Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

CHARLES McDANIEL, et al.		**Docket No.** 420
Petitioners,	:	
vs.	:	
JOSEPH BARRESI, JR., et al.	:	
Respondents.	:	

Place Washington, D. C.

Date October 13, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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vs. No. 420

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Washington, D. C.,

Tuesday, October 13, 1970.

The above-entitled matter came on for argument at 1:25 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HAROLD BLACKMUN, Associate Justice

APPEARANCES:

EUGENE A. EPTING, ESQ.,
Erwin, Epting, Gibson & Chilivis
Athens, Georgia
Counsel for Petitioners

E. FREEMAN LEVERETT, ESQ.,
Heard & Leverett
Elberton, Georgia
Counsel for Respondents

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 420, McDaniel vs. Barresi.

Mr. Epting, you may proceed whenever you are ready.

ARGUMENT BY EUGENE A. EPTING, ESQ., ON BEHALF OF PETITIONERS

MR. EPTING: Mr. Chief Justice, and may it please the Court, I think the Court will find that this case is somewhat unique. I would venture to say that in most, if not all, of the cases before this Court involving boards of education, the board has been here either complaining that it should not be required to do that which it has been told to do, or defending itself in claiming that it has done all that is required to do.

Here you have a board of education defending itself against a charge that it is doing too much. In other words, the Clark County Board of Education has tried to avoid the entanglement of federal court decisions in regard to the question of desegregation, so far has succeeded, and when I hear and read the argument in regard to the tribulations of Charlotte and Mobile and Clarksdale and Bessemer and Jefferson, I think they have acted wisely on that score.

But we have come to the proposition where having avoided entanglements in federal court orders running our schools, we find ourselves faced with a state court injunction that says we can't do what we have done because in undertaking to honor the Fourteenth Amendment rights of some people, we

are thereby violating the Fourteenth Amendment rights of others.

Now, I would agree with the tenor of the argument in Charlotte that all of this busing of students from one community to another is not in the best interests of education, if I understand one of their points correctly.

But in the Clark County case we are not dealing with court ordered busing, we are dealing with what has been called pocket busing to a limited extent. We are a small school district. We have only 11,000 students. We have only thirteen elementary schools. We call it pocket busing; in Charlotte they call it satellite zoning, but it means the same thing.

In undertaking to pocket bus, and if the Court wishes to look at the record, I think you will see a map on page 174 that shows the geographical locations of these pockets of students who were bused to schools which were formerly predominantly clear of the other race.

If you will look at page 167 you will see the chart of a neighborhood plan which was twice adopted by this board and which shows the extent -- the dot on the map shows the extent of racial mixing. Now, when we talk about desegregation and racial balance and integration, when we get it all down to a common denominator, we are talking about mixing the races in the schools, and that is what it amounts to in plain, simple language.

Q Has the board here decided to do it?

A The board here decided to -- well, let's put it this way -- the board felt that under the decisions of this Court, and particularly the decisions of the Fifth Circuit Court, we were compelled to do it.

Q But you weren't under an order?

A We were not under an order and we didn't want to get under an order.

(Laughter.)

Q So does this case pose the question I asked the counsel who just stepped down?

A It is strikingly similar except they are talking about a statutory --

Q I mean in terms of the power of the board on its own to do something.

A Yes, sir. Now, it is our position that when this Court decided Brown II, this Court said that there was a duty on the boards of education to do something more than back off on state ordered discrimination. Brown I had already said that. And if that is all we were required to do, is stop segregating by law, then we didn't need Brown II and we didn't need Green vs. New Kent County. Brown I had already said that is unconstitutional.

But when this Court said, in Brown II, we are going to give you, in effect, some guidelines, we are going to tell

you what you have got to do to disestablish the existing system, and then it followed with such things as Cooper vs. Aaron, which says you have got to take steps to eliminate formally segregated school systems, route and branch, and when it comes along with Green vs. New Kent County, of course, a number of years later, and says the boards of education have an affirmative duty to take whatever action is necessary to disestablish the dual system, that clearly calls for some affirmative move, not just backing off and leave things the way they are.

That is the way we have interpreted the decision, and that is the way the Fifth Circuit interpreted it. Maybe the Fifth Circuit isn't the final word, but we are in the Fifth Circuit, and we have to honor its decisions.

(Laughter.)

