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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., *Petitioners,*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents.*

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The National Education Association hereby moves, pursuant to Rule 42 of the Rules of the Supreme Court, for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari filed June 18, 1970, in behalf of James E. Swann, et al., in the above-entitled cause. Consent to the filing of the brief has been sought from the petitioners and from the Charlotte-Mecklenburg Board of Education and members thereof, respondents. Petitioners have consented.[1] No response has been received to date to the requests made of the Charlotte-Mecklenburg Board of Education and the members of the Board.

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[1]The written consent of the petitioners has been filed with the Clerk.

The National Education Association (hereinafter NEA) is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million regular members, and is the largest professional organization in the world. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is (34 Stat. 805)–

> to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

NEA has conducted detailed studies of the educational implications of the maintenance of dual school systems based upon race. It has long been committed to the principle that racial segregation in education adversely affects the quality of the education received by both black and white students. Reflecting this position, the Representative Assembly at the June 1969 Convention adopted a formal continuing resolution providing, in part (NEA Handbook 1969-70, p. 66):

> The Association endorses the decision of the U.S. Supreme Court in Brown v. Board of Education and urges compliance with subsequent federal laws and regulations in this area . . . .

On March 20, 1970, the Executive Committee of the Association adopted a more specific resolution on desegregation in the public schools and recommended it to the Board of Directors and the 1970 Representative Assembly:

> The NEA believes it is imperative that desegregation of the nation's schools be effective. Policies and guideline statements for school desegregation in all parts of the nation must be strengthened and must comply with *Brown v. Board of Education* and subsequent judicial decisions and with civil rights legislation and decisions.

> The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographic realignment, pairing of schools, grade pairing and satellite schools. These arrangements often require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and spirit of the law.

It has long been settled that complete disestablishment of formerly *de jure* segregated school systems is required by the Constitution. This case presents to the court important issues concerning the meaning of a school board's responsibility to convert from a dual to a unitary school system and the steps which it may be required to take to accomplish that conversion. As the principal association of educators in this country, NEA can draw upon a breadth of experience to inform the court as to the reasonableness of the requirements for desegregation framed by the district court's order of February 5, 1970, when judged from the standpoint of educational considerations as well as the practices and expenditures of other school systems. Pursuant to leave granted by the court of appeals, NEA filed a brief *amicus curiae* in the proceedings below (see, *e.g.*, Appendix to Petition for Certiorari, pp. 194a, 211a) and, upon invitation, presented oral argument.[2]

Accordingly, the National Education Association respectfully requests that this Court grant leave to file the attached

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[2]The NEA and its State associations have participated as *amicus curiae* in other major proceedings involving issues of education and race. See *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, No. 29745 (5th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Lee v. Macon County Board of Education*, 283 F. Supp. 194 (M.D. Ala. 1968).

brief *amicus curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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June 25, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., *Petitioners,*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents.*

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The National Education Association (hereinafter NEA) is an independent, voluntary organization of professional educators. It has over one million members, including teachers, supervisors, and administrators. As stated in the Association Charter, its purpose is "to elevate the character and advance the interests of the profession of teachers and to promote the cause of education in the United States." Both the NEA and its members have a deep interest in the quality of education received by the children of all races. NEA endorses the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), and considers it imperative that desegregation of the nation's schools be complete and effective. In pursuit of these purposes NEA has recently conducted investigations of the problems of race and education in the school systems of Wilcox County, Alabama;

Baltimore, Maryland; some 22 counties in Louisiana; Detroit, Michigan; some 30 counties in Mississippi; Hyde County, North Carolina; and the region of East Texas. NEA has also participated in several school desegregation cases, including the appeal proceedings before the Fourth Circuit in the instant case, and in numerous others has actively supported efforts to secure judicial relief.

