No. 75-164

In the Supreme Court of the United States

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PETITIONERS

v.

NANCY ANNE SPANGLER, ET AL.

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners—a California school board and certain of its members—administer a school district that has been operating under a court-ordered plan of desegregation since 1970. They seek review of a judgment of the court of appeals affirming the denial of their January 15, 1974, motion for (1) relief from the original desegregation order, (2) dissolution of the district court's injunction, (3) termination of the court's supervision, and (4) alternatively, leave to implement a freedom-of-choice plan of student assignments, at the elementary level, which the evidence showed would likely result in resegregation.

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The court of appeals correctly concluded that, in the circumstances presented, the district court did not abuse its discretion in refusing the requested relief. Further review is not warranted.

1. On January 23, 1970, the United States District Court for the Central District of California entered an order enjoining racial discrimination in the operation of the Pasadena Unified School District and directing the development of a desegregation plan requiring that no school in the district enroll "a majority of any minority students." That order was based on a determination, supported by detailed findings of fact, that the school system had been *de jure* segregated for 16 years.[1] The board did not appeal the judgment of the district court, and the court-approved Pasadena Plan was implemented at the commencement of the 1970–1971 school year.

[1] The judgment of January 22, 1970, together with the court's March 12, 1970, findings and conclusions, is reported at 311 F. Supp. 501. The court found that, between 1954 and 1970, discriminatory action and inaction by the school board had contributed to and promoted racial segregation (see 311 F. Supp. at 506–521).

Petitioners are incorrect in asserting (Pet. 3) that the discrimination found by the district court was, for the most part, passive. The court's findings reflect a series of affirmative, discriminatory actions by the board: (1) The board did not make a single attendance area change involving the assignment of students from a majority-white residential area to a majority-black school; instead, it transported white students past majority-black schools with excess capacity to majority-white schools (311 F. Supp. at 507–508) and effected other attendance changes the net effect of which was to make white schools "whiter" and black schools "blacker" (*id.* at 508–510). (2) It consistently rejected proposals by citizens' committees, the district's superintendent, and certain board members that would have significantly promoted integration (*id.* at 510–511). (3) It used transportaion to enable white students to avoid attending largely black schools (*id.* at 512). (4) It hired few black teachers and assigned most of those whom it did hire to predominantly black schools (*id.* at 513–514); similarly, it assigned black substitute teachers to majority-black schools and allowed white substitutes to avoid teaching at black schools (*id.* at 514). (5) It assigned less experienced teachers with less education to majority-black schools more frequently than to majority-white schools (*id.* at 514). (6) It discriminated against blacks in the hiring and promotion of administrators (*id.* at 516). (1) It approved the construction of new facilities and additions to existing facilities which contributed to the racial identifiability of the district's schools (*id.* at 517–518). (8) It employed classroom "grouping" procedures that were based upon racially discriminatory tests and that resulted in classroom segregation by race (*id.* at 519). (9) It granted transfer requests, many of which it knew or should have known were groundless or racially motivated, which promoted racial segregation (*id.* at 520).

The district court found that the school district had experienced a high degree of racial separation, especially in its elementary schools, for 15 years. In each of those years 90 percent of the district's white elementary-age children had attended majority-white schools, while more than 50 percent of its black elementary-age children had attended majority-black schools (*id.* at 507). In the 1969–1970 school year, the court found, 85 percent of the district's black elementary-age children attended its eight majority-black elementary schools, and 93 percent of its white elementary-age children attended the remaining elementary schools (*id.* at 506–507); thirteen of its elementary schools were less than 5 percent black in enrollment, two were more than 90 percent black, three were more than 80 percent black, two were more than 60 percent black, and another was 59 percent black (*ibid.*).

At the February-March 1974 hearing on their motion for relief from the 1970 decree and termination of the court's continuing jurisdiction, petitioners presented evidence intended to show that the quality of education in Pasadena had deteriorated under the Pasadena Plan. The United States offered evidence showing that the plan had been successful, from an educational perspective, and the district court found

itself unable to conclude otherwise (see 375 F. Supp. at 1308). Petitioners also attempted to show that the plan had caused "white flight" from the district's schools. The United States presented evidence showing that the trend of declining white enrollment in Pasadena had closely paralleled the California statewide trend since at least 1966 and that Pasadena's loss of white students could not be attributed to its desegregation efforts under the plan. The district court resolved the conflict in the evidence in favor of the respondents (*id.* at 1306).

2. In its present posture, this is a narrow case. Neither the correctness of the district court's 1970 conclusion that the Pasadena school system was *de jure* segregated, nor the validity of the court's directive that no school in the system enroll "a majority of any minority students," was before the court of appeals (see Pet. App. A3, A20). Yet petitioners seek to raise these issues here (see, *e.g.*, Pet. 2, 3, 10, 13), contending that the decision below has far-reaching implications inconsistent with this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, because of an alleged "commitment of the lower federal courts, like those below, to a rigid formula of specified racial balance to be accomplished by extensive busing" (Pet. 10). There is, however, no such commitment in the decision of the court of appeals; and any inconsistency that may have existed, prior to its decision, between the "no majority of any minority" requirement and this Court's rejection, in *Swann,* of an extended use of racial ratios to

overcome past discrimination, see 402 U.S. at 24–25, was, in any event, prospectively eliminated by the court of appeals, which "expressly disapprov[ed] such portions of the record as suggest that the district judge interprets his injunction to require continuous annual redistricting" (Pet. App. A11; see also Pet. App. A20).

