ORIGINAL

In the

Supreme Court of the United States

NOLAN ESTES, ET AL.,	)	
DONALD E. CURRY ET AL.,	)	
RALPH F. BRINEGAR, ET AL.,	)	No. 78-253
PETITIONERS,	)	No. 78-282
V.	)	
METROPOLITAN BRANCHES OF DALIAS NACCP, ET AL.,	)	No. 78-283
RESPONDENTS.	)	

Washington, D. C.
October 29, 1979

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Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NOLAN ESTES, ET AL., Petitioners, v. METROPOLITAN BRANCHES OF DALLAS NAACP, ET AL., Respondents.	No. 78-253
DONALD E. CURRY, ET AL., Petitioners, v. METROPOLITAN BRANCHES OF DALLAS NAACP, ET AL., Respondents.	No. 78-282
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Washington, D. C.,

Monday, October 29, 1979.

The above-entitled matters came on for oral argument at 1:01 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WARREN WHITHAM, ESQ., 210 Adolphus Tower, Dallas, Texas 75202; on behalf of Petitioners, Estes et al.

ROBERT L. BLUMENTHAL, ESQ., 3000 One Main Place, Dallas, Texas 75250; on behalf of Petitioners, Curry et al.

JAMES A. DONOHOE, ESQ., 1700 Republic National Bank Building, Dallas, Texas 75201; on behalf of Petitioners, Brinegar et al.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae, supporting Respondents.

E. BRICE CUNNINGHAM, ESQ., Cunningham, Greenidge & Gaines, 2606 Forest Avenue, Dallas, Texas 75215; on behalf of the Respondents, NAACP et al.

EDWARD B. CLOUTMAN, III, ESQ., 8204 Elmbrook Drive, Dallas, Texas 75247; on behalf of Respondents Tasby et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-253 and the consolidated cases.

Mr. Whitham, you may proceed whenever you are ready.

ORAL ARGUMENT OF WARREN WHITHAM, ESQ.,

ON BEHALF OF PETITIONERS ESTES ET AL.

MR. WHITHAM: Mr. Chief Justice, and Members of the Court:

This is a school desegregation case involving the Dallas Independent School District which is situated primarily in the City of Dallas, Texas, although the boundaries are not coterminous.

Involved in this case is remedy and remedy alone with respect to this petitioner which I will hereinafter refer to as the School District. The Estes petitioners are the School District. Our position is --

QUESTION: At your convenience, Mr. Whitham, and perhaps your friends will comment on the same, first this case is here now because we have granted the writ, but are there any issues in this case that could not have been resolved after the District Courts have carried out the remand directions?

MR. WHITHAM: There is a great issue involved here, and I think it becomes even a greater issue, Mr. Chief

Justice, in view of this Court's recent opinions in Columbus and Dayton of last July which in effect may well bring all of us, North and South, East and West, to a common problem if de jure segregation is now to be, in effect, arrived at either by old State law or constitution, or by the inability to overcome presumptions and evidentiary matters.

The issue here is, Mr. Chief Justice, to return to your question, if I may, whether or not the elimination of all one race schools, given the urban condition in the large urban school district described by the courts below and in these petitions, is the controlling factor to be considered. I may well be rising to ask this Court to take the great broad principles enunciated in Swann, perhaps address those again, perhaps recognize that the lower courts have taken those principles and taken the tools referred to in that case, be it transportation, attendant zone changes, satelliting, paring, clustering, to address the question of whether the tools discussed have somehow or other been elevated to the principles of Swann, a circumstance that I would respectfully suggest is creating untold turmoil for the district courts of this land and the school boards of this land in trying to find out what is a plan that would ultimately arrive at a unitary school system.

The district court in this case formulated a plan which the school district initially opposed, but in an

effort to get out of court, to become that stranger to school desegregation proceedings that the Fifth Circuit accuses us of not being, the school board, 9 to nothing, has voted to support this plan of the district court, and this plan was remanded by the Fifth Circuit. So yes, I stand here readily admitting that this court has taken a case where technically the court of appeals has rejected the plan and this school district is here urging that this Court affirm the district court's plan as being a solution for public education in the urban environment, given the facts of this case.

Now, what are some of the facts that bring us here, this long history they speak of of Dallas School District litigation? And before I get into that, let me say, remedy is all that's involved -- I want to emphasize that -- this school district recognizes it is located in a State that by State constitution required separation of the races. This school district recognizes it had a first and prior desegregation lawsuit pending against it, filed in 1955 following Brown II. It had a history in the courts until 1965. Admittedly through that plan in 1967, a stair step plan reached its final implementation. This school district is cognizant of this Court's observations concerning stair step plans, and we are not here saying that's the beginning and the end, and that we should not still be searching for a

remedy, in view of prior language of this Court, concerning stair step plans.

But on October 6, 1970, a new plan was formulated for this -- or a new lawsuit, a new school desegregation lawsuit was filed by separate parties representing black and Mexican-American students. In this lawsuit, we have the problem of formulating now , and the district court had a problem of formulating, and this school board was charged with the duty of drafting a plan that had these difficult components; that there had been numerous demographic changes partly as a result of the prior desegregation order and remedy.

It is now a minority Anglo school district, and a tri-ethnic remedy is required. At the time of the first remedy hearing in July of 1971, the school district was probably 59 percent Anglo and a lesser percent black and Mexican-American. At the time this second hearing was held in February of 1976, from which hearing the plan now before this Court came about, the district had dropped to 41 percent Anglo, 44.5 percent black, and 13.4 percent Mexican-American.

Now, the first appeal in the July of '71 remedy which the school district supported -- the school district supported whatever the district court there ordered -- the Fifth Circuit sent it back, but the Fifth Circuit itself sat on that case for virtually four years. Summer of '71 you

have the trial. December 2 of '71 you have oral argument in the Fifth Circuit. July 23, 1975, you finally have an opinion from the Fifth Circuit with respect to the July of '71 remedy. Therefore we start again on hearings February 2, 1976, on how to formulate a remedy. Again, no question of liability. The school district has put that aside. The school district simply wants to find out what it is that the district court and the court of appeals can finally come to agree upon as a remedy for a large urban school district with an ever-decreasing Anglo population and with an ever-increasing minority population, and being in the Southwest with a remarkable ever-growing Mexican-American population.

At this time, as of this October, if the district court were to now be formulating a plan, it would be looking at October's figures where it has now dropped to Anglo of 32.2 percent, Mexican-American of 17.26 percent, and black of 49.4 percent.

Over the ten years that this second desegregation case has been pending involving the Dallas Independent School District, there has been a drop of minus 58 percent of the Anglo population, as of the day I stand here, in this school district. There has been an increase of 17.3 percent in the black scholastic population, and these figures are scholastic, not total people population --

QUESTION: And the percentages.

MR. WHITHAM: And the percentages, and there, as to the Mexican-American scholastic population, has been an amazing increase in this 10-year period of 56.7 percent of Mexican-American children.

Now, how did we come to this circumstance? We are in the strange circumstance that Mexican-Americans were never separated by State law in Texas. They were treated as white. From this point on, if I refer to Anglo, black and Mexican-American, I am speaking in terms of desegregation as we speak of it in the American Southwest, to have descriptive terminology.

On July 16, 1971, the district court made a finding of liability against the school district that there were vestiges of a state imposed school system as to blacks. As I say, from that point on we ceased to fight about it. We accepted it. Let's come to the remedy. The district court, though, did a strange thing. The district court made a specific finding that there was no de jure showing that the plaintiffs had failed in their burden of proof to show de jure segregation of the Mexican-American student; however, the district court ordered that the Mexican-American be treated as a separate ethnic group for purposes of a desegregation remedy, and in its July 23, 1975 opinion, the court of appeals affirmed that.

Therefore, and this court --

QUESTION: Had the State constitution prior to 1954 required the segregation of Mexican-Americans?

MR. WHITHAM: No, sir. Mr. Justice Stewart, in Texas where the Mexican-American case comes before the courts, you are dealing in terms of the North and the West as to black in finding State action in local school board authority, not in State statute, not in State constitution.

