Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 498

MRS. ROBERT LEE MOORE, et al.	
Appellants	
vs.	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.	
Appellees.	

Place Washington, D. C.

Date October 13, 1970

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Appellants,

vs. No. 444, 498

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Appellees.

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

The above-entitled matter came on for argument at 10:10 o'clock 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
HAROLD BLACKMUN, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Moore vs. Charlotte-Mecklenburg, No. 498.

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

WHITEFORD S. BLAKENEY, ESQ., ON BEHALF OF APPELLANTS

MR. BLAKENEY: Mr. Chief Justice, may it please the Court, I believe that this Moore case will furnish to the Court more truly than is to be found elsewhere in the Charlotte-Mecklenburg litigation clarity and certainty and, indeed, their solution for the problem with which the Court is now wrestling.

These qualities emerge, if the Court please, first, I think, because in this case and only in this case are there individuals before the Court pleading their constitutional right against the compulsions which have been imposed below.

This Court has often recognized, of course, that that puts constitutional questions in its clearest light.

Furthermore, if the Court please, the compulsions which have been imposed are all opposed by these Moore plaintiffs for whom I appear. They do not accept some and reject the rest. They oppose all the compulsions of racial nature which have been fastened upon them below.

By contrast, as Your Honors will have noted, the plaintiffs in Swann, of course, in the District Court below, to be sure, support all the compulsions which have been imposed.

On the other hand, the Charlotte-Mecklenburg Board of Education, defendant in this case, acquiesces in some of the compulsions and oppose some of them.

The Solicitor General acquiesces in such as may be regarded as reasonable -- pardon me, the Solicitor General more specifically in such as may be regarded as feasible. And the Circuit Court below, in such as may be regarded as reasonable.

Q Are you able to draw any dictionary distinctions between those two words?

A I myself am not able to draw any distinction satisfactory to myself, Your Honor.

In any event, we stand against all the racial compulsions, and that is our posture in this case. And from beginning to end, our position may be summarized thus briefly:

We obtained an injunction below which expresses it. This injunction said to the Charlotte-Mecklenburg Board of Education and to any agency imposing these compulsions, it said do not bar any child from any school in Charlotte-Mecklenburg because of his race, and do not assign children to any Charlotte-Mecklenburg school on the basis of race.

This is our theme, as I say, at all stages.

Q Your clients are who, Mrs. Moore --

A And others. I don't need to know their names. I am not interested in that. But they are the parents of white

public school children as well as Negro public school children.

Q Both?

A Both, Your Honor.

Q What do you do about the problem of disestablishing the de jure segregated school system?

A Your Honor, that is, of course, a central subject that I will come to, but --

Q In your own time.

A I will answer it now. I will, if I may, because it is indeed, of course, the heart, the ultimate heart of the problem.

Q Because taking what you said literally, then, there is no power.

A There is no power, we say, Your Honor --

Q To disestablish it.

A There is no power to trample the constitutional right of any citizen in the disestablishing process, and the constitutional right of these citizens, these plaintiffs, is that they shall not be barred on racial grounds and they shall not be assigned on racial grounds, and that is what is being done to them.

Q But a person, we assume, is caught in a ghetto as established by the state, and he doesn't have the resources to get out. What is your solution then?

A The Constitution says --

Q That he should take his course?

A The Constitution says to him, the Constitution is expounded in Brown, we say that the Constitution, seeing his situation, says to him, every effort is going to be exerted and all zeal and all absolute good faith must be put into effect to see to it that you are given freedom, that you shall not be barred anywhere on account of your race, and that you shall not be assigned anywhere on account of your race. And I think that is what this Court was referring to in the cases it has recently decided. This Court was expressing its stern impatience with the fact that freedom was not truly accorded as this Court considered in many of these cases, such as New Kent and Carter and Alexander vs. Holmes.

And we go one-hundred percent with all and any who will see to it that the freedom is truly there. But once that freedom is truly accorded, that freedom from governmental action based on race, once that freedom is truly accorded, then we say it is not to be said that the Constitution then requires that the freedom of any person be taken from him in the process of the dismantling.

To express it otherwise, Your Honor, the dismantling process shall not itself reconstruct the very thing that is being dismantled. Or, to use still another analogy, the Constitution, so Brown commanded us, says you shan't travel the racial road in the matter of public schools.

Now, Your Honor, our basic theme is you can't travel that same racial road in, so to speak, remedying the constitutional wrong of the past. You do not remedy past constitutional wrong of a racial nature by imposing present constitutional wrong of racial nature.

Q Would you consider that it is under the Constitution if the school board, not the Court, the school board closed all of the entirely Negro schools and provided public transportation of the students of those schools into other schools to accomplish the dismantling as they saw it?

A We think that the Constitution, Your Honor, cannot be said to require that any action be taken which has as its sole objective racial assignments.

Q Does it prohibit it?

A It prohibits it.

Q In other words --

A That is what Brown says.

Q -- your answer to my question would be, then, that the school board could not close these schools and transport the students out to other schools in the outlying districts?

A If, Your Honor, in the operation of the schools on a natural geographic or other non-racial basis, such action can naturally, can normally educationally, very well. But if the school board's action and purpose was to accomplish

assignments on racial basis, which otherwise would not be done, but if indeed done, the child is pushed, the child is taken, the child is compelled solely because of his color, then that runs afoul of the Constitution right there, just as truly as what existed in Brown, and we plead the same constitutional right here that the plaintiffs pled in Brown.

Now, quickly, Your Honor, since jurisdiction in this case was deferred, I should spend a moment on how we come here, I think. I will try not to take too much time on that because it is developed in our brief, our jurisdictional statement, and also a typewritten response which we filed only a few days ago in answer to a suggestion filed by the Swann plaintiffs, only a few days. We beg the Court's attention to those documents.

But to outline briefly, these plaintiffs, upon learning in February of this year that certain compulsions were being imposed -- were about to be imposed upon them, went into the State Court of North Carolina. There they obtained an injunction, an injunction which we say is in the terms of the essential meaning of Brown, and an injunction which is in the terms of a North Carolina statute also, and those terms simply were what I have already repeated -- do not assign a child on the basis of his race, any other basis but not his race, do not exclude him from a school because of his race.

Now, that injunction was -- our case was moved into

the federal court at that point, upon valid federal grounds, as we understand, and the defendant Board of Education asked for a three-judge court to determine the constitutionality of the pronouncement of the statute which, as I say, was the very words of the injunction that we had.

Before the three-judge convened and heard the case, the district court below set aside our injunction, the single judge set it aside, saying, in the express terms that he did so, pending the rulings of the three-judge court and of this Court.

Now, the three-judge court heard the case and ruled that the words I have already expressed, Your Honor, are unconstitutional, and here came a remarkable inconsistency, an inconsistency that is deep and inherent and afflicts all who seek, I respectfully say, rises again and again to plague all who seek to say we will obey Brown, which commands operating schools on a non-racial basis, we will obey Brown by the very act of operating them on a non-racial basis.

Here is the inconsistency that the court itself expressed: It says it is constitutional, quite constitutional, indeed it is the essence of Brown, that you shall not exclude a child from a public school on the ground of his race, but it is unconstitutional to say that he may not be assigned to a school on the basis of his race.

Those two things, Your Honor, are absolutely in

conflict. They are inherently so. Is it not obvious that if there can be no prohibition against assigning the child on the basis of his race, and if you do therefore assign him on the basis of his race, you are excluding him on the basis of race from another school, the school to which he wishes to go or which he may have been attending, and to which it is natural geographically or otherwise that he should attend.

Q Your argument is based entirely on the 14th Amendment of the United States Constitution and not at all on any federal statute, is it?

A Entirely.

Q Entirely on this?

A Yes. We stand or fall, of course, on the Constitution.

Q And your clients are the parents of school children, there are no teachers, you don't represent any teachers, do you?

A Parents and children. The children themselves by proper process have been made parties.

Q And therefore you are making no claim with respect to the constitutionality of the integration of faculty?

A No.

Now, we present this question, Your Honors, not in the abstract. We show the factual background in Charlotte-Mecklenburg, where these children go to school. We show in

this record, and it is concise, these things, quickly: That as far back as 1965 this school system was adjudged by the district court, the Southern District Court, the same district court, albeit a different judge, was adjudged to be operating on a non-racial basis, a basis in which there was no gerrymandering of school attendance zones and there was complete freedom of transfer, and so it was adjudged non-racial, and the Circuit Court upheld that.

And now it was adjudged within the past year, the same district court, with now the new judge, reaffirmed many of those factual findings, adjudged, for example, that in no other public school system had the board of education achieved as much in the way of racial mixing -- no other case that had come before the appellate court had so much been achieved of that nature, that there was and is now no racial purpose, motive or element in the spending of money, in the providing of facilities, faculties, schools, buildings, books, and enumerated numerous others.

Nevertheless, Your Honors, upon that picture there came order sofu nusual severity, these orders said, despite the factors just found, it is also true that in some schools there is not the mixture of the community, therefore this court will order that the mixture of the community shall take place in every school.

And the court went on to say, this shall be main-

tained henceforth, and note these words, almost revealing in its paradox, these words -- just as was done for decades before Brown. And there is the situation, Your Honors, non-racial until now ordered to be racial.

Now, furthermore, I have already mentioned that these plaintiffs occupy a posture different from any other parties in the Charlotte-Mecklenburg litigation in that they plead their own constitutional right; none others do. They also raise opposition on an issue which the Chief Justice, concurring in Northcross, said was one of the questions that needed attention. Only these plaintiffs raise that issue. No other parties do. That issue is uncontested before this Court, except and unless than we raise it.

