# Supreme Court of the United States

OCTOBER TERM, 1970

**In the Matter of:**

**Docket No.** 436

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BIRDIE MAE DAVIS, et al.

Petitioners,

vs.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

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**Place** Washington, D. C.

**Date** October 13, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

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| BIRDIE MAE DAVIS, ET AL., Petitioners, | : | |
| vs. | : | No. 436 |
| BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., Respondents. | : | |

Washington, D. C.,
Tuesday, October 13, 1970.

The above-entitled matter came on for argument at 2:20 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:

ERWIN N. GRISWOLD, ESQ.,
Solicitor General, United States

JACK GREENBERG, ESQ.
On behalf of Petitioners

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: The next case on for argument is No. 436, Davis vs. Mobile County Commissioners.

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

MR. GREENBERG: Mr. Chief Justice, may it please the Court, this case is here under writ of certioari from the United States Court of Appeals for the Fifth Circuit. The area under consideration is metropolitan Mobile, which is portrayed on this map behind me, with a school population in excess of 50,000 students. This 50,000 is out of a total Mobile County school population of approximately 70,000 students.

The black-white ratio in metropolitan Mobile is almost exactly 50-50. In the system as a whole, city and rural, the black-white ratio is about 60 percent white, 40,000 students, 40 percent black, 30,000 students. Eighty-five percent of the black students or about 26,000 in the system reside in metropolitan Mobile.

At all stages of the litigation, the courts and the parties, including the school board, have treated metropolitan Mobile as a separate matter. The proceedings which have resulted in this writ of certiorari focus on integration of the elementary schools in metropolitan Mobile, although facts just furnished to us by respondents, and set forth in a supplemental brief filed Saturday, indicates that the junior high schools

and the high schools there, in which a substantial degree of integration was supposed to have been accomplished are in very substantial measure identifiably black.

The question presented to this Court is whether in this school system with the entire spectrum of school assignment techniques that have been used in the past to maintain racial segregation -- non-contiguous zoning, satellite zoning, pairing, busing, a bewildering array of deviations in grade structure, portable classrooms, school closings, school construction --whether those techniques which have been employed in the service of segreagation now ought to be used in the service of integration. Or is the sole standard to be an innovation, that is the exclusive employment of the neighborhood schools, whatever that means, now suggested by the United States and the respondents as a method of school assignment, even though it results in an exceedingly high degree of racial concentration.

Some children had in the past in Mobile sometimes been assigned on the basis of some concept of neighborhood among the number of other assignment factors. But as the sole means of assignment, it is an innovation.

It might be added at this point, at least I would like to add at this point parenthetically, an answer to the argument which emerges from this sharp departure in administration, which was anticipated yesterday by counsel for the

Charlotte School Board who stated, and by Mr. Blakeney, who stated today, two wrongs do not make a right. That seems to be the only answer to this series of facts which exist here in Mobile and in the other cases, the other cases argued earlier. He conceded two wrongs do not make a right was the only answer. And however satisfying that aphorism might be, a brief analysis, we submit, illuminates the issues in this case.

Busing to segregate was indeed wrong. So was non-contiguous zoning, portable classrooms and so forth. But the wrong was not the busing or the zoning, it was the racial segregation. These assignment techniques were normal, neutral administrative means of implementing a governmental policy, in this case an unconstitutional governmental policy. Similarly, transportation and the various other aids to school assignment in the service of integration are neither good nor bad, considered abstractly. They are similarly instruments in the service of disestablishing an unconstitutional system.

The question under review is this Court's judgment -- is the Fifth Circuit's judgment of June 8, 1970, as modified by judgments of August 4 and August 28, 1970 -- these were the ninth, tenth and eleventh appeals to the Fifth Circuit since 1963. The case now pending there on further appeal having to do with the enforcement of the transportation and faculty portions of the earlier decree. It has been before the district court and the court of appeals a sufficient number of

times so that the docket entries alone occupy half of the first volume of this record, and throughout these proceedings a vast quantity of materials have accumulated.

Nevertheless, the salient facts are clear and they are not complex and the issues confronting the court are clear. The essence of the problem is revealed in statistics filed by the respondent in the district court on October 2, a week ago last Friday, and not, I may add, served on us. Respondent's document has been reproduced in our supplemental brief, filed with the court on October 10 and analyzed in the brief. There is a photocopy of their document in our brief. And what I am about to describe is the board's own statistics, although we submit that upon an evidentiary hearing we could demonstrate that the facts are far worse.

