IN THE

Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, *et al.*,
Petitioners,

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, *et al.*,
Respondents.

MOTION AND BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the American Jewish Congress, respectfully move this Court for leave to file the annexed brief as *amicus curiae.*

The American Jewish Congress is an organization of American Jews established in part to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere. It established its Commission on Law and Social Action in 1945, in part to fight every manifestation of racism and to promote the civil and political

equality of all minorities in America. The American Jewish Congress has expressed its long-standing concern with the evils of racial segregation in public schools in a number of ways, including the filing of briefs *amicus curiae* in this Court in *Brown* v. *Topeka,* 347 U. S. 483 (1954) and other cases.

Our concern here, however, stems primarily from what we regard as a threat to our constitutional system of government. This Court declared racial segregation in public schools unlawful in 1954. As we show in the annexed brief, that decision has not yet been translated into reality for more than a small fraction of the Negro children of the South. As a result, an increasing number of Americans are expressing doubt as to the effectiveness of judicial enforcement of constitutional guarantees.

Recent developments, including enactment of Title VI of the 1964 Civil Rights Act, 78 Stat. 241, 42 U. S. C. A. 2000d, give promise of more rapid movement toward effective integration. The chief danger that that movement will be frustrated lies in the widespread adoption of "integration" plans such as that involved here. If judicial approval is given to freedom of choice plans in areas where, because housing is integrated, geographic zoning would promptly and sufficiently achieve school integration, implementation of the *Brown* decision will be set back for at least another ten years.

The freedom of all Americans rests on our unique system of democratic constitutional guarantees. Nullification of any one of these guarantees threatens enforce-

ment of all the rest. We believe it is essential that no such nullification be permitted.

In the annexed brief, we urge that the decision below approving a freedom of choice plan for the New Kent school district rests on a too narrow concept of the remedial powers of the courts and of the needs of the immediate situation. We develop the argument that, in fields of law other than civil rights, the courts have recognized the necessity of undoing the effects of past illegal conduct even if this means barring measures that would otherwise be legal. We attempt to show that, because of the cumulative effects of 100 years of segregation and oppression, a freedom of choice plan in a school district such as New Kent necessarily means continuation of segregation and the inequality that results from segregation.

We have sought the consent of counsel for both parties to the filing of this brief. Counsel for petitioners consented but counsel for respondents withheld his consent.

Respectfully submitted,

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January 24, 1968

IN THE

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October Term, 1967

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COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, *et al.*,

Respondents.

BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

This brief is submitted with a motion for leave to file a brief *amicus curiae*. The interest of the American Jewish Congress is stated in the motion.

Statement of the Case

New Kent is a rural county in Virginia, in which there is no residential segregation. There are two public schools, New Kent and George W. Watkins, at opposite ends of the

county, both combining elementary and high school. Until the 1965-66 school year, every Negro pupil attended Watkins and every white pupil New Kent.

On March 15, 1965, petitioners, suing as Negro children and parents of children in the county, brought this class action in the United States District Court for the Eastern District of Virginia against the County School Board, its individual members, and the Superintendent of Schools, seeking injunctive relief against maintenance of separate schools for the races. When the suit was filed, assignment of students in New Kent County was governed by the Virginia Pupil Placement Act, Section 22.232.L, *et seq.*, Code of Virginia 1950 (1964 Replacement Volume), repealed by Acts of Assembly 1966, c. 590, under which each child was assigned to the school previously maintained for his race unless his parents took the initiative to request reassignment to another school in the county.

On August 2, 1965, after suit had been filed, the respondent School Board adopted a freedom of choice desegregation plan to be place in effect in the 1966-67 school year (A. 34a). This new plan was adopted to meet the minimal requirements of Title VI of the Civil Rights Act of 1964, 78 Stat. 241, 42 USCA 2000d, as implemented by regulations of the United States Department of Health, Education and Welfare. It is this plan which is challenged herein on the ground that it does not involve sufficient affirmative action by local officials to remedy the effects of segregation formerly imposed upon the citizens of the county.

Under the present plan, students entering all grades except 1 and 8 are automatically, as under the prior plan,

assigned to the school they attended in the previous year unless they take the initiative in asking for a transfer. The only major change concerns grades 1 and 8. In those grades, pupils are required to specify which school they wish to attend. Thus, both Negroes and whites in those two grades must specify whether they wish to attend Watkins or New Kent. In 1966-67, the white children attended New Kent and 85% of the Negro children attended all-Negro Watkins (Petition for Writ of Certiorari, p. 6).

