In the

Supreme Court of the United States

'ILLIAM G. MILLIKEN, et al.,	)	No. 73-434
LLEN PARK PUBLIC SCHOOLS, et al.,	)	No. 73-435
'HE GROSSE POINTE PUBLIC SCHOOL SYSTEM, et al.,	)	No. 73-436
Petitioners,	)	
v.	)	
ONALD G. BRADLEY, et al.,	)	
Respondents.	)	

Washington, D.C.
February 27, 1974

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THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, et al., Petitioners, v. RONALD G. BRADLEY, et al., Respondents.	No. 73-436

Washington, D. C.,

Wednesday, February 27, 1974.

The above-entitled matter came on for argument at 10:52 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

FRANK J. KELLEY, ESQ., Attorney General of Michigan, 750 Law Building, 525 West Ottawa Street, Lansing, Michigan 48913; for Petitioners, certain State officials.

WILLIAM M. SAXTON, ESQ., Butzel, Long, Gust, Klein & Van Zile, 1881 First National Building, Detroit, Michigan 48226; for Petitioners Allen Park, et al.

J. HAROLD FLANNERY, ESQ., Larsen Hall, Appian Way, Cambridge, Massachusetts 02138; for the Respondents.

NATHANIEL R. JONES, ESQ., 1790 Broadway, New York, New York 10019; for the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Nos. 73-434, 35, 36, Milliken against Bradley, Allen Park Schools against Bradley, and Grosse Pointe against Bradley.

Mr. Attorney General.

ORAL ARGUMENT OF FRANK J. KELLEY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

At the commencement of trial in this matter, the plaintiffs were a group of parents and children residing in Detroit and a joint plaintiff, the Detroit branch of the NAACP.

The defendants were the Detroit Board of Education, and Superintendent of Schools. And my clients in this case are certain named State officials, the Governor, the Attorney General, the State Board of Education, the State Superintendent of Public Instruction.

Later on, but prior to the trial, Intervenors Magdowski, another group of parents, and the Detroit Federation of Teachers were allowed to intervene as Party Defendants.

These were all of the parties throughout this action,

during the trial stage and the appellate proceedings, except towards the end of the remedy, the court -- the remedy hearings, the court on its own motion added the State Treasurer for the State of Michigan, whom I also represent.

Now, although the lower court's decision, and the Court of Appeals have made frequent and numerous references to the State of Michigan, the State of Michigan is not a party to this suit and has not consented to be a party. Frequent references are made to the Legislature of Michigan, the Legislature of Michigan is not a party, nor any member thereof.

In their original complaint, the plaintiffs made three claims:

First, that the assignment of pupils within the Detroit Public School System only was based upon race.

Second, that the assignment of personnel within the Detroit Public Schools only to some extent was based upon race; and

Third, that Section 12 of the Public Acts of the Michigan Legislature in 1970, Act 48, was unconstitutional because it interfered with implementation of what was known as the Detroit Board's April 7th plan.

This plan altered attendance areas for 12 of 21 of Detroit's high schools; involved at the most three or four

thousand students, and -- making up one and a half percent of the Detroit student body.

Now, initially, the plaintiffs sought a temporary injunction, asking the District Court to implement the April 7th plan. This was denied by the District Court and affirmed by the Court of Appeals.

However, the Court of Appeals, one month after the commencement of the school year that year, declared Section 12 unconstitutional. On remand, the District Court actually came up with a plan of school attendance variance, called the MacDonald Magnet plan, involving many more students, some eight thousand students; and the District Court never made any attempt to implement the April 7th plan itself.

Toward the end of the trial, the District Court, in our judgment, became preoccupied with the majority black character of the Detroit School District.

Repeatedly, questions were asked by the Court, and I quote: "How do you integrate a school district where the student population is, let's make a guess, 85 to 95 percent black? Close quote.

Another reference, quote: "There aren't enough white students to go around." Close quote.

At the time, and the record of the trial discloses, that the predominance, the black majority of students in the City of Detroit was 63.8 percent.

The District Court ruled, at the conclusion of a trial that went over forty days, that -- on the merits -- that de jure segregation existed among the school buildings within the City of Detroit, not between Detroit and any other school district.

The Court also found that the principal cause undeniably had been population movements and housing patterns, quoting the court again.

No faculty segregation was found, no acts of de jure segregation with regard to the assignment of faculty was found.

The court then ordered intradistrict plans and multidistrict plans to be submitted.

We appealed at that point, feeling that there was absolutely no basis on the trial record for the court to entertain a multidistrict remedy. We did not prevail.

After the hearings on the intradistrict plans commenced, the court allowed, for the first time, 43 suburban school districts to intervene. However, their intervention was limited.

After hearings on a multidistrict plan commenced, the court issued its order rejecting any intradistrict plan, without stating in its order whether or not a unitary system could be found in the City of Detroit, meaning a system whereby no child in that district would be excluded from a

school because of race.

On June the 14th, 1972, the trial court ordered a desegregation plan, including 53 school districts involving 780,000 students and requiring at least 310,000 of them to be bused daily, on the school days, so that each school, each grade and each classroom would reflect the racial makeup of the entire 53 school district areas.

The court also ordered a ten percent black faculty in each school, although in the trial court no evidence was found of any segregatory acts with regard to assignment of school personnel in Detroit at all, the principal case.

QUESTION: Mr. Attorney General, did you say that the judge ordered busing?

MR. KELLEY: He ordered -- he ordered a desegregation plan.

QUESTION: Did he order busing?

MR. KELLEY: Later on, yes, on July the 11th, he ordered the State of Michigan to buy 295 buses.

QUESTION: Where is that?

MR. KELLEY: That is covered in our Appendix for Petition for Writ of Certiorari, 106, on 107 -- page 106 and 107.

QUESTION: 106 and 107.

MR. KELLEY: He ordered my clients, the forenamed defendants, to bear the cost of 295 school buses.

Now, the Court of Appeals in substance affirmed the District Court, although the case was remanded for joinder of all the school districts affected by the remedy. You recall that 43 were joined, but the remedy recommendation was 53. They were not before the Court.

Now, more than three years after the complaint was filed, and two years after the completion of the court's decision, first in their amended complaint and now to this Court, the plaintiffs represent that this case is one of intentional confinement of black children to an expanding core of State-imposed black schools within a three-county area.

They made no such complaint in their -- they made no such allegation in their original complaint; they made no such claims during the entire course of the trial; they made no such claim in the Court of Appeals.

On September the 4th, 1973, the plaintiffs filed an amended bill of complaint, and in that amended bill of complaint they did not allege that the school boundaries had been created, altered or manipulated in any of the areas for the purpose of segregation, nor did they allege, with the exclusion of Detroit, that any other school district had committed any acts of de jure segregation.

QUESTION: Is that amended complaint in the Appendix?

If not, go ahead.

MR. KELLEY: Thank you, Justice Rehnquist.

It was the position of the plaintiffs that what -- of the defendants and appellants, that what this case is about, as distinguished from what the plaintiffs now say this case is about, is of critical importance. We feel that this is a classic case of a remedy in search of a violation.

This case was pleaded and tried and decided by the District Court on the theory of a single school district violation. The District Court made it abundantly clear, and I quote from the trial record, when it said: "This lawsuit is limited to the City of Detroit and school system; so that we are only concerned with the city itself, and we are not talking about the metropolitan area." Close quote.

However, the District Court, at the remedy stage, candidly revealed what we feel is a self-assumed role to pursue a social goal. Quoting the court: "The task that we are called upon to perform is a social one, which the society has been unable to accomplish; to attain a social goal through the education system by using the law as a lever." Close quote.

QUESTION: What's your Appendix reference on that?

MR. KELLEY: That, Your Honor, is in our Joint Appendix for the Petition for -- our Appendix for the Petition for Writ of Certiorari, page 40 and 41.

QUESTION: Mr. Attorney General, I have trouble with the Appendix. Each volume goes just a hundred and some pages; and I've been unable to find this.

MR. KELLEY: Well, that's this -- the Appendix I refer to is our -- we have filed a separate Appendix, Your Honor, as to our Petition for Writ of Certiorari.

QUESTION: Right.

MR. KELLEY: Separate from the five-volume Appendix.

QUESTION: Right. Right.

MR. KELLEY: The District Court then acknowledged in its ruling on the metropolitan desegregation area, and quoting the court again: "That the court has taken no proof with respect to the establishment of boundaries of the 86 school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the City of Detroit, such school districts have committed acts of de jure segregation." Close quote.

Now, all of this is important, we submit, when we consider the nature of the violation found by the District Court, and the proofs relied on to support that violation, we respectfully submit that the underpinnings are fragile and slender reeds upon which to build an edifice of achieving a social goal or a multidistrict remedy, regardless of how worthy that goal might be from the standpoint of a social goal.

I wish to examine the rulings against the clients that I represent here, because the only clients, as far as the State of Michigan are concerned, that are before this Court, are the Governor, the Attorney General, the State Superintendent of Public Instruction, the State Treasurer, and the State Board of Education.

Much has been made, at the lower court stage, about the transportation of some school students from a Carver School District outside of Detroit, back in the 1950's. As a matter of fact, the Court of Appeals stated that this busing of students from the Carver School District into Detroit was done -- could not have taken place, I should say, without the tacit approval, express or implied, of the State Board of Education.

Well, I submit that there is no obligation on the State Board of Education to be notified of any transportation of that type, there was not that responsibility, nor is there anything in the record to support the conclusion that it could not have been taken without the tacit or implied approval of the State Board of Education.