The Firth Circuit plan in operation, according to their statistics, results in 7,651 or about two-thirds of all the Negro school children in metropolitan Mobile are attending all-black elementary schools, using the Fifth Circuit's definition of an all-black school as one with fewer than 10 percent white students.

This map of metropolitan Mobile indicates the elementary school districts in that portion of the system. It is approximately ten miles across the waist and 18 miles from north to south. Almost all black children are separated from the preponderant white portion of the city by Interstate

65. This is the separating line, this is the black section, and this is the white section. The all-black zone now on their own admission includes Robbins, which is all black, Grant, which is all black, Frazier, which is all black, Stanton Road, which is all black, Owens, which is all black, Caldwell, which is all black, and Council, which is all black. Then here is Whitley, which is 89 percent black, 1 percent from the Fifth Circuit definition, and other schools ranging from 64, 76 and 80 percent black.

Now, these districts here, using again a definition of no more than 10 percent black students, are all white. Indian Springs, all white, Carstow, all white, Austin, all white, Pond, all white, Sheppard, all white, Morningside, all white, Merks, all white, Westland, all white, Williams, all white.

Here is a district with 52 percent white, going from an all-black enclave here, where for many years was the only one to twelve school in the system, the school being one to twelve, so that it would absorb all the black children in that area. The school was closing, they would go to the school over there.

There are in fact some small percentage of white students living in some of the 90 percent or more black districts but under the plan as it is operated, as the respondents have informed the district court, for reasons

that we do not know, not all of them and perhaps none of them are attending the schools to which they are assigned. There is a motion pending in the district court about that, but we have not been able to get a hearing.

Moreover, the petition which we took to this court involves only elementary schools. The high school situation, however, under actual enrollment figures now furnished seems far worse than projected in the government's plan, which was essentially adopted below. As page 3 of our supplemental brief indicates, more than 6,700 Negro students will be going to high school and junior high school in all-black schools, therefore we have a situation in which the preponderant number of black students in metropolitan Mobile will be spending half of their education, the elementary years, in all-black schools, and the so-called paliative of integrated junior high and high school education which does not in any event cure denial of constitutional rights for the first six years will in fact not exist to them.

And the issue is does this final -- this is a final desegregation plan, does it satisfy the Fourteenth Amendment. The Fourteenth Amendment rule has most recently been expounded in Green and Alexander as requiring the ending of the last vestages of segregation and the elimination of segregation root and branch. And we submit that that imperative is far, exceedingly far from having been satisfied.

Now, the justification offered by respondents and the United States for leaving racial segregation essentially intact in metropolitan Mobile is that the result is required by neighborhood schools. In assessing the so-called neighborhood school zoning in Mobile we might, however, first describe the methods of school zoning which Mobile has used traditionally.

On this record, the school district buses more than 20,000 students at an average round-trip of thirty miles a day. Most of the busing is in the rural area, but there is a substantial amount at shorter distances in the city, and so busing is hardly foreign to Mobile education, and this figure compares fairly well with the fact that 40 percent of all American school children are bused to school Some of this busing has clearly been for the purpose of maintaining racial segregation as, for example, when approximately 600 black students were bused from rural Saraland down to around this area to an all-black school.

Approximately 7,000 students in the western part of Mobile over here in the metropolitan area are bused, where the school districts are large and the distances are somewhat greater and the preponderant part of the white population lives. But the point is that busing is commonplace in Mobile education.

Mobile has in the past regularly used non-contiguous

zoning. I would like to ask the Court to turn to page 7a in the Appendix to our brif and look at the two pages of colored maps there. These maps were prepared by the United States and have been adopted in their Appendix in the Court of Appeals for the Fifth Circuit. The zones on the map are colored in a way so that all parts of a non-contiguous zone are the same color, and some of these involve so-called satellite zoning and some of these involve non-contiguous pairing.

It can be seen at a glance that Mobile has assigned children to schools on anything but a neighborhood basis. The differences, of course, is that this map depicts a period in which non-contiguous zoning was used to maintain racial segregation.

On the first page, for example, the bright pink portions constitute a single school zone in which black children were bused in the northern part of the zones to pink semicircular sections on the right side which is the Saraland situation I was describing a moment ago. White children attended a school in the blue portion of the map, that being satellite zoning. There was a school in one part but not in the other. But the corridor between the two sections called Commis was formed because blacks lived in there and they were not to go to the white school.

On the next page, the bright red portions of the

map, again just taking an example, constitute a white school zone and white children at Brookley went up to the white school at Woodcock.

