Supreme Court of the United States

October Term, 1970

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE

All parties having consented, William B. Spong, Jr., pro se, hereby respectfully files a Brief Amicus Curiae in this case.

The interest of William B. Spong, Jr., arises from the fact that he is a United States Senator from the State of Virginia, and decisions in this case may be determinative of cases pending in the lower federal courts involving the urban school systems of Virginia.

The School Board of the City of Norfolk, Virginia, filed a Petition for a Writ of Certiorari on June 26, 1970, in *School Bd. of City of Norfolk, Va., et al.* v. *Brewer, et al.*, No. 1753,

Oct. Term, 1969, seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 22, 1970. That Petition was denied on June 29, 1970, the last day of the October, 1969, Term, with Mr. Justice Black being of the opinion that Certiorari should be granted.

The aforesaid Petition is attached hereto and is adopted as the Brief Amicus Curiae.

Many of the issues in the Norfolk case are now before the Court in this case, and those issues are more clearly delineated in the Norfolk case than in any other case. The arguments presented in the Norfolk case are highly pertinent and of great importance to a decision in this and the related cases, and such arguments may not otherwise be presented to the Court in such manner that they may receive the consideration which is warranted.

Respectfully submitted,

WILLIAM B. SPONG, JR., *pro se*

5327 New Senate Office Building
Washington, D. C. 20510

Supreme Court of the United States

October Term, 1969

No. 1753

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,
Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE*

TOY D. SAVAGE, JR.
ALLAN G. DONN
WILLCOX, SAVAGE, LAWRENCE, DICKSON & SPINDLE
Virginia National Bank Building
Norfolk, Virginia 23510

LEONARD H. DAVIS
City Attorney
Norfolk, Virginia 23501

Attorneys for Petitioners

* Motion to Advance omitted.

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

The School Board of the City of Norfolk, Virginia, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 22, 1970.

OPINIONS BELOW

Although this proceeding has been pending for more than thirteen years, resulting in a substantial number of opinions

of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, the opinions of the courts below directly preceding this petition are as follows:

1. The opinions of the Court of Appeals filed June 22, 1970, not yet reported, are as follows:

(a) Opinion for the Court by Judge Butzner (Appendix hereto p. 1).[1]

(b) Opinion of Judge Bryan specially concurring (App. 13).

2. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, quoted at 308 F. Supp. 1274 (App. 16).

3. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, reported at 302 F. Supp. 18 (App. 58).

JURISDICTION

The judgments of the Court of Appeals were entered on June 22, 1970 (App. 15A and 15B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a school system in which there is no current racial residential discrimination, but in which the application of neutral and objective standards to the assignment of pupils would result in a number of all Negro and all white schools because of racial residential patterns,

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[1] The appendix (App.) of opinions below is presented in a separate volume because it is voluminous.

(a) is it constitutionally permissible for the School Board [in determining the extent of the affirmative action to be taken to achieve integration] to take into account the fact that once the ratio of Negro pupils to whites passes beyond a critical point the benefits from integration are completely lost;

(b) is the constitutionality of a plan for desegregation principally determined by the degree of success in obtaining the racial mix of pupils or by the degree of success in providing equality of educational opportunity for all pupils where both purposes cannot be simultaneously achieved;

(c) does good faith implementation of governing constitutional principles require racial balancing in each individual school throughout the system, comprised of many different schools, where it is freely conceded that massive compulsory busing will be required?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

1. Introduction

The Petitioners are seeking a review of an *en banc* decision of the United States Court of Appeals for the Fourth Circuit, reversing and remanding an Order of Walter E. Hoffman, Chief Judge of the Eastern District of Virginia, which had approved, in most aspects, the long range plan for the integration of the Norfolk school system.

2. Proceedings Below

Judge Hoffman's opinions followed hearings extending over many days during which he received evidence and made meticulous findings with respect to the housing patterns and demography of Norfolk and adjacent communities, the educational principles of the School Board plan, the financial and transportation resources of the school system, and the feasibility of alternative proposals advanced by the respondents. He found no racial discrimination by the School Board and that the School Board had affirmatively sought to obtain the maximum degree of equal educational opportunity within the capacity of the system.

