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No. 89-1290

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROBERT R. FREEMAN, *et al.*,

Petitioners,

v.

WILLIE EUGENE PITTS, *et al.*,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
for The Eleventh Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal*

Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984); *City of Richmond v. J. A. Croson Co.*, ____ U.S. ____, 109 S.Ct. 706 (1989); and *Pacific Mutual Life Ins. Co. v. Haslip*, Case No. 89-1279 (March 4, 1991).

Southeastern has been previously involved in this case by filing, with permission of the District Court, an *amicus curiae* brief in support of a group of minority parents who sought to intervene in the case. By order dated December 19, 1990, the District Court allowed those parents to intervene as plaintiffs in the litigation.

STATEMENT OF THE CASE

Amicus Southeastern adopts the statement of the case contained in the brief of Petitioners and the brief of *amicus curiae* Plaintiffs-Intervenors.

SUMMARY OF ARGUMENT

Any racial imbalance in the DeKalb County School System is present, not because of any actions by any governmental agency, but because of the cumulative effect of the individual decisions of parents in DeKalb County. There can be no constitutional violation based upon the independent actions of private individuals, and the courts should not force the petitioners to "correct" the parents' decisions. Parents have a fundamental right to govern their children's education in search of quality instruction, and there is no justification in this case for their judgment to be overruled.

ARGUMENT

I.
THERE IS NO CONSTITUTIONAL VIOLATION IN THIS CASE BECAUSE ANY RACIAL IMBALANCES RESULT FROM THE CUMULATIVE EFFECT OF INDIVIDUAL DECISIONS BY DEKALB COUNTY PARENTS.

The fundamental issue in this case is whether the Eleventh Circuit Court of Appeals is correct in requiring the DeKalb County School System (DCSS) to implement involuntary assignment plans such as gerrymandering of school zones, grade reorganization, and busing, *Pitts v. Freeman*, 887 F.2d 1439, 1450 (1989), *cert. granted*, No. 89-1290 (1990), or whether the DCSS has fulfilled its constitutional responsibility by implementing voluntary student assignment systems. Although the parties to this appeal are the school board and a group of concerned parents, there are other parents whose rights and concerns about quality education also must be placed in the balance.

In the course of a school desegregation melee, it is difficult for courts to sift through the opinions of experts and the interests of the parties without losing sight of the individual children whose education is at stake. Self-appointed representatives presume to speak for those children and their parents, and experts talk about them. Yet, in this case, the Court is not forced to rely solely upon the parties and their experts to determine the educational goals of individual students. It need only look, as did the District Court, at the fact that DeKalb County parents have made independent decisions to live in a particular neighborhood and send their children to a particular school.

A.
Any Racial Imbalance In This Case Resulted Not From Governmental Action, But From The Cumulative Effect Of Individual Decisions By DeKalb Parents.

One of the few facts that is undisputed in this case is that during the time that the DCSS has been under court supervision, DeKalb County has experienced profound demographic changes. Between 1975 and 1980, approximately 64,000 non-white citizens moved into southern DeKalb County, while 37,000 white citizens moved from that area to surrounding counties. Pet. App. 38a. As the Court of Appeals noted, these demographic changes resulted in northern DeKalb County's non-white population increasing by 102% between 1970 and 1980, while the non-white population in southern DeKalb increased by 661%. *Pitts*, 887 F.2d at 1442.

These demographic changes necessarily affected the racial balance of the DCSS. Between 1976 and 1986, for example, the population of children in the DeKalb County elementary schools decreased by 15%, but the enrollment of black students increased by 86%. *Id.* Enrollment in DCSS high schools declined by 16%, although black enrollment increased by 119%. Pet. App. 39a. The District Court found, and the Court of Appeals did not dispute, that the school system's previous unconstitutional segregation did not cause the current residential and educational racial imbalance, and that the DCSS has acted in good faith, within the limits of its ability, to combat the demographic shifts. Pet. App. 45a - 46a. The school system's actions include voluntary programs such as a Minority-to-Majority transfer program and several magnet schools. *Pitts*, 887 F.2d at 1441.

