Nos. 281, 349, 436

In the Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, ET AL., PETITIONERS, CROSS-RESPONDENTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., RESPONDENTS, CROSS-PETITIONERS

BIRDIE MAE DAVIS, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
JERRIS LEONARD,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

405-880—70——1

Cases—Continued

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 281, 349

JAMES E. SWANN, ET AL., PETITIONERS, CROSS-RESPONDENTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., RESPONDENTS, CROSS-PETITIONERS

No. 436

BIRDIE MAE DAVIS, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

1. *Charlotte-Mecklenburg.* This case was commenced in January 1965, and the district court thereafter approved a free-transfer desegregation plan. 243 F. Supp. 667 (W.D.N.C.), affirmed, 369 F. 2d 29 (C.A. 4). The present proceedings were initiated

in September 1968 by the plaintiffs' motion for supplemental relief based on *Green* v. *County School Board,* 391 U.S. 430, and its companion cases. Following an evidentiary hearing, the district court held on April 23, 1969, that the school system was not being operated in conformity with constitutional requirements and directed submission of a plan for faculty desegregation to be effective in the fall of 1969 and for student desegregation to be implemented in two steps at the commencement of the 1969 and 1970 school years (App. 285a). The school board, in substance, declined to submit a plan for either faculty or student desegregation (App. 330a–340a).

Further evidentiary hearings were held, and on June 20, 1969, the district court again directed submission of a plan (App. 448a). The school board thereafter proposed a plan by which some all-black schools would be closed and students from those schools, as well as from over-crowded black schools, would be permitted to attend predominantly white schools, and otherwise the free-transfer plan would remain in effect; no faculty desegregation plan was offered (App. 480a). The district court approved the board's submission on an interim basis and directed the preparation by November 17, 1969, of a plan for student and faculty desegregation to be effective for the 1970–1971 school year. The school board, indicating that a plan was being prepared, moved for an extension of time until February 1970. The district court denied the motion (App. 655a), and the board again indicated that a plan for student

desegregation was being prepared based on the premises that only rezoning would be used to achieve desegregation and that no school to which white students were assigned would be less than 60 percent white (App. 670a–671a).

On December 1, 1969, the District court held that the board's submission was unacceptable and appointed an education expert to prepare a desegregation plan (App. 698a). Plans were filed by the school board (App. 726a) and the court-appointed expert. On February 5, 1970, the court adopted, with some modifications, the board's plan for secondary schools and the expert's plan for elementary schools (App. 819a) and adopted a timetable for implementation suggested by the board.

Implementation of the plan was partially stayed by the Court of Appeals for the Fourth Circuit on March 5; and thereafter stayed in its entirety by the district court (App. 1255a). This Court declined to disturb the Fourth Circuit's order. 397 U.S. 978. On appeal, the court of appeals indicated approval of the district court's order of February 5 insofar as it rejected the school board's plan but vacated the order and remanded the case for reconsideration and to permit the board to submit a new elementary school plan (App. 1262a). This Court granted certiorari on June 29, 1970, directing reinstatement of the district court's order pending further proceedings in that court (App. 1320a; 399 U.S. 926).

On remand, two new plans for elementary schools were submitted: a plan prepared by the United States

Department of Health, Education, and Welfare based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board achieving substantially the same results as the court-expert plan but requiring somewhat less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing, the district court directed the board to adopt the minority board plan or to submit a new, equally effective plan; the court ordered that the court-expert plan would remain in effect in the event that the school board declined to adopt a new plan. On August 7 the board so declined.

2. *Mobile County.* This case was initiated by private plaintiffs in 1963, and the United States intervened as a party-plaintiff in 1967. The history of the litigation is recorded in a lengthy series of decisions cited on page two of the Memorandum for the United States on the petition for a writ of certiorari.

In June 1969 the Court of Appeals for the Fifth Circuit reversed the district court's approval of a desegregation plan combining elements of freedom of choice, geographic zoning, and minority-to-majority transfers. 414 F. 2d 609. The district court was directed to order the school board to engage the assistance of the United States Department of Health, Education, and Welfare in preparing a new desegregation plan for the entire system. HEW developed a two-step desegregation plan, reaching all rural schools and the schools in the western portion of metropolitan Mobile in 1969 and reaching the eastern urban schools

in 1970. The district court adopted a plan substantially the same as the first step of the HEW plan and directed submission of revised plans for the eastern schools. That decision was affirmed *sub nom. Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (C.A. 5) (en banc) (per curiam), reversed in part *sub nom. Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (per curiam).

On December 1, 1969, plans were filed by the school board and HEW. At the district court's request, the Department of Justice filed on January 27, 1970, a separate proposal for implementation pendente lite. On January 31 the district court adopted, with some modification, the school board's submission based on geographic zoning. The plaintiffs and the United States appealed.

