IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CHARLES C. GREEN, ET AL., Petitioners v. COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, ET AL., Respondents	No. 695
BRENDA K. MONROE, ET AL., Petitioners v. BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ET AL., Respondents	No. 710
ARTHUR LEE RANEY, ET AL., Petitioners v. THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, ET AL., Respondents	No. 805

Washington, D. C.
Wednesday, April 3, 1968

The above-entitled matters came on for argument at 10:15 o'clock a.m.

BEFORE:

EARL WARREN, Chief Justice of the United States
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

S. W. TUCKER, ESQ, 214 East Clay Street, Richmond, Virginia, on behalf of Charles C. Green, et al., Petitioners

JAMES M. NABRIT III, ESQ, 10 Columbus Circle, New York, New York, on behalf of Brenda K. Monroe, et al., Petitioners

JACK GREENBERG, ESQ., 10 Columbus Circle, New York, New York, on behalf of ARTHUR Lee Raney, et al., Petitioners

FREDERICK T. GRAY, ESQ., on behalf of County School Board of New Kent, Virginia, et al., Respondents

RUSSELL RICE, SR., ESQ., 215 East Main Street, Jackson, Tennessee, on behalf of Board of Commissioners of the City of Jackson, Tennessee, etc., Respondents

ROBERT V. LIGHT, ESQ., 1100 Boyle Building, Little Rock, Arkansas, on behalf of The Board of Education of the Gould School District, et al., Respondents

LOUIS F. CLAIBORNE: Assistant to the Solicitor General, on behalf of the United States of America

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 695, Charles C. Green, et al., Petitioners, vs. County School Board of New Kenty County, Virginia, et al.,

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Tucker.

ORAL ARGUMENT OF S. W. TUCKER, ESQ.,

ON BEHALF OF CHARLES C. GREEN, ET AL.,

PETITIONERS

MR. TUCKER: Mr. Chief Justice, may it please the Court.

This case is here on writ of certiorari from the Fourth Circuit.

The case involves the public schools of New Kenty County, Virginia.

There are but two such schools, each with elementary and high school departments serving grades 1 through 12.

There is no residential segregation in that county. White families and Negro familes live in every part of the county, yet three years ago, no child of either race had ever been brought into contact with persons of the other race as a part of his normal public school experience.

In March of 1965, when this action was commenced,

some 739 Negroes, Negro children attended the George Watkins School, located in the western half of the county, and some 522 white children attended New Kent School, located in the eastern part of the county.

Eighteen Indian children living in New Kent County were transported by public school bus to Samaria Indian School in adjoining Charles City County.

For more than ten years the County School Board of New Kent County had simply ignored this Court's decision in the School Segregation Cases. And they had no intention of complying with them.

Negro citizens of the county petitioned the School Board to end racial segregation in the public school system. They, too, were ignored.

On March 15, 1965, 36 Negro school children and their parents brought this class action in the District Court for the Eastern District of Virginia, praying that the School Board be required to adopt and forthwith implement a plan which will provide for the prompt and efficient elimination of racial segregation in the public schools.

This action, so far as bringing about a change, may as well have been ignored.

On June 1, 1965, when the defendants answered, they said, in effect, that the school board has no duty

to desegregate the school system and that if any Negro parent was dissatisfied with his child's attending Watkins School, he was at liberty to apply to the Pupil Placement Board of Virginia for the child's assignment or transfer to New Kent School.

Such is the School Board's position today, except for the fact that it has reassumed the responsibility for assignments and transfers and for the further fact that the State Pupil Placement Board no longer exists.

After the school officials had filed their answer, they, like most school officials in the South, found themselves facing a threat of losing federal funds pursuant to Title VI of the Civil Rights Act of 1964.

So, like most school boards in the South, the New Kent School Board on August 2, 1965, adopted what was basically a standard freedom of choice plan meeting what were then the requirements of the Department of Health, Education and Welfare. Essentially, this meant that any child or his parents for him could decide before May 31st, of each year, which of the two schools he would attend -- Watkins or New Kent.

Of course, the predictable practicality of the adoption of the freedom of choice plan was that no white parent was going to choose for his child to attend the Watkins School and only the more aggressive Negro parents

would risk their child being an unwanted intruder at the New Kent School.

On June 28, 1966, the District Court approved the plan as supplemented. There were some additions to provide for the de facto segregation which did not come into effect the following year.

The case was retained on the docket with leave of either party to seek further relief, the court's memorandum stating that it may become necessary to revoke in full or in part the approval that the court had given the plan.

But, meanwhile, 35 Negro children broke the tradition by enrolling in the New Kent School in the fall of 1965.

On appeal by the plaintiffs, this case and the case against the County School Board of Charles City County were argued in the Court of Appeals for the Fourth Circuit on January 9, 1967.

And at that time, some 111 Negro children had obtained assignments to New Kent School; no white student was enrolled in the Watkins School, and no white person taught at Watkins.

One Negro teacher visited New Kent two days per week, or the equivalent.

Indian children were being transported to Samaria

School in Charles City County as always.

The picture today in the New Kent County public schools has been altered slightly. Ten Indian children attend New Kent School. Some 115 Negro children, a gain of 4 over the previous year, attend New Kent School.

But 621 (and that is 84 per cent) of the county's Negro school children attend Watkins School completely isolated from all of their white and Indian fellow citizens, except one white teacher initially assigned to Watkins School for the current school year.

MR. CHIEF JUSTICE WARREN: The Indians were assigned to what school?

MR. TUCKER: To the white school, beginning this year.

MR. CHIEF JUSTICE WARREN: What was the reason for that change? Do you know?

MR. TUCKER: I don't know whether it was pressure from HEW. It was probably a requirement of the Department of Health, Education, and Welfare. I am only surmising that.

MR. CHIEF JUSTICE WARREN: I see.

MR. TUCKER: Such are the facts 14 years after this Court concluded that in the field of public education the doctrine of separate but equal has no place.

The Court of Appeals' opinions were rendered on

June 12, 1967, the basis for the decision and for the special concurrence being stated in the Bowman vs. Charles City case.

The majority opinion by Chief Judge Haynsworth states two contradictory propositions which we feel this Court should resolve:

(1) The majority says (and no one seems to disagree with the abstract statement) that "the burden of extracting individual pupils from discriminatory, racial assignments, may not be cast upon the pupils or their parents."

(2) But the holding of the majority is totally inconsistent with that abstract principle where it is said that the school board may not be required to make "compulsive assignments to achieve a greater intermixture of the races," or, as otherwise stated by the majority below, that "the Constitution does not require that he (the individual pupil) be deprived of his choice," freely exercised.

In sharp contrast with this holding, Judges Sobeloff and Winter emphasized what we think is the true constitutional imperative in this case, and that is that "freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end -- the abolition of the system of segregation and its effects.

Using, as nearly as we can, language suggested by the respondents, we state the issue and our position. We contend that: The County School Board of New Kent County, Virginia, has a constitutional duty immediately to assign children to each of the public schools so that children of all races will attend each school indiscriminately.

And in support of that we argue two propositions:

1. That Brown contemplated that this school system would long since have been converted into a unitary non-racial system; and

2. Freedom of choice in the context of this case is an impermissible expedient to evade a constitutional duty.

On May 7, 1954, this nation, indeed, the entire world, was electrified by this Court's holding that Negro children, by being segregated in the public schools, were deprived of the equal protection of the laws.

Many Americans were jubilant or merely relieved. Some were disappointed. But few, if any, questioned what the Court meant when it decided that in the field of public education, the doctrine of separate but equal has no place. From that point of departure, Americans have come to accept the demise of separate but equal in other areas, but it still lingers in the area in which this Court first

pronounced its demise.

Having settled the basic issue, the Court then addressed to counsel and directed reargument upon two questions, including a question which posed two alternatives:

(a) Whether a decree would "necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice"; and

(b) Might the Court,"in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions"?

The respondents argue in their brief that the quandry raised by these questions was freedom of choice now or gradual progression to a system that would allow freedom of choice in some indefinite time in the future.

We do not so read the question, but in 1955, this Court resolved that the question said nothing about the choice of any individual.

On the contrary, this Court directed that there be, among other things, "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis."

It was obvious that such revision of some of the

larger and more complex school districts and the attendance areas therein might take considerably more time than revision of a small school district which had only two separate but equal schools.

Hence this Court charged the district courts to allow time where necessary, but the lower courts were directed to bear in mind, however, that "the burden rests upon the defendants to establish that such time is necessary in the public interest and consistent with good faith compliance at the earliest practicable date."

In New Kent, with two schools, it would be a simple matter to assign all children in the western part of the county to Watkins School and all children in the eastern part to New Kent School.

Or, one school could be made the elementary school and the other the high school.

Either of these could have been overnight, but for Virginia's infamous massive resistance, and we say the earliest practicable date for compliance in New Kent County would have been the first day of school in the fall of 1955.

The respondents do not suggest that there are, or ever have been, obstacles of administrative character to justify delay in making the transition.

On the contrary, they deliberately selected

the only available alternative, cumbersome as it may be, by which segregation might continue. This they admit on pages 3 and 4, where they say their adoption of freedom of choice was designed to honor the educational imperative of the system.

By that they mean that, if they desegregated both schools, that white patrons will withdraw their children from the public schools.

I think this suggestion was answered by the Court when it said that it should go without saying that the vitality of these constitutional principles should not be allowed to yield simply because of disagreement with them.

We think the answer was reaffirmed in 1958 in the Little Rock, Arkansas, case, Cooper vs. Aaron.

And the same answer was reaffirmed in the 1964 Prince Edward County, Virginia, case, in Griffin vs. School Board.

It was again reaffirmed in January of 1968, in the Louisiana Teachers case from Louisiana. That was another [illegible] to that threat or the possibility that [illegible] persons might withdraw their children from the public schools.

We submit that in New Kent County, Virginia, compliance with the Brown mandate is long overdue. The time for deliberate speed has run out.

Freedom of choice in New Kent and in most places where it has been adopted is just another expedient to avoid compliance with the Brown mandate. But residential segregation pervades school boards wishing to retain segregated schools and send children to schools in accordance with zones, and thereby force the racial separation of children in the public schools.

Such a case in 1965 was Cilliam vs. Hopewell, where, as here, residential segregation does not prevail, the school board pleads that it should not "force" children to attend school with children of the other race. "Force" is seen as normal governmental regulation when its use retains segregation. But school boards make it seem horrible when used with reference to putting children of both races in a public school.

New Kent points to dicta in the case from Atlanta, Georgia (Calhoun vs. Latimer), and the case from Knoxville, Tennessee (Goss vs. Board of Education), as justifying its adoption of freedom of choice, for New Kent. In those large metropolitan systems, it seems to me the Court could conceive of valid reasons why a person should exercise the choice. In a large system there may be differences in curricula or other differences by which it would valid for a person choosing one school against another.

In New Kent County, the only choice is a choice of white school against the colored school, and we submit the state is forbidden by the Fourteenth Amendment to extend such choice, and thereby permit citizens to accomplish the racial segregation which the state is forbidden to maintain.

MR. JUSTICE STEWART: How do the schools compare physically?

MR. TUCKER: We assume physically they are alike. I don't know. There is nothing in the record that suggests otherwise.

MR. JUSTICE STEWART: They are, more or less, equivalent, in quality. How about in capacity?

MR. TUCKER: The capacity is generally the same.

MR. JUSTICE STEWART: They are more or less equivalent?

MR. TUCKER: They are more or less equivalent. The Negro school population is a little larger than the white school population. I don't think there is a great difference in the size of the school.

MR. JUSTICE BRENNAN: You suggested that one might be made the high school and the other the elementary school?

MR. TUCKER: Yes.

This is the thirteenth school session since Brown

II. The struggle to desegregate --

MR. CHIEF JUSTICE WARREN: May I ask before you get to that, may I ask about the teaching staff. Is there any difference in the teaching staff?

MR. TUCKER: Today there is one white teacher assigned to the Watkins School, which is the Negro school, and one Negro teacher. I take it from the figure given, as a 0.4 teacher, she teaches two days a week at the New Kent School. There might be another explanation for the fraction. That is my surmise. We didn't develop any striking difference in the qualifications for the teachers. We served interrogatories on the qualifications, but we have no striking differences to present to the Court that would suggest that there is inequality in that regard in the schools.

MR. CHIEF JUSTICE WARREN: I noticed in one of these cases a Negro teacher is paid $200 less than the white teachers.

MR. TUCKER: I don't think that prevails here.

MR. JUSTICE BRENNAN: Is there any issue on de facto segregation?

MR. TUCKER: There is no issue on de facto segregation. The Court remanded the case to the District Court to do something about factual desegregation, but we elected to bring it here.

The struggle to desegregate Virginia's public schools is in its fourth phase. For four years, 1955 through 1959, we had massive resistance. The next three years, 1959 through 1962, we had the State Pupil Placement Board (or local school boards) rejecting the applications of Negro children to attend white schools on the basis of criteria which did not apply to white children. This practice the Fourth Circuit Court struck down in 1962.

Then, for three years, 1962 through 1965, we had freedom of choice, administered by the State Pupil Placement Board. The Department of Health, Education, and Welfare came into the picture effective with the fall of 1965. The Department of Health, Education, and Welfare, is seeking to expand or to accelerate the desegregation of schools, but they can only require such speed as the judicial opinion of the courts seems to require.

Today, the New Kent School Board says that, if any of the inequalities that were noted in the Brown decisions managed to survive the Fourth Circuit's striking down of the discriminatory features of the State Pupil Placement procedures, they were clearly overcome and made all right by August 1965, as if by the wave of a magic wand, when the New Kent School Board formally adopted the plan called "Freedom of Choice."

By its own resolution, it claims to have become

a neutral party, without interest in and without responsibility for the continuing struggle between those who want New Kent's schools to be segregated and those who want all vestiges of segregation to be removed.

These kinds of struggles are going to continue as long ans school boards and federal judges can read judicial dicta and make semantic arguments contending that public authority is not required to use the more expeditious means to accomplish total rather than token desegregation.

And the most famous of such dicta is one that was composed 45 days, I believe it was, after this Court's remand of the Brown cases in the case of Briggs vs. Elliott, when Judges Parker, Dobie and Timmerman, sitting as a three-judge district court for the Eastern District of South Carolina, convened to hear suggestions of counsel as to the decree to be entered pursuant to this Court's mandate.

But before permitting any such suggestions to be made by counsel, Judge Parker, from the bench, read what has become a very famous and much-quoted dictum. And it is from there that the notion springs that the Supreme Court had not decided that states must mix persons of different races in the school or must give them the right of choosing the schools that they attend, or, as he otherwise expressed it, that the Constitution does not require integration, it merely forbids discrimination.

In analyzing the dictum, the factual basis for it was entirely false, because at that time there never was any right of persons to choose what school they would attend, and certainly not in New Kent County or anywhere else in Virginia. And I dare say not in Clarendon County, South Carolina.

But now, in the language of the Fourth Circuit, the majority in this case, under that right so blandly assumed, have correspondingly accorded it overriding constitutional dimensions.

The legal conclusions stated in Briggs vs. Elliott that this Court had not decided that the state must mix persons of different races in the public schools and the Constitution merely forbids the use of governmental power to enforce segregation, those legal conclusions were in the very teeth of the fact that this Court had just decided that the state's failure to mix persons of different races in the public schools denied to Negro children the equal protection of the laws.

The Briggs doctrine was subjected to Judge Wisdom's sweeping analysis, critical analysis, in United States v. Jefferson County Board of Education, 372 Fed. 2nd 836, beginning at page 861.

The Briggs doctrine was very soundly rejected by Judges Sobeloff and Winters in this very case.

But, unfortunately, it is still living law as far as the Fourth Circuit majority is concerned, and that is why we are here.

We urge, in Judge Wisdom's words, written in 1965 in Singleton vs. Jackson Municipal School District, that the dictum of Judge Parker's be laid to rest. We ask that the cases be reversed.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Gray.

ORAL ARGUMENT ON BEHALF OF RESPONDENTS, COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, ET AL., BY FREDERICK T. GRAY, ESQ.

MR. GRAY: Mr. Chief Justice, may it please the Court, a few years ago, there was a very popular parlor game called, "Gossip." The game was played by a person writing down a little statement on a piece of paper, not letting anyone see what he had written, and then whispering it to the person on his left, and having that person whisper it to another person and so on around the room, and between and among them, and then it was whispered back to the person who had uttered it, and then he would state aloud what had been whispered to him and read aloud what he had originally written, and the point of the game was that the results were very amusing and sometimes quite startling, at the change that came to be in what was said

originally and what came back to him, because a message gets garbled in the transmission.

It is over 13 years now since this Court decided the Brown case, the case which has been talked about, construed and interpreted in the courts of this land. And I think that we can very quickly point out some of the results and similarities to the game of "Gossip" by reference to the --

MR. CHIEF JUSTICE WARREN: Does the game you mentioned have in mind that the players would try to repeat the statement accurately or distort it?

MR. GRAY: The attempt was to try to repeat it accurately.

MR. CHIEF JUSTICE WARREN: You think it is comparable to the segregation cases we have had in these recent years?

MR. GRAY: The courts of this land have tried to repeat as accurately as they can what the Court here has said. I don't think any of the courts have tried to distort the Brown decision.

Your Honors, you will recall in the oral arguments in the Brown case, Mr. Justice Frankfurter at one point, in questioning counsel, asked whether or not in a decision of this magnitude the Court should not fashion its language with a studious accuracy, which was a direct quote. I think

your Honors were right in your opinion, you chose the language very carefully, because of the significance and importance of it, and for that reason, I think we have to go to the Brown decisions themselves to determine what this Court meant when it wrote the Brown decisions.

If I may point out to you the language on pages 30 and 31 of the appellants' briefs, in speaking of Brown II, appellants say that this Court presupposed major reorganizations of the educational systems, and that the direction of Brown II said that the lower courts were held to consider problems relating to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas, and so forth.

But this, Your Honors, was not as I understand Brown and as it has been understood. This was not a direction to the District Court that all of these things, of necessity, need be revised. This was said in response to the request that time needed to be granted. And Your Honors said that the District Courts, in determining with what speed the District Courts must require the school systems to move, could take these problems into consideration, that these things might have to be done in order to achieve the results, but there was no direction that all of this be done.

MR. CHIEF JUSTICE WARREN: What considerations did they give between 1954 and 1965 in this county?

MR. GRAY: In this county?

MR. CHIEF JUSTICE WARREN: Yes.

MR. GRAY: In this county, New Kent County, Virginia, immediately following --

MR. CHIEF JUSTICE WARREN: I beg your pardon.

MR. GRAY: In New Kent County, immediately following the Brown decisions, the State of Virginia undertook all pupil assignment functions. The State Pupil Placement Board had the pupil assignment function. The County School Board had no control whatsoever over student assignment.

When the State Pupil Assignment Board was abolished and New Kenty County, Virginia, again had the pupil assignment function, this was the first time that New Kent County, Virginia, had the assignment function; after the constitutional provisions in Virginia requiring the segregation of the races was struck down, the first action which New Kent County, Virginia, School Board, ever took after Brown, was to adopt a freedom-of-choice plan, that every child in the county could go to the school of his choice. That was the first act the defendants ever took.

