In The Supreme Court of the United States

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF CHARLES E. BENNETT, M.C.

TO: The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

COMES NOW Charles E. Bennett, Member of Congress, and respectively moves this Honorable Court for the entry of an Order granting him leave to file a brief as amicus curiae in this cause, which brief is incorporated herein and tendered herewith, and in support thereof would show unto this Court as follows:

1. This motion and accompanying brief is filed pursuant to the provisions of Rule 42 of the Revised Rules of the Supreme Court of the United States adopted June 15, 1970, effective July 1, 1970.

2. The undersigned Charles E. Bennett, is a Member of

Congress, representing the Third Congressional District of the State of Florida, which district encompasses almost all of the Consolidated City of Jacksonville, Florida. Said City has a geographical area of 840.1 square miles, which makes it one of the largest cities in the United States in area. The boundaries of said Consolidated City of Jacksonville, Florida, are coterminous with the physical boundaries of Duval County, Florida, whose school system is the thirteenth largest school system in the United States. Said school system for the 1970-1971 School Year is projected to serve 122,549 pupils in a total of 137 schools.

3. Of the total pupil population of 122,549, there is a projected black pupil population of 35,287 and a white pupil population of 87,262. This gives an approximate ratio of white to black of 70-30%.

4. The Consolidated City of Jacksonville in the "Inner Core City" includes a "ghetto" area, which encompasses 26 black or substantially all-black schools by pupil population.

The pupil attendance in said school system is based upon a neighborhood plan with zoned boundaries established on objective non-racial grounds utilizing the criteria of (a) capacity of the subject school, and (b) proximity to the school.

5. The school system of the Consolidated City of Jacksonville is currently involved in an integration suit under the style of *Daly N. Braxton, et al, Plaintiffs, vs. The Board of Public Instruction of Duval County, Florida, et al, Defendants,* United States District Court, Middle District of Florida, Jacksonville Division, No. 4598-Civ-J (Hon. William A. McRae, Jr., presiding Judge).

6. On August 6, 1970, in open court, the United States District Judge William A. McRae, Jr. announced as the "law

of the case" a constitutional duty upon the Duval County School Board to racially integrate all or substantially all of the remaining all-black or substantially all-black schools in the ghetto area of the City of Jacksonville, without however making any finding that the zone boundaries of the neighborhood schools established by the Duval County School Board were in any way gerrymandered or other than objectively drawn on a non-racial basis. (See Exhibit "A" to the Brief tendered herewith)

7. On August 6, 1970, the same District Judge entered an Order requiring (as the first step towards compliance with the aforesaid "law of the case",) that for the School Year 1970-1971 the Duval County School Board arbitrarily pair, cluster, and gerrymander certain of the former black or all-black schools in the ghetto which lay on the periphery of said ghetto with white or substantially all-white schools laying just outside of the periphery of the ghetto (see Exhibit "B" to the *amicus curiae* brief incorporated and tendered herewith).

8. The aforementioned August 6, 1970 Order is obviously merely the first step in effectuating what the U. S. District Court conceived to be the final constitutional mandate imposed upon the Duval County School Board in its statement of the "law of the case" at the hearing held on August 4, 1970.

9. As a direct and proximate result of the aforesaid August 6, 1970 U. S. District Court Order, the school system of the City of Jacksonville has been forced to acquire an additional 36 school buses at a cost of $190,000.00, because of the additional "busing" requirements mandated by the Order of the court with respect to the pairing, clustering and gerrymandering of certain zoned boundaries by the Court Order.

10. The action of the Court and the required pairing, clustering, gerrymandering and busing of schools and school children, respectively, has caused tremendous emotional impact upon the people of the Consolidated City of Jacksonville, both black and white. The undersigned Charles E. Bennett respectfully submits that the August 6, 1970 Order of the U. S. District Court is merely the forerunner of far more sweeping Orders from that Court or from the United States Court of Appeals for the Fifth Circuit where the *Braxton* case, *supra,* is currently pending on appeal under the style of *Daly N. Braxton and Sharon Braxton, etc., et al, Plaintiffs-Appellees, vs. The Board of Public Instruction of Duval County, Florida, etc., et al, Defendants-Appellants,* Case No. 30418, if the aforesaid "law of the case" is upheld and maintained.

11. The undersigned Charles E. Bennett, Member of Congress, would respectfully show unto this Court that the situation in the school system in his District is similar to the situation faced by the Charlotte-Mecklenburg Board of Education in the above-entitled cause.

12. The August 6, 1970 Order of the U. S. District Court directed to the school district in the City of Jacksonville, as well as pronouncement of the "law of the case" in open Court on August 4, 1970, is a pronouncement by the Court that the City of Jacksonville, Florida, is required to bus pupils or students from one school to another for the sole purpose of racially balancing student bodies, although Section 407(a) of Title IV of the Civil Rights Act of 1964, enacted by the Congress of the United States, specifically prohibits such orders.

13. The decision by this Court in the present case with reference to Question No. 1 presented herein as set forth on Page 3 of the Petition for Writ of Certiorari will have an immediate, direct and material bearing upon the pronounce-

ment of the "law of the case" of the United States District Court in the above-cited *Braxton* case, *supra,* as to any such constitutional duty imposed upon metropolitan school districts to arbitrarily integrate, for integration sake alone, any black or substantially all-black ghetto schools in the absence of any finding that the neighborhood boundaries of said schools, together with the remaining schools throughout the district, are drawn on an other than objective non-racial basis.

WHEREFORE, the premises considered as stated above, the undersigned Charles E. Bennett, as Member of Congress, respectfully moves this Court for the entry of an Order authorizing him to file the accompanying brief tendered herewith as *amicus curiae* in the above-entitled cause.

AND your movant will ever pray.

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AMICUS CURIAE BRIEF OF CHARLES E. BENNETT, M.C.

QUESTIONS ADDRESSED

1. Is there a constitutional duty imposed upon a metropolitan school district to racially integrate the student bodies of black or substantially all-black schools located within a metropolitan ghetto area by requiring such metropolitan school districts to assign particular children, black and white, to a particular school solely because of their race and to exclude said children from schools they would otherwise attend solely because of their race where the attendance of said children, black and white, at their former schools was not the result of any official policy or practice by the school district of restoring or reinstituting a former dual school system on a segregated basis and where zoned attendance boundaries of said former schools were and are based upon

bona fide non-racial and objective criteria of a neighborhood school plan utilizing the factors of (a) capacity and (b) distance from each school for the establishment of such boundaries.

