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CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

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

v.

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

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF THE MOTION TO ADVANCE AND THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The following organizations—the United Negro College Fund, Inc., the National Urban Coalition, the League of Women Voters of the United States, the League of Women Voters of the State of North

Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, the Mississippi Educational Resources Center, the Harvard Center for Law and Education, and the Washington Research Project of the Southern Center for Studies in Public Policy—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief *amici curiae* in the above-entitled cause. Petitioners have consented to the filing.[1] Consent has not been granted by the respondents.

The United Negro College Fund, Inc., is an organization consisting of 34 member colleges, all but one of them in the South, which was established in 1943 to raise funds and provide other assistance to member colleges. The Fund and its members have an important and direct interest in assuring that elementary and secondary school students are well prepared for college and thus have a continuing concern about the persistence of segregated public schools.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 47 affiliated local coalitions and representation from corporations, unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as *amicus curiae* in a case involving the equal distribution of educational resources.

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[1] The written consent of the petitioners has been filed with the Clerk.

The League of Women Voters of the United States, the League of Women Voters of North Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, are three organizations with common aims and principles but with independent decision-making powers. Founded in 1920, the national League now has 156,000 members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. As part of its overall program of encouraging informed and active participation of citizens in government, the national League has placed major emphasis upon the quality of public education and in 1970 reaffirmed its pledge to support efforts to end racial discrimination in education. The North Carolina and Charlotte-Mecklenburg Leagues have conducted studies of the quality of educational opportunity in their respective areas. Like the national League, they are committed to work for equality of opportunity in education.

The Mississippi Educational Resources Center is a private organization established in 1969 to represent professional, parent, and community groups throughout the State of Mississippi. Its membership is predominantly black. Its purpose is to assist communities and school districts in overcoming problems incident to the school desegregation process and to assure that desegregation takes place and in an orderly and positive manner.

The Harvard Center for Law and Education is an educational institution established in 1969 by Harvard University and the United States Office of Economic Opportunity to "promote reform in American education by working in the area of social policy and law." To carry out its aims, the Center has sponsored and

conducted research on various aspects of the educational process. It has also served as *amicus curiae* in several cases involving issues within the area of its expertise.

The Washington Research Project, established in 1968, is a research organization located in Washington, D. C., and affiliated with the Southern Center for Studies in Public Policy of Clark College in Atlanta, Georgia. The principal aim of the project is to assist in the establishment of equality of opportunity for all citizens through negotiation and monitoring of administrative agency programs and litigation. It is deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a study of the impact of Federal aid to education programs on minority children and maintains a continuing effort to monitor such programs to ensure that they are conducted without discrimination.

Each of the movant organizations consists of black and white citizens. While their activities vary, all are bound together by a common commitment to strengthen public education in this country and to work for an end to racial segregation in the schools. All of the movant organizations, moreover, share a common commitment to the maintenance of the Rule of Law in this nation. They believe that the Rule of Law is threatened by continuing violations of the rights of Negro school children declared by this Court in 1954.

Movant organizations seek leave to enter this case for the purpose of supporting fully the position of the petitioners. Movants believe, however, that—by virtue of their breadth, their special interest in education and

the scope of their activities in conducting and sponsoring research on issues of education and civil rights and in evaluating the progress of school desegregation under Federal civil rights laws—they are well equipped to inform the Court with respect to issues which may not otherwise be fully explored by the parties. Specifically, movant organizations believe that they can provide information as to the impact that the decision of the court below may have upon the process of school desegregation throughout the nation and as to the educational impact upon children of the various forms of relief that are in issue in this case.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief *amici curiae* and that the Court consider their brief together with the petition for writ of certiorari, the petitioners' motion to advance, and with other papers in the case.

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Dated: June 23, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

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

v.

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

BRIEF AMICI CURIAE

for the United Negro College Fund, Inc., the National Urban Coalition, the League of Women Voters of the United States, the League of Women Voters of the State of North Carolina, the League of Women Voters of Charlotte-Mecklenburg, North Carolina, the Mississippi Educational Resources Center, the Harvard Center for Law and Education and the Washington Research Project of the Southern Center for Studies in Public Policy.

