Supreme Court of the United States

In the Matter of:

Docket No. 436

BIRDIE MAE DAVIS, et al.	
Petitioners;	
vs.	
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,	
Respondents.	

Place Washington, D. C.

Date October 14, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

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

Washington, D. C.
October 14, 1970

The above-entitled matter came on for argument at 10:10 a.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
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

(The same as heretofore noted.)

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PROCEEDINGS

(The argument in the above-entitled matter resumed at 10:00 a.m.)

MR. CHIEF JUSTICE BURGER: Mr. Greenberg, have you finished?

MR. GREENBERG: I am saving my time for rebuttal, sir.

MR. CHIEF JUSTICE BURGER: And who is on schedule now, Mr. Solicitor General? We will proceed, then, with Case No. 436, Mr. Solicitor General, where you left off yesterday.

MR. GRISWOLD: Well, Mr. Chief Justice, I am beginning now.

MR. CHIEF JUSTICE BURGER: Where we left off yesterday.

ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF THE UNITED STATES

MR. GRISWOLD: May it please the Court: Before commencing my argument, I would like to explain one circumstance. The brief which we have filed covers all three cases, the two Charlotte cases and this case, and it says "Brief for the United States as Amicus Curiae."

In the Charlotte cases we were Amicus Curiae, though a very active one in both lower Courts and here, but in this case we are a party. We have been a party-plaintiff since 1967, and we appear here as a party, and the brief should

have had a somewhat longer caption, as Amicus Curiae for those cases and for the United States as a party in this case.

I should also like to make it plain, though I assume it is entirely plain from what has gone on, that we do not support the Board here and never have. We have been with the counsel for the petitioners here fighting against the dilatory tactics of this Board for the past three years, and we still are, and we do not support the Board in the Charlotte case and never have.

In the District Court in this case, after repeated appearances of the case in the Court of Appeals, which are cited in the memorandum which we filed in connection with the petition for certiorari, we submitted a plan on January 27, 1970.

This was in fact based on one of the HEW plans, but with some modifications, and it was submitted then, following this Court's decisions last term requiring immediate action. It was submitted then as one which could be implemented immediately pendente lite, to remain in effect until the conclusion of the then-current school year, that is, until June 1970.

The District Court rejected that plan. On appeal to the Court of Appeals in expedited procedure and without oral argument, the Court of Appeals ordered the Government's plan into effect on a permanent basis.

That put us in something of a problem. Because it

was our plan which the Court of Appeals had approved, although we had not offered it as a permanent plan, we did not file a petition for certiorari. But we did file a memorandum with the Court, saying that we thought the decision would be reviewed, and because the petitioners were filing a petition we felt that it was not necessary for us to file a petition which would have involved our seeming, in a sense at least, to attack the plan which we had filed with the District Court.

Now, the two cases, Charlotte and Mobile, present perhaps the extremes of the situations which may come before the Court.

In Charlotte, the district judge applied perhaps as drastic a resolution as possible, and we have contended that he may have applied the wrong standard in doing that.

Here, in Mobile, No. 436, the Court of Appeals has entered what may be regarded as a minimal order, under the circumstances. It does include, specifically ordered by the Court of Appeals, a majority-to-minority transfer plan, so that no student is locked into any school where he is in the majority race.

Q Does that also include transportation?

A Yes, Mr. Justice, that includes a non-segregated bussing and, I believe, priority, that is the right to get into the school even against the contention that there are no places.

The order also includes allocation of teachers, so

that a great many of the steps which can be taken to remove the appearance of the school as being a black school or a white school have been taken.

In our view, it promises realistically to work and it promises realistically to work now, but, I repeat, on a minimal basis.

At the argument yesterday, it was suggested by Mr. Nabrit that our position here, and our position in the Charlotte bussing cases, were inconsistent. We did not seek to appear orally in the several cases that were argued in the latter part of yesterday, but we did file briefs and we do support the District Court in the Charlotte bussing cases, the --- District Court which held the North Carolina statute unconstitutional, Nos. 444 and 498.

But I believe that our positions in these cases are consistent. Our position here and there is that the Constitution requires the disestablishment of dual school systems, requires the disestablishment of dual school systems, requires affirmative action to disestablish dual school systems.

No more, but likewise no less.

In the bus case arising under the North Carolina statute, Nos. 444 and 498, we think that the statute interferes with that objective and so is invalid.

Here, we think that the order of the Court of Appeals does show promise of eliminating the dual school system, though

barely so, and thus we support the decision below.

I think that this point ---

Q Perhaps I am mistaken, but isn't there possibly a little question-begging in the statement of your position? Isn't the real issue here, what is required to completely disestablish a dual school system? The gentlemen on this side of the table say that the very disestablishment of a dual school system requires the elimination of all racially identifiable Negro schools, unless that is shown to be absolutely impossible.

And you say that once a dual school system is disestablished, then neighborhood schools are all right. That is skipping over the basic issue, isn't it? What is required to disestablish a dual school system?

A Surely the problems are very complex and highly interrelated. I think it is possible to oppose their argument in a form which says that the schools are not disestablished until no black student may be assigned to a racially identifiable black school at any grade level, which is the position for which they contend.

Our position is that is not required, that it is required not really to eliminate any discrimination now, which is what the North Carolina statute does. If we were starting out anew with a clean slate and were writing a picture for what America ought to be, we might well include the North

Carolina statute in it. But the statute was interposed at a time when there was a great deal of history and a great many practical consequences, and we think that the statute interferes with actions that must be taken in order to disestablish what had clearly been a dual school system.

Q Perhaps I should ask my question this way, Mr. Solicitor General. Your position, as I understand it, is that once there has been a disestablishment, a dismantling of a dual school system, then a neighborhood school system is constitutionally permissible.

Now, may I ask, what in your view does the Constitution require for that first step, to disestablish, to dismantle, a dual school system as a minimum?

A Well, Mr. Justice, let me start with a slightly different example which I want to use in my answer.

Suppose we had a school system where there was absolutely no trace of any prior discrimination, no dual school system ever, and nothing with respect to public housing or restrictive covenants or anything else, and we find that in this sytem a lot of people of German descent have come to this community, and a lot of people of Slovak descent have come to this community, and a lot of Negroes are living here and a lot are living elsewhere, and in that community we find a school which is all or 90% black, I would say that there is nothing in the Constitution which requires that there be any change in

that situation. In other words, if you can find a place where there is no past history of discrimination, I do not believe that anything can be found in the general language of the equal-protection clause or the due-process clause which supports the position that no black student may be assigned to a racially identified school at any grade.

Q Wouldn't you want to make that hypothesis include any past or present discrimination? You wouldn't rule out present discrimination?