QUESTION: But in State constitution and/or statute, there had been a requirement of segregation of Negro students; is that it?

MR. WHITHAM: Well --

QUESTION: Until 1954.

MR. WHITHAM: Blacks. Article 7 Section 7 of the Texas Constitution.

QUESTION: Said what?

MR. WHITHAM: Said that children should be separated in school by race, black and white. No reference to Mexican-Americans.

QUESTION: And Mexican-Americans are white?

MR. WHITHAM: Were treated as white, and had been for many years until the demands for cultural recognition of this very growing Mexican-American population has now caused that ethnic group to wish to be treated as a minority.

QUESTION: But there was never de jure school segregation of that ethnic group; is that correct?

MR. WHITHAM: Never by State statute; never by State law. By State statute or State constitution.

After struggling so hard with a school district with changing demographic patterns and to illustrate, you will find at page 219 of the Joint Appendix what the racial makeup -- those are not the maps before you. The maps before you would show where the children now go to school under the district court's order.

QUESTION: Are those maps before us duplicated in the appendix?

MR. WHITHAM: The maps that were handed out are not duplicated in the appendix. They show where children now would go to school. Duplicated in the appendix are three demographic maps. Here is the school district. The yellow area basically in 1960 was Anglo, the orange area was the predominantly black settlements in the school district.

In your appendix at page 220 you will find this map reproduced that shows what is referred to in the argument and before this Court as the Anglo area, which will be the yellow area. The orange area will be the predominantly black or predominantly Mexican-American area, and when you study the briefs and hear the arguments about the naturally integrated areas, they will be represented here in what I will call the purple color. Those are problems faced by the district court.

You will find in your appendix another map that shows that color at page 221 of where the Anglos live across the north and east, the ever-growing black population, and these slashed lines show the tremendous, tremendous Mexican-American growth.

I will simply yield any rebuttal time I have to finish these remarks. The twenty minutes allotted for a case this complex for the school district is simply, I must say, inadequate to get the story over.

The district court became dissatisfied with the school district's plan and with the NAACP plan and called a special meeting on September 16 of '76 for the community to come together, all parties in the lawsuit. The district court then asked a tri-ethnic civic group to come up with a plan. That tri-ethnic civic group did come up with some concepts. The district court then ordered that tri-ethnic group to come in as amicus curie and present some evidence. The district court then ordered the school district to take that tri-ethnic group of citizens' concepts and flesh them up into a student assignment plan.

What you have before you is the result of a tri-ethnic group seeking to formulate a remedy for the Dallas Independent School District. I will move on.

The court of appeals became very concerned over time and distance studies. Time and distance studies were

not necessary here. Time and distance studies were used simply as an excuse to get around Swann's great dilemma, and I must hurry and say what it is. When you say there is to be no requirement of racial balance, but you say on the other hand, you must eliminate one-race schools, you leave the lower courts and school boards with a tremendous difficulty of how do you accommodate to that dilemma? That dilemma must be resolved in the urban condition, but when the court of appeals sent this case back, it overlooked the record on time and distance as surely as anything in the world.

The plaintiff's own witness, Professor Willie, on Appendix 51 you will see his statement, "I made time and distance studies and it takes too long to go from North Dallas to East Oak Cliff," which is the predominantly thing. The plaintiff's own lawyer, my friend and brother, Mr. Cloutman, who will argue here, made a time and distance study and let it go at that, where it would take 35 minutes and 22 miles to get from the predominant white area to the predominant black area, and he admits he made that test on noon on a Sunday, which is completely illogical. But the Fifth Circuit had that before it.

The court of appeals had before it the court's own expert witness who said, "You can't do crosstown bussing that requires a travel time greater than 30 minutes," and

they recognized that when they formulated their plan.

QUESTION: Well, when the district court conducts its time and distance studies, won't the court of appeals have a different problem?

MR. WHITHAM: If you conduct those time and distance studies, all the court of appeals will find is what all of the parties to this lawsuit knew and what the district judge knew, and the district judge has had this case in the palm of his hand for 10 years, and that is that the time and distance from where the Anglos live and where the predominantly minority areas are is too far and is beyond all of Swann's teachings with respect to transportation.

Also I would point out that of the now 32 percent Anglos that we deal with in this district to be a part of a remedy, that not all of them live in just the north and east, the so-called yellow strips you will see in the appendices at 219. Probably 45 percent of those remaining Anglos now make up the Anglos in the naturally integrated areas that you will see. So for a school district and a district judge to come to grips --

QUESTION: You may finish your sentence.

MR. WHITHAM: -- to come to grips in the urban society with an ever-growing Anglo population, with the plaintiffs in their own plan admitting three times -- and it's in the record and in the briefs -- that distance is too

far from the whites, that the growing black population is too far from the ever-decreasing Anglo population, that the condition and quality of schools in the so-called East Oak Cliff or predominantly black areas warrant them remaining one race, when you see that the court of appeals in its opinion in effect virtually pays tribute to the district judge for having considered the many complex factors involved in the urban society and formulated a comprehensive plan for a remedy, but simply because they will not face up to the dilemma of no racial balance and eliminate one-race schools, have played volleyball with desegregation cases, including this one on the remedy, and sent it back to the district court, then in the urban society we will never, never be able to bring these difficult matters to an end.

I appreciate your courtesy.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Whitham.

Mr. Blumenthal.

ORAL ARGUMENT OF ROBERT L. BLUMENTHAL, ESQ.,

ON BEHALF OF PETITIONERS CURRY ET AL.

MR. BLUMENTHAL: Mr. Chief Justice, and may it please the Court, the issue in this case, does the Constitution mandate forced transportation of students in the previously segregated State school system where private housing patterns are racially imbalanced, is one that concerns Curry. The Court has previously answered that question

yes, and it has done it on two assumptions. One, it is assumed that because there was once State-enforced segregation it somehow happened to create the racial imbalance which exists in the housing pattern, and the second is the assumption that once that imbalance is created, the school system can remedy it.

It is Curry's position that both of those assumptions are false. In this case, both of those assumptions have been held by the district court as a fact not to have existed. The district court found that it was private housing patterns which caused the racial imbalance, not anything that was ever done by the Dallas Independent School District. And indeed, the experience of Dallas post 1965, during the time that the court was mandating all student assignments, would amply indicate that that finding is true and is based on the evidence. During that period there was a fluid movement of schools that went from all white to all black.

In 1971, children were bussed from South Oak Cliff High School, an all-black school, to Carter High School, a predominantly white school. In 1976 the effort was how to relieve Carter High School, which was then a some 75 or 80 percent black school from its predominantly minority status. But in 1965 when the Fifth Circuit adopted a racially neutral school policy, South Oak Cliff was an all-white school.

The shifting populations, the integration of the

city, is a whole different thing; you are dealing with a different problem than was dealt with in the Fifties or the post-Brown in the period of school districts attempting to maintain segregation. But even more vividly pointed out is the false assumption that the school district can remove one-race schools. In city after city after city circuit courts and indeed this Court have ordered school districts to racially change the makeup of their cities. You've asked them to eliminate one-race schools. You might as well ask them to nail currant jelly to the wall, because they've been unable to do it unless you concede, unless you believe that Detroit has succeeded in eliminating one-race schools, or Cleveland, or Oakland, or Kansas City, or Atlanta, or the District of Columbia. If that's the perception of having eliminated the one-race school, then perhaps it's possible. But in fact what has happened in case after case after case, and what has happened in the Dallas Independent School District, is that every attempt by the district court and every attempt by a school district to mandate student assignment, to force transport, to rearrange the school district, has met with a minority isolated district itself, one in which any hope for integrated education dies, and one ultimately that loses the community support so vital to a school district.

In this case we have testimony from Dr. Coleman,

who you know is the noted sociologist, the father of the Coleman Report, the authority on school segregation, the one who wrote the report in 1960, that the result of this type of transportation will ultimately be a resegregated district.

QUESTION: Mr. Blumenthal, may I interrupt?

MR. BLUMENTHAL: Yes, Mr. Justice.

