Nos. 72-649 and 72-668

In the Supreme Court of the United States

OCTOBER TERM, 1972

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

JOSE CISNEROS, ET AL., CROSS PETITIONERS

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

MEMORANDUM FOR THE UNITED STATES

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This school desegregation class action was brought on July 22, 1968, by black and Mexican-American parents of children in the Corpus Christi Independent School District. Following an initial trial, the district court found that both blacks and Mexican-Americans were unconstitutionally segregated in the Corpus Christi schools as a result of official actions by the defendants (Pet. App. 1–52). The court of appeals denied the defendants' petition for permission to appeal the interlocutory order of the district court (Pet. App. 53).

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Thereafter, various desegregation plans were submitted by the parties, and the district court held a hearing with respect to the relief to be ordered. On October 16, 1970, the district court requested the assistance of the United States Departments of Justice and Health, Education, and Welfare. The Department of Justice, pursuant to the court's request, applied for and was granted leave to intervene. After receiving a desegregation plan prepared by the Department of Health, Education, and Welfare, and objections thereto by both plaintiffs and defendants, the district court on July 2, 1971, ordered the implementation of its own plan, reflecting elements of the plans submitted by the parties, with certain alterations made by the court (Pet. App. 54–103).

The defendants appealed from the district court's judgments holding that black and Mexican-American students were unconstitutionally segregated in the Corpus Christi schools and requiring implementation of the student assignment plan set forth in the court's opinion of July 2, 1971.[1] The July 2 order was stayed pending a decision by the court of appeals (Pet. App. 104–105). On August 2, 1972, the court of appeals affirmed the finding of unconstitutional segregation, but directed the district court to use a different approach in fashioning a remedy on remand (Pet. App. 119–154).

1. The district court found that the defendants had discriminated against black and Mexican-American students by gerrymandering attendance zone boundaries, discriminating in construction and location policies for new and existing schools, discriminating in faculty assignment policies, promoting segregation in transfer policies, and failing to take reasonable steps to promote desegregation generally (Pet. App. 31–36). The Corpus Christi school system was therefore held to be *de jure* segregated (Pet. App. 36). The court of appeals, while not disapproving the district court's findings, concluded that "the direct and effective cause of segregation in the schools" was the defendants' imposition of "a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result" (Pet. App. 131). The court of appeals also held that discriminatory intent, in the form of racially motivated state action, need not be shown to establish a violation of students' constitutional rights (Pet. App. 132–134).

The school district's petition presents questions concerning the standards for determining whether schools are *de facto* or *de jure* segregated and the extent to which discriminatory intent by school officials must be shown to support a finding that a student assignment policy is unconstitutional.[2] In our view, as ex-

[1] The petitioners do not seek review in this Court of the findings regarding black students.

[2] The petition presents five questions (Pet. 3–4), three of which concern the extent of a school district's duty to "eliminate unintended ethnic [Mexican-American] concentrations in some of the schools which result from residential and demographic patterns not effected by state action" or to abandon the neighborhood school concept in the face of such concentrations. The last two questions relate to the appropriate scope and timing of a desegregation remedy where at least some discrimi-

pressed in our brief below and our brief as *amicus curiae* in *Keyes* v. *School District No. 1, Denver, Colorado, et al.*, No. 71–507, this Term (argued October 12, 1972), specific school board actions or policies which cause or promote segregation *on account of race or national origin* must be remedied. While failure to show subjective segregative motivation by school board officials is irrelevant to the determination of unconstitutional segregation of public schools (cf. *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 462), circumstances showing their explicit consideration of race or implicit race-consciousness are of central importance. If the court below meant to direct that the inquiry should ignore the question of objective intent and focus only on the elements of state action and segregative effect,[3] its opinion would seem to prohibit racial imbalance in a neighborhood school system regardless of whether discrimination exists. We submit that such a result would be inconsistent with this Court's affirmance of *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N.J.), affirmed, 404 U.S. 1027, and with its opinion in *Jefferson* v. *Hackney,* 406 U.S. 535, 547–549.

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natory action toward Mexican-Americans is found in a system where that ethnic group has never been segregated by statute.

[3] The majority opinion (Pet. App. 129) states that *Brown* "requires simply the making of two distinct factual determinations to support a finding of unlawful segregation. First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action."

Accordingly, if this Court agrees with the analysis suggested in our *amicus curiae* memorandum in *Keyes*, an appropriate disposition here would be to grant the petition, vacate the judgment below, and remand for further consideration in light of *Keyes*. The Court may therefore wish to defer action on the petition pending its decision in *Keyes*.

2. In addition, the court below (Pet. App. 136–137) ordered the fashioning of broad brush, system-wide desegregation relief, of the sort traditionally applied in remedying statutory dualism, as opposed to school-by-school relief based on a showing with respect to each that the segregation has been caused by intentional segregative action on the part of the school board. As we argued below, however, whether the relief appropriate in a case of statutory dualism is appropriate in a case such as this depends upon the extent of the proved discrimination.

Finally, while approving a system-wide remedy, the court of appeals concluded that a proper remedy could be achieved without increasing student transportation to the extent required by the district court (Pet. App. 137). It therefore remanded the case for the application of specified remedial guidelines (Pet. App. 137–140). The cross-petition of Cisneros presents the question whether a remand on this basis was erroneous (Cross-Pet. 2).

These issues with respect to the remedy may also be resolved by this Court in *Keyes*. The Court, therefore, may wish to postpone disposition of the present petitions pending its decision in *Keyes*.

Respectfully submitted.

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