HARRY BRIGGS, JR., ET AL.,
Appellants,

—vs.— No. 101

R. W. ELLIOTT, Chairman, J. D. CARSON, ET AL., Members of Board of Trustees of School District No. 22, Clarendon County, S. C., et al.,
Appellees.

Washington, D.C.
Tuesday, December 9, 1952.

The above-entitled cause came on for oral argument at 3:15 p.m.,

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

THURGOOD MARSHALL, ESQ., *on behalf of the Appellants.*

JOHN W. DAVIS, ESQ., *on behalf of the Appellees.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: Case No. 101, *Harry Briggs, Jr., et al.*, against *Roger W. Elliott, Chairman, J. D. Carson, et al., Members of Board of Trustees of School District No. 22, Clarendon County, South Carolina, et al.*

THE CLERK: Counsel are present.

OPENING ARGUMENT OF THURGOOD MARSHALL, ESQ., ON BEHALF OF APPELLANTS

MR. MARSHALL: May it please the Court:

This case is here on direct appeal from the United States District Court for the Eastern District of South Carolina. The issue raised in this case was clearly raised in the pleadings, and was clearly raised throughout the first hearing. After the first hearing, on appeal to this Court, it was raised prior to the second hearing. It was raised on motion for judgment, and there can be no question that from the beginning of this case, the filing of the initial complaint, up until the present time, the appellants have raised and have preserved their attack on the validity of the provision of the South Carolina Constitution and the South Carolina statute.

The specific provision of the South Carolina Code is set forth in our brief at page ten, and it appears in appellees' brief at page fourteen, and reads as follows:

> It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race.

That is the Code provision.

The constitutional provision is, again, on page ten of our brief, and is:

> Separate schools shall be provided for children of the white races—

This is the significant language:

> . . . and no child of either race shall ever be permitted to attend a school provided for children of the other race.

Those are the two provisions of the law of the State of South Carolina under attack in this particular case.

At the first hearing, before the trial got under way, counsel for the appellees in open court read a statement in which he admitted that, although prior to that time they had decided that the physical facilities of the separate schools were equal, they had concluded finally that they were not equal, and they admitted in open court that they did not have equality; and at the suggestion of senior Judge Parker, this was made as an amendment to the answer, and the question as to physical facilities from that stage on was not in dispute.

At that time, counsel for the appellants, however, made the position clear that the attack was not being made on the "separate but equal" basis as to physical facilities, but the position we were taking was that these statutes were unconstitutional in their enforcement because they not only produced these inevitable inequalities in physical facilities, but that evidence would be produced by expert witnesses to show that the governmentally imposed racial segregation in and of itself was also a denial of equality.

I want to point out that our position is not that we are denied equality in these cases. I think there has been a considerable misunderstanding on that point. We are saying that there is a denial of equal protection of the laws, the legal phraseology of the clause in the Fourteenth Amendment, and not just this point as to equality, and I say that because I think most of the cases in the past have gone off on the point of whether or not you have substantial equality. It is a type of provision that, we think, tends to get us into trouble.

So, pursuing that line, we produced expert witnesses, who had surveyed the school situation, to show the full extent of the physical inequalities, and then we produced expert witnesses. Appellees in their brief comment say that they do not think too much of them. I do not think that the district court thought too much of them. But they stand in the record as unchallenged as experts in their field, and I think we have arrived at the stage where the courts do give credence to the testimony of people who are experts in their fields.

On the question that was raised a minute ago in the other case about whether or not there is any relevancy to this classification on a racial basis or not, in the case of the testimony of Dr. Robert Redfield—I am sure the Court will remember his testimony in the *Sweatt* case—the district court was unwilling to carry the case over an extra day. Dr. Redfield was stuck with the usual air travel from one city to another. And by agreement of counsel and

with approval of the court, we placed into the record Dr. Redfield's testimony.

If you will remember, Dr. Redfield's testimony was to this effect; that there were no recognizable differences from a racial standpoint between children, and that if there could be such a difference that would be recognizable and connected with education, it would be so insignificant as to be unworthy of anybody's consideration. In substance, he said, on page 161 of the record—I think it is page 161—that given a similar learning situation, a Negro child and a white child would tend to do about the same thing. I think I have it here. It is on page 161:

> Question: As a result of your studies that you have made, the training that you have had in your specialized field over some twenty years, given a similar learning situation, what, if any difference, is there between the accomplishment of a white and a Negro student, given a similar learning situation?
>
> Answer: I understand, if I may say so, a similar learning situation to include a similar degree of preparation?
>
> Question: Yes.
>
> Answer: Then I would say that my conclusion is that the one does as well as the other on the average.

