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BRIEF OF RESPONDENTS

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1014

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

PETITIONER,

-vs-

THE TRANSITIONAL DESEGREGATION PLAN OF TUCKAHOE, *ET AL.*,

RESPONDENTS

BRIEF OF RESPONDENTS

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OPINIONS BELOW

The opinion and order of the United States District Court for the Northern District of Douglas is not yet reported and may be found in the record. The order of the United States Court of Appeals for the Thirteenth Circuit, affirming the decision of the District Court, was made per curiam, without opinion.

JURISDICTION

A formal statement of jurisdiction is omitted pursuant to the Rules of the 1976 Frederick Douglass Moot Court Competition.

STATUTES INVOLVED

Constitutional provisions and statutes relevant to the issues in this case are the Fourteenth Amendment to the United States Constitution; 28 U.S.C. § 1254(1), 1291 and 1343; 42 U.S.C. § 1983; and Rule 23 and 24 of the Federal Rules of Civil Procedure. The foregoing are set forth, in pertinent part, in the Appendices to this Brief.

QUESTIONS PRESENTED

I. Whether the NAACP, a national organization, composed of local chapters through which it acts on matters of local concern, has sufficient legally cognizable interest upon which to ground standing to intervene in a class action, after a decree has been entered approving a compromise settlement, when one of the attorneys representing the class, who had agreed to the settlement, was acting on behalf of the local chapter of the NAACP?

II. Assuming *arguendo* that this Court finds that the NAACP's interest in this litigation is sufficient for standing to intervene, whether its ability to protect that interest is sufficiently jeopardized to allow intervention, where the settlement provides for continuing jurisdiction of the District Court, with quarterly review of the operation of the settlement, and should the settlement prove ineffective, the NAACP has at its disposal a vehicle for immediate redress without any burdens of res judicata, collateral estoppel or *stare decisis*?

III. Assuming *arguendo* that this Court finds that the NAACP's interest in this litigation is subject to impairment, whether that interest has been adequately represented by the local chapter so as to prohibit intervention, where there exists no adverse interest between the NAACP and the local chapter as to the goals sought to be obtained, but rather, only minor differences as to the means to be employed, where there has been no allegation that the local chapter acted collusively or fraudulently in agreeing to the settlement, and where the District Court, pursuant to the status of this litigation as a class action, twice reviewed the adequacy of representation and found it sufficient?

IV. Whether the NAACP has waived any right it may have had to intervene, in that it stood idly by for a five-month period, having notice and knowledge of all that was occurring, without raising any objection to what was transpiring until after a settlement had been negotiated and approved by the District Court?

V. Whether the Transitional Plan for desegregating the city school system, embodied in the settlement agreement, as approved by the District Court, which effectively provides for meaningful integration through the use of faculty and staff reassignment, with stipulated preferential employment provisions, and reassignment of the student body through the use of busing, rezoning through the pairing and closing of schools, and a majority-minority transfer program, so as to assure that no school will have less than a 30% black population, fulfills the mandate of the Fourteenth Amendment?

VI. Whether the Total Plan for desegregation, advocated by the NAACP, which calls for massive busing so as to guarantee a 60% quota of blacks in each school, and insures the eventual resegregation of the entire school system, is so unrealistic and ultimately counter-productive as to be violative of the Fourteenth Amendment?

STATEMENT OF FACTS

In 1960, black parents initiated a class action suit in Federal District Court against the Board of Education of Tuckahoe, Douglas (the Board), to desegregate the public schools (Statement of Facts (R.) 1). The action resulted in an initial integration order in 1963, which was appealed (R. 1). On appeal, the Court of Appeals for the Thirteenth Circuit ordered Tuckahoe to produce a plan that would integrate the schools in the wake of the Denver and Detroit school desegregation decisions (R. 1). On remand, the Federal District Court then ordered the School Board to prepare a plan that would comply with those standards (R. 4). Subsequently, the Court of Ap-

peals approved the Total Integration Plan submitted by the Board, as adopted by the District Court (R. 1).

In May, 1975, the District Court, exercising jurisdiction over the original suit, appointed a Bi-racial Committee to mediate disagreements still existing between the parties (R. 2).

