this Court to have the partial stay rescinded; the application was denied.

The district court received additional evidence pursuant to the directives of the court of appeals and entered a supplemental Memorandum (1221a) and Supplemental Findings of Fact (1198a)[13] on March 21, 1970.[14]

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[13] The supplemental findings were amended in certain respects on April 3, 1970 (1259a), in response to a motion by defendants (1239a).

[14] During this period there were also proceedings concerning the North Carolina anti-bussing law:

> "In June of 1969, pursuant to the hue and cry which had been raised about 'bussing,' Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called 'anti-bussing' statute, N.C.G.S. 115-176.1 [supp. 1969]" (1223a).

Plaintiffs were granted leave to file a supplemental complaint in July, 1969 and to add the State Board of Education and State Superintendent of Public Instruction as defendants to attack the statute (464a). At that time the statute did not appear to the court to be a barrier to school desegregation (579a, 585a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds be expended for the transportation of students pursuant to the district court order of February 5 and several state judges issued *ex parte* orders of similar effect acting under color of the state statute. (See 1305a, 1307a, 1308a).

At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants (901a). He, thereafter determined that the constitutionality of the state statute was at issue and, therefore, requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24. On April 29, 1970, the court entered its decision (1305a) declaring unconstitutional the portions of the statute prohibiting the assignment of any students "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national

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The opinions and judgment of the court of appeals were filed on May 26, 1970. The court decided by a vote of 4 to 2 to vacate and remand the judgment of the district court for further proceedings. A majority for the judgment was created by the vote of Judge Bryan joining with the three members of the court subscribing to the plurality opinion written by Judge Butzner, although Judge Bryan dissented from the views expressed in the plurality opinion (1304a).[15]

3. ***Proceedings Pending Certiorari***

Judge McMillan conducted hearings from July 15 through July 24, 1970 in accordance with the order of this Court of June 29, 1970 granting certiorari, authorizing the remand directed by the Court of Appeals for further proceedings and reinstating the district court's judgment.

The school board had filed, but did not support, a plan prepared by the Department of Health, Education and Welfare (hereinafter HEW) and a plan prepared by four of the five members of the school board.

The Department of Justice appeared at the hearing as *amicus curiae* to present the HEW plan. Testimony was therefore directed to the comparative advantages and disadvantages to these plans and another plan which had been prepared by Dr. Finger during his tenure as court consultant.

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origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing."

The state and the local defendants have noted appeals to this Court.

[15] The judgment was vacated in its entirety. Judge Butzner's reason for this action was to give greater flexibility to the development of a new elementary plan (1263a). Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable (1295a, n.*). The judgment expressed Judge Bryan's hope that "upon re-examination the District Court will find it unnecessary to contravene the principle stated . . ." in his dissent (1304a).

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The Court entered a Memorandum of Opinion and Order (Br. A1) on August 3, 1970 in which it: rejected again the majority board plan; rejected the HEW plan as unconstitutional, and unreasonable in the context of Charlotte; accepted as constitutional and reasonable the originally ordered plan, the minority board plan and the preliminary Finger plan; and continued in effect his previous order of February 5, 1970 but allowing the board to choose to operate under one of the other plans found acceptable by the court if such a decision were made and presented to the court in writing before noon on August 7, 1970.[16]

The school board, at a meeting on August 6, 1970 decided not to exercise any of the options offered by the order of August 3 and to appeal and seek a stay in this Court and in the court of appeals (Br. A40). Upon receiving the report the court ordered the court ordered plan of February 5 be implemented (Br. A39).

4. *The Charlotte-Mecklenburg County School System in 1968-69*

In March of 1969, the plaintiffs presented to the district court detailed evidence about the school system, such as the number and location of the schools, the grades served, the kinds of programs offered, the achievement of the students in the different schools, the racial distribution of students and faculties in the system, and the changes which had occurred over the years. The plaintiffs also showed by expert testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.[17]

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[16] The court also allowed the board to close rather than integrate the Double Oaks School (black). There had been evidence presented at the hearing that it is difficult to get buses to the school although buses served the school during the 1969-70 school year.

[17] See the testimony of Charles L. Green (15a-27a), Daniel O. Henningan (28a-57a), Paul R. Leonard (57a-64a) and Yale Rabin (174a-241a). And see the testimony of defendants' witness, William E. McIntyre (251a-284a).

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The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.[18] Each succeeding order reflects a comprehensive analysis of new submissions of evidence by the parties and the cumulative evidence already before the court. The court of appeals has accepted the district court's findings (1262a).[19]

Judge McMillan's first opinion on April 23, 1969, gave a detailed description of the school system, the community which it serves and the extent of racial segregation within the schools (285a). We only summarize here some of the salient facts contained in the April opinion.

The Charlotte-Mecklenburg school system serves more than 84,000 pupils residing in the city of Charlotte and Mecklenburg County. In April, 1969, there were 107 schools, including 76 elementary schools (grades 1-6), 20 junior high schools (grades 7-9) and 11 senior high schools (grades 10-12). The system employed approximately 4,000 teachers and nearly 2,000 other employees. The racial composition of the students in the system was approximately 71% white and 29% black. The residential patterns of the county were sufficiently integrated so that most of the county school zones included both black and white students. No all-black schools remained in the County. In the City, however, the

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[18] Significant findings are contained in eight of the orders leading to the decision of the court of appeals: Opinion and Order, April 23, 1969 (285a); Opinion and Order, June 20, 1969 (448a); Order, June 24, 1969 (459a); Order, August 15, 1969 (579a); Memorandum Opinion, November 7, 1969 (657a); Opinion and Order, December 1, 1969 (698a); Order, February 5, 1970 (819a); Supplemental Findings of Fact, March 21, 1970 (1198a); and Further Findings, etc. (1259a).

See also the most recent Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[19] The most recent findings (Br. A1), of course, have not been reviewed by the court of appeals.

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residential areas were and are generally segregated by race,[20] and most schools were racially identifiable.

During the 1968-69 school year, students were assigned to the schools under the same plan as approved by the district court in 1965—initial assignments by geographic zones with freedom of transfer restricted only by school capacities.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black (303a).[21] The court further found that most of the desegregated city schools were in transition from a previously all-white enrollment to all-black (302a). Seven schools which served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965. In 1968 they served 5,757 students, 81% of whom were black.

The school system had been growing at approximately 3,000 students per year, requiring an on-going school construction program. With few exceptions, the size and place-

[20] Most of the evidence concerning residential segregation was produced at the March 1969 hearings. (See note 17, *supra.*) The April order describes the housing patterns and some of the forces which created them. The matter was examined again in subsequent orders, particularly the Order of November 7, 1969 (657a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

[21] In June, after further analysis of the data, the court concluded that approximately 21,000 of the 24,000 black students in the system lived within the city of Charlotte and that nearly 17,000 of them were attending black or nearly all-black schools (459a). The court also found that nearly 19,000 of the more than 31,000 white elementary students attended schools which were nearly all-white. (There are only 150 black students attending these schools.) More than one-half of the 14,741 white junior high school students attended schools with a total black population of 193 (453a).

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ment of the recently constructed schools produced either all-white or all-black new schools.[22]

The court found faculties segregated. The great majority of the 900 black teachers were teaching in black schools. There was less than one white teacher per black elementary school. The two black high schools had teaching staffs more than 90% black.

The court concluded that the board's policies of zoning, free transfer and its school placement had contributed to and continued an unlawfully segregated public school system. It also concluded that the faculties had not been desegregated as required by the 1965 order. The board was directed to produce plans for the active desegregation of the pupils and faculties by May 15, 1969.

On appeal, Judge Butzner agreed that the system was unlawfully segregated in April of 1969:

> "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was operating a dual system of schools in the light of subsequent decisions of the Supreme Court . . ." (1263a-1264a).[23]

The district court further found that the impact of segregation on black students in the system had resulted in the denial of equal educational opportunities. Comparative test results showed a wide disparity in achievement between students attending all-black schools and students attending

[22] The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (1203a-1204a).

[23] Both Judges Sobeloff and Winter concurred in this conclusion (1279a, 1295a).

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white and integrated schools (857a-859a, 702a-704a, 1206a-1207a).[24]

The court also found that the residential segregation was far from benign or de facto. The school board by gerrymandering zone lines (455a-456a) and other practices, together with the activities of other governmental agencies, had had a significant impact upon the creation of Charlotte's ghetto. Again, the three circuit judges subscribing to the plurality opinion and Judges Sobeloff and Winter concurred in these findings. As Judge Butzner summarized:

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property [footnote omitted] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage.
>
> The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accom-

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[24] The court reviewed the most recent data in July, 1970 and found wide disparities again (Br. A1).

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> modate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (1264a).

In addition to the activities of the governmental agencies producing the discriminatory zoning (297a, 1229a) and the urban renewal programs (297a, 1229a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (1229a), that public housing officials had overtly discriminated until recent years and have reinforced racial segregation by their site selection (1229a) and that those officials responsible for planning and building streets and highways have created racial barriers. (See, generally testimony of Yale Rabin (174a-241a)).

There was also significant testimony concerning "private" individual and institutional forces which have kept blacks out of white residential areas. The Rev. Daniel O. Hennigan, a black realtor testified at length concerning the enormous difficulties he had experienced over a period of four years in becoming the first—and so far only—black member on the Charlotte Board of Realtors. He finally secured membership by agreeing not to seek participation in Charlotte's multiple listing service. He also told of instances where he had negotiated the purchase of land in white areas but was unable to proceed because funds were denied his clients by the lending institutions (28a-57a).

5. *The Schools in 1969-70*

During the 1969-70 school year the schools were again operated under the board's 1965 desegregation plan as modified in its submission to the court in July 1969. The modifications provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these

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children 3,000 were to come from 7 schools which were to be closed and 1,245 from overcrowded black schools. The board also proposed some further faculty desegregation but would retain all other racially discriminatory features as found by the court in April. The board did propose, however, to study its building programs and such measures as altering attendance lines, pairing, clustering and other techniques in order to develop a comprehensive desegregation plan for the future.

The plaintiffs had objected to the proposal on the grounds that it left many schools segregated for yet another year and placed the full burden of desegregation upon black children.

The court, in an order entered on August 15, 1969 (579a), approved the proposed pupil reassignments for the 1969-70 school year "only (1) with great reluctance, (2) as a one year temporary arrangement and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." The board was ordered to file a third plan by November 17, 1969, "making full use of zoning, pairing, grouping, clustering, transportation and other techniques . . . having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible" (591a).[25]

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (593a).

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[25] The board explicitly refused to follow these directives. Each of the next two plans submitted by the board rejected the techniques of "pairing, grouping [and] clustering." See n. 29, *infra*. A similar directive of the court of appeals has also been ignored (Br. A1).

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The plan did not accomplish what was promised. The court later found that "the 'performance gap' is wide" (659a).

> In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now [March 21, 1970] only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board (1226a).

In the November, 1969 Memorandum Opinion (657a) the court set out in detail the racial characteristics of the school system during the 1969-70 school year (658a-663a). The court concluded that there had been no real improvement from the segregated situation found during the previous school year.

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

Analyzing the same figures in a later order (698a) the court pointed out that "Nine-tenths of the faculties are still obviously 'black' or 'white.' Over 45,000 of the 59,000 white students still attend schools which are obviously white" (702a).

The court also determined that the free transfer provision in the board's plan negated any progress which the

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July plan might have produced (662a).[26] It also found that attempts to desegregate the schools by altering attendance lines would continue to fail as long as students could exercise a freedom of choice (662a-663a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (1266a, 1275a).

6. *The Plan Ordered by the District Court in Feburary, 1970*[27]

In the decision of December 1, 1969 (698a) in which the court announced that an educational consultant would be appointed, 19 principles were stated for his guidance (708a-713a). Dr. Finger's instructions included "all the black and predominantly black schools in the system are illegally segregated . . ." (711a); "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but . . . variations from that norm

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[26] The court had made similar findings in June:

> Freedom of transfer increases rather than decreases segregation. The School Superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished (453a).

