IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. A 249

BUSTOP, a California nonprofit corporation,

Applicant,

v.

THE BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, (Defendant); MARY ELLEN CRAWFORD, etc., et al., (Plaintiff), BETTER EDUCATION FOR STUDENTS TODAY, an unincorporated association, (Intervenor); ROBERT LOVELAND and MARY KEIPP, (Intervenors); CHARLES DREEBIN, etc., et al., (Intervenors);

Respondents.

APPLICATION FOR STAY

PENDING APPEAL OR PETITION FOR CERTIORARI

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To the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Introduction

This is an application for stay pending the filing of a petition for certiorari or an appeal in the largest case of court ordered school desegregation in the United States. The case comes to this Court in an unusual procedural posture, i.e., through the courts of a state, but the legal issues are familiar -- violations by a court of the federal law of school desegregation and hence a violation of the federal civil rights of the families impacted.

The tremendous need of the children for relief is illustrated by an internal memorandum copied on the following page.

INTER-OFFICE CORRESPONDENCE
LOS ANGELES UNIFIED SCHOOL DISTRICT

TO: Dr. Jerry Halverson
Associate Superintendent

Date
September 7, 1978

FROM: Max J. Barney
Director of Transportation

SUBJECT: EARLIEST PICKUP TIMES

Based on a quick review of route sheets, the following are the earliest A.M. pickup times for the programs listed:

Magnets	5:20 a.m.
PWT	5:45 a.m.
Pairs & Clusters	6:30 a.m.

MJB:lt

cc: Mr. Bremenkamp
Mr. Jacobs

Race is the sole factor used in deciding which students will be mandatorily reassigned and subjected to pickup at 6:30 a.m.

Organization of Papers

Attached to this application is a copy of the memorandum of points and authorities filed with the court of appeal and supreme court of California. The two days between the state supreme court decision and this application do not allow for the rewriting of the memorandum. We respectfully request the Court's indulgence in allowing us to present a memorandum focused at the state courts.

Parties

By peremptory writ of mandate issued in Bustop v. Superior Court, 69 Cal. App. 3d 66; 137 Cal. Rptr. 793 (1977), [Ex. 76], Bustop became an intervenor in the action described below. Bustop is an organization devoted to voluntary integration, which has in excess of 100,000 supporters.

Respondents are:

(a) the defendants in that action, the Board of Education of the Los Angeles Unified School District (commonly referred to in the trial court as Respondent and hereinafter as Respondent or the Board);

(b) Mary Ellen Crawford, etc., et al., the original plaintiffs, (commonly referred to in the trial court and hereinafter as Petitioners); and

(c) Intervenors Better Education for Students Today; Charles Dreebin, et al.; and Robert M. Loveland and Mary Keipp.

To avoid confusion and to be consistent with usage in the record in the trial court, Applicant, Bustop, is sometimes referred to as Bustop or in the first person.

History of the Case

The history of the litigation through April 1977 is set forth in Bustop v. Superior Court, supra, [Ex. 76]. Briefly, an action was commenced in August 1963 entitled "Mary Ellen Crawford, a minor, by Ellen Crawford, her guardian ad litem, et al., plaintiffs, vs. Board of

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Education of the City of Los Angeles, defendant," Los Angeles County Superior Court case number 822 854.

In 1976, the California supreme court filed its opinion in this case, Crawford v. Board of Educ., 17 Cal. 3d 280, 130 Cal. Rptr. 724 (1976), confirming the trial court's determination that the Los Angeles Unified School District was racially imbalanced and affirming the trial court's order that the Board propose and implement a reasonably feasible integration plan. The court reversed the trial court on the issue of defining segregated and integrated schools and remanded with instructions.

Subsequently, the Board promulgated its first desegregation plan.

On July 5, 1977, the trial court invalidated the Board's first plan as insufficient to meet the mandate and ordered [Ex. 20] the Board to propose a second plan. In October 1977, the Board proposed its second plan (hereinafter "Plan 2" or "The Plan"). [Ex. 31.] Thereafter, the trial court repeatedly promised, but failed to hold, a trial on Plan 2 (see memorandum, section VIII A) as required under both the United States and California Constitutions.