At a hearing for the purpose of receiving comments by members of the class, held on June 18, 1975, the question of representation was heard, and all parties and interested persons were granted an opportunity to object to the establishment of the Bi-racial Committee, and the continued participation by the attorneys of record. No objections were advanced (R. 5). As a result, by voluntary agreement, it was then determined that the plaintiffs were to be represented exclusively by the attorneys of record (R. 5).

Negotiating sessions were held regularly thereafter, which culminated in the formulation of the Transitional Plan of August 28, 1975. The Plan was adopted by the attorneys for the parties pursuant to the settlement agreement and was then presented to the Court for approval. The agreement submitted contained a jointly proposed plan for settlement and final resolution of all issues involved in the litigation. The Court carefully reviewed the plan, and concluded that it had been freely evolved by the parties, together with the Bi-racial Committee previously appointed by the Court, and that the plan was consented to by an attorney of record for each of the parties (O. 35-36).

However, at this point, the Legal Defense Fund, Inc. (LDF), one of the counsel of record for the plaintiff class, suddenly reversed its position at the last moment, and directed its attorney not to sign despite LDF's willing and active participation in the negotiations (R. 5). The national office of the NAACP then claimed for the first time that the plan violated NAACP policy, and directed the local branch to repudiate the agreement (R. 5). The local refused, and in accordance with the terms of the negotiations, its counsel, also of record, signed the agreement (R. 5). Thereafter, the national office suspended the local chapter's officers (R. 5).

The District Court ruled that the plan would be summarily enforced on the grounds that a settlement agreement once entered into cannot be unilaterally repudiated by either party (R. 5). The LDF filed a motion on behalf of the NAACP to intervene in the suit under Fed. R. Civ. P. 24(A) alleging that the interests of the NAACP membership were not adequately represented (R. 5).

The District Court denied the NAACP's motion on the ground that the class was adequately represented, that question having been decided by the Court in its original holding that the class action was maintainable under Rule 23 (R. 5). However, the District Court did allow the NAACP to file an *amicus curiae* brief on the merits of the Transitional Plan.

The Transitional Plan contains detailed provisions regarding the immediate total integration of the administrative staff (O. 5-8) and faculty (O. 8-13). With regard to the integration of the student body, by the start of the next academic year (O. 22), the Transitional Plan provides for an extensive student reassignment program, including busing, rezoning by the

pairing and closing of schools (O. 22-27), and an effective majority-minority transfer program (O. 13-22), which will insure that no school within the system has less than 30% black students (O. 23).

The Total Plan, as proposed by the NAACP, was originally designed by the School Board to achieve the same basic goals as the Transitional Plan. However, overwhelming community opposition to the Total Plan, which included a massive busing program in order to insure that the black student ratio in every school was 60%, a quota reflecting the overall community racial composition, caused the parties to formulate the Transitional Plan (R. 1-2).

The NAACP national appealed the decision of the District Court denying its motion to intervene and upholding the constitutional validity of the Transitional Plan. The Court of Appeals for the Thirteenth Circuit affirmed the lower court's decision, per curiam, without opinion.

The NAACP national then petitioned this Court for a writ of certiorari, which was subsequently granted.

SUMMARY OF ARGUMENT

I

Petitioner cannot intervene in the instant case because it has failed to meet the four criteria set forth in Fed. R. Civ. P. 24 (a).

Petitioner has no interest in the litigation, other than a general interest, which is insufficient ground for intervention. Assuming *arguendo* that this Court finds petitioner's interest sufficient, there is no danger that said interest will be impaired by the decision below, because the District Court has retained continuing jurisdiction, and the present integration plan will be subject to continuous mandatory review and modification, thus providing the petitioner with a vehicle with which to protect its interest.

Assuming *arguendo* that this Court finds that the petitioner's ability to protect its interest has been impaired, the petitioner has failed to demonstrate that it is inadequately represented. There is no adversity of interest between the petitioner and the local chapter, nor has the petitioner alleged the existence of collusive or fraudulent dealings by the local chapter. The District Court twice reviewed the adequacy of representation under Fed. R. Civ. P. 23, and found it to be sufficient.

Furthermore, Fed. R. Civ. P. 24 requires that a right to intervene be exercised by timely motion. Petitioner was inexcusably tardy in making such motion, and therefore has waived all rights to intervention.

