NO. 89-1290

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT R. FREEMAN, et al.,

Petitioners,

V.

WILLIE EUGENE PITTS, et al.,

Respondents.

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

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI ON BEHALF OF GEORGIA SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Georgia School Boards Association, Inc. (GSBA), is a nonprofit membership corporation organized under the laws of Georgia. Its Articles of Incorporation

declare that it is to serve as an association of local school boards and other persons interested in education; to render assistance to local board members and administrators; to work cooperatively with other groups and organizations for the improvement of public education; and to provide, publish and otherwise disseminate educational information, literature and services. The Association now represents all 186 local public school boards in Georgia, and is governed by a Board of Directors consisting of representatives from local boards of education throughout the State.

This case involves a question of law which is of significant importance to local boards of public education in the State of Georgia. As one State whose Constitution and laws previously mandated de jure racial segregation in the public

schools (Constitution of 1945, Art. VIII, Sec. I, Par. I), most Georgia local school districts have a vital interest in ascertaining with reasonable certainty when they have eradicated all vestiges of the prior de jure system and achieved unitary status. They equally are interested in being assured that the constitutional principles governing this important question are the same in Georgia as they are in the other forty-nine states of the Union. This case presents an opportunity for this Court to address this issue, and resolve the uncertainty not only for all Georgia school systems, but for school systems all over the Nation.

Both parties have agreed that this brief might be filed without motion.

SUMMARY OF ARGUMENT

In this case, the Court of Appeals for the Eleventh Circuit rejected the

incremental desegregation rule approved in Morgan v. Nucci, 831 F2d 313 (1st Cir. 1987), and arguably recognized by this Court in Pasadena City Board of Education v. Spangler, 427 U.S. 424, 436 (1976). The effect of the decision below is necessarily to prolong the period during which federal courts maintain judicial oversight over formerly de jure school systems. Regardless of which way this issue is resolved, it involves significant questions relating to the role of the Courts in education, as well as what standards should govern desegregation in the public schools. Other Courts of Appeal have recently reached different views of the same issue, i.e., when is unitariness achieved, although in the context of a somewhat different question. Whatever the law may be as finally determined by this Court, it should be the

same in Georgia as it is in Boston, Oklahoma City, or Topeka, Kansas. Considerations of federalism, including the equal footing doctrine, compel this uniformity. The writ of certiorari should be granted.

ARGUMENT

In its decision below, Pitts v. Freeman, 887 F2d 1438 (11th Cir. 1989), the Court of Appeals rejected the doctrine of incremental desegregation, and held that a school district does not achieve unitary status until it has eliminated "all vestiges of its dual system" by fulfilling at the same time all six factors referred to in Green v. County School Board, 391 U.S. 430, 435 (1968), i.e., faculty and staff assignments, transportation, extracurricular

activities, facilities and student assignments, and even then, the Court might conclude for other reasons that the system was still not unitary, for "Application of the Green factors does not strip a district court of its responsibility and ability to consider unique circumstances in each school system." (887 F2d at 1446). Under this rationale, even though the DeKalb County School District had early achieved unitary status with respect to student assignments, because it had failed to do so with respect to faculty and staff, it remained under a continuing duty to "take affirmative steps to gain and maintain a desegregated student population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status." (887 F2d at 1448). The school district was

specifically ordered on remand to consider pairing and clustering of schools, drastic gerrymandering of school zones, grade reorganizations, and busing "regardless of whether the plaintiffs support such a proposal" (887 F2d at 1450).

This rejection of "incremental desegregation" as the Court below conceded, is directly in conflict with a contrary holding in Morgan v. Nucci, 831 F2d 313 (1st Cir. 1987), and arguably conflicts with this Court's decision in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) (where the Court held that year-to-year adjustments to maintain student racial balance were not required "although it may well be that petitioners have not yet totally achieved the unitary system contemplated. . . for there has been . . . dispute as to the petitioner's complaince with those

portions of the plan specifying procedures for hiring and promoting teachers and administrators" (427 U.S. at 436-437).