That issue is this: One of the compulsions here -- they are of two essential natures, all the compulsions can be categorized under two headings. Number one, the gerrymandering of the school attendance zones, which the school board itself proposed, and which of course all parties other than ourselves are now accepting. We oppose that gerrymandering. It is of racial nature. The circuit court says it drastically is racial gerrymandering at the same moment that it upheld it. It says that is what it is.

And now all other compulsions here come under the heading of requirement that the child go long distances to school, even beyond the gerrymandered boundaries.

Q What is the longest distance?

A Beg pardon, sir?

Q What is the longest distance as the record shows?

A There are distances of as much as 15 to 16 miles. Now, the distances, however, are not our point, nor in our point as such. That is a colloquialism. We oppose the compulsion, the requirement that we go away from the natural geographic school and near the child's home that he be forced to go away from that, whether in a gerrymandered new zone or whether crossing the boundaries of the gerrymandered zone into another zone.

Q You don't mean to say it is a matter of -- that absolutely a school board could never send a child away from neighborhood for any reason?

A No, I do not say that.

Q There can certainly be a lot of good reasons to send children away from -- you say they should not -- where were they sending them that they couldn't do so on account of race?

A Brown forbids their doing so on account of race.

Q And you say that gerrymandering, racial gerrymandering, carrying, transporting or doing it on a racial basis is invalid.

A Invalid.

Q And I suppose you would say the majority, the minority transfer rule is equally invalid?

A Indeed, this Court so held in Goss, Goss vs. Board of Education.

Q Well, if there is no compulsion involved, would you still say it is invalid? I thought your objection was to compulsory assignments.

A No. There was an interaction, compulsory upon the child and shaped and based on no grounds, it is solely that. The child is looked that, his color is observed, and that determines where he will go to school.

Q So there are two rules that apply under the transfer from the majority to minority transfer rule, and one of them is white and one of them is black, and the transfer is to a school with a white majority and a black minority, the two children transferring will not both be transferred, only one will be.

A That is true, but --

Q The black one will get the transfer and the white one won't.

A Yes, and that is --

Q Or the reverse, if a transfer from a white school is requested.

A And that is selectivity on the basis of race.

Q And you say it is invalid?

A It is prohibited by the Constitution, and I repeat, Your Honor, that specific subject was dealt with by this Court in Goss vs. Board of Education. It was in the other direction, but it was held unconstitutional.

Q I see that you told Justice Stewart that you didn't rely on any federal statute.

A Yes, sir.

Q I see you cite the federal statute that is in the Civil Rights Act of 1964.

A That is true, Your Honor, but only for this purpose, of showing that when it comes to the action of the elected representatives of the people, this is not a constitutional point, but it is significant to note that no elected representative of the people have ever enacted any legislation in the direction which we here oppose and which we say the Constitution prohibits.

The Congress, in the Civil Rights Act specifically, twice expressed itself to this effect -- let it not be thought --this is the meaning of it, I take it -- let it not be thought that in this Civil Rights Act we mean to condone or to provide for or in any way authorize racial balance, racial ratios compelling anybody to go anywhere just because of his race. This Act does not mean that. That is the sence in which we cited it, Your Honor.

But we stand or fall on the Constitution.

Q Because the statute, you think, is restricted to de facto segregation rather than --

A No, sir. I think that statute clearly meant to say that we, the Congress, are not to be understood as we enact this civil rights law, we are not to be understood as providing for any kind of --

Q This is a directive to federal judges.

A Well --

Q Section 2006(a).

A -- I think in the interpretation and administration of that statute is meant. But, Your Honor, whatever may be the true interpretation of that statute, I cannot stand upon it against the Constitution. My adversaries say that the Constitution requires the racial compulsion which they espouse. I say the Constitution forbids the racial compulsion which they espouse.

Q Are you suggesting that Green was improperly decided under the Constitution?

A No, Your Honor. I can only speak to Green -- I have sought to find the exact facts of Green as nearly as I could. The factual situation in Green is far different from here. I think that this Court did not mean to say anything in Green contrary to what I am here arguing for.

In Green, for example, each child was assigned to

the district that he formerly -- to which he formerly attended.

Q It was still dual zone.

A Yes, sir. And I think -- and, furthermore, right of transfer was accorded only after that suit was instituted. Here it has been accorded for five years and here for five years it has been judicially found nobody has been excluded from any school on account of his race. Nobody claims that anybody has, by governmental action and compulsion.

Now, we must remember, I think, Your Honors, it must constantly be borne in mind, that we here are applying the Constitution in its primal elemental provisions. There is no legislation here in which it might be considered that there is leeway for the policymaker -- excuse me, that is not the situation.

Here it is purely a question and a question we propound and contend for is simply this, that the Constitution in the Fourteenth Amendment, as Brown declared it, ruled the case and rules in favor of the pronouncement, injunctive pronouncement and statutory announcement that we had below and which has been taken from us.

Now, let me come back for just a moment -- my time draws to a close -- for just one moment to this basic proposition. The Constitution comes to a condition of separateness. What does it do? I say that the Constitution, as declared in Brown, says with regard to the condition of separateness,

every diligence must be exerted, every effort must be put forth in good faith, if the hand of government is to be found in that separateness, causing it, producing it, directly or indirectly, by subterfuge or subtly or in any manner, it must be sternly removed. And that, I say, we agree with, we argue for one-hundred percent.

Q What did Charlotte-Merklenburg do for the ten-year period after Brown, since you say that is what Brown said? What did they do for ten years?

A They moved gradually in the direction --

Q Like what? What specific was done?

A The zoning -- the attendance districting was made geographic and --

Q When? When was that done?

A About 1963, thereabouts.

Q Well, what did they do for the eight years after '55?

A After Brown?

Q Yes, sir.

A There was a state statute in effect which did not say take the hand of government out of racial compulsion, but it did --

Q And in '65, what you did was to draw boundaries and when you drew those boundaries how much mixing did you get?

A A considerable degree of it, Your Honor.

Q How much?

A I cannot say the exact degree.

Q You said this was a very clear record.

A But I am saying this, Your Honor, if I may --

Q Yes, sir?

A -- that this is not how much racial mixing occurs. The test is did -- and in any situation today, the test is in good faith is there governmental compulsion forcing children to be racially separate in the schools or is there not.

Q Do you recognize that there is a need for government compulsion to desegregate and set up a unitary system?

A Yes, sir, I --

Q You have no quarrel with that?

A -- I recognize that there is a constitutional mandate that governmental action shall not bar any child from a school because of his race and shall not assign him to any on the basis of race.

Q That is not my question. Is it not true that you are required to take affirmative action to disestablish the segregated system? Is it or not?

A Affirmative action to take the hand of government out of any racial compelling.

Q And just leave it as it is?

A Once that governmental hand is removed and freedom is truly accorded --

Q Well --

A -- if it is, then the Constitution --

Q -- my question is, you just say take the governmental hand off and let it stay like it is. Is that your position?

A Yes, sir, the government cannot --

Q Well, won't you still have a segregated system?

A The government cannot go further and take the children by the coat collar and say to them, "You must go there, and you must go there because of your race."

Q Well, what did the government tell them in '55? The government told them, "You have got to go to that white school, and you can't go to any school but that school." Didn't the government do that?

A The Charlotte authorities?

Q The government of North Carolina.

A No, sir, they did not.

Q Well, you didn't have segregated schools? You had segregated schools, didn't you?

A We removed governmental action compelling segregation, and when that is done, Brown is of age. And when the government goes further, it reverses Brown.

Q Well, you rely so much on Brown, what about Green?

A What about what?

Q Green.

A The true meaning of Green is consistent with Brown. Green has not reversed Brown. This Court would not have taken so crucial an action without saying so.

Q Well, I don't think this Court reversed Brown. I just say that Brown is a more recent case.

A Green is more recent.

Q I mean Green is more recent.

A Yes, sir.

Q And Green says you can't have pupil placement.

A Green, like Brown, says you must accord true freedom and that we say has been done here. And I will end with this, if I may: We stand upon this, the individual constitutional right against governmental action on the basis of race and any individual, Your Honor, no matter how little, no matter how alone, he can stand against the powers of all government, state and federal, and stand upon that proposition and he can say, no matter when, by whom or where, racial compulsion was formerly imposed, I object to it now being imposed upon me and I object to being moved anywhere because of my race.

Now, that is a lot to which he can claim and it

will save him, because that is the uniqueness and the transcending power of individual liberty under the Constitution, and our faith is that this Court will keep it so.

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

Mr. Waggoner?

WILLIAM J. WAGGONER, ESQ., ON BEHALF OF APPELLEES

MR. WAGGONER: Mr. Chief Justice, may it please the Court. I will speak very briefly to the statute. The position the board has taken with reference to the statute, that it is a reexpression of the statements of Brown, non-racial assignment of students; but, like Brown, we say that the statute also carries with it a permission to disestablish a dual system.

A statute should be construed in a constitutional manner where it can without the Court straining for a ridiculous or unwarranted result.

Q That isn't the construction that the state court gave it, though, is it?

A The state court, in a non-adversary proceeding, used the language of Brown, as I recall, in its order. I might point out the circumstances of the --

Q As I understand it, your argument is based on the fact that the Constitution forbids discrimination on account of race.

A That's correct.

Q And it forbids discrimination, even when the

effort may be the beneficient one of trying to prevent discrimination?

A Insofar as assignment of students, that is correct.

