In the

Supreme Court of the United States

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, et al., Petitioners, v. STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, et al., Respondents.	)	No. 72-549
and CAROLYN BRADLEY, et al., Petitioners, v. STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, et a., Respondents.	)	No. 72-550

Washington, D. C.
April 23, 1973

Pages 1 thru 86

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Washington, D. C.,

Monday, April 23, 1973.

The above-entitled matters came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 72-549 and 72-550, School Board of Richmond against the State Board of Education, and Bradley against the State Board of Education.

Mr. Coleman, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,

ON BEHALF OF BRADLEY, ET AL.

MR. COLEMAN: Good morning, Mr. Chief Justice; may it please the Court:

The basic issue here is whether, 19 years after Brown, State created school division lines were bamboo curtains in the cause of school segregation in Virginia, lines which were freely and repeatedly crossed and ignored to maintain segregated schools in Virginia, now become iron curtains constituting an absolute bar to the effective desegregation plan before the court below. For, in this case, the district court found as a fact that Virginia, through its State school officials, its Legislature, and its school divisions, including that of Richmond, repeatedly and consistently violated the black petitioner's constitutional right to attend public schools free from State-sponsored racial segregation.

In other words, the question here is whether a district court is without power to approve a desegregation

relief plan solely because it involves interdivision assignment of pupils among adjacent divisions.

And if this Court determines that that power has ever -- does exist, was there a gross abuse of discretion to exercise it here when the record includes undisturbed findings that, one, Virginia, including the three school divisions here involved, repeatedly ignored the division lines to preserve segregated schools.

Second, that it was no longer possible to achieve effective and complete desegregation within the confines of the Virginia, of Richmond school division itself.

Third, that repeated unconstitutional acts and intentional delays, directed by Virginia, created this situation.

Fourth, the school division lines serve no useful administrative or educational purpose; and the result of such failure would be to have black and white schools within walking distance of each other.

In addition, the two adjoining school divisions here involved, Henrico and Chesterfield, were themselves operating non-unitary racial systems.

Petitioners in No. 72-550 are black school children, the defendants are the State Board of Education, the State Superintendent of Public Instruction, the three Division School Superintendents who, under Virginia law, incidentally,

are centrally nominated, the Legislative bodies of Richmond, Henrico, and Chesterfield, and the School Boards of these three Divisions, each of which, under Virginia law, is an administrative subdivision of the State.

QUESTION: You said the School Superintendents, Mr. Coleman, are centrally nominated?

MR. COLEMAN: Yes, sir.

QUESTION: What's that mean?

MR. COLEMAN: Under Virginia law, it's provided that the State Board of Education makes up a list of people eligible to be appointed, and the School Divisions can appoint only from that list; and, in fact, the Virginia law provides that if, within sixty days, the person is not appointed if there's a vacancy, the State Board itself makes the appointment.

And, incidentally, in this case, the School Superintendent of the Division of Chesterfield was appointed in that manner. He was appointed by the State, because Chesterfield, within sixty days, had not made the appointment.

Now, from 1871 until the time of the Brown decision, Virginia's Constitution, its statutes, and all of its policy-making authorities compelled each School Division to operate racially segregated schools.

At the time of the Brown decision, the school population of the Richmond Division was 43 percent black and

57 percent white. In Chesterfield, it was 21 percent black and 79 percent white. In Henrico, it was 11 percent black and 89 percent white.

For the three divisions together, however, the composite figure was 33.7 percent black and 66.3 percent white.

As I stated before, in each division, regardless of what the local division would want to do, by State law, black and white had to attend wholly separate schools.

Now, unfortunately, Brown brought no change whatsoever On pages 18 through 22 of our brief, we recount the very successful State actions by State officials, with school division cooperation, to keep Virginia schools segregated, into position, then a statute under which the governor would take over any school which voluntarily or by court order admitted blacks, then a public placement law, and then the State tuition laws.

Now, the public placement law, as this Court knows, was particularly effective. As stated in Bradley, it took out of the hands of the school boards and school superintendent any decision relating to the integration of the school.

And so in 1961 these black petitioners brought a class action on behalf of all black children in Virginia against State officials, including the Richmond School Division, to be admitted to white schools despite the provision of the pupil placement law.

The district court granted limited relief, but not class relief. The Court of Appeals reversed, directing class relief.

The Commonwealth and the Richmond School Division then sought to void the impact of this decision by introducing a Freedom of Choice plan. This plan was accepted by the Court of Appeals, but this Court reversed, because the plan failed to deal with desegregation of teachers.

It was now 1966, 12 years after Brown, a consent decree was entered into involving a Freedom of Choice plan, placing the affirmative duty on school authorities to modify free choice if it did not result in effective desegregation.

Unfortunately, segregation continued, but the school officials took no action whatsoever.

For this reason, the black petitioners, on March 10, 1970, filed for further relief pursuant to this Court's ruling in Green. On that date, even though the composite racial makeup of the three divisions had not altered, which, you'll recall, I said 33.7 percent black and 66.3 percent white; the makeup in Virginia had become 64.2 percent black and 35.8 percent white. While Chesterfield had become 9.5 percent black, 90 percent white; and Henrico, 8.1 percent black and 91.9 percent white.

Now, at that point, this is 1970 now, just two and a half years ago, the Richmond School Board admitted that it

had been and it was in violation of petitioners' constitutional rights. The schools were still rigidly segregated. And I would ask the Court to please turn to pages 167 and 168 of the Appendix to the Petition for Certiorari.

QUESTION: What pages, again?

MR. COLEMAN: 167a, Mr. Justice Brennan, and 168a.

And just look at the situation. And this is 1970. Of the seven high schools, three were 100 percent black, one was 99.26 percent white. In other words, six of the seven schools, by any test you could make, were clearly racially identifiable.

The middle schools, six of the seven were clearly racially identifiable.

The elementary schools, almost all of them were clearly racially identifiable.

The faculty and staff were clearly racially identifiable.

Now, I am confident -- now, this is 16 years after Brown -- I am confident that no one can stand up before the bar of this Court and question the correctness of the district court's resulting finding at pages 168a -- 169a, pardon me, where the court says that the schools were racially segregated, racially identifiable, and violative of petitioners' constitutional rights.

Now, frankly, we find it impossible to characterize such contemporary facts as, quote, "history" or "original sin",

as respondents do at pages 47 and 73 of their brief.

At that point, the district court's job was an attempt to see that the School Board would produce a plan which would effectively desegregate the public schools.

The Richmond School Board continued to file inadequate interim plans, which were approved only because of time pressure, and the schools would have to open at the time. In each case, the court specifically found that these interim plans did not conform to constitutional requirements.

Then, on November 4, 1970, the Richmond School Board, stating under oath that it was impossible to desegregate the schools in the context of Richmond only, moved to join the adjacent divisions of Henrico and Chesterfield Counties, The State Board of Education and the State Superintendent of Public Instruction.

And at that time the black petitioners filed a second amended complaint, which again asked for relief on behalf of all children throughout Virginia. They asked that the adjoining school divisions be included in a desegregation plan either by consolidation or by contractual arrangements.

Now, after trial, and I wish the Court would follow me through these findings, I really think that this case, unless you can upset these findings, that this case has to be decided in favor of the black petitioners. That at trial, after trial, a full trial now, the district court found --

QUESTION: That complaint was filed when -- '71?

MR. COLEMAN: This was filed in 1970, Your Honor.

QUESTION: 1970 still?

MR. COLEMAN: Yes. Yes, in 1970.

QUESTION: And is that done in response to an implicit invitation by the district court?

MR. COLEMAN: No, sir.

QUESTION: It's not.

MR. COLEMAN: No, sir. That was not done. What happened was, Your Honor, that they were trying to come up with an effective plan. In the course of that, Mr. Little, who is of the Richmond School Division, said that the only way you could have a plan would be that you involve the other counties. At that point, the judge, in a letter which appears I think on about page 150a of the Appendix to the Petition, indicated there are a lot of problems here and we would want the lawyers to cooperate.

Then the School Board filed the motion and the -- it's attached to the -- there's an order in which there's a motion to recuse the judge, and it's attached to that order, Your Honor. It's 58, 58a is the order --

QUESTION: 58a of what?

MR. COLEMAN: Of the Appendix to the Petition, Your Honor. It's page 81. If you read the letter, sir, and once you read that letter, I am confident that you will not

conclude that that was an invitation on the part of anybody to file a claim.

In other words, the findings were that, one, the pupil assignment patterns in the three --

QUESTION: Now, was this a formal finding, Mr. Coleman?

MR. COLEMAN: Yes, sir.

QUESTION: At what page?

MR. COLEMAN: Well,as I go through, I will give them to you.

QUESTION: All right.

MR. COLEMAN: One, that the pupil assignment patterns in the three school divisions showed great disparity in 1971 racial composition, making both individual school facilities and the entire three systems racially identifiable.

He said that the Richmond system is identifiable as black, and that of each county is perceived as a white system. That's on page 201a to 208a.

That a great number of one-race schools had recently existed and, I repeat, some still exist. That's at page 186a, 201a.

He also found that at the time Chesterfield and Henrico were joined, and at the close of the record, each was operating a non-unitary school system in violation of the Constitution; and that's at page 524a of the record, 526a of

the record with respect to Chesterfield, and page 527a of the record and 529a of the record with respect to Henrico.

It further found that past and continued action by State authorities interfering with desegregation, that a constitutional plan for the city and for the counties as well cannot be achieved within current school division boundaries. That finding is at 237a, 207a, and 201a.

He concluded that the defendant should not be permitted to profit by self-created problems, and that's at page 237a.

Finally, he found that at the time the record closed, each division still operated a school system which was, in some respect, non-unitary.

The court never found, as respondents would have you believe by page 8 of their brief, that any one of the three divisions had ever achieved a unitary status. And I ask you to look at the chart in the Appendix to the Court Opinion, which shows that each division operates racially identifiable schools. And the chart is in Volume II, beginning on page 524, where he takes the schools of Chesterfield County, then Henrico County, and Richmond. And I assure you, when you will examine those, you will find that in each instance in this record every one of these schools were racially identifiable.

