

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBERT R. FREEMAN, ET AL.,

Petitioners V. WILLIE EUGENE PITTS, ET AL.

CASE NO: 89-1290

PLACE: Washington, D.C.

DATE: October 7, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT R. FREEMAN, ET AL., :
Petitioners :
v. : No. 89-1290
WILLIE EUGENE PITTS, ET AL. :

- - - - -X
Washington, D.C.
Monday, October 7, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:07 a.m.

APPEARANCES:

REX E. LEE, ESQ., Provo, Utah; on behalf of the
Petitioners.
GENERAL KENNETH W. STARR, ESQ., Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the United States, as amicus curiae, supporting the
Petitioners.
CHRISTOPHER A. HANSEN, ESQ., New York, New York; on behalf
of the Respondents.

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1 PROCEEDINGS

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 89-1290, Robert Freedman v. Willie Eugene
5 Pitts.

6 Mr. Lee.

7 ORAL ARGUMENT OF REX E. LEE

8 ON BEHALF OF THE PETITIONERS

9 MR. LEE: Mr. Chief Justice, and may it please
10 the Court:

11 The two questions presented by this case are
12 squarely and cleanly framed by the district court's
13 findings of fact. Since 1969, the DeKalb County School
14 System has been subject to a Federal desegregation order
15 formulated principally by the Department of Health,
16 Education and Welfare, and containing two core features:
17 neighborhood school system attendance zones and the
18 immediate and complete abolition of all racially -- of the
19 six racially identifiable schools that existed as of 1969.

20 Beginning almost immediately after the entry of
21 that order, DeKalb County, which borders Atlanta
22 immediately on the east, experienced population shifts
23 described by one expert as one of the most largest and
24 most rapid ever observed anywhere. So that from 1970
25 through 1986, the percentage of black students served by

1 this school district increased from slightly over
2 5 percent to almost 50 percent, with a disproportionately
3 high concentration in the southern part of the county.

4 The district court found, in response to
5 petitioners' request to be relieved of further judicial
6 relief under the 1969 order, that the racial imbalances
7 which had resulted in the schools were "the result of
8 demographic shifts" which could again, quote -- which
9 again, quote, "were not caused by any action on the part
10 of the DCSS."

11 QUESTION: Well, you found for a time there was
12 a racial balance?

13 MR. LEE: That is correct, until such time as
14 this racial -- as this -- these demographic changes came
15 in.

16 QUESTION: How long was that? Did it start --

17 MR. LEE: Almost immediately. It started and
18 has just continued since that time, and it continues
19 today.

20 QUESTION: But there's no question that there
21 was racial balance --

22 MR. LEE: But there was racial balance in the
23 beginning.

24 QUESTION: -- as soon as there was neighborhood
25 schools --

1 MR. LEE: That is correct. Actually this was a
2 very clean approach that HEW took. That was really all
3 that was needed. Unlike most of the southern districts,
4 DeKalb was able to just eliminate those six black schools,
5 which had always been the principal problem, and then that
6 with the neighborhood school zones. But the subsequent
7 racial imbalance came about as a result of the
8 demographics.

9 QUESTION: Would you agree that the school
10 district had the obligation at the outset in 1970-71 to
11 correct that imbalance?

12 MR. LEE: Yes. And I think to leave it in place
13 for a time to see what it was that might happen.

14 QUESTION: So is what you are saying that there
15 is really at least a two-phase aspect to the remedial
16 period: a primary phase in which there must be racial
17 balance regardless of the cause, plus a disengagement
18 phase that follows it, and that you are now in the
19 disengagement phase? Does that summarize what you are
20 going to tell us?

21 MR. LEE: What we're saying is that there was
22 compliance with the order as of 1969. The court, in fact,
23 determined that for a time there was what you would under
24 any circumstance desegregation. But then later on, there
25 were these demographic shifts, over which the district

1 court said we had no control, that changed the racial mix.
2 -- But not --

3 QUESTION: And yet there was total segregation
4 for 20 years after Brown.

5 MR. LEE: Almost, yes.

6 QUESTION: To 1966.

7 MR. LEE: Yes, that is correct.

8 QUESTION: Mr. Lee, did the district court
9 consider the possibility that the demographic changes in
10 the seventies were attributable somehow to racially
11 identifiable schools in the district?

12 MR. LEE: As I read his order, that is simply
13 not consistent with any of the findings that he made.
14 What he said was in essence --

15 QUESTION: But no finding really dealt with
16 that. So we're not sure?

17 MR. LEE: No, it happens that he did not make
18 that specific finding. But what he did say was that
19 regardless of whether the school district had taken the
20 steps that years down the road the respondent said he
21 should have taken, that it wouldn't have made any
22 difference in as far as the racial mix in the schools was
23 concerned.

24 QUESTION: But you agree that in the initial
25 period when there is imbalance, even if that imbalance is

1 caused by demographic factors, that the school district
2 had a duty to realign the attendance zones to cause racial
3 balance to the extent practical?

4 MR. LEE: Well, that really wasn't this case.
5 Because in this case we were in balance within a short
6 period of time after the entry of the order. But the
7 question that you're asking, which is a hypothetical in
8 this case, is a much more difficult one. And I think it
9 would depend on what the findings of fact happened to be
10 in that particular instance. But I think -- in the
11 majority of instances, I think the answer would be yes,
12 there probably would be a period of time in which it
13 would continue.

14 But the point is that here, under those
15 circumstances, the order has existed for 22 years. And
16 the district court, consistent with these findings that it
17 made, retained jurisdiction over two issues which are not
18 before the Court today, namely, faculty assignment and
19 allocation of resources. But it held that it would order
20 no further relief in four other areas. And one of those
21 areas in which there was to be no further judicial
22 supervision was student assignment.

23 The court of appeals did not reject any of the
24 district court's findings as clearly erroneous. Rather,
25 its reversal was based on two legal prepositions. The

1 first, contrary to the district court, the court of
2 appeals squarely held that the school district is legally
3 responsible for what it referred to as segregation caused
4 by demographic changes, so long as they occur during the
5 pendency of a desegregation decree.

6 And second, the Eleventh Circuit held that a
7 school district cannot attain relief from judicial
8 supervision in one respect without qualifying at the same
9 time in all six of the so-called Green factors, and for a
10 period of at least 3 years.

11 It's important to clarify at the outset that
12 this is not a case like Dowell last term. This is not a
13 case in which we are asking the Court for any present
14 ruling that we have reached the end of our judicial
15 remedial road.

16 QUESTION: But you are asking that we say that
17 with respect to some of the so-called Green factors, that
18 it apply incrementally some how. And I'd like to ask
19 whether you think the Green factors represent distinct
20 constitutional violations or is there a single violation
21 that we're dealing with? I think this is a concern.