A If there is any past discrimination or present discrimination, then steps must be taken to eliminate it. And how extensive, how drastic, those steps are, it seems to me, depends on two things: (a) the extent to which there has been past discrimination and the effect of that still continued, which is very great in Mobile and certainly considerable in Charlotte, and (b) on the other hand, on this problem on which we have not been able to find a word--and I have no doubt there never will be exactly one word, reasonable, feasible, absolutely unworkable--I think absolutely unworkable is too strong, I seized upon feasible because I considered it a considerably stronger word than reasonable, but it ought to be explained with words which indicate that strong action is required to eliminate past discrimination.

Q May I ask you one question? Why isn't the one word applied to all the schools whether or not there is

discrimination on account of race now?

A I think, Mr. Justice, that is clear, provided in the now you subsume everything that has happened in the past and which has its effect now.

And there is obviously enormous amounts of that effect in Mobile and a great deal of it in Charlotte.

And to eliminate discrimination now, you have to take steps to eliminate the effects of that past discrimination. In my view, it is not enough to say, well, we will just leave things as they are, but for now on we will be good. That seems to me to not take the steps which this Court has long indicated, beginning in Cooper and Aaron and Green and Montgomery County, must be taken to eliminate the effects of past discrimination, which effects are effective now.

Q What you are saying is that there has to be some race-mixing?

A There has to be some attention paid to race in the process of eliminating the effects of past discrimination.

Q Including assignments on the basis of race?

A On the basis of race, yes, Mr. Justice. But the touchstone is, we submit, the disestablishment of the dual school system.

Q Now, you bother me with that, Mr. Solicitor General. Now, the way you bother me with that is in trying to draw a distinction because something was done wrong in the

past, my understanding of the Constitution is that it forbids discrimination on account of race now.

A Mr. Justice, if that something that was done wrong in the past has a persistent and continuing effect which is present on the scene now, then, it seems to me, that action must be taken to negative that effect.

Q Even though it itself, to do that, would amount to discrimination?

A Yes, Mr. Justice, I think that is required by, I think that bridge has been crossed long past in the decisions of this Court, that actions must be taken to eliminate the effects of past discrimination. That is Green, that is Montgomery County. In Green the statute is on its face utterly non-discriminatory, but actually it doesn't work to eliminate the effects of past discrimination and the Court held it invalid.

In Montgomery County the Court held that teachers must be assigned because of race. We supported that. I was counsel in the case. The Court adopted it. And I had not supposed there was any ground to question that actions must be taken now, based on race, in order to eliminate the effect of past discrimination.

And we support that position. It is only a question really of how far that has to go. This, it seems to us, is what the Court ordered under the Constitution in Brown. It

is what the Court spelled out in Green and Montgomery County. And it is the standard which should be applied here.

There is today, as always, a tendency for legal thinking to be too much dominated by cliches. Perhaps this is true about racial balance.

There is likewise, I think, the possibility of great misunderstanding in the talk about neighborhood schools.

For what it is worth, to the best of my ability, I do not think that you will find the phrase "neighborhood schools" in our brief. You will find "neighborhood," and you will find "schools," and perhaps this is just a quibble.

But that phrase is used by some persons as a subterfuge for maintaining segregation. And I have seen that in my own area of our country.

There is no doubt that when applied in bad faith it can work out that way. I have no doubt, for example, that if it were applied in Mobile without any Court supervision, that it would work out that way.

And I am not appearing for such a conception of the neighborhood school.

As the President said in his statement of March 24, 1970, "While the dual school system is the most obvious example, de jure segregation is also found in more subtle forms. Where authorities have deliberately drawn attendance zones or chosen school locations for the express purpose of creating and

maintaining racially separate schools, de jure segregation is held to exist. In such cases the school board has a positive duty to remedy it. This is so even though the board ostensibly operates a unitary system."

And in the same statement, the President said, in referring to executive action, "The neighborhood school will be deemed the most appropriate base for such a system."

Note that he said "base." He did not mean that it was the sole method or the sole requirement. Many methods are available and are evidenced in the record of these cases, which will serve to eliminate or minimize the consequences of past official conduct.

Thus there can be truly impartial zones. There can be pairing of schools. And this is particularly relevant in the smaller communities which previously had dual systems with two schools. That was true of New Kent County--you have a black school and a white school, it is easy to eliminate the dual school system by saying one school will take grades 1 to 4, the other school will take grades 5 to 8.

And there can be closing of some schools and expanding of others. And there can be satellite pairing when the distances are not too great and when the corridor is not a clear gerrymander.

And, of course, there must be proper allocation of faculty and there must be elimination of discrimination in

bussing and in athletics and activities.

All of these things can be done and should be done as far as feasible in order to eliminate the consequences of past discrimination.

School boards are making decisions all the time. They will not have done enough if they simply establish properly designated neighborhood schools. They are making decisions daily--short-range and long-range. They ought to be required, when they make decisions, to make the choice that will tend to overcome segregation.

The decision-making process cannot be used to perpetuate segregation.

What schools are you going to expand? What programs are you going to promote? All of these things must be properly handled and are required in addition to the basic concept of having children, especially small children, go to school within a feasible distance of their own homes.

Now, turning to another matter, there has been some reference in these arguments to the Civil Rights Act of 1964 and the provisions that Congress included there with respect to bussing. What was in Section 407A of that Act, and the section specifically authorizes the Attorney General to institute for, or in the name of, the United States a civil action for a relief, and then it goes on and says that "provided that nothing herein"--the key word of that provision, "nothing

herein"--"shall empower any official or court of the United States to require bussing to achieve racial balance."

Well, this is not a suit by the Attorney General under Section 407A. There is no provision in that statute, or in any other statute, because somewhat similar things have been enacted as riders on HEW appropriation acts, which takes away any powers which the courts otherwise have. All this statute does is to make it plain that that statute does not add to any authorities which the courts might otherwise have.

Or, let me put it another way. It makes it plain that Congress is not, under that statute, making an enactment under Section 4 of the Fourteenth Amendment, which requires or specifically authorizes, that that kind of bussing be done.

I think that this statutory action, both here and in the appropriation acts, is relevant simply because it indicates that Congress has not sought an extension to require bussing to achieve racial balance which, in my opinion, though it is not here and I haven't fully considered it and it isn't briefed, but in my opinion is now advised, Congress could, in exercising its power under Section 4 of the Fourteenth Amendment.

All that I think that statutory language means is that Congress has not exercized such power.

Q You don't think that, under that supplemental clause, the Court could do that, do you?

A I think, Mr. Justice, that a Court can require

bussing where it is needed in order to provide the remedy to disestablish the present consequences of past discrimination.

Q Well, I don't understand you to put that on the same level as the powers of Congress, do I?

A No, Mr. Justice, I don't. That is simply a question of the Court fashioning a remedy to meet the right which it has established in the Brown case and several subsequent decisions, the right not to be discriminated against, and that includes not only present enactments but the application of present official decisions to fact circumstances which arose out of past situations.

Q How far past? I am thinking, for example, of my tate of Ohio which, up until about 90 years ago, allowed school boards to maintain and conduct segregated schools, explicitly allowed that. About 90 years ago Ohio repealed that statute and took away the power of school boards to maintain segregated schools, but I am sure there may be a good many vestiges of that former official policy.