Q Discrimination.

A Yes, sir.

Q That is the key.

A Yes, sir, that is the key. Our position would be that it is perfectly possible under this statute, a system being found dual, to be required to undo racial assignments and reassign children to other schools based on proximity and convenience and other non-racial factors of sound school administration. This would be our position with reference to this.

There is some question about perhaps the legislative intent. The legislature must make findings, must determine public policy, and if it finds that the liberties of the children involved, we find that thus far this year we are transporting an additional 20,000 students. This is a substantial number of students that are being transported. I do not say the full 20,000 are assigned involuntarily or by reason of race. Some of them would have been assigned to their school by reason of proximity and convenience.

Q Now, are you saying that you now transport 20,000 more than you did last year?

A Yes, sir.

Q Where did you get the buses?

A We are running school from 7:30 in the morning until 9:15 for opening schedules. We have some buses that we acquired in the past year. We have received a loan of some 14- to 16-year-old buses from the State of North Carolina for the purpose of transport. We have also found that the legislative position with reference to safety of children in congested areas was very much warranted. We are transmitting not quite twice as many students. Our accident rate is up 440 percent.

Q I gather you haven't bought any new buses, is that it?

A We were furnished 28 new buses by the state that were scheduled for replacement of old buses.

Q Mr. Waggoner, since we are addressing the factual matters --

A Yes, sir.

Q -- there would be a considerable amount of busing, would there not, under the board's plan in this case, right? Intra-zonal busing, would there not?

A Yes, sir.

Q Because of the size and the odd shape of some of those?

A That is correct.

Q Of the zones that the board created.

A Right.

Q There would be necessarily?

A There would be. At one time we had hoped that we would be able to stretch Brown, being intellectually honest, to permit a strained concept of gerrymandered lines. I don't feel that the board plan would be truly constitutional because it does take race too much into account and goes outside the compactness that Brown spoke of.

I don't think that the statute would prohibit a desegregation technique such as the location of a new school. This would accomplish the assignment of students, by locating a school in a border zone, where again they would be assigned to a school on objective, non-racial criteria.

Now, a great deal of criticism has been directed to --

Q If a board has a choice of locating a new school in a black zone or white zone or in a border zone and it chooses the border because of racial considerations, would you think that was stretching Brown or not?

A If the nearby schools are overcrowded and a school must be built in this area --

Q It must be built somewhere.

A -- it must be built somewhere -- I think the board can go to the next step and construct the school, knowing

that the general attendance lines will lie in this area --

Q That would be one of the reasons. What if there was a choice?

A If there was a choice --

Q Can they decide, well, we are going to built it where we will have the most blacks and whites going to school together.

A I assume your question does not contain an overcrowding of nearby schools.

Q Well, they need a new school somewhere but it could easeily be a half mile or a half mile that way.

A I think that it would be within the leeway of the board to locate the school on the basis we must build a school, this is an educational reason, and as ancillary we are going to promote desegregation.

Q Well, you would suggest that a school board, as part of its educational decision-making, could say we choose to education -- if we have a choice, we prefer to educate white students and blacks together rather than separately?

A That is correct.

Q And if we have some legitimate decisions to make such as location of the school, drawing of zone lines, we just prefer to get as many of them together as possible, and you would think that would be permissible, even though

they are specifically taking race into account.

A I would not agree on zone lines, redrawing zone lines.

Q What is the difference between drawing the zone lines and deciding where to build a school?

A Because a student has no right to the location of a school. There have been many cases in North Carolina where school construction was sought to be restrained, and this is a decision from the Board of Education, unless there is use of discretion, the school will be constructed where the board determines.

Now, there has been some suggestion that there was some overreaching on the part of the board. I would like to clear up one point. The board was served with an injunction on 25 February. On the 26th we renewed at the federal court, which was on Thursday. On Monday morning we presented an order to the district court for relief from this state court order because it was interfering with our implementation efforts.

We were at that time faced with a district court order that directed us to desegregate April 1. We had a state court order that said do nothing now, and the contempt powers of the court are approximately equal, so we had to take the choice of honoring the one that had immediacy.

The legislature may have had in mind the affirmative

duty that was first spelled out by Judge Sobeloff in Bradley vs. Richmond; and in his concurring opinion in the Swann case, when it was in the court of appeals in 1966, you recall that Judge Sobeloff dissented and gave a very strong dissent in our case.

In his concurring end result in our approval of our 1966 plan, he said this: "This is far from suggesting that children are to be uprooted arbitrarily and bused against their will to distant places merely to place them with children of the other race."

Here Judge Sobeloff was talking about affirmative duty even before Green fully enunciates, I think.

I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Vanore, whenever you are ready.

MR. VANORE: Mr. Chief Justice, may it please the Court, I think that some of us have mislabeled the statute which is now before the Court as an anti-busing statute. In effect, it is an anti-discrimination statute, which it embraces in toto the pronouncements of this Court in Brown vs. Board of Education, in that it says that no child shall be compelled to attend any school on the basis of race, and no child shall be excluded from any school on the basis of race.

We have all been labeled in North Carolina, as have

some of the other States, as having de jure segregation. The problem, as I see it, may it please the Court, is when does one remove this label of de jure segregation.

When this Court made its pronouncement in Brown at that time, as a matter of law, segregation was forever outlawed in North Carolina. De jure segregation was outlawed. I need not remind the Court --

Q I presume you are saying segregation was outlawed, whatever you call it?

A That is correct, Mr. Justice Black. I think there is no question but what segregation was wrong but, of course, we in North Carolina simply until 1954 and until this Court reversed its decision in
we were doing no more than was allowed by this Court until that time.

Now, I think the Court stated in Green, we must -- the boards of education have an affirmative duty to do what is necessary to come up with a plan that will realistically work. We contend that the only realistic plan that will work, both for the North and the South, and I do think that the de jure-de facto distinction is legal fiction. I think we must recognize that whatever the Court does, this Court must conside that it will be the law of the land, not only for the South but also for the North. The only realistic approach to this is to allow that each child attend the school nearest

his home which serves his grade consistent with school capacity.

Now, the statute that is now before this Court provides for that very thing. The legislature of North Carolina intended as best it could to preserve the neighborhood school concept, a concept which will work both in the North and the South.

It seems that, in listening to the arguments that were made yesterday, if this Court is to adopt an approach other than the neighborhood school system of student assignment, if this Court is to adopt a reasonableness approach or a feasibility approach, we are going to have the same amount of litigation if not more litigation than we have experienced since Brown, since the Court said that you must use all deliberate speed.

At the time the North Carolina General Assembly enacted this legislation, which was in July of 1969, there were two cases that had been decided by the Supreme Court that it had to go by, that is Brown and Green. And also the General Assembly was guided by sections 401 and 407 of the Civil Rights Act of 1964, which we think this statute embraces, as it does embrace Brown and Green.

Now, in Green, as this Court suggested, of course, that was a rather simplistic fact situation there where you had only two schools involved, and the Court suggested, as I

recall, in footnote 6, that the easiest way to eliminate the dual school system there was to draw a line down the middle of the county and all of the children in the eastern end of the county would attend the New Kent School, and all of the children in the western end of the county would attend the Watkins School.

Now, this, we say, was a -- not necessarily a pronouncement, but certainly a suggestion by this Court that a child be assigned or be allowed to attend, not on the basis of race but be allowed to attend a school nearest his home. And we say that this is exactly what the statute does. The statute does not allow any assignments, as this Court prohibited, on the basis of race. All of the children are allowed to go to the school nearest their home, and we think this is the only reasonable way that this Court can approach the facts now before it.

I would like to save some time for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Nabrit?

JAMES M. NABRIT, III, ESQ., ON BEHALF OF APPELLEES

MR. NABRIT: Mr. Chief Justice, and may it please the Court, the main theme of my argument is that the three-judge district court which heard this case below correctly held that a portion of this State law, two sentences in it, the last two sentences of the second paragraph, violated the

Constitution by interfering with a school board's duty to desegregate the schools. That court held unanimously that this was the effect of the law as well as its purpose.

Let me begin by simply listing the matters I hope to cover in my allotted time. First, I would like to state a bit about the procedural history of this case and discuss some of the facts about school busing, the factual background against which this statute was enacted, and against which it actually functions.

And in that connection I shall tell the Court that in No. 498 the parties have stipulated, and the court below also considered, that the entire record in the Swann case, which was argued yesterday, was a part to be considered in the three-judge court case.

Third, I hope to discuss briefly the meaning of the statutory reasons and the various interpretations the parties have given of it; and, fourth, the main point, why we think the statute violates the equal protection clause.

Q Where have you printed the statute so that I can see the exact part of it which you say is unconstitutional?

A If you will turn rather to the Appellees brief, Case No. 498, the brief for Appellees --

Q Yes.

A -- the first page of the argument, which is quoted there in the footnote number 8.

Q Number what?

A The footnote at page 20.

Q 20?

A Page 20, and the part that the court below held was unconstitutional --

Q And that is the part that you are claiming --

A And it is the only part that we attack, was the last two sentences in the second paragraph, and they appear near -- over on 21, continuing in that footnote, those two sentences.

I also hope, if I have time, to -- well, in connection with the main argument about the statute violating the equal protection clause, I think particularly interesting the contradictory positions taken by the parties, because if I heard them correctly, Mr. Waggoner, representing the School Board, stated quite clearly that he thought the School Board's plan of desegregation, which the board has presented to Judge McMillan, defended in the Fourth Circuit, defended here by its own petition for certiorari, and in its brief, that the School Board's plan, says Mr. Waggoner, violates the Brown case and is unconstitutional because, he says, it accomplishes too much desegregation. That is, indeed, an amazing turn of events.

