In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., PETITIONERS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c–6, 2000d in the area of school desegregation. The outcome of this case will affect that enforcement responsibility. The government participated below as *amicus curiae* at the invitation of the court of appeals, and the United States Department of Health, Education and Welfare is now preparing desegregation plans for Charlotte-Mecklenburg as recommended by the court of appeals.

389–264—70

STATEMENT

The school system here involved comprises the urban area of Charlotte, North Carolina, as well as the more rural Mecklenburg County. The system serves approximately 82,500 students, of whom about 23,200 are black and 59,300 are white (123a–128a), attending 106 schools. This school district has been in desegregation litigation since 1965.

The issue raised by the plaintiffs' petition relates primarily to nine elementary schools attended by about one-half of the black elementary students, who reside in the urban area in the northwest quadrant of Charlotte. The plan proposed in the district court by the school board, while fully desegregating some other all-Negro schools, would have resulted in virtually all-Negro student bodies in these nine schools. That plan, relying solely on geographic zoning and based on the premise that no Negro school should be desegregated unless it could be at least 60 percent white, was rejected by the district court—a decision approved by the Fourth Circuit. The district court approved a plan, drawn by an educational expert recommended by the plaintiffs, based on the premise that there should be no Negro-majority schools in the entire system. The plan used the technique of noncontiguous pairing or "satellite" zoning so that black schools in northwest Charlotte would be paired with predominately white schools in suburban areas.

The court of appeals affirmed as to the high schools and junior high schools and disapproved the elementary school plan. It held:

> first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. * * * [189a]

The court approved such techniques for achieving desegregation as rezoning, "pairing, grouping, clustering, and satellite zoning" (198a) but held that the elementary school plan required by the district court was beyond constitutional requirements and inappropriate in the circumstances of this case.

Accordingly, inasmuch as implementation of all parts of the district court-approved plan had been stayed (135a, 177a) and the 1969–1970 school year was at an end, the court of appeals remanded the case with instructions to require, on an expedited schedule, the formulation of additional alternative plans for elementary schools. On remand, the Fourth Circuit suggested, "the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare

and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation" (199a). The board is to submit a new plan by June 30, 1970 (200a).

DISCUSSION

While we believe that the court of appeals was correct in its formulation of the school board's obligation, we agree with the petitioners that this case presents issues of national importance requiring resolution by this Court. But we think that, in the posture of this case, determination of the merits by this Court is not appropriate at this time.

As the court of appeals noted, "Similar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally" (188a). The question of the appropriate remedial standard for school districts covering large urban areas is now being presented to a number of appellate courts. Cases have recently been decided or are now pending involving Orlando and Tampa, Florida; Mobile, Alabama; Houston, Texas; Jackson, Mississippi; Little Rock, Arkansas; Oklahoma City and Tulsa, Oklahoma; Norfolk, Virginia; Alexandria, Louisiana; Memphis, Tennessee; and Cincinnati, Ohio, among others. Appellate decisions to date have not uniformly adopted a single remedial standard; and the issues as framed by the petitioners would ask this Court to address some of the questions posed by Mr. Chief Justice Burger

concurring in *Northcross* v. *Board of Education,* 397 U.S. 232, 237.

The issue here focuses on the appropriate remedies for school segregation in the context of an urban school district characterized by racial residential segregation. In view of the large number of students who would continue to attend virtually all-Negro schools under the school board's plan and the board's quite artificial limitations on that plan, namely, that no technique but rezoning would be used and that no integrated school should be less than 60 percent white, both of the courts below held that the school board's plan was not an adequate remedy. We fully agree with that conclusion.

The court of appeals declined, however, to endorse as to elementary schools the alternative plan adopted by the district court. To be sure, district courts have wide discretion in formulating appropriate remedies in school-desegregation cases. See, *e.g., Brown* v. *Board of Education,* 349 U.S. 294, 299–300; *United States* v. *Montgomery County Board of Education,* 395 U.S. 225; *Green* v. *County School Board,* 391 U.S. 430, 438 n. 4, 439, 442 n. 6; *Griffin* v. *School Board,* 377 U.S. 218, 232–234; cf. *Carter* v. *Jury Commission,* 396 U.S. 320, 336–337; *Turner* v. *Fouche,* 396 U.S. 346, 355. Indeed, this Court has authorized requiring implementation of educator-devised desegregation plans although recognizing that the particular plans were not the exclusive means of satis-

fying constitutional mandates. *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290. But holding that, "if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation * * * should not void an otherwise exemplary plan for the creation of a unitary school system" (190a), the Fourth Circuit, in effect, remanded the case to determine whether, in view of HEW alternatives,[1] remaining segregation could be eliminated by a more limited use of the available techniques. In its remand, the court of appeals did not direct, as had the district court (116a), that all schools must be majority white. For that reason, the plaintiffs seek review by this Court.

Yet, because of the importance of the question, we think the record in this case should be supplemented before this Court decides the issue. New plans will be filed in the district court by June 30, 1970. It can be anticipated that those submissions will be the subject of an evidentiary hearing held on an expedited basis and will be accorded full consideration by the district court and perhaps also the court of appeals. Those plans, in conjunction with the plans already in the record, will no doubt reflect the full range of possibilities available to desegregate this school district. Ac-

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[1] Cf., *e.g.*, *Alexander* v. *Holmes County Board of Education*, *supra; Carter* v. *West Feliciana Parish School Board*, *supra*, at 291–293 (Harlan, J., concurring). *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5) (en banc) (per curiam); *Clark* v. *Board of Education of the Little Rock School District*, No. 19,795 (C.A. 8, May 13, 1970) (en banc).

cordingly, the plans may provide the indispensable context in which to review the Fourth Circuit's rule that "school boards must use all reasonable means to integrate the schools in their jurisdiction" (189a). It would seem inadvisable to resolve the issues of this significant case only in the abstract and without the benefit of a complete record (cf. *Northcross* v. *Board of Education, supra*), and we, therefore, suggest that plenary consideration of the merits of the case by this Court would be premature at this time.

Although we believe, as previously explained, that the court of appeals' order remanding the case for further proceedings in conformity with its opinion was proper, we recognize that the district court's decree constituted one means of accomplishing a unitary school system in the respondent district. Consequently, in accordance with this Court's opinion in *Alexander* v. *Holmes County Board of Education, supra,* that decree might well remain in effect until replaced by a modified decree also establishing a unitary system, even though there appears to be ample time for the formulation of such a modified decree prior to the re-opening of school.

We suggest, therefore, that the petition for a writ of certiorari should be granted, and that the judgment of the court of appeals should be left undisturbed insofar as it remands the case to the district court for further proceedings but that the district court's prior judgment should remain in effect pending those proceedings. In the alternative, if this Court should decide to grant plenary review at this time, we suggest

that it direct the filing with the Clerk of this Court of all plans, pleadings, proceedings, findings of fact, and conclusions of law from the district court.

Respectfully submitted.

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