STATEMENT

1. Description of the Charlotte-Mecklenburg School System. The Charlotte-Mecklenburg School System is the forty-third largest in the United States, educating more than 84,500 pupils in 106 schools, including 76 elementary schools, 20 junior high schools, and 10 senior high schools. While the system covers the county's 550 square miles, over 50,000 of the students reside within the City of Charlotte. (Appendix to Petition for Certiorari, pp. 9a-10a, 18a, 85a-86a, 123a.)[1] The 1969-70 budget was $57,711,344, of which nearly $51,000,000 represented operational expenses (139a).[2]

Of the 84,500 students, about 29 percent, or 24,714, are Negro, and about 71 percent, or 59,828, are white (10a, 85a). Approximately 21,000 of the system's 24,714 black students attend schools within the City of Charlotte (57a). The predominant percentage of the system's black students live in a triangular area, four or five miles on a side, in the northwestern quadrant of the city. This area is almost exclusively Negro. (1a, 12a, 14a, 142a-144a.)

2. History of Desegregation. The Charlotte-Mecklenburg Board of Education has operated a dual system of schools based upon race (185a). A suit for desegregation was initiated in 1965 (1a), and the district court ordered into effect

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[1]The Appendix will be cited hereinafter by page number only.

[2]Expenditures for construction of school buildings are not included in these budget figures (139a).

a plan proposed by the School Board based upon geographic zoning with a free transfer provision which was approved by the court of appeals (185a). In September 1968, following the decisions of this Court in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Raney v. Board of Education*, 391 U.S. 433 (1968), and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), the petitioners filed a motion for further relief which sought greater speed in desegregation and elimination of other racial inequities (1a). Following a hearing, the district court concluded that the "manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance, and community development" (28a); that the Board has created or controlled school zones so as to promote segregation of black students (54a); and that the Board has an affirmative duty to promote faculty desegregation and desegregation of pupils, and to deal with the problem of the all-black schools (29a). The district court ordered the Board to submit by May 15, 1969, a plan for complete desegregation of teachers to be effective with the 1969-70 school year, and for desegregation of pupils to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970 (30a, 31a).

Pursuant to this and subsequent orders of the district court, the Board submitted two plans, neither of which was considered adequate by the court (51a, 55a, 68a, 69a). On August 15, 1969, because of the shortness of time before the opening of school, the district court approved an interim plan for the 1969-70 school year and directed the Board to present, on November 17, 1969, a plan for complete faculty and student desegregation for 1970-71 (70a-71a). The 1969-70 plan proposed to close seven black inner-city schools and to transfer their 3,000 students to suburban schools, all but one of which were white (83a). It also proposed to transfer 1,245 black students from eight over-crowded black or predominantly black schools to white suburban schools (64a, 83a). The Board, however,

did not carry out the plan (83a). Only 1,315 of the promised 4,245 black students were transferred to white schools (84a).

The Board's November 17, 1969 plan was disapproved by the district court which found that "it contains no promise nor likelihood of desegregating the schools" (93a). Among other provisions, the plan provided that no white students would be assigned to schools with less than 60 percent whites; and that where schools were to be desegrated, the ratio of black to white students would not exceed 60 percent white–40 percent black (94a-95a). Seven all-black elementary schools were to remain that way (94a).

The district court thereupon designated a consultant to prepare a desegregation plan in accordance with nineteen principles drawn from the decisions of this Court and the lower federal courts and set forth in the opinion and order (103a-108a). The court invited the Board to submit a further plan of its own (110a-111a).

3. The Desegregation Plan Ordered by the District Court on February 5, 1970. Reviewing the results of almost four and one-half years of court-ordered desegregation, the district court found in November 1969 that the Charlotte-Mecklenburg schools "are still in major part segregated or 'dual' rather than desegregated or 'unitary' " (86a). "Of 24,714 Negro students, something above 8,500 are attending 'white' schools or schools not readily identifiable by race"; 13,945 were still in 90-100 percent black schools;[3] and 9,216 of these were in 100 percent black schools. Of 59,828 white students, over 45,000 were attending schools which were 86-100 percent white (85a-86a). Ninety-eight of the 106 schools in the System continued to be "readily and obviously identifiable by the race of the heavy majority of their faculties" (84a).

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[3]The court found that more than 16,000 black students were attending schools which were between 56 percent and 100 percent black (85a).