QUESTION: I read these briefs some little time ago and I remember that the Estes parties and the Curry parties and the Brinegar parties take differing positions.

MR. BLUMENTHAL: Yes, sir.

QUESTION: We've heard from Mr. Whitham representing the Estes party who ask us that they are supporting the district court decree.

MR. BLUMENTHAL: Yes, sir.

QUESTION: What is your basic position?

MR. BLUMENTHAL: Our basic position, sir, is to reverse both the district court and the court of appeals, to tell the district court that if it finds discrimination, remove it. If there is something that it can remedy, remedy it, but it is under no requirement by the Constitution, the 14th Amendment does not mandate the transportation of children in a formerly State segregated school unless there is some discrimination that is being remedied in particular.

QUESTION: Well, I don't think, in Judge McMillan's case, I don't think our Court -- perhaps I'm mistaken, but I

don't think our Court has ever said that the Constitution mandates bussing of students, but simply that it's a permissible tool in a desegregation decree, once the court has found unconstitutional segregation. I think that's correct.

MR. BLUMENTHAL: But, sir, you've also imposed a presumption that any formerly State segregated school has had a system-wide violation, and a system-wide violation calls for a system-wide remedy, and the only system-wide remedy is forced transportation. And if you would make it clear to a district court and to the Fifth Circuit to quit reversing, just because you haven't, quote, "bussed enough."

QUESTION: Why do you say that the only cure for a system-wide violation is bussing?

QUESTION: Yes.

MR. BLUMENTHAL: Because that's the only cure that the Fifth Circuit certainly has indicated is appropriate. Every other account in the first hearing, there was television, there was majority and minority, there were all of the various -- magnet schools -- all of the panoply of efforts to integrate schools, and the Fifth Circuit rigidly reversed and said, "You haven't made constitutional muster, see Swann and the remedies prescribed in Swann," again with bussing, with this --

QUESTION: Those are remedies permitted in Swann.

MR. BLUMENTHAL: Beg pardon?

QUESTION: They were not prescribed remedies in Swann, were they?

MR. BLUMENTHAL: Mr. Justice Stewart, the Fifth Circuit in the reading by the district courts certainly, if you read his record, read his statements to counsel, he is saying I am mandated to bus by the Fifth Circuit, and that's really the only fair reading of the 1976 opinion. It's the only fair reading, I believe, of the 1975 opinion, and the only really fair reading of the 1976 opinion, which is more --

QUESTION: And the district court's decree mandated so-called bussing of some what, 17,000?

MR. BLUMENTHAL: The last decree I believe mandated the bussing of some 17 to 20,000 of whom only about 10,000 are still in the school district. The rest of them have disappeared. 20 percent of the blacks who were to be bussed have disappeared.

The middle class opts out of the system, black or white. It's not a purely racial thing. But the circuit court has said eliminate one-race schools, and the only way they can suppose that you can eliminate one-race schools is to force assigned students.

QUESTION: Well, the district court did not eliminate one-race schools, and that's what the court of appeals found wrong with it.

MR. BLUMENTHAL: The district court only has 41,000 Anglo students left, and they cannot be distributed around the district like --

QUESTION: So what is it you quarrel about with the district court's decree?

MR. BLUMENTHAL: Well, the district court's decree in making its forced assignments has now removed us from a 57,000 Anglo student to 41, and the continuation of that decree is going to ultimately bring this into a racially isolated district in which no one can ever achieve the benefits of an integrated education.

QUESTION: That may or may not be post hoc reasoning. Post hoc ergo propter hoc, you've heard --

MR. BLUMENTHAL: Well, it was predicted precisely by the witnesses that Curry produced. Dr. Armour predicted the precise continuation if a plan was adopted similar to the one the court adopted, he predicted the precise ratios to which the student assignment would drop. Coleman says the same thing. Every district has had the same experience. Leon Bessinger talks about cognitive dissidence in which an idea devoutly held is not abandoned even when evidence that it fails is produced. He uses an example, the Court will recall, Adventists who predicted the end of the world on a certain day, and the world didn't end on that day and the people became more fervently convinced than before that their

theory was right and the world would come to an end --

QUESTION: That it had ended on that day?

MR. BLUMENTHAL: No, that it would end. They picked another day. They said more busing will get us there. Just because the busing that we've done to date hasn't worked, obviously we need more. Obviously we need to go to --

QUESTION: I'm trying to get at your position, Mr. Blumenthal, and perhaps I should be more familiar with it, I would be if I had read your brief more recently, but is it your position that the district court was in error in ordering any busing whatsoever?

MR. BLUMENTHAL: It is our position that the district court was not in error in light of the Fifth Circuit's decision. It's our position that the Fifth Circuit continually ordering the district court to continue to bus, in spite of whatever the court finds, that's the error.

It is our position, Curry's position, that if the district court were instructed to use whatever tools to desegregate it chose to use, but it did not have to use forced transportation if it felt like it was not productive -- remember, the district court --

QUESTION: Now -- go ahead and finish your sentence.

MR. BLUMENTHAL: Then I think Curry would be, if you could say you don't have to bus, Curry would be pleased

with the result. That's the position we urge that the Constitution permits.

QUESTION: That it is permissible but not mandatory; is that it?

MR. BLUMENTHAL: Permissible only to remedy some discriminatory purpose, but not mandatory, and you don't have to remove one-race schools unless those one-race schools were found to have been caused by the DISD.

QUESTION: Yes.

MR. BLUMENTHAL: Now, remember, the district court found that in 1971, I bussed 1,000 children to the high schools of which 50 were still here in 1976, five years later. The courts concluded from that, the district court, that it does not work, but no one is going to permit that district court's conclusion to stand up.

And what about those thousand students? Why don't they count in relieving. They're gone now, but under Pasadena they've been assigned to those school districts; why don't they count as people, although not present, who have integrated a one-race black school? They were assigned to the school by the district and through no act of the district as found by the district court, they're gone.

Staring all of this in the face, too, is to what end? For whose purpose are we changing the school districts into minority isolated school districts?

QUESTION: You are saying that bussing is permissible, but you must also be saying that there are plenty of circumstances in which it is forbidden to be used? You say it certainly isn't permissible as ordered by the court of appeals.

MR. BLUMENTHAL: It certainly is not, and I would say that --

QUESTION: But you don't think as a constitutional matter it ought to be banned?

MR. BLUMENTHAL: No, you don't need to ban it if you tell the district court that if you don't think this is going to work --

QUESTION: And therefore you must concede, then, that in some circumstances it may be ordered.

MR. BLUMENTHAL: In some circumstances, but only if it has some prospect of working, Mr. Justice White.

QUESTION: All right. Now, you just disagree with the court of appeals? Do you think the court of appeals --

MR. BLUMENTHAL: Yes, I --

QUESTION: You don't think the court of appeals says, well, Mr. Blumenthal, we understand your rule, but we're going to order this bussing even though we think it has absolutely no chance to work whatsoever?

MR. BLUMENTHAL: In fact they said that very thing in Lee v. Macon County --

QUESTION: But did they say it in this case?

MR. BLUMENTHAL: No, sir, but they did say that we think the Swann mandates bussing, even though we know it will not desegregate.

QUESTION: Perhaps you could just give me a little indication of where you think the court of appeals came the closest to saying, we're ordering this bussing or this review even though we have no hope that it will work at all?

MR. BLUMENTHAL: In Lee v. Macon County --

QUESTION: Where does it say it in this case?

MR. BLUMENTHAL: Beg pardon?

QUESTION: Where does it say it in this case?

MR. BLUMENTHAL: In this case they didn't say it. They just kept sending it back, saying get rid of one-race schools, as if there was some power that the district court had.

QUESTION: And where is, then -- what's the site for the Lee?

MR. BLUMENTHAL: The Lee v. Macon County, it's in our --

QUESTION: It's in your brief?

MR. BLUMENTHAL: It's in our brief; yes, sir. It's 465 Fed. 2d 369 at 370.

QUESTION: To pursue Mr. Justice Stewart's question, the relief you really ask is that the complaint be dismissed,

isn't it?

