

No. 72-190

In the Supreme Court of the United States

OCTOBER TERM, 1972

AARON LEE SMITH, ET AL., PETITIONERS

v.

BOARD OF EDUCATION, INDEPENDENT SCHOOL DISTRICT
No. 1, TULSA COUNTY, OKLAHOMA, ET AL.

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

MEMORANDUM FOR THE UNITED STATES

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The United States commenced this desegregation case against the Board of Education, Independent School District No. 1, Tulsa County, Oklahoma, and its officers on July 30, 1968, under 42 U.S.C. 2000c-6. Following the reversal of the district court's holding that the Tulsa schools were no longer *de jure* segregated (*United States v. Board of Education*, 429 F. 2d 1253 (C.A. 10)), the parties reached agreement as to student assignments to secondary schools, integrated teacher assignments, a majority-to-minority transfer provision, construction of new schools to promote a unitary system, and the filing of an annual

(1)

report. After hearings on the remaining issues, the district court held that four of the nine remaining schools in which the student enrollment is more than 80 percent black were *de jure* segregated and therefore must be desegregated, but that the other five were *de facto* segregated (Pet. App. 71a-74a). The United States appealed from the holding that as to these five schools the school district had no remedial obligation, and petitioners here—whom the district court had allowed to intervene for the purpose of appeal—appealed both as to those five schools and as to the consent agreement respecting the secondary schools. On May 5, 1972, the court of appeals affirmed (Pet. App. 27a-34a).

1. The five elementary schools with respect to which appeal was taken include four formerly all-white schools which had become predominantly black since 1954 and one which opened in 1966 with one white and 458 black students. The district court found that the segregation at these schools was due solely to population movement over which the school board had no control. The court of appeals, in affirming the district court in all regards, held that these findings were not clearly erroneous and that the district court's evidentiary analysis was sufficient to support its conclusion that the school district bore no remedial obligation with respect to those schools.

The question presented by the petition as to these schools¹ necessarily raises the issue of what standards

¹ "1. Whether a formerly dual school system is constitutionally obligated to desegregate—within the limits of practicality—

of evidentiary analysis should be applied in determining whether a school is *de facto* or *de jure* segregated. To this extent the question may be controlled by this Court's decision in *Keyes v. School District No. 1*, No. 71-507, in which oral argument has been set for October 12, 1972. As to this question, therefore, the Court may wish to defer action on the petition pending its decision in *Keyes*.

2. The junior high school portion of the secondary school plan provided for the closing of one black and one white junior high school and made reassignments among one black and eleven white junior high schools so that no junior high school had an enrollment more than 53 percent black.² Under the senior high school portion of the plan, the formerly black senior high school will be converted to a city-wide Metro Learning Center enrolling 800 to 1,000 students on a desegregated basis, upon completion of a new high school in September 1973, at which time each of the other high schools will have enrollments from 7 to 22 percent black. The Metro Learning Center is presently in partial operation at the formerly black school.³

all of its schools, including those which were all-white in 1954 but became virtually all-black thereafter before any effective desegregation occurred." Pet. 3.

² It was projected in the plan that none of these schools would have an enrollment more than 33 percent black, but the actual enrollments that resulted (set forth at p. 162 of the Appendix in the court of appeals) exceeded the projected percentage figures in several schools.

³ A copy of the entire secondary school plan, which is "Exhibit A" to the district court's order of July 23, 1971, has been lodged with the Clerk of this Court. (The order, without the exhibit, is set forth at Pet. App. 62a-66a.)

The second question presented in the petition is whether the above-described plan "perpetuates discrimination against black students" (Pet. 3). The court of appeals held that the record did not support petitioners' contention that the plan places a disproportionate share of the burden of desegregation on the black community (Pet. App. 34a). It held the plan was not racially discriminatory. The approach of the court of appeals was consistent with the general approach of the other circuits in determining whether black school closings are constitutional; *i.e.*, to ask:

* * * whether the Board's decision is so plainly unfair that it clearly amounts to invidious discrimination in violation of the equal protection clause.

Allen v. Asheville City Board of Education, 434 F. 2d 902, 905 (C.A. 4). The question as to the secondary school plan is a factual one, and presents no substantial legal issue.

It is therefore respectfully submitted that the Court may wish to postpone disposition of the present petition pending its decision in *Keyes v. School District No. 1*, No. 71-507.

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DAVID L. NORMAN,
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SEPTEMBER 1972.