A Mr. Justice, I would find it hard to answer that question without knowing more about the facts, knowing how persistent the consequences had been. I would think the chances were very great that it had washed out, but I can conceive ---

Q Certainly in the big cities of Ohio, as in the big cities of any other State that I am familiar with, there are neighborhood residential patterns which reflect racial

separation.

A I don't know how far back, Mr. Justice. I think if it can be shown that the effect of past discrimination persists to any substantial extent, then that is relevant.

Q But this question would raise a question as to whether or not restrictive covenants in housing practices are also in the category of de jure.

A It does.

Q Which is not in this case.

A It certainly is in the Charlotte case and I believe it is in the Mobile case.

Q 436. When you have a statute segregating the schools by races, it is hard to determine how much restrictive covenants ---

A I think that some of those things are somewhat attenuated, just as the historical instance of Justice Stewart has given. If you had only those and no more, the Court might say well, there is the stream of history, and you get eddies and swirls and not much of it is left.

But I think it is something that has to be considered and evaluated and passed upon. I don't say that the mere existence of it alone is a sufficient basis for a present remedy.

Now, there are a couple of other points to which I should like to refer.

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Q You mean if there was no history of a compulsory segregated school system,--my State of Washington has never had that by law--but if they had that ---

A Washington?

Q The State of Washington.

A The State of Washington, excuse me. I thought you meant the District of Columbia.

Q If they had shown on the record a pattern of restrictive covenants, produced these ghettoes, would you think that would be de jure segregation?

A Well, Mr. Justice, if it could be shown that schools had been specifically located to deal with particular groups and for that purpose, I think there might be something which would provide a basis for a remedy.

Q That wouldn't be because it is de jure or de facto, but because it was discrimination?

A Mr. Justice, it would be de jure because the decision to place the school there was the State action.

Q --- the central reason be that it was discriminatory action?

A All right, Mr. Justice.

Q On account of race.

A It was discriminatory action on account of race, the effects of which may still persist.

Now, I would like, in the short time remaining, to

make reference to two further factors to which very little reference has been made here, which seem to me to be very important.

The first is the problem of resegregation. A great deal of effort has been expended in trying to desegregate schools in many parts of the country, North and South, and it is constantly disrupted because of movements of population and withdrawals from schools, going into private schools, of which, I suppose, the District of Columbia is the clearest and most familiar example.

Mr. Greenberg said yesterday that, under his plan, in three years everything would be straightened out. I can guarantee that it won't be. Under his plan, under any plan, in any city there will be shifts and adjustments and it will have to be ---

One of the problems, it seems to me, in this area is not to require too much. If you require too much, you aggravate the problems of movement and withdrawal. If you set up a system which provides a good deal of elimination of past discrimination and provides some hope that it might be reasonably stable, you may achieve a great deal more in the long run than if you adopt the standard which counsel for the petitioner has advanced.

There is another aspect to the problem which is ---

Q I would like to pursue that for a moment, the

resegregation matter. In the experience of HEW or the Department, have you arrived at any rules of thumb or even more complicated rules as to what promotes or hinders resegregation? Is there a tipping point that you read about in the briefs or some literature, or not?

A Mr. Justice, they talk about it and I am not qualified to respond to the question.

Q Mr. Greenberg or Mr. Nabrit yesterday suggested that Judge MacMillan had in mind this problem in the remedy that he arrived at, in the sense that there was a Negro minority that could be educated in white schools without having or without reaching any tipping point.

A Mr. Justice, I have read about that as a member of the Civil Rights Commission. I read about it as a citizen. I see it. There certainly comes a place when white fleeing is accelerated or becomes complete. I am not qualified to respond to the question in any sense as an expert or even as a lawyer.

Q I would think that, if preventing resegregation is a consideration in devising a remedy, why you must have some basis for fashioning that remedy.

A I have no doubt, Mr. Justice, that there is a tipping point. What I am not qualified to say is where it is. I suspect that it varies widely according to the circumstances, including the opportunities to get out, either through moving

to other parts of the city or the use of private schools.

I would like to make reference to one other thing, which is black separatism, something that we have only begun to learn about in recent times and which many of us did not foresee.

But it is far from clear how far all of the people represented by the petitioners here want to have what they seek for them. Maybe they ought to have it, maybe it would be good.

Certainly, in my view, the public should facilitate their getting it whenever they want it, but it isn't clear to me that children should be forced into schools, that black children should be forced into schools that they don't want to go to.

I encountered this first in connection with predominantly black law schools. And we have, of course, the example of Howard University here, which, I suppose, everyone has the strongest feelings that it should be supported, the United Negro College Fund, and other such things. There still remains a problem as to how far black people should be forced into these matters.

And so I conclude that the judgement below in this case should be affirmed as an experiment. Of course, it will have to be watched to see how it works, including the good faith of the board and the diligence of the District Court

and the effects of supervening events, which will always be with us.

Q Do I understand you to say, Mr. Solicitor General, that objecting Negro children should be given the privilege of opting out?

A No, Mr. Justice, I didn't quite say that. I didn't say that at all. I just said that in evaluating the standard or the objective which is to be reached, that this is one of the factors, one of the intangible unmeasurable factors, like the problem of resegregation, that the District Courts surely ought to take into account. And, if so, it seems to me that this Court has to recognize it in some way.

Q What is the position of the United States as to whether or not objecting Negroes or objecting whites should be able to opt out?

A Mr. Justice, I think it is quite plain that when the plan is established, when it is adopted, there should be no opting out, except the majority-to-minority transfer which we have provided for.

What I am talking about is what kind of a plan should be adopted and should be approved. And I think it is relevant to take into account, in connection with that.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. Mr. Philips?

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ARGUMENT OF ABRAM L. PHILIPS, JR.

IN BEHALF OF BOARD OF SCHOOL COMMISSIONERS

OF MOBILE COUNTY ET AL.

MR. PHILIPS: Mr. Chief Justice, may it please the Court: Before we begin our argument time, we have some maps on an easel that we could not bring in because of the admission ceremony which we need to bring in now, if we may have a moment.

MR. CHIEF JUSTICE BURGER: Very well.

MR. PHILIPS: May it please the Court: I represent the Board of School Commissioners of Mobile County. My client was the defendant and the appellee below and is the respondent here.

I am advised by the Clerk that I have 45 minutes time for argument, but I must share this with another respondent, the Parent-Teacher Association, so I will attempt to limit my argument to not more than 30 minutes.

Q May I ask you, are you supporting or defending the judgement?

A Your honor, we ask that the judgement be overturned and sent back to the District Court for the formulation of a new plan in the light of certain principles that we hope the Court would reaffirm.

Although I am pressed for time to present my own argument, several assertions made by the petitioner yesterday

should not go unanswered, so I will rejoin just briefly.

Petitioner stated that the school board has changed its pupil-assignment plan from year to year and sometimes more frequently.

