

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MISSOURI, ET AL., Petitioners v. KALIMA JENKINS,
ET AL.

CASE NO: No. 93-1823

PLACE: Washington, D.C.

DATE: Monday, January 11, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, ET AL., :
Petitioners :
v. : No. 93-1823
KALIMA JENKINS, ET AL. :
- - - - -X

Washington, D.C.
Wednesday, January 11, 1995

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

JOHN R. MUNICH, ESQ., Assistant Attorney General of
Missouri, Jefferson City, Missouri; on behalf of the
Petitioners.

THEODORE M. SHAW, ESQ., New York, New York; on behalf of
the Respondents.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the United
States, as amicus curiae, supporting the Respondents.

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1 PROCEEDINGS

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1823, Missouri v. Jenkins.

5 Mr. Munich.

6 ORAL ARGUMENT OF JOHN R. MUNICH

7 ON BEHALF OF THE PETITIONERS

8 MR. MUNICH: Mr. Chief Justice and may it please
9 the Court:

10 This 17-year-old desegregation case involves a
11 remedy of unprecedented breadth and unparalleled expense.
12 One of the remedy's central aims is to lure nonminority
13 children from the suburbs to the district for the express
14 purpose of altering the racial balance within the Kansas
15 City School District.

16 In pursuit of this so-called desegregative
17 attractiveness goal and the companion objective of
18 suburban comparability, one of the orders at issue here
19 today requires the State of Missouri to prove that a
20 quality education component of the remedy has produced
21 improved student achievement.

22 In the other orders at issue today, the lower
23 courts have also ruled that the State must fund salary
24 increases for noninstructional personnel of the KCMUSD,
25 again premised on the same goals of suburban comparability

1 and desegregative attractiveness.

2 These rulings, and the underlying goals that
3 motivate them, far exceed the scope of the violation found
4 in this case. They must be corrected to ensure that the
5 case may proceed to unitary status in a proper and orderly
6 fashion.

7 We start off with the proposition that the core
8 mandate in one of these cases is to eliminate the racially
9 identifiable schools from the district. That has been the
10 focus since Green, and carried through in Dowell and
11 Freeman.

12 That test looks to whether the resources and the
13 students in the district have been allocated in a race-
14 neutral fashion to the extent possible, to the extent
15 practicable. In other words, has everything practically
16 been done to ensure that students are assigned to schools
17 on an equitable basis, and that resources are assigned to
18 schools --

19 QUESTION: Mr. Munich, there was an order
20 entered by the district court, I take it, requiring
21 improved student achievement?

22 MR. MUNICH: That's correct, Your Honor.

23 QUESTION: And I take it from the questions
24 presented in the petition for certiorari in this case that
25 we are not asked to review the propriety of that order?

1 MR. MUNICH: What we are asking the Court to do,
2 Justice O'Connor --

3 QUESTION: Isn't that right? I mean, that -- we
4 are not asked to review whether that order was proper or
5 not?

6 MR. MUNICH: At the outset, that's correct,
7 Justice O'Connor. What we are asking the Court to do,
8 though, is to examine today, in light of the State's --
9 the posture of this case for unitary status, whether the
10 goals that the lower courts have held the State to are
11 proper today, and those goals are what we view as the
12 interdistrict goals of suburban comparability and --

13 QUESTION: You know, I thought we were here to
14 review whether the State, as opposed to the school
15 district, should have partial unitary status. I mean, I
16 thought that was really the question before us, and
17 whether the courts below examined the proper factors and
18 made the proper determination on that issue. Is that
19 right?

20 MR. MUNICH: That's correct, Justice O'Connor,
21 and we --

22 QUESTION: Because much in your brief seemed to
23 go quite beyond that and reach back to the validity of the
24 order that was initially entered.

25 MR. MUNICH: I think the posture of this case,

1 Justice O'Connor, is very similar to what the Court
2 confronted in Spangler. There, there had been initial
3 orders and goals set for minority to majority transfers
4 and racial balances and all of that. The Court said
5 that -- and when it took the case, it would not review the
6 validity of those goals back then, but it would look to
7 the validity of those goals in 1974, when the district had
8 asked to be relieved of the order.

9 We are asking for the same thing here. We are
10 not saying that everything that has already happened needs
11 to be undone, but what we are saying is that the goals
12 that are still extant in these orders, these interdistrict
13 goals, go beyond the scope of the violation here, and when
14 we are being held, when the State of Missouri is being
15 held to those goals, that the Court must look at those in
16 the context of the question of whether partial unitary
17 status should be ordered and what the standards are, more
18 importantly.

19 QUESTION: Do you take the position that the
20 measurement of student achievement is irrelevant in
21 determining whether the goals have been met?

22 MR. MUNICH: We do, Your Honor. For the purpose
23 of unitary status there's no question about that. We
24 believe that if one --

25 QUESTION: There is no question that it is

1 irrelevant?

2 MR. MUNICH: We don't think it is relevant, Your
3 Honor, for these reasons. First off, the traditional
4 Green factors that the Court has historically looked at
5 deals with facilities --

6 QUESTION: Well, the Green -- you -- I take it
7 you would accept the proposition that the Green factors
8 are not exclusive?

9 MR. MUNICH: Your Honor, we think that they may
10 not be completely exclusive. However, we think that
11 they --

12 QUESTION: Well, that means they're not
13 exclusive.

14 MR. MUNICH: That's correct, Your Honor --

15 QUESTION: Okay.

16 MR. MUNICH: -- but we do think they focus on
17 allocation of resources and not what you get after you do
18 that, and we think the reason --

19 QUESTION: That's right. They may, indeed, so
20 focus, but if it is appropriate to look at some point to
21 educational offerings as being a goal, ultimate or
22 intermediate, then why is it irrelevant to look to the
23 measurement of whether those educational offerings are
24 having any effect or not?

25 MR. MUNICH: We think for this reason, Justice

1 Souter. Educational quality, of course, was one of the
2 things the district court looked at in Freeman, and it
3 looked at whether resources had been allocated, textbooks,
4 faculty assignments, were teachers biased, the good
5 teachers, the better quality teachers biased in favor of
6 the white schools or the black schools, and those are the
7 types of things that we believe can be looked at.

8 But when we're talking about how the student
9 does, on the other hand, we think that's quite a different
10 story, and for this reason. On the one hand, when we talk
11 about a school district that makes assignments, that is
12 asked to basically allocate resources to eliminate racial
13 identifiability in the schools, it can do that by
14 executing a change in policy. If it says, the boundary
15 line shall be henceforth moved, it happens. If it says
16 that the athletic league shall henceforth be unified, it
17 happens.

18 On the other hand, when we are talking about how
19 a student does, those inputs that the school board
20 introduces are filtered through individual students and
21 their individual talents, volitions --

22 QUESTION: Even if it happened, then, even if
23 there were a remarkable increase in achievement level,
24 that, too, would be irrelevant, that it doesn't matter,
25 even if you could show a remarkable improvement, that

1 would not qualify you in any way to be released?