MR. BLUMENTHAL: On the basis of this record with no discrimination to be remedied, yes, sir, because we agreed on a majority-minority school district, we've agreed on it, the community is supporting it -- look at the high schools which are today neighborhood high schools with majority to minority; set out in our brief is a racial breakdown of those high schools. Look in the pink brief. Look at those racial high schools and tell me if that's not a unitary school system. Tell me what's wrong with those. It was very close, by the way, to the racial makeup of the school district before the courts began to ship children around, but it's now very far out of whack as to the racial makeup of the district because 95,000 Anglos is now 42,000 Anglos and sinking at about 7 or 8 percent of that population a year. And you can't integrate if you don't have children.

If this was an isolated, if Dallas was the only city in the Nation that this was true of, then perhaps you could talk about Dallas. But Dallas has been a model for a system in which the community has gone together to work or to achieve a desegregation plan and it didn't work there, and it hasn't worked anywhere.

QUESTION: Now, your reference to what, at least I thought you suggested was a holding concerning bussing

in Swann, the opinion states, "No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations." Thus transportation has been a part of public education for years.

It goes on to say that this is merely one of the permissible tools, not a mandated tool in every case, by any means.

MR. BLUMENTHAL: But the 5th Circuit has not applied it in that way, and the eloquence of turning those busses around that were used to segregate to use to desegregate is so appealing, and yet the fact of the matter is that it doesn't work. But nonetheless, the circuit court keeps requiring the district court to achieve it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Donohoe.

ORAL ARGUMENT OF JAMES A. DONOHOE, ESQ.,

ON BEHALF OF PETITIONERS BRINEGAR ET AL.

MR. DONOHOE: Yes. Mr. Chief Justice, Members of the Court, let me try to answer the question you posed to Mr. Whitham, Mr. Chief Justice:

I represent a group of parents and citizens who reside in an area found by the district court to be naturally integrated, in terms of school population. And the reason we are here before --

QUESTION: Where is that area on the map?

MR. DONOHOE: It would be in the eastern, near eastern portion of the school district, Justice Stewart.

QUESTION: Here?

MR. DONOHOE: Yes, that's correct.

The reason that we're here complaining of the court of appeals' opinion might be best stated by just reading the applicable portion of the opinion.

The court of appeals says: "We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of these techniques. There are no adequate time and distance studies in the record in this case. Consequently we have no means of determining whether the natural boundaries and traffic considerations preclude either paring and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing."

Now, Mr. Whitham stated that this is a remedy case. I think you can go a little further than that. This case really only involves questions of student assignment. There are no issues here regarding site selection, faculty desegregation, school administration, single-member school districts, or any of these kinds of issues. As a matter of fact, there is a specific finding by the district judge that

the school board was in good faith subsequent to 1971, attempting to meet the Swann requirements following the Brown decision.

Now, our concern is that in a situation where, at March 1 of this year, there were only about 40,000 Anglo students, slightly over 40,000 Anglo students left in the school district, of which 38,000 under the plan, if you turn to the respondent plaintiff's brief, were already in statistically or numerically integrated schools, that there simply weren't enough school students, Anglo students, left to transport. As a matter of fact, in the government's brief they acknowledge that at March 1, only 8 percent of the schools of the Anglo students in the Dallas Independent School District were going to predominantly Anglo schools.

Now, we would like to point out to this court that there aren't very many Anglo students left in the district. The few that are left are, a good percentage of the few that are left, are in naturally integrated neighborhoods. In view of the court of appeals' opinion, and it was aware of these facts, or at least the record was before it, we are concerned that the effect of their decision to order time and distance studies is to effectively order transportation of students.

We certainly agree, Justice Stewart, that the Swann decision does not require bussing, but what we are

concerned with, as I think Mr. Justice Rehnquist was concerned with in the Valdosta case, where this Court rejected certiorari, petition for certiorari, but over his objection, that the court of appeals is too concerned with one-race schools, and that you could have the absurd result in this case of in fact, an order of having -- pardon me. You could have the absurd result of having transportation of Anglo students or black students from naturally desegregated areas where they consentually elected to live together, to other parts of the school district in order to eliminate one-race schools.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

AS AMICUS CURIAE SUPPORTING RESPONDENTS

MR. WALLACE: Mr. Chief Justice, and may it please the Court, the United States submits that the court of appeals was correct in this case in remanding the case for further consideration of the remedy and for more specific factual findings, and in light of the limited nature of the court of appeals' holding some of the questions being argued before the Court today seem to us prematurely presented because they involve matters that the court of appeals has not yet passed on, and believes it needs to have a fuller record before it can pass on them.

The question before the court of appeals was whether the remedy adopted by the district court was adequate to disestablish the continuing effect of a pervasive system of dual schools that had been maintained in the Dallas Independent School District for generations, pursuant to Texas Constitution and statutes.

QUESTION: Now, the question before the court of appeals and the question before us is not a constitutional question at all, is it? It's a question of equity.

MR. WALLACE: It's a remedial question.

QUESTION: Correct.

MR. WALLACE: It can be debated whether --

QUESTION: What is there to debate about?

MR. WALLACE: Whether the --

QUESTION: There's an admission that there was a constitutional violation until 1954.

MR. WALLACE: That's correct.

QUESTION: This is just a matter of permissible decree, isn't it?

MR. WALLACE: That is correct, Mr. Justice. The question is entirely remedial. The question of liability is not being debated, and both courts below proceeded on the premise conceded by the school board in this case that the dual system had not yet been disestablished, we're at that elementary remedial stage, familiar in other Southern cases,

of disestablishing for the first time the continuing effects of the dual system.

QUESTION: Or Northern.

MR.WALLACE: It is familiar in some of those as well, Mr. Justice White.

Now, the conspicuous problem with the remedial order that reached the court of appeals in this case was the large number of one-race schools that would remain under that order and the large percentage of black students, the ones found to have been discriminated against, who would still attend them, according to the court of appeals' figures approximately 66 of the 176 schools would remain one-race schools.

There are other ways of looking at the figures in this record, but they all come out showing that substantially more than a quarter of the schools would remain one race, and perhaps even more significantly, 59 percent of the black school children would be attending one-race schools, schools in which more than 90 percent of the students would be minority students. This is indicated on page 22 of our brief --

QUESTION: When you say minority students, does that include Mexican-American?

MR. WALLACE: In some instances it does, Mr. Justice, although it's principally isolation of black children

that's involved. The best picture of that is presented in the table on page 53 of the brief for Respondent Tasby, the table compiled from the April 1979 report of the school board to the district court, and you will note that the percentage of black students, which is the fifth column of figures, less than 1 percent whites in the school, 38.3 percent of the black students are in such schools, whereas only 2.04 percent of the Hispanic students are in such schools, and 1 to 9 percent, 20.63 of the black students are in such schools, where for the Hispanics it's a little less than 10 percent.

QUESTION: Don't you suppose, Mr. Wallace, that very similar statistics could be -- wouldn't be true of Detroit or Pittsburgh or Cincinnati or New York City, or many, many cities whose states had never had, either by statute or constitutional, de jure segregation?

MR. WALLACE: There could be a very similar pattern of school assignments, yes, Mr. Justice, but the legal question presented might be quite different. Here under this court's decision, reaffirmed last term, there is a burden on the school board to show that the extent to which there remain substantially disproportionate or one-race schools in the system was not the result of the pattern of illegal conduct that had been mandated by law over a period of generations, and that presumptively affected the development of the entire commun ty, the siting, the capacities of schools,

the growth of residential areas, depending on access to schools, and the entire development of community that was built around a legal system that mandated racial separation in the schools. This is the familiar law under all of the governing decisions in this Court.

QUESTION: Well, wasn't it the finding in the Detroit case that -- undisputed finding -- that the proportion of students in the so-called one-race schools was greater than you have here, and that the number of one-race schools, just counting the schools, was greater than you have here?

MR. WALLACE: This can occur due to residential patterns in cities where there may have been some de jure acts that added to segregation in those cases under this Court's decision require an inquiry into the incremental effect of de jure acts on the racial separation that otherwise would have existed as a guide to the remedy that should be used.