On June 8, 1970, the court of appeals reversed, adopting with some modifications the plan submitted by the Department of Justice, and the plaintiffs petitioned for a writ of certiorari. The court of appeals has since twice amended its mandate (see decision reprinted in appendix to the government's memorandum on the petition and *Davis* v. *Board of School Commissioners of Mobile County,* No. 29,332 (C.A. 5, Aug. 28, 1970)).

ARGUMENT

INTRODUCTION AND SUMMARY

Several threshold considerations may serve to illuminate the issues in these two school desegregation cases.

405-880—70——2

First, these are school districts which contain large metropolitan areas. While this Court has dealt with such districts in the past, it has not had occasion since the *Green* trilogy [1] and *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, to define with particularity the obligations of large metropolitan school systems with respect to pupil assignment. *Green* and *Alexander* answered many of the questions as to the obligations of rural and small town systems, and the question now is the extent to which the remedial principles developed in those cases of classic dualism apply to large metropolitan systems. In this sense, these are cases of first impression.

Second, both of these school systems are characterized by residential patterns of racial separation as well as a history of racial separation in the public schools. The two types of separation are interrelated, but the extent of the relationship is at best speculative. These cases might thus involve the questions whether school boards can retain a "neighborhood school" assignment policy where the result is to operate some schools that are racially identifiable at least to the extent reflected by the racial composition of the student bodies, whether the Fourteenth Amendment requires school boards to achieve some mathematical degree of integration regardless of housing patterns, and the extent to which the burdens of alleviating racial isolation are to be borne by school boards and

[1] *Green* v. *County School Board*, 391 U.S. 430; *Raney* v. *Board of Education*, 391 U.S. 443; *Monroe* v. *Board of Commissioners*, 391 U.S. 450.

school children rather than being shared by other governmental institutions and agencies having the power to affect such isolation.

Third, there is evidence that these school boards previously maintained aspects of dualism—such as some dual, overlapping zones, faculty segregation, and dual transportation systems. If these school districts are, therefore, properly regarded as traditionally dual school systems, whose obligation is to convert to unitary systems, the question remains: what constitutes a unitary system? Stating this question another way: what remedial adjustments would bring these school districts into compliance with constitutional requirements? And, when school boards have failed to select a method of compliance, a further question arises as to the scope of judicial discretion in ordering appropriate remedial adjustments.

These questions relate both to rights and to remedies and raise yet another question: In desegregating school systems is there a conflict between individual rights and public need, and, if so, is there some proper balance between them? We think there could be such a conflict if the Fourteenth Amendment granted students an absolute right to attend school with children of other races, *i.e.,* required some form of racial balance, or if there were an unyielding public need which would justify the wholesale maintenance of racial segregation; but we think the first of these conflicting goals is not prescribed, and the second not countenanced, by the Constitution. Rather, we think the right of school children articulated in *Brown* is to

attend school in a system where the school board exercises its decision-making powers so as to operate a nonracial unitary school system free from discrimination, and that where this has not been done there is a violation of the rights of such children requiring remedial adjustments which give proper weight to that which is feasible and that which is just. If choices exist which may have a racial impact, they cannot be exercised in a racially neutral manner where to do so is to perpetuate segregation. Thus, the right and the remedy are interrelated.

This interrelationship is most easily perceived in rural systems, such as New Kent County, Virginia, where the violation was the maintenance of two twelve-grade schools, one nearly all white and one black, each serving the entire system. Pairing or zoning the two schools were remedies that flowed naturally from this violation. But where scores of schools serve the same grades, some attended largely by students of one race, the remedy is not self-evident.

The controversy in these cases is over the standards to be applied in fashioning remedies for state-imposed segregation in large metropolitan areas. We believe that an appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district.

All these circumstances have been taken into account by HEW's Office of Education in the development of desegregation plans for urban school systems. That Office has followed the general principle that school districts which are under a duty to reorganize have an obligation to make all reorganizational decisions so as to eliminate the vestiges of dualism, but are free at the same time to take into account the benefits to be derived from preserving the traditional neighborhood method of school assignment. In applying this principle, the Office has employed the techniques of expanding contiguous geographic zones and pairing or clustering schools having contiguous zones. This principle has found general acceptance in the lower courts and should be adopted by this Court.

This Court observed in *Green* v. *County School Board,* 391 U.S. 430, that *"Brown II* was a call for the dismantling of well-entrenched dual [school] systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution," *id.* at 437, and held that "[s]chool boards * * * then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437–438; see *Raney* v. *Board of Education,* 391 U.S. 443, 447–448; *Monroe* v. *Board of Commissioners,* 391 U.S. 450, 458–460. Last Term this Court held that "the 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; see *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290; *Northcross* v. *Board of Education,* 397 U.S. 232.

