No. 86-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA, a Public Body Corporate,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

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

BRIEF IN OPPOSITION TO CERTIORARI

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Counter-Statement of Question Presented

In the circumstances of this case, the questions sought to be raised by petitioner simply do not arise on this record. The judgment below is not based upon resolution of those questions. Rather, the only issue which this Court could appropriately decide were it to grant review at this stage of the proceedings is:

> Should members of a class on whose behalf a mandatory injunction has been issued be permitted to reopen the litigation to seek enforcement of their rights upon a showing "that the defendants abandoned [compliance with the decree] without court approval" (Pet. App. 13a)?

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BRIEF IN OPPOSITION TO CERTIORARI

Statement

Respondents are members of the class of black school children on whose behalf this school desegregation lawsuit was originally commenced. They sought to intervene and to reopen the litigation, in order to obtain enforcement of the mandatory injunction which the original plaintiffs had secured for their benefit. The

injunction had never been vacated or withdrawn even though the federal district court had relinquished active supervisory jurisdiction of the lawsuit.

The district court set the matter down for a hearing "at which time the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of." At the conclusion of the hearing the court not only denied the motion to reopen but purported to rule on the underlying substantive question whether the injunction should remain in effect.

The Court of Appeals held that respondents should have been permitted to reopen the case and that the trial court's ruling on the merits was premature, since respondents had no adequate notice of the scope of the hearing and were consequently denied the opportunity to present all relevant proof. Accordingly, the Court of Appeals

remanded for further evidentiary proceedings while emphasizing that it was not "addressing, even implicitly, the ultimate issue . . . ." (Pet. App. 15a.)

History of Litigation

From the time of Oklahoma's admission to the Union in 1907 until well after Brown v. Board of Education, 349 U.S. 294 (1955), the public schools of Oklahoma City were operated on the basis of complete and mandatory racial segregation as directed by the state's constitution and laws. Dowell,[1] 219 F. Supp. 427, 431-34 (W.D. Okla. 1963). This lawsuit was initiated in 1961 because the dual system of education remained in place at that time. Following an evidentiary hearing, the district court in 1963 found that residential patterns in Oklahoma City were highly segregated by

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[1]Citations to earlier reported opinions in this action are identified simply as "Dowell."

race because of state law,[2] enforcement of restrictive covenants,[3] and the long standing practice of school segregation.[4] Accordingly, the court found, when the school board in 1955 drew geographic (non-overlapping) zone lines for each school, the traditionally black schools "remained virtually 100% Negro."[5]

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[2]Dowell, 244 F. Supp. 971, 975 (W.D. Okla. 1965); cf. Buchanan v. Warley, 245 U.S. 60 (1917); City of Richmond v. Deans, 281 U.S. 704 (1930).

[3]Dowell, 219 F. Supp. at 433, 244 F. Supp. at 975; cf. Shelley v. Kraemer, 334 U.S. 1 (1948).

[4]Dowell, 219 F. Supp. at 433-34; 244 F. Supp. at 975, 976. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971)(influence of school segregation policies upon residential segregation); Tr. 88-89 (same [testimony of school board member Dr. Clyde Muse])

[5]Dowell, 244 F. Supp. at 975. The board also established a minority-to-majority transfer policy which operated to maintain segregation. Id. at 434-35, 440-41, 244 F. Supp. at 997; see Goss v. Board of Educ. of Knoxville, 373 U.S. 683 (1963).

In 1963 the district court directed the school board to prepare and submit "a complete and comprehensive plan for the integration of the Oklahoma City school system," Dowell, 219 F. Supp. at 447-48. It took nearly a decade of further litigation before such a plan was prepared and implemented.[6] When that occurred, in 1972,

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[6]The school board's initial submission "professe[d] adherence to a neighborhood school policy based on 'logically consistent geographical areas,'" 244 F. Supp. at 976, which the district court found to "lea[d] inexorably to continued school segregation" because of the officially induced segregated residential patterns of Oklahoma City. Id.

The trial court repeatedly allowed the school board additional time to submit an effective desegregation plan. See Dowell, 244 F. Supp. 971 (W.D. Okla. 1965), modified and aff'd, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967); 396 U.S. 269 (1969)(reversing delay in implementing interim secondary plan); 307 F. Supp. 583 (W.D. Okla. 1970), aff'd, 430 F.2d 865 (10th Cir. 1970)(approving secondary plan). In 1972, finding that the school board had failed to carry out its secondary plan and refused to submit an effective plan for its elementary schools, the district court ordered the im-

the school board and "its members, agents, servants, employees, present and future," were specifically enjoined to "implement and place into effect [a plan] which embodies the principles and suggestions contained in the Plaintiffs' Plan," and they were also prohibited from "alter[ing] or deviat[ing] from the New Plan without the prior approval and permission of the court." Dowell, 338 F. Supp. at 1273 para.

