Nos. 99-2389, 99-2391

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TERRY BELK, et al.,

Plaintiffs-Appellants,

WILLIAM CAPACCHIONE, et al.,

Plaintiffs-Appellees

v.

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether the district court, in declaring the school district unitary, assessed the district's compliance with prior desegregation orders under the proper legal standards.

2. Whether the district court erred in finding that a unitary school district does not have a compelling interest in integrated schools.

IDENTITY AND INTEREST OF THE UNITED STATES AS AMICUS CURIAE

The United States Department of Justice enforces the Equal Protection Clause of the Fourteenth Amendment in the desegregation of public schools, see 42 U.S.C. 2000c-6, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which

prohibits discrimination by recipients of federal funds. The Department of Education enforces Title VI in administrative proceedings and administers the Magnet Schools Assistance Program of 1984 (MSAP), 20 U.S.C. 7201 et seq., a grant program that assists local desegregation efforts. The United States thus has an interest in the development of the law regarding the use of race in educational contexts. The United States files this brief pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE CASE

These appeals arise out of Swann v. Charlotte-Mecklenburg Board of Education, filed in 1965. The district court entered an initial desegregation order in 1965. Swann v. Charlotte-Mecklenburg Bd. of Educ., 243 F. Supp. 667 (W.D.N.C.). In 1969, it made extensive findings of the vestiges of discrimination that remained in the Charlotte-Mecklenburg Schools (CMS), Swann, 300 F. Supp. 1358, 1359 (W.D.N.C.), and ordered a new plan in 1970. Swann, 311 F. Supp. 265, 266 (W.D.N.C.). The Supreme Court upheld the plan, which used noncontiguous satellite zones and pairing of inner-city black schools with outlying white schools. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25, 30 (1971).

The district court entered several orders adjusting the plan. In 1974, the court approved guidelines under which CMS agreed to formulate a transfer policy to help maintain desegregation. Swann, 379 F. Supp. 1102, 1106 (W.D.N.C. 1974). The order required CMS to monitor transfers, providing that

student transfers "must not jeopardize the racial composition of any other school" and that "[c]apacities and allocation of maximum numbers of students that may be drawn from each other school attendance area, by race, are to be designated." Id. at 1108. The order also required CMS to site new schools to aid integration: "Buildings are to be built where they can readily serve both races." Id. at. 1107. The order required CMS to ensure that "the burdens of busing" were shared equally. Id. at 1104, 1106. The next year, the district court found that the school board was properly implementing remedial measures and removed the case from the active docket. Swann, 67 F.R.D. 648 (W.D.N.C. 1975).

A few years later, white parents challenged as unconstitutional the plan's limit that no school was to be more than 50% black. Martin v. Charlotte-Mecklenburg Bd. of Educ., 475 F. Supp. 1318, 1335-1336 (W.D.N.C. 1979), aff'd, 626 F.2d 1165 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). The court rejected plaintiffs' claim, finding that the system had never achieved a racially-neutral attendance pattern, so race-conscious remedies should continue. The district court also found that a school board has inherent authority to assign students to promote integration even without a remedial obligation, and this Court affirmed on this basis, finding that the school board "is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students." 626 F.2d at 1167. The district court also

had cited CMS's failures to monitor transfers and to locate new schools where they can "readily serve both races." 475 F. Supp. at 1330-1332, 1334 (quotations omitted).

To respond to the growth of the black student population, the court in 1980 modified the order to allow the elementary schools' black population to vary from the district-wide average. Capacchione, 57 F. Supp. 2d at 238-239. In 1992, to help "phase out pairing," CMS implemented a new student-assignment plan, including the magnet school program at issue here that sought a 60% white, 40% black balance in magnet schools. See id. at 239, 287.

STATEMENT OF THE FACTS

1. In September 1997, William Capacchione filed suit after CMS denied his daughter, Cristina, admission into a magnet school. Under the magnet program, the percentage of spaces are allocated by race to reflect the system-wide balance. Capacchione, 57 F. Supp. 2d at 287. CMS refused Cristina admission because "non-black" slots were full. Capacchione sought declaratory, injunctive, and compensatory relief under 42 U.S.C. 1983 and 2000d, and later amended his complaint to allege that CMS should be declared unitary. CMS responded that the desegregation order in Swann required race-conscious assignment policies. The court returned Swann to the active docket and consolidated it with Capacchione. 57 F. Supp. 2d at 240.