Moreover, during the choice period prior to the 1969-70 school year, just two white students out of 59,000 elected to transfer to black schools and only 330 black students out of 24,000 chose to transfer to white schools (*Id.*).

[27] A portion of the February order was stayed by the court of appeals on March 5 (922a) and the remainder by the district court on March 25 (1255a).

The order was reinstated by this Court on June 29 (1320a) pending further proceedings in the district court.

On August 3, 1970 the district court continued this Court's order in effect subject to options made available to the board for elementary school assignments if exercised on or before August 7, 1970 (Br. A1). Since the board declined to exercise any of the options, the court, on August 7, 1970 directed the court ordered plan of February 5 be implemented (Br. A39).

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may be unavoidable" (710a); "bus transportation to eliminate segregation [and the] results of discrimination may validly be employed" (710a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (712a).

Dr. Finger's work is described in the Supplemental Memorandum of March 21, 1970 (1221a):

> Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans.[28] When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report.[29] The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.
>
> The detailed work on both final plans was done by the school board staff (1231a).

Both plans were presented to the court.[30]

a. *High Schools*—The school staff had developed a plan which produced a white majority of at least 64% in each

[28] One of his preliminary plans was introduced and described at the July, 1970 hearing (Br. A1).

[29] The board's two most significant limiting factors were: (1) Rezoning was the only method to be employed; the board rejected such techniques as pairing, grouping and clustering; (2) a school sought to be desegregated would be at least 60% white; thus, the board's plan for elementary schools produced some schools between 57% and 70% white, eight schools 1% to 17% white, two schools 0% white and no schools between 18% and 58% white.

The court of appeals found as the district court had that these limiting factors were improper (1275a-1276a).

[30] Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (819a, 825a-827a) and tables

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of the ten high schools including the all-black West Charlotte High School (see Exhibit B, 829a). The board accomplished this result by restructuring attendance lines. Dr. Finger's proposal used the board's new zones and assigned an additional 300 pupils from a black residential area to Independence High School which would have had only 23 black students under the board's plan. Judge McMillan adopted the Finger modification. This portion of the plan was approved on appeal. Judge Butzner wrote:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools (1273a).

b. *Junior High Schools*—During the 1969-70 school year the board operated 19 junior high schools. Five were all or predominantly black; eight were more than 90% white. (See Exhibit D, 830a.) The board, by rezoning eliminated several of the black schools. One school, however, Piedmont, remained 90% black. Additionally, four schools would be more than 90% white.[31]

Dr. Finger devised a plan which would integrate all the junior high schools. Twenty of the schools would have white populations ranging from 67% to 79% and the re-

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(829a-839a); Supplemental Findings, March 21, 1970 (1198a, 1208a-1214a); Supplemental Memorandum, March 21, 1970 (1221a, 1231a-1234a); Opinion of Court of Appeals (1262a, 1268a-1269a). See also the Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[31] Two new junior high schools are scheduled to open for the 1970-71 school year. Both proposed plans contemplate assigning students to these new schools. It is significant that under the board plan one of the schools would be 100% white and the other 91% white (830a).

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maining school would be 91% white. The plan employed rezoning and satellite zones.[32]

The district court approved of the board's plan except as to Piedmont, and gave the board four options: (1) rezoning to eliminate the racial identity of the remaining black school, (2) two-way transportation of pupils between Piedmont and white schools, (3) closing Piedmont, or (4) adopting the Finger Plan. The board reluctantly chose to employ the Finger Plan.

Judge Butzner found the plans for junior and senior high schools by use of satellite zones together with transportation "a reasonable way of eliminating all segregation in these schools" (1273a).

c. *Elementary Schools*—The board in restructuring attendance lines for the 76 elementary schools was unable to affect a majority of the students attending racially identifiable schools. As the court of appeals observed, "Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white" (1269a; see Exhibit H, 832a-834a).

The Finger Plan also employed the board's rezoning. 27 schools were rezoned, and 34 schools were desegreated by clustering and pairing with transportation.[33] Judge McMillan described the plan:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black

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[32] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[33] The designated clusters are shown in Exhibit K (838a-839a). The zones of ten schools remained substantially unchanged.

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> inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.
>
> The "Finger Plan" itself . . . was prepared by the school staff. . . . It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools. . . ." (1212a-1213a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 835a-837a.)

Judge McMillan found the board plan to be inadequate and directed that the Finger Plan or some other plan which would accomplish similar results be implemented.

The court of appeals agreed that the board plan was unacceptable. "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both black and white elementary pupils in schools that were nearly completely segregated" (1275a). The court of appeals, however, decided that the board should not be required to undertake the additional transportation necessitated by the Finger Plan (1275a) and directed further proceedings for the development of another plan (1277a).

d. *Transportation*—The district court's order required additional transportation to be provided. The plurality opinion approved of the increments of transportation to accomplish the junior and senior high assignments (1273a) but determined that the elementary school busing appeared too extensive (1276a).

During the 1969-70 school year, the board operated 280 school buses transporting 24,737 of its 84,000 students.[34]

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[34] Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state

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The board reported (619a) the number of children transported, by grade level, as follows:

Pre-school	599
Elementary	10,441
Junior High	8,989
Senior High	4,708

Another 5,000 students rode public transportation at a reduced fare (1214a). The average annual cost per child was about $20.00 or about $475,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.[35] The buses averaged 1.8 one-way trips

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and the country, in his Supplemental Findings of March 21, 1970 (1198a). (See also Further Findings, etc. of April 3, 1970 (1259a)). The court had examined the transportation system in previous decisions as well (306a-307a, 449a-450a, 822a-823a).

Similar evidence was presented at the July, 1970 hearing with resulting findings by the court (Br. A1). These additional findings are discussed below.

[35] See Further Findings, etc., April 3, 1970 (1359a-1260a). The district court had originally understood the average cost to be about $40.00 per pupil (306a-307a, 1200a). The state reimburses local school boards for operating expenses for transportation for those students who are eligible under state law. The original cost of the bus is borne by the local board but the state replaces worn out buses (1259a-1260a).

During 1969-70 and previous years, pupils eligible for transportation were those children who lived more than 1½ miles from school and who lived either in the county or in portions of the city which had been annexed since 1957. Additionally, the state paid the transportation costs for children who lived within the pre-1957 city limits who attended schools outside of the pre-1957 limits (1203a).

For the 1970-71 school year, as a result of a decision in an unrelated case, *Sparrow* v. *Gill*, 304 F. Supp. 86 (M.D. N.C. 1969) (3-judge court), the State Board of Education has directed each school system either to offer transportation (at state rather than local expense) to *all* city children living more than 1½ miles from the school to which they are assigned or to *no* children living within the city limits.

Thus all of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense. (See, Br. A1).

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per day carrying an average of 83.2 students, averaging 40.8 miles (1200a).[36]

Judge McMillan's Findings in March (which were reaffirmed after 8 days of hearings in July, 1970) as accepted by the court of appeals show the added transportation under the plan ordered on February 5 to be:

	No. of Pupils	*No. of Buses*	*Operating[37] Costs*
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,00	138	$266,000

The initial one-time[38] capital outlay to purchase new buses would be $745.200.[39] However, it was discovered at

[36] The overall figures for the state show a higher percentage of students riding buses than in Charlotte. During the 1968-69 school year about 55% of all students in North Carolina rode buses to school; 70.9% were elementary students (1199a). (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

[37] These operating cost figures are as determined by the court of appeals (1269a) by applying the district court's Further Findings, etc. of April 3, 1970 (1259a) to its Supplemental Findings of March 21, 1970 (1198a). Operating costs are reimbursed by the state.

The board had claimed much greater increases in the extent and cost of additional busing, but the district court, after carefully analyzing the data, found the board's figures to be exaggerated (see "Discount Factors," (1214a-1216a). The court's findings are also consistent with the transportation requirements projected by the board for its plan to transport 3,000 Negro children to the suburbs for the 1969-70 year (Exhibit E, 491a).

[38] Obsolete buses are replaced by the state. See note 35, *supra*.

[39] The district court observed that there was at least 3 million dollars worth of vacant school property which had been abandoned pursuant to the 1969-70 desegregation plan (1219a) and which, as the board had pointed out in its report in the summer of 1969, could be disposed of to produce necessary "desegregation" funds (Exhibit E, 491a).

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the recent hearings that the board has on hand 107 buses not now being used to transport children to school.

> 14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 busses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J.W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:
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> | | | |
> |---|---|---|
> | (i) | Spare busses | 20 |
> | (ii) | Activity busses (each driven less than 1,000 miles a year) | 20 |
> | (iii) | Used busses replaced by new ones in 1969-70 | 30 |
> | (iv) | New busses currently scheduled for replacement purposes and expected to be delivered in near future | 28 |
> | | Total: | 107 |

(Br. A 18).

Moreover, the court found that since "early 1970 . . . there were 75 new busses available to the local school system if they wanted them, out of the 400 new busses then held by the state" and that the 400 second-hand busses in the state are "available on loan, without cost, for local school boards to use in 1970-71" that "could be safely used" (Br. A 1).

Thus no initial capital expenditures for busses is required of the local board.

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> "No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used busses as 1970-71 experience may show they actually need" (Br. A 1).

And, again, operating costs are borne by the state.

The board itself had proposed the busing of 4,200 black inner-city children for the 1969-70 school year to outlying suburban schools as a desegregation measure (584a-586a). The board's February 2 plan proposes to bus approximately 5,000 additional students, about half of whom are elementary pupils. A major portion of this busing is within the City (1217a, 1270a, n. 4). Moreover, there is nothing novel about city children riding school busses. Children living in the city but outside of the 1957 city limits have been bused. Many city boards of education, such as Greensboro, have provided transportation for all city children living more than 1½ miles from school with local funds. The present State Superintendent of Public Instruction, his predecessor and the prestigious 1969 Report of the Governor's Study Commission on the Public School System of North Carolina had all recommended that transportation be provided for children, city as well as rural, on an equal basis (1201a-1202). State policy for the 1970-71 school year is that all city children living more than 1½ miles from school will be eligible for transportation at state expense.

The bus trips required for the paired elementary schools would be straight-line non-stop trips (1205a), would be shorter and would take less time than the average bus trip in the sytem or in the state (1199a, 1205a).

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34. . . .

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools (1215a).[40]

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (1200a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (1203a-1204).

Judge McMillan's most recent memorandum includes significant findings concerning transportation. The exhaustive evidence on transportation presented in July verified beyond question the court's conclusions of March. It also revealed, even more clearly, the gross exaggerations of the Board's transportation estimates for all desegregation plans. Among the more pertinent findings are:

1. "In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated schools*" (Br. A16).

2. The state now authorizes transportation at state expense for all city children living more than a mile

[40] The court later explained how these figures were developed:

The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus trip mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates —taking straight line mileage and adding 25%. (Emphasis in original; 1215a.)

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and a half from school, causing a significant increase in the number of children riding school busses in North Carolina from the 55% who were bussed during the 1968-69 school year (Br. A16).

3. "School bus transportation is safer than any other form of transportation for school children" (Br. A16).

4. There were 17 busses carrying 700 four and five year old children to child development centers on one-way trips ranging from seven to thirty-nine miles during the 1969-70 school year (Br. A18, A24).

5. The Board's cost " 'estimates,' when heard against the actual facts, border on fantasy!" (Br. A24). Its projections do not, as claimed, reflect the Board's experience in transporting inner-city black children to outlying white schools for the 1969-70 school year.

> "[T]he evidence [shows] for example . . . that one [such] 'desegregation bus' (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary on the other, with the driver then going on in the bus to South High School" (Br. A22).[41]

6. There is an emple supply of busses, new and used, money and drivers to implement the court order (Br. A18-A20, A26).[42]

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[41] The defendants estimate for all plans are based upon the assumption that one bus will make one trip to one school with one load of 45 or less children (Br. A21-A22).