22 MR. LEE: Yes, it is an important question,
23 Justice O'Connor. It's more helpful to me to look at
24 those as kind of guidelines, as indicators among the
25 things that you might look at, but it is a single

1 indicator.

2 And that is why I regard that second issue as
3 much more important -- much less important, and really
4 following from the first. Because what we are really
5 asking for, the only thing we're asking for from this
6 Court is relief from a new expanded order imposed after we
7 had been operating under the old one for 16 years, an
8 order which said by its terms that it was to be final and
9 terminal. With the new expanded features, greatly
10 expanded, aimed exclusively at features -- at
11 circumstances over which we have no control and which we
12 did not cause.

13 QUESTION: Mr. Lee, may I ask you a question
14 here? Supposing, first of all, I assume you don't
15 challenge, or maybe you do, the figures that the red brief
16 contains in the early part of the brief that are not
17 covered by the findings of fact dealing with the period
18 between '69 and '75. And during those early years,
19 there's a trend of increasing the number of more than 50
20 percent black schools: two in '69, two in '73, three in
21 '71, and so forth.

22 My question is in 1969 or '70, would it have
23 been the duty, or would the district judge have had the
24 power to prevent that increased concentration, even if it
25 were attributable entirely to demographic changes?

1 MR. LEE: I think -- excuse me.

2 QUESTION: That's the whole -- that's the
3 question.

4 MR. LEE: Yes. I think that would depend on the
5 relevant findings of fact that would have been made at
6 that time. Now, in fact, we did not go back --

7 QUESTION: Well, I'm assuming the relevant
8 finding of fact is (a), it is attributable to people
9 moving into the county from Atlanta, and (b), there will
10 be as a result of that change, racially identifiable
11 schools only a year or two after the decree was entered.
12 And they asked for relief right there.

13 MR. LEE: I think I would be arguing the same
14 thing, particularly if we could have had the additional
15 finding that we have here that there's little that we
16 could have done that would have made a difference.

17 Both of the court of appeals' rulings are
18 squarely inconsistent with the precedents of this Court.
19 With regard to the first, the issue of causation, starting
20 at least as early as Swann and very consistently
21 thereafter, this Court has made it very clear that Federal
22 judicial authority is limited to curing the constitutional
23 violation which gave rise to the Federal court's authority
24 in the first place.

25 There is no better way to say it than this Court

1 said it in Milliken II, and I quote very briefly, "Federal
2 court decrees exceed appropriate limits if they are aimed
3 at eliminating a condition that does not violate the
4 Constitution or does not flow from such a violation.

5 QUESTION: Well, the constitutional violation is
6 that this causes a stigma to the entire black community.
7 And you're telling us in answer to me and to Justice
8 Stevens, that even if you have racially identifiable
9 schools within 1 year after a decree is entered and there
10 has been 1 year of balanced, that that's the end of the
11 Court's concern. But it seems to me that the nature of
12 the violation extends beyond that period.

13 MR. LEE: That proposition, Justice Kennedy,
14 that it is the stigma that is the controlling factor, has
15 been considered by the Court on several occasions and
16 never commanded a majority of the Court. If that all by
17 itself, the kind of stigma -- the only kind of stigma that
18 you can have in this case, which is that there still is
19 racial imbalance. That's just another way of saying that
20 there is racial imbalance. That's what the Eleventh
21 Circuit says, that that's what you have to cure.

22 Now, if that is the case, there have been some
23 erroneous decisions that have been entered in the past,
24 including this Court's decision in Pasadena, including
25 Judge Rubin's decision in Houston, and including the

1 decision about 12 years ago in Atlanta itself, in which
2 you had gross racial imbalance but you couldn't trace that
3 to anything -- any unconstitutional conduct that the -- of
4 which the school board had been guilty.

5 QUESTION: But isn't it plausible to say that
6 the stigma is also controlled by the time that's elapsed
7 so that the stigma that existed, say, in 1971 is much more
8 clear to the community, is much more palpable, much more
9 tangible than in 1991?

10 MR. LEE: And those can be difficult factual
11 questions. Fortunately for the Court and for us in this
12 instance, we have factual findings that deal squarely with
13 that issue. And actually what is involved here is the
14 basic distinction between de jure and de facto
15 segregation.

16 All across the country there are instances in
17 which there are racial imbalances, from Saginaw, Michigan,
18 to Cincinnati, Ohio, Houston, and probably most
19 significant of all for these purposes, Atlanta itself, our
20 next-door neighbor, where it's actually considerably worse
21 than it is in DeKalb County.

22 But the consistent approach has been that what
23 you look to, and there have been at least a half-dozen
24 instances in which the Court has said that, is who caused
25 it. Was this a result of the constitutional violation.

1 You will not have very many cases in which that issue is
2 posed -- which a legal issue is posed so cleanly because
3 of the cleanliness of the findings of fact.

4 There is one case that really squarely disposes
5 of both issues, and that's Pasadena. The facts on both
6 questions were remarkably similar. In Pasadena, as in
7 this case, you had a Federal court order entered which
8 resulted in a -- what the Court called a racially neutral
9 system of student assignment. And then you had de facto
10 changes in the demographics that occurred after that time.

11 With regard to the first question presented, the
12 Court said, and I quote, "That these shifts were not
13 attributable to any segregative actions on the part of the
14 petitioners." And they did so on findings that were less
15 clear than we have here.

16 And with regard to the second question, there
17 was a disagreement in Pasadena over whether the school
18 board's compliance with one portion of the plan dealing
19 with hiring and promoting teachers, but the
20 non-achievement of that particular factor, the Court said,
21 did not, quote, "require the district to rearrange its
22 attendance zones."

23 In short, what Pasadena held was that relief
24 with respect to student assignment need not await the time
25 that the district is entitled to relief with respect to

1 hiring and promotion. And that's this case.

2 I would like to say just a short word about the
3 fundamental principals of federalism and the efficient
4 allocation of educational resources that are involved in
5 this case. The Court said in Dowell that Federal
6 supervision of local school systems is intended as a
7 temporary measure. And what that recognizes is that,
8 aside from the need to cure constitutional violations,
9 with which we're all in agreement, we're better off if our
10 nation's school systems are run by school boards rather
11 than Federal courts.

12 And to paraphrase Justice Brandeis in the New
13 State Eyes case, school systems are among our Nation's
14 most effective laboratories. Yet the safest thing for a
15 school board, subject to a judicial decree to do in
16 response to an innovative idea, is absolutely nothing.
17 And that's what this case really comes down to.

18 For 22 years, the school district has complied
19 with the neighborhood attendance zone that was set by HEW.
20 In that time there have been no further violations, no
21 hint of recalcitrance, and as the district court said, we
22 have a school board and administration who, and these are
23 the district court's words, "are trying to obey the law."
24 The racial imbalances that exist in DeKalb County can no
25 more be traced to a constitutional violation than they can

1 in Chicago or Philadelphia or Atlanta.

