No. 81-9

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment is violated by a state initiative that forbids local school districts—in the absence of a need to remedy a constitutional violation—from assigning students to schools beyond the school geographically nearest or next nearest the student's place of residence, except where such assignment is made for health, safety or special educational purposes or is in response to inadequate or unfit conditions.*

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*Appellants also challenge an attorney's fee award to parties other than the United States. We do not address that issue.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. B-1 to B-29) is reported at 633 F. 2d 1338, and the opinion of the district court (J.S. App. A-1 to A-36) is reported at 473 F. Supp. 996.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1980, and a petition for rehearing was denied on March 26, 1981 (Pet. App. E-1). A notice of appeal was filed on May 18, 1981 (Pet. App. D-1 to D-6), and the appeal was docketed on June 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1. Seattle, Tacoma, and Pasco school districts are municipal corporations created under the laws of the State of Washington. The public policy of the State of Washington with respect to public education is set forth in Article

IX, Section 1 of its constitution, which states: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Article IX, Section 2 of the constitution provides that "[t]he legislature shall provide for a general and uniform system of public schools," and that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." It is apparently uncontested that (J.S. 4) "no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools."

2. On December 14, 1977, the Seattle school board adopted a resolution which selected strategies to be used in eliminating perceived racial imbalance in the district's schools and also directed the district's administrative staff to continue developing a "desegregation" plan (J.S. App. A-17). Thereafter, in March 1978, the Seattle school district adopted a plan of race-conscious student assignments to create racial balance in the district's schools. A principal component of the plan was the mandatory assignment of entire neighborhoods of students to schools beyond those closest to the students' homes (*id.* at A-17 to A-18). Similar race-conscious student assignment policies were adopted and implemented by the school districts of Tacoma and Pasco (*id.* at A-9 to A-14).

In January 1978, Citizens for Voluntary Integration Committee ("CiVIC"), a voluntary citizens committee opposed to the Seattle policy of race-conscious student assignments, was organized as a nonprofit corporation under Washington law (J.S. App. A-19). CiVIC drafted, for submission to the voters of the state at the 1978 general election, Initiative 350, which provides in pertinent part:

"[N]o school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *" (Wash. Rev. Code Ann. § 28A.26.010 (Cum. Supp. 1981)). Initiative 350 does allow school assignments to be made beyond the nearest or next nearest school "[i]f a student requires special education, care or guidance"; "[i]f there are health or safety hazards" between the student's residence and the neighborhood school; or if the neighborhood school "is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (*ibid.*). Initiative 350 also expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981). In November 1978, Initiative 350 was approved by approximately 66% of the voters statewide. The Initiative failed in only two legislative districts, both in Seattle (J.S. App. A-22).

3. In November 1978, the Seattle, Tacoma and Pasco school districts, together with certain individual plaintiffs, brought this action against the State of Washington and various state officials in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment (J.S. App. A-1 to A-3, A-6). Numerous parties intervened (*id.* at A-3 to A-6), including the United States, which intervened on behalf of the plaintiffs under 42 U.S.C. 2000h-2. The district court permanently enjoined enforcement of Initiative 350, holding that it violated the Equal Protection Clause for three reasons (J.S. App. A-27):

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for

purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

4. The court of appeals affirmed by divided vote (J.S. App. B-1 to B-29). Relying on this Court's decision in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and the decision of the district court in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the court of appeals held that Initiative 350 is unconstitutional because it embodies an impermissible legislative classification based on race (J.S. App. B-4). The court stated (*id.* at B-7 to B-8):

> Applying the[] principles [of *Hunter* and *Lee*] here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of *Hunter* and *Lee*.

Despite the state's constitutional responsibility for providing public education and the limited role of local school boards under Washington law, the court of appeals concluded that "[t]he interest of the State of Washington in mandating a state-wide policy of neighborhood schools

must * * * fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy" (J.S. App. B-11). The court held that the Initiative was unconstitutional because it was not supported by a "compelling state interest" (*ibid.*), and therefore found it unnecessary to address the questions whether the district court had erred in holding that the Initiative was motivated by a discriminatory purpose and is constitutionally overbroad (*id.* at B-4).