Consequently, some plan had to be formed that would eliminate the separation in the schools, a neighborhood plan. And if this Court would say that all that a school board is required to do is zone without discrimination as to race and set up a neighborhood plan, we can do it, but we will have some black schools and we will have some white schools with -- well, we had one with 525 whites and 20 blacks. We had another one with approximately 500 whites and 19 blacks, because the neighborhoods are made up that way.

So, as I say, the result of our efforts is that in

-- and we had some five-to-four decisions in that court or, rather, six-to-five. They were not unanimous. But our decision was that the most feasible way or most reasonable way, as those who preceded me have discussed, was to zone and pick up an area that is not contiguous to the zone and take the children from that area to the zone school.

It might be in order to accomplish what we understand is our affirmative duty. Now, it might be said, well, you could zone in such a way as to bring in substantial numbers of both races. The pattern in our -- this is a county-wide system, it involves not only the City of Athens but the entire county -- the pattern of housing racial distribution is such that when you step out to pick up another area, you pick up more of what we might call the wrong race than you do of the race that you are trying to get in. So that won't work.

We were told that it might be possible to break this school system down into a different plan, have the first three grades or the first four grades in certain schools, have the fifth and sixth or the fourth, fifth and sixth in other schools. When you do that, you are going to bus over the entire county because you have got to have a bus route that covers the entire county for each of two separate sets of schools. And you are going to pick up the young children, the first-graders from an area adjacent to what is now a school that accommodates them and take them off to some other

school. And you are going to have to go over to the other school and bring back some fourth-, fifth-, and sixth-graders, or fifth and sixth, whatever it is, bring them from nextdoor to a school over to one that accommodates their grades.

So we decided, the board decided that this pocket busing was the most feasible way of wiping out the problem within the means that this board has.

Now, it happens that no plaintiff in the lower court -- and, by the way, I assume this court has the information as to how this thing proceeded, an injunction or two injunction suits were filed in the Superior Court of Clark County. The injunctions were denied. The people, the plaintiffs then appealed to the Supreme Court of Georgia and the Supreme Court of Georgia says that in taking students of one race into a school that is predominantly of the other race, that that is discrimination for the purpose, that is, of achieving racial balance, that is discrimination. And taking then people out of that school in order to make room for those you brought in is a violation of the Fourteenth Amendment rights of those taken out.

Now, it happens that nobody included in any of these four of the five pockets, four pockets that are being bused to a more distant school, not one of those persons is a party to these law suits. The people who are being pocket bused are not complaining, not one of them.

When you pocket bus or however you arrange to take students to a school that is already filled to capacity, you have to take somebody out of that school in order to make room for those brought in. It is that simple.

The result was that we had -- the board had to rezone the area served by that particular school or those particular schools, not on a basis of excluding whites but realigning the zones so that the students in those areas went to a different school. We had to make room for those brought in.

If the Georgia court is right in saying that by rezoning in order to accommodate those brought in, then no course is left open to the board of education except the freedom of choice or a strict neighborhood zone, leaving the racial composition to stand or fall on the zone lines.

I do not understand that this Court has given us that right. I do understand that the Fifth Circuit Court has said we can't do that in Jefferson. I think that was the effect of one of the decisions in Mobile. I think that was certainly the effect of the decision in the Indianola case, which obviously is an extreme case. I think that was the effect in Clarksdale.

So this board has done what it thought it had to do under the decisions of this Court and, of course, the Fifth Circuit. Brown II and the decisions following it require

affirmative action by the school boards. New Kent County -- and that was followed in Raney and Monroe -- called for the same affirmative duty and in Monroe, where the board had a zone plan with a free transfer provision, the court plainly held that the affirmative duty was not satisfied by a neighborhood zone plan unless it resulted in substantial mixing of races in all of the schools.

Now, we in Clark County have frankly gerrymandered zones not to retain segregation but to try to do just the opposite, to try to mix them in the schools, to avoid the entanglements that were consequent on maintaining a segregated system.

We obviously had a dual system prior to 1954. We began the process of eliminating that in 1959 with one of the transfer plans which were thought as vogue in the South then. In 1963, prior to the Civil Rights Act of 1964, we had our first integrated in Clark County. Subsequent to that, we have followed various methods in trying to get our system, keep our system in line with the law as we understood it. But we can't compete with the decisions of one court saying go one way and the decisions of another saying go another.