The other thing I want to make --

QUESTION: In mine I find no page 524.

MR. COLEMAN: It's the -- it's attached, Your Honor, to the Appendix to the Petition for Certiorari. It's a chart, it is 524, Your Honor. The white book.

And with respect to Chesterfield County, any test you will apply, you would have to say three out of those six schools are identifiable as white.

Now, another thing which I'd like to clear up in this case, the judge never found, and we don't urge, that the absence of a quota gives rise to a constitutional violation. And I would just ask you to read page 519a of the record, once again in the same opinion -- I mean the same, it's the opinion, but it's in the Appendix.

Now, once he found these massive constitutional violations, he had a constitutional duty to end them. And in Charlotte, the Swann case, in Davis, this Court has said that once there's a violation, the court should take all steps necessary to end that violation and to end the effects of it.

Now, the only reason, and the only thing that makes this case any different from Davis and Swann is something that my friends try to raise, namely, this division line. And I stand here and say once again that in order to maintain segregated schools, this line was never observed. Students freely were taken back and forth across this line.

You will find from this record now, for example, that the Kennedy School, which is under the Richmond Division, is actually situated in Henrico County, and black children -- Kennedy is now about 80 percent black. And if you look at page 8 of our brief, we set out a table for you; on page 8.

And here you have a situation where Kennedy High School, built in 1967, opened as a black school. Now, over 80 percent black. In fact, it's 93 percent black as of now. That within four miles of that school is Henrico High School, which is four percent black.

Now, that's the problem that the district judge had here. He looked at this map and he saw that you had an array in the Richmond School Division of black schools, measured by any test that you want to measure.

Right on top of them, outside in these counties, there were white schools. Now, certainly, in Swann, what you did was to approve a plan which said that you should desegregate the schools and that you send students by contiguous zones, by busing, to these various places.

Now, here the only reason is this line. Now, I assure you, the record will show and will repeatedly show, this line is an arbitrary line, it was never used to -- when there were segregated schools.

The judge found, at page 193a of the record, in his opinion, also in the record, this record now, sir, at page

912, there's testimony that under the State Tuition law when a black child would get the right to go to school in Richmond, and then if the white parent didn't like it, he, under the State Tuition law, as you know, Mr. Justice White, could opt out and go some place else; that the State paid the tuition and the white child went out of the county. That's on 912a of the record.

QUESTION: Mr. Coleman, as I understand it, the busing issue was a separate matter and is not involved in this case.

MR. COLEMAN: Well, Footnote 2 of the Court of Appeals opinion says this is not a busing case. The record's clear here that the amount of busing involved here is less than it was --

QUESTION: Well, the question of busing is not in this case, is that right or not?

MR. COLEMAN: That's correct.

QUESTION: And that whether there's too much or too little, or whether there's any at all or not is irrelevant in this case.

MR. COLEMAN: Irrelevant; irrelevant.

The sole issue here, Your Honor, is that when a judge finds as a fact that these lines have been repeatedly ignored in the cause of segregation, can you -- do they then become an iron curtain when you attempt to integrate the

school, particularly when there's a finding of fact by the judge, not upset by the Court of Appeals, which says that it's impossible to do it within the context of Richmond only.

QUESTION: Mr. Coleman, --

MR. COLEMAN: Yes, sir?

QUESTION: -- you referred to 193a, Judge Merhige's opinion about prior practice of crossing these lines. Does he mean there that that crossing had taken place in other counties in Virginia outside the Richmond metropolitan area? Or does he mean that pupils were exchanged previously between Henrico and Chesterfield and Richmond?

MR. COLEMAN: He means both.

QUESTION: So there were actual pupil exchanges?

MR. COLEMAN: Yes, there were actual pupils in these three counties, and, in addition, there were cases in other counties where there were regional black schools. And, incidentally, Mr. Justice Brennan, you ought to remember from the Green case, that they actually bused Indians across the line, too, at one particular time.

QUESTION: Well, what was the nature of the exchange between Henrico and Richmond or Chesterfield and Richmond?

MR. COLEMAN: Well, the nature was that under the Pupil Placement law, when a black person would apply to go to school in Richmond, the white family then had the right to send his child to some other school. He would then make an

application to go to school in Henrico or go to school in Chesterfield, and they would have to take him.

In fact, the testimony says that if, for some reason, Richmond would stand up and say, No, you can't do that, the State would get back at them by just deducting from the next State grant check the amount of the tuition. And so the testimony says, We couldn't do anything about it; this was State-directed, we had to do it.

And the fact is that these children were going across these lines all during that time. And that's what the judge found.

In addition, now in these counties there are special schools, like science schools in one county, the children go across that line and nobody gets upset. And it's only when it comes to desegregating the schools that this line, all of a sudden, becomes the most sacrosanct thing in the world.

And we just don't think that under your cases that that is so. And we also cite a lot of cases in the district court, on page 78 of our brief, and I think it's Footnote 121, where the Court of Appeals and the district courts have repeatedly ordered that there be an interchange of students, if that was the only way.

And, Mr. Justice White, what I'm trying to say, when you have a line which is just ridiculous, never used, then, under those circumstances you can't say that that becomes

an absolute bar. And this case is just that simple.

Now, as I said before, that I think that the real issue here is one of whether the discretion was properly exercised, and in my opening I indicated to you the reason why I thought it was properly exercised.

Thank you.

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

Mr. Little.

ORAL ARGUMENT OF GEORGE B. LITTLE, ESQ.,

ON BEHALF OF THE SCHOOL BOARD, et al.

MR. LITTLE: Mr. Chief Justice, and may it please the Court:

I believe the marshal is bringing an exhibit in, would you prefer that I --

MR. CHIEF JUSTICE BURGER: No, you may proceed unless you need it at the outset.

MR. LITTLE: All right, sir. No, sir.

As Mr. Coleman stated, the Richmond School Board, an arm of the State of Virginia, conceded that its schools were not being operated in accordance with constitutional requirements.

In addition, this bi-racial board, consisting of four whites and three blacks, is unanimous in its belief that there can be no elimination of black and white schools, absent assignment of pupils across existing lines.

I would like to capsule four aspects of this case underlying this position. A brief word on the constitutional violation, discussion of the precise issue, a more detailed review of the evidence which shows the lack of sanctity in these school division lines, and, finally, key aspects of the particular relief decreed.

Coming to the constitutional violation, the mere fact that a dual school system was still flourishing in Richmond 16 years after Brown provides the nexus for the relief decree.

The only question confronting the district court from the first day of the reopening of this protracted litigation was how to remedy this persistent and deliberately deferred perpetuation of a dual school system. This is a remedy case. We don't have to search for a constitutional violation.

This search for an effective remedy provides the lens through which all of the evidence and all of the actions of the district court must be viewed. The precise issue is a rather narrow one.

Did the district court abuse its discretion in approving a Richmond School Board desegregation plan which involved assignments of pupils across these lines?

This concept of interdivisional assignments constituted the essential ingredient in both of the alternative

forms of relief sought. Consolidation was not the only relief sought.

The first was a contractual interchange between the existing school divisions, fully authorized by State law.

The second was a consolidation of these school divisions in accordance with the provisions of State law.

Our position is that the action of the lower court was dictated, on this record, by a sound application of the all too familiar remedial guidelines previously established by this Court.

Under these decisions, there's only one test, that's effectiveness. Effectiveness is the key. No one can stand before the bar of this Court and argue that the Richmond School Board plan is not obviously more effective than the present plans in operation in Richmond or Henrico or Chesterfield.

The respondents and the government have studiously avoided any discussion of effectiveness which, as we understand it, is the heart of Brown, Green, Swann, Davis, and other decisions of this Court.

The district court -- let me go back. What we analyze the position of the respondents to be, and the government apparently, is that notwithstanding these guidelines which are so clear and explicit, regardless of consequences, regardless of the feasibility of the means to overcome these

lines, regardless of the past treatment of these lines by the State of Virginia, these lines impose a geographical limitation on the powers of a chancellor seeking to remedy an admitted constitutional violation.

The district court very carefully considered the importance which State authorities and local authorities had attached to these lines. He concluded that there was no overriding State interest in either restricting the assignment of pupils to the political subdivision in which they reside or in requiring each political subdivision to operate its own school system.

He also concluded, from a review of all of the facts, that these lines did constitute barriers to any effective relief for these plaintiffs.

Now, what evidence supports these findings?

It falls into three areas. First, we don't have to look far, we simply only have to go to the Code of Virginia, the State laws. We next can go to the expressed policies of the State Board of Education, the father -- we're a child in Virginia. The power over schools is in the State. This is a State violation. Richmond did not, of its own initiative, set up a dual school system.

We can go to the established policies of the Board. And, finally, we can go to the history of past practices.

Let's come to the laws. Our Code expressly, for

many years, has set out a framework for the operation of a school division consisting of two or more separate and distinct political subdivisions. Our State law, for years, and we have all used it, has expressly provided for the operation of joint schools for any educational need.

Our State law, and we have all engaged in it -- not all, but many divisions have -- specifically provides for the contractual interchange of pupils between separate political subdivisions.

These, the very existence of these laws totally belies any overriding State interest in restricting the assignment of pupils to the political subdivision in which they live. But they even do something else under the remedial guidelines of this Court, a fair interpretation of it, they suggested alternatives which a district court, in the performance of his duty to end segregation and its effects, had to consider.

Let's come to State Board policies. The State Board of Education has encouraged consolidations of separate political subdivisions into one school division for almost thirty years.

In 1944, it approved and accepted in principle a plan which had as its objective the reduction of the number of school divisions then in existence in Virginia. At that time we had 110, and for the most part each represented a

separate political subdivision. This plan, which was endorsed by our own State Board of Education, had as its objective the reduction of the number of school divisions from 110 to 40 or 50, which would have necessarily involved combining the separate political subdivisions into a single school division.