I.

INTEREST OF AMICI

Amici, as is more fully set forth in the Motion for Leave to File a Brief Amici, are all organizations with a deep interest in maintaining and improving the quality of education available to children of all

races. As a part of this interest, they have all committed themselves to work for the elimination of racial segregation and other forms of discrimination in education.

Several amici have conducted or sponsored research on problems of establishing equal educational opportunity. Others have supported and appeared in litigation involving the public schools and discrimination. Still others have undertaken to work for the full and fair enforcement of civil rights laws by Executive departments and agencies of the Federal Government.

All have a commitment to the maintenance of the Rule of Law and a deep concern about the continuing denial of constitutional rights of black school children.

II.

SUMMARY OF ARGUMENT

This is a case of crucial importance. Only a prompt hearing and disposition of the case can prevent harm from being done to thousands of black students in many areas of the nation. Unless such action is taken, when schools open in the fall these students will be assigned to segregated schools pursuant to the erroneous decision of the court below.

The refusal of the court below to sustain a workable plan for desegregating the schools of Charlotte-Mecklenburg denied the constitutional rights of petitioners. The ruling conflicts with the decision of this Court in *Brown* v. *Board of Education* and other cases. In holding that a school board must do only what is "reasonable" rather than what is necessary to desegregate the schools, the court below created a new loophole, one which would allow the rights of many black children

to be indefinitely deferred or denied completely. Even if a "reasonableness" test were permissible, the district court plan was by any standard "reasonable." It promised to remedy the harm now being inflicted on black children in segregated schools without causing harm to any child in the Charlotte-Mecklenburg school system. The alternatives to desegregation suggested by the court below would allow harm to continue to be inflicted on petitioners.

III.

ARGUMENT

A. This case must be expedited to prevent irreparable harm to petitioners and to thousands of black children in other school districts.

The holding of the court below violates the rights of petitioners and requires the earliest reversal in order to prevent the assignment of thousands of black children this fall to segregated schools in violation of the Fourteenth Amendment. Expedited action by this Court is essential to avoid massive confusion and inconsistency among desegregating districts and among various agencies enforcing school desegregation as to standards permissible under the Fourteenth Amendment.

Three times since *Brown* v. *Board of Education,* 347 U.S. 483, this Court advanced hearings or otherwise accelerated disposition of school desegregation cases to prevent circumvention or delay in vindicating the constitutional rights of black school children. *Aaron* v. *Cooper,* 358 U.S. 27; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *W. Felici-*

ana Parish School Board, 396 U.S. 290.[1] Amici submit that the instant case is of equal importance and warrants the earliest possible decision to avoid still further delay of a desegregated education to black school children denied rights over sixteen years.

The "reasonable means" test promulgated by the court below permits school boards to continue to assign black children to all-black, or virtually all-black, schools even where it is undisputed that such segregation resulted from official public action. Such a test portends grave consequences for school desegregation this fall and hereafter. We agree with Judge Sobeloff that:

> "Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. 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." (Plaintiffs' App., at p. 212a)

That this new rule of reasonableness is nothing more than a "new loophole" and "catapults us back" to a time when "good-faith" rather than concrete desegregation was considered the appropriate test of compli-

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[1] In *Aaron* v. *Cooper, supra,* it was necessary for the Court to convene a Special Term during the summer recess to hear and decide the case. Other cases in which hearings have been advanced under Rule 43(4) include *United Steel Workers* v. *United States,* 361 U.S. 878; *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420; *Power Authority* v. *Tuscarora Indian Nation,* 360 U.S. 915, 361 U.S. 892, 362 U.S. 99; *Lurk* v. *United States,* 365 U.S. 832, 366 U.S. 712; *Katzenbach* v. *McClung,* 379 U.S. 294; *Williams* v. *Rhodes,* 393 U.S. 23.

ance seems clear (p. 213a). And to permit this decision to stand will undercut the slow progress already made, will result in further litigation and confusion, and will delay still more the endlessly delayed rights of thousands of black children to a desegregated education now. We can think of little that is "reasonable" in denying or delaying complete desegregation after sixteen years.

