INDEX

Table of Cases:

IN THE

Supreme Court of the United States

October Term, 1969

No. .....

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

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

MOTION TO ADVANCE AND FOR *PENDENTE LITE* RELIEF

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of national importance which require prompt resolution by this Court for the reasons stated in the annexed petition for a writ of certiorari. It would be desirable for the issues to be decided before the beginning of the next school term in September 1970 in order to guide the many courts and school boards now making plans for the coming year and to reduce somewhat the possible necessity for reorganizations of systems after the 1970-71 school term is underway.

Wherefore, petitioners pray that the Court:

1. Advance consideration of the petition for writ of certiorari and any cross-petition[1] or other response thereto

[1] On June 8, 1970, the Charlotte-Mecklenburg Board of Education voted in a public meeting to file a petition for certiorari seeking review of the decision below. We believe the board also desires expeditious consideration of its views.

during the current term, or if need be during the Court's vacation or such special or extended term as may be convenient;

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate, including either summary disposition without argument[2] or a special term for argument.[3] If the Court decides to hear argument, it is suggested that the Court consider the case on the original record without printing or alternatively to permit reproduction of the appendix record used in the court of appeals by other than standard typographic means.

Petitioners also seek *pendente lite* relief pending disposition of the petition for certiorari comparable to that granted by the Court in *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 226 (1969), and companion cases, namely, an order providing in substance that:

(1) The respondents shall take such preliminary steps as may be necessary to prepare for the complete and timely implementation of the district court's order of February 5, 1970, as amended by the district court, in the event this Court should uphold the district court order on the merits; and

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[2] Comparable issues have been decided without the necessity for argument in such cases as *Bradley* v. *School Board,* 382 U.S. 103 (1965); *Rogers* v. *Paul,* 382 U.S. 198 (1965); *Dowell* v. *Board of Education,* 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970); *Northcross* v. *Board of Education,* 397 U.S. 232 (1970).

[3] In 1957 the Court extended its term to hear arguments during July. *Wilson* v. *Girard,* 354 U.S. 524 (1957). Special terms were convened to consider *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Rosenberg* v. *United States,* 346 U.S. 273 (1953); and *Ex parte Quirin,* 317 U.S. 1 (1942).

(2) The respondents shall take no steps which are inconsistent with or will tend to prejudice or delay full implementation of the February 5 order as amended at the beginning of the next school term.

Such an order is obviously necessary to avoid the possibility that the passage of time while the case is being reviewed here will unnecessarily prejudice the substantive rights of petitioners to attend a unitary system "at once". *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969).

Respectfully submitted,

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—v.—

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

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

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 26, 1970.

Opinions Below

The opinions of the courts below directly preceding this petition[1] are as follows:

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (Appendix hereto 1a).[2]

[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).

[2] The appendix of opinions below is printed in a separate volume because it is voluminous.

2. Order dated June 3, 1969, unreported (40a).
3. Order adding parties, June 3, 1969, unreported (44a).
4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (46a).
5. Supplemental Findings of Fact, June 24, 1969, 300 F. Supp. 1386 (57a).
6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (58a).
7. Order dated August 29, 1969, unreported (72a).
8. Order dated October 10, 1969, unreported (75a).
9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (80a).
10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (82a).
11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (93a).
12. Order dated December 2, 1969, unreported (112a).
13. Order dated February 5, 1970, unreported (113a).
14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (134a).
15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (135a).
16. Supplementary Findings of Fact dated March 21, 1970, unreported (136a).
17. Supplemental Memorandum dated March 21, 1970, unreported (159a).
18. Order dated March 25, 1970, unreported (177a).

19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (181a).

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 (184a).

    b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (201a).

    c. Opinion of Judge Bryan dissenting in part (215a).

    d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (217a).

21. The judgment of the Court of Appeals appears at 226a.

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 227a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970 (226a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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 an unreasonable 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

Petitioners are here seeking review of an *en banc*[3] decision of the United States Court of Appeals for the Fourth Circuit setting aside certain portions of an order of District 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

[3] One judge did not participate. Prior to argument, Judge Craven entered an order disqualifying himself. He had sat and decided the case as a district judge when it first came to trial 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.

of available methods, including busing, to disestablish its dual school system, but thought that the extent of busing required by the district court to desegregate the elementary schools was unreasonable (184a). Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate and would have affirmed (201a, 217a). 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.

2. Proceedings Below

Black parents and students brought this action in 1965 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 desegregation on behalf of the black teachers in the school system. This current phase[4]

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[4] The case was first tried in the summer of 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 the free transfer policy which had resulted in the transfer of every white child initially assigned to black schools as had the previous minority to majority transfer policy. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active, affirmative steps to integrate the schools. Also under attack was the board's policy looking to the "eventual" non-racial employment and assignment of teachers.

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 had in fact been closed. 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.

of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,[5] again sought the desegregation of the schools.

District Judge James B. McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 1a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the next twelve months.[6] He rejected the first plan submitted and called for another, found the second plan inadequate but accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.[7] On December 1, 1969,

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[5] *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).

[6] Judge McMillan has provided an excellent summary of the proceedings in the district court in his Supplemental Memorandum of March 21, 1970 (159a).

[7] The first plan was rejected on June 20, 1969 (46a). 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 second plan was found inadequate on August 15, 1969 (58a) but was accepted for the 1969-70 school year only because it promised some measure of desegregation and the court felt there was not 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 (82a).