MR. CHIEF JUSTICE WARREN: When was that act repealed, the state pupil assignment act?

MR. GRAY: '64, I believe. I believe it was '64.

Now, going forward with this quotation, with this reference in the brief, if Your Honors please, the point I am trying to make here is that what we have before us is what you have to decide today: Does Brown compel integration?

That is what runs through these three cases, and page 31 of their brief indicates that appellants here attribute to this Court, as I read what they are saying in the middle part of that page, that the Court did not stop by saying that compulsory racial assignments shall cease. It is a direct quote from the brief. "But the Court did not stop there. It ordered, rather, a pervasive reorganization which would transform the system into one that was 'unitary and non-racial'".

As I read this, this purports to be a direct quotation from Brown, and I cannot find it in Brown. I find it in Jefferson, only recently decided. This goes to the very heart of the case. I cannot conceive, Your Honors, that Brown ordered compulsory integration.

Mr. Tucker has referred here this morning to the fact that in Briggs vs. Elliott, which was one of the five cases before this Court at the time of the Brown decision, 45 days after the decision, Judge Parker, on the

Fourth District bench, handed down the decision that what the Court has done is strike down compulsory segregation, but it has not ordered compulsory segregation, and it is inconceivable to me, call it dicta, if you will, in its original utterance, perhaps it was, it didn't remain dicta very long, it has been adopted by one court after another across this land, and it was inconceivable to me that it could stand in the repeated cases before that have come before this Court, and stand as a guide before this Court, the highest court of the land, if that were not the meaning of Brown.

MR. CHIEF JUSTICE WARREN: Has it been uniformally accepted?

MR. GRAY: Until the Jefferson case it has been uniformally accepted.

MR. CHIEF JUSTICE WARREN: In the Fifth Circuit?

MR. GRAY: Fifth Circuit, Jefferson County is the first case that departed from the concept that compulsory integration is not required.

I think Your Honors, in preparation for this matter, have to determine what Brown meant. We have repeatedly read the arguments made before this Court and the briefs filed before this Court, and I sincerely say to this Court, if you were to read those voluminous arguments and the briefs filed there, you would quickly come

to the conclusion that you weren't even asked that question. It wasn't even here.

Mr. Justice Marshall was the distinguished counsel in the case for the petitioners and plaintiffs there, and on December 9th, at one point in the Briggs case, he said, "My emphasis is that all we are asking for is to take off the state-imposed segregation. It is the state-imposed part of it that affects the individual children."

And in another point, "We are not asking for affirmative relief, striking down the statute will not put anybody in any school. The only thing we ask for is that state-imposed racial segregation be taken off and leave to the County School Board, the county people, the district people, to work out their own solution to the problems to assign children on any reasonable basis, that they went to assign them on."

So we urge Your Honors that, in deciding this question, the issues that are here, that you return to Brown. Your Honors, in examining the validity of constitutional and statutory provisions requiring segregation, both in the states and in the District of Columbia, you laid these provisions down alongside the Fourteenth Amendment in the case of the states and the Fifteenth Amendment in the case of the District, to see if they squared with the Constitution, and we say that you must go back to the

Constitution and laid down freedom of choice alongside the equal protection clause, and read the equal protection clause, "No state shall deny any person within its jurisdiction equal protection of the law." That is the test, and that is what we ask the Court --

MR. JUSTICE MARSHALL: Mr. Gray, did you have freedom of choice before 1965?

MR. GRAY: For three years before '65, sir, the Pupil Placement Board, the State Pupil Placement Board accorded any child assignment tothe school that he chose.

MR. JUSTICE MARSHALL: But you didn't have freedom of choice before 1965; right?

MR. GRAY: The county did not have a freedom-of-choice plan.

MR. JUSTICE MARSHALL: And the first one that this county ever put on was '65?

MR. GRAY: The first time that this county had the authority, after the Brown decision, to assign children to schools was '65.

MR. JUSTICE MARSHALL: You didn't have it before '65.

MR. GRAY: The children had the right, prior to '65, to apply to the State Pupil Placement Board, which controlled the assignment of all children.

MR. JUSTICE MARSHALL: Well, do you now say that

the Pupil Placement Plan of 1965 was adopted without regard to race or color? Do you say that?

MR. GRAY: I say, sir, that the Pupil Placement Plan of 1965 accorded to every child in New Kent County, Virginia, the right to go to any school in the county, regardless of his race and accords to him full equal protection of the law.

MR. JUSTICE MARSHALL: It was for the purpose of giving children freedom of choice, and there was no question of the race problem at all?

MR. GRAY: It was to give --

MR. JUSTICE MARSHALL: Is that your position?

MR. GRAY: It was to give children freedom of choice to attend whichever school they wanted.

MR. JUSTICE MARSHALL: Was it brought about because of the Brown decision or not?

MR. GRAY: Unquestionably, it was brought about by the Brown decision.

MR. JUSTICE MARSHALL: So race was involved in the adoption of it.

MR. GRAY: Race had to be involved in it, in the adoption of it. Prior to the Brown decision, the constitution of the state prohibited the actual mixing of the races.

MR. JUSTICE MARSHALL: Mr. Gray, was it adopted

for any purpose other than to perpetuate as much segregation as you could?

MR. GRAY: Mr. Justice Marshall, let me answer you in this manner, if I may. As I conceive the situation in New Kent County, as related to Brown, prior to the Brown decision, with two schools, one at each end of the county, New Kent County, there was a fence, a legal fence, across that county, and the law of the State of Virginia said to the white person, "You go to school A; you may not climb that fence and go to school B."

And it said to the colored children in the county, "You go to school B, and you may not climb the fence and go to School A."

And this Court, sir, said to the county, "Take down that fence."

And it was taken down by the Brown decision. And the school board said to the children and says to the children, "There are two schools in this county. Look them over. Regardless of whether you are white or colored, look them over, and go to the one that you choose."

And the appellants here today are saying to this Court, "Choices are not being made to suit us. Put the fence back. Build a fence in New Kent County, Virginia, today and say to certain of the white children, 'No, you may not go to school A, because all white children can't

congregate there, and because some of you are white, you must go to school B,' and to say to the colored children, 'No, you may not go to school B, you must go to school A, because we can't have you congregate all in school B.'"

MR. JUSTICE BRENNAN: Is it quite like that? I thought the idea was that there might be two school districts.

MR. GRAY: For what reasons?

MR. JUSTICE BRENNAN: You might create two school districts, and you might put all the children who lived in school district A, without regard to color, shall attend school A. That is what I think they did in my home town. I had to go to the school where it was set up for the district in which I lived.

MR. GRAY: That is the vehicle which would be used. That is the device which would be used to do it, but for what reason?

It is just inconceivable to me that I stand before this Court, the highest court of this land, this morning, defending the school board of New Kent County, and at this very moment in New Kent County we are denying somebody something, we are denying equal protection of the law, that is what they say.

The language of the decisions doesn't bother me. Are we violating the equal protection clause of the Fourteenth

Amendment. That is what we have to square with, and at this very moment in New Kent County, Virginia, every child in the county, it happens by coincidence, the choice period is over right now, from now on to the first of May, every child in New Kent County, Virginia, has one of these choice forms.

MR. CHIEF JUSTICE WARREN: Has there ever been a white child admitted to the colored school?

MR. GRAY: No white child has applied to go to the colored school.

MR. CHIEF JUSTICE WARREN: Isn't the net result, then, that, although they took down the fence, that they put booby traps in the place of it?

MR. GRAY: No, sir.

MR. CHIEF JUSTICE WARREN: So there won't be any white children going to a Negro school.

MR. GRAY: No, sir.

MR. CHIEF JUSTICE WARREN: Isn't the experience of three years in that county, where there never has been a white child go to a Negro school, isn't that some indication that it was designed for the purpose of having a booby trap for them, that they couldn't, didn't dare to go over?

MR. GRAY: If your Honor please, it is the free choice of American citizens, if that is a booby trap, then this plan has booby traps.

MR. CHIEF JUSTICE WARREN: Yes. Didn't we say

in the Brown case that we couldn't let the feelings of the community delay this deliberate speed that we spoke of?

MR. GRAY: But deliberate speed to what, Your Honor? Deliberate speed to the granting of equal protection of the law.

MR. CHIEF JUSTICE WARREN: That is right.

MR. GRAY: Not to the integration of the school system. Not to the integration of the school system.

I ask you, sir: Who is the plaintiff in this lawsuit? I think you get to the question there. Who is the plaintiff? Who can stand before the bar of this court and say to this court, "I am being denied my equal rights"?

MR. CHIEF JUSTICE WARREN: If I was a Negro in the county, I would say so.

MR. GRAY: By signing this piece of paper, you may go to either school that the county offers.

MR. CHIEF JUSTICE WARREN: But the social and the cultural influences and the prejudices that have existed for centuries there are by themselves written into that piece of paper.

MR. GRAY: No, Your Honor. Please, over the three years of operation of this plan, the first year white children chose to go, colored children chose to go to the school.

Your Honor asked me a question about the Indians.

Let me parenthetically explain that situation. For years there had been an Indian tribe that lived on reservations in New Kent and Charles City counties, Virginia. They wanted their own school system, and they had their own school system, until the adoption of the freedom-of-choice plan, under the guidelines of the HEW, which said that you may not transport children out of the county or into a county to preserve any form of racial segregation, and for that reason, we had to take away from the Indians the schools that they would have preferred to keep, but they chose the schools to which they went, just like every other child in the county.

Your Honors, it is just inconceivable to me that anyone can stand here and say to this Court, "I am being denied equal protection," because, as Your Honor said in Brown I, public education, when the state undertakes to provide it, must be given to all on equal terms.

Now, I say to Your Honors, the entire New Kent County, Virginia, can get any educational facility which New Kent County offers by the mere signing of his name.

MR. JUSTICE MARSHALL: Mr. Gray, on this freedom of choice, so many Negro parents want to choose sometime to send their child to what we label, for the purpose of this situation, the white school, and his employer says, "I suggest that you not do it." Would that be freedom of

choice?

MR. GRAY: No, sir, that would not be freedom of choice.

MR. JUSTICE MARSHALL: Do you think that has happened?

MR. GRAY: No, sir, I do not.

MR. JUSTICE MARSHALL: That is a different county, isn't it?

MR. GRAY: Mr. Justice Marshall, in the case before this Court, in the Fourth Circuit, there was an admission before the bar of the court, Judge Haynesworth took into consideration the very type of factors that you have enumerated, and he said, of course, if there were any extraneous pressures, then it wouldn't be a free choice. But there is an admission before the bar of the court in this case that the choices are free and unrestricted.

MR. JUSTICE MARSHALL: Is that here? Is that in the record before us?

MR. GRAY: That is in the appendix, page 68 of the appendix. It is in the opinion of the Fourth Circuit, and in the brief of the appellants, in this case, at page 22.

MR. JUSTICE MARSHALL: 22?

MR. GRAY: In the appendix, 68, is Judge Haynesworth's statement. In the brief filed by the appellant at

MR. JUSTICE MARSHALL: Where is it?

MR. GRAY: The white brief, at page 22, they say, "To be sure, each child was given the unrestricted right to attend any school in the system."

MR. JUSTICE MARSHALL: Well, I also see a quote down at the bottom of that same page that doesn't seem to say the same thing: " . . . the very nature of a free-choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students."

MR. GRAY: They are quoting from the guidelines of HEW, speaking of this situation across the country generally, but in this case, which was presented to a court of law, counsel for the appellants admitted that the children are given a free and unencumbered choice.

If we are talking about free-choice plans, that is something else. We want to talk about where they have a free choice. In this county, the 115 children of the colored race have elected to go to the white school and they are going to the white school, and there is not a shred of evidence that anyone has been abused, that any parent has lost his job, that any pressure has been exerted, and the School Board, in notifying the parents of their plan, tells them that they will be admitted to the school of

their choice, to all of its activities, that there will be no coercion, no punishment, nothing of any kind used against them. So it just isn't in this case to say that there are pressures.

MR. JUSTICE MARSHALL: Is there in this case any place the reason that this plan was chosen rather than some other plan?

MR. GRAY: I am sorry. I didn't understand your question.

MR. JUSTICE MARSHALL: Is there anything in the record to show that the School Board of New Kent County adopted this plan rather than some other plan?

MR. GRAY: There is nothing in the record to show any reason why the plan, why one plan was chosen over another, no, sir.

MR. JUSTICE BRENNAN: Do you show there was any consideration at all of setting up two districts?

MR. GRAY: No, there is nothing to show why they chose the freedom-of-choice plan.

MR. JUSTICE FORTAS: Do I correctly understand that there are now 115 Negroes that attend in the New Kent school?

MR. GRAY: Yes, and, of course, usually, as I said, the freedom of choice period is open at this moment. We don't know what choices will be made for this coming

school year.

MR. JUSTICE WHITE: Is there anything in this record to show where the 115 Negroes live?

MR. GRAY: No, sir, there is not.

If I may answer on this 115 children, specifically, no, sir. The record does show, in answer to interrogatories and the evidence which was developed, that, generally, the pattern of residence is throughout the county.

MR. JUSTICE WHITE: I understand that, but are the 115 Negroes going to New Kent mostly Negroes, who live around that school?

MR. GRAY: I do not know, sir, and the record does not show.

MR. JUSTICE WHITE: Is there state transportation?

MR. GRAY: There are buses that transport the students to both schools.

MR. JUSTICE WHITE: And Negroes live far from the Watkins end of the county?

MR. GRAY: They would be transported.

MR. JUSTICE WHITE: Would be transported to New Kent.

MR. GRAY: Yes, along with the white children.

MR. JUSTICE BRENNAN: Along with the white children?

MR. GRAY: Yes, sir.

MR. JUSTICE BRENNAN: There must be a good many children living in the Watkins end that attend the New Kent.

MR. GRAY: Yes. The buses serve the schools. If you go to the school, you ride that bus.

MR. JUSTICE BRENNAN: The few colored children who live in the New Kent area are bussed over to the Watkins area?

MR. GRAY: Yes, according to the choice they make.

MR. JUSTICE WHITE: What would you say if the state adopted the freedom-of-choice form, and then at the bottom said, "Why do you choose this school?" And the parents put down, "I prefer to go to a white school." And the Negro parents put down, "I prefer to go to a Negro school," and transfers were allowed on that basis.

MR. GRAY: I think, sir, what the Court would say -- but I know what HEW would say, because they have specifically, and, of course, in the acoption of the plan, they also adopt this provision. They are so fearful of this subtle pressure, that Mr. Justice Marshall is speaking about, that they would not permit you to question, ask why.

MR. JUSTICE WHITE: Was there any evidence in this record as to why these choices were made?

MR. GRAY: There is no evidence in this record, Your Honors, but I actually can say to you why they were made. They were made because in a rural Virginia county the colored school is a community center of colored activity. It is the hub of their social life. They don't want to lose that school. This is the heart of their social life, and their community center. They go to that school, because they want to go there.

In my city of Hopeville, some thought was given to consolidating the high school into one school based on residential patterns. There was a colored high school, which was on one side of the town, and a white high school on the other.

MR. JUSTICE WHITE: Do you think it is unfair to say that the free-choice plan the way it operates here is, in effect, an authority to the parents to make their choice based on race?

MR. GRAY: The white child's parents certainly cannot chose to go to a segregated school because he does not go to a segregated school.

MR. JUSTICE WHITE: But if parents, do you think it is unfair to say that or not, to the extent that there are racial differences between the two schools, is an authority to the parents to make that a factor in choosing the school?

MR. GRAY: The only way you can do that is to say that no one but white will go here. This is not the case.

MR. JUSTICE WHITE: But the state is saying to parents, the state is saying, "Look, if all of you parents got together in the county, if you had a countywide PTA meeting, and you parents decided that we would just like to have a white school and a Negro school, and all the parents of the Negro children will go to the Negro school, and the parents of the white children will send them to the white school, that would be permissible under this plan, wouldn't it, to the extent that the community itself in a big town meeting decided to have it that way?

MR. GRAY: It would be permissible under this plan, and would be permissible under the Constitution. If I may answer you in this way, if I have time to make this point, it seems to me that prior to Brown the government of my state and the government of many states for reasons sufficient to the government, determined that the plan is better for one reason or another, and that it is better for white children to go to one school and colored children to go to another school. This Court struck that down and said, "You may not have compulsory segregation." And when it was struck down, this county said, "All right, our answer to that is: Let every child go where he wants

to go. We deny no one anything." And now people stand before this Court and say to you, "The right choices aren't being made," and the only reason --

MR. JUSTICE WHITE: Who signs those forms?

MR. GRAY: I beg your pardon, sir.

MR. JUSTICE WHITE: Who signs those forms?

MR. GRAY: Beg your pardon, sir.

MR. JUSTICE WHITE: Who signs those forms?

MR. GRAY: The parent, guardian, or, if the child has reached the ninth grade, or is 15 years old, he can make his own choice.

MR. JUSTICE MARSHALL: Mr. Gray, those things you outlined to Mr. Justice White about the feeling in a local rural community in Virginia and that they would prefer to go to their own school, and all, would I be fair in assuming that the school board knew that, when they adopted this plan?

MR. GRAY: Yes, I think you would, sir.

MR. JUSTICE MARSHALL: Then the plan was conceived in an atmosphere of race?

MR. GRAY: The plan was conceived, sir, by a school board which had the duty, the sworn duty to try to preserve public education and to better public education in New Kent County. They had before them certainly in law at least some alternative, I presume they could have, if

they chose, put the name of every first-grade child in a paper bag and said, "All right, we will do it by lottery. We will pull out the names, and this child will go to this school, and this child to this school, regardless." They could have done it by pairing the schools, one as an elementary school and one as a high school, as long as they did it in a manner that did not deny to any child the equal protection of the law, they did it constitutionally, they chose the plan, which they felt would preserve the public education system in New Kent County, Virginia, for all the children, and to give them the equal protection of the law.

I say to you, sir, that there is not a child in New Kent who can stand before this Court and say that the school board of New Kent County is denying me anything. Every facility is open to him, and I say to him, if integrated education is what the colored plaintiff wants, I can provide it for him this morning, if he is in the room. He need only sign that form and check the New Kent School, and he will have a fully integrated education.

MR. CHIEF JUSTICE WARREN: When you say to us that there are no community attitudes that pervade that county, which would militate against the Negro child saying that he wanted to go to the white school, can you say that to us honestly?

MR. GRAY: I think, Your Honor, that I can. New Kent County and Charles City County were adjoining counties, both of them have a colored population larger than the white population. In New Kent County, Virginia, and I think that the appellants have wisely chosen not to proceed with the Charles City County appeal, which they started to bring here. Charles City County has progressed along the line, to the point where a great many of the elected officials are members of the colored race. In New Kent County there are four men on the governing board. One of the members of the governing board is a Negro. In Charles City County, one of the members of the School Board, who adopted an identical freedom-of-choice plan, is a Negro, and he felt that, if we afford everyone a free opportunity to go where he wants to go, we do not deny him equal protection, I do not believe that in any community activity.