2 Yet my clients are now told that they will
3 continue under judicial supervision for who knows how
4 long, and also, that they may be subject to such radical
5 and greatly expanded impositions as drastic gerrymandering
6 of school zones, busing, and that even the neighborhood
7 plan is not inviable.

8 Mr. Chief Justice, unless there are questions,
9 I'll save the rest of my time.

10 QUESTION: Thank you, Mr. Lee.

11 General Starr, we'll hear now from you.

12 ORAL ARGUMENT OF KENNETH W. STARR

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING THE PETITIONERS

15 MR. STARR: Thank you, Mr. Chief Justice, and
16 may it please the Court:

17 In light of what has been said, let me focus on
18 two aspects of the discussion. The first is causation.
19 Causation, we believe, is a critical part of the inquiry.
20 That is to say, as Mr. Lee indicated, this Court has said
21 quite frequently that a Federal court remedy is excessive
22 if it goes beyond seeking to cure the constitutional
23 violation. The 1969 decree that was entered into here was
24 a comprehensive plan. It was agreed to by all the
25 parties. As Mr. Lee indicated, this was a plan that was

1 formulated with the guidance of HEW. It was a plan
2 formulated with the guidance of this Court, the demand of
3 this Court in Green, that plans be developed to work and
4 to work now.

5 I think the critical thing about then the way
6 this plan was carried out was that the school board was
7 found by the district court to be acting in good faith.
8 It sought to achieve the maximum amount of desegregation
9 that was practicable. It instituted voluntarily two
10 programs in the wake of the demographic changes that swept
11 over DeKalb County: the majority to minority transfer
12 program, which this Court identified in Swann as being a
13 very important part of the desegregation plan. As soon as
14 Swann came down, the school board voluntarily, with the
15 plaintiffs' approbation, instituted such a plan, as well
16 as a magnet school plan.

17 For 6 years there was silence in this case.
18 Justice Stevens talked about the developments beginning in
19 early 1970, but the plaintiffs did not come in to court to
20 question the efficacy of the plan.

21 QUESTION: Suppose they had. What would have
22 been your response to Justice Stevens' concern and mine as
23 to whether or not there is an obligation in the immediate
24 period after the desegregation plan is implemented to
25 demographic changes? Is there a continuing duty to

1 balance in this primary remedial phase -- initial remedial
2 phase?

3 MR. STARR: No. If the demographic change
4 cannot be laid at the feet of the school board, the answer
5 is no. This Court answered that question no in Pasadena.
6 In a very real sense --

7 QUESTION: In Pasadena there had been
8 desegregation in place for a number of years.

9 MR. STARR: The plan as I -- I don't want to
10 quibble about the facts in Pasadena, but the demographic
11 changes in Pasadena began very promptly after the plan
12 went into effect in 1970, so that in 1971 and '72, very
13 early on, there were in fact racially identifiable
14 schools. The key is not whether there is racial
15 identifiability. The key is what is the action of the
16 school officials. Have they in fact contributed to the
17 creation of racial identifiability through racist
18 assignment policies or other forms of policies.

19 But if there is not causation, then the school
20 board gets to look at the decree. The decree is a final
21 judgment. At page 61 of the joint appendix in this case,
22 this decree, that everyone agreed to, stated by its terms
23 that this is a final and terminal plan of desegregation.

24 QUESTION: But Mr. Starr, if I understand your
25 argument, it really wouldn't have mattered if the

1 plaintiff had objected violently all along the line
2 because they wouldn't have been entitled to any protection
3 from demographic changes not caused by the dual system.

4 MR. STARR: If they had not been -- because it
5 may be, and I agree with Mr. Lee, that the facts are
6 terribly important in each of these cases. At a
7 theoretical level, I have to say that by virtue of the
8 nature of Federal judicial power and the power that the
9 courts enjoy under the equal protection clause, that power
10 must go to remedying a violation. We do have to identify
11 a violation.

12 QUESTION: So to boil it down, what you're
13 saying is they really wouldn't have had a valid argument
14 to advance even if they had argued from the very beginning
15 that something should have been done to prevent the
16 creation of a lot of racially identifiable schools shortly
17 after the decree was entered if they were caused by
18 demographic changes.

19 MR. STARR: Justice Stevens, I --

20 QUESTION: It may well be right, but that --

21 MR. STARR: Well, Justice Stevens, I think they
22 should certainly be heard to say this plan was defective
23 for the following reasons. It was reasonably foreseeable
24 in light of the nature of this plan that this would have
25 occurred. It is critical in these cases, and the United

1 States fully --

2 QUESTION: I don't see why it would matter for
3 the reasonably foreseeable because the thing that was
4 foreseeable was not, under your argument, was not the
5 consequence of illegal conduct.

6 MR. STARR: I think reasonable foreseeability is
7 important because it goes to good faith. If the board was
8 party to a decree that was not in fact entered into in
9 good faith, if it felt --

10 QUESTION: Well, why wouldn't it be in good
11 faith? If they said well, we can anticipate a lot of
12 people are going to move into the county because there is
13 a lot of business developing here and so forth, but that's
14 not our problem.

15 MR. STARR: I think they could do that.

16 QUESTION: So I don't see how foreseeability
17 changes it a bit. Suppose they foresaw the whole thing.

18 MR. STARR: They could very well say our duty is
19 to treat all students alike and not to treat them
20 differently on grounds of race, and that we're entitled to
21 have a proper and appropriate educational system as long
22 as we don't engage in that. Now what we do have to do,
23 and this is getting back to the point that seems to be of
24 control -- of concern to the Court, is to dismantle that
25 prior dual system.

1 And what does dismantling mean? I think it does
2 mean getting at the Green factors, those six aspects of
3 the school system, to make sure that no school is being
4 essentially labeled by the stay as a --

5 QUESTION: Well, are you going to look at those
6 factors incrementally? Mightn't one factor need remedies
7 in other areas of the factors to make it all come into
8 place? If there's then initially a single violation,
9 don't we have to see that all the Green factors are met
10 for a period of time?

11 MR. STARR: Oh, I don't think so. Footnote 5 in
12 Pasadena looks very strongly the other way. So does the
13 learning of three United States courts of appeals that
14 have focused on this and this is why. The plaintiffs in
15 this case readily agree, they conceded at the district
16 court level, that in three of the Green factors all
17 remnants of the prior de jure system had been entirely
18 eradicated. It would be passing strange, and in our view,
19 would be a violation of the limitations of judicial power
20 under the equal protection clause for a remedy now to be
21 directed at those three integral parts of a school system
22 that had been found to be completely desegregated.