The third plan was not a plan at all, but 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 (93a).

Judge Sobeloff traces this history in an extensive footnote (213a, 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."

following the court's patient but unavailing efforts to secure from the board an acceptable desegregation plan, the failure of the board to carry out its minimal interim plan for 1969-70 which had been "reluctantly" accepted by the Court in August of 1969 and the mandate of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, that schools are to be desegregated "at once", Judge McMillan decided to seek assistance from an outside educational consultant to assist him in devising a unitary system (93a). The following day the court appointed Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (112a). The board was invited again to submit another plan (93a).

On January 20, 1970, plaintiffs requested that Dr. Finger bring in his plan so that the schools could be desegregated "at once".[8] The Finger plan and a fourth board plan were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5

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[8] Plaintiffs' request followed the controlling decisions in *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 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 (80a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt, objections to patently defective plans, motions enjoining school construction, motions to vacate state court orders, motions to add new defendants and motions to enjoin state officials from interfering with orders of the court. Despite these and other efforts in the district court, the court of appeals and this Court, the schools are no more desegregated now than in September 1968 when this round of litigation commenced.

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 (113a).[9] The order was based upon the plan submitted by the board and Dr. Finger.

The school board appealed and sought a stay in the court of appeals. On March 5, 1970, the court of appeals 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 busing required by the February 5 Order (135a). 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 (159a) and Supplemental Findings of Fact (136a) on March 21, 1970.[10]

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[9] The order was slightly modified on March 3, 1970 (134a).

[10] The supplemental findings were amended in certain respects on April 3, 1970, in response to a motion by defendants (181a).

During this period there were also proceedings concerning the North Carolina anti-busing 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]" (161a).

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. At that time the statute did not appear to the court to be a barrier to school desegregation (see 58a, 64a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds were to 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 277a, 229a-230a.) (Continued on p. 9)

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.[11]

3. The Charlotte-Mecklenburg County School System in 1968-69

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

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At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants and determined at that point that the constitutionality of the state statute was at issue. He therefore requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24 and on April 29, 1970, the court entered its decision (227a) declaring unconstitutional the portions of the statute prohibiting the assignment of any student "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing." The court, however, denied plaintiffs' prayer for injunctions.

[11] 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. Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable. 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.

testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.

The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.[12] 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 (184a).

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 (1a). We only summarize here some of the salient facts contained in the April opinion.

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 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

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[12] Signicant findings are contained in eight of the orders leading to this appeal: Opinion and Order, April 23, 1969 (1a); Opinion and Order, June 20, 1969 (46a); Order, June 24, 1969 (57a); Order, August 15, 1969 (58a); Memorandum Opinion, November 7, 1969 (82a); Opinion and Order, December 1, 1969 (93a); Order, February 5, 1970 (113a); Supplemental Findings of Fact, March 21, 1970 (136a); and Further Findings, etc. (181a).

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 residential areas were and are generally segregated by race,[13] and most schools were racially identifiable.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black. The court further found that most of the desegregated city schools were in transition from a previously all-white enrollment to all-black.[14]

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 placement of the recently constructed schools produced either all-white or all-black new schools.[15]

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[13] Most of the evidence concerning residential segregation was produced at the March 1969 hearings. 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 (82a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

[14] 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. The figure is even greater if the black students attending schools which are rapidly becoming all-black are included. 11 schools served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965 and in 1968 served 5,757 students, 81% of whom were black. 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 attend schools with a total black population of 193 (50a).

[15] The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (141a; 142a).

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 . . ." (184a, 185a-186a).[16]

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 white and integrated schools (58a, 65-a-68a, 93a, 97a-99a, 136a, 144a-145a).

The court also found that the residential segregation was far from benign or *de facto*. The school board by gerrymandering zone lines (53a-54a) and other practices, together with the activities of other governmental agencies, had a significant impact upon the creation of Charlotte's

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[16] Both Judges Sobeloff and Winter concurred in this conclusion (201a, 217a).

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 accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (186a).[17]

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[17] In addition to the activities of the governmental agencies producing the discriminatory zoning (13a, 167a) and the urban renewal program (13a, 167a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (167a), that public housing officials had overtly discriminated until recent years and has reenforced racial segregation by its site selection (167a) and that those officials responsible for planning and building streets and highways have created racial barriers.

4. The Schools Today

During the 1969-70 school year the schools were operated under a desegregation plan submitted to the court in July 1969. The plan provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these children 3,000 were to come from 7 schools which were being closed and 1,245 from overcrowded black schools. The plan proposed some further faculty desegregation but would retain all other racially discriminatory features of the school system. 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 proposal for the future.

The plaintiffs objected to the plan 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 (58a), 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." [18]

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening

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[18] 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. 20, *infra*.

of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (72a).

The plan did not accomplish what was expected. The court later found that "the 'performance gap' is wide" (84a).

> 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 (164a).

In the November, 1969 Memorandum Opinion the court set out in detail the racial characteristics of the school system during the 1969-70 school year (82a, 83a-88a). 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." (86a).

Analyzing the same figures in a later order, 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." (93a, 97a).

The court also determined that the free transfer provision in the board's plan negated any progress which the July plan might have produced.[19] 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 (87a-88a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (188a).