2. At the bench trial, CMS and the Swann plaintiffs argued that CMS was not yet unitary, presenting evidence of continued

disparities in the areas outlined in Green v. County School Board, 391 U.S. 430 (1968).[1] See Capacchione, 57 F. Supp. 2d at 243. CMS defended the magnet school program as a proper remedy for de jure segregation and had not developed a plan to be used if declared unitary (see Tr. 6/21 at 49).[2]

CMS also presented evidence that even if declared unitary, it has a compelling interest in maintaining integrated schools. Three sociologists, Drs. Rosalyn Mickelson, Robert Peterkin, and William Trent, submitted reports describing the benefits of integrated schools, focusing on the importance of teaching children of all races to "learn to work productively together" (Def. Exh. 6, Peterkin Report). Mickelson testified that desegregated education benefits students in terms of academic achievement, occupational preparation, and "civic values * * * important for living and working in a pluralistic diverse democracy * * *" (Tr. 6/15 at 77). The Chancellor of the University of North Carolina at Charlotte testified that diverse classrooms "better prepare[] students for what they will find when they enter the work force and that is diverse teams and diverse clients or customers" (Tr. 6/16 at 189). The Superintendent of CMS testified that integrated public schools help students understand the differences and similarities among

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[1] The parties will address the voluminous evidence relating to unitary status so, given our word limitation, we will not repeat that discussion. Rather, we will address the evidence relating to race-conscious efforts in a unitary status context.

[2] References to "Tr. _/_ at __" are to the date and page number of the trial transcript.

students of different races (Tr. 6/8 at 55). The First Union Corporation's Chairman testified that it was important for people of different races to be able to work together as a team in a multi-racial environment (Tr. 6/9 at 3, 6-10, 14).

Two CMS teachers and the Chair of CMS's Board of Education testified similarly that diverse schools produce better-educated children less likely to engage in racial stereotyping (Tr. 5/14 at 174, Tr. 6/17 at 64, Tr. 6/21 at 4-5). Plaintiff-intervenors produced no witnesses disputing these benefits, and two of their witnesses conceded the value of integrated education (see Tr. 4/26 at 5, 126-127; Tr. 4/29 at 255-256). Dr. David Armor, a sociologist, testified that diversity in education "add[s] other elements to the overall social experience of children" (Tr. 4/29 at 4, 256).

3. The district court declared the school system unitary. Capacchione, 57 F. Supp. 2d at 228. The court stated that in analyzing unitariness, it must assess: "(1) whether the school board has eliminated the vestiges of past discrimination to the extent practicable and (2) whether the school board has in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan, such that it is unlikely for the board to return to its former ways." Id. at 243.

The district court found that the current conditions in the school system were not the product of the prior dual system. The court, however, did not refer specifically to CMS's obligations under the 1974 order to ensure that transfers do not harm

desegregation at sending schools, finding generally that one CMS employee "'kept an eye on [magnet transfers] so that there wouldn't be a run on the bank so to speak from any one school.'" Id. at 250 n.23.

In addressing facilities, sitings, and the burdens of transportation, the court found that CMS's school siting decisions "have not constituted an intentional or neglectful pattern of discrimination." Id. at 251. The court found that current burdens were acceptable, even if the great percentage of white students bused are bused voluntarily so that they can attend magnet schools. Id. at 253. The district court imposed on CMS and the Swann plaintiffs the burden of proving that CMS intended to discriminate with respect to facilities and found that they had not met their burden. Id. at 262-267.

Considering the challenge to the magnet program, the district court held that the program's racial limits on enrollment were not constitutional, even as a remedy for de jure segregation. Id. at 290. The district court then addressed CMS's possible consideration of race in a unitary setting. Id. at 291. The court rejected CMS's interest in promoting the benefits of integration, id. at 291-292, and prohibited CMS from using any "race-based lotteries, preferences, and set-asides in student assignment." Id. at 292. On December 30, 1999, this Court stayed the injunction.