Hundreds of school desegregation cases are now pending in various stages of negotiation and enforcement proceedings at the Department of Health, Education and Welfare (hereinafter HEW) and in the courts.[2] The United States, which urged a position similar to that adopted by the court below, can be expected to urge similar positions in its administrative proceedings and has already begun to do so.

Several of these pending administrative cases illustrate the importance of early consideration and reversal by this Court. In Richland School District, Columbia, South Carolina,[3] HEW considered desegregation plans

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[2] As of May 28, 1970, 205 school districts were involved in HEW compliance proceedings, 61 of which had undergone fund cutoffs for noncompliance. [These were all cases exclusive of those pending in the courts.] Forty-two involved districts which had received a notice of intention to initiate formal enforcement procedures; hearings had been conducted in 37 cases; in 12 a decision of noncompliance had been rendered following a hearing or default proceeding; 32 districts had an appeal pending before a reviewing authority; 19 districts had been found not to be in compliance by the reviewing authority; one had a report of the final decision filed with Congressional committees (61 had completed Title VI appeal procedures and had had their funds terminated in previous years). In addition to these 205 cases, at least 80 others were in pre-enforcement negotiations.

[3] HEW Docket No. CR 589.

for a district of 40,122 pupils, 53.3 percent of them white and 46.7 percent black. The Reviewing Authority decision of February 25, 1970, reversed a determination of the hearing examiner approving the plan filed by the school board, pointing out that there were available alternatives that were more effective. On June 5, 1970, after the decision by the court below, the Director of HEW's Office for Civil Rights reversed the Reviewing Authority and reinstated the school board's plan, which permitted 15 of the 43 elementary schools to remain more than 80 percent black and 11 schools to remain more than 80 percent white. While these segregated schools could have been eliminated by some busing, the approved school board plan excluded busing except in a few cases to relieve overcrowding.

There is grave danger of similar results being reached in other cases. A Title IV plan was submitted March 24, 1969, in Newport News, Virginia,[4] for a district of 31,138 students, 64 percent white and 36 percent black. The plan, involving pairing of schools, would have reduced the proportion of black students at two virtually all-black high schools and two virtually all-black junior high schools to 50 percent at each high school and 48 percent and 55 percent at the two junior high schools. The school board objected that the plan required "involuntary" busing and was therefore "unreasonable." The case is now pending before the HEW Reviewing Authority where, as matters now stand, it is likely to be decided under the broad "reasonableness" standard in the instant case.

In Raleigh, North Carolina,[5] a recent decision of the

[4] HEW Docket No. CR 669.

[5] HEW Docket No. CR 612.

Reviewing Authority refused to accept a plan which provided no busing and under which only 22 percent of the black students attended integrated schools. This decision is now subject to challenge on grounds that alternative plans involving busing would be "unreasonable." The Austin, Texas [6] school district serves 52,724 students, 65 percent white, 19 percent Mexican-American, and 16 percent black. Of the 70 schools in operation, 9 are more than 94 percent black. HEW's Title IV plan permits four elementary schools to continue a combined black and Mexican-American population of more than 94 percent. The government's brief in the HEW proceeding, at p. 8, stated that "the [Title IV] team operated under guidelines which prevented them from making any recommendations which would require busing across town in order to desegregate the Negro schools." This case is now pending before a hearing examiner and in present circumstances may well be influenced by the decision in Charlotte-Mecklenburg.

The decision of the court below is also likely to influence pending judicial proceedings. In *Beckett* v. *School Board of Norfolk,* 308 F. Supp. 1274 (E.D. Va. 1969) an appeal has been taken from a decision permitting the continuation of a substantial number of all-black schools. In oral argument before the Fourth Circuit sitting *en banc* on June 5, 1970, attorneys for the United States stated that in light of the "reasonable means" test in Charlotte-Mecklenburg, the government would no longer insist on the plan for desegregation it had previously urged.