5. The Plan Ordered by the District Court

In the decision of December 1, 1969, in which the court announced than an educational consultant would be appointed, 19 principles were stated for his guidance (93a, 103a-108a). Dr. Finger's instructions included: "all the black and predominantly black schools in the system are illegally segregated . . ." (106a); "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 may be unavoidable" (105a); "bus transportation to eliminate segregation [and the] results of discrimination may

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[19] 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. (51a-52a)

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.*)

validly be employed" (109a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (107a).

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

> Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. 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.[20] 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. (169a)

Both plans were presented to the court.[21]

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

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[20] 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 (126a-128a). The court of appeals found as the district court had that these limiting factors were improper (197a-198a).

[21] Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (113a, 119a-121a) and tables (123a-133a); Supplemental Findings, March 21, 1970 (136a, 146a-152a); Supplemental Memorandum, March 21, 1970 (159a, 169a-172a); Opinion of Court of Appeals (184a, 190a-191a).

of the ten high schools including the presently all-black West Charlotte (see Exhibit B, 123a). 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. (195a)

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, 124a.) 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.[22]

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 remaining school would be 91% white. The plan employed rezoning and satellite zones.[23]

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[22] Two new junior high schools are scheduled to open in 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 (124a).

[23] A "satellite zone" is an area which is not contiguous with the primary zone.

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" (195a).

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." (191a; see Exhibit H, 126a-128a.)

The Finger Plan also employed rezoning: 27 schools were rezoned, and 34 schools were desegregated by grouping, pairing and transportation between zones.[24] 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

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[24] The designated clusters are shown in Exhibit K (132a-133a). The zones of ten schools remained substantially unchanged.

> grouping two or three outlying schools with one black 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 . . .". (150a-151a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 129a-131a.)

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" (197a). The court of appeals, however, decided that the extent of transportation required by the Finger Plan was unreasonable and directed further proceedings for the development of another plan.

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 but determined that the elementary school busing was excessive.

During the 1969-70 school year, the board operated 280 school buses transporting 23,600 of its 84,000 students.[25] Another 5,000 students rode public transportation at a reduced fare. The principal's monthly bus reports show that between 10,000 and 11,000 of those riding school buses were elementary students. The average annual cost per child was about $20.00 or about $472,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.[26] The buses average 1.8 one-way trips per day carrying an average of 83.2 students, averaging 40.8 miles (136a, 138a).[27]

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[25] Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state and the county, in his Supplemental Findings of March 21, 1970 (135a). (See also Further Findings, etc. of April 3, 1970.) The court had examined the transportation system in previous decisions as well (1a, 22a-23a, 40a, 47a-48a, 113a, 116a-117a).

[26] See Further Findings, etc., April 3, 1970 (181a-182a). The district court had originally understood the average cost to be about $40.00 per pupil (1a, 22a-23a, 136a, 138a). 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 (181a-182a).

Pupils eligible for transportation are those children who live more than 1½ miles from school and who live either in the county or in portions of the city which have been annexed since 1957. Additionally, the state pays the transportation costs for children who live within the pre-1957 city limits who attend schools outside of the pre-1957 limits (136a, 141a).

All but a few hundred of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense (155a).

[27] 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. (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

Judge McMillan's Findings 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 Costs*
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,300	138	$266,000[28]

The initial one-time[29] capital outlay for the buses would be $745,200.[30]

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 (58a, 63a-65a). 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 (155a, 192a). Moreover, there is nothing novel

[28] These are the figures determined by the court of appeals (191a) by applying the district court's Further Findings, etc. of April 3, 1970 (181a) to its Supplemental Findings of March 21, 1970 (136a).

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," 136a, 152a-154a). 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. (See Report filed in summer of 1969, Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

[29] Obsolete buses are replaced by the state. See note 24, *supra.*

[30] 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 (157a) 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. (See Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

about city children riding school buses. Children living in the city but outside of the 1957 city limits are bused. Many city boards of education, such as Greensboro, provide transportation for city children 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 have all recommended that transportation be provided for children, city as well as rural, on an equal basis (136a-140a).

The bus trips required for the paired elementary schools would be straight-line non-stop trips (143a), would be shorter and would take less time than the average bus trip in the system or in the state (137a).

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 (153a).[31]

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (138a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (141a, 142a).

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[31] 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; 153a.)

REASONS FOR GRANTING THE WRIT

Introduction

This case merits review on certiorari because it involves important legal questions about implementing *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955), and because it will have important practical consequences with respect to school desegregation. In petitioners' view the major questions presented are the related issues about the proper formulation of specific desegregation goals and the proper standard for appellate review of a decision on the feasibility of a desegregation plan.

In Part I, *infra*, we submit that on this record the district judge was correct in his specific formulation of the goal of eliminating each predominantly black and all-black school. We believe the court of appeals erred by substituting a less concrete and complete goal requiring "all reasonable means to integrate the schools" but that not every school "need be integrated."

The decision below announces a legal rule of great consequence. The court below, by a narrow vote (actually three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new legal principle requires that in each case a court must decide whether the goal of complete desegregation of all schools is a reasonable goal. Thus we have not merely an issue about the reasonableness of methods of desegregation but rather an issue about the reasonableness of the goal of desegregation—whether the court thinks desegregation is worthwhile given the circumstances of the district.

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

> . . . 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. 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." (212a-213a)

As thus framed, the issue of appropriate goals for desegregation plan is one which merits this Court's expeditious attention. The struggle to implement *Brown* may founder on the new rule that segregation must be ended only where it is "reasonable" to end "black" and "white" schools. This Court's decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), may be of little effect if a kind of reasonableness test on desegregation timing is replaced by a similar test for deciding the goal.