We have to know where to go, and this decision, this question in this Court is a simple question, but its answer involves tremendous problems. If this Court should say you have complied with the law when you create neighborhood

schools, that is all right. But if this Court meant what it said when it said you have an affirmative duty to take whatever action is necessary to disestablish the dual system, then we think this Court would have to uphold the action which is taken by the Clark County Board of Education.

Q In this case, it is not whether or not you have complied with the law, this is not quite the question you put. The precise issue in this question, in this case, as I get it, is whether you violated the law by going further than simple neighborhood zoning. Is that right?

A Well, yes, whether we violated the construction of the law placed on it by the Georgia Supreme Court.

Q But that is what the Georgia Supreme Court held --

A That is right.

Q -- that you violated the law by going beyond neighborhood zoning.

A The Georgia Supreme Court, in using the Green case as its basis, says that no person shall be excluded from a school because of his race. The students, the white students who were zoned into another school area were not zoned there because of race but obviously they were zoned there because black students were being brought in. Now, we concede that. That is the only way we saw to work it out.

Q Do you agree with the Solicitor General's

view, if I understand his view correctly, the school board has broader powers in working out these remedies than a district court?

A The school boards in Georgia -- and I am sure this is true more or less nationwide -- have a broad discretion in such matters, and only the school board can solve these problems. The courts can't do it. I mean the mechanics of it, the school board has to solve the problems facing such things as transportation, availability of funds, availability of school facilities, location of buildings. The board has a discretion under a number of decisions of the Georgia courts and the board will have to be permitted to exercise that discretion if it continues to operate schools.

Q Then your answer would be generally you join in that view --

A Yes, sir.

Q -- expressed by the Solicitor General?

A Yes, sir, I do.

Now, the next point that I would like to mention on the -- with regard to the decision of the Georgia Supreme Court, is after saying that the action of the Clark County Board of Education in the adoption of its plan violated the Fourteenth Amendment rights of those students who were required to go to a different zone, it says also that its action violates those provisions of the Civil Rights Act dealing with

the definition of desegregation, 407 and 2000(c) and 2000(d)6, I believe, which says that desegregation shall not mean, as used in these chapters, desegregation shall not mean busing to achieve a racial balance.

And in the second section, 2000(c)6 of the code annotated, that no court or public body or federal body, I believe -- I forget the exact language -- shall be authorized by this act to require busing to achieve racial balance, in that sense.

Now, as used in that act, and I think it was best stated in the Olson case in the District Court in New York, that pertains to the use of funds under that section of that title of that act. Whatever Congress may have meant to say, it didn't put a restriction on the discretionary action of a board of education.

The Georgia court says that the action of this board violates the provisions of that section of the Civil Rights Act, and I don't think it does. I think that part of that decision is also in error.

The problem that we have is the basic problem which faces this Court, what exactly is a school board required to do and what can the school board do in order to meet its obligation. Obviously, when you honor the rights of some, if they have rights in regard to where they attend school, you are going to change the exercise of the rights of others

where your school system is filled to capacity.

I would like to call this point to the attention of the -- it is in the record -- the attention of the court to this particular instance. The people, except for three who have children who walk from one zone to a school in another, both within a mile and a half of both schools, except for those three, the other plaintiffs in the trial court and the appellants in the Supreme Court of Georgia, those people were sent to a school that had been used the previous year to house a particular -- students from a particular neighborhood who had to be bused to that school because the school in their neighborhood was under construction.

Consequently, when we entered the school, the '69 school year, and the school in that particular neighborhood, the new school had been completed, we had a substantially empty school building. We had to use it. We used it by zoning the contiguous area that involved these plaintiffs here, these respondents here but plaintiffs in the court below, by bringing them to that school with the exception of two of three, they had to be bused somewhere, and it was logical to bus them to the school where the space was available.

And that is what this board did. That is one of the little details that only a board can solve. We ask this Court therefore to uphold this board in the exercise of its

discretion and reverse the judgment of the Supreme Court of Georgia, which seems to curtail our exercise of that discretion.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Epting.

ARGUMENT BY E. FREEMAN LEVERETT, ESQ., ON BEHALF OF RESPONDENTS

Mr. Leverett?

MR. LEVERETT: Mr. Chief Justice, may it please the Court, I would like to direct some remarks at the outset to some tests that have been proposed here and then deal specifically with the contentions of the petitioners.