[42] The court also found to be without basis the Board's claim that: elementary children should not ride buses ("There may be more first graders than children of any other age riding school busses" (Br. A24)); that additional buses will unduly clog traffic in Charlotte (Br. A25); and that it would unduly disrupt the system if

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7. *Other Elementary Plans Reviewed by the District Court in July, 1970*[42a]

Judge McMillan reviewed and compared five elementary plans at the hearings in July, 1970: (1) The majority board plan which he had rejected in February and which the court of appeals had rejected; (2) the Finger plan as ordered in February, 1970; (3) the minority board plan supported by four of the nine members of the board; (4) another plan which Dr. Finger had prepared when acting as court consultant; and (5) the HEW plan.

a. *The Majority Board Plan*—The court was of the opinion that the court of appeals had required the board to prepare and present another plan. The board chose not to do so, but relied again upon its February submission. Judge McMillan was not persuaded that he could approve a plan which left over half of the black and white elementary children in racially identifiable schools and which had been rejected by the court of appeals (Br. A27).

b. *The HEW Plan*—This plan was developed by a team of four HEW officials. They did not consult with or seek the assistance of the local staff in the preparation of the plan. The team was lead by Mr. Henry Kemp, recently hired by HEW, who had no previous experience as an educator with a school system of over 6,000-7,000 students. Charlotte was Mr. Kemp's first assignment by HEW to prepare a desegregation plan. His principal assistant was

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it were necessary to stagger the hours of school to simplify transportation problems ("The schools already operate on staggered schedules. . . . The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools" (Br. A25-A26).)

[42a] At the time of the preparation of this brief, the July, 1970 proceedings have not yet been transcribed.

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Mr. John Cross, a young lawyer who also had never worked upon a complete desegregation plan for a city or metropolitan school system.

The plan used the newly created zones of the majority board and Finger plans and then created several contiguous clusters each containing a black school with two or more rezoned desegregated schools with each school serving all the students within the cluster for 1, 2 or 3 grades. It left two schools all black.[43] The schools which had been desegregated by rezoning would therefore have a significantly greater black student population than under the Finger plan.

Both plaintiffs and defendants objected strenuously to the plan for substantially the same reasons. The Board's position on the HEW plan was unanimous.[44] The court described the HEW plan:

> 2. The HEW plan.—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial de-

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[43] One of these schools, Double Oaks, is in a *cul-de-sac* which was built to serve a segregated public housing project which surrounds it. Dr. Finger testified that if he were forced to decide which of the black children in Charlotte would be desegregated and which would not, he would seek initially to offer the children at Double Oaks a desegregated education.

[44] It was noted at the hearing that the Board's rejection of the HEW plan was the first unanimous action taken by the Board on a desegregation issue in a long time. Four members of the Board supported a minority plan at the July hearing which was designed to desegregate all the elementary schools so that each school would be approximately 70% white and 30% black; five supported the board plan of February which left 10 black or predominantly black schools.

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segregation of the most of the black schools. The faults of the plan are obvious.

It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to the orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low- or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution (Br. A28-A29).

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c. *The Finger Plan, the Board Minority Plan and the Preliminary Finger Plan*—Judge McMillan found each of the three remaining plans to be basically acceptable, but found the original Finger plan to be the only finished plan.

> "The original court ordered (Finger) plan is the only complete plan before the court" (Br. A2).

The Minority plan created clusters of two or more elementary schools zones using the old (1969-70) attendance areas and included all elementary schools. Each cluster contains approximately 2,000 students with a white-black ratio in the neighborhood of 70%-30%. There is no method specified as to how the students would be assigned within the clusters, although the principal author of the plan, Dr. Carlton Watkins, testified that he favored some kind of random assignment plan which would produce the desired racial ratio at each school. He also favored having each school serve grades 1 through 6 rather than having altered grade structures as in the Finger plans where each school would serve either grades one through four or five and six.

In terms of the number of children to be transported and transportation costs the plans are not greatly different.[45]

> "All plans which desegregate all the schools will require transporting approximately the same number of children. The overall cost, if a zone pupil assignment method is adopted, the minority Board Plan may be a little cheaper than the Finger plan" (Br. A23).

[45] The HEW plan would require somewhat less busing at less cost because it leaves two schools all-black. If those schools were desegregated, however, the number of children to be bused would be about the same at a cost not significantly less than any of the other plans.

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As to the preliminary Finger plan: "From the standpoint of economics it may be the cheapest plan available" (Br. A23).

Judge McMillan indicated the relative advantages and disadvantage, of these three plans. He judged each plan to be constitutional since each plan is feasible, reasonable and desegregates the schools. He, therefore, continued in effect the February 5 order, but allowed the Board to choose one of the other acceptable plans or some combination thereof on or before August 7, 1970. At a meeting on August 6, 1970, the board decided not to exercise any of these options (Br. A40). The court therefore ordered the February 5 plan to be implemented (Br. A39).

Summary of Argument

I

Both courts below held that the Charlotte-Mecklenburg school system was unconstitutionally racially segregated during the 1968-69 and 1969-70 school years. These holdings were clearly correct.

During the 1969-70 school year, the school board's desegregation plan which provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to other schools had resulted in: more than 16,000 of the 24,714 black pupils attending all-black or predominantly black schools; over 45,000 of the 59,000 white students attending schools which were obviously white; 16 schools were 98-100% black; 9 other schools were readily identifiable as black; 57 schools were identifiable as white; only 24 schools were not identifiable by race; and the faculties of 90% of the schools were still obviously white or black. In the elementary schools about three-fourths of the 13,010 black elementary pupils attended black or predominantly black schools. The courts below,

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in applying the teachings of *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968), properly found the schools to be unlawfully segregated.

The district judge found that the segregation of black students in Charlotte had produced its inevitable results in retarded achievement. Although this case does not depend upon such findings of harm to black children, *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958), these facts profoundly impressed Judge McMillan and underscored the importance of his holding that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

The courts below found that the segregation of school children in Charlotte was caused by actions of governmental officials. The school board, for its part had over the years chosen school sites, determined capacities and drawn zone lines in a fashion to promote segregation. The residential segregation found in Charlotte was in large part created and maintained by the official actions of those involved in planning, zoning, public housing, urban renewal and other activities. Neighborhoods were kept white by the use of racial covenants, the functional equivalent of racial zoning ordinances. (*Bell* v. *Maryland,* 378 U.S. 226, 329 (1964), Mr. Justice Black dissenting.) Thus, no claim that the schools should remain segregated by reference to a "neighborhood school" policy is tenable. As this Court made plain in *Cooper* v. *Aaron,* 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by actions of other state officials."

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II

The goal set by the district court to eliminate the racial identity of the present "black" schools in the Charlotte-Mecklenburg system is in conformity with the decisions of this Court. Upon finding that the continued existence of all-black schools in Charlotte was the result of racial discrimination by the school board and other governmental agencies, the court was required to seek ways to eliminate the consequences of these discriminatory actions. This Court has said in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) that "the system of segregation and its effects" (*id.* at 440) must be dismantled (*id.* 391 U.S. at 437), and eliminated "root and branch" (*id.* at 438). A desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442) and courts are to enter decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*id.* at 438, note 4).

The trial judge, therefore, when he found it was necessary to appoint a consultant to assist him in preparing a plan because of the recalcitrance of the school board, appropriately instructed the consultant that black schools were illegally segregated in Charlotte and that "efforts should be made to reach a 71-29 [white-black] ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable." This specific, although flexible, goal for pupil assignments is exactly parallel to the kind of goal for faculty desegregation set by the district court and approved by this Court in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1968).

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In contrast to the complete relief sought by the district court, the court of appeals has announced a new rule looking toward less than complete relief. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. The new rule portends serious consequences for the general course of school desegregation. It is a new litigable issue which will produce less desegregation and at a slower pace. The rule is vague and ambiguous. The only thing clear about it is that it means less desegregation than the standard which we understood to apply before, that is, whether a plan is feasible. And there is no question as to the feasibility of the plan set aside by the court of appeals.

The court of appeals agrees with the district court that the segregation sought to be dismantled is illegal, but holds that, for some reason, the remedy is not worth the price. We think such a finding is unacceptable in the United States and conflicts with *Griffin* v. *School Board,* 377 U.S. 218 (1964). The techniques to right the wrong found to exist in Charlotte are at hand as the court ordered plan so clearly demonstrates. The holding of the court of appeals threatens to water down or temper the duty to convert to a unitary system. It should be rejected.

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-(a)(2)) forbid the busing ordered by the district court. We think the disposition of this issue by the court below was clearly correct in ruling that the Civil Rights Act placed "no limitations on the power of school boards or the courts to remedy unconstitutional segregation" (1274a). This is the construc-

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tion placed on the statute by all four circuits which have addressed the issue. Moreover, the district court did not impose racial balance. Under its order the schools would vary from 3% to 41% black. What the court did do was to set a specific, yet flexible goal, the purpose of which was "the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools" (Br. A10).

III

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. The principle characteristics of the dual system—the all-black schools—will be gone. The plan works.

The plan was produced because the district judge undertook the duty imposed upon him by law to seek means of desegregating the schools. It would seem beyond question that the court, having a detailed, feasible plan before it which desegregated all the schools was correct in judging that the board had failed to meet its "heavy burden . . . to explain its preference for an apparently less effective method." *Green, supra,* at 439.

We agree with the dissenters below that the proper test is whether a plan is "feasible" and whether it provides "effective relief," (*Green, supra,* at 439) not whether in the subjective judgment of a court the means are "reasonable." We do not understand the court below to question the feasibility of the plan. The plan calls for a transportation system which would be commensurate with the percentage of pupils transported in the state. The additional

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busing would be for considerably shorter distances and take less time than the average distance and time for the bus trips for the 23,000 students presently transported in 1969-70. Nearly 11,000 elementary children are now being bused in the system. About 700 pre-school children are being transported great distances. The cost of the additional transportation will be a tiny fraction of the school budget. Enough buses are either on hand or available to be purchased or borrowed to implement the plan. The plan is educationally sound. The only impediment to the immediate conversion to a unitary school system under the court's plan is the board's unwillingness to do so.

The courts below approved of the techniques of pairing and clustering with transportation as appropriate and here necessary means, to desegregate the schools. Pairing was approved in *Green* (*supra* at 442, n. 6) and has been required in scores of school districts. Bus transportation is an ordinary tool of desegregation and has been required to desegregate schools. Since the constitutional imperative in this case is the desegregation of the schools, we can conceive of no reason why the courts below were wrong in holding that busing be employed.

We think that the courts below were also correct in rejecting the defendants' arguments that there is something wrong with assigning children to schools outside of their zones of residence. School boards have traditionally and necessarily reserved the right to alter attendance lines, grade structures and educational programs for their schools. As the district court's decision plainly shows, segregation can be eliminated by choosing to alter grade structures and provide transportation. The only reason for limiting assignments to adjacent zones in Charlotte would be to preserve segregation. In Charlotte only 541 of 17,000 of the children in black schools ride buses. At the white

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schools, however, over 40% of the children already ride school buses. The question is not whether children will ride school buses, but where the buses will go.

The neighborhood school theory cannot be invoked now in support of segregation when it has been traditionally ignored to promote segregation. This is particularly true in a state which buses over 54% of the children in public schools.

The court of appeals has violated traditional standards of review in overturning the decision of the district court. In school desegregation cases district courts have been admonished to assess "the circumstances present and options available in each instance." *Green, supra,* at 439. And "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education, supra,* at 235. The equitable decree entered by the district court was faithful to those instructions and should not have been disturbed without a strong showing of abuse of discretion. *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). Instead of the traditional standards of review, the court of appeals fashioned its own subjective rule of reasonableness and vacated the district court's judgment. This new rule signals to district judges that their room for "experimentation" and their "options" are strictly limited. The signal is "go slow." We submit that the decision below has not only undercut *Green* and *Montgomery County*, but runs counter to the philosophy of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969) which requires immediate and effective relief. As Judge Sobeloff observed in dissent "reasonableness" is "all deliberate speed" in a new guise.

