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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRILL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WORD and HAROLD C. MARTIN, as members of Alabama State Board of Education,	)
Appellants and Applicants for Stay Pending Appeal	)
Vs.	)
ANTHONY T. LEE, et al.,	)
Appellees (Plaintiffs Below)	)
UNITED STATES OF AMERICA,	)
Appellee (Plaintiff-Intervenor and Amicus Curiae, Below)	)
(Full caption of case appealed from is shown by the attached copy of Decree appealed from)	)

APPLICATION FOR STAY PENDING APPEAL

To Honorable Hugo Black, Associate Justice of the Supreme Court of the United States:

Now come applicants (the appellants) Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word

and Harold C. Martin, as members of Alabama State Board of Education, and respectfully move this Honorable Court for a Stay of the enforcement of the mandatory features of the Order, Judgment and Decree of the three-judge court sitting in the United States District Court for the Middle District of Alabama, Northern Division, entered on the 22nd day of March, 1967.

This application for Stay is addressed only to the compulsory, affirmative or mandatory features of the decree appealed from. Applicants do not pray for a Stay of the prohibitory aspects of the decree; however, applicants will question this also, on appeal.

As grounds for the application for Stay, applicants assign the following:

1. On March 22, 1967, a three-judge court entered an injunction, judgment, decree and opinion (Exhibit I) which (1) declares the 1965-1966 Tuition Grant Statute of the State of Alabama unconstitutional, (2) enjoins applicants for the Stay (appellants) from interfering with "the elimination of racial discrimination by local school officials in any school system in the State of Alabama". (3) requires of the applicants (who were parties to the action below) immediate specified mandatory and affirmative action in accordance with a prescribed schedule for the operation of 99 public school systems of the State of Alabama and for the transportation of students, the consolidation and construction of schools and many other detailed administrative matters. (See Exhibit IV listing some 26 mandatory orders). Likewise, the affirmative orders would compel action by local school officials, who were not parties to the action below. The ordered action will require the expenditure of large sums of the public funds of the State of Alabama and is unauthorized by applicable Alabama law. The actions ordered by the decree are irrevocable, and the injury to the State will be irremedial.

2. On April 7, 1967, appellants filed their Notice of Appeal to the Supreme Court of the United States. The appeal was taken purusant to 28 USC §1253. (The Notice of Appeal is set out as "Exhibit A" to Exhibit II. Note: Specific attention is called to pages 3 to 7 of the Notice of Appeal setting out the questions presented by the appeal; it is urged that these questions be carefully read, as they will point up the substance and merit of the appeal without necessity of elaboration).

3. On April 10, 1967, appellants filed the application for Stay (Exhibit II) addressed to the three-judge court and on April 15, 1967, after a hearing in open court, appellants' application for Stay was denied by written order. (Exhibit III).

4. Applicants specifically disclaim any right to stay pending appeal the prohibitory injunction against discrimination. Applicants do show that irreparable injury will follow if the enforcement of the mandatory injunction of the decree is not stayed, and a successful appeal would be a barren victory. The mandatory or compulsory features of the decree expose applicants to contempt proceedings before the decree can be reviewed by this Honorable Court; and, it appears that parties never before the court during the hearing on the merits (the local school officials) will likewise be exposed to contempt proceedings, all without due process of law.

Appellants are ordered, and unless the mandatory injunction is stayed, will be coerced, to take the actions detailed and listed in Exhibit IV, which require expensive and substantial changes in school construction, student transportation and the operation and administration of the various school systems. If the limited stay requested is granted, no comparable substantial injury can follow because racial discrimination continues to be prohibited.

5. This case is unique and the basic questions presented are novel. The Supreme Court of the United States has not yet reviewed

a decree which requires compulsory integration on a "racial balance" basis or a State wide compulsory integration case of this kind. This case is distinguished from the Delaware case (Ennis v. Evans, 364 U. S. 802, 1960) because by statute the Delaware state authorities had control over the local schools; the Supreme Court of Alabama has determined (Opinion of the Justices, 276 Ala. 239, 160 So. 2d 649, Exhibit V) that the applicants have no legal authority to carry out the requirements of that mandatory injunction. The decree appealed from affects 99 local school boards, yet only one local school board was a party to the suit or had opportunity to be heard and present evidence showing its particular situation. The decree orders detailed action to be taken by the local school boards through a mandatory injunction directed to the Governor, the Superintendent of Education and the State Board of Education. The local school officials were not parties to this action and coercion on them is clearly without due process of law.

The three-judge court made a finding of fact that applicants exerted control over the local school boards; but it remains indisputable that applicants have no lawful authority to command the local school officials to take the ordered action.

If a former Governor acted beyond the law, is that reason or justification for the court to command his successor to do the same?

This aspect of the appeal can be expressed by the question:

DOES A FEDERAL COURT HAVE POWER TO ORDER A STATE OFFICIAL TO EXCEED HIS LAWFUL AUTHORITY AS SUCH PUBLIC OFFICIAL IN CARRYING OUT THE MANDATORY REQUIREMENTS OF THE INSTANT DECREE?