Q I heard him say that the same way except for the "because" clause. That is not the reason he said he

thought it violated Brown.

A Well, because of the technique --

Q Because of the compulsion of people to attend certain schools --

A Yes.

Q -- based on their race.

A That is correct.

Q What he said was that in obeying the Brown decision, in his opinion, they went a little too far. That is all I understood him to say.

A Right.

Q And I didn't understand him to say he was abandoning any of the argument.

A Well, I -- let me address that, because I think that my reply is that his position is inconsistent and I hope to develop that as part of my argument.

Q Mr. Nabrit, I am looking at the statute now, so I want to know which part of those sentences you say is unconstitutional.

A The court below held that both of the sentences were unconstitutional.

Q The entire sentences?

A Yes.

Q No student shall be assigned or compelled to attend any school on account of race -- surely it didn't

hold that as unconstitutional.

A Yes, it did, I think so.

Q That no student shall be compelled to attend or not attend a school on account of race was held unconstitutional?

A Mr. Justice Black, the court below held that that sentence, the whole sentence, was unconstitutional, including --

Q And do you --

A -- that clause and the next clause.

Q And do you think that is, that part of it is unconstitutional?

A Yes, sir, I do, because it interferes with the school board's -- it imposes blinders on the school board. It says you cannot consider race in the context of a segregated system.

Q I thought that is what the Constitution says.

A Well --

Q I thought that is what the Constitution says, and that is what we held. You can't discriminate on account of race.

A I understand that to be the argument, however--

Q I am not talking about argument. I thought that is what we held in every case and that is what your client had been insisting on in every case.

A Mr. Justice Black, I understand the Brown case to hold that compulsory school segregation violates the equal protection clause and that this statute, the court below held, in North Carolina, where they still have school segregation, prevents the school board from doing its duty of abolishing that discriminatory system.

Q But this --

A It tells the school board --

Q This provision of the statute says that there shall be no discrimination.

A Well, the court --

Q That is what I just read to you.

A Well, the court below didn't understand it that way and that is not the understanding that state court judges gave us or that --

Q Well, this is saying that people can be compelled to go to a school or refrain from going to a school because of their race.

A Mr. Justice Black, I think we cannot understand that sentence merely on the basis of that first clause, you see.

Q Well, at least that one is something. If the whole sentence is held unconstitutional, I don't see how any part of it can be based on that clause.

A Well -- the statute --

Q · Are you distinguishing in the application of this statute between its application and the abstract of that sentence and its application in the context of a remedy for what was stricken in Brown?

A That's right, the statute was specifically designed to overturn Judge McMillan's order, and that is its history. And it attempts to do this by saying the state must be colorblind, it cannot integrate the schools because it cannot take into account race at all in assigning students or in transferring, and that it cannot do anything for a racial purpose in connection with assigning students.

And if you can't -- if you have an existing system of all black schools and all white schools, this statute says you can do nothing about it, that you must be blind to the race of a school. And that was the understanding that the three judges below gave to this statute, and that was certainly its intent, Mr. Justice Black.

Q Intent of whom?

A This is the way it has been applied by the North Carolina judges.

Q You mean --

A This is the way it is -- this is its purpose, it is the way it is applied by the North Carolina judges.

Q You are not, I hope, relying on our probing the mind of the legislature?

A Not at all.

Q I can understand your second argument.

A I am merely saying, Mr. Justice Black, that on this issue the federal courts have been entirely consistent that this sort of evasion of Brown cannot be permitted, that an artificial assertion of nondiscrimination of neutrality cannot be permitted to stand in the way of actually accomplishing a reform of the segregated system. All of the federal courts that have considered this argument have rejected it quite uniformally.

Q Well, the courts rejected that from the beginning.

A And it is important that none of the argument on --

Q What I am saying is they can't be discriminated against --

A And that this statute is a subterfuge, and that is what Judge Craven held in the court below, is a subterfuge.

Let me state a few facts, Mr. Justice Black, about busing, and let me begin by answering the question that you have asked twice about what is the longest bus ride.

If you will turn to the Petitioners brief in No. 281, Judge McMillan made a specific finding on this at Appendix page 34, in the brief in No. 281.

Q No. 281.

A Page 24 of the Appendix. Judge McMillan states, The longest bus routes in the entire county are the routes by which four- and five-year-old kinderqarten children are transported to child development centers. See Principal's Montly Bus Report, Defendant's Exhibit 63.

The Pineville Child Development Center has one bus, No. 297, which travels over 79 miles a day on one round-trip with four- and five-year-old children -- 79 miles round-trip with four- and five-year-old children.

Mr. Justice Black, Judge McMillan made a detailed study of this substitute busing. I have in my hand the exhibits which list every bus route in the country, driver's name, all the stops he makes, all the time. Judge McMillan's findings on this were based on an in-depth study of this busing system. And, of course, in that paragraph, there are descriptions of other buses. That one I mention, the longest one, was the kindergarten bus. But, of course, there are other trips nearly as long involving the regular elementary classes.

In the same paragraph, he mentions another trip of over 70 miles a day, round-trip, others 48 to 60 miles a day, five-year-old children.

Bane Elementary School, Bus No. 115, a bus over 60 miles a day on one round-trip, requiring two hours in the

morning and two hours in the afternoon.

Q Do the findings show --

A This is last October, before the plan.

Q Does that finding show how far it would have been to the nearest school, nearer than the 79-mile trip?

A Well, the --

Q Just suppose --

A -- the Bane Elementary finding, which is an ordinary elementary school, the busing was based on the school board's zones, which are not drawn on the basis of proximity but drawn on a basis of discretion. Nevertheless, they are zones. In other words, the school board decides where it shapes its zones to its own purposes.

But, in any event, this case has a complete record on the subject of the busing and the transportation and all of those questions, the answers to all of those questions can be ascertained by the record.

Let me state just a few general facts about busing. First, it is widespread. In this Nation, 40 percent of all the children who go to school every day ride school buses, 18 million of that, and that is documented in the amicus curiae briefs, the excellent one by the National Education Association. It is also a finding in this record.

In North Carolina, 610,000 children are day, 55 percent of all the children ride school buses every day. They

are not merely --

Q But not for the purpose of creating a balance or ratio of race, religion or national origin, you don't claim that?

A Oh, no, no.

Q That is what this is directed to.

A Well, I was trying to state a few facts, the background of when the statute was enacted, before I discuss its application.

These are not only children in the counties; they include city children. The way the law is applies in North Carolina, the state up until last year paid for all children who were bused in the counties and also in those areas inside city limits that have been annexed in the past thirteen years, any area annexed since 1957, and these are exhibits I got out of the record room this morning to show that a large part of Charlotte has been annexed, and these children are bused at state expense in the red area, and of course all of those outside.

In addition, anyone who travels from the center to the outside is bused at state expense and anyone who travels in either direction. Since Judge McMillan's opinion, the state has changed its regulation and now all children in the State of North Carolina under the current regulations, no matter where they live, in the city or county, are entitled

to busing at state expense if they live more than a mile and a half from school.

Q As I understand it, I want to be sure that I am right about this, someone has argued that you are saying that the state would be without power to pass a regulation doing away entirely with busing if the Constitution would permit. Is that your argument?

A Mr. Justice Black, that argument is not necessary to our logic in this case.

Q Has it been made?

A It has not been made, because we don't face any such facts.

Q I didn't see it.

A However, if that were to happen, the inquiry would have to be whether or not it had a racially discriminatory effect. It wouldn't seem in neutral circumstances to be discriminatory to say all -- no one gets a bus ride; but, just like the school closing in Prince Edward County, it might under some circumstances, taking away busing, have a discriminatory effect.

Q The reason I ask that, I have always supposed that it was within the power of a state to operate schools or not as it saw fit without federal interference. And I would suppose that the State of North Carolina would repeal all of its laws providing for public schools that no one

could insist that the federal Constitution prevented it. And I think the same thing about busing.

A. The state's power is plenary unless the effect is to make a racial discrimination. At that point, the equal protection clause would prohibit it, and that requires an examination of a record and facts, and we don't have that case. But --

Q Well, I thought the state's power was plenary to determine whether or not it has schools. I didn't think we had --

A That was the argument, that was the argument that was made in the Griffin case, Your Honor, where the school board abolished, just closed down all the public schools and reserved it to the parent.

Q We found there was discrimination there on account of not closing them all down.

A Well, that is the inquiry I am suggesting would have to be made.

Q Yes.

A Whether or not it is discriminatory. That is the only inquiry I am suggesting. The state's power is also plenary in determining the boundaries of municipalities, but in Gremillion vs. Lightfoot, the court inquired as to whether or not that kind of power was used to get a discriminatory effect, to deprive blacks of the right to vote. It is the

same kind of --

Q That was under equal protection.

A Equal protection, that is the only thing I was saying.

Q Under the state law.

A That's correct.

Q What I was talking about was the absolute abolition of public schools. I wouldn't think there could be any question about that. Are states allowed to do that or absolutely to do away with buses?

A In Charlotte-Mecklenburg, the board's own figures -- and this is at page 619a of the Swann record, the record in No. 281 -- show 10,414 elementary children last year rode buses, in other words 42 percent of the total children bused in Charlotte were elementary children, even though the elementary schools are ordinarily closer to home than the high schools. So the system that we are dealing with has busing as an integral part of the normal educational program, for elementary children as well as for high school children.