2. Are Courts of the United States "empowered" to issue orders to bus pupils or students from one school to another or from one school district to another to racially balance student bdies although Section 407(a) of Title IV of the Civil Rights Act of 1964 specifically prohibits such orders?

3. Does the requirement of arbitrarily or artificially integrating for integration sake alone the student population of black ghetto schools in a metropolitan school district result in the establishment of *de jure* quotas by the Courts and does not such establishment constitute the assignment of students to public schools in order to overcome racial imbalance in violation of Section 401(b) of Title IV of the Civil Rights Act of 1964?

ARGUMENT

PRELIMINARY STATEMENT

This *amicus curiae* does not wish to overburden the record of the above-entitled cause or the cases consolidated for disposition therewith by reiterating the very thorough and succinct argument and authorities set forth in the *amicus curiae* brief of William C. Cramer, Member of Congress.

The undersigned *amicus curiae* completely concurs in the argument made and the authorities cited in the *amicus curiae* brief of the said William C. Cramer, Member of Congress, and incorporates same by reference herein.

The main purpose of this *amicus curiae* brief is *factual* in nature.

We seek to set out an example of what happens to a large metropolitan school district when the courts impose a doctrinaire and arbitrary duty to integrate for integration sake alone student populations of all or substantially all of the black or substantially all-black neighborhood schools located within a metropolitan "ghetto." The situation in the City of Jacksonville, Florida, is akin and analogous to that of the City of Charlotte, North Carolina. It is similar and analogous to every city having a greater or lesser degree of "ghettoization" by race, whether the ghetto occurs in Atlanta, Miami, Jacksonville, Chicago, Boston, Philadelphia, Cleveland, etc. It is a nationwide problem.

The purpose of this brief is to succinctly bring to the attention of this Court another illustration in addition to that of Charlotte, North Carolina, of exactly what happens when the arbitrary "integration for integration sake alone" rule is imposed upon a metropolitan school district.

BASIC FACTS CONCERNING THE DUVAL COUNTY PUBLIC SCHOOL SYSTEM

Pursuant to authorization of Section 9 of Article VIII of the Constitution of 1885 of the State of Florida, the Florida State Legislature, in 1967, enacted Chapter 67-1320, as amended by Chapter 67-1310, Laws of Florida of 1967, which authorized a referendum of the citizens of the City of Jacksonville and the former political entity known as Duval County, Florida, a political subdivision of the State of Florida, to determine whether or not they desired a consolidation of the former City of Jacksonville with the former county government.

The referendum was successful by a vote of 2 to 1.

On October 1, 1968, consolidation of the former City of Jacksonville and the former Duval County was accomplished as a matter of law. Since that date, the Duval County School Board is an independent agency of the Consolidated City of Jacksonville.

The Duval County School System encompasses the entire Consolidated City of Jacksonville, which city is now by operation of law, coterminous with the physical boundaries of Duval County, with an area of 840.1 square miles.

The School System is the thirteenth largest school system in the United States.

The total population in the City according to the latest preliminary Federal census figures is in excess of 513,000.

There is an approximate ratio of 70 white to 30 black in the population as a whole as well as in the student population of the school system.

For the 1970-1971 School Year, the projected student population in the 137 schools scattered throughout the 840.1 square miles of the school system is a total of 122,549 students, breaking down to 87,262 white and 35,287 black students.

Of the 137 schools in the entire system, 26 schools are located in or on the edge of the black "ghetto" area and have a student population of all-black or substantially all-black, i.e., less than 10%, white pupil admixture.

Reference is made to the analysis map which is attached hereto as Exhibit "C". This map reveals a realistic analysis of the City of Jacksonville's school attendance areas. They have been divided arbitrarily into seven (7) different areas purely for analysis purposes.

The boundaries of these analysis areas are the Intracoastal Canal, the St. Johns River, the interstate highways, and the Atlantic Ocean.

All students who live more than 1.5 miles away from their subject school are transported to the school by school transportation buses as a matter of School Board policy (Florida School Law requires transportation when a student lives in excess of 2 miles from the school he is attending, but authorizes school boards to shorten this distance, as has been done by the Duval County School Board). School Board budgeted figure for pupil transportation costs for 1970-1971 is $1,132,934.00.[1]

Of this transportation cost amount, approximately 50% is derived from state revenue designated for pupil transportation and 50% from other sources.

The school attendance plan established by the subject school district in Jacksonville, Florida, is a "neighborhood school plan" whereby the basic criteria used in establishing said boundaries are (a) the size and capacity of the subject school in handling the number of students and (b) the proximity of the student with relationship to his residence to the school.[2]

An examination of Exhibit "C" (the analysis map) reveals that for the School Year 1970-1971:

(a) *Area I* (the Jacksonville Beaches) is completely and practically integrated. The Plaintiffs in the *Braxton* case or

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1. As a result of the U. S. District Court Order of August 6, 1970 (see Exhibit "B" attached hereto) this figure has had to be increased by an amount in excess of $190,000.00.

2. Of course, it is obviously necessary on occasion to take into account artificial and natural barriers, such as the St. Johns River itself, the existence of multi-lane limited access interstate highways, etc., in establishing said boundaries.

the Miami Desegregation Center in its latest report in the *Braxton* case do not allege otherwise.

(b) *Area II* (Arlington). In this entire area, there is a total projected black pupil population of only 127 as compared to 6,229 white pupils. The black population is scattered throughout the Arlington area. There is only one school (Lake Lucina) where there are no black pupils within the neighborhood attendance area. All pupils attend school in their attendance area. Neither the Plaintiffs nor the Desegregation Center in the *Braxton* case, *supra,* charged that any of the boundary lines in Area II were "gerrymandered" to maintain or perpetuate segregation. Black pupils within the Area will feed through the two junior high schools and into Terry Parker Senior High. Thus, black pupils within Area II will attend throughout their academic careers predominantly white schools.