When it became apparent that the promised trial would not be held, we filed a motion for stay in the trial court, based on the:

(1) change of circumstances since the California supreme court's decision in Crawford -- including the clarification in federal law dealing with racial discrimination, rapid decline in the number and proportion of Anglo students, and passage of Proposition 13;

(2) excessive busing times;

(3) violation of federal law;

(4) denial of hearings;

(5) total lack of reasonableness or feasibility, and

(6) other factors.

The motion, filed June 23, 1978, sought a stay (the Notice is Ex. 1) and was accompanied by a separate memorandum [Ex. 3] and 15 exhibits [Exs. 4A-O.] Thereafter, we filed additional exhibits [Exs. 5P-Z] and briefs [Exs. 6-8.] The Board filed the only other evidence -- two declarations [Exs. 10 and 11] and responses to interrogatories and requests for admission [Ex. 12.] The Board's evidence did not conflict with ours in any material aspect. All exhibits and briefs before the state courts are filed herewith. Because of their volume, they are filed under separate covers.

The motion, requesting modification of the 1970 writ of mandate [Ex. 19] based on the change of circumstances and other factors referred to above, was based in part on the doctrine enunciated by the Supreme Court in Pasadena City Board of Educ. v. Spangler, 427 U.S. 424 (1976). The motion

sought relief in the form of a preliminary injunction prohibiting the Board from, among other things, discriminating based on race and mandatorily reassigning students away from their neighborhood school; or, in the alternative, limiting mandatory reassignment to a total round trip transportation time, portal to portal, of one hour; or, in the alternative, dismissing the case. [Ex. 1.]

The trial court denied the motion by order issued August 3, 1978 [App. B.] On August 25, application was made to the court of appeal for the State of California for the relief sought herein. On August 31, in an unanimous decision by a three judge court, the relief sought was granted as prayed in a 4 page opinion [App. C.]

On September 5, petitioners below reversed the position they had taken previously that the Plan would do more harm than good to the minority plaintiffs, and they requested the California supreme court to vacate the stay [Ex. 68.] They also asked that the California supreme court take jurisdiction of the case.

On the morning of September 6, 1978, Bustop filed oppositions setting forth the entire brief filed in the court of appeal [Ex. 73.] The Board of Education asked that the stay remain in effect [Ex. 71.] The Attorney General of the State of California filed an amicus brief asking that the stay remain [Ex. 74.]

In an unprecedented action [Ex. 72: A5] at approximately 5:00 p.m. that day, the California supreme court (5-2 vote)

transferred the case to itself, vacated the stay, and returned the case to the court of appeal for further proceedings on appeal. This application followed two days later.

Description of the District

The Los Angeles Unified School District (the "District") is the second largest school district in the United States with an enrollment of almost 600,000 students. It serves not only the city of Los Angeles but 25 other cities located within the District's 711 square miles. The size of the District can be further appreciated when it is realized that the school districts serving the cities of Washington, Detroit, Denver, Boston, Milwaukee, Cleveland, Philadelphia, and Providence would fit within the District's boundaries [Ex. 4D: 104.]

Down the middle of the District (a map of which is provided as Ex. 75) runs a formidable geographic barrier, the Santa Monica mountains.

The overwhelming majority (all but 11) of the predominantly Anglo schools subject to mandatory busing are located in the San Fernando Valley on one side of these mountains, while the overwhelming majority of predominantly minority schools [Exs. 75 and 5P] are on the other. The only practical routes available to transport students between Anglo and minority schools are the three freeways which traverse the Santa Monica mountains. These freeways are heavily traveled by commuters [Ex. 5R.]

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Description of the District

The Los Angeles Unified School District (the "District") is the second largest school district in the United States with an enrollment of almost 600,000 students. It serves not only the city of Los Angeles but 20 other cities located within the District's 711 square miles. The size of the District can be further appreciated when it is realized that the school districts serving the cities of Washington, Detroit, Denver, Boston, Milwaukee, Cleveland, Philadelphia, and Providence would fit within the District's boundaries [Km. 4D; 104.]