The district court found that these student assignment patterns reflected the segregation of Mecklenburg County's residential areas (86a). This segregation, it said, "is the result of a varied group of elements of public and private action, all deriving their basic strength originally from the public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school buses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods" (86a-87a; see also 12a-14a). Based upon these findings, the district court ruled, "[t]here is so much state action embedded in and shaping these events that the resulting segregation is not innocent or '*de facto*,' and the resulting schools are not 'unitary' or desegregated" (87a).

Faced with these conditions, the district court, on February 5, 1970, framed a desegregation plan using, where it could, portions of the plan submitted by the School Board (see 119a-121a). The court held that an acceptable plan would have to be consistent with sixteen requirements set forth in the order (117a). Some of the requirements were expressed in mandatory terms, such as number five "[t]hat no black school be operated with an all-black or predominantly black student body." Others, although framed as requirements, were drawn to allow leeway for practical considerations incident to the operation of the school system. These included number six calling for the assignment of pupils so that "as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students," and number seven providing that transportation be offered on a uniform non-racial basis to children who live farther from the school to which they are assigned "than the Board determines to be walking distance."

The district court then approved a desegregation plan in four separate parts, one each for the senior high schools, for the junior high schools, for 27 elementary schools for which new zones were defined, and for 34 elementary schools which were paired and assigned noncontiguous zones. For the senior high schools, the court approved a zoning plan submitted by the Board which integrated nine of the system's ten schools with percentages of black students ranging from 17 percent to 36 percent. The court ordered one modification: it required that 300 pupils be transported from the black residential area of the city to the Independence School which would have been 2 percent black and under-capacity under the Board's plan (190a, 123a).

The court disapproved the Board's rezoning plan for the junior high schools because it left the Piedmont School 90 percent black, and offered the Board various alternatives which would desegregate all the junior high schools. The Board chose to adopt the plan proposed by the court's consultant which combined zoning and satellite districts and which left the junior high schools from 9 percent to 33 percent black (125a, 190a-191a).

The Board's plan for the elementary schools was based entirely upon zoning. It would have left more than half the black elementary pupils in nine schools 86 to 100 percent black and would have assigned about one-half the white elementary pupils to schools 86 to 100 percent white (191a). Rejecting that proposal, the court adopted a plan offered by its consultant which drew new zones for 27 schools and paired 34 others, each of which was assigned noncontiguous zones. Approximately 22,400 of the 44,000 elementary pupils would attend the paired schools, 10 of which are in the city and 24 of which are outlying suburban white schools. Children in grades 1-4 from the zones surrounding all 34 schools would attend the 24 suburban schools, while those in grades 5-6 would attend the 10 city schools (133a). The racial make-up of the elementary schools would vary from 3 percent to 41 percent black (129a-131a).

Under the court-approved plan, no schools would remain all-black or predominantly black. The pairing and grouping of schools, as well as rezoning provided for in the plan, would, the court found, add a maximum of 13,300 children who "may conceivably require transportation" to the 23,600 pupils transported daily on school buses and the 5,000 whose fares on public coach lines are paid by the Board (138a, 155a). Of these 13,300 children, 1,500 would be at senior high level, 2,500 at junior high, and 9,300 at elementary school level (155a). One hundred thirty-eight additional buses would be required, 90 for the elementary students (155a). The cost of implementing the plan would be $266,000 for bus operations ($186,000 of this for the elementary school phase) and a one-time expenditure of $745,200 for additional buses ($486,000 for the elementary phase) (156a-157a, 182a, 191a).[4]

4. The Decision of the Court of Appeals. The court of appeals, by a vote of four to two, vacated the district court's judgment.[5] The court carefully analyzed and specifically accepted the district court's finding "that residential

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[4]The district court did not consider the plan immutable. It stated that "the duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, . . . *are illustrations of means or partial means to that end.* [Footnote omitted.] The defendants are encouraged to use their full 'know how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or the plan, but the *results.*" The court stated its intention "to leave maximum discretion in the Board to choose methods that will accomplish the required result." (118a-119a, 121a.)