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ARGUMENT

I.

The Public Schools of the Charlotte-Mecklenburg School System Are Racially Segregated in Violation of the Equal Protection Clause of the Fourteenth Amendment as the Result of Governmental Action Causing School Segregation and Residential Segregation.

A. *The Schools Are Organized in a Dual Segregated Pattern.*

Both courts below held that the Charlotte-Mecklenburg system was still unconstitutionally racially segregated. The record amply supports that finding and conclusion. Prior to this suit in 1965 there had been only a token break of the pattern of total racial segregation mandated by state law. The desegregation plan adopted in 1965 and continued in effect through the 1969-70 school term provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to attend the schools outside their areas of residence.[46] This is substantially the same kind of plan considered by this Court and found to be inadequate in *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968).[47] The court below concluded that: "The neighborhood school concept and freedom of choice as administered are not furthering desegregation" (313a; 300 F. Supp. at 1372). The court concluded that the Mecklenburg "rural schools are largely desegregated" but that in

[46] The plan was approved in 1965, and affirmed on appeal. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

[47] A similar plan for geographic assignments and free transfers was also involved in *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970).

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the city of Charlotte "schools are still largely segregated" (302a; 300 F. Supp. at 1367-1368). Although the plan was modified in July 1969 to attempt to increase desegreation by closing certain black schools, there was little actual improvement.[48] Judge McMillan summarized the extent of desegregation during the 1969-70 term in these words:

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decicision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

The court found that "nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black"; that "nine-tenths of the faculties are still obviously 'black' or 'white' "; and that "over 45,000 out of 59,000 white students still attend schools which are obviously 'white' "

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[48] The July 29, 1969, plan, which was approved for one year only, did not produce the promised improvement and the court held that there had been a wide "gap" between the school board's promise and its performance (659a). The court found that "only 1,315 instead of the promised 4,245 black pupils" were transferred to white schools under the 1969 plan (659a). Even worse, the manner in which the free transfer feature operated threatened to transform some integrated schools into all-black schools threatening a "rapid shift from white to black, [so that] the net result of the 1969 pupil plan would be nearly zero" (659a). By March 1970, the court found even less progress: "In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board" (1226a).

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(702a). During the school term just ended there were 11 schools which were 100% black, 5 schools 98-99% black, 3 schools 90-97% black, and 6 schools 55-89% black (660a). Thus, in a school system where black pupils were but 29% of the total, there were 25 schools out of 106 which the district judge held were "readily identifiable as black" (660a).[49]

Segregation was particularly intense at the elementary school level. About three-fourths of black elementary pupils attended predominantly black or all-black schools. There were 9,718 (or 74.6%) of the 13,010 black elementary pupils in schools which were from 65% to 100% black (832a-834a) and 60.7% of all black elementary pupils attended schools that were 98-100% black (id.).[50]

The court of appeals agreed with the district court that there was still a dual segregated system saying: "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the light of subsequent decisions of the Supreme Court, *Green* v. *School Bd. of New Kent County,* 391 U.S. 430, 435 (1968), *Monroe* v. *Bd. of Comm'rs,* 391 U.S. 450 (1968), and *Alexander* v. *Holmes County Bd. of Ed.,* 396 U.S. 19 (1969)" (1263a-1264a).

[49] The judge classified 57 schools as readily indentifiable as white schools and 24 as not readily identifiable by race (660a).

[50] The 1969-70 elementary school breakdown for heavily black schools is as follows (832a-834a):

% Black	No. of Elementary Schools	No. of Elementary Students White	Black	Totals
100%	8	1	5,311	5,312
98–99%	4	32	2,536	2,568
92%	1	83	902	985
65–80%	3	378	969	1,347
	16	494	9,718	10,212

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The several desegregation plans proposed by the school board were rejected by the courts below because they failed to accomplish sufficient desegregation.[51] The board sought to defend its fourth plan, filed in February 1970, in the court below. But the court of appeals held that "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated."[52]

The district judge examined the academic achievement test results of pupils in the segregated and desegregated schools in Charlotte and concluded that black children in

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[51] The board's May 1969 plan was the same basic plan which had been rejected in April 1969 with some modification of pupil transfer rules. The district court found that the free transfer plan did not accomplish desegregation. See 300 F. Supp. at 1384; 453a. The board's July 1969 plan was approved "reluctantly" for one year only. This plan closed 7 all-black schools and allowed pupils from the closed schools to be transported (if they so chose) to white schools. There was substantial opposition in the black community to the fact that this plan operated by one-way busing of blacks to white schools but closed black schools instead of desegregating them. The court found that the plan accomplished little increase in desegregation. The board's third proposal, the November 17, 1969, plan was rejected in the order of December 1, 1969. This plan called for rezoning. The court found that it would maintain 7 all-black schools and that most of the 25 black schools serving 16,197 of the 24,714 black children would be continued as black schools (701a).

[52] The board's senior high school plan, involving rezoning, was approved by the trial court with one exception. The court changed the zones to shift 300 black pupils in a designated area to Independence High School. This change created a satellite zone for Independence and the court of appeals rejected the board's appeal, and approved the change as one which "will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent 'tipping' or resegregation of other schools" (1273a). The board's proposals for junior high schools were found unacceptable because the plan would have left Piedmont Junior High 90% black and shifting toward 100% black.

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Charlotte were suffering a substantial educational deprivation caused by segregation. Judge McMillan found that:

> Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.
>
> It is painfully apparent that "quality education" cannot live in a segregated school; *segregation itself is the greatest barrier to quality education* (588a).

The judge found that "segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children" (587a). Sixth grade students in black schools were on the average achieving at a fourth grade level on national achievement tests, whereas there was substantially higher levels in integrated and white schools (304a; 588a; 702a-704a).

More recent data was reviewed in the opinion entered on August 3, 1970. The gross disparities remained. Judge McMillan concluded:

> Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the State,* which still constitutes the greatest deterrent to achievement (Br. A9).

As noted above, Judge McMillan was persuaded by the expert testimony[53] and by the facts of the case that "segregation itself is the greatest barrier to quality educa-

[53] Plaintiffs' experts had testified at the hearing in March, 1969 in agreement with the conclusion of the Civil Rights Commission that: "The evidence indicates that Negro children attending desegregated schools that do not have compensatory education programs perform better than Negro children in racially isolated schools with such programs." *Racial Isolation in the Public Schools,* A Report of the United States Commission on Civil Rights, 205 (1967).

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tion" (588a). And the school board apparently does not perceive compensatory education as a viable substitute for desegregation in creating equal educational opportunities for its black children:

> The defendants have come forward with no program nor intelligble description of 'compensatory education,' and they advance no theory by which segregated schools can be made equal to unsegregated schools (Br. A16).

Whatever doubts there may be about the standardized achievement tests as measuring instruments, the results profoundly impressed the trial judge that black children in Charlotte's all-black schools were not receiving an equal education. Of course, the case does not depend as a legal matter upon such local findings of educational harm. "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958). The segregation system was a massive intentional disadvantaging of the Negro minority by the white majority and its elimination is an urgent task. The district judge correctly held that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

B. *Governmental Agencies Created Black Schools in Black Neighborhoods by Promoting School Segregation and Residential Segregation.*

The findings of the district court make it plain that the existing pattern of school segregation in Charlotte-Mecklenburg is the deliberate result of state action designed to create a segregated school system. The court found that all

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the school segregation in Charlotte was illegal and that there was no aspect of possibly innocent or adventitious segregation. Each and every black school in the system was held to be segregated in violation of the constitutional prohibitions against racial discrimination:

> On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County* (711a).

The district court made no attempt to proclaim a general principle that all-black schools are illegally segregated *per se*. He held only that the particular all-black schools in Charlotte were illegally segregated.[54] That conclusion was supported by substantial evidence and findings.

Judge McMillan found that the school board had gerrymandered school attendance areas to promote segregation, selected the sites and sizes of schools to promote segregation, and used the school transportation system toward the same end. It was held that the racial makeup of the schools had been controlled:

> . . . the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

[54] Judge McMillan stressed this point in his recent opinion. See section headed, *"This is a local case in a local court—a lawsuit—to test the constitutional rights of local people"* (Br. A12).

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> zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not deemed as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy (455a-456a).

The court heard extensive evidence about the extent of residential segregation in Charlotte and the governmental responsibility for the existing pattern of almost total residential separation. About 98% of the black inhabitants of Charlotte reside in the northwest quadrant of Charlotte. Judge McMillan summarized the findings about how this extensive segregation came about in these words:

> The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action all deriving their basic strength originally from public law or state or local governmental action. These elements include, among others, the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools

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> so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or desegregated (1228a-1229a).

The Fourth Circuit accepted these findings and conclusions stating that they were "supported by the evidence" (A. 1264a). The Fourth Circuit opinion mentions that "North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley* v. *Kramer,* 334 U.S. 1 (1948), prohibited this discriminatory practice" *(ibid.).* See, e.g., *Phillips* v. *Wearn,* 226 N.C. 290, 37 S.E.2d 895 (1946) (involving property in Mecklenburg County); *Eason* v. *Buffaloe,* 198 N.C. 520, 152 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.,* 226 N.C. 58, 36 S.E.2d 710 (1946). Racial restrictive covenants operated to exclude Negroes from entire areas of cities. They had the same effect and purpose as residential segregation laws and ordinances of the kind outlawed by *Buchanan* v. *Warley,* 245 U.S. 60 (1917). Indeed, restrictive covenants were the functional and practical equivalent of such segregation ordinances when they were enforced by injunctions as in *Shelley, supra,* or damage suits (see *Barrows* v. *Jackson,* 346 U.S. 249 (1953)). Mr. Justice Black has pointed out that *Shelley* was argued to this Court on this basis by the Solicitor General, among others:

> This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective

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> to be accomplished by a system of private contracts. (*Bell* v. *Maryland,* 378 U.S. 226, 329 (1964), Mr. Justice Black, dissenting.)

Judge McMillan's findings about the causes of residential segregation in Charlotte are entirely corroborated by the national experience as reported by the United States Commission on Civil Rights. The Commission's formal findings were:

> 5. Within cities, as within metropolitan areas, there is a high degree of residential segregation—reflected in the schools—for which responsibility is shared by both the private housing industry and government.
>
> (a) The discriminatory practices by city landlords, lending institutions, and real estate brokers have contributed to the residential confinement of Negroes.[55]
>
> (b) State and local governments have contributed to the pattern of increasing residential segregation through such past discriminatory practices as racial zoning ordinances and racially restrictive covenants capable of judicial enforcement. Current practices in such matters as the location of low-rent public housing projects, and the displacement of large numbers of low-income nonwhite families through local improvement programs also are intensifying residential segregation.[56]
>
> (c) Federal housing programs and policies serve to intensify racial concentrations in cities. Federal policies governing low- and moderate-income housing pro-

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[55] See the testimony of Daniel O. Hennigan covering this kind of discrimination in Charlotte (28a-57a).

[56] See the testimony of Yale Rabin concerning state and local actions in Charlotte (174a-241a).

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grams such as low-rent public housing and FHA 221 (d)(3) do not promote the location of housing outside areas of intense racial concentration. Federal urban renewal policy is insufficiently concerned with the impact of relocation on racial concentrations within cities.

6. Individual choice contributes to the maintenance of residential segregation, although the impact of such choice is difficult to assess since the housing market has been restricted. (*Racial Isolation in the Public Schools, supra,* at 201-202.)