SUMMARY OF ARGUMENT

The district court erred as a matter of law in granting full unitary status without directly assessing CMS's compliance with the specific obligations imposed by prior desegregation orders, as Freeman v. Pitts, 503 U.S. 467, 492 (1992), requires. The district court made no specific finding that CMS had complied with earlier court orders by controlling the number of children who could transfer out of any particular school to a magnet/optional school, or that CMS had sited schools to "readily serve both races," thereby ensuring that the burden of transportation fell equally on black and white students, and creating the potential for long-term integration. Swann v. Charlotte-Mecklenburg Bd. of Educ., 379 F. Supp. 1102, 1104, 1107-1108 (W.D.N.C. 1974). The district court also failed to make the proper findings regarding whether CMS had complied with the Green factor requiring equality of facilities given the evidence of disparities related to the age of schools, and that "most facilities in the predominately black inner city are older while facilities in the predominately white suburbs are newer." Capacchione, 57 F. Supp. 2d at 265. The United States takes no position on the ultimate question whether CMS has, in fact, attained unitary status. We are concerned, however, that in evaluating that question, the district court failed to make findings that closely assess whether CMS complied fully with the court's desegregation orders.

The district court also erred in reaching out to consider whether preserving integrated schools may ever be a compelling interest even after unitary status is achieved. This Court reserved that issue in Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), petition for cert. pending (U.S. Jan. 31, 2000) (No. 99-1274); Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), petition for cert. pending, 68 U.S.L.W. 3433 (U.S. Dec. 23, 1999) (No. 99-1069), and, in Tuttle, vacated an injunction almost identical to the injunction entered here. The court below should have refrained from deciding the constitutionality of the non-remedial use of race until CMS adopts a post-unitary plan using race.

The district court also erred in concluding that no non-remedial interest can ever justify race-conscious assignment policies. For the past 40 years, courts have recognized the significant benefits of integrated education and a school board's authority voluntarily to assign students to integrate elementary and secondary schools. See Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Congress, viewing integration as an important national priority, has funded local efforts to promote public school integration. See Emergency School Aid Act of 1972 (ESAA), 20 U.S.C. 1601 (repealed 1978, Pub. L. No. 95-561); Magnet School Assistance Program of 1984 (MSAP), 20 U.S.C. 7201 et seq. These judicial and congressional judgments are supported by academic research and experience in the CMS schools confirming that all

children realize significant academic and social benefits from integrated education.

ARGUMENT

I

IN DECLARING CMS UNITARY, THE DISTRICT COURT FAILED TO ASSESS FULLY CMS'S COMPLIANCE WITH THE DESEGREGATION ORDERS UNDER PROPER LEGAL STANDARDS

In general, "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system." Freeman v. Pitts, 503 U.S. 467, 485 (1992); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County Sch. Bd., 391 U.S. 430, 437 (1968). Until full unitary status is achieved, school districts operating under a desegregation decree are judged by whether their actions effectively further or inhibit desegregation. "To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system." Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090, 1095 (11th Cir. 1992)(footnote omitted); see also Wright v. Council of Emporia, 407 U.S. 451, 460 (1972) ("* * * proposal must be judged according to whether it hinders or furthers the process of school desegregation"). The school district is under "a 'heavy burden' of showing that actions that increase[] or continue[] the effects of the dual system serve

important and legitimate ends." Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (quoting Green, 391 U.S. at 439).

In determining whether a school district has complied with these obligations, "'[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.'" Freeman, 503 U.S. at 492 (quoting Board of Educ. v. Dowell, 498 U.S. 237, 249-250 (1991)). Although the term unitary is not a "precise concept," "it conveys the central idea that a school district that was once a dual system must be examined in all its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn." 503 U.S. at 486-487.

Given the effects of a declaration of unitary status on minority plaintiffs, who were once the victims of prolonged discrimination, it is critical that courts make a unitary status finding with the care and precision the Supreme Court has demanded. The district court here appears to have articulated the correct general legal standards governing the unitary status analysis. Capacchione, 57 F. Supp. 2d at 243. In conducting that analysis, however, the court must make findings that closely assess whether the school system fully complied with federal court orders. While the United States takes no position on the question whether CMS has, in fact, achieved unitary status, we

are concerned that in evaluating this question, the district court erred as a matter of law in failing to assess fully CMS's compliance with prior orders.