While amici do not wish to prejudge the outcome of these cases, we cannot ignore the already clear im-

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[6] HEW Docket No. CR 902.

pact of Charlotte-Mecklenburg on these other pending cases, and on the rights of black children in those districts.

If, as we believe, the "reasonable means" standard is unconstitutional, this will mean that as long as the decision stands unreversed, plans will be approved that unconstitutionally assign many thousands of black children to segregated schools. And if such plans are put into effect in the fall it will undoubtedly require all or the greater part of the school year 1970-1971 or longer to undo the harm done.

B. The refusal of the court below to sustain a district court decision eliminating segregated schools denied petitioners their constitutional rights.

1. The decision of the court below that school boards may lawfully continue to operate *de jure* segregated schools indefinitely conflicts with previous decisions of this Court.

This is not a case of *de facto* segregation. This is a case of segregated public schools continuing sixteen years after *Brown, supra,* directly as a result of discriminatory governmental action.[7] This is a case where it is possible to completely disestablish segregated

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[7] The district court found that segregation in the public schools resulted from policies of the respondent school board and other governmental officials who helped establish patterns of residential segregation. The policies of school officials included the selection of school sites in a manner which perpetuated racial segregation. Actions of other government officials included judicial enforcement of racially restrictive covenants until ruled unconstitutional in *Shelley* v. *Kraemer,* 334 U.S. 1, discriminatory implementation of zoning ordinances in white and black residential areas, and discriminatory relocation of citizens through urban renewal programs. (pp. 13a-14a, 86a-87a)

schools and provide every school child a desegregated education.[8]

Despite these clear facts and the circuit court's explicit adoption of the findings of the district court of these facts, it nevertheless concludes "that not every school in a unitary system need be integrated" (p. 189a). This is in patent error and violates standards for school desegregation established by this Court in *Green* v. *County School Board of New Kent County, Va.,* 391 U.S. 430, 437-38 (1968), where this Court unanimously declared that school boards were "clearly charged with the affirmative duty to take *whatever steps may be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch" (emphasis added). See also *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 230 (1969). Both cases expressed a concern that no schools be racially identifiable.[9]

The holding of the court below cannot be squared with these decisions.

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[8] The opinion of the court below indicates that the plan prepared by Dr. Finger, an expert appointed by the district court, and which was adopted by the district court would eliminate all segregated schools. Judge Sobeloff found that:

> "The plan ordered by the district court works. It does the job of desegregating the schools completely . . . 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." (p. 204a)

[9] And in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), this Court stated bluntly:

> "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter *only unitary schools*" (emphasis added).

2. The constitutional rights of petitioners cannot be conditioned upon a "reasonable means test."

We can conceive of little, if anything, that is "reasonable," which after sixteen years denies or further delays the Fourteenth Amendment rights of black school children. Nor can we square the rights of each individual black child to a desegregated education with a result that leaves some of them—be it 100 or 10,000—in segregated black schools under a guise of reasonableness. As to them, is the Constitution not to apply?

This "rule of reason" contravenes the mandate in *Green, supra,* that imposes upon school boards the duty to take whatever steps are necessary to establish a unitary system eliminating racial discrimination *"root and branch,"* 391 U.S. 430, 438 (emphasis added). There were no qualifications placed on this mandate. It is no excuse that "vindication of these rights was rendered difficult or impossible by actions of other state officials," *Cooper* v. *Aaron,* 358 U.S. 1, 16. And, indeed, the discriminatory action of other government officials does not prevent the school board from fulfilling its duties under *Green.*

We have had "all deliberate speed" and "good faith" for sixteen years. These doctrines have been used by school boards to evade, delay and deny black children constitutional rights.[10] To be faced in 1970 with a

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[10] Indeed, this Court formally disapproved the standard of "all deliberate speed" in *Alexander* for precisely this reason. *Cf.* the opinion of Mr. Justice Black on application to vacate the 5th Circuit's order in *Alexander,* 90 S.Ct. 14 (1969):

> " 'All deliberate speed' has turned out to be only a soft euphemism for delay."