The Commission reported that the policy of the Federal Housing Administration in the 1930's and 1940's was a "principal impetus to housing discrimination" (*Id.* at 254).[57] The FHA not only recommended the insertion of racial covenants, but even after *Shelley* v. *Kraemer, supra,* the Commission reports, "the FHA continued to treat racial integration in housing as a reason for denying benefits to an applicant" (*id.* at 254; citing Abrams, *Forbidden Neighbors,* 233 (1955), and Weaver, *The Negro Ghetto,* 71-73 (1948)).

The court below thus accepted the finding of the trial court that the schools in Charlotte were illegally segregated. Judge Butzner wrote:

> The fact that similar forces operate in cities throughout the nation under the mask of *de facto* segregation

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[57] A glaring example of the nearly inevitable effect of the policy of the federal government to promote residential segregation and the school board's policy of building schools in accommodation of that policy is the Double Oaks School. The federal housing officials and the local housing authority built a low-income housing development for blacks, leaving space for a school. The school board built a school to serve the children of that project. In 1969-70, as in previous years, only black children attended Double Oaks—over 800 (832a). This is one of the ten schools the board would leave all-black (*id.*) and is one of the two schools HEW would leave all-black.

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> provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools (A. 1264a-1265a).

The court below thus rejected the board's argument that segregation in the Charlotte schools could be justified by reference to a "neighborhood school" policy. The Fourth Circuit cites a number of decisions where courts have reached similar conclusions about the relation between segregated housing policies and segregated schools, *e.g., Henry* v. *Clarksdale Munic. Separate School Dist.,* 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied,* 396 U.S. 940 (1969); *United States* v. *School Dist. 151 of Cook County,* 404 F.2d 1125, 1130 (7th Cir. 1968), *aff'g* 286 F. Supp. 786, 798 (N.D. Ill. 1968); *Brewer* v. *School Bd. of City of Norfolk,* 397 F.2d 37, 41 (4th Cir. 1968); *Keyes* v. *School Dist. No. One, Denver,* 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated,* 396 U.S. 1215 (1969); *Dowell* v. *School Bd. of Oklahoma City,* 244 F. Supp. 971, 975 (W.D. Okla. 1955), *aff'd,* 375 F.2d 158 (10th Cir.), *cert. denied,* 387 U.S. 931 (1967).[58]

It does not matter, for purposes of judging the constitutionality of the resulting school segregation, that agencies of the state, other than the local school board, are in part

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[58] See also *Holland* v. *Board of Public Instruction of Palm Beach County,* 258 F.2d 730, 732 (5th Cir. 1958). In a number of recent decisions the Fifth Circuit has held that geographic zoning plans are acceptable only if they tend "to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Sep. School Dist.*, 406 F.2d 1086, 1093 (5th Cir. 1969); *United States* v. *Indianola Municipal Sep. School Dist.,* 410 F.2d 626 (5th Cir. 1969), *cert. denied,* —— U.S. —— (1970); *Davis* v. *Board of School Comm'rs of Mobile County,* 393 F.2d 690, 694 (5th Cir. 1968); *United States* v. *Choctaw County Board of Ed.,* 417 F.2d 838 (5th Cir. 1969); *Braxton* v. *Board of Public Instruction of Duval County,* 402 F.2d 900 (5th Cir. 1968); *Valley* v. *Rapides Parish School Board,* 423 F.2d 1132 (5th Cir. 1970); *Youngblood* v. *Board of Public Instruction of Bay County, Fla.,* —— F.2d —— (5th Cir., No. 29369, July 24, 1970).

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responsible for the residential segregation pattern. As this Court made plain in *Cooper* v. *Aaron,* 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by the actions of other state officials." Nor is the local board's responsibility relieved by the fact that private as well as governmental discrimination in housing has contributed to the segregated residential pattern. As Judge McMillan has found, the board has made choices in locating schools, fixing the sizes and grade structures of schools, determining the transportation patterns, and adopting the policy of assigning pupils by residences. The board has defined the relevant school "neighborhoods" by its own decisions. Housing segregation results in school segregation only in the context of these choices by the school board—an agency of the state. Thus, a situation which has the appearance of inevitability—school segregation in Charlotte's black ghetto—is revealed as the product of governmental decision-making. As the Fourth Circuit held in *Brewer* v. *School Board of the City of Norfolk,* 397 F.2d 37, 41-42 (4th Cir. 1968):

> If residential racial discrimination exists it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color (Footnotes omitted).

The reasoning in *Brewer* is all the more apt where, as here, government has contributed heavily to creating the segregated housing pattern.

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II.

The District Court Was Correct in Ruling That the Dual Segregated System in Charlotte-Mecklenburg Must Be Disestablished by Reorganizing the System So That No Racially Identifiable Black Schools Remained. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. *This Court's Decisions Require Complete School Desegregation.*

The district court sought to afford complete relief in this case by requiring a desegregation plan which would eliminate the racially identifiable "black" schools and leave "just schools". The trial judge's decision that each predominantly black or all-black school in Charlotte must be reorganized on an integrated basis by reassigning pupils and faculties is in conformity with this Court's decisions defining the duty to eliminate state-imposed segregation in the public schools. *Brown* v. *Board of Education,* 347 U.S. 483 (1954) (*Brown I*), and *Brown* v. *Board of Education,* 349 U.S. 294 (1955) (*Brown II*). *Brown II* speaks of the need "to achieve a system of determining admission to the public schools on a nonracial basis." (349 U.S. at 300-301) In *Cooper* v. *Aaron,* 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bringing about the elimination of racial discrimination in the public school system." In 1968, in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), the Court made it plain that *Brown* required more than simply a system of nondiscriminatory admission of Negroes to "white" schools. Rather, the whole system of segregation must be dismantled (*id.,* 391 U.S. at 437), and discrimination must be eliminated "root and branch" (*id.* at 438). The Con-

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stitution requires "abolition of the system of segregation and its effects" (*id.* at 440).

This Court has called for the abolition of racially identifiable schools saying that desegregation plans must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442). The requirement of complete relief was emphasized by the holding in *Green, supra,* that courts should render decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (391 U.S. at 438, note 4). Mr. Justice Brennan's opinion said that the courts should "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). Thus it ought to be entirely clear that this Court's decisions require fundamental reform of racially segregated dual systems to abolish every vestige of segregation and prevent its recurrence. The courts are not limited to requiring a mere minimum amount of desegregation which might give the bare appearance of non-discriminatory assignments. Rather, the lower courts have been admonished to strike out the roots and branches of the segregated system. The district court's decision was faithful to the duty set out in *Green, supra.*

Judge McMillan, having determined that the black schools in Charlotte were illegally segregated, directed his expert consultant to devise a plan which eliminated the black schools. Judge McMillan had to appoint his own consultant to devise a plan because of what Judge Sobeloff has aptly described as the school board's "total lack of cooperation" and the fact that the board "has resisted and delayed desegregation at every turn" (1293a; see note 9 at 1291a-1293a). Accordingly, the court set forth detailed guidelines for the court consultant to follow in preparing

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the plan. Among the criteria set forth in the December 1, 1969, opinion are the following:

> 2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful . . . [citations omitted].
>
> * * *
>
> 12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.
>
> * * *
>
> 14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation . . . [citations omitted].
>
> 15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . [citations omitted].
>
> * * *
>
> 17. Pairing of grades has been expressly approved by the appellate courts . . . [citations omitted]. Pairing, grouping, clustering, and perhaps other methods

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may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this country ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools (708a-712a).

Petitioners urge that the desegregation goals for Charlotte which were set forth in the trial court's instructions to the expert consultant were entirely appropriate under this Court's decision in the *Green* case. This Court's decision in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1968), also provides a substantial precedent for the trial judge's approach in setting a concrete desegregation objective. Judge Winter's dissenting opinion below states this well (1301a-1302a):

> The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education,* 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro

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faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County,* 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

B. *The Fourth Circuit's New Reasonableness Rule Makes the Goal of Desegregation Less Complete and Specific and Threatens to Undermine Brown v. Board of Education.*

The court below, by a narrow vote (actually, only three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. Thus we have not merely an issue about the reasonableness of particular desegregation plans or techniques, but rather, an issue about the reasonableness of the goal of desegregation.

As Judge Sobeloff has stated so clearly in his dissent, the new rule portends serious consequences for the general course of school desegregation:

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> . . . Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt.[59] The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome" (1290a-1291a).

We believe that the court of appeals erred by not adopting the trial court's more specific requirement that each black school in Charlotte be reorganized so that it would no longer be a racially identifiable black school. The district judge made no effort to announce a rule of law to govern any case but the Charlotte case (Br. A 12-A13). He found that the Charlotte schools were unlawfully segregated and that it was educationally feasible to desegregate each of them. The Finger Plan demonstrates that desegregation of all the schools is indeed feasible, and we

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[59] It was only two weeks later that Judge Sobeloff's prediction was realized. The trustees of School District No. 1 of Clarendon County, South Carolina urged upon the court of appeals the "reasonableness" of a freedom of choice plan which had not worked. *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County,* No. 14571, —— F.2d —— (4th Cir., June 5, 1970) (separate concurring opinion by Judge Sobeloff):

> "This case is the lineal descendant of *Briggs* v. *Elliot,* one of the four cases consolidated in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). [Footnote omitted] That it is still being litigated at this date, nineteen years since *Briggs* was initiated and sixteen years after the decision in *Brown* is a most sobering thought." *Ibid.*

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do not understand the court of appeals majority to seriously question the general feasibility or educational soundness of the Finger Plan. However, the reasonableness doctrine was applied to set aside the Finger Plan for elementary schools on the ground that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a). At the same time, the reasonableness rule was applied to approve the Finger Plan for secondary schools involving busing, non-contiguous and satellite zoning, and similar techniques to eliminate each predominantly black secondary school.

The Fourth Circuit has explicitly attempted to formulate a legal principle to be applied in desegregation cases on a national basis. The rule was announced as one necessitated by the problem of some cities "which have black ghettos so large that integration of every school is an improbable, if not an unattainable goal" (1267a-1268a). It is particularly inappropriate and unecessary to attempt to frame such a rule in a case such as this, for Charlotte has no vast intractable desegregation problem as the Finger Plan demonstrates.[60] Desegregating the Charlotte schools is not a difficult matter in the technical sense. The technology to desegregate school systems of this size is readily available. The problem is and has been a problem of political and legal resistance to desegregation.[61] The

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[60] Judge McMillan again found this to be so:

> There is no 'intractable remnant of segregation' in this school system. No part of the school system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable (Br. A18).

[61] Judge McMillan thoughtfully addressed this point in his recent decision. (See section headed *"The Issue Is One of Constitutional Law—Not Politics,* Br. A13-A14):

> Civil Rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom need

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United States Commission on Civil Rights has recently made the point:

> It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and create no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size. (Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

The real thrust of the "reasonableness rule" as applied to reject the elementary school plan is as Judge Sobeloff wrote:

> . . . no more than an abstract, unexplicated judgment —a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

If the reasonableness of school desegregation as a goal is to be litigated in every case by a subjective assessment of

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to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid (Br. A14).

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whether the end justifies the cost involved, then the *Brown* decision will in many places become a practical nullity.

As the National Education Association Brief *Amicus Curiae* in support of the Petition for Certiorari in this case has pointed out, the Fourth Circuit decision is paradoxical in that while it "creates a wide ambit for the exercise of discretion to limit desegregation, it severely, and NEA believes unwarrantedly, restricts the traditional discretion of the district court to frame a plan which will secure the constitutional objective." (NEA Brief *Amicus Curiae,* p. 21, note 19.)