In dissent (J.S. App. B-18 to B-29), Judge Wright stated that the majority's reliance on *Hunter* v. *Erickson, supra*, and *Lee* v. *Nyquist, supra*, was misplaced and that Initiative 350 does not create a racial classification by permitting isolated deviations from the neighborhood school policy for safety, health, and special educational purposes. See J.S. App. B-18 to B-24. Judge Wright also reached the other grounds relied on by the district court in invalidating the Initiative. The district court's factual findings on intent, Judge Wright concluded, had insufficient record support to establish that Initiative 350 was motivated by any racially discriminatory intent (*id.* at B-24 to B-27). Judge Wright also rejected the district court's "overbreadth" analysis because Section 6 (Wash. Rev. Code Ann. § 28A.26.060) permits departures from the neighborhood school policy when necessary to rectify constitutional violations, and thus does not threaten interference with the vindication of constitutional rights (J.S. App. B-27 to B-29).

ARGUMENT

The United States believes that the Court should note probable jurisdiction to consider the question whether, in these circumstances, a public initiative establishing a race-neutral statewide, neighborhood school policy violates the Fourteenth Amendment because it prohibits race-conscious

student assignments except to remedy a constitutional violation. While the United States argued in the lower courts that such an initiative was unconstitutional, we have reconsidered that position since the decision of the court of appeals. We disagree with the majority opinion below and with its holding that Initiative 350 is unconstitutional. The question is an important one with significant and far-reaching ramifications. It plainly deserves plenary consideration by this Court.

1. Initiative 350 does not, by its terms, classify persons according to race. Rather, it prohibits local school districts from assigning any student, without regard to race, to any school other than that nearest or next nearest to his residence, except for reasons of health, safety, or special educational needs or in response to unfit or inadequate conditions. This Court has never held that such a policy is a per se violation of the Equal Protection Clause. Where, as here, "the law on its face treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)), the challenged enactment will violate the Equal Protection Clause only if it "places special burdens on racial minorities within the governmental process" (*ibid.*), and those burdens are not justified by some compelling state interest (*id.* at 392).

Based on this Court's decision in *Hunter* v. *Erickson, supra*, and on the district court decision in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the majority of the court of appeals found that Initiative 350 creates "special burdens" that are not justified by any compelling state interest. As Judge Wright pointed out in dissent, however, those cases are not controlling here.

In *Hunter* v. *Erickson, supra*, the Court upheld a constitutional challenge to a city charter amendment requiring the approval by a majority of voters in a general referendum with respect to any ordinance forbidding discrimination "on the basis of race, color, religion, national origin or ancestry" in the sale or rental of real estate. Housing ordinances dealing with other issues would become effective merely on approval by the city council.

In finding a violation of the Equal Protection Clause, the Court reasoned in *Hunter* that the charter amendment created an "explicitly racial classification" (393 U.S. at 389) because it expressly targeted ordinances designed to eliminate racial discrimination in housing and subjected only those ordinances to a special legislative process that "obviously made it substantially more difficult to secure [their] enactment" (*id.* at 390). The constitutional deficiency in *Hunter* was not, of course, that the charter amendment dealt with an issue involving race, but that it visited "special burdens on racial minorities within the governmental process" (*id.* at 391). As the Court stated, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (*id.* at 393).

In *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), a three-judge district court applied *Hunter* to invalidate a New York statute explicitly prohibiting race-conscious student assignment by appointed school boards, but not by elected boards. The statute "structure[d] the internal governmental process in a manner not founded on neutral principles," and thus "operate[d] to disadvantage a minority, a racial minority, in the political process" (318 F. Supp. at 720). Accordingly, the

statute was found to deny racial minorities equal protection of the law.[1]

2. Initiative 350 does not alter the legislative process in the State of Washington in a way analogous to the measures at issue in *Hunter* v. *Erickson, supra,* and *Lee* v. *Nyquist, supra*. As Judge Wright points out in his dissent, the Washington Constitution entrusts formulation of educational policy to the State, and Initiative 350 is an exercise of the State's constitutional responsibilities in this field (J.S. App. B-23). Moreover, Initiative 350 does not subject state legislation sought by racial groups or other minorities to procedures more burdensome than those applicable to any other type of legislation. At most, the Initiative simply alters the State's previous allocation of responsibility for the assignment of students to schools in local jurisdictions (but without making any change in the method of reallocating that responsibility). Whether such action by the State constitutes an infringement of the Equal Protection Clause