This record, I think, dispels some of the misconceptions about how costly busing gets to be. The average state cost for a pupil for a whole year in the State of North Carolina is $23.40. The cost in Charlotte-Mecklenburg is about the same, around $20 to bus a pupil for the whole

year.

What is involved, as McMillan found, was the cost that amounted to about the operating expenses of the Charlotte school system for two days out of the year. That is the kind of finances we are dealing with in relation to the overall picture. It is a $66 million budget for the school system; this is just two days a year out of it.

The busing plan that Judge McMillan ordered is, as the Court knows, in effect, Judge McMillan found that it went into effect -- the plan we have been talking about for two days is in operation, it is functioning this morning, it has been for several weeks, under this Court's denial of this day under the rule of Alexander vs. Holmes.

Judge McMillan found that the board had no need to make any additional capital expenditures in the current year, because he found out at the last hearing in July that the board had, in effect, been hiding buses, his opinion states, and it is in that same opinion that I referred you to a moment ago, Mr. Justice Black, at page 18 of the Appendix to Petition's brief in No. 281. This is the August board memorandum, that the school board had in effect not only been exaggerating its bus needs in all of the argument, but had led the court to believe that they actually owned 107 or around 100 less buses than they had. And he found that their $5 million cost estimate that was bandied around all

over the Nation, including the papers filed in this Court last spring, bordered on fantasy and he referred it to Alice in Wonderland. And I was there and again in July we had five days of testimony about these bus estimates, and Judge McMillan's finding, and he heard the witnesses and he saw all these thousands of reams of paper, these opinion statements about the busing were not worthy of belief.

Q Were any of those findings on the busing issue disturbed by the court of appeals?

A No, sir. The court of appeals accepted Judge McMillan's findings, based on a study of the record.

Q Well, except the proceedings of last summer, of last July and August, haven't been through the court of appeals yet.

A That is correct, but his conclusion was that his original findings were essentially still correct, based on all of this new --

Q But then he found some more factors.

A That's correct.

Q And that hasn't gone to the court of appeals yet.

A That record is here. It was printed and it was just filed recently by the school board. It is the printed Appendix in No. 349. This has the entire transcript and many of the exhibits for the hearing.

Q Talking about what Mr. Waggoner told you earlier, I gather that the experience of the last several weeks has confirmed the accuracy of Judge McMillan's findings, hasn't it?

A Mr. Waggoner is asserting some new facts, brand new facts this morning about it.

Q I thought he answered me earlier that they have got the buses, they borrowed them from the state, they did the things that Judge McMillan said they could do to get them, didn't he?

A Entirely correct.

Q They haven't had to make any capital investment, I gather.

A That is true.

Q Does that also apply to next year?

A Well, Judge McMillan -- no, it does not -- Judge McMillan's finding was that they could establish the needs on the basis of actual practice with the buses that were available free of charge from the State Board of Education. But they would have to buy them next year.

What one must understand, in relation to that, is that the school board -- Judge McMillan's findings are based on what they need to do, but it has always been in the school board's interest to exaggerate this and to devise routes based on inefficient principles, and all of their estimates

were based on running a less efficient bus system than they were actually running, and that is why they got all of those inflated estimates.

Q Mr. Nabrit, if you will permit me to say so, I think this business about busing and whether it is $23.40 throughout the State of North Carolina, and $20 per pupil per year in Charlotte-Mecklenburg, and how many buses they have and how old they are and what the mileage is, is of some interest; but, so far as I am concerned, it is really collateral and peripheral to the basic question that this case poses.

The first sentence of the statute, the first sentence that was held to be unconstitutional doesn't say anything about the busing. It just says "no student shall be assigned or compelled to attend any school on account of race, creed, color, or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin."

Now, that involves the fundamental question, and that is, it seems to me, the fundamental question in this case, and that question exists whether or not children walk or go by horseback or public transportation or buses. If you are right, of course, buses are going to be needed where and if the distances are great. But that is a rather peripheral to the basic question, isn't it? Or am I all wrong when we

get to the busing?

A Well, I agree and what I want to talk about is the subject you are raising. I think it is not peripheral, because of the arguments by the school board and the Solicitor General and the Fourth Circuit opinion. The reasonableness doctrine depends on assessing all of these factors in some way and adding them up --

Q Well, it begins with the proposition. This, I appreciate, is at least a tripartitie controversy, but if you begin with the proposition that it is the duty of a school board to maximize compulsory integration to the extent that it is (a) feasible, or (b) reasonable, or (c) humanly possible, that is one thing. But the question is whether that is the constitutional duty of a school board. Isn't that the basic question?

A Well, certainly, and Judge McMillan --

Q And the question of busing is just a collateral issue.

A -- Judge McMillan made all these detailed findings about the busing and the cost and all of that at the request of the court of appeals at the time the stay was granted. The court of appeals stayed his order and said give us detailed findings about this.

Let's talk about the central issue in this statute. The law prohibits assigning or compelling students on the

basis of race, that is the colorblind provision, and also in the same purpose, assignment for the purpose of creating a balance or ratio of race.

Now, the court below, in its opinion, held that this was a legislative effort to limit school boards to either freedom of choice plans, another part of the statute, or the so-called neighborhood school concept. This is the basis on which the Attorney General in the court below defended this statute. The decision below relies on this. This is from the brief by the Attorney General of North Carolina about what this statute means.

He says, "The above quoted statute, General Statute 115-176.1, is really nothing but the embodiment of the neighborhood school concept, and as we attempt to show, the neighborhood school is a legitimate and legal school facility and should not be broken up or fragmented to correct racial imbalance. This statute was designed obviously to eliminate transportation costs and permit the student to remain as near his or her home as possible. Stated another way, the statute was designed to require that local school administrative units throughout the state operate as nearly as possible under the so-called neighborhood assignment system."

Q Standing right there, do you have any quarrel with that as a statement of legislative policy or school board policy?

A My quarrel --

Q Laying aside for a moment the --

A My quarrel is based on the equal protection clause and only that.

Q Laying aside for the moment a situation where it has as its purpose to frustrate the mandate of Brown.

A I agree with the court below. It says federal courts don't sit to review school board policies or legislative policies about how they allocate their resources. Our argument is based only, based only on the claim that this statute denies the equal protection of the laws because it interferes with school boards in carrying out their obligations, their affirmative duties under the Brown case.

The Attorney General's brief in this court makes a firm challenge to Green, it takes a sentence out of Green where this Court said there shall be no white schools and no black schools, there should just be schools. The Attorney General's brief takes a sentence out of Green and says that can never happen. That is pointed out in our brief in this case.

Q Has the State Attorney General filed a brief in this case?

A He has indeed.

Q In either 444 or 498?

A The Solicitor General filed a brief, memorandum

of the United States as amicus curiae in 444 and 498. And it is my submission -- and he urges, as we do, that the court below should be affirmed. However, it is my view that this position of the Solicitor General in this case is entirely inconsistent with the arguments yesterday. As I understood the Solicitor General's argument yesterday to be that the choice for the court was between something called racial balance, which he attributed to us, and something that the Solicitor General supported, which was called a neighborhood school assignment system.

Now, the holding of the court below, the three-judge court case, is that this statute embraces, embodies the neighborhood school assignment system, and yet the Solicitor General's memorandum in the three-judge case says this: In many cases neither freedom of choice nor racially neutral zoning is adequate to disestablish the former dual system. We agree with thatexactly.

He goes on to state: "Other steps, such as pairing or consolidating schools, redrawing boundary lines, restructuring transportation routes or any combination of these may be required."

Now, I cannot understand how someone who adheres to that position can contend that Judge McMillan's decision must be overturned. I just don't understand how the two are going to fit. I do understand why the Solicitor General has to adopt

that view. It is because this statute would also invalidate the HEW plan, because the plan for Charlotte developed by the Department of Health, Education, and Welfare embraces the school board's gerrymandered zones and goes further with them, it combines them into groups of schools, so that the Solicitor General has not made the argument that Mr. Waggoner made for the school board's plan is unconstitutional.

Mr. Justice White, in questioning one of the counsel, asked whether or not rezoning to promote integration, changing of lines that by which the school board defines what a school's neighborhood is for the purpose of integrating the schools, whether or not that violates this statute. I understood counsel to say that it did.

Q That would be a different law suit, wouldn't it?

A I think not. I think that is precisely this law suit --

Q You mean that the court --

A -- because --

Q -- should now comple, in a general case like this, to look into the question and examine whether the schools in this country have been put in the right places?

A Not in a general sense, but in a particular sense. There is no escaping the fact that those choices, those decisions, those routine, everyday decisions by the

school board about where a school goes, how -- the size, the grade structure, that is the -- those are the decisions that are used to manipulate these school systems and keep them all black and all white. So it is necessary to look at that, at those techniques in order to stop the segregation, to stop the discrimination.

Q That would be requiring us to review questions with reference to the constitutional validity of the states putting a school in a certain place in some case other than where it directly has raised that point. That is where you have gone.

A Well, I think the case does raise that point, because Mr. Blakeney's clients went into the State Superior Court in Mecklenburg County and got an injunction which restrained the school board from carrying out this kind of step.

Q Well, he didn't restrain them from building a school, did he?

A He restrained them -- well, let's look at the terms of --

Q That is where this started. If it is wrong, it would seem that the pattern would probably be wrong all over the United States and we would have to -- our courts would be busy trying cases of whether schools were located at the right spots constitutionally.