The evidence in the record, then, shows that any current racial imbalance in the DCSS is not a result of the past unconstitutional actions by the school board. Rather, it is the

result of the individual choices of DeKalb County parents to live in a certain county and in particular neighborhoods.

Furthermore, the evidence in the record shows that these choices were unfettered by any government actions such as prior school segregation, zoning regulations or enforcement of discriminatory restrictive covenants. It is convenient to speculate, as did the Court of Appeals, that parents chose their homes because of prior educational segregation, *Pitts*, 887 F.2d at 449, or any number of unseemly motives, but the evidence in the record is to the contrary. As the District Court found, the demographic changes

> were inevitable as the result of suburbanization, that is work opportunities arising in DeKalb County as well as the City of Atlanta, which attracted blacks to DeKalb; the decline in the number of children born to white families during this period while the number of children born to black families did not decrease; blockbusting of formerly white neighborhoods leading to selling and buying of real estate in the DeKalb area on a highly dynamic basis; and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier.

Pet. App. 44a - 45a.

None of these factors demonstrates discriminatory actions or intent on the part of any governmental agency, and some of them, such as increased job opportunities, were beneficial to minorities. Thus, the parents of the school children involved in this case made their decisions unfettered by unconstitutional governmental action. They chose their neighborhoods, and through the two voluntary assignment programs, may choose schools outside their residential neighborhoods. Those choices are as free as any can be in an urban, industrialized society.

This fact distinguishes the DCSS from the system in *Green v. County School Board*, 391 U.S. 430 (1968), where this Court held that a "freedom of choice" plan did not meet the school board's constitutional obligation. The *Green* school system had been racially segregated for many years, a problem that made affirmative steps by the school board necessary. A mere freedom of choice system could not meet this Court's mandate for "the dismantling of well-entrenched dual systems" such as the one in that case. *Green*, 391 U.S. at 437.

Neither the parties to this appeal nor Southeastern contend that purely voluntary plans would automatically satisfy constitutional requirements if the racial imbalance in this case were due to the past segregation of DeKalb County schools. The facts in this case, however, show that the DCSS is more accurately compared to the school system in *Board of Education of Oklahoma City v. Dowell*, _____ U.S. _____, 111 S.Ct. 630 (1991). In that case, the school board proposed to abolish its involuntary student assignment plan for lower grades while keeping a voluntary majority-to-minority plan, a change that would result in severe racial imbalance in certain schools. *Id.*, 111 S.Ct. at 634. According to the District Court, the racial imbalance was due to residential segregation that "was the result of private decisionmaking and economics" rather than former school segregation. *Id.*, 111 S.Ct. at 638 n. 2. Although this Court decided the case on other grounds, it instructed the District Court to review the proposed plan on remand "under appropriate equal protection principles," citing cases requiring proof of discriminatory purpose. *Id.*, 111 S.Ct. at 638.

Parents in DeKalb County are in a similar posture, having made their decisions based upon many factors, none of which is the former segregation in the DCSS. For example, some of those parents asked to intervene in this case after the Court of Appeals rendered the decision that is on appeal to this Court. The District Court, which retained

jurisdiction by virtue of the Eleventh Circuit Court of Appeals remand of the case, granted the motion. *See*, Brief of Plaintiffs-Intervenors. App. 1a.

The intervenor parents presented as witnesses in the District Court hearing two experts and nine black parents of children enrolled in the DCSS. These parents, while supporting desegregation, expressed opposition to involuntary student assignment in order to achieve integration:

> The intervenors' witnesses believed that quality of education should be the most important consideration, and should not be sacrificed solely for the purpose of obtaining strict racial balance through busing.

Brief of Plaintiffs-Intervenors, App. 3a.