2 MR. MUNICH: We think that's right, Justice
3 Ginsburg. We're not trying to have both sides of the pie,
4 here. If resources are not allocated equally, if there is
5 racial identifiability in the schools because of the way
6 resources are allocated, we're not -- the State should not
7 be let off the hook because scores have gone up for some
8 reason.

9 QUESTION: I'm glad that you've clarified that,
10 that it's irrelevant either way, and I would also be
11 helped if you could point to the precise part of the
12 district court's order that you're challenging, because
13 there seems to be some confusion.

14 Two of the members of the dedicated panel on the
15 Eighth Circuit thought that there was no order that
16 increased test scores were required. I'm sure you're
17 familiar with the part of the clarification that two of
18 the judges gave on rehearing. It was that test scores
19 must be only one factor in the equation.

20 So where -- and those two judges also said
21 nothing in the district court's opinion said otherwise, so
22 where do you find this order that there must be an
23 improvement in the scores?

24 MR. MUNICH: One of the problems here, of
25 course, Justice Ginsburg, is the fact that the district

1 court did not directly address the State's partial unitary
2 status in the order that it issued on June 17, 1992.

3 What the court of appeals did when it examined
4 the State's claims on appeal was, it looked not only at
5 that order, but it also looked at several other orders to
6 try to ascertain from those whether the district court had
7 properly analyzed the State's Freeman arguments, the
8 unitary -- partial unitary status argument.

9 It looked, for example -- this is in the
10 petition appendix at page 131, where the district court
11 relied on national norms in another order. That's the
12 April 16th, '93 order.

13 QUESTION: But why shouldn't we take it as the
14 law of the case that nothing in the district court's
15 opinion so required, that what was said with regard to
16 test scores is that there is a factor in the equation?

17 MR. MUNICH: Well, Your Honor, we would -- it's
18 certainly unclear, as you point out, whether it is a --
19 whether the panel meant it is a factor or a controlling
20 factor, but we think that the State's view is that either
21 way it should not be considered on the question of whether
22 unitary status is at hand, that the whole point of looking
23 at whether unitary status is at hand is a question of
24 whether, again, the resources within the district have
25 been allocated properly. The Eighth Circuit standard,

1 even if we read it narrowly as simply a relevant factor,
2 we think does an injustice to that standard.

3 QUESTION: You say it is not a relevant factor,
4 and that if all other factors have been satisfied but this
5 one hasn't, and therefore that's the sole basis why you're
6 denied the unitary status, that's wrong?

7 MR. MUNICH: We think that's wrong, Justice
8 Scalia.

9 QUESTION: Aren't you retreating from your
10 answer to me a moment ago? You agreed that the Green
11 factors were not exclusive. You seem to be coming back to
12 the position that nothing but allocation of resources,
13 which I take to be a Green factor enumeration, is
14 relevant. You conceded a moment ago that there is more
15 that may be relevant than that.

16 MR. MUNICH: Justice Souter, let me make sure
17 that I'm -- that my answer on that is clear. There may be
18 things other than faculty assignments, extracurricular
19 activities, facilities, which are among the traditional
20 Green factors. Those things may include, we think,
21 allocation of textbooks, allocation of computers, per
22 capita spending -- in Freeman, of course, there was some
23 question whether per capita spending among students had
24 been equalized.

25 We think that those things can properly be

1 considered. In our view, they are probably subsumed
2 within the six Green factors as they exist, but we would
3 say -- we would concede that allocation issues, when we're
4 talking about resources, are things that Green looks to,
5 but that --

6 QUESTION: Do we somehow blind ourselves to the
7 forest for the trees, here, because the forest is the
8 elimination of the vestiges of the prior de jure
9 discrimination, and it seems to me that the argument
10 you're making is that we ignore the forest for the trees,
11 and by and large the trees are the Green trees?

12 MR. MUNICH: I don't think that would be the
13 result, Justice Souter.

14 QUESTION: Where, then, in your analysis, is
15 there room to consider the -- sort of the ultimate
16 question of the elimination of vestiges?

17 MR. MUNICH: We think that the elimination of
18 vestiges, to the extent practical, comes about by the
19 allocation, by -- first by the allocation of equal
20 resources, and --

21 QUESTION: Well, isn't one of the original evils
22 of a segregated system substandard academic performance?

23 MR. MUNICH: If that has been found in a proper
24 case, Justice Kennedy, that is correct, and that gets us
25 to what --

1 QUESTION: And you would not challenge that
2 finding in this case, as I understand it.

3 MR. MUNICH: We're not saying that that's a
4 clearly erroneous finding. We are challenging the legal
5 sufficiency of it, Justice Souter.

6 But to get back to your question, Justice
7 Kennedy, we think that -- our view is that one of the
8 inherent flaws that has guided the lower courts below is a
9 commingling of the analysis, of the analyses as to
10 whether, 1) whether unitary status is at hand, measured by
11 the Green factors, and as I say, we look -- we believe
12 that fairly looks to whether resources have been allocated
13 equally.

14 The point that Your Honor makes I think is the
15 second point, which is namely, are there some sort of
16 educational deficits that the de jure system have visited
17 upon minority students? The problem, we think, is that --
18 and that, of course, is Milliken II.

19 The problem, we think, is that the courts below
20 have not -- have failed to distinguish between those two
21 components of the remedy, and that is why -- of the
22 analysis, and that is why we have rather skewed tests as
23 to when the remedy should end, rather skewed goals here as
24 to what must be attained, and what we view, in essence, as
25 an open-ended remedy.

1 QUESTION: I assume that if you have
2 nondiscriminatory input, teachers and textbooks and so
3 forth, for a certain period of time, for long enough, that
4 every student who is currently in the school system has
5 not been subjected to lower input. Then it could not be
6 possible that any of the lower achievement is a vestige of
7 discrimination, isn't that right?

8 MR. MUNICH: That's correct, Justice Scalia.

9 QUESTION: And for how long has that compliance
10 with the equal input requirement existed in this school
11 system?

12 MR. MUNICH: In this case the initial
13 Milliken II, the compen -- what the parties refer to here
14 as the Milliken II components were implemented in the
15 beginning of 1985, '86.

16 QUESTION: '85, '86?

17 MR. MUNICH: That's right, Justice Scalia.

18 QUESTION: So at least at the grammar school
19 level, through eighth grade, there's nobody in that system
20 that hasn't had equal input?

21 MR. MUNICH: That's correct, Justice Scalia.
22 The other thing I should point out is that before the
23 remedy was entered in this case, the Kansas City District,
24 beginning in 1977, implemented its own voluntary student
25 reassignment policy. It was a massive effort. It

1 transferred -- involved the transfer of some 16,000 of the
2 school district's 41,000 students.