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plementation of a plan drafted by the plaintiffs' expert witness, Dr. John A. Finger, see Swann, 402 U.S. at 8-9. Dowell, 338 F. Supp. 1256 (W.D. Okla.), aff'd, 465 F.2d 1012 (10th Cir.), cert. denied, 409 U.S. 1041 (1972).

The "Finger Plan" retained the board's post-Brown attendance zones for elementary schools but clustered each traditionally black school with a group of predominantly white schools, restructuring the grades to achieve integration. (Tr. 263, 275). Elementary zones were somewhat similarly grouped into feeder patterns for the various junior high and high schools to desegregate them. Dowell, 338 F. Supp. at 1267-68.

2,3,5.[7] That injunction has never been vacated.

Termination of Jurisdiction

Over the next five years the litigation continued to be quite active. The docket entries reflect that during this period of time, the district court approved seven board-proposed modifications of the plan and denied three requests.[8]

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[7]The district court's order recited that "[i]t is not intended that the school authorities be placed in a 'strait jacket' in the administration of the plan, but it is essential that the court be informed of any proposed departure from the sanctioned program." 338 F. Supp. at 1273 para. 3.

[8]Most of the changes involved alteration of feeder patterns or closure of schools; school attendance areas have remained basically the same up to the present time (Tr. 336 [testimony of school board president]). The trial judge also required the board to reassign principals in order to mitigate the racial identifiability of the two high schools enrolling the highest proportions of black students, Dowell, No. CIV-9452 (W.D. Okla. June 3, 1974), aff'd, No. 74-1415 (10th Cir. Jan. 28, 1975), cert. denied, 423 U.S. 824 (1975), and warned the

On January 18, 1977 the district court disposed of a June 2, 1975 "Motion to Close Case" filed by the school board.[9] It relinquished jurisdiction over the case because:

> the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the [Finger] Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which this cause has been pending before the Court.[10]

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board in 1974 that he "w[ould] not look with favor upon further proposals casting disproportionate burdens on the black community."

[9]The court held a hearing on the motion on November 18, 1975.

[10]The court's order further stated:

> . . . The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> Now sensitized to the constitutional implications of its conduct

However, the January 18, 1977 order did not vacate the 1972 permanent injunction; consequently plaintiffs did not appeal.[11]

> and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .

(The entire Order of January 18, 1977 is reprinted at Pet. App. 35a-36a.)

The court also dissolved the bi-racial committee whose members it had appointed since 1972 and which had been the source of a number of modifications to the plan, including the reassignment of high school principals, see supra note 8.

[11]The trial court had earlier dismissed the action sua sponte "to have a cooling period" so that "the schools were permitted to operate during the 1970-71 school year without the stress of litigation," see Dowell, 338 F. Supp. at 1258 n.1, but it vacated that dismissal some eight months later, id., fashioning further remedial orders when it learned that the school board had reneged on its commitment and obligation to implement the previously approved plan. See supra note 6.

Current Proceedings

As the court and the parties anticipated, the plan remained in effect after 1977. In 1984, purportedly concerned by the interrelationship between the "stand alone school" feature of the original Finger Plan[12] and a school board policy on school closings,[13] the board appointed a

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[12]The plan recommended that schools serving attendance zones (the same zones drawn by the board in 1955, see supra text at n.5 & note 8) which became residentially integrated should no longer participate in the system of grouping and grade restructuring but should serve all elementary students living in their zones.

[13]The school board has adopted minimum enrollment requirements for elementary schools to remain open. Since 1972, the attendance areas of about a dozen formerly white schools have become sufficiently mixed residentially so that the schools qualified for "stand alone" status, see supra note 12. As white students from these schools were removed, enrollment in the formerly all-black schools (which served only a single grade under the plan) was most drastically affected and, under the board's closing policy, the schools in were in danger of being shut.

committee of its members to study possible changes in the elementary school assignment

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It is not the "stand alone" feature of the Finger Plan that "many years later proved inequitable due to intervening demographic changes in Oklahoma City" (Pet. 3 n.1). Threatened school closings in the black community resulted from the board's minimum enrollment policy (to which it decided it wished to adhere) rather than from the Finger Plan (which the board decided it wished to change).