The Court of Appeals also upheld the conclusion that for years black children in the Carver School District were assigned to black schools in Detroit because no white suburban district would take the children.

We say that that is exceptional error, there's

nothing in the record of this case to base that conclusion.

Actually, members of the Court, the Carver School District was an independent school district in the 1950's that did not have a high school. Detroit reached out, took these children in, and gave them an education, a high school education that they wouldn't have otherwise had.

Under Michigan -- established Michigan law, there is no obligation for any school district in Michigan to accept pupils or take pupils from any other school district.

But Detroit did take these pupils, to give them some education. Then, some thirteen years ago, the Oak Park School District, through the initiative of local officials, annexed the Carver School District, so that now the Carver students are a part of the Oak Park School District, which is a suburban school district, predominantly white, and which has the richest per pupil contribution of any State -- or any district in the State.

This, I believe, gives lie to the plaintiffs' theory that there is some containment going on, because if that were true these students would not have been annexed to the Oak Park School District, but would have been annexed and confined to the City of Detroit.

In other words, I believe that the Carver example, rather than showing a willful purpose to segregate, shows a willful act of trying to integrate.

The merger of the entire Carver School District, in 1960 I believe, under the theory expressed in Keyes, shows that something going back in the 1950's is so attenuated now, in any event, not to establish -- so that it cannot establish a precedent for an act of de jure segregation in the 1970's.

QUESTION: Was Carver contiguous to Detroit, to the the school district?

MR. KELLEY: It was contiguous, I believe, to Detroit, it was also contiguous to Oak Park, who initiated the local --

QUESTION: To Oak Park. And Carver itself did not have a high school.

MR. KELLEY: Carver did not have a high school; never had one.

QUESTION: Is there no obligation on a school district in Michigan, as a matter of State law, to have a high school?

MR. KELLEY: No, there is not. As a matter of fact, there's a case directly in point, which occurred in out-State Michigan, at 349 Michigan 1, called Jones vs. Grand Ledge, which indicates that that is not the case. And incidentally that was a case in out-State Michigan, where there was no racial factor involved.

QUESTION: What is the obligation of a school

district with respect to having schools? Does it have to have any schools?

And if not, what's the point of having a school district?

MR. KELLEY: The -- no, I think there's an obligation of a school district to have schools, and they did have schools in Carver, but they were not -- they did not have a tax base, and could not tax themselves to the point to build a high school. I believe there was inference made. They just were never able to build a high school in this -- which, from a tax base standpoint, as I understand it, Mr. Justice Stewart, was a very poor area, taxwise.

QUESTION: Was Carver, back in the Fifties, a predominantly Negro area?

MR. KELLEY: To the best of my knowledge it was always predominantly Negro, from the time it received its -- not only the school district but from the time it became a chartered township.

QUESTION: Unh-hunh.

MR. KELLEY: Another pivot of the plaintiffs' brief that attempts to bring State involvement into this matter, as a predicate for a multidistrict remedy, is the reference to Section 12 of 1970 Acts of the Legislature, the act being Act 48.

This piece of legislation actually provided for more

local control to the parents within the Detroit School System, 13 sections which intensified and gave the parents more local control.

Following the situation in New York that had occurred prior to that time, where the parents wanted more local control.

All that Section 12 did, in our judgment, was to delay an attendance plan that had been put out until the new board took over on January the 1st; but, in point of fact, -- and it also provided that if there needs to be any school attendance change of practical necessity, they could continue to do it.

But that section was only in effect for a month, because the Court of Appeals declared it unconstitutional. Any effect it has was de minimis, and any effect it had would be applied solely to the single Detroit School District, because the statute applied only to the single Detroit School District, and had no bearing on any other school district in Michigan.

There's no evidence that the defendants who I represent, the State defendants, had anything to do with the passage of the statute. Nor does it show that there was any segregatory effect caused in any other school district of Michigan, and the record is barren of that.

A point is also made by the plaintiffs that the

Sixth Circuit especially reached the same conclusion that construction in Detroit in the mid and late 1960's is a basis for involving my State defendants in a predicate for a multi-district remedy.

What this Court recognized in Rodriguez and in other cases, that the school construction is primarily a function of the local school district: site acquisition, the purchase, the right of eminent domain is given to our school districts in Michigan. We, the State Board, at the State level, at the Capitol, has very little to do with the acquisition and construction of schools. As a matter of fact, the only contact by law in Michigan is that the State Superintendent of Public Instruction approves them as to fire and safety regulations, and that prior to 1962 he approved the site as to its adequacy after the fact. But --

QUESTION: Mr. Attorney General, how are the funds raised for capital improvements in the school districts?

MR. KELLEY: I would say that overwhelmingly the majority of the funds are raised locally by taxation and bonding.

QUESTION: By bonding? Who issues those bonds?

MR. KELLEY: The district issues the bonds, Your Honor.

QUESTION: The district is the maker of the bonds.

MR. KELLEY: That's correct.

QUESTION: They're not general obligations of the State?

MR. KELLEY: No.

QUESTION: And it requires a vote of the people in the district, to authorize a bond issue?

MR. KELLEY: In most cases, Your Honor.

As a matter of fact, one of the allegations in this case was that Detroit was -- was contributing less per pupil than the other districts in the tri-county area, and the court concluded that that was a fact.

The actual fact is that Detroit, during this period, has been -- has had more -- has had higher per pupil contributions per student than most of the other districts in the area.

In the area of school financing, I believe that there's an example here of straining in order to involve my clients, named, as a predicate for a multidistrict ruling.

And also there's a point made about the transportation -- an Act, the statute passed with regard to transportation based on an urban-rural classification.

The statute passed in 1947 provided that all home rule cities, all home rule municipalities in the State, and certain villages, were to be excluded from appropriations for certain transportation funds. It was certainly not racially motivated, it was certainly an equal classification that

applied to all the cities, including the city that I was City Attorney in at the time, Alpena, Michigan, which had no black population whatsoever. It applied to hundreds of cities like that.

And the plaintiffs have tried to show that this statute was an example of the violation of equal protection of their clients' rights. It was not.

As a matter of fact, since 1972, the Legislature has been making specific appropriations to villages and cities, separate and apart from the previous statute.

QUESTION: But the previous statute applied to home rule cities?

MR. KELLEY: All home rule cities --

QUESTION: And Detroit is a home rule city.

MR. KELLEY: Was one of many -- one of hundreds.

QUESTION: One of hundreds in the State --

MR. KELLEY: That's correct.

QUESTION: -- and these satellite communities of Detroit are not home rule cities?

MR. KELLEY: Some of them were and some of them did not receive funds.

QUESTION: Some were and some were not. Yes.

MR. KELLEY: Some of them were and some did not receive funds, Your Honor, that were incorporated,in that manner.

Now, it is our position that the findings against my clients -- and I can only speak for my clients; as you know, the City of Detroit School District has not seen fit to appeal or participate in this appeal. But they have their attorneys, their own counsel, and they make their own decisions in this area.

I am here representing only the Governor, the Attorney General, the State Board of Education, the State Treasurer, and the State Superintendent of Public Instruction.

And I submit to this Court that the record in this case is devoid of any action by any of my clients that could be said to be a purposeful act, as a public official, with an intent to segregate anybody at any time.

And I think also that if we are to allow the courts to engage in social goals, rather than to confine themselves to the scope of the remedy that the violation requires, and in order to predicate a remedy for those goals we allow them to trample on the rights of clients such as mine here today, who, in the record, are devoid of any acts, then really the ends of justice are not served.

QUESTION: You'd be satisfied if we just left you out of the case?

MR. KELLEY: No, I don't think that would be proper. I think that -- I think that what's more important here, Your Honor, is that the lower courts have failed to read Swann and

Keyes and the other more recent rulings of this Court, as I understand them, this is a single district case, a single district allegation, --

QUESTION: You've said that you don't represent the city.

MR. KELLEY: That's correct, Your Honor.

QUESTION: And you don't represent the School Board.

MR. KELLEY: That's correct.

QUESTION: And that nobody here represents them.

MR. KELLEY: That's correct, Your Honor.

But, by the same token, I do feel, Your Honor, that we, my clients are being used as the predicate for a multidistrict remedy, when it is not warranted by the facts.

And if we are not, if we are dismissed from the case, then this case should not be remanded, but should be ended, because the plaintiffs have had their day in court on a single district allegation; everything they alleged that was tried, and there is testimony that we can have a unitary solution within the city of Detroit, because this Court has never said that there should be, that a predominantly black school district can't meet the test of Brown and the other cases.

And I think that that is the issue in this case.

MR. CHIEF JUSTICE BURGER: General, your time, I think, has now expired.

MR. KELLEY: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Saxton.

ORAL ARGUMENT OF WILLIAM M. SAXTON, ESQ.,

ON BEHALF OF THE PETITIONERS, ALLEN PARK, ET AL.

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

My name is William Saxton, and I appear here on behalf of 44 school districts, who are listed as petitioners in this case.

Each of these petitioner school districts is a body corporate under Michigan law and possessed, under Michigan law, with the right to sue, to be sued, in its own name, the right to possess property, and to hold both real and personal property for educational purposes.

These school districts are located in varying degrees of geographical proximity to Detroit, some ranging up to 30 to 35 miles away.

In most instances these school districts are predominantly white, in both their population, makeup as a whole, and in their racial population. This is --

QUESTION: Mr. Saxton, you said you were appearing for 44?

MR. SAXTON: Yes, Your Honor.

QUESTION: But there are 53 involved, are there?