Down the middle of the District (a map of which is provided as Km. 7E) runs a formidable geographic barrier, the Santa Monica mountains.

The overwhelming majority (all but 11) of the predominantly Anglo schools subject to mandatory busing are located in the San Fernando Valley on the side of these mountains, while the overwhelmingly majority of predominantly minority schools [Km. 7E and 8E] lie on the other. The only practical routes available to transport students between Anglo and minority schools are the three freeways which traverse the Santa Monica mountains. These freeways are heavily traveled by commuters [Km. 5B.]

The Integration Plan

The basic mandatory integration technique in the court ordered integration plan (the Plan) is the pairing or clustering (hereinafter pairing) of all but two of the elementary and junior high schools with an Anglo enrollment of 70 percent or more with some of the elementary and junior high schools with minority enrollment of 70 percent or more [Ex. 31, 5P.] A list of the pairings is set forth in Ex. 5P. In using this procedure, the Board arbitrarily established a 70/30 quota system whereby no school in the District would be in excess of 70 percent Anglo [Ex. 31: 14.] Schools between 70 and 30 percent Anglo (or minority) are exempt from the mandatory reassignment features of the Plan [Ex. 31: 14.]

The Plan currently involves approximately 61 pairs [Ex. 5P, 14, 15.] The majority of pairs invove the busing of 9-13 year old children [Ex. 12: 6] in grades 4-8, between Anglo schools located in the San Fernando Valley and minority schools in the central city, with almost all such round trip distances ranging from 36 miles to 66 miles, school to school. (Additional miles must be added for pickup and dropoffs.) [Memorandum: 125-129.]

In pairing schools, the Board did not make any effort to minimize transportation times. On the contrary, it established a procedure that allowed schools relatively close to each other in the center of the city to pair with

The Desegregation Plan

The basic mandatory desegregation technique in the court ordered desegregation plan (the Plan) is the pairing or clustering (mathematical pairing) of all but two of the elementary and junior high schools with an Anglo enrollment of 70 percent or more with some of the elementary and junior high schools with minority enrollment of 70 percent or more [Doc. 32, 58.] A list of the pairings is set forth in Doc. 32. In using this procedure, the board arbitrarily established a 70\30 quota system whereby no school in the District would be in excess of 70 percent Anglo. [Doc. 32, 44.] Schools between 70 and 30 percent Anglo (or minority) are exempt from the mandatory reassignment features of the Plan [Doc. 32; 14.]

The Plan currently involves approximately 21 pairs [Doc. 32, 14, 15.] The majority of pairs involve the busing of 5-12 year old children [Ex. 12; 4] in grades 4-6. Seventeen Anglo schools located in the San Fernando Valley and minority schools in the central city, with almost all areas found transportation ranging from 25 miles to 66 miles, school to school. (Additional miles must be added for picking and discharge.) [Discovery, 126-129.]

In pairing schools, the board did not make any effort to minimize transportation times. On the contrary, it established a procedure that allowed schools relatively close to each other in the center of the city to pair with

one another, thus forcing the pairing of schools on opposite ends of the city and causing excessive travel by the students left stranded [Ex. 3: 82-83; Ex. 10: 4.] [Compare Ex. 3: 11 with 4P.] See also Ex. 4B, 5Q.

Essential Facts

While various other facts will be discussed in connection with the denial of hearings, appropriateness of a stay, and other issues, there are only four factors essential for the ultimate disposition of this matter:

(a) There Has Never Been a Dual School System or Federal Constitutional Violation in Los Angeles.

There was never a dual school system in Los Angeles or a federal constitutional violation under applicable federal standards. The facts which the California supreme court in Crawford found to constitute a California constitutional violation clearly indicate that the District has always operated a racially neutral neighborhood school system.

Under Crawford, however, a school board is under the same obligation to integrate, whether the cause of racial imbalance is deliberate acts of the school board or housing patterns in no way effected by any governmental action. The District's "violation" under California law was that it failed to take affirmative steps to alleviate racial imbalance existing even under the operation of a school system, which under federal law would clearly be a unitary system and which is required by the Equal Educational Opportunities Act of 1974, 20 U.S.C.A. 1701 et seq. (1978).

one [illegible], since forcing the parking of students on opposite sides of the city and causing excessive travel by the students both abounded [Mo. St. 3d 48-49; Ind. 1]. [illegible] Mo. St. 3d with 49.] See also Ind. 4a, 5b.