He has considerable testimony along the lines. But we produced testimony to show what we considered to be the normal attack on a classification statute, that this Court has laid down the rule in many cases set out in our brief, that in the case of the object or persons being classified, it must be shown: one, that there is a difference in the two; two, that the state must show that the difference has a significance with the subject matter being legislated; and the state has made no effort up to this date to show any basis for that classification other than that it would be unwise to do otherwise.

Witnesses testified that segregation deterred the development of the personalities of these children. Two witnesses testified that it deprives them of equal status in the school community, that it destroys their self-respect. Two other witnesses testified that it denies them full opportunity for democratic social development. Another witness said that it stamps him with a badge of inferiority. The summation of that testimony is that the Negro children have road blocks put up in their minds as a result of this segregation, so that the amount of education that they take in is much less than other students take in.

The other significant point is that one witness, Dr. Kenneth Clark, examined the appellants in this very case and found that they were injured as a result of this segregation. The court completely disregarded that.

I do not know what clearer testimony we could produce in an attack on a specific statute as applied to a specific group of appellants.

The only evidence produced by the appellees in this case was one witness who testified as to, in general, the running of the school system and the difference between rural schools and consolidated schools, which had no basis whatsoever on the constitutional question.

Another witness, E. R. Crow, was produced to testify as to the new bond issue that was to go into effect after the hearing in this case, at which time they would build more schools as a result of that money. That testimony was admitted into the record over objection of the appellants. The appellants took the position that anything that was to be talked about in the future was irrelevant to a constitutional issue where a personal and present right was asserted. However, the court overruled the objection. Mr. Crow testified.

Then he was asked as to whether or not it would not be "unwise" to break down segregation in South Carolina. Then Mr. Crow proceeded to testify as an expert. He had six years of experience, I think, as superintendent of schools, and prior to that time he was principal of a high school in Columbia. He testified that it would be unwise. He also testified that he did not know but what the legislature would not appropriate the money.

On cross-examination he was asked as to whether or not he meant by the first statement that if relief was granted as prayed, the appellees might not conform to the relief, and Judge Parker made a very significant statement which appears in the record, that, "If we issue an order in this case, it will be obeyed, and I do not think there is any question about it."

On this second question on examination, when he was asked, who did he use as the basis for his information that this thing would not work in the South, he said he talked to gangs of people, white and colored, and he was giving the sum total of their testimony, or rather their statements to him. And again on cross-examination he was asked to name at least one of the Negroes he talked to, and he could not recall the name of a single Negro he had ever talked to. I think the basis of his testimony on that point should be weighed by that statement on cross-examination.

He also said that there was a difference between what happened in northern states, because they had a larger number of

Negroes in the South, and they had a larger problem because the percentage of Negroes was so high. And again on cross-examination, he was asked the specific question:

> Well, assuming that in South Carolina the population was 95 percent white and five percent colored, would your answer be any different?

And he said, no, he would make the same answer regardless.

That is the only evidence in the record for the appellees here. They wanted to put on the speech of Professor Odom, and they were refused the right to put the speech in, because, after all, Professor Odom was right across in North Carolina and could have been called as a witness.

So here we have a record that has made no effort whatsoever—no effort whatsoever—to support the legislative determinations of the State of South Carolina. And this Court is being asked to uphold those statutes, the statute and the constitutional provision, because of two reasons. One is that these matters are legislative matters, as to whether or not we are going to have segregation. For example, the majority of the court in the first hearing said, speaking of equality under the Fourteenth Amendment:

> How this shall be done is a matter for the school authorities and not for the court, so long as it is done in good faith and equality of facilities is offered.

Again the court said, in Chief Judge Parker's opinion:

> We think, however, that segregation of the races in the public schools, so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the Federal courts are powerless to interfere.

So here we have the unique situation of an asserted federal right which has been declared several times by this Court to be personal and present, being set aside on the theory that it is a matter for the state legislature to decide, and it is not for this Court. And that is directly contrary to every opinion of this Court.

In each instance where these matters come up in what, if I may say "sensitive" field, or whatever I am talking about—civil rights, freedom of speech, et cetera—at all times they have this position: The majority of the people wanted the statute; that is how it was passed.

There are always respectable people who can be quoted as in support of a statute. But in each case, this Court has made its own independent determination as to whether that statute is valid. Yet

in this case, the Court is urged to give blanket approval that this field of segregation and, if I may say, this field of racial segregation, is purely to be left to the states, the direct opposite of what the Fourteenth Amendment was passed for, the direct opposite of the intent of the Fourteenth Amendment and the framers of it.

