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No. 77-1395

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD VETTERLI, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF
MANDAMUS AND PETITION FOR A WRIT OF MANDAMUS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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The present phase of this proceeding began in June 1976, after the decision of this Court in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424. This Court held that the district court erred insofar as it had required "that there would not be a majority of any minority in any Pasadena public school" (427 U.S. at 435) and directed that that provision be stricken from the Pasadena school desegregation plan (427 U.S. at 440). The Court remanded to the court of appeals for "further proceedings not inconsistent [herewith]" (427 U.S. at 441).

The court of appeals concluded that "all determinations as to modifications required under *Pasadena City Board of Education v. Spangler* * * * of the district court's decrees should *initially* be made by the district court" (549 F. 2d 733 (C.A. 9); emphasis added).¹ The court of appeals explicitly stated, however, that "a bald unqualified order that there shall *never* be any 'majority of any minority' in any Pasadena attendance zone cannot stand" (*ibid.*; emphasis in original).

On July 1, 1977, the district court entered an order deleting the "no majority of any minority" provision from the Pasadena Plan (Pet. 9). The parties recognized that new arrangements for student assignments would be necessary in light of that deletion. Accordingly, defendants' counsel represented that the Pasadena school system would continue making student assignments in accordance with the existing plan pending the outcome of the district court's hearing, scheduled to begin July 14. See June 27, 1977 Tr. 35-37; July 14, 1977 Tr. 766.²

The district court held a hearing between July 14 and July 28, 1977. During that hearing the parties introduced evidence concerning past operations of the school district and any future plans or changes in operations that the school district might be considering.

¹ The court of appeals' decision is reproduced as Appendix A, *infra*.

² Copies of the relevant portions of these pages are attached as Appendix B, *infra*.

In September 1977 the United States and the private plaintiffs proposed findings of fact and conclusions of law, and the United States filed an extensive post-trial brief. Our brief opposed termination of the district court's jurisdiction over the school district on the ground that the evidence showed that the district, if released from jurisdiction, intended (a) to take steps that would reimpose the effects of the prior racial discrimination and (b) to take actions that were intentionally discriminatory. Resolution of these issues is now pending before the district court.³

On February 21, 1978, the district court held a hearing concerning the statement by the school board (see Pet. 14-15 n.*) that it would no longer be bound by the representation that no changes would be made in the school district's method of student assignments pending the court's decision on the matters then under submission. At the end of the hearing, the district court scheduled a further hearing for February 27, 1978. Prior to the next hearing, both the United States and the student plaintiffs-intervenors submitted proposed written orders to be entered by the respondent judge (see Pet. 16-18). Each of these proposed orders included an express reaffirmation of

³ Although we do not understand petitioners to raise the issue of their entitlement to be released from district court jurisdiction, we dispute any implication that the evidence demonstrated their entitlement to be released from jurisdiction. See generally pages 41-65 of our brief on the merits when the case was before this Court, No. 75-164, October Term, 1975.

the July 1, 1977, order striking the "no majority of any minority" requirement. Petitioners filed a responsive memorandum, arguing, *intra alia*, that no further order was justified or necessary but that, if an order were made, it should specifically include the provision that: "Nothing in this Order requires defendants to take any measures for the purpose of insuring that no school in the Pasadena Unified School District has a majority of any minority students."

At the conclusion of the February 27 hearing the district court ordered that all members of the Pasadena City Board of Education and the Superintendent of Schools be present in court the following day. On February 28, 1978, members John L. Hardy, Marjorie Wyatt, and Henry S. Myers, Jr., and Superintendent Ramon C. Cortines were present in court. The district judge addressed them as follows (Pet. 17):

Mr. Cortines, Mr. Hardy and Mrs. Wyatt and Dr. Myers, there having been no facts indicated to the Court as to why there should be any changes or why there are any necessary changes in the matter of making student assignments in the Pasadena Unified School District, it is ordered that pending decision of this Court on the submitted matters before the Court or until further order of the Court, that each of you are enjoined from making any changes in the method of student assignments in the Pasadena Unified School District that was in effect on October 21, 1977.