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Nonetheless, in 1970, the failure of the Board to take affirmative action was labeled de jure by the trial court. [Memorandum: 62-69.]

In the state court proceedings, neither the parties nor any court took issue with our analysis of the 1970 trial court's Findings of Fact [Ex. 19.]; which analysis concluded that no federal violation existed. Some only said the attachment of the de jure label was dispositive. [Memorandum: 62-99. See also Ex. 2: 3, Ex. 17: 6.] (A detailed analysis of current federal standards as applied to this case can be found in Ex. 3: 100-33.)

(b) Race is the Sole Criteria Used in the Plan.

Plan 2 uses racial quotas (race is used herein to include color and national origin), classifications, and preferences in every phase, including selection of schools and students for busing, admission of students to unique educational programs (magnet schools), and allocation of funds. [E.g., Ex. 3: 135-47. See also memorandum at section I.]

(i) Race is the sole criteria used in selecting or exempting students for mandatory busing.

(ii) Rigid racial quotas are also used to determine admission to magnet schools and virtually every other special program in the District. Indeed, one method used by the Board in magnet school admissions was to

sort applicants by race and have a computer fill each racial quota. [See, e.g., Ex. 2: 1-4, 7; Ex. 3: 135-47; Ex. 4M: 439; Ex. 9: 15; Ex. 10: 4-7; Ex. 16: 5-8.]

(c) Thousands of 9-13 Year Old Children Will Be Forced to Endure Daily Travel Times of 3 Hours or More.

Children at 18 of the 61 pairs (30 percent) will be subject to daily travel times of 3 hours or more; 37 pairs (61 percent) involve travel times of 2-1/2 hours or more; and 42 (69 percent) exceed 2 hours each day. [Memorandum: 34, 39, 110-29.] The facts were not disputed in the state court proceedings, although one party contended that these times are legal. [Id. at 34-35.]

The impact of 3 hour travel times on children is staggering. It requires some to get up well before 6:00 a.m. each school day. They do not return home until well after 4:00 p.m. [See especially the chart on page 39, infra.]

(d) There has Been no Evidentiary Hearings or Judicial Scrutiny of the Plan Prior to Implementation.

As discussed in section VIII, pages 79-85, infra, there has been virtually no scrutiny whatsoever of the Plan. Applicant was continually promised hearings by the trial court which were never held. Even in cases involving egregiously segregated dual school systems, implementation of such a systemwide remedy without any judicial scrutiny, let alone the strict scrutiny required of any state action involving a suspect classification (race) or impinging on

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L.v. 7: Ex. 3: 183-(7) Mr. dis 4OS; Mr. 9:
15; Ex. 10: 4-7; Mr. 10: 3-5.]

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As discussed in section VIII, pages 29-33, infra, there has been virtually no security whatsoever of the Plan. Fraud was continually produced hearings by the trial court which were never held. Even in cases involving apparently segregated dual school systems, implementation of such a systematic remedy without any judicial scrutiny, let alone the strict scrutiny required of any state action involving a suspect classification (race) or infringing on

fundamental rights (liberty and privacy), has never been permitted by this Court.

Irreparable Injury

As pointed out to the trial court [e.g., Ex. 3: 50-99], the threatened action of the Board will cause immediate and irreparable injury to the parents and students within the boundaries of the District, many of whom are represented by Bustop. These injuries cannot be adequately compensated for by a remedy at law. The irreparable injury includes the injury inherent in the denial of equal educational opportunity, in racial discrimination, and in extensive pupil transportation. In addition, if Plan 2 is allowed to be implemented on September 12, 1978, it will cause irreparable injury in, among others, the particulars set forth below.

In addition, a stay at this late date will not disrupt the school district since the Board desperately needs more time to work out its Plan. Assuming, arguendo, that our legal claims are meritless, the Plan must be delayed because implementation on September 12 would be disastrous.