The Court of Appeals, without holding that the District Court's findings were clearly erroneous, set aside the judgment of the trial court and directed that a new plan be filed by July 27, 1970, and implemented by September, 1970. Although the Court of Appeals did not expressly order the racial balance of the schools, that appears to be the effect of its holding, and such a result is beyond the capacity of the Norfolk school system.

This petition is filed four days after the entry of judgment. Precedent of other similar cases does not indicate that any stay is to be expected. Irreparable disruption caused by a "best efforts" implementation of the order of the Court of Appeals will be so erosive of the school system as to place in jeopardy the implementation of the School Board Plan in the event the District Court Order is reinstated.

3. Demography of Norfolk

The Norfolk system is generally typical of southern school systems of its size. It consists of 56,000 students in 72 schools, with a 6-3-3 pattern including 56 elementary, 11 junior high and 5 senior high schools. At the elementary level, 44%

of the students are Negro. Over all, the system contains 42.4% Negro students.

The City of Norfolk has a population of approximately 300,000 and is 61 square miles in area. 80% of the Negro population of Norfolk is concentrated in a large densely populated area in the south central sector of the City.

The School Board has no bus system for the transportation of pupils to and from the schools. Approximately 8,000 students, only a few of whom are at the elementary level, now use public transportation at their own expense.

The District Court found that evidence introduced fell short of establishing discriminatory racial residential patterns about the City and that "unless a spot of the disease poisoned the entire city, there remained other areas in Norfolk which could not be considered *de jure* constituted." 308 F. Supp. at 1303; 302 F. Supp. at 27. Whether or not any area of the City has a racial residential pattern which originated in discriminatory action, there is no significant governmental or private discriminatory action restraining free residential patterns at this time. 308 F. Supp. at 1307.

4. Background of Long Range Plan

To assist its own Director of Educational Research and Planning, Dr. John C. McLaulin, the School Board obtained the services of Dr. James Bash, Director of the University of Virginia Desegregation Institute, operated under funding by the Department of HEW, and Mr. Howard O. Sullins and Mr. Albert Tippett, representatives of the Department of HEW. There came to the attention of the Board a substantial body of learning, recently developed and based upon the analysis and definition of the relationship between integration and educational opportunity. Among the literature primarily influencing the development of the plan by the Board were the following:

1. *James S. Coleman, "Equality of Educational Opportunity,"* (1966), based upon a broad and exhaustive survey carried out pursuant to the Civil Rights Act of 1964 by the United States Office of Education and generally known as the COLEMAN REPORT. (SBX, April No. 1);
2. *Racial Isolation in the Public Schools Vol. 1,* prepared by the United States Commission on Civil Rights pursuant to request of the President and generally known as RACIAL ISOLATION. (SBX, April No. 2);
3. *Equal Educational Opportunity,* 38 Harvard Education Review, (Winter 1968), (SBX, April No. 4);
4. *Weinberg, Desegregation Research: An Appraisal* (SBX, April No. 3);
5. *Armor, School and Family Effects on Black and White Achievement: A Re-examination of the USOE Data,* (SBX, Oct. No. 24);
6. *Pettigrew, Advantages for the Disadvantaged in Equality of Educational Opportunity in the Large Cities of America: The Relationship between Decentralization and Racial Integration.* (Govt. Ex., Oct. No. 8);
7. *Wilson, Educational Consequences of Segregation in a California Community,* RACIAL ISOLATION Vol II, p. 165. (SBX, April No. 2).

The Board became convinced that, aside from the requirements of law, integration provides the conditions for an improved educational program for the City as a whole. Norfolk's was the first system to formulate principles for a plan based on the best available social science data.