MR. SAXTON: There are 53 involved in the lawsuit,

Mr. Justice Brennan, --

QUESTION: Are the other nine --

MR. SAXTON: -- some of whom have never been before the court in any capacity.

QUESTION: Well, are the other nine represented here today?

MR. SAXTON: They are not represented here today, Your Honor.

I might also -- it is a little confusing. Some of the school districts whom I represent, and for whom I speak in this argument, were not included in the metropolitan remedy decreed by the lower court. Nevertheless, they are still intervenors in the case, and petitioners in this lawsuit.

So it isn't really fair to say that there are only nine left. There are really eighteen school districts, Your Honor, Mr. Justice Brennan, that have never been before the court, that were included in the plan.

QUESTION: Because you represent at least nine who were not included in the plan, is that correct?

MR. SAXTON: No, Mr. Justice Stewart, I represent thirty-some who were included in the plan, --

QUESTION: Yes.

MR. SAXTON: -- and twelve of some who were excluded, and none of those who have never been before the court.

QUESTION: Well, twelve is at least nine.

MR. SAXTON: Right.

QUESTION: But all of your clients are intervenors, even though they may not have been included?

MR. SAXTON: That is correct, Mr. Justice Rehnquist.

As I was going to point out, in most cases the petitioner school districts' racial composition, in terms of its pupil composition, is majority white. This is not true in all cases, well, it is the majority in all cases, but, for instance, in the case of River Rouge, which is roughly 43.5 percent black pupil population, and in one or two other districts, the racial composition is from 10 to 15 percent black.

I might point out to the Court that there is an exhibit contained in Volume V of the five-volume Appendix, which I believe is Exhibit 12, which will give the racial composition, school district-wise, of all of the school districts involved in the plan.

If I may digress a moment, Mr. Justice Burger, the Chief Justice, I believe, asked about the amended complaint. I think that's at Volume I of the five-volume work, at page 294 -- I a 290, and I believe the particular part that the Attorney General referred to is at page 294.

At the outset it should be emphasized that there

is absolutely no claim, and there is absolutely no finding in this case that any school district in the entire State of Michigan, with the singular exception of the City of Detroit School District, that has committed an act of de jure segregation, and that includes all of these petitioner school districts.

There is no claim in this case, there is no evidence in this case, that any school district in the State of Michigan, including Detroit, was established or created for the purpose of fostering racial segregation in the public schools.

The City of Detroit School District was created as co-terminus to the city boundaries over a hundred years ago. Unlike cases like U.S. vs. Missouri, and U.S. vs. Texas, there has been no gerrymandering of school district boundary lines or changes for the purpose of including or excluding black students.

The District Court in this case conducted its trial on the merits on the sole and singular issue of whether or not the Detroit School System was operated as a de jure segregated school system; not established but operated.

On September 27th of 1971, he issued a so-called Ruling on Segregation, in which he found that as a result of acts committed by the Detroit School Board, which he also found were aided and abetted by acts of certain officials of the

State government, that the Detroit School District was operated as a de jure system.

In October of 1971, the first inkling came that the remedy might exceed the trial on the merits, and the newspapers carried a story that the District Court was requiring the State defendants to submit plans for so-called metropolitan desegregation.

I submit this is a misnomer in itself, because there's no evidence there's any metropolitan segregation, and therefore there is no metropolitan desegregation warranted.

In some of the briefs, the petitioner school districts have been criticized for not intervening in this case sooner. I would merely submit it's rather hard to get into a case where you're not a defendant, where no claims are made against you, and where the only issue relates to the City of Detroit School District.

As soon as it became obvious that the District Judge intended to embellish the remedy beyond the scope of the trial on the merits, the petitioners intervened.

Now, the petitioners here do not contend that the findings with respect to the de jure operation of the Detroit School District are erroneous, nor that they should be set aside.

What the petitioners here do contend is that those findings, which are limited in scope and effect to the

operation of the Detroit School District, may not be used like a rubber band to snap in all the petitioner school districts in a so-called metropolitan remedy, which has, as its avowed purpose, under the decisions of both lower courts, the desegregation of the Detroit School System.

We think, Your Honors, that part of the problem here arises from strange semantics. What does desegregation mean?

Well, as viewed by the District Court, and as viewed by the Court of Appeals' majority for the Sixth Circuit, it obviously means a minority black school system.

We submit that nothing in the Constitution of the United States so prescribes, nor does any decision of this Court so require.

If the mere existence of racial disparities between separate, distinct and unrelated school districts does not offend the Constitution, and we submit it does not, then there is absolutely no basis upon which a multidistrict remedy can be predicated in this case.

Let me say this: You will search this record in vain to find one whit of evidentiary material that any suburban school district committed any de jure act of segregation, either by itself, in complicity with the State, or complicity with anyone else.

There is no such evidence.

The Court of Appeals tries to put together in its

opinion a metropolitan remedy by the very tenuous strain that there is a vicarious liability here which permits the metropolitan remedy, because State officials were involved in the desegregatory action in Detroit.

There's rather an anomaly here that does require the Court to follow a little bit the rulings of the Court of Appeals.

The Court of Appeals' majority for the Sixth Circuit only affirmed the findings of fact in two orders issued by the District Court, and this is found, if you will, at page 112 of this separate volume to the Petition for Certiorari.

You'll note on page 112 that the court only affirmed findings in two orders, the order on the ruling on Issue of Segregation, and the order where the Findings of Fact and Conclusions of Law on a "Detroit only" plan of desegregation.

Then if you will turn to pages 177 and 178, you will note that all orders issued by the District Court, which were before the Court of Appeals, and are set forth at page 112 of the record, were vacated by the Court of Appeals.

Now, I state that as background because despite having vacated, the only orders where any suburban school district is mentioned, or suburban school districts, the court uses statements in the very orders it vacated, as a grounds for premising a metropolitan remedy.

Now, I submit that's somewhat an anomaly, when the court will extract statements from rulings and orders that it did not affirm, and which it itself vacated.

There are only two mentions in this whole record of anything about suburban school districts.

The first one has to do with the Carver School District, which was mentioned by Attorney General Kelley.

I would call the Court's attention to the fact that there are only four places in this entire record where the Carver School District is mentioned. It initially comes into the record because it was submitted as a statement by the plaintiffs in this case as part of their proposed findings of fact and conclusions of law in support of a metropolitan remedy.

The plaintiffs initially made the gratitutous statement that no suburban school district would accept the Carver students.

There is no evidence in this record that will support that statement. I think it is incumbent upon the respondents plaintiffs in this case to indicate to the Court where it can be found. We have searched the record in vain.

As far as the lower court's finding on the Carver School District is concerned, it comes as a footnote to his ruling on governments for a metropolitan plan, which appears at page 96a of this volume submitted with the Petition for Certiorari.

Now, as far as the Court of Appeals decision on the Carver School District is concerned, the Court of Appeals stated that the lower court was right in basing its finding on the Carver School District based upon the testimony of Dr. Norman Drachler, who testified that there were students in the Carver School District who were bused to the Northern High School in Detroit.

The Court of Appeals opinion embellishes on this by copying from the plaintiffs' proposed findings, and says that that occurred because no white suburban school district would take these students, and because no white school district in Detroit would take them.

The Court of Appeals, however, did not read all of Dr. Drachler's testimony. In Volume V a, of the five-volume Appendix, page 186, the same witness, upon whom they rely for their findings, testified that the Carver students were bused past Mumford, the nearest white school in Detroit -- not for segregatory purposes, because Mumford was overcrowded.

I'd ask the Court to look carefully at the Court of Appeals finding, based upon Dr. Drachler's testimony. The testimony which they rely on starts out: I was told. I was not in the Central Office in 1957 and '58.

The most rankest form of hearsay. He was told, and there is no indication in the record even by whom he was told. And on that slender thread was put together a pillar to

formulate a metropolitan remedy affecting nearly a million parents and children in 53 school districts.

Now, the only other mention of any suburban school districts or any of their activities is the gratitutous statement that construction policies pursued in suburban areas, or areas outside of Detroit, caused segregation in Detroit.

Now, this can only be upheld on the strained idea that if the suburban areas or the independent school districts outside of Detroit had not built any schools, then no white families would have been able to move out of Detroit with children, because there wouldn't have been any place for them to go to school.

And underlying this contention is the fallacious argument that merely by building a school to serve the population in that area, that that acts as a lure to white citizens in a central city, and therefore is an act of segregation.

We submit that's too tenuous to support a metropolitan remedy.

The Court of Appeals and the lower court have misapprehended the controlling principles of law enunciated by this Court, beginning with Brown, that the rule is that if education is provided by the State, it must be made available on equal terms to all. There is no evidence in this record that that has not been done in any school district other than

Detroit.

In Swann, this Court said that the task is to correct the constitutional violation by balancing the individual and collective interest. That means that the interest of those one million parents and children who live outside Detroit, who have paid taxes to support their school district, who have considerable investments in homes, who have input into the local school, who desire to continue the concept of local schools, also have interest in this case, equally as well as the plaintiffs.

And if those interests are to be balanced, the rights of these people may not be sacrificed on the altar of racial balance in order that their children may be judicially conscripted and interchanged with students in Detroit.

Thank you.

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

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

The United States appears as amicus curiae here today because the Court's resolution of the issues in this case will affect the government's responsibility in the school desegregation area.

I think I need not recite the facts or the proceedings that have occurred so far.

From our point of view, the unique aspect of this case is that an extensive interdistrict remedy is contemplated. Certainly -- almost certainly including busing.