[5]Chief Judge Haynsworth and Judge Boreman concurred in an opinion of Judge Butzner. Judge Bryan wrote a separate opinion dissenting in part but joined in voting to vacate the judgment of the district court in accordance with the opinion of Judge Butzner "for the sake of creating a clear majority for the decision to remand" (226a). Judges Sobeloff and Winter concurred in part and dissented in part (201a). Judge Craven disqualified himself (184a).

patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action" (186a). It concluded that "[p]redominantly black schools were the inevitable result" of the School Board's policy of locating schools and fixing their size to fit these segregated residential patterns (186a). The court of appeals recognized that this condition was not unique to Charlotte; that "[s]imilar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally" (188a).

The court of appeals then declared three general principles which it would apply to resolve the issues in the case: "first, not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race" (189a).[6] It held bussing to be "a permissible tool for achieving integration," but declared that "[i]n determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (194a).

Applying these principles, the court of appeals approved the desegregation plan for junior and senior high schools, holding that "it provides a reasonable way of eliminating all segregation in these schools" (195a). The appellate court also affirmed the district court's disapproval of the School Board's elementary plan because it left about one-half of

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[6]The court identified such "further steps" to include special classes, functions and programs on an integrated basis to be made available to pupils in the black schools, majority to minority transfers with transportation provided, and assignment to an integrated school for a later portion of a black student's career (189a).

both black and white pupils in schools that were nearly completely segregated (197a).[7] However, the court of appeals found the elementary plan approved by the district court unacceptable, holding that "[t]he board . . . should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system" (198a).[8]

REASONS FOR GRANTING THE WRIT

1. **Introduction.** The decision of the Court of Appeals for the Fourth Circuit presents two issues of fundamental importance to the future course of school desegregation. The first issue is whether a school board, in fulfilling its obligations to establish a unitary system, must disestablish the identity of all "black" and "white" schools by reassigning students, and providing transportation where necessary, even though this will require the board to bear financial and other burdens.[9] The second issue, which arises only if this

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[7]The court of appeals also approved the provisions of the district court's order dealing with faculties (185a).

[8]The court's use of the phrase "such extensive additional bussing" followed a recitation of the following facts: the plan would require transporting 9,300 pupils in 90 additional buses; the greatest portion would involve cross-bussing; the average daily round trip would approximate 15 miles through central city and suburban traffic; the additional elementary pupils would represent an increase of 39 percent over all pupils presently being bussed and would require an increase of about 30 percent in the present fleet of buses; and, when added to the additional bussing required under the junior and senior high plans, the total percentage increases would be: pupils, 56 percent; and buses, 49 percent (198a).

[9]As we show *infra*, pp. 16-17, the true basis of the conclusion of the court of appeals that the elementary school plan was unreasonable had to be the financial cost entailed in purchasing and operating the 90 additional buses required to transport the 9,300 additional children required to be bussed. The reasonableness of the plan judged upon the basis of the other measures referred to by the court of appeals—age of pupils, time and distance required for transportation and effect on traffic—appears clear on this record.

Court should conclude that the constitutional obligation to establish a unitary system may be circumscribed by the costs and other burdens its fulfillment would require a school board to assume, is what standards school boards and district courts should apply in framing acceptable desegregation plans.

As the court itself recognized (186a-187a), the duty of virtually every school board with responsibility for an urbanized area of any size will hinge upon the resolution of these issues. Undoubtedly too, the principle announced by the Fourth Circuit, if allowed to stand, would significantly influence the future course of desegregation of rural systems as well.[10] Thus, the case is truly one of national significance.

2. The Duty to Disestablish Racially Identifiable Schools. The court of appeals quite properly affirmed the district court's conclusion that the predominantly black schools in the Charlotte-Mecklenburg system are the "inevitable result" of state action (186a).[11] Having so ruled, the primary question, then, was whether, under the Equal Protection Clause of the Fourteenth Amendment, the School Board was required to reassign students so as to disestablish the racial identity of these schools.