The basic principles adopted by the Board can be summarized as follows:

(a) Children of all backgrounds and races do better in schools with a predominant middle class millieu. The entire argument for the efficacy of desegregation in providing equal educational opportunity ultimately depends upon this simple truth and upon it also rests the ultimate success of any long range plan for integration.

Aside from the family background of the individual student, a factor which is beyond the control of the School Board, the social class[2] climate of the school is the single most important school factor affecting student performance and attitudes. (RACIAL ISOLATION, Vol. 1, p. 89). The social class climate factor is so powerful that it may be more important than all other factors combined.

(b) There is a high correlation between socio-economic class and race. While more than 60% of white America is middle class, only one Negro in four is middle class (whether defined by income, white collar occupation, or high school education). A comparable correlation exists in Norfolk. The significance of the correlation is that desegregation is required to provide a predominantly middle class milieu for Negro pupils.

(c) The beneficial effects of desegregated schools for Negro children are not linear; that is, Negro test scores do not rise evenly with increasing percentages of white children in the classroom. Achievement in classes with less-than-half whites is associated with scores not significantly different from those in all-Negro classrooms. The research shows that significant improvement does not begin until the school is at least half-white, and that a simple majority is not suffi-

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[2] The term "socio-economic class" more accurately expresses the meaning, but "social class" has been commonly employed with the same connotation in most instances.

cient to obtain the desired benefits of desegregation. Instead there must be a clear, but not overwhelming, white majority. Dr. Armor's analysis of the COLEMAN REPORT data showed that the optimal point, taking into account both the social class and race effects is about 30% Negro.

(d) White students do less well in majority Negro schools than they do in majority white schools. The conclusion is a necessary corollary to the principle that children of all backgrounds do better in schools with a predominant middle class milieu.

(e) A plan for the City of Norfolk will work best to the extent that it arrives at 30% Negro in as many schools as possible and, for this reason, that percent Negro is considered optimal. The purposeful establishment of schools in which there are more than 40% Negro will not provide any improvement of educational opportunities in such schools for either white or Negro. In determining the effects of optimal desegregation, the inquiry is not limited to educational achievement. Rather, the concept of optimal desegregation is equally concerned with racial attitudes, racial behavior, racial preferences, and college and occupational aspirations.

5. Development of Long Range Plan

The principles of the plan were applied to the circumstances of the Norfolk school system with the clear purpose of providing the maximum degree of integration which is feasible.

The development of the plan for elementary schools began with a geographical attendance area plan based on neutral and objective lines, with each student attending the school within the natural capacity zone in which his residence fell. The socio-economic data of each such zone was then carefully analyzed. With the use of this base data, the designers of the zones set about to achieve zones which were hetero-

geneous in terms of socio-economic class and race, rather than homogeneous. Neither natural boundary lines nor community of interest of a given area was allowed to interfere with this purpose. Natural boundaries were departed from and neighborhoods were intentionally divided among different schools. Every plan or device suggested in any writing or by any consultant or by the NAACP or the Civil Rights Division was given mature consideration, and a number of such suggestions were incorporated. None of them was rejected if it was found to be currently feasible for the purpose of providing more integration than the plan which was adopted. A number of subsidiary concepts, such as the consolidation of schools, the closing of schools, and the changing of the location of schools, was adopted.

All of the experts testifying complimented the School Board on the job that was done. The degree of success was favorably compared with that which could be obtained by a computer. No one was able to point out a single instance in which lines were drawn to avoid desegregation. Because of racial residential patterns, it would not be possible, without massive cross busing, to create a much greater percentage of desegregation in the system. On the basis of that the educational opportunity offered to Negroes in majority Negro schools would be no better and perhaps not as good as that offered in an all Negro school and that the opportunity offered to white students would be substantially less than that which would be offered to them in a majority white school, majority Negro elementary schools were not created. The intentional creation of a majority Negro school would provide a net loss to the community rather than a net gain in terms of the feasible achievement of the benefits of integration.

