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No. 23724

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH STELL, ET AL., PLAINTIFF AND APPELLANT, UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR AND APPELLANT, AND THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, DEFENDANT AND APPELLANT

v.

LAWRENCE ROBERTS, ET AL., INTERVENORS AND APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

SUPPLEMENTAL BRIEF OF UNITED STATES

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In this Supplemental Memorandum we discuss the question of the disposition which this Court should make of this case. In our brief of May 15, 1967 we suggested that this Court reverse the judgment below and remand the case with directions to the district court to enter the Jefferson County decree. However, at the argument of this case the

school board presented a plan "desired by this Appellant Board, and for which it urges approval." That plan follows in its main outline and in many particulars the Jefferson County decree. We believe that it is, taken as a whole, a good plan well-suited to the individual needs of the Savannah-Chatham school system, but that some of its deviations from Jefferson County are unwarranted and others, while warranted, require refinement.

Many of the changes are changes in wording only, and not in substance. For example, in paragraph II(b), the phrase "both white and Negro," is omitted. The purpose of the phrase was to make it abundantly clear that the requirement that all students exercise a choice extended to students of both races. The school board here recognizes that fact, and the additional words would be superfluous. Then there are changes in substance which seem justified by the school board's experience--changes which the board has found administratively desirable but which do not impair the operation of the free choice plan. Examples of these include changing the choice period from March to February (II(c));

allowing the school board to distribute choice forms through the students instead of the mails (II(f)); listing the school board's preferences as to where the choice form should be returned (II(i)); deletion of Jefferson County's paragraph IV(a) as unnecessary, since such transfers are not needed where the students have free choice; changing the equalization reporting provision from October to November (VI(a)); and changing the times of the other reports to the Court (IX). We have no objection to these changes.

However, there are three types of changes which we believe merit close attention. First, of course, is the addition of a zone system superimposed on the free choice. There is nothing inherently wrong with this, but a zone system has a clear and strong potential for undermining free choice. There is no record before this Court on the adequacy of the zones in this case. It is clear that at some stage of the desegregation process a clearly defined case may well come before this Court, involving the adequacy of such zones. But for purposes of the present case we believe the Court should not disallow the use of zones. Instead we suggest that the

decree to be entered on remand should contain the following paragraph:

> X. The school board may continue to use attendance zones as described in Paragraph I. Such zones should be constituted, to the extent consistent with the proper operation of the school system as a whole, with the objective of eradicating the vestiges of the dual system. The school board shall, within a month of the entry of this decree, file with the Clerk of the Court and serve upon the parties maps showing the zones and the schools serving each zone, and shall similarly file and serve any proposed changes at least a month prior to the date said changes are scheduled to take place. The district court will, prior to the expiration of the month and upon motion of any party, hold a hearing to determine whether the zones or the changes therein meet the requirements set forth herein.

This provision is consistent with the preamble to the Jefferson County decree (p. 8 of the slip opinion), imposes no hardship on the school board, and contains safeguards to insure that if there is any question as to whether the zones meet the requirements of the decree the parties may promptly litigate that question.

The second problem area is the school board's proposal to change certain other provisions of Jefferson County, not because of any particular circumstances existing in Savannah, but because

of the school board's preference. We believe that this Court's decision in Jefferson County requires that the decree set forth therein "apply uniformly throughout this circuit in cases involving plans based on free choice of schools," unless "exceptional circumstances compel modification of the decree." 372 F.2d 836 at 894 (opinion of panel). In this case the school board proposes the following changes which we believe are barred by this Court's decision in Jefferson County:

> 1. Deleting the provision for older students to exercise their own choice and replacing it with a provision for joint exercise of choice by such students and their parents. The Jefferson County provision adequately protected parental control over the student by allowing the parent to override the student's choice. The new provision would unnecessarily complicate the task of filling out choice forms. (II(a) and (b)).
>
> 2. Changing the provision with respect to choices not on the official form so as to specify the information which must be shown. This change is completely inconsistent with the Jefferson County emphasis on removing all barriers to exercising a free choice. If a student submits a "writing which contains information sufficient to identify the student and indicates that he has made a choice of school," that should be sufficient. (II(j)).

3. Conditioning remedial education on the availability of money from the United States or other sources and restricting it to 'those instances where and if such inadequacies exist.' This change would sufficiently hedge the provision so as to make it unenforceable. (VI(b)).

We believe this Court should reinstate the Jefferson County provisions in these three instances. The school board would still be free to seek a modification from the district court, upon a showing of exceptional circumstances. To allow changes here without a showing of need would serve as a precedent for a recommencement of the tortuous case-by-case litigation as to the details of desegregation plans.

Finally, we believe that portions of the plan are written in terms not suitable to a decree. The preamble to the Jefferson County decree (p. 8 of slip opinion) should be included in the decree, and the self-serving declarations in paragraphs I and VIII(a) should be deleted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief in this case has been served by official United States mail in accordance with the rules of this Court to the attorneys for the parties addressed as follows:

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