These decisions clearly contemplated the reorganization of racially segregated, dual school systems. But, like earlier school desegregation decisions of this Court, they arose in the context of rural, classically dual systems or the perpetuation of the most egregious forms of racially dual operation. New Kent County operated two schools, one attended solely by Negroes and the other almost exclusively by whites, offering exactly the same grades and serving exactly the same attendance area (coextensive with the entire county), while both whites and blacks resided throughout the district. Similarly, in *Raney* "[t]here [were] no attendance zones, each school complex providing any necessary bus transportation for its respective pupils." 391 U.S. at 445. In *Monroe* v. *Board of Commissioners, supra,* involving a small city school district in which many residential areas were racially segregated, a zoning plan had "assigned students to * * * schools in a way that was capable of producing meaningful desegregation," 391 U.S. at 458, but a free-transfer option superimposed on geographic zoning had "permitted the 'considerable number' of white or Negro students * * * to return, at the implicit invitation of the Board, to the comfortable security of the old, established discriminatory pattern." *Id.* at 458–459.

Hence, while this Court has dealt with large urban school districts in the past, including Topeka, Kansas, *Brown* v. *Board of Education,* 347 U.S. 483; Little

Rock, Arkansas, *Cooper* v. *Aaron,* 358 U.S. 1; Knoxville, Tennessee, *Goss* v. *Board of Education,* 373 U.S. 683; Richmond, Virginia, *Bradley* v. *School Board,* 382 U.S. 102; Montgomery, Alabama, *United States* v. *Montgomery County Board of Education,* 395 U.S. 225; and Memphis, Tennessee, *Northcross* v. *Board of Education,* 397 U.S. 232, the Court has not had an occasion to define with any degree of finality the constitutional obligations—particularly the pupil assignment obligations—of such school systems. The *Green-Raney-Monroe* trilogy presented issues associated with traditional dualism. In the circumstances of those cases, freedom of choice and free transfer were held to be unacceptable methods of student assignment because they maintained racial segregation by tacitly perpetuating dual, overlapping attendance areas, "[t]he central vice in a formerly de jure segregated public school system," *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 867 (C.A. 5), affirmed on rehearing, 380 F. 2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840.

In accordance with the mandate of *Green* and this Court's definitive announcement in *Alexander* v. *Holmes County Board of Education, supra,* and *Carter* v. *West Feliciana Parish School Board, supra,* that dual systems must be converted "at once," nearly all of the traditionally dual school districts are desegregating by implementing desegregation plans based on compact geographic zones and grade restructuring, through either litigation or voluntary

agreements with the United States Department of Health, Education, and Welfare.[2]

Most of these are rural systems which, by the use of contiguous zoning and contiguous pairing, have converted to systems "without a 'white' school and a 'Negro' school, but just schools." *Green,* 391 U.S. at 442. In urban school systems like Mobile and Charlotte, however, the constructive use of contiguous zoning and pairing places biracial student populations in most, but not all, schools. This distinction was well stated by Judge Butzner in the *Charlotte* case below:

> All schools in towns, 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 ghettos so large that integration of every school is an improbable, if not an unattainable, goal. [App. 1267a–1268a.]

In this respect, then, these cases present issues of first impression for this Court and may require the Court to distinguish between rural and metropolitan school districts.

I. THE CHARLOTTE AND MOBILE SCHOOL SYSTEMS HAVE FOLLOWED POLICIES AND PRACTICES WHICH PERPETUATE THE DUAL SYSTEM

Racial dualism in large urban systems may be found not only in overlapping attendance areas but also in

[2] See Appendix, *infra*, for a summary of the status of school districts in eleven Southern states, which brings up to date the table in the Appendix to the government's Supplemental Memorandum filed in this Court in *Alexander* v. *Holmes County Board of Education*, No. 632, October Term, 1969.

the organizational decisions of the system in furtherance of racial separation. It may be manifested in distorted grade structures, outsized schools, gerrymandered zones, curriculum manipulation, and various other devices for accommodating the organization of the system to fluctuating racial residential patterns.

Neither North Carolina nor Alabama presently requires racial segregation in public education by law; and insofar as an official policy of segregation plays a part in defining the Charlotte and Mobile school boards' present constitutional obligation, it is meaningful only to the extent that it is manifested in the decision-making (involving both long-range planning and day-to-day operations) of the boards. Accordingly, all of those decisions must be considered in determining the extent to which a school district has engaged in discrimination contrary to *Brown of Education,* 347 U.S. 483. See *Brown* v. *Board of Education,* 349 U.S. 294, 300–301; *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (C.A. 5). See, also, *Smith* v. *Texas,* 311 U.S. 128, 132.

Site selection and school construction are important aspects of a school board's decision-making responsibilities in school districts characterized by racial residential segregation, because they have been used as substitutes for dual zoning. The records in both *Charlotte-Mecklenburg* and *Mobile* suggest that the school boards have consciously selected building sites and

405-880—70——3

constructed schools in a manner designed to perpetuate separate schools for whites and blacks. Thus in 1963, when the Mobile board sought a stay of a Fifth Circuit order directing it to commence admitting Negro students to white schools under the Alabama pupil-placement laws, the board argued that

> desegregation would "seriously delay and possibly completely stop" the Board's building program, "particularly the improvement and completion of sufficient colored schools which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools."