No one is able to suggest any device which will effectively increase the results obtained by 20%, 10% or even 5%. The only alternative to the School Board plan recommended is

the complete racial balance of every school in the system through massive cross busing. The School Board cannot overcome the physical obstacles to massive cross busing by the 1970-71 school year.

REASONS FOR GRANTING THE WRIT

1. Introduction

Brown v. *Board of Education,* 347 U.S. 483 (1954), takes its place among the more important decisions of this Court because it determined that there was a relation between segregation of public Schools and equal educational opportunity. The record in this case for the first time presents a clear and exhaustive analysis and definition of the nature of that relationship.

Brown I established the constitutional *right* of minorities to desegregated schooling and expressly based its determination upon the right to equal educational opportunity.

Brown v. *Board of Education,* 349 U.S. 294 (1955), and all of the subsequent cases decided by this Court essentially deal with the *remedy* which the Court felt to be realistically available at the time of the decision. The relief granted by the Court in *Brown II* constituted a negative mandate, requiring the school boards to admit students to public schools "as soon as practicable" on a non-discriminatory basis, "with all deliberate speed." 349 U.S. at 300, 301. In more recent cases, culminating in *Alexander* v. *Board of Education,* 396 U.S. 19 (1969), this Court has removed the conditions of "as soon as practicable" and "with all deliberate speed" from the negative mandate. Further, this Court has asserted the affirmative duty of school boards to adopt the most "feasible" and "reasonably available" alternatives to affirmatively effectuate integration. *Green* v. *County School Board,* 391 U.S. 430 (1968); *Raney* v. *Board of Education,*

391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968). In view of the fact that circumstances in such cases all pointed in the same direction, this Court has not yet defined the nature and extent of the remedy provided by such affirmative mandate. It is submitted that, in arriving at that definition, it should be kept in mind that the constitutional right to be provided is equal educational opportunity and that mixing races is but a means to that end.

The conclusions of educational and social science with respect to the nature and extent of the relation between integration and education have in recent years been widely disseminated and, by and large, accepted. The Commission on Civil Rights quoted that "On the basis of its findings, the Commission has made recommendations which provide a basis for action by government at all levels; * * *." *Racial Isolation in the Public Schools Vol. I,* p. ix.

On March 24, 1970, Richard Nixon, President of the United States, issued a policy statement entitled SCHOOL DESEGREGATION: "A Free and Open Society." (116 Cong. Rec. S4351, Daily Ed., March 24, 1970). In that statement he said:

> "Available data on the educational effects of integration are neither definitive nor comprehensive. But such data as we have suggest strongly that, under the appropriate conditions, racial integration in the classroom can be a significant factor in improving the quality of education for the disadvantaged. At the same time, the data lead us into several more of the complexities that surround the desegregation issue.
>
> "For one thing, they serve as a reminder that, from an educational standpoint, to approach school questions solely in terms of race is to go astray. The data tell us that in educational terms, the significant factor is not race but rather the educational environment in the

> home—and indeed, that the single most important educational factor in a school is the kind of home environment its pupils come from. As a general rule, children from families whose home environment encourages learning—whatever their race—are higher achievers; those from homes offering little encouragement are lower achievers.
>
> "Which effect the home environment has depends on such things as whether books and magazines are available, whether the family subscribes to a newspaper, the educational level of the parents, and their attitude toward the child's education.
>
> "The data strongly suggest, also, that in order for the positive benefits of integration to be achieved, the school must have a majority of children from environments that encourage learning—recognizing, again, that the key factor is not race but the kind of home the child comes from. The greater concentration of pupils whose homes encourage learning—of whatever race—the higher the achievement levels not only of those pupils, but also of others in the same school. Students learn from students. The reverse is also true: the greater concentration of pupils from homes that discourage learning, the lower the achievement levels of all.
>
> "We should bear very carefully in mind, therefore, the distinction between educational difficulty as a result of race, and educational difficulty as a result of social or economic levels, of family background, of cultural patterns, or simply of bad schools. Providing better education for the disadvantaged requires a more sophisticated approach than mere racial mathematics."