Moreover, the plan distributed the burdens of desegregation inequitably from the very start: Dr. Finger would have preferred to have had the formerly black elementary schools each house two grades, not one, but based on the existing elementary attendance zones he could not match school capacities with this grade division (Tr. 296-97) and he lacked the data necessary to redraw the lines (Tr. 263, 275). Dr. Finger recognized the inequity and had expected Oklahoma City school authorities to have eliminated the inequity long before 1984 (Tr. 293). Contrary to Pet. 6 n.5, however, Dr. Finger supported "less bussing [sic] of young blacks" only "to the extent possible" "without resegregating the schools" (Tr. 297, 298) and he saw no danger to health or safety of Oklahoma City school children of any age in the pupil transportation necessitated by an adequate plan of desegregation such as the one he had devised (see Tr. 291, 197-99).

plan to address the concerns.[14] The committee recommended, and the board adopted (without seeking court approval as required by the permanent injunction, see supra note 7 & accompanying text) a modified student assignment scheme which dismantled the elementary school groupings and reinstituted the old "neighborhood school" zone lines for all grade K-4 facilities.

The board's own projections demonstrated that this new plan does more

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[14]The black board member who initiated the action was disturbed by the busing inequity and the potential black school closings (Tr. 33-35, 39-40, 49). Although he, like Dr. Finger, would have supported alterations which more evenly distributed busing burdens among black and white students (Tr. 40, 64-65, 274, 277-78), the committee considered such a plan only "[i]n our conversation . . . so far as the committee. Insofar as that being a proposal to the board, no" (Tr. 41). The committee flatly rejected any such approach because, "facing reality" (id.), it feared white flight to suburban districts or private schools (Tr. 41-43).

than create "some racially identifiable schools" (Pet. 7)(emphasis supplied). Eleven K-4 schools were expected to be more than 95% black; of these, all but two[15] were all black or virtually all black in 1971-72 prior to implementation of the Finger Plan.[16] Compare Dowell, 338 F. Supp. at 1260 n.3 with D-X 22, p. 2. Fifteen other schools would be less than 10% black. Id.

Respondents, black pupils attending Oklahoma City public schools, on February 19, 1985 sought to intervene in this

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[15]One of these two, King, was not operated in 1971-72. The other is North Highland elementary. Four other elementary schools that were virtually all-black in 1971-72 have been closed (Culbertson, Dunbar, Edison and Harmony) while three have become integrated fifth grade centers (Green Pastures, Page and Woodson).

[16]The eleven schools are Creston Hills, Dewey, Edwards, Garden Oaks, King, Lincoln, Longfellow, North Highland, Parker, Polk, and Truman.

action, to reopen the case, and to obtain preliminary injunctive relief to enforce the earlier orders.[17] The district court on March 13, 1985 set the matter down for an evidentiary hearing "at which time the question of whether this case shall be re-opened and the applicants allowed to intervene shall be tried and disposed of."[18] Following the hearing,[19] the court denied

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[17]In the conclusion to their motion, respondents asked the district court "to allow their intervention, to allow them to file an intervenors complaint, and thereafter, . . . to set an early hearing on the merits of the controversy raised herein."

[18]The Order is reprinted infra pp. 1a-2a.

[19]Petitioner is simply incorrect in stating that there was "extensive discovery on the merits" (Pet. 11 n.12). On April 8, 1985, the date originally scheduled for the hearing (which on March 27 had been delayed one week), respondents were able to take the deposition of the school superintendent, board president, the board member who proposed the change, and a school system staff member. Petitioner deposed Dr. Finger on April 13, 1985.

the motion to reopen the case and, although the issue had not been identified in the scheduling order, the court went on to sustain the constitutionality of the student reassignment plan (Pet. App. 16a-34a). Respondents appealed. The Tenth Circuit reversed and remanded (Pet. App. 1a-15a).

The Decision on Appeal

The Court of Appeals held that respondents had established grounds for allowing the suit to be reopened by demonstrating that "the defendants abandoned the Finger Plan without court approval" which they were required to seek by a permanent injunction that had never been vacated or modified (Pet. App. 13a). The Court also reviewed the record and concluded that the trial court had failed to give respondents notice that the April, 1985 hearing would deal with the underlying merits of the

controversy and had limited the proof which respondents could offer (Pet. App. 14a).