Race relations in New Kent County, Virginia, are excellent.

MR. CHIEF JUSTICE WARREN: Don't we find, though, in many counties, the larger the Negro population is percentage-wise, the greater the animosity is toward their participation in things?

MR. GRAY: I think that, generally speaking, that is true.

MR. CHIEF JUSTICE WARREN: So a large size of the

Negro population will be considered, wouldn't bring one normally to believe what you just said.

MR. GRAY: I can only say to you, as I said before, this record in this lawsuit recites in the Court's opinion and in the brief filed here, they admitted in the court, to the bar of the court, they have free and unrestricted choice. If you want to send this back on an evidentiary hearing on whether there are community pressures, militating against their choices, that is another thing, but this case on this record, has to be decided on the basis that they do have an unrestricted choice.

MR. CHIEF JUSTICE WARREN: But aren't we entitled to take into consideration what has happened in that county for 100 years before?

MR. GRAY: I don't know what you mean by what has happened in the county for 100 years before.

MR. CHIEF JUSTICE WARREN: I mean you actually had segregation not only in schools, but in everything, your buses and transportation, trains, and everything else, where you segregate the races, aren't we entitled to and wasn't the Court entitled to below, shouldn't it have taken those things into consideration in determining whether this was an honest effort to desegregate these schools?

MR. GRAY: I think they did take that into consideration. Certainly they were entitled to. It was

a matter of law up until the Brown decision, that it was constitutionally permissible, to have separate facilities, and this court had put its stamp of approval on it. I think what you should do is what has happened under this plan.

MR. CHIEF JUSTICE WARREN: Without relation to anything that has gone before.

MR. GRAY: To see if this plan is working fairly to see what is working on this plan.

MR. CHIEF JUSTICE WARREN: Is it accomplishing the prupose of Brown and its project any when there hasn't been a single white child going to that school that is entirely Negro? Is that accomplishing any purposes for Brown?

MR. GRAY: As I understand Brown, its purpose was to strike down cultural segregation. That has been accomplished.

MR. CHIEF JUSTICE WARREN: And we referred to the district court for accomplishing that purpose. Has that purpose been accomplished?

MR. GRAY: The compulsory integration does not exist in New Kent County.

MR. CHIEF JUSTICE WARREN: Mr. Tucker.

MR. TUCKER: We understood that the rebuttal would be done at the end of the three cases, after the Solicitor General.

MR. CHIEF JUSTICE WARREN: I see. All right.

That completes Green vs. County School Board of New Kent County, does it?

Very well. No. 740, Brenda K. Monroe et al., Petitioners, vs. Board of Commissioners of the City of Jackson, Tennessee, et al.

Mr. Nabrit.

THE CLERK: Counsel are present.

ORAL ARGUMENT BY JAMES M. NABRIT III, ESQ., ON BEHALF OF PETITIONERS, BRENDA K. MONROE, ET AL.

MR. NABRIT: Mr. Chief Justice Warren, may it please the Court, this case is here on certiorari to appeal the judgment of the Court of Appeals for the Sixth Circuit, which affirmed an order entered by the District Court in the Western District of Tennessee, approving a desegregation plan proposed by the school authorities in Jackson, Tennessee.

At the outset, before I begin a description of the facts in the proceedings, let me attempt to state the issues as I see them here. I think the question is whether a school board, which has maintained a dual segregated system satisfies its obligations under the equal protection clause simply by ceasing its illegal practices, its practices of assigning pupils on the basis of race, or

whether, on the other hand, the courts should require such boards to begin affirmative steps to thoroughly dismantle the dual segregated system and bring about a system which is no longer segregated.

Now, the courts below have agreed with the school board's argument, which is that their only obligation is to stop using race to assign pupils, to declare neutrality, and that, as long as they don't use race any more, it does not matter what happens, it does not matter, they argue, that the schools remain largely segregated, as they were before.

Petitioners' view -- and our basic submission today -- is that this is not enough merely for the boards to stop their illegal and unconstitutional practices, but that in addition, the school authorities have to take steps designed to actually reform the dual systems of schools, which they built up, to desegregate them, if you will.

In other words, we urge that the remedy might be designed, must be designed to cure the evil, that the evil is the racially segregated schools, school system, that the authorities have put together.

This is a very basic and fundamental question, I think, about the meaning of the Brown decision, because the Court is familiar with the war that has been going on, the war that many public officials have been waging against

the Brown decisions for all these years. And I think the school boards in these cases are still fighting that war.

They have sophisticated arguments, but they are indeed fighting to keep just as much segregation in these school systems as the courts will let them keep. That is what is involved here, and that is the issue: Will we have real reform, segregated school systems, or will the courts be content with nominal and token compliance?

The United States Civil Rights Commission examined this situation in a report to the Congress, and the President last July, and it pointed out that in many areas there has been commendable progress, but that, nevertheless, the vast majority of Negro children are still denied the rights, their rights under the decision in the school desegregation cases.

The Commission said in its conclusion, "If these rights are to be secured, this cannot be a time for retrenchment, or waivering of purpose." And that is our view, too. I think it is helpful to look a bit at the particular facts of the Jackson, Tennessee, school system.

Jackson has 13 schools, a little more than 7600 pupils, about 60 per cent of them white and about 40 per cent Negro.

When petitioners filed this lawsuit in January 1963, there were still complete segregation of faculty and

pupils, except for 7 Negroes who had been admitted in white schools. And today, after five years of litigation, we still have the five all-Negro schools, attended by 80 per cent of the Negro pupils in the country, a little more than 80 per cent.

Now, in August 1963, when the District Court first approved a desegregation plan for Jackson, Tennessee, it approved a plan calling for gradual desegregation in five annual steps at various grade levels. And the plan proposed by the school board provided for school zones, provided that each school building would have a geographical attendance area around it, and that also made provision for people to transfer out of the areas where they lived, and the plan that the Judge approved was that any transfer arrangements that the school board wanted to make would be acceptable, provided the court said they were reasonable and were not based on race or color.

MR. JUSTICE BRENNAN: Does that mean a free transfer system?

MR. NABRIT: It didn't work out that way. I think that is what the District Court Judge said.

MR. JUSTICE BRENNAN: In this sense, was it any different than the Kenty County?

MR. NABRIT: It is not now. I was telling the events chronologically. Now we have free choice, just like New Kent. We have free transfer out of the zones.

At that time, and in the fall of 1964, 27 Negroes, Negro pupils, after the plan had been operating for two whole years, 27 Negro pupils intervened in the case and complained that they had been denied admission to white schools discriminatorily, they complained that the school zones were gerrymandered and asked for de factodesegregation.

The District Court held a hearing for several days and issued an opinion and order in 1965, and in that opinion, it held that, indeed, the school board was disobeying its prior order, that they were discriminating in the transfer. He thought that their disobedience was of a previous order.

Counsel feels on that issue what the school board was doing was that it was fine that white children who lived in a Negro zone were permitted out, to transfer out, to go to a white school. One hundred per cent of the white children did that. Everyone who was zoned in a Negro area was sent to a white school. The Negro pupils were required to stay in the school. This was two years after the Court condemned such an arrangement in the Goss case, the Jackson School Board was still doing it.

The District Court ruled that the schools ones for the elementary schools, eight elementary schools, five white and three Negro, were gerrymanded racially and that finding by the Distric Judge followed elaborate presentations

of evidence through graphs and maps and expert testimony by school educators. And the District Court found that the elementary school zones were gerrymanded.

The court rejected the plaintiff's argument about gerrymandering of the junior high school zones, and I am going to -- I think the trial judge made plain in his opinion, however, that the basic position which guided his decision of these gerrymandering issues, and the zoning issues, was a view of the law that he thought primarily a legal question involved. This is as to what sort of standard he should use in looking at the evidence.

Petitioners had two school administrators, two school superintendents as expert witnesses, to make a study of the zone lines, and the attendance pattern, and they prepared a number of exhibits, which we were not able to present, but we have reproduced one of them. It is the exhibit in the folder, the blue folder. We have reproduced photographically a copy of, I think, the most important exhibit, and the exhibit you have in the blue folder is the small copy of the exhibit I have here on the easel, the one on the easel is an enlargement of the little one.

MR. JUSTICE BRENNAN: We have the peel-offs, too, do we?

MR. NABRIT: Yes.

The simplest way to begin is to peel back the three

layers and start with the basic map.

MR. JUSTICE BRENNAN: Peel off the top three layers and then we get to the beginning; is that correct?

MR. NABRIT: That is correct.

The underlying map shows the City of Jackson, and if you spread the red dots over, you see that these dots represent the white junior high school children in the city. What the picture shows is that they are spread all over the city generally. They are distributed throughout Jackson.

MR.JUSTICE DOUGLAS: The red dots represent the white children?

MR. NABRIT: Yes.

If you move that for a moment and spread the blue dots, over this, you see that the Negroes in Jackson, Tennessee, are distributed more or less in the center of the city.

Now, starting with that situation, the school board built three junior high schoos, all since the Brown decision. They built one junior high school out in the other part of the city. They built one in the east and they built one in the center. And they adopted in those three schools a policy where two are all white schools and one is an all Negro school, established with all-Negro faculty. The Merry School in the center is the all-Negro school, and the other it established as the all-white school

in 1965, when the board was ordered to segregate the junior high schools. At that time it proposed these school zones indicated by the green lines. If you drop the green lines over the blue dots for a moment.

MR. JUSTICE STEWART: I understand that all these schools were built since 1955.

MR. NABRIT: Yes.

In 1965 they began to desegregate. Ten years after the Brown decision was when the plan reached the junior high school system. So that what we have is this hour-glass shaped zone, as the witness called it. In the middle was the attendance area for Merry Junior High School, the Negro school.

As you can see, it included most, but not all of the Negroes in the city. If you remove, put the red dots on again and spread the zone over them, you can see that there are a handful of white pupils in Merry Junior High School.

MR. JUSTICE BRENNAN: Do they go to that junior high school?

MR. NABRIT: No, they never went.

MR. JUSTICE BRENNAN: They transfer out to --

MR. NABRIT: To Tigrett or Jackson, and Merry has been almost 100 per cent Negro as a school.

MR. JUSTICE WHITE: How about the Negroes in the Jackson school district?

MR. NABRIT: Jackson is desegregated. All of the enrollment figures for the current year are on page 3 of the School Board brief.

MR. JUSTICE WHITE: How many of the Negroes who live in Jackson go to the Jackson School?

MR. NABRIT: I have a total of 135 Negroes.

MR. JUSTICE WHITE: How many Negro children are there in the district?

MR. NABRIT: It would take me a moment to calculate; this is the picture as of 1964.

MR. JUSTICE BRENNAN: The dots stand for --

MR. NABRIT: Five pupils each.

MR. JUSTICE BRENNAN: It looks like 1008. Each dot is 5.

MR. JUSTICE WHITE: I wondered to what extent the Negro had operated under the free-choice plan, either to go to a white school or a Negro school.

MR. NABRIT: We don't have a breakdown. For the current year we don't have it, beyond the year that is given on page 3 of the school board's brief.

Now, the plaintiff's expert witness proposed when he testified, he thought that it was quite plain with this arrangement that Merry was going to remain an all-Negro school. The experience two years prior to the plan in the elementary grade, every white child in the Negro zone trans-

ferred out, and there were some few whites in the Merry zone, so few, and there were so many Negroes concentrated there, the way it worked, it was just apparent that Merry was going to remain an all-Negro school.

The plaintiffs' expert proposed an alternative in his testimony. Mr. Herman proposed an alternate arrangement, a plan to desegregate all three schools, and it was very simple. He proposed that the white elementary school in this area, called Highland Park, and the East Jackson school and the negro school down here feed their pupils to Tilyett, and that the white pupils finishing in the elementary school here and the Negro pupils here send their children to Merry, and that the pupils of the two white schools in the eastern section and the Negro school down here, and Washington-Douglas send their pupils to Jackson. They said that the capacities all fit, that this method would be in accordance with the traditional way of assigning pupils in schools all over the country, in assigning thegraduates of [illegible] school together to the junior high school.

MR. JUSTICE BRENNAN: This eliminated any freedom of choice?

MR. NABRIT: Yes.

MR. JUSTICE BRENNAN: You would go to the school in the district in which you lived?

MR. NABRIT: That is right.

MR. JUSTICE BRENNAN: Is that correct?

MR. NABRIT: That is right.

He would have assigned pupils so that all three junior high schools would have been desegregated.

MR. JUSTICE BRENNAN: This was done by drawing district lines to accomplish it?

MR. NABRIT: Yes, he would have taken the elementary school zone lines, which are on another map, and clustered them, combined three of them, and made them the zones for the junior high school.

MR. JUSTICE STEWART: This expert witness, what was his area of competence? What was his area of expertise?

MR. NABRIT: There were two people here. One was a school superintendent, and the other was an assistant school superintendent.

They made a study. The prepared these exhibits. They made a study of all the school zones. They were from two different school systems in Illinois. And they conducted a fairly substantial study of the Jackson system and made this recommendation.

The trial judge objected to it because he said these witnesses assume that there was a duty to integrate the schools and the maximized integration, and that was not his understanding of the law, so he disregarded their recommendation, because, apparently, the trial judge thought

that his search was to find out where -- whether there was a non-racial explanation for the plan, whether or not there was a non-racial explanation, to find out, explain why the plan retained a large degree of segregation. It is our view, of course, that that is the wrong inquiry, the proper inquiry for the trial court should be to find out if there is any reasonable way of reforming the system, any reasonable way of integrating the schools.

We think if the court had understood the issues that way, it would have reached a different result. We think that there must be a duty to disestablish segregation, because this is the only way to assure that the effects of the unconstitutional practices are really dissipated, and are not, and that segregation is not just carried on under another guise.

It is the only way the community can be disabused of the idea that schools are still segregated, just as they always were.

MR. JUSTICE WHITE: You are apparently, your principle, then, would be limited to the areas where there had been legal segregation.

MR. HABRIT: I think I would make an argument in the other areas, that is consistent with that one, but the argument I made is addressed to such a community.

MR. JUSTICE WHITE: It is an issue of remedy.

MR. NABRIT: Yes. I think looking at it as an issue of remedy is very illuminating. It is very analogous to cases like this Court has under the National Labor Relations Act, which involved company-dominated unions, and the issue is whether or not it is simply enough to order them to stop the illegal domination, or you must require disestablishment.

We would follow that analogy out as this Court has done, and say, obviously what has to be done is to strike a way to wipe the slate clean. You can't wipe the slate clean.

MR. JUSTICE WHITE: Where there was official segregation, it should be followed by official desegregation?

MR. NABRIT: Yes.

MR. JUSTICE WHITE: That is your submission?

MR. NABRIT: Yes, sir. That is, the policy of neutrality is not good enough to undo what they have done. In a system like this, a community like this, Tennessee school segregation laws, when you think about them, are really significant in that Tennessee was a state where the law made it a crime and you could get six months in jail for running an integrated state school. They were criminal statutes. Having a policy like that is significant. It can't be uprooted by a hands-off, laissez-faire attitude.

MR. JUSTICE WHITE: Would you think this is a

plan that is neutral?

MR. NABRIT: No, I think there is a gloss of neutrality about the free-choice idea. But this is not a neutral plan at all. I think this is a segregationist plan, because the groups resulting group allthe Negroes together.

The trial judge found that this was their intention in the elementary school zones. He found that they had segregationist policies in the terms of the way they were administered, the transfers were administered, but he stopped them.

MR. JUSTICE WHITE: Are you urging this case here on the basis that this zoning of the junior high schools is really and actually in reality official segregation?

MR. NABRIT: Oh, yes. Yes, surely.

MR. JUSTICE BRENNAN: Is that because you say [illegible] it is impossible against this background that it could be neutral?

MR.NABRIT: I think, no, that there is nothing that is not neutral about the geographic zoning idea. I think this particular plan was not well attended. That is all I meant to convey.

In a voting case that the Court considered several terms ago, called Louisiana vs. The United States, Mr. Justice Black wrote for the Court that the Court has not merely the power or the duty to render a decree which will, so far

as possible, eliminate the discriminatory effects of the past, as well as bar like discrimination in the future.

It seems to me what I am talking about is the elimination of the discriminatory effects of the past, and that, where the school board is engaged in vigorous efforts to maintain segregation, that they must engage in equally rigorous efforts to dismantle the dual system they created.

MR. JUSTICE MARSHALL: Mr. Nabrit, just a point of information: You mentioned the Washington-Douglass Elementary School.

MR. NABRIT: Booker T. Washington.

MR. JUSTICE MARSHALL: I didn't know whether it was Booker or George.

MR. NABRIT: Frederick Douglass.

To finish, I think that to fully understand what the trial judge's thinking was and how we regard the erroneous study influenced him, the trial judge looked at the zones, and he thought -- and this is from his opinion -- that their discrimination in drawing zones should not be overridden unless it constitutes a clear abuse of discretion.

In other words, the Court thought that he was required to approve any arrangements that the school board made, as long as they weren't obviously phony, an obvious trick to preserve segregation.

Whereas, we submit that the proper desire is for

the judge to look at what is the most reasonable way consistent with maintaining an effective educational program, what is the most reasonable way for dismantling the dual system, and eliminating segregation, and the district judge made that inquiry, we would get substantially different results in these communities.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Very well.

Mr. Rice.

ORAL ARGUMENT BY RUSSELL RICE, SR., ESQ.

ON BEHALF OF RESPONDENTS, BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ET AL.

MR. RICE: Mr. Chief Justice, may it please the Court, it was interesting to me to listen to Mr. Nabrit, and to realize that the changes that can occur in something by the way it is placed in the language.

The trial judge in the Jackson, Tennessee, case, granted summary judgment in June of 1963, the latter part of June, a brand new school board took office July 1, 1963, and a brand new city attorney took the job on July 1st, of that same year.

The first thing that was handed to me, when I went in there, was what to do about this school summary judgment, and what they did do was, upon my recommendation --

and I do, in a way, hate to see the motives of the school board and myself impugned with an absolute barren record of fact -- we did the very best that we could do to meet the requirements of the Brown decision of this Court, and I will show to the Court, I think, some of the differences that exist between what we actually did and the way that it has been stated here today.

First of all, I must agree that I have never read the Brown decision as being a command for racial mixing as such. As I read Brown, this Court said, "Stop segregating, stop compulsory segregation, and establish a system of admissions to your schools based on some other factor than race."

And we have done that in Jackson, Tennessee, in our view.

This Exhibit 5, which has been handed to you, purported to be the residences of people who live in these zones. That is not so. The residences of the people who live in these zones appear upon this large Exhibit 11. What you have here is a study of who attended certain schools. And it appears, their residence appears upon here, but the residences of all the other people living there do not appear here.

The initial decision of our trial judge allowed those children attending a school to continue in that school

until graduation, regardless of where they lived.

Secondly, the transfer provision was allowed.