As recently as 1969, again in a statement expressing the desire, the State Board stated that consolidation be considered for educational needs, expressly stated that, quote, "Political boundary lines do not necessarily conform to educational needs."

This is not what the plaintiffs in this case have said; this is what our own State Board of Education has recognized.

QUESTION: Where do we put our finger on that in the record --

MR. LITTLE: Pardon me, sir?

QUESTION: Where do we put our finger on that in the Appendix here?

MR. LITTLE: This is on Richmond School Board Exhibit 82, it's in the Exhibit Appendix, on page 63 and 64. In the second paragraph, the last two sentences: "The State Board, therefore, has favored in principle the consolidation of school divisions with the view to creating administrative units appropriate to modern educational needs."

QUESTION: I don't believe I have the right one.

MR. LITTLE: I beg your pardon, sir, this is the Exhibit Appendix.

QUESTION: The white one? No.

MR. LITTLE: This is the thin brown Appendix. It's hard to identify these, sir.

QUESTION: Page 63 and 64?

MR. LITTLE: Page 64 particularly, the language I'm quoting. In the middle of the page, second paragraph.

-- "has favored in principle the consolidation of school divisions with the view to creating administrative units appropriate to modern educational needs. The Board regrets the trend to the contrary, pursuant to which some counties and newly formed cities have sought separate divisional status based on political boundary lines which do not necessarily conform to educational needs."

Not only the State Board but this record contains testimony from some of the more outstanding educational experts in the country, which agree with the State Board, that political boundary lines are of no significance in the area of education.

Now, so much for the State Board policies. Let me pass on -- excuse me.

QUESTION: How many school divisions are there now in Virginia?

MR. LITTLE: Approximately 130.

QUESTION: And you said there were how many in --

MR. LITTLE: 110.

QUESTION: -- 1944?

MR.LITTLE: Right. So more towns have attained status, such as this Court saw in Emporia. That is the reason for the increase.

The objectives of that plan were never carried out, but I am urging it to show what the policy of the State Board has been.

Let's come to the past practices of these, with respect to these lines.

The district court quite properly found that the State officials and the local officials had historically used principles of consolidation and interdivisional assignment of pupils in the establishment and maintenance of regional schools for blacks, joint schools for blacks, and joint schools for other educational needs.

These regional schools for blacks consisted of as many as four separate political subdivisions encompassing an area as large as 1700 square miles, requiring the children to spend the night at these schools because of the extreme travel distances involved.

These schools operated in Virginia, and the last one did not close, as this Court might have anticipated, in 1955, it closed in 1968.

There is not a scintilla of evidence in this record that any finance problems arose as a result of one regional school being supported by four, as many as four or five separate political subdivisions.

Now, what about the use of interdivisional assignments

There's a statute on our books, it's still on the books, Section 22-115, found in our brief but also in the Petition Appendix at 194, which, in 1960, the State declared it a matter of public policy of the State to encourage students to participate in programs which would require them to attend schools in political subdivisions other than the one in which they reside.

More significantly, in order to perpetuate segregation, not pre-Brown, but after Brown, in the Fifties, the last Sixties, thousands of blacks were involuntarily shoved across these so-called sacred lines for the sole purpose of perpetuating segregation in defiance of this Court and in defiance of the affirmative duty on school authorities to end discrimination.

Now, is this all history? What's happening today? Let's come to Richmond, if we can.

Mr. Coleman mentioned Kennedy High School. This black line, irregularly shaped, is the city limit of Richmond [indicating on map].

The only schools shown on the map are those within

one to three miles of that line. This one school might be a little more than three miles.

Kennedy High School -- the blacks in Richmond historically and today live in the eastern portion of the city, the south-central portion. This is the black part of the city [indicating]. The lily-white area is in the western part, and part of the southern.

Kennedy High School, right here, is a Richmond school opened in 1967, it is located entirely in Henrico County. It opened as an all-black school. And every day since it has opened 1500 children cross this so-called iron curtain, attend Kennedy, leave that school and cross that line again to go home.

QUESTION: Do any students living in Henrico go to Kennedy?

MR. LITTLE: Not that we know of, sir. We did discover in one of the schools that an Henrico child, by giving a false address, had enrolled, I'm not sure it was at Kennedy, but it was in Armstrong High School.

On Fairfield Court is another Richmond school, an elementary school, a historically black school. That lies partly in the county and partly in the city. It enrolls about 560 students. Each day of their lives they cross the line to go to school; they probably cross the line several times during the day that they're in the school because the

line goes right through the school building.

So far as crossing lines in the past, as recently as '69 Henrico was operating this school right up here in the extreme northern portion of the county. They who claim to be lovers of neighborhood schools have a neighborhood school for this school consisting of the entire Henrico County. Students from the easternmost portion of Henrico, to get to that school, had to go into the city, across this great line, through the city, outside the line again, up here. That's how sacred the lines were.

At the present time, Henrico, Richmond, Chesterfield, we operate joint schools for educational needs. The location of the Math Science Center, referred to by Mr. Coleman, is right here, School 408 -- I beg your pardon, this school right here.

In 1970-71, approximately, it varies within 1,000 or 1500, approximately 10,000 students from Henrico attended some courses there, 10,000 from Chesterfield, 10,000 from Richmond. So that's what significance the line has for us in Richmond today.

I submit the Richmond School Board, in light of its ignoring these lines in the past for educational purposes could not stand up here, if it so desired, and interpose this line as a shield to effective relief.

I think that on the basis of the State laws, the

State Board policies, of the past treatment of these lines, what else could a chancellor conclude? That he was entitled to use, certainly, at the very least, the same means that were used to violate the Constitution. I fail to see where that is a drastic decision on the part of a person seeking to remedy the constitutional violation.

One other thing on the map I would point out. The Henrico offices are located right at the heart of the city. The building permit for Kennedy School was issued by Henrico County.

QUESTION: Which part of the city was really annexed? The part involved in the whole litigation?

MR. LITTLE: Right. Right out here.

QUESTION: And that was taken from --

MR. LITTLE: Chesterfield.

QUESTION: -- Chesterfield County?

MR. LITTLE: That's right.

This is the James River, this line right through here, embraces it.

Henrico envelops the city north of the river, Chesterfield envelops the city south of the river. Like a butterfly, as one witness testified.

QUESTION: When an annexation takes place, is the school district boundary automatically changed with it?

MR. LITTLE: Automatically changed, yes, sir. We --

that boundary has shifted some 14 times, by virtue of annexations.

May I come to some of the key aspects of the relief decree.

I think it highly significant, the judge's order of January the 10th, from which this appeal is taken, simply requires these school authorities to exercise powers which they presently possess under State law; namely, to consolidate these schools.

Secondly, I would like to observe this: we are not saying that the particular plan, even though the district court found it to be reasonable, feasible, workable, educationally sound, we don't stand here saying it's the only plan to effectively desegregate these schools.

QUESTION: Mr. Little, what's the formality by which a consolidation is effected?

MR. LITTLE: All it requires is the consent of the State Board of Education, and I would refer the Court to the detailed framework set out -- first, it's Section 22-30 of the Code, found in the Petition Appendix on page 617; then there's a long series of statutes saying how you bring it about, how you create the Board, how the representation is determined, how the finances, both for capital outlay and operating funds, are handled.

There's a detailed framework set out in State law,

all it requires is a request, the State Board has to approve the request, and the counties have to consent to it. But once the consent is there, the machinery is already in our law to set it up.

But coming back to the plan, the only reason it was the only plan before the court was that, despite invitations from the court and from the Richmond School Board, none of the respondents would participate in the preparation of a plan, even assuming this relief were appropriate.

The lower court, in its order of January the 10th, expressly provided and gave them an abiding opportunity to come in and make amendments to the plan, modify the plan, even at this date, or if they come up with a better plan, so long as it eliminates segregation in its effects, there will be no problem.

Now, one other point on the plan. There is no more racial balance created under this plan than in the plan approved by this Court in Swann v. Mecklenburg. Under the plan in Swann, the variance in black composition ranged from 8 percent to 38. Under the Richmond School Board plan here, it ranges from 17 percent to 41 percent black.

It's true that every school ends up majority white, just like it did in Swann v. Mecklenburg, simply because of the historically stable racial composition which hasn't varied one-tenth of one percent in a decade in Richmond, in the

Richmond metropolitan area, of two-thirds white, one-third black.

This Court, in McDaniel vs. Bressey?, by approving that plan for Clarke County, certainly approved a plan which does a lot more toward racial balance than either this plan contemplates or results in or was done in Swann.

Furthermore, I call the Court's attention to the caveat of the district court, found in the white Petition Appendix, Volume II, page 519-20, where the court itself said, whereas the racial composition is educationally sound, there's no constitutional requirement for it, it's not to be deemd inflexible, rate or variations might be unavoidable, and giving them the opportunity to make amendments.

In concluding, then, may it please the Court, on this record the acceptance of interdivisional assignments is certainly too broad a remedial device. It has inherent limitations, namely, time and distance. The only time where interdivisional assignments would be an appropriate remedial tool would be where, as here, the transportation times and distances are remarkably comparable to what is presently being carried out in each of the separate divisions.

In conclusion, I think the bald truth is shown by this map. We have 67, 68, 60 percent black schools right now in Richmond. This is based on '71-72 figures.

Look what's right next door, seven-tenths of one

percent black, three-tenths of one percent black, zero percent black; and the greatest percentage of black in any of the schools shown here is five percent.

That's our problem. And if this Court affirms the Fourth Circuit, you have historic reality of black and white schools in the face of a feasible alternative for eliminating it.

And, finally, if it affirms the Fourth Circuit, I think it's all too clear from a practical standpoint that the promises of Brown will be rendered illusory for every black child in the City of Richmond.

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

Mr. Kurland.

ORAL ARGUMENT OF PHILIP B. KURLAND, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KURLAND: Mr. Chief Justice, and may it please the Court:

We respectfully submit that the question in this case is not whether the Richmond School System is desegregated. It is. There are no children included or excluded from any Richmond school on the basis of race.