3 It used noncontiguous zoning, clustering,
4 pairing, a lot of the same types of things that were --
5 procedures and remedies that were used throughout the
6 South to desegregate heavily segregated school districts.
7 That has been going on since 1977 in this district.

8 QUESTION: Mr. Munich, then you're saying that
9 the Government was inaccurate in telling us, as they did
10 in their brief, that in 1985 you joined -- the State
11 joined in urging the district court to order programs that
12 would increase student level achievements at both the
13 elementary and secondary level, so apparently in 1985 you
14 thought that there was not the required upgrading of the
15 system.

16 MR. MUNICH: After liability was ordered --
17 found here, Justice Ginsburg, the court ordered the
18 parties to come forward with plans, and the court made it
19 very clear that what it wanted was plans that would be
20 addressed to student achievement. The State, of course,
21 came forward with such plans.

22 I should add, though, that the point here is
23 that on two occasions at least the State challenged
24 whether those compensatory plans, or those remedial plans,
25 could be applied in a system-wide fashion such as we have

1 here, and that --

2 QUESTION: But there is no -- I'm trying to
3 determine the basis for your saying that everything was up
4 to snuff in 1985, because it seems the district court
5 didn't think so, and from what the Government represents
6 about the State's position, even the State didn't think
7 that in 1985 you were in full compliance.

8 MR. MUNICH: Our position is not, Justice
9 Ginsburg, that we were -- that the district was fully
10 equalized as of 1985. That's when the programs, these
11 compensatory or remedial programs began.

12 The point that I may have been unclear on was
13 that prior to that, at least in the student assignment
14 arena, there had been massive changes going on.

15 QUESTION: I thought in '85 the district court
16 was not trying to equalize all of the schools in the
17 district, but was rather trying to have a level of input,
18 and of accomplishment, that made that district better than
19 all the surrounding districts.

20 MR. MUNICH: That is correct, Justice Scalia.

21 QUESTION: Wasn't that the purpose for the
22 additional upgrading that you agreed to, not necessarily
23 assume that all these schools within the district were
24 equal, but rather, to make this district better than the
25 ones around it so it would attract new students?

1 MR. MUNICH: That's correct, Justice Scalia, and
2 that's where we parted ways with the district court. We
3 had the view back then, and still take the view, that to
4 the extent there were identifiable victims of the de jure
5 system who had suffered educational deficits, that
6 Milliken II, of course, makes clear that something
7 extraordinary can be done for them.

8 But it needs to be targeted to those victims,
9 and one of our complaints with this remedy is that this --
10 these remedial components were not so targeted.

11 QUESTION: Yes, but your complaint is with the
12 remedy, but your -- we do not have the question before us
13 whether that goal, whether that underlying theory to which
14 the remedy relates, was legally erroneous or not. That's
15 over and done with. We denied cert on that in 1989, as I
16 understand it.

17 MR. MUNICH: I -- that is correct, Justice
18 Souter, it was denied.

19 QUESTION: So the only question we come back to
20 is, assuming that to be, as it were, the standard of the
21 case, is it legally irrelevant that the test scores are
22 up, down, or unchanged?

23 MR. MUNICH: Justice Souter, I would disagree
24 with you on the question of whether that question --
25 whether those goals are correctly before the Court or not.

1 We think that it --

2 QUESTION: What's the significance of the denial
3 of cert in '89 if they are?

4 MR. MUNICH: I think it has no significance,
5 Your Honor. I think that --

6 QUESTION: What's the significance of your not
7 repeating the questions you brought up then?

8 Your current position pinpoints two precise
9 questions, and it's strikingly different from your
10 petition the last time around, when you did present to the
11 Court, and the Court did not grant cert on, the broad
12 question.

13 Now, presented with the broad question, the
14 Court denied cert. This time, you chose not to repeat the
15 broad question, and then just to give us those two
16 specific questions.

17 I've heard of bringing in narrower questions
18 under a larger umbrella, but how do you present the
19 narrower questions and then reach up to the large question
20 that you didn't repeat?

21 MR. MUNICH: Justice Ginsburg, I think the
22 difference is exactly the type of situation that occurred
23 in Spangler, where we are not saying today -- back in '88,
24 when we did raise the issue of the scope, that was as an
25 initial matter of whether these remedies should go forward

1 as of this day, and the Court denied cert on that issue,
2 but we do not think today in 1995 that the Court can
3 properly examine the question of unitary status in this
4 case without looking at those unitary goals.

5 Indeed, the Eighth Circuit, when it analyzed our
6 appeal in this case, said that it had to look at those
7 goals to ensure whether we had been held to them properly
8 or not, and the Eighth Circuit did in fact go back, and
9 one of the things it did was look at whether the goals of
10 desegregative attractiveness and suburban comparability
11 had been met.

12 And, in fact, even the Jenkins respondents
13 argued in their brief at page 25 that the State had the
14 burden below of proving that the quality of education
15 programs had achieved their remedial goals, so we think,
16 in fact, that it would be examining this question, this
17 question of partial unitary status here and what the
18 standards are, with blinders, to look at that question
19 without examining the Eighth Circuit's underlying goals,
20 because --

21 QUESTION: Well, what specific decision of the
22 court of appeals do you want us to reverse here? I mean,
23 being very precise, looking at what the court of appeals
24 did, what is it you're asking?

25 MR. MUNICH: There are two decisions, Justice

1 O'Connor. One was in November and one was in December of
2 1993. The first dealt with this so-called Freeman issue,
3 the -- and the salary issue, the second dealt with the
4 salary issue, also.

5 We want the Court -- or, what we ask the Court
6 to do is to reverse both those orders on the grounds
7 that -- on the first, on the grounds --

8 QUESTION: Well, excuse me, because you state in
9 your reply brief that you do not seek a declaration of
10 partial unitary status, so please tell us, as simply as
11 you can, precisely what it is you are saying, you are
12 asking us to do with regard to the court of appeals
13 decision.

14 MR. MUNICH: First, to reverse the orders.
15 Second, to instruct the lower courts that the
16 interdistrict goals of suburban comparability and
17 desegregative attractiveness are beyond the scope of this
18 intradistrict case. Third, to instruct the lower courts
19 that the compensatory or remedial programs in this case
20 must be limited to those victims of segregation, and third
21 to -- and last to make sure that the -- to make clear to
22 the lower courts that the question of student outcomes, as
23 opposed to allocation of resources, has no part in this
24 case.

25 QUESTION: Why do we have to instruct the lower

1 courts to that effect? Isn't it enough simply to answer
2 the questions that you presented in your petition and to
3 say that no, student achievement levels cannot be the
4 basis for measuring compliance because -- because, without
5 ordering it to do anything, because you have no power to
6 require this district to be better than surrounding
7 districts? Can we not just give it as a reason for the
8 precise matters you ask us to address in issuing any order
9 on that subject?