Until this case, it was recognized that the constitutional duty of a school board under such circumstances was to terminate all vestiges of its dual system "at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20

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[10]The considerations on which the duty to disestablish the racial identity of predominantly black schools would depend—cost, for example—(see discussion, *infra*, pp. 16-17) are not unique to urban systems. History teaches that rural systems would urge them as grounds for relief from the constitutional mandate to operate unitary schools. Indeed, the court of appeals suggested that the constitutional principles "should be applied nationally" wherever segregation exists because government policies fostered segregated neighborhood schools (188a).

[11]The findings of the district court and their affirmance by the court of appeals are set forth in the Statement, *supra*, pp. 9, 11-12.

(1969). And a unitary school system had been understood to be one without schools which are racially identifiable by reason of their student bodies, *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), or their faculties, *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). A number of other lower courts, including the Fourth Circuit itself, have interpreted these rulings to bar neighborhood student assignment plans which freeze in the effects of residential segregation resulting from state action.[12] This was the conclusion of the district court which held that an acceptable desegregation plan must provide "[t]hat no school be operated with an all-black or predominantly black student body" (Order of February 5, 1970; 116a).

3. **The Irrelevance of Monetary Costs.** Like the district court, the court of appeals recognized the obligation of the School Board to reassign students to disestablish the racial identity of the schools (189a). However, it held that where "black residential areas are so large that not all the schools

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[12] *Henry v. Clarksdale Munic. Sep. School District*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States v. Greenwood Munic. Sep. School District*, 406 F.2d 1086, 1093 (5th Cir. 1969); *Valley v. Rapides Parish School Bd.*, No. 29237 (5th Cir. March 6, 1970); *United States v. Baldwin County*, No. 28880 (5th Cir. March 9, 1970); *Kemp v. Beasley*, No. 19072 (8th Cir. March 17, 1970); *United States v. School Dist. 151*, 286 F. Supp. 786, 798 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Dowell v. School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Spangler and United States v. Pasadena City Bd. of Ed., No.* 68-1438-R (C.D. Calif. March 12, 1970); *Keyes v. School District No. 1, Denver*, 303 F. Supp. 279, 289 (D. Colo. 1969), *stay pending appeal granted*, ___ F.2d ___ (10th Cir. No. 432-69, Aug. 27, 1969), *stay vacated*, 396 U.S. 1215; see *Cato v. Parham*, 302 F. Supp. 129 (D. Ark. 1969). In *Brewer v. School Board of City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968), the court of appeals went further, saying that it is immaterial that the residential patterns are the result of private discrimination: "The school board cannot build its exclusionary attendance areas upon private racial discrimination."

can be integrated by using reasonable means," the school board may leave those schools black.[13] The court, we believe, correctly recognized that "bussing is a permissible tool for achieving integration" (194a). *Kemp v. Beasley*, No. 19782, p. 14 (Slip Op.) (8th Cir. March 17, 1970); *United States v. Jefferson County Board of Education,* 372 F.2d 836, 898 (5th Cir. 1966); *United States v. School District No. 151, Cook County*, 286 F. Supp. 786, 799 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968). It said, however, that in determining the part bussing may reasonably play in a unitary school system "a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (194a).

Viewing the plan for junior and senior high schools against these principles and the background of national, state and local transportation policies, the court found "it provides a reasonable way of eliminating all segregation in these schools" (195a). The court, however, reached the opposite conclusion with respect to the elementary plan. As we now show, a review of the plan against the five measures the court said should be taken into consideration compels the conclusion that the plan was rejected because the court of appeals found the financial cost of the bussing "unreasonable."[14]

Thus, with respect to the measures of time, distance, and traffic, the district court found that the children required to be bussed by its order "will not as a group travel as far,

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[13] The steps the court indicated the Board might take to satisfy its constitutional duty are set forth, *supra*, p. 12, n. 6.