Four different tests, as I understand it, have been proposed by the counsel in the cases that have been argued here yesterday and today. The Fifth Circuit itself has postulated a rule that declares it the duty of each system to prevent the existence of an all-black school, if "reasonable alternatives exist."

When all-black schools do exist, the Fifth Circuit has said that, the state or the system must specify valid reasons for those schools. Further, the Fifth Circuit draws a distinction between not only the de jure and de facto systems but, in addition, it draws a distinction between urban systems on the one hand and rural systems on the other. This is indicated from its decisions and the Orange County and Hillsboro cases on the one hand, involving urban systems, and its decision in the Monroe, Louisiana case involving a

rural system.

Now, the Fourth Circuit has postulated a rule in the Charlotte case in terms of whether the all-black schools are capable of abolition by reasonable means. The Justice Department, in its brief, refers to a rule of feasibility which seems to be taken from the Green case.

The Petitioners in the Charlotte and Mobile cases, on the other hand, have stated a point-blank requirement that "every black child is to be free from assignment to a black school, an identifiable racial minority school at every grade, subject only to this qualification."

In the case of an "absolute unworkability," now apparently this exception is aimed at such places as Washington and Newark where it would be physically impossible to bring about a realization of what they seek.

We submit in this case that all of these tests miss the point. They involve standards which differ only and only in degree. Under them, the sufficiency of a plan is made to depend upon a statistical appraisal. They involve court formulated tests which we submit if any state legislature had attempted to enact, would have immediately been declared unconstitutional by this court as being void.

We submit that they invite another generation of litigation. They either avoid or assume without acknowledging it a determination of the basic questions which lurks in

all of these cases that have been argued thus far, and that is what does the Constitution require, what did you mean in Brown.

Does the Constitution simply prohibit state enforced discrimination or does it require an actual integration of the races in the schools?

Now, the problem, it seems to me, with the position of the government and the position that the petitioners in this case have to take, is that they seem to assume that the Constitution does require integration except where it is not reasonable, where it is not feasible, or where it is absolutely unworkable. Now, this, we submit, is inconsistent because it makes the scope of a constitutional right depend upon the ready availability of a remedy, and it would make the rights of a minority child differ in places such as Newark, in Atlanta, or in Charlotte, North Carolina.

The position of Respondents in -- they are both black and white respondents, and I think the Court probably is area of that in this case, they were both black and white parents that were objecting to being assigned on the basis of race in order to bring about this 20 to 40 percent ratio in each school that the petitioners were seeking to implement.

Our position is simply that the Constitution does not require affirmative state enforced integration but that it only prohibits state enforced segregation. So being, we say

that the assignment of children to achieve racial balancing is not required but is unconstitutional, consequently the majority to minority transfer option that has been discussed we submit that also is not valid, any more than the minority to majority transfer option struck down Goss is valid.

Secondly, Mr. Justice White, I don't think it is involved in this case, for reasons that I will get to, but we submit that a state or a board of education cannot on its own policy determination, in an effort to alleviate de facto or whatever you call it racial balance, undertake to affirmatively assign students on the basis of race in order to bring about a racial balance.

Now, I will attempt to show later on that that is not involved in this case because the Clark County Board of Education was not acting voluntarily but according to the testimony of its superintendent at page 97 of the record, he said we are acting because we are under compulsion of HEW. They were about to cut off the money.

Q Yes, but HEW was acting pursuant to its statutory authority and that statute happened to be valid, and you really come to the question of whether the school board could do it or whether Congress could do it.

A If HEW's action is valid, of course, that would be true, but we deny that HEW's action is valid.

Q You say that no governmental authority may

decide that for educational reasons, we want to educate blacks and whites together and therefore we will not send them to the same neighborhood schools that we used to.

A Before Brown, yes; after Brown, I say no, but I qualify that by saying that the court does not have to make that holding in this case in order to affirm the judgment of the Supreme Court of the State of Georgia.

Q Well, we do. We do, if you say that the court -- your answer is that the board acted under compulsion of HEW.

A I thought I understood the Justice to propose a question whereby the board voluntarily and without compulsion would --

Q Let's concede for the moment that your board did act under the compulsion of HEW. Let's assume that HEW's action is valid, action under the statute that it was operating under.

A You have assumed my case then.

Q Well, no, because you would say the statute is unconstitutional.