Q Before you leave that, coming to the corridor, as you called it, between the two blue sections with the title "Thomas" on it, to what school were the students in that area to go? Where are they assigned?

A No?

Q Yes. I am trying to follow that on the exhibit.

A You are going to have difficulty, as I have had, in going from one map to another because Mobile has changed its school assignment system so frequently and so much from year to year that zones you will see on one map, Mr. Justice, one year will not be on the map for the subsequent year and so forth.

Q Well, one of those -- where was the --

A There was a black school named Thomas in the zone in that time. There was a black school named Thomas in the commit zone between these two blue parts. The black students went to the commit school and white students attended school, a single school.

Q The outlines of the Thomas school are not shown on this map, the zone, are they?

A Yes, Mr. Chief Justice --

Q The green line?

A No, the outline of the Thomas school are between Whistler and Park, is all in white, is not colored in. We have colored in only the non-contiguous zone.

Q And when was this zoning plan --

A These are maps that I believe were made in 1964 and 1965. It is a composite prepared by the Department of Justice for those two years. The non-contiguous zoning, the non-contiguous zones are listed on page 19a of our brief, Mr. Justice Stewart, for each of the years. If you will turn there, there is a list with a single-spaced, a single-spaced page of rather small type which lists all the non-contiguous zones which existed in the Mobile school system, and by year, '63, '64, '65, '66, '67, that is as of the time that record was made.

Now, if this analysis of the last five minutes has not completely laid to rest the fact that there is nothing to the notion of neighborhood schools in Mobile, I would like to add that in the black areas, whenever they had a school where the capacity of the school was filled up with black children and they wanted to put more blacks in, they added portable classrooms, and the record shows with respect to white children they did the same thing. The capacity of a school can determine the neighborhood it will serve, but where the capacity of a school is a readily expandable thing, like an accordian, it is like an Alice in Wonderland. What is the

capacity of the school. The capacity of the school is whatever the decision the school board decides it will be. In fact, in Mobile portable classrooms, the record shows, were substantially added to black schools while white schools were undercapacity, and this is shown by respondents' report which is on page 208 of the Appendix and in Appendix B to our brief. Appendix B to our brief has a list of portable classrooms. And so the notion of neighborhoods as somehow related to a fixed capacity of the school, well, we would submit in no cases applicable here is ludicrous.

Another way school population is defined is by grade structure. In this all-black area over here, which is called Hillsdale, they have the only one-to-twelve school in the City of Mobile. I mentioned that earlier, because that absorbed all the black kids. If this, for example, were only a K to 3 school or a high school or junior high school, then black kids would then have to go to schools elsewhere. That school ultimately was closed, but it is a normal and quite recent assignment practice of the school system.

Elsewhere in the system there is the most variegated combination of grade structure. An expert witness said he had never seen anything like it. In our brief on page 35 there is just a summary of the grade structures which they have used -- 1-5, 1-6, 1-7, 1-8, 1-9, 2-5, 6-7, 6-8, 6-9, 6-10, 6-12, 7, 7-8, 7-9, 7-11, 7-12, 8-12 -- and I am just picking

them out.

In other words, the notion of neighborhood as determined by the capacity of a school serving a geographical area is even -- well, it is a concept that is really not capable of definition, certainly in this case.

We saw in the Swann case, the Charlotte case, there was claim to be a neighborhood, that is a contiguous zone, can consist of something like the shape of a dumbbell, two large, round areas connected by a connecting bar. The connecting bar in there is called a neighborhood, and if you take that out, it is called non-contiguous zong and not a neighborhood school.

But the complexities and curiosity of the neighborhood school system in Mobile are even more fantastic than that. The record will show that Mobile school officials define the neighborhood school not merely in geographical terms but in psychological and sociological terms as well, for whatever that may mean.

The question for this court, therefore, is whether in a school system which has been segregated by law until 1954, and which remains completely segreated until 1969, and which is still now overwhelmingly segregated as the result of a so-called final desegregation plan under which it now operates, this Court, supervising district courts sitting in equity, should fashion an effective remedy to forever end the unconstitutional administration of the school system so far as

race is concerned.

Q That would end it just in this particular case, wouldn't it?

A Pardon me, Mr. Justice?

Q That would end it -- your objective would end it forever, that would end it just in the areas you have shown on your map, wouldn't it?

A An effective remedy would, yes.

Q If we found this effective remedy.

A Yes.