A. Transfers

The 1974 court order required CMS to monitor transfers to optional (or magnet schools) through "strict and central control" to ensure that the sending schools did not become more segregated. Swann, 379 F. Supp. at 1108. CMS was to designate the "[c]apacities and allocation of maximum numbers of students that may be drawn from each other school attendance area, by race * * *." Ibid. In 1979, in Martin, the court found CMS had not complied with these requirements and contemplated their future enforcement. 475 F. Supp. at 1336-1337.

In finding CMS unitary, the court found that "magnet schools have had an overall effect of countering resegregative trends" and that there was a CMS employee who "'kept an eye on [magnet transfers] so that there wouldn't be a run on the bank so to speak from any one school.'" Capacchione, 57 F. Supp. 2d at 250 n.23. The court made no direct finding, however, either that CMS had instituted controls to limit transfers on a per-school basis, as the earlier orders required, or that compliance with that obligation was impossible.

Failure to monitor transfers may result in more racially identifiable schools. See Martin, 475 F. Supp. at 1337-1338 ("the resegregative tendency of an unrestricted or unmonitored transfer policy or practice can, history teaches, undo much of

what the community has struggled to accomplish"). The Swann plaintiffs presented evidence illustrating that unlimited transfers of white students since 1992 into the magnet schools transformed several sending schools from schools that were well-integrated to schools that were more heavily minority (see e.g., Swann Pl. Exh., Stevens Report; Swann Pl. Br. 28-30). In light of the specific obligation the 1974 desegregation order imposed on CMS to exercise "strict and central control" over admissions to magnet schools to ensure that "[r]eassignments * * * [do] not jeopardize the racial composition of any other school," Swann, 379 F. Supp. at 1108, it was incumbent on the district court to address this evidence and make direct and detailed findings regarding CMS's compliance with its obligation. A finding that a CMS employee "kept an eye" on magnet transfers, Capacchione, 57 F. Supp. 2d at 250 n.23, is not, in our view, the equivalent of a specific finding of compliance, or an explanation why compliance was not achievable.

B. Transportation and Facility Siting

The 1974 order requires that "[b]uildings are to be built where they can readily serve both races" and that population trends not be the sole determinant of school siting. Swann, 379 F. Supp. at 1107. Compliance with this requirement was integrally related to portions of the 1974 order requiring equality in the racial burdens of transportation. Id. at 1104. The district court found in 1979 that CMS had not complied, and had no plans to comply, with these requirements. Martin, 475 F.

Supp. at 1332, 1334 ("[i]n short, the construction, location and closing of schools have continued to make desegregation more difficult"). The court also noted the critical interrelation of school siting and "other major components of the pupil assignment features of the desegregation efforts of the court * * *." Id. at 1332.

The district court's 1974 desegregation order, as explained by the 1979 decision in Martin, imposed on CMS the obligation to site schools "where they can readily serve both races," at least in part to avoid the discriminatory burden of transportation on black children. Compliance with this obligation is also likely to lead to a system that will be more integrated in the long run. In making siting decisions, therefore, CMS was not to follow "the outward migration of new housing, away from the center city." 475 F. Supp. at 1339. Rather, the court order required CMS either to build schools in integrated areas or between white and black areas, thus allowing the schools to be naturally integrated or integrated by methods that would equalize the transportation burdens on children from black and white neighborhoods.

In considering unitariness in 1999, the district court referred to CMS's obligation under the 1974 order regarding school siting, and then found that CMS's siting decisions "have not constituted an intentional or neglectful pattern of discrimination," new schools generally have "racially balanced student populations," and CMS "routinely consider[s] racial diversity in school siting decisions." 57 F. Supp. 2d at 250-

252. The court, acknowledging that "almost all newly constructed schools have been built in predominately white areas," noted the difficulty of drawing contiguous assignment zones in the inner city that result in racially-balanced schools, given the high concentration of black residents there. Id. at 252. The district court also recognized the difficulties associated with busing white students in from the suburbs given rush hour traffic patterns. Ibid. Finally, the district court noted that these siting decisions "were the subject of public hearings, televised meetings, and ballot referenda," and found it significant that "neither the Swann Plaintiffs nor anyone else ever called on the Court to intervene in these school siting decisions." Id. at 253.[3]