DeKalb County minority parents, then, made their decisions based on a number of factors, chief of which is the quality of education that their children will receive. None of those factors, according to the evidence in this case, was discrimination or discriminatory actions by government officials. Speculation about societal discrimination or other unjust influences is contrary to the facts in this case and should not be used as a reason for ignoring the decisions that individual parents have made.

B.
The Effects Of Individual Choices Do Not Create Constitutional Violations.

Given the fact that any racial imbalance in the DCSS results from the cumulative effect of individual decisions by DeKalb citizens, the next question, and one of the two issues upon which this Court granted review, is the responsibility of the DCSS to remedy that imbalance. The answer is that the DCSS has an obligation only to remedy its constitutional

violations, and independent decisions of private individuals do not create a constitutic violation requiring a government remedy.

This principle has been evident since early in this Court's decisions regarding school desegregation. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court, while affirming the broad equitable powers of federal courts to combat the effects of unconstitutional segregation, noted

> the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. . . . In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.

Swann, 402 U.S. at 25-26. See also *Spencer v. Kugler*, 404 U.S. 1027 (1972) (affirming New Jersey statute establishing school district lines to coincide with boundaries of political subdivisions, even though that districting pattern created racial imbalance). The fact that a racially mixed community has many schools that are predominantly white or predominantly black, "without more, of course, does not offend the Constitution." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977).

In *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), this Court considered a system in which schools became racially imbalanced as a result of a "quite normal pattern of human migration." *Id.* at 436. Noting that the demographic shifts "were not attributed to any segregative actions" by the school system, the Court vacated a District Court order requiring the school system to

rearrange its attendance zones each year to maintain a particular racial balance. *Id.* at 436, 441.

A similar case is *Bazemore v. Friday*, 478 U.S. 385 (1986), in which the Court considered charges of racial discrimination against a state agricultural extension service. One of the issues was the operation of extracurricular 4-H and Homemaker Clubs in area schools. Many of those clubs were all-white or all-black, in spite of non-discriminatory admissions policies. This Court found no constitutional violation in the operation of the clubs, noting the District Court's finding that any racial imbalance "was the result of wholly voluntary and unfettered choice of private individuals." *Id.*, 478 U.S. at 407 (White, J., concurring).

These decisions are consistent with, if not based upon, bedrock principles of the U.S. Constitution. With the exception of the 13th Amendment, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Constitution and its Amendments restrict individual actions in only a narrow range of circumstances. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946) (private company conducting public functions of municipality held subject to the limitations of the 1st and 14th Amendments); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) (individual who has acted with or obtained significant aid from state officials, or whose conduct is otherwise chargeable to the state, is subject to due process restrictions).

Thus, there is no constitutional violation even when private persons infringe upon such individual rights as free speech, *Hudgens v. NLRB*, 424 U.S. 507 (1976); racial equality, *Moose Lodge No.107 v. Irvis*, 407 U.S. 163 (1972); or due process, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Although individuals may be charged with the violation of particular state or federal statutes, the fact remains that constitutional violations do not result from independent individual actions. Similarly, the "numerous private choices of individual parents of school age children" cannot create a

constitutional violation. *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (state tax deduction for expenses of educating children, including expenses of parochial schools, held not to violate establishment clause of the Constitution). The cumulative actions of individual DeKalb County parents in moving to particular school districts or enrolling their children in particular schools do not constitute an equal protection violation that needs government redress.

II.
THERE IS NOT SUFFICIENT JUSTIFICATION FOR GOVERNMENT AGENCIES, WHETHER SCHOOL BOARDS OR COURTS, TO OVERRIDE DECISIONS THAT DEKALB COUNTY PARENTS MAY MAKE REGARDING THEIR CHILDREN'S RESIDENCE AND EDUCATION.

Neither the DCSS nor any other government body coerced DeKalb County parents into living in particular neighborhoods. Both the county government and county school system have allowed parents to chose housing within the limits of their financial ability, and to chose schools for their children either within the limits of school boundary zones or through DCSS voluntary programs. This Court has consistently recognized the constitutional right of parents to make such decisions. There is no justification for either federal courts or school boards to override those individual decisions and compel students to attend specific schools in order to achieve a particular racial balance.