The reasonableness rule is so vague, ill-defined, and, in Judge Sobeloff's phrase, "inherently ambiguous" (1289a) that it is "highly susceptible to delaying tactics in the courts" (1290a). The Charlotte-Mecklenburg board illustrates this by the Cross-Petition for Certiorari which defends the reasonableness rule but argues that the Fourth Circuit has misapplied its own rule in approving the junior and senior high school desegregation plans ordered by the district court. The point is that the opinion below contains no standards by which to judge the reasonableness question. The specific application in Charlotte, in which the plan for high schools and junior high schools was approved by the court of appeals, yet the elementary plan was disapproved, leaves the law in great uncertainty. The result implies that it may be legal to deny a desegregated education to some black children and that the only requirement is to offer constitutional protections to a reasonable number of them. Such a doctrine is alien to the requirement that the States shall not deny "to *any person* within their jurisdiction, the equal protection of the laws" (emphasis supplied). The reasonableness rule, if applied in this fashion, would conflict with the tradition of personal constitutional rights under the Fourteenth Amendment. (See Br. A 13.)

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Judge Butzner's decision suggests that complete desegregation can be achieved only in "towns, small cities, and rural areas" (1267a). The ruling implies that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools, by its statement that "not every school in a unitary system need be integrated" and that while boards "must use all reasonable means to integrate the schools" sometimes "black residential areas are so large that not all schools can be integrated by using reasonable means."[62] This holding, by acknowledging that the black schools are the product of illegal segregation practices holds that the wrong is without a remedy.

We urge that this Court reject the notion that the constitutional rights of black citizens to equal protection of the laws may be left without a remedy in the courts of the United States. The concept that a state may violate the constitutional rights of citizens because it is too expensive to protect those rights is unworthy of our legal system and a betrayal of our constitutional heritage. Judge McMillan stated the correct rule: "The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin* v. *School Board* [377 U.S. 218 (1964)]; *United States* v. *Cook County, Illinois* [404 F. 2d 1125 (7th Cir. 1968)]" (710a). See also, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); cf. *Baldwin* v. *New York,* 26 L.ed 2d 437 (1970).

The court below suggests three measures which might be taken instead of eliminating racially identifiable schools, e.g., providing an integrated school for each child in later

[62] There is perhaps some slight unclarity in the application of the rule to this case, for the court fails to state categorically that Charlotte's black residential area is of such size that schools must remain black.

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years (as at the secondary school level), establishing special integrated programs in the black schools, and permitting black pupils the right of free transfer to leave the all-black schools. None of these suggestions represents a satisfactory substitute for the constitutional right to attend school in a system where racial identification of the schools has been removed and there are "just schools." *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 442 (1968). The idea of providing integration in later years is merely a postponement of the right of desegregation and conflicts with this Court's determination that the dual system must be abolished "now and hereafter." *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969). The provision of special integrated programs at black schools is by its terms limited to peripheral activities not central to the daily classroom experience of grade school children. The provision of free transfers for blacks has proven an unsuccessful method of desegregating the schools in Charlotte-Mecklenburg and it cannot be expected that any but a few blacks would benefit from the proposed rule allowing black students to transfer from majority black schools. *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968). These three measures, while unobjectionable in themselves, are simply no substitute for a desegregated school system.

The reasonableness rule threatens to undermine the *Brown* decision. As Judge Sobeloff has suggested in dissent, the holding threatens to water down or temper the duty to convert to a unitary system (1281a). Sixteen years after *Brown I* there is no room for retreat from the principle that racial segregation is unconstitutional and must be abolished. This Court has just recently rejected the doctrine of "all deliberate speed" because of the long experience of evasion and delay of the duty of desegregation. *Alexander* v. *Holmes County Board of Education,* 396 U.S.

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19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools,* 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970). The new and subjective reasonableness rule portends a new era of litigation under a subjective standard sanctioning a great deal of continuing racial segregation. It should not be followed.

C. *The Goal of Integrating Each School in Charlotte Is Consistent With Federal Statutory and Constitutional Requirements.*

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-6(a)(2)) forbid the busing ordered by the district court. The court of appeals rejected this reasoning stating that the argument "misreads the legislative history of the statute," and that the sections "are not limitations on the power of school boards or courts to remedy unconstitutional segregation" (1274a). The same argument has been rejected on numerous occasions by other courts and we think the treatment of this issue by the court below is sufficient to dispose of the question (1247a-1248a). Other courts have come to the same conclusion in a number of cases: *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 880-881 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir. 1967), *cert. den. sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840 (1967); *United States* v. *Board of Trustees of Crosby Independent School District,* 424 F.2d 625 (5th Cir. 1970); *Tillman* v. *Board of Public Instruction of Volusia County,* No. 29180, —— F.2d —— (5th Cir., April 23, 1970); *Andrews* v. *City of Monroe,* No 29358 —— F.2d ——(6th Cir., April 23, 1970); *United States* v. *School District 151, Cook County, Ill.,* 404 F.2d 1125, 1130 (7th Cir. 1968), *affirming* 286 F. Supp. 786 (N.D. Ill.); *Keyes* v. *School*

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District No. One, Denver, 303 F. Supp. 289, 298 (D. Colo. 1969), *stay granted,* —— F.2d —— (10th Cir. 1969), *stay vacated,* 396 U.S. 1215 (1969); *Moore* v. *Tangipahoa Parish School Board,* 304 F. Supp. 244, 250 (E.D. La. 1969).

The board's construction of the Act would render it an unconstitutional attempt by the Congress to authorize the States to violate the Fourteenth Amendment by continuing segregation. But, of course, "Congress may not authorize the states to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651, n. 10 (1966).

This case does not present the abstract question of whether any racial balance of the schools is required. By requiring the elimination of racially identifiable schools the trial judge did not impose any strict requirement that each school be a racial microcosm of the entire system. Certainly there was no question of balance unrelated to the requirement of eliminating unconstitutional racial segregation caused by the State. The district judge did not require any fixed racial ratios of pupils. He merely adopted the racial ratio "as a starting guide, expressed a willingness to accept a degree of modification, and departed from it where circumstances required" (1287a). As he recently wrote:

> The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix," but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools (Br. A10).

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Petitioners do not contend that the Constitution requires that formerly segregated systems must invariably convert to an arrangement in which every school has an approximate ratio which reflects the system-wide ratio of the races. The trial judge did not proceed on the theory that any such balancing was required by the Constitution, although the board's arguments continue to characterize the holding in this manner. But petitioners do urge that it is within the discretion of district courts to adopt as a remedial goal some specific target to measure progress toward eliminating racial identifiability of schools. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The objective of desegregation plans, to convert to a unitary system, might in some cases achieve a balanced system where every school is a racial microcosm of the entire system. Such racial balance plans may often be feasible as recent experience in Greenville, South Carolina demonstrates, for example. *Whittenberg* v. *School District of Greenville County,* C.A. No. 4396, D. S.C., Order of Feb. 4, 1970. The Greenville plan produced a ratio of about 20% black and 80% white in each school in a system with 58,000 children in 105 schools; it included transportation for pupils living more than 1½ miles from school. As we have said previously, this nation has more than adequate technology to integrate the schools and afford a quality education. It is generally possible to eliminate all-black schools by feasible desegregation plans. However, we take no absolutist position which ignores the possibility that there are exceptions to this rule. It is sufficient to decide this case to conclude that a feasible and workable plan to eliminate "black schools" and "white schools" is at hand.

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III.

The District Court Acted Within the Proper Limits of Its Discretion by Ordering a Plan Consistent With the Affirmative Duty to Desegregate the Schools and the Objective of Preventing Resegregation.

A. *The Finger Plan Promises to Establish a Unitary System.*

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. It is undisputed that the plan will eliminate the principal characteristics of the dual system—the all-black schools. This is the essential thing that a plan must accompish in order to be an "adequate" plan under *Brown* v. *Board of Education,* 349 U.S. 294, 301 (1955), and *Green, supra. Green* calls for *results* in accomplishing desegregation. The trial judge understood this, stating:

> The courts are concerned primarily not with the techniques of assigning students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical. (582a)

Judge McMillan was also cognizant of this Court's advice that no "universal answer" or "one plan will do the job in every case." *Green, supra,* 391 U.S. 430, 439. He knew also that this Court had emphasized that "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 235 (1969). Thus Judge McMillan undertook a detailed and conscientious study, aided by the

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skilled and intelligent advice of an unusually capable expert consultant working with the local school administrative staff, to devise "alternatives which may be shown as feasible and more promising in their effectiveness." *Green, supra,* 391 U.S. at 439. The Finger Plan was the product of this study.[63]

Where there is an available plan which will completely desegregate the schools and the board opposes it, "that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439. The board has never sustained the "heavy burden" of opposing the Finger Plan. Indeed, the board has never had any viable legal theory. The board's arguments rest largely on ideological positions against "racial balance" which are premised on a denial of the duty to integrate the schools and are in the teeth of the *Green* decision.

B. *The Court Ordered Plan Is Feasible.*

Petitioners agree with the dissenting judges below that the "feasibility" of a desegregation plan is the proper matter for inquiry. *Green, supra,* indicates that plans must be shown to be *"feasible"* and to "provide *effective* relief" (391 U.S. at 439).

The district court made detailed findings of fact supporting the conclusion that the Finger Plan is feasible and these findings are supported by substantial evidence. It was error for the court of appeals to substitute its own

[63] We do not contend that the Finger Plan is the only plan which will satisfy constitutional requirements in Charlotte, nor did the court below. In February, the court ordered the board to implement the Finger Plan or any other plan it might devise which would work (824a-825a). In August, the court specifically approved two other plans which the board could employ if it chose to do so and if the details were completed (Br. A33-34).

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opinion that the plan required the board to engage in too much increased bussing where there was no claim that any of the district court's findings on this issue were clearly erroneous. Cf. *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232, 235 (1970). As Judge Sobeloff has shown, in dissent, "there is no genuine dispute" on the feasibility of the plan; it is "simple and quite efficient" (1284a). Here are the facts.[64]

The Finger Plan requires transportation of pupils to accomplish desegregation. The system now transports 23,600 pupils by school bus and another 5,000 by common carrier.[65] The school board's proposed plan would bus about 5,000 additional children,[66] but still would not desegregate the

[64] The facts discussed in this section covering the feasibility of the Finger Plan are those that were in the record in the Court of Appeals.

Many of these matters were re-litigated at the hearing in July, 1970. And the significant findings of March, 1970 were reaffirmed (Br. A16-A26).

There were some new findings, all of which support our view that the Finger Plan is feasible. 1) Funds are now available from the State for the operational costs of transportation of *all* city children who live more than 1½ miles from the school to which they are assigned (Br. A11). 2) There are sufficient buses on hand or available on loan so that *no* capital expenditures are required to implement the Finger Plan immediately (Br. A18-A20, A23, A26). 3) Pre-school children are presently bused the greatest distances (Br. A16-A17, A24-A25). 4) There is an ample supply of bus drivers (Br. A21, and see A9). 5) The plan will not cause an unwarranted traffic problem (Br. A25). 6) The board already staggers the opening of schools so that adjusting of the opening and closing hours of particular schools to accommodate the transportation system would be consistent with established practice (Br. A25). 7) The total school budget for 1970-71 is approximately $66,000,000 (Br. A21, A23). Both the county and the state have more than sufficient surplus funds to pay for any conceivable expense which might be occasioned by the Finger Plan (Br. A23).

[65] See 1200a.

[66] See 1219a.

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system, leaving 10 Negro schools.[67] The Finger plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)[68] will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to the secondary students (1,500 senior high and 2,500 junior high pupils), but reversed the requirement as to elementary pupils (9,300 pupils, including 1,300 in schools to be simply rezoned, and 8,000 involved in cross busing between paired schools).[69]

The court carefully considered the busing from the standpoint of the children. The crucial finding is this:

> The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense. (1205a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.[70] Eighty percent of the buses in the system require more than one hour for a one-way trip now.[71] The average one-way trip under the court plan "for elementary students is less than seven miles, and would appear to require not over 35 min-

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[67] The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (826a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (830a).

[68] See 1219a.

[69] *Ibid.*

[70] See 1204a, 1215a.

[71] See 1204a.