Earlier in his opinion, he stressed the danger of the vagueness in such a standard:

new and undefined doctrine of "reasonableness" can only portend another decade of litigation, evasion, delay and denial of vital rights protected by the Constitution. This is impermissible where such important rights are at stake.

The court below mistakes the duty of the school board and offers the board such broad discretion as to violate Fourteenth Amendment rights. In its only effort to supply a standard for the doctrine of reasonableness, the court said:

> "The board should view busing for integration in the light that it views busing for other legitimate improvements, such as school consolidation and the location of new schools" (p. 194a).

This is clearly erroneous. The demands of the Constitution cannot be relegated to the same level as other educational improvements which, while desirable, are not constitutionally required.

> "Federal courts have ever since [*Brown II*] struggled with the phrase 'all deliberate speed.' Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated."

Id.

It is instructive that these opinions were written in 1969. As early as 1964, this Court had disapproved the phrase:

> "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."

Griffin v. *County School Board of Prince Edward County,* 377 U.S. 218, 234 (1964). In 1968, this Court stated again, in *Green,* 391 U. S. at 438, that "[t]he time for mere 'deliberate speed' has run out."

3. Even if the Constitution permits a "reasonable means" test, the court below erred in rejecting as unreasonable a sound desegregation plan approved by the district court and adopting a plan perpetuating segregated schools.

This is not a case involving arbitrary and unreasonable action by a district court. This is not a case involving a hastily drafted or ineffective desegregation plan but one developed by the district court after much deliberation with the help of an expert in consultation with the school board. This is not a case of a school district unable to comply with the district court's plan. Nowhere is this contended. This is a case where the school district has had every possible opportunity to comply with *Brown, supra,* and *Green, supra.* This is a case where the school district took no action to desegregate between 1954 and 1965, took in adequate action in 1965 and then in 1969 and 1970 failed to submit an acceptable plan after ten months and four opportunities to do so (ftn. 9, p. 213a). This is a case of a school board seeking to do the minimum to comply when alternative and more effective means exist to fully and constitutionally comply with this Court's mandates.

We believe that the constitutional duty of a school board is not simply to use "reasonable means" but to do whatever is necessary to convert a dual school system into a unitary one. But, assuming *arguendo,* that it was not inappropriate for the court below to employ such a standard, the judgment requires reversal because (a) the plan approved by the district court did not exceed the bounds of "reasonableness" and (b) respondents did not meet the burden of proof required

of a school board that seeks to overturn an effective school desegregation plan.

a. Under the school board's plan, more than half of the black elementary school students in Charlotte-Mecklenburg would be assigned to schools 86 per cent to 100 per cent black and about half of the white elementary school students would be assigned to schools 86 per cent to 100 per cent white. Under the district court's plan, the racial composition of all elementary schools would range from 9 per cent to 38 per cent black (p. 191a). The court-approved plan required busing of 13,300 additional students, 8,000 more than under the school board's plan (p. 191a).

To conclude properly that the court-approved plan was "unreasonable" the court below would have to show more harm to black and white children as a result of busing than that suffered by black children who would otherwise remain in segregated schools. In fact, the court was not able to find that children would suffer *any* harm as a result of busing.

Instead, the court below attempted to judge the approved plan in light of factors which it did not relate to impact upon school children, e.g., the amount of busing, its cost in relation to the board's resources, the age of the pupils involved and distance and time (p. 194a). But here, "unreasonableness" is not shown with respect to any of these factors. Judge Sobeloff concluded that "distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal" (p. 210a).[11]

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[11] The 13,300 additional children to be bused when added to the 23,600 already bused would mean total busing of 47 per cent of the school population, far less than the 55 per cent average proportion

In sum, the record makes no showing that the busing under the district court's plan is unreasonable in light of national, state, or local practices of busing or will harm pupils in any way. Nor does the record show undue burden to the school board in implementing the district court's plan.

b. In *Green,* this Court held that the availability of a plan that promises to be more effective than another plan "places a heavy burden upon the board to explain its preference for an apparently less effective method." 391 U.S. at 439. And in *Montgomery County,* 395 U.S. 225 (1969), and *Carter* v. *W. Feliciana Parish School Board,* 396 U.S. 290 (1970), this Court reversed decisions by courts of appeals which had imposed desegregation requirements which were less stringent than

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of pupils now being bused to schools in North Carolina (p. 211a).