A I beg your pardon?

Q You would say the statute is unconstitutional.

A Correct, if they are acting pursuant to a statute, but I understood the question to presuppose that the statute -- I understood the question to presuppose that the statute was constitutional.

Q Oh, no, no. I think we have just -- so I think the constitutional question is posed about -- by this case, whether or not a legislative body may on its own decide that education of the races together is better than apart.

A I would answer your question this way, Mr. Justice White. I think that is perhaps a difference between what the Constitution requires on the one hand and what it permits on the other. I will attempt to develop that momentarily, because I think it involves some prior decisions of this Court.

Now, we say that this position that we maintain follows for several reasons. First, the language of Brown itself and the overwhelming judicial interpretation placed upon it within the first decade after 1954. We have collected those cases in our brief.

This Court's decision in the Goss case itself states the rule in terms of a classification based on race for the purpose of transfer between public schools as here. The wording of the Fourteenth Amendment, we rely upon that. The Fourteenth Amendment is negative, it is not affirmative. It confers an immunity upon people to be free from discriminatory government action.

Q Well, it is affirmative in one respect, isn't it? In section 4 --

A Enforcement costs?

Q Yes. Congress shall have power to enforce by appropriate legislation the provisions of this article.

A In that respect, it certainly is, sir.

Q Well, do you have that involved in this case at all?

A We do not think so. You have the HEW provisions of title 6 that are involved, but I do not interpret those as presenting the issue that you have proposed.

Q Mr. Leverett, what do you think was the responsibility of the school board?

A I interpret the affirmative duty language of this Court's decision in Green to mean this, Mr. Justice Marshall, that no school board who had a de jure school system in 1954 or at any other time could simply sit back and not do anything. I think it was --

Q Well, how mush should they do?

A I think they were required to reorganize their attendance zones, to change their method of assigning students to school. I think they were required to eliminate faculty desegregation or faculty segregation. I think I should hasten to add that a lot of these things that are clear now were not clear five and even ten years ago, because school boards have labored under a degree of uncertainty --

Q Assuming all of that, as of 1969, which is what is involved here, how far do you -- what is the one or

more things that the school board did that you think was wrong?

A The school board in Clark County, Georgia?

Q Yes, sir.

A They did two things wrong. They gerrymandered the attendance lines with the express purpose of bringing about a 20-40 racial mix; secondly, being unable --

Q What in the Fourteenth Amendment prohibits that?

A How is that, sir?

Q What is there in the Fourteenth Amendment that prohibits drawing gerrymandered lines?

A The equal protection clause, as interpreted by this court in the Brown case. And a number of the Fifth Circuit decisions --

Q Gerrymandering was in the Brown case?

A The Brown case said that any assignment of pupils by race is a denial of the equal protection of the laws, that is my interpretation, that is the basic issue that I think you have got to decide today.

Q There were no zones in there. There were two schools involved, that's all.

A That is right, sir, but the fact that you assigned them by zones or by race --

Q Well, are you saying that all the board has to do is say we no longer have a segregated school system?

A Certainly not. Certainly not. I am saying that any board -- and this is based upon the law as it has been developed in Green, not perhaps as some of us assumed back in 1955, because this Court itself upheld a pupil placement plan in the Shuttlesworth case that on its face it provided for the racial assignment of pupils. Now, looking back, it is probably --

Q I personally don't have to look beyond the Green case. I don't have to go back any further. But in the Green case, you have to do something.

A There is no question about that. We aren't disputing that. The question that we are in disagreement about is what do they have to do.

Q Well, suppose the only way you can break up the segregated system is to gerrymand it? You say you can't do it.

A No, sir. I don't accept the premise. I think you presuppose that you can deny rights to one group in order to accord them to another, and that would mean that the Constitution then would become a suicide pact.

Q I am not assuming anything. I personally am assuming what we said in Green, that you have to break up this system.

A Well, the disagreement comes on what you meant when you said that. Did you mean that you have got to

affirmatively consider race or did you mean simply that the boards or the systems involved in those three cases could not continue to use systems of assignment that are racial?

Q Well, are you arguing about considering race -- is there any way under the sun you can break up the segregated system without considering race?

A I think there has to be. I think there has to be.

Q Without considering race?

A Yes, sir, I think there has to be.

Q So then you consider race in every plan you think of and you still have all-black and all-white schools. Don't you agree, you have to go a little further?