Petitioners argued that this plan is constitutionally unacceptable as a tool for desegregation under the particular facts of this case, especially since desegregated education could have been achieved simply and promptly by division of the county into two geographic attendance districts.

The District Court approved the plan, over petitioners' objection. The Fourth Circuit Court of Appeals, sitting *en banc,* affirmed, Judges Sobeloff and Winter dissenting. The case is here on writ of certiorari to the Fourth Circuit.

Question to Which This Brief is Addressed

This brief is addressed solely to the question whether the freedom of choice desegregation plan for the New Kent schools approved by the court below is constitutionally unsound because it fails to undo the effects of past unlawful racial segregation.

Summary of Argument

A. Racial segregation is still the prevailing pattern in Southern public school districts generally and in the New Kent District. This is due in large part to the fact that desegregation has been limited and grudging. No effect has been given to the concept that officials in formerly segregated school districts have an obligation to undo the effects of their past conduct and to make a fresh start.

B. Our legal system recognizes the necessity of framing remedial orders so as to undo the effects of past illegal conduct. Not only in cases affecting racial discrimination but also in such areas as anti-trust and patent law, the courts have acted to insure that their decrees eradicate the effects of past misconduct.

C. Continuing segregation in the New Kent schools, despite adoption of a freedom of choice plan, is the result of unremedied past illegal conduct. The plan adopted here looks only to the future and does not undo the accumulated results of past segregation.

In a school district such as New Kent, powerful community pressures are at work to inhibit Negro children and their parents from choosing the formerly all-white school. Indeed, it is likely that freedom of choice plans are supported by school officials in New Kent and elsewhere in the South because they expect such pressures to operate. It should not be necessary, as the court below required, to wait until there is proof of such pressure against specific parents in the district.

Aside from the matter of pressure, there is a factor of inertia on the part of Negro parents. A century of segregation, backed by oppression, has resulted in a deep-seated reluctance on the part of most Southern Negroes to demand changes for their benefit. This factor, also a result of past unconstitutional conduct, must not be allowed to play a part in shaping the public school system.

Finally, desegregation cannot be achieved under a freedom of choice plan unless a substantial number of white parents elect to send their children to the formerly Negro schools. That has not happened and is not likely to happen.

In view of these factors, the plan approved by the court below does not meet the requirements of this Court's decision in the school segregation cases.

ARGUMENT

The desegregation plan approved by the court below is constitutionally unacceptable because it fails to undo the effects of past discrimination.

A. Racial segregation is still the prevailing pattern in southern public school districts generally and in the New Kent district.

This Court's decisions of 1954 and 1955 in *Brown* v. *Topeka,* 347 U.S. 483, 349 U.S. 294, holding segregation in public schools unconstitutional have not yet been implemented. The relevant data are all too familiar.

The U.S. Commission on Civil Rights has recently reported that, according to the "highest estimates," no more

than one Negro child out of every 13 in the Deep South attended school with white children.[1] In 1964, only 2.25% of the Negro children in the 11 states of the Confederacy and 10.9% in the entire region encompassing the southern and border states attended schools with white children. Southern Educational Reporting Service, STATISTICAL SUMMARY 2, December 1965 at p. 29. Half of the bi-racial school districts in that area (1555 out of 3031) were still fully segregated. *Ibid.*

In Virginia, as of September, 1963, more than 98% of the Negro public school population attended all-Negro schools. Only 23 school districts out of the 55 which had both Negro and white pupils had begun to desegregate. PUBLIC EDUCATION, staff report submitted to the U.S. Commission on Civil Rights, p. 231 (1964).

The result of this continuing segregation is a denial of constitutional rights to millions of American children, injuring them in a manner not easily repaired. As this Court held in the *Brown* case (347 U.S. at 494):

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The great bulk of Negro children in the South and in the New Kent district are still suffering the effects of this separation.

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1. U. S. Commission on Civil Rights, "Survey of School Desegregation in the Southern and Border States 1965-66," February 1966, p. 51 (hereinafter cited as "Survey").