II

The Transitional Plan is the only viable means for immediately integrating the Tuckahoe schools in light of practicalities unique to that community.

The plan provides for the immediate desegregation of faculty and administrative staff by a system of reassignment and preferential hiring de-

signed to insure that no individual school can be designated black or white on the basis of the racial composition of its faculty or administrative staff.

In order immediately to integrate the student body, the plan provides a complex formula for student reassignment including busing, rezoning, the pairing and closing of schools, and an effective majority-minority transfer program, designed to insure that no school will have less than 30% black students by the start of the next academic year.

III

The Total Plan proposed by the petitioner is ineffective within the context for which it was designed, in that it provides for massive busing in order to achieve a 60% quota of black students in each school, which will eventually lead to the total resegregation of the school system, in violation of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. The Petitioner Has Failed to Fulfill the Requirements for Intervention as Set Forth in Rule 24 of the Federal Rules of Civil Procedure.

The prerequisites for intervention as of right are set forth in Fed. R. Civ. P. 24 (A) (Appendix C). Subsection (2) of that provision requires that upon timely application, intervention is proper:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A. *The Petitioner has no Legally Cognizable Interest in the Instant Action.*

To support a motion to intervene, the applicant's interest in the transaction must be more than merely general in nature. Rather, it must be of direct and immediate import to the intervenor. *Donaldson v. United States*, 400 U.S. 517, at 531 (1971); *United States v. City of Jackson, Miss.*, 519 F.2d 1147 (5th Cir. 1975).

The petitioner's interest is of a general, public character, much akin to the interest discussed in *Sierra Club v. Morton*, 405 U.S. 727 (1972), where this Court held that public interest in an issue is not sufficient to satisfy the requirements of standing. While that case did not involve a motion to intervene, the Court's analysis of the sufficiency of interest required to sustain standing is clearly relevant to the case at bar.

> . . . there was no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them.
>
> We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense. . . . *Sierra Club, supra*, at 731.

In *Horton v. Lawrence County Board of Education*, 425 F.2d 735 (5th Cir. 1970), the court held that a national teachers' organization could not intervene in an action brought by its state subsidiary. The parent organization had attempted to intervene to protect the rights of a segment of the local's members. The court held that the national did not possess a sufficient interest, in that the case involved purely local issues, with only incidental national implications.

In *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), the defendant School Board did not appeal a desegregation order. The superintendent of the Board subsequently resigned and attempted to appeal, as an individual, by way of intervention. The court held that he had lost all standing when he left his official position. In the same case, parents of school children who were not named parties in the original suit, sought to intervene in the Court of Appeals. The court held that while they had an interest in the transaction, they were not permitted to intervene, because minor disagreements were not sufficient to require intervention where the class had been adequately represented.

In the instant case, the petitioner, like the superintendent in *Smuck*, lacks an individual interest in the litigation sufficient to afford standing to intervene. Nor can the petitioner intervene on behalf of its members who may object to the settlement. While those individuals may themselves possess a sufficient interest, they, like the parents in *Smuck*, were adequately represented below.

The purpose of the local chapters is to represent the interests of local members, NAACP Const. Art. II (Appendix D). By the very structure of the NAACP, only the local chapters can truly perform such a function. The NAACP is composed of local organizations bound together under a national charter, and relies on local members and interests to formulate national policy. While the national officers can act on behalf of the organization in national affairs, they must act through the local chapters to represent the interest of the members on local matters. Thus, the only entity possessed of adequate interest in the instant case is the local chapter, in that this litigation involves local parties and issues, which revolve around facts unique to the city of Tuckahoe.

Similarly, a parent corporation has no *per se* right to intervene in litigation involving a subsidiary. The possibility of some incidental, indirect injury, which flows, if at all, by way of the basic corporate structure, is an insufficient interest. *Commonwealth Edison Co. v. Allis Chalmbers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963). See also *Wrath v. Seldin*, 422 U.S. 490 (1975), holding that a petitioner's reliance on the remote possibility (unsubstantiated by allegations of fact) that its situation might have been better had respondents acted otherwise, is not adequate to satisfy standing.

The petitioner here stands in a position where, at worst, it is subject to a collateral injury to a general interest shared by the vast majority of all Americans. As such, it possesses an insufficient interest in this litigation upon which to ground a right of intervention.