A Mr. Justice Black, that is why we submit that

the test we urge for -- that the Court ought to adopt, is a test based on results, a test based on actually desegregating the system, and that these other -- and that no one else in the case, not the Solicitor General, not the school board, none of the amicus curiae supporting their position, are answering the questions that they rhetorically assert have to be answered as to what is a unitary system. But none of them are saying how -- giving any concrete basis for instructing the school superintendent or district court how it is he runs his school system so he won't be discriminatory and can remove segregation.

Q Mr. Nabrit, let me try this question out on you. This statute that you challenge here today has been adopted by the state on its admission to the Union and enforce strictly from the beginning right down to the present time. Would you have a quarrel with it?

A If I leave out the whole history of state racial discrimination against the blacks in the country or in the state --

Q I said "and enforced it." If the state had adopted it and enforced it, there wouldn't have been any segregation, would there?

A If the states had been colorblind from the beginning and we never had slavery and we never had racial segregation, then I wouldn't be here.

Q Then this statute would be all right, wouldn't it?

A (No response.)

Q If a statute 200 years old was strictly enforced right from the beginning.

A That's right. But the essence of my submission is to look at this statute as it exists in the world we know, the world where the states have done everything they can, including the school board, and they have resisted Judge McMillan's orders in every way they know how, to keep racial segregation. And this Court knows that history. The Solicitor General referred to it yesterday, in talking about Little Rock and all that, but I disagree that it is all over. This war against the Brown case is still going on, it is just in a much more subtle form, and that is why we have to deal with these details about how school boards run their system, because they are not engaging in -- they are engaging in more sophisticated types of evasion, that is what this case is all about here.

Q Well, if this statute is unconstitutional, it is only because the Constitution requires precisely what this statute prevents in the circumstances of this case. You are saying that the Constitution of the United States requires assignments based on race in this case, requires it because of past discrimination, and that as a matter of remedy you

would say that the Constitution absolutely requires it. Otherwise I suppose the statute would be constitutional, wouldn't it?

A Well, that is correct, but my main argument is --

Q Well, would you say -- are you saying --

A -- it is not correct about my other two arguments.

Q Or are you saying that a United States court or any judge has got some -- or a United States court has got some discretion as to how to fashion a remedy and that a state statute which purports to interfere with his discretion is invalid?

A Right.

Q Which one are you saying?

A Well, I am saying that and I am also saying --

Q That the Constitution requires it?

A -- I am also saying -- well, I certainly say that, but I also submit that the Brown case requires a result. The Brown case requires an actual reform of the school system, so the Constitution does require, if that is to be accomplished in fact, that the goal be achieved.

Q You say Brown says that racial discrimination in school assignments are unconstitutional and we should have remedied the situation by making some more racial assignments?

A I am not saying that. I --

Q Well, why did you answer yes?

A Well, maybe I didn't hear the question.

Q All right. Never mind.

A I understood -- the answer is yes, but the Brown case requires something more, that is my only point. The Brown case requires -- the Brown case held that the separate schools for black were inherently unequal and had to be abolished, and it was not simply a decision based on the existence of a racial classification.

This neighborhood school concept in the context of a system like Charlotte, and so far as I have been able to tell in the context of all of these school segregation cases in the courts nowadays, this neighborhood school concept is really a fiction.

Q Is what?

A A fiction. It certainly never existed in Charlotte. No one in this case in Charlotte, certainly not the school board, not the HEW plan that the United States presented, is proposing that pupils be assigned on the simple basis that Mr. Vanore stated, that is no one has proposed that you assign pupils in Charlotte schools to the closest school that can hold them.

Q Suppose it did, would you think that was unconstitutional?

A I would think that on the facts of Charlotte it is unconstitutional.

Q You think it would be unconstitutional --

A Yes, sir. Yes, sir.

Q -- forget Charlotte for the moment -- do you think it is unconstitutional to have schools where the main objective is to have them close to the children in the surrounding community, whether they call them neighborhood schools or anything else?

A I have nothing against that policy and that policy is not per se unconstitutional. But it does produce an unconstitutional result where the neighborhoods are racially defined by the state, as in Charlotte, or where --

Q The problem is that the state has been racially defining schools, and then this is a different problem to this. If you are saying that they pass laws that required people to concentrate in one section rather than another, I think you would admit that is quite a different law suit.

A Well, they accomplished precisely that by a series of administrative steps in the small decisions, precisely that. They defined a neighborhood racially --

Q You mean the population is set there by the laws of the state, where they are?

A This has really two aspects. Yes, the --

Q What laws of North Carolina did this?

A There is no law applicable to Charlotte, no racial segregation ordinance applicable to Charlotte, but the same thing has been accomplished in Charlotte by the use of -- by the whole record we made on the zoning, on the way the black neighborhoods were treated differently than the zoning on the way the public housing was built and the way the urban renewal moved the people around --

Q That is a pretty good job to assign to us, isn't it, to try to rearrange the areas of all the Nation where the people have naturally concentrated in one place because of poverty or because of wealth, or because of something else?

A Well --

Q Isn't that more than a court ought to have to do?

A I think the choice is that we -- Judge McMillan made a finding that that is what had been going on in Charlotte, so that the choice is --

Q What has been going on?

A That the government had been accomplishing residential segregation by the several methods in Charlotte, so that choice that gives us --

Q Well, then, your complaint should be against what the government has been doing there, wouldn't it? How can you rearrange the whole country in such a fashion?

A We don't seek to. We seek to integrate the schools on the simple case that --

Q Yet you state your case by challenging the place people live and not letting them have schools in their areas.

A Well, the school board is not proposing to give them schools in their areas and they never have, so that is not a decision that I have made or that the plaintiffs in the case have made, but --

Q And I understand that you want to haul people miles and miles and miles in order to get an equal percentage of the races in the schools where they don't live close to them.

A Mr. Justice --

Q Is that right?

A I don't describe my position that way, no, sir. Let's take a concrete example. Let's look at an example of what Judge McMillan was faced with. He is faced with something that -- on this piece of cardboard which we showed you yesterday, we have just simply made tracings of a proposal about how you treat the pupils in a particular area, and the red outline is the government proposal for this particular area, and the black outline is the one Judge McMillan ordered, and let me take it very specifically, in an effort to show you, not that there is something particularly wrong with --

not that somebody made a mistake about this particular thing, but an effort to illustrate the principle that there really is no difference between this racial balance idea that we are chartered with and the neighborhood school idea that the others say they assert.

Q You wouldn't show the neighborhood school outline that some parties would be urging, would you?

A This is the HEW neighborhood school --

Q I know, but there are parties in the case who say that that is a gerrymandered district --

A Oh, yes.

Q -- a racially gerrymandered district, and they object to it on that basis.

A I am saying --

Q So I am not sure you should suggest that that is the neighborhood school system that some people are talking about.

A I agree with that, Mr. Justice White.

Q All right, go ahead.

A I will call it the HEW neighborhood plan. Here is what it does, the one that the Solicitor General supports. There is a black school here down at this part I am pointing to that is called Lincoln High School. And there is a white school here called Deryder, and there is a white school here called Statesville Road, and all three of them have

grades one through six, last year.

The school board constructed some zone lines to -- in their proposed integration plan, and it left Lincoln High 100 percent black. So HEW proposes to cure that by combining all three into one big school zone, combining all three into one big school zone, and saying that the children in the first two grades will go to Deryder over here, children in grades three and four will go to Statesville Road, and the children in grades five and six, even those white children who live way out here, will go to the black school in the ghetto in grades five and six.

Now, that is defended as neighborhood schools, and this is a particularly large -- not a compact example of this, but this is neighborhood school HEW style.

Now, the black --

Q What is the school board's plan vis-a-vis that?

A The school board opposes this.

Q Yes.

A But I am not trying to advocate this particular zone. I am trying to --

Q Nobody in this case really is advocating the HEW plan.

A Yes, Your Honor, the brief of the United States --

Q Except the Solicitor General in a very unenthusiastic way, as I understood him.

(Laughter.)

A The Solicitor General's submission, to be accurate about it, is that the case ought to be remanded and Judge McMillan should understand the correct legal principle that that is a valid plan and the school board ought to be permitted that choice.

Q None of the parties to the litigation that we have got here, no court and none of the parties in their briefs have had very much good to say for the HEW plan.

A But, this really isn't --

Q Now, this doesn't mean that they have a neighborhood plan, either.

A Let me be clear, this is very much representative of what the United States government is requiring all over the South, because their principle is the only way to integrate -- it is in the Solicitor General's brief -- the only way to integrate is you rezone or you combine contiguous zones -- he has the three methods listed there in his brief -- it is combining contiguous zones.

Our point is that from the standpoint of the actual practical operational of the school system, of the actual practical effect on the child, this principle of contiguity doesn't have any meaning. It is the same to the child,

whether he is bused across this intervening area or if you draw a big line around it and he is bused the same distance.

Q Well, I think surely you are not saying it makes no difference to the child. He might be separated from his brothers and sisters. He might be transported 15 miles, may have to go to a school, one of them two miles away and one of them six miles away. I think that there is something to the concept of the neighborhood school that is worthy of consideration in this Court, particularly when we have to decide by looking at maps.

A Well, what I would suggest is that Judge McMillan said it precisely right when he said that the neighborhood school concept, whatever may be its value, has no standing in the Constitution to override the constitutional duty of the school board. It has no standing to block the board from performing its affirmative duty to change the unitary system.

If you assume, Mr. Justice Black, that the neighborhoods are really natural and that the people all voluntarily move there --

Q Of course, they are natural.