Petitioners' concern about transporting school children to accomplish desegregation (Pet. 10) is a legitimate one that may call for the further attention of this Court in an appropriate case. But transportation is not an issue at the present stage of this case.[2] Similarly, questions of deteriorating educational quality and the so-called "white flight" phenomenon (see Pet. 4, 9–10) may be significant in other school districts and other cases if those phenomena could accurately be attributed to school desegregation measures; but, in view of the district court's findings (see 375 F. Supp. at 1306, 1308), this is not such a case. Because of the "narrow ambit of [its] review" resulting from the procedural posture of the case (Pet. App. A2), the court of appeals—correctly, in our view—did not directly address these issues; and this case in its present posture is not an appropriate one for this Court's resolution of them.

The principal question before the court of appeals was whether the district court had clearly erred in

[2] Indeed, as the district court found, "the evidence shows that as much or more busing would be necessary to accomplish the ends of an integrated school system under [petitioners'] Alternative Plan as is currently required to achieve the same ends under the Pasadena Plan" (375 F. Supp. at 1308).

determining that, between 1970 and 1974, conditions in Pasadena had not so changed as to justify dissolution of the court's unappealed injunction or termination of its continuing supervision over the actions of the school board (see Pet. App. A2). The court of appeals answered that question in light of the unique form in which this aspect of the case arose—a school board motion that expressed the board's intention to implement a predictably resegregative free-choice plan of student assignments (see Pet. App. A7–A8), either by securing judicial approval of that plan or by winning its freedom from judicial restraint.

The court of appeals applied well-settled legal principles. Judge Ely's opinion did not formulate a broad rule resolving the question (left open in *Swann*) of "how long a school system must remain under the control and direction of a federal district court" (Pet. 12). The opinion stated only that the district court "did not clearly err in concluding that it was not yet clear that the contemplated disestablishment of segregation had been achieved in the Pasadena Unified School District," and that "[o]n these facts the court did not abuse its broad equitable discretion in finding an urgent need to retain, for some time, its jurisdiction of the controversy" (Pet. App. A12).

3. Petitioners contend that the school system has become unitary despite deviations from the "no majority of any minority" requirement, and that the district court was therefore obliged to return it to the unsupervised control of the board (see Pet. 12–13). But injunctions in racial discrimination cases have a

threefold purpose: to stop official acts of discrimination, to correct the effects of past discrimination, and to protect against future discrimination. *Louisiana* v. *United States,* 380 U.S. 145, 154–156. A request for modification or dissolution of an injunction in a school desegregation case must be assessed in light of all these aims. The decisions below are correct, not only because of the school system's non-compliance with the specific injunctive provision of its unappealed court-ordered plan designed to eliminate all vestiges of racial discrimination and prevent resegregation in the future, but also, and more importantly, because of the board's announced intention to substitute a free-choice plan that the district court found would predictably lead to the resegregation of some schools.

There are circumstances in which a court of equity should modify or dissolve an injunction. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 31–32; *Dombrowski* v. *Pfister,* 380 U.S. 479, 492. As Judge Chambers' concurring opinion below noted (Pet. App. A20, A21), "a school district surely should not be kept under injunctions of a court forever," and in this case "a termination of the mandatory injunction within a very short time after the school [district] again gets in compliance" may well be appropriate. But, as Julge Ely's opinion stated (Pet. App. A10–A11), "[o]n the specific facts of this case * * *, it was reasonable for the District Court to conclude that full and effective elimination of racial discrimination had not been achieved during three school years following the initial year in which the

Pasadena Plan was in effect."[3] Since this school system has not yet arrived at the point, envisioned in *Swann,* when judicial supervision ceases to be necessary, the district court's denial of relief and retention of jurisdiction were proper. See *Raney* v. *Board of Education,* 391 U.S. 443, 449.

4. Petitioners point out that, in *Green* v. *County School Board,* 391 U.S. 430, this Court "did not invalidate 'freedom of choice' *per se*" (Pet. 15). But the district court disapproved the board's alternative plan, not simply because it was a free-choice plan, nor because it "did not include a continuing mandate for the 'no majority of any minority' rule" (Pet. 14), but because the court was not satisfied that, in Pasadena, such a plan would maintain desegregated schools (see 375 F. Supp. at 1307). There was, as Judge Ely stated (Pet. App. A14):

> ample evidence to support the District Court's conclusion that the proposed freedom of choice or "Alternative Plan" would not discharge the Board's duty to ". . . make every effort to achieve the greatest possible degree of actual desegregation. . . ." *Davis* v. *Board of School Commissioners,* 402 U.S. 33, at 37 (1971). Previous efforts by Pasadena to desegregate by

[3] Regardless of whether petitioners are correct in claiming that the board's failure to comply with the district court's outstanding injunction was solely "the result of demographic changes not attributable to the school board" (Pet. 13), the board's effort here to dissolve the injunction (and terminate judicial supervision) arose in the context of a board-proposed freedom-of-choice plan which would have resegregative effects beyond those allegedly attributable to demographic changes.

> "freedom of choice" plans had failed. * * * There was also evidence showing that freedom of choice plans in [other] California locations, the cities of Richmond and San Bernadino, had been wholly unsuccessful.

The district court's rejection o fthe board's alternative plan was entirely consistent with the decision in *Green.* See 391 U.S. at 440–441.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

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[4] Petitioners have filed a memorandum suggesting that this case is moot because the original named plaintiffs have been graduated from high school and are no longer students in the Pasadena school system and because the district court has not certified a class action in accordance with Rule 23(c) of the Federal Rules of Civil Procedure. The United States, however, is a party plaintiff in this case, having intervened pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h–2. It is "entitled to the same relief as if it had instituted the action" (*ibid.*). Whatever may be the effect in cases such as these of the graduation of the named plaintiffs, the government's status as a party plaintiff in this case means that it is not moot.

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