In cases of this sort, that is not the approach that the court has taken. But rather the court has stated, as we quote on page 42 of our brief in this long case that there is the burden on the school authorities to satisfy the court that the racial composition of those schools that remain predominantly of one race after a pattern of generations of mandated racial separation, that the remainder of those schools are not the result of present or past discriminatory

action. That was the question that was before the court of appeals, whether there were findings made by the district court that would satisfy that the school district had satisfied that burden here.

The reason why this problem was as conspicuous as it was to the court of appeals is not merely because of the more generalized formulations in this court's opinions that the adequacy of a remedy to disestablish a dual system of this kind is to be measured by its effectiveness, but because more specifically of the fact that the last time the court of appeals for the 5th Circuit upheld as constitutionally adequate a desegregation plan --

QUESTION: I thought we agreed we weren't talking about whether or not this is constitutionally adequate.

MR. WALLACE: Well, upheld as adequate for a constitutional violation --

QUESTION: It's not your contention, is it, or is it, that the Constitution of the United States requires an integrated school system?

MR. WALLACE: That is not our contention.

QUESTION: It simply requires a desegregated school system?

MR. WALLACE: It requires a desegregated school system. The question here is one of remedy. The reason the problem was so conspicuous is because the last time this court

of appeals upheld as adequate a remedy in such a system that preserved a comparable number and percentage of one-race schools, this Court unanimously reversed it. This was some years ago; it was in Davis v. the Mobile School Commissioners, and the situation was very comparable to the one involved here, the figures referred to in this Court's opinion showed that 64 percent of the black elementary school children and a majority of the junior high school and senior high school students would remain in one-race schools, an aggregate figure that obviously would come out very close to the 59 percent that's involved here.

And the Court unanimously held that the tools specified in the Swann case should be considered before this kind of racial isolation should be upheld, and when the district court looked more specifically -- when the court of appeals looked more specifically here at the reasons why the remedy adopted left so many children in one-race schools, they found that the problems had not shown that the burden of the school board had been met here.

For one thing, the whole East Oak Cliff area involving 27,500 students almost all of whom were black, more than 40 percent of the black students in the district, was simply excluded from the remedy adopted by the district court --

QUESTION: Mr. Wallace, does EOC stand for East

Oak Cliff?

MR. WALLACE: That is my understanding.

QUESTION: And is this East Oak Cliff?

MR. WALLACE: That is the area. That is the area that was excluded, even though plans had been submitted to the district court that showed it was feasible to include portions of this area and the area was in a comparable geographic configuration to the area east of the North-South Interstate Highway in Mobile that had been erroneously treated separately by the court of appeals in that case. Indeed, the western boundary of East Oak Cliff is the North-South Interstate Highway.

There is a very close parallel there.

QUESTION: Mr. Wallace, have you thought about the question I put to your friend? Is there anything before the Court now which couldn't be resolved, even though at a later date, after the district court acts on the remand?

MR. WALLACE: Nothing, Mr. Chief Justice. The implication of your question seems to me that the Court may wish to consider dismissing the writ as improvidently granted at this interlocutory stage of the case, and in light of this Court's intervening decisions in Dayton and Columbus since the grant of certiorari in this case, that is a course that should be considered to enable the proceedings on remand to go forward more quickly.

QUESTION: Mr. Wallace, may I ask you a question in that connection?

This school system has been in litigation since 1955. As a representative of the United States Government, do you think there is any merit in the suggestion that it would be well to bring that litigation to an end here in this court, to the extent we possibly can?

Can you imagine yourself trying to run a school system that has been in litigation for a quarter of a century?

MR. WALLACE: I think it is very regrettable --

QUESTION: Does the United States Government --

MR. WALLACE: -- that it has taken as long as it has, and --

QUESTION: You want it to go back for another two to five years of litigation?

MR. WALLACE: No, I just suggested one course that could be adopted to enable the proceedings on remand to take place sooner than they otherwise might. They would have been under way now had review not been granted of this interlocutory stage. We're all for proceeding quickly with the case, but it seems to me that the court of appeals has decided rather little, and unless this Court wants to undertake the task of a court of appeals or the task of a district court in the case, there is relatively little that it can do

to conclude the case, it seems to me, in light of its review of the governing principles as recently as last July.

QUESTION: We could affirm the district court, could we not?

MR. WALLACE: Well that, it seems to me, would require reconsideration of matters that the Court reconsidered and came up the other way on last July.

QUESTION: You see no difference between this case and Dayton and Columbus?

MR. WALLACE: Well, in many ways this case seems to me to follow a fortiori from Dayton and Columbus, Mr. Justice, because it's so much closer to the Mobile case, as I have just been indicating, and because the other point that I was about to make, more than half of the grades were completely left out of the desegregation plan by the district court. It limited the plan to grades 4 through 8; left out more than half the grades, to begin with. It would be extraordinary for the Court to affirm that.

QUESTION: Well, doesn't the district court have some discretion when it comes to very young children in saying there shall be less bussing with respect to them than with respect to older children?

MR. WALLACE: Some discretion based on adequate factual inquiry and findings.

QUESTION: Didn't Swann --

MR. WALLACE: -- the part about grades 9 through 12, Mr. Justice.

QUESTION: Didn't Swann say precisely that, Mr. Wallace?

MR. WALLACE: Swann did say that, and I answered consistently with that answer.

QUESTION: With young children, there was to be a different approach with younger children?

MR. WALLACE: Young children are being bussed, including some children in grades 1, 2, and 3 in the Dallas system today. There are 5,000 children being bussed, not for purposes of desegregation, but the district court refused to consider any bussing for purposes of desegregation of children of those grade levels.

QUESTION: Mr. Wallace, may I put this question to you: The district court found thatit was his duty to adopt a plan that would be effective, effective to accomplish as much integration as possible, given the problems in that community. Is it the position of the United States that the effectiveness of a desegregation plan in terms of accomplishing the ultimate objective, and that is to have diversity of students in public school systems of our country, is it the government's position that effectiveness is immaterial?

MR. WALLACE: Not at all, Mr. Justice.

QUESTION: The district court found that this was a

most effective plan. That was a finding based on years of experience with an intractable problem. What do you do? Do we second-guess the district court at this level, after that record?

MR. WALLACE: I cannot accept the premise, Mr. Justice, that this was an intractable problem as the record presented it before the district court --

QUESTION: Would you be content with wholly one-race schools or two-race schools in the City of Dallas?

MR. WALLACE: There were a number of plans before the district court that showed that a much higher degree of desegregation could be achieved and no specific findings were made about why those plans were impracticable within the meaning of this court's governing considerations. So I don't believe it accurate to assume that there was an intractable problem here that necessitated limiting the remedy to grades 4 through 8 and excluding more than 40 percent of the black children from any consideration of remedy.

QUESTION: May I ask one question before you sit down?

The district court made a reference -- primarily been talking about these Oak Cliff areas, as I understand, and I think the district court made a reference to the fact that I think all but one of the plans contemplated leaving the East Oak Cliff area predominantly black, but one of the

plaintiff's plans was quite different, and as I read the court of appeals opinion, they were primarily critical of the district court for the lack of detail in its findings. Do you understand that consistently with the court of appeals' opinion, if the district court reexamined the record in detail and made more elaborate findings, it would at least be open to it as one alternative to re-enter its original decree supported by more detailed findings?

MR. WALLACE: The court of appeals said nothing to preclude this. We might argue that it would be legal error, but that would depend on the findings.

QUESTION: I understand.

MR. WALLACE: But it seems to me the nature of the court of appeals' holding is an extremely limited one here. They basically said they didn't have a full enough record or full enough findings to be able to decide anything.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

Mr. Cunningham.

ORAL ARGUMENT OF E. BRICE CUNNINGHAM, ESQ.,

ON BEHALF OF RESPONDENTS NAACP ET AL.