B. *Assuming Arguendo that the Petitioner has a Legally Cognizable Interest in the Instant Action, it has Failed to Demonstrate that its Interest has been Impaired by the Decisions Below.*

Assuming *arguendo* that this Court finds that the petitioner has sufficient interest in this litigation, petitioner has failed to demonstrate that this interest has been impaired.

In determining the extent of impairment, concepts of res judicata, collateral estoppel and stare decisis are no longer the sole tests to be applied, but rather, the issue must be examined in practical terms, as well as on the basis of traditional criteria. *Atlantis Development Corp. v. United States,* 379 F.2d 818, at 823-24 (5th Cir. 1967); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 1967,* 81 Harv. L. Rev. 356, at 401-403 (1967).

The integration plan, as approved, contains two provisions critical to this issue. First, the District Court retains continuing jurisdiction, while secondly, the settlement provides for quarterly review of the plan's effectiveness. The petitioner's interest is well served by these very provisions. Should the plan subsequently be found ineffective, not only is a forum already established in which that ineffectiveness can be immediately dealt with, but the quarterly reviews will provide the best evidence of that ineffectiveness. Thus, the petitioner will have at its disposal a pre-established vehicle for determining the validity of the plan, while the District Court's continuing jurisdiction precludes any obstacles based upon res judicata, collateral estoppel or stare decisis.

Therefore, any contention that the petitioner's nationally or locally oriented interests are impaired by the presently approved integration plan are in direct contradiction to the facts of the instant case.

C. *Assuming Arguendo that the Petitioner has a Legally Cognizable Interest in the Instant Action which is Subject to Possible Impairment, it Has Failed to Demonstrate that it was not Adequately Represented in the District Court.*

1. *The Petitioner has failed to establish that its interests are adverse to those of the local chapter.*

Petitioner's interest is "ending all forms of segregated education" (R. 5). This interest was adequately represented by the local chapter, which, as a member of the national organization, is inexorably bound to the furtherance of that objective. NAACP Const. Art. II (Appendix D).

Disagreements over means, rather than ends, or other collateral matters, are insufficient to destroy unity of interest and adequacy of representation. *Hobson v. Hansen,* 44 F.R.D. 18 (D.D.C. 1968); *United States v. Blue Chip Stamp,* 272 F. Supp. 432 (C.D. Calif. 1968). See also *Spangler v. Pasadena Board of Education,* 427 F.2d 1352 (9th Cir. 1970), holding that parents of school children who were dissatisfied with a desegregation plan, had no right to intervene so that they might press an appeal from the decree. The petitioner not only carries the burden of proving inadequacy of representation, *Afro American Patrolman's League v. Duck,* 503 F.2d

294 (6th Cir. 1974); it must further show that such inadequacy stems from adversity of interest, not merely disagreement over detail.

The petitioner has not alleged any direct injury to its national goals resulting from the local's actions. Rather, it merely complains of the means used by the local to further those goals. While the petitioner's specific plan for desegregation was not adopted, that is insufficient to raise allegations of inadequacy of representation. In *Allegheny Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), the court held that a decision adverse to certain interests does not necessarily mean those interests were not adequately represented. Adequacy of representation is not determined by the outcome of the litigation, but rather by whether the applicant's interest was fairly represented in the agreeing process. *Allegheny, supra.*

In alleging inadequacy of representation, the petitioner must demonstrate that it will be materially affected if intervention is not granted. It has made no such demonstration. In *Hobson v. Hansen, supra*, a school integration suit, several black parents, in attempting to intervene, to voice their dissent to the desegregation plan, failed to make a showing that they or their children would be materially affected by the plan. The court held that mere disagreement was not enough to raise inadequacy of representation.

Clearly, where no adverse interest exists between the petitioner and the local chapter, no grounds for intervention exist.

2. *The Petitioner Has Failed to Establish any Collusion between the Parties in the Proceeding Below.*

Adequacy of representation is often determined by evidence of collusion or bad faith. *Allegheny Corp. v. Kirby, supra.* However, the existence of such a basis for intervention must be alleged. *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844 (5th Cir. 1973); *Allegheny Corp. v. Kirby, supra.*

In the instant case, there have been no such allegations of collusion. That there can be none is clearly evidenced by the detailed and extensive terms of the settlement plan. Thus, the petitioner is unable sufficiently to establish its allegations of inadequacy of representation.