The question in this case is not whether the Richmond School System is unitary. It is. There is no school in the Richmond School System that is racially identifiable as white or black; they are just schools in Richmond.

The question in this case is whether the Constitution requires that a desegregated, unitary city school system, which has a substantial black majority, be consolidated with two other independent, desegregated, unitary county school systems in order to assure a white student majority in the city schools.

The fundamental facts here are just three.

The Richmond School System has a substantial black majority. The county school systems have a substantial white majority. And the district court plan, and that is what is in question here, the plan entered by the district court in this case is under review here; the district court plan in question would create a single consolidated system so that students will attend schools with substantial white majorities.

The issues here, then, are whether a ratio of seven black students to three white students in the unitary school system is constitutionally forbidden; whether a ratio of seven white students to three black students is constitutionally compelled.

With the Court's permission, I shall address myself first to some of the facts, second,to the applicable precedents, and third, to the question of the existence of a constitutional violation, and, finally, to the problem of a remedy.

This action was not one initiated against the Counties of Henrico or Chesterfield to desegregate their school

systems, because those school systems are, and were before they were brought into this case, desegregated and unitary.

QUESTION: But there seems to be some question about that, doesn't there? I --

MR. KURLAND: By definition, Your Honor, --

QUESTION: You've said that now three or four times, that all three of these systems are desegregated and unitary, and were long before this order was entered.

MR. KURLAND: Before this order was entered. That's right, sir.

QUESTION: I gather that there is some disagreement, just as a matter of fact, at least, at the factual level between you and your brothers on the other side.

MR. KURLAND: Well, I don't think --

QUESTION: Is there not?

MR. KURLAND: I don't think there's disagreement as to fact, if I may say so, Mr. Justice.

QUESTION: Well, I'd like to know about that.

MR. KURLAND: There's disagreement as to conclusion. There is nothing to suggest that the distribution of students, in any of these three systems, is race by race. There is nothing to suggest that any of the schools in each of these three school systems is identifiable by race. And that is what this Court has said is a unitary, desegregated school system.

QUESTION: Well, Judge Merhige, in his very long opinion, -- and I grant you, it wasn't explicitly clear -- but I drew from what he said that in his view neither one of these systems was unitary and desegregated, that each one of them --

MR. KURLAND: The only --

QUESTION: -- showed vestiges of an officially segregated system at the time this decree was entered.

MR. KURLAND: The only factual --

QUESTION: Am I wrong about that?

MR. KURLAND: No, sir. Well, the only factual basis on which Judge Merhige could reach his conclusion was that the percentage, the ratio of whites in the county schools was different from the ratio of whites and blacks in the city schools. The problem that Mr. Little was talking about.

There was, in one of the counties, a laboratory school attached to a --

QUESTION: A State university.

MR. KURLAND: That's right. -- which the HEW asked be desegregated, and it was separated from the system. There was a school in one of the counties which, over a period of time, had turned from white to black as a neighborhood school, and that was changed.

Those are the two on which any notion, aside from this ratio proposition, which any notion that the county

schools were not desegregated could be based.

QUESTION: When you use the term "racially identifiable school", precisely what do you mean? Taking Richmond.

MR. KURLAND: What I mean is that within the city there is no -- let me change it. In accordance with this Court's mandate, the distribution of blacks and whites within these schools in Richmond is such that none can said to be assigned or identifiable as black and others as white. Every one of the schools comes within 50 percent of the total Richmond ratio.

QUESTION: What would you say, Mr. Kurland, if the State Legislature suddenly consolidated these three counties for purposes of operating schools, say these three school districts were consolidated suddenly?

MR. KURLAND: What would I say to that?

QUESTION: With respect to a suit which charged that there was not a unitary school system?

MR. KURLAND: If this were one system, the distribution of students would not be satisfying the mandate of this Court.

Our proposition is that it is not one system --

QUESTION: Right.

MR. KURLAND: -- and the power of the State Legislature to effect such a change certainly exists.

QUESTION: Right.

MR. KURLAND: We submit the power of this Court does not reduce that.

QUESTION: Right, and that is the issue.

QUESTION: Mr. Kurland, in the Richmond area, I don't see any gray spot there.

MR. KURLAND: Any what, sir?

QUESTION: Gray, according to the chart there. And you have a unitary system, but not one single gray there.

MR. KURLAND: You mean 20 to 39 percent? The distribution in Richmond, Your Honor, --

QUESTION: Well, is that map correct?

MR. KURLAND: I cannot tell you whether it is correct. I can tell you by looking at the exhibit, on page 155e of our Exhibit Appendix, you will see the distribution of schools in Richmond. There are 59 schools. There are none with all-black population. There are none with 90 percent black population. There are nine with 80 percent black population. And the other fifty are under 80 percent black population.

There are five majority white schools, Bellemeade has 63 percent, Webster Davis has 56 percent; there are others, 54, 60, and 57 percent.

QUESTION: And that's a unitary system?

MR. KURLAND: To the extent -- if it is not, Your

Honor, if the distribution of whites and blacks within Richmond is not proper, then the order of the district court should be directed to Richmond to improve that distribution.

QUESTION: I suppose if you did have a gray spot within -- a so-called gray school, that is zero to 19.9 percent white -- within Richmond, that would be evidence of a segregated system, would it not?

MR. KURLAND: That's right, sir. You would have an attempt to single out a school as a white school.

QUESTION: Well, I don't care whether you look at it one way or the other, but as I look at it, practically all the gray ones are outside and all of the black ones are inside, by sheer accident.

MR. KURLAND: It's not accident, Your Honor. It's the demographic distribution of population between the poor city, not only here but in every city in the United States.

QUESTION: Well, how many of the findings of Judge Merhige were upset by the Court of Appeals?

MR. KURLAND: The Court found that there was no nexus between the alleged wrongdoing in the past and the demographic distribution between the counties and the city here, which is --

QUESTION: Well, I -- excuse me, sir.

MR. KURLAND: -- which is the essence of the finding

of inadequacy of the trial court opinion. The trial court opinion, Your Honor, --

QUESTION: Well, in the granting -- they disagreed with the opinion, but did they do anything with the findings?

MR. KURLAND: They found that the findings did not support the basis for the remedy. The findings, Your Honor, are in terms of what we must concede are egregious areas in violation of constitutional provisions in the past.

This case came, this issue came in 1970, after, if I may say so, there had been a great change. This school system, all three school systems were already under order, were already desegregated and unitary. And what the Court of Appeals found, Your Honor, was that there was an absence of a nexus, that what had been done in the past, which we concede and abominate, is not a cause of the distribution, this population distribution which you have here.

As I say, this case originated as an action to desegregate the Richmond School System. The respondents were not made parties to the action until after the Richmond School System came under a decree to desegregate in accordance with this Court's mandate in Green v. School Board of New Kent County.

It was only after the district court decreed and effected a unitary plan for Richmond that Richmond proposed, the plaintiffs embraced, and the trial court adopted,

Consolidation Plan which called on the respondent counties to provide students to the Richmond School System to assure a substantial white majority in every Richmond school.

The Consolidation Plan approved by the trial court, which is the plan under review here, would assure that no school in the consolidated system would have a student body of less than 60 percent or more than 80 percent white. This plan has no function or effect other than to assure this specific racial balance which petitioners' experts have labeled a, quote, "viable racial mix".

Each of the three school systems here is already a large, well-functioning school system. Each had approximately the same wealth and tax base per pupil for educational financing. Except that Richmond reported a slightly larger wealth and tax base than either of the two counties.

Each was an integral part of its respective county or city government, and has been so since the origin of public education in Virginia,for over a century.

The geographic division of the counties and the city, which have always been the geographic divisions of the school systems, have existed since before the founding of the Republic, except for annexations in the county by the city.

In order to attain a viable racial mix, the trial court ordered segregated busing of about 70 percent of the combined systems, with busloads of black school children being

exported to Henrico and Chesterfield schools, and busloads of white children being imported to Richmond schools.

QUESTION: I thought the busing issue was not in this case.

MR. KURLAND: The busing issue, sir, is our -- we've never made a contention that busing is not an appropriate means of effecting a unitary system. We do suggest that there are difficulties with this as a remedy, because of the nature that the busing takes here. That is, the segregated nature of the busing.

In determining whether --

QUESTION: But you are -- am I to understand that you are arguing that a separate ground for sustaining the Court of Appeals decision is that there is a --

MR. KURLAND: No, Your Honor, what we are --

QUESTION: -- that it relates to busing?

MR. KURLAND: What we have said, Your Honor, is that busing is a perfectly appropriate tool, subject to the limitations expressed by this Court in Swann, to effectuate a desegregation of a school system.

But we say, though, that when you measure the remedy that has been offered, the form that this busing takes is a fact that the Court must take into consideration in deciding whether or not the remedy is an appropriate one.

QUESTION: And you're not urging as a separate reason

for affirming the Court of Appeals that the district court thought that it was implementing some racial balance idea? I mean, you're not saying that the district court was wrong solely for that reason?

MR. KURLAND: We are saying that the court was wrong because that was the function and effect of the plan, yes, sir; yes, Your Honor.

QUESTION: Yes, but the issue that is here is whether or not --

MR. KURLAND: This plan.

QUESTION: Yes, the issue here is the plan, but the issue as to whether -- is whether or not the Court of Appeals was right in saying that the district court could not cross these school boundaries?

MR. KURLAND: That's the -- the basic issue is the one I stated, whether it can cross the school boundaries for the purpose of effectuating a viable racial mix.

If the Court looks at the record created by the City of Richmond and the plaintiffs, at the trial level, --

QUESTION: But I thought you said a while ago that if this, if all these three districts were together, the distribution of blacks and whites wuld not be acceptable?

MR. KURLAND: That's right. You would not have a -- you would have a total system within the three units which would have whites, identifiable white schools and identifiable

black schools.

QUESTION: Well, if the three schools districts were together and were one system, would you be here attacking this plan?