The court's general findings about the siting decisions do not demonstrate that CMS complied with the court's orders to site schools where they would be naturally integrated or centrally located, or explain that compliance was impossible. The court, therefore, never specifically determined that CMS adhered to the legal obligations of the 1974 court order. The issue is not, as the district court assumed, whether CMS achieved racial balance in newly-opened schools in white areas by busing black students from the inner-city. See id. at 251-252. That effort does not comply with the orders, has a limited long-term impact on

[3] While the district court suggests that there were opportunities for the Swann plaintiffs or others to object to CMS's siting decisions, the Swann plaintiffs contest this characterization of the process (Br. 26).

desegregation, and results in disproportionate transportation burdens on black students. Nor is it sufficient, as the district court found, that CMS had considered racial impact, along with other factors, in making siting decisions. Id. at 251. The district court's discussion of the difficulty in "draw[ing] contiguous assignment zones" downtown, given the high concentrations of black students in the inner city, id. at 253, similarly fails to explain why schools were not built between the inner city and the outlying white neighborhoods, or at least in areas that were equally accessible. While there may have been insurmountable traffic problems if schools were located equidistant from black and white areas, the district court did not make that finding.

If there were reasons explaining the non-compliance in this area critical to the future of desegregation in the Charlotte-Mecklenburg Schools, the court did not make such findings. The Swann plaintiffs contend (Br. 11-12), that 25 of 28 new schools were sited in newly-developing white areas and 91% of the students assigned to satellite schools and involuntarily bused from their neighborhoods are black. Given those facts, and the rigorous requirements Freeman imposes on district courts evaluating unitary status applications, the district court was obligated to provide that critical analysis.[4]

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[4] Referring to site selection, the district court, citing Freeman, stated that the "'passage of time'" permits the district court to look at the obligations "in a new light." 57 F. Supp. 2d at 251. Freeman, however, focused on student assignment

(continued...)

C. Facilities.

The district court's analysis of equality of facilities also appears flawed in two respects. First, the district court's analysis was affected by its erroneous decision to require the Swann plaintiffs and CMS to prove that any current disparities in facilities were the result of discriminatory intent exercised either before or after entry of the desegregation orders. See Capacchione, 57 F. Supp. 2d at 267 ("the Swann Plaintiffs have failed to * * * establish[] the requisite discriminatory intent and causation"). Proof of discriminatory intent in this proceeding is not required. Once a school system is implementing a desegregation order, it must not only refrain from intentional discrimination, "but also [] render decisions that further desegregation and help to eliminate the effects of the previous dual school system." Harris v. Crenshaw County Bd. of Educ., 968 F.2d 1090, 1095 (11th Cir. 1992). The school district's action is judged by its effect -- "whether it hinders or furthers the process of school desegregation" -- regardless of intent. Wright, 407 U.S. at 460.

The district court in this case, however, appears to have concluded that unequal facilities with a disparate impact on minority students were irrelevant to its inquiry in the absence of discriminatory purpose, and that error appears to have

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[4](...continued)
patterns caused by private choice substantially uncontrolled by school authorities, 503 U.S. at 494, whereas decisions on site location are totally under the control of school authorities.

infected its factual findings. For example, the court found, on the one hand, that "facilities needs are spread across the system without regard to the racial composition of its schools." Capacchione, 57 F. Supp. 2d at 265. But on the other hand, the court acknowledged that there are disparities tied to the age of the schools, and that "the inference is that differences in building standards tend to affect black students disproportionately." Ibid. The court's conclusion that "this does not amount to racial discrimination," ibid., seems to rest on the court's view that disparate impact alone is not sufficient without proof of discriminatory intent.

The district court repeated this analysis at another point, making the twin findings that "inequities in facilities exist throughout the system regardless of the racial makeup of the school," but that there are "disparities [which] are generally the result of the relative ages of the facilities." Id. at 266. The court found that the pattern of disparities based on age had no significance -- whatever its impact on minority students -- because it does not show "discriminatory intent." Id. at 266. While the court noted that some older schools with inferior facilities were predominantly white, id. at 265, and some older predominantly black schools had been renovated and provided with superior facilities, id at 266, it did not dispute the proposition that there is a disparity in facilities based on the age of schools, which has a disproportionate adverse impact on minority students. Thus, the district court's findings do not

establish that CMS followed its obligation to avoid even those actions that unintentionally affect students on the basis of race. As amicus curiae, we are not in a position to provide an independent assessment of the evidence in the case, but any determination of the question of unitary status must be untainted by the erroneous view that discriminatory intent is required.