23 QUESTION: Even if that were necessary in order
24 to achieve the requirements on the other two factors that
25 haven't been met?

1 MR. STARR: If there were a finding that that
2 were necessary -- I would -- I certainly would agree if it
3 were necessary in order to achieve the dismantling. That
4 would be quite a different matter. But what the Court
5 does have the comfort of in this case is the district
6 court's finding at page 45a of the petition appendix, that
7 nothing that this school board could have done would have
8 made a difference by -- by virtue of the overwhelming
9 demographic shift in DeKalb County.

10 QUESTION: What you want us to hold, then, that
11 once one of the Green factors has been satisfied, that it
12 simply should be a presumption against further orders with
13 respect to that factor?

14 MR. STARR: I wouldn't put it in that way. I do
15 think that it does in fact raise a question that the
16 school board might very well say we have completed our
17 duties in that respect, nothing more needs to be done.
18 And then the critical judgment, and it is a judgment by
19 the district court, is whether that board is acting in
20 good faith.

21 Here, the court has the benefit of two judges
22 having concluded that this school board has been acting in
23 good faith since 1969. Two judges who have had this case
24 before them have said this is a school board that is
25 seeking the interest and welfare of all of its students.

1 And the two areas where there is still work to be done are
2 areas that the school board already believes it has
3 corrected, and indeed are rather technical requirements --
4 the Singleton requirement and the like -- in terms of the
5 seamless web point, racial identifiability of the faculty.

6 It's important to remember that this school
7 board has desegregated the faculty. Not a single school
8 in this district has had a majority black faculty since
9 1969. The Fifth Circuit law, as this Court is well aware,
10 imposes a very rigorous requirement, the Singleton
11 requirement, with respect to ratios in each school. That
12 ratio can be met by the exercise of something that this
13 school board did not want to do. It did not want to
14 engage in the mandatory reassignments of teachers. It has
15 now been told by the district court you must do that. You
16 should have been mandating -- even though the teachers
17 didn't want it, you should have been mandating that they
18 go to different schools, and you have to take additional
19 steps in ensure that expenditures per capita are entirely
20 equalized. This obviously remains for the district court
21 on remand.

22 The point is this: those points did not give
23 rise to any indication at all that there was bad faith.

24 I thank the Court.

25 QUESTION: Thank you, General Starr.

1 Mr. Hansen, we will hear now from you.

2 ORAL ARGUMENT OF CHRISTOPHER A. HANSEN

3 ON BEHALF OF THE RESPONDENTS

4 MR. HANSEN: Mr. Chief Justice, and may it
5 please the court:

6 There are three central and undisputed features
7 to this case. First, the DeKalb County School District
8 was intentionally segregated on the basis of race for as
9 long as anyone can remember and up to at least 10 years
10 after the decision in Brown.

11 Second, the district court found it's undisputed
12 that the DeKalb School System has never been fully
13 desegregated, that there remain vestiges of segregation
14 even 15 years after the court -- after the school district
15 was ordered to cure the problems, and 30 years after
16 Brown.

17 And third, the schools in DeKalb County today
18 remain both separate and unequal. One set of schools are
19 attended by black students, who are disproportionately
20 taught by black teachers who are disproportionately
21 administered by black administrators, and those set of
22 schools have fewer resources than the schools that are
23 attended by white students, have white teachers, white
24 administrators, and have more resources.

25 QUESTION: Excuse me, what do you mean by fewer

1 resources?

2 MR. HANSEN: The district court found in looking
3 at those schools that are disproportionately black versus
4 those schools that are disproportionately white that you
5 consistently find that less money is spent per pupil in
6 black schools, that the teachers in the black schools have
7 less experience than the teachers in the white schools.

8 QUESTION: I'm just wondering how that could be
9 without a finding of discrimination. Is it just that -- I
10 suppose, the principal factor is faculty salaries, and
11 there are just teachers who don't want to move to other
12 schools, so that you get more senior teachers in some
13 schools. Is that the principal element?

14 MR. HANSEN: The district court suggested that
15 was one element. It suggested there may also be something
16 having to do with the age of the schools. But the
17 district court said you could not explain inequality
18 through just those factors. It said some of the disparity
19 could be explained through those factors but not all of
20 them. I think those factors can in part be explained by
21 the fact that there are black schools in DeKalb County and
22 white schools.

23 One of the consequences of continuing to have
24 black schools for essentially all of the history of DeKalb
25 County is that sort of inevitably leads school districts

1 toward inequality. It inevitably leads to black schools
2 at least being perceived as inferior, and in this
3 instance, being treated as inferior by the school
4 district.

5 Last term, in Dowell, this Court said that there
6 were two questions to be asked in these kinds of cases.
7 First, has the school district engaged in good faith
8 compliance to the prior court orders. The district court
9 found that in at least two instances that the school board
10 has not engaged in good faith compliance. They were
11 ordered in 1969 and again in 1976 to desegregate faculty
12 and staff, and they had not done it even as of 1986,
13 despite the repeated orders of the court.

14 Today, in those schools that are 80 percent
15 black, the administrators are 60 percent black. In those
16 schools that are 2 percent black, the administrators are 6
17 percent black. And faculty shows similar disparities.

18 QUESTION: Could I ask what if it was
19 unquestioned that the faculty had been appropriately
20 desegregated and that resources were equal, but
21 nevertheless, there was this student imbalance that was --
22 that had been going on for years, almost immediately after
23 the decree was entered? What then?

24 MR. HANSEN: Well, the obligation of the school
25 board in 1969 was to break the pattern of segregation.

1 And that pattern includes the coincidence of faculty and
2 staff segregation, and so on, going along together.

3 QUESTION: Well, let's assume that if the staff
4 and the resources are all -- have all been solved, and you
5 think the school board, nevertheless, has a constitutional
6 duty to reassign students to counteract the demographic
7 changes?

8 MR. HANSEN: I don't think the school district
9 has an obligation to counteract purely demographic
10 changes, and that's not what we're suggesting. If faculty
11 and staff assignment patterns had been desegregated in
12 1969, if inequality had been desegregated in 1969, and if
13 the school district had maintained a desegregated school
14 system for some period of time in the 1969 to 1973, '74,
15 '75 period, I think we'd have a very different case.

16 QUESTION: Well, you think the school board
17 would have been required to reassign students to
18 counteract demographic changes for at least 3 years.

19 MR. HANSEN: Well, the Solicitor General, in
20 their brief suggests 3 years, and we agree.

21 QUESTION: Is that right?

22 MR. HANSEN: Yes. Yes, it is. Yes, it is.

23 QUESTION: So there is a constitutional duty to
24 counteract demographic changes.

25 MR. HANSEN: The phrase that's used in the Fifth

1 and Eleventh Circuit to describe this phenomenon is one
2 swallow does make a spring. Hitting desegregation for one
3 instance doesn't mean you counteract 50 or 100 years of
4 segregation.