Board of School Commissioners v. *Davis,* 11 L. Ed. 2d 26, 28 (Black, J., on application for a stay). As Mr. Justice Black then observed, "It is quite apparent from these statements that Mobile County's program for the future of its public school system 'lends itself to perpetuation of segregation,' a consequence which the Court recently had occasion to condemn as unlawful." *Id.* at 28–29. This policy continued until at least June of 1969. See *Davis* v. *Board of School Commissioners of Mobile County,* 414 F. 2d 609 (C.A. 5).

Similarly, in *Charlotte-Mecklenburg* the district court found that the "[l]ocation of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. With a few significant exceptions * * * the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built." *Charlotte* App. 305a; see *id.* at 456a–457a.

Other necessary educational and administrative decisions must be coordinated with a school-construction program; and the record in *Mobile* is especially clear on the potential effects of those decisions on racial separation. The capacities of schools can be based on the size of the racially identifiable areas they are to serve. Two junior high schools were constructed, for example, to serve relatively small white neighborhoods virtually surrounded by predominantly Negro residential areas; accordingly, the capacities of those schools were far smaller than the capacities of other schools in the system serving the same grades. Brief for Petitioners in *Mobile,* Appendix at 15, n. 24. The same is true of grade structures. No reason can satisfactorily explain, for instance, why one all-Negro school was the only school in the city to offer all twelve grades except that the Negro area to be served by the school was relatively small, compact, and surrounded by white residential areas.[3] *Id.* at 4, 15 n. 24; see, also, *id.* at 10. The *Mobile* record contains evidence of numerous instances in which port-

[3] That school has now been fully desegregated by reducing the number of grades and expanding the neighborhood zone to be served.

able classrooms were used at schools serving one race while nearby schools offering the same grades but serving another race operated under capacity. *Id.* at 10–11; see, also, *id.* at 64–67. The location of attendance-zone boundaries (including the use of noncontiguous zones) has also been utilized in *Mobile* to produce segregation. *Id.* at 7–9.

We submit, therefore, that the constitutional violations which have occurred in these two cases are the products of a process of decision-making in which the state chose, in spite of the availability of feasible alternatives, courses which perpetuated the racially segregated dual systems. In light of the fact that in many metropolitan school systems "black residential areas [may be] so large that not all schools can be integrated by using reasonable means," *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 (C.A. 4) (App. 1267a), it is appropriate, therefore, to look to that decision-making process as the focal point of a proper remedy. Accordingly, an appropriate remedy is to require that the governmental decisions affecting racial segregation be so made and implemented, when feasible alternatives are available, as to disestablish the dual system and eliminate its vestiges. In this sense, the remedy is a dynamic one, cf. *Clark* v. *Board of Education of Little Rock School District,* 426 F. 2d 1035 (C.A. 8), and not a static one. And, as we shall now show, it does not require, as an *a priori* constitutional standard, racial balance or integration of every all-white, all-Negro, or predominantly Negro school.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE, AS A MATTER OF LAW, RACIAL BALANCE IN ALL PUBLIC SCHOOLS OR INTEGRATION OF EVERY ALL-WHITE OR ALL-NEGRO SCHOOL

The plaintiffs-petitioners in both *Charlotte-Mecklenburg* and *Mobile* argue that school boards have a constitutional obligation to eradicate the "racial identifiability" of all schools within their jurisdiction. In this view a predominantly Negro school would be "racially identifiable" in a school district having a majority of white students such as Charlotte and Mobile. It would appear that all school boards, according to the petitioners' theory, must be required to ensure that the ratio of white to black students in each school is as near as possible to the ratio of white to black students in the system as a whole. We do not agree that either general constitutional principles[4] or the holdings of this Court or the courts of appeals with respect to disestablishment of dual school systems compel acceptance of this formulation of school boards' remedial duty. In our view, "[h]ow far that duty extends is not answerable perhaps in terms of an unqualified obligation to integrate public education without regard to circumstance * * *." *Branche* v. *Board of Education of Hempstead,* 204 F. Supp. 150, 153 (E.D.N.Y.).

[4] It is, of course, clear that the Fourteenth Amendment's requirement of due process and equal protection does not, by itself, prescribe any particular racial (or other) admixture in the membership of individual institutional groups, such as a particular jury. *Cassell* v. *Texas,* 339 U.S. 282.

As the court of appeals stated in the *Charlotte* case, "if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation * * * should not void an otherwise exemplary plan for the creation of a 'unitary school system' " (App. 1268a). Neither, on the other hand, do the decisions support the use of racial quotas, as in the Charlotte-Mecklenburg school board's plan, as a limitation on the extent of a school board's remedial obligation.