10 MR. MUNICH: That may suffice, Justice Scalia,
11 but the thing that I need --

12 QUESTION: Unless you do that, it seems to me
13 you're going beyond the questions presented.

14 I thought your position was, in answering the
15 question presented, of course you can't decide whether
16 this particular matter is within the power of the court to
17 decree unless you know what the court is authorized to
18 achieve, and if it is not authorized to achieve
19 interdistrict comparability, or, indeed, interdistrict
20 superiority, then this particular factor is improper.

21 MR. MUNICH: That would probably do the trick,
22 Justice Scalia, but --

23 QUESTION: It's the most you'll get from me.

24 (Laughter.)

25 QUESTION: Let me ask you this: in Missouri,

1 have there been any challenges brought by districts that
2 are not within this district who claim, we're being denied
3 equal protection because the facilities and opportunities
4 afforded us by the State are so much less than afforded in
5 this district? Have you had to face those claims yet?

6 MR. MUNICH: We have not -- my office, Your
7 Honor, has not defended any such claims. I don't know
8 whether anything is brewing out there or not. Obviously,
9 there are complaints from school --

10 QUESTION: What is the difference between per-
11 student spending in this district versus per-student
12 spending in Missouri districts as a whole?

13 MR. MUNICH: On the general level the average
14 State-wide is somewhere between \$3,000 and \$4,000 per
15 student, Justice -- Chief Justice -- Mr. Chief Justice.

16 In the district, there is some question whether
17 you take out the capital costs or not, but it's somewhere
18 between, with the capital we would say about \$13,500 as of
19 1992, '93. If you take the capital out, somewhere about
20 \$9,000 or \$10,000.

21 QUESTION: As opposed to \$4,000 State-wide?

22 MR. MUNICH: That's correct, Mr. Chief Justice.

23 QUESTION: I have two questions, if I may ask
24 you very briefly. When in the district court did the
25 State first take the position that student achievement was

1 totally irrelevant to the issues before the court?

2 MR. MUNICH: I think, Justice Stevens, that it
3 certainly occurred at the court of appeals level.

4 QUESTION: No, no, I said in the district court.

5 MR. MUNICH: One of the -- the reason I answer
6 that way is that the district court did not tell us when
7 the State moved for partial unitary status that that was
8 the standard it would be holding the State to. In fact,
9 that standard --

10 QUESTION: Really? But as I understand it,
11 earlier in the proceedings you had agreed that they were,
12 or at least you had accepted the proposition that the
13 district court was going to rely in part on this factor.

14 MR. MUNICH: On the --

15 QUESTION: And I'm just wondering when you told
16 the district court for the first time that you felt it was
17 totally irrelevant.

18 MR. MUNICH: On the Milliken II side, Justice
19 Stevens, we did, when the court ordered us to, propose
20 compensatory programs that were remedial in nature, aimed
21 at helping students out with extraordinary educational
22 programs. At that time, though, and until -- as far as I
23 am aware, until this court of appeals decision that --
24 November '93 court of appeals decision --

25 QUESTION: But you never asked the district

1 court to rule squarely one way or the other as to whether
2 or not this was a factor that it was permissible for it to
3 consider?

4 MR. MUNICH: That's correct, Justice Stevens.
5 That --

6 QUESTION: You did not ever ask --

7 MR. MUNICH: Again, that first surfaced in the
8 court of appeals.

9 QUESTION: My second question is, throughout
10 your brief, you use the phrase, the dedicated panel. I
11 didn't quite understand whether you were challenging the
12 integrity of the panel or not.

13 MR. MUNICH: It didn't occur to me until --

14 QUESTION: What did you mean by that? What did
15 you mean by that?

16 MR. MUNICH: It didn't occur to me until after
17 we wrote that that that could be misconstrued.

18 QUESTION: It was misconstrued by me, and I
19 thought it was a most unfortunate phrase.

20 MR. MUNICH: The Eighth Circuit in the case is
21 referred to as a dedicated panel because the same three
22 judges sit on every appeal.

23 QUESTION: Is every panel that has the same
24 judges over and over again a dedicated panel?

25 MR. MUNICH: Yes. Yes.

1 Unless there are further questions, Mr. Chief
2 Justice --

3 QUESTION: I do actually have a -- I want to go
4 back to your initial statement. Are you saying, imagine a
5 school district was segregated for many years, and as a
6 result, those discriminated against could not read, and
7 then it was desegregated. Why isn't it at least relevant,
8 when you're asking whether the desegregation is working,
9 that you'd look at some point to see if they can read?

10 MR. MUNICH: For a couple of reasons, Justice
11 Breyer.

12 QUESTION: Are you honestly saying you can't
13 look to see if they can read now?

14 MR. MUNICH: We think that that is -- if the
15 question is whether the State has done what it can do, we
16 think that it's inherently impractical to ask more than
17 that the State put into place the programs that the
18 experts say are the appropriate ones to monitor them, to
19 make sure that they're funded properly, and to allow the
20 students to proceed through their academic careers in
21 those programs.

22 QUESTION: Well, I suppose it's always a matter
23 of argument as to how long you keep having to dedicate the
24 court's efforts to see that the school system is
25 functioning properly, and in trying to answer that

1 question, are we still okay? Do we have to do more? In
2 trying to answer that question, how long, can't you at
3 least look to see if they can read now?

4 MR. MUNICH: We don't think, Justice Breyer,
5 that that should be the analysis that the court
6 undertakes, for this reason.

7 It's just -- again, it's inherently impractical,
8 when -- the respondents' briefs and the United States'
9 briefs even concede that, for example, if outcomes are
10 flat, that may either mean that you've done all you can
11 do, or that you need to do more, and it simply strikes us
12 as being not as probative, in fact probably wholly or
13 almost wholly nonprobative as compared to the question of
14 whether you've applied the proper resources, monitored
15 them, funded them, and made sure that they're in place.

16 QUESTION: Let me ask you a related question.
17 One of the assumptions is, and I guess one of the findings
18 in this case is, that one of the effects of the prior de
19 jure segregation is an effect in sort of attitude and
20 expectation which affects the performance that kids in
21 school actually come up with, and the assumption, and
22 again I think the finding here is, that those attitudes
23 and expectations and attitudes get passed on. They go
24 from one school generation, or, indeed, one biological
25 generation to another, and it takes time to change them.

1 Do you deny that, a) that is a fact, and do you
2 deny that that is a relevant consideration in coming to
3 the conclusion of whether the vestiges of de jure
4 segregation have been eliminated?

5 MR. MUNICH: We don't think that that's a proper
6 consideration, Justice Souter, because we think that --

7 QUESTION: I take it you accept it as a fact,
8 then, and you're just saying it should not be a legally
9 relevant fact?

10 MR. MUNICH: It's possible, and the Court's
11 opinions have certainly held that there's discrimination
12 out there in society that -- that is unfortunate --

13 QUESTION: Well, we're not talking about
14 discrimination in society here, we're talking about, sort
15 of expectations about what can be achieved in school which
16 just get passed on from parents to children, and from one
17 group of kids to another group of kids.