5 QUESTION: Well, I couldn't answer my question
6 by quoting that.

7 MR. HANSEN: I thought maybe I could, though.

8 (Laughter.)

9 QUESTION: Well, all you had to do is say yes.

10 (Laughter.)

11 MR. HANSEN: That wasn't as eloquent as one
12 swallow, which is not my phrase.

13 In order for the school district to prevail in
14 this Court, it must win on both of its propositions:
15 first, that the Green factors have to be looked at as
16 totally separate entities, and second, that there's no
17 causal link between current segregation.

18 QUESTION: Well, is that, strictly speaking,
19 true? The district court found the current violations to
20 be only with respect to per pupil expenditure and the
21 assignment of the teachers and principals. Nevertheless,
22 the Eleventh Circuit ordered the district court to look at
23 all kinds of things like gerrymandering of school zones
24 and reorganizing grades and possibly busing. And it
25 certainly would be possible to say that those remedies are

1 more extensive than the violations to be cured, that
2 the jurisdiction in the district court, of course, but
3 that nevertheless, the remedies have to be tailored to the
4 problem.

5 MR. HANSEN: I don't think there's any question
6 that remedies have to be tailored to the problem, but what
7 the school board's argument rests on is the notion that
8 the Green factors don't interact in any way, that they're
9 separate and distinct conditions.

10 QUESTION: Well, I thought in response to my
11 questions that we got some response that conceivably they
12 may be interrelated and that the remedies, conceivably,
13 could be.

14 MR. HANSEN: Well, I think the remedy has to be
15 what cures the pattern of segregation that has built up.
16 And if the faculty and staff assignments have interacted
17 to create a pattern of segregation, then I don't see how
18 you can involve a remedy that doesn't break that pattern
19 in all the areas of the pattern.

20 QUESTION: But we don't have a finding to that
21 effect.

22 MR. HANSEN: We do not have a finding. I think
23 it is fair to say that the district court ignored the
24 possibility that the Green factors operated in
25 interaction. The district court does not address that

1 question directly. And in the way he structures his
2 opinion, he appears to be oblivious to the notion that
3 they might interact together.

4 QUESTION: Well, the district court --

5 QUESTION: What do you mean by interact?

6 MR. HANSEN: Faculty -- if a school district
7 assigns disproportionately faculty to one particular
8 school, that says something to the community about what
9 that school is. That may have an impact on the student
10 assignment patterns that grow around that -- that school.
11 In this case what has happened is every single one of
12 these factors has operated in lock step. Every time there
13 is a school that's disproportionately black by student
14 assignment, it's also disproportionately black by faculty
15 assignment, in some cases, anticipatorily.

16 QUESTION: Well, I know, but the -- at your
17 first step, the school board has no responsibility and
18 couldn't possibly have prevented these demographic changes
19 which caused the student imbalance.

20 MR. HANSEN: Well, I'm not sure that's clear.
21 At the very first step in 1969.

22 QUESTION: Well, that was the finding of the
23 district court.

24 MR. HANSEN: It was the finding of the district
25 court.

1 QUESTION: You may not be sure of it, but --

2 MR. HANSEN: Well, the district court in its
3 finding on this regard is somewhat anomalous. He found
4 that they couldn't have done anything to break this -- the
5 pattern. He also at the same time found that if they had
6 put in magnet schools or grade reorganization, it would
7 have broken the pattern. It's hard to reconcile the
8 district court's conclusion that Your Honor is citing with
9 his findings which hint the other way.

10 QUESTION: Well, the court of appeals didn't
11 upset any of his findings.

12 MR. HANSEN: The court of appeals did not upset
13 any findings. But it's also hard to reconcile the
14 district court's conclusion that the school district did
15 nothing with the district court's earlier decision. In
16 1976, the district court found that between '69 and '76,
17 in the area of student assignment, the school board was
18 affirmatively taking actions that perpetuated the vestiges
19 of student-assignment segregation.

20 QUESTION: But whatever they managed to do
21 really didn't cure the problem, did it? Of student
22 imbalance.

23 MR. HANSEN: They were making it worse. They
24 weren't trying to cure it. In the period '69 to '75, the
25 district court found in '76 they were making it worse.

1 They weren't trying to cure it. And this is precisely the
2 problem.

3 In the context of remedy where we've got a
4 finding of liability here, the question isn't did they
5 cause it after 1969. The question is did they cure it.
6 This Court has held innumerable times that the question in
7 remedy is did the district take actions that had the
8 effect of desegregating the schools.

9 QUESTION: Well, you don't -- I gather that
10 immediately upon the entry of the decree and as soon as
11 neighborhood zones were created and the black schools were
12 closed that there was not this racial imbalance.

13 MR. HANSEN: There was racial imbalance from the
14 very outset. Prior to 1969, the black students were
15 assigned to six all-black schools. After -- in 1969, 59
16 percent of the black students were assigned to seven
17 schools that were disproportionately black. 83 percent of
18 the black students in 1969 were assigned to a small group
19 of 15 schools. And those schools had disproportionately
20 black faculty, had disproportionately black staff.

21 QUESTION: So you disagree with your opponent
22 that as of the date of the compliance with the decree,
23 that there was -- that there was not an imbalance.

24 MR. HANSEN: That's correct. We do disagree on
25 that.

1 QUESTION: Didn't the district court make a
2 finding on that question?

3 MR. HANSEN: The district court made a finding
4 on that question but then went on to say that the finding
5 was irrelevant in some respects, in his view, because you
6 couldn't just achieve compliance in one instant. You had
7 to achieve compliance for at least a longer period of
8 time.

9 QUESTION: Hadn't your clients also conceded at
10 one point in the litigation that there was desegregation
11 after the decree?

12 MR. HANSEN: No. There -- the clients -- we
13 have consistently argued from the very beginning that
14 there were disproportionately assigned schools even in
15 1969. The court does quote one, I think, very
16 infelicitously phrased sentence from the plaintiffs'
17 trial brief, which uses the term desegregation. I think
18 that was intended to say that we do concede that in 1969
19 the black schools themselves were closed.

20 But we do think that in 1969 the school district
21 was confining black children to certain schools, it was
22 assigning black faculty to those schools, and it was
23 assigning black staff to those schools. And then we rely
24 in part on the district court's --

25 QUESTION: Was there objection by the

1 plaintiffs, then, to this decree in '69 because they felt
2 it was inadequate?

3 MR. HANSEN: There was certain objection to the
4 plan in 1969, but the court resolved that objection in the
5 very first year in the favor of the plaintiffs. There was
6 an argument about whether the final black school would be
7 closed, and there was a debate about that in '69.