And thirdly, those who lived in that zone had the uncontested right to go to that school, if they wished to do so. After all three of those provisions had been applied and the student body had assembled for the school year, after transferring, after exercising their right to remain if they had been attending, and those who live in that zone were going there, that is what appears here.

It does not show you the residences of the people, it shows you who went to those schools, after all three of those factors had been exhausted.

As far as zoning is concerned, it shows this Court nothing.

MR. JUSTICE STEWART: You say it shows who went to the various schools? I am referring to this exhibit.

MR. RICE: Yes.

MR. JUSTICE STEWART: This seems to show that at least some Negro children went to Tigrett Junior High, because there are some blue dots to the left of that green line, and yet, in your brief, it is indicated that no Negro children go to that junior high school.

MR. RICE: The figures that Your Honor holds there, Mr. Justice Stewart, is of 1963. The figures which I used are the year 1967, and I thought we started out with

some, we have 7 in Tigrett at this time.

MR. JUSTICE STEWART: And this would indicate if each one of these dots represents five children, there are some 70 or so children represented by those blue dots; is that right?

MR. RICE: I can't really tell.

MR. JUSTICE STEWART: More like 50, perhaps.

MR. RICE: I hope the Court can see this. It is not too large. The blue dots on here, I don't know how we got switched up on these exhibits, the blue dots on this exhibit indicate where the white children live. This is white children age 1 through 18. Regardless of where they go to school, this is where they live.

The red dots on here indicate where the Negro children in the City of Jackson, age 1 through 18, actually live.

This is the Tigrett Junior High. This is Merry Junior High School.

MR. JUSTICE WHITE: Mr. Rice, it may interest you to know that at this end of the bench I don't see any [illegible] your map.

MR. RICE: Mr. Justice White, I sympathize with the bi-focal problem. I have it myself. I wish I could do something about it.

MR. JUSTICE DOUGLAS: It has nothing to do with

the bi-focals.

MR. JUSTICE WHITE: I am unable to see them.

MR. RICE: I am willing to do anything that the Court suggests.

MR.JUSTICE WHITE: It doesn't do a whole lot of good to refer to the map and the dots.

MR. JUSTICE DOUGLAS: We can't see them.

MR. RICE: Yes. I hope at some stage the Court will take the occasion --

MR. JUSTICE WHITE: We can't see the dots.

MR. JUSTICE DOUGLAS: Do you have this in miniature?

MR. RICE: Yes.

MR. CHIEF JUSTICE WARREN: Is it in the record?

MR. RICE: Yes, it is in the record.

MR. CHIEF JUSTICE WARREN: The diagram?

MR. RICE: You mean in the printed record?

MR. CHIEF JUSTICE WARREN: Yes.

MR. RICE: No, sir. I thought in bringing this --

MR. CHIEF JUSTICE WARREN: Is there a miniature of that?

MR. RICE: In the official record, there is an exhibit of this type, but not printed in the opinion.

MR. CHIEF JUSTICE WARREN: Before you go farther with your argument, would you mind telling us what the breakdown is in each of these three schools, as to Negroes

and whites?

MR. RICE: Who attend the school?

MR. CHIEF JUSTICE WARREN: Who attend the school.

MR. RICE: Yes. On page 3 of the respondents' brief, the Alexander School --

MR. CHIEF JUSTICE WARREN: Which was -- will you point it out to us?

MR. RICE: You just want the junior highs, Your Honor?

MR. CHIEF JUSTICE WARREN: First, I thought we would go to those three represented by those red labels.

MR. RICE: Tigrett Junior High School, which is this school out to the west, has 812 white and 7 Negro children.

It is in the predominantly white neighborhood. The entire area there is white. The Jackson Junior High School, which is the one to the east, has 349 white students -- 195 Negro students.

The Merry Junior High, which is the one in the center, is entirely Negro, having 640 Negro children, and 13 white children.

Now, the elementary schools --

MR. CHIEF JUSTICE WARREN: Why would that be? That they are all Negroes there and there are no whites.

MR. RICE: Primarily, your Honor, because the

Negro children are preferring to go there and the whites are transferring out under the free transfers.

MR. CHIEF JUSTICE WARREN: Could it be also those various lines that you draw there, those red lines, that appear on the map, do they have anything to do with it?

MR. RICE: I don't believe it does.

MR. CHIEF JUSTICE WARREN: Where were they drawn with that irregularity, with that irregular line going across the city?

MR. RICE: That is a fair question, and I am willing to give the Court a fair answer. We were trying to find natural boundaries, if the Court cannot see this map at this time, it is a little hard to point it out. We would just as soon have had boundary lines running in this fashion, as in any other fashion, it would have been easier. There didn't happen to be any usable boundary that would make it clear.

MR. JUSTICE WHITE: What is the natural boundary got to do with educational considerations?

MR. RICE: It has this factor to consider, Your Honor. If you draw catty-corner across blocks in every single street, you have the problem who is in this district, who is in that district. These are merely clearly identifiable boundaries.

MR. JUSTICE WHITE: That one boundary, does that

seem to follow a freeway?

MR. RICE: Are you speaking of this one?

MR. JUSTICE WHITE: Yes.

MR. RICE: This one follows a major highway until it reaches this point, where it turns west and follows a major thoroughfare at this point, and follows a railway out of Jackson.

MR. JUSTICE WHITE: How about the one to the north?

MR. RICE: I was speaking of this one. This boundary right here follows a major road all the way into town, coming in, it turns west on a major road, goes south on a major road, and goes out on a major road.

MR. JUSTICE WHITE: Why does it? There are other major roads around they could have followed.

MR. RICE: That is the problem, Your Honor.

MR. JUSTICE WHITE: Why that one?

MR. RICE: There isn't. This town is an old town, and it is cut up into tiny squares in there, and there didn't happen to be one we could use. The map will show it to the Court. The fact of the business, these petitioners talked about the experts who came and examined our system and stayed quite awhile there, finding out about it, and I believe Mr. Herman, when he was on the stand, objected to this. He said it looks to him as if it had

been gerrymandered. I offered him the tape and I said, "Mr. Herman, you put your lines on there and settle this lawsuit right now,"and he wouldn't touch it.

We have no pride of authorship of those zones, but they are not gerrymandered in the sense that they were trying to prevent people from going to some school. They might otherwise wish to do so.

MR. JUSTICE BRENNAN: In relation to what lines, Mr. Rice, was it that the district court found gerrymandering as to the elementary schools? Are they there?

MR. RICE: Yes. Can the Court see these green lines?

MR. JUSTICE BRENNAN: Well, not too easily. I can see something that looks like lines.

MR. RICE: Let me say this. The first time we submitted the plan to the court, the trial judge approves our [illegible] lines. On the motion to rehear, he set it down for a hearing. At that time, after one year's experience, the school board, on its own volition, changed this line right here. It came in in this fashion, and across, it moved it down to straighten that line. The trial judge took where we followed that railroad track on down withthe line here, he moved it over and came down that part right there. That is the extent, I believe that is all, of the gerrymandering that he found in the elementary school lines.

MR. JUSTICE BRENNAN: Did he deal with the general issue of gerrymandering on the junior high school lines?

MR. RICE: Yes. We had an extended hearing on the question of gerrymandering. There just doesn't happen to be a natural boundary to come there. We did estimate with these petitioners about the high school lines which run on a major thoroughfare, I believe it is, that one just like that straight, and I think Merry Juniry High, now there are 30 Negroes, they have taken advantage of the unfettered opportunity to attend the white schools.

MR. JUSTICE BRENNAN: In any event, as long as you have a free transfer plan and one can go out anywhere he pleases, what is the significance, what significance does the lines have?

MR. RICE: It has this significance. Nobody who lives in that district has the unqualified right to attend that school. We were told by this Court to eliminate segregated schools, the segregated dual system, and this plan right here sets up a unitary, geographic zone for every school in our system. We take that student's hand and make him go into that school physically every year and register, and as far as the city of Jackson is concerned, that is where that child must go to school, unless his parents choose otherwise.

MR. JUSTICE MARSHALL: Mr. Rice, you drew the

line right in the middle for the high school, in the middle of the map.

MR. RICE: Something like that.

MR. JUSTICE MARSHALL: Why couldn't you use that same line for the junior high school?

MR. RICE: We possibly could.

MR. JUSTICE MARSHALL: Now, just on the question of energy.

MR. RICE: The question of what, sir?

MR. JUSTICE MARSHALL: Energy. Wouldn't it have been easier to do that than all this other involved business?

MR. RICE: We have no pride of authorship in these lines. If that line suits this court, it suits us.

MR. JUSTICE MARSHALL: Would you be willing to put that line down there and say, everybody on that one side of the line goes to that one junior high school, and the ones on the other side, go to the other?

MR. RICE: As long as it gives us the freedom that the Court desires.

MR. JUSTICE MARSHALL: I'm not giving you that freedom.

MR. RICE: I don't believe it is constitutional to do that. When we prepared this plan, I looked to see

what this Court told us to do.

I stated to the Court what I thought Brown said. If that is not the law, then I am wrong. That is what I read it to mean. Otherwise I am wrong. I looked to see where we had to be rigid, inflexible, whether the zoning had to be rigid and inflexible. I found where the Court in the Gross case went out of its way to tell us that, if we had a free, wholly non-racial transfer plan, that that would be an entirely different question than what we have here. That is the way the Court put it.

Why would that be of importance? It is important to this effect. I hope the Court, recognizing the fact that Jackson, Tennessee, has never been heard of by this Court, we are not a racist town. We have had no trouble. We are not fighting the problem. And we were late in coming along. We had the advantage in so being, that we could look at what this Court had to say and try to do what you wanted us to do.

MR. CHIEF JUSTICE WARREN: When did you start coming along?

MR. RICE: The first integration in Jackson was on a voluntary basis in 1961. I grant the Court that it was, more or less, putting the foot in the cold water, so to speak, to see what the temperature was, but, nevertheless, it was a move of considerable magnitude in that

area at that time.

Still, in all, it was not until 1963, that we were confronted with the court order to desegregate. In any event, in 1963, when we were so confronted, we had the advantage, if it can be called that, of seeing what this Court had to say, and that is where we went.

MR. JUSTICE WHITE: I gather your submission is much as it was in the previous case, that, as long as you have a free transfer, free choice of schools, that you can't be violating the Fourteenth Amendment.

MR. RICE: We don't think we are violating the Fourteenth Amendment, Your Honor. The Fourteenth Amendment told us to stop doing something, it didn't tell us to affirmatively do something or command us to do something.

MR. JUSTICE WHITE: With the free choice provision, do you suppose that in Jackson it was predictable that there would be this pattern of school attendance?

MR. RICE: I can say this to you, Your Honor, that we had no more ideaof what would come of this than any judge sitting on this bench.

MR. JUSTICE WHITE: In any event, it is a plan which permits the community attitudes to be reflected in the school attendance, and you say that is precisely what it does, and that does not violate the Fourteenth Amendment.

MR. RICE: When you speak of a community attitude.

MR. JUSTICE WHITE: I am using community, it permits the reflection of the attitude of parents of school children.

MR. RICE: As distinguished from hostile community attitudes, because we don't have any hostile community attitudes, but we do have the attitude -- you see, there are many Negroes in this country, and in Jackson, Tennessee, we have a considerable group who have great pride in their race, and in things that are all Negro, and I think it is an erroneous conclusion to conclude that anything that is all-Negro ipso facto, per se, is bad.

MR. JUSTICE WHITE: You had the benefit of Goss and Goss said no official transfer plan of which racial segregation is the inevitable consequence; right?

MR. RICE: Right.

MR. JUSTICE WHITE: May stand under the Fourteenth Amendment.

MR. RICE: That is right.

MR. JUSTICE WHITE: That would apply to the so-called unrestricted plans, transfer plans, as well as any other?

MR. RICE: I think it would be. It was the inevitable result.

MR. JUSTICE WHITE: How non-inevitable is this in Jackson?

MR. RICE: It is not inevitable in this sense, Your Honor, that in 1966-1967, 475 Negroes, Negro children, took advantage of integrated education. In 1967-68, 615 Negro children are taking advantage of an integrated education.

All of our white childre are engaged in an integrated education.

So, to that extent, there is nothing inevitable about it. When they register in September, then we have no idea whether we will have 600 or what.

MR. JUSTICE WHITE: They initially register in the school in their district?

MR. RICE: They must do that.

MR. JUSTICE WHITE: So the city places them in a certain school by a school zone arrangement?

MR. RICE: Right.

MR. JUSTICE WHITE: Then there is a transfer [illegible]

MR. RICE: If they choose.

MR. JUSTICE WHITE: Without going and giving any reason?

MR. RICE: That is right.

MR. JUSTICE WHITE: Without the necessity for

giving any reason?

MR. RICE: That is correct. We tried to have them give a reason, and the trial judge found that to be erroneous. That brought on the other problem that we had. We abandoned that. Every Negro child asking for a transfer since August 11, 1965, has been granted that transfer.

MR. JUSTICE FORTAS: You have not had to deny the transfer in any case because of lack of facilities?

MR. RICE: No, sir, we have not.

MR. CHIEF JUSTICE WARREN: Is there any reason why that red line to the left, to my left, should outline an area of the city which is almost entirely white?

MR. RICE: Capacity of the school.

MR. CHIEF JUSTICE WARREN: Beg your pardon.

MR. RICE: Capacity of the school. You have to get enough children in a school to use it efficiently. That is all.

MR. CHIEF JUSTICE WARREN: Is there any reason why you couldn't have divided the city a little differently, so it wouldn't find most of the Negroes in one district and most of the whites in another?

MR. RICE: I assume not; yes, sir.

MR. CHIEF JUSTICE WARREN: Why did they do that, then?

MR. RICE: Well, as I say --

MR. CHIEF JUSTICE WARREN: Was that just happenstance?

MR. RICE: The Negroes all live in the center area of the city, and almost anyway we diagram that, we are going to have a substantial group of Negroes together. But I say again that we have no particular pride of authorship in this geographic zoning. There are other ways to do this. This happened to be the way that, considering the capacity of the school and the streets, and so forth, of how they get there, and the natural boundaries, that is the one they came up with.

MR. JUSTICE FORTAS: You run free bus service for school children?

MR. RICE: No, sir.

MR. JUSTICE FORTAS: What sort of transportation do they use?

MR. RICE: There is a city bus system. Primarily, they either walk to the school or their parents bring them.

MR. JUSTICE FORTAS: Is there reduced fare for school children on the city buses?

MR. RICE: I will tell you the truth, I don't know. I just don't know.

MR. CHIEF JUSTICE WARREN: So you are arguing, under your argument, the Negroes would live over there on the right

side of your map?

MR. RICE: Yes.

MR. CHIEF JUSTICE WARREN: Would have to either walk or have their own automobiles or go on buses to attend this chool 'way over in the left part of the town?

MR. RICE: Are you speaking here?

MR. CHIEF JUSTICE WARREN: Yes.

MR. RICE: If these over here wanted to go there, they would have to get there somehow.

MR. CHIEF JUSTICE WARREN: I suppose there are no natural routes that would take them up there to that school, because you say that is the way you drew your lines differently.

MR. RICE: No, sir, you find your planned area of our city on the outskirts. This is an old town, just [illegible]ly is chopped up like cordwood.

MR. CHIEF JUSTICE WARREN: I see.

We will recess now.

[Whereupon, at 12.00 o'clock noon, the oral argument was recessed to reconvene at 12:30 o'clock p.m. of the same day.]

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Rice, you may continue your argument.

MR. RICE: May it please the Court, I would like to point out to the Court, I looked at the printed appendix for a moment, and I find that Exhibits 1 through 9 of the defendants in the court below were consolidated on this exhibit, which is Exhibit 11. The smaller exhibits were not printed, because I had thought that this would be by far the best exhibits to use, but in any event those smaller exhibits are in the record, if that is of any consequence to the Court.

MR. CHIEF JUSTICE WARREN: Are those the petitioners' exhibits?

MR. RICE: They are the defendants' exhibits below.

MR. CHIEF JUSTICE WARREN: Yes, defendants' exhibits.

MR. RICE: In the short time that I have left, there are one or two points that I would like to touch in connection with our transfer plan, which we consider to be within the meaning of Goss. That plan provides the necessary elements of flexibility to our plan, which assures that this plan will, in fact, work.

If it were rigid, we would have the immediate reaction of resegregation. I am of the opinion that if we discarded our transfer plan and made this a rigid zoning plan, within three years there would not be a blue dot on the map to the right of the line. That may sound like community hostility. I don't think that is community hostility. There was an article on that very question in THE NEW YORK TIMES March 24, which was an analysis of that type problem, by some West Coast sociologist, and it had so much sense in it, and these people understand what we are up against, so thoroughly, that I had it reproduced and it is in a supplement to this rather voluminous appendix, that I filed here.

I am sorry that the appendices are so long, but the importance of this case, we felt like the voice of the educators should be heard, and the considerable trouble we have had, we have amassed in our appendix what we consider to be editorial and educational information that is vital to the determination of the question before this Court.

MR. CHIEF JUSTICE WARREN: Is there anything in the record to indicate the fairness or otherwise of the transfer system as you have used it here?

MR. RICE: The record itself is an appeal from the District Court order telling us to see that this is free.

MR. CHIEF JUSTICE WARREN: But is there anything

to indicate whether it has worked equitably in the past?

MR. RICE: You mean from here back to August 11th?

MR. CHIEF JUSTICE WARREN: Let's put it this way. Is there anything in the Court's opinion below to indicate whether this was an attempt to do the equitable thing or whether there was discrimination on the part of the board?

MR. RICE: The court has never found that we were in bad faith.

MR. CHIEF JUSTICE WARREN: I am not talking about bad faith. What did they determine about discriminatory effects of what you have done?

MR. RICE: Up to the time of the August 11, 1965, decision, the Court said that we were not granting every Negro child a transfer and since every white child got a transfer, we were in error. They fined us $1000 for that. I might point this out.

MR. CHIEF JUSTICE WARREN: They thought you were actually discriminatory?

MR. RICE: In the Court's conclusion, I think that would have to be the conclusion, yes, sir, and he told us to stop it. Since August 11, 1965, I state to this Court, upon pain of disbarment, without any question, that there has nto been a Negro child denied a transfer in the City of Jackson in these three school years -- not one.

MR. CHIEF JUSTICE WARREN: Has there ever been

one since that time that asked for a transfer to this school on the left, where it is allwhite?

MR. RICE: There are seven Negro children in there, and everyone that has asked to go there has been allowed to go there.

MR. CHIEF JUSTICE WARREN: They have been allowed to go?

MR. RICE: Yes. We gave serious consideration -- I don't suppose this is really pertinent -- but we did consider appealing that proposition from the District Court, but, you know, we have other things to consider. To carry on that litigation, to keep the pot boiling, it was worth $1,000 to let us get it over with and keep the community quiet and get on with our business of education.

And that is neither here nor there, but that happened to be the consideration upon which we decided to let it drop. You try not to stir these things any more than you can help.

MR. JUSTICE BLACK: Could you tell me just a brief statement what you understand they want to do and what you say is the difference in what you are doing?