Other Courts of Appeal recently have announced somewhat different approaches to determining "unitariness"[1]

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1. In Brown v. Board of Education of Topeka, 892 F2d 851 (10th Cir. 1989), the Court seems to reject unitariness altogether in the sense of recognizing a point at which a system is no longer in the remedy phase and stands in the position whereby anyone complaining against it must prove discriminatory intent. Brown seems to say that as to a formerly de jure system, any condition of racial imbalance at any time thereafter raises a presumption that it is causally related to the prior illegal status, and shifts the burden to the defendant district to prove otherwise, and that the district's actions "have eliminated all traces of past segregation to the maximum extent possible; mere proof that it has not acted illegally is not sufficient, but the district must show that it affirmatively promoted desegregation. In Dowell v. Board of Education of Oklahoma City, 890 F2d 1483 (10th Cir. 1989), cert. pending, No. 89-1080, 58 L.W. 3469, the same Court held that the traditional rules governing dissolution of injunctions, applied in United States v. Swift & Co.,

The result in the DeKalb County School District is that it must once again undertake a restructuring of its student bodies to achieve some sort of a racial balance in school attendance through pairing and busing, which, as another Court in Georgia recently observd, may be a technique designed "to destroy the very school system it is intended to save", Stell v. Board of Public Instruction of Savannah and County of Chatham, 724 F.

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1. continued. . .286 U.S. 106, 119 (1932) (which render it difficult if not impossible in both cases to even get free of a desegregation order) apply to school desegregation cases. On the other hand, Flax v. Potts, 864 F2d 1157 (5th Cir. 1989) and Quarles v. Oxford Separate School District, 868 F2d 750 (5th Cir. 1989) reflect a more flexible standard for achieving unitariness under which present racial disparities do not necessarily raise any presumption, and unitariness permits a school district to thereafter operate free from continuing judicial oversight. See also United States v. Overton, 834 F2d 1171 (5th Cir. 1987), specifically rejecting the Tenth Circuit's rule that formerly de jure systems are subject to perpetual superintendence.

Supp. 1384, 1400 (D.C. Ga. 1988, aff'd and remanded, 888 F2d 82 (11th Cir. 1989).

The incremental desegregation rule is one that reasonable people may differ on. Many of the school board members represented by the amicus curiae undoubtedly would oppose it. Others would approve. On the other hand, even some members of the class represented by plaintiffs disagree with the position taken by plaintiffs before this Court.[2]

Regardless of what the law may ultimately be on this point, it should be the same in DeKalb County, Georgia, as it is in Boston, Massachusetts. "The Constitution, in all its provisions, looks to an indestructible Union, composed of

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2. See The Atlanta Journal, Wednesday, February 14, 1990, p. D.4, headline reading "Blacks in DeKalb Who Oppose Busing Seek Part in Suit".

indestructible States." Texas v. White, 7 Wall. 700, 725 (1869), and under the equal footing principle, ". . . [T]he constitutional equality of the states is esential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution". Coyle v. Smith, 221 U.S. 559, 580 (1911).

In this case, there is no evidence that the deficiencies in DeKalb County's faculty and staff assignment procedures had any causal relationship with respect to the demographic changes in student attendance patterns, and hence this case presents the clear cut issue of which of two divergent doctrines in the circuits should be approved. The question here has profound implications not only for school

desegregation per se, a matter of highest national priority, but also for the role of the judiciary in continued oversight of public education.

CONCLUSION

Conflict in the circuits is one of the "special and important reasons" for the granting of certiorari, under Rule 17 of the Rules of this Court. When the conflict relates not just to some question of private law, the reasons may be attenuated. But here, the conflict relates to a matter of national importance and priority - the issue of when compliance in school desegregation has been achieved so that the goverance of the public school system may be returned to

the school administrators. The writ should be granted.

Respectfully Submitted,

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