MR. CUNNINGHAM: Mr. Chief Justice, may it please the court, on behalf of the NAACP, it is the NAACP's position that this is a dual segregated de jure system that has never been desegregated, and that it is not desegregated by the student assigmment plan that was adopted by the district

judge in this case in accordance with the instructions that were given to the district judge in 1975, directing that district judge specifically to this Court's holding in Swann and directing that district judge to use the tools and techniques set out in Swann.

The reason the NAACP submit that this student assignment plan does not desegregate the Dallas Independent School District is, one, the exclusion of high school students 9 dash 12 from inclusion in this student assignment plan; two, the number of one-race schools that were left one-race without any justification, the NAACP submits; three, the exclusion of kindergarten dash third grade students from inclusion in the plan; and four, the creation of an all-black district which was totally written off by the district judge below, locking in more than 26,000 students with the only method of getting out of that all-black district using a transfer form, that is that they themselves either opt out by magnet concept, attending a magnet school, or majority to minority transfers.

We submit, the NAACP submits that the court of appeals below was correct in remanding this case back to the district judge for additional findings, and the NAACP would submit that this was a very moderate order, and when you look at the order entered by the 5th Circuit in this case, and specifically moderate when you compare it with the order that

was rendered by this same court in this same case in July of 1975, when it specifically directed the district judge to utilize the tools that this court set out in Swann, and that this school district has never fully utilized, and further went on to tell that district judge to do it by the second semester or second term of the 1975-76 school year, which was not done.

Addressing myself to the four glaring errors that the NAACP submits that clearly indicates that this student assignment plan does not comply with this Court's ruling in Swann is the exclusion of the high school students 9 dash 12, which in effect is a neighborhood concept for these high school students, and with the indication that the only method of desegregating these high school students was a magnet concept. They have six magnet high schools plus skyline. The magnet concept has been a failure in the Dallas Independent School District.

Less than 2,500 students are enrolled in the magnet concepts right now. At the time, in 1976, there were approximately 3,500. The magnet concept has failed.

The other two referred to by the district judge for the desegregation of the high school students nine dash 12, the majority to minority transfer, is a failure in the Dallas Independent School District. 1,403 students out of a total population of better than 131,000 have taken advantage

of the majority to minority transfer program, and 96 percent of those were black. Therefore, with respect to the high school students 9 dash 12, the NAACP submits that there is no effective desegregation in accordance with this Court's holding in Swann.

The second point, the number of one-race schools left in this district, approximately 76 out of a total of 177, at the time that this order was entered 48 of those schools were Negro schools; 25 of those schools were Anglo schools. At the present time there are 76 one-race schools still existing in the Dallas Independent School District. 62 of those schools are black schools, and to that you add 14 combined, and you have, you come up with 76 one-race schools that the court of appeals below said that there was no factual finding, and the court of appeals below did not simply rely upon the fact that there was a large number of one-race schools. It went on to say in its opinion, and address itself to the high school question.

The third point that I would like to make --

QUESTION: Are a majority of the one-race schools, at least of the all-Negro schools, in this East Oak Cliff?

MR. CUNNINGHAM: There are 28 one-race schools in the East Oak Cliff.

QUESTION: How many?

MR. CUNNINGHAM: 28.

QUESTION: 28.

MR. CUNNINGHAM: The rest are in the other four sub-districts that were created by the district judge.

QUESTION: And what was the total of all-Negro schools?

MR. CUNNINGHAM: 28 in East Oak Cliff sub-district.

QUESTION: The total?

MR. CUNNINGHAM: There are a total of 62 one-race schools.

QUESTION: But does that mean all-Negro schools? Not necessarily, does it?

MR. CUNNINGHAM: There are 52 one-race schools, black schools; 9 one-race Anglo schools; and 1 Mexican-American one-race school existing in the Dallas Independent School District.

QUESTION: And of those, 28 of the all-Negro schools are in East Oak Cliff, right?

MR. CUNNINGHAM: In the East Oak Cliff area. The remaining all-Negro schools are outside of the East Oak Cliff area.

QUESTION: Uh-huh.

MR. CUNNINGHAM: The student assignment plan also in excluding kindergarten dash 3, the NAACP submits that there were no factual findings to justify the exclusion of these students from inclusion in the plan. There were no

indications by the district judge. There were other plans that were submitted. The NAACP submitted a plan that would have desegregated Dallas. Plaintiff's Plan A would have desegregated Dallas more than the plan that was adopted by the district judge below.

The court even appointed a court-appointed expert who submitted a plan, and that plan was not even adopted by the district judge below. And that plan of the court-appointed expert used part of the East Oak Cliff in attempting to desegregate Dallas, make Dallas come in compliance with Swann.

And then the last point: The creation of this all-black district.

QUESTION: Mr. Cunningham, is it your position that the district court was bound to adopt the plan which in your words most desegregated the school district of the ones submitted to it?

MR. CUNNINGHAM: I think that the district judge under this Court's holding had a duty to adopt the plan that desegregated Dallas and utilizing the tools in Swann.

QUESTION: Well, he had what, was it five or six plans submitted to him?

MR. CUNNINGHAM: He had six plans submitted to him.

QUESTION: Is it your position that he was obligated to adopt, of those six, the one which most desegregated

the school district?

MR. CUNNINGHAM: He was obligated to so adopt the plan that most desegregated Dallas. It is the NAACP's position that he did not adopt the plan that most desegregated Dallas, but that the plan that was adopted continued the dual school system that had existed from the time of Brown 1 and Brown 2 up to the present time, and as it exists right now.

QUESTION: Mr. Cunningham, back in 1972 in the case to which your colleague on the other side referred, Lee against Macon County -- are you familiar with that case?

MR. CUNNINGHAM: I have read that case, Your Honor.

QUESTION: As I read it, the court of appeals seemed to say that even if this desegregation order would result in complete resegregation -- I think there were six schools there black, or some number of schools that were black and a much fewer number of schools that were white, but those were all the schools there were, and the desegregation order was supposed to result in integrating those schools, and the court said even if complete resegregation would result, we nevertheless must order this plan into effect, order the HEW plan into effect. Do you support that holding?

MR. CUNNINGHAM: We support --

QUESTION: Do you understand it that way?

MR. CUNNINGHAM: If I understand, Mr. Justice White, we are dealing with Dallas, and --

QUESTION: Well, my next question is going to be, to you, of course, that your colleague suggests that much of the court of appeals' opinion and decision in this case rests on an understanding of the law such as that, namely that except for their feeling that the resegregated consequences of an integration plan is irrelevant. They wouldn't have come to the conclusions they did. Now, is that -- to what extent is the approach to desegregation cases such as Lee, to what extent does the present decision rest on such an understanding?

MR. CUNNINGHAM: The present decision rests upon -- I think the court of appeals below's decision rests upon this Court's holdings, in Brown 1, 2, Green, and particularly Swann, because on -- this is the second time that the court of appeals has directed this district judge to look at the tools set out by this Court in Swann and to apply those tools and techniques to the desegregation of the Dallas Independent School District.

QUESTION: Do you think the district court on a remand such has been suggested in this case is -- is he forbidden or is he permitted to take into account, in formulating his plan, whether or not a particular plan that has been suggested will result in further resegregation ultimately, or

white flight or black flight? Is he forbidden to take that into account?

MR. CUNNINGHAM: I think that he may take that into account, but I think that the NAACP's position is that still taking that into consideration, his first consideration, the first consideration are the minority children that are being desegregated, and seeing that their constitutional rights are protected and guaranteed, and that is what the NAACP says was not done.

QUESTION: So the NAACP was just as certain as it could be from experience that bussing, this cross-bussing would result in these black children next year or the year afterwards nevertheless going to an all-black school because there wouldn't be any whites or any people of any other color to go to school with, even if the NAACP was convinced by experience that that would occur, would you still be arguing what you are now, that you must take that first step?

MR. CUNNINGHAM: The NAACP would still be arguing the same position that it's arguing now and that it argued in the court of appeals below and in the district court.

QUESTION: May I put it a little bit differently? Do you think that the position you are taking would accelerate a return to separate but equal schools, or what we had all tried to get away from?

