IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, *et al.*,

Petitioners, Cross-Respondents,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents, Cross-Petitioners.

BIRDIE MAE DAVIS, *et al.*,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners respectfully request leave to file the attached reply to the brief of the United States. This reply is being filed less than three days before the time the case will be called for hearing. See Rule 41, Rules of the Supreme Court.

The brief of the United States was filed on October 6 and received by petitioners' counsel on October 7 and 8.

Accordingly, it was not possible to complete this reply and have it printed for filing until October 10. Special arrangements are being made to serve counsel who will be arguing the case, prior to the arguments.

Respectfully submitted,

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PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES

Several arguments advanced by the United States in its brief amicus curiae occasioned this reply.

(1) At p. 17, the Government attributes to petitioners the position that the Constitution requires "the ratio of white to black students in each school [to be] . . . as near as possible to the ratio of white to black students in the system as a whole." This is not petitioners' position. Nothing in petitioners' briefs suggests this position, which

the Government elsewhere characterizes as "racial balance" (pp. 16, 18-21, 23).

Petitioners' plan for the desegregation of the Mobile public school system in No. 436 does not depend upon a theory of "racial balance." [1] Nor does Judge McMillan's plan for the desegregation of the Charlotte-Mecklenburg public school system in Nos. 281 and 349 depend upon a theory of "racial balance." [2] "Racial balance" is a whipping-boy that respondents and the Government find it convenient to belabor. But it has nothing to do with petitioners' contentions respecting the requirements of the Constitution.

(2) Petitioners' contentions do not depend upon "ratios." They would permit 50-50 schools to exist, for example, in a 70-30 school district where residential stability and other characteristics of the school population did not threaten resegregation, and the history of the school board per-

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[1] See Brief for Petitioners in No. 436, pp. 63-79.

[2] See the Government's quotation from Judge McMillan's opinion at p. 21. After the Charlotte-Mecklenburg school board had consistently failed to produce an acceptable desegregation plan, Judge McMillan was compelled to appoint an expert to devise a plan. He was thereby obviously required to instruct the expert concerning the *ideal* objectives of the plan—something that would not have been necessary if the board had developed anything approximating a satisfactory plan of its own. In this context only, Judge McMillan resorted to ideals defined by ratios—but with the clear recognition that substantial deviations from the ratios would be permitted where other practical and educational considerations called for them. And the ultimate plan approved by Judge McMillan does not in fact involve racial ratios in each school that reflect those of the district as a whole.

Judge McMillan expressly noted that his decision does not rest on a conclusion that "racial balances" are constitutionally required. He said:

> "This court has not ruled, and does not rule, that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before the court*" (emphasis in original) (Brief Appendix, p. 12).

formance did not require more exacting demands to guard against evasions. What petitioners *do* urge is simply that this Court should announce principles for the ultimate form of school desegregation plans which meet two requirements:

First, they fulfill the promise and the constitutional holding of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), that no black child is to be assigned to a racially identifiable "black" school such as the all-black and virtually all-black schools which the Fifth Circuit has permitted to exist in Mobile and which the HEW plan would permit to exist in Charlotte-Mecklenburg.

Second, they announce this first requirement in terms that are sufficiently clear, unmistakable, and decisive so that the Court's opinion in these cases will not spawn 16 more years of litigation like the 16 years of litigation that followed *Brown.*

(3) The Government's position fails to meet either requirement. The Government urges that:

> An appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district. (P. 8)

If 16 years of litigation under *Brown* have demonstrated anything, it is that the enunciation of this "standard" by this Court in this year 1970 would be an unmitigated disaster. Under this standard, southern desegregation will remain an unresolved issue, and litigation of how many black children can be penned in all-black schools will still be going on, in 1986.

(4) The only justification that the Government offers for this unserviceable standard is the notion of deference to "the traditional neighborhood method of school assignment" (p. 9; see p. 24). But we are talking about desegregating schools that have never had a "traditional neighborhood method of school assignment." Time out of mind prior to *Brown,* both Mobile and Charlotte-Mecklenburg had school assignment systems that took black children out of their "neighborhoods" to black schools and white children out of their "neighborhoods" to white schools. After *Brown,* both used plans that were not "neighborhood" plans.[3] Recently, both developed "neighborhood school" schemes whose design and effect were to perpetuate segregation. If the neighborhood school system had any other "benefits" (p. 9), they had escaped local notice altogether during many years, and now continued to be subordinated to the interests of segregation for schools were located, their capacities designed, their grades structured, their zone lines drawn, and their "neighborhoods" thus shaped to achieve continued segregation of the races.