[1]In *Lee* the district court noted that "[t]he statute denies appointed officials the power to implement non-voluntary programs for the improvement of racial balance" to undo *de facto* or *de jure* segregation (318 F. Supp. at 714-715), and also that "[t]he statute is unambiguous on its face and clearly applies to all efforts to achieve racial balance, including such efforts by a school district subject to a pre-existing order to eliminate segregation in its schools * * *" (*id.* at 715). Here, of course, school districts may make racially-conscious assignments pursuant to a court order based on a finding of *de jure* segregation. See Wash. Rev. Code Ann. § 28A.26.060. Thus, this case is far different from *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971). Moreover, in this Court the State points out (J.S. 21) that the Initiative's legislative history and interpretation by state officials charged with its implementation indicate that Initiative 350 should be interpreted as permitting local officials to make race-conscious student assignments in order to remedy *de jure* segregation. The present case, therefore, differs significantly from *Lee* v. *Nyquist*.

to the extent that it forecloses local school boards from voluntarily utilizing race-conscious busing in the absence of a need to remedy *de jure* segregation, poses an issue discussed indirectly by the district court in *Lee* (see 318 F. Supp. at 714), but not there decided, nor ever given plenary consideration by this Court. Especially in light of the decade of judicial and educational experience since *Lee*,[2] we believe the Court should now give plenary consideration to this issue, partly for reasons explained by Justice Powell in *Keyes* v. *School District No. 1*, 413 U.S. 189, 242, 250 (1973) (Powell, J., concurring and dissenting in part).

There is another respect in which the decision below warrants the noting of probable jurisdiction. In *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), this Court considered a school board's rescission of a resolution in which its predecessor board recognized its own fault in not taking remedial measures with respect to student assignments.[3] In disposing of a constitutional challenge to the repudiation of the earlier resolution, the Court adopted the analysis of the court of appeals in that case, stating (*id.* at 414, quoting *Brinkman* v. *Gilligan*, 503 F. 2d 684, 697 (6th Cir. 1974)):

[2]In addition to judicial experience in education cases, there is also the development of equal protection theory in such cases as *Washington* v. *Davis*, 426 U.S. 229 (1976), to be considered.

[3]We recognize that in *Dayton I* the Court noted that "[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date" (433 U.S. at 413-414). This difference between *Dayton I* and the present case does not, however, detract from the pertinence here of the Court's analysis.

"The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took. Cf. Hunter v. Erickson, 393 U.S. 385 . . . (1969); Gomillion v. Lightfoot, 364 U.S. 339 . . . (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation."

In the present case, it is clear that Seattle and other local school boards did not adopt their plans because of any finding of *de jure* segregation, judicial or otherwise. The majority below distinguished this Court's analysis in *Dayton I* on the ground that the plans here were rescinded not by a successor school board, but by statewide referendum (J.S. App. B-10 n.8). On the court of appeals' analysis, rescission of the mandatory student assignment policy by a successor school board would have been constitutionally valid, but rescission by a superior decision-making authority, the state electorate, was not. That reasoning is unsound. This Court's analysis in *Dayton I* rests not on the *identity* of the rescinding body, but on its *authority*. Here, it is undisputed that the State of Washington has ultimate authority over public educational policy. There is thus no proper basis for concluding that the action taken at the state level was any less valid than the court of appeals apparently concedes it would have been if taken at the local level.

Nor do we find persuasive the conclusion of the court below grounding constitutional infirmity on the fact that Initiative 350 leaves other questions of pupil assignment to local option. Even if some or all of those decisions were to be made on a statewide basis, the same basic argument could be made against the Initiative so long as other matters of school policy are left to local choice. Where, as here (and

unlike the situation in *Hunter*), the processes of governmental decision-making remain unchanged, it is not apparent that the rule of *Hunter* v. *Erickson* can logically be applied without requiring the State to resort to pervasive statewide policymaking in order to exercise its authority to adopt the particular statewide policy at issue here.[4]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals raises serious concerns that have prompted the United States to reexamine the position it took below. The question presented is a substantial one that has not heretofore received plenary consideration by this Court. Accordingly, the Court should note probable jurisdiction.

Respectfully submitted.

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SEPTEMBER 1981

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[4]If the Court notes probable jurisdiction on this question and concludes that Initiative 350 is not constitutionally infirm under *Hunter* v. *Erickson*, *supra*, it may either remand the case to the court of appeals to consider the other grounds the district court relied on to invalidate Initiative 350 (see, *e.g.*, *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 23-27) or it may choose to decide those issues itself (see, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 281 (1978)). See also page 8, note 1, *supra*).