(c) *Area III* (Southside). In this area, the School Board recently altered certain boundary lines to provide for better use of facilities in this area. There are 880 black elementary students and 9,807 white elementary students. The black pupil population is scattered throughout the elementary schools with the one exception being School 159 (Pine Forest) which would have had 92 white pupils attending for the first time a formerly all-black school. In each of the three junior high schools, black pupils at this stage of their academic careers are attending predominantly white schools and the same is true, of course, in the two senior high schools in this area.

Neither Plaintiffs nor the Desegregation Center contend that any of the neighborhood zone boundaries are gerrymandered.

(d) *Area IV* (Southwest). In this area, the black stu-

dents are to a certain degree scattered throughout the elementary school attendance areas. In each case where black students attend school, they attend predominantly white schools. There are no schools which have no white pupils attending and there are only five schools, e.g., Ortega Elementary, which are all-white.

Neither Plaintiffs nor the Desegregation Center have seen fit to charge the School Board with improperly drawn boundary lines of any of the schools in question. Here again, in each of the junior high schools, black students will be in attendance with the majority of white students. The same is true of the three senior high schools located in this area. It is also obvious that the attendance of the senior high schools of black students will increase due to the operation of the neighborhood feeder system of the junior high schools for the following School Year 1971-1972.

(e) *Area V* (West—between Interstate 10 and U.S. #1). This area is adjacent to the ghetto area with the majority of the elementary black students residing in the attendance area for Forest Park, A. L. Lewis and West Jacksonville, together with S. P. Livingston. The remainder of the black pupils live in elementary school attendance areas which are to some extent integrated, being on the border of the ghetto. Here again, neither the Plaintiffs nor the Desegregation Center has challenged the propriety of any attendance zone boundary.

(f) *Area VI* (I-95 East to the St. Johns River). Area VI, together with Area VII, hereinafter discussed, constitute approximately 75% of the black population of the Consolidated City of Jacksonville and together constitute or encompass the ghetto area. This is reflected in the attendance figures for the elementary school with pupils attending schools in their

respective school attendance areas. Schools 3, 6, 70, 106, 135 and 148 reveal only slight integration in the neighborhood attendance area and in the case of School 135 and School 148, there is apparently solid black attendance neighborhoods.

Neither the Plaintiffs nor the Desegregation Center has charged the School Board with improperly drawing any of these school attendance boundary lines.

(g) *Area VII* (Northwest—West of I-95 to U.S. #1). This area represents the other half of the ghetto area encompassed by this area and Area VI, together with adjacent neighborhoods that are to a certain degree integrated. Schools 14, 124, 128, 154, 157, 158, 162, 163, 164 and 166 in the elementary school level indicate a complete and solid black neighborhood residential segregation. The remaining schools indicate a varied pattern of integration from completely all-white, e.g., Schools 37 and 59, to incipient integration in School 14. Here, as in the other areas, pupils attend schools in their neighborhood attendance area. The number of black pupils and white pupils which are transported are almost equal.

Prior to the entry of the August 6, 1970 Order, the School System had 27 schools that were either all-black or were comprised of predominantly black student bodies with the white percentage of student participation being less than 10%.

A glance at the map will readily disclose the existence of a large ghetto area encompassed by Areas VI and VII primarily, but also including a portion of Area V along the periphery thereof.

Within this ghetto area there are 26 black or substantially all-black schools as far as the ratio composition of the stu-

dent body is concerned.[3]

On the attached Exhibit "C" (the analysis map), we have circled those schools which have been ordered to be paired or clustered on the edge or periphery of the ghetto and "x"ed out the high schools within the ghetto which have been closed as senior high schools and whose attendance boundaries have been gerrymandered by the August 6, 1970 Order of the District Court.

Placing the first and second grade in one school of the cluster; the third and fourth grades in another school; and the fifth and sixth grades in the third school of the cluster has produced in many, many cases the need for an elementary child to be transported by bus more than the 1.5 miles normally established by School Board policy.

The result which has often occurred is that in a family, for example, having three children of elementary school age, who formerly all attended a school within a few hundred yards of their front door, (both black and white) said children are now required to get on a bus to be transported back and forth to their respective grades assigned in the paired or clustered schools.

It is respectfully submitted that this result is not only incongruous but has a slight "Alice in Wonderland" effect about it all.

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3. Parenthetically, it should be noted that the Duval County School Board, pursuant to a U. S. District Court Order entered on December 30, 1969, has transferred some 1300 black and white teachers throughout the system to establish the black-to-white teacher ratio of 70-30% in each school of the system as mandated by *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1965), 348 F.2d 729 (*Singleton* I); *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1966), 355 F.2d 865 (*Singleton II*); *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1969), 419 F.2d 1211 (No. 26285, December 1, 1969), reversed in part, sub nom., *Carter v. West Feliciana Parish School Board* (1970), ___ U.S. ____, 90 S.Ct. ____, 24 L.Ed 2d 477 (*Singleton* III); and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

We pass over the fact that such clusterings and pairings of course completely destroy the benefits derived by younger children from attending school with older children and learning by imitation as to mores and manners.

Local support for neighborhood schools in the matter of Dads' Clubs, P.T.A.s, etc. is, in most cases, destroyed.

Two things are graphically shown on Exhibit "C".

First, it is obvious that the U. S. District Court Order of August 6, 1970 is the "first bite of the apple". It is an attempt to proceed around the periphery of the ghetto and to pair or cluster the all-black or substantially all-black schools with corresponding all-white or substantially all-white schools just outside of the ghetto.

Secondly, there is left remaining within the ghetto, however, as shown by the "circles" at each numbered school site, some 18 all-black or substantially all-black schools which lie within the heart of the ghetto even after the pairings or clusterings of the periphery schools are accomplished.

There are, therefore, some 18,586 black students deep within the heart of the ghetto who are still attending 18 all-black schools (12 elementary; 4 junior high; and 2 senior high), *even after the provisions of the Order have been complied with.*[4]

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4. In order that the record may be made clear, let it be understood that even though this Order of the U. S. District Court was promptly appaled to the United States Court of Appeals for the Fifth Circuit where it is now pending, and even though the Defendant School Board sought but was not granted an appropriate Stay Order by the U. S. District Court, the United States Court of Appeals for the Fifth Circuit, and the Hon. Hugo L. Black, Associate Justice, respectively, the School Board proceeded in good faith to comply with the Order of the Court at the opening of school on September 8, 1970, despite the tremendous emotional upheaval on the part of the patrons and students alike, both black and white, and the tremendous logistic problems involved in compliance with such Order.