May I remind the Court that, since August of 1966, this school system has each year received an order of the Court requiring a new or changed desegregation plan, that since 1967 the student assignment portions of these plans have been devised by someone other than the school board, either the District Court, the Court of Appeals, HEW, or the Department of Justice.

Since 1970 we have been ordered to implement--since January of 1970--six different plans for student assignment in the desegregation process.

It is not the board that has been changing the plan. They are merely attempting, to the best of their ability, to carry out the orders of the Court.

Petitioner in its argument ---

Q Let me be sure I understand you. Are you telling us that the board has been ordered to implement six different plans during this year, all relating to the same subject-matter and the same area?

A Yes, sir.

Q These plans, by inference, I take it, are in conflict with one another in some respects?

A Well, they are different from one another, they take different approaches, they draw different zones. One was drawn by HEW, one by the Justice Department, one by the Court of Appeals, two by the District Court, several were superseded before they could be placed into implementation, in others the steps towards implementation began and then they were superseded.

Q Which one is in effect now?

A A combination plan that involves elements of a plan developed by HEW, modified by the Justice Department, ordered by the Court of Appeals, modified by the District Court, and remodified by the Court of Appeals.

Petitioner has framed his argument essentially in terms of results, not the Constitution, but results. So let me show you something of results.

Crag Head school, listed on Mr. Greenberg's map, is 76% black. This, in the time of the dual school system, was an all-white school. L--- 64% black, was at one time an all-white school. Osheo Road 80% black, at one time an all-white school. Palmer, at one time an all-white school, now listed by Mr. Greenberg as all-black. Glendale, at one time an all-white school, now listed by Mr. Greenberg as 70% black.

The same pattern goes throughout. Thomas, 62% white, once an all-black school.

Q Where is Interstate 65? That is the divider?

A That is the divider.

Q And in terms of residential pattern, -- show what the racial makeup is of those who live east of that divider, those who live west of that divider, in Mobile?

A I think east of the divider it is roughly 60% black, 40% white. West roughly 70% white, 30% black.

So this is some of the results, if we wish to frame things in terms of results, rather than in terms of complying with the constitutional mandate.

Now, let us turn for a moment to another question that was raised, and that is the question of the effects of past discrimination.

Petitioner relies heavily on the fact that bussing to preserve segregation occurred in the past, and this is freely admitted in the brief. They point to examples of bussing where students, for example, in this area, which is in the rural area--and I might remind the Court that this is a map of metropolitan Mobile, Pritchard, and Chickasaw, three cities with coterminous boundary lines.

This is roughly 18 miles from north to south and 13 miles from east to west. The county itself is 53 miles from north to south and 27 miles east to west, from the river to the Mississippi line, from the Gulf of Mexico north.

With reference to the bussing, students carried from this area, black students bussed to this area four or five years

ago into this school, unquestionably this occurred. But these students are no longer bussed and have not been bussed for four or five years.

How can it be contended that there is any effect left from the dual system as the result of bussing thirty students from here to here five years ago?

Certainly it was in effect at the time, but we are dealing with a presently existing effect of a once dual system.

The same thing occurs with reference to split zones or non-contiguous zones that petitioner referred to yesterday with reference to the Whistler and Thomas schools, indicating the fact that Thomas, an all-Negro school, Whistler, an all-white school, and people from this area where, at the time, there was no school, went past the Thomas school to the Whistler school.

There again, this occurred four or five years ago. Where can there be any present existing effect from this, as it exists now, when you consider that Thomas, which was once an all-Negro school, is now 62% white and has been for two school terms, predominantly white? And Whistler, which was at one time all-white, is now 52% white, although last year it was predominantly Negro?

Petitioner has stated that Mobile has never adhered to the neighborhood school concept. This is incorrect. And I must adopt, at least in part, the language of the Solicitor

General with reference to the cliches or seizing upon words, such as the neighborhood school concept.

As the record will show, the Mobile school system has always adhered to and favored the neighborhood school concept, based upon specific geographic zones, except when ordered by the Court to do otherwise.

Admittedly, prior to the disestablishment of the dual school system, at one time there existed the dual zones, overlapping zones, one zone for blacks, one zone for whites, superimposed upon one another. This has been disestablished and was disestablished as much as four years ago by the simple elimination of both zones, redrawing a zone around each school, a unitary zone, so that every person, black or white, goes to the school in the zone, regardless of the present or past racial makeup of the school.

Admittedly, prior to the disestablishment of the dual system, there were these overlapping zones, but they no longer exist. And it should be observed, in its adherence to the neighborhood school concept, as a concept, the Mobile board opposed freedom of choice when this first concept, looked upon apparently as a panacea which didn't pan out, first came upon the scene.

Admittedly, several years after the freedom of choice concept, which was foreign to the Mobile school system, came upon the public scene, the board, through public pressure,

was forced into asking the Court for freedom of choice. But we have never had freedom of choice in the Mobile public school system except when it was specifically requested by motion of the Justice Department for freedom of choice in the rural portion of the system.

Q How long ago was that?

A Freedom of choice?

Q How long a period?

A Your honor, I think it came in the decree of the District Court in July and August, 1968. The District Court entered a decree on July 29, pursuant to a motion to amend by the Justice Department. It entered a supplemental decree on August 2, three days later.

Q What individuals were given freedom of choice?

A I am sorry, I didn't hear the question.

Q Who was given freedom of choice, pupils or parents?

A It was a Jefferson-type freedom of choice, allowing the pupil above a certain age or, for the younger pupils, the parent should exercize the choice in his behalf.

Q Was it wide-open freedom of choice? Majority-to-minority, minority-to-majority, both races?

A Yes, it was full freedom of choice within the terms of freedom of choice as specified by the Jefferson decree. If you recall, the Fifth Circuit Court of Appeals in

Jefferson spelled out very specifically and minutely a method of applying a freedom-of-choice plan, and this was adopted by the District Court and ordered for implementation in a portion of the system.

Even there, the freedom of choice was limited to the rural portion of the system, which is not shown here.

Q Then it is not very much at issue in this case, is it?

A No, sir. I simply point it out from the standpoint to show that the school board in adhering to its favoritism for the neighborhood school concept, even opposed that at the time it was placed upon us.

Q Well, inherent in the board's neighborhood concept, race was involved, If I understand you correctly, in a ten-block square area, where you have both white and Negro students, you had two neighborhood schools.

A That is correct.

Q One white, one black.

A That is correct.

Q Could I conclude from that that tied in with the phrase "neighborhood school" is "segregated"?

A It was at that time, under a dual system, a dual set of zones, but we have disestablished the dual system, we have disestablished the dual zones.

Q In every area?

A In every area.

Q Of the city?

A Of the city. And the county.

Q Well, I am only interested in the city, if you don't mind.

A All right, sir.

Q In the city itself, you still have all-black schools?

A Yes, sir.

Q And all-white. How many?

A As I recall, we have seven schools that are literally all-black or all-white, two of them all-black, and five all-white. This is throughout the entire system.