(1) After argument on our motion, the Board, on July 28, 1978, revised 18 pairs by interposing midsites, mostly at junior high schools; that is, students from minority and Anglo schools would attend classes at a third site. Ninth graders at the midsite schools were to be shifted to high schools to make room for the new students. [Ex. 2, 14.] Each week thereafter the Board revised and is

Fundamental rights (liberty and privacy) has never been granted by this Court.

Irreparable Injury

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In addition, a stay at this late date will not disrupt the school districts since the Board definitely needs more time to work out its Plan. Furthermore, alternatively, that our legal claims are meritless, the Plan must be delayed because implementation on September 12 would be disastrous.

(1) After argument on our motion, the Board, on July 24, 1970, revised 12 zones by interposing minorities, mostly at junior high schools; thus in, students from minority and Anglo schools would attend classes at a third site. Minor students at the middle schools were to be shifted to high schools to make room for the new students. [Tr. 2, 14.] Each week thereafter the Board revised and is

revising school sites, dropping out or adding midsites [Ex. 15.] We alleged in the court of appeal without contradiction of any party that there is no curriculum worked out for the displaced ninth graders at the high schools they will attend.

(2) In many cases, these midsites require portable classrooms to accommodate the influx of students; these portable classrooms will not be in place by the start of school. Again this allegation was made in the court of appeal and was not challenged by any party.

(3) On August 8, 1978, the monitoring commission appointed by the trial court reported [Ex. 60] tremendous problems with starting the Plan on September 12, including:

(a) No provisions have been made for aides to ride buses and assist drivers in handling students. [Id.: 9.]

(b) No provisions have been made for bilingual aides or assistants to handle the "significant number" of students that do not speak English. [Id.: 19.]

(c) "The District is currently assigning as many as 40 students to some bus stops. This number is in conflict with the District policy and, especially if no plans are made for adult supervision, could precipitate a crisis." [Id.: 13.]

(d) There will be no supervision at bus stops. [Id.: 10.]

(e) The Board is planning to use one bus

stop for two or more buses and routes [id.: 13.] "On some routes the driver has to leave the bus to escort students crossing an unguarded pedestrian crossing. The absence of a driver from the bus, albeit for a short period, constitutes a significant danger to the transported students." [Id.: 14.]

(f) In the case of some junior high schools, "as many as 600 students may arrive at the school grounds virtually simultaneously . . . . A single onsite transportation coordinator cannot be expected to sort out 600 students." [Id.: 15.]

(g) "[I]t is far from clear whether the Transportation Branch can complete all student transportation assignments, including the latest changes, before the opening of schools . . . ." [Id.: 21.]

(h) As of August 8, 1978, only one-quarter of the contract drivers had been hired. [Id.: 6.]

(i) Drivers are allowed to choose routes by seniority. [Id.] It is therefore likely that the most inexperienced drivers will be left with the most difficult routes both in terms of terrain and students.

Three hour bus rides are detrimental to the health, safety, and education of the children involved. Once a child is bused beyond his neighborhood school, he is subject to health and safety risks he would not have to endure if he were allowed to remain. Children will lose hours each day from their educational process, thus depriving them of or diluting their right to an education. In

addition, because of the extremely poor air quality in the Los Angeles area and the high concentration of pollutants over the freeways, children, who are eight times more susceptible to air pollution than adults, [Ex. 4N] will be subjected to carbon monoxide, lead, absestos, and other pollutant levels beyond those set for adults by various scientific and governmental agencies, both state and federal. [Ex. 3: 35-49; Ex. 4N, 4O, 5S.] The Board of Education has made no study whatsoever of the effects of these pollutants on its students. [Ex. 12: 9.]

The Plan's implementation will increase segregation. The student population in the District is rapdily becoming almost all minority and Plan 2 will drastically accelerate this trend. Over the last 10 years, the Anglo birth rate has decreased steadily. In 1976, it was less than 25 percent. [Ex. 4D: 119.] In the fall of 1977, the District's kindergarten class was only 23.85 percent Anglo. [Id.: 114.] And in 1980, under current trends, without white flight, only 17.3 percent of the District's elementary school students will be Anglo. [Id.: 111.] In addition, if Plan 2 is implemented, the District will lose 20,000 to 30,000 Anglo students. [E.g., Ex. 3: 50-70; Ex. 55, Tr.: 90-91. See memorandum section IV B.]