That the August 6, 1970 Order of the U. S. District Court is the "first bite of the apple" is shown by the pronouncement of the "law of the case" from the bench by the U. S. District Court at the hearing held on August 4, 1970 (Exhibit "A" attached hereto).

It is thus obvious that if the District Court's decision as to the constitutional duty imposed upon a metropolitan school district, such as that of the Consolidated City of Jacksonville, to integrate the black student bodies for integration sake alone, of all of the remaining 18 black schools in the ghetto is correct, the following alternatives exist:

(a) The School Board will very promptly be required, (either by subsequent Order of the U. S. District Court or by the United States Court of Appeals for the Fifth Circuit in the appeal now pending), *to bus all of the black students in the remaining 18 black ghetto schools out of the ghetto to other schools in the system, thus requiring these other schools to go on double sessions, or,*

(b) *to bus all of the black students remaining in the 18 black ghetto schools out of the ghetto and bus an equivalent number of white students from other parts of the school district into the ghetto to fill up the vacant ghetto schools which would be emptied by the busing of the black students out of the ghetto.*

Either of the foregoing alternatives would require a massive additional busing operation that would cost the local School Board an additional expenditure in excess of one million dollars annually.

A moment's comprehension of what is obviously involved in either of the foregoing alternatives reveals that they are somewhat incredible.

And yet these are the only practical alternatives to carrying out the doctrinaire "law of the case" as laid down by the U. S. District Court in the *Braxton* case and apparently is in harmony with the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Bradley v. Board of Public Instruction of Pinellas County,* No. 28639, Fifth Circuit, filed July 29, 1970, ... F.2d ..... where a similar type of massive busing of children in and out of the ghetto was mandated by the U. S. Court of Appeals for the Fifth Circuit with reference to the ghetto schools located in the City of Tampa, Florida.

It should be recognized that nowhere in the Court Order of August 6, 1970 is there any finding that the Duval County School Board is, or was, responsible for the maintenance of the ghetto area in the City of Jacksonville or was there any finding that the neighborhood school zone boundaries as amended by prior Order of the Court and by voluntary action of the present School Board and its Superintendent, were established on anything other than an objective non-racial basis.

Consideration of the U. S. District Court Order when taken into conjunction with its ruling on the "law of the case" at the hearing on August 4, 1970, reveals a simple fiat to the effect that even though neighborhood school boundaries may be objectively established on a non-racial criteria, black or substantially all-black student-populated schools must "go" and we therefore have a clear mandate to arbitrarily commence the racial integration of the student populations of the subject ghetto schools with integrated schools in other areas of the community solely for the purpose of playing a "numbers game", i.e., solely for the purpose of reducing the number of said black or substantially all-black schools in the ghetto.

If the Constitution requires integration of all of the 26 ghetto schools, either all of the students in the ghetto schools must be bused out of the ghetto into double sessions in their newly assigned schools, or the School Board would have to bus the black students out of the ghetto schools and bus an equal number of white students into the ghetto schools.

Is not such a doctrinaire requirement of busing children out of the ghetto or into the ghetto nothing more than the exclusion of said children solely because of race from attendance at a particular school which they would otherwise attend based upon non-racial objective criteria?

Is not such action, therefore, in direct violation of the mandate of this Court in *Brown v. Board of Education* (1954), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873 (*Brown* I); *Brown v. Board of Education* (1955), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed 1083 (*Brown* II); and *Alexander v. Holmes County Board of Education, supra,* in which latter case this Court held that no child was to be excluded from a particular school because of race?

The constitutional "knife" of *Alexander v. Holmes County Board of Education, supra,* should cut both ways.

If, in pre-*Brown* I days, it was unconstitutional to arbitrarily bus black school children miles from their home to attend *de jure* all-black schools, then it would seem inevitable that it is just as unconstitutional today to artificially "bus" black and white children solely because of their race to a particular school other than the one to which they would normally attend as based upon objective non-racial and uniform criteria.

The only possible justification attributable to the U. S. District Court action and to the action of the other U. S. District Courts in the South this summer in imposing similar doctrinaire requirements of integration for integration sake alone

of ghetto schools lies ultimately in the case of *United States v. Jefferson County Board of Education,* 372 F.2d 836 (C.A. 5, 1966), commonly referred to as *Jefferson* I, affirmed and adopted en banc with minor clarifications, 380 F.2d 385 (*Jefferson* II).

In *Jefferson* I, supra, a three-judge panel of the United States Court of Appeals for the Fifth Circuit considered the provisions of the Civil Rights Act of 1964, with reference to school desegregation cases in the Southern Circuit.

After giving lip service to the fact that the Congress of the United States "speaks as the voice of the nation":

> "More clearly and effectively than either of the other two coordinate branches of the government, Congress speaks as the voice of the nation."[5]

And:

> "We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy . . . "[6]

This three-judge panel of the United States Court of Appeals for the Fifth Circuit then proceeded to do just the opposite. They promulgated the intellectual distinction of "de facto - de jure" forms of segregation. In essence, as noted very succinctly by William C. Cramer, M.C., in his *amicus curiae* brief on Page 20 thereof:

> "Adopting the 'ingenious though illogical distinction' between so-called *de facto* and *de jure* segregation, it concluded that Congress had intended that the 'equal

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5. Id. at page 850.

6. Id. at page 859.

> protection clause' was to be applied unequally and that, in effect, every manifestation of racial isolation in the South constituted *de jure* segregation. * * * For the Court to have imputed such an intention was to thwart congressional will and, in the process, raise the spectre of a Second Reconstruction in America – one effected by judicial ukase."
>
> "The Court's rationale for this divisive rendering of the Union of States was this: Since the South was the area of the Nation which had maintained dual systems of education imposed by law prior to *Brown* I, the South required special rules for rehabilitation and reform – by implication, in perpetuity."