MR. KURLAND: Yes, I would be here attacking this plan, Your Honor. For the reason that this was not an attempt to desegregate or create a unitary system, but to effectuate a specific thesis, which is that in order to have a proper school system you need a ratio of between 60 and 80 percent white, and no more than 40 or less, to 25 --

QUESTION: That was one of the questions that is presented in the petition for certiorari, but you are urging it as a respondent, is that it?

MR. KURLAND: That's right. It is in our response to the petition for certiorari.

It's quite true that the petitioners have run away from the factual record on which this case and the judgment was based.

As I say, the plan ordered the separation of the school systems from their county and city tax bases; it ordered the abolition of the county and city school boards, and their replacement by a court-created school board, with the consequent dilution of the control of local education by local parents; it ordered the replacement of an already large, fully equipped school system, or three already large, fully

equipped school systems by a single school system, so large as to be in the top .2 percent of American school systems.

And it did this, and this is my point, it did this all solely for the effect of assuring a white majority in the classrooms of Richmond.

The Court of Appeals for the Fourth Circuit held that this restructuring of local government for this purpose was beyond the power of the federal courts. We respectfully submit that the judgment below should be affirmed by this Court.

The case for the respondents rests on three propositions established by this Court in four of its most recent rulings on the subject of school desegregation. All of these decisions support the conclusion of the Court of Appeals; the judgment of affirmance by this Court may rest on any one of them. All of these precedents will have to be rejected, I submit, if the judgment of the Court of Appeals is to be reversed.

The first of the rules established by this Court on which respondents rely is the function of judicial school desegregation decrees is to transform a dual system into a unitary school system. This was the rule established in Green.

It should be noted that the New Kent County School System, involved in Green, like the Richmond School System, is

a black majority school system adjacent to a white majority school system, and was such at the time this Court ordered the creation of a unitary system within New Kent County.

The command of Green was accomplished by the trial court in this case when it approved both the plans proffered by the plaintiffs and by Richmond to effect the unitary school system in Richmond.

Under the plans approved by the trial court, one of which has been in effect in Richmond for the past two school years, each of the schools in Richmond appropriately reflects the racial composition of the school population of the entire system.

The school system of Richmond, therefore, I submit, is unitary in accordance with the requirement of Green. And that is what this Court has said in recent cases, that is what the Constitution requires.

Until the decision by the trial court below, there had not been a single decision that went beyond the requirement of creating a unitary school system out of a dual school system, except where school system boundaries had been drawn with the effect of perpetuating a dual system or preventing its conversion.

The second rule on which respondents rely was established by this Court in Swann v. Charlotte-Mecklenburg, when it held that the establishment of a racial balance among

the schools, even within a single system, was not a constitutional duty. Indeed, the Court said in Swann that the use of a racial balance other than as a starting point for a plan to restructure a dual system was judicially improper. And it said that once the unitary system had been established, as is the case here, the federal court had fulfilled its constitutional function and should go no further.

Even in the face of later demographic changes not attributable to invidious governmental action.

In the instant case, the whole purpose and effect of the consolidation plan is to establish a racial balance. One need not look only at the allegations of the respondents. The petitioners' summary of their plan, as set forth in our brief, the petitioners' testimony in support of the plan, as set forth in our brief, and if you will look at pages 18 to 30 of our brief you will see that a viable racial mix was the objective of this plan. They call it racial balance. But here the viable racial mix was defined for the district court as one in which there are not less than 20 percent nor more than 40 percent black students in every school in the system.

We submit that the consolidation plan accomplishes nothing else than the effectuation of this viable racial mix.

The third case on which we rely is Wright v. City Council of Emporia. In that case both the majority and the

minority were agreed that racial balance was not a proper objective of the school desegregation decree. The majority ruled that the school system boundaries could not be redrawn where the effect of such action would be to leave black pupils in inferior schools and inhibit the effectuation of the unitary system therefore ordered by the trial court.

Parenthetically it should be noted that the single school system that the Court left in the Emporia case had a racial balance approximately the same as that which exists in Richmond.

It is clear, I submit, from Emporia, that it was the invidious effect of the manipulation of school system boundaries that permitted the trial court to enjoin the separation of the newly created city school system from the county system, of which it had been so long a part.

In this case there is no possibility of charging that school system boundaries, as ancient as these, co-terminus as they are with the county and city governments of which they are a part and on which they depend, were any way created or manipulated with the effect of preventing the creation of a unitary system in Richmond.

But it is only when such gerrymandering has occurred that the Court has sustained the power of the federal judiciary to interfere with the allocation of functions of municipal governments.

The point underlined by both the majority and dissent in Emporia is the constitutional right to local control of educational systems, except only where that allocation of authority was a means to preclude the establishment of a unitary system.

The fourth of the cases -- before I leave that point, there is an incident of local control which I think is not irrelevant and which is particularly pointed out by the amicus brief by CORE, that not only will the consolidated school plan remove or destroy local control of the counties and their governments, in effect it will pollute the black influence that has become existent in the Richmond area, where they now have three of the seven members of the School Board.

The fourth of the cases that I submit is controlling here is Spencer v. Kugler, where this Court affirmed the proposition that school system boundaries that were patterned on the boundaries of local government units, of which the school systems here are an integral part, are not subject to revision by a federal court in order to establish a better racial mix among the separate and distinct school systems.

Here, as in Spencer, there is a demographic pattern that shows a concentration of black population within certain school systems. Here, as in Spencer, there is no showing that the demographic patterns are in any way a consequence of governmental action to effectuate the separation of the races.

The fact is that so far as the demography of the Richmond area is concerned, the racial pattern is similar to that of all cities' suburban areas in the United States, north, south, east, and west, except that the in-migration of blacks to the city, to Richmond, is smaller than in most other such areas.

I submit that the decision of the Court of Appeals under review here is consistent with and indeed required by each of the precedents established by this Court in these cases.

What petitioners seek here is a major departure from this Court's precedent. If petitioners are to succeed here, it can only be because black majority school systems are unconstitutional, per se, where such a school system is adjacent to a white majority school system; although both school systems are in compliance with the constitutional commands of this Court.

The only alleged deficiency, the only alleged deficiency of the Richmond system is that it has a black majority. The notion of the intrinsic inferiority of school systems with black majorities, as asserted by petitioners' expert witnesses, is, for the reasons so cogently set forth in Judge Sobeloff's opinion in the Brunson case, basically inconsistent with the ruling of this Court in Brown v. Board of Education.

The other unwarranted innovation which petitioners would bring about is the duty of the federal courts to restructure local government in order to bring the different racial mixes that exist within cities and outside cities under a single governmental unit.

Insofar as petitioners' claim rests on the concentration of blacks within cities, and the concentration of whites outside cities, a nationwide phenomenon, as a reason for joining the school systems, its argument is equally valid or invalid with regard to every governmental function performed by local government units.

The general problem of metropolitan government, whether existing cities and suburbs can continue to exist as separate jurisdictions or must be combined in some metropolitan unit, is the most complicated political, social, and economic problem which has many aspects other than schools, but which is not and cannot be the concern of the Judiciary in our system of government.

I'll turn, if I may, to the question of the existence of a constitutional violation. As this Court reiterated in Swann, before a federal court may intervene to substitute its authority for that of a local government, there must have been a constitutional violation committed by that local government and the federal court's action must be directed to a cure of that violation.

Respondents here are not guilty of any such constitutional violation, and so the necessary predicate for federal court action is lacking.

What the petitioners have shown is only that there is a concentration of blacks in the urban population of the Richmond area, a concentration of whites in the surrounding areas; but there is and could be no showing that the respondents are in any way responsible for bringing about that racial distribution.

QUESTION: But surely the petitioners have shown more than that; they've shown as a matter of basic State law there was officially imposed segregation in the public schools throughout Virginia until 1954, and that thereafter there was a history of 17 years of resistance to the constitutional rule announced by this Court in Brown v. Board of Education.

MR. KURLAND: That's right.

QUESTION: Throughout the State of Virginia, and including, specifically and explicitly, these three school districts. Isn't that true?

MR. KURLAND: That's right, Your Honor. There are two things that were not shown. It was not shown that any of this resulted in the demographic distribution, which is the basis of their charge here.

QUESTION: You mean the State-imposed segregation

doesn't bring about segregated housing?

MR. KURLAND: There is nothing in this record --

QUESTION: Are you going that far?

MR. KURLAND: Just what I'm saying, Your Honor, there is nothing in this record to suggest that the housing patterns here have developed as a result of State action. Nothing.

QUESTION: Well, you did have State-segregated schools?

MR. KURLAND: We did have State-segregated schools.

QUESTION: You did have restrictive covenants?

MR. KURLAND: No, sir, we have not -- we had restrictive covenants, but they were abolished by this Court way back in 194- --

QUESTION: But they were there before?

MR. KURLAND: That's right. There is nothing in this record which --

QUESTION: Are you going so far as to say the State of Virginia had nothing at all to do with it?

MR. KURLAND: With this distribution of population?

QUESTION: Yes.

MR. KURLAND: Yes, Your Honor. That this record does not reveal a single factual basis --

QUESTION: You said the record doesn't show it.

MR. KURLAND: That is what I assume the basis for --

QUESTION: The record does show that despite the decision of this Court, Richmond, compelled by the State, defied it for 17 years.

MR. KURLAND: That is right, Your Honor. And that defiance came to an end. That defiance came to an end before this order was passed upon.

QUESTION: But not before the suit was filed.

MR. KURLAND: No, sir; the suit was filed in 1954. Certainly not before then.

The immediate suit that was brought here, the basis on which this, the amended complaint came after. Not only the end of defiance, but the adoption of an equal protection provision in the Virginia Constitution, in the adoption of an open housing law by the State of Virginia.

There is a difference, I submit, between the State of Virginia, the Commonwealth of Virginia, as it is today and has been for the last several years, in the period on which the petitioners have predicated their basis for interference with Virginia government action.

I come back to the proposition, and I repeat the proposition, that there is nothing in this record -- this is not a short record, Your Honors -- to suggest that the demographic distribution, which is the basis for the request for relief, was in any way caused by actions of the State, or any of the respondents.

