

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ROBERT R. FREEMAN, ET AL.,

Petitioners V. WILLIE EUGÈNE 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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20  
21  
22  
23  
24  
25

CONTENTS

|   | PAGE |
|---|------|
| ORAL ARGUMENT OF<br>REX E. LEE, ESQ.<br>On behalf of the Petitioners  | 3    |
| GENERAL KENNETH W. STARR, ESQ.<br>On behalf of the United States, as amicus<br>curiae, supporting the Petitioners | 15   |
| CHRISTOPHER A. HANSEN, ESQ.<br>On behalf of the Respondents   | 23   |
| REBUTTAL ARGUMENT OF<br>REX E. LEE, ESQ.<br>On behalf of the Petitioners  | 48   |

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1 P R O C E E D I N G S

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

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EUGENE PITTS, ET AL.

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

BY Michelle Sanders

(REPORTER)