In *Jefferson* I, the Court concluded:

> "Adequate redress . . . called for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state system of *de jure* school segregation *and the organized undoing of the effects of past segregation.*"[7]

The Jefferson I Court cited with approval, Fiss, *Racial Imbalance in the Public Schools:* The Constitutional Concepts, 78 Harvard Law Review, 564 (1965); and Wright, *Public School Desegregation,* 40 N.Y.L.R. 285 (1965), for the following exercise in conceptual reasoning.

(a) The *Jefferson* I Court assumed as did Professor Fiss and Judge Wright, that residential segregation in ghettoes in the South were caused *solely* as a result of past *de jure* action e.g., "Jim Crow" laws and/or local ordinances.

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7. *Jefferson* I at 866.

(b) That racial segregation in the North, East or West was caused solely by entirely different reason, i.e., economic factors.

(c) Therefore doing away with the "Jim Crow" laws in Southern states was not enough – that school boards being agencies of the "state" should proceed affirmatively in a ". . . organized undoing of the effects of past segregation."

Implicit in this "reasoning" is the belief that if there had been no "Jim Crow" laws, that there would have been no residential racial segregation in metropolitan Southern cities.

This is naive.

Racial segregation is caused in *all* metropolitan areas by three basic factors: (a) density of population, (b) poverty of the vast majority of the ethnic group in the ghetto, and (c) personal, racial and/or religious prejudice of both the ethnic minority group and the predominant majority group outside of the ghetto.

These three factors are the basic factors that cause ghettoes of Irish Catholics in Boston; Italian Catholics in New York; Protestant Blacks in Chicago, as well as the black ghettoes of Atlanta, Dallas and Jacksonville, merely to name a few.[8]

The truth of the matter is that if there had been no "Jim Crow" laws in the State of Florida, but if all other factors had been historically equal, i.e., population density, poverty

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8. We, of course, are aware of the fact that where "Jim Crow" laws exist, they have an additional oppressive factor in *maintaining* th ghetto. To say that they caused the creation of the ghetto is an entirely different matter. We note for the record that the Supreme Court of Florida, the Florida State Legislature, the new Florida Constitution, and the Council of the City of Jacksonville, have all taken affirmative action since *Brown* I and *Brown* II to abolish, repeal or overrule all of the former vestiges of "Jim Crow" laws and ordinances existing.

of blacks, and racial prejudice, there would still be a ghetto in the City of Jacksonville as there is in every other large metropolitan area in the South, North, East and West.

It is interesting to note that many other circuits in the United States have rejected the concept of *Jefferson* I and *Jefferson* II, e.g., *Deal v. Cincinnati Board of Education* (6 Cir. 1966), 369 F.2d 55 (*Deal* I), cert. denied ..... U.S. 847, 88 S.Ct. 39, 19 L.Ed 2d 114, wherein it was held:

> "We hold that there is no constitutional duty on the part of the board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose."

See also, *Annotation,* "De Facto Segregation of Races in Public Schools", 11 A.L.R. 3rd 780, for cases from other circuits holding to the same import.

It would seem that not even the United States Court of Appeals for the Fourth Circuit in the instant case has adopted such a doctrinaire position as expressed by the *Jefferson* I and *Jefferson* II Court, *supra.* See, for example, Page 10 of the Opinion of the United States Court of Appeals for the Fourth Circuit in *James E. Swann, et al, v. Charlotte-Mecklenburg Board of Education, et al,* Nos. 14,517, 14,518, which is the subject of this present certiorari proceeding:

> "We adopted the test of reasonableness – instead of one that calls for absolutes – because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides the test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns and small

> cities and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils. *Some cities, in contrast, have black ghettoes so large that integration of every school is an improbable, if not an unobtainable goal.* Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary preliminary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruction of Orange County,* No. 29124, Feb. 17, 1970, ... F.2d ..... (5th Cir.)." (Emphasis supplied)

However, it is interesting to note that closer examination of the *Ellis* case, *supra,* cited by the Fourth Circuit Court of Appeals in the *Swann* opinion, reads as follows:

> "There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white student population (88%) *and to residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns.* The majority-minority transfer provision under the leadership of the bi-racial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the bi-racial committee, will guarantee elimination in the future. In addition, open housing, Title VIII, Civil Rights Act of 1968, 42 U.S.C.A., Sec. 3601, et seq., *Jones v. Mayer,* 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed 2d 1189, will serve to prevent neighborhood entrapment."
>
> (Emphasis supplied)

The black or substantially all-black schools in the Jacksonville ghetto obviously are the result of residential patterns as they are, and were, in Orange County, Florida, and are, and were, in all of the other metropolitan ghettoes, not only in the South but also throughout the United States.

It is interesting to note that nothing is said in the *Ellis* case, *supra,* about any constitutional duty upon the Orange County School Board to racially integrate the remaining all-black schools in Orange County by the use of such devices as pairings, clusterings, gerrymandering of zone boundaries, etc. This panel of the Fifth Circuit, in *Ellis,* recognized that the attendance boundaries were drawn on objective non-racial criteria and that any racial segregation resulting in all-black or substantially all-black or all-white schools was due to the obvious fact of *de facto* residential segregation.

Parenthetically, one might ask that if this is the rule that was applied in Orange County, Florida, why is it not the rule to be applied in Duval County, Florida, and in every other metropolitan school district which is under orders from the Fifth Circuit to arbitrarily integrate their black ghetto schools, e.g., *Bradley v. Board of Public Instruction of Pinellas County, Florida, supra*? ....

As Judge Bell, the author of the opinion in the *Ellis* case, *supra,* stated in his succinct dissent in *Jefferson* II, supra, at Page 417:

> ". . . The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or

> that there must be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to 'stick to our last' so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. *Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal . . .*"
>
> (Emphasis supplied)

If Judge Bell (and other Federal Judges who have pronounced the same opinions) is correct in his reasoning that "integration is not an end in itself", then we respectfully submit that this Court should take this occasion to overrule or modify the reasoning of *Jefferson* I and *Jefferson* II, and to bring the majority of the Judges of the United States Court of Appeals for the Fifth Circuit in line with the reasoning of the many other circuits in the United States that have dealt with this question.