On this question of the sensitiveness of this field, and to leave it to the legislature, I know lawyers at times have a hard time finding a case in point. But in the reply brief, I think that we have a case in point that is persuasive to this Court. It is the case of *Elkison* v. *Deliesseline*, a decision by Mr. Justice William Johnson, appointed to this Court, if I remember, from South Carolina. The decision was rendered in 1823. And in 1823, Mr. Justice Johnson, in a case involving the State of South Carolina, which provided that where free Negroes came in on a ship into Charleston, they had to put them in jail as long as the ship was there and then put them back on the ship—and it was argued by people arguing for the statute that this was necessary, it was necessary to protect the people of South Carolina, and the majority must have wanted it and it was adopted—Mr. Justice Johnson made an answer to that argument in 1823, which I think is pretty good law as of today. Mr. Justice Johnson said:

> But to all this the plea of necessity is urged; and of the existence of that necessity we are told the state alone is to judge. Where is this to land us? Is it not asserting the right in each state to throw off the Federal Constitution at its will and pleasure? If it can be done as to any particular article it may be done as to all; and, like the old confederation, the Union becomes a mere rope of sand.

There is a lot of other language and other opinions, but I think that this is very significant.

MR. CHIEF JUSTICE VINSON: Mr. Marshall, what emphasis do you give to the words, "So long as equality of rights is preserved"?

MR. MARSHALL: In Judge Parker's opinion—

MR. CHIEF JUSTICE VINSON: Yes.

MR. MARSHALL: —of physical facilities, because he ends up in this statement, and makes it, I think, very clear. On the second hearing, on three or four occasions, he made it clear that segregation was not involved in the case any longer.

MR. JUSTICE REED: Segregation or equality of rights?

MR. MARSHALL: He said that segregation was out of the case, and that we had disposed of it. And page 279—I think I marked it—yes, sir, the question was asked of me about building the schools overnight, and down near the end of the page he mentions the fact of segregation:

> Well, I understand you do not admit that any conditions exist that require segregation. I understand that.
>
> MR. MARSHALL: Yes, sir, that is right.
>
> JUDGE PARKER: But that has been ruled on by the Court. What we are considering now is the question: whether the physical facilities, curricula—

MR. CHIEF JUSTICE VINSON: —"and the other things that can be made equal, without the segregation issue, are being made equal?"

MR. MARSHALL: He is talking about physical facilities.

MR. CHIEF JUSTICE VINSON: He is also talking about the curricula, "and the other things that can be made equal."

MR. MARSHALL: I am sorry I mentioned that, sir. I considered curricula in the physical facilities.

MR. CHIEF JUSTICE VINSON: That is a shorthanded question.

MR. MARSHALL: Yes, sir. But again on page 281 they asked the question of whether something can be done, and I said that they could break down segregation. Judge Dobie said, "Let that alone."

Judge Parker said, "That is the same question."

So I think for all intents and purposes, the district court ruled out the question of all of this argument that segregation had the effect on these children to deny the children their rights under the Constitution, and they passed upon curricula, transportation, faculty, and schools. At the second hearing, the report showed that they were making progress. The schools still were not equal. But the question was that if they proceeded the way they were as of March of last year, they would be equal as of the September just past.

But in this case in the trial we conceived ourselves as conforming to the rule set out in the *McLaurin* and the *Sweatt* cases, where this Court held that the only question to be decided was the question as to whether or not the action of the state in maintaining its segregation was denying to the students the equal protection of the laws.

Of course, those decisions were limited to the graduate and professional schools. But we took the position that the rationale, if you please, or the principle, to be stronger, set out in those cases would apply just as well down the line, provided evidence could be introduced which would show the same type of injury.

That is the type of evidence we produced, and we believed that on the basis of that testimony the district court should properly have held that in the area of elementary and high schools the same type of injury was present as would be present in the *McLaurin* or the *Sweatt* case.

However, the district court held just to the contrary, and said that there was a significant difference between the two. That is, in the *Sweatt* case it was a matter of inequality, and in the *McLaurin* case, McLaurin was subject to such humiliation, etcetera, that nobody should put up with it, whereas in this case, we have positive testimony from Dr. Clark that the humiliation that these children have been going through is the type of injury to the minds that will be permanent as long as they are in segregated schools, not theoretical injury, but actual injury.

