No. 76-416

In the Supreme Court of the United States

OCTOBER TERM, 1976

DELAWARE STATE BOARD OF EDUCATION, ET AL.,
APPELLANTS

v.

BRENDA EVANS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether this Court has jurisdiction of the appeal from the judgment entered by the three-judge district court, and

2. Whether the district court erred by requiring a remedy for racial discrimination in the operation of the schools more extensive than is necessary to eliminate all of the effects of that discrimination.[1]

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[1]This question is fairly comprised within questions two and three presented by the jurisdictional statement (J.S. 3). We take no position with respect to the first question presented by appellants, believing that it is foreclosed in substantial measure by this Court's summary affirmance of the judgment on the liability question. See 423 U.S. 963, affirming 393 F. Supp. 428.

The jurisdictional statements in No. 76-474, *Newark School District* v. *Evans;* No. 76-475, *New Castle-Gunning Bedford*

INTEREST OF THE UNITED STATES

The United States has an immediate interest in this case because the Court's resolution of the jurisdictional issues involved may affect the jurisdiction of this Court in *United States* v. *Board of School Commissioners of City of Indianapolis,* C.A. 7, No. 75-1730, decided July 16, 1976, appeals and petitions for a writ of certiorari pending, Nos. 76-212, 76-458, 76-468, 76-515, 76-520, and 76-522. In *Indianapolis* a single-judge district court ordered substantial inter-district reassignments of students. Similarly, in *Milliken* v. *Bradley,* 418 U.S. 717, a single judge ordered the consolidation of school districts. If the order here consolidating school districts and requiring the inter-district transportation of students could be entered only by a three-judge court, then the district court in *Indianapolis* (which declared unconstitutional a state statute's exclusion of metropolitan school districts from governmental consolidation) may have acted without jurisdiction, with the consequence that that case must begin again.[2] If, on the other hand, three judges were not required in either case, the appeal here properly lies to the court of appeals rather than this Court. *Butler* v. *Dexter,* No. 75-623, decided April 19, 1976; *Norton* v. *Mathews,* No. 74-6212, decided June 29, 1976.

School District v. *Evans;* No. 76-499, *Mount Pleasant School District* v. *Evans;* No. 76-500, *Marshallton-McKean School District* v. *Evans;* and No. 76-501, *Claymont School District* v. *Evans,* appear to present related questions concerning the district court's judgment, and we do not separately discuss them. Because of this relationship and the fact that the jurisdictional problems in the case pertain to all of the appeals, we believe that this Court's disposition of them should be governed by its disposition of No. 76-416.

[2]We have previously argued that the single judge had jurisdiction in that case. See *Metropolitan School District of Lawrence Township* v. *Dillin,* certiorari denied, 412 U.S. 953.

Moreover, the United States has substantial responsibility under Titles IV, VI, and IX of the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and under the Equal Educational Opportunities Act of 1974, Pub. L. 93-380, 88 Stat. 514 *et seq.,* 20 U.S.C. (Supp. V) 1701 *et seq.,* with respect to school desegregation. The Court's resolution of the issues presented in this case would affect that enforcement responsibility. Although the United States did not participate in this case in the court below, it has participated, either as a party or as *amicus curiae,* in most of this Court's previous school desegregation cases, including *Brown* v. *Board of Education,* 347 U.S. 483, 349 U.S. 294; *Cooper* v. *Aaron,* 358 U.S. 1; *Goss* v. *Board of Education,* 373 U.S. 683; *Green* v. *County School Board,* 391 U.S. 430; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1; *Wright* v. *Council of City of Emporia,* 407 U.S. 451; *School Board of City of Richmond* v. *State Board of Education,* 412 U.S. 92; *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189; *Norwood* v. *Harrison,* 413 U.S. 455; *Milliken* v. *Bradley,* 418 U.S. 717; *Runyon* v. *McCrary,* No. 75-62, decided June 25, 1976; and *Pasadena Board of Education* v. *Spangler,* No. 75-164, decided June 28, 1976.

DISCUSSION

1. In March 1975 the three-judge district court in this case concluded that appellants had discriminated against students on account of their race, that the discrimination was "a cooperative venture involving both the city and the suburbs" (393 F. Supp. at 437), and that, as a result, it would probably be necessary to devise an inter-district plan for reassignment of students. The court also held that the Educational Advancement

Act of 1968, a Delaware statute, was racially discriminatory to the extent that it forbade appellant State Board of Education from consolidating school districts after 1969 or including the Wilmington and Newark school systems in any consolidated district (*id.* at 438-446). The court entered a judgment directing the parties to submit alternative inter- and intra-district student assignment plans (*id.* at 447). It also enjoined appellants from relying in the future on those provisions of the 1968 Act that had been found unconstitutional by the court. 423 U.S. 963, 963 n. 1 (Rehnquist, J., dissenting). This Court summarily affirmed. 423 U.S. 963.