The court below accepted the findings of the district court as to transportation costs which, as Judge Winter pointed out in his dissent, would amount to less than 1.2 per cent of the respondent board's total budget when operating and capital costs are combined (p. 221a). In fact, the district court's estimate of 138 buses required under its plan was also adopted by the court below (pp. 191a, 194a) and exceeded the school board's estimate of 104. The average one-way trip for elementary students bused under the court-approved plan would be less than seven miles and 35 minutes (p. 207a), compared with an average one-way trip of 15 miles and one hour and fourteen minutes for students now being bused in Charlotte-Mecklenburg (p. 207a) and an average roundtrip of 24 miles for all students now bused in North Carolina (p. 194a). The court below made no findings as to the age of children to be bused or as to the impact upon traffic but it appears from the record that substantial numbers of elementary school students are already being bused in Charlotte-Mecklenburg (pp. 210a-211a) and that the possibility that the court-approved plan would cause a problem of traffic congestion is negligible (pp. 206a-207a).

those in plans available.[12] And in *Carter,* Mr. Justice Harlan, in a concurring opinion joined by Mr. Justice White, stated that school districts must demonstrate "beyond question" the unworkability of an effect proposal, 396 U.S. 290, 292. In addition, while the court below properly limited its power of review to factual questions it found "clearly erroneous" (p. 194a), it improperly rejected the district court's determination as to the burden of compliance. In *Brown II,* 349 U.S. at 299, primary responsibility for implementing school desegregation decrees is placed in the district courts. And recently in *Northcross* v. *Board of Education of Memphis, Tennessee,* 397 U.S. 232, the court of appeals was held in error for substituting its findings for that of the district court as to whether a dual school system had been effectively dismantled when the district court's findings were "supported by substantial evidence."

Under the facts of this case and in light of the District Judge's careful findings supported by the record, and this Court's previous decisions, the court below must be reversed.

C. The harm suffered by black children in segregated schools cannot be vitiated by steps short of integration.

The arguments preceding are sufficient to warrant the granting of the relief sought by petitioners. It is not necessary to argue the harm that will be suffered by the black children in the Charlotte-Mecklenburg school district who under the decision of the court below will

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[12] In *Montgomery County,* the more effective plan had, as here, been adopted by the district court. In *Alexander* and *Carter,* the U.S. Department of Health, Education and Welfare had prepared the plans.

continue to attend segregated schools. That issue was settled in *Brown* v. *Board of Education,* 347 U.S. 483, 494 where this Court concluded:

> "To separate them [Negro children in grade and high school] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The court below did not dispute the applicability of this conclusion in *Brown* to the instant case, and indeed in upholding the determination of the district court that the segregation was of a *de jure* character it implicitly acknowledged that the findings of *Brown* applied here. Nevertheless, the court strongly implied that the harm suffered by the black children in segregated schools could be vitiated by remedies other than total desegregation. Specifically, the court recommended that the defendants (1) employ "special classes, functions and programs on an integrated" basis, and (2) ensure "that pupils who are assigned to black schools for a portion of their school careers" are assigned to integrated schools as they progress to higher grades.[13]

There was, however, no evidence to support a conclusion that either of these steps, whether taken singly or together, will prevent or undo the harm that black children suffer in segregated schools. In fact, avail-

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[13] The only other alternative suggested by the court was a majority to minority transfer plan which allowed free voluntary transfer of blacks "to any school in which their race is a minority if space is available." An identical provision had not worked before in Charlotte-Mecklenburg, and there is no reason to believe it can now have any meaningful impact.

able research on this issue leads to a contrary conclusion—that black children will continue to suffer harm so long as they are assigned to segregated schools, even if they are permitted to participate in special interracial programs and even if part of their educational experience is in integrated schools.