[14] At the most, the elementary school plan would have entailed an annual expenditure of $186,000 to operate the buses plus a one-time investment of $486,000 for the 90 additional buses (191a). In aggregate, the first-year expense would be just slightly above one percent of the system's annual budget (139a). From this there should be subtracted the value of the improvement in the education available to black children which is significant, although not easily quantifiable in dollars.

nor will they experience more inconvenience than the more than 28,000 children who are already being transported . . ." (143a), and this finding was not disturbed by the court of appeals. The average one-way bus trip per elementary pupil would be seven miles (153a), compared to an average of between 15 and 17 miles per child in the system today (153a, 195a) and 12 to 13 miles under the plan for senior high pupils (195a). The average time would be 35 minutes as against nearly an hour and a quarter today per child in the system (153a).

Insofar as the age of the pupils to be bussed is concerned, the district court found that the plan would require bussing of an additional 9,300 elementary students. This figure is just under 70 percent of the 13,300 additional students of all ages required to be bussed by the plan. Statewide in North Carolina 70.9 percent of all pupils bussed are elementary students (137a).

Thus, the reasonable inference is that cost alone was the basis for the conclusion of the court of appeals that the elementary plan was unreasonable. That this was the sole basis for rejection of the plan is confirmed by the court's statement that "[t]he board . . . should not be required to undertake such extensive additional bussing . . ." (198a).

The court of appeals has thus announced a new constitutional principle governing school desegregation: that the duty to disestablish all racially identifiable schools is a conditional one depending upon the financial costs involved. This principle conflicts with the well considered holdings of this Court which establish that "[t]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). In *Green v. County School Board*, 391 U.S. 430, 442 (1968), the Court, adopting the language of the Court of Appeals for the Fifth Circuit, defined a unitary system as "a system without a 'white' school and a 'Negro' school, but just schools."

To date, this Court has never held, or even suggested, that this constitutional mandate may be avoided by showing that performance would entail monetary costs. In *Green*, this Court held that the school board was under an "affirmative duty to take *whatever steps* might be necessary to convert to a unitary system," 391 U.S. at 437-38 (emphasis added).[15] There was no suggestion that a "unitary system" was not a fixed goal established by the Constitution. Indeed, the words chosen by the Court indicated that a unitary system is one "in which racial discrimination would be eliminated root and branch." *Id.*, at 437-38. Under the decision of the court of appeals, the constitutional objective, the unitary system, would vary according to the cost of the steps available to the school board.

The interpretation given the Constitution by the court of appeals cannot withstand analysis: Thus, no State could be heard to justify a denial of a jury trial or due process of law on the grounds that fulfillment of these rights costs too much. The right to equal protection of the laws stands on the same footing. Thus, "[t]he State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." *Schlesinger v. Wisconsin*, 270 U.S. 230, 240, (1926). Certainly factors such as "convenience and expediency" do not exempt the state or other governmental agencies from the requirements of the Fourteenth Amendment. *Ohio Bell Telephone Company v. Commissioner*, 301 U.S. 292, 305 (1937); *Russell-Newman Manufacturing Company v. National Labor Relations Board*, 370 F.2d 980, 984, (5th Cir. 1967); *Cella v. United States*, 208 F.2d 183, 789 (7th Cir. 1953).[16] The right to equal

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[15]See *Griffin v. County School Board*, 377 U.S. 218 (1964), where this Court held that a school board may be ordered to spend whatever is necessary to afford the pupils in its jurisdiction desegregated education equal to that being afforded pupils in other systems throughout the State.

[16]The ruling of the court of appeals also seems inconsistent with the well recognized rule that states may not casually deprive a class of individuals of a constitutional right because of some remote admin-

[continued]

protection, moreover, is a right personal to each individual. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1958). A black child assigned to a black school such as Double Oaks or Lincoln Heights (126a, 127a) is afforded little consolation—and no vindication of his "personal and present" [17] constitutional right—by the fact that the Board is affording other students an integrated education.

The court below suggested that where costs of bussing warrant, certain "other steps"—the offering of special integrated classes, freedom of transfer with transportation, and an integrated school assignment later on—may be substituted for the elimination of predominantly black schools. The decisions of this Court in *Green v. County School Board, supra*, and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), demonstrate the constitutional inadequacy of these alternatives. In those cases this Court disapproved freedom of choice and freedom of transfer plans because they left Negro students in all-black schools and placed upon them the burden of choosing a desegregated experience.