If Judge Bell's reasoning is wrong, then we respectfully submit that this Court should also, *in such event,* promulgate a rule that "integration is an end in itself" but that it should apply to *all* school systems in the United States, e.g., that there is a constitutional duly upon the Cook County, Illinois School Board to integrate all of the black ghetto schools in Chicago; that a similar duty rests upon the New York City School System; the Philadelphia School System; the San Francisco School System; and not just merely the school systems of Tampa, Jacksonville, Miami, and Charlotte, North Carolina.

It is respectfully submitted that school integration cases are not the proper vehicle to launch an educational or sociological "experiment" in reshaping a "brave new world" to

effectuate ". . . new notions of what a free society embraces."

As noted by a three-Judge panel of the United States Court of Appeals for the Fifth Circuit in *Ellis, supra,* the remedy for correcting ghetto areas lies in the field of open housing legislation, such as Title VIII, Civil Rights Act of 1968, 42 U.S.C.A., Sec. 3601, et seq.

What was attacked in *Brown* I and II, *supra,* was the operation of an official dual school system.

This had to be the case because it is axiomatic that the Fourteenth Amendment to the United States Constitution reaches only official action and not to any separation or discrimination as between the races caused by individual prejudices or desires.

We submit the test is, and should be, whether a school district, either North or South, is operating a school system in that all of its official policies and actual practices are applied district-wide without regard to race.

Responsibility for the poverty, density of population, personal prejudice, apathy, etc., or whatever other non-official reasons which exist in maintaining the ghetto, not only in the City of Jacksonville, but in every other metropolitan area in the United States cannot logically be visited upon present-day school boards.

School integration cases should not be the vehicle to either enforce Fair Housing Laws; to judicially correct the acts of personal prejudice or the result of economic poverty; or to advance a sociological or educational theory of what is "good" or "bad" from an academic point of view in "integration for integration sake alone."

We should remember that our late colleague and friend, Justice Oliver Wendell Holmes, when speaking in an eco-

nomic context, once reminded us: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics.*"[9]

Neither should the Fourteenth Amendment enshrine any particular sociological or educational philosophy, either pro or contra, concerning integration as an end in itself.

Constitutional rights carry their own justification. They do not need excess baggage to support their validity.

A child, black or white, is entitled to attend a school system which is operated on objective non-racial lines in the assignment of teachers, assignment of pupils, distribution of maintenance and building supplies, etc. without regard to the race of the student concerned.

Where attendance boundaries of existing schools are adopted upon the obvious common sense plan of a neighborhood school program and where the boundaries are established objectively and on the non-racial basis of capacity and proximity of home to school, the fact that the student population of the schools reflects the residential segregation patterns of the city as a whole would seem to be no reason to require an affirmative, arbitrary and doctrinaire constitutional duty to "integrate as an end in itself."

And yet this is exactly what the United States District Court has done in the Consolidated City of Jacksonville; this is what many of the three-judge panels of the United States Court of Appeals for the Fifth Circuit have required, e.g., *Bradley v. Board of Public Instruction of Pinellas County, Florida, supra;* but this, however, is not what the other circuits in the United States have decided.

---

9. Dissent in *Lochner v. New York,* 198 U.S. 45, 75, 76 (1905).

CONCLUSION

It is respectfully submitted that the time has now come for this Court to grapple with the problem which is presented to it within the framework of Question No. 1 as stated in the Petition for Certiorari in the subject case arising in Charlotte, North Carolina. Either:

(a) That there is a constitutional duty to integrate for integration sake alone. If this is so, then that duty should apply throughout the entire United States and this Court should say so.

(b) That there is no duty imposed by the Constitution to integrate for integration sake alone. If that is true, then this Court should say so.

We earnestly and respectfully submit to this Court that the hour for decision has now arrived.

Respectfully submitted,

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In The
Supreme Court of the United States

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

EXHIBITS TO AMICUS CURIAE BRIEF OF CHARLES E. BENNETT, M.C.

INDEX TO EXHIBITS

Exh. 1

EXHIBIT "A"

"MR. BUCKMAN:

Your Honor, may I state, on behalf of my client — both clients — the Board and Dr. Hardesty — that we certainly subscribe to the view that this matter should be settled locally. It seems to me, *as I understand Your Honor's ruling this morning, is the 27 all-black schools must go.* For all practical purposes, that - - -

"THE COURT:

I don't say all.

"MR. BUCKMAN:

Well, substantially.

"THE COURT:

I mean substantially. I mean, you can't justify that.

"MR. BUCKMAN:

I understand, Your Honor. But I would point out - - -

"THE COURT:

And you are familiar with these cases - - -

"MR. BUCKMAN:

I am, too, sir. But I - - -

"THE COURT:

And it just won't hold up.

"MR. BUCKMAN:

I understand that, Your Honor. But I merely point out, most respectively, *that this is the first time*

in this case that we have been told that substantially all of the ghetto schools must go. Now, that is, therefore, the law of the case, as far as I'm concerned, and we can go forward - - -

"THE COURT:

That's the law of the case, so far as I'm concerned; yes"[1]

1. Verbatim transcript of hearing held in open Court, August 4, 1970.

Exh. 3

EXHIBIT "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4598-Civ-J

DALY N. BRAXTON and SHARON BRAXTON, etc., et al.,

Plaintiffs,

v.

THE BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, etc., et al.,

Defendants.

(Filed August 6, 1970)

ORDER

Upon consideration of the briefs filed pursuant to this Court's order of July 7, 1970, and after hearings on July 28 and August 4, 1970, this Court finds that the projections of the school board regarding the 1970-1971 school year meet the requirements of a unitary system, as set forth in *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968) in the areas of teacher assignment, transportation, facilities, and extracurricular activities.1/

For the 1970-1971 school year, the system is projected to serve 122,549 pupils in 137 schools. Of that number of pupils, 26,080, or 73.9% of the 35,287 Negro pupils, would attend twenty all-Negro and seven virtually all-Negro schools under

the board's estimate. Such an assignment pattern is inconsistent with recent decisions of the Fifth Circuit Court of Appeals dealing with urban situations. *E.g., Bradley v. Board of Public Instruction* of Pinellas County, No. 28639 (5th Cir., filed July 29, 1970, and July 1, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 64% to 14.2%); *Mannings v. Board of Public Instruction of Hillsborough County,* No. 28643 (5th Cir., filed May 11, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 60% to 21%). *See also Ellis v. Board of Public Instruction of Orange County,* 423 F.2d 203 (5th Cir. 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 51% to 16%); *Davis v. Board of School Commissioners of Mobile County,* No. 29332 (5th Cir., filed June 8, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 60% to 28%).