Q And out of a total of how many schools?

A 83 schools.

Q Are the two all-black elementary schools?

A Yes, sir.

Q And the five white elementary schools?

A I believe they all five are, yes, sir.

Q And all in the city?

A No, sir.

Q Where are the two all-black schools?

A The two black schools are within the city, they are within this eastern portion.

Q What do they call that community or neighborhood

or whatever it is, where the two all-black schools are?

A One is Brazier and the other, I think, is Grant.

Q Is what?

A Is Grant, but I am not certain. It is set out in the supplemental brief for the petitions.

Q Why are they all-black, according to your judgement?

A It is Brazier and Owens. They are black, in my judgement, because--well, if you will notice Brazier, it is difficult to see it, it is bounded on its western edge by the belt line of Federal Interstate highway. The zone is rather symmetrical, the school is on the far edge of the belt line.

No matter how far you extend this zone, this is a predominantly black school, an all-black school, as listed by Mr. Greenberg. This was once an all-white school, but it is now all-black. And this school, which was once all-white, but it is 67% white now, so it is hemmed in by the belt line on one side and essentially by all-black areas on the other.

Q Are all the people who live in that zone black?

A I think they are, your honor, I think they are. I am not aware of any white students living in that zone.

Q But there are several other schools that would have no more than 10% white?

A That is right. I said literally all-black.

Q And there are two or three schools, two white, three white, something like that?

A That is correct. Let me call your attention to page 3 of petitioner's supplemental brief.

Q 2 and 3.

A 2 and 3. Look at page 3 to the high schools. Blount High School, black 2,033, white 41. This is the actual enrollment. The zone drawn by the Court and assigned to that school is 1233 black, 1041 white--out of 1041 students, 41 are in attendance.

Q Where did the 800 blacks come from?

A Your honor, I don't know.

Q Where did the 1000 white people go, white students?

A I have a better idea as to that. We know, as the record has indicated and as I have indicated in my brief, this school system since 1965, when the population of Mobile has increased constantly, and the school-age population even more proportionally. While the population has continued to increase since 1965, the school enrollment has gone down. We are now some 10,000 students less than we had in 1965.

We know that many of these students have enrolled in private schools, we know that many of these students who were supposed to be in the Blount zone, as assigned by the Court, have simply moved their residence--some within this

county, some to other places, perhaps some to other parts of the country that has not yet faced this problem.

Q Do you have the figures for all the other schools ---?

A Yes, sir.

Q I mean the actual attendance as compared with what the Court had contemplated?

A They are before the Court in this respect. In my brief I have a chart at page 7 which shows the assigned enrollments according to the assignment made by the Court.

In the supplemental brief of petitioner, they set out the enrollments as of October 2.

In 1963, when the desegregation litigation first began in this school system, it was, in both a legal and a practical sense, a dual school system.

Q One other question before you leave the point you were on.

A Yes, sir.

Q You have just referred to a district where it is all-black.

A Yes, sir.

Q What is the argument of the others as to how you could get white people into that school ---?

A Your honor, the District Court, the Court of Appeals, HEW, and the Justice Department, along with the

34 school board, have struggled with that problem for three or four years, and we have not been able to do it.

Q I mean what is the argument of the other side as to what you should do to change that school from all-black into having some whites? What would be required by their arguments?

A Either to close the school--and we have closed, during the process of this litigation, 16 schools, 12 of which were all-black at one time, in an effort to eliminate all-black schools.

The only other solution they suggest is to pick out a white or nearly all-white school and cross-bus it.

Q You mean pick out another area?

A Yes, sir.

Q Pick out another area and cross-bus students, so that you can put the whites into that and some of the blacks into another?

A Yes, sir. If I may, I will borrow another of Mr. Greenberg's maps. An example of that is the thing they would do with Thomas school and Whittley school. This is the plan drawn by HEW, the plan B-1 Alternative, by which HEW proposes to do all of this cross-bussing.

This is where every two or three attendance areas within the system are paired together. For example, Dodge, Owens--this is roughly 13 miles. Williams, they make a

three-cornered --- of these zones. They send every student in grades 1 and 2 from all three zones to one of these schools. That means bussing 15 miles from here to here and 9 miles from here to here.

They send every student in grades 3 and 4 from all three zones to this school.

Q Does that mean sending some of the blacks on a 13-mile drive away from schools that are close to them?

A Your honor, it means sending both blacks and whites.

Q Well, I was going to ask about whites, too. It means sending both.

A Yes, sir. If there are blacks and whites in this zone, and there are--there are 45 black students, along with 500-odd white students in this school--you arbitrarily take every first and second grader in this school, black or white, and bus them up here to this school.

Q I assume that there are some people who live in that vicinity who have children of different ages, of different grades?

A I think that is a fair assumption.

Q And that would separate the children?

A Yes, sir.

Q So that one of them would have to go to a school 13 miles away and another to one close to him?

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A Of necessity it would. In this case there is a three-cornered pairing, three schools. The first grader would perhaps go here, the third grader would go 13 miles by bus here, the fifth grader would go 9 miles by bus here.

Most of the pairing is of two schools, but there are two or three instances of three-cornered pairing.

Now, some of this plan that HEW has proposed to deal with this problem, defies reason. I will give you an example of that.

The --- and Whistler schools.

Q Is Whistler a part of Mobile?

A Yes, sir. It was a separate community at one time.

Q It was a different city, wasn't it?

A Yes, sir. It is in the city of Pritchard at this time.

Q It is in what you call Greater Mobile?

A Metropolitan Mobile which includes the city of Mobile, the city of Pritchard, and the city of Chickasaw.

Whistler, here, and it is labelled Willma on the map--the school is actually Will, W-i-l-l, Willma is a community out in the county. It is roughly 9 miles between the two schools. Willma, or Will, was once an all-white school zone, or school; Whistler was once an all-white school.

The enrollment now at Will is 652 white and 160 black.

The enrollment at Whistler is 227 white and 160 black. Both schools have 160 black students, one with 227 whites and one with 652 whites.

And yet you are bussing back and forth.

Q Is that in the Court's order that you attack it?

A No, sir, it is in Plan B-1 Alternative drawn by HEW which petitioner is urging.

Q That is not required by the judgement of the Court you are attacking?

A No, sir. But this is what the petitioner has asked pendente lite.

Q Mr. Philips, are those the lines that the school board drew?

A No, sir, these are the lines that HEW drew.

Q No, I mean the district lines, the zone lines, they are not yours?

A No, sir. That is what HEW drew. Another example of this is Thomas and Whittley. Here is Thomas, and Whittley. Both of these were at one time all-Negro schools. Thomas now has 74 black students and 160 white; Whittley has 345 black students and 127 white.

Q If you should win, would that condition continue with reference to the personnel of the school?

A Yes, sir. Of course, we ask that it be sent

back to the District Court for formulation of a plan in light of certain principles which we hope would eliminate some very grossly gerrymandered zones. That I may be able to get to in a later portion of the argument, but I may not.