We believe that on the basis of that, on that narrow point of *Sweatt* and *McLaurin*—on that I say, sir, that we do not have to get to *Plessy* v. *Ferguson*; we do not have to get to any other case, if we lean right on these two cases. We believe that there is a broader issue involved in these two cases, and despite the body of the law, *Plessy* v. *Ferguson, Gong Lum* v. *Rice,* the statement of Chief Justice Hughes in the *Gaines* case, some of the language in the *Cumming* case, even though not applicable as to here—we also believe that there is another body of law, and that is the body of law on the Fifth Amendment cases, on the Japanese exclusion cases, and the Fourth Amendment cases, language that was in *Nixon* v. *Herndon*, where Mr. Justice Holmes said that the states can do a lot of classifying that nobody can see any reason for, but certainly it cannot go contrary to the Fourteenth Amendment; then the language in the *Skinner* case, the language of Mr. Justice Jackson in his concurring opinion in the *Edwards* case.

So on both the Fourteenth Amendment and the Fifteenth Amendment, this Court has repeatedly said that these distinctions on a racial basis or on a basis of ancestry are odious and invidious, and those distinctions, I think, are entitled to just as much weight as *Plessy* v. *Ferguson* or *Gong Lum* v. *Rice.*

MR. CHIEF JUSTICE VINSON: Mr. Marshall, in *Plessy* v. *Ferguson*, in the Harlan dissent—

MR. MARSHALL: Yes, sir.

MR. CHIEF JUSTICE VINSON: Do you attach any significance

when he is dealing with illustrations of the absence of education?

MR. MARSHALL: Yes, sir. I do not know, sir. I tried to study his opinions all along. But I think that he was trying to take the position of the narrow issue involved in this case, and not touch on schools, because of the fact that at that time—and this is pure speculation—at that time the public school system was in such bad shape, when people were fighting compulsory attendance laws, they were fighting the money to be put in schools, and it was in a state of flux. But on the other hand, in the majority opinion, the significant thing, the case that they relied on, was the *Roberts* case, which was decided before the Fourteenth Amendment was even passed.

MR. JUSTICE FRANKFURTER: But that does not do away with a consideration of the *Roberts* case, does it?

MR. MARSHALL: No, sir, it does not.

MR. JUSTICE FRANKFURTER: The significance of the *Roberts* case is that that should be considered by the Supreme Court at a time when that issue was rampant in the United States.

MR. MARSHALL: Well, sir, I do not know about those days. But I cannot conceive of the *Roberts* case being good for anything except that the legislatures of the states at those times were trying to work out their problems as they best could understand. And it could be that up in Massachusetts at that time they thought that Negroes—some of them were escaping from slavery, and all—but I still say that the considerations for the passage of any legislation before the Civil War and up to 1900, certainly, could not apply at the present time. I think that every race has made progress, but I do not believe that those considerations have any bearing at this time. The question today is—

MR. JUSTICE FRANKFURTER: They do not study these cases. But may I call your attention to what Mr. Justice Holmes said about the Fourteenth Amendment?

> The Fourteenth Amendment itself as an historical product did not destroy history for the state and substitute mechanical departments of law . . .

MR. MARSHALL: I agree, sir.

MR. JUSTICE FRANKFURTER: Then you have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that.

MR. MARSHALL: I do not know of any other proposition, sir, that we could consider that would say that because a person who is as white as snow with blue eyes and blond hair has to be set aside.

MR. JUSTICE FRANKFURTER: Do you think that is the case?

MR. MARSHALL: Yes, sir. The law of South Carolina applies that way.

MR. JUSTICE FRANKFURTER: Do you think that this law was passed for the same reason that a law would be passed prohibiting blue-eyed children from attending public schools? You would permit all blue-eyed children to go to separate schools? You think that this is the case?

MR. MARSHALL: No, sir, because the blue-eyed people in the United States never had the badge of slavery which was perpetuated in the statutes.

MR. JUSTICE FRANKFURTER: If it is perpetuated as slavery, then the Thirteenth Amendment would apply.

MR. MARSHALL: But at the time—

MR. JUSTICE FRANKFURTER: Do you really think it helps us not to recognize that behind this are certain facts of life, and the question is whether a legislature can address itself to those facts of life in spite of or within the Fourteenth Amendment, or whether, whatever the facts of life might be, where there is a vast congregation of Negro population as against the states where there is not, whether that is an irrelevant consideration? Can you escape facing those sociological facts, Mr. Marshall?

MR. MARSHALL: No, I cannot escape it. But if I did fail to escape it, I would have to throw completely aside the personal and present rights of those individuals.

MR. JUSTICE FRANKFURTER: No, you would not. It does not follow because you cannot make certain classifications, you cannot make some classifications.