The school board, and the school superintendent working with it, have not proposed an alternative plan that is legally sufficient, and so the Court must enter the following plan of its own formulation for the 1970-1971 school year.

As stated in *United States v. Board of Education of the City of Bessemer,* 396 F.2d 44 (5th Cir. 1968):

> The question is and must always remain: Is the constitutional imperative being met? That duty is not on plaintiffs, nor on the [federal] government, nor on school children. It is squarely on the back on the State and here, the State's Agents, the School Boards. *Id.* at 48.
>
> We do not seek the burden or responsibility of school operation. We ought not to have it. . . . Now it should be up to school boards either alone in taking the initiative so obviously called for, or in conjunction with

> cooperative (it is hoped) efforts of parent, race, or similar groups to achieve the goal of race-less public schools. To be sure, this puts burdens on all sides, but this too, is part of constitutional democracy. The Judiciary is not, cannot be, the universal salvor. *Id.* at 52.

The Court notes several significant aspects of the present order:

1. The order affirmatively desegregates twelve schools which would otherwise have been entirely or virtually all-Negro in the 1970-1971 school year.

2. The order adopts the school board's own elementary attendance zone boundaries.

3. Special programs at Beal (#11), and Axson (#8), are not disturbed by the order.

4. The order effectively desegregates every Negro elementary school adjacent to a predominately white school without busing children from their residential attendance zone, as modified.

5. Although increases in transportation will be required by the order, the distances involved are small and are confined to the student's residential attendanrce zone. Those residential attendance zones are made larger to include two or more schools under pairing or clustering, but that result does not, and has been held not to, violate the "neighborhood school concept." *Mannings v. Board of Public Instruction of Hillsborough County, supra.* No busing to a non-contiguous zone is required under the order. The board, in carrying out necessary increases in transportation, is authorized to make use of facilities that meet federal standards.

6. Of the seven geographical areas of the county delineated by the school board in its July 20, 1970 study, complete desegregation of all schools is achieved in four areas. The order desegregates the all-Negro elementary schools in the remaining three areas that are not entirly surrounded by other all-Negro schools./2 This plan for pupil attendance has been achieved in a manner that does not materially disturb 108 schools in the system. Six other schools will be only slightly affected by marginal zone boundary adjustments.

7. The order does not violate the integrity of the junior and senior high school grade divisions and thereby avoids vast adjustments in the various educational offerings, athletic programs, and equipment and facilities. All secondary schools under the plan are rezoned rather than paired, clustered, closed, or redesignated as certain grade centers.

8. Most important of all, the plan seeks to prevent the disruption and chaos that would surely occur if the appellate courts were to be froced to rule in the middle of the school year. It further provides some protection from mistakes that might be made by courts, ruling from a distance, which are unfamiliar with the problems existing in the Duval County school system. This Court feels impelled by its sincere concern for the children of our community to shoulder the burden of formulating a plan that seeks to comply with the appellate decisions and, at the same time, protects the welfare of the pupils.

The Court is keenly mindful of the stress this order will put upon the parents, the children, the school board, the teachers, and the community. It is an order required by appellate decisions and by the Constitution, and as such it deserves, and the Court is confident that it will receive, obedience and respect. But as an order affecting the welfare

of many of our children it deserves more than this: it deserves the full cooperation and best efforts of all concerned to ensure that it works with the least possible disruption to sound education in our community. By working together, this plan will succeed in accordance with the law, and will further the best interests of our children.

In accordance with the cited cases, the recommendations of the Florida School Desegregation Consulting Center, filed March 15, 1970, the suggestions of plaintiffs filed July 31, 1970, and the independent consideration given to the case by the Court, it is

ORDERED:

1. Elementary schools Forest Park (#104) shall be paired with Lackawanna (#10); East Jacksonville (#3), with Fairfield (#9); Harbor View (#220), with Hull (#169); North Shore (#70), with Long Branch (#106); and West Jacksonville (#143), with Annie Morgan (#21). Grade centers shall be designated between the paired schools in the discretion of the school board.

4. Elementary schools M. V. Rutherford (#6), Scott (#24), John Love (#73), and Brown (#148), shall be clustered, with grade centers to be designated in the discretion of the school board.

5. Matthew-Gilbert Senior High School (#146) is to be closed as a senior high school, and senior high school pupils presently assigned to it shall attend Andrew Jackson Senior High School (#35). Excess pupil capacity in Matthew-Gilbert Junior High School (#146), resulting from the above reassignments, shall be filled by rezoning pupils from Kirby-Smith Junior High School (#25), which may thereby permit closing of the Kirby-Smith Annex. All re-

zoning shall be directed toward fulfilling the duty of the school board affirmatively to desegregate the affected schools. Thus, wherever possible, without creating a non-contiguous zone, lines should be drawn to transfer to the recipient school the maximum number of students in the minority race there.[3/]

6. Eugene Butler Senior High School (#168) is to be closed as a senior high school, and senior high schools pupils presently assigned to it shall be rezoned to the adjacent high schools, namely New Stanton Senior High School (#153), Paxon Senior High School (#75), and Robert E. Lee Senior High School (#33). Certain students from Lee (#33) may be rezoned to attend N. B. Forrest Senior High School (#241). The school board is directed to rezone pupils accordingly. Excess pupil capacity in Eugene Butler Junior High School (#168), may be filled by rezoning pupils from adjacent junior high schools, which at present are overcrowded. All rezoning shall be directed toward fulfilling the board's duty affirmatively to desegregate the affected schools. Thus, wherever possible, without creating a non-contiguous zone, zone lines should be drawn to transfer to the recipient school the maximum number of students in the minority race at the recipient school.

7. Plaintiffs' requests for modifications at Raines High School (#165), and Ribault High School (#96), are denied because the changing demographic composition of that area and the projected composition of the respective feeder schools make such changes useless to fulfill the affirmative duty to desegregate imposed by the appellate courts and the Constitution.