The reviewing court recognized that the district judge had, in his 1977 order relinquishing jurisdiction, used language which described Oklahoma City as having "slowly and painfully accomplished" a "unitary system" (see Pet. App. 7a, 12a) and also that the trial court could decide, on a proper motion, to modify or terminate its injunctive orders (Pet. App. 11a). Neither circumstance, it held, authorized the school board to bypass the court, however. It thus remanded the matter to allow the trial court to determine, after an evidentiary hearing, "whether the original mandatory order will be enforced or whether and to what extent it should be modified" (Pet. App. 15a).

REASONS FOR DENYING THE WRIT

I

The Judgment Below Rests Upon Rulings On Issues Other Than The Questions Presented In The Petition, Which The School Board Does Not Contest And Which Were Correctly Decided By The Court Of Appeals

In light of the unusual procedural setting of this case, described above, it is a wholly inappropriate vehicle for deciding the questions which the school board seeks to present to this Court. The judgment below rests entirely upon two key determinations by the Court of Appeals which petitioner has not asked this Court to review: (a) the district court erred in denying the motion to reopen the suit (Pet. App. 13a); (b) the district court erred in deciding the merits of the new student assignment plan because it had not given respondents adequate notice that the hearing was to cover that issue, and

respondents did not have an opportunity to offer all their relevant proof on that subject (Pet. App. 12a, 14a).

The Court of Appeals explicitly did not decide whether the board's new pupil assignment plan was constitutional but remanded for a hearing after the case was formally reopened: "Our holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendants' new school attendance plan" (Pet. App. 15a). Since this Court reviews judgments, and not opinions, the broadly phrased "Questions Presented" in the Petition logically could have no bearing upon the Court's decision whether or not to affirm the ruling below, if it were to grant the writ. See, e.g., Belcher v. Stengel, 429 U.S. 118 (1976)(dismissing writ as improvidently

granted); Jones v. State Board of Education, 397 U.S. 31 (1970)(same); Smith v. Butler, 366 U.S. 161 (1961)(same).

Petitioner apparently does not contest the Court of Appeals' "procedural" determinations, for it has not included them among the Questions Presented which it seeks to raise. Thus, we repeat, petitioner has conceded the grounds upon which the lower court's judgment rests. Although the board appears to advance some sort of "waiver" argument to justify overlooking the dispositive procedural rulings of the court below, see Pet. 11 n.12, the facts belie this contention.[20] Indeed, respondents'

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[20]The trial court did not "inquir[e] if there was a question as to which side had the burden of proof" (Pet. 11 n.12). He simply asked, "Have you lawyers decided who should take the lead or who should put on your proof first?" Counsel for respondents replied, "We haven't, Your Honor, but we're prepared to start first" (Tr. 6). There was no discussion of the "burden of proof."

counsel explicitly confirmed their understanding of what issues were to be tried and decided at the conclusion of the hearing, after the close of proof but before the district court had ruled:

> MR. SHAW: I just wanted to confirm my understanding, that this is a hearing on a motion to reopen the case.

Similarly, while the court did ask respondents' counsel, when it was announced that respondents would not present any further evidence, "I take it that you're satisfied you've had a fair hearing" (Tr. 303), there was no basis for interpreting this question as manifesting the court's view of either the burden of proof or of the underlying substantive question. When respondents' counsel assented, the court neither announced a ruling nor invited an oral motion by the school board for judgment in its favor. He said merely: "Then, let the record show the intervenors or Applicants for Intervention now rest their case" (id.).

Finally, it is of course of no significance that respondents' counsel did not argue with the trial court's extemporaneous comments during the hearing, particularly in light of its narrow scope as set forth in the March 13, 1985 scheduling order, see supra text at n.18.

> THE COURT: It's for an evidentiary hearing to see whether or not the Court will reopen it or not. [Tr. 450.]
>
> * * *
>
> MR. SHAW: As I understand it, the hearing that we're here for, for the last two days, is while that question is raised, the question presented to the Court now is whether we prepared enough evidence to show that the case should be reopened.
>
> THE COURT: Well, I think you're probably right about that. [Tr. 451-52.]