18 And so it's not -- I think the point that I'm
19 making is not that present racial attitudes are sort of
20 undermining the scheme. I'm just saying that a certain
21 set of attitudes gets passed on, and I take it you say as
22 a factual matter, yes, it's true, they do.

23 MR. MUNICH: That may happen, and we think that
24 that --

25 QUESTION: But you are saying that it's legally

1 irrelevant and shouldn't be considered in assessing
2 compliance with a plan like this?

3 MR. MUNICH: We think that's right, Justice
4 Souter. It's just one of those things that --

5 QUESTION: Why should it be irrelevant if it's a
6 fact, and if the object is to eliminate the vestiges, why
7 should that be irrelevant?

8 MR. MUNICH: It's one of those things, we think,
9 Justice Souter, that is just beyond, as Swann pointed out,
10 the capacity of the schools to deal with.

11 QUESTION: Thank you, Mr. Munich.

12 Mr. Shaw, we'll hear from you.

13 ORAL ARGUMENT OF THEODORE M. SHAW

14 ON BEHALF OF THE RESPONDENTS

15 MR. SHAW: Mr. Chief Justice, and may it please
16 the Court:

17 The respondents contend that the principal issue
18 in this case is whether the State, without even attempting
19 to meet its burden of proof under this Court's decision in
20 Freeman v. Pitts, is entitled to an order of partial
21 unitary status ending the Milliken II remedial components
22 of the remedy ordered by the district court.

23 Under Freeman, of course, the State had the
24 burden of showing 1) that the vestiges of segregation have
25 been eliminated to the extent practicable, secondly that

1 retention of judicial control was not necessary to achieve
2 the compliance with the decree in other aspects of the
3 system, or the facets of the system, and thirdly, that
4 there has been full and complete compliance with the
5 remedial decree in good faith.

6 The State has not even attempted to meet its
7 burden of proof. At the hearing below --

8 QUESTION: Do you think those vestiges include
9 what Justice Souter was asking about, or the fact that
10 that attitudes in one generation get passed on to another
11 generation?

12 MR. SHAW: Justice Scalia, I think that they do.
13 I think that Brown v. Board of Education --

14 QUESTION: And that -- those were included in
15 the vestiges?

16 MR. SHAW: They may be included in the vestiges,
17 but I realize --

18 QUESTION: That the State has to prove that they
19 are no longer there?

20 MR. SHAW: No, I -- Justice Scalia, I think it
21 depends on the findings of the district court. If there's
22 a district court finding that there's a violation with
23 effects, that those effects can be remedied, then I think
24 there's a duty to remedy them. The State, of course, is
25 always free to come in and show that it is impossible to

1 remedy those effects of the violation.

2 QUESTION: That's the only defense? That's the
3 only defense? The State is obliged to prove that there is
4 no such vestige, or that if there is, there is nothing the
5 State can do about it, even for something as remote, as
6 unproximate as a generational attitude that's several
7 generations back?

8 MR. SHAW: My argument and my position is simply
9 that Swann controls. That is to say that the scope of the
10 remedy is determined by the nature and extent of the
11 violation, if there are findings, that they have to be
12 remedied, but that's beyond what's presented in this
13 Court.

14 QUESTION: I'd hate to have to try to prove
15 that, either that it no longer existed, or that there was
16 nothing that could be done about it. It seems to me quite
17 impossible.

18 MR. SHAW: In any event, Justice Scalia, I
19 believe that's beyond what's presented before this Court.
20 It's not necessary to reach that question, because that's
21 not what the district court relied upon. It's not what
22 the plaintiffs rely upon. It's not what the school
23 district relies upon in their arguments that the remedy
24 needs to be full and complete in its effectiveness.

25 QUESTION: So you don't argue here that the

1 lingering consequences of attitude on the part of the
2 people who were in segregated schools is a factor in this
3 particular case?

4 MR. SHAW: The findings here -- no. The
5 findings here are much more specific. The findings here
6 go to the effects of segregation with respect to the
7 school district's ability to provide quality education and
8 also the segregation that remained in the system.

9 There are findings, in fact, that talk about
10 other effects of segregation, but we believe that those
11 findings are not as crucial to the remedy here.

12 QUESTION: Mr. Shaw, who has the management
13 authority over the schools in this district? Is it the
14 State, or the school district, basically?

15 MR. SHAW: The school board certainly still has
16 the management responsibilities over the district.

17 QUESTION: Are there -- as a result, are there
18 any differences in -- for the district court to consider
19 in an application for partial unitary status made by the
20 State as opposed to the school district itself? In other
21 words, are there different things required of the State
22 and the school district that has the managing authority?

23 MR. SHAW: I think, Justice O'Connor, that
24 because the State has been found guilty of the
25 constitutional violation which precipitated the conditions

1 in the Kansas City School District, its responsibility is
2 to see that that -- that the effects of that violation are
3 remedied to the extent practicable.

4 Now, in answering that question, it may be that
5 because the State is not as close to the day-to-day
6 operations of the school district, that in the facts of
7 determining what is practicable, there may be a
8 difference.

9 QUESTION: Yes, I thought there --

10 MR. SHAW: But that's a factual matter.

11 QUESTION: -- actually might be, that the State
12 might be responsible more for the provision of facilities
13 but not for the day-to-day teaching and that sort of thing
14 that goes on, and I just wondered whether that has to be
15 taken into account.

16 MR. SHAW: I think, Justice O'Connor, that no
17 question with respect to what is practicable and what the
18 State can accomplish has been foreclosed by the district
19 court. Indeed, the problem is that the --

20 QUESTION: Well, except that if the lower courts
21 here think that the State has to be maintained under its
22 jurisdiction here until certain student test scores reach
23 a certain level, then there may be a problem.

24 MR. SHAW: Well, perhaps it's time for me to
25 speak to that point, then.

1 QUESTION: Yes.

2 MR. SHAW: It is not the position of the
3 plaintiffs or the Kansas City, Missouri School District
4 and the district court that this is an outcome-based
5 measure. That is to say, unitary status does not depend
6 on any particular degree of test scores. The district
7 court simply did not apply that standard.

8 The argument that we are making, which is
9 consistent with this Court's precedent in Swann and
10 Milliken II and, indeed, in all its school desegregation
11 jurisprudence, is that a district court has to have
12 flexibility in fashioning a desegregation remedy, and in
13 the process of doing so, it certainly can continue -- can
14 consider test scores as one among many factors as to
15 whether or not the violation has been remedied, but it
16 can't do it inflexibly.

17 QUESTION: But you agree that no particular
18 level of achievement could be the sole determining factor?

19 MR. SHAW: I agree that -- that's right. That
20 is our position here, that we have -- we're not arguing
21 here that any particular level of achievement is the sole
22 determining factor, absolutely.

23 QUESTION: Mr. Shaw, as I understand the law, a
24 State can have different districts that have a different
25 level of educational input, and districts that have a

1 different level of achievement, so long as there's not
2 discrimination within each of those districts between
3 majority and minority students.

