

3/20/78

No. 77-960

In the Supreme Court of the United States

OCTOBER TERM, 1977

CLINTON MUNICIPAL SEPARATE SCHOOL DISTRICT,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-31) is reported at 560 F. 2d 1188. The opinion of the district court (Pet. App. 1-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1977. A timely petition for rehearing was denied on October 28, 1977. The petition for a writ of certiorari was filed on January 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly remanded this case for the district court to assess the effect of the creation of a separate school district within a district that had been ordered to desegregate.

STATEMENT

In 1967, the United States filed suit to desegregate the schools in the Hinds County (Mississippi) School District. That suit resulted in an order by the court of appeals directing the implementation of a desegregation plan designed by the Department of Health, Education, and Welfare. *United States v. Hinds County School Board*, 423 F. 2d 1264 (C.A. 5), certiorari denied, 396 U.S. 1032. The HEW plan divided the school district into seven attendance zones. Students in each zone were assigned to schools within that zone, except that students whose race was in the majority in a school could transfer to a school in which their race was in the minority. One of the attendance zones comprised the City of Clinton and certain surrounding areas (Pet. App. 28-29).

The court ordered the HEW plan to be implemented no later than December 31, 1969. Shortly thereafter, the City of Clinton and the state legislature created a separate school district, the boundaries of which coincided with the HEW attendance zone for the Clinton area, but which was wholly independent from the Hinds County School District (Pet. App. 28-29). Since the court of appeals had retained jurisdiction over the case, school district officials moved for that court's approval of the severance of the Clinton district—petitioner here—from the Hinds County School District. Because the United States declined to consent to the severance, however, the court of appeals refused to grant the motion (Pet. App. 29).

When the case returned to the district court, the United States moved to dissolve the petitioner school district and remerge it with the Hinds County School District. The district court denied the motion on the ground that the boundaries of the new district were coterminous with the boundaries of the Clinton attendance zone in the HEW plan. For that reason, the Court held, the creation of the new district had no adverse effect on the fulfillment of the court-ordered school desegregation.

The court of appeals vacated the district court's judgment and remanded for further consideration of the effect of the creation of the new school district on the desegregation plan. The district court had erred, the court of appeals held, by not considering the impact of rigid district lines on the majority-to-minority transfer program and on the flexibility of the HEW plan. The court instructed the district court to make its determination in light of the tests set out in this Court's decisions in *Wright v. Council of City of Emporia*, 407 U.S. 451, and *United States v. Scotland Neck City Board of Education*, 407 U.S. 484. The court further noted that nothing in its opinion required the disestablishment of the petitioner district as a legal entity and that only if the district court found that the creation of the new district served to hinder desegregation could the court order the merger of "any part or all of the district's pupils, faculties, and facilities" into the Hinds County School District (Pet. App. 31). Finally, the court observed that if the district court determined that the separation of the Clinton district had an adverse effect on the desegregation process, it would have to take into consideration "financial, contractual and other complications" and resolve them in an orderly way (Pet. App. 31).

ARGUMENT

1. The court of appeals did not enter a final judgment in this case; it merely remanded the cause for further factual and legal determinations by the district court. In the absence of extraordinary circumstances, this Court has traditionally declined to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 258; *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 378, 384. This case well illustrates the reason for this salutary rule.

Petitioner's claim is founded on an alleged inconsistency between the decision of the court of appeals and several of this Court's recent decisions. Yet the court of appeals explicitly instructed the district court on remand to apply the teachings of this Court's decisions, including one of the decisions on which petitioner chiefly relies (Pet. App. 30).¹ Moreover, the court of appeals recognized that the district court was primarily responsible for evaluating the effect of the creation of the new school district on the process of desegregation, and it expressly left to the district court the task of weighing the numerous competing factors in making its determination. Review at this point would therefore be premature.

2. In any event, the decision of the court of appeals was correct. The district court erred in holding that simply because the new district coincided with the boundary lines of the HEW attendance zone it had no effect on the operation of the court-ordered plan. As the court of appeals pointed out, the HEW attendance zones were merely tentative and subject to alteration if they proved

¹ *Wright v. Council of City of Emporia*, 407 U.S. 451.

ineffective; the boundaries established by the creation of the new district, by contrast, were permanent. In addition, as the court of appeals noted, the creation of permanent boundaries would interfere with the majority-to-minority transfer program, which was an important element of the original desegregation plan.

Careful consideration of the effect of the separation of the petitioner school district from the Hinds County School District is particularly important in light of the substantial change that withdrawal of the new district effected in the racial composition of both the new and the surviving districts. The withdrawal of the Clinton district, which was 15 percent black, left the remaining portions of the Hinds County district 68 percent black (Pet. App. 30-31 n. 5). While this disparity is not dispositive, see *Wright v. Council of City of Emporia*, 407 U.S. 451, 462-464, it is nonetheless an appropriate factor for the district court to consider in assessing the effect of the creation of the new district.

Petitioner argues that the Hinds County School District had been converted to a unitary system by the time the Clinton district was created and that it was therefore improper for the court of appeals to review the effect of the withdrawal of the Clinton district on segregation in either the new or the surviving district. As in *Wright v. Council of City of Emporia*, *supra*, however, the Clinton district was created during the implementation of the court-ordered desegregation plan, and the impact of that withdrawal on the effectiveness of the court's plan is therefore properly subject to the court's review.²

² *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, on which petitioner relies, is inapposite, since that case involved a court order requiring a school district to make annual readjustments in student assignments, if necessary, to maintain each school as majority white regardless of the cause of any change in the racial composition of the school's population.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.