A.
Parents Have A Constitutional Right To Make Choices Regarding Education For Their Children.

This Court has long recognized that parents have a strong interest in decisions regarding child-rearing, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating zoning ordinance limiting occupancy of residence to a narrowly defined "family"), and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down Oregon law requiring children to attend public schools because of "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding unconstitutional a state law that prohibited the teaching of foreign languages to children, citing the power of parents to control the education of their children). These rights are related to the fundamental right to privacy, *Carey v. Population Services International*, 431 U.S. 678, 685 (1977), which right the government may not infringe upon absent a compelling state interest. *Id.* at 686.

The government cannot "standardize its children" by forbidding them to attend private schools, *Pierce*, 268 U.S. at 535, or by forcing them to live in certain family patterns, *Moore*, 431 U.S. at 506. Similarly, the government cannot treat school children as indistinguishable units and simply ignore the individual interests of parents in desegregation and quality education.

Of course, the government may intervene in parental decisions in order to protect children, *Prince v. Massachusetts*, 321 U.S. 158 (1944). The state may not, however, on the strength of a mere claim that it knows best, sweep into the lives of children that it does not know in order to substitute its conventional wisdom for a parent's individualized knowledge and concern.

In this case, DeKalb County parents chose their neighborhoods, and within the limits imposed by the DCSS, may choose schools for their children outside their residential boundary lines. These parental decisions are as free a choice as any can be in a complex democratic society. This Court has recognized the right to make those decisions as an important one, and a government body, whether school board or courts, should not interfere with that right absent proof that the interference is narrowly drawn to meet a compelling state interest.

B.
The Assumption that Numerically Accurate Racial Balances Automatically Provide Quality Education Is Not Proven; Therefore, There Is No Justification for Nullifying Parents' Decisions Regarding What Is the Best Public School Education Available to Their Children.

There can be no doubt that equal education opportunities and the elimination of racial discrimination are compelling state interests that must be balanced against, and in many cases override, parental decisions. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Nor can there be any doubt that the fundamental goal of desegregation is not a perfect numerical racial balance, but quality education for all students. "It is well to remember that the course we are running is a long one and the goal sought in the end—so often overlooked—is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention

and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation." *Keyes v. School District No. 1*, 413 U.S. 189, 253 (1973) (Powell, J., concurring in part and dissenting in part).

The interest in non-discriminatory, quality education, however, is not automatically served by involuntary student assignment plans, and the evidence is certainly far from conclusive that merely counting heads will redress the evils of racial discrimination in education. Absent clear evidence to that effect, government agencies and federal courts should defer to individual parents regarding what would be the best education for individual children.

According to various surveys, the majority of parents of school students believe that they should have the right to choose the school where their child attends. *See, e.g.*, Rossell & Glenn, *The Cambridge Controlled Choice Plan*, 20 Urb. Rev. 75, 77 (1988). It is all too easy to classify these parents as prejudiced or uneducated, and to emphasize the need for government limitations on parental choice in order to prevent segregation of racial minorities. *See, e.g.*, Wells, *Improving Schools Finds Role for Free Market*, N.Y. Times, March 14, 1990, at A1, col. 2. Such simplification, however, is both unhelpful and inaccurate.

Accusing opponents of involuntary student assignment of supporting discrimination ignores evidence that many parents opposed to such plans happily enroll their children in racially mixed magnet schools. *See, e.g.*, Schofield, *Black and White in School* (1982). Furthermore, a large number of minority parents have defected from public schools, preferring to start their own independent programs. *See, e.g.*, Gruson, *Private School for Blacks*, N.Y. Times, October 21, 1986 at C1, col. 5 (minority parents, increasingly dissatisfied with public schools, are turning to private schools that stress academics and discipline); Ratteray, *One System is Not Enough: A Free-Market Alternative for the Education of*

Minorities, American Education 4 (November, 1984) (over 300 independent schools operated by and for minorities).