8 Plaintiffs did not raise objections. I concede
9 plaintiffs did not raise objections in the period '69 to
10 '74 or '75 when the motion was brought. I think that
11 that's in part explainable by the -- by one of counsel
12 having died. But it's also partly, I think, irrelevant.
13 Either the black children in this district were entitled
14 to a desegregation -- desegregated education or they were
15 not.

16 QUESTION: Mr. Hansen, suppose you have a school
17 district that is found to have been violating the law only
18 in faculty assignment and in allocation of resources. It
19 has not been assigning students to schools on a racial
20 basis, but in fact, it has been assigning faculty and
21 allocating resources on a racial basis. Would it be
22 necessary when a remedy for that violation is imposed by
23 the Federal court, that the remedy include student
24 allocation?

25 MR. HANSEN: No. I think you would -- I think

1 the Court would want to look at whether the faculty
2 misallocation and the resource misallocation had had an
3 effect on student assignment.

4 QUESTION: Okay. So the factors can hang
5 separately. It depends on whether one factor affects
6 another one.

7 MR. HANSEN: In the context of a school district
8 that has never been intentionally segregated. As a matter
9 of law, if we were talking about at school district that
10 had never desegregated ever in its history on the basis of
11 student assignment, then I think the factors can operate
12 either in conjunction or separately.

13 If the question is are we going to remedy a
14 school district that has intentionally segregated its
15 schools, then, I think, almost presumptively, or almost
16 inescapably, the factors have to be all remedied and the
17 factors have to be seen together.

18 QUESTION: Well, I mean, is it presumptively or
19 inescapably? If it's just presumptively, I would say the
20 district court here considered it and the presumption no
21 longer stands. He says we can remedy the two problems
22 that still exist without affecting student assignment.

23 MR. HANSEN: I don't think the district court
24 addressed this question. I don't think it addressed the
25 notion that there was a presumption. And I don't think it

1 addressed the interconnection.

2 QUESTION: It addressed the question implicitly.
3 I mean, it certainly thought it was providing as much of a
4 remedy as is now needed to end whatever discrimination
5 there is. And it said it's enough to do it in just these
6 two areas and not in the others.

7 MR. HANSEN: Well, again, we're -- this is --
8 it's an anomalous opinion because it doesn't say precisely
9 that. It says that today and over the last few years
10 there have been things that could have desegregated
11 student assignment further that the district -- that the
12 school district has not done. And it then reaches magnet
13 schools and grade reorganization, both of which the
14 district court says could have had a desegregative effect
15 in the past if they had been used, both of which were not
16 used by the school district under, what I understood this
17 Court's precedence to be, that's almost -- that's enough.

18 But the district court then goes on to somewhat
19 oddly conclude that even though they haven't taken all the
20 steps they needed to desegregate, even in student
21 assignment, they still have taken all the steps needed to
22 desegregate. I find his conclusion puzzling in light of
23 his own finding.

24 I also find his conclusion puzzling in light of
25 the district court's findings in 1976 that the school

1 district was taking actions, affirmative actions, between
2 '69 and '76 that did perpetuate segregation even in the
3 area of student assignment. And it's at that period where
4 the massive, if you will, resegregation occurs in this
5 case. In 1975, just a few -- 6 years after the entry of
6 this order, 73 percent of all the black students were in
7 12 majority black schools. At that point, this was as
8 segregated a school system as it can get, and in some
9 ways, as segregated a school system as it is today. It
10 was in that short period in the early seventies when the
11 resegregation occurred.

12 QUESTION: Well, wait a minute. Segregated in
13 that sense is not against the law. I mean, you're saying
14 it was as segregated.

15 MR. HANSEN: Segregation purely as a result of
16 demographics is not against the law. I concede that. But
17 the district court found in '76 that the student
18 assignment segregation in this district was not purely as
19 a result of demographics. Now, the district court in '86
20 appears to ignore the -- its own '76 holding. I don't
21 know how to explain that, but it does.

22 But in addition to that, I want to re-emphasize
23 --

24 QUESTION: Of course, if we go on that, we --
25 this becomes almost a noncase, if you go on that finding

1 that the school board is then causing imbalance in the
2 school system deliberately.

3 MR. HANSEN: I think this -- if you go on that
4 finding, I agree with the Court, it does become a noncase.
5 But -- and I think there is ample in this record in order
6 to reach that conclusion.

7 But I also think that the question in remedy,
8 the question in a case where there's intentional
9 segregation, as there was here, is whether --

10 QUESTION: Only the court of appeals didn't go
11 on that thesis that you just proposed.

12 MR. HANSEN: Well, the court of appeals didn't
13 explicitly --

14 QUESTION: The court of appeals decided on
15 different grounds, and those are the grounds we're
16 reviewing.

17 MR. HANSEN: The court of appeals did not
18 explicitly do so. The court of appeals said, however, and
19 I think that we agree and that's what we're proposing
20 here, that this is a school district that has never
21 effectively desegregated.

22 QUESTION: Well, is it your understanding that
23 if the Eleventh Circuit's opinion is affirmed that the
24 district court will then be under an immediate duty to
25 direct the school board to take all steps necessary

1 forthwith to have racial balancing throughout DeKalb
2 County in student assignments?

3 MR. HANSEN: No, I don't think that. Yes,
4 mostly, but not entirely. I think that if the district --
5 if the court of appeals is affirmed, I think the district
6 court will be under a duty to break the pattern of
7 segregation that exists in DeKalb County. I think that
8 will include some aspects of student assignment.

9 Now, the district court found --

10 QUESTION: Well if it had been 1970, you answer
11 to my question would have been yes, wouldn't it?

12 MR. HANSEN: Yes, it certainly would have been.

13 QUESTION: What's changed between now and 1970?

14 MR. HANSEN: I don't think anything has
15 significantly has changed. I think --

16 QUESTION: All right, so then the duty is the
17 same. Even though they are caused by demographic changes,
18 there has to be absolute racial equality in student
19 assignments by all means necessary to accomplish that end.
20 Isn't that the reasonable and plausible interpretation of
21 the Eleventh Circuit's position?

22 MR. HANSEN: I think that's a reasonable and
23 plausible interpretation of the Eleventh Circuit's
24 opinion. It's not the one I would adopt. I think the
25 Eleventh Circuit was saying that under the circumstances

1 of this case, it's clear that the school district did take
2 actions that segregated.

3 It's also even more clear to the court of
4 appeals, I think, that the school district had a duty to
5 desegregate and that this has never been a desegregated
6 school district. And I think the court of appeals was
7 saying you have to look at the Green factors as an
8 interconnected, interrelated pattern. And what we have to
9 do is break this pattern.