I would like now to respond to a question that has been raised a couple of times by the Chief Justice and by others, and that is with reference to the necessity of the Court to continue to balance schools, once we move to a purely result-oriented constitutional theory.

And I suggest to you this. Absent the power of the Court to force people to attend public school--and I might mention to you that there is no applicable requirement that, by law, that a student attend school in Mobile, Alabama, no compulsory attendance law--absent the power of the Court to force people to attend public school and absent the power of the Court to restrict all people, black or white, rich or poor, in the movement of their residence, then the Court will forever and eternally be in the business and process of balancing. The balancing process can never end.

What better example of this can I give you than the supplemental brief filed by petitioner the day before yesterday? I quote from the report in the brief where they purport to set out the students assigned by the Court order that is here attacked. The report shows that there are 11,894--and I am quoting--"11,894 black elementary students in metropolitan

Mobile. The percentage of those assigned to all-black schools is 64%."

Then they proceed to list these enrollment figures. They do not draw the distinction between those assigned by the Court and those actually enrolled. The figures they quote are those enrolled, not those assigned by the Court as a consequence of the Court order.

And so we get back to the figures I have quoted before of Blount High School where the Court assigned 1233 blacks 1041 whites. And it comes out an all-black school, with 41 whites enrolled and 2033 blacks enrolled.

Or Washington Junior High School where the Court assigned 780 blacks, 636 whites. There are 809 blacks and 59 whites enrolled.

And the same thing appears throughout.

When this litigation first began in 1963, as I described, there is no question but what we had a dual school system. But this dual school system has been disestablished.

In 1967, after a full evidentiary hearing, the District Court in an exhaustive opinion and finding of fact, after hearings spanning some four weeks, found and stated that the dual system had been disestablished in every particular described by the Courts, except the element of faculty and student assignment.

There has been no finding to the contrary by any

Court since that time--and that covers transportation, athletics, extracurricular activities, facilities, activities and programs.

This finding was reconfirmed as late as the June 8 1970 opinion of the Court of Appeals.

The two areas labelled as deficient by the District Court in 1967, faculty assignment and student assignment, these have since been rectified.

Faculty by the assignment of teachers so as to create a bi-racial faculty in every school in the system but two, two years ago, in every school in the system but one, last year--and that one, I might mention, is a school isolated on Dolphin Island in the Gulf of Mexico with 20 white students in the school.

Q And only one teacher?

A And only one teacher.

Q It could hardly have a bi-racial faculty.

A I hardly think so. This year, of course, in order to comply with the order of the Court, which requires a 60-40 racial balance in every school in the system among faculty, the personnel department has been engaged in a tragicomic game of fruit-basket turnover in order to try to meet this requirement of 60% white faculty and 40% black faculty in every school in the system.

But we have come up to the terms of the order, give

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or take a few, and in our brief I listed the actual faculty assignments for the year, including the number of assignments yet to be made in order to reach the ratio.

Q Mr. Philips, I hope it doesn't interrupt your chain of argument, but I am concerned about these missing students, 1000 in the one school, the all but 59 out of 636 in another.

A Yes, sir.

Q Has anyone made any inquiry as to whether or not they are just drop-outs, since you say there is no school compulsory attendance, or whether they moved out of the district or how many went to private schools, or what. Has that been pursued as part of the record?

A Yes, sir. Well, it is not in the record, because it has come so late, you see. The enrollment figures are as of October 2.

Q Could the record be supplemented readily to disclose what happened to these people?

A It will disclose within reason, because we won't be able to locate each one, but we know where many of them are. For example, if you total up the difference between the assigned students, assigned by the Court order, and those enrolled, you come to a total of approximately 2000 or 2500, as I recall. I may be wrong in my figure, I think it is around 2500.

The total enrollment is down from last year over

42 4000, so we know, within reason, that many of these missing students are within this 4000, simply did not re-enroll in public school this year.

We know others have changed their residence. We know others have been granted transfers. We know others are simply not going to school this year.

Q Transfers on a hardship basis, for specific showing?

A Your honor, the transfer policy is set out as an appendix to my brief. The transfer policy specifies transfers, first the majority-to-minority transfer provision requiring that you furnish transportation and guaranteeing ---. This was required first by the District Court and then reaffirmed by the Court of Appeals.

The other transfer provision is in order to obtain a course of study not available at the school where you attend.

And the other is for any good cause non-racial in character.

And, while we are on transfers, I might mention this. This year we received approximately 3600 transfer applications, where the normal number runs between 4 and 600 each year.

It is surprising the number of transfer applications which attach a doctor's certificate attesting to the need to transfer of the child into a stable school in order to maintain or, what is worse, to regain the physical and mental wellbeing

of the child.

Q How many of those are white? Do you know how many are white and how many colored who ask for transfer?

A Your honor, I think it runs close to the proportion of white and black students in the system, approximately 60% white and 40% black--I think the transfers run as much as 80% white and 20% black, but I would not wish to be held to that figure, because this is just my recollection. I did not comment on this in my brief and I don't have the exact figures.

Q Do you have any record showing how many of them wanted to be transferred to get away from long bussing?

A Your honor, I think we had quite a few that would fall into that category. If I might get into that--if I could get the Clerk to help me move this map and get the other map.

Q They are not allowed to give that as a reason, though. That is not a permissible reason under the existing system?

A No, sir.

Q Well, they have to give some other reason.

Q Does this new map you have started on show zones also?

A Yes, sir.

Q Who drew those zones?

A Your honor, the map I am going to get to, you

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see the junior high zones that are now in implementation as drawn by the Court.

Q The Court drew the zones?

A The Court drew the zones. These are the junior high zones.

Q And the other one is the HEW zones?

A HEW zones, yes, sir.

Q Do you know how many of them were --- in Mobile?

A The HEW ---

Q Any people who drew those zones?

A Your honor, the HEW zones were drawn by HEW experts, one from Washington, one from North Carolina, and one from Miami, Florida. These zones were fashioned by the Court of Appeals and the District Court. Of course, the District judge is a resident of Mobile.

These are the junior high zones. If you will look at Central Junior High School, the zone is a long, narrow zone running diagonally, from northeast to southwest.

Central Junior High School, which is right here, was once a high school but by the Court was this year reduced to a junior high school.

The two other junior high schools near the tip of the zone, Haynes and Hall, both are integrated junior high schools.

Students down here at the tip of the zone are within

walking distance of Haynes and Hall. They are roughly 4 miles from Central diagonally across the heaviest traffic part of the city of Mobile, this being the central city of Mobile lying on the river.

Many of these students that are not going to school--and Central is one that is in the figures that you will find, where 231 white students and 1563 Negro students were assigned, and 1508 Negro students and 17 white students enrolled--many of these students simply can't get to Central.

The Court drew the zones. Now, Mr. Justice Black directed his question towards bussing. The Court didn't say bus them. The Court simply drew zones and left them to get there as they will.