In Part II, *infra*, we urge that the court of appeals applied an inappropriate standard for appellate review of an equitable remedy in setting aside the district court's elementary school plan as "unreasonable." Where no equally expeditious and effective plan is available, we think it contrary to this Court's decisions for an appeals court to strike down an effective plan which has been reliably found to be feasible and workable. Moreover, the appellate court's view that the remedy was too onerous was influenced by its erroneous determination that it was unnecessary to integrate every school in Charlotte, as discussed in Part I.

In addition to these clear legal issues, the case should also be reviewed because the ultimate decision in this case will have enormous practical impact on the future of public school desegregation. The case is singular in a number of respects. The decision of the district judge on February 5, 1970, which has now been set aside in important part, immediately assumed national significance and became the focus of much public attention because it promised the complete desegregation of every school in an urban school system. There was this promise of complete desegregation, notwithstanding the complexity of a system with 106 schools and more than 84,000 pupils, the recalcitrance of the locally elected school board, and the concentration of most Negro residences in one area where a number of all-black schools were maintained. Recent years have seen considerable school desegregation progress in smaller towns and rural areas of the South. This is partly because available remedies are more obvious in small school systems. But most often Negro plaintiffs have been unable to accomplish anything more than partial desegregation in urban systems.

Judge McMillan's decision in the Charlotte case finds a way to break the pattern and integrate every school in North Carolina's largest school district. The Fourth Circuit's decision reversing the plan for elementary school desegregation blots out the rays of hope that complete school desegregation will be accomplished in urban schools. The result on this appeal clearly signals to every district judge and school board that a cautious "go-slow" approach to using busing to eliminate all-black schools is in order. Judge McMillan's decisions signaled that substantial desegregation can be accomplished; the reversal signals that it will not be accomplished. So the result of the case has assumed transcending importance. What the Fourth Circuit did speaks as loudly as what it said. What the court

did, of course, was overturn one of the first desegregation orders that ever required complete urban school desegregation in the circuit.

We hasten to add, particularly in view of our request for expedition and our suggestion that summary disposition might be appropriate, that the case may well be controlled by settled decisions. Although the opinion below raises the new legal issues we have discussed, they need not necessarily be decided in the terms in which the court of appeals posed the issues. Given the findings of the district judge, which are not clearly erroneous, the desegregation plan for Charlotte may be ordered implemented in September without breaking any new legal ground. The district court's decision is supported by a complete record proving that the existing school system is unconstitutional and that a feasible remedy is at hand. The meticulous and painstaking decisions of the district court are ample support for a decision that the plan should be implemented as scheduled.

I.

This Court's School Desegregation Decisions Support the District Court's Holding That the All-Black and Predominantly Black Schools in Charlotte Are Illegally Segregated and Should Be Reorganized So That No Predominantly Black Schools Remain. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. *The Remedial Goals Set by the Courts Below.*

This case involves whether it was proper, on the record and findings made, for the district judge to require that the racially segregated dual system in Charlotte-Mecklenburg be thoroughly reorganized so that each of 25 remain-

ing all-black or predominantly black schools in the system will be integrated. Understanding of the issue is aided if we analyze the particular facts of the Charlotte case as well as the general legal principles which apply in school segregation cases.

On December 1, 1969, nearly five years after this suit was filed by Negro plaintiffs seeking desegregation, District Judge McMillan held that:

> 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 . . . (106a).

Thereafter, on February 5, 1950, when a concrete plan had been designed by the court's expert consultant after working for two months with the local school superintendent and his staff, it was apparent to Judge McMillan that there was a feasible way to eliminate the black schools he had found to be illegal. He thus ordered that "no school be operated with an all-black or predominantly black student body" (116a), and the plan was ordered under which the percentage of black students would vary in individual schools from a high of 41% black to a low of 3% black (156a). Thus the district court first found the black schools illegal, and then found that their continuation was needless and that there was an available remedy for the unconstitutional situation.

This seemingly straight-forward sequence of events has been nullified and the mandate of the appeals court now requires that desegregation planning for Charlotte's 76 elementary schools begin anew. Petitioners believe that the court of appeals has not stated the goal of desegregation planning in suitably specific terms to satisfy the consti-

tutional requirement and that the district court's formulation was proper, at least for the Charlotte-Mecklenburg system.

The court of appeals ruling, in the practical context of the case, requires that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools. The opinion for three members of the court, by Judge Butzner, states 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" (189a). This view acknowledges that the black schools are the product of illegal segregation practices, but suggests that the problem is essentially intractable and that there is in effect a wrong without a remedy. The wrong is not remedied if you discount as we do, the three alternatives to integrating the black schools mentioned by Judge Butzner, *e.g.,* providing an integrated school for each child in later years, relying on the black pupils' use of a free transfer right to leave the black schools, and establishing special integrated programs at the all-black schools. None of these suggestions represents a complete 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 (1958). The first method merely postpones the right and does not grant it "now and hereafter" (*Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969)). The second method—free transfers for blacks—has proven illusory and only a partial answer in Charlotte-Mecklenburg. *Green, supra,* and *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1958). The third method by its own terms is limited to peripheral activities not central to the daily classroom experience

of grade school children, and fails to remove the racial identifiability of the schools.