The quoted statement of policy of the United States is quite remarkably consonant with the policies promulgated by the School Board in its long range plan in June, 1969, and approved by the District Court on December 30, 1969, and here presented to this Court for consideration.

It is clearly established that the quality of educational opportunity offered to pupils of both races in schools which have a majority Negro is no better, if as good, than that offered to pupils of all Negro schools. It is difficult to find any situation in which integration has been successful in terms of educational opportunity or stability where white pupils have not been in a substantial majority. A determination of whether or not the Norfolk School Board and other school boards similarly situated are entitled to take this phenomenon of social science into account in determining the extent of affirmative action to be taken to achieve integration appears to be essential to the development of public education of this country at this time. Is a rule such as the one man —one vote rule of the apportionment cases appropriate to the education cases? If it is not educationally desirable or even relevant that the racial composition of a school be a mirror image of the racial composition of the community, should such a goal be sought by any plan? These are among the basic practical problems to be resolved which are appropriately presented by this case.

2. The Opinion of the Court of Appeals

The opinions of the Chief Judge of the District Court deal in depth with the educational principles and the phenomena of social science with respect to integration and with the demography and financial, transportation and other resources of the school system. It was found that the School Board had affirmatively sought to obtain the maximum degree of educational opportunity within the capacity of the system.

The opinion of the Court of Appeals appears to be based primarily if not entirely upon the degree of success in obtaining a racial mix in schools. The word "education" is not mentioned on a single occasion in the majority opinion.

The Court of Appeals failed to deal with the important questions set forth in this petition. Conclusions are arrived at in its opinion which are contrary to the findings of fact of the District Court without any acknowledgment thereof. The capacity and resources of the Norfolk school system are not delineated or discussed by the Court of Appeals, but the judgment would appear to call for action by the School Board beyond the capacity and resources found to exist by the District Court.

CONCLUSION

The reasons for the degree of success or failure of existing integration plans in attaining educational goals can be properly understood only by examination in light of the social phenomena explicated in this proceeding. Such success or failure of proposed plans can be accurately predicted by application of these principles of social science. The extent to which such principles may or must be taken into account under constitutional mandates has not been considered or determined by this Court. It is vital that such determination be made at this time.

The importance of the issues raised in this proceeding to the Norfolk school system are obvious. Although the circumstances and predicaments of each school system with respect to desegregation are to some extent peculiar to it, Norfolk fits a not uncommon pattern. The issues are also important to many other such similar school systems. The cases pending on petitions for writs of certiorari from the cities of Charlotte, North Carolina, and Little Rock, Arkansas, together with the issues presented here appear to cover the spectrum of the most pressing problems requiring decisions by the lower courts, local governments, educators and minorities.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

TOY D. SAVAGE, JR.
ALLAN G. DONN
WILLCOX, SAVAGE, LAWRENCE, DICKSON & SPINDLE
Virginia National Bank Building
Norfolk, Virginia 23510

LEONARD H. DAVIS
City Attorney
Norfolk, Virginia 23501
Attorneys for Petitioners

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Respondents.

CERTIFICATE OF SERVICE

This is to certify that copies of the attached, printed Brief Amicus Curiae were served upon counsel listed below by United States mail, first class or air mail, as required by the rules of this Court as follows:

James M. Nabrit, III
10 Columbus Circle
New York, New York 10019

J. LeVonne Chambers
Chambers, Stein, Ferguson & Lanning
216 West Tenth Street
Charlotte, North Carolina 28202

William J. Waggoner
Weinstein, Waggoner, Sturges, Odom and Bigger
1100 Barringer Office Tower
Charlotte, North Carolina 28202

Honorable Erwin N. Griswold
Solicitor General of United States
Department of Justice
Washington, D. C. 20530

Honorable Robert Morgan
Attorney General
State of North Carolina
Department of Justice
Raleigh, North Carolina

Benjamin S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina 28202

This 1st day of October, 1970.

WILLIAM B. SPONG, JR., *pro se*