And it involves -- a remedy that involves not merely costs to the children in Detroit and the rest of the area, but also widespread disruption of long-established governmental units. And that remedy is ordered as supposedly a remedy for racial discrimination found to have occurred so far only within the City of Detroit.

The government believes that a remedy so disproportionate to the violation found is an improper exercise of judicial power.

And in that sense the case involves precedent for future remedies and also a question of the proper role of the judiciary in this -- in government in this area.

The issue seems to us fairly simple. The reasoning of the Court of Appeals majority and of the District Court contains an obvious flaw. That reasoning runs like this:

Unconstitutional segregation of school children has occurred in Detroit. The law now requires that the unlawful dual system be converted to a unitary system. There are too few white children in Detroit to achieve a truly integrated school system and, in fact, busing or a remedy confined to

Detroit might merely hasten the departure of other whites, and thus leave the Detroit system identifiably black.

It follows, according to the court's reasoning, therefore, that the only effective remedy is for the court to reach out to the suburban school districts to find enough white children to provide racial balance in Detroit.

The fatal defect in that reasoning is that it equates the concept of a unitary system with a particular ratio of black and white school children. Those concepts may not be equated.

As this Court's opinion in Swann makes quite clear, and indeed as this Court's opinion in its affirmance of Spencer v. Kugler makes quite clear, a unitary school system is not one containing any particular proportion of the races. It is simply one in which State action does not separate the races.

Thus, a remedy confined to Detroit is completely adequate to meet the law's command that the unconstitutional school system be dismantled and converted to a unitary system.

The interdistrict remedy here contemplated by the court below is not tailored to the constitutional violation shown, as the Swann opinion says it should be. If the respondents wish an interdistrict remedy, then we suggest that this case should be remanded for trial and findings concerning the presence or absence of constitutional violations that

directly altered or substantially affected the respective racial composition of the Detroit school system and the specific suburban school systems.

QUESTION: Can you tell me, Mr. Solicitor General, when, in the course of this litigation, the allegations were made that the outlying districts, 44 or 54, whatever they amount to, had engaged in conduct violative of the Constitution?

MR. BORK: Mr. Chief Justice, it is my understanding that no such allegation has been made to date.

QUESTION: Well, then, we remand to -- your proposal is that it be remanded to allow them to --

MR. BORK: Amend the complaint.

QUESTION: -- amend their complaint.

MR. BORK: And seek remedy along those lines, if they feel there is a case along those lines, and if they feel that that is the remedy they wish.

QUESTION: Even though the parties haven't thought that there was a case along those lines, after all this litigation?

MR. BORK: I would find it difficult to say, and not terribly useful to say, I think, that the parties must begin a new lawsuit aimed at interdistrict violations. In effect, it is a new lawsuit. But I don't see why it can't be accommodated by -- if -- if the plaintiffs wish -- by an

amendment of the complaint here, to allege such intradistrict violations as they may think have occurred.

They may not think any interdistrict violations have occurred, in which case I'm sure they will not amend their complaint.

QUESTION: Mr. Solicitor General, what do you mean, exactly, by interdistrict violations?

MR. BORK: A violation that results in altering the racial composition of two districts, so that blacks tend to be confined to one and whites confined to another.

QUESTION: Does it require cooperative action on the part of two or more districts in --

MR. BORK: I don't think it requires that, Mr. Justice Stewart, I think that is one way in which it could occur, if a State ordered it done, even though the two districts themselves might resist it.

QUESTION: Unh-hunh.

MR. BORK: I assume that would be an interdistrict violation.

So it would either be action by the State at the State level, or it would be collusion or cooperation between the two districts.

QUESTION: By two or more districts.

MR. BORK: That's correct.

QUESTION: Unh-hunh.

QUESTION: Some sort of shifting of a district line in order to preserve segregation?

MR. BORK: A shifting of a district line, in order to preserve segreation, Mr. Justice Rehnquist, would do that as would cross-district busing.

If a district with 20 percent black children bused all of its black children out.

QUESTION: Without any change in the line?

MR. BORK: Without any change in the line, into another black district, in order to preserve segregation. I assume that would be an interdistrict violation, which would justify an interdistrict remedy.

QUESTION: Anyway, I --

QUESTION: Mr. Solicitor General, --

QUESTION: -- take it, an interdistrict violation would not include just violations in two districts?

MR. BORK: I think not, unless those violations in some way, Mr. Justice White, --

QUESTION: Had some connection.

MR. BORK: -- affected the balance -- the racial composition of those two districts.

QUESTION: And you would be making the same argument if they did prove segregation in the suburbs, and segregation in Detroit -- but that's all they prove, they didn't have any particular connection?

MR. BORK: If they had no connection, Mr. Justice White, and did not alter the racial composition --

QUESTION: Yes.

MR. BORK: -- as between those two districts, I think there would be no occasion for an interdistrict remedy.

QUESTION: Mr. Solicitor, in addition to this interdistrict point, don't you think it's -- the Court of Appeals, the trial court, or somebody should get a new shot at this? There's no order yet. I mean you --

MR. BORK: Oh --

QUESTION: -- mentioned busing and rightfully so, and everybody, but there's no order to bus in this case.

MR. BORK: Mr. Justice Marshall, I certainly think they should have a -- a new shot at this case. I think it is undeniable that what is contemplated by the Court of Appeals and what was contemplated by the District Court is an interdistrict remedy that would necessarily involve a great deal of busing.

QUESTION: Well, it hasn't been done yet.

MR. BORK: No, sir. And I think --

QUESTION: None of it's been done. And don't you think it -- they should have another shot at how it's -- whether it can be done, whether it should be done, and,even more importantly, if they go to those two, it's how it should

be done.

MR. BORK: I -- I --

QUESTION: And the trial court should do that.

MR. BORK: Mr. Justice Marshall, I entirely agree that the trial court should do that, but I think the trial court should not begin that study until it has found interdistrict violations that must serve as the predicate for that remedy.

It seems to me that until a showing of racial discrimination, which affects cross-district lines, is made, then an interdistrict remedy, whether it includes busing or not, is not designed to remedy constitutional violations. But, rather, it is designed to interfere with the consequences of demographic shifts.

The redesign of demographic patterns, I think, is not a proper function of the federal courts. This Court noted in Swann, where there were -- that even where there are constitutional violations within a district, once those violations have been remedied, and a unitary school district created, there will be no occasion, and there should be no further occasion for a federal court to continue to pursue demographic changes.

And I would think it follows, a fortiori, that where there is no violation affecting the relative racial compositions of two districts, that there would certainly be

no case for a federal court to concern itself with demographic patterns.

But that conclusion seems to me to be reinforced by the substantial interest in preserving governmental units, that are certainly present in this case, including school districts. In this line.

So far as we have on the record there is no school district line that was not established for neutral reasons. There is no school district line that we know of that was altered or established in order to affect any racial distribution.

It may be that something like that can be shown, but it hasn't been shown yet.

The Court of Appeals for the Sixth Circuit refers to these school district lines as artificial lines, and I think that kind of remark ought to be noted and rebutted.

These are not artificial lines. When you first draw a line on a map, it is in some sense artificial, you could have drawn it elsewhere. But over a period of years, in this case, as the City of Detroit, over a period of 142 years, people arrange their lives according to where that line rests on the map.

If you move the line, people would rearrange their lives over a period of time; according to where those lines are.

They are not artificial lines. They are lines that dramatically affect individual and governmental interests.

QUESTION: Well, they're artificial lines in the same sense that the boundary between Ohio and Indiana is an artificial line. Isn't that correct? It's not a natural --

MR. BORK: Indeed it is correct, Mr. Justice --

QUESTION: It's not a river, it's not a mountain range, it's --

MR. BORK: It's an artificial line in the same sense --

QUESTION: -- an artificial politically drawn line.

MR. BORK: -- that the boundary between Connecticut and --

QUESTION: That's what I understood the -- all that the Court of Appeals was talking about.

MR. BORK: Well, I think the implication in the word "artificial" was that, therefore, there is no particular reason not to shift those lines or to respect those lines. And I was suggesting that there is, because people have arranged governmental units, bonding financing, control of local schools; they have arranged their lives according to where those lines are.

QUESTION: We have another example of that, do we not, in the line between, let us say, the Fourth Circuit and the Fifth Circuit? A Fourth Circuit district court case would

not do very well in an appeal in the Fifth Circuit, would it?

MR. BORK: I think not, Mr. Chief Justice. Although there probably are occasions when an attorney would like to be able to cross over.

[Laughter.]

MR. CHIEF JUSTICE BURGER: Mr. Flannery.

ORAL ARGUMENT OF J. HAROLD FLANNERY, ESQ.,

ON BEHALF OF THE RESPONDENTS.

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

To our minds the issue here is whether the courts below were correct in holding, upon the record in this case with respect to the nature and scope of the segregation violation, that interdistrict desegregation relief must be considered.

In that context, if the Court please, I propose to address the nature and scope, or extent of the violation as a predicate for proposed interdistrict remedies; and, secondly, the opportunity of suburban districts to be heard, both heretofore and hereafter.

My associate, subject to the concurrence of the Court, my associate Mr. Jones, will address himself primarily to the practicalities of interdistrict desegregation, including Michigan law and practice with respect to its district educational units and their boundaries.

QUESTION: Mr. Flannery, you represent here Mr. Bradley and others?

MR. FLANNERY: I do, Your Honor.

QUESTION: Unh-hunh.

MR. FLANNERY: It appears to petitioners at this writing that there are proffered to the Court different analyses of this issue.