The Plan will cost in excess of $120 million the first year. [Compare Ex. 12B with Ex. 10: 7.] Expenditures of these funds will deprive the students of the District of desperately needed money for basic educational programs such

as summer school. [See also Ex. 44: 4-5.] The District cancelled summer school for 1978 because of lack of funds.

The Supreme Court Has the Power to Review this Action Now.

The reviewing power of the Supreme Court over this cause of action is based on 28 U.S.C. § 1257,which permits review of final judgments or decrees of a state high court both by appeal where the validity of a state statute has been questioned and upheld and by certiorari where any title, right,privilege or immunity is claimed under the Constitution or federal statutes.

In the instant case, both grounds are applicable. The California Constitution (as interpreted by California courts to allow racial discrimination to remedy non-federal violations) has been questioned against federal standards and upheld by the California supreme court. In addition, the federal rights and privileges of the children of the Los Angeles Unified School District to be free of invidious discrimination based on race have been specifically raised and the claims rejected by the state's highest court.

The current posture of this case in the courts below is set out above.

The specific federal issues raised there are discussed at length in the memorandum attached hereto, which was before the courts below.

Applicant is mindful of the rule that the judgment of a state court must be final to justify review by this Court.

As will be discussed below, the decisions of this Court in North Carolina Railroad Company v. Story, infra, Richfield Oil Corporation v. State Board of Equalization, infra, Mills v. Alabama, infra, and Pope v. Atlantic Coastline Railroad Co., infra, establish that when an intermediate decision of a state supreme court effectively disposes of federal issues and, for practical purposes, determines the eventual outcome of an action, the Supreme Court can review that decision although it might not be technically "final" because further proceedings, including trial, are still pending in the state courts.

Organization for a Better Austin v. Keefe, infra, additionally demonstrates that where as here the order of the state court deals with a temporary injunction, when the permanent remedy sought is effectively the same as that sought by the temporary relief considered, and important constitutional rights are involved, review is proper.

Finally, it will be demonstrated as an independent ground that this Court has recognized a penumbral area to finality when an ostensibly intermediate order of a state court affects substantial individual rights and carries grave public consequences or renders the right of appeal illusory. North Dakota Pharmacy Board v. Snyder's Stores, infra, and Local No. 438 v. Curry, infra.

Despite the fact that there still remains a hearing to be had in the state court of appeals, the ruling of the state supreme court vacating the stay after having all federal and constitutional issues presented to it, for all

practical purposes predetermines the outcome of the matter in state courts and is a final judgment for the purposes of 28 U.S.C. § 1257. Under the circumstances of this case, in which the constitutional rights of over 75,000 children will be violated daily until the issues presented are resolved by the United States Supreme Court, this Court has jurisdiction to review this matter.

For the last 50 years, the Supreme Court has looked past the strict procedural question of whether further acts remained to be done in state courts toward the practical importance of a prompt decision by the federal court of a federal question decided by a state supreme court. Since at least 1925, in North Carolina Railroad Co. v. Story, 268 U.S. 288, 69 L. Ed. 959 (1925), this Court has recognized that the granting or denying of ostensibly temporary relief can, under some circunstances, effectively dispose of a case and justify immediate federal review.

As Mr. Justice Douglas states in delivering the Court's opinion in Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L. Ed. 80 (1946),

> "The question is whether it can be said that 'there is nothing more to be decided' . . . , that there has been 'an effective determination of the litigation.'"

Id. at 72, 91 L. Ed. at 87 (citations omitted).

In Richfield, supra, the facts had been stipulated and the California supreme court had been presented with and decided the issues which would control the litigation in the

lower courts. In the present case, the evidence relied upon by Applicant had been submitted in documentary form and was available to the state court. Its decision vacating the stay of the appellate court cannot therefore be expected to be changed by any factual issues to be raised below. And its vacation of the stay clearly indicates its disregard of the constitutional arguments raised. The prospect is therefore a hearing in the court of appeal; regardless of the decision there, an appeal to the state supreme court will follow and its disregard of applicant's constitutional arguments will again be made manifest. Then an appeal or application for certiorari to this Court will be made for resolution of the issues now ripe for decision. In the meantime, the rights of thousands of children will have been egregiously and irremedially violated.