The district court then received the plans submitted by the parties and concluded that, in light of the inter-district violations discussed in its previous opinions, only an inter-district desegregation plan would be sufficient (J.S. App. A15-A34). It held that the 11 school districts in northern New Castle County must be consolidated into a single school district, which will assume all of the educational and administrative functions of the schools. It did not select all of the districts to be included in this consolidated system on the basis of their participation in the inter-district violations; it relied, in addition, on information concerning the racial composition of the districts to be included, and it apparently chose some of the districts to be included with a view to producing a consolidated district with racial proportions that would, the court thought, enable desegregation to be "successful."

Within the new consolidated district students must be reassigned. The court stated that it "will consider that any school whose enrollments in each grade range between 10 and 35% black to be a [*sic*] *prima facie* desegregated" (J.S. App. A43, footnote omitted). The range of 10 to 35 percent black students for each grade in each

school (subject to variation in certain circumstances)[3] was chosen to represent a range above and below a target of 21.5 percent, the percentage of students in the consolidated school district who are black. The court chose 10 percent as the lower bound for each grade in each school because it believed that a lower percentage "presents severe difficulties in the 'identity' of minority youngsters, who would not see fellow minority students in positions of leadership in the school" (J.S. A43, footnote omitted). The court chose 35 percent as the upper bound because a higher proportion of black students "is said to produce a substantial likelihood of white flight" (*ibid.*, footnote omitted). The court did not identify with any particularity the effects of the racial discrimination to be remedied, and the remedial standards it adopted are not constructed to produce the state of affairs that would have existed but for the racial discrimination in the operation of the schools.

The court entered a judgment (J.S. App. A72-A75) declaring that all of the school districts in northern New Castle County shall be reorganized into a single district and requiring the State Board of Education to design a student assignment plan consistent with the opinion of the court. It directed the State Board to appoint a five-member school board to oversee the consolidated district, and the court made certain other orders necessary to effectuate its plan. It then dissolved itself; jurisdiction over future proceedings was passed to a single-judge district court.

2. When this case was last before this Court, Mr. Justice Rehnquist wrote that it "veritably bristles with jurisdictional problems" (423 U.S. at 964). The Court's summary affirmance indicates that five Justices did not

[3] See J.S. App. A36, A43 n. 148.

share the doubts Mr. Justice Rehnquist expressed. We accept, as law of the case, the Court's resolution of the points Mr. Justice Rehnquist raised. But two other jurisdictional problems now affect the case. For the reasons discussed below, we believe that the judgment of the district court could have been entered by a single judge. Because the judgment here was not one required to be entered by a three-judge court alone, an appeal properly lies only to the court of appeals.

The injunction that was affirmed by this Court last fall forbade the appellants to rely in the future upon the 1968 Act, a state statute of statewide applicability. Whether or not that statute was *functus officio* at the time the injunction was entered was a question of state law; the district court has resolved that question in favor of the vitality of the statute. But the statute, so far as this case is concerned, expired when this Court affirmed the injunction against reliance upon it. The district court has not entered a further injunction against the operation of the state statute. None was necessary; its operation already had been enjoined, and that injunction had been affirmed by this Court. The three-judge district court therefore could have dissolved itself immediately upon the affirmance of its injunction. Three judges were not thereafter necessary to order the consolidation of the school districts in northern New Castle County.

Moreover, once this Court affirmed the issuance of the injunction barring reliance on the statute, the rationale for the requirement of three judges was satisifed. "Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 97, footnote omitted. The

convening of three judges in the earlier stage of this case saved the 1968 Act from improvident doom at the hands of a single judge; it met its demise at the hands of three judges, and then at the hands of this Court. Surely there was no need for three judges thereafter simply to see to the interment. Indeed, once this Court affirmed the district court's injunction against reliance on the statute, its unconstitutionality was settled. Three judges are unnecessary to enjoin the operation of a statute where there is no doubt that it is unconstitutional. *Bailey* v. *Patterson,* 369 U.S. 31.

There is another reason why three judges became unnecessary after this Court's affirmance of the first injunction. The first injunction ran statewide; it forbade appellants to rely upon the statute to resist consolidation of school districts where that might be necessary as part of a desegregation plan. The injunction involved on this appeal, however, pertains only to northern New Castle County. It directs the State Board of Education to abolish 11 particular school districts and to create another in their stead (J.S. App. A73-A74). The judgment, by its terms, affects only part of the State of Delaware. Three judges are unnecessary to issue an injunction affecting only part of a state or of a state program. *Board of Regents* v. *New Left Education Project,* 404 U.S. 541; *Wolff* v. *McDonnell,* 418 U.S. 539, 542 n. 1.