A Well, Mr. Justice Marshall, I don't concede that that would be the result of not giving consideration to race. And even if you had a situation where you ended up with that result, that would to me not necessarily carry with it the proposition that discrimination had been practiced or that the former dual system had not been dismantled.

Q Well, suppose your school system has a Negro high school called the Frederick Douglas Negro High School. I assume your position is that you just take that word "Negro" off, and that did it.

A Certainly not. Certainly not.

Q Well, what more do you have to do?

A I think that the board would have to revise its assignment policies. It could do it either one of two ways. It could go to a pure freedom of choice plan, not the freedom of choice plan that this Court struck down in the three cases in '68 --

Q What other one is there?

A The other would be to simply draw district lines that would --

Q No, I mean what other freedom of choice plan is good?

A I beg your pardon?

Q Do I assume you to say there is a freedom of choice plan that is a good one?

A I would certainly hope so. In fact, I was going to suggest to Mr. Justice Douglas that that would be the answer to his question about how you could get these people out of the ghettos.

Q Well, how would you have legitimate freedom of choice?

A You would have a freedom of choice plan under which the choice was actually free. The problem in the Green case, the Raney case and the Monroe case is that the choice was not in fact free but that the systems in all three cases continue to assign students on the basis of race. In the Kent case, where the student did not exercise the choice, he was

automatically put back in the school which he had been assigned to on a racial basis.

Q Well, how do you conceive that in a school system that has been segregated since its existence you could have actual freedom of choice? Do you actually believe that is possible?

A Yes, sir, I do.

Q You would help me, Mr. Leverett, if you would just list one, two, three, if that is how many there are, the things which must be done now to comply with the desegregation mandate which were not required to be done prior to the series of holdings of this Court.

A Mr. Chief Justice, I will express it this way: Much of the law that has been developed in Green and other cases -- perhaps this Court meant it in Brown -- but I would say this, that very few school attorneys or others interpreted many of the things that the Court has since required. It was assumed, for example, after Briggs vs. Elliott, for a long time -- and this is going back to ancient history and perhaps it is difficult to visualize that this was once assumed to be possible, but you had the pupil placement plans that said that students remain where they are, albeit they were put there on a racial basis, but they are permitted to transfer out by meeting a list of 17 criteria that were set out in the Shuttlesworth case, and the Court upheld that in the late

fifties or the early sixties, I am not sure which.

Well, the law has evolved and as the court of appeals said in the Charlotte case, to say that the same law is in effect in 1969 or '68 that the courts, including the courts of appeal, assume was the law in 1965 is simply missing the point because it is not so. The concepts in this area have changed, and I am not saying that they shouldn't have changed. I am simply saying that what a system did not do in 1955 should not indict it at this time on the basis of requirements that we feel had been imposed only by decisions starting in about 1967 in the Fifth Circuit in the Jefferson and in the Green case in 1968.

Q But what are these specifics now?

A I think a school system has to completely change its method of assigning students from the old system. The old basis in most southern school districts was a neighborhood plan except you had dual zones. You had one for black and one for white. I think a system, in order to carry out its affirmative duty, has to erase those dual zones, and it has to draw a line, if it wants to go to a neighborhood plan, and say the students on this side will go to this school, the students on that side will go to that school. I think the system, as this court was saying in Green, could on the other hand go to a pure uninhibited freedom of choice. Now, the problem in Green and the other cases is that the choice was not free, and

we have attempted to distinguish those cases in our brief at page 29, I believe, all three of them, to show that in each instance the free choice plans involved in those three systems continued to make initial assignments in one form or another of students on the basis of race and then put the burden on them to get out of it.

Q The second one, then, is a bona fide freedom of choice which would be implemented in good faith in every respect?

A Correct.

Q All right. Now, what is the third one?

A Well, those are the two types of plans that immediately come to my mind. I see no -- if a system wants to consolidate all of its students and put them all into one, I think it could do that, and that would certainly solve the problem.

Q Do you think there are other duties with respect to faculty, facilities and buildings and buses --

A Yes, sir. We concede those.

Q -- transportation and many other things?

A Certainly, faculties, extracurricular activities, athletics, the other five or six points that are referred to in Green.

Q What insulates, in your mind, an order of the school board to a faculty member to go to a certain school and

teach there because he is a black teacher or he is a white teacher?