Federal courts have made basically three uses of such expressions as "racially identifiable schools," "all-Negro schools," and "racial balance," none of which supports the near-absolute standard suggested by the plaintiffs-petitioners. The courts have used these expressions as a characterization of the state's holding out a classically dual school system in tacit perpetuation of legally required segregation, as an analytical starting point, and as a convenient reference to a remedial standard requiring the comparison of available alternatives.

This Court said in *Green* that an acceptable desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. But that remark was made in the context of the state's holding out one school for whites and another for blacks serving the same attendance area, just as it had done when racial segregation was enforced by law. In holding that the state could not maintain such a system, even though it had the appearance of racial

neutrality in the sense that student assignments were based on free choice, this Court might well have said that the schools of New Kent County must be merged or "racially balanced," for the simplest techniques of effecting desegregation (such as zoning and pairing, see 391 U.S. at 442 n. 6) would necessarily promise exactly that result in the circumstances of that case. It was in the same context, namely, the failure of freedom of choice to alter significantly the racially dual attendance patterns of the past, that the Court of Appeals for the Fifth Circuit adopted the rule, now moribund, that an existing student-assignment plan was unacceptable if it retained an all-Negro school. See, *e.g.*, *Adams* v. *Mathews*, 403 F. 2d 181 (C.A. 5); *Hall* v. *St. Helena Parish School Board*, 417 F. 2d 801 (C.A. 5), certiorari denied, 396 U.S. 904; *United States* v. *Hinds County School Board*, 417 F. 2d 852 (C.A. 5), related order reversed *sub nom. Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (reversing as to timing). But see *Harris* v. *St. John the Baptist Parish School Board, sub nom. Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211, 1221 (C.A. 5) (en banc).

The Fifth Circuit, although no longer relying on a standard of no all-Negro schools, has required a showing and findings of the specific "reasons, if any, for the continuation of any all Negro or all white schools" under proposed desegregation plans. *Singleton* v. *Jackson Municipal Separate School District*, No. 29,226, at 14 (C.A. 5, May 5, 1970); *Andrews* v. *City of Monroe*, 425 F. 2d 1017, 1021 (C.A. 5). This

requirement, obviously, is an analytical starting point designed to inform the court of appeals of both the extent to which racial concentration remains in a school district and the feasibility of reducing concentration by alternative means. For numerous recent decisions of that court, including the decision in *Mobile,* have approved plans even though all-Negro schools remained. See, *e.g., Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5), modified on rehearing (C.A. 5, July 28, 1970); *Valley* v. *Rapides Parish School Board,* No. 30,099 (C.A. 5, Aug. 25, 1970); *Mannings* v. *Board of Public Instruction of Hillsborough County,* No. 28,643 (C.A. 5, May 11, 1970). Similarly, the Court of Appeals for the Eighth Circuit observed with respect to racial balance:

> We do not rule that precise racial percentages across the District at the respective elementary, junior high, and high school levels are as yet constitutionally required. * * * We certainly can conceive of a fully desegregated system where percentages do vary from school to school and in which even one school might have a black majority and another a white majority but still, when all factors are fairly and unemotionally considered, the system is "unitized" within the Supreme Court's *Alexander* requirement. That happy day may not yet be upon us and until it arrives percentages may be more significant than they eventually deserve to be.

Kemp v. *Beasley,* No. 19,782, at 14–15 (C.A. 8, March 17, 1970) (El Dorado, Arkansas); see *Swann* v.

Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1299, 1312 (W.D.N.C.) (App. 710a); *United States* v. *Georgia,* C.A. No. 12,972 (N.D. Ga., Dec. 17, 1969) (and subsequent orders amending the formula in light of the circumstances of individual school districts).

Finally, the standard of no predominantly Negro schools has been used as a means of translating into remedial terms a finding, in view of available alternatives, of the extent to which racial concentration could feasibly be eliminated. See, *e.g., Spangler and United States* v. *Pasadena City Board of Education,* unreported order entered on findings and conclusions reported at 311 F. Supp. 501 (C.D. Calif.). Such an articulation of remedial obligations cannot be read in the unyielding terms suggested by the plaintiffs-petitioners. Indeed, the district court in *Charlotte-Mecklenburg,* while approving the plan supported by the plaintiffs, was careful to point out, "This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; * * * nor that the particular order entered in this case would be correct in other circumstances not before this court." *Swann* v. *Charlotte-Mecklenburg Board of Education,* C.A. No. 1974, at 12 (W.D.N.C., Aug. 3, 1970); see *id.* (Feb. 5, 1970) (App. 822a). Insofar as such remedial expressions are made on the basis of a record and findings on "the availability to the board of other more promising courses of action," 391 U.S. 439, they

represent no departure in constitutional principle from *Green,* which directed district courts to assess proposed plans "in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Ibid.*