The court did not include in this order the provision suggested by defendants. Accordingly, when member

Jerome D. Meier appeared in court, counsel for petitioners sought a clarification of the earlier injunctive order, and the following colloquy ensued (Pet. 17-18):

Mr. McDONOUGH. Your Honor, in the memorandum we filed on Friday expressing our comments on the orders proposed by counsel for the other parties, in expressing our comment on the order proposed by Mr. Okrand [representing the student plaintiffs-intervenors] we suggested that there be included in that order if it was entered by the Court the following provision, "Nothing in this order requires defendants to take any measures for the purpose of insuring that no school in the Pasadena Unified School District has a majority of any minority students."

Now, that provision was not included in the injunction you issued this morning to defendants Wyatt, Hardy, and Myers. We have concluded from that omission, your Honor, that the purport of the order which was issued or the injunction which was issued this morning to those defendants was that they are indeed enjoined to take measures for the purpose of insuring that no school in the district has a majority of any minority students.

THE COURT. That is right, Mr. McDonough. There is to be no change in the student assignment system that was in force on October 21st, 1977.

On April 10, 1978, Mr. Justice Rehnquist denied petitioners' application for a stay pending the disposition of their petition for a writ of mandamus.

DISCUSSION

1. Petitioners request this Court to issue a writ of mandamus to set aside the district court's February 28, 1978, orders. In our view there is no reason for petitioners to bypass the court of appeals, which could both issue a stay and reverse the injunctions on their merits. The district court's order is appealable (see 28 U.S.C. 1292(a)(1)), and petitioners should pursue that remedy.

Petitioners would suffer no irreparable harm while seeking relief in the court of appeals. Even under the interpretation of the district court's order most adverse to petitioners, they would not be required to make any student reassignments until next fall (Pet. App. 4-8). It may be inconvenient for petitioners to engage in planning in the meantime, but that inconvenience is not an adequate reason for bypassing available appellate review. See *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383; *Jefferson Parish School Board v. Dandridge*, 404 U.S. 1219 (Marshall, J., in chambers). Indeed, the district court may decide during this time the issues that are presently under submission in that court, making the present aspect of the controversy moot.

2. This Court held when the case was previously before it that the "no majority of any minority" provision of the Pasadena Plan was invalid because it would require annual reassignments of students, despite any lack of ongoing racial discrimination. If the district court were to require such annual reassignments or to attempt to enforce a "no majority of any

minority" rule, it would be in palpable violation of this Court's judgment. The district court has explicitly deleted the "no majority of any minority" requirement from the Pasadena Plan, however, and it is far from clear that the court's recent orders reinstate that forbidden requirement.

The recent orders direct the school board not to make "any changes in the method of student assignments * * * that was in effect on October 21, 1977" (Pet. 17). By that date, the "no majority of any minority" rule had been deleted from the student assignments plan. The district court's recent order can be construed as simply requiring the school board to adhere for the time being to the present assignment of particular students to particular schools; such an order would not be inconsistent with this Court's decision, which prohibited constant reassignments and did not address the propriety of a "freeze" on present school assignments.

The district court's attempt to clarify its own order (see Pet. 18) may indicate that it had something more in mind. If so, the order exceeds the court's authority and may, in addition, be unacceptably vague. See *Schmidt v. Lessard*, 414 U.S. 473; Fed. R. Civ. P. 65(d). But, as Mr. Justice Rehnquist wrote in denying the application for a stay, "one would have to strain to read the colloquy * * * as indicating that the judge thought his order had reimposed the 'no majority' provision. * * * A judge should not be thought, by a cryptic and off-handed

remark * * *, to have reimposed an obligation which he specifically and unequivocally eliminated just a few months before * * * (slip op. 4). In any event, any error in this regard could be fully corrected by the court of appeals, and mandamus should "not * * * be used as a substitute for appeal" (*Ex parte Fahey*, 332 U.S. 258, 259-260; *Schlagenhauf v. Holder*, 379 U.S. 104, 110).