MR. RICE: The difference between us, Mr. Justice Black, is that they want to compulsorily assign white children to what has been the formerly Negro schools. In other words, they want us to substitute compulsory assignment on the basis

of race; in other words elimination of segregation based upon race.

MR. JUSTICE BLACK: They want to compel the colored students to go into the white schools?

MR. RICE: And white children, vice versa, into the Negro schools.

MR. JUSTICE BLACK: And what is your position?

MR. RICE: Our position is that the Constitution [illegible] us to stop discrimination, and that we have so stopped, that it does not require racial mixing, they don't define [illegible] formula, but that it does not require the state to [illegible] assign somebody in order to achieve racial [illegible] in any particular school.

MR. JUSTICE BLACK: Over here, when you put your [illegible] where they are, over the school that is all white, how far is that? What is the distance?

MR. RICE: From the maximum, I would say it is three miles.

MR. JUSTICE BLACK: And that is what they would have to walk or go on a bus?

MR. RICE: If they were assigned over there, they [illegible] to that school.

MR. JUSTICE HARLAN: Are there buses that [illegible] this school on the right over to the school [illegible] left?

MR. RICE: No, sir.

MR. CHIEF JUSTICE WARREN: The one that is all Negro and the one that is white, with the exception of seven Negroes?

MR. RICE: No, sir.

MR. CHIEF JUSTICE WARREN: How would they have to go?

MR. RICE: This is the downtown area of Jackson, Tennessee, where my finger is. All bus systems come in like fingers on the hand, they come to the center transfer, and go back. It applies that way all over the city.

MR. JUSTICE BLACK: What would you have to do? You would have to walk, like our fathers did.

MR. RICE: Or ride the city buses to town and ride back out. That would be six or seven miles, a trip of six or seven miles.

MR. CHIEF JUSTICE WARREN: What is the fare? What is the bus fare from this school on the right to the school on the left?

MR. RICE: The regular fare, Your Honor, is [illegible] cents.

MR. CHIEF JUSTICE WARREN: Each way?

MR. RICE: Yes. But I do not know for certain whether there is a reduced fare or not. I think there is, but I can't say with any degree of accuracy that that is

true. I think it is 15 cents, but I don't know that.

MR. JUSTICE MARSHALL: Mr. Rice, what is the purpose of the transfer plan?

MR. RICE: The purpose of the transfer plan, Mr. Justice Marshall, is simply this, that at the level in which I operate, which is at the school board level, we have to deal in possibilities. We are not permitted the luxury of dealing in theory or Utopian ideas, we have to deal in possibilities. That transfer plan allows enough flexibility. It lets the citizen of that town give and take in accordance with his desires, to some degree.

At the same time, it guarantees them the right to go to the school in their district, if they want to do that. That assures that that transfer plan is not going to segregate our schools, our system, our city, just half, into a racial line.

We now live together, play together, work together, go to school together, and we do extremely well in our condition, in view of the uncontrolled forces that are now [illegible] in this country.

MR. JUSTICE MARSHALL: But the transfer plan was to permit individual people who had a desire to attend the school of one racial group could do so.

MR. RICE: For any reason.

MR. JUSTICE MARSHALL: And you did realize that

that was one of the reasons?

MR. RICE: We did realize, Your Honor, that the Goss case told us that a transfer that was utterly free without racial consideration was satisfactory.

MR. JUSTICE MARSHALL: And you realized that this was allowing for the individual on their own to use their racial prejudices to determine which school they would go to?

MR. RICE: I don't know that I realized that at all.

MR. JUSTICE MARSHALL: Didn't you realize that there were some white people living next door to that Negro high school that wouldn't go there?

MR. RICE: I had no idea. We didn't know what would happen. We thought there was a good chance, and we wondered what we would do.

MR. JUSTICE MARSHALL: What do you think that happened, that there were none there?

MR. RICE: They didn't wish to go there.

MR. JUSTICE MARSHALL: You didn't realize that they wouldn't want to go to the Negro school?

MR. RICE: I had no idea what they would do.

MR. JUSTICE MARSHALL: You did not realize that a white citizen in Jackson, Tennessee, might not want to go to the Washington-Douglass School?

MR. RICE: I was reasonably sure --

MR. JUSTICE MARSHALL: Especially if it was Booker T.?

MR. RICE: I was reasonably sure that the white people wouldn't want to go there.

MR. JUSTICE MARSHALL: You knew that when you proposed the plan?

MR. RICE: Of course, I knew that. That was not the basis for the plan. We looked to the Supreme Court to tell us what we had to do, and that is where we found it.

MR. JUSTICE BRENNAN: If you did not have the free transfer privilege --

MR. RICE: Yes, sir.

MR. JUSTICE BRENNAN: -- and all the junior high school children living in a district had to attend the junior high school in that district --

MR. RICE: Yes, sir.

MR. JUSTICE BRENNAN: -- what would be the racial [illegible] three schools?

MR. RICE: I have to guess.

MR. JUSTICE BRENNAN: I appreciate that.

MR. RICE: Because I don't know. The district of the Jackson junior high school, I would say, would be about 25 per cent Negro and 75 per cent white. The district in the center, which is the Merry Junior High School, I

would judge would be in the neighborhood of 70 per cent Negro and 30 per cent white. The Tigrett Junior High would perhaps be 80-20, something of that type.

MR. JUSTICE BRENNAN: I think you said earlier, yes, the thing you comprehended, if that kind of a plan was adopted, is that those living in the district -- is it Washington-Douglass, that middle district?

MR. RICE: That middle district is the Merry Junior High. This is the Merry Junior High.

MR. JUSTICE BRENNAN: Yes, that those living in that district, the white would move out rather than have their children go to that school.

MR. RICE: I don't think there is any question about it, Your Honor.

MR. JUSTICE BLACK: As I understand your position, you take the position that you now have provided for anyone who wants to go to any school they want to, that is No. 1? You consider to give them an exercise of a voluntary choice, do you consider that, if you passed a law, which asked these people to stay at that school who want to stay, to go to the other, that would be either the city or the state compelling people to go to the school they didn't want to go to?

MR. RICE: On the basis of race; yes, sir.

MR. JUSTICE BLACK: And that is the position you take, that is the argument between you, isn't it?

MR. RICE: If I understood Your Honor, it is very close.

MR. JUSTICE BLACK: Based on the fact that you would not make any child in the community of a certain age, or his parents agree to send him to a school which they objected to sending him to, that you take the position -- and your board takes the position -- that you will not compel anybody to go to a school they don't want to go to.

MR. RICE: On the basis of race; yes, sir.

MR. JUSTICE BLACK: On any basis. What you are saying is that you are not going to tell them to do it.

MR. RICE: That is the big difference, because the petitioners contend here that, if they should be compelled because they are white, to go to a Negro, formerly [illegible] school.

MR. JUSTICE BLACK: That is on that side, but [illegible] about the other side?

MR. RICE: On our side of the picture, Mr. Justice Black --

MR. JUSTICE BLACK: I am not talking about your position. One is white and one is colored. What about the colored, are you taking the position to compel them to go to a school they don't want to go to in pace the state in an attitude of knowing better than they do what school they ought to go to?

MR. RICE: That is right, yes, Mr. Justice Black. I am talking about education. Here we are in an equity posture. And I think the real equity in this thing, the real equity is the education of the children. That is the only function that we have, and I think that it is here our position that integration is an integrated education, that may be helpful to some children, we think that there is no question that an integrated education may be harmful to some children.

The government in its brief, in making a point that there ought to be no transfer, points out that, while there are no gross abuses here, they talk about this more subtle type of influence, such as fear, whether it is founded or unfounded, emotional instability, apathy, fear of being [illegible], they point to those things, as to why there should be no transfer.

I can say to this Court, in all honesty, that educationally speaking, that is the child that absolutely needs to stay out of an integrated situation, integrated education. We cannot educate a child under those conditions.

MR. JUSTICE WHITE: How many -- I suppose that it would be relevant to our inquiry -- how many Negroes have requested transfers out of the district to which they would be initially assigned? Does the record show that?

MR. RICE: No, sir, but I can tell the Court if

the Court wants it.

MR. JUSTICE WHITE: All right.

MR. RICE: In this '67-'68 year, in which we now are, 111 Negro children transferred from predominantly Negro schools into predominantly white schools.

MR. JUSTICE WHITE: How about the reverse?

MR. RICE: Three hundred three Negroes, Negro children, transferred from predominantly white schools into predominantly Negro schools. Of the white children transferring from predominantly Negro schools to predominantly white schools, 269.

MR. JUSTICE BRENNAN: Mr. Rice, is this a fair question: If it is a fair one, I would like to ask; if this were an all-white community, do you suppose you would have a free transfer plan?

MR. RICE: I really can't say, because we didn't have that before, when we were trying to work this up, we didn't have it before us. We think that we need, we think any school department --

MR. JUSTICE BRENNAN: For example, I am sure, with your obvious problem with this Goss problem, in other places, where they have all-white communities, are free transfer plans common, do we find them at all?

MR. RICE: Let me talk about what we had before integration was knocked out. We had what amounted to a free

transfer ifwe had room for the people to go.

There are many reasons why people wish to transfer. We tried to accommodate our citizens.

MR. JUSTICE BRENNAN: I suppose there are transfers in so-called hardship cases, and so forth. I wonder if it is a common experience to have a free transfer plan where the child thinks he wants it, or the parent wants it, for whatever reason, and has the absolute right; as I understand, under this plan, a child may transfer to any school he wants to.

MR. RICE: Perhaps not as absolute in this case because of the terminology of the Goss case. Schools belong to the people and where we have capacity and the ability to accommodate somebody without damaging the system, we have always tried to do that.

MR. CHIEF JUSTICE WARREN: Mr. Rice, is there any real difference in principle between your program here and the statute of California, which was recently before this Court, which said that anyone could sell or lease his real estate to anyone that he wanted to and could not be compelled to sell it to anyone else regardless of the rights? We struck that down. I wonder if there is any difference in principle between that statute and this one which you have here.

MR. RICE: Mr. Justice Warren, I am not

acquainted with that case, and I really would be reluctant to answer it without knowing the basis for it.

MR. CHIEF JUSTICE WARREN: Very well.

No. 805, Arthur Lee Raney, et al., Petitioners, vs. The Board of Education of The Gould School District, a Public Body Corporate, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

ORAL ARGUMENT BY JACK GREENBERG, ESQ.

ON BEHALF OF ARTHUR LEE RANEY, ET AL.,

PETITIONNERS.

MR. GREENBERG: Mr. Chief Justice, may it please th Court, this case, like the two cases preceding it, involves an issue of remedy, and that is the question of what a school district must do to come into conformity with the requirements of this Court in the case of Brown vs. The Board of Education, not merely to come into conformity with the requirement of the Court in the case of Brown, after having maintained centuries of segregation, but having maintained segregation for a decade following this Court's decision in Brown.

MR. JUSTICE BRENNAN: I gather your emphasis [illegible] on remedy.

MR. GREENBERG: Yes.

MR. JUSTICE BRENNAN: You are suggesting that

we don't have to decide whether this is constitutionally preferred.

MR. GREENBERG: It is perhaps difficult to disentangle the procedure that is required.

MR. JUSTICE BRENNAN: The principle is desegregation?

MR. GREENBERG: Yes.

MR. JUSTICE BRENNAN: But whether or not the Constitution compels a certain way of accomplishing it is not so much the problem as to how to accomplish desegregation as a remedy?

MR. GREENBERG: I might put it that way.

MR. JUSTICE BRENNAN: Is that it?

MR. GREENBERG: Yes, I might put it that way.

The Gould Special School District is a small district of approximately 3000 population. In the 1965-1966 school year, when the litigation began, the total school enrollment was 879. As of December 1965, the district had taken no steps whatsoever to comply with this Court's decision in Brown against the Board of Education. It maintained at that time and indeed continues to maintain at this time two complexes of buildings, about ten blocks from each other, one having an elementary and a secondary school, as does the other.

The Gould School, named after the community, is

the white school complex. The Field School is all Negro.

After passage of the Title VI of the Civil Rights Act of 1964, Gould instituted freedom of choice. It covered all twelve grades. And it is interesting to note that 100 students applied, 100 Negro students applied to go to the white school. 70 Negro students were admitted to the white school, 28 were sent back because there was not adequate room for all. No white students applied for admission to the Negro school.

I might note that since then freedom of choice has continued to operate and never again has that level been attained, anywhere close to 100. I covered around 70. This school year it went up to 80; when it started there were enough eagerness for 100 to apply, which we haven't reached again. These were children of fifth, tenth and eleventh grade. They were plaintiffs in this lawsuit.

MR. JUSTICE STEWART: How many students are there in each school?

MR. GREENBERG: The Field complex has approximately 500 students. The Gould school complex has approximately 370 students, 70 of whom are Negro.

MR. JUSTICE STEWART: Seventy out of 300?

MR. GREENBERG: Approximately 80 this year.

MR. JUSTICE STEWART: About 80.

MR. GREENBERG: Those facts are in our brief, not in the record.

MR. JUSTICE STEWART: The other school, there are no white children?

MR. GREENBERG: No white children whatsoever.

MR. JUSTICE BRENNAN: Any problem in this case, Mr. Greenberg, with the quality of the facilities?

MR. GREENBERG: Yes, there is no question about it. The Negro schools are decidedly inferior and [illegible] unaccredited. And the white schools are accredited.

MR. JUSTICE BRENNAN: There is a difference in salary?

MR. GREENBERG: There is a difference in teacher salaries, which is explained on the basis of supply and demand. They felt they could get the Negro teachers cheaper, and didn't see any reason why they shouldn't.

The first year that freedom of choice went into operation, there were 70 Negroes that transferred to white, and the second year there were 71, and this year there were approximately 80.

In the previous cases there was considerable questioning from the bench concerning what was the motivation behind the institution of the freedom of choice, the freedom of choice plan, but in this case it is not necessary to guess at that. It is set forth rather

explicitly in the respondents' brief, the last paragraph at page 18. I may read a sentence or two:

"Since there are about two Negro students for each white student in this school district, the procedure suggested by petitioners as a 'feasible alternative' to freedom of choice would result in both schools being predominantly Negro if the white students continued to attend them. However, most if not all would be withdrawn. Although desegregation is an accomplished fact in this district, and every white child is attending a school where Negro students exceed 20 per cent of the student body, the white parents in Gould would be no more willing than those in Chicago, Washington, or New York to send their children to predominantly Negro schools."

This is why the plan was adopted. This is the basis of respondents' case.

During the case, a school construction program [illegible] and a motion was made at the trial that the new construction, which was going to be a replacement for the [illegible] high school building that was built in 1924, be put on the white campus or the white school complex. That was denied.

Then in the Court of Appeals a motion was made, since the school already had been completed, that there be some reallocation of function of facilities, that is,

the Gould complex be used as a high school facility completely for all the high school students and the Field School complex be used as an elementary school complex.

It turned out the numbers were just about right. The Court of Appeals noted that that might be done, but, as it said, this was not the time.

And the trial court and the Court of Appeals approved what was done by the respondent school district, citing with approval and as partial justification, that the plan and its operation had been approved by the Department of Health, Education, and Welfare.

Therefore, we have a situation in which the procedure has been adopted by respondent after more than ten years of violating the requirements of Brown, which has the purpose, as stated in the brief, and has had the result of continuing the existence of an all-Negro school complex, and the admission of a small and stable proportion of Negro children to a formerly all-white school.

MR. JUSTICE HARLAN: Supposing the freedom of choice was introduced the day after Brown.

MR. GREENBERG: My position, I think, would be the same. It is entirely possible that the condition might not have persisted. It may be. This has never happened. It may be if it was introduced the day after Brown

it may have expressed a willingness and acceptance on the part of the communities to do something about it, that is, rather than a decade of hostility and antipathy to that discourages freedom of choice. It is so hypothetical that I don't think I can answer it.

MR. JUSTICE HARLAN: Does Brown require compulsory integration?

MR. GREENBERG: I read Brown to require dis-establishment of the dual school system. In some of the Court of Appeals decisions there has been some debate about integration or desegregation or compulsory segregation. I think that becomes, after a while, a semantic more as the issue is what are the available alternatives, what are the options that a school district may exercise to end up with a school system which is, as far as possible, different in terms of racial allocation and complex rather than the school system they had before 1954. It may be that some of these options are not available or feasible in terms of the other educational considerations or experience that may or may not be.

In this case -- and in most cases -- there are available options, and the option that produces the greatest disparity from the pre-existing situation should be used rather than the option that produces the least, especially where the option that was chosen was adopted with that

expectation in mind.

MR. JUSTICE BLACK: Why was it not violating the man's right to enjoy the equal protection of the laws, contrary to the Fourteenth Amendment, to compel him to go to a school that he didn't want to go to?

MR. GREENBERG: Mr. Justice Black, the typical method of assigning students to schools before the Brown decision, as this Civil Rights Commission report shows, and the typical method of assigning students to school all over the country generally has been to just assign students to school, and noone has questioned being assigned to a school, even though he objected to going to that school, is a denial of a constitutional right. Now, if we face the question of disestablishing a system run in violation of the Constitution, I don't think it is denial of anyone's right to set up zones or allocation of school facilities or indeed, in some circumstances, as our brief points out, perhaps even freedom of choice, as the basis of available options.

MR. JUSTICE BLACK: That doesn't deny the person who has the option if he is given freedom of choice?

MR. GREENBERG: No, I would think ordinarily not. As the basis of getting as far away as possible from the pre-existing unconstitutional system.

MR. JUSTICE WHITE: To do that, your position is that it is perfectly permissible to draw a school line

based on racial considerations?

MR. GREENBERG: Oh, yes. I don't think, since the case is all about race, you can put race out of your head.

MR. JUSTICE WHITE: It was bad todraw school zone boundaries based on race to segregate, but it is all right to eliminate that to draw school zone lines based on race, in order to integrate, in order to desegregate?

MR. GREENBERG: I would say, as a matter of remedy, yes. Though I would assume that that would not be the inexorable and overrriding fact in all circumstances. I think you have to look at the available options.

MR. JUSTICE WHITE: In some circumstances, it is permissible to have state action based on racial considerations?

MR. GREENBERG: I would think so. I don't see how you can unscramble the racial desegregation situation without thinking about race in doing so.

MR. JUSTICE WHITE: Of course, you could say that, to desegregate you should draw school zones on neutral lines without regard to race at all, but you say, "No, you may draw the zone lines based on race."

MR. GREENBERG: Just to take a simple hypothetical case, in desegregating a school system, you could draw a north-to-south or east-to-west line. One would segregate

as before, and the other would substantially integrate. Given those two options, you have to make a choice.

MR. JUSTICE WHITE: There are a lot of school districts where there are no racial problems at all one way or another, and there is the problem of drawing zone lines and the zone lines are drawn without regard to race, they are based on all sorts of other things, I suppose -- capacity, geographic factors. I suppose even in a city where there are racial problems, where there has been segregation, you could draw school zone lines based on those so-called neutral factors.

MR. GREENBERG: Yes.

MR. JUSTICE WHITE: But you think that would not be permissible against a background like this, that the school zone lines must be drawn with racial consideration.