3. *The Issue of Adequacy of Representation Was Previously Addressed by the District Court Pursuant to Federal Rules of Civil Procedure 23.*

Two determinations as to adequacy of representation were made by the District Court independent of the petitioner's motion. One of the threshold requirements of a Rule 23 (Appendix C) class action is that the parties adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). The binding nature and effect upon all class members of the class action judgment necessitates the fair and adequate representation requirement under concepts of due process. *Hansberry v. Lee*, 311 U.S. 32 (1940).

The words "fairly and adequately protect" are to be interpreted in their obvious sense, incorporating such factors as the extent of the named plaintiff's interest in the litigation, *Doglow v. Anderson*, 43 F.R.D. 472 (S.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970), the existence

of conflicting interests within the class, *Schy v. Susquehanna Corp.*, 419 F.2d 1112 (7th Cir. 1970), *cert. denied,* 400 U.S. 826 (1971), the co-extensiveness of those interests, *Cottrell v. Virginia Electric Power Co.*, 62 F.R.D. 516 (D. Va. 1974), and the basic quality of the representation, *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972).

In the instant case, the court below determined that the representative parties did fully, fairly and adequately protect the interests of the class.

Pursuant to Rule 23(e), the District Court again examined all aspects of the litigation, including the issue of adequacy of representation, as a result of its obligation to approve the terms of the settlement. In this investigation as well, the court below found no evidence which would support an allegation of inadequate representation.

Only the petitioner, without support from any other quarter, raises allegations of inadequate representation, allegations which, on their face, are insufficient to give rise to a right of intervention.

D. *The Petitioner Has Waived any Right to Intervene by Failing to Make Timely Application as Required by Rule 24 of the Federal Rules of Civil Procedure.*

Rule 24, while not itself defining "timely application", has been construed to requie that the right to intervene must be exercised within a reasonable time, within the discretion of the trial court. *Cameron v. President and Fellows of Harvard College,* 157 F.2d 993 (1st Cir. 1946).

The courts do not look with favor upon one who is fully aware of what has transpired, and nonetheless fails to act or is unreasonably tardy in moving for intervention. In the instant case, the petitioner could have moved much earlier. The chronology of events, of which petitioner had notice and knowledge, from May through September, 1975, included negotiations, announcement of the proposed settlement, which received wide publicity, the filing of the plan with the District Court and the Court's subsequent approval of the plan after lengthy hearings. The petitioner has slept on its rights, and now, at this late date, asks this Court in effect to destroy what has been accomplished.

Although there are occasions when courts have permitted intervention after judgment, those cases are distinguishable. In *Cuthill v. Ordman-Miller Machine Company,* 216 F.2d 336 (7th Cir. 1954), intervention was allowed after judgment because the party purporting to represent the intervenor had collusively entered an agreement adverse to the intervenor's interest. In *Wolpe v. Poretsky,* 144 F.2d 505 (D.C. Cir. 1944), intervention was granted for purposes of prosecuting an appeal because affected property owners did not learn until after judgment that the zoning commission did not intend to appeal the adverse judgment.

Where the inadequate representation comes to light only after entry of the decree, this is an exception to the general rule forbidding intervention after entry of judgment. However, this exception is narrowly defined, and intervention will be allowed after a final decree only where it is necessary to preserve some right which cannot otherwise be protected. *Wolpe v. Poretsky, supra,* at 508.

In a more analogous case, *Sam Fox v. Glickman Corp.*, 355 F.2d 161 (2d Cir. 1965), the parties to a class action commenced negotiations which culminated in a settlement as to certain areas of disagreement. The court thereupon gave notice that persons interested should show cause why the limited settlement should not be approved. The court denied an intervention motion, by a third party, stating that it had been made after all pretrial procedures had been completed, while the attorneys were preparing for trial on the remaining issues.

Petitioner knew of the entire settlement process, yet failed to object when it had the opportunity. To permit intervention and vacation of the decree now would impose an unwarranted burden on the parties.