As I understand the petitioners, Allen Park and the State of Michigan, interdistrict remedies may be considered in only two situations, where there has been manipulation or gerrymandering of school district lines as in Gomillion v. Lightfoot, where there has been segregative racial exclusionary conduct on the part of suburban school districts.

Perhaps, although it was not mentioned, where changes in lines might impair a free existing constitutional obligation as in Emporia and Scotland Neck.

It appears to us that the Detroit Board, in its brief, the Detroit Board respondents, take a different view as we understand their position and as characterized by the Solicitor General, as school districts, both constitutionally and under Michigan law, are not more than artifacts of convenience of a State education system. When it is found that black pupils have been segregated on the basis of race, by the State, acting at the State level, and through its local units, then practicable desegregation must be achieved

for the affected children. And practicable desegregation may require the crossing of school district lines, unless it can be shown that there is a counterveiling compelling State interest.

The Solicitor General offered what appears to be the petitioners to be a middle ground. If I read the Solicitor General's brief correctly, pages -- I have particular reference to pages 10 and 13 and 14 -- it would be his view that the courts below need not find segregative practices on the part of suburban districts, nor need they find manipulation or gerrymandering of school district lines.

Indeed, interdistrict relief could be predicated, in the view of the Solicitor General, upon a finding that a violation, either by the State or by several districts, or even by one district, had affected or substantially altered -- I believe the phrase is in his brief -- the composition of schools in a different district.

If I have correctly characterized, from pages 10 and pages 13 and 14, the view of the Solicitor General, I would note parenthetically that we find it too cramped for the affirmative breach of the Fourteenth Amendment, but it has a virtue in this instance, may it please the Court, of fitting the facts of this record.

It is the view of the petitioners that two courts below, a total of ten Federal judges below, have examined the

facts in this case very carefully, and have come to the conclusion, if I may summarize it too cryptically, not only that there were conventional segregative practices affecting a limited number of school children within the Detroit district. On the contrary, there were such segregative practices by the State of Michigan, acting through its local agents, the Detroit Board, and acting at the State level.

There were a variety of other governmental private and quasi-governmental practices which caused housing segregation and school segregation to be mutually supportive, mutually interlocking devices. With the result, may it please the Court, if you can perceive the tri-county area in your mind's eye, with the result that black families and black children were confined to a small portion of the tri-county area and to the schools located therein, and both directly and by the reciprocal mechanism noted by Mr. Justice Brennan's opinion for the Court in the Keyes case, the confinement of black children to an identifiable -- today expanding but always during the relevant period -- identifiable core of black schools, inevitably created on the fringe of Detroit and beyond the border of Detroit without regard to its permeability or impermeability, a corresponding reciprocal ring of white schools.

With the Court's indulgence, I would like to discuss briefly the segregative school practices and their reciprocal

effects as addressed by the courts below.

At pages 122a and 123 of the Certicrari Appendix it was noted that as early as 1960 protests were made by a man who was subsequently an official of the Detroit School System, against what was characterized as a policy of containment, of minority groups, within specified boundaries; when, in 1959, a school district, the Center School District, was created on the basis of where black people resided at that time in Detroit.

The courts below found that the drawing of attendance zone lines along north-south lines, which also conformed, knowingly and deliberately, to the residential configurations in the City of Detroit, served to confine black families to the schools designated for that area.

The courts further found that manipulation of attendance zones, feeder patterns, and grade structures had conformed the composition of schools to the composition -- racial composition -- of neighborhoods.

The courts below noted, and I'm referring now to the Higginbothom School, page 26a, in Judge Roth's District Court opinion, Volume IIIa, at 206 in the Appendix, the building and maintenance of a school and its attendant zone to contain black students.

At times black students were transported to relieve overcrowding, past white schools with space, to other black

schools.

Now, this is, of course, a segregative practice, as described in countless cases by other federal courts and noted by this Court in its Keyes opinion. But the fact is that the courts below found that it was having, in addition to school segregation, it was having a segregative effect on neighborhoods. Because when families seek to disperse throughout the Detroit area, or on a broader basis, the phenomenon of reassigning children in those families back to black schools -- because they must be transported somewhere to relieve overcrowding -- effectively deters dispersal.

QUESTION: This was when, during the Sixties, Fifties or Sixties?

MR. FLANNERY: Oh, yes, the transportation of black children occurred up to the time of trial.

QUESTION: And in the City of Detroit so far, what you described?

MR. FLANNERY: Yes. Yes, Your Honor.

Now, for descriptive convenience, of course, it's helpful to an advocate, I think, to try to separate the role of the State from the role of the city, from the role of other governmental units. But I invite the Court's attention to the fact that Judge Roth and the majority of the Court of Appeals underscored the fact that these were a series of mutually supportive, interlocking devices that were operative.

It wasn't the State's role in isolation today and the Detroit Board's role in isolation tomorrow. All of these factors, especially the segregated school practices, operated in lock-step with an areawide metropolitan policy of confining by housing discrimination at the local level, at the governmental levels, both State and federal, and at the private level, confining black families to an identifiable core in Detroit, which is, to be sure, expanding but still surrounded by a white ring of reciprocal corresponding schools, now separated only by the border -- or soon to be separated only by the border, as Judge Roth observed.

The policies of the State, let me advert to them very briefly, constitutionally at all times and explicitly under Michigan law until 1962, the State level school authorities bore school site selection responsibilities. And the Courts noted that school site selection on a segregated basis proceeded apace during the period from 1950 to 1969.

We have noted several times that the State discriminated in its educational policies against Detroit as a shool system. It has been observed, and I acknowledge rightly, by the petitioners that such discrimination against Detroit did not have race as its primary object, was not ultimately racial, it was a common phenomenon in this country, of perhaps too common, of a form of State legislative discrimination against big cities.

By the point we are trying to make is that at the time these policies caused Detroit to be perceived as a disfavored school system, as the stepchild of the State education units, at that time,the testimony is comprehensive in the record, there was, throughout the metropolitan area a policy of excluding black families from residential opportunities outside the City of Detroit.

So that families choosing to respond to the lure of more favored schools in the metropolitan area, namely those outside Detroit, were only white families. Black families' opportunities were limited.

So the actual workings of the transportation formula have been the subject of dispute.

The point is that there was not reimbursement for Detroit and other, some other city transportation, although it's interesting to note that when city transportation was ended in the statute referred to earlier in response to Mr. Justice Stewart's question, there was also a grandfather clause, and today some cities that would be ineligible remain eligible if they remain outside the Detroit area, by virtue of that grandfather clause. That is, they had been receiving transportation reimbursement before it was cut off.

The working of the bonding formula, the working of the State aid formula -- again this is not Rodriguez, these

are not cited as deficiencies inherent on constitutionalities on their own, they are cited as evidentiary of Michigan's disfavoring of Detroit as a school system, at a time when black people were confined there, and white people were responding to the message that there were hundreds of thousands of new seats going up in the suburbs in attractive new schools.

Now, the culminating contribution of Detroit -- of the State of Michigan, rather, to Detroit's present status as a segregated district was Act 48 of 1970. This Act is fully parsed in the briefs, I'll not labor it -- not impose upon the Court's time to labor it; but I would note that for the first time the State's local educational agency practices effecting segregation had begun to falter.

Up to that point, the local agency had done all that needed to be done in order to accomplish the job of segregating black from white children.

In 1970 an amelioration was proposed, and the State intervened promptly and decisively. It suspended the desegregation plan. It was addressed exclusively to Detroit, the only first-class city in the State, which is only Detroit. It proposed, mandated open enrollment and neighborhood schools as the pupil assignment patterns in that school system.

With the result, Your Honors, that the message was imparted, it seems to us, to all the citizens of Michigan and

to the citizens of Detroit, that Detroit was not an autonomous school system, but the State would intervene and manage the school affairs of Detroit in the most vital day-to-day sense, when the objective was the retention of segregation.

So it appears to us that a variety of State practices, some implemented at the local level, some by State education officials, have combined with massive housing segregation throughout the Detroit metropolitan area, each reinforcing the other, as noted by this Court in Swann, and again in Keyes. Each reinforcing the other, and carefully parsed by the courts below to result in this pattern.

Now, the question has arisen: whether the petitioners brought this analysis to the Court's attention heretofore, is this an eleventh-hour consideration, or have these matters been addressed in the courts below?

I invite the Court's attention to Volume II, page 11, very early in the first week of trial, a witness is speaking of the basic containment pattern that was emerging as early as 1950.

Throughout that volume, pages 12 through 84, approximately seven or eight witnesses who repeatedly speak of the containment pattern, housing and schools, that was coming to characterize the metropolitan area, not merely the City of Detroit.

I do not represent to the Court that every witness

said, to a man, there is an interlocking pattern of housing and schools, and it's limited not to Detroit but includes the whole metropolitan area.

But that was the testimony of a number of the witnesses, and that, more importantly, was the finding of both lower courts.

And it is suggested, it is suggested that only at the eleventh-hour did it occur to the plaintiffs to introduce the concept of metropolitan relief.

At that same Volume II of the Joint Appendix, I invite the Court's attention to page 41 and 44 and thereafter to page 70.

To summarize very briefly, Judge Roth admonished counsel for the plaintiffs not to take the witness into questions involving metropolitan relief, and counsel for the plaintiffs responded, on both occasions, at page 44 and at page 70, in effect: Your Honor, we'll have to see what the record will show. It may develop, on the basis of the record made in this case -- and I remind the Court, this was during the first week of trial -- that Detroit-only relief may be found insufficient.