The desegregation plan supported by the Charlotte-Mecklenburg school board is based on the premise that "[n]o school district to which white students are assigned should have less than 60 per cent white student population * * *." App. 671a. In the factual circumstances of the Charlotte school system, this rule, when coupled with the board's declining to consider any technique of desegregation except geographic zoning, inevitably constitutes a limitation on the extent of desegregation to be achieved: Whenever an all-Negro school could not be so zoned as to make it at least sixty percent white, this limitation would require that it remain all-Negro. As the district court observed, such a use of a " '60–40' ratio is a one-way street," App. 701a, and the court of appeals properly rejected it. App. 1276a. See *Lee* v. *Macon County Board of Education,* C.A. No. 604–E (M.D. Ala., April 3, 1970) (Conecuh County); *Brewer* v. *School Board of City of Norfolk,* No. 14,544 (C.A. 4, June 22, 1970), reversing 302 F. Supp. 18, 308 F. Supp. 1274 (E.D. Va.). No use of racial quotas "of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Goss* v. *Board of Education,* 373 U.S. 683, 689.

III. THE CHARLOTTE AND MOBILE SCHOOL BOARDS ARE REQUIRED, IN CONVERTING FROM DUAL TO UNITARY SYSTEMS, TO MAKE ORGANIZATIONAL AND ASSIGNMENT ADJUSTMENTS TO ELIMINATE THE VESTIGES OF THE DUAL SYSTEM BUT NOT TO ACHIEVE ANY PARTICULAR RACIAL BALANCE OR RATIOS

1. Clarification of the proper remedial standards in this field thus begins, in our view, with recognition of the basic principle that the constitutional requirement of "a completely unified, unitary, nondiscriminatory school system" (*Montgomery,* 395 U.S. at 235) is not a requirement that racial balance need be achieved in all schools within the system or that all instances of non-discriminatory racial isolation need be eliminated. It is, instead, a requirement of a school "system in which racial discrimination * * * [has been] eliminated root and branch" (*Green,* 391 U.S. at 438). It follows that the constitutional objective can, in most situations, be achieved by means of any of a variety of methods of pupil assignment, and that the choice of the particular method, or combination of methods, to be employed is a matter of educational policy within the discretion of the school board—so long as that choice accomplishes the constitutional objective. As this Court said in *Green* (391 U.S. at 439):

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circum-

> stances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. * * *

Indeed, the Court in *Green* specifically declined to "hold that 'freedom of choice' can have no place in such a plan," or "that a 'freedom-of-choice' plan might of itself be unconstitutional" (391 U.S. at 439), even though it noted that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation" (391 U.S. at 440) and held that in the three cases before it the freedom-of-choice plans were constitutionally inadequate. And the Court specifically indicated in *Green* that either geographic zoning or pairing (consolidation) of the two schools in the rural district involved in that case would be an acceptable method of pupil assignment (391 U.S. at 442 n. 6).

We submit that a system of pupil assignment on the basis of contiguous geographic (residential) zones—the "neighborhood" school system, which is the most familiar and traditional method of pupil assignment employed throughout the Nation—is constitutionally acceptable in desegregating urban school systems also. We recognize, however, that where dual systems have previously been maintained, school buildings and facilities will frequently be located on sites which would not have been chosen had the system been operated on a unitary basis, and that there will generally be available to school boards more than one choice of pupil

assignment plans which would be consistent with the neighborhood school concept.

In many such districts the constitutional adequacy of the "neighborhood school" method of converting a dual system into a unitary one will, accordingly, depend on the choice of those complementary techniques designed to eliminate the effects of state-imposed discrimination that would otherwise remain (see *supra,* pp. 13–16). The techniques available to school officials include:

> (*a*) Change the grade structure. A school with fewer grades can accommodate more children in each grade, so that it would serve a larger area.
>
> (*b*) Permit students to transfer from a school in which their race is in the majority to one in which it is in the minority. The courts below, in adopting this technique, also required that such students be provided transportation.
>
> (*c*) Close unneeded or substandard schools.
>
> (*d*) Draw zone lines so that they cut across racially impacted residential areas instead of encircling them.
>
> (*e*) Plan new construction of school facilities so as to serve students of both races.

All of these techniques are utilized in the plan approved by the court of appeals in *Mobile,* and they have been used successfully elsewhere. See, *e.g., Singleton* v. *Jackson Municipal Separate School District,* No. 29,226 (C.A. 5, Aug. 12, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5, July 28, 1970); *Mannings* v. *Board of Public*

Instruction of Hillsborough County, No. 28,643 (C.A. 5, May 11, 1970); *Henry* v. *Clarksdale Municipal Separate School District,* No. 29,165 (C.A. 5, Aug. 12, 1970). The good faith utilization of such techniques to promote desegregation would, in our view, ordinarily enable any district which prefers a "neighborhood" school policy to achieve compliance with constitutional requirements by means of that method of pupil assignment.[5] Such racial isolation as might then persist, not attributable to school officials, can best be undone through the action of the numerous public and private agencies and individuals whose daily decisions can influence the racial composition of a neighborhood.