QUESTION: What's Judge Merhige's finding on that precise point?

MR. KURLAND: I don't know that I can help you, Your Honor.

QUESTION: Well, perhaps you can come back to that later --

MR. KURLAND: If I may.

QUESTION: -- rather than to delay now.

MR. KURLAND: What we have here is a situation in which the respondents have reached that point spoken of by this Court in Swann, that point in time when the unitary school system has been established, and the time for the federal courts to abstain from interference with the management of the State school systems, unless there is a showing of action which has an invidious effect.

QUESTION: Mr. Kurland, --

MR. KURLAND: Excuse me, Your Honor.

QUESTION: -- what about page 169, where he says: The present pattern is a reflection of the past racial discrimination contributed in part by local, State and Federal Government?

MR. KURLAND: There isn't any doubt that he said that, Your Honor. What I'm contesting is that there is any factual basis in the record on which to reach that conclusion.

I cannot give you record references to the absence

of proof.

QUESTION: Well, you think he pulled this out of the clear blue?

MR. KURLAND: I don't know whether it came from the blue, I know it did not come from the record.

I'll turn, if I may, to the last issue. Even where this Court has found constitutional violations, as with the attempted withdrawal of the Emporia schools from the county system to perpetuate segregation, it has made clear that the propriety of the remedy is one that is dependent on a number of factors to be weighed.

I submit that in this case all that factors weigh against the remedy here which is the consolidation plan. The consolidation plan which is the subject of review by this Court.

First, the remedy is not responsive to any constitutional violation.

Second, the factor of timing, as it was termed in Emporia, shows that here as there the new plan, the consolidation plan, was not forthcoming from the city until after a unitary plan had been approved and established.

Richmond here, like Emporia there, moved to take itself out from the unitary plan that would have resulted in majority black schools in the City of Richmond.

There is no showing here of any white flight from

the city schools to the county schools; to the extent that there has been white flight from the Richmond schools has been to somewhere else in the schools of the respondents. And if white flight from the public schools were a result of the desegregation of the Richmond school system, it may be hazarded that that is not going to be abated by the consolidated plan.

There is here no showing, as there was in Emporia, that there are any differences in quality or capacity between the school systems of Richmond and the school systems of the counties.

To the contrary, the effect of the consolidation would be to require a school system of inordinate size, with the consequent problems from which all oversized metropolitan school systems suffer.

QUESTION: What about the contention that there were exchanges of students back and forth across these lines in historical times?

MR. KURLAND: There is no doubt, Your Honor, that during the period of obstruction there were individual students who crossed State lines. There has never been, in the history of the State of Virginia, a consolidation of school systems. The only consolidation of school systems that exists is where a single superintendent has been appointed as the chief administrative officer for two school

systems.

But those school systems each maintained their own pupil placement, their own teacher employment and, indeed, as has been suggested, the selection of a superintendent, although it does come with the approval of the Board, the State Board, is usually by the local school system.

The answer to your question is yes, there was in the past crossing of State lines in order to engage in unconstitutional activities.

QUESTION: How about the Kennedy High School, they didn't have any trouble at the line with that?

MR. KURLAND: I don't know what you mean by trouble with the line. The City of Richmond was --

QUESTION: Well, isn't Kennedy outside of Richmond?

MR. KURLAND: Certainly, Your Honor. The City of Richmond has the power to place its schools.

QUESTION: Well, they didn't have any trouble with the county line on that, did they?

MR. KURLAND: Nobody has any possibility of interfering with it, as far as I understand, Your Honor. Kennedy is placed in Henrico, of course that's what Richmond wants. They have the power to --

QUESTION: Doesn't the Richmond school system --

MR. KURLAND: -- suggest it, even now. Any of this area which we're talking about is possibly subject to

annexation by the City of Richmond.

QUESTION: Well, I understand the Richmond School Board is in favor of this plan.

MR. KURLAND: It's the Richmond School Board's plan, Your Honor.

QUESTION: Yes.

MR. KURLAND: Yes, sir. They're not asking to bring this area in. This plan brings in the entire two counties to be joined with the City of Richmond.

QUESTION: I know, but my point is I thought you made great stress on we shouldn't cross these county lines.

MR. KURLAND: I'm saying that we should not separate -- create new school systems, new forms of local government in the city of, in the State of Virginia or any other State in the Union.

QUESTION: All right.

QUESTION: I suppose with respect to the county high school, the Richmond School District acquired the land with its money --

MR. KURLAND: Yes, sir.

QUESTION: -- and built the school?

MR. KURLAND: Yes, sir.

Each of the schools within each of the systems is owned by the school system that operates it.

QUESTION: Who has the police power over it?

MR. KURLAND: Who has the police power?

QUESTION: Yes.

MR. KURLAND: You can ask the Attorney General who has the police power over the Kennedy -- the area occupied by the Kennedy School System.

QUESTION: The City of Richmond.

MR. KURLAND: The City of Richmond.

The fifth factor to be weighed in terms of the desirability or appropriateness of this consolidation plan is the construction of the local control of the school boards, a factor that both the majority and the minority in Emporia found of such great consequence, and the importance of which is underscored by this Court's recent decision in the Texas School financing case.

I would submit that if this plan were to be approved by this Court, the resulting rule would require a reorganization of every urban and suburban school district in the nation. By changing their boundaries and removing their systems from local control. The demographic patterns existent here, and that is the basis for the petitioners' case, are nationwide and not local. And if we look only at the areas adjacent to Henrico and Chesterfield Counties, the map in the back of our brief, you will see that if the Court were to adopt petitioners' thesis, there could be a proper demand on these same two counties to supply their white

students not only to Richmond but to the counties of Charles City, Dinwiddie, Amelia, Goochland, and New Kent, as well as the City of Petersburg.

We submit that such a vast overhauling of the school systems of the nation will not have a happy result in the maintenance of public schooling.

I've said, Mr. Justice White, that busing is not an inappropriate means under the circumstances described in Swann to the effectuation of a unitary system. It is not irrelevant that the busing involved here is totally segregated busing. It has to be if what you're doing is moving whites into the core and blacks out of the core.

We submit that that is not likely to help solve the conflict, the racial conflict that's existent.

The children of Richmond, Chesterfield and Henrico would be selected by a draft-like lottery. The distances to be traversed and the time to be invested are necessarily greater than under the existing programs.

The Richmond School System covers 63 square miles; the proposed consolidated system would cover 752 square miles, a nd since busing would be to and from the City of Richmond, distances must necessarily be great.

I submit, in short, that the proposed cure would be far more deleterious than the alleged disease.

As this Court indicated in Emporia, it would not

support even an intrasystem plan where its consequences would be egregious. They certainly are here.

In sum, the case presents the simple but important question: whether the Constitution requires that wherever there is a demographic pattern of racial separation, school systems must be restructured by federal courts to assure the presence of white student majorities whereever possible.

This Court has already announced that racial balance within the school system is an objective beyond the scope of the federal judicial function. A fortiori, I submit, it is beyond the scope of federal judicial power to impose racial balance among independent unitary school systems.

The teaching of Brown, if the Court please, and the judgments that have been founded upon it, is not that there must be a racial balance but rather that the races should have equal status.

We respectfully submit that the trial court's judgment would detract rather than add to the equality of status. And we pray that the judgment of the Court of Appeals for the Fourth Circuit be affirmed.

Thank you, Your Honors.

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

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

FOR THE UNITED STATES AS AMICUS CURIAE,

SUPPORTING RESPONDENTS.

MR. GRISWOLD: May it please the Court:

This case is an inevitable sequel to the decisions in Brown I and II. That we have got this far is, I think, a sign of progress.

The only constitutional provision which is applicable here is the clause in the Fourteenth Amendment which says that no State shall deny to any person within its jurisdiction the equal protection of the laws.

There is nothing in the Constitution about education, about quality education, about racial balance, or racial mix.

The problem in the Brown cases clearly arose because of the maintenance of dual school systems, where children were assigned to one school or another in the same school district because of their race. That was what was attacked there, and no greater relief was there claimed.

Here there is no dual school system in Richmond under Plan 3 now in operation.

Whether in the absence of a dual school system or its vestiges in Richmond the Equal Protection Clause has any application is the issue now presented here.

Before I proceed further, I would like to refer to

certain phrases which are used in the brief for the petitioners in No. 72-550, sometimes taken from the opinion of the district court below, because I believe that they are or can be misleading or an unintentional hindrance to thought.

For example, on pages 44 and 46 of the brief the words, quote, "greatest possible degree of desegregation", close quote, appear. This is an attractive phrase, but I think that standing alone it has no real meaning. It takes on meaning only as it is applied to a specific group of students attending schools in a defined area.

It has meaning as applied to the students in the City of Richmond; it has meaning as applied to students attending schools in a larger area. But it does not help in the task presented here, which is to determine whether the process by which a dual school system is effectively disestablished can be extended to a larger area, not for the purpose of eliminating dual schools but for the purpose of providing a viable racial mix.

Another phrase which appears several times in the brief to which I have referred, and in the district court opinion, is, quote, "racially identifiable schools", close quote. Again I suggest that this phrase has no operational meaning, except as it is applied to a particular area.

There are many schools in Vermont and New Hampshire and other States which are 100 percent white, and thus, I

suppose, they are racially identifiable. But they do not in any sense violate any provision of the Constitution. It is only when a school is racially identifiable with respect to something else that the phrase has any legal significance.

On this record there are no schools which are racially identifiable with respect to any other school in the City of Richmond. A school is not racially identifiable for any purpose of legal significance merely because it is 70 percent white or 70 percent black or, indeed, 100 percent white or 100 percent black. And I doubt that that presents any question under the Equal Protection Clause.

Indeed, there is something somewhat contradictory and unattractive in the proposition that a school is inferior merely because it has a certain percentage of black students. Unless the proportion of students of one race in a school is the consequence of some sort of invidious discrimination or unless it leads to discrimination through inequality of appropriations, it should be colorless legally.

