12/12/77

No. 77-626

In the Supreme Court of the United States

OCTOBER TERM, 1977

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-626

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, a Mississippi school district and some of its officials, seek review of a judgment requiring the school district to desegregate four overwhelmingly black elementary schools, schools that had been designated for black students when state law required a dual school system.[1]

The United States instituted this suit in 1970; it sought desegregation of petitioners' schools. A consent decree was entered that year, desegregating the junior and senior high schools (Pet. App. 2a and n. 2).

[1]Petitioners maintained their dual system for more than 10 years after this Court decided *Brown* v. *Board of Education*, 347 U.S. 483. See Pet. App. 2a n. 1.

The current proceedings began in 1975, when the United States sought relief with respect to the elementary schools. Three elementary schools, formerly reserved by law for black students, still had student populations more than 90 percent black (Pet. App. 2a and n. 4). A fourth school, except for the attendance of some white children from a military base outside petitioner's geographic boundaries, had a student population more than 98 percent black (*ibid.*).

Petitioners conceded in the court of appeals (Pet. App. 1a, 4a) that these schools were substantial vestiges of the statutorily-mandated dual system, and that the Constitution required a remedy.[2] The district court required petitioners to "establish three pairings, one involving each of the most heavily segregated black schools" (*id.* at 3a; see also *id.* at 40a-49a).

Petitioners argue that they should have been permitted to implement one of the two remedial plans they proposed in the district court. The court of appeals, in an opinion on which we rely, considered petitioners' contentions and rejected them (Pet. App. 6a-8a). It noted that petitioners' plan would leave four grades at one school and two grades at another "virtually 100% black" (*id.* at 6a-7a), and it observed that allowing such racial identifiability to continue would not comply with the constitutional

[2]A great deal of petitioners' argument in this Court (Pet. 5-20) seems to take issue with this concession and to contend that the United States has not established a violation of the Constitution. This argument, to the extent it is contrary to petitioners' concession below, has not been properly preserved. It is, in any event, frivolous, because state law required racial separation in petitioners' schools, and the school district preserved total separation until 1965 (Pet. App. 2a n. 1). There was unquestionably intentional racial discrimination, and the only open questions concern the formulation of a remedy that will eliminate all vestiges of that discrimination.

requirement to eliminate the vestiges of discrimination "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438. After concluding (Pet. App. 4a-6a) that the remedy selected by the district court was consistent with *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, and *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977, the court of appeals considered and rejected petitioners' contentions based on factors such as transportation time (Pet. App. 7a and n. 14) and expense (*id.* at 7a and n. 15).

The decision of the court of appeals applies settled principles to the particular situation of this school district. There is no reason for this Court to review the essentially factual conclusion, concurred in by two lower courts, that the desegregation plan favored by petitioners was inadequate to overcome all of the lingering consequences of the dual school system the school district had maintained for many years.

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

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.