Second, we do not believe the court accurately analyzed the ultimate effect on desegregation that results from the existing disparities tied to the age of schools. In holding that the system was unitary with regard to facilities, the district court acknowledged that there were disparities in the quality of facilities based on the age of the schools and recognized that those older facilities are primarily in the "predominantly black inner city." Capacchione, 57 F. Supp. 2d at 265. Green, however, states that a segregated system exists where schools can be "identified" by race by considering such factors as "faculty, staff, transportation, extracurricular activities and facilities." 391 U.S. at 435. School systems must take action to ensure that facilities across the school system are generally equal, so that racial identification cannot be made by the quality of facilities alone -- the school system must create not white or black schools, but "just schools." Id. at 442.

Once unitary, a school system may, absent proof of discriminatory intent, discontinue mandatory assignment of students by race in favor of neighborhood zoning. Were a system allowed during desegregation to create better facilities in white

residential areas and inferior facilities in minority areas, that pattern, along with a declaration of unitary status, can easily create a racially unfair system where minority students attend inferior schools.

It is doubtful that a school district should be declared unitary if it has created a pattern of disparate quality of schools that corresponds closely to the racial area in which the school sits and from which the school ultimately will draw its student body. The district court should have examined more closely the pattern of disparities to determine whether that pattern, coupled with a declaration of unitary status, will create the potential for racially disparate educational services under the guise of unitariness, ultimately allowing the system to "revert to its former ways." 57 F. Supp. 2d at 243.

II

THE DISTRICT COURT ERRED IN HOLDING THAT A UNITARY SCHOOL DISTRICT MAY NEVER CONSIDER RACE IN ADMISSIONS

A. The District Court Decided An Issue That Was Not Necessary To The Judgment

The district court erred by prohibiting CMS from considering race before CMS had even developed a post-unitary status plan. The district court, after holding CMS unitary, held that no non-remedial interest may justify race-conscious action. See Capacchione, 57 F. Supp. 2d at 291-292. The magnet school program under review was implemented long before CMS was declared unitary, and there was no evidence that CMS intended to maintain

the specific limits on attendance in the magnet schools after being declared unitary.[5]

Even if it were appropriate for the district court to consider whether the racial limits on the magnet program were constitutional in a non-remedial context, the court should have limited its consideration to whether the program was narrowly tailored, consistent with this Court's holding in Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), petition for cert. pending (U.S. Jan. 31, 2000) (No. 99-1274). Issued shortly after the district court's decision here, Tuttle held that Arlington's diversity program was not narrowly tailored, avoiding the broader question whether non-remedial integration can ever be a compelling interest. Id. at 707.

Where a court is able to decide a difficult constitutional question on a narrow ground, the Supreme Court has counseled, as in Tuttle, avoidance of the broader issue. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217 (1995) (addressing the separation-of-powers question rather than the due process claim, since the former was the narrower constitutional ground and had no implications for Fourteenth Amendment challenges); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) ("[t]he Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"

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[5] Under Texas v. Lesage, 120 S. Ct. 467, 468 (1999), Capacchione was not entitled to damages because Cristina's lottery number was so high that she would not have been admitted to the magnet program even if race had not been considered in admissions. 57 F. Supp. 2d at 288 n.50.

(quotations omitted)). Because the district court unnecessarily reached the broader issue here, its injunction should be vacated, as this Court vacated the similarly broad injunction in Tuttle.

B. CMS Has A Compelling Interest In Preserving Integrated Schools

Even if the issue were properly presented, the district court erred in holding that only a remedial purpose can justify race-conscious action. Capacchione, 57 F. Supp. 2d at 291. In defending the constitutionality of its policy, CMS argued that it has a compelling interest in avoiding the resegregation of its elementary and secondary schools. Maintaining an integrated school system is a value that is sufficiently established as part of national policy to be deemed compelling.