MR. MARSHALL: But the personal and present right that I have to consider, like any other citizen of Clarendon County, South Carolina, is a right that has been recognized by this Court over and over again. And so far as the appellants in this case are concerned, I cannot consider it sufficient to be relegated to the legislature of South Carolina where the record in this Court shows their consideration of Negroes, and I speak specifically of the primary cases.

MR. JUSTICE FRANKFURTER: If you would refer to the record of the case, there they said that the doctrine of classification is not excluded by the Fourteenth Amendment, but its employment by state legislatures has no justifiable foundation.

MR. MARSHALL: I think that when an attack is made on a statute on the ground that it is an unreasonable classification, and competent, recognized testimony is produced, I think then the least that the state has to do is to produce something to defend their statutes.

MR. JUSTICE FRANKFURTER: I follow you when you talk that way.

MR. MARSHALL: That is part of the argument, sir.

MR. JUSTICE FRANKFURTER: But when you start, as I say, with the conclusion that you cannot have segregation, then there is no problem. If you start with the conclusion of a problem, there is no problem.

MR. MARSHALL: But Mr. Justice Frankfurter, I was trying to make three different points. I said that the first one was peculiarly narrow, under the *McLaurin* and the *Sweatt* decisions. The second point was that on a classification basis, these statutes were bad. The third point was the broader point, that racial distinctions in and of themselves are invidious. I consider it as a three-pronged attack. Any one of the three would be sufficient for reversal.

MR. JUSTICE FRANKFURTER: You may recall that this Court not so many years ago decided that the legislature of Louisiana could restrict the calling of pilots on the Mississippi to the question of who your father was.

MR. MARSHALL: Yes, sir.

MR. JUSTICE FRANKFURTER: And there were those of us who sustained that legislation, not because we thought it was admirable or because we thought it comported with human notions or because we believed in primogeniture, but for different reasons, that it was so imbedded in the conflict of the history of that problem in Louisiana that we thought on the whole that was an allowable justification.

MR. MARSHALL: I say, sir, that I do not think—

MR. JUSTICE FRANKFURTER: I am not taking that beside this case. I am not meaning to intimate any of that, as you well know, on this subject. I am just saying how the subjects are to be dealt with.

MR. MARSHALL: But Mr. Justice Frankfurter, I do not think that segregation in public schools is any more ingrained in the South than segregation in transportation, and this Court upset it in the *Morgan* case. I do not think it is any more ingrained.

MR. JUSTICE FRANKFURTER: It upset it in the *Morgan* case on the ground that it was none of the business of the state; it was an interstate problem.

MR. MARSHALL: That is a different problem. But a minute ago the very question was raised that we have to deal with realities, and it did upset that. Take the primary case. There is no more ingrained rule than there were in the cases of *McLaurin* and *Sweatt*, the graduate school cases.

MR. JUSTICE FRANKFURTER: I am willing to suggest that this problem is more complicated than the simple recognition of an absolute *non possumus*.

MR. MARSHALL: I agree that it is not only complicated. I agree that it is a tough problem. But I think that it is a problem that has to be faced.

MR. JUSTICE FRANKFURTER: That is why we are here.

MR. MARSHALL: That is what I appreciate, Your Honor.

But I say, sir, that most of my time is spent down in the South, and despite all these predictions as to what might happen, I do not think that anything is going to happen any more except on the graduate and professional level. And this Court can take notice of the reports that have been in papers such as The New York Times. But it seems to me on that question, this Court should go back to the case of *Buchanan* v. *Warley*, where on the question as to whether or not there was this great problem, this Court in *Buchanan* v. *Warley* said:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

In this case, granting that there is a feeling of race hostility i South Carolina, if there be such a thing, or granting that there i that problem, we cannot have the individual rights subjected t this consideration of what the groups might do. For example, i was even argued that it will be better for both the Negro and th so-called white group. This record is not quite clear as to who is i

the white group, because the superintendent of schools said that he did not know; all he knew was that Negroes were excluded. So I imagine that the other schools take in everybody.

So it seems to me that insofar as this case is concerned, whereas in the Kansas case there was a finding of fact that was favorable to the appellants—in this case the opinion of the court mentions the fact that the findings are embodied in the opinion, and the court in that case decided that the only issue would be these facilities, the curriculum, transportation, etcetera.

In the brief for the appellees in this case and the argument in the lower court, I have yet to hear anyone say that they denied that these children are harmed by reason of this segregation. Nobody denies that, at least up to now. So there is a grant, I should assume, that segregation in and of itself harms these children.

Now, the argument is made that because we are drawn into a broader problem down in South Carolina, because of a situation down there, that this statute should be upheld.