MR. CUNNINGHAM: Mr. Justice Powell, I think that

is speculation.

QUESTION: But don't you think that the record suggests that it might or probably will?

MR. CUNNINGHAM: That is the district judge's finding based upon speculation, but we have here a plan in effect which shows that the student enrollment is constant, that all that there has been, and no white -- well, white flight, as this Court said in Swann, should not be, or should not be a reason for denying minority children their right guaranteed to them by the Constitution.

QUESTION: Their right is to go to schools which are in a desegregated system, and that's the extent of their right, isn't it?

MR. CUNNINGHAM: That is the extent of their right, Mr. Justice Stewart, sir.

MR. CHIEF JUSTICE BURGER: Mr. Cloutman.

ORAL ARGUMENT OF EDWARD B. CLOUTMAN, ESQ.,

ON BEHALF OF RESPONDENTS TASBY ET AL.

MR. CLOUTMAN: Mr. Chief Justice, may it please the Court, on behalf of the respondent Tasby and others, original plaintiffs in the trial below in the trial since 1970, we support the conclusion reached by the United States Court of Appeals, 5th Circuit, which is a very simple and I believe direct order, simply requesting of the trial court to make further findings regarding a new student assignment plan as t

any one-race schools he deemed to be necessary, and necessary for purposes of all the factors articulated in Swann.

QUESTION: May he take into account the possibilities of whitesmoving out of the public school system, or may he not, in your view?

MR. CLOUTMAN: Mr. Justice White, I think the court may consider any practicality necessary to make the plan realistically work --

QUESTION: So is your answer yes or no?

MR. CLOUTMAN: My answer is not necessarily yes, based upon the record in the Dallas case. The Dallas case explored that very thoroughly, and there is no conclusive evidence that it will cause that. We're talking about Dallas and the Dallas school system, so for Dallas I would say no, the court would not be reasonable in including such a factor in limiting racial segregation of the schools.

QUESTION: The record doesn't show why the percentage of whites in the Dallas school system is so much lower than it was, or does it?

MR. CLOUTMAN: The record shows many expert opinions as to what might have happened, what might happen in the future, and those are divergent --

QUESTION: I didn't ask about the opinions. Isn't it the fact that there is a much lesser percentage of whites in this --

MR. CLOUTMAN: You're asking if the Anglo enrollment has decreased; it has. It began decreasing, Mr. Justice White, prior to litigation in this case, however, not as a direct result of this, and probably as a result of many things.

QUESTION: Yes. And I take it there is still a naturally integrated area in town --

MR. CLOUTMAN: There may be several.

QUESTION: -- that hasn't been particularly upset by anything.

MR. CLOUTMAN: There may be several of those pockets of neighborhood residences, that's true.

QUESTION: Well, how about the schools in those areas?

MR. CLOUTMAN: In each plan, by the way, proposed by the planners, we preserved to the extent that we could those areas intact.

QUESTION: You mean you don't have to use either those blacks or those whites to integrate some other schools?

MR. CLOUTMAN: We did not, in both Plans A and B. As a matter of fact, the particular reasons that we indicate to the court it should support the 5th Circuit's decision are quite simple. The unexplained exclusion of high school grades from any part of the plan without any justification in the record we think all by itself requires a remand for

hearings and a new plan to include those very schools.

By way of example, the maps you have before you demonstrate the absolute feasibility of desegregation in Grades 4 through 8 in a precisely identical manner that the high schools may be integrated throughout Dallas, and you are using older students. No rationale in the record or in the court's findings exists for their exclusion. For that reason alone the 5th Circuit was correct.

The 5th Circuit also points out indirectly, and there is no rationale given in the court's findings, the exclusion of K-3. Now, while this court said in Swann the age of children may be considered, there is no explanation, no rationale, and no evidence in the trial record regarding the exclusion of those children. For that reason again, and the fact that the exclusion of high schools and K-3 centers from a student assignment plan results in basically close to 100 one-race administrative units.

Those children in K-3 centers do not attend class with students of another race in over 100 cases. They may have black or white children in the building, but they are not in their classrooms, and they are for all purposes segregated.

QUESTION: K-3 being the kindergarten through third grade?

MR. CLOUTMAN: Yes.

By way of example again, the maps before you, and we have demonstrated this in our brief, there is an elementary school named Carr, and the students are all black and are sent to a far north Dallas school to attend Grades 4 through 6. At the conclusion of this, when they are met by white students, they are transferred further north and further east to the Ewell Walker Middle School, Grades 7 and 8. Now, these students are traveling 20 miles or better.

Now, after having attended segregated K through 3 and integrated 4 through 8, they're sent back home to an all-black high school to complete their education. There is no rationale in the plan for that, and the 5th Circuit says why do you do this? We want some reasons for this court to support that result.

QUESTION: May I ask this question: The district court's opinion said this, and I want to understand what your view is about it. It says, "Due to the geographic layout of the district and the factors of time and distance," which the court of appeals seemed to think the district court had not considered at all, "this East Oak Cliff area was left predominantly black in every plan proposed to the court with the exception of Plaintiff's Plan A." I think that's the NAACP plan, wasn't it?

MR. CLOUTMAN: No, Your Honor, it was ours.

QUESTION: What is yours?

MR. CLOUTMAN: Plaintiff's Plans A and B. We had two.

QUESTION: Two. Who sponsored Plan A?

MR. CLOUTMAN: The plaintiffs, Your Honor. Plaintiff Tasby and others.

QUESTION: Did the NAACP endorse that plan?

MR. CLOUTMAN: They had a third plan, Your Honor.

QUESTION: Right. Anyway, that plan which proposed to establish an exact racial balance in every school and which would have necessitated the transportation of either 49 or 69,000 pupils, how many would the plan you proposed require to be bussed?

MR. CLOUTMAN: Our evidence was 35,000, Your Honor. The court makes inconsistent findings, as you have noted, as to how many students it will actually require for transportation. The Plaintiff's Plan A, I will submit, and Plaintiff's Plan B and the court's own expert's plan all desegregated East Oak Cliff more than the plan presently in existence. There were three better plans testified to by three different groups of persons in the record, and their rejection is not explained, either.

Now, the court's reference to time and distance, there are no time and distance studies supportive of any rejection of Plaintiff's A, Plaintiff's B, Dr. Hall's plan, or in support of the plan adopted by the court. The record

is just absent, except for the little time and distance studies that we did perform on Plaintiff's A, and what counsels refer to, we did measure the longest bus run of 22 miles in Plaintiff's A. That was to give the court an idea of what the longest was going to look like.

QUESTION: What was the court talking about when it said, "The court is of the opinion that given the practicalities of time and distance and the fact that the DISD is minority Anglo, this subdistrict" -- I suppose that's East Oak Cliff?

MR. CLOUTMAN: Yes.

QUESTION: -- "must necessarily remain predominantly minority" --

MR. CLOUTMAN: The court is making a conclusion in its opinion with no record evidence to support it. That is what the 5th Circuit noted. We have no record evidence and the court makes no detailed findings as to why it concludes time and distance.

The court couldn't find the trial judge clearly erroneous because there were no facts for them to review.

QUESTION: Does this judge live in Dallas?

MR. CLOUTMAN: Yes, Your Honor.

QUESTION: He was unfamiliar with the distances?

MR. CLOUTMAN: He had not measured them himself, I don't believe, and there was certainly no evidence he did.

QUESTION: These maps show the distances, don't they?

MR. CLOUTMAN: No, Your Honor, not accurate. You may measure, I suppose, with a ruler front to back, but it does not tell you street miles.

QUESTION: Of course, but do you really think that --

MR. CLOUTMAN: I think that only an expert can tell us with any certainty not only what distances are, but what times are going to be like.

QUESTION: You'd have to lay out specific bus routes from school to school.

MR. CLOUTMAN: That's correct, and --

QUESTION: And an expert presumably wouldn't measure it on a Sunday afternoon, would he?

MR. CLOUTMAN: That is correct.