1. Language in several Supreme Court cases supports a school district's compelling interest in ensuring that children of different races attend school together. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), the Supreme Court discussed the importance of education in preparing children for participation in society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Relying upon social science research, Brown concluded that segregated education deprives minority children of equal educational benefits. 347 U.S. at 493-495 & n.11. In Washington v. Seattle School District No. 1, 458 U.S. 457, 472 (1982), the Court noted that "it should be equally clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'" (quoting Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting)).

The Supreme Court has approved race-conscious governmental action to promote integration even where remedying de jure segregation is not an issue. Almost 30 years ago, the Supreme Court in this case endorsed the non-remedial authority of local school officials voluntarily to consider race or ethnicity in student assignments:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities * * *.

Swann, 402 U.S. 1, 16 (1971); see also North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy"); Board of Educ. v. Harris, 444 U.S. 130, 141-142 (1979) (through financial aid to school districts, Congress was trying to eliminate de facto segregation that could not be remedied by the courts); Lee v. Nyquist, 318 F. Supp. 710, 712-713 (W.D.N.Y. 1970), aff'd, 402

U.S. 935 (1971) (striking down state statute prohibiting school officials from considering race in student assignments to avoid racial isolation).

In the higher education context, the Court in Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978), struck down an admissions scheme that set aside a specific number of places for minorities. A majority of the Court, however, reversed the lower court's decision and found that a university could employ race-conscious measures even though it had not engaged in prior de jure segregation. See 438 U.S. at 272 (Powell, J.); 438 U.S. at 325-326 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). In Bakke, Justice Powell specifically identified the promotion of diversity in student enrollments as a compelling interest, 438 U.S. at 311-315, and Justice O'Connor wrote in concurrence in Wygant v. Jackson Board of Education, 476 U.S. 267, 286 (1986), that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest" (citing Bakke). As this Court noted in Tuttle, 195 F.3d at 704-705, the Supreme Court has never held that a non-remedial interest such as preserving integration is not a compelling interest.[6]

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[6] The Court's statement in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989), that the use of race should be "reserved for remedial settings," should be seen in the context of a public contracts case that was defended on only remedial

(continued...)

This Court, in Martin, upheld CMS's plan requiring the reassignment of students on the basis of race without relying on a remedial justification. "The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students." 626 F.2d at 1167 (citing Swann, 402 U.S. at 16).

More recently, this Court twice reserved the question whether there are non-remedial interests that would justify race-conscious action. In Tuttle, 195 F.3d at 703-704, this Court applied strict scrutiny to a lottery in which race was a factor for admission into an alternative school. The Court addressed narrow tailoring only, stating that "nothing in Bakke or subsequent Supreme Court decisions clearly forecloses the possibility that diversity may be a compelling interest." Id. at 705 (footnote omitted). Holding that an admissions policy that engages in "straight racial balancing" to achieve that interest is not narrowly tailored, id. at 707, this Court vacated an

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[6](...continued)
grounds. In Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), the Court did not address whether diversity or promoting integration might be a compelling interest, but noted, without criticism, that Justice Powell had applied strict scrutiny in Bakke. 515 U.S. at 218, 224. In Hunter v. Regents of the University of California, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999), the court found that Croson and other cases considering race in remedial or noneducational settings had "no bearing on the question whether a non-remedial interest, such as the operation of a research-oriented elementary school * * * can serve as a compelling interest sufficient to survive strict scrutiny," and held that the school had demonstrated such a compelling interest.

injunction prohibiting the school district from any consideration of race and ordered an evidentiary hearing "to give the School Board an opportunity to present alternative admissions policies." Id. at 708. In Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), petition for cert. pending, 68 U.S.L.W. 3433 (U.S. Dec. 23, 1999) (No. 99-1069), this Court also assumed diversity could be a compelling interest, finding, as in Tuttle, that the transfer policy was not narrowly tailored. 197 F.3d at 131.

2. A clear national policy favoring integrated education is reflected in federal legislation designed to help integrate elementary and secondary schools regardless of the cause of segregation. Congress endorsed race-conscious efforts in elementary and secondary school assignments because it found that elimination of racial isolation has significant educational benefits. In 1972, Congress enacted the Emergency School Aid Act (ESAA), Pub. L. No. 92-318, §§ 702-720, 86 Stat. 354 (codified at 20 U.S.C. 1601 (1972)), which provided federal financial support for desegregation-related actions. Congress's purpose was to eliminate racial isolation, regardless whether there was or had been de jure discrimination. See S. Rep. No. 61, 92d Cong., 1st Sess. 6 (1971); Harris, 444 U.S. at 141-142.