So there we have a direct cleavage from one side to the other side. I do not think any of that is significant. As a matter of fact, I think all of that argument is made without foundation. I do not believe that in the case of the sworn testimony of the witnesses, statements and briefs and quotations from magazine articles will counteract what is actually in the brief.

So what do we have in the record? We have testimony of physical inequality. It is admitted. We have the testimony of experts as to the exact harm which is inherent in segregation wherever it occurs. That I would assume is too broad for the immediate decision, because after all, the only point before this Court is the statute as it was applied in Clarendon County. But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem, to assign children on any reasonable basis they want to assign them on.

MR. JUSTICE FRANKFURTER: You mean, if we reverse, it will not entitle every mother to have her child go to a nonsegregated school in Clarendon County?

MR. MARSHALL: No, sir.

MR. JUSTICE FRANKFURTER: What will it do? Would you mind spelling this out? What would happen?

MR. MARSHALL: Yes, sir. The school board, I assume, would

find some other method of distributing the children, a recognizable method, by drawing district lines.

MR. JUSTICE FRANKFURTER: What would that mean?

MR. MARSHALL: The usual procedure—

MR. JUSTICE FRANKFURTER: You mean that geographically the colored people all live in one district?

MR. MARSHALL: No, sir, they do not. They are mixed up somewhat.

MR. JUSTICE FRANKFURTER: Then why would not the children be mixed?

MR. MARSHALL: If they are in the district, they would be. But there might possibly be areas—

MR. JUSTICE FRANKFURTER: You mean we would have gerrymandering of school districts?

MR. MARSHALL: Not gerrymandering, sir. The lines could be equal.

MR. JUSTICE FRANKFURTER: I think that nothing would be worse than for this Court—I am expressing my own opinion—nothing would be worse, from my point of view, than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.

MR. MARSHALL: No, sir. As a matter of fact, sir, we have had cases where we have taken care of that. But the point is that it is my assumption that where this is done, it will work out, if I might leave the record, by statute in some states.

MR. JUSTICE FRANKFURTER: It would be more important information in my mind to have you spell out in concrete what would happen if this Court reverses and the case goes back to the district court for the entry of a decree.

MR. MARSHALL: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

For example, the colored child that is over here in this school would not be able to go to that school. But the only thing that would come down would be the decision that whatever rule you

set in, if you set in, it shall not be on race, either actually or by any other way. It would violate the injunction, in my opinion.

MR. JUSTICE FRANKFURTER: There is a thing that I do not understand. Why would not that inevitably involve—unless you have Negro ghettoes, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with them, or vice versa—why would it not involve Negro children saying, "I want to go to this school instead of that school"?

MR. MARSHALL: That is the interesting thing in this procedure. They could move over into that district, if necessary. Even if you get stuck in one district, there is always an out, as long as this statute is gone.

There are several ways that can be done. But we have instances, if I might, sir, where they have been able to draw a line and to enclose—this is in the North—to enclose the Negroes, and in New York those lines have on every occasion been declared unreasonably drawn, because it is obvious that they were drawn for that purpose.

MR. JUSTICE FRANKFURTER: Gerrymandering?

MR. MARSHALL: Yes, sir. As a matter of fact, they used the word "gerrymander."

So in South Carolina, if the decree was entered as we have requested, then the school district would have to decide a means other than race, and if it ended up that the Negroes were all in one school, because of race, they would be violating the injunction just as bad as they are by violating what we consider to be the Fourteenth Amendment now.

MR. JUSTICE FRANKFURTER: Now, I think it is important to know, before one starts, where he is going. As to available schools, how would that cut across this problem? If everything was done that you wanted done, would there be physical facilities within such drawing of lines as you would regard as not evasive of the decree?

MR. MARSHALL: Most of the school buildings are now assigned to Negroes, so that the Negro buildings are scattered around in that county. Now, as to whether or not lines could be properly drawn, I say quite frankly, sir, I do not know. But I do know that in most of the southern areas—it might be news to the Court—there are very few areas that are predominantly one race or the other.

MR. JUSTICE FRANKFURTER: Are you going to argue the District of Columbia case?

MR. MARSHALL: No, sir. If you have any questions, I would try, but I cannot bind the other side.

MR. JUSTICE FRANKFURTER: I just wondered, in regard to this question that we are discussing, how what you are indicating or contemplating would work out in the District if tomorrow there were the requirement that there must be mixed groups.

MR. MARSHALL: Most of the schools in the District of Columbia would be integrated. There might possibly be some in the concentrated areas up in the northwest section. There might be. But I doubt it. But I think the question as to what would happen if such decree was entered—I again point out that it is actually a matter that is for the school authorities to decide, and it is not a matter for us, it seems to me, as lawyers, to recommend except where there is racial discrimination or discrimination on one side or the other.