A -- you still have to face -- no, they are not, not in these findings -- but you still, even if you make that assumption --

Q You mean they made findings that they are

artificial, that the neighborhoods are artificial?

A No, that the neighborhoods are racial, that the neighborhoods -- that say the neighborhood system is the same as saying racial system, is not the same as saying non-racial and neutral system, that is the finding.

Q Well, now I may say to you, sir --

A And I may say --

Q -- that what I am interested in and have been interested in from the first case is if there is plain discrimination on account of race in a particular instance, I think we should correct it, under the Constitution. But it disturbs me to try to challenge the whole arrangement of the living practices and the way of life of the people all over this Nation.

A Mr. Justice Black, if we had ever seen in any of these cases the real neighborhood system, based on every child going to the closest school system -- to the closest school, then we might say that the judgment of the court is upsetting some established practice. But we don't have that in Charlotte. They have never had that in Mobile.

Q You don't have any schools, any people that have moved to places because they are close to a school?

A It certainly happens that sometimes pupils attend the closest school, but these city school systems are not operated on any kind of basis of strict proximity. Where

you have got 103 schools, like Charlotte has, it is just not run that way.

Q I would like to ask you this question now, which your statement just prompted. Do you consider Judge McMillan's findings as to state action after 1954 or after Brown essential to the defense of Judge McMillan's order?

A No, Your Honor, not at all. I take it by that that you mean state action with reference to housing?

Q Yes.

A No, the housing --

Q There were no findings made whatever as to state action post-1954, and you have come to this Court with the history of racial segregation in schools up to 1954. Would you be defending this case as you are now, defending the order as you are now?

A Yes, I would, provided --

Q I assume you would, naturally.

A But it is because -- it is not only the housing practices that are racial, the school assignment practices have been racial ever since Brown.

Q Well, I amjust wondering if you are not taking on a little more baggage than you have to.

A Your observation is entirely correct that that is not essential to Judge McMillan's decision, and we don't believe it is so, because the school assignment practices,

the dual zones of using buses to keep the schools segregated, busing children past their nearest school to keep them segregated, all of those practices -- Mr. Justice Black, there is an exhibit in the opinion by Judge McMillan, at page 1206a of this third volume of 281, which lists the nine schools that the school board would leave all black, and all of them but one were either built since Brown or had additions put on them since Brown, enlarged or improved.

So what we are looking at is institutions constructed on an all-black segregated basis since Brown, and Judge McMillan is dealing with the reality of life in a community where the school board has been engaging in all of the chicanery to keep the schools segregated, and it is his job to find a remedy for that, and we suggest that the only administrable principle is not some -- you will never get these schools integrated if you tell the district judges to go develop reasonable plans or operate on one of these verbal formulations that is based on something other than doing the job.

Q Well, if you can show us from any of these particular things where the order has been approved which shows in the record that it is discrimination against a race, then I will be interested in it. But I don't like this wholesale method of trying to condemn a whole practice and do away with what I consider to be a valuable part of our

society, at least it is traditional, of the neighborhood school idea.

A Well, Judge McMillan proceeded in precisely that kind of common law tradition. He said he was deciding this case on its facts and on Charlotte, and he wasn't trying to make law for the whole country, he was trying the case on the record before him. It is a detailed record. It is the, I am sure, most detailed record on the subject of busing in relation to school desegregation that has ever been made. And the suggestion that we ought to have a remand for some further proceedings, it seems to me, is a suggestion that not that the court clarify the law for the guidance of the school board but a suggestion that we have more confusion and more lack of clarity.

Q Do you consider that Judge McMillan's findings with reference to de jure segregation arising out of racial prevalence, zoning -- I am not speaking now of school zoning -- zoning ordinances and regulations is essential to his conclusions?

A No, I thought I answered --

Q Why did you --

A It is not --

Q I should think your answer could be consistent. Why did you offer evidence on the subject and why did he make findings on it if it is irrelevant?

A Well, it is because the court's traditional approach to these problems in state actions is to look at the whole factual pattern and all the background pattern, and we don't rely on any one factor and we certainly don't rely on any one novel state action approach, so you have got all this conventional state action, namely schools run on a compulsory segregated basis right up until July 1969, this school system ran with 25 black schools, two-thirds of the children on a freedom to transfer plan, just like that in the Monroe case, from Jackson, Tennessee, that was a companion of Green.

So there is so much conventional state action we don't have to deal with --

Q You are still on the Chief Justice's question. I understood that this post-1954 state action evidence was introduced and considered by Judge McMillan as bearing upon the question of whether these schools was in the context of original, an original dual system, could still be regarded as racially identifiable.

A Certainly he thought it had some bearing on the matter, and I think that is correct. But I do not believe it is correct to say that the decision hinges on it or that it depends on it.

Q Well, that was the question I put to you first.

A If I may take an example of the relevance of this kind of evidence in a concrete way, the two schools that

HEW were going to leave all black were Oak Lawn and Double Oaks. Now, Double Oaks school is a school built right in the midst of a low-income federal housing project. That is the most de jure neighborhood in town. And the suggestion that that is the school to be left all-black, it seems to me, contradicts the Brown decision.

MR. CHIEF JUSTICE BURGER: Counsel, we have absorbed some little time of yours in the process of our questions, and if after lunch there are some points that you wish to make that you feel you haven't covered on your argument in chief, we will give you some additional time, five or ten minutes.

MR. NABRIT: I appreciate that.

MR. CHIEF JUSTICE BURGER: You can indicate how much you need.

MR. NABRIT: I appreciate that.

MR. CHIEF JUSTICE BURDER: Thank you.

(Whereupon, at 12:00 o'clock meridian, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Nabrit, you may proceed.

MR. NABRIT: Mr. Chief Justice, and may it please the Court, I would like to use an additional ten minutes, if the Court would allow.

MR. CHIEF JUSTICE BURGER: Very well.

MR. NABRIT: Merely to state two additional arguments which are made in our brief and in the process, I think, add to my answer to the Chief Justice's question which suppose that this statute was adopted in an entirely neutral atmosphere, perhaps hundreds of years ago outside any context of a history of segregation and so forth.

The first of the two arguments is the one we set out in our brief and which the court below relied on, based on the supremacy clause. Now, that argument, of course, would not apply to this hypothetical statute adopted in another environment.

The second argument I will make is based on the principle decided in Hunter vs. Erickson and the lucid opinion by Judge Paul Hays last week involving the New York statute, might apply in that other situation, and then I will talk about that.

And I would like to conclude by returning to what

we mean by the racially identifiable school.

Now, the supremacy clause issue is, I think, quite simple and quite fundamental. It is that the statute constitutes a practical interference with the remedial powers of the district judge.

Even if we accept Mr. Waggoner's interpretation of what the statute means, that is true. Mr. Waggoner says that the statute only applies after you have a unitary system, and then when you do you can no longer use race and that the statute forbids or prohibits the school board from using race to go beyond the requirements of Brown. You can go up to the requirements of Brown but not beyond.

Now, practically what does that do? What did it do in this case? It put the school board in the position of having a federal judge who would enjoin them, to come up to the requirements of Brown, to do at least the minimum necessary to comply with Brown, and a state judge who would enjoin them, that you can't take one step beyond it, that you can go one inch beyond the minimum federal constitutional requirements.

Now, the statute is over-broad in general and vague, as this one is, which sets up that kind of collission between the federal power and the state judge's power is a practical interference with the remedial powers of the federal court, the courts below, and the same thing is found in an

Alabama case, which we have reprinted in the rear, on 29a, of the brief for Appelless, a 1970 Alabama statute which the three-judge court in Alabama, Judges Gewin, Thomas and Pittman, held unconstitutional on the same grounds that the legislature was trying to overturn the decisions of the federal court and under the supremacy -- on a constitutional matter, they were trying to review the federal court's decisions about constitutional rights in this case called Alabama vs. the United States, and that the law was unconstitutional under the supremacy clause as well as under the Green case, and the Brown case.

Now, by making that argument on Mr. Waggoner's assumption that the statute is neutral, I don't mean to suggest for a moment that we accept that interpretation of the statute. The real meaning is the one the Attorney General of North Carolina urged in the court below and the three-judge court accepted, in that the statute was intended to prohibit school boards from using these ordinary techniques of school administration, such as busing, pairing, clustering and rezoning, any of them, if the purpose was to affect any racial ratio on the basis of race, any kind of racial balance.

Q It says what?

A Well, the words of the statute, the second clause of that first sentence we were talking about in this North Carolina statute, is what I refer to, Mr. Justice Black.

It is page 21 of our brief and it is that "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin." That was the clause we talked about, and it says "or for the purpose of creating a balance or ratio of race, religion or national origins." It was understood -- this is what the Attorney General and the court below accepted as embodying this limitation on the power of the court to reorganize the system, and this is what is involved.

Now, the Hunter vs. Erickson point I do not intend to argue at any length but merely to state. The point is simply this, that the statute does make an expressly racial classification. It says to a school board, you cannot, for example, bus children in order to racially balance schools, but you can bus them for any other purpose. You can bus children to segregate them by sex, you can bus them any distance, any age, for any other reason the school board might want to use, to save money, to build the schools out -- and this is realistic -- to build the schools out where the land is cheap, or any of these kinds of reasons you can bus. The only reason you can't use is busing for racial balance. And Hays' opinion doesn't presuppose any duty to integrate, even if as he assumed there was no duty to racially balance as a constitutional matter. Nevertheless, the statute disables the school board from doing something that the black community

is interested in getting, namely advancing the cause of racial integration in the schools.