ESAA's legislative history reflects Congress's view that promoting integration is of the highest priority, because "racially integrated education improves the quality of education for all children * * *." H.R. Rep. No. 576, 92d Cong., 1st Sess.

10 (1971). The Senate Report recognized that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both [minority and nonminority children]." S. Rep. No. 61, 92d Cong., 1st Sess. 7 (1971). "Whether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." Id. at 6.

In 1984, Congress enacted the Magnet Schools Assistance Program (MSAP), Pub. L. No. 98-377, 98 Stat. 1299, to continue to provide financial assistance to eliminate de jure or de facto segregation. In reauthorizing MSAP in 1994, Congress again found: "It is in the best interest of the Federal Government to * * * continue the Federal Government's support of * * * school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. 7201(5)(A).

3. Educational and sociological research demonstrates the substantial benefits of desegregation. Some research has shown that school desegregation enhances achievement of African-American students.[7] Other studies have demonstrated increased

[7] Janet W. Schofield, Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in Handbook Of Research On Multicultural Education 597, 599-602 (James A. Banks ed., 1995); U.S. Comm'n on Civil Rights, (continued...)

rates of high school graduation, college attendance, and college graduation; and better occupational prospects among African-American students who have attended integrated schools.[8] Research also indicates that, in the long term, "desegregation may help break a cycle of racial isolation," leading to better acceptance of racially mixed residential and occupational settings among both African Americans and whites.[9] CMS proffered one study that concluded: "[t]he research evidence is impressive that students who graduate from racially mixed schools often are better prepared for adult roles and will encounter fairer career opportunities and less segregation in their adult lives." Jomills H. Braddock II & James M. McPartland, The Social and Academic Consequences of School Desegregation, in Equity and Choice 5, 70 (Feb. 1988) (proffered as Def. Exh. 73). While this evidence was not admitted at trial, this Court should consider the body of published evidence illustrating that promoting integration in elementary and secondary schools is a compelling governmental interest.

4. CMS also presented evidence below reflecting the undisputed opinion that the integration of CMS schools has

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[7](...continued)
Racial Isolation in the Public Schools 91 (1967).

[8] Schofield, supra, at 605-606; James M. McPartland & Jomills H. Braddock II, Going to College and Getting a Good Job: The Impact of Desegregation, in Effective School Desegregation: Equity, Quality, and Feasibility, 141, 146-149 (Willis D. Hawley ed., 1981).

[9] Schofield, supra, at 610; U.S. Commission on Civil Rights, supra, at 109-112.

benefitted all students. See pp. 5-6, supra. Significantly, plaintiff/intervenors' experts agreed that it was important to preserve integration in the Charlotte-Mecklenburg Schools (Tr. 4/26 at 5, 126-127; Tr. 4/29 at 255-256).

C. Until CMS Adopts A Post-Unitary Plan, The District Court Has No Basis Upon Which To Decide Its Constitutionality

CMS should not be foreclosed at this stage, when it has just been declared unitary, from determining whether to implement any race-conscious action to preserve the integration achieved after 30 years of desegregation efforts. If the unitary status declaration is upheld and CMS develops a student assignment plan under which race is one factor considered, the district court may then be asked to engage in the fact-intensive analysis of whether the school district's plan was geared specifically toward achieving the benefits of an integrated education. This Court in Tuttle and Eisenberg held that a program incorporating system-wide racial balancing would not be narrowly tailored in a non-remedial context. Tuttle, 195 F.3d at 707; Eisenberg, 197 F.3d at 131. Beyond that, this Court has not determined what measures would be narrowly tailored to achieve the benefits of integrated education.

CONCLUSION

This court should assess the record on unitary status under the proper legal standards and hold that the district court erred in enjoining CMS from considering race after being declared unitary.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Based on the word-count in the word-processing system, the brief contains 6962 words. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

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CERTIFICATE OF SERVICE

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