6. The order under Paragraph III of the decree requiring each student throughout the State of Alabama "be transported to the school he attends if that school is the one nearest his residence and is at least two miles from his residence", together with the "desegregation

plan" attached to the decree as Exhibit "A", the consolidation of schools compelled under Paragraph I-A of the decree, the construction of schools and the expansion of existing facilities under Paragraph I-D and the other mandatory orders of the decree combine to violate the intent of Congress and the definition of "discrimination" as applied to the public schools contained in Public Law 88-352 (Civil Rights Act of 1964), particularly Sections 401 (b), 407 (a), 407 (a) (2), 410, 602, 604, 702 and 702 (j) thereof and Section 604 of the Elementary and Secondary Education Act of 1965 as amended on October 6, 1966.

In short, the order would require the bussing of students and other actions seeking to obtain racial balance in the school systems of the state, in direct conflict with the expressed intent of Congress and the prohibitions contained in the Civil Rights Act of 1964 (Public Law 88-352).

7. The suit is one prohibited by the Eleventh Amendment to the Constitution of the United States which provides that the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another state, by citizens or subjects of any foreign state or by citizens of that state. (Hans v. Louisiana, 134 U. S. 1). Here, the three-judge court assumed jurisdiction of the case brought by citizens of the State of Alabama which is in reality against the State of Alabama for two reasons: (a) the relief sought, and ordered, requires expenditure of state funds, requires changes in physical facilities, equipment, etc., and therefore is in effect a decree against the state; (b) the suit is nominally against the individual officers but it seeks to affect their official actions as state officers, to compel "state action".

(a) If the purpose of a proceeding in court is to obtain a judgment which established liability of the state which will be paid

out of state funds, the proceeding falls within the prohibition of the Eleventh Amendment or sovereign immunity. (O'Neill v. Early, 208 F. 2d 286, Gainer v. School Board of Jefferson County, 135 F. Supp. 559).

Whether the action is one against the state is determined by the result of the judgment or decree which is, or may be, entered. (Chicago R.I. & P. R. Co. v. Long, 181 F. 2d 295; People of Colorado v. District Court of U.S., 207 F. 2d 50).

Where relief is sought against the State, the action is against the State, no matter what the procedures or the names of the nominal parties. If the rights of the state are directly and adversely affected, the Federal Courts will not enter a money judgement against the state and the injunction to withhold the state's money or to expend it is obviously the same. (State of Ohio v. Glander, 74 N.E. 2d 82, 148 Ohio St. 188, Cert. den. 332 U.S. 817.)

(b) Generally, suits to restrain action of state officials can, under the Eleventh Amendment, be prosecuted only when action sought to be restrained is without authority of state law, or contravenes statutes or the Constitution of the state or the United States.

We recognize that suits by citizens can be maintained against individual state officials to prevent such individuals from taking action which they have no lawful authority to take, and that illegal or unconstitutional action under color of office is in reality "individual" action. But here state officials are sought to be coerced to take official action - state action; and that action would actually be without legal authority for them to take.

8. The case began by seeking the desegregation of the public schools of Macon County, Alabama, and an injunction was granted therein by a single United States District Judge (Lee v. Macon County Board of Education, 221 F. Supp. 297) then by amendment the

jurisdiction to order desegregation of the public schools of Macon County, Alabama, jurisdiction which only the single judge district court had. As was said in Geneva Furniture Mfg. Company v. Karpen, 238 U. S. 254, 259," . . . it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction . . . "See also Hanna v. Larche, 363 U. S. 420.

9. The case began as a class action by the named plaintiffs to desegregate the public schools in Macon County, Alabama, by the named parties who were representative of that class of citizens allegedly discriminated against in the public schools; no representatives of the class allegedly discriminated against in the operation of trade schools or junior colleges were ever before the court. None of the plaintiffs was shown to be students of or applicants for admission to or even eligible for admission to any trade school or junior college. The requirements for class action with respect to trade schools and junior colleges was completely ignored by the court below and that feature of the case is procedurally erroneous and fatally defective.

Furthermore, there was no evidence taken regarding the operation and administration of the state trade schools, junior colleges, colleges and universities.

10. The provisions of Paragraph X declaring unconstitutional Title 52, Section 61 (a), Code of Alabama (Tuition Grants Statute, 687, approved September 1, 1965) would destroy the rights of all students in Alabama to receive funds under the statute during the pendency of the appeal; and, if the appeal is successfully maintained, irreparable injury would be done to such students unless the enforcement of the decree is stayed.

11. The decree and the "desegregation plan" attached thereto as Exhibit "A" will compel the transfer of many teachers from schools in which they are entitled to remain under the Alabama Teacher Tenure Law, and enforcement of the decree, if the cause is later reversed, will do irrevocable injury to such teachers and will result in a shifting of the composition of the faculty of the schools throughout the state.