4 Why is it relevant to that issue of law what the
5 test scores of the district as a whole are? As I
6 understand what we're talking about here, it's not the
7 test scores of minority students who are presumably
8 bearing the vestiges of prior discrimination, but rather
9 the test scores of the entire district, white and minority
10 as well. I don't see any relevance of that to the issue.

11 MR. SHAW: Justice Scalia, the district court
12 made a finding that there has been a system-wide reduction
13 in academic achievement in consequence of the
14 constitutional violation -- that is, the segregation.

15 This is a district that is a heavily majority
16 black district, and it is that way as a consequence of the
17 violation that the State initiated, and in which the
18 Kansas City, Missouri School District was complicit. As a
19 consequence of that violation --

20 QUESTION: But that would be an interdistrict
21 violation, and I thought there had been no finding of an
22 interdistrict -- in fact, a finding that there was no
23 interdistrict violation. The only issue here is whether
24 there is discrimination within the district between
25 minority and majority students, and I don't see it's at

1 all relevant to that what the average test score of the
2 district as a whole is. It would be -- it would be
3 arguably relevant what the test scores of the minority
4 students were, but --

5 MR. SHAW: Let me -- let me answer that
6 question --

7 QUESTION: Now, I do see how it's relevant what
8 the test score of the whole district is if you're trying
9 to attract students from other districts, but that's an
10 interdistrict problem and an interdistrict remedy. I
11 don't see how it relates to intradistrict matters.

12 MR. SHAW: Let me answer that question in two
13 ways. First, Justice Scalia, the district court did not
14 find an interdistrict violation as it related to the
15 suburban school districts. They were let out by the
16 court's June 5th, 1984 order. It did not find that they
17 were complicit in the violation, or that there was any
18 effect in any one of those school districts.

19 The district court, however, has made findings
20 that as a consequence of segregation, black students were
21 impacted in the Kansas City School District, and that the
22 Kansas City School District swelled in black enrollment.
23 As a consequence of that, the Kansas City School District
24 ultimately was rendered unable to raise the revenue
25 necessary to fund public education in an adequate way.

1 As a consequence, all of the schools began to
2 deteriorate. That affected all of the students in the
3 system.

4 Let me use this analogy. If there is a school
5 that is a majority black school as a consequence of
6 segregative State action, and it is created as a majority
7 black school, and there are still some white students in
8 it, those white students will suffer the same effects of
9 the violation as the black students or the majority in
10 that school.

11 That is the same thing that happened in the
12 Kansas City, Missouri School District. Eventually, the
13 segregation violation overtook the entire district, and
14 all of the students suffered. That was why the district
15 court order was aimed at remedying the system-wide
16 reduction in achievement.

17 Secondly --

18 QUESTION: I understand that explanation, but I
19 don't see why it isn't an explanation that rests on a
20 presumption of an interdistrict violation.

21 MR. SHAW: Let me, then, address the second
22 part, which I think may -- I hope it will answer that
23 question, Justice Scalia, and that's that the
24 interdistrict violation was not found by the district
25 court, but however, there are findings that white students

1 left the system and went to public schools. Some left for
2 the suburbs -- went to private schools, rather.

3 Certainly, even in an intradistrict remedy, it's
4 appropriate for, given those findings, which are not under
5 challenge here and we believe cannot be challenged at this
6 point, for the court to fashion a remedy that attempts to
7 attract those students back into the district.

8 It's voluntary. It doesn't run afoul of
9 Milliken I. It doesn't impinge upon the autonomy of the
10 suburban school districts. It also aims at attracting
11 students back into the system who are in private schools
12 within the boundaries of the Kansas City, Missouri School
13 District.

14 That doesn't in any way implicate the
15 interdistrict violation concerns that Milliken I
16 addresses. That's why we lost on interdistrict relief.
17 We know that. But we also know that the district court
18 carefully fashioned a remedy that would precisely address
19 the violation that it found and its effects.

20 QUESTION: Has the district court made any
21 determinations or given any guidance as to when it is
22 feasible or practical -- practicable to end its
23 supervision?

24 MR. SHAW: That question, Justice Kennedy, the
25 court began to take up in the April 16, 1993 order, which

1 the Eighth Circuit relied upon. That -- in that order,
2 the court asked for plans from -- or some -- rather,
3 not -- yes, some plans from the parties to talk about a
4 phaseout procedure over an alternative scheme of years.
5 That indicated that the court is already thinking about
6 that, and I want to stress that contrary --

7 QUESTION: Well, it must think about that under
8 Freeman and Pitts, must it not --

9 MR. SHAW: That's right.

10 QUESTION: -- that the principal objective of
11 the court must be to return control of this district to
12 the civic authorities, not the judicial authorities?

13 MR. SHAW: That's correct. That -- I would only
14 add that the principal objective also is to remedy the
15 violation and then return it to the control of the
16 authorities.

17 QUESTION: Mr. Shaw, could you be more specific
18 about what those plans that were called for were, because
19 they seemed to in years go from 3 years to 10 years. The
20 district court said, come up with plans to get the
21 State -- to get the court out of this, and why 3 years, 5
22 years, 7 years, and 10 years?

23 MR. SHAW: I think that the court was attempting
24 to get before it an array of alternative plans under which
25 it could consider what the best transition was going to

1 be. That's why it chose these 3-year, 7-year, 10-year
2 plans as the panoply at which it wanted to look. That
3 makes sense. It wanted to carefully consider the
4 transition phase.

5 It also stressed, I think, contrary to what I
6 believe the State's representations to be, that it was
7 contemplating this transition to a system in which the
8 Kansas City, Missouri School District would be largely
9 responsible, or wholly responsible, for funding whatever
10 components of the remedy are left in place, and it would
11 have to consider that consistent with the fact that the
12 State would no longer be in as a defendant that was
13 funding the remedy. We think that's proper under Freeman,
14 under Dowell, and it's a responsible way for the district
15 court to proceed.

16 QUESTION: Would you --

17 QUESTION: As a practical matter, doesn't that
18 sound like the district is kind of walking towards a
19 cliff? If they're now getting somewhere between \$9,000
20 and \$13,000 per student, as compared to \$4,000 in other
21 Missouri districts, and all of a sudden that funding is
22 gone, then what happens to the school district?

23 MR. SHAW: Justice Rehnquist, that is exactly
24 the kind of concern that I think the district court
25 contemplated addressing in asking for these plans.

1 QUESTION: Well, what sort of plan would solve
2 that problem?

3 MR. SHAW: Well, I think in part the answer is
4 that if the plan as it is working now continues to succeed
5 in attracting white patients back into the district, that
6 would undercut the stigma that has been attached to the
7 school district in which whites were not enrolled and as a
8 consequence they wouldn't fund the district, and it may be
9 possible to get on a better footing with respect to local
10 funding for the school system.