The fashioning of special programs, functions and classes conducted on an integrated basis for children who attend segregated schools is not a new technique. It has been tried before, usually as an aspect of compensatory programs designed to improve the quality of education for disadvantaged children. Generally, the effort is made to broaden the horizons of poor children by giving them access to activities not ordinarily within their reach—activities such as short-term exchanges of teachers and students between schools and visits and field trips to concerts and museums. In its Report on Racial Isolation in the Public Schools in 1967, the United States Commission on Civil Rights examined the results of compensatory programs and concluded that:

> "Evaluations of programs of compensatory education conducted in schools that are isolated by race and social class suggest that these programs have not had lasting effects in improving the achievement of the students. 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." [14]

A more recent comprehensive report summarizing evaluations of compensatory programs, prepared by the New York State Education Department, reached

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[14] Racial Isolation in the Public Schools (1967) at 205.

similar conclusions. It found that the programs "failed to show any real promise in reducing the intellectual and achievement deficits of disadvantaged children" and that in contrast comparative studies "showed integration to be superior." [15] Indeed, temporary or *ad hoc* arrangements to provide some interracial contact between students attending segregated schools may even have a counterproductive effect. The U.S. Civil Rights Commission Report noted:

> "Indeed, in one community the Commission was told that the contrasts afforded by inter-school trips between white and Negro students under compensatory programs heightened the sense of inferiority felt by the Negro students." [16]

The second alternative step put forward by the court below is the assurance that children who are assigned to segregated schools will attend integrated schools at some point in their career. In practice this means that the substantial number of black children who would attend segregated elementary schools (more than half of all black children under the respondents' plan) would then go on to integrated junior and senior high schools. Black students who attend the segregated junior high schools presumably would be assured an integrated high school experience.

It is clear, however, that the harm inflicted upon Negro children in segregated elementary schools is not undone by providing integrated schooling later on. In its Racial Isolation Report, the U.S. Commission on

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[15] Racial and Social Class Isolation in the Schools, A Report to the Board of Regents of the University of the State of New York (1969) at 374.

[16] Racial Isolation in the Public Schools (1967) at 138.

Civil Rights examined the cumulative effects of segregation and desegregation upon student attitudes and achievement. Employing data compiled by a major survey conducted by the United States Office of Education, the report noted that the average grade-level performance for 9th grade Negro students was consistently higher when their earliest grade of attendance in desegregated schools was the 1st, 2nd or 3rd grade than when it was later.[17] The Commission concluded:

> "Both the academic performance and attitudes of Negro students, then, are affected by the duration of their school contact with whites. Students whose first contact with whites was late in elementary or early in secondary schools are at a distinct disadvantage when compared with Negroes who have had school contact with whites since the early grades." [18]

The fact that all of the available research demonstrates that the alternative steps proposed by the court will not undo the harm caused by segregation underscores the incorrectness of its decision and the danger to black children in the adoption of loose standards of "reasonableness" that permit something less than prompt and complete compliance.

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[17] Racial Isolation in the Public Schools (1967) at 106-108. The Office of Education survey itself made a similar finding—that pupils who first entered integrated schools in the early grades recorded consistently higher scores than other groups. Office of Education, U. S. Department of Health, Education and Welfare, Equality of Educational Opportunity (1966) at 20, 32.

[18] Racial Isolation in the Public Schools at 108.

IV.

CONCLUSION

Prompt action is needed in this case if irreparable harm is not to be inflicted on petitioners and thousands of other black children. The decision below cannot stand because it allows school boards to continue to segregate schools merely because an effective remedy might cause some burden or inconvenience.

It would be tragic irony, if, after years of massive resistance, evasion, and delay the rights of black children were now denied or further delayed on grounds that ending segregation is "unreasonable."

Amici believe that under the authority of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, a stay of the order of the Court below would be appropriate relief. But neither a stay nor the injunction *pendente lite* sought by petitioners would be an adequate substitute for an expedited hearing and disposition of the case. Only a prompt decision of this case on the merits can avert harm to thousands of black children in other districts.

Accordingly, amici urge that the Court grant the petition for writ of certiorari, and petitioners' motion to advance during the current term or if need be during such special or extended terms as may be convenient.

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