Thus, there can be no blinking the fact that the district court unexpectedly decided the underlying substantive question (the permissibility of the board's new student assignment plan) and denied respondents a fair opportunity to challenge

that plan in a full evidentiary hearing.[21]

To be sure, the Court of Appeals' opinion discusses the district court's 1977 order and also expresses disagreement with the opinion of the Court of Appeals for the Fourth Circuit in Riddick v. School Board of Norfolk, 784 F.2d 521 (4th Cir. 1986), pet. for cert. filed, 54 U.S.L.W. 3811 (U.S. May 29, 1986). However, the Tenth Circuit's holding was a limited one: that the motion to reopen should have been granted and respondents given an opportunity, with adequate notice, to put

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[21]The Court of Appeals' conclusion that respondents' presentation of evidence was curtailed and restricted (Pet. App. 12a, 14a) is also well supported on this record. See, e.g., Tr. 164 (evidence of similarity between justifications given by board for new plan and justifications offered in 1972 for plan rejected by court not "helpful to me"), 270-71 (availability of less segregative alternatives to address inequities by modifying Finger Plan not relevant because Finger Plan "is over, done and complied with").

on their proof. That holding rests upon the Court of Appeals' fundamental determination that the provisions of the permanent injunction in this case remained in effect in 1984 and justified the effort by parties for whose benefit it was originally entered to reopen the lawsuit on the ground that the injunction had been disobeyed.

If the Court were to grant review at this time, therefore, it would be unlikely to reach and decide the Questions Presented in the Petition, because it would logically consider first -- and affirm -- the Tenth Circuit's determination that respondents were denied their day in court on those issues. Moreover, the Court traditionally decides broad constitutional questions only upon a fully developed factual record, which is lacking in this case for the same reason. Finally, review at this stage of

the proceedings would at the very least be premature since the Court of Appeals leaves to the district court in the first instance the decision whether "the original mandatory order will be enforced" (Pet. App. 15a).

II

The Substantive Questions The Board Seeks To Have Determined Are Already Raised In Riddick, A Case In Which There Was A Full And Complete Evidentiary Hearing And In Which There Are No Procedural Issues Clouding Their Resolution By This Court

This matter involves, even in the view of the petitioner,[22] no substantive issue which is not already presented to the Court

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[22] See, e.g., Pet. 13 ("Because the need for a decision by this Court is beyond serious dispute, the only significant issues are whether the Court should grant both petitions, or only one, and if only one, which it should be").

in Riddick (No. 85-1962). Often this Court benefits from reviewing more than one case presenting similar issues, since nuances and subtleties may be revealed. That possibility is absent here, however, because the instant matter is clouded by the dispositive procedural ruling upon which the judgment below rests, as we have described in Point I.

The petitioner's exhortations come down to the proposition that in its view, the Fourth Circuit was right and the Tenth Circuit was wrong (see Pet. 14), a matter which, by definition, the Court can decide adequately in Riddick.

It is certainly far from clear that the Court's consideration and analysis of the legal issues will be materially assisted by having "briefs and arguments of two sets of counsel." No legal argument is suggested in the Oklahoma City Petition

which the school board in Riddick has not already advanced. The Petition demonstrates, however, that in its zeal to bring this case to this Court on the bootstraps of Riddick, the Oklahoma City board has not only ignored the actual basis for the Court of Appeals' judgment but also has palpably misstated or exaggerated the record in significant respects.[23] For this reason, a

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[23]For example, petitioner asserts that "[t]he Board's action adopting the [student reassignment] plan was supported by a 'majority of the community' (T. 32), including the black community. (T. 432-436)." There is no discussion whatsoever of the subject on page 32 of the transcript. As to the testimony of Dr. Tommy B. White, which includes pages 432-36 of the hearing transcript, the relevant portions are as follows:

> Q You made a statement that the majority of the community supports this plan, did you not?
>
> A Yes, sir.
>
> Q The majority of what community supports this plan?
>
> A The community that was -- actually, what happens is that the or-

ganization decided that it would petition our community and the petition will demonstrate that the community does in fact --

Q My question is: The majority of what community?

A The community that we canvassed.

Q Is this canvas already completed?

A No, it certainly is not completed. [Tr. 433-34.]

Similarly, petitioner incorrectly attempts to suggest that respondents were not surprised by the trial court's ruling on the substantive merits despite the March 13, 1985 order limiting the scope of the hearing, see supra notes 20, 21 & accompanying text. Its facile statement that the new plan "did result in the creation of some racially identifiable elementary schools," although "[t]here are no [100%] one-race schools as a result of the plan" (Pet. 7, 8) obscures the dramatic resegregation worked by the student reassignment plan (compare supra text at nn.15, 16) and indicates that the school board does not appreciate the seriousness of the Fourteenth Amendment rights at stake in desegregation cases. As the district court stated at an earlier stage of this case: "The Superintendent of Schools takes the incomprehensible view that . . . a school loses its racial identity when one member of the opposite race is enrolled."

brief on the merits from this petitioner would have to be scrutinized with extra caution.