11 It also is not necessary to maintain all of the
12 aspects of the remedy in place, once a district is
13 unitary. At that point, there should be a transition to a
14 system that may be scaled down in terms of the way in
15 which it operates. Many --

16 QUESTION: But it seems to me that what's
17 happening here is that the greater the intrusion into the
18 local domain, the easier it is for the court to justify
19 its continued supervision, and I should think the calculus
20 ought to be just the other way around.

21 I mean, you're asking here -- we haven't
22 discussed it yet -- that we affirm the order raising
23 teacher salaries, and I just see no end to this --

24 MR. SHAW: Oh, well, it --

25 QUESTION: And I fear, based on your answer to

1 the Chief Justice's question, that the only way for you to
2 continue this funding is to continue the judicial
3 supervision --

4 MR. SHAW: Justice Kennedy --

5 QUESTION: -- which is contrary to Freeman and
6 Pitts.

7 MR. SHAW: -- I have no doubt that there will be
8 an end to this remedy, and certainly this Court's
9 teachings make it clear to all of the parties that the
10 Court will not countenance perpetual jurisdiction. That's
11 not what this remedy is about.

12 There are difficult questions with respect to
13 how to make the transition once the school system is
14 unitary, but that's precisely what this Court considered
15 in Freeman and why it requires district courts, given the
16 kind of deference that this Court has traditionally placed
17 in the hands of the district courts, to answer the
18 difficult questions about how to make that transition.

19 I don't have all the answers at this point as to
20 how this would work, because it has not yet been before
21 the district court, but we think those questions should be
22 brought there first, and not here, that the process of
23 adjudication should not be an inverted pyramid in which
24 the issues balloon as the case goes up to the Supreme
25 Court.

1 QUESTION: Mr. Shaw, do you support even the
2 district court's order increasing salaries of
3 noninstructional employees --

4 MR. SHAW: Yes, Justice O'Connor.

5 QUESTION: -- as within the scope of the remedy?

6 MR. SHAW: Yes, Justice O'Connor, although it is
7 certainly a question of discretion, and I understand the
8 concerns of the Court.

9 QUESTION: I just wonder whether it might not be
10 an abuse of discretion to go that far. It has nothing to
11 do with student achievement or anything else.

12 MR. SHAW: No, Justice O'Connor, but --

13 QUESTION: I'm just quite amazed.

14 MR. SHAW: -- it does have something to do with
15 the day-to-day operations of the district, and the day-
16 to-day operations of the district with respect to its
17 ability to carry out the desegregation plan.

18 The findings, again, of the district court are
19 that as a consequence of segregation this is a district
20 that was woefully underfunded. It was devastated as a
21 consequence of the violation. Now, the ability of the
22 school district to raise funds as a consequence of this
23 Court's order with respect to the tax decision that was
24 before it is one that limits those funds to actually
25 desegregation purposes, ultimately.

1 QUESTION: What is there in this record that
2 shows the inability of the school district to make its own
3 determinations as to how to allocate its existing revenues
4 for salaries?

5 MR. SHAW: Justice Kennedy --

6 QUESTION: Why does it need supervision for
7 that?

8 MR. SHAW: As you phrase the question, I
9 believe, that is to say, as I understand your question,
10 it's what is that says that the court must be involved in
11 the school district's decisions as to how to allocate
12 salary --

13 QUESTION: Yes.

14 MR. SHAW: -- a budget for salary? There is no
15 rule of law that per se requires the school district to do
16 that. However, because of the woefully limited funds
17 available to this school district as a consequence of the
18 effects of the violation and the limitations on the money
19 that the school district is able to raise with respect to
20 the necessity to fund its share of the desegregation
21 components of the remedy, it just doesn't leave much money
22 available.

23 QUESTION: Why are funds limited as a result of
24 the violation?

25 MR. SHAW: Because --

1 QUESTION: Because they've all been spent?

2 MR. SHAW: Because the State has insisted,
3 understandably, that the school district fund its share of
4 the remedy, and it has not always been able to do that, so
5 the court has applied principles of joint and several
6 liability, but the fact is that there's just been limited
7 ability of the school district at this point to fund the
8 remedy.

9 QUESTION: Thank you, Mr. Shaw.

10 Mr. Bender.

11 ORAL ARGUMENT OF PAUL BENDER

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE RESPONDENTS

14 MR. BENDER: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The United States believes that the decision of
17 the court of appeals in this case was correct, and that it
18 should be affirmed.

19 We agree, Justice Scalia, that there's no power
20 in the courts to require this district to achieve
21 educational performance that's equal to or greater than
22 the surrounding suburban districts, or, indeed, equal or
23 greater than any other district in the country, or any
24 arbitrary level or chosen level of achievement, but there
25 is a power and, indeed, a responsibility, to require the

1 district to remove the lingering effects of the
2 unconstitutional segregation that were present in this
3 district for a long time.

4 There are students who, in 1982 -- in 1992, when
5 the district court order in this case was issued, had
6 spent several years in a segregated situation in this
7 school district. Those years -- assume, for example, that
8 there were the first 4 or 5 years of the student's
9 academic career --

10 QUESTION: Hypothetically the students should
11 now be, what, high school seniors?

12 MR. BENDER: They could be in tenth grade.

13 The remedies in this case, the Milliken II
14 remedies in this case, were not fully implemented until
15 the late 1980's. The district court decided that they
16 should be implemented in 1985. They're not implemented
17 overnight.

18 So you could have a student in tenth grade now
19 who spent the first 4 or 5 years of her years in school in
20 a segregated system that the district court has found
21 suffered tremendously from the effects of segregation.

22 QUESTION: In a different school. I mean, I
23 take it, in Kansas City people don't go to the same school
24 from kindergarten through high school senior.

25 MR. BENDER: I don't think that they do, right.

1 It was probably in a different school. But if a child in
2 the first 4 or 5 years of school did not learn basic
3 reading skills, basic reading comprehension, basic
4 communication skills, basic concepts of number values,
5 basic study skills, you cannot expect a student like that
6 to immediately start achieving at the level the student
7 would have achieved if the student had not suffered those
8 deprivations instantly.

9 QUESTION: Is all of this funding just directed
10 at those upper grades so that it sort of follows this
11 hypothetical student from the fifth grade, where she was
12 when the disparities were eliminated, up to the sixth
13 grade? It's my impression this money is going to the
14 whole system --

15 MR. BENDER: Right.

16 QUESTION: -- including those people who have
17 never been under a segregated --

18 MR. BENDER: I believe that that's true, and
19 certainly the State can bring before the district court an
20 effort, a claim to have some or all of those remedies
21 reduced or eliminated in some of the lower grades, but
22 there's a procedure that this Court has set out in which
23 the State should do that, and the State has not followed
24 that procedure in this case.