MR. GREENBERG: I don't think you are able to ignore the racial consideration. I don't think anybody doing it ignores the racial situation. It is inconceivable to me someone facing the situation to redraw the school zone puts the consideration of race out of his head. I have heard children play the game, "Don't think of an elephant." That is all they think of is an elephant. You can't say, "Integrate the school system and don't think about race." You have to think about race.

MR. JUSTICE WHITE: But that assumes you are going

to integrate the school system.

MR. GREENBERG: Yes. We say this is in may respects like Anderson vs. Martin. Race was put on the ballot. You can't go into the ballot box and then vote to keep that out of your mind, once the state has done it.

I might say in this case there is more than that involved. In this particular case there is more than that involved, because we don't have what I might call antiseptic freedom of choice. There is a great deal more going on.

MR. JUSTICE BLACK: That argument was based on the fact that it is involuntary.

MR. GREENBERG: It is not involuntary in the sense that there has been great showing of intimidation or coercion. There is some slight showing of that. It is based on what you might extract from circumstances that one might reasonably expect to have deterring influences on the Negro children and families.

For example, the fact that segregation prevailed for ten years after Brown shows the attitude of this school district. The accepting of 70 children after they showed up and sending back 28, after they said you had freedon of choice and they said there is no room, the segregation of the faculty, the faculties are segregated.

MR. JUSTICE HARLAN: Was there room?

MR. GREENBERG: No, there wasn't room. But rather than use some neutral standard, whereby white and Negro children would be judged equally, as being qualified to fill the space in the school, Negro children were sent back as the applicants coming from the Negro school. There should have been some objective standard rather than the fact that you were the Negro.

MR. JUSTICE BRENNAN: Proximate to the two schools. If there were enough white children who lived near the Negro school.

MR. GREENBERG: That was never considered.

MR. JUSTICE BRENNAN: That is what you are talking about.

MR. GREENBERG: Yes, they just sent them back. It is interesting to note on page 51 of the record -- I read this record very many times -- it just dawned upon me that the superintendent refers to the white school as our school, but the Negro school as the Negro school. School construction was undertaken during the course of this case, which tended to perpetuate the dual school complex.

The worth that the school district places upon the Negro children is evidenced by the fact that they have gone to unaccredited schools, whereas the white children have to go to accredited schools.

It might be argued that notwithstanding all these

circumstances, freedom of choice was perhaps justified as the best available alternative to reach desegregation, or it might be argued that freedom of choice was more economical, or simpler to administer, but the record indicates quite the contrary, they are running two sets of science rooms, and auditoriums, and gymnasiums, two sets of cafeterias, under the new system it would be far more economic to allocate the school facilities, as we suggested in our brief, that is not for the Court to decide. Obviously, there would have to be a hearing, or something like that that, but certainly it should not have been put out of hand, and that is what the Court of Appeals did.

MR. JUSTICE WHITE: Does your position extend tosaying, as a matter of remedy, the Court should have done this and also limited freedom of choice, so that parents could not send their children to private schools?

MR. GREENBERG: Could not send their children go genuinely private schools, not a state subsidized one?

MR. JUSTICE WHITE: Yes.

MR. GREENBERG: That introduces different questions. No one has questioned the right to send a child to a private school.

MR. JUSTICE WHITE: Even though the reason for parents sending the child to the private school was there were no white schools?

MR. GREENBERG: I don't believe anyone has ever suggested that. I think the Pierce case --

MR. JUSTICE WHITE: I know you haven't suggested it. Wouldn't your principle reach that?

MR. GREENBERG: No, it wouldn't reach that.

MR. JUSTICE WHITE: Why?

MR. GREENBERG: Because other principles are introduced into the case and those other principles to me suggest again out of the Pierce case, and the Meyer case, and so on, that parents do have the right to select a private education for their children if it meets certain standards.

MR. JUSTICE BLACK: If they have a right, can the state take it away?

MR. GREENBERG: Can the state take away the right to private schooling?

MR. JUSTICE BLACK: To send them to the school they want to send them to?

MR. GREENBERG: I have not considered that to be at issue here and have not adequately thought it through. I just wouldn't know. I think it does invoke a whole additional series of considerations, and a related, but different branch of the law. In other words, if one concludes that the basis of our position is that when a school district is faced with the task of remedying a pre-existing segregation, one must look at what are the options, what are the

alternatives and which of them, consistent with educational principles and economic considerations, is more likely to achieve integration, maximum integration, or desegregation.

In this case the answer is rather clear. I think it is in all the cases argued here today. I would hope that the Court would announce that there is a positive duty on the part of school systems to disestablish pre-existing segregated systems, that it is not enough to merely announce something which is called freedom of choice, that where various alternatives are available, such as drawing of school districts, school district lines, or reallocating facilities as when elementary and secondary school use those options, they should be canvassed and the one which is likely to achieve the greatest amount of integration and assuming that it is at all consistent with other educational factors should be employed.

MR. JUSTICE BLACK: Elimination of freedom of choice?

MR. GREENBERG: Yes, I would in such cases, although, as I've pointed out in our brief, it may be that some communities have such rigid residential situations that freedom of choice might be the only way to eliminate the pre-existing system. I think there has to be the traditional flexibility of a court of equity here, and I think the general principles are not terribly difficult, at least as I have suggested.

MR. CHIEF JUSTICE WARREN: Mr. Light.

ORAL ARGUMENT BY ROBERT V. LIGHT, ESQ.,
FOR RESPONDENTS, THE BOARD OF EDUCATION OF
THE GOULD SCHOOL DISTRICT, ET AL.

MR. LIGHT: Mr. Chief Justice, may it please the Court, Mr. Greenberg's views on the freedom of choice have changed since 1959, during which year he published his now classic book, RACE RELATIONS AND AMERICAN LAW, cited in our brief, and where, at page 239, he stated:

"Moreoever, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negries may be legally equivalent to none. If, however, in education there were complete freedom of choice, or geographical zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection."

And I endorse, on behalf of respondents in this case, and embrace that principle entirely. It is entirely right when he wrote those words.

Due to the importance of the constitutional issues here, I want to allude only very briefly to the factual issues that are peculiar to this case, that are not involved or are different from those involved in the other cases.

With respect to the teacher salary differential -- and it must be remembered that this case was tried in 1965, the proof was that there was a small differential in the salary paid to Negro and white teachers, that the school board had an active program for several years prior to trial, narrowing that gap, and we are using all the financial resources of the district to do it, and it was comprehended that this was the last year that the gap would exist and, as far as I know, I have not had occastion to confirm, because it didn't dawn on me until I heard the argument this morning, as far as I know the immediate year after that trial, the gap was closed. There were plans of this nature at the time of the trial, and commitment made at the trial to the District Judge, and he made that observation in the opinion.

With respect to the quality of the facilities, the only facility which could be said to be unequal that was not [illegible] had, in fact, been used historically by the Negro students is the Negro high school, and at the time of the trial, plans were already made to replace that facility, it was an old building. It needed to be replaced and funds had been earmarked to be replaced. It has now been replaced, and the campus occupied by the elementary school and the high school, utilized by the Negro students in this district.

The proof will show in this record as far as the

other facilities are concerned, those of the white schools are inferior because of the addition of this new building. The elementary school attended by Negroes was already a relatively new and perfectly acceptable and usable educational facility.

With respect to the accreditation difference between the two, again this was three years ago, and the primary reason that the accreditation, that the school attended by Negroes was not the same as whites, was because of the high school building that had to be replaced before proper accreditation could be attained.

With respect to the suggestion in the briefs and the very brief reference by Mr. Greenberg, the suggestion of intimidation in this school district of Negro students [illegible] or undertaking to exercise their rights under the Constitution and their rights under this freedom of choice plan, I don't want to take the time to get into the details of that. It is covered in the brief. There is absolutely, Your Honor, nothing to it. I rely on the expressed findings of both of the courts below that this school board was in perfect good faith in adopting and carrying out freedom of choice and undertaking the secured rights of students in the existing district, whether he be a colored child or white child.

There is testimony that I refer the Court to on

this subject, if the Court is interested, and I think the Court would be in the attitude of the Board of Directors who are the defendants of this case toward the exercise by the Negro students of their rights and the education of the Negro students, just like their interest in the white school, and that is the testimony of the president of the board, and his testimony when asked, "Is there any intimidation, and have you heard of any in this little community?" -- and in a community of that size, the president of the school board would know that -- he said, "We have had nothing like that. Board members have gone out and encouraged the Negro students during the first year of the operation of the plan to send their children over to the white school. We have encouraged them to. There is not a member of this board that doesn't have people living on their property."

That is a cotton-oriented rural community.

MR. JUSTICE BLACK: What is the population?

MR. LIGHT: Of the school district?

MR. JUSTICE BLACK: Yes, the school district or town.

MR. LIGHT: The town is the only incorporated community in a school district. The school district is rural around the town, for I don't know how many miles. I believe I would be reluctant to tell you the geographical size. The population of the school district is about 3000

people, I believe Mr. Greenberg said. The student population --

MR. JUSTICE BLACK: How is that divided between the races?

MR. LIGHT: Your Honor, there are approximately 66-2/3 per cent Negroes in the school population, and 33-1/3 per cent white. There are two Negro students for each white students in this district.

MR. JUSTICE MARSHALL: Mr. Light, are there any white students in Field Elementary School?

MR. LIGHT: No, sir, Your Honor.

MR. JUSTICE MARSHALL: Can you give me any reason why?

MR. LIGHT: Yes, sir. No white child or his parent in behalf of his child has exercised the right to go to that school.

MR. JUSTICE MARSHALL: What would be the reason for that?

MR. LIGHT: Could it possibly be that the white parents don't want to send their children to a school that paid $45,000 to build the educational part of the school and $802,000 for the gymnasium? Could it be that they would rather go to a nice school than a nice gymnasium? Could that be the reason?

MR. LIGHT: Your Honor, I hadn't previously been

aware that the figures might indicate that there was some disproportionate amount of money paid forthis gymnasium.

MR. JUSTICE MARSHALL: I would like to point out page 5 of your brief.

MR. LIGHT: That gymnasium, I have been in that facility, as I recall, it contains various facilities other than the gymnasium itself. That building just referred to as the gymnasium, that is the way it is referred to. That is the predominant reason.

MR. JUSTICE MARSHALL: That could have been the reason they would rather not send their children there.

MR. LIGHT: No, sir, that is not in this case. The Field High School and Elementary School Complex, which is on the same two square blocks, is, by far, the superior facility. In that district, there is no question about it.

MR. JUSTICE MARSHALL: It is better than the white one?

MR. LIGHT: Yes, sir, there is no question about it.

MR. JUSTICE MARSHALL: Then the white people should have a lawsuit ready. Are you discriminating against them?

MR. LIGHT: No, sir, because they have a free right, an absolute right to choose to go to the Field

School or the Gould School, without regard to race, Your Honor.

MR. CHIEF JUSTICE WARREN: Do you have a school bus system?

MR. LIGHT: Yes. Bus transportation is afforded to students who live a certain distance from the school, which is a school mandated distance. I believe it is 2 miles. And the buses are routed to serve the schools, which they are assigned to, and the Negro students who have elected to go to the Gould School ride the Gould School buses.

MR. CHIEF JUSTICE WARREN: How large an area is the school district?

MR. LIGHT: That was the question Mr. Justice Black just asked, and I told him I would have to guess.

MR. CHIEF JUSTICE WARREN: In square miles. It is not in the form of a rectangle or square, is it?

MR. LIGHT: Your Honor, my recollection is that we have never introduced maps in this litigation of this district. There has been no occasion to really do so. It is a sizable little country school district, with the entire state penitentiary and state penal farm enclosed in that boundary. That farm is 20,000 acres. I can't give you any more accurate description without going back in the record. It is in the record.

MR. CHIEF JUSTICE WARREN: Does it tell what the distances are between the two schools?

MR. LIGHT: Yes, eight to ten blocks.

MR. CHIEF JUSTICE WARREN: Eight to ten blocks?

MR. LIGHT: Yes. They are both in the little community, incorporated community of Gould.

MR. JUSTICE FORTAS: Is there HEW approval of those plans still outstanding? HEW did approve the plans?

MR. LIGHT: They have not withdrawn that approval, Your Honor. As Mr. Greenberg said -- and I appreciate his candor -- it was only a one-year incident in which every child in the district was not afforded the right to select his school. The two subsequent years, including the current school years, there has been no overcrowding of the facilities. Every child in that school district is attending a school selected by him or his parents, and there have been no further complaints or other complaints than those complaints made before.

MR. JUSTICE FORTAS: Was HEW approval expressed in the form of a letter, or something of that sort?

MR. LIGHT: That is my recollection.

MR. JUSTICE FORTAS: Is that in the record?

MR. LIGHT: This documentation was introduced in the record. It has not been printed in the printed appendix, however. The references are there. The witnesses'

testimony putting that material in is there.

MR. JUSTICE WHITE: That is in the record that is lodged here with the Clerk?

MR. LIGHT: Mr. Justice White, I really don't know what the other side brought up in the way of a record. The printed appendix was all that was served on me.

I would like to point out, since the Ballard case was mentioned by Mr. Greenberg, where the racial decision was placed on the ballot, Negro or white, that has nothing to do with this here. That was the state making racial classifications.

What we have done here is quit making racial classifications. We are affording the fullest exercise of individual liberty without any penalties because of race.

MR. JUSTICE FORTAS: Do these two school complexes have athletic contests?

MR. LIGHT: Between themselves, Your Honor?

MR. JUSTICE FORTAS: Yes.

MR. LIGHT: If they do, I am not aware, if they do, it would be an innovation since the time of the trial.

MR. JUSTICE FORTAS: They do play other schools, I think.

MR. LIGHT: Your Honor, there was evidence in

the record, there is some organized athletic activity. I don't know what sort of program they play, whether they are large enough to participate in a formally scheduled program, or not, I don't know.

I would like to point out that subsequent to Brown, there having been no intimation, of course, in Brown, that the constitution compelled the intermingling of the races by any sort of predetermined mixture, that what the people had to do, what the state had to do is quit disriminating, quit making racial classifications in public education, that the decisions of the Courts of Appeals of every circuit that had substantial school desegregation litigation, were unanimous in reading Brown just as Judge Parker did, that the Constitution does not command integration, and the Supreme Court hadn't held that it does.

Until the Jefferson County case decided by the Fifth Circuit in the last year or fourteen months ago, with all respect, of course, to that court, that decision is just wrong, and it is error, and we demonstrate it. In looking at what Judge Wisdom says, we have to take a new look at this constitutionality question, because that court would overrule earlier decisions on this point.

He saysthat what makes us take a different look at it now is the Civil Rights Act of 1964 has been

passed, and he mentions the HEW has promulgated some guidelines on how to go about school segregation. Then they examine the constitutional issue in light of the Civil Rights Act of 1964, and conclude that it required affirmative manipulation of the students in order to achieve affirmative integration, and, of course, the act didn't do anything of the sort, Your Honors.

Its own language is crystal clear. Its legislative history is entirely consistent, that if the intent was to adopt the legal duty as the legal duty of the local school officials in this area, that which was already their duty under the Fourteenth Amendment construed by this Court in Brown, and there are expressed references, Senator Humphrey, who managed the bill in the Senate, expressly said, here is the Bell vs. School City, decided by Judge Beamer, later affirmed by the Court of Appeals, by the Seventh Circuit, I believe it is, and certiorari denied here, this is the sense of Congress, this is the national policy, that we are adopting, that the Constitution doesn't require manipulation of these people, it doesn't require overcoming racial imbalances. What it requires is that you not discriminate, not classify these people according to race, with respect to admitting and assigningthem to the public schools, and in the event that Congress left anything to be speculated about, what the intent was in the '64 Act,

frankly, in 1966 it came along and made it expressly clear in the 1966 amendment to the 1965 Secondary and Elementary and Secondary Aid to Education Act, and at page 42 in our brief, we set out this amendment, which states that:

"In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or state educational agency, or require the assignment or transportation of students or teachers in order to overcome racial imbalance."

That is the national policy expressed by the Congress with respect to any federal concern about racial imbalances.

We would like to say this about freedom of choice, since it was suggested that it was a recent innovation to escape constitutional obligations, I think that would be a fair characterization of what my adversary suggests.

In the first place, school assignment has been followed by many districts. It happens to be the residential zoning, drawing zone lines has been the predominant way to assign schools in this country, but I think freedom of choice is next. Baltimore is the largest city that

traditionally for many, many years, used freedom of choice, and that was apparently the case, I learned that in rereading the arguments before this Court in the Brown case, for many years prior to that Baltimore used freedom of choice, as did many other places.

MR. JUSTICE MARSHALL: Mr. Light, it would interest you to know, as an old Baltimorian, nobody every knew about it. It was there, but nobody ever knew about it until after the Brown case.

MR. LIGHT: Your Honor, perhaps the first references that I read -- and I don't recall -- concerning the Baltimore freedom of choice plan, because it was discussed by several of the counsel on both sides of the table during the Brown arguments, may have been during the last argument concerning the remedy.

MR. JUSTICE MARSHALL: Right.

MR. LIGHT: But references were made.

MR. JUSTICE MARSHALL: But you didn't have it in Arkansas.

MR. LIGHT: I don't know whether we had it in Arkansas.

MR. JUSTICE MARSHALL: You didn't have it in Gould.

MR. LIGHT: We didn't have it in Gould.

MR. JUSTICE MARSHALL: You didn't have it until

you were up against the wall.

MR. LIGHT: We had it in 1965.

MR. JUSTICE MARSHALL: We will leave it in 1965. You could have taken and combined the two schools together, the two campuses, physically.

MR. LIGHT: I don't know how you could combine facilities that are eight or ten blocks away physically. Perhaps I didn't understand the thrust of your question.

MR. JUSTICE MARSHALL: You could have made an elementary school of one and a high school of the other.

MR. LIGHT: Yes, sir, that is one of the "feasible alternatives" suggested by our adversary.

MR. JUSTICE MARSHALL: In 1954, when you built the Field Elementary School, you could have built that on the campus with Gould.

MR. LIGHT: Yes, sir.

MR. JUSTICE MARSHALL: Yes, sir.

MR. LIGHT: No, sir, the proof at the trial is that there is no place available on the Gould campus for any further construction. The issue tried in this case was whether we should build the new proposed high school building on the site the school board had secured and was planning building on, which was near the Field Elementary School, or whether we should build it at Gould.

MR. JUSTICE MARSHALL: I assume you have a right

to build the school wherever you want to build it, but you could have made one large elementary school and one large high school and put everybody in the same school without much trouble.

MR. LIGHT: Your Honor, certainly the proof in the record doesn't support that assumption.

MR. JUSTICE MARSHALL: It is a possibility.

MR. LIGHT: I would certainly concede it is a possibility, yes, sir.

MR. JUSTICE MARSHALL: And there is one other possibility, you could have drawn the line four blocks from each one of the schools and said, everybody on that side, go on to either one of the schools, and everybody four blocks from the other would be able to go there. One would have to be in the middle.