I suggest earnestly to the Court that the notion of metropolitanwide school-housing or housing-school segregation was not, in the minds of the lower courts or in the minds of the plaintiffs, a Johnny-come-lately objective.

And I think the notion that District Judge Roth was determined from the outset to achieve a racial balance, or the Detroit Board's more recent notion of racial nonidentifiability, is belied by the fact that on that occasion, at page 41 and at several other occasions, he admonished counsel that the initial theory of the complaint had been Detroit-only violations.

And it was thereafter, when Judge Roth began to perceive the magnitude of the violation, as I have endeavored to describe it to the Court, only thereafter did he begin to address the question of the scope of the remedy in terms of the scope of the violation.

If the Court please, we have heard from the counsel for the petitioners that their opportunities to be heard were unconstitutionally or at least unfairly suppressed in the courts below.

I remind the Court that no segregation violations, no segregative conduct, with respect to the original cration of school district lines, or on the part of suburban districts, were alleged. And that those against whom violations were alleged, State level officials acting at their own level and through the Detroit Board, were before the court.

Moreover, on the basis of Lee v. Macon County, and United States v. Texas, and on the basis of District Judge

Roth's view of the plenary power of the State under Michigan law and practice, the parties necessary to grant relief, including interdistrict relief, were in fact before the court.

In addition, in our view and that of District Judge Roth, school districts are not persons under the Fifth Amendment. Therefore, the inquiry turned to rights to be afforded suburban districts under Rule 19.

On the one hand, it appeared to us, since the State has plenary power, since the State had between 1964 and 1968, for example, reduced the number of school districts in Michigan from 1400 to 700, it appeared that the matter could proceed without those districts, and that there were difficult questions of manageability, which districts might be appropriate and which might not -- which has yet to be determined, as the Court has heard -- and which other public officials might possibly be affected by the remedy.

None of these questions could be answered confidently in late 1971, in September, when the magnitude of the violation was first held by the court to be as I have described it.

Consequently, upon application thereafter, still without claims being asserted against suburban school districts, nor did we agree as to their indispensability for relief, but in an abundance of caution, upon application intervention was granted.

Now, little was done with that opportunity below, in our judgment, and we have yet to be told what would be done, what practicalities would be advanced by the local school district, other than the jurisdictional impermeability of lines, what knotty, intractable, flinty problems is District Judge Roth or the Court of Appeals asked to come to grips with?

Well, we've not heard that, either by way of an offer of proof or otherwise. Nevertheless, in, it seems to us, another superabundance of judicial caution, the Court of Appeals for the United States Sixth Circuit said: Return below and you may make defendants, you are obliged to make defendants of all possibly affected school districts, -- that has been done -- and let them have their say.

As we say, we feel this is unnecessary but appropriate.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mr. Flannery.

MR. FLANNERY: Thank you.

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

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Flannery, you may resume where you left off, if you will.

ORAL ARGUMENT OF J. HAROLD FLANNERY, ESQ.,

ON BEHALF OF THE RESPONDENTS - [Resumed]

MR. FLANNERY: Thank you, Mr. Chief Justice.

Members of the Court:

I was observing, as we adjourned, that although we adhere to the view that the suburban school districts are not in any sense constitutionally or under Rule 19 indispensable to the granting of appropriate effective relief.

As they were not indispensable to the charge of illegal segregation, in that no conduct specifically was attributed to them.

But, nevertheless, that out of what we characterize as an abundance of caution, the United States Court of Appeals for the Sixth Circuit remanded with directions that they be joined as parties defendant in the court below, and that, where matters are now poised for further proceedings, and the Court of Appeals placed no limitations on District Judge Roth or his successor District Judge, as the case may be, with respect to the interests to be asserted by the suburban school districts.

So our point on this issue, may it please the Court,

is simply that after three and a half years of litigation, vis-a-vis the suburban school districts, there is as yet nothing irretrievable, and it would cost, in terms of judicial administration, the timely vindication of constitutional rights to remand and vacate would cost a great deal and gain nothing; but to remand in the posture as matters now stand for further proceedings in the District Court would secure, would guarantee to the suburban school districts all the rights that are asserted abstractly rather than specifically so far, to be sure, but all the rights that are asserted by them to be theirs, and all of the interests.

Those --

QUESTION: But I take it that the Court of Appeals has finally decided that there's no need for any more showing with respect to any discriminatory activity in the suburban districts?

MR. FLANNERY: The United States Court of Appeals, as we read the opinion, Your Honor, has said that Judge Roth is not required to receive evidence with respect to the violations and their effects.

QUESTION: So your answer is yes?

MR. FLANNERY: Well, they are not prohibited with respect to that.

QUESTION: Well, I just said the Court of Appeals has decided that there's no need for any more showing of

discriminatory activity in the suburban districts.

MR. FLANNERY: I agree, Your Honor.

QUESTION: Well -- that's all I asked.

MR. FLANNERY: The State, as a violator, is responsible constitutionally and, in Michigan, practicably -- and practically, for the violation here. And it was on that basis that District Judge Roth then turned to the question, on the basis of a metropolitan areawide violation found, and its effects, not limited to the school system of Detroit.

And I wish to emphasize that, because the courts were under no misapprehension with respect to the nature and extent of the violation. And in that context I invite this Court's attention to the Joint Appendix, at page 23, 24, 76 to 78, and 87 and 88, as a limited number -- by no means exhausted -- of references by District Judge Roth to the metropolitan Detroit areawide nature of the violation.

The Court of Appeals reiterated that view at page 164 of the same volume, 176, 151, 157, 154, 158, and 172.

Indeed, in language which presaged this Court's subsequent opinion in the Keyes case, the Court of Appeals quoted approvingly from United States v. Texas Education Agency, to the effect that the kind of confinement of black families and black children to a specific set of schools in a given larger area reciprocally created white schools outside that black core.

District Judge Roth, mindful of this Court's admonition that any vehicle can bear only so much baggage, then turned to the question of remedy, including the question of practicability. District Judge Roth's mind-set, if you please, in our judgment was that after school and housing segregation had caused this containment, this confinement on a mutually supportive basis, should those phenomena be allowed to perpetuate duals schools, the pattern of dual schools if that is practicably to be avoided.

That was the nub of his next inquiry. And the question whether it may be practicably avoided necessarily invited inquiry to the question of whether schools beyond a given district line are to be viewed as schools, for example, as multischool attendance zones in one large decentralized school district which, surely under this Court's teaching in Keyes, would be included; or whether they were impermeable jurisdictional barriers to practicable relief.

I thank the Court.

QUESTION: Mr. Flannery, just as a matter of curiosity, may I ask you the same question I asked counsel in the Richmond case: If, instead of the City of Detroit, this were Greater Kansas City, with an artificial State line in between, I take it like considerations would flow?

MR. FLANNERY: Well, I think, Your Honor, there are clear jurisdictional problems in that States under our

Federal Constitution have a form of sovereignty, a form of autonomy, ceded to them by the Constitution; which, neither under the Fourteenth Amendment nor under Michigan practice, do school districts enjoy. They are nonautonomous, artifacts of State-ceded power, so that it does appear to me that with respect to their existence, with respect to their functioning, vis-a-vis the Fourteenth Amendment as well as Michigan law, they are different from two States.

QUESTION: You are saying, then, that's a different case; right?

MR. FLANNERY: I would think it is a different case, Mr. Justice Blackmun.

I would think, however, if States had, between themselves, made arrangements which resulted in the segregation of school children, I would think that the federal courts would sit as a forum to vindicate those rights; but I have not thought through the jurisdictional questions, Your Honor.

QUESTION: Well, that's a little different answer than the one I had before, and it's -- I would think this would flow from your argument here, it's a big "if" of course, that if it could be shown that, then what you have said and what you have argued would seemingly apply on the interstate aspect.

MR. FLANNERY: Given an appropriate forum, in the resolution of the jurisdictional questions, it would have to

to vindicate the rights involved.

QUESTION: Perhaps the District of Columbia might have been a better example than Greater Kansas City, because the area is so much smaller.

QUESTION: Mr. Flannery, I understood you to say rights ceded to the States, wouldn't it be perhaps more accurate to say the rights reserved --

QUESTION: Retained.

MR. FLANNERY: Conferred upon; retained.

QUESTION: -- reserved by the States --

MR. FLANNERY: Retained, Mr. Chief Justice --

QUESTION: -- retained by the States, would make this clearer?

MR. FLANNERY: Well, I think, --

QUESTION: The particular rights we're talking about.

MR. FLANNERY: I -- certainly with respect to matters of constitutional philosophy, I defer to the Court. In my view, all of the rights emanated from the people, some conferred upon the States, some conferred upon the federal government. So I don't view the States as setting up the central government and retaining some powers.

But I did not mean to imply that it was a matter of noblesse oblige. Those are State jurisdictions, different from that of local school districts, to be sure.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jones.

ORAL ARGUMENT OF NATHANIEL R. JONES, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to emphasize during this portion of my argument two basic themes which guided the District Court and the Court of Appeals as they attempted to grapple with the flinty and tractable realities involved in vindicating the constitutional rights of the children found to have been violated in the core schools of Detroit.

No. 1, the District Court exercised extreme caution and judicial restraint, in our view, and exerted painstaking efforts in the examination of the proofs that were offered.

I might note that some portion of this case has been reviewed by the Court of Appeals of the Sixth Circuit on four different occasions. One of these occasions, the panel of three affirmed the District Court; and, following the decision by the Circuit to review en banc, the full court reviewed the findings and the deliberations that occurred before Judge Roth.