10 And I think this court of appeals -- all the
11 court of appeals was saying was what this Court has said
12 in Columbus and even in Swann. You have to break the
13 pattern of segregated schools in such a way that the black
14 children of this county receive a desegregated education
15 for some period of time in their lives. The court of
16 appeals was saying that's never happened here and was
17 relying on, I think, some of the findings of the district
18 court in that regard -- magnet school finding and the
19 grade reorganization finding and so on.

20 QUESTION: What do you do about Pasadena?

21 MR. HANSEN: I think Pasadena stands for the
22 proposition that the district court can't readjust --
23 can't minutely readjust boundaries year after year after
24 year after year indefinitely. I mean --

25 QUESTION: Even though there are some other

1 vestiges that are still apparent? Is that right?

2 MR. HANSEN: That is not, I believe, what
3 Spangler stands for, what Pasadena stands for. I think
4 Spangler and the Pasadena case does not say that the
5 vestiges can't be considered interconnected. It doesn't
6 even sort of directly address that question. The only
7 apparent vestige that appeared to remain in Pasadena, at
8 least based on the Court's opinion, was in faculty hiring.

9 Faculty hiring is in fact somewhat different
10 than faculty assignment. Because faculty assignment and
11 student assignment and resource assignment and staff
12 assignment all sort of go together to give you a
13 segregated school system. Faculty hiring plays less a
14 role in giving you a picture or a reality of a segregated
15 school.

16 QUESTION: Would you say that is -- that wasn't
17 even a vestige then, that had to be cured?

18 MR. HANSEN: I think faculty hiring can be a
19 vestige, and I think it has to be cured. I think that --

20 QUESTION: Well, it wasn't cured in that case.

21 MR. HANSEN: It had not been cured.

22 QUESTION: And yet the Court said that the
23 district court wasn't required and shouldn't have tried to
24 keep up with demographic changes.

25 MR. HANSEN: Indefinitely into the future,

1 that's what the Court said.

2 QUESTION: Or even right then.

3 MR. HANSEN: But in Pasadena itself, thereafter,
4 the district court was involved in student assignment
5 issues and in faculty assignment issues. The -- I don't
6 think either the court of appeals or the district court in
7 that case interpreted this Court's opinion to say that
8 student assignment was forever -- inquiry into student
9 assignment was forever barred, because I think that
10 inquiry still needed to be made. All right, is there a
11 pattern here and has this pattern been broken. And I
12 think that it hadn't been broken in Pasadena.

13 QUESTION: May I ask another question about your
14 theory of back in 1976. You say the earlier district
15 court opinion indicates that the school board's actions
16 intentionally contributed to the segregation in the
17 schools. But supposing your view is that maybe it
18 contributed marginally, may have affected maybe 5 percent
19 of the assignment in some way, but 95 percent are still
20 contributable to demographic changes. How do you bring
21 that forward to today? What's the consequence? And if
22 you say, you know, the basic problem still is demographic.

23 MR. HANSEN: I think the -- if the school board
24 has contributed in part to the current segregation in
25 student assignment, as well as the other areas, then I

1 think that children in DeKalb County are entitled to a
2 fully desegregated education. If that job is harder today
3 than it was in 1969 or 1970 because of demographic changes
4 in the district, that's the school board's own fault.
5 They could have desegregated in '69, '70, '71. They could
6 have given us a period of desegregated education in that
7 period. If demographic changes occurred since then, it's
8 not the children who should bear the brunt of that. It's
9 the school district.

10 QUESTION: Do you think they were required to
11 take that action by the terms of the actual decree that
12 was entered or by the overriding obligation under the
13 Constitution?

14 MR. HANSEN: Both. The precise decree that was
15 entered indicated that in several areas they had to take
16 specific actions -- for example, construction. The order
17 said construction had to be used in the future to
18 disestablish the segregated system rather than establish
19 it. And in fact, they used construction exactly the
20 opposite way. They closed schools in the middle of the
21 district that would have been naturally desegregated and
22 opened schools around the periphery of the district.

23 But I also think that in addition the original
24 order said that you had -- couldn't discriminate against
25 black children. And what we find today is that there is

1 discrimination, unequal resources being provided to the
2 black schools. So I think both by the terms of the decree
3 and by general principles under the equal protection
4 clause, I think the duty would have occurred in 1969 and
5 the early seventies, and occurs -- remains in existence
6 today.

7 This school district is not the first school
8 district in history to have tried to take the various
9 parts of a school system and break it into little pieces
10 and look at each one separately. In 1965 in Rogers, the
11 school district argued in this Court that it should be
12 allowed to desegregate grade by grade, and the Court
13 rejected that argument. In Keyes, the school district
14 argued that it should be able to segregate geography by
15 geography, and this Court rejected that argument.

16 In this particular case, in the district court,
17 this school district argued it should be able to
18 desegregate school by school. And the district court
19 properly described that notion as ridiculous. Their
20 argument with respect to the Green factors in this Court
21 is really no different than the arguments that the others
22 have made in the past and have been rejected by this
23 Court. And that is that the condition that offends the
24 Constitution is not a segregated school system, but it's
25 little pieces of segregation, each of which are unrelated

1 and not connected.

2 In our view, the -- in Keyes, this Court said
3 that you look at the Green factors, quote, "considered
4 together," unquote. That remains our view, that you look
5 at the Green factors considered together and their
6 interaction.

7 And what is striking in DeKalb County is that
8 the Green factors did in fact go along together throughout
9 the entire history of DeKalb County. For every single
10 year, if a school was black by student assignment, it was
11 black by faculty assignment as well. It was black by
12 staff assignment as well. And at least for the last few
13 years it's been unequal as well. And for every single
14 year of this school district's history, if a school was
15 white by student assignment, it was also white by teacher
16 assignment, it was also white by staff assignment, and it
17 got more resources.

18 In our view, the court should not -- should
19 affirm the finding of the court of appeals. This Court
20 shouldn't reward this school district that has delayed
21 desegregating, giving the black children of this county a
22 fully desegregated education, for almost 20 years.
23 Instead, what the Court ought to do is affirm the court of
24 appeals' finding and allow the black children in DeKalb
25 County to finally have a desegregated education.

1 QUESTION: Counsel, there is some discussion in
2 the record about subdistricting as a remedy that the board
3 might have chosen. Can you explain to me briefly what
4 that is? Could DeKalb County -- was the suggestion that
5 DeKalb County just break itself into three and then
6 proceed district by district?

7 MR. HANSEN: You can -- what a classic --
8 neighborhood school plan is is there are very tight little
9 neighborhood schools and tight little boundaries around
10 the school. If you take four or five neighborhood schools
11 and consider that your sort of school boundary, then you
12 can assign students. You see that as one school boundary
13 and you can assign students sort of as a group within
14 that. And it can have a desegregative effect.

15 QUESTION: But if that had been true, given the
16 demographics, then southern DeKalb County would have been
17 almost entirely black within the district -- within the
18 subdistrict, would it not?