Here is the place where the Constitution should be colorblind.

Yet the record shows that it was this sort of reasoning which led the district court to its conclusion. The district court's order is based on a concept of a viable racial mix, a phrase that is used many times in its order, and which comes directly from the testimony in the district

court of Dr. Little and Dr. Pettigrew.

This approach has already been judicially answered in one of the characteristically illuminating opinions of Judge Sobeloff in the Brunson case, which is quoted at pages 59 and 60 of the respondents' brief, of the notion that a good school must have a white majority does, as Judge Sobeloff said, seem to constitute a direct attack on the roots of the Brown decision.

Yet that is the only basis of the district court's order.

QUESTION: What do you understand by the meaning of the overworked adjective "viable" in this phrase? I thought that it meant a makeup of school population that would be stable, that would not have inherent in it the probability of leading to all-black and all-white schools.

MR. GRISWOLD: And that, Mr. Justice, in the words of the experts, is a school population with no less than 20 percent black, because the blacks feel isolated if there's less than 20 percent, nor more than 40 percent black, because white flight --

QUESTION: That leads to the whites flight.

MR. GRISWOLD: -- enters into the picture. And the consequence is that what it means is there must always be a white majority in every school, to have a viable --

QUESTION: Well, in the context of the Richmond

metropolitan area, that's what all the testimony had to do with, wasn't it?

MR. GRISWOLD: No, I think, Mr. Justice, that the testimony of the experts would be applicable throughout the United States, where there is any problem of racial adjustment. Less than 20 percent makes the Negro feel isolated, and more than 40 percent means that there is risk of white flight.

QUESTION: Well, I understood the testimony basically to be directed to the facts, the demographic facts of this metropolitan area, which is basically two-thirds white and one-third Negro.

MR. GRISWOLD: Mr. Justice, I think the testimony of the experts, if examined, will show that in their opinion, in any situation in which there are two or three or four percent black students, that that is undesirable for the black students; and that in any situation in which there are 50, 60, 70 percent black students, that there is a great potentiality of white flight.

QUESTION: Yes.

MR. GRISWOLD: And here the children of Chesterfield and Henrico Counties are brought into the picture for the purpose of maintaining this not less than 20 and not more than 40 percent black, and yet why stop there? As the map at the close of the respondents' brief shows, these three areas are completely surrounding by other counties where there is a

majority of black. Why should not some of the Chesterfield and Henrico students, perhaps those living close by, be used to leaven the mix in the surrounding territories?

QUESTION: I see.

MR. GRISWOLD: Indeed, this suggests a way to test the district court's decision below. This case began in Richmond, and the remedy is designed to improve the situation in Richmond.

Let us suppose, though, that the case had been started in Chesterfield County, and complaint had been made that the schools in Chesterfield are racially identifiable and that a mix of 20 percent to 40 percent black students is preferable according to the expert testimony. Does it seem conceivable that an order would then have been made joining Richmond as a party defendant in the Chesterfield case, and then bringing Richmond students into Chesterfield in order to provide there a viable racial mix.

It may be suggested that this is absurd, but I wonder if it is really different from what the district court undertook to do here.

And in this connection I would like to refer to a few undisputed facts. The combined area of Richmond, Chesterfield and Henrico is 752 square miles. That is more than ten times the area of the District of Columbia. It is 63 percent of the area of the State of Rhode Island, and

nearly 37 percent of the area of the State of Delaware. The petitioners' arguments here inevitably lead to a large amount of centralization and concentration of control over these schools. And, logically, there is no reason for stopping short of a Statewide system.

Indeed, since the Due Process Clause of the Fifth Amendment embraces the concept of the Equal Protection Clause, there's no logical reason for stopping short of a single national school system, with a viable racial mix in every school.

This is very close to the problem with which this Court dealt in the San Antonio School District case, where it concluded that the Equal Protection Clause should not be applied so mechanically to produce a type of overawed, inflexible, egalitarianism which is indeed alien to our history and to our institutions.

Our position here is not quite as broad as that taken by the respondents. We do not contend that school district lines are inevitably or inherently inviolable. On the contrary, in the Scotland Neck and the Emporia cases last term we contended that district lines should be disregarded when they were established or put into effective use for the purpose of maintaining the consequences of a once combined and segregated school system.

But there are no such facts here, and there is no

contention here that these district boundaries were invidiously established. If there had been specific instances when the lines have been used to maintained segregation and that effect continues, then we would regard the district lines, the district court as having power to look into that situation and devise an appropriate remedy.

QUESTION: Mr. Solicitor General, how do you read the Court of Appeals opinion -- did the Court of Appeals, in your view, say that there was an independent reason for reversing the district court, in that the district court attempted to establish a racial quota or establish a racial balance among all the schools?

MR. GRISWOLD: Yes, I think, Mr. Justice, that that's essentially what the Court of Appeals meant, and that becomes very apparent when the district court's opinion is read, because it is filled with this holding, "to achieve a viable racial mix".

QUESTION: As you read the Court of Appeals, it would have reversed the district court even if -- even if the boundary line question were not a separate issue in itself?

MR. GRISWOLD: No, Mr. Justice, I think that if this were historically and always had been a single school district, that then there would not be -- then there would be racially identifiable schools within the school district.

QUESTION: Yes, but that isn't the question. The

question was whether or not in proceeding -- if historically this had always been one area, and it had been racially segregated, then the problem was to disestablish the dual school system. Would the Court of Appeals then have reversed the district court because of the way it approached it in terms of racial quotas or racial mixes?

MR. GRISWOLD: I'm not sure, Mr. Justice. That would have been a case very close to the Charlotte School case, where this Court said that an absolute racial balance throughout the system was not required, but here there would have been a considerable concentration in one area. It would have been not unlike the situation in Charlotte, before the district judge there --

QUESTION: Well, then, it must be that the Court of Appeals didn't use that factor as a separate, independent grounds for reversing the district court. The boundary line issue has to be -- has to be -- is critical to the Court of Appeals decision?

MR. GRISWOLD: Oh, yes, Mr. Justice. Yes, there isn't any question about that. It's critical to my position here.

There's a section in the petitioners' --

QUESTION: Are you saying, Mr. Solicitor General, that boundary lines may be disregarded to achieve some objectives, but they may not be disregarded to achieve racial

balance?

MR. GRISWOLD: Mr. Justice, I'm say that they might be disregarded where it is shown that they were established for the purpose of providing or maintaining some sort of discriminatory consequence with respect to the schools. In this case there is no such evidence and no such claim.

My time seems to have expired, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Yes. If you wish to finish, we'll make an adjustment accordingly.

MR. GRISWOLD: Well, I have only a little more.

The district court opinion and the petitioners' brief do rely on the fact that some Richmond schools and some Henrico schools are, quote, "located a very short distance apart," close quote. And I would mention that on this chart the only schools that are shown are those which are thought to be close to the boundary line. There are many other schools in between, which are not shown.

I think, though, that there's less here than meets the eye. In the first place, seven of the eleven pairs of schools, and I would call attention to the tabulation at page 429 of the Appendix, in the district court's opinion, seven of the eleven pairs of schools are more than three miles apart, and four of them are 4.9 miles apart, and up to 6.2 miles apart.

Now, five miles is as far as from the Capitol out

Massachusetts Avenue to the American University. Two of the schools are listed as 1.4 miles apart, and there's a notation that this is eight blocks. But the distance of 1.4 miles is the entire length of Pennsylvania Avenue, from the foot of the Capitol to the Treasury Building; that's 14 Washington blocks on a diagonal. If 1.4 miles is eight blocks, that allows more than 300 yards per block, which are rather large blocks.

QUESTION: Is there anything in the record that shows how far they presently bus children in Richmond?

MR. GRISWOLD: How far -- what, Mr. Justice?

QUESTION: They presently bus children in Richmond.

MR. GRISWOLD: I believe there is. I'm not familiar with what it is. It cannot be as great as the distances involved in busing the children from Henrico into Richmond, and the children from --

QUESTION: Well, I understood they used to bus them clean across Richmond. Isn't that right?

MR. GRISWOLD: Yes, but that isn't very far, Mr. Justice.

QUESTION: Well, Richmond is more than five miles, isn't it?

MR. GRISWOLD: Yes, Richmond in many places is more than five miles. I am suggesting that this is not a case of having a black school here right next to a white school, which

is the impression which is sought to be created by this tabulation.

On this record there are no invidious local examples of discrimination. At any rate, that is not the basis on which the district court below undertook to act. The basis of its decision was the desirability of establishing a viable racial mix, a phrase which it used repeatedly. That concept, we submit, is itself invidious, and a denial of equal protection to both white and black.

Accordingly, the decision of the Court of Appeals should be affirmed.

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

Mr. Coleman, we'll enlarge the time of the rebuttal by three minutes. You work that out the way you wish.

REBUTTAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,
ON BEHALF OF BRADLEY, ET AL.

MR. COLEMAN: Thank you. Do you think it might take me twice as long to move as fast as the Solicitor did?

QUESTION: Mr. Coleman, --

MR. COLEMAN: Yes, sir.

QUESTION: -- may I ask one question for you to answer at any time. Suppose this were not Richmond, Virginia. Suppose, everything else being the same, this were Kansas City, and the line between the districts was not a school

district line but was the State line between Missouri and Kansas; would there be any difference in this case?

MR. COLEMAN: Oh, Mr. Justice Blackmun, there's a lot of difference. Federalism is important. And there's no way you can stand up here and say that when you're involving two States the rule is the same as when you're involving school districts.

QUESTION: Isn't this the next case, though?

MR. COLEMAN: The Constitution specifically provides that any time that two States get together there has to be a congressional compact, and that's just completely different than, with all due respect, it is nowhere near this case and we're not contending that.

QUESTION: Then you disagree with the Solicitor General's comment to that effect?

MR. COLEMAN: Oh, I certainly do, and I really -- well, I do, yes, sir.