To postpone assignment of black students to a desegregated school until a later "portion of their school careers" is merely to hold out the hope of a morsel of desegregation and to ignore the rule that token desegregation fails to comply with the constitutional requirement. During their elementary school years these black students would be "effectively excluded" from desegregated schools because of their race. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). Beyond these

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istrative benefit to the state. *Harman v. Forssenius*, 380 U.S. 528, 542-44 (1965) (requirement of a certificate of residence as a precondition to voting); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (servicemen permitted to vote only in the county of residence at the time of entry into service); *Oyama v. California*, 332 U.S. 633, 646-47 (1948).

[17] *Sweatt v. Painter, supra*, 339 U.S. at 635.

constitutional considerations, the unreasonableness of such an alternative is shown by the fact that maximum benefits from desegregated education come only if pupils are assigned to integrated schools at an early age. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 106 204 (1967).

4. The Reasonableness of the District Court's Plan for Desegregation of the Elementary Schools. NEA believes that the Court should reaffirm its ruling in *Green* that the school board is under an "affirmative duty to take whatever steps are necessary to convert to a unitary system," 391 U. S. at 437-438; and that it should reject the suggestion that the duty to disestablish separate schools based upon race may be avoided because its fulfillment will cost money. Such a ruling would dispose of this case.

However, if the court should accept the rule framed by the court of appeals, a significant issue would still remain: the court of appeals purported to apply a "rule of reason," but it did not indicate the standards it applied in reaching the judgment that the "undertakings" incident to the plans for desegregation of the senior and junior high schools were reasonable but those required for the elementary schools were not. In essence, that court struck down the elementary school plan because of the "extensive additional bussing" (198a) it would require, but failed to indicate the criteria it applied in determining how much bussing was too much—and why.[18]

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[18]Since *Brown v. Board of Education,* 349 U.S. 294 (1955), it has been recognized that the district courts are invested with broad powers to frame relief from racial discrimination in the public schools. Indeed, the Court has declared that the district court not only has the "power" but in fact "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States,* 380 U.S. 145, 154 (1968), quoted in *Green, supra*, at 438 n.4. In our view, the district court properly fulfilled this duty and did not abuse its discretion in framing the elementary school plan.

School boards and lower federal courts are left at large by the appellate court's ruling. The vast discretion inherent in the rule is an open invitation to circumvent the constitutional right of black children to equal educational opportunity—an invitation which the 16-year history since *Brown* demonstrates is all too likely to receive wide acceptance.[19]

CONCLUSION

From *Brown* to *Alexander*, the question was one of "all deliberate speed"—the timing of transition from separate to equal schools. This case presents the question whether, now that the Court has declared the transition period closed, the constitutional objective itself is to be realized. If the decision below is allowed to stand, it forecasts a host of separate black schools in every urban community which, for the forseeable future, will be impregnable to constitutional attack.

NEA urges the Court to grant the petition for a writ of certiorari filed in behalf of James E. Swann, et al., and to

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[19]The decisions In *Kemp v. Beasley*, No. 19072 (8th Cir. March 17, 1970); *United States v. School District No. 151 of Cook County*, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Spangler and United States v. Pasadena City Board of Education*, Civ. No. 68-1438 (M.D. Calif. March 12, 1970); and *Keyes v. School District No. 1, Denver*, 303 F. Supp. 279 (D. Colo. 1969), ___ F.2d ___ (10th Cir. No. 432-69, August 27, 1969), 396 U.S. 1215 (1969), indicate that, with the increasing focus on integration of urban schools, the need to make bussing a part of such plans will be increasingly at issue. Paradoxically, while the appellate court's decision creates a wide ambit for the exercise of discretion to limit desegregation, it severely, and NEA believes unwarrantedly, restricts the traditional discretion of the district court to frame a plan which will secure the constitutional objective. Review now by this Court will insure that no such unwarranted restriction survives.

establish an expedited schedule for briefs and argument which will permit a decision at the earliest practicable time.

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June 25, 1970