Most of the continuing segregation is due, of course, to the simple refusal of southern school districts to make any move in compliance with *Brown* until compelled to do so by court action (or, since the 1964 Civil Rights Act, by the threat of the withholding of Federal funds under Title VI).[2] Much is due also to the fact that those steps that have been taken have been designed to maintain the *status quo* as far as possible. In most cases, all that has been touched has been the refusal of school officials to heed the demand of a specific parent for non-racial assignment of his children. The result has been to place on the segregated Negroes the burden of pressing for desegregation not only school district by school district but also child by child. Entirely rejected has been the concept that the school officials who have maintained segregated schools have the obligation to undo the effects of their past unconstitutional actions and to make a fair, fresh start.

The situation in Virginia and in the New Kent school district illustrates this point. Virginia's first response to the *Brown* decisions was its program of "Massive Resistance."[3] When that collapsed, the state fell back on its Pupil Placement statute which gave state and local school authorities broad powers of school assignment. Acts of 1958, ch. 500, p. 638, as amended by Acts of 1959, Ex. Sess., 1959, ch. 71, p. 165. This statute was described as follows

2. The 1964 Staff Report cited *supra,* reporting on the status of integration efforts in selected counties in 17 states as of the end of the 1963-64 school year, reveals in detail the great effort that has been demanded to obtain constitutionally mandated desegregation. See particularly the section dealing with 13 counties in Virginia (pp. 231-277).

3. Muse, B., *Virginia's Massive Resistance* (U. Ind. Press, 1961).

by the U. S. Civil Rights Commission in its 1961 Report, Book 2, "Education," at p. 55:

> "Massive resistance" to the *School Segregation Cases* is legally dead in Virginia, but its spirit lingers on. In 1959 the general assembly enacted a new program designed to limit desegregation and to permit white students to avoid attendance at schools enrolling Negroes. The spirit of the new approach was expressed by Governor J. Lindsay Almond, Jr., on January 28, 1959, in an address to the general assembly.
>
> > I pledged to the people of Virginia that I would resist with every source at my command that which I know to be wrong and would destroy every rational semblance of effective public education in Virginia. I have kept that pledge and you have kept it. Only those Virginians whose hearts are not in the fray give up in adversity. To be strong, a battle lost is but a challenge to redouble effort, energy, and devotion to scale the heights of worthy achievement.

Not surprisingly, no desegregation was achieved under this statute in the New Kent district and the schools were still wholly segregated when this proceeding was started (A. 25a).

The pupil assignment system, of course, was unconstitutional because it continued the procedure of assigning children to school on the basis of their race. However, the fact that a number of courts issued decisions to that effect[4] did not affect operations in New Kent. The pupil assignment law continued to be applied in New Kent with continued complete segregation (A. 23a-24a, 25a). Presuma-

4. "Survey," *supra,* note 1, pp. 11-12.

bly, it would still be in effect but for the decrees issued in this proceeding.

In theory, the freedom of choice plan approved by the court eliminated the factor of race in this district. The school officials are no longer basing assignment of pupils or teachers to schools on the basis of race. The court's decision, however, ignores what everyone knows about how parents, Negro and white, act under these circumstances.

The vice of the decision below is that the court acted as though it was writing on a clean slate. It assumed that the formal act of telling parents that they may choose a school for their children established a non-racial school system. We submit that neither a board operating formerly segregated schools nor a reviewing court may ignore the known effects of prior segregation and discrimination—effects that render that assumption untenable.

B. Our legal system recognizes the necessity of framing remedial orders so as to undo the effects of past illegal conduct.

Our system of law recognizes that the courts have power to undo past conduct that has a continuing effect upon the situation before them. Indeed, the courts do not hesitate, in such cases, to require or forbid, for remedial purposes, a course of conduct that would not be required or forbidden by direct operation of the law.

After the National Labor Relations Act was adopted in 1935,[5] the Labor Board frequently found situations in which the effects of past practices had to be undone. One typical

5. 49 Stat. 449 (1935).

fact situation showed a company union established by the employer prior to 1935. Employer support continued until the NLRA was held constitutional in 1937.[6] Thereafter, employer support was reduced or terminated. Subsequently, a new union was started by the leaders of the old one but without employer assistance. In such cases, the Board held that the employer could not deal with the new union, even though it was established by legal procedures, because the continuing effects of the past practices had not been eliminated.