We believe that Judge McMillan was correct, and that the court below was in error, in defining an appropriate specific desegregation goal for Charlotte. Judge McMillan's findings and conclusions that the all black schools and predominantly black schools in Charlotte-Mecklenburg are unconstitutionally segregated were accepted by all members of the court below except Judge Bryan, who wrote a separate dissenting opinion. Fortunately, this case contains an unusually detailed and extensive factual record, and meticulous findings which explain how racial segregation was created in the Charlotte system. The detailed record showing how the dual system was created makes the case an appropriate one to consider the important questions relating to remedial measures. We set out in detail in the next subsection the findings about the causes of school segregation, the related findings about the governmental responsibility for housing segregation in Charlotte, and the particular findings about the effects of the denial of equal educational opportunity on black children in this locality. In a succeeding subsection we discuss the governing legal principles which support Judge McMillan's statement of the desegregation goal.

B. *The Dimensions, Causes, and Results of the Dual System in Charlotte—The Nature of the Constitutional Violation.*

Judge McMillan found that governmental authorities had created black schools in black neighborhoods in Charlotte by promoting school segregation and housing segregation. The board "gerrymandered" or manipulated school attendance areas to promote segregation, selected sites and the sizes of schools to promote segregation, and used the school transportation system to promote segregation. The court

found that the extensive residential segregation which concentrated 95% of the city's Negroes in Northwest Charlotte was promoted by public authorities, including school practices and those of other government agencies.

Judge McMillan summarized the results by noting that although the slightly more than 24,000 Negroes in the system were but 29% of the total school population, more than 16,000 Negroes were in 25 all-black or predominantly black schools, including more than 9,000 in 11 100% black schools (165a). He concluded that: "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" (166a). At the same time, more than two-thirds of the white pupils (45,012 out of a total of 59,828) were in 57 schools readily identifiable as white schools (165a). Less than one-fifth of the pupils in the system attended 24 schools not readily identifiable by race (165a-166a).

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 repecting 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 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 (166a-167a).

The Fourth Circuit accepted these conclusions (186a-187a), and also pointed out as one aspect of this, that North Carolina Courts had enforced racial restrictive covenants on property prior to *Shelley* v. *Kraemer,* 334 U.S. 1. See e.g. *Phillips* v. *Wearn,* 226 N.C. 290, 37 S. E. 2d 895 (1946) (involving property in Mecklenburg); *Eason* v. *Buffaloe,* 198 N.C. 520, 142 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.,* 226 N.C. 58 36 S. E. 2d 710 (1946). These racial restrictive covenants enforced by injunctions and damage suits were the functional and practical equivalent of residential segregation laws and ordinances.[32]

Nor was the decision below unique in recognizing the interrelationship between school segregation and state responsibility for residential segregation. See *Holland* v. *Board of Public Instruction of Palm Beach County,* 258 F. 2d 730, 732 (5th Cir. 1958); *Dowell* v. *Board of Education,* 244 F.

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[32] *Shelley* was argued in this Court on this basis (by the Solicitor General among others) as Mr. Justice Black has described:

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

Supp. 971, 975-977 (W.D. Okla. 1965), affirmed 375 F. 2d 158 (10th Cir. 1967), cert. denied 387 U.S. 931 (1967), both involving residential segregation ordinances. Cf. *Brewer* v. *School Board of the City of Norfolk,* 397 F. 2d 37, 41-42 (4th Cir. 1968).

Judge McMillan also made explicit findings based upon his examination of the local system about the harm that segregation was inflicting upon black children. Judge McMillan found "that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children." (66a-67a). Sixth grade students in black schools were on the average achieving at a fourth grade level, whereas there were substantially higher levels in integrated and white schools. (20a; 67a; 97a-99a). The District Judge wrote that:

> "This alarming contrast in performance is obviously not known to school patrons generally.
>
> It was not fully known to the court before he studied the evidence in the case.
>
> It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.
>
> The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.
>
> 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" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.*
>
> As hopeful relief against this grim picture is the uncontradicted testimony of the three or four experts who testified, some for each side, and the very interest-

> ing experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.) (67a-68a)

Legally, of course, the case does not depend on any such local findings of 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). But it is well to remember that the segregation system condemned by *Brown* is a massive intentional disadvantaging of the Negro minority by the white majority. See Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421 (1960). That disadvantage is not dissipated so long as the dual system is intact. The district judge perceived that its elimination is an urgent task.

C. *The Decision Below Conflicts With Applicable Decisions of This Court.*

The district court's decision that each of the predominantly black and all-black schools in Charlotte-Mecklenburg must be reorganized on an integrated basis is in conformity with this Court's decisions defining the nature of the duty to desegregate public schools which was first declared sixteen years ago in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). *Brown II* spoke of the need "to achieve a system of determining admission to the public schools on

a nonracial basis." *Brown* v. *Board of Education,* 349 U.S. 294, 300-301 (1955). In *Cooper* v. *Aaron,* 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bring about the elimination of racial discrimination in the public school system." *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), made it clear that *Brown* requires more than nondiscriminatory admission of Negroes to "white" schools. *Green* held that *Brown* was addressed to the whole system of segregation in which "racial identification of . . . schools was complete, extending not just to the composition of student bodies . . . but to every facet of school operations . . ." (391 U.S. at 435). Under *Green* these dual systems must be abolished; the task is the "dismantling of well-entrenched dual systems" (391 U.S. at 437), and "disestablishing state-imposed segregation" (*id.* at 439). The *Green* decision states that a "unitary, non-racial system of public education was and is the ultimate end to be brought about" (*id.* at 436), that discrimination must be eliminated "root and branch" (*id.* at 438), and that the Constitution required "abolition of the system of segregation and its effects" (*id.* at 440). The courts are to render 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 courts are to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). A call for the complete abolition of racially identifiable schools is sounded by the command that the plan "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442).