This is even worse than the situation found by this Court in Mills v. Alabama, 384 U.S. 214, 16 L. Ed. 2d 484 (1966), in which no new factual issues remained to be determined by state trial courts after denial of a demurrer and remand by a state supreme court. There the Supreme Court concluded that further proceedings in state courts:

> "would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon

lower courts. In the present case, the evidence relied upon by petitioner had been submitted in documentary form and was available to the state court. The decision vacating the stay of the appellate court cannot therefore be expected to be changed by any factual issues to be raised below. And the vacation of the stay clearly indicates the disregard of the constitutional requirements raised. The prisoner is therefore a hostage in the court of appeal: regardless of the decision there, an appeal to the state supreme court will follow and the disregard of applicant's constitutional requirements will again be made manifest. Then an appeal or application for certiorari to this Court will be made for resolution of the issues now ripe for decision. In the meantime, the rights of thousands of children will have been egregiously and irremediably violated.

This is even worse than the situation found by this Court in Mills v. Alabama, 384 U.S. 214, 16 L. Ed. 2d 484 (1966), in which no new factual issues remained to be determined by state trial courts after denial of a demurrer and remand by a state supreme court. There the Supreme Court concluded that further proceedings in state courts

> "would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon

the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this court, but it would also result in a completely unnecessary waste of time and energy . . . . "

Id. at 217, 16 L. Ed. 2d at 487.

Similar conclusions were arrived at in Pope v. Atlantic Coastline Railroad Co., 345 U.S. 379, 97 L. Ed. 1094 (1953):

"Yet we are not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted § 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of § 1257.

"The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation . . . . But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided

> that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause, ..."

345 U.S. at 382, 97 L. Ed. 1098-99 (citations and footnotes omitted.)

In the case at bar the very implementation of the subject Plan will grossly violate the civil rights of over 75,000 children and virtually destroy the Los Angeles Unified School District, guaranteeing further racial imbalance. The lifting of the stay previously granted pending hearing on the appeal,concerning the preliminary and permanent injunctions sought,therefore effectively decides the issue. The injury sought to be prevented and the urgency remained the same at all times during the proceedings below.

The jurisdictional issue at hand would therefore appear to be controlled by the decision of this Court in Organization for a Better Austin v. Keefe, 402 U.S. 415, 29 L. Ed. 2d 1 (1971).

There the Supreme Court on certiorari reviewed an Illinois court decision upholding a temporary injunction.

> "The injunction is termed a 'temporary' injunction by the Illinois courts. We have therefore con-

sidered whether we may properly decide this case. 28 USC § 1257. We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case."

Footnote 1, 402 U.S. at 418, 29 L. Ed. 2d at 5 (citations omitted).

Mr. Justice Harlan, who consistently argued for the strictest interpretation of the finality requirement, dissented on that issue, reasoning that because the state (Illinois) supreme court had simply denied leave to appeal from an order of the appellate court, the highest court had not considered the constitutional issue presented. In the situation at bar, even that objection is resolved,

as the California supreme court was presented with all of the constitutional arguments presented by Applicant to the court of appeal.

Moreover, even if the case at bar were found to be factually different from the preceeding cases because it is believed that a different result might eventually occur in the state courts than now appears inevitable, it is now settled that the question of finality has a "penumbral area" when the practical effect of an ostensibly intermediate order of a state supreme court affects substantial individual rights or engenders grave public consequences, or when the right to appeal will be of little value if the issues presented are not immediately resolved. See, e.g., North Dakota Pharmacy v. Snyder's Stores, 414 U.S. 156, 160, 162, 38 L. Ed. 2d 379, 383, 384 (1973) citing comments by Mr. Justice Frankfurter and Mr. Justice Taney.