Q Now, while we are there, I suppose Mobile is no exception to what is true in almost every large community in the country, that there is a more or less constant movement of people, sometimes described as an upward movement, people trying -- people with a two-bedroom house trying to get a three-bedroom house or a three-bedroom house trying to get a four-bedroom house, this movement going on.

How does the district court in performing this function keep track of the changes that would flow from that? I assume that you would agree that changes will flow from that upward movement.

A Well, Mr. Chief Justice, I would submit it is not the job of the district court to keep up with it on its own initiative. It is like another other decree in equity. If a party or parties come to the court with a pleading, setting

forth a claim upon which relief can be granted, then the court will examine it and decide whether relief would be granted, but the court is not going to replace the school board. I submit that the school board has a constitutional duty, having taken the oath to uphold the Constitution, to keep up with this type of thing, and the district court may or may not be called upon to do it.

Q Well, if I can propose a hypothetical situation to you, assume that in a given district where you have a racial balance of the school which as of today you find acceptable and that three years from now, by the so-called upward movement, the population of that area has changed so that the balance no longer satisfies the standard racial balance that is found acceptable today, in 1970. Is that a matter as to which the court should grant a remedy?

A Well, Mr. Chief Justice, I would like to make several observations, in an effort to answer that, and one is that in a city like Mobile, indeed many communities which may come before a court or this Court, we have a situation in which the Constitution has been violated without a doubt to their knowledge from 1954 to 1969 and it may be not asking too much to take another look at it again three years later. It is not as if they have been thoroughly well-integrated for a hundred years and someone is suddenly calling them into court.

Secondly, it may be that the court will have to look

at it, as indeed policing an antitrust decree or a water rights case or anything like that. It is possible that an adjustment will have to be made on the merits of the case. As your question implies, will a period arise sometime in history in which a court will no longer ever have to look at it again, I imagine that at some point it would arise but now one year after Mobile has first taken a step, going only as far as it has, I think the suggestion is premature to consider that question.

Q But in the hypothesis I was putting to you, there is no element of discrimination that brings this about, but merely natural change in the structure of the community. So is it your position then that the court has a duty -- the school board in the first instance, the court, the party must go in and see to it that adjustments are made to reflect the composition of the community independent of any discriminatory motive?

A Well, again, that is not this case but I don't want to evade your question by giving that kind of an answer to it. The school board is being asked to take affirmative action at this time to undo a long history of quite vigorously enforced discrimination. And in talking about a hypothetical case, I would assume that in a period of three years the racial segregation which has been so virulent and has, as Mr. Nabrit said earlier, been a part of American history, as slavery, for

a hundred years, and segregation for a hundred more, may not be so easily uprooted. Maybe the court will have to look at it again and see whether or not this is just a natural movement of upward mobility to get a house with an additional bedroom or is related to something else.

But that is on a record that I haven't seen and no one has seen.

Q What I am driving at is that last point I was trying to make to you, is this always tied to the discriminatory motivation or does this requirement of racial balance exist independent of the reason and source.

A The racial balance is in your question, not in my statement, and it is not a term that, I think you made quite clear, we are advancing to this court. The Solicitor reads our brief which says we disavow racial balance. It says, "Aha, that shows that they are for racial balance." So I would like to say that if you're hypothesizing a case of racial balance, I will answer in terms of the hypothesis, but it is not all hypothesis.

Q But you were citing figures to us. What do those figures mean?

A That it is not a question of balance, it is all black.

Q No, I am talking about the corrective parts. You mentioned some specific figure. I have forgotten now what

it was. It was corresponding to the 71-29 figure in the case we argued yesterday.

A I have not yet mentioned any figure, Mr. Chief Justice --

Q Then let's suppose --

A The figure which I mentioned was merely describing the racial population just so the Court would have an understanding of what the facts of the case are. I was not proposing any --

Q You used the Fifth Circuit definition.

A Yes, I did use the Fifth Circuit definition in describing those districts. A school I call all-black is in terms of the Fifth Circuit definition, as indicated here, 90 percent black. Yes, that is correct.

Mr. Chief Justice, there is a time when the courts can divest themselves of this problem. I would seriously doubt that would be three years from now, but it would be at some time and we don't know when. I think only experience will tell.

Q Even though the intervening acts which change the complexion of a neighborhood may be wholly private decision-making?