Now, what the Solicitor General said, this is Charlotte but for these division lines. Now, he did not tell you that in Division 6 there is nothing done under this plan. Now, once you eliminate division 6, you then don't have the 752 square miles that they would have you believe, but you have only 400-and-some-odd miles. That is less than what you had in Swann, because Swann was over 500, and Mobile was 1200 square miles.

So, really, with all these horribles that you don't have that in this case.

Now, I have tried to argue the case based upon the record, and Mr. Kurland, with all due respects, when he was asked about the record, he walked away from the record. I do think that this case has to be decided on the record, and contrary to what Mr. Kurland said about findings with respect to residential and segregation, there is a finding at 206a in the Appendix to the Petition for Certiorari, 211a, and, indeed, on 572a it's the one finding that the Court of Appeals accepted and said the district court was correct, and that he was not upsetting.

Now, secondly, they constantly talk about these systems being unitary at the time they were brought on, at the time of the decree; that just is not the fact. The record findings are to the contrary. The Court of Appeals never mentions Rule 52(a), it never discusses the evidence, it just says: I assume that these systems are unitary.

But the district judge, and I referred you to those places, Mr. Justice Brennan, and I just ask you to read them. That's supported by the record. Look at that exhibit and you will find that these schools certainly are not unitary, that they are all-black schools, they're all-white schools, measured by any test you wish to meet.

QUESTION: Well, let me put it this way, in these

terms: Do you say that in the City of Richmond today they are operating a dual school system in terms that we used in Green and prior cases?

MR. COLEMAN: The answer affirmatively is yes, as loud and clear as I can make it, Mr. Chief Justice. I say the same thing with respect to Henrico. I say the same thing with respect to Chesterfield.

But, more important, what I said, that's what the district judge found, and no Court of Appeals has upset that finding. And it seems to be that on this record, that's the way that this has to be decided by this Court.

Now, they talk about this line, I think at some point somebody should tell you that this line was redrawn in 1971, and if you look at the Exhibit book, on page 67e, you will find a memorandum from the State Board of Education, saying, "By official action at its June meeting the State Board of Education established school divisions as per the attached effective at noon, July 1, 1971."

Now, the district judge said, and he found as a fact -- and every time I see this chart that Mr. Kurland puts in his brief, I say I wish I had put it in there, because that's what this case is about.

Now, here you have a State agency charged with the responsibility of setting a new line. It sees Richmond as all-black, it sees these counties as all-white. Now, I ask

you, can you exercise State power in such a way to keep that black enclave there? This was done in 1971, after this lawsuit was under way in final hearing. And it was done at a time when anyone who drew that line knew the result of drawing that line was to create all-black schools and all-white schools.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch, Mr. Coleman.

MR. COLEMAN: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Coleman, you may continue.

REBUTTAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,
ON BEHALF OF BRADLEY, ET AL - [Resumed]

MR. COLEMAN: Mr. Chief Justice, may it please the Court:

Just at the luncheon break, sir, I pointed out that the respondents in 1971 had an opportunity to redraw these lines and they drew them in the same place.

Unless there be any doubt about that, just look at pages 228a and 229a of the Appendix.

Now, there was some mention about white flight. Once again, we have a finding on it. The judge found as a fact that between 1970 and 1972, 7800 white students, or 39 percent of the entire white student population of Richmond, left the school system. That's at page 237a of the Appendix, and in the record it's at page 417a.

Now, there is talk about these schools, and I think it very interesting that when you come to the opposition of the stay, or trying to grant the stay after Judge Merhige, at page 1347a of the record, the lawyers, seeking the stay, representing the State Board of Education, the Superintendent of Public Instruction, the Attorney General of this great

Commonwealth of Virginia that so long has segregated blacks, says: The evidence indicates that Richmond school buildings are old and obsolete in some cases, while Chesterfield and Henrico have gone forward in the past decade and a half with aggressive, modern building programs.

Now, we also heard some mention, which I really think comes with ill grace from the Commonwealth of Virginia, that the blacks having the courage to seek this relief somehow should be criticized because of the question of white control.

Well, you had pointed out to you that it was a bi-racial School Board that made the determination to seek this relief.

Secondly, you had pointed out to you that it's the black petitioners asking this relief. And I really think it comes with poor grace from the Commonwealth of Virginia that has this tremendous history of segregation in penning black people up to now say that somehow we are criticized for attempting to get schools which comply with the Constitution. That's all we want. And not have schools which are in violation of the Constitution.

QUESTION: Suppose that the State of Virginia, Mr. Coleman, decided that it was awkward to try to have these two counties and the City of Richmond function for administrative purposes only in the field of education, and decided to legis-

late an annexation or however they do it in Virginia. This would be one way of accomplishing this process, wouldn't it?

MR. COLEMAN: Yes, sir. And, as Mr. Little pointed out to you, Mr. Chief Justice, the Virginia statutes permit the result that the judge brought about, and the only statute which he didn't follow 100 percent was the statute that was amended in 1971, while this litigation was pending, and the record makes it clear on page 906a of the record, 942a of the record, and 944, that the Legislature sitting in Richmond, knowing that this lawsuit was pending, then sought to change the statute so that these local counties would have to consent.

QUESTION: Are you suggesting that it follows that if State law permits something, that then that vests constitutional authority in the courts to reach the same result?

MR. COLEMAN: Well, Your Honor, I'm glad you asked that question. Our position is, clearly, that once we establish a constitutional violation, which I think we have from 1871 until, to date, then the Court can take steps to end the violation and to correct the situation. And certainly if the steps they take are those that are consistent with State law, there can't be any criticism, particularly when you, Your Honor, in the Davis case, indicated that once there is a violation and the only way to end the violation is to

ignore a State statute, that the federal court has the duty and the obligation to ignore that statute.

You will recall --

QUESTION: Well, all State statutes aren't fungible.

MR. COLEMAN: No, but State statutes which prevent the ending -- well, no, State statutes are not fungible, I agree. I have no problem with that.

But I'm saying that this State, any State statute that's involved here, if it has the effect of preventing effective desegregation, you then do what you did in the North Carolina vs. Swann, and if you indulge, on page 46, where you said: Just as the race of students must be considered in determining whether the constitutional violation has occurred, also must race be considered in formulating a remedy, to forbid at this stage all assignments made on the basis to deprive school authorities of the tool. And there North Carolina was arguing they had a State statute which specifically said that you can't send children to school --

QUESTION: That State statute would have frozen the statute's role permanently, would it not?

MR. COLEMAN: Well, that's exactly the same thing here, Your Honor. Look at my friend's map, that's what he is attempting to do. He is attempting to freeze permanently that situation, and I just don't think that a federal district court

is without power in permitting -- particularly, Mr. Justice Rehnquist, when you asked me the question, I stated that they took people across this line to maintain segregation, and you asked Mr. Kurland that and he agreed with me.

I do think that under those circumstances, certainly to say that you can't do it to get an effective desegregation is more sophistication than at least I have.

QUESTION: Mr. Coleman, you answered Mr. Justice Blackmun rather vehemently when he put the question to you about State lines. Let me try a hypothetical, perhaps not so hypothetical, nearer home, nearer where we are.

You're familiar with the problems in the District of Columbia, over the years. It has been suggested publicly and privately, from time to time, that the State lines of Virginia and Maryland should be ignored and that the metropolitan area of Washington should be treated just as the Court has treated the metropolitan area of Richmond.

Would your response to that be the same as Mr. Justice Blackmun's question?

MR. COLEMAN: Well, I think that that is slightly a different situation. That's not this case. But I would say that after checking I would find much greater difficulty urging that you can cross the district line to go into the -- to go into Maryland, because once again there are constitutional provisions dealing with how you set up a district

And with the Tidewater case decided in 1940, and other cases, it's a different question, but it's not the question we have here.

It's just different, Your Honor. Now, if I had that case, I would then meet the issue, and I would be able to answer the question; but I just think it's a completely different question.

QUESTION: Well, the Equal Protection Clause, in its terms, applies to a single State.

MR. COLEMAN: That's right; yes. Yes, sir. Well, that's one --

QUESTION: Mr. Coleman, in your petition for certiorari you present the single question of whether or not a federal court may go beyond the geographic boundaries of a school district in providing a remedy.

MR. COLEMAN: That's right.

QUESTION: That's the single question. Now, let's assume we agreed with you and said that it may go beyond. Would we just say, reverse and not reach anything else in this case?

MR. COLEMAN: Well, --

QUESTION: Is there another question?

MR. COLEMAN: -- the light has gone on, and I --

QUESTION: Well, I have asked you a question. Is there another question in the case? You can --

MR. COLEMAN: Well, my understanding is that if you make the determination that the Court of Appeals was wrong in saying you could not go beyond that division line, then I think you should affirm Judge Merhige.

If you don't, because --

QUESTION: Well, we don't -- we haven't got Judge Merhige to affirm here, we've got the Court of Appeals judgment.

MR. COLEMAN: Well, you reverse and order them, what you do all the time, Your Honor, you order them to reinstate the judgment.

QUESTION: I know, but is there any other question we must reach before reversing?

MR. COLEMAN: I think not, Your Honor. And --

QUESTION: Well, were there any other questions raised in the Court of Appeals that the Court of Appeals did not reach and decide?

MR. COLEMAN: To the best of my knowledge, the answer to that is no, there were not, Your Honor. And what's happened here is a very sophisticated way to confuse the situation. The viable racial mix appears nowhere in the principal opinion of Judge Merhige. In his entire opinion, in that part which is from page 164a to 263a, thereafter there's an additional part of the opinion where all he does is to take all the testimony and discuss it. And they find

only in that part, you cannot find in what he said his opinion was, and so I think that if you determine that that line which was a bamboo curtain for purposes of segregation cannot become an iron curtain, you should reverse and reinstate the judgment of Judge Merhige.

If you felt you should send it back, I think at least under your other cases you should say when it goes back -- which I don't think it should go back to the Court of Appeals -- at least the Merhige plan should go into effect the way you did in Swann, until such time as relief, because, after all, I do hope that the next generation at least will get a constitutional education.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:08 p.m., the case in the above-entitled matters was submitted.]