Q But in high school that would presumably be by public transportation, would it not?

A No, sir. This is junior high school, beginning with grade 6.

Q Beginning after grade 6?

A Grades 6 through 9.

Q I think you had your signal on division of time and --- observe it.

A Yes, sir. Thank you, your honor.

Q Thank you, Mr. Philips. Mr. Stockman?

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ARGUMENT OF STOCKMAN

IN BEHALF OF THE MOBILE COUNTY PARENT-TEACHER ASSOCIATION

MR. STOCKMAN: May it please the Court: Mr. Chief Justice, your honors, I present an argument on behalf of the respondents, Mobile County Council PTA, which is an association of the PTA associations of the various schools in the system.

The PTA got into this case as an intervenor--I think Mr. Philip's statement in the record in this case will indicate the problem that the PTA, or the members, the parents, the teachers and the students were faced with.

The number of changes that we had seen in the last few months is absolutely devastating. I don't think any one of us in this courtroom could live with the changes which these people have had to face. And each one was highly publicized in the newspaper because that was part of the order.

When the District Court made a change it was publicized and each of the parents get ready--I have one child over here and one over here and one over here. Next month, next week sometimes, there would be a revision either by the District Court or by the Court of Appeals.

---I think basically we were concerned with the fact that the people in Mobile wanted the neighborhood concept, they wanted neighborhood schools, they wanted convenience.

Q What do you mean by neighborhood schools?

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A By neighborhood schools, we are talking about communities. Mobile, as Mr. Philips may have pointed out, and I would like to reiterate just a couple of points, that the concentration of the colored or black population lies right in this area, with a few in here.

Now, this is a densely populated black area. Mobile is a rather large city, or the metropolitan area is rather large, 155 square miles in the city itself. But all of the concentration--and another thing that makes it more difficult, is the fact that on this side, you will see this water, this is nothing but marshland and ---, there is only one tunnel going under the river to B---- County, and then up here there is this one bridge. I mean, this is just a demarcation, physical impossibility.

And nestled against the bank of all this water is the black community, you see. And all the rest of the city, the county, is located to the west and to the north and to the south. So the difficult problem is not even like the Charlotte case, which had the community nestled in the middle where you could go out inttwo directions or four directions at least.

In addition to that, since we are on the junior high level, you can see why Washington, and I don't know whether you Justices can see it well, but I will get it up a little higher--this zone right here is the Washington zone, which Mr. Philips and Mr. Greenberg have both discussed the fact that

48 people didn't even attend. But you will see the school sitting way up here in a predominantly colored neighborhood. And you will notice right here, this large pocket of students here that previously went to one of these other schools either right across here a few blocks or here a few blocks, now travel as much as 12 in the arteries to get there, impossible.

Q How far?

A Some of them 12, 15 miles, just around streets to get there, in heavy traffic at the time of day which is impossible. I think this Court is faced with one simple problem--I say simple problem, it is very complex--well, I think there comes a time when we are going to have to face up to the real issue, whether or not the constitutional right of the individual, who has any constitutional right at all to determine where he goes to school, maybe that is oversimplified, but I think the real issue ---

Q Mr. Stock , do you consider a junior high school a neighborhood school?

A I would think that in the context of my client, the Parent-Teacher Association, every school is a neighborhood school.

Q Every school? In a city that has one high school, the high school is a neighborhood school? You don't mean that certainly.

A I mean it from the standpoint of my client.

When I say that, simply this, Mr. Justice Marshall, is that every parent feels an obligation to participate in the educational institution which his child attends. And this is an obligation that you feel in Mobile I guess just as much as you feel in any other community.

They feel an obligation to participate as a community in every school, no matter which school it is, whether it is bi-racial or not, they participate in the activities.

And the tragedy of the whole thing is, as Mr. Griswold pointed out, is that these people, some of them, we are losing out of the schools, Mobile is losing to private schools and otherwise, some of the people who are leaders, the parents who would otherwise be leaders and instruments in causing these schools to become a part of the community.

Even an underprivileged child, under the --- of the PTA Council in a given school, receives many benefits from the Council itself, or from the PTA itself, because of the fact that it makes the people more interested or more instrumental in the schools.

If we take the issue that is squarely before the Court, as I see it in this case, it is not the issue of whether a child is bussed one mile, or two miles, or four miles, or twenty miles. The issue is the fundamental constitutional right of the individual to be compelled to attend any particular school solely on the basis of race.

We need know nothing else but one thing to make assignments under the plan sought by the petitioner, that is, the race of the child.

If you know the race of the child, we can assign him. Without that, we cannot. And this is being made the sole basis of this whole plan. The school board, the courts, and others, have tackled this problem for seven years, and it is a physical impossibility to condemn, put children in school under the plan proposed by the petitioners.

There is no adequate public transportation in Mobile, the transportation company went broke. It collapsed, and the city picked up the transportation system in its hands and is now running an extreme deficit. There are no adequate bussing facilities. There is a minimal amount of bussing done in the semi-suburban area, simply because people live so far from the schools that are built because the schools are or don't accommodate them.

In the county there is bussing, as in all rural counties. But, at the same time, we have a problem here of the people in the system getting their children to school under this plan, because every child would have to be bussed in every grade almost, under this system, and there just aren't adequate buses even with a two-million, three-million dollar budget, which Mobile does not have.

Q I have one question for you.

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A Yes, sir.

Q Is the PTA of Mobile composed exclusively of whites?

A No, sir.

Q Or of whites and colored?

A No, sir, it is whites and colored. Now, I might clarify that, Mr. Justice Black, in that there was in the past, under the dual system, two different associations. They have had some trouble getting together in their representation and, as a result, our organization, representatives, making up three members from each school that represented blacks and whites.

And so the PTA Council that we represent does have on the Council the Council organization of three representatives from each school, consist of blacks and whites.

And we just ask the Court to consider the fundamental constitutional issue, the feasibility test, the reasonable test, or any other test which might be applied, first of all, I think, we must apply the one question as to whether or not that test violates the constitutional guarantees of the individual who has an individual right, a constitutional right, to not be forced to go to a school or excluded from a school.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stockman. Mr. Greenberg?

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ARGUMENT OF JACK GREENBERG, ESQ.

ON BEHALF OF DAVIS ET AL.

MR. GREENBERG: Mr. Chief Justice, and may it please the Court: There has indeed been a great deal of confusion in Mobile, and that confusion has stemmed, in considerable part, from the fact that Judge Thomas has not given hearings at any of these plans for a period of two years.

And, as an example, I would like to point to the question of the missing students. One reason why there are some missing students is there has been a loss of population of approximately 17,000 over the past few years in Mobile because of the closing of the B---- Air Force Base.

But another reason is is that there is something down there known as non-conformers, children going to school as they please, where they please, in violation of the Court order.