A Well, if they are wholly private decision-making and can be totally divested from everything else, I might tend to agree would be sooner rather than later. But I think careful examination of records indicate frequently that what is

taken to be wholly private is often not wholly private. I think we will have to see. But on the hypothesis as wholly private and a hypothesis that we have had a completely desegregated system and so forth, I would say such a time could arrive.

I was going to say that the questions of this Court, as we see it on this record, is whether in a school system which has been segregated by law until 1954 and remained segregated until 1969, and which is now still overwhelmingly segregated as the result of a so-called final desegregation plan, this Court supervising district courts sitting in equity should fashion an effective remedy to forever end the unconstitutional administration of the school system so far as race is concerned.

We submit that this Court as a remedial measure should declare a rule which requires that every black child at every grade in his educational career must be free of assignment to a racially identifiable minority school. And such a school, in the language of our brief, is one which by reason of a very considerable concentration or disproportion is conceived as designed to receive black children.

Q I would like to ask a question that I asked yesterday in somewhat different context. I understand your position, the position that is spelled out very clearly in your brief, and you have just expressed very clearly here. But is

it your position that that is the test that must be met in remedying and rectifying a previously dual school system on the one hand, or is it your position that that is test that is requiredsubstantively by the Fourteenth Amendment, regardless of the history of a particular school system?

A Well, it is the former but the two are intertwined because you do not get to disestablish a segregated school system except for the Fourteenth Amendment, unless it is state or federal legislation, but it is essentially the Fourteenth Amendment we are talking about in cases like this.

What we are talking about is of a remedial measure. We are talking about remedy, but frequently from remedies rights do stem. In an antitrust case you may get a right to license or a right -- the government, they get a right to compel divestiture, which is a remedy that you could not do but for the fact of a certain substantive violation. However, it is a remedy.

Q So then do I understand that it is not -- you do not claim that it is the personal individual constitutional right under the Fourteenth Amendment of a Negro public school child to attend throughout his school career a school that is not racially identifiable?

A I want to be sure that I understand your question. Your limiting your question to areas where there has been segregation imposed by law --

Q No, I am limiting my question -- I am asking you whether it is your position that the Fourteenth Amendment confers upon every school child in the United States, and particularly every Negro public school student, the right to attend racially non-identifiable schools throughout their school career, throughout his school career?

A My answer is no, and I would have to explain the reason for the answer so I am sure I am not misunderstood. It appears to me that you are essentially raising what might be called the de facto question, whether where there has been no de jure segregation and there is nevertheless a considerable concentration of black students in a racially identifiable school, nevertheless one may obtain a decree from a federal district court integrating the schools according to the measures we propose.

My answer to that is we require some finding of -- we think that the rulings of this Court require that there have been some segregation imposed by law. We think, however, that in parts of the country which are normally not referred to the South, out of the South, one can find that segregation imposed by law, as in Denver, and in New Rochelle, and other places where it has been found, and it hasn't been done by courts, and we think that a searching record in other places would turn it up as well.

We will assume that there are places where that has

not been established and cannot be established, and in those places I personally would be willing to urge a court that the same remedy should apply, would be on a different basis and not this case, and I --

Q Then you would say it is a substantive constitutional right?

A I would concede that it is an open question and hardly the thing to be decided here today.

Q But in that case it would not be a remedy to rectify an illegal situation?

A That is correct. Now, in that case, one would have to find a substantive right.

Q It would be a personal substantive constitutional right in that hypothetical.

A That's right, but that is not this case. This case is a case we argue on the basis of remedy and I would readily admit, as I would have to, a fair reading of the cases indicates that is the case in open question.

Q Let me ask you one question to get this clear to me. There was a village in Alabama, and I live there, which is a hundred percent colored. They had a mayor who was colored. They had a board of aldermen, colored. The city was run by colored people. That was by nature, that is it may be that there was some reason why that -- why they had concentrated but they were there. Would it be your view that in a

place lik that they would have to come under the rules which you are asking for?

A No, Mr. Justice Black, and I did not get to state the second part of my rule that it must be feasible and workable, and as you describe the case, without really understanding the situation any further, it is difficult for me to understand how that would be feasible or workable.

Q It worked pretty well, the way they had it.

(Laughter.)

A I mean feasible or workable to integrate the schools, is what I am referring to. One would have to find some workable method of integrating the schools there and at least as the case it is put to me, I can't think of a way of doing it.

Q Well, probably no one would have wanted it.

A That is the second part of the --

Q Would that be the same answer for Bayou?

A I imagine I would have to, yes.