But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. And the testimony in many instances is along that line.

So in South Carolina, if the district court issued a decree—and I hasten to add that in the second hearing when we were prevented from arguing segregation, the argument was made that on the basis of the fact that the schools were still unequal, we should get relief on the basis of the *Sipuel* decision—the court said in that case, no, that the only relief we could get would be this relief as of September, and in that case the court took the position that it would be impossible to break into the middle of the year. If I might anticipate a question on that, the point would come up as to, if a decree in this case should happen to be issued by the district court, or in a case similar to this, as to whether or not there would be a time given for the actual enrollment of the children, etcetera, and changing of children from school to school. It would be my position in a case like that, which is very much in answer to the brief filed by the United States in this case—it would be my position that the important thing is to get the principle established and if a decree were entered saying that facilities are declared to be unequal and that the appellants are entitled to an injunction, and then the district court issues the injunction, it would seem to me that it would go without saying that the local school board had the time to do it. But obviously it could not do it overnight, and it might take six months to do it one place and two months to do it another place.

Again, I say it is not a matter for judicial determination. That would be a matter for legislative determination.

I would like to save my fifteen minutes for rebuttal.

MR. JUSTICE JACKSON: Coming back to the question that Justice Black asked you, could I ask you what, if any, effect does your argument have on the Indian policy, the segregation of the Indians? How do you deal with that?

MR. MARSHALL: I think that again that we are in a position of having grown up. Indians are no longer wards of the Government. I do not think that they stand in any special category. And in all of the southern states that I know of, the Indians are in a preferred position so far as Negroes are concerned, and I do not know of any place where they are excluded.

MR. JUSTICE JACKSON: In some respects, in taxes, at least, I wish I could claim to have a little Indian blood.

MR. MARSHALL: But the only time it ever came up was in the—

MR. JUSTICE JACKSON: But on the historical argument, the philosophy of the Fourteenth Amendment which you contended for does not seem to have been applied by the people who adopted the Fourteenth Amendment, at least in the Indian case.

MR. MARSHALL: I think, sir, that if we go back even as far as *Slaughter-House* and come up through *Strauder*, where the Fourteenth Amendment was passed for the specific purpose of raising the newly freed slaves up, etcetera, I do not know.

MR. JUSTICE JACKSON: Do you think that might not apply to the Indians?

MR. MARSHALL: I think it would. But I think that the biggest trouble with the Indians is that they just have not had the judgment or the wherewithal to bring lawsuits.

MR. JUSTICE JACKSON: Maybe you should bring some up.

MR. MARSHALL: I have a full load now, Mr. Justice.

MR. CHIEF JUSTICE VINSON: Mr. Davis.

ARGUMENT OF JOHN W. DAVIS, ESQ., ON BEHALF OF THE APPELLEES

MR. DAVIS: May it please the Court:

I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity. If it may classify it for one purpose on the basis of admitted facts, it may, according to my contention, classify it for other.

Now, I want to address myself during the course of this argument to three propositions, and I will utilize the remaining minutes of the afternoon to state them.

The first thing which I want to contend for before the Court is that the mandate of the court below, which I quote, required:

> . . . the defendants to proceed at once to furnish plaintiffs and other Negro pupils of said district educational facilities, equipment, curricula, and opportunities equal to those furnished white pupils.

That mandate has been fully complied with. We have been found to have obeyed the court's injunction. The question is no longer in the case, and the complaint which is made by the appellants in their brief, that the school doors should have been immediately thrown open instead of taking the time necessary to readjust the physical facilities, is a moot question at this stage of the case.

The second question to which I wish to address myself is that Article XIV, section 7, of the Constitution of South Carolina, and section 5377 of the Code, both making the separation of schools between white and colored mandatory, do not offend the Fourteenth Amendment of the Constitution of the United States or deny equal protection. The right of a state to classify the pupils in its public schools on the basis of sex or age or mental capacity, or race, is not impaired or affected by that Amendment.

Third, I want to say something about the evidence offered by the plaintiffs upon which counsel so confidently relied. I say that the evidence offered by the plaintiffs, be its merits what it may, deals entirely with legislative policy, and does not treat on constitutional right. Whether it does or not, it would be difficult for me to conceal my opinion that that evidence in and of itself is of slight weight and in conflict with the opinion of other and better informed sources.

I hope I have not laid out too much territory for the time that is allotted to me. Let me attack it seriatim.