And as Judge Roth endeavored to probe his way through the proof and the obligations which flowed from the mandates of this Court, it's fair to say that he was guided each step

of the way by what this Court has suggested and has directed in the series of cases which are controlling.

My brother counsel, Mr. Flannery, outlined the nature of the violations that occurred inside of the school area of Detroit, brought about by the actions of the State of Michigan and its sub-unit, the Detroit School District, which led to the containment of 133,000 black children in 133 core schools surrounded by a ring of white schools.

Now, in the face of these findings, the District Court, pursuant to the mandate from this Court, had an obligation to direct the educational authorities in the first instance to come forward with a plan to disestablish, to convert this system -- which, I might add, the court found to have been a State educational system -- into a unitary system.

A plan that promised to realistically work now and hereafter. A plan that would eliminate the vestiges of State-imposed segregation, that would eliminate the core of State-imposed black schools.

This took the District Court to the question of desegregation planning. And we understood, and the court understood, that planning for desegregation requires the exercise of the equitable powers of the court; and, in so doing, the court must be guided by the practicalities of the local situation, as this Court has directed.

And so the District Court commenced hearings on a Detroit-only remedy, and invited the Detroit School District to submit a plan or plans. Not only did the Detroit School District submit plans, but the plaintiffs offered a plan to the court.

Upon due consideration, the court rejected the plans offered by the Detroit School System, and there were two in number, and it also rejected the plan offered by the plaintiffs.

In so doing, the court concluded that the ratification or the acceptance of any of the plans offered by the parties would have led to an increase in the black core, resulting in the perpetuation of a black school district surrounded by a ring of white schools.

And in view of the fact that this is a State educational system, and the school districts of the State comprise and constitute related components of that system, the court felt, in the exercise of its authority and obligation and duty, it had to proceed to a consideration of a metropolitan remedy.

So it initiated a preliminary inquiry as to the relevant area that should be involved. It initiated an exploration of the practicalities involved in a metropolitan solution to the problem.

Among the practicalities the court considered was

the relevant area, boundaries, law and practice, and weighing those against constitutional rights that it had an obligation to vindicate.

With respect to the relevant area, the court took note of the fact that the tri-county area would be a proper benchmark. The tri-county area consists of Wayne, Oakland and Macomb Counties.

These three counties constitute the standard metropolitan statistical area. There is a community of interest which weaves and binds these three counties together. They are bound together by economic interests, recreation interests, social concerns and interests, governmental interests of various sorts, and a transportation network.

An example, for instance, of the inextricable relationship that exists between these three counties was provided by Mr. Marks in his testimony to Judge Roth. And he stated that one-third of all the persons who reside in Oakland County who work work in Wayne County.

Nearly one-half of all the persons in Macomb County who are employed are employed in Wayne County.

The court further noted that 20,000 black persons who live in Detroit go to Warren, Michigan, in the suburbs, to work every day.

And that housing opportunities are denied them, and

for that reason it's necessary for them to commute.

With respect to the law and practice practicalities that the court considered, the people of Michigan made a choice as to the arrangement of the control and power of their educational system. And this decision can be traced back to the time of the Northwest Ordinance, and flows through to the present time, through a series of constitutional provisions. And these constitutional provisions have been interpreted by the Michigan State Supreme Court to stand for the proposition that education in the State of Michigan is a State responsibility.

This proposition has been affirmed by the Sixth Circuit Court of Appeals on two occasions. There has been reference made this morning to the fact, I believe in response to a question by Mr. Justice Powell, as to the bonding authority in the State. And the proof offered to the District Court and affirmed by the Court of Appeals is that the authority for issuing bonds is reposed in a municipal finance commission, consisting of Mr. Kelley, the Attorney General, the State Superintendent of Education, and one other State official whom I believe may be the State Treasurer.

Every school district in the State of Michigan, every one of these 43 intervening school districts, who wish to issue bonds, must go through this State Commission.

And this State Commission determines the amount of

money thereby that will reach the sub-units of State education.

QUESTION: Are the bonds State bonds or local bonds?

MR. JONES: These are State approved -- they may be local bonds, but they must be approved by the --

QUESTION: But the obligation is the district's, isn't it? The obligation is not the State's.

MR. JONES: Well, by approving, the State -- the State assumes a certain amount of responsibility for the -- for placing it --

QUESTION: Well, suppose there's a default, may the State be held to pay the bond?

MR. JONES: I am not sure of the answer to that question, Mr. Justice Brennan.

QUESTION: What's the nature, Mr. Jones, of the municipal finance commission's authority to review a submission by a local board that, say, wants to ask for approval of a bond issue?

MR. JONES: It could deny it, and the bond would not be issued.

QUESTION: Just in its discretion?

MR. JONES: In its discretion.

With respect to the general authority of the State education department over education in the State, it

may be summarized as follows:

It has the authority to remove a school board of a local district, without any consent of the local patrons.

It has the power to act, it has the power to compel, it has the power to consolidate, it has the power to merge, to withhold funds; and, in fact, in 1970 it did withhold funds from the Grand Rapids School District.

And it has the power to transfer property from one school district to another.

This is power and authority which is retained and exercised absolutely by the State educational authorities, without any consent of the local officials.

QUESTION: Mr. Jones, how are funds raised for the operation year-to-year of the school districts?

MR. JONES: It's raised through the -- through millage, and there is a formula by which the -- under which the State contributes a portion of the funds to the various school districts.

QUESTION: I think the record shows the State contributes 34 percent; but does the school board itself assess the millage rate, and determine its own budget?

MR. JONES: There is a State Equalization Commission, Mr. Justice Powell, which provides a formula which determines the amount of funds which a State may -- which a local school district may raise.

QUESTION: Are you saying the State decides the budget for each one of these school districts?

MR. JONES: No, sir, I'm not saying that; I'm saying there is an equalization formula which is State controlled.

QUESTION: An equalization formula relates to the State's contribution, if it operates like the States with which I'm familiar. But do -- who levies the taxes on the real estate in these school districts?

MR. JONES: The local districts do that, Mr. Justice Powell.

QUESTION: The local districts do that?

MR. JONES: That is correct.

QUESTION: And they set their own budgets.

MR. JONES: That is correct.

But, irrespective of that, the State -- this power is delegated to the State, in so far as it conforms to the broad outlines of State policy and State responsibility.

QUESTION: The State equalization formula which you describe, Mr. Jones, is that, if you know, is that substantially the kind of equalization that appeared in the Rodriguez case, under the Texas statutes, where the poorer districts would receive more than the more affluent districts? Is that the kind of a function Michigan has?

MR. JONES: I think that's -- I think that may be

generally speaking, Mr. Chief Justice, the same type of function. And the reason for advancing it here is to show that the District Court, as it grappled with these flinty and tractable realities of how you go about determining a way to desegregate the schools, measuring whether the obligations of the Fourteenth Amendment which are placed upon the court to desegregate may be hemmed in by the school boundaries to the extent of their autonomy, or whether in fact there is a State education system.

These were the factors the court took into consideration in reaching its determination that this is a State system, with certain delegated authority.

QUESTION: What happens, Mr. Jones, if this plan goes forward, will each of these outlined municipalities incur a greater expense than they now do, than they now budget, to run their school system?

MR. JONES: Well, there's no answer to that, Mr. Justice Brennan, for the reason that there is no plan before the Court. The -- all that is before the Court now is the narrow question of whether or not these boundaries, these geographical boundaries, are impermeable.

QUESTION: Yes.

MR. JONES: Or whether they may be crossed. There is no plan, there is no plan of government, finance; these are the matters that are poised for determination by the court

below based upon the remand of the Sixth Circuit.

QUESTION: Well, do you suppose when that issue is addressed there will be some of these school districts will have larger school populations than they now have?

MR. JONES: Frankly, I would have no way of knowing. I think this is something that would have to be hammered out through the adversary proceedings that would take place before the appropriate District Court.

QUESTION: Well, suppose they did?

Would that worry you particularly? Suppose they did have higher -- a great deal more expense than they had before, in order to implement this plan?

MR. JONES: Well, Mr. Justice White, I think this would be one of the practicalities, and I would trust that the District Court would take all these matters into consideration. I would -- my basic objective would be to see that a constitutionally supportable plan of desegregation were accomplished, consistent with the practicalities.

QUESTION: Do you think the people in the outlying districts could fairly be taxed to pay the extra expenses of an effective remedy for the desegregation of the Detroit district?

MR. JONES: Well, Mr. Justice White, they are part of the State of Michigan, and they're --

QUESTION: Well, your answer is yes, you do.

MR. JONES: Yes, I think that under their obligations of citizenship and as citizens of the State of Michigan, this would be one of the other obligations that they would have to meet.

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

Mr. Saxton, you have, I believe, nine minutes left.

REBUTTAL ARGUMENT OF WILLIAM M. SAXTON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAXTON: Thank you, Mr. Chief Justice.

I understand we have nine minutes.

I would like to raise one matter. We understood that counsel for the respondents had distributed some maps, some overlays for the Court, and we were advised just before the argument they were being withdrawn.

If they are not being withdrawn, we do have serious objection to them on the grounds of accuracy and completeness; if they are being withdrawn, I won't go into --

QUESTION: Well, I have them here; are these they?

MR. SAXTON: Well, counsel for respondents advised us they were being withdrawn, and I did note they -- although having been told they were being withdrawn, they are still in front of the Court.

QUESTION: Can't read them, anyway.

MR. SAXTON: I had the same problem, Mr. Justice.

QUESTION: And there's been no reference to them at

all during oral argument.