MR. LIGHT: I suppose that is a possibility. As Your Honor knows,in the dispute in the first case, when you get into drawing lines, people disagree where the lines be drawn.

MR. JUSTICE MARSHALL: You could have drawn the line right down the middle of the county and detouredthe penitentiary and said, "Everybody on this side goes to this one and everybody on this one goes to the other one."

MR. LIGHT: Yes, sir, but one of the failings of that is that it wouldn't alter the opportunity we have here

for every child or his parent on his behalf to make a full and free choice on his own in this matter.

MR. JUSTICE MARSHALL: And finally, once you did that, you would consider both of them as your schools, rather than just the Gould school.

MR. LIGHT: This board that I represent considers both of them their schools now, Your Honor. I want to say something on freedom of choice, that it is not what it might be pictured here, just a device to achieve a result that it may be thought that we set out to achieve. It is an old procedure in education, and I would like to refer the Court to how it works at the collegiate level, where we have had freedom of choice at the college level since we started to build colleges in this country, 300 years ago, and we have had freedom of choice at the college level since the states got into the business of offering collegiate training, for their citizens, and even in the states where formerly segregation was legal, we have had freedom of choice at the collegiate level since some years before Brown, because of the decisions of this Court in Sweet vs. Painter, and others.

What has that freedom of choice, that long-existing freedom of choice, produced? It has produced the same pattern that we have in this school district, with respect to racial attendance, and the same pattern you have in the Virginia case, the school district with respect to racial pattern.

You have a relatively few regular Negro students going to white educational, predominantly white educational institutions.

In the Gould school district, it is approximately 15 per cent of the Negro students who are those that have elected to go to the previously white schools;in the New Kent County, Virginia, case, I believe it is about 18 per cent, that is about the pattern you have in the colleges over this nation as a result of freedom of choice.

The vast majority of these people, and you can't draw any other rationale, I don't think, you can't draw any other rational inference, want to attend school with members of their own race. That has been proved year after year. I have never heard any suggestion that any intimidation brought about that pattern.

I would submit to the Court that there is a serious question, I believe the vast majority of Negro students in this country that receive collegiate training in the predominantly Negro schools and if the Court made a ruling that it is unlawful to operate an all-Negro educational institution, as I understand, the petitioner seeks to have that rule here, what would happen to all the Negro colleges where collegiate training is now being received. It is a serious problem.

I want to bring down to the real issue and get away

from the theories, what would happen if this Court adopted the rule of law that petitioners seek here. They have suggested, as their feasible alternative, although they have no proof in the record, that it is feasible, this issue wasn't even tried in the lower courts, that we could make one of the schools an elementary school and one a high school.

If we did that, Your Honor, the high school would contain 157 white students and one complex and 247 Negro students. And that would be the elementary school. The high school would contain 174 white students and 301 Negro students. These are based on the figures supplied by the petitioner with their petition for certiorari. They filed the HEW statistics concerning this district, with this Court, and I have taken those figures. So you have approximately two Negro students to one white student in each of those schools, and I think that, if we examine that situation with candor -- and I want to speak to the Court with candor on this -- that we know from experience that the white students will not continue to attend those schools. That is the racial breakdown you would have if the white students in those schools were to continue. But they would flee, just as inevitably as they have fled from the public schools in Washington, D. C., and go to private schools, they go stay with relatives in some of the other school districts, but

they leave. I don't know how to characterize the reason for them doing that any better than to say in all sincerity that, as one of the justices suggested this morning, I believe the Chief Justice, that we can't ignore what has gone on for 100 years, in that community, we can't ignore what has gone on for 100 years in that community, whether that history is right or wrong, whether it is moral or Christian, it has gone on, it is a fact that we have had to deal with. That has produced two groups of people with which, with such cultural differences in that community, Your Honor, that when the dominant culture becomes that of the Negro people in the community, the white people flee. It is not acceptable to them. It is a difficult thing to speak about with candor, but I feel obliged to speak about it with candor.

MR. CHIEF JUSTICE WARREN: That being the situation, Mr. Light, isn't it a fact that the school board is doing here what could be said to be merely bowing to the imperatives of community feeling, rather than to bow to the law in trying to desegregate the schools, and that, if permitted to go on, it will go on indefinitely with all of the white students going to one school or practically all and all the Negroes, or practically all, to another, and the desegregation decision, therefore, becomes frustrated entirely?

MR. LIGHT: No, sir, Your Honor. To answer the

the first of your two-part question --

MR. CHIEF JUSTICE WARREN: Yes, sir.

MR. LIGHT: The motive of the school board, and this has been inquired into before during the course of the argument, if the motive of the school board is important, perhaps it is, it adopted this alternative from among the several that it had to look at at the time the decision to desegregate these schools, because it is the only one it could adopt in its judgment, and I concur in the judgment, that wouldn't destroy the public schools of this system. It was the only one that would be responsive to the constitutional requirements, giving everybody their rights under full equality of the law, and not destroy the public school system by driving out a substantial support of the community, and losing the support of that segment of the community which provides for the public schools.

I am fearful --

MR. JUSTICE MARSHALL: How many private schools do you have in your county?

MR. LIGHT: In that county?

MR. JUSTICE MARSHALL: Yes, sir.

MR. LIGHT: None of which I am aware.

MR. JUSTICE MARSHALL: So you don't have to worry about that problem, do you?

MR. LIGHT: Well, the fact that there are no

private schools, I am relatively certain that there is no private schools in Prince Edwards County, Virginia, until recent years.

MR. JUSTICE MARSHALL: I understand that is over with now, too, because they weren't private.

MR. LIGHT: Well, Your Honor --

MR. JUSTICE MARSHALL: You don't think that your county would proceed to do what Prince Edwards County found was wrong.

MR. LIGHT: No, sir.

MR. JUSTICE MARSHALL: You wouldn't think of doing that?

MR. LIGHT: These respondents, Your Honor, will comply to the extent within their power, with whatever order this Court enters.

MR. JUSTICE MARSHALL: Look into the future. About how long do you think it will take for your county to reach the point where they wouldn't mind the white children attending the school where there was 2 to 1 Negroes? How long do you think your county would take to get around to that?

MR. LIGHT: I am not clairvoyant to project that. It would coincide with the length of time it took the majority of Negro people in the community to decide they did not want to actually keep their school as a community

center and attend schools of their own race. Everyone has the right to go to the school of his choice.

MR. JUSTICE MARSHALL: Doesn't it appear that Mr. Arthur Lee Raney is interested in that?

MR. LIGHT: Mr. Arthur Lee Raney is in the Gould School and was admitted to the school when he first applied in 1965, and was erroneously listed as plaintiff here.

MR. JUSTICE MARSHALL: You are not speaking for all the Negroes, are you?

MR. LIGHT: Speaking for all the Negroes in saying what?

MR. JUSTICE MARSHALL: In saying they want to be by themselves in their own little school.

MR. LIGHT: I am saying that I am speaking of all those that are in the Field Elementary and High Schools.

MR. JUSTICE MARSHALL: How many Negroes do you know in that town personally?

MR. LIGHT: Your Honor, I have had some professional contact with some of the staff.

MR. JUSTICE MARSHALL: How many approximately, because you are speaking for all of them?

MR. LIGHT: No, sir, I am not speaking for them.

MR. JUSTICE MARSHALL: You just said, I thought you said you are speaking for all of them.

MR. LIGHT: I could not do that any more than Mr. Greenberg could be said to speak for all the Negroes. I know he does not. It would be impossible for him to do so.

MR. JUSTICE MARSHALL: I am not talking about Mr. Greenberg. I am talking about you. You say that the Negroes in Gould love to be by themselves in their won school building. You didn't say so, you merely mean some, don't you, however?

MR. LIGHT: I think, Mr. Justice Marshall, may I specifically suggest that you have taken some liberty with what I said. I said that the Negroes in the Field School complex all freely selected to go there. They are there, because they want to be there.

MR. JUSTICE MARSHALL: How do you know? You don't know why they are there.

MR. LIGHT: No, sir. I know how the mechanics work.

MR. JUSTICE MARSHALL: Weren't they first assigned there?

MR. LIGHT: Pardon?

MR. JUSTICE MARSHALL: The children in the Field school were first assigned there, weren't they?

MR. LIGHT: Your Honor, they filled out a choice form to get there. They selected the school, those that

are the higher grade before 1965 originally were assigned there.

MR. JUSTICE MARSHALL: That is what I mean.

MR. LIGHT: On a racial basis.

MR. JUSTICE MARSHALL: How do they get out?

MR. LIGHT: By signing a document, such as the one --

MR. JUSTICE MARSHALL: Which they had to sign.

MR. LIGHT: The parents, in some instance.

MR. JUSTICE MARSHALL: But it is up to them, they had to make the move.

MR. LIGHT: That is right, simply by signing their name.

MR. JUSTICE MARSHALL: They had to make the move, didn't they?

MR. LIGHT: Yes.

MR. CHIEF JUSTICE WARREN: Mr. Claiborne.

ORAL ARGUMENT BY LOUIS F. CLAIBORNE, ESQ.

ON BEHALF OF THE UNITED STATES OF AMERICA

AS AMICUS CURIAE

MR. CLAIBORNE: Mr. Chief Justice, may it please the Court, it might be helpful at this stage to summarize the context in so far as it is common to these three cases. As the United States views these cases, they present three situations very alike in that in each one

normal, old-fashioned, geographic zoning would achieve either a substantial measure or complete desegregation of the school districts, yet this long after Brown, in each of these three school districts, 80 to 85 per cent of the Negro children attend all Negro schools. And each and every one of the previously all-Negro schools in each of these school districts, remains today absolutely all-Negro schools. It is that persistenceof racial segregation in each of these districts, it seems to us, that calls for a remedy.

There has been a lot of talk about compulsory desegregation, and the challenge to freedom of choice is characterized as advocacy of compulsory integration. It seems to us that that is a false issue, as it applies in these cases.

We are not talking here about busing or any other extraordinary measure to accomplish a racial imbalance in the schools of the district. We are merely suggesting that the old-fashioned, traditional system of neighborhood schools, of geographic zoning, be followed here, as it, no doubt, would have been followed but for effort to escape the racial integration that would follow from such geographic zoning.

To hear the respondents, one would suppose that there was some sort of constitutional right in children to

choose their own schools. There is, of course, no such right, and the practice in this country for a century has been to assign children to the school, either nearest their home or on some other basis, but without giving them any absolute freedom as to which school they wish to pick.

One would suppose that the Brown decision had condemned not racial segregation, but compulsory assignment. Surely, Brown did not condemn the old system of assigning children to a school in the best interest of the district as a whole. All it condemned was the system of racial assignments, not the system of compulsory assignments.

It is one thing -- and bad enough -- if the school districts, after these many years of maintaining segregation, want to wash their hands of the problem and leave it up to the students or leave it up to somebody else to repair the damage that has been done, but that is not even this case. They are not simply washing their hands of the problem. They are not simply abdicating responsibility, which, it seems to us, is theirs, and in the circumstance and in the light of history.

They are going very far out of their way -- they are taking affirmative steps -- to make possible a resegregation, or a perpetuation of segregation within these school districts.

They are not simply letting the assignments fall

as they would naturally by geographic boundaries.

MR. JUSTICE WHITE: What if old-fashioned zoning produced no segregation at all, left the segregation what it is? That is another case, really.

MR. CLAIBORNE: That presents another, different problem. I don't say that we wouldn't in that case argue, at least against the background of enforced racial segregation, there weren't some affirmative duty on the school board to take measures or at least to avoid, as between equal alternatives, that alternatives, which are less likely to produce an end of the dual school system.

But that is not what is involved here. As I say, rather these school boards have taken quite extraordinary measures to avoid the natural result that would follow.

We condemn freedom of choice here in this context, where it does seem to us to be an artificial device to delay, retard, even to defeat desegregation, first because it is so obviously artificial. It is not a traditional method of assigning, at least in the South, elementary and high school students, whatever it might be at the college level.

It seems to me educational nonsense, it is a pure haphazard system in theory which takes no account of what might be possible and desirable from an educational point of view, at least in some cases, in those cases where

it requires long distances of busing, as in New Kent, Virginia. It imposes a special financial burden on the school district, and, of course, it is an administrative nightmare if it works, as it should in theory, because not only do you have forms, letters to send out, receive, tabulate, count all of which would be unnecessary if the school board simply assigned as it used to, on the basis of residence, but the results are unpredictable from year to year. School construction can't proceed on any intelligent basis, if, as I say, it worked as it is supposed to in theory, and the results would be unpredictable.

Of course, the fact is that freedom of choice is not supposed to work toward desegregation. If it did, it would be self-defeating, from the point of view of its authors, because pretty soon the white school to which all Negroes would transfer would become overcrowded. The Negro school would have to be closed, and the whole theory of freedom of choice would be ended, and there would be no free assignment or free choice, there would then have to be compulsory assignments on the basis of approximate distances of residents to the school.

In fact, this alone shows that freedom of choide is not supposed to work in the sense of achieving desegregation. It is calculated on the theory that the whites will all choose to attend the white schools and that very few

Negroes will overcome the burden and have the courage to take the adventure into a school where they have been shunned, where they don't expect to be welcome.

MR. JUSTICE FORTAS: The result of the freedom of choice is to place 80 Negroes in the white schools; is that right?

MR. CLAIBORNE: In one of these cases, yes, sir.

MR. JUSTICE FORTAS: That is in the Gould case, as I understand it. It has about 20 per cent of Negroes that have enrolled in the white school. That is my understanding.

MR.CLAIBORNE: The figures are from 80 to 85 per cent.

MR. JUSTICE FORTAS: I gather that the system did accomplish that much. It did accomplish the placement of 80 Negroes in the white schools; is that right?

MR. CLAIBORNE: It accomplished that much.

MR. JUSTICE FORTAS: Now, it left the Negro school all-Negro, as I understand it.

MR.CLAIBORNE: Yes.

MR. JUSTICE FORTAS: Suppose the resultant situation was to have the 20 per cent Negroes in the white school, and 20 per cent whites in the Negro school, would that still have been your contention of a result that ought to be achieved here?

MR. CLAIBORNE: Mr. Justice Fortas, we are not playing a game of statistics.

MR. JUSTICE FORTAS: That is what I am trying to find out. We are not playing games. This is dead serious. Is the test of the result here a statistical test? If it is not, what is it? Is it a test of good faith, or just what is it?

MR. CLAIBORNE: Certainly it is relevant what results are achieved. If good results are achieved, the method, even though seemingly bad, is harmless. On the other hand, if the results are so insubstantial as they are here, then one begins to look to see if some other method would not achieve better results.

MR. JUSTICE FORTAS: How do you test the adequacy of the result here? You did have a result of this system, where there had been no Negroes landing in the white school, as I understand it, it is the Raney case, let's just take that alone, what does that say to you? That the result so far as the previously white school was concerned, it shows what?

MR. CLAIBORNE: That figure alone I find meaningless. Mr. Justice Fortas, I have to test it against what the result would be, if another alternative were followed, especially when the other alternative is cheaper, simpler, more customary, and when I find that that other alternative would bring

50 per cent integration, then I condemn the 20 per cent.

MR. JUSTICE FORTAS: Then tell me in Raney, you take one of the other cases, if it is easier for you, what the alternative method might be that seems feasible to you, and would produce a different result?

MR. CLAIBORNE: In the Gould case.

MR. JUSTICE FORTAS: Which one?

MR. CLAIBORNE: I think the Ranegase is the Gould case, No. 805, the character of the two methods already mentioned, one would be drawing a geographical line down the middle, as Mr. Justice Marshall put it, four blocks from each of the schools, right down the middle, separating the district into two zones, and assigning the students on the basis of geography.

Or alternative steps might be taken. This is a system with more Negro students. One would suppose that economic and educational considerations would normally [illegible] in a school district, if race was not involved, that they would consolidate and pair and have one of the buildings used for the high school and the other used for the elementary school for everyone in the district. That latter system, of course, would produce total desegregation, and we are told there is little residential segregation in this district, so we would presume that a fairly drawn geographic zoning system would likewise produce a substantial degree of

desegregation.

MR. JUSTICE FORTAS: What you are really saying is that the standard of compliance with Brown in a previously segregated school district should be rather of the alternatives reasonably available, that alternative which is adopted which would result in the maximum desegregation.

MR. CLAIBORNE: I don't think I have to go that far, Mr. Justice Fortas, because it is a situation where these are not equal alternatives. This is so obviously a cumbersome, out-of-the-way transparent device to retard the segregation that you don't have to say what would be the result if it were a question of consolidation versus geographic zoning, and then have one or the other, depending on the resultant statistics. Here there is an extraordinary effort by state action, not only to abrogate whatever responsibility there may be in the school district to repair, to compensate for the discrimination of the past, but devising of a scheme, which allows race to control assignment of students, albeit race in the exercise of private choice, in those terms, rather than the school board itself.

MR. JUSTICE STEWART: The result in these three cases, the net result is that every white student in each of these three schools goes to a school where there are some Negro students.

MR. CLAIBORNE: I am not sure that is true.

MR. JUSTICE STEWART: You tell me if I am wrong. But in each of the three cases, some, if not most, of the Negroes, Negro students, go to schools where there are no white students.

MR. CLAIBORNE: In each case 80 to 85 per cent of the Negroes go to schools in which there are no white students.

MR. JUSTICE STEWART: Every white student goes to an integrated school.

MR. CLAIBORNE: Integrated in a token sense.

MR. JUSTICE STEWART: In some of the cases more than a token sense, according to your definition. Is token 30 per cent?

MR. CLAIBORNE: Let me point out that this free choice which is spoken of as though we are asking that Negroes and whites be denied it, it is unfair. No one has ever asked the Negroes in their Negro schools whether they would object to the assignment of some white students there. Until that point comes, there is no basis for saying that they would be denied the right to go to school alone. There are, of course, obvious and many reasons why the Negro is reluctant to take the adventure into the white school and the system works, so as to put the entire burden on him. The white assigns himself back to his own school where he is familiar. The Negro is expected to leave the familiar

surroundings and to go to a school where he is led to believe, right or wrong, that he will be shunned, that he will be unwelcome and in all events, he is the one that has to make the move. He is the one that has to break with the comfortable, customary surroundings, and that in itself is unfair.

All this would be tolerable if it were necessary, if it were unavoidable, but it is not only unnecessary and avoidable, it is a manufactured burden that could so easily, by employing traditional and customary methods of assignment --

MR. JUSTICE WHITE: To say that, I suppose, Mr. Claiborne, you assume that if some alternative plan were adopted, you either say the whites would not move out or if they would, it is wholly irrelevant to the question, is that right?

MR. CLAIBORNE: I have to say, first, Mr. Justice White, that that frightening prospect which is always put forward in these cases tends to argue against segregation.

MR. JUSTICE WHITE: I realize that. I understand that. But you say, as a matter of fact, you dispute it.

MR. CLAIBORNE: I have no basis on which to dispute whether in this particular school district it would or would not happen.

MR. JUSTICE WHITE: If you accepted it, would you

say it was irrelevant?