3. Petitioners argue that mandamus is appropriate in light of *Vendo Co. v. Lektro-Vend Corp.*, No. 76-156, decided January 23, 1978, which stated that this Court would correct by mandamus any disobedience to its judgments. But the district court here has not engaged in disobedience, at least as this Court used that term. It struck the offending "no majority of any majority" provision from the desegregation plan, as both this Court and the court of appeals (App. A, *infra*) had required. The orders that petitioners contend are invalid were entered later, as part of the district court's attempt to preserve the *status quo* while it passed on the arguments concerning the appropriate plan for future years. The court's orders do not represent a direct attempt to produce the annual reassignments that were found to be improper, and they therefore do not directly disobey this Court's judgment, even if they are given the construction petitioners place on them. Accordingly, their validity is not foreclosed by this Court's previous decision, and mandamus to effectuate this Court's judgment is unnecessary. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nancy Anne Spangler, by her father and next friend,
James E. Spangler, Jr., et al., Plaintiffs-Appellees,
and

United States of America,
Plaintiff-Intervenor-Appellee,

v.

Pasadena City Board of Education et al.,
Defendants-Appellants.

No. 74-2116.

Jan. 24, 1977.

Rehearing and Rehearing En Banc
Denied April 27, 1977.

ORDER ON REMAND

Before CHAMBERS, ELY and WALLACE, Cir-
cuit Judges.

The court concludes that all determinations as to
modifications required under *Pasadena City Board of
Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49
L.Ed.2d 599 (1976) of the district court's decrees of
1970 and 1974, should initially be made by the district
court. In doing so, it will conclude that some super-
seding judgment or decree is needed to be entered and
to be preceded by current findings of fact.

It seems clear that a bald unqualified order that there shall *never* be any "majority of any minority" in any Pasadena attendance zone cannot stand.

The resolution of such questions as are mentioned in Part III of the majority opinion by the Supreme Court will necessarily depend on the existing record as it will be supplemented by a subsequent hearing or hearings.

Further than as above indicated, we do not go.

APPENDIX B

June 27, 1977, hearing

MR. BALL [Counsel for petitioners]. But let me get back to this problem. The Supreme Court says that this provision, no majority of any minority, shall be stricken from the decree. I think that should be done today. That's our plea to you.

THE COURT. That's the order, that there be no change.

MR. BALL. I can state to you that there's no plan to change any assignment of pupils. No plan that I know of.

THE COURT. As an officer of the Court, you make that representation?

MR. BALL. Yes, I do.

THE COURT. It need not be an order, then.

MR. BALL. I can assure you that there's no such plan. And we have advised that there be strictly no plans. If there are a change of plans, I wouldn't be their lawyer anymore.

THE COURT. I know that, Mr. Ball. I'm taking your representation.

MR. BALL. We want a hearing on facts. I will give you that representation.

THE COURT. All right. I'm taking that.

MR. OKRAND. Your Honor, may I say a word?

Obviously, Mr. Ball's representation to the Court is good enough for me, but I have been given to understand—I suppose this would have to be verified—that teachers have been given instructions to prepare

to move pursuant to some change that's going to take place and that worries us a little bit. I would prefer having the Court's order read as it was intended to at the beginning.

Mr. BALL. I know of no such orders. And I just asked a member of the school board, and he says there is no such order.

THE COURT. As soon as it comes to your attention—

Mr. BALL. I will stop it right now. Furthermore, I will investigate and I will find out.

Mr. OKRAND. Thank you.

THE COURT. I will see you gentlemen on Friday.

* * * * *

Hearing commencing on July 14, 1977

Mr. MANASEVIT. Thank you, your Honor. The last issue is that based on the schedule.

The district schools are going to be open prior to the resolution of the issues before the Court.

THE COURT. I was going to take that up, I assume, the same word from the counsel that no changes will be made in pupil assignment prior to any decision to the court on the matters presently pending.

Mr. McDONOUGH. Certainly not, your Honor, unless we can come to a situation where we need that to be done and then we can present that to the Court for his approval.

* * * * *