Even Mr. Justice Harlan, who, as noted above, consistently argued for a very strict interpretation of finality, admitted that "where intermediate rulings may carry serious public consequences" a strict adherence to form is dispensed with. Hudson Distributors v. Lilly & Co., 377 U.S. 386, 397, 12 L. Ed. 2d 394, 402 (1964) (dissent). Justice Harlan dissented in that case because he saw no

> "suggestion of compelling public considerations requiring a determination of whatever issue it is that the Court does actually decide. Nor are there private interests at stake which will be irremedially lost unless the court

acts . . . . "

Id. at 400-401, 12 L. Ed. 2d at 403-04 (emphasis added, footnotes omitted).

In the case at bar, both circumstances undeniably exist, leading to the conclusion that even a Justice devoted to the strictest interpretation of 28 U.S.C. § 1257, as was Mr. Justice Harlan, would concede the propriety of the Court exercising its jurisdiction in this case at this time.

As in Local No. 438 v. Curry, 371 U.S. 542, 9 L. Ed. 2d 514 (1963), the California supreme court's action with respect to a temporary stay

> "effectively dispose[s] of petitioner's rights and render[s] entirely illusory his right to review here . . . ."

Id. at 550, 9 L. Ed. 2d at 520.

If this court does not exercise its jurisdiction now, by the time the futile procedures take place in the California appellate court, leading to a now predetermined appeal to the state supreme court, the children of Los Angeles, of all races, will have been subjected to invidious discrimination and physical punishment, no matter how benign the intent, five days a week, month after month, for a period that can conservatively be estimated as at least a year.

Having established the jurisdiction of the Supreme Court to review this matter at this time and the propriety of that course of action, the necessity of a stay pending filing of a petition for certiorari (or other extraordinary relief under 28 USC § 1651) or

appeal is self evident. School is scheduled to commence September 12, 1978. The California court's decision vacating a stay was entered on September 6. Application to that court for a stay pending appeal or certiorari is therefore impossible prior to presentation of this petition to the Supreme Court.

Finally, the appropriateness of a stay is shown by analogy to Columbus Board of Educ. v. Penick, 47 U.S.L.W. 3089, (August 11, 1978). The situations are admittedly not identical because in Columbus the circuit court had rendered a decision contended to be erroneous and there was the need for this Court to control the lower courts.

In the instant case, however, there is a far greater likelihood that the full court will ultimately review this case. Unlike desegregation cases coming to this Court through the lower federal courts, of which there must be hundreds, if not thousands, here the issue is novel. The issue: May California in an attempt to racially balance schools use its doctrine of independent state grounds to ignore the federal rights of its citizens to be free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy.

Applicant contends that the Plan:

(1) Violates the fourteenth amendment, title VI of the Civil Rights Act of 1964, and the 42 U.S.C. sections 1981 and 1983 by using race as the sole criterion in allocating important educational benefits.

(2) Violates the fifth and fourteenth amendments because no hearings were held and the strict scrutiny

test was never applied.

(3) Violates the fourteenth amendment because the extensive pupil transportation involved violates liberty and privacy rights.

(4) Frustrates the full purposes and objectives of Congress in enacting the Equal Educational Opportunities Act of 1974 and other statutes.

We will petition or appeal to this Court to decide the validity of these contentions.

WHEREFORE, Applicant prays that this Court issue a stay order, pending the timely filing of an appeal or a petition for a writ of certiorari and determination of this matter, in effect reinstating the stay order issued by the California court of appeal which:

1. Stayed mandatory reassignment between any ofthe schools listed on Ex. 4P, allowing these children to continue at their neighborhood schools.

2. Required the Board, to the extent that it is able, to provide transportation for those students involved in the pairs referred to in paragraph 1 to travel to the paired school upon the student's volunterring to do so.

3. Allowed the magnet school program to continue in accordance with current Board guidelines and policies.

4. Allowed the continuance of the PWT program.

5. Allowed Plan 2, insofar as it deals with incentive grants and aspects other than pupil reassignment to go ahead as scheduled.

Dated: September 7, 1978

Cliff Fridkis
Thomas F. Bartmam
Thomas Paine Dunlap

By_____
Cliff Fridkis

Attorneys for Applicant