25 If the State followed that procedure, it would

1 be required 1) to show that it has implemented in good
2 faith the remedies that the Court required. Secondly, it
3 would have to show that those remedies have removed the
4 vestiges of segregation to the extent practicable. Not
5 that it has removed them altogether, but to the extent
6 practicable.

7 QUESTION: How does it make that showing?

8 MR. BENDER: There are lots of different ways to
9 make that showing. For example, the district court
10 found -- in making its finding that the segregation had
11 had the result of impairing academic performance, the
12 district court relied on a number of factors.

13 Some were test scores, comparing test scores in
14 this district with test scores in other districts of a
15 similar nature except that they had not suffered
16 segregation. Other things that would indicate that there
17 was low academic performance would be graduation rates,
18 attendance rates, dropout rates, things like that.

19 The -- I would think that the first thing you
20 would want to do is compare -- let's take this
21 hypothetical tenth grade student now, or tenth grade
22 students in general in the system, and see whether their
23 performance, general academic performance, is comparable
24 with students in systems in other cities of similar size
25 and demographics that had not suffered from the terrible

1 deprivations that segregation caused here. That would be
2 one step.

3 QUESTION: That sounds to me like a fascinating
4 sociological inquiry, but I submit that it is highly
5 questionable as to whether or not it is a practicable
6 measure for the court to use to determine how quickly it
7 can return the control of this district to the elected and
8 democratically responsible authorities.

9 MR. BENDER: It seems to me that it could be
10 quite practical, Justice Kennedy.

11 For example, suppose you saw that the students
12 in the tenth grade in the Kansas City schools had roughly
13 the same academic achievement as the students in the tenth
14 grade in the Philadelphia public schools, or the New York
15 public schools. That would be a very powerful indication
16 that the effects of the segregation were no longer
17 present, because the students in Philadelphia had not
18 suffered that de jure segregation.

19 QUESTION: Is that the comparison that was made?
20 I thought it was against average national standards.

21 MR. BENDER: You mean originally, when the
22 district court --

23 QUESTION: Right. What was the district court
24 looking to?

25 MR. BENDER: I think the district court compared

1 originally in 1985 --

2 QUESTION: Below national norms, is what the
3 district court -- below national norms at many grade
4 levels. Well, I mean, half the country is below national
5 norms.

6 MR. BENDER: National norms would not be --
7 right. National norms are not the right test. I think if
8 you're going to do that kind of comparison, which is one
9 way, and I think if the comparison showed that they were
10 comparable, that they were about the same, you could
11 easily conclude that the results of segregation had been
12 gone.

13 Another thing you can look at is, you would
14 expect that if the educational performance was lower in
15 1985, and then --

16 QUESTION: But jurisdiction does not remain
17 until the results of segregation are gone. It remains
18 until all practicable remedies to accomplish that have
19 been gone, and that, it seems to me, you have not
20 addressed.

21 MR. BENDER: Well, one way you could show that,
22 for example, is after the remedies were started you would
23 look at test scores, or other indicia like attendance
24 rates, for the next 2 years, and see what happened to
25 them.

1 You might find that they went up and then
2 leveled off. I think that would be a very powerful
3 indication that you had done as much as was practicable to
4 do. You might find that they never went up at all, which
5 again I think would show that you had done as much as was
6 practicable to do, because these remedies were the
7 remedies which were the state-of-the-art educational
8 remedies at the time.

9 But you might find that they have been going up
10 every year, and that that progress continues, and if you
11 found that, and in addition found that the level of
12 progress was below the level in Philadelphia, or San
13 Francisco, or New York, that would be powerful evidence
14 that the remedies should not be stopped, because the
15 effects of the segregation were still there.

16 QUESTION: Don't you think the amount of money
17 spent is one element of practicability?

18 MR. BENDER: Absolutely.

19 QUESTION: At \$1.3 billion here already.

20 MR. BENDER: A lot of that was spent on capital
21 improvements which are not repetitive expenses, but I
22 agree with you completely that the level of expenditure
23 necessary is relevant.

24 QUESTION: And what about the length of time
25 that you withhold this school district from democratic

1 control --

2 MR. BENDER: Also relevant.

3 QUESTION: -- when it's managed by a Federal
4 district judge?

5 MR. BENDER: All of those things are relevant,
6 but those things are exactly what the district court
7 should be asked to consider, and those are the issues on
8 which the State has the burden of proof in showing that it
9 has done whatever it is practicable to do. What are the
10 additional costs of continuing these remedies for a couple
11 of years?

12 QUESTION: Well, don't you think those things
13 were before the district court, the amount of money that
14 had been spent and the length of time? Are you suggesting
15 that wasn't presented, or argued, or --

16 MR. BENDER: No. The amount of money that had
17 been spent up until then was before the district court,
18 but I don't think that the State presented to the district
19 court any of the evidence I'm talking about, or how these
20 remedies worked.

21 In fact, the State has said here today that
22 that's a totally irrelevant question. If the State
23 maintained that position below, then it did not make that
24 showing.

25 QUESTION: So you say it must present --

1 MR. BENDER: That's where the thing starts.

2 QUESTION: You say it must present this evidence
3 in order to resist an order requiring it to increase
4 teacher salaries? That's exactly where we are.

5 MR. BENDER: We -- the Government has not taken
6 a position on the teacher salary issue, which does not
7 have national importance. As far as we know this is the
8 only district in which that issue has arisen.

9 But to the extent that teacher salaries are
10 relevant, and I think to some extent they are, to the
11 quality of the education program, and to the extent that
12 it's necessary to keep teacher salaries at a certain
13 minimum level to ensure that you're getting decent
14 teachers into the system, yes, the State would have to
15 show that if you lowered the teacher salaries, if you
16 withdrew the support for teacher salaries, then you
17 wouldn't go back to the educational deficiencies that you
18 had before.

19 QUESTION: But on the salary issue it seemed
20 like it was just a very convenient way for the school
21 district and the labor union to get what they wanted
22 without going through collective bargaining, and there are
23 some very unattractive features --

24 MR. BENDER: I agree --

25 QUESTION: -- to what the district court did

1 here, and the State is just left holding the bag because
2 the school district and the labor union make a deal with
3 the court that the court's going to set the salaries.

4 MR. BENDER: But I think, Justice --

5 QUESTION: It can't be relevant.

6 MR. BENDER: -- O'Connor, it's very important
7 for this Court to make clear that you have to follow an
8 orderly procedure in withdrawing from those remedies, that
9 you don't do that by making factual assertions in an
10 appellate court or in the Supreme Court that you -- you
11 don't do that by making assertions that you don't back up
12 with proof.

13 The way to do that is to go to the district
14 court and say, look, we don't think that we should have to
15 be having all-day kindergartens any more, because the
16 students coming into the school now have not been harmed
17 by the prior segregation.

18 QUESTION: Thank you, Mr. Bender.

19 MR. BENDER: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 11:02 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MISSOURI, ET AL., Petitioners v. KALIMA JENKINS, ET AL.

CASE NO.:93-1823

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

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