19 MR. HANSEN: Today that's true. It's not clear
20 that that would have been true if subdistricting had been
21 going on in 1969 or '70 or '71 or '72. DeKalb -- southern
22 DeKalb County is disproportionately black today, but that
23 wasn't true in the early years. The ultimate irony of
24 this case is it was easy to desegregate this school
25 district in the early years, but the school district

1 didn't do that. It assigned -- it continued to do things
2 like assign black faculty and black staff to black
3 schools. We'll never know --

4 QUESTION: Well, the finding is the demographic
5 changes were inevitable. So as I understood that
6 suggestion, if they had adopted geographic subdistricting,
7 say, into three -- northern, central, southern -- you
8 would have had an all black southern district based on the
9 inevitability of the demographic changes. And I find that
10 a very strange suggestion for the petitioners to be urging
11 on the board.

12 MR. HANSEN: If you had done it subdistrict
13 north, central, south, that's exactly correct. If you'd
14 done subdistrict east, middle, west, it's not correct
15 because then you would be drawing from the northern black
16 schools in east and -- the northern white schools in the
17 east and the southern black schools in the east, and the
18 northern white schools in the center. I mean, you can
19 divide your subdistrict in any number of ways, so that
20 depending upon how you draw your subdistrict lines you
21 would not necessarily have the result that Your Honor is
22 suggesting. You might well have a much more desegregated
23 school.

24 QUESTION: I just want to ask you one question
25 about the change in population. Is it all -- the

1 demographic change all attributable to black people moving
2 into the county -- into southern part of the county, or is
3 some of it also white people moving from the south to the
4 northern part of the county?

5 MR. HANSEN: Both.

6 QUESTION: Both. Is there any difference in
7 legal significance between those two changes?

8 MR. HANSEN: No. No. And we don't concede, as
9 I think I've suggested, we don't concede that all of the
10 population -- student assignment population today, can be
11 explained purely by demographics. But the demographic
12 features go both ways. There's a chart particularly, in
13 the joint appendix, that shows how there's been an
14 increase in the number of black people in DeKalb County.
15 Only in the 1975 to 1980 period, then there start to be a
16 decline in white people in DeKalb County and movement into
17 surrounding counties, and also into the northern part of
18 the county.

19 QUESTION: I think I'm looking at the chart
20 you're describing. The interesting thing to me is that in
21 the period of '70 to '75 apparently there is almost as
22 many additional whites in the county as additional blacks.

23 MR. HANSEN: Well, that's right. It wasn't
24 until 1975, as we suggest, that this -- the problems that
25 the school district is suggesting are created by the

1 demographics actually started to occur. And of course, by
2 1975 we already had 73 percent of the black children in
3 the majority black schools. And by the time the whites
4 started to leave the county, we already had the problem
5 that they now complain is giving them -- making it more
6 difficult to desegregate today.

7 All we ask is that the court of appeals'
8 decision be affirmed and that the black children of DeKalb
9 County one day have a desegregated education.

10 QUESTION: Thank you, Mr. Hansen.

11 Mr. Reid, do you have rebuttal? Mr. Lee.

12 REBUTTAL ARGUMENT OF REX E. LEE

13 ON BEHALF OF THE PETITIONERS

14 MR. LEE: It is very easy at this point in time
15 to suggest all kinds of things that should have been done
16 in the past. Once again we have a district court finding
17 that is dispositive, and that is that nothing that could
18 have been done, that was suggested, in the district
19 court's view would have led to desegregation that would
20 have happened any faster than it did under the procedures
21 that were followed.

22 QUESTION: (Inaudible) you and your colleague on
23 the other side, about whether at any point the students
24 were -- the student attendance problem was cured.

25 MR. LEE: Well, this simply represents a shift

1 from the position that they earlier took. I will refer
2 you to the district court's opinion, which says that, on
3 35a, plaintiffs concede --

4 QUESTION: 35a of what, the petitioner's
5 appendix?

6 MR. LEE: I'm sorry, the petition -- the
7 appendix to the cert. of petition. "Plaintiffs concede
8 that this action effectively desegregated the DCSS for a
9 period of time."

10 - QUESTION: Well, your opponent quotes some
11 figures indicates that's just wrong.

12 MR. LEE: Well, I know, but they conceded that
13 in an earlier time according to the district court. I
14 wasn't --

15 QUESTION: And the court of appeals didn't
16 disturb that.

17 MR. LEE: The court of appeals did not. And I
18 want to make this very clear. There is nothing in the
19 court of appeals opinion that even vaguely implies that
20 anything the school board did led to this problem. The
21 court of appeals' opinion rests on a legal foundation and
22 not on a factual foundation. And it cannot be better
23 summarized than in this single sentence which comes from
24 the court of appeals opinion 20a, of the cert. of petition
25 appendix. "We also reject the district court's refusal to

1 require the DCSS to eradicate segregation caused by
2 demographic changes." And that's what's got to be
3 reversed. That's what's causing the mischief.

4 QUESTION: Mr. Lee, may I interrupt you right
5 there?

6 MR. LEE: Yes.

7 QUESTION: Supposing we agree 100 percent with
8 you that that proposition is wrong. Does it necessarily
9 follow that the decree should be vacated?

10 MR. LEE: Yes, it does, Justice Stevens. And
11 I'm -- thank you for asking that.

12 QUESTION: You mean only to that extent, only
13 with respect to that?

14 MR. LEE: Yes, only with respect to that.

15 QUESTION: But no, I'm asking does it -- the
16 relief you ultimately seek is to vacate the decree so you
17 don't ever have to run into court and get permission to --

18 MR. LEE: Yes. And the case really ought to go
19 back to the district court. There is nothing --

20 QUESTION: But you don't say that the entire
21 decree should be vacated.

22 MR. LEE: Oh, no, no, no. We still have proof
23 to make back before the district court.

24 QUESTION: You still have -- you still have a
25 problem of --

1 MR. LEE: We still have these other two. We're
2 ready to make the proof.

3 QUESTION: You're just wanting be free from
4 having to readjust student assignments.

5 MR. LEE: That's right. That's right.

6 QUESTION: The review should be the judgment of
7 the court of appeals in the decree of the district court.

8 MR. LEE: That is correct.

9 QUESTION: That still doesn't answer my
10 question. My question, though, is still supposing that
11 you corrected factor 6 or 5, or whatever it was, as of
12 today, just assume. And you go back to the district
13 court. Are you then entitled to have the decree vacated
14 tomorrow?

15 MR. LEE: We think so. We think so. By the
16 district court, but that's the procedure in which I would
17 proceed.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

20 The case is submitted.

21 (Whereupon, at 11:06 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

89-1290 - ROBERT R. FREEMAN, ET AL., Petitioners V. MILLIE

EUGENE PITTS, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)