A What insulates it?

Q Yes. I mean why is that consistent with the Fourteenth Amendment?

A I don't think that it is. If the assignment of that teacher is motivated by considerations of race, whether to achieve a particular racial balance or otherwise, we submit that it is not involved in this case.

Q So you would say the same rule applies to the faculty as to the student?

A That's right. Now, you have a difference in that --

Q But you don't concede anything about the faculty?

A No, sir, certainly not. But I am saying this, that the system cannot continue under the old arrangement. One solution might be to simply, to undo the effects, to simply put all the names in a hit and maybe classify some of them that perhaps would not be qualified to go into a particular school and then draw the names out, and in that way you would have the pure chance area coming in.

Q That wouldn't give much help in terms of long distances, would it, if you left it to pure chance?

A No, sir,but it would be one way to avoid retaining the effects of past discrimination.

Q Discrimination.

A It may not be educationally wise, but I am trying to postulate something in terms of satisfying --

Q That is a cure that might be worse than the illness, don't you think?

A That is quite possible. Perhaps I think what should have been done, we recognize now under court decisions, is that as replacements were made they should have been made on a non-racial basis and perhaps in many instances they were not. And practically the way it works is the principal of each school usually goes out and gets teachers and the black principals get the black teachers and the white ones get the white ones. This Court has told us that is wrong and we recognize that. We don't dispute it. But you can't delegate it to somebody.

The Fifth Circuit has stated what I am trying to state in these terms -- first let me say this: In the Houston case, the Judge there referred to the fact that the Constitution guarantees the right to vote and it guarantees the right to ride buses free of discrimination, but the Constitution does not require that a person vote and it does not require that he ride the bus in any particular manner. He can still go to the back or he can go to the front or anywhere else that he wants to.

The Fifth Circuit said this: The Constitution

affords him these rights not recognized until recently. It does not impose an obligation on him to exercise those rights. It is for him to decide whether it be to his advantage -- the individual is still the master of his fate.

And we say thirdly that all students cannot be assigned to schools on the basis of race without at the same time violating the rights of those students, both black and white, and there are four instead of three here -- without at the same time violating the rights of the black and white pupils who object to being assigned on the basis of race. I think for this purpose we can assume, although we will certainly not concede the validity of this proposition that says that educational, equal educational opportunity cannot be achieved in fact unless there is an actual integration of the races.

But, assuming that, it does not follow, we submit, that the rights of the group seeking compus ory association to achieve this end of equal educational opportunity can be superior to those who seek to avoid it. This Court said this in Shelley vs. Kramer: The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals. It has never been constitutional doctrine that the rights of one group seeking this can be used as a pretext for denying them to another group.

Q Well, do you think the law could not be passed

by the Congress to that effect?

A Justice Black, I would --

Q Or that the courts have power to do it?

A Mr. Justice Black, there is certainly a difference between the power of Congress under the enforcement clause and the power of the court sitting in the context of these cases. I would say that Congress could not do it. I stood here about four years ago and argued the voting rights case and --

Q But suppose Congress could, does it necessarily follow that this court could?

A No, sir, it certainly does not, because the difference between the power of Congress, which is given the authority to implement the Fourteenth Amendment, and the powers of the court which are not given that express authority but necessarily have to enforce part of it.

And another appearance of the Houston case --

Q While we are there, would you say that the powers of the court, this Court, and the powers of Congress under the Fourteenth Amendment are mutually exclusive?

A Not mutually exclusive. I don't think they are identical.

Q Just under the one section, I am talking about, just under the enforcement part, that is --

A I am not certain I understand what you mean by

mutually exclusive under the enforcement clause.

Q If it falls under the enforcement clause, then only Congress may implement it with action, and not the courts. Is that your argument?

A Well, Congress, of course, has enacted certain statutes, 1983, 1981, under which all suits are brought, but I don't think that the Court has interpreted the Fourteenth Amendment as being limited to the express provisions spelled out by Congress in statute, that the Court has said that it has certain powers and responsibilities under the Fourteenth Amendment independent of statute, but it does not follow that its power is the same or can be equated to in the absence of a statute to the power that it would have if Congress had enacted a statute.

Q Could the Court have framed the remedies which were articulated in 1983 in the related section independent of Congress?

A I would think not, sir.

Q You would take the position they couldn't pass a statute?