II. THE TRANSITIONAL PLAN, APPROVED BY THE DISTRICT COURT PURSUANT TO AGREEMENT BY THE PARTIES BELOW, FULLY IMPLEMENTS THE MANDATE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*) decreed that school desegregation was to take place with all deliberate speed. This obligation was modified in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), and detailed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1 (1971), to the effect that thereafter, dual school systems were to be terminated at once.

The Tuckahoe School Board's Transitional Plan was drafted to conform to the guidelines expressed in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970). Although decided before *Swann, supra, Singleton* is entirely consistent with *Swann*, in that it immediately implemented the unitary school system mandated by *Alexander, supra.*

The *Swann* decision laid down four basic means for achieving integration: the limited use of mathematical ratios, the pairing and grouping of non-contiguous school zones, the use of busing, and majority-minority transfer programs.

The basic thrust of *Swann* was that any remedy for segregation should be suited to the particular context in which it is constructed, and that the test of any plan is the effectiveness of the plan in establishing a unitary school system. These concepts form the basis of the petitioner's plan.

The *Singleton* plan, which rested well within the above-described principles, was two-step in approach, with the first step calling for the immediate desegregation of all faculty and staff, and the second step, to take place no later than the start of the next school year, encompassing the merger of the student body.

A. *The Terms of the Transitional Plan Provide for the Immediate and Total Integration of Both Faculty and Administrative Staff Throughout the Entire School System, in Accordance with the Requirements of the Fourteenth Amendment.*

The desegregation of faculty is a critical aspect of achieving a public school system free from racial discrimination. *United States v. Montgomery*

County Board of Education, 395 U.S. 225 (1969). The faculty and administrative staff portions of the Transitional Plan, which meet the requirements of *Montgomery, supra*, were formulated by first identifying those schools not in compliance with that mandate, and subsequently developing a transfer program analogous to that used in *Singleton.*

As a result of this reorganization, to take place between January 1, 1976, and March 30, 1976, blacks will occupy 20 of the 27 identifiable top level administrative positions, and the filling of any subsequent vacancies will be done in accordance with equal protection.

With regard to faculty, the plan functions through the reassignment of black and white teachers in each school within the system, to comply with the requirement that the ratio of black and white teachers in each individual school must reflect the overall ratio of black and white teachers within the entire system. *Pate v. Dade County School Board*, 434 F.2d 1152 (5th Cir. 1970); *Ellis v. Board of Public Instruction of Orange County, Florida*, 423 F.2d 203 (5th Cir. 1970); *Bradley v. Board of Public Instruction of Pinellas County, Florida*, 431 F.2d 1379 (5th Cir. 1970).

These provisions insure the ultimate goal of impossibility of identification of a school as black or white, based on the racial composition of the faculty. *Swann, supra*, at 18; *United States v. Greenwood Separate School District*, 406 F.2d 1086 (5th Cir. 1969).

B. *The Terms of the Transitional Plan Provide the Only Effective Means Available for the Immediate and Total Integration of the Student Body, as Required by the Fourteenth Amendment.*

The second aspect of any desegregation program is the integration of the student body. The Transitional Plan has dealt with this complex sociological and logistical problem utilizing two of the methods enumerated in *Swann, supra.*

The pupil assignment program, which entails the transportation by bus of 2,761 school students, which complies with this Court's explicit endorsement of the use of busing, *Swann, supra*, at 29-30, is designed to further the goal that no school within the Tuckahoe System will contain less than 30% black students. While this alone will still result in some schools remaining predominantly black, this fact must be analyzed with a view to the black-white ratio of the total school district population, which is 60% black. The constitutional command to desegregate the schools does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Swann, supra*, at 24. Not only does the existence of a minimal number of insufficiently integrated schools not, in and of itself, constitute segregation, but any attempt to enforce a strict school-by-school reflection of the community would raise serious constitutional questions. *Swann, supra*, at 24.

While the pupil assignment program alone does much to ". . . achieve the greatest possible degree of actual desegregation . . .", *Swann, supra*, at 26, within the context of Tuckahoe's population, the School Board has reinstituted, and strengthened, its majority-minority transfer program, which

had previously resulted in the voluntary transfer of 2,000 majority race students to schools in which they were in the racial minority. Such a program has been held to be an indispensable tool to effect total integration. *Swann, supra,* at 26-27.