Judge McMillan addressed himself to the most obvious remaining characteristic of the dual system in Charlotte—the 25 black schools which serve the bulk of the black population. By the time Judge McMillan wrote his opinion

on December 1, 1969, the school board had failed despite three orders to present a plan which eliminated the black schools. Judge McMillan perceived that school segregation could not be justified or excused on the basis of segregated neighborhood patterns where the state itself was responsible for Fourteenth Amendment purposes for the housing segregation as well as the school segregation.[33] Thus he faced the practical problem of formulating specific instructions and criteria for the men preparing a desegregation plan. He believed that the concern was "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" (61a). In order to guide his court appointed consultant in preparing a plan, Judge McMillan stated simple legal guidelines and criteria. They are in the spirit of *Green* and are entirely unexceptionable:

> 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].
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> * * *
>
> 12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had

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[33] *Dowell* v. *Board of Education,* 244 F. Supp. 971, 975-977 (W.D. Okla. 1965), *affirmed,* 375 F.2d 158 (10th Cir. 1967), *cert. denied,* 387 U.S. 931 (1967); *Holland* v. *Board of Public Instruction of Palm Beach County,* 258 F.2d 730, 732 (4th Cir. 1968). 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 Separate School District,* 406 F.2d 1086, 1093 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School Dist.,* 409 F.2d 682 (5th Cir. 1969); *United States* v. *Indianola Municipal Separate School District,* 410 F.2d 626 (5th Cir. 1969); *Keyes* v. *School District Number One, Denver,* 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated,* 396 U.S. 1215 (1969) (Justice Brennan in Chambers). And see this Court's decision in *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970).

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

18. Some 25,000 out of 84,000 children in this county 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.

The court of appeals decision that some indefinite number of black schools may remain conflicts with *Green.* There

is no warrant in *Green* for anything less than complete dismantling of the dual system. The holding that racial identifiability of schools need not be redressed threatens, as Judge Sobeloff has suggested, to water down or temper the duty to convert to a unitary system (203a). The conclusion that the board need accomplish only so much desegregation as seems "reasonable" poses a fundamental threat to the principle of *Brown I.* As Judge Sobeloff wrote, dissenting, "the conclusion of the majority that, all things considered, desegregation of this school system is not worth the price" is a "conclusion neither we nor school boards are permitted to make" (210a).

The district court had power under the *Green* decision to require much more than a minimal sort of plan. The court was not bound to accept school board proposals designed to search out the gray area between a dual system and a unitary system to satisfy minimum desegregation requirements. On the contrary, the court was empowered to strike at the roots as well as the branches of the segregated system. The court was empowered to root out segregation so thoroughly that it is unlikely to occur again. The opinion below in part recognizes this by approving the trial judge's efforts to prevent re-segregation of desegregated schools at the high school level.[34] But the essential thrust of the decision conflicts with this idea. It seems clear that the opinion approves the continuation of some majority black schools. But experience in Charlotte has demonstrated the difficulty of maintaining stable desegregation in majority black schools. Frequently such schools fast become all-black as neighborhood patterns change in an oft-repeated pattern of white flight from Negro neighborhoods and

[34] The court below approved the trial judge's effort "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" (195a).

schools. Judge McMillan's plan was designed to cope with this problem by eliminating all racially identifiable schools so that this factor would no longer play a part in the community.

The court of appeals' goal of obtaining as much integration as is "reasonable" in the jurisdiction must leave every board or court which seeks to apply the formula essentially at sea. The standard of reasonableness was adopted, says the court, because "some cities . . . have black ghettos so large that integration of every school is an improbable, if not unattainable, goal." But, of course, the Finger plan demonstrates that this goal is not unattainable in Charlotte-Mecklenburg. And Charlotte-Mecklenburg, the largest school system in North Carolina, is fairly representative of the desegregation problem in the cities of the Fourth Circuit. The United States Commission on Civil Rights had recently made the same 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 creates 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.)

Judge Butzner's decision suggests that complete desegregation can be obtained only in "towns, small cities, and rural areas" by the available techniques. But this very

record demonstrates that the technology is available to design desegregation plans for a city the size of Charlotte which will do the job of desegregating the schools. In part II which follows, we shall discuss the evidence about the workability of this plan.

II.

The Court Below Erred in Not Accepting the District Court's Decision That Its Desegregation Plan Was Feasible and in Setting It Aside as "Unreasonable," Particularly in the Absence of Any Equally Effective and Expeditious Alternate Plan.

The district judge in this case faced an acute practical problem in formulating a remedy to redress the violations of the Constitutional rights of black children in the Charlotte-Mecklenburg system. The system is large with 84,542 pupils in 106 schools. School segregation is still extensive with more than three-fourths of the children still in racially identifiable "white" schools or "black" schools. Some of the integrated schools have rapidly moved through a temporary integration to an all-black re-segregated situation. The free transfer plan was a conspicuous failure. To make matters worse, the school board refused to accept its duty of preparing an adequate plan. The board attacked the judge's decisions in public forums and the state legislature enacted an anti-busing law to nullify his decisions. The board did not even deliver on desegregation promises in its interim plan for 1969-70. In the summer of 1969 the black community had protested "one-way" desegregation in the interim plan by which only black pupils were bused to white schools and formerly black schools were abandoned. White parents groups were aroused against "busing" by televised school board meetings decrying the destruction

of "neighborhood schools." Against this background in October 1969, the board requested a delay in filing a desegregation plan. The judge regretfully concluded:

> The school board is sharply divided in the expressed view of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools. By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance." (90a-91a)

Judge McMillan had no choice but to deny the requested delay in view of this Court's then recent decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (October 29, 1969). The school board then filed a third plan which the court later held "contains no promise or likelihood of desegregating the schools" (93a).