Riddick frames the issues squarely; this case simply does not, and the writ should be denied.

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338 F. Supp. at 1270 n.14.

III

On The Particular Facts Of This Case, If This Court Were To Reach The Merits It Would Be Required To Hold The Use Of The Board's Pupil Reassignment Plan Impermissible

There is another reason to deny the writ. If the decision below were a ruling on the substantive merits of the board's pupil reassignment plan, and if it were properly presented to this Court for review, application of established law to the particular facts of this case would compel the conclusion that use of the plan is impermissible.

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 31-32 (1971) and Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434-35 (1976), this Court emphasized that the remedial orders of federal courts in school desegregation cases should be limited to

correcting the effects of unlawful actions by school authorities and that they may be directed only at current conditions of segregation attributable to the intentional acts of state officials. See Keyes v. School District No. 1, Denver, 413 U.S. 189, 211 (1973)("at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention").

On the facts of the instant lawsuit, these prerequisites are clearly met. The connection between the virtually all-black enrollment of eleven K-4 elementary schools under the board's 1985 assignment plan, and the historic, de jure unconstitutional con-

duct of Oklahoma public authorities, is unquestioned.[24]

As described in the Statement, supra, the district court has made explicit findings in this litigation that the highly segregated residential patterns in Oklahoma City, including the overwhelmingly black northeast quadrant, result from generations of official policy -- and that mandated school segregation contributed significantly to these patterns. See supra text at nn.2-5. Because of this extensive, governmentally induced residential segrega-

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[24]As the unanimous Court observed in Swann, 402 U.S. at 28:

> "Racially neutral" ["neighborhood school"] assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school sizes in order to achieve or maintain an artificial racial separation.

tion, when the school board established "neighborhood school" geographic zone lines in 1955, the traditionally black schools remained virtually all black. Dowell, 244 F. Supp. at 975, 976, 980. The Finger Plan was designed to overcome this barrier to the elimination of the dual system.[25]

The record also establishes that, because the Finger Plan was based on grouping and grade restructuring at the elementary school level and recombination into feeder patterns at the secondary level,[26] zone lines in Oklahoma City have remained basically unchanged since long prior to 1972. Under the board's 1985 plan, these

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[25]The school board's expert witness, Dr. George Henderson, testified at the hearing that both in 1972 and in 1985 it was not possible to disestablish racially identifiable schools in Oklahoma City "if you're concerned with the racial mix" because of this residential segregation (Tr. 388-89).

[26]See supra note 6.

same, longstanding "neighborhood school" zone lines became re-operative for purposes of school assignment of pupils in grades K through 4:

> Q But the School Board knew that it would be creating racially identifiable schools, even if we use your very generous definition of 90 percent?
>
> A No, we did not create those schools. Those neighborhood boundaries are the same neighborhood boundaries as have existed for years. People have chosen to live wherever they live, so that the racial -- if they're racially identifiable, that was not created by this Board. [Tr. 336 (board president).]

These zone lines today perpetuate Oklahoma City's traditionally all-black elementary schools,[27] as they did prior to 1972. Thus, the pupil segregation in the K-4 schools under the board's 1985 plan is the continuing vestige of Oklahoma City's long-

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[27] See supra notes 15, 16 & accompanying text.

maintained policies of racial discrimination and segregation.

Conclusion

For the foregoing reasons, respondents respectfully pray that the writ be denied.

Respectfully submitted,

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APPENDIX

FILED March 13, 1985
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Clerk, U.S. District
Court

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ROBERT L. DOWELL, et al. Plaintiffs, vs. BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS, et al. Defendants.	)	No. CIV-9452

ORDER

The court has carefully reviewed the Motion to Intervene, To Reopen Case And For Further Relief, and the Memorandum in support thereof, filed by the applicants for intervention on February 19, 1985. Likewise, the court has received and carefully reviewed Defendants' Response to Motion to Reopen Case and has concluded that before the court can make any ruling

with respect to the applicants' motion, the court should conduct an evidentiary hearing. The court, therefore, concludes that the motion to intervene and reopen and the defendants' response join the issues, and the matters in them are set for evidentiary hearing at 10:00 a.m., April 8, 1985, at which time the question of whether this case shall be reopened and the applicants allowed to intervene shall be tried and disposed of.

IT IS SO ORDERED.

Dated this 13th day of March, 1985.

s/ Luther Bohannon

UNITED STATES DISTRICT JUDGE