The courts upheld the Board in this matter without reservation. Thus, they accepted the theory that the Board could properly consider events prior to the effective date of the Act. See, e.g., *N.L.R.B.* v. *Newport News Co.,* 308 U. S. 241 (1939); *Western Union Tel. Co.* v. *N.L.R.B.,* 113 F.2d 992, 994 (C.A. 2, 1940). They held that the Labor Board could require "disestablishment" of unions created by employers even though all employer support had been withdrawn. This was viewed as "a means of eradicating the effects of past unfair labor practices" (*American Enka Corp.* v. *N.L.R.B.,* 119 F. 2d 60, 63 (C.A. 4, 1941)), thereby "wiping the slate clean and affording the employees an opportunity to start afresh. * * *" *Newport News* case, *supra,* 308 U. S. at 250. See also *N.L.R.B.* v. *Southern Bell T. & T. Co.,* 319 U. S. 50 (1943). The same considerations applied even where a new union had been formed to supplant the organization that had received employer support. *N.L.R.B.* v. *Youngstown Mines Corp.,* 123 F. 2d 178 (C.A. 8, 1941); *Sperry Gyroscope Co.* v. *N.L.R.B.,* 129 F. 2d 922

6. *N.L.R.B.* v. *Jones & Laughlin Corp.,* 301 U. S. 1, and companion cases.

(C.A. 2, 1942); *N.L.R.B.* v. *Rath Packing Co.,* 130 F. 2d 540 (C.A. 8, 1942).

Anti-trust law likewise suggests useful analogies. For example, in *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), a company which had violated the anti-trust statutes urged that the corrective decree should merely invalidate the contracts that were found to be illegal. It asserted that it was "entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no further than the violation or threat of violation" (332 U. S. at 400). This Court said (*ibid.*):

> * * * We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the anti-trust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market.

Similarly, in *United States* v. *E. I. du Pont,* 353 U. S. 586 (1957), this Court traced the situation requiring correction back almost 50 years (353 U. S. at 598-599). In particular, it found that the du Pont company's acquisition of a substantial part of the General Motors stock in 1917 was subject to the drastic remedy of divestiture despite the absence of evidence of abuse of that position for 30 years. It expressly rejected the trial court's conclusion that "30 years of nonrestraint negated 'any reasonable probability

of such restraint' at the time of the suit'' (at 598). It stressed that the courts have wide discretion in the shaping of remedial decrees (366 U. S. at 322). See also *United States* v. *E. I. du Pont,* 366 U. S. 316 (1961); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 186 (1944).

Parallels can also be found in patent law, where effective elimination of the results of past misconduct is a matter of judicial concern. In *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495 (1942), this Court barred enforcement of a patent because the patentee had used it to foster an illegal monopoly. When the patentee urged that it had halted its illegal practices, the Court said (at 498): ''It will be appropriate to consider petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles *and that the consequences of that practice have been fully dissipated.*'' (Emphasis supplied.)

These principles have frequently been applied in cases involving racial discrimination. For example, in *Guinn* v. *United States,* 238 U. S. 347 (1915), this Court considered an Oklahoma statute requiring literacy tests for all voters but providing an exemption for persons eligible to vote on January 1, 1866 and all lineal descendants of such persons. On that date, of course, Negroes were barred from voting. The bar was valid because the Fifteenth Amendment had not yet been adopted. The Court nevertheless held the statute unconstitutional. It found that the statute brought the standard of race into the voting process ''since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the

controlling and dominant test of the right of suffrage" (at 364-5). It was enough that the right to vote was affected by race, even though the discrimination which had that effect had occurred half a century earlier and had been legal at that time. See also *Myers* v. *Anderson,* 238 U. S. 368 (1915); *Lane* v. *Wilson,* 307 U. S. 268 (1939).

In *Meredith* v. *Fair,* 305 F. 2d 343 (C.A. 5), cert. denied, 371 U. S. 828 (1962), a rejected Negro applicant to the University of Mississippi challenged a requirement that an applicant be sponsored by six University alumni on the ground that Negroes had theretofore been excluded from admission. The court held the requirement invalid. See also *Alabama v. United States,* 304 F. 2d 583, aff'd without opinion, 371 U. S. 37 (1962).[7]

In the following section, we seek to show that the freedom of choice plan approved by the court below fails to

7. The same approach has been taken by the New York State Commission for Human Rights, which administers the New York Law Against Discrimination, N. Y. Exec. Law, Secs. 290-301. In *Lefkowitz* v. *Farrell, et al.,* Case No. C-9287-63, decided Feb. 26, 1964, order enforced, *State Comm'n for Human Rights* v. *Farrell, et al.,* 43 Misc. 2d 958 (1964), it was charged and found that a union, which had maintained a policy of excluding Negroes up to and beyond enactment of the state fair employment law, favored applicants to an apprentice training program who were recommended by, and were usually relatives of, union members. The Commission found that this practice illegally discriminated against Negroes. It said (at p. 15):

> It is no defense to say that selection based on family ties affects whites and non-whites alike, and therefore does not discriminate against Negroes specifically. * * * The fact that its practices may work against some white persons at some times does not alter the fact that they work againt all Negro applicants at all times.