A That's right, sir, that is expressing it more directly. I would like to distinguish two doctrines that are relied upon in these cases by the plaintiffs or petitioners. It is said that there are two doctrines that can be used to support this, and one is the remedying the effects of past

discriminations and the disestablishment cases.

In the one instance, reliance is placed upon the voting cases involving the freezing principle. Well, our answer to that simply is this, that there you can accomplish your remedial device without denying the rights of the whites and blacks who object. In the freezing cases you have two classes, one of which was granted certain rights and one of which was denied it, and in that context you simply confer the rights on the class that was denied and you don't take anything away from the class that was granted the favored treatment.

In the disestablishment cases, the reliance is placed upon the line of cases in the antitrust field saying that having found an illegal combination of something in violation of law, that the courts can go further than simply issuing a prohibitory injunction aimed at the future and can require retroactively a divesture, a dissolution of the illegal combination.

There the courts are dealing entirely with wrongdoers. Everybody has had some culpability involved in that situation, so there is no problem presented in saying that we can rob you of the fruits of this illegal conspiracy; but here you have innocent awhite and black children who are objecting to this treatment and their rights cannot be made, we submit, to be sacrificed in order to accord the rights of somebody else.

Q Let me see if I follow completely. You are suggesting that a school board could solve this problem

constitutionally and satisfy all our demands if it had zones and pairing of schools, et cetera, the same types of things that have been done in all of these cases, but provided that any pupil objecting would have the freedom of choice to go where he wanted to go. Is that your --

A No, sir. No, sir.

Q Well, let me --

A That would still involve an initial assignment by race if the lines were gerrymandered. Now, I am not certain that I understood --

Q Well --

A If the lines were not based on race, I think what the Chief Justice is saying would be correct, that that plan would be valid and superimposing an absolute completely freedom of choice option on top of it would not invalidate it. But if you presuppose that in drawing these lines or in going to these pairings that this was based upon race, I think you are right back where you started.

Q Well, wouldn't people be permitted, couldn't they take advantage of an assignment even if it was done on race if they liked it and wanted it and didn't object to it?

A No, sir, the cases in the Fifth Circuit struck down the whole pupil placement statute on that very reason, that even though they gave the student an unlimited right to transfer out, that he was still initially assigned to the old

school that he had been assigned to on the basis of race and the burden was put on him to do that which the board of education itself should have carried.

Q I wasn't proposing that as a remedy. I was proposing that I understood your proposition to encompass that as a permissible remedy, that you say that if in the first instance race was taken into account in the zoning or the pairing, it is quite right from the beginning.

A The proposition that I formulated in response to a question that Mr. Justice Douglas asked was that it was not any zoning to begin with but a complete freedom of choice along the lines that the Fifth Circuit set out in the Jefferson case in 372 Fed 2d 836, where they said that -- they set out the requirements and said that if a student does not assign himself, you have to assign him to the nearest school on the basis of proximity.

Coming back momentarily to this question, I think that the arguments that have been made here in which it is said that the remedial aspects of this, in order to give the remedy, the courts can do this -- it comes down to this, that can a remedial device be employed which denies the substantive right to another class.

I see that the time is up.

Q Could I just ask you -- you said a while ago that the board's plan in this case was prompted, wasn't a

voluntary act but was prompted by HEW.

A Yes, sir. They had enforcement proceedings pending against them. They had been already threatened --

Q Do you challenge at all, raise any question about HEW's conduct under this -- was its conduct within the statute --

A No, sir. We certainly challenge it. The board had adopted a bona fide neighborhood plan which eliminated --

Q That wasn't -- let me finish my question. Do you challenge the authority of HEW under the statute that governs its conduct?

A Yes, sir.

Q You do?

A Yes, sir.

Q And I suppose you would say that if its conduct was authorized by the statute, that the statute was unconstitutional?

A That is correct, sir. I know my time is up, but I would point out that we also contend that this plan is void because it placed an unequal burden upon the Negro respondents by requiring them to be assigned out of their zones where it did not impose that upon the whites.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Leverett.

Mr. Epting, you have some time for -- no, excuse me, you have used all your time.

MR. EPTING: I was about to say I think I have used it and I think I have said about all I need to say. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Epting. Thank you,Mr. Leverett. The case is submitted.

(Whereupon, at 2:20 o'clock p.m., argument in the above-entitled matter was concluded.)

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