2. In the present cases, the courts of appeals correctly held that neither school board came forward with a pupil assignment plan adequate to meet its constitutional obligations. Nothing in the record in either case would suggest that either school board's objective in the plans it offered was anything other than to attempt to maintain racial segregation while eliminating overlapping attendance zones. This plainly did not fulfill the boards' "affirmative duty" (*Green,* 391 U.S. at 437) to eliminate the effects of racial discrimination, "root and branch" (391 U.S. at 438).

[5] Of course, the Constitution does not require the adoption of a "neighborhood" pupil assignment policy, and school districts are free, if they prefer, to choose an assignment method designed to achieve racial balance or any other non-discriminatory assignment method. See Memorandum for the United States as Amicus Curiae in *McDaniel* v. *Barresi,* No. 420, this Term.

We come, then, to the precise issue in these cases: the question of the propriety of the remedies adopted by the courts below in the face of each school board's default. This Court has consistently held, in accordance with general principles of equitable remedies, that in this situation the lower federal courts have wide discretion in formulating appropriate relief. See, *e.g., Brown* v. *Board of Education,* 349 U.S. 294, 299–300; *United States* v. *Montgomery County Board of Education,* 395 U.S. 225; *Green* v. *County School Board,* 391 U.S. 430, 438 n. 4, 439, 442 n. 6; *Griffin* v. *School Board,* 377 U.S. 218, 232–234; cf. *Carter* v. *Jury Commission,* 396 U.S. 320, 336–337; *Turner* v. *Fouche,* 396 U.S. 346, 355. Indeed, this Court has authorized requiring implementation of desegregation plans although recognizing that the particular plans were not the exclusive means of satisfying constitutional mandates. *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290. It is, in general, incumbent on the federal courts to assess the school boards' proposals "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness" (*Green,* 391 U.S. at 439). And, "in this field the way must always be left open for experimentation" (*Montgomery,* 395 U.S. at 235).

In *Mobile,* we believe that the plan approved by the court of appeals meets these standards. It is basically a "neighborhood" school plan, supplemented by judi-

cious use of complementary techniques (see *supra,* p. 25) designed to minimize residual racial isolation. Especially in light of the court's inclusion of a majority-to-minority transfer option and its scrupulous attention to desegregation of faculty and of school facilities and activities (See Pet. App. 12a–13a, 16a), the plan, in our view, "promises realistically to work, and promises realistically to work *now*" (*Green,* 391 U.S. at 439). It should, of course, be re-evaluated in practice by the courts below, after it has been in operation for a sufficient time (see 391 U.S. at 439; *Raney* v. *Board of Education,* 391 U.S. 443, 449).

In *Charlotte,* we believe the court of appeals correctly sustained the district court's judgment as to the junior and senior high schools, in light of the unacceptability of the school board's proposal and the feasibility and practicality of the court's modifications thereof. We also believe the court of appeals was correct in remanding the case to the district court for further consideration of that aspect of the court's order requiring far-reaching cross-busing of elementary school pupils, since the district court had initially indicated some doubt as to whether racial balance was the constitutionally required objective (see App. 710a) and may, therefore, have exercised its remedial discretion in pursuit of an erroneous constitutional standard. On remand, the district court reconsidered the matter. Although it had another opportunity to do so, the school board again failed to come forward with a constitutionally adequate plan. The Department of Health,

Education, and Welfare did submit a plan of contiguous zoning which we believe was constitutionally acceptable, but the school board objected to it strongly and indicated that it might prefer the court's original plan.[6]

In these circumstances the district court rejected the HEW plan. If the decision of the district court was based on an understanding that racial balance is a constitutional requirement, it cannot be supported for the reasons stated in earlier portions of this brief. In light of the fact that the plan ultimately adopted by the court went beyond the HEW plan in departing from the neighborhood school concept, and the fact that the school board rejected any alternative to its own plan which failed, in our opinion and the opinions of the courts below, to meet constitutional requirements, we believe that in further consideration of the problem the board should be required to choose

[6] See Transcript of Hearing, July 15–24, 1970, at 1071, 1077–1078 (Mr. Waggoner, attorney for the school board):

> The HEW plan, under anybody's estimation, is a plan that doesn't produce any satisfactory solutions in any way.
>
> * * * * *
>
> So we take the position, if the Court please, that there is no reasonable alternative between the Finger plan and the Board plan, the alternatives suggested here or portions thereof are unreasonable, and this places * * * the Board and the plaintiffs in the difficult position of seeing a situation where an appellate court has ruled one plan doesn't go far enough and the other plan goes too far. We feel this is where the chips in this case fall, there is no middle ground.

See, also, *id.* at 1113.

from among those plans in the record, including the "Finger" plan, the minority board plan, and the HEW plan, or in the alternative submit to the district court a plan meeting the standards and requirements of the Constitution as enunciated by this Court.