The Commission order prohibited the union from continuing to favor applicants recommended by union members.

meet the standards for remedial action established by the cases reviewed above.

C. The continuing segregation in the schools operated by the defendant school district, despite adoption of a freedom of choice plan, is the result of unremedied illegal segregation.

The vice of adopting a freedom of choice plan in a school district such as that involved here is that it looks only to the future. It does not serve to undo the accumulated results of the practice of segregation. It does not make sure "that the consequences of that practice have been fully dissipated." *B. B. Chemical* case, *supra.* It assumes that mere use of the "free choice" formula means that the choice thereafter made by individual parents will in fact be free of any influence of past denials of constitutional rights. Common sense negates this assumption and experience destroys it.

(1) It is all too well known that the institution of racial segregation in the southern states has always depended ultimately on the threat of violence and economic pressure against those who challenge it.[8] Hence, the fact that a school attendance plan that purports to depend on "freedom" is widely accepted in the formerly segregated states ("Survey," *supra,* note 1, p. 30) is inherently suspicious. The suspicion is no less valid in New Kent.

This is a county with almost no segregation in housing patterns and with two K-12 schools at the opposite ends of

8. See, for example, Myrdal, G., *An American Dilemma* (Harper, 20th Ann. Ed., 1962), pp. 555-569.

its area. It would have been a simple matter to have adopted the common practice of geographic zoning—establishing two attendance areas by drawing a line down the middle.[9] It is therefore not unfair to say that the freedom of choice plan was probably found acceptable largely because it was assumed that those Negro families who presumed to send their children to previously white schools would be appropriately discouraged by extra-governmental forces.

But whether or not that was the conscious purpose of the plan, it is certainly the effect to be expected. There is ample evidence that efforts have in fact been made to dissuade Negro families from exercising their rights where freedom of choice plans have been adopted. See the section entitled, "Fear, Intimidation, and Harassment" in the U. S. Commission on Civil Rights "Survey" *supra,* pp. 35-42. The *New York Times* of January 12, 1968 reported that Harold Howe, 2d, United States Commissioner of Education, after noting that the gains in desegregation "must be described as minimal," has said.

> It is a sorry thing to have to acknowledge that much of the desegregation that has taken place has occurred because thousands of Negro students and their parents

9. If it is argued that the school district is justified in rejecting geographic zoning because of the administrative difficulties it would cause and the possible inconvenience to the children who may be transferred from one school to the other, the simple answer is that neither the difficulties nor the inconvenience are substantial. Moreover, as this Court said in the second *du Pont* case (*United States* v. *E. I. du Pont,* 366 U. S. 316, 326 (1961)):

> * * * But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.

> have been steadfast in the face of pressures of the cruelest sort.

The article reports that he listed these pressures as including "harassment and intimidation, threats of loss of jobs and evictions from homes and gunshots into dwellings of Negro school children."

The court below dealt with this aspect of the case by saying (A. 67a):

> Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is acceptable only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

The court thus held, in effect, that court evidence of pressure in the school district would have to be produced.

We submit that this is an ostrich-like approach that is inconsistent with equitable remedial principles and facts of common knowledge. It ignores the reality of what the Negro parent in the previously segregated school district knows without daily reminder—that desegregation is opposed by the white community which dominates the political, economic and social structure of the state and locality, that it has been put into effect over that community's last-ditch opposition, that violence and oppression have been used for more than a century to punish those Negroes who attempt to assert their rights and that the white-controlled

government has never moved effectively to restrain those who resort to those measures. A century of such memories is not wiped out by a school district's coerced acceptance of a court decree.

This is particularly true of children attending public schools. The peculiar susceptibility to community pressure of such children was commented on in a different connection by Justice Frankfurter in his concurring opinion in *McCollum* v. *Board of Education of Champaign, Illinois,* 333 U. S. 203, 227 (1948):

> * * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

So here, although the child is "offered an alternative," there is "an obvious pressure" upon him not to challenge traditional practices. See also *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 351 (1910); *State ex rel. Weiss* v. *District Board,* 76 Wis. 177, 199-200 (1890); *Knowlton* v. *Baumhover,* 182 Iowa, 691, 699-700 (1918); *Kaplan* v. *Independent School District of Virginia,* 171 Minn., 142, 155-156 (1927) (dissenting opinion).