Other reasons for opposition to involuntary student assignment include the fact that children are pulled out of their neighborhoods and educated at schools distant from their homes, which makes it more difficult for parents to be involved in the education process. This forced distance hurts the education of minority children. Studies show a high correlation between parental involvement and improved student achievement and behavior. Jennings, *Studies Link Parental Involvement, Higher Student Achievement*, Education Week 20 (April 4, 1990). If parents cannot be involved because their children are transported to far-away schools, the children suffer.

In addition, black students assigned to mainly white schools are all too often resegregated by placement in remedial or other special classes composed mostly of other minorities. *See, e.g.*, Hochshild, *Thirty Years after Brown* 200-22, 26-28 (1985); Hochshild, *The New American Dilemma* 160-168 (1984); Deal, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470-516 (1976). Thus, strict numerical balancing can compound rather than resolve educational inequalities.

Many opponents of involuntary student assignment plans, then, like the intervenors in this case and this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), have as their primary concern quality education for minorities. They simply do not believe that merely counting heads and ensuring that the proper number of minority students are sitting next to the proper number of majority students will spontaneously produce a quality education.

The evidence on this issue is, at best, inconclusive. Many scholars have stated that no one knows definitely whether involuntary student assignment plans in search of racial balance lead to a quality education for minorities. *See*,

e.g., Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 Personality & Soc. Psychology Bull. 420 (1979); St. John, *The Effects of School Desegregation on Children: A New Look at the Research Evidence*, Race and Schooling in the City 84, 87-88 (1981); Crain & Mahard, *How Desegregation Orders May Improve Minority Academic Achievement*, 16 Harv. C.R.-C.L. L. Rev. 693 (1982); Orfield, *Research, Politics and the Antibusing Debate*, 42 Law & Contemp. Probs. 141 (Autumn 1978).

The most recent comprehensive treatment of the issue is the National Institute of Education study, *School Desegregation and Black Achievement* (1984). According to the NIE, school districts with voluntary desegregation programs reported academic gains, while those districts with involuntary plans either experienced no gains or saw actual losses. *Id.* at 26.

Thus, there is little evidence, and certainly none in this case, that nullifying parental decisions through involuntary student assignment will produce the quality education that everyone seeks. Rather, the evidence that is available shows that racial balance through mandatory plans actually impedes the educational progress of minority students.

Instead of supporting parents' search for quality education, or marshalling the evidence that will justify a school board or court's interference with that search, proponents of involuntary assignment programs often substitute what the district court in this case termed "a paternalistic view" of their responsibility. Brief of Plaintiffs-Intervenors, App. p. 4a. It is quite easy to dismiss parents opposed to busing by considering them, as do the original plaintiffs in this case, to be "naive and ill-informed," *id.* at 4a, and to announce that a school system and district court must consider busing "regardless of whether the plaintiffs support such a proposal." *Pitts*, 887 F.2d at 1450. This Court, however, has consistently rejected such a patronizing attitude towards parental child-rearing decisions. "The child

is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

Condescension and conventional wisdom cannot be allowed to substitute for evidence, and should not be used as a basis for determining the burdens to placed upon school children. If the state decides to interfere with a parent's wishes regarding quality education for his or her child, it should be certain, or at least have more proof than is currently available, that the state's programs will meet its goals.

Neither school boards nor courts should be part of a social experiment to see what will happen if a school system transports the right number of minority children to a school with the right number of majority children. "It is time to return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert. This will help assure that integrated school systems will be established and maintained by rational action, will be better understood and supported by parents and children of both races, and will promote the enduring qualities of an integrated society so essential to its genuine success." *Keyes*, 413 U.S. at 253 (Powell, J., concurring in part and dissenting in part).

CONCLUSION

Amicus respectfully requests that this Court reverse the judgment of the Eleventh Circuit Court of Appeals, and affirm the decision of the District Court in this case.

RESPECTFULLY SUBMITTED,

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