I will confess that I, like perhaps some others in the court room, am confused about the feasible, workable, reasonable tests, and I think we have to focus not on those words which have been used in ways to make them so inherently confusing, but on something else that relates to them, and that --

Q But I don't understand -- I gather that Green

used feasible, didn't they?

A Yes.

Q Where does reasonable -- I know reasonable comes in the Court of Appeals in the Fourth Circuit, but where does reasonable or workable come from? Why isn't feasible good enough?

A Workable was used in a corcurring by Mr. Justice Harlan in the Carter case and --

Q I know, I read your brief.

A -- in the Fourth Circuit.

Q But I wondered --

A I think we ought to focus on something else. These words, as they are being used, are getting us nowhere and I think we ought to focus on one, the result to be achieved, and the result is the elimination of the all-black school, and workability or whatever other word you use have to be seen in that context, and then the casting of the burden.

Q I thought we used feasible in the sense of an alternative, if there were any alternatives to keeping it a black school.

A Yes --

Q The school board had the duty of employing one of those alternatives to desegregate it.

A Yes.

Q Is that the sense in which we used it?

A I think so, but I think it has to be also seen, and I think we use it in that sense also, in terms of the burden. If it appears that it can be done, there is a very heavy burden on the board to establish that it cannot be done.

Q By feasible you mean possible, really, isn't that about it?

A In Mobile and Charlotte and in Athens in different ways we know it is possible. We know it is possible in Athens because they are doing it. We know it is possible in Charlotte because it happened today. We know it is possible in Mobile because they have done it. They have done far more than they really have to.

Q And your formulation would be if it is possible and you would put the burden on the school board to show it is impossible, isn't that about it?

A Yes, and a considerably heavy burden. Now, the Solicitor has said that we are arguing some racial balance. He has read the clear language of our brief, he picked it up and he read it. I ought to turn to it because I thought maybe this brief had been changed by the printer or something when he said, "Gee, they are for racial balance" and I was really scared when he started reading that because I thought that it said something it didn't say. But it says what it was supposed to say, that in a unitary school system no black student may be assigned to a racially identifiable black school. I

think we can explain it in considerable length that that does not mean racial balance and why.

As we understand the meaning of racial balance, it means that every school has to reflect approximately the percentage of students in the same ratio as the ratio in the overall population. In metropolitan Mobile, it would be 50-50, in Charlotte it would be 71-29, and Mr. Chambers made it clear yesterday -- and I am making it clear now -- that that is not what we are arguing. Our position is that the constitutional obligation to disestablish a dual segregated system requires at least that the resultant schools are ones which are not so overwhelmingly black when considered as a total population of that school district, that it is considered to be a black school.

And we differ also from the government which use the words "feasible" and "workable" as we have and that we focus on results. We say, and the decisions of this Court suggest that a most heavy burden is on the school board to establish that a means to end segregation do not exist, that a plan does not work. In Mobile it is workable, because I think of the ten techniques they have used, if they pick any two or three they could do it, and certainly if they used all ten. Athens is workable and Charlotte is workable. Mr. Justice Black's hypothesis, I would assume, is not workable, and Bayou I would assume is not workable.

But we have this case here and I don't think we have to -- it is difficult enough without considering all the cases that we don't have here.

Q Let me take you beyond this case. Suppose that that interstate were the boundary line between two school districts, what then is the situation?

A Well, actually that interstate is the boundary between a number of school districts. It is the boundary -- well, I hadn't thought of it that way, Mr. Justice Blackmun, but it is a common school boundary for a large number of school districts.

Well, they have moved school districts around all over the place and I think they would just -- it was just one way of doing it, not that they would have to reach the interstate barrier. They might do a variety of other things. Actually the Department of Health, Education, and Welfare has adopted a plan called Alternative B-1, and I want to have it clearly understood that we are not urging Alternative B-1 upon the Court.

Alternative B-1 was conceded in the Court of Appeals by the government to be a feasible plan. It was designed by HEW, was one of four plans that could work to desegregate Mobile. We are not urging it upon the Court because they have not -- this record is riddled with denials of hearings, ex parte action, the facts have changed, and it is

entirely possible that at this moment it work not be appropriate a scheme for Mobile, but is approximately the sort of thing which can do it and as a matter of fact --

MR. CHIEF JUSTICE BURGER: I think we will take it up at 10:00 o'clock tomorrow morning.

(Whereupon, at 3 o'clock p.m., argument in the above-entitled matter was in recess, to reconvene on Wednesday, October 14, 1970, at 10:00 o'clock a.m.)

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