I want to put this case in its proper frame, by reciting what has transpired up to this time, so that Your Honors may be sure that my assertion of full performance is not an idle boast.

When the first hearing was at an end, the court entered its decree, demanding us to proceed forthwith to furnish, not merely physical facilities, as my friend would have it, but educational facilities, equipment, curricula, and opportunities equal on the part of the state for the Negro as for the white pupil.

Now, the court could have stopped there, and for the enforcement of its decree it could have awaited the moment when

some complainant would have come in and invoked process of contempt against the delinquent defendants. That would have satisfied the duty of the chancellor. He would have retained in his own hands the powers of enforcement which the rules of equity give him, and perhaps his conscience might have been at rest with the feeling that he had done all that judicially he was called upon to do.

But the court below went further. In order to ensure the obedience to its decree, it required the defendants within the period of six months, not later than six months, to report what progress they were making in the execution of the court's order. The court might have said, "You must do this tomorrow"; I gather from counsel that not even counsel for the appellants here contends so much.

Insofar as the equality, equalization required the building of buildings and, of course, the court knew, as every sensible man knew, that you do not get buildings by rubbing an Aladdin's lamp, and you cannot create them by court decree—to say that the day following this decree all this should have been done would have been *brutus fulmen* and no credit to the court or anybody else.

In December, within the allotted time, the defendants made report of progress. At that time, the case was on Your Honor's docket. Because of the fact that an appeal had been taken from so much of the decree below, they refused to strike down the constitution and the statute.

Thereupon, the district court sent that report to you, and you, not desiring to pass upon it, remanded the case to the district court, and called upon them to pass upon the report which had been made to them, and to free their hands entirely for such action as they might see fit. You vacated the order entered below.

The district court thereupon resumed control of the case. It set it down for a hearing in March of 1952, at which time the defendants filed a supplemental report showing the progress up to that precise day and minute. Thereupon, the court declared that the defendants had made every possible effort to comply with the decree of the court, that they had done all that was humanly possible, and that by the month of September, 1952, equality between the races in this area would have been achieved. So the record reads.

Now, I should just like briefly to summarize what the situation was that these reports exposed. They showed that in the State of South Carolina, under the leadership of the present Governor, there was a surge for educational reform and improvement, which I suspect has not been exceeded in any state in this Union. It began with the legislature, which adopted the act providing for the

issuance of a maximum of 75 million dollars in bonds for school purposes—not an ultimate of 75 million dollars, but a maximum at any one time of 75 million dollars—and that to be supported and serviced by a three percent sales tax. Speaking from some slight personal experience, I can assert that it escapes very few transactions in that State.

That being done, the legislature set up an educational finance commission, with power to survey the educational system of the State, to consolidate districts for better finance, to allot funds to the districts all over the State in such manner as this commission might find to be appropriate. Thereupon, the commission goes to Clarendon County, which is the seat of the present drama. It finds that in Clarendon County there are 34 educational districts, so-called, each with its separate body of officers and administrators, and all of them bogged down, I take it, by similar poverty.

It directed that that county be readjusted, redistricted, into three districts, one, District No. 1 to contain the contentious District No. 22, with which the litigation began, and six others. I gather that counsel wants to reverse that process. Having brought these districts into unity and strength, he has some plan, the mathematics of which I do not entirely grasp, by which the districts will be redistricted again with resulting benefit to all concerned.

District No. 1 was created. Its officers entered this litigation, and agreed to be bound by the decree, and are here present.

The first thing that the district did was to provide for the building of a new Negro high school at Scott's Branch, and for the repair of the secondary school at Scott's Branch, for which it expended the sum of 261,000 dollars on a contract that they should be completed and put into use by September of 1952. I speak outside the record, but that has been accomplished.

It was also provided that it should purchase the site for some two Negro secondary schools, which should be serviced by this fund. 21,000 dollars was appropriated immediately for additional equipment, and those secondary schools are now on the verge of completion.

But what could be done immediately—and with this I shall close for the afternoon—what could be done immediately by this school board was done. Salaries of teachers were equalized. Curricula were made uniform, and the State of South Carolina appropriated money to furnish school buses for black and white. Of course, in these days, the schoolboy no longer walks. The figure of the schoolboy trudging four miles in the morning and back four in the afternoon swinging his books as he went is as much a figure of myth as the presidential candidate born in a log cabin. Both of these characters have disappeared.

MR. CHIEF JUSTICE VINSON: The Court will adjourn.

[Whereupon, at 4:30 o'clock p.m., argument in the above-entitled matter was recessed, to reconvene the next day, December 10, 1952.]