The Government admits that all of this is so as to Mobile and Charlotte-Mecklenburg (pp. 12-16), but seem to suggest that Mobile and Charlotte-Mecklenburg are aberrations. They are not aberrations. If one is to go outside these records, one will find that no school district which practiced the sort of racial discrimination condemned in *Brown* had a "traditional neighborhood" school system. They all sent blacks to black schools and whites to white schools without regard to "neighborhoods" or geographic proximity. These are the school systems that are at issue here.

But we do not think that the Court should go outside the record. If there are school districts which have truly

[3] Indeed, in No. 436, the Mobile School Board adamantly resisted the principle of neighborhood schools. See petitioners' brief in No. 436, p. 29, n. 26.

had "traditional neighborhood" school systems, they lie beyond the scope of this Court's post-*Brown* experience and doubtless differ in so many ways from Mobile and Charlotte-Mecklenburg that nothing the Court decides herein could affect them. To reason from the supposed nature and "benefits" of those systems without a record adequately describing them would be perilous enough even if such systems were in question. But the only systems in question here are those that have traditionally subordinated or shaped neighborhoods to race; and, as to them, the Government's "traditional neighborhood" school principle is manifestly hollow.

(5) The Government's reasoning from the "neighborhood" school premise is as faulty as the premise. We understand it to say that because various devices have been used by southern school boards to make the "neighborhood" school principle a serviceable tool of segregation—i.e., school location, school size manipulations, grade structure manipulation, zone line manipulation (pp. 12-16)—these same devices, but only these, may be used as "the focal point of a proper remedy . . . to disestablish the dual system and eliminate its vestiges (p. 16; see p. 25). Two things are wrong with this argument as a basis for concluding that "a system of pupil assignment on the basis of contiguous geographic (residence) zones . . . is constitutionally acceptable in desegregating urban school systems" (p. 24).

First, southern school boards—and these school boards—have used not merely manipulative practices within contiguous zones but also non-contiguous zones and busing to achieve segregation. If the measure of desegregation devices is to be determined by those devices previously used to segregate, then non-contiguous zones and busing are included.

Second, there is no doctrinal, logical or practical reason why the roster of desegregation devices should be measured by that of segregation devices. So far as we are aware, it has never been supposed that the remedial means of a court of equity were those used by a malefactor in creating the situation that requires remedying.

(6) It is not only, however, the Government's reasoning that troubles us, but the consequences to which it inevitably leads:

First, as we have said in paragraph (3), *supra,* the Government's vague and elastic "standards to be applied in fashioning remedies for state-imposed segregation" (p. 8) will unquestionably produce another desolating, wasteful and protracted era of school desegregation litigation. We had hoped that this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970), were meant to end that sort of thing.

Second, standards of this sort cannot be fairly and uniformly administered. In practice, they boil down to the disposition of the school board, or local district judge, or the sitting panel of the court of appeals. Experience in the Fifth Circuit in the past year demonstrates the effect of standards such as the Government proposes. The Government's description of the Fifth Circuit jurisprudence at pp. 19-20, 25-26, suggests a sort of consistency that the cases entirely lack. In the Fifth Circuit, as we have shown in petitioners' brief in No. 436, the degree of desegregation ordered varies from panel to panel.

Third, in the last analysis, as the Government admits on p. 26, its "standards" amount to nothing more than a promise of judicial review of the "good faith" of school officials. Sixteen years of school desegregation litigation

since *Brown* teach the delusiveness, the utter futility of any such approach to desegregation.

(7) This Court should order that the schools be desegregated by declaring that each black child in Mobile and Charlotte-Mecklenburg must be assigned to a school which is not a racially identified "black" school. See para. (2), *supra*. Judge McMillan's order on Nos. 281 and 349 should be approved as a practicable plan found effective to achieve this result in Charlotte-Mecklenburg; and the judgment of the Court of Appeals for the Fifth Circuit in No. 436 should be reversed.

Respectfully submitted,

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