The singular thing about this case is that faced with this panoply of obstacles and difficulties, the district judge promptly found a means to completely integrate every school. He adopted the reasonable procedure of: (1) writing detailed legal guidelines for the preparation of a desegregation plan, (2) appointing the court's own expert consultant to devise a plan, and (3) ordering the professional staff of the Charlotte school system to work with the court's expert and give him full cooperation.[35] The

[35] The board was ordered to provide the consultant with work space, pay his fees and expenses, give him stenographic assistance, the help of business machines, draftsmen, and computers, as well as

procedure worked. By February 5, 1970, about two months after the expert's appointment, the court was able to approve the plan. Over plaintiffs' objection, and at the board's request, implementation was postponed until later in the spring to enable the board to make further preparation.[36]

The decision of the court of appeals approved the plan for junior and senior high schools rejecting the school board's appeal in this regard. But the elementary school plan was struck down because three judges of the court below held it was not "reasonable," and a fourth judge thought the plan undertakes the illegal objective of "achieving racial balance" by busing pupils.

To summarize petitioners' position briefly, we think the ground for disapproving the elementary plan—that the bus-

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access to all the board's studies, including computer studies, of desegregation plans. The school staff was ordered to provide the consultant with "full professional, technical and other assistance" (110a). The Fourth Circuit approved this procedure citing Justice Brandeis' opinion *In the Matter of Peterson,* 253 U.S. 300 (1920). See also, *Scott* v. *Spanjer Bros., Inc.,* 298 F.2d 928 (2nd Cir. 1962); 9 Wigmore, Evidence § 2484 (3rd Ed. 1940), 2 Wigmore, Evidence § 563; McCormick, *Some Observation Upon the Opinion Rule and Expert Testimony,* 23 Texas L. Rev. 109, 131 (1945) (cases recorded as early as the 14th Century); cf. Rule 28 Fed. R. Crim. P., 18 U.S.C. (providing for court appointed experts in criminal cases). The appointment of a court-appointed expert panel to devise a school desegregation plan was approved in *Dowell* v. *Board of Education,* 244 F. Supp. 971, 973 (W.D. Okla. 1965), *aff'd* 375 F.2d 158, 162 (10th Cir. 1967), *cert. denied,* 387 U.S. 931 (1967). If a court has the equity power to award plaintiffs counsel fees against a foot-dragging school board (*Bell* v. *School Board of Powhatan County, Va.,* 321 F.2d 494 (4th Cir. 1963)), *a fortiori,* the court can take the milder course of taxing costs necessary to enable the judge to frame his decree. This is all the more appropriate because the case so plainly involves the public interest.

[36] After the court of appeals stayed part of the plan pending appeal, the district judge concluded that the integration requirement was no longer so urgent and postponed the entire plan until September 1970. Petitioners unsuccessfully opposed each delay and cross-appealed the delay order. The school year ended without any Fourth Circuit action on petitioners' motion to set aside the stay.

ing involved is too onerous for the board—is in Judge Winter's phrase, "insubstantial and untenable" (218a). Judge McMillan has ordered a very feasible and sensible plan. It promises to eliminate segregation immediately. There is no other plan in the record which is equally effective. The district court's determination that the plan is feasible is supported by substantial evidence and the findings to this effect were accepted on appeal as not clearly erroneous. Acceptable procedures were used to formulate the plan. There is no basis for concluding as a matter of law that the plan is "unreasonable." There was no abuse of discretion in formulating the remedy. The arguments about illegal busing to achieve racial balance and the neighborhood school theory are also legally insubstantial.

The district court acted within the limits of its discretion in fashioning an equitable remedy for the present unconstitutional system. The Finger Plan meets the principal test established by *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), in that it does promise to dismantle the dual system and provide a unitary system of schools. It will produce a system without a single school which might be labeled a "white" school or a "black" school. The elimination of racially identifiable schools promised by this plan produces the *result* called for by *Green, supra.*

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segregation, there would be room for discussion about which plan is most desirable. But, 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. (146a)

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" (204).

The 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. 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," 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." Finally, in decisions this term the Court has limited the discretion of the courts to delay relief by making it plain that the "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970); *Dowell* v. *Board of Public Education of Oklahoma City,* 396 U.S. 269 (1969).

There is nothing in this development of school desegregation law since *Brown* which warrants the departure from the traditional rule of appellate review announced by the plurality opinion of Judge Butzner for the court below. 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 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.

The district court's decision that the Finger Plan is feasible is in any event supported by substantial evidence. It was error for the court of appeals to substitute its own finding of "unreasonableness" where there was no claim that the district court's findings were clearly erroneous. Cf. *Northcross* v. *Board of Education,* 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" (206a). Here are the facts.