8. Transfers from residence attendance zones shall be permitted only as defined in this Court's orders of January 24, 1967, and August 22, 1967, namely, transfer for special needs,

hardship transfers, transfers ordered by Duval County Juvenile Court, and majority to minority transfers. Strict adherence to this provision will tend to desegregate schools not affected by the above order.

9. This Court, on its own motion, hereby orders added as necessary parties under Rule 19, Federal Rules of Civil Procedure, the Honorable Hans G. Tanzler, as Mayor of the Consolidated City of Jacksonville, and the members of the City Council of the Consolidated City of Jacksonville.

10. Plaintiffs' attorney, Earl M. Johnson, Esquire, is requested to make a designation of substitute local counsel in light of the above joinder of additional parties. *See* rule 3(D)(2), Local Rules (M.D. Fla., 1968 Rev.).

11. Jurisdiction is retained in this cause for such further action as may be necessary.

DONE AND ENTERED this 6th day of August, 1970.

/s/ WM. A. McRAE, JR.
Judge

Copies to counsel

FOOTNOTES

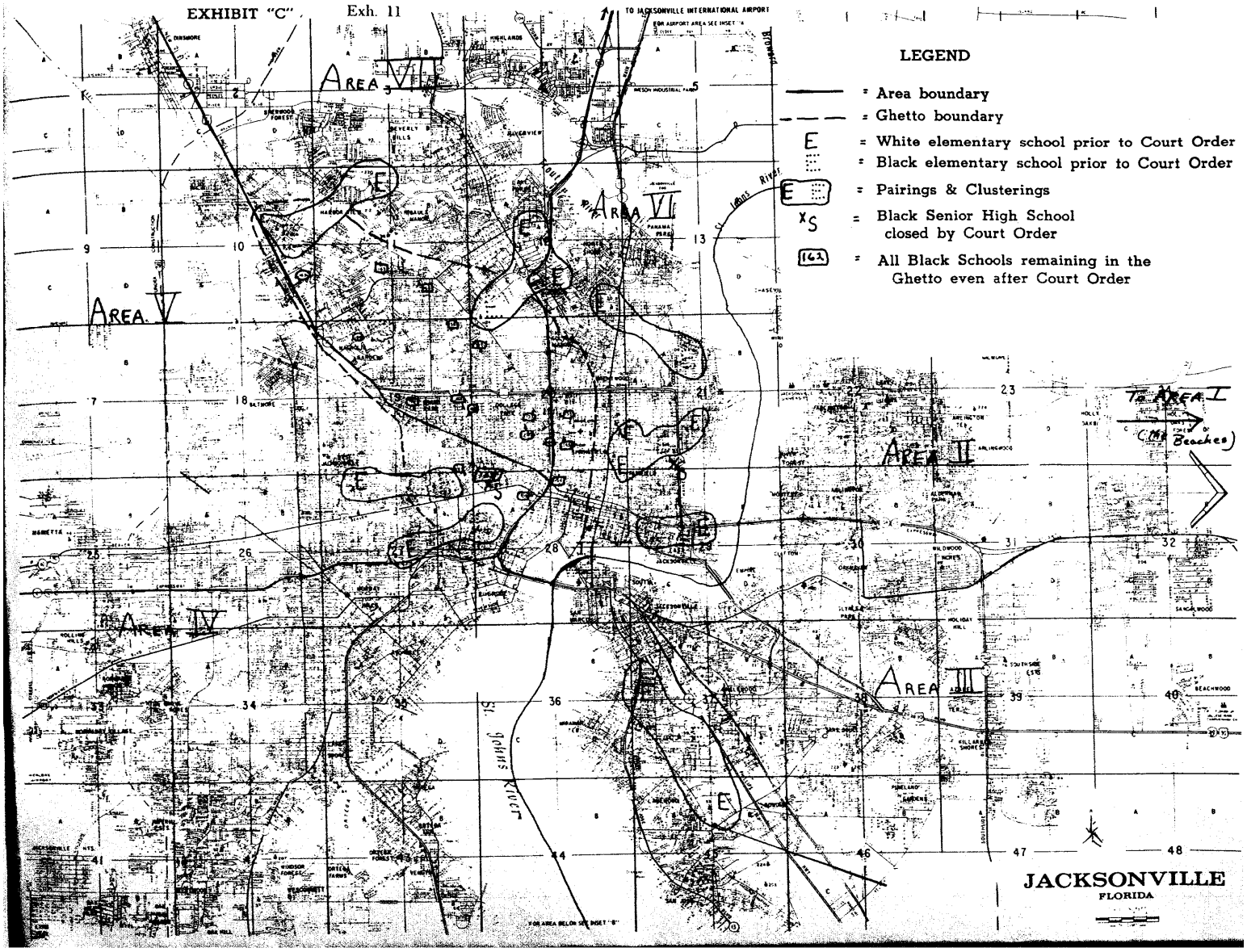
1/ To the extent this order affects these areas, the school board shall attempt to make adjustments to comply with the Singleton requirements set forth in this Court's order of December 30, 1969, especially in the area of teacher assignment. Some permissible deviation from the precise compliance for teacher assignments (reflected in the July 20, 1970 study) may occur when the respective teachers are reassigned with the students transferred by this order.

2/ Two exceptions to this statement are Beal (#11), which has a special federal program, and Picket (#205), which is separated from two larger all-Negro schools by two separate railroads and an interstate highway.

3/ To the objection that such affirmative rezoning is unconstitutional "gerrymandering" that uses for purposes of desegregation a technique impermissibly used in the past to segregate, the Fifth Circuit Court of Appeals stated sevral years ago the following:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. *United States v. Jefferson County,* 372 F.2d 836, 876 (5th Cir. 1966).

Two weeks ago, in making reference to the above quotation, the Fifth Circuit stated: "At this point, and perhaps for a long time, true non-discrimination may be attained, paradoxically, only by taking color into consideration." *Youngblood v. Board of Public Instruction of Bay County,* Florida, No. 29369 (5th Cir., filed July 24, 1970).



CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief as Amicus Curiae were served by U. S. Mail upon:

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this 7th day of October, A. D. 1970.

/s/ CHARLES E. BENNETT
ATTORNEY