The decisions below should not be regarded as prescribing the only method of pupil assignment which may, in the future, be used in these districts. It is still the school boards, and not the federal courts, that have the authority, within constitutional limitations, to make educational policy—including pupil assignment policy. The role of the courts in these matters arises only because of the school boards' failure to fulfill their constitutional obligations. So long as that failure persists, the courts must, to a limited extent, assume the functions of the school boards and, within the traditional confines of equitable discretion, engage in "experimentation" (*Montgomery*, 395 U.S. at 235) comparable to that appropriate for the boards in achieving the constitutionally required objective. The boards are free, however, to reassert their authority whenever they wish, by coming forward with constitutionally acceptable proposed modifications of the court's plan or with an entire new plan that meets constitutional standards. We see no reason why the school boards in these cases should not be permitted to propose, for the approval of the courts below, new pupil assignment plans (if they so desire) for implementation in the 1971–1972 school year.

CONCLUSION

In view of the district courts' express retention of jurisdiction to entertain amendments to the plans,[7] it would be appropriate for this Court to enunciate the standards which are applicable to cases of this sort and to remand the cases to those courts for further proceedings in the light of those standards.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

OCTOBER 1970.

[7] The August 3, 1970, decision of the district court in *Charlotte* properly retained jurisdiction pursuant to the directive of the court of appeals that "after a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the district court considers the suggested modifications." In *Mobile* the court of appeals also directed the district court to retain jurisdiction.

APPENDIX

The following status report on eleven southern states as of September 1970, indicates how many school districts were unitary prior to 1970–71, how many are committed to terminal 1970–71 plans, and how many are currently not committed to a terminal 1970–71 plan. This information was compiled from a central status report now maintained jointly by the Department of Justice and the Department of Health, Education and Welfare. While absolute accuracy in placing school systems in appropriate categories is not possible, every effort has been made to reconcile the sometimes conflicting information by using the most recent data.

Under the heading "Unitary Prior to 70–71" are included the following:

1. Those desegregated districts as enumerated by HEW.

2. Those few districts operating under court-ordered freedom of choice plans which, according to the statistics, are effectively desegregating the systems.

3. Those districts ordered by district courts to desegregate totally before 1970–71.

Under the heading "Committed—1970–71 Terminal" are included:

1. Those districts for which the district court has ordered a terminal 1970–71 plan.

2. Those districts for which such a plan has been achieved through voluntary agreement with HEW.

Under the heading "Uncommitted—1970–71 Terminal" are included:

1. Those systems currently in court proceedings where a final plan has not yet been filed or ordered.

2. Those districts which are under court order but which (a) have been ordered to implement a terminal 1971–72 plan, or (b) are operating under a freedom of choice or other court-ordered plan (terminal later than 1971–72) which does not appear to be effectively desegregating the system for 1970–71; districts in this category are not currently involved in court proceedings.

3. Those districts which are committed to neither a court order nor a voluntary plan; this category includes districts from which HEW is trying to obtain voluntary compliance, those which are involved in out-of-court negotiations with the Justice Department, and those which have reneged on voluntary plans.

Under the heading "Private Suit-Status Unknown" are included districts involved in private suits where our information regarding the progress or status of that suit is not current.

The use of the word "terminal" to describe a plan and "unitary" to describe a system means that the system has been ordered or has agreed to follow a plan which would achieve conversion to a unitary system by the fall of 1970. But some cases are on appeal, some plans may not be fully implemented, and all may still be subject to challenge or modifications in the district courts. In Texas, we have classified as unitary prior to 1970–71 some all-black districts; a government suit to merge some of these districts with integrated districts is pending. Because Texas law did not require segregation of Spanish-surnamed students, the report does not take into account litigation involving discrimination against Spanish-surnamed students.

STATUS OF SCHOOL SYSTEMS IN 11 SOUTHERN STATES

	Alabama	Arkansas	Florida	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Tennessee	Virginia	Texas	Total
Unitary prior to 1970–71	32	305	35	66	33	63	98	12	109	107	1,126	1,986
Committed: 1970–71 terminal:												
Court order	88	18	23	102	26	56	10	32	23	14	28	420
Voluntary plan	0	48	9	13	3	28	35	49	9	11	35	240
Subtotal	120	371	67	181	62	147	143	93	141	132	1,189	2,646
Uncommitted: 1970–71:												
In current court proceedings	2	7	0	1	2	1	4	0	0	1	4	22
Under court order:												
(*a*) 1971–72 terminal	1	1	0	0	0	1	0	0	0	0	0	3
(*b*) Not unitary and not in current court proceedings	1	1	0	1	1	0	0	0	0	0	9	13
Not committed to voluntary plan and not in litigation	0	3	0	5	1	1	2	0	3	0	2	17
Subtotal	4	12	0	7	4	3	6	0	3	1	15	55
Private suit—Status unknown	0	3	0	3	0	0	4	0	5	2	3	20
Total number of districts	124	386	67	191	66	150	153	93	149	135	1,207	2,721

U.S. GOVERNMENT PRINTING OFFICE: 1970