QUESTION: How about the finding on page 34A of the petition for writ of certiorari, the district court's opinion of, I think it's March 1976: "Moreover, this court must adopt the plan which promises to be effective in eliminating the vestiges of the dual system. The court is convinced that the magnet school concept on the 9 to 12 grade level will be more effective than the assignment of students to achieve a certain percentage of each race in each high school. The court tried this method of student

assignment in 1971 and it has not proved wholly successful."

MR. CLOUTMAN: The court tried in 1971, Mr. Justice Rehnquist, a high school assignment plan in which it in whole abandoned, and in part because the court assigned, for instance, 100 white students to a thousand-person black school and students in that case did not show up.

QUESTION: But at least the district court did make a finding that the magnet school system would be more effective than the transportation and assigning students on a racial basis to high schools. Now, if he was wrong on the record, shouldn't the court of appeals have reversed him, rather than just saying we need more findings?

MR. CLOUTMAN: The fact is, Mr. Justice Rehnquist, there is no record to support his conclusions. The court of appeals was being, I submit, very gentle in their opinion. There is no record to suggest the magnet schools would have ever worked. There is nothing to indicate that, and there is everything to indicate in the past that volunteer transfers have not worked in Dallas, and that's all the magnet schools are, is a system of voluntary transfers. The record now indicates they have not worked in all but one case. One desegregated high school has resulted out of that plan. One. And on that and that alone, the court of appeals could have, I submit, reversed, but it didn't. It vacated and requested the trial judge to hold further hearings on new

student assignment plan so that it could, the court of appeals could review the rationale and the reasons supporting the court's conclusion.

QUESTION: Suppose the magnet high school had worked in the sense that everybody showed up. Would there have been a lot of bussing involved in getting back and forth?

MR. CLOUTMAN: Absolutely. Absolutely a lot of bussing.

QUESTION: Well then --

MR. CLOUTMAN: Or a lot of cars.

QUESTION: So what was it, a voluntary magnet high school?

MR. CLOUTMAN: That's right, and I'm glad you asked that.

QUESTION: So why wouldn't the, if the voluntary magnet high school would have involved a lot of bussing, it wouldn't have involved any more bussing if there had been assignments to the magnet high school?

MR. CLOUTMAN: That's entirely correct, Mr. Justice White, and as a matter of fact, those bus routes, since many of the magnets are district-wide, are as long as the ones the court says it can't use that are too long. The students come from all over the district.

QUESTION: Do you think it did make a difference in

the case of the magnet schools that the parents were making a voluntary choice for their children, rather than a Federal district judge? And also you said, as I understood you, that the magnet schools were identical to the situation of majority to minority transfers. Am I incorrect in thinking that the magnet schools provide special types of education, vocational, for example, so that children who elect to go there might receive the types of education in subjects which may be of special interest to them?

MR. CLOUTMAN: Mr. Justice Powell, you're correct and that is the -- in the latter assumption that there are special programs being offered to schools. My analogy of the majority to minority was the students were voluntarily opting to go to schools. That was not working. It hasn't worked in the magnet schools, either, and apparently the parents' choice, as you suggested, may make a difference appears wholly speculative, because it didn't make a difference in majority to minority and has not made a difference in the magnet schools, either.

QUESTION: How many magnet schools do you have in operation?

MR. CLOUTMAN: I believe there are 6 or 7 in operation.

QUESTION: But additional ones are either under construction or planned, aren't they?

MR. CLOUTMAN: That is my understanding.

QUESTION: Is it a fact that the community down there approved an $80 million school bond issue following this court decree?

MR. CLOUTMAN: We approved a bond issue following, approved bond issues during litigation, as a matter of fact.

QUESTION: Does the district court plan have the support of the community? Some of the briefs so said.

MR. CLOUTMAN: Your Honor, that is wholly speculative. I have no way of knowing whether this plan has the support of the community or not. It does not have the support of the litigants in this Court.

QUESTION: Obviously.

MR. CLOUTMAN: Many of them, at least.

In conclusion, I would like to speak briefly to the, I think the issue raised by several members of the Court earlier.

We don't think there is any issue of constitutional violation properly before this Court. If there is, the record is so complete the Court should take five minutes and dispose of that question in the affirmative. The violation was rampant.

This district has resisted in 25 years' litigation anything close to a student assignment system that would allow desegregation of any sort in Dallas. When we started

litigation and found that 70-some-odd schools are all Anglo and 49 are all minority, in 1970 after a stair-step plan, we know we have vestiges of the dual system.

QUESTION: Well now, how do you know that?

MR. CLOUTMAN: Because we --

QUESTION: You could find the same situation in big urban areas which were never, never had a dual school system. How do you know that?

MR. CLOUTMAN: I know for a fact that 37 schools that were one race black under the pre stair-step plan continue to be part of the 52 black schools today, and that is a vestige, clear and simple.

QUESTION: Well, you don't know that any more than I know that.

MR. CLOUTMAN: I know they were black before that; I know they're black now.

QUESTION: You can find the same sort of statistics in Pittsburgh or Cincinnati or Detroit or Chicago or New York City which never had dual school systems de jure. Then how do you know that the existence of those statistics in Dallas are the result of that de jure system?

MR. CLOUTMAN: Very simple, Mr. Justice Stewart. The black students were required to go to those 37 schools by law and by school district practice prior to 1965. No excuses, no transfers, no exceptions, and no integration. And

in 1970 there are 49, including the original 37, still black and one race. Now, I can tell this Court that in my judgment that's a reasonable inference, when the schools have always been black and were black by State law and black by school board policy, which certainly is a de jure act, that when you find them in 1970 still black, they are a remnant or a vestige of that system, unlawful, and must be remedied in this case.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Whitham.

ORAL ARGUMENT OF WARREN WHITHAM, ESQ.,

ON BEHALF OF ESTES ET AL. -- REBUTTAL

MR. WHITHAM: Mr. Chief Justice, I knew my time was up, but I understand Mr. Donohoe had yielded --

MR. CHIEF JUSTICE BURGER: Three minutes.

MR. WHITHAM: Three minutes. Let me reply briefly to some things I have heard here.

First, the Plaintiff's Plans A and B and the NAACP plan all propose magnet schools, so they were for them to start with.

Second, the plaintiffs, in effect, have abandoned their plans and counsel has so admitted to me, Mr. Cloutman, and never urged them in the 5th Circuit.

Oddly enough, following the entry of the district court student assignment plan and its total remedy, Mr.

Cloutman, my brother, filed a motion for attorney's fees as the prevailing party under the Educational Amendments Act of 1972, and received a substantial award of attorney's fees from the district court on the theory that he was the prevailing party, that is that the plaintiffs were, and he represented to the court and the court so found, and you will find this in our brief and in the appendices, that virtually every precept and proposal that the plaintiffs had made to the district court had been incorporated in the district court's remedy.

Next, we should consider my brother, Mr. Cunningham's, language about K-3. Consider the following language admitted to by Mr. Cunningham: "The members of the NAACP can see justification possibly for K through 3 because we are dealing with young children the first time in school. I have talked with some teachers and they explain that these kids may lose or may have problems," et cetera, end of quote.

That admission was made to the district judge.

We are dealing here with the desegregation of systems, school systems. This court recognized in Keyes that the plaintiffs had never had to prove separation of the races by individual school building or individual student, and that reference is contained in our brief. It is the system that we must look to, the entire system, and how to desegregate it given the awesome urban problems that we deal with.

There is a valid, proper constitutional issue before this Court and this Court, now given Columbus and Dayton of last summer, will ultimately have to live with it, and in the name of help for the urban condition, North and South, it must be addressed in the framework of what this district judge has tried to do for an urban condition, regardless of whether it's in a State that sent its troops to the Army of Northern Virginia. And that issue is, from a constitutional standpoint, if there is a remedy to be corrected for a violation of the equal protection clause, that must be a constitutional question, and again we must address the problem of what is the definition of a one-race school. Nowhere is that addressed.

Thank you.

MR. CHIEF JUSTICE BURGER: Gentlemen, the case is submitted.

(Whereupon, at 2:35 o'clock p.m., the cases in the above-entitled matters were submitted.)

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