Under these circumstances, we submit, it was error for the court below to require that proof of actual pressure be submitted for "judicial appraisal." The exercise of pressure on the Negro parent to continue to accept segregation must be assumed. Some will resist the pressure but many, if not most, will not. This common sense conclusion is one

that the courts should reach without evidence of specific coercive measures.

When a defendant in a criminal case asserts that he cannot get a fair trial because an inflammatory atmosphere has arisen that will prevent jurors from bringing in an unpopular verdict, he is not required to show that particular jurors have been threatened. The courts make their decisions as to a change of venue or other corrective measures on the basis of the total atmosphere and their inference as to its likely effect. *Moore* v. *Dempsey,* 261 U. S. 86 (1923); *Sheppard* v. *Maxwell,* 384 U. S. 333, 362-3 (1966).

Here, as in the *International Salt* case, *supra,* the pressures may be "subtle" and "difficult to prove" but they may nevertheless be inferred. However, there is more than mere inference that strong community pressure is at work in this case. The Watkins school attended by Negroes is plainly inferior to the New Kent school, attended primarily by whites (A. 23a-24a). Moreover, for many Negroes, it stands at the opposite end of the county. Yet, only 15% of the Negro families have chosen to have their children go to the New Kent school. It is highly unlikely that this result would have been reached in a truly non-racial, free-choice system. If proof were needed of the existence and effectiveness of pressure, this figure would supply it.

(2) To whatever extent the failure of Negroes to apply for a change is due not to fear but to inertia, the respondent school board, as a state agency, must also be held responsible. One of the recognized results of the Jim Crow system so long maintained by the southern states was the fact that

Negroes were placed in a position of inferiority. The "equality" aspect of the Separate but Equal Doctrine was never more than pretense. Indeed, the segregation system was defended under the slogan of "white supremacy"—hardly a form of equality.

As this Court found in the *Brown* case, segregation of blacks by a society dominated by whites created a sense of inferiority in the segregated race. Throughout his life, and specifically in the segregated schools, the Negro was told that he was inferior and simultaneously prevented from taking any effective steps to assert his equality. The result, as many studies of the subject show, has been adoption by the Negro, particularly in the South, of a deep-seated reluctance to demand change.[10] A population so trained by official suppression cannot be expected to opt for equality unanimously at the first opportunity. The government that segregated the Negroes in the first place has an obligation to take affirmative steps to undo the effects of its past wrongs. If it fails to do so, the courts have the power and responsibility to compel effective action.

It is no answer to say that some, perhaps even a majority, of the Negro families will choose integration. To whatever extent the factors described above cause some to remain segregated, the segregation is a carry-over from the original constitutional wrong.

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10. Lewis, H., *The Blackways of Kent* (Coll. & Univ. Press, 1955), pp. 321-2; Silberman, C. E., *Crisis in Black and White* (Vintage Press, 1964), p. 200; Rose, A. M., *The Negro's Morale* (U. Minn., 1949), pp. 85-95; Pettigrew, T. F., *A Profile of the Negro American* (Van Nostrand, 1964), pp. 27-34.

(3) Assuming that the freedom of choice plan has operated in the New Kent schools without impairment by either undue pressure or inertia caused by past oppression, the fact remains that integration cannot be effective unless white children go to the Watkins school. Under a freedom of choice plan, that will not happen. Anyone familiar with the situation in the South knows that white parents will not make that choice. They have not done so at New Kent or, to any significant degree, in the many other districts that have adopted freedom of choice. "Survey," *supra,* note 1, at pp. 33-34. Realistic remedial action in this case therefore requires an attendance plan that does not rest on the factor of parental choice.

It is because of the factors discussed above that freedom of choice has come to be recognized as the most effective device for perpetuating racial segregation in public schools in areas having a high degree of residential integration. Affirmance of the decision below would grant school segregation in the South, presumably condemned 14 years ago, another reprieve in a series of reprieves that has already cast grave doubt on the effectiveness of our constitutional system.

The freedom of choice plan approved by the Circuit Court gives the Negro children in New Kent neither freedom nor equality. It therefore fails to comply with "the mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon,* 286 U. S. 73, 88 (1932).

Conclusion

We respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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