The pupil assignment program coupled with the majority-minority transfer program will not result in desegregation which reflects, to exact percentages, the racial composition of the community as a whole. Total desegregation in that sense is not required by the Constitution, and indeed carries, under *Swann*, a presumption of unconstitutionality where it results in the application of a quota system. The Tuckahoe Plan does insure that no person will be effectively denied admittance to any school because of race or color, *Alexander, supra.*

In addition to these initial actions taken to desegregate the Tuckahoe schools, the respondents have constructed a rigorous system of quarterly reviews of the actual effectiveness of the plan with an eye toward taking whatever corrective measures are required. Thus, the constitutionality of the plan will be continually reviewed by the respondents, in conjunction with the District Court, which has retained jurisdiction over the operation of the plan for a period of three years. The Transitional Plan, thus viewed in its entirety, promises to work realistically and immediately. *Raney v. Board of Education*, 391 U.S. 443, at 448 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450, at 459-460 (1968), by taking into account those practical limitations inherent in the community which it was designed to serve.

III. THE TOTAL PLAN, AS PROPOSED BY THE PETITIONER, IGNORES THE BASIC FOUNDATIONS UPON WHICH ANY SCHOOL DESEGREGATION FORMULA MUST BE BASED, AND WOULD CONSEQUENTLY DESTROY ANY POSSIBILITY OF ULTIMATE COMPLIANCE WITH THE MANDATE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Total Plan, as advocated by the petitioner, would defeat the purpose for which it was formulated, by requiring 60% blacks in each school in the district, with no more than 5% variation.

Statistics demonstrate that where blacks reach 30% of any school's population, the number of white students in that school begins to decline, as parents of white students fear that the school will ultimately become totally black. Giles, Cataldo & Gatlin, *White Flight and Percent Black: The Tipping Point Re-examined*, 56 Soc.Sci.Q. 85-95 (1975). This results in white families moving out of the district, and the district ultimately does become totally black. Thus, a black population of 60% in each school, as guaranteed by the Total Plan, would assure the eventual resegregation of the entire school system. The decline of white residents in Tuckahoe since the inception of this litigation is hard evidence of that fact (R 1-3).

This resegregation would be impossible to remedy, absent a showing that neighboring school districts implemented policies which operated to contribute to that phenomenon. *Milliken v. Bradley*, 418 U.S. 717, at 745 (1975).

In light of this Court's holding that any plan in which racial segregation is an inevitable consequence is constitutionally impermissible, *Goss v. Mon-*

roe Board of Commissioners, 391 U.S. 450 (1963), the Total Plan stands no less violative of the Constitution than the situation which it would attempt to remedy.

In counterpoint to the above stands the Transitional Plan, which promises to satisfy the mandate of the Fourteenth Amendment by the beginning of the 1967-77 school year, without chaos, and without eventual resegregation. Only such a plan, as will avoid those irreparably debilitating results, can fulfill the mandate of equal protection under the law.

CONCLUSION

As a result of the foregoing, the respondents respectfully request that this Honorable Court affirm the decision below.

Respectfully submitted,
Sherman L. Anderson

Richard M. Humphreys
Counsel for Respondents

APPENDIX A

UNITED STATES CONSTITUTION AND AMENDMENTS

AMENDMENT XIV

Section 1. * * * No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

* * * *

APPENDIX B

FEDERAL STATUTES

28 U.S.C. § 1254(1). Courts of appeals—Certiorari

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * *

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

* * * *

28 U.S.C. § 1343. Civil rights and elective franchise

The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity

secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

* * * *

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 24(A). Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

APPENDIX D

NAACP CONSTITUTION

ARTICLE II

Statement of Objectives. The principal object of the National Association for the Advancement of Colored People shall be to insure the political,

educational, social and economic equality of minority group citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of Federal, state and municipal laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take any other lawful action in furtherance of these objectives consistent with the Articles of Incorporation.

SECTION III:

THE MINORITY CANDIDATE AND THE BAR EXAMINATION

SYMPOSIUM

"The Minority Candidate and the Bar Examination"

May 1, 1976

UCLA School of Law

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Attorney
Los Angeles County Bar Association

Panelists: Clyde O. Bowles
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National Conference of Bar Examiners

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