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utes at most, because no stops will be necessary between schools.[72]

The court of appeals ruled that busing is "a permissible tool for achieving integration" and stated that the factors to be considered in appraising busing were "the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (1272a). Only the cost factors seems to have been used to support the court's decision that the elementary school plan involved too much busing. The age of the pupils seems not to have been a decisive factor since busing elementary pupils is an established tradition in Charlotte-Mecklenburg with 10,441 elementary pupils already being bused in 1969-70 (619a). There was no suggestion that the times and distances were decisive since they compared most favorably with the present practice. The average elementary school busing distances under the Finger Plan were shorter than the average trips now made and only a little over half as long as the busing distances approved by the Court of Appeals for the black high school students assigned to Independence High School (1273a).

With respect to the costs of the Finger Plan, we believe that this ground for disapproving the elementary plan is, in Judge Winter's phrase "insubstantial and untenable."[73] The court below states the cost issue in terms of the in-

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[72] See 1215a. "The average straight line mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles" (1201a). The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%."

[73] Indeed, Judge McMillan's recent findings that *no* capital outlay will be required to immediately implement the total court ordered plan (Br. A23) would seem to dispose of the matter entirely.

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creased *percentage* of pupils who will be bused. The court recites that the additional elementary pupils who must be bused represent an increase of 39% over all pupils presently bused requiring a 32% increase in the bus fleet (1276a). The court also stated that the added secondary busing which was approved brought the total percentage increases to "pupils 56%, and buses 49%" (*ibid.*). These were the facts recited to support the conclusion that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a).

The ruling below does not contain any discussion of the costs of the Finger Plan busing "in relation to the board's resources" but only a discussion of the cost in relation to present expenditures for busing. As we have stated elsewhere in this brief, we do on any account accept the premise that such a monetary consideration should be decisive of important individual rights. All the more does it seem clear that the prior level of expenditures in operating an unconstitutional, segregated system should not be decisive in defining what constitutes a nonsegregated unitary system. But in any event, there is no foundation in this record for a conclusion that the board lacks sufficient resources to implement the Finger Plan. The board's resources are much broader than local funds because in North Carolina transportation costs for school children are largely met by the state board of education, which bears most of the operating costs and also replaces worn out buses after local authorities make the initial purchase. The capital outlay required for the 90 buses needed in the elementary school phase of the Finger Plan will be about $5,400 per bus or $486,000, an investment which will buy not only vehicles with useful lives of up to 15 years, but also the right to have them perpetually replaced at no further cost to the

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local board.[74] The State will bear the operational cost of the 90 buses which was found to be $186,000 annually. When these expenditures are considered in the context of the local education budget figures, which exceeded 57 million dollars in 1969-70,[75] and the 3.5 billion dollar state education budget, they are so small as to be insignificant.

Moreover, the discussion of these costs ignore a vital fact. *The State Board of Education, a defendant in this case, already has in its possession a sufficient number of buses to implement the Finger Plan.* The case thus involves merely a decision about whether existing state resources—buses already owned by the defendant State Board of Education—will be used to integrate the Charlotte schools. Judge McMillan found that the State Board of Education had "approximately 400 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (1219a).[76] As Judge McMillan put it:

> The problem is not one of availability of busses but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case (1220a).

Since the State Board of Education already owns sufficient used busses in storage to implement the Finger Plan

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[74] And, of course, none of these vehicles need be bought immediately.

> "No capital outlay will be needed to supply buses for the 1970-71 school year. The state is ready and willing to lend the few busses the board may need; replacements can be bought after actual need has been determined under operating conditions" (Br. A23).

[75] The local budget is approximately $66,000,000 for the 1970-71 school year (Br. A21, A23).

[76] The facts as to availability of busses in July, 1970 are found at Br. A18-A20.

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there really is no legitimate issue in this case about the financial burden of the plan. Even if the local board had insufficient money to pay for these busses (which is not true), desegregation may not be defeated on the basis that one agency of the state does not have sufficient funds to reimburse another state agency which has an equal duty to aid in desegregation of the public schools. The appropriate principle was stated in *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958), where the Court unanimously declared that:

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

It would plainly be within the power of the district court, if it proved necessary, to require the State Board of Education to loan—or even grant—the necessary buses now in storage to the Charlotte-Mecklenburg board. Cf. *Griffin* v. *County School Board,* 377 U.S. 218 (1964), where the Court required that money be levied and spent to redress constitutional rights.

C. *The Finger Plan Utilizes Appropriate Techniques to Achieve Pupil Desegregation.*

We believe that the court below was correct in rejecting the board's objections to a variety of desegregation techniques used in the court ordered plan, such as busing to promote integration, creating satellite school zones in noncontiguous areas, and creating paired or clustered schools with altered grade structures. The court below pointed to the direction in *Brown II* about using "practical flexibility" in shaping remedies, as support for use of the satellite zone technique (1247a). *Brown* v. *Board of Education,* 349 U.S.

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294, 300 (1955). The court also noted that the pairing and clustering of schools was approved in *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430, 442, n. 6 (1968), and *Hall* v. *St. Helena Parish School Bd.,* 417 F.2d 801, 809 (5th Cir. 1969), *cert. denied,* 396 U.S. 904 (1969). There are a great many other decisions in which courts have required use of pairing and clustering techniques, sometimes necessitating transportation, in order to accomplish desegregation.[77] Adoption of the board's argument would require repudiation of techniques widely employed to accomplish the dismantling of segregated systems.

School bussing is an ordinary tool of educational administration which may properly be employed to desegre-

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[77] Cases where courts have employed the pairing or clustering technique include: *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040, 1042 (4th Cir. 1969) (*en banc*); *Brunson* v. *Board of Trustees of School District No. 1,* No. 14571, —— F.2d —— (4th Cir., June 5, 1970); *Green* v. *School Board of Roanoke,* No. 14335, —— F.2d —— (4th Cir., June 17, 1970); *Brewer* v. *School Board of Norfolk,* No. 14544, —— F.2d —— (4th Cir., June 22, 1970), *cert. den.* 38 U.S.L. Week 3522; *Hall* v. *St. Helena Parish School Board,* 424 F.2d 320 (5th Cir. 1970); *United States* v. *Board of Trustees of Crosby Independent School District,* 424 F.2d 625 (5th Cir. 1970); *Mannings* v. *Board of Public Instruction of Hillsbrough County,* No. 28643, —— F.2d —— (5th Cir., May 11, 1970); *Davis* v. *Board of School Commissioners of Mobile County,* No. 29332, —— F.2d —— (5th Cir., June 5, 1970), cert. pending on other issues, No. 436, O.T. 1970; *Harvest* v. *Board of Public Instruction of Manatee County,* No. 29425, —— F.2d —— (5th Cir., June 26, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28639, —— F.2d —— (5th Cir., July 1, 1970); *Tillman* v. *Board of Public Instruction of Volusia County,* No. 29180, —— F.2d —— (5th Cir., July 21, 1970); *United States* v. *School District 151,* Cook County, Ill., 404 F.2d 1125 (7th Cir, 1968), affirming 286 F.Supp. 786 (N.D. Ill.); *Kemp* v. *Beasley,* 423 F.2d 851, 856 (8th Cir. 1970); and *Jackson* v. *Marvell School District No. 22,* 425 F.2d 211 (8th Cir. 1970).

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gate the schools.[78] Generalized objections to school busing to promote desegregation do not sustain the board's burden. Obviously some transportation is necessary in the system. It is plainly not a valid objection to busing that it is used to promote integration, for this is the constitutional imperative. The board has no satisfactory theory to differentiate that busing which is admittedly necessary from that which it finds objectionable, i.e., to legally differentiate between "good" and "bad" busing.

The board attacks arrangements which involve transporting children from their zone of residence to a non-adjacent zone. But pupils have no inherent right to attend any particular school because of their place of residence. A child's "own neighborhood school zone" does not exist in the order of natural phenomena. It is the product of school board decision, i.e., state action. Attendance areas and the grades served by particular buildings are always subject to change and often are changed. There is no good reason not to use available transportation facilities to desegregate the schools, or to limit that transportation to an artificial "adjacent" zone. Segregated schools need not inevitably follow segregated housing patterns. There is nothing inexorable about such segregation; there is merely the appearance of inevitabilty. The general case for busing to promote integration is well stated in "On The Matter of

[78] Busing to promote desegregation has been approved in a number of cases including: *Kemp* v. *Beasley*, 423 F.2d 851 (8th Cir. 1970) ("bussing is only one possible tool in the implementation of unitary schools"; per Blackmun, J.); *Clark* v. *Board of Education of Little Rock*, No. 19795, —— F.2d —— (8th Cir., May 13, 1970), cert. pending No. 409 O.T. 1970; *United States* v. *Board of Trustees of Crosby Independent School District, supra; Harvest* v. *Board of Public Instruction of Manatee County, supra; Tillman* v. *Board of Public Instruction of Volusia County, supra;* and *United States* v. *School District No. 151,* Cook County, Ill., *supra.*

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Bussing: A Staff Memorandum from the Center For Urban Education" (February 1970):

> Good education, as well as the moral imperatives of a pluralistic society, demands desegregation of the schools. How can school desegregation be accomplished in cities and suburbs with long-established racial housing patterns? What method can circumvent the hard fact that segregated neighborhoods foster segregated neighborhood schools? One tried and tested means is the transportation of children out of their immediate neighborhoods by school bus.
>
> Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900. And, until recently, it had conveyed no emotional overtones other than nostalgia for lost youth. In a country as large as ours, neighborhood schools within walking distance are a relatively recent luxury of the cities.
>
> Most children take a bus or car to school. Children in rural areas ride to central schools. Children in suburbia queue up on the corner for the bus that their parents at open school board meetings insist is theirs by right. Private and parochial school pupils board school busses and ride often for half an hour to their destination. In large cities children travel public subways and busses, sometimes more than an hour each way, to special schools of music and art, performing arts, or science. And parents of handicapped children have maintained steady pressures on state legislatures to provide state-supported bussing to schools filling special educational needs. More recently, southern parents have rented their own busses to transport white children to private, segregated schools. In none of these cases have parents complained of harm to their children by the bus ride, or of the expense of the busses.

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> Transferring children from one school to another is literally a means to an end—the end of the bus ride should be better schooling. In cases where the transfer becomes an end in itself, the results are predictably disappointing. Other things being equal, a child from a racially isolated neighborhood will find an integrated school a better environment for learning than a school in which his classmates are equally isolated. But there is no magic in a bus ride which offsets poor planning, a teacher's dislike or lack of respect for a child, or a disregard of emergency procedures.

The poverty of the board's ideas in its arguments against busing to integrate schools is emphasized by the facts with respect to the current use of busing in Mecklenburg. Many new white schools are located so that few pupils can walk to schools. The walk-in school is basically a phenomenon of the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (1204a). The white schools have the opposite pattern. For example, in six white high schools and two junior high schools with a total of 12,184 pupils, only 96 students live within the mile and a half walking distance (1203a). Some 12,088 of these pupils are eligible for transportation and 5,349 of them ride the school buses (*id.*). Many pupils use private transportation.

The more one studies the detailed facts with respect to school bus transportation in Charlotte, and the data in the record with respect to such transportation in North Carolina generally, the more it seems clear that the only reason not to use buses to integrate the schools is to keep them segregated.