The opinion accompanying the decree indicated that forced mixing of the school faculty and staff will be required, "because students are entitled to a nonracial education" in the words of court. This blind formula does not discern the distinction between "rights" and "oppressions" and the objective of the court should be developed under a prohibition against racial discrimination rather than by an inflexible affirmative fiat. To require a pattern of teacher assignment without evidential hearings is a legislative action rather than a judicial decision, and it is without due process of law to all involved.

The conclusion reached by the court that teachers assigned on the basis of race deny students equal protection of the law was made without the benefit of any evidence and is a misconstruction of this Court's cases of Bradley v. School Board of Richmond, 382 U. S. 103 and Rogers v. Paul, 382 U. S. 198, which specifically hold that an evidentiary hearing must be held. This Court did not draw such a conclusion as reached by the District Court, because this Court recognized the necessity for proving that the assignment of teachers did, in fact, deny students equal protection of the law.

12. Under the provisions of Paragraph VII of the decree, the voluminous reports and records therein required are extremely burdensome, will divert from the educational program the expenditure of substantial and excessive funds, and will place an oppressive and intolerable burden upon the State Superintendent of Education and

judicial intrusion into the administration of an executive function of government, and discloses the willingness of the three-judge court to take over and run the executive functions of government in violation of the basic separation of powers concept of our government.

13. The decree of March 22, 1967, the subject of this Appeal and Application for Stay, indicates, or threatens, action against local school officials who were not parties to the case during its hearing on the merits. After the appeal was taken, motions were filed by the United States of America, Plaintiff-Intervenor and Amicus Curiae, for ex parte orders to add new party defendants to this case and to require affirmative action of them and to require further affirmative action of the applicants; and, although the basic decree of March 22, 1967, had been appealed to this court, and in spite of the fact that the new parties had not been before the trial court on the hearing on the merits, the trial court on the 24th day of April, 1967, entered an order adding new party defendants to this case and requiring all defendants, including applicants, to show cause why the added defendants should not be required to adopt desegregation plans conforming to the trial court's decree of March 22, 1967, and granting further relief. Exhibit 6.

14. The necessity for the Stay further shown by the affidavit of Ernest Stone, the State Superintendent of Education, which factually substantiates the statements herein set out. Exhibit 7.

15. Conclusion:

In summary, almost all of the schools systems in the State of Alabama have been operating under what is generally

referred to as "Freedom of Choice" plans, wherein a student, without regard to race, color, creed or national origin, could select the particular school he wished to attend. In the 99 systems covered by the Court order, the Justice Department of the United States had received no complaint of discrimination and had filed no suit under the provisions of Title IV of the Civil Rights Act of 1964. The Court order in this case requires action of these 99 boards, even though they were not given the opportunity to come into Court and be heard. This order makes findings of discrimination in the State's Senior Colleges, Universities, Junior Colleges and Trade Schools under the control of the State Board of Education. Such institutions were not given an opportunity to be heard, and, in fact, there was no proof that anyone had been denied admission to any of the institutions on the ground of race, color, creed or national origin.

The order of the District Court requires State officials to take affirmative action in connection with the operation of local elementary and secondary schools, and the law of the State of Alabama as announced by the Supreme Court of Alabama is to the effect that said officials had no such control -- and therefore, cannot perform said acts.

The ultimate effect of the order would be to require the assignment of students to the schools of Alabama in order to obtain "racial balance".

14. ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

John C. Satterfield
P. O. Box 466
Yazoo City,
Mississippi

MacDonald Gallion, As
Attorney General of Alabama
State Capitol
Montgomery, Alabama

Maury Smith
Goodwyn, Smith and Bowman
325 Bell Building
Montgomery, Alabama

Gordon Madison, As Assistant
Attorney General of Alabama
State Capitol
Montgomery, Alabama

Nicholas S. Hare, Special
Assistant Attorney General of Alabama
Tyson Building
Montgomery, Alabama

ATTORNEYS FOR APPLICANTS FOR STAY

PROOF OF SERVICE

I, MacDonald Gallion, Attorney General of Alabama and one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of the Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrill, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Word and Harold C. Martin, as members of Alabama State Board of Education, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of May, 1967, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the Office of Ben Hardeman, Esq., United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postagle prepaid, to The Solicitor General. Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiae, by mailing copies, in a duly addressed envelope, with air class postage prepaid, to the respective attorneys of record as follows:

Ramsey Clark, Esq.
United States Attorney General
Washington, D. C.

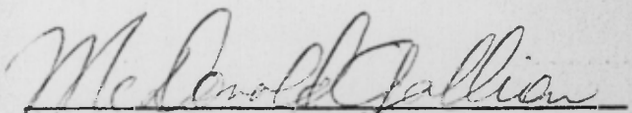
St. John Barrett, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Brian K. Landsberg, Esq.
Department of Justice
Civil Rights Division
Washington, D. C.

Fred D. Gray, Esq.
34 North Perry Street
Montgomery, Alabama

Melvyn Zarr, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York

Henry M. Aronson, Esq.
NAACP Legal Defense and
Educational Fund
10 Columbus Circle
New York, New York



Attorney General of Alabama
Office of the Attorney General
State Capitol
Montgomery, Alabama