MR. CLAIBORNE: Even if we were to accept it, I would say it is irrelevant. The more school districts are subjected to the same constitutional standard, the less place there is to refuge, the more tuition aid to so-called private schools are stricken down, the less attractive the alternative private school becomes, and it works perhaps a little bit like the public accommodation law, if everybody who has to desegregate does so, there is no place else to go, and pretty soon people stay where they once were, and I would hope that would work here.

MR. JUSTICE BRENNAN: Do I read your brief [illegible] as suggesting that at least in the New Kent and [illegible] case, that this Court not only should say that in those [illegible] the free choice is not a viable alternative, but that we should go beyond that and require that the school board adopt zoning practice?

MR. CLAIBORNE: At first, it is our suggestion, Mr. Justice Brennan, that there is no basis or occasion for remand to reconsider the proper priority of freedom of choice in those two districts or the free option.

MR. JUSTICE BRENNAN: I understood that.

MR. CLAIBORNE: But as to what final solution ought to be adopted, whether geographical zoning or pairing or consolidation, as to those matters, I would think it

would be in the first instance a matter for the district court or perhaps the school board.

MR. JUSTICE BRENNAN: Then I am reading your brief in suggesting that we should proscribe --

MR. CLAIBORNE: I think this Court should condemn freedom of choice.

MR. JUSTICE BRENNAN: This is on the premise that we did,then we remand and tell the district court the board has to come up with some other more satisfactory alternative.

MR. CLAIBORNE: I don't know that there are any, but those are the two.

MR. JUSTICE BRENNAN: What do you understand? That is what I am trying to get at.

MR. CLAIBORNE: There are those two -- pairing and geographic zoning. I would not suppose it appropriate for this court to choose between them.

MR. JUSTICE BRENNAN: But you propose that it would be appropriate for this Court to say these two, which appear on this record, would be satisfactory as a remedy, but you go ahead and say, "Mr.District Court, go ahead and choose between them," limiting the District Court to a choice between the two.

MR.CLAIBORNE: I would leave it perhaps a bit more open and if the District Court can devise some plan which I haven't thought of.

MR. JUSTICE BRENNAN: Don't you see that it is singularly inappropriate for us to prescribe the plan?

MR. CLAIBORNE: I don't suggest this Court ought to prescribe the precise plan which any given district ought to apply. I do think it is both appropriate and fitting that this Court do condemn freedom of choice as applied in this sort of circumstances.

Let me hasten to say that we do not challenge freedom of choice in all circumstances. As I think Mr. Greenberg mentioned, in those circumstances where residential patterns of segregation are so strong that geographic zoning would produce a high degree of segregation, freedom of choice can certainly do no harm, and it may do substantial good.

Finally, I want to stress that because this is such a transparent device to enable the white students primarily and their parents to segregate or continue the segregation of the school system in a way that the state itself could not, because everybody understands that that is the reason why this plan was resorted to and because that message has been got across, both thus to the Negro community and the white community, in which the state appears at least to be applauding, to be encouraging, to be at least sanctioning and approving a choice made on the basis of race. Since this is a device to permit the white students to

find a haven away from their normal assignment in a school which is mostly Negro, and since the state has gone to such extraordinary lengths and put such a burden on itself to make this choice available , it has thereby indicated to all members of the community that this is a legitimate and properbasis on which to choose your school, and thereby it seems to me it has hardened those racial attitudes which are the whole purpose of educational desegregation to relax.

And it has also compounded the injury of the Negro children, it is bad enough to be segregated off, to have that as the accidental consequences of geographic zoning, which is wholly neutral is one thing, but to have it as the consequence of a deliberate policy sanctioned by the state, of being shunned by the white students who live next door to them, makes the injury that much more severe, and that is the injury which the Brown decision was concerned with, an injury which is that much worse when it seems to have the sanction, the approval of the state behind it.

Finally, and to conclude, let me repeat what I said at the outset, we do not in these cases think it necessary to argue that the school boards have affirmative obligations to take special measures to achieve racial balance, that is not our argument here. Our argument is rather that the state must at least avoid resorting to

extraordinary measures which can only be in their purpose and effect, to defeat, retard desegregation.

On this submission, we suggest that in all three cases the judgments below be reversed.

MR. CHIEF JUSTICE WARREN: Mr.Light.

REBUTTAL ARGUMENT ON BEHALF OF RESPONDENTS, THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT

MR. LIGHT: Mr. Chief Justice, may it please the Court, Mr. Claiborne indicated that he would not challenge the proposition that there is a tendency of the whites to leave when they are in a situation where predominantly Negro facilities develop. I have evidence to support that in the form of a report of the United States Commission on Civil Rights, cited at page 60 of my brief, where they say: "There is evidence to suggest that once a school becomes almost half -- or majority -- Negro, it tends rapidly to become nearly all-Negro."

And this is consistent with the experience which we have had all over the country. This is not a Southern phenomenon. I don't want to be understood as arguing that the Court should approve the freedom of choice method of assignment, because it is the only one that preserves the public schools in the rural South at least, the Court should approve it because it is clearly constitutional.

It accords to everyone the full exercise of his constitutional rights, and, incidentally, it will preserve the public schools.

I think it is interesting that in the three hours of argument we have been talking about schools, and we have been talking about desegregation, that nothing has been really said about education, and how does it square with this.

After all, the purpose of the schools is to educate these children, and I believe the voice of the educator should be before the Court, and in the Tennessee case there is a large appendix of many writings to assist the Court in determining what the practical effects would be if you stike down the freedom of choice, what would be the practical effects if we are required to adopt a plan to put in Gould School District 66 Negro students and 33 white students, a ratio of that sort, would that affect the education, with the placement of those two hostile groups in the same building, perpetuate a climate where education can take place?

MR. JUSTICE MARSHALL: Do you have any residential segregation in Gould? The answer is no; is that right?

MR. LIGHT: Yes, sir; no.

MR. JUSTICE MARSHALL: The white and colored children play together, they sometimes eat together, and

the only time they are segregated is in school and in church; is that an accurate statement?

MR. LIGHT: I couldn't attest to it or challenge it. I have not made those observations of white children playing together with the Negro children, so I am not in a position to say.

MR. JUSTICE MARSHALL: You have never seen white and colored kids playing together in that county?

MR.LIGHT: I have not, but my occasions to be in Gould, which is some 70 miles from Little Rock, would not be frequent enough to make me a reliable judge.

MR. JUSTICE MARSHALL: Have you seen white and colored kids playing together in Little Rock?

MR. LIGHT: White and Negro children playing together on the school grounds in Little Rock, that is common.

MR.JUSTICE MARSHALL: And on the streets where they live?

I am trying to get at whether there is this hostility that you speak of. Where do they get this hostility to each other? You said they would be hostile to each other. Do they get it from the church or the school?

MR. LIGHT: I am not a sociologist, I am not an expert on that. We know there is tension and we see it in the number of cases,where they got it, I don't know.

According to the educational significance of this, it has been called to my attention this morning, there was put in the CONGRESSIONAL RECORD yesterday by Congressman Fountain, page E2532, the same article that the attorney for the school board in the Tennessee case printed as an appendix to his brief. I believe you recall it.

It has an excellent summary of absolute impartial professional observers about the practical effects on education of this school desegregation process I have ever seen.

In that article there is a full biography of the authors of this article in the CONGRESSIONAL RECORD, where it was inserted, and I commend that to the Court for its consideration in this regard.

The Solicitor General has considerably changed his view apparently since the Goss case in 1963 only five years ago about freedom of choice as a device to resolve the problems that a school district like this is confronted with. He argued in that case, Goss involved two Tennessee cities, and he argued in that case that the school board had a fine alternative to this plan. That was brought to this Court and attacked. It can take full freedom of choice, and the particular merits, that would be a constitutional alternative, no question about it, and the particular merit of this material from the Solicitor General's

brief in this case, at page 50, the particular merit of freedom of choice suggested by the Solicitor General then is that it would avoid any child, Negro or white, from being confronted with the mandatory prospect of having to go to a school that was predominantly populated by the other race. This is a serious educational consideration, and the Solicitor General was much more realistic about this practical problem at that time.

I would like to suggest further that the alternatives that our adversaries suggest, all of them are suggested for purely racial reasons to achieve a purely racial result, as the only reason to offer the alternative. They don't attack freedom of choice per se. They say they don't like the results it achieved in this particular instance. They offer an alternative to achieve a different result, a racial result.

Those alternatives that they offer do not square with this Court's insistence that the state be neutral in matters of race. That is the proper position for the state to take.

It must maintain a neutrality.

The Solicitor General says in his brief that in Newton, Evans vs. Newton, that the Court said -- I believe Mr.Justice White wrote the opinion, although I am not sure -- that the state must be neutral in racial matters. The

Solicitor General suggests in his brief here that neutrality is not enough, and presumes the argument along that line.

Thank you very much.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

MR. GREENBERG: I believe Mr. Gray indicated he was going to take further time.

REBUTTAL ARGUMENT BY FREDERICK T. GRAY, ESQ., ON BEHALF OF RESPONDENTS, COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, ET AL.

MR. GRAY: Mr. Chief Justice.

MR. CHIEF JUSTICE WARREN: Mr. Gray.

MR. GRAY: May it please the Court, if I might, sir, I would like to volunteer my distinction of the California case. What condemned California was a provision by which a particular individual could be denied the right to acquire what he was seeking to acquire. But under a freedom of choice plan, the particular individual may not be denied the right to acquire that which he is seeking to acquire. I think that is the basic distinction. Every child in this county can go where he wants to go, even though I can't recall whether it was Justice Brennan and/or Justice White, who asked me about the PTA groups getting together. I think it was Justice White. This was about the PTA groups getting together and deciding all the colored people will go here and the white people will go

here. I answered you that that could happen, but it can't happen against the wishes of any one person, because any one person that wants to go to a particular school could, of course, choose to go to that particular school.

MR. CHIEF JUSTICE WARREN: In the California case, the act simply said that everyone could lease, or sell or not lease or not sell to anyone of his choice, for any reason.

MR. GRAY: But the point I make is that, if I were the seller, that would give me the right to discriminate and thus deny to a particular individual the right to acquire that which he was seeking to acquire, but [illegible] a freedom of choice plan, that individual can't [illegible] action. I can still seek to discriminate, but I [illegible] his going to the school he wants to. He can still go where he wants to.

MR. CHIEF JUSTICE WARREN: You are assuming that there are no customs and no community attitudes or anything of that kind that would deter a person from having a free choice.

MR. GRAY: I assume that in my case, because in my case, sir the record says that they have unrestricted freedom of choice, and I was delighted to have Mr. Justice Marshall point out that there really isn't the hostility, the children play together and do everything together, that

there is not really the hostility that is supposed to exist in New Kent CountyVirginia, there is nothing in this record to suggest any subtle form of pressures against the children making the choice they want to make.

MR. JUSTICE WHITE: As a matter of fact, a lot of decisions as to where children will go to school are made on the basis of the racial composition of the school.

MR. GRAY: Yes.

MR. JUSTICE WHITE: Wouldn't you suppose -- so the state is saying that you want to choose based on racial considerations, go ahead and do it.

MR. GRAY: Any basis, choose on any basis.

MR. JUSTICE WHITE: Including a racial basis.

MR. GRAY: Any basis. In the petition filed in the New Kent case, I thought there was a singularly extraordinary statement that the New Kent County School Board afforded to the Negro children "a privilege rarely enjoyed in the past, the opportunity to attend the school of their choice."

That seems to be a very, very strange thing to be the subject of an appeal, that they should have that taken away from them, that which we have finally achieved. Legislative bodies at one point said, "We want segregation, we want choices made on the basis of race," and you struck it down, and now you are asked to substitute your judgment

for the judgment of the children's parents and find some method, if you have residential segregation, make them have free choice. If you have free choice that leads to resegregation, make them have zoning, but do something, don't let them choose what they want, take their choice away from them, again on a racial basis.

MR. JUSTICE MARSHALL: Isn't it true what you say, if white parents want to send their children to the Negro school, he has a perfect right to make that choice and send his child to that school, the Negro school, and then come home and take his chances with his neighbors and his employer, and so forth?

MR. GRAY: Mr. Justice Marshall, I have to try a lawsuit on my record. My record says there is no restriction against the choice in New Kent County, and I say to you that I know of situations in Virginia where white children have chosen to go to colored schools and have gone and their parents are still employed, and I know of nothing untoward that happened to them when they made that choice, but I say to you also, sir, that there isn't a white person in New Kent County, Virginia, that can elect to send their child to a segregated school in New Kent, Virginia, because there isn't one for white children in New Kent County, Virginia. Every white child in New Kent, County, Virginia, goes to a racially integrated

school.

One further point about the complexes of going to vast trouble to set up a system. The Solicitor General says we go to complicated bus routes all over the county to get the kids to these two schools. He suggests you could turn one into a high school and the other into an elementary school. And I wonder how we would bus the children without running the buses all over the country, just as they do now. If you will carry the children to the two schools, they will have to run buses all over the country.

As far as the complicated forms are concerned, I don't know of a simpler way in the world to find which school you want to go to. If you draw a zone line, you have to take a census to find out where the child lives and you have to get a form from him to determine his age and name and all the other factors that school officials always get from children when they go to school.

The question was asked about the fact that, it was asked of Mr. Tucker, about the faculty, the comparative faculty, in New Kenty County. We don't have a breakdown of the entire faculty in the record. There is a breakdown of the faculty employed for the last five years, and by way of comparison, of the 11 white teachers who have been employed, five of them do not have a collegiate degree, three of them have a B.S. degree. One has a Bachelor of

Music, and two have B.A.'s. So we have six with bachelor degrees, and five with no degrees.

And of the colored teachers, there are nine with bachelor degrees, five B.A. degrees, four with B.S. degrees and one with no degree. So of the 16 Negro teachers hired, only one does not have a degree. And of the eleven white teachers hired, five have no degrees.

I would also like to point out that the statistics in the record as to the overcrowding of the schools and the feature capacities, were figures as of three years ago. With the 115 colored children moving into the white schools, the pupil-teacher ratio of the colored school is now less than that at the school which was integrated.

We just submit, in closing, Your Honors, that we come here under the Fourteenth Amendment, and unless this Court is prepared to go beyond anything that has been conceived that it said in Brown, unless it is prepared to say that, when it spoke in Goss and said, if we had completely free choice, that would be an entirely different case, because, then the parents or the children could choose free of racial consideration, unless you are, in fact, prepared to write an affirmative command in the Fourthenth Amendment, freedom of choice mst stand as a constitutional answer to the command of Brown.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Rice.

REBUTTAL ARGUMENT BY RUSSELL RICE, SR., ESQ., ON BEHALF OF BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, ETC., RESPONDENTS.

MR. RICE: Mr. Chief Justice, if the Court please, I will be very brief.

On page 14 of our brief for the respondents, the relief sought in the lower court is copied therein and it was to have the City of Jackson stop excluding these plaintiffs from entering the Jackson High School, Alexander Elementary and other similar schools, and that is the summary judgment that was granted by the District Court, to stop excluding these people from these schools. And we have done that.

Now, there are two points brought up by the Solicitor General that provoke me to make a short rebuttal. The argument that I understood him to make -- and I listened carefully -- is that racial mixing is required in the schools. He concluded his statement by saying that was not what he meant. He said that freedom of choice is not unconstitutional per se, provided that choice is exercised in a predetermined way. In other words, if these people exercise that choice in accordance with the plan which the government has in mind for them, then it is all right if they do not exercise it in that direction. Then it is not

unconstitutional. That is no freedom whatever. We have given to the parents the right to determine under our transfer plan where that child will go to school.

Now in this Court we seek to take that right away from that parent, who is only here as a class. I think it is all right to bring them here as a class when you are trying to give them rights, but now we seek to take that right away from these parents, which has been held by this Court to be a fundamental principle of our government, that the parent has the right to control the rearing of his child.

So now we will take away from that parent, who is not even in this Court, except perhaps as a member of a class, that right.

We think that is carrying the class doctrine too far.

And finally, I want to make this point. There has been in many cases some effort to make a distinction between de jure segregation and de facto segregation, and I have heard it argued here today that segregation which results from housing patterns, well, that is all right, but if it is something that occurred in a state that had a statute requiring segregation at the time of Brown, then it is up to the school board to do something more than just eliminate that segregation.

Now, I want to ask this Court one question. If you are in a de facto segregation area in, say, New York City, just to pick an example, how can you get out? You are there by law. You have no choice. You must go to a segregated school, and that is all right, so they say.

In the City of Jackson, Tennessee, if you are in a segregated school, you get out by signing your name, and I ask the Court, which really gives to the individual the greatest choice?

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Greenberg.

REBUTTAL ARGUMENT BY JACK GREENBERG, ESQ.

ON BEHALF OF PETITIONERS, BRENDA K. MONROE,

ET AL.

MR. GREENBERG: If it please the Court, in the moment remaining, I would like to make several points. I think these cases come down to several propositions, among which, I think, the most prominent one is whether or not a school system has disestablished segregation when it continues to remain in existence the all-Negro school, which is the symbol of the segregated system in circumstnaces when steps can be taken, quite reasonable steps can be taken to end that situation.

Secondly, I would like to address myself perhaps just for a moment to the proposition that has been mentioned

several times today, the possibility that something like free choice may be a constitutional right. If that is so, it certainly has not been articulated previously. Certainly, it appears nowhere explicitly in the Constitution.

And finally, if it were the case, it would totally upset the administration of school systems throughout the country, because most of them traditionally for generations have operated on the basis of assigning children.

Finally, if I may be permitted a personal reference, there was a quotation from RACE RELATIONS IN AMERICAN LAW, and some reference to the statement out of context.

I might say I did not know then what I know now. And if I had --

MR. JUSTICE BRENNAN: You might not have written the book.

MR. GREENBERG: No.

MR. JUSTICE BRENNAN: That is the danger.

MR. GREENBERG: If I hadknown it, I would have stated matters somewhat differently.

MR. JUSTICE BRENNAN: Or not have written the book.

MR. GREENBERG: I might not have written that section of the book. I think I would have written it, but I would have written it differently.

Actually, I think it is somewhat out of context.

I would not have written anything susceptible to such an interpretation. Certainly, the entire question of this proposition being raised in the brief, how many majority districts there are in the United States or at least in the region of the country that could be affected by this decision.

Of the approximately 6000 school districts in the 17 Southern and border states, 303, approximately 5 per cent, have Negro student majorities. An even smaller percentage have 60 per cent Negro students. So the matter is practical, but not of any great import.

As a matter of principle, hostility may not be ground to refuse to abideby the decision of Brown, reiterated in Cooper vs. Aaron, and ultimately, the proposition that when this Court expounded the Constitution, states a proposition and principle which, as a practical matter, may not be actually attainable at any given moment, but should be worked for.

As I see Brown, this should be one country, rather than two, and we should not acquiesce in various schemes and devices to frustrate the Brown decision, which I think is perhaps the greatest thing to have come out of this Court in the history of the nation.

Thank you.

[Whereupon, at 2:35 o'clock p.m., the argument was concluded.]