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the deci-

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sion approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (1289a). The major distinction between the busing which is approved and that which is rejected is that the secondary plans primarily increased busing of black students to formerly white schools while the elementary plan requires busing of white children as well as Negroes. We are unlikely to ever end the dual school systems until it becomes accepted that the inconveniences incident to reorganizations of the school systems will not be borne by black pupils alone but will be shared by the white community. Equal protection does require that desegregation plans be generally equitable and not place the entire burden on blacks. Judge McMillan announced at the time he approved the interim plan for 1969-70 that he would not again approve a plan for one-way busing (590a-591a). He wrote that:

> If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. (591a)

D. *The Neighborhood School Theory Cannot Be Justified on the Basis of History and Tradition Because It Was Widely Disregarded in Order to Promote Racial Segregation.*

Much of the argument about preserving the neighborhood school and against busing is simply a fake—a spurious attempt to suggest that there is a great traditional right that pupils have always had to go on foot to a nearby

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school located conveniently to their homes. That concept has little reality in a state like North Carolina where 54.9 percent of the pupils ride a school bus every day an average trip of 12 miles one way (1199a). The real tradition of North Carolina schools, and other states in the Fourth Circuit, is a tradition not of neighborhood schools, but of separate "white" and "Negro" schools, whether or not the neighborhoods were separate.

It has not been so very many years since the Fourth Circuit solemnly assembled to hear school men attempt to justify busing Negro children not only out of their neighborhoods but out of their counties to segregated all-black schools. These cases give one an interesting perspective about the arguments current now. The following are some busing arrangements revealed in cases in the Fourth Circuit:

1. *Griffin* v. *Board of Education of Yancey County,* 186 F. Supp. 511 (W.D. N.C. 1960). The court found that Negro pupils were being bused every day an 80 mile round trip from Burnsville to Asheville. While the case was pending without any relief, the board finally built a school for the 25 Negroes in Yancey County with a *changed grade structure*: to wit, all 12 grades were taught in two rooms for 25 pupils. Judge Warlick's opinion notes that bus transportation was used extensively throughout the State.

2. *School Board of Warren County, Va.* v. *Kilby,* 259 F.2d 497 (4th Cir. 1958). The school board appealed an order requiring desegregation where some Negro pupils were bused out of the county 25 miles each way and others were bused 50 miles each way to a boarding school where they were required to remain all week and return home on weekends. We repeat: the school board appealed seeking to preserve this arrangement.

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3. *Goins* v. *County School Board of Grayson County, Va.,* 186 F. Supp. 753 (W.D. Va. 1960), stay denied, 282 F.2d 343 (4th Cir. 1960). Negro pupils bused 30-40 miles out of their county.

4. *Corbin* v. *County School Board of Pulaski County, Va.,* 177 F.2d 924 (4th Cir. 1949) (bus travels out of county 60 miles per day). Eleven years later, see *Crisp* v. *County School Board of Pulaski County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 721.

Similar arrangements involving out of county assignments were condemned in *Buckner* v. *County School Board of Greene County, Va.,* 332 F.2d 452 (4th Cir. 1964), and *Walker* v. *County School Board of Floyd County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 714.

The conception that pupils were entitled to go to their nearest school got short-shrift in the context of the segregated system. Dual overlapping attendance areas within which blacks were often denied access to nearby white facilities were common, *Jones* v. *School Board of Alexandria, Va.,* 278 F.2d 72, 76 (4th Cir. 1960). Also common were "satellite zones" and non-contiguous attendance zones. See, e.g., *Haney* v. *County Board of Education of Sevier County, Ark.,* 410 F.2d 920 (8th Cir. 1969). See, generally, the excellent monograph commissioned by the U.S. Office of Education, Weinberg, "Race and Place, A Legal History of the Neighborhood School" (U.S. Govt. Printing Office, 1967). Weinberg recalls the non-contiguous *satellite zone* in the Arlington County, Virginia case called the "North-Hoffman Boston Zone" which was an all-black satellite zone located a 20 minute bus ride from the school:

> In much-litigated Arlington County, Va., 30 Negro children applied under the State pupil placement law for transfer to a white school. The school board re-

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jected 26 of the 30 applications, claiming it based its decision on five criteria: "attendance area, overcrowding at [white] Washington and Lee High School, academic accomplishment, psychological problems, and adaptability."[26] Seven of the students had applied for transfers on the ground that three white schools were nearer to their home. As the court explained: "However, the school authorities had other factors to consider, such as the adoption of presently established school bus routes, walking distances and the crossing of highways, as well as that [all-Negro] Hoffman-Boston was but a 20 minute bus ride for these pupils."[27]

[26] *Thompson* v. *County School Board of Arlington County*, 166 F. Supp. 529, 532 (1958).
[27] *Ibid.* at 533.

Of course, current practices in Charlotte-Mecklenburg sanction deviations from the neighborhood school ideal to promote segregation. The district judge disapproved a board request for a modification of the 1969-70 plan saying, "As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations" (595a). The free transfer plan now in effect allowed 1,200 white students to transfer out of their neighborhood schools in black neighborhoods in 1968-69 (453a).

Judge McMillan was right when he ruled: "The neighborhood school theory has no standing to override the Constitution" (300 F. Supp. at 1369; 306a).

E. *The Finger Plan Is Necessary to Accomplish the Constitutional Objective.*

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segrega-

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tion, there would be room for discussion about which plan is most desirable. Judge McMillan demonstrated that he was prepared to accept school board alternatives which produced equal results in accomplishing desegregation. He preferred such "home-grown products" even where he believed the expert consultant's proposals were more efficient. But an essential finding which supports the Finger Plan for elementary schools is Judge McMillan's conclusion that it was *necessary* to adopt a plan of this type to accomplish the result of desegregation. The court found:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (1208a)

Judge Sobeloff's dissenting opinion noted that "The point has been perceived by the counsel for the board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it" (1282a).

F. *The Court of Appeals Applied an Improper Standard for Appellate Review of the District Court's Discretionary Determination in Formulating Equitable Relief.*

Where the constitutional objective of integration is accomplished a district court's judgments on issues relating to the feasibility of particular local arrangements should not be upset except for plain abuse of discretion. There is, of course, no "discretion" to keep schools segregated. But there must be a substantial area of discretion for trial

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judges to make practical judgments about the feasibility of local school desegregation arrangements.

The Finger elementary plan ought to be upheld if the case is governed by the traditional rule for appellate review of a chancellor's decree in equity. The prevailing rule is that equitable discretion in framing remedies is necessarily broad and that a strong showing of abuse of discretion must be made to reverse such a decree. *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953); *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago R. I. & P. R. Co.,* 294 U.S. 648, 677 (1935); *United States* v. *Corrick,* 298 U.S. 435 (1936); *Rogers* v. *Hill,* 289 U.S. 582 (1933). In order to set aside the equity decree the appellant "must demonstrate that there was no reasonable basis for the district judge's decision," and thus that the remedy is so lacking in rationality as to amount to an abuse of discretion. *United States* v. *W. T. Grant Co., supra,* 345 U.S. at 634.

This Court's decisions in school cases have relied on traditional equitable principles on remedial issues. In the second *Brown* decision the Court invoked the tradition of equity which was said to be "characterized by a practical flexibility in shaping its remedies and by a facility for reconciling public and private needs" (349 U.S. at 300). The *Brown II* Court cited with approval a passage in *Alexander* v. *Hillman,* 296 U.S. 222, 239 (1935), stating.

> Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and properly to enforce substantial rights of all the parties before them.

In *Griffin* v. *School Board,* 377 U.S. 218, 232-233 (1964), the Court said that "relief needs to be quick and effective,"

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and that a federal court could require a county to levy taxes if necessary to maintain a non-discriminatory public school system. *Green* v. *County School Board,* 391 U.S. 430, 439 (1968), emphasized that in formulating a remedy district courts were to assess "the circumstances present and the options available in each instance." In *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 235 (1969), the Court emphasized that "in this field the way must always be left open for experimentation." In the *Montgomery County* case the Court reversed a court of appeals decision which labeled the district judge's order too rigid and inflexible in favor of the trial court's "more specific and expeditious order."

There is nothing in this development of school desegregation law since *Brown* which warrants the departure announced by the plurality opinion of Judge Butzner for the court below from the traditional rule of appellate review. This new test of "reasonableness" enables the reviewing court to set aside the trial court's discretion on the ground that the appeals court majority would prefer another mode of relief albeit less effective. This runs exactly counter to the spirit of *Green* which declares that the result—actual desegregation—is the imperative thing and that the methodology of desegregation plans is secondary. It also runs counter to the philosophy of *Alexander, Carter* and *Dowell, supra,* which place a premium on the immediate implementation of constitutional rights pending the completion of litigation. The reasonableness test allows so much scope for unpredictable reversals of those decrees which accomplish actual desegregation as to substantially nullify *Alexander.* The reasonableness test signals the need for trial courts to adopt a "go-slow" cautious approach. Although busing is approved in principle in the opinion below, the result makes it clear that busing must be

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limited. The standard of "reasonableness" is broad and vague, but it does not allow broad discretion for trial courts to order busing. Any plan found objectionable by a school board can colorably be said to be "unreasonable" justifying at least a stay pending appeal. The "reasonableness" test is "deliberate speed" in a new guise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court reinstated with directions that the desegregation of the schools proceed forthwith.

Respectfully submitted,

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APPENDIX

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Memorandum of Decision and Order, dated August 3, 1970

I.

Summary

Pursuant to the mandates of the Supreme Court of the United States and the Fourth Circuit Court of Appeals, further hearings (eight days of them) have been conducted July 15-24, 1970, regarding methods for desegregation of the public schools of Charlotte and Mecklenburg County, North Carolina, and the known plans for desegregation of the elementary schools have been reconsidered.

The Court again finds as a fact that compliance with all parts of the desegregation order for senior high, junior high and elementary schools now in effect will require, at the most, transportation of 13,300 children on 138 busses.

The elementary portion of the order will require, at the most, transporting 9,300 children on 90 buses. The defendants already own or control at least 80 safely operable busses not in use on regular routes, *and* they expect early delivery of 28 more new ones. Such buses as may be needed beyond these 108 can be borrowed for a year without cost from the State.

No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used buses as 1970-71 experience may show they actually need. If they have to buy 120 new ones, at $5,500 each, the cost will approach $660,000, which is less than the cost of two days' operation of the schools.

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Memorandum of Decision and Order, dated August 3, 1970

Regardless of any order of this court, all children assigned to any school more than 1½ miles from home are, under state law and regulation, now entitled to bus transport.

The 5/4 School Board majority have not obeyed the orders of the Circuit Court to prepare a new plan for elementary schools in place of their rejected plan. The court ordered plan for all schools has been in effect since June 29, 1970 under the mandate of the Supreme Court.

The School Board has not used all reasonable means to desegregate the elementary schools.

At least three reasonable plans are available to the Board: (1) the court ordered (Finger) plan; (2) the 4/5 minority Board ("Watkins") plan; and (3) an earlier draft of the Finger plan.

The Circuit Court directed this court to have a plan in effect for the opening of schools in the fall, and the Supreme Court on June 29, 1970 put this court's February 5 order back into effect pending these proceedings. The court ordered (Finger) plan is the only complete plan before the court, and it is a reasonable plan. The Board is herein directed to put the court ordered plan (with authorized modifications, if desired) into effect with the opening of school in the fall, unless they exercise the options set out herein to adopt the 4/5 minority Board plan (the "Watkins" plan) or an earlier draft of the Finger plan, or any combination of these three plus excerpts from the HEW plan, which complies with the directives in the February 5 order. The Board is directed to notify the court in writing by noon on August 7, 1970, as to the course of action which it has voted to follow.

Board plans for desegregation of the faculties of all schools and of the student bodies of the senior high schools and the junior high schools are approved.

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Memorandum of Decision and Order, dated August 3, 1970

II.

Brief History of Proceedings.

On April 23, 1969, after lengthy hearings and research, an order was entered that the defendants submit a plan for the desegregation of the schools of Charlotte and Mecklenburg County, North Carolina, to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970. Among other things the court found that under North Carolina law there is no "freedom of choice" to attend any school; that the Board of Education has the total control over the assignment of students to schools; and that residence has never created a right to attend a particular school. It was further found that all the black and predominantly black schools of this school system are illegally segregated. The November 7, 1969 opinion contained detailed guidelines for desegregating this particular group of schools, and included the following findings:

> "The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their *locations,* their *controlled size* and their *population* have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land;

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