3. We therefore conclude that this Court lacks jurisdiction of the appeal in this case. We believe, however, that this case is an important one in the evolution of the constitutional principles pertaining to racial discrimination in the schools, and that it should receive the attention either of this Court or of the Third Circuit as expeditiously as possible.

We believe that the remedial standards adopted by the district court in this case differ significantly from those that, under this Court's decisions,[4] properly govern school desegregation relief. The district court's order is apparently founded on the assumption that the obligation to desegregate, triggered by the constitutional violation on the part of the school districts, means that the school districts must seek to achieve a racial balance in each school approximately equivalent to that in the district as a whole. Beginning with this premise the district court would allow adjustments, but these adjustments would in most cases be limited by the need for a "viable minority" on the one side, and, on the other, by the need to avoid "tipping points" that might lead to "white flight." The central point, however, is that, to the extent feasible, each school should have what the district court considered a desirable racial mix and, indeed, school districts were included in or excluded from the "desegregation area" on this basis.

In our view, this is not the right way to formulate a desegregation order. Instead, the proper task of a desegregation plan should be nothing more or less than the elimination, "root and branch," of all of the effects of official racial discrimination intended to affect the operation of the schools. The "desegregation" that courts are both empowered and obligated to accomplish is not, as the district court apparently thought, a degree of racial mixture thought socially desirable and hence ordered without reference to the actual amount of separation caused by the constitutional violation. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination. A properly formulated desegregation decree should not, therefore, be based on a court's belief that such schools are undesirable, or that each school should have a racial mixture or balance.

[4]See, *e.g.*, *Milliken* v. *Bradley*, *supra*, 418 U.S. at 746; *Swann*, *supra*, 402 U.S. at 15-16.

The proper approach requires a court to seek to determine, as precisely as possible, the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects.[5] That is the way fully to satisfy the constitutional command, in a manner consistent with the proper role of the judicial branch in rectifying constitutional wrongs. It is only in this context and for the purpose of achieving these objectives, that practicalities are properly taken into account in formulating a school desegregation remedy. For these reasons, which we have explained in greater detail at pages 14-18 of our brief in *Texas Education Agency (Austin Independent School District)* v. *United States*, petition for a writ of certiorari pending, No. 76-200,[6] we submit that the district court here has erred in articulating the remedial standards to govern this case. Its judgment, which was based substantially on these remedial standards, therefore should not stand.

The principles we have articulated would, we believe, require a substantial amount of student reassignment in New Castle County. The district court concluded (393 F. Supp. at 433-438) that there have been significant and continuing inter-district acts of racial discrimination. In our view, these acts would require a significant inter-district remedy. Because no plan for student assignments under the district court's approach has yet been formulated, however, it is impossible to say how a plan designed under the principles we have set out would differ from a plan

[5]See, *Swann*, *supra*, 402 U.S. at 15-16.

[6]We are furnishng copies of that brief to counsel for the parties in this case.

complying with the remedial guidelines established by the district court. It seems safe to say, however, that it is highly implausible that, but for the acts of racial discrimination, every grade in every school in northern New Castle County would have been between 10 and 35 percent black.

4. Because the Court does not have jurisdiction of this appeal, the appropriate disposition of the case is to dismiss the appeal. Appellants already have filed a protective notice of appeal in the court of appeals (J.S. 7 n. * * *), and the case therefore could proceed there without further delay.[7] If the Court dismisses the appeal, we will present our views as *amicus curiae* in the court of appeals.

Appellants have suggested, however, that if the Court dismisses the appeal it should grant a writ of certiorari before judgment to the court of appeals (J.S. 7 n. * * *). We cannot say that this case "is of such imperative public importance as to justify * * * deviation from normal appellate processes" (Rule 20 of the Rules of this Court). Cf. *United States* v. *Nixon,* 418 U.S. 683, 686 n. 1 (collecting cases). It may be, however, that in light of the pendency of the *Indianapolis* case, which presents similar issues concerning the appropriate principles for devising a remedy in school cases, the Court may think it best to hear both the instant case and *Indianapolis* together (if it should grant review in *Indianapolis*), in order to explore more fully the questions of remedy. We think that in these circumstances it would not be inappropriate to issue a writ of certiorari before judgment in the instant case.

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[7] An order of a district court finding liability and requiring submission of a plan and consideration of a remedy ordinarily is an unreviewable interlocutory order (see *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737), and this is so in school cases no less than in others. *Taylor* v. *Board of Education,* 288 F. 2d 600 (C.A. 2). But where, as here, the district court has required school officials to take present action in response to its order, the order is injunctive in nature, and the granting of an injunction may be appealed even if the injunction is interlocutory. 28 U.S.C. 1292(a).

CONCLUSION

The appeal should be dismissed for want of jurisdiction. The Court may, however, wish to consider issuing a writ of certiorari before judgment to the court of appeals.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.