MR. SAXTON: All right.

I would like to first of all address myself to some of Mr. Jones's remarks. Not being from the State of Michigan, it's understandable that he would not correctly understand Michigan law relating to school districts.

First of all, the bonding authority for local school districts is not in the Municipal Finance Commission. The Municipal Finance Commission is a commission of State officers that's created to see that school districts follow statutory requirements when they seek to borrow money. If they meet those statutory requirements, the bonding must be approved. If they don't, the Commission can refuse them.

Under Michigan law, in fact, the Commission can be required to approve it by mandamus, if all the statutory conditions are met.

The State Equalization Board has absolutely nothing to do with the levy of millage in local school districts. The amount of millage to be raised is determined, first of all, by the School Board itself, really generally on the basis of what the market will bear. It is then submitted to a vote of the people.

The State Equalization Board is a board that's set up by the State to make sure that an assessing of real property in the State, that the same basic format is used so

that in different taxing areas you won't have different bases for taxing property.

This statement of Mr. --

QUESTION: This passing on the bonds --

MR. SAXTON: I beg your pardon, Mr. Justice Marshall?

QUESTION: The bonds in the several school districts.

MR. SAXTON: Yes, sir?

QUESTION: Are they governed -- I mean State endorsed or not?

MR. SAXTON: They are guaranteed by the State. They are the initial obligation of the School District. They are --

QUESTION: Yes. But they do --

MR. SAXTON: -- guaranteed, however, by the State. That's correct.

With respect to one other remark by Mr. Jones, the State --

QUESTION: I suppose there are State laws, limitations both on the millage and the amount of bonded indebtedness --

MR. SAXTON: Yes. They may borrow without a vote, they may -- the School District may, in fact, borrow without a vote of its local electorate, --

QUESTION: Up to a certain ceiling?

MR. SAXTON: -- up to the point of five percent of its tax base within the School District.

QUESTION: Right. Beyond that it --

MR. SAXTON: Beyond that they must go and get local voter approval.

QUESTION: And I suppose there are similar limitations upon the amount of bonded indebtedness; are there?

MR. SAXTON: That is correct, sir.

One other point Mr. Jones alluded to, that the State had the power to remove school board officials without cause, is simply not so. The statute is cited in our reply brief. School Board members may be removed only for misfeasance or malfeasance in office, and then only after due notice, a public hearing, and a finding of failure to comply with statutory responsibility.

QUESTION: And who has the power of removal, for cause?

MR. SAXTON: The State Board may remove them after due notice, a hearing, and a finding.

QUESTION: The State Board of Education?

MR. SAXTON: And that, of course, may be appealed to the court system in the State.

QUESTION: The State Board of Education?

MR. SAXTON: That's correct, Mr. Justice.

QUESTION: How are School Board members -- how do they become School Board members, by election?

MR. SAXTON: By popular election within their School District.

QUESTION: Unh-hunh. They're nonpaying jobs? Or paying jobs?

MR. SAXTON: Well, sometimes it's nonpaying, and the highest one I've ever known of is $75 a year. It's not very well-paying, Mr. Justice Stewart.

QUESTION: Unh-hunh.

QUESTION: Does the governing board of the county have anything to say about using School Board members?

MR. SAXTON: No. No, that's purely a local matter, it's decided by local election.

I would like to address myself to a few remarks made by Mr. Flannery.

As I listened to Mr. Flannery, I thought of an old lady trying to knit a sweater without any thread; it just wouldn't stretch that far.

There is no violation in this case that extends beyond the City of Detroit.

Mr. Flannery's statement, and I use his words, that what we're involved with here in terms of a metropolitan remedy is practicable desegregation -- that's his term.

I don't find that term in any of the decisions of this Court. The term I always find is, based on Swann, is that if there is a constitutional violation, the nature of that violation will determine the scope of the remedy.

Not a question of practicable desegregation, but when

unconstitutional activity has resulted in segregation, there must be visible desegregation within the scope of the violation.

There has been no violation outside the City of Detroit here. Mr. Flannery made reference to residential segregation. I would call to the Court's attention that on page 159a of the Appendix filed with the Petition for Certiorari, the Sixth Circuit Court of Appeals went out of its way to say that no part of their findings were based upon residential segregation.

What it all comes down to is there is simply no violation upon which a metropolitan remedy can be supported.

Unless this Court is now prepared to say that it's not the nature of the violation that determines the scope of the remedy but the violator; if the violator determines the scope of the remedy, then all remedies will always be co-extensive with the borders of any State. Because, in the last analysis, education is a State function, in every one of the Fifty States of the Union.

If, however, this Court is going to adhere to previous principles which it has announced, namely, that the violation will determine the scope of the remedy, this remedy must stop at the boundary lines of the Detroit School District.

Plaintiffs' expert witness, Dr. Foster, testified in

this case that desegregation, both in the practical, constitutional and educational sense, does not require a remedy extending beyond Detroit.

There is only one premise where a remedy extends beyond Detroit, and that's racial balance; there is no other premise upon which to predicate it.

Now, with respect to the Solicitor General's comments, we would concur in his argument that there is absolutely no predicate for a multidistrict remedy in this case. We would disagree with his suggestion that this case should be remanded.

This is not like Keyes, where the lower court applied the wrong standard in arriving at a violation. There is nothing to be remanded here. The suggestion of remand is that the case should be sent back so a new lawsuit could be started under the aegis of this one.

This case, we submit, should be reversed, in so far as the finding is that desegregation cannot be accomplished within Detroit, and in so far as there is a finding that a multidistrict remedy is proper without a constitutional violation.

If the plaintiffs then desire to bring a lawsuit of another character, that's certainly within their power. But we do not think it's within the province of the appellate court to properly exercise its discretion to remand the case

to permit plaintiffs to bring a new and different lawsuit founded on new and different grounds.

We submit that this case should be reversed, in so far as a metropolitan remedy is concerned, and the petitioner school districts should be dismissed.

QUESTION: What's the -- under what federal law do they, did the plaintiffs proceed?

MR. SAXTON: The plaintiffs brought this lawsuit under the Thirteenth Amendment, the Fourteenth Amendment and, I think, the Civil Rights Act of 1866.

QUESTION: This is a 1983 suit?

MR. SAXTON: I think it's 1981, 1983, the Thirteenth and Fourth Amendments.

QUESTION: Unh-hunh. But jurisdictionwise, I suppose it's 1343?

MR. SAXTON: That's correct, as I understand it.

QUESTION: And is the -- are the school districts persons for the purposes of that?

MR. SAXTON: I'd like to answer that. My answer to that is yes, that the Michigan Supreme Court, as noted in our reply brief, has said that school districts in Michigan are municipal corporations. I think it would be anomalous for this Court to say that they are not persons within the meaning of the Fifth Amendment, in view of two recent decisions of the Court.

QUESTION: Well, how about for 1983 purposes? A city is --

MR. SAXTON: For 1983 purposes, I think they would not be persons.

QUESTION: Well, if they're proceeding under 1983, to the extent this case depends on 1983, the --

MR. SAXTON: I think the case must fail, because I think neither the State nor its political subdivisions are persons within 1983.

QUESTION: Well, as -- does that have any practical impact on this, also?

MR. SAXTON: I don't think it does, Mr. Justice White.

QUESTION: Why not? What about --

MR. SAXTON: Because I don't --

QUESTION: -- what about the Detroit School District, for instance? Is it a defendant?

MR. SAXTON: Yes, it is a defendant.

QUESTION: And does the Court's jurisdiction over it rest on 1983?

MR. SAXTON: I don't think it has jurisdiction under 1983, because it is not a person within that statute.

May I -- could I finish answering --

QUESTION: I wish you would. I just don't understand why something -- there must be some explanation why a

remedy can run against a defendant that the Court has no jurisdiction over.

MR. SAXTON: Well, I think, Mr. Justice White, that the basic predicate for this lawsuit is violation of the Fourteenth Amendment, equal protection clause; and that's what the finding of the District Court is predicated on.

QUESTION: But still -- you still get into court on 1343, which depends on 1983.

MR. SAXTON: Well, I think part of their jurisdiction, though, is founded on violation of the Fourteenth Amendment, and that's what the court predicated its findings on.

QUESTION: Well, that may be, but I'm not sure that has a great deal to do with jurisdiction.

MR. SAXTON: Right. May I finish answering the question I started, Your Honor?

QUESTION: Certainly.

MR. SAXTON: Of Mr. Chief Justice.

I think it would be anomalous to hold that school districts are not persons within the Fifth Amendment, in view of the recent decision written by Mr. Justice Marshall in Moore vs. Alameda County in California, where this Court held that a county which had the right to sue and be sued and to hold property was a person for purposes of diversity of citizenship jurisdiction.

Now, certainly, it would be anomalous to say to a political public corporation that for purposes of diversity jurisdiction you're a person, so that you may sue and be sued in the federal court; but once you get there under the Fifth Amendment you have no right to a hear, no right to cross-examine witnesses; in fact, no due process rights at all.

And I submit that would be a very anomalous result, to lead a corporation to the federal courts, only to tell them that they have no rights after they get there.

QUESTION: Well, I thought Moore was a holding that a county didn't partake of the same immunity as the State did un the Eleventh Amendment.

MR. SAXTON: I think that's one of the holdings. But I also -- also in the Illinois vs. City of Milwaukee case, which was decided in 1972, I think this Court very clearly declared that a municipal corporation is a person for purposes of diversity of citizenship.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:38 o'clock, p.m., the case in the above-entitled matter was submitted.]