Mr. Cooper and I went in to see Judge Thomas about two weeks ago to get a hearing on the non-conformers, and he said he would set it for some time in November. We pointed out that we thought there was some urgency to setting it, and setting it soon, because school was going on now, and he said he would set it in November and if we disagreed we could go to the Fifth Circuit.

That is why we have had confusion in Mobile and why it is very difficult to understand what is going on.

Q Mr. Greenberg, is there an answer to why some

800 more blacks, for example, are in Blount than were assigned there?

A Well, there have been wholesale transfers of students, again in violation of the order, and only last week the Justice Department was able to get a hearing before Judge Thomas and get a temporary restraining order against that.

But it may be partly wholesale transfers, it may be partly non-conformers.

Q Voluntary transfers or involuntary transfers?

A These are voluntary transfers granted in violation of where the assignments ought to be under the order.

Now, Alternative B-1, contrary to what Mr. Philips and Mr. Stockman said, is not a plan we are urging upon this Court, since we cannot urge it with any confidence. There has never been a hearing on that.

However, it is a general notion of the kind of thing that can be done if one wants to assign students according to normal systems of school administration in Mobile, and end up with an integrated system.

Q Before you leave the question Justice Brennan was putting to you, you said there were 800 Negro pupils more than were assigned to the school, and I want to get a little bit clearer picture of what is the explanation for it.

A I don't know.

Q Was some of it voluntary and some of it not?

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A I don't know, Mr. Chief Justice, we have been unable to get a hearing.

Q Could any of them be there involuntarily?

A Well, the answer is I just don't know. The thing that we have focussed on mostly is, first of all, wholesale transfers. We don't know to what extent they are voluntary. If they are involuntary, we don't know whether or not they have been coerced or suggested in any way.

We do know there are large numbers of so-called nonconformers, children going to school without official assignment, just attending schools, and we have not been able to get a hearing. And indeed there is confusion down there, but I can ascribe a good deal of it to what I have just said.

Q Judge Thomas has not given you a hearing, any hearing at all at any time?

A There have been hearings at various times. The plan that is in effect was put in following a pre-trial conference, but a trial was never held. It was just put right in by Judge Thomas without a hearing.

At an earlier stage we made a motion to the Court that, had this thing not occurred several times, saying that we would like a procedure set down for filing objections and papers and having a hearing, and it was denied.

And that is all set forth in our brief and it is in the record.

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May it please the Court: Despite the considerable disagreement over the matter discussed in the last moment or two, there has been, nevertheless, a remarkable amount of agreement among the parties and the courts below, with the exception of the Moore plaintiffs, who feel that nothing at all ought to be done, and the respondents in this case, who have not addressed themselves to the question of what ought to be done--everyone appears to agree that race can and must be taken into account to undo the effects of a de jure segregated school system.

The Fifth Circuit has moved lines and it has gerrymandered. The Fourth Circuit has done that. And indeed in the Swann case itself, has approved bussing and non-contiguous zoning for junior high school and high school students.

The Solicitor General advocates gerrymandering when he feels it is appropriate, building schools, closing schools. The Charlotte school board believes it can gerrymander in the face of the advice of its counsel, but its counsel thinks it can locate schools but not new school zone lines. The Athens board believes that it can do what it calls pocket bussing, which is what we call non-contiguous zoning or clustering.

Judge MacMillan believes that relief should be effective and he should a variety of techniques to achieve a result of no identifiable Negro school.

We urge, in the Mobile case, that the judgement

below be reversed, that the case be sent back in accordance with the principles of Alexander v. Holmes County for hearings, and a time table as suggested by Alexander, that a plan, not Alternative B-1 devised by HEW, but a plan of that general nature, using the techniques that have been available in Mobile, be employed, and that the test be one of results, not anything else.

Now, I would say in further response to the Chief Justice's question of yesterday, which was essentially when can the Federal Courts get out of this business, that the Federal Courts will get out of this business as soon as the results are achieved, when an identifiable clear test is decided upon, and people know what they have to do, where, in Mobile, as an extreme example, they haven't had the slightest idea.

Q Now, you said a moment ago that it seemed to be agreed that race could be taken into account in the dismantling of a dual system.

Now, one of the complaints made with respect to Judge MacMillan's order, which we are not revealing now but it would perhaps relate to others, is that 71-29 ratio mechanically applied is doing more than taking it into account.

A I don't believe he did that, Mr. Chief Justice.

Q I am not suggesting he did precisely, but I am saying that if you had 71-29 and then applied that rigidly,

57 you certainly would be doing more than taking it into account, wouldn't you?

A We would not urge that. We do not urge that.

Q Wouldn't you think, Mr. Greenberg, that a 71-29 population pattern would be satisfied by variations in various districts that would go some 80-20, some 60-40?

A I think certainly that in many cases that would be satisfied.

Q How large a variation from the precise 71-29 pattern do you think is tolerable?

A I would then have to look at the workability test. In one aspect of that, at the general distribution of population of the community. In another aspect--I think Judge MacMillan handled it quite pragmatically, he had a 4% school, and he had a 40% school. He did not insist upon a rigid ratio. We don't.

But just as in the jury case which had been spoken about, which I think are really not appropriate in many respects, the universe is larger, you are not dealing with 12 people, you are dealing with 900 people. You do look at the numbers to get some idea as to whether or not there has been too wide a deviation.

It is impossible to come to a judgement without looking at the numbers. In a 90-10 it would be one thing, in a 50-50 district it would have to be another. You can't avoid

looking at the numbers.

Q If there isn't some room left, some substantial room left for play in the joints, you are bound to have a constant problem of reapportionment, aren't you?

A You are entirely right, Mr. Chief Justice, and Judge Johnson in --- v. Montgomery County Board of Education case, which was reversed by the Fifth Circuit, which was in turn reversed by this Court and Judge Johnson's orders reinstated, he set up a ratio, I think it was a 60-40 ratio, if I recall correctly, and allowed a 15% deviation, because he needed something he could administer.

When he was talking to the school district there in terms of generalities and not in terms of results, it just didn't work. When he had something he could administer, he then had something that was clear, they had an order they could follow, and, as far as I can tell, it has worked very well, not only there, but in hundreds of districts around the country.

May it please the Court: Sixteen years have passed since the first Brown decision was handed down by this Court, and in Mobile, as in hundreds of cities and towns across the south, black children born in the year of that decision have completed their entire public school career without ever attending a segregated school.

The record of district-by-district resistance to the Constitution is well-known to this Court and I will not repeat

it here, but I do urge upon this Court now, in 1970, as it last begins to appear that more than a decade and a half of litigation is bearing in desegregation decrees, whether litigated or consented to, it is essential to the integrity of our legal structure and to the faith--Mr. Griswold spoke about black separatism--I mean the faith that the effectiveness of the remedy fashioned by a District Court comport with the momentous nature of the constitutional right which is to be assured.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg. Thank you, Mr. Solicitor General. Thank you, Mr. Philips, Mr. Stockman. The case is submitted.

(Whereupon, at 11:40 a.m. the argument in the above-entitled matter was concluded.)