Now, finally, our definition of the school board's duty under the Constitution does not rest on a notion that racial balance is required. We state our view of the rule that the court ought to adopt very precisely in our brief in the Mobile case. As the Solicitor General pointed out, we have adopted it in the Swann case.

It is that every black child is to be free from assignment to a black school and an identifiable racial minority school at every grade of his education, and we define identifiable racial minority school not in terms of mathematical percentages or any precise notion of a balance, but in these terms:

The racially identifiable black schools are those which by reason of a very considerable disproportion or a very considerable racial concentration are conceived as designed to receive black children. The schools that are set aside for the black children is what we are talking about. And the definition doesn't rest on anything like your mathematical position. We recognize that a range of results or ratios would satisfy the definition of a school not identified racially.

The definition embodies both the concept of disproportion, which everybody is familiar with in the debate, and

also the concept of a considerable racial concentration, on the idea of concentration, referring to where even though a race is a very small part, they are all clustered in one school, or in a particular school. But the test depends, in the final analysis, and you can't get away from it, not on application of a mathematical rule but on the court's exercising judgment about whether the school in all the circumstances is one which is conceived and designed for black children, as a separate, segregated school set out as the institution, the principal institution of the segregated system, the principal vestage of the segregated system.

Thank you, Mr. Chief Justice.

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

You may proceed.

REBUTTAL ARGUMENT OF WHITEFORD S. BLAKENEY, ESQ.

MR. BLAKENEY: May it please the Court, counsel on our end of the table have agreed that I may speak briefly in the few minutes that remain in the time that we were to divide.

MR. CHIEF JUSTICE BURGER: I think you have 13 minutes, Counsel.

MR. BLAKENEY: Thank you, sir.

MR. CHIEF JUSTICE BURGER: If you find you need a little more, we can give you some more.

MR. BLAKENEY: I don't believe I will.

I would like to address my observations at this

time, if I may, Your Honors, to what seems to me to have emerged as the main focus of contention, and that is this matter of remedy, remedial action to cure or correct undue or dismantle a situation caused by, let us assume for the moment, caused by wrongful governmental action in the past, or indeed wrongful governmental action presently existing.

And may I take as my point of departure the question that the Chief Justice asked Mr. Nabrit earlier to this effect, whether he was arguing under Mr. Justice Black's questioning about the constitutionality of the statute on its terms. The Chief Justice put the question to Mr. Nabrit, are you contending that that wording is unconstitutional in itself or are you contending that it won't due, it is invalid, it is unconstitutional in its application to this factual situation?

And I understood Mr. Nabrit to reply it is the latter.

Now, I make bold to take the position, this position, Your Honors, I cannot conceive of any situation, no matter what the presence of governmental action in the past or in the present may be, in which any remedy can be utilized to redress a past constitutional wrong by imposing a new constitutional wrong upon anybody who objects.

Now, I stand upon that and I think that is constitutional gospel. But let me develop that just a little

more, if I may.

I say that on the question of determining whether or not there is or has been governmental action that is causing, producing a situation of compelled segregation, that is the true issue to be litigated in this respect: If it can be found -- and this is essentially what I argued earlier -- if it can be found through careful litigation in any case that freedom is not being truly accorded now to the child, then whatever it takes to remove that governmental action that is denying that child that true freedom today -- by true freedom, I mean freedom to go to school on non-racial basis, without regard to his color, without consideration of his race -- if that freedom is not being truly accorded to him, then that is what the litigation should be about in each and every case as it arises, and they will of course arise still, no matter what the decision here is.

But that should be the inquiry and the result should be to root that out, as has been said by this Court. That freedom genuinely must be accorded. But, Your Honors, it is not the course to take to say to him, we will now put you back on the road of racial compulsion, rather see that he gets freedom, individual freedom.

Now, let me give an illustration to indicate further what I am speaking of. Shall it be said to a Negro child, for example, today at a given school, the Negro child, let us say,

is attending a school that is convenient to his home and that he prefers to go there, his parents prefer him to go there, they say so, they say so in the Moore case, this is where he wants to attend. Shall school authorities be allowed to go to that child and say, becuase your parents were by law or governmental action forced to go here, now therefore you are going to be forced to leave here for that -- because of that racial compulsion that was imposed upon them, we now will impose a racial compulsion upon you to go somewhere else, though you do not wish to go. And it is only because of your race that we now take you and move you.

Or to the white child, shall governmental authorities say to him today, because your parents attended this school, let us say, in the past, in the neighborhood of your home, and at that time Negro children were not allowed to come here, by law they weren't, therefore, you the white child must now leave here and go to another school you do not wish to attend. And we send you away from here because you are white.

There must be retribution effected here for what was. Or let us bring it to the present. If it be not a matter of retribution for the past but here is a condition of separateness existing today, we must correct this separateness and therefore we must force you against your will and we will pick you by your color and send you.

Now this, it must be starkly called what it is. It is government compelling people, driving people on the basis of race.

Q Take a case where there has been no dual system, no discrimination, but it just so happens that there are some white schools and some black schools in the city, by whatever circumstances causes it, there are black schools and white schools, and some black and white schools, and the school board says to itself, we think we will have a better educational result right across the board, people will come out better citizens if they are educated better, so we are going to pair some schools and we are going to make sure that all through all the grades education is furnished to blacks and whites together rather than separately, not because we are required to, not because there is any -- not because we have to give a remedy for anything. We just think as an educational matter it is going to further the public interest to do it this way.

So they go to your black child and say you have been going to this school but you are not going to go to this school any more. You are going over here to another school where you can go to school with whites. And they say to the white people the same thing. I take it you wouldn't say that is proscribed?

A I would say this to them, Your Honor, that --

Q Well, is it yes or no? Is it proscribed or not under the position you took a while ago?

A I think that the protesting child is entitled to an inquiry as to whether or not the hand that drew the boundaries and decided where that school --

Q The school board said that we concede freely that the reason you aren't going here is because we want blacks and whites to go to school together and this is a racial -- to that extent, it is a racial reason for the change. We want them to be educated together.

A Your Honor, if there is anything in the natural geographic situation consistent --

Q There is nothing whatsoever in geography that would indicate -- they say this used to be the first six grades here, but it isn't going to be the first six grades any more. It is going to be the junior high school and you are going to have to go to grade school over here with all the other people who are going to those grades.

A And my answer, Your Honor, is that if the school board was formerly utilizing or at any time utilizing natural geography and then left it, departed from it for no reason other than to force people against their will, on the basis of race, then the objectors --

Q Well, the school board says we are going to force you against your will to be educated with members of the

opposite race. That is our decision. We are going to force you to do that. We think it is better for education. You would say that is unconstitutional?

A I would say, Your Honor, that the sole test is what Brown laid down, namely, look to inquire, look to see, is the action of government here, is it shaped according to race and race alone, race alone, then it cannot be.

Q Well, the school board freely concedes the only reason we are making this change is to make sure that blacks and whites go to school together.

A Race alone, then Brown does not permit it, Your Honor.

Q Would you say that that is critical to your position?

A In this case?

Q Yes.

A We, of course, rest upon the exact facts of this case, but the proposition generally --

Q Well, what if you are wrong on that, that a school board could do what I just described?

A Then in this case they have not done so, Your Honor. Here it is not the situation you have just described. Here --

Q Let's assume a school board could do what I described, consistently with Brown and the Fourteenth Amendment,

does that make any difference in terms of your argument about the acceptability of this order of the district court in this case?

A I will say, Your Honor, where the facts are as here admitted, namely, we drew these lines for no reason except to include blacks or exclude whites or vice versa, we drew them for no reason than that. It was not educational purpose that motivated us or moved us here, it was not that. This was conceded here in this Moore record. These lines were drawn, these moves were made, these people are being sent here and there not for educational reasons but for racial reasons.

Q Mr. Blakeney, when did this bill pass, in '69, the no-busing bill?

A The no-busing bill?

Q Yes, sir, the no-busing bill, what month?

A In the spring of '69, early '69.

Q Well, suppose that same bill had been passed in '55, we wouldn't have this problem, would we?

A Might indeed still have this problem, Your Honor.

Q Well, isn't there a difference between when you pass this bill or do you admit that this bill was passed with the express purpose of offsetting the judgment of the district court?

A No, sir, the district court orders were entered

a year after this statute was passed.

Q Well, why was it passed?

A This statute was passed to express the policy of the state as being the same as the decision of this Court in Brown.

Q Well, it was after the '65 decision of this Court, wasn't it, the district court?

A The district court in '65 said that Charlotte-Mecklenburg was a non-racial system and being operated non-racially.

Q Well --

A And the circuit upheld that.

Q Well, it was obviously after '65, it was '69.

A The statute was in '69.

Q In '69?

A Yes, sir.

Q And don't we have to consider in that context not just as an ordinary statute that was passed 80 years ago --

A Well, whatever context it is to be considered in, Your Honor, the point is this: This statute said, the State of North Carolina adopts as its policy this principle, specifically, from here on, namely, children shall not be barred from a school on account of race and they shall not be assigned to a school on account of race. That is all it said, and that is all we ask enforcement of and that is all that our injunction

said, and the only reason we are entitled to enforcement of our injunction is because Judge McMillan has ruled the opposite. He has said, contrary to Brown, he has said, children, you must go because of your race now into the schools where I send you. That is what we complain of, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Blakeney. Mr. Waggoner, Mr. Vanore. Thank you, Mr. Nabrit. The case is submitted.

(Whereupon, the argument in the above-entitled matter was concluded.)

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