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.[37] The school board's proposed plan would bus about 5,000 additional children[38] but still would not desegregate the system, leaving 10 Negro schools.[39] The board's plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)[40] will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to 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).[41]

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. (143a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.[42] Eighty percent of the buses in the system require more than one

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[37] See 138a.
[38] See 155a.
[39] The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (120a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (124a).
[40] See 157a.
[41] *Ibid.*
[42] See 142a, 153a.

hour for a one-way trip now.[43] 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 minutes at most, because no stops will be necessary between schools."[44]

Judge Butzner's opinion approves "bussing [as] a permissible tool for achieving integration, but . . . not a panacea." He wrote that in deciding on busing boards "should take into consideration 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." This ruling is enlightened and progressive as used to approve busing plans for secondary schools. But it fails to satisfy constitutional requirements, if it means, as it apparently does, that these factors are to be weighed in determining whether schools will be integrated at all. There is no suggestion in the opinion that the majority found the Finger plan wanting in terms of the "age of the pupils", since busing elementary pupils is an established tradition in this system. There was no suggestion that the times and distances involved were excessive since they plainly compared favorably with the present practice. The determination to reverse the elementary plan is put entirely on the cost factor.

To begin with, the court below states the cost issue not in dollar terms, but in terms of the increased percentage of busing. Thus the cost is not considered in terms of its "relation to the board's resources" but only in relation to present expenditures for busing. Even on this basis the plan will require less busing in Charlotte than the statewide average of 54.9% of the pupils (137a). But the

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[43] See 142a.

[44] See 153a. "The average *straight line* mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles." (183a) The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%.

"board's resources" in this context are much broader than the local funds because in North Carolina transportation costs are largely met by the State, which replaces all buses after the local authorities make the first purchase, and bears most of the operating costs. The total annual cost per pupil is about $20 in the system. (Note that the $39.92 figure mentioned several times in opinions is erroneous and is corrected to $20 at 181a-182a.) Virtually the entire cost is borne by the State, except for one-time bus purchase costs and incidental administrative costs and parking expenses. The capital outlay required for the elementary busing is $5,400 per bus for 90 vehicles, or $486,000. This investment will bring not only vehicles with useful lives of ten or more years but also the right to have them perpetually replaced at no further local cost by the state board of education. Operational costs (reimbursed by the State) for the added elementary busing were found to be $186,000 annually (191a, 181a-182a).

When these expenditures are considered in the context of the local budget figures and the state budget figures they are so small as to be insignificant. The 1969-70 budget for Charlotte-Mecklenburg is $57,711,344, and future years may bring even larger expenditures. Between six and seven million dollars represents capital outlay and debt service. School construction is not included in these figures. In 1968-69 the state's education budget was over 3.59 billion dollars and this included over $14 million spent on transportation for an average of 610,760 pupils daily. Given this financial framework, the decision below that there is a financial barrier to integrating the local school system cannot be sustained. The appropriate principle was stated in *Cooper* v. *Aaron,* 358 U.S. 1, 19, where a unanimous court 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.

We live in a society where it is a commonplace for government to spend vast sums to protect the constitutional rights of our citizens. New York City in recent weeks is reported to have spent a million dollars for overtime police protections for pro- and anti-war demonstrators in the streets. Examples could be proliferated. The rights of black children to an equal educational opportunity cannot be sacrificed on the ground that it costs too much to grant equal treatment. If necessary, the federal courts may even command that the money be levied and spent to redress denial of constitutional rights. *Griffin* v. *School Board,* 377 U.S. 218 (1964). But this case involves merely a decision about how existing resources are allocated. As a matter of fact, at the time of the judge's supplemental findings of March 21, 1969, the state board of education (a defendant in this case) had "approximately 40 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (157a). "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" (157a-158a).

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the decision approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (211a). 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 (69a-70a). 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. (70a)

Judge McMillan's plan should be approved as an intelligent effort to comply with the *Brown* decision. When first considering the idea of eliminating all racially identifiable schools by a percentage formula he pointed out that:

> . . . it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the New Kent County language, would be "just schools"; it would make all schools equally "desirable" or "undesirable" depending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county . . . ; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like sur-

> gery be the most conservative solution to the whole problem and the one most likely to produce good education for all at a minimum cost.

This record shows that there is no reason not to use school buses to integrate the schools except to keep them segregated. Busing is a legitimate technique of educational administration. In Charlotte schools today, the walk-in neighborhood school is primarily a phenomenon in the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (142a); no black school depends very much on school buses. By contrast, white schools have the opposite pattern, and "suburban schools, including the newest ones, have been located far away from black centers, and where they cannot be reached by many students without transportation" (*ibid.*). The Center for Urban Education recently said that "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." ("On the Matter of Busing: A Staff Memorandum from the Center for Urban Education", February 1970.) The Civil Rights Commission has made the same point:

> Thus the arguments that some now make about the evils of busing would appear less than ingenuous. The plain fact is that every day of every school year 18 million pupils—40 percent of the Nation's public school children—are bused to and from school, and the buses log in the aggregate more than two billion miles—nine billion passenger miles—each year. It also should be understood that the overwhelming majority of school busing has nothing to do with desegregation or achieving racial balance. The trend toward consolidation of schools, for example, particularly in rural areas, requires extensive busing. It causes no

disruption to the educational routines of the children and is treated as normal and sensible.

* * *

In the Commission's view, the emphasis that some put on the issue of busing is misplaced. As most Americans would agree, it is the kind of education that awaits our children at the end of the bus ride that is really important.

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

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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