

IN THE
SUPREME COURT OF THE UNITED STATES

No. 1, MISC.—AUGUST SPECIAL TERM, 1958.

John Aaron, et al., Petitioners.

vs.

William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Respondents.

APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO.

To the HONORABLE CHARLES EVANS WHITTAKER, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit:

Now come the petitioners, John Aaron, et al., and pray that the stay of mandate granted by the court below be vacated, that the order of the District Court be stayed, and for such other and further relief as may be appropriate and show the following:

1. On June 21, 1958, Judge Harry J. Lemley of the District Court of the United States for the Eastern District of Arkansas entered an order modifying the prior orders of that court which had been entered ordering respondents to proceed with their plan of gradual desegregation and ordered a suspension of the operation of that plan until mid-semester of the 1960-1961 school term. On the same day, petitioners filed a Notice of Appeal to the United States Court of Appeals for the

Eighth Circuit and applied to Judge Lemley for a stay of his order pending such appeal. The application for a stay was denied on June 23, 1958. On June 24, 1958, petitioners applied to the United States Court of Appeals for the Eighth Circuit for a stay of Judge Lemley's order pending appeal and on the same day petitioners' appeal was docketed in the United States Court of Appeals for the Eighth Circuit.

2. On June 26, 1958, petitioners herein filed in this Court petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit praying that this Court grant said writ of certiorari before judgment by the Court of Appeals and reverse the judgment below (see No. 1095 October Term, 1957).

3. On June 30, 1958, this Court entered a *per curiam* order, *Aaron v. Cooper*, — U. S. — 2 L ed. 2d 1544, stating that:

. . . The order that the District Court suspended has, in different postures, been before the Court of Appeals for the Eighth Circuit three times already. *Aaron v. Cooper*, 243 F 2d 361; *Thomason v. Cooper*, — F 2d — (April 28, 1958); *Faubus v. United States*, — F 2d — (April 28, 1958). That Court is the regular court for reviewing orders of the District Court here concerned, and the appeal and the petition for a stay are matters properly to be adjudicated by it in the first instance.

We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year.

Accordingly, the petition for certiorari is

Denied.

4. On August 4, 1958, argument was had before the United States Court of Appeals for the Eighth Circuit in this cause and on August 18, 1958, said court handed down an opinion appended hereto as **Exhibit "A", which**

adequately describes the background of this cause, reversing the judgment of the District Court and holding in part that "the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto."

5. On August 20, 1958, petitioners filed a motion in the United States Court of Appeals for the Eighth Circuit requesting that the mandate in said case be issued forthwith. On the following day respondents filed a motion for stay of issuance of the mandate and on the same date, August 21, 1958, the United States Court of Appeals without allowing the petitioners the five days' opportunity to file a brief in opposition as provided by Rule 18 (b) of the Rules of the United States Court of Appeals for the Eighth Circuit said Court of Appeals granted respondents' application for stay of the mandate in said cause for a period of thirty days from said date and further providing that if within the period of thirty days it receives notice from the Clerk of the Supreme Court that an application for certiorari has been filed by petitioners, the stay is continued until said application is finally disposed of. Said stay is appended hereto as Appendix "B".

6. This Court may take judicial notice of the fact that the next school term at Little Rock Central High School commences on September 2. In denying the petition for writ of certiorari in order to permit the Court of Appeals to consider the issues involved, this Court stated that it had "no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year." But in the present posture of these proceedings, despite an opinion of the Court of Appeals deciding the right of petitioners to continue in nonsegregated schools, petitioners will be relegated back to segregated schools for at least a year. Thus, respond-

ents have effectively secured the relief they originally sought—a suspension of desegregation for an undetermined duration.

7. Petitioners' right to attend unsegregated schools has long since been settled, *Aaron v. Cooper*, 143 F. Supp. 855 (E. D. Ark. 1956). aff'd 243 F. 2d 361 (8th Cir. 1957) and petitioners have in fact attended an unsegregated school for one year. The only issue in this case is whether respondents are entitled under the circumstances presented here to an order suspending the rights of petitioners for any period of time. The court below has effectively decided this issue by issuing a stay. If that stay is allowed to stand until September 2, 1958, it will for all purposes constitute a final disposition of the only issue of this case.

8. Petitioners are Negro citizens of the United States residing in the State of Arkansas whose legal rights to attend Central High School in Little Rock are now beyond question. Yet if this procedural motion for a stay which the Court of Appeals has granted remains in effect at the beginning of the forthcoming school term and until this Court disposes of petition for writ of certiorari, that right will be withheld for perhaps the next school year or possibly even longer.

9. For authority that the decision on a motion for a stay in a litigation of this sort turns on considerations substantially co-extensive with those involved on the merits, see, *Lucy v. Adams*, 350 U. S. 1; *Tureaud v. Board of Supervisors*, 346 U. S. 886. That a stay pending further litigation is tantamount to a determination on the merits was the position of respondents before Judge Lemley when petitioners applied for a stay of his judgment. Judge Lemley ruled, in denying petitioners' application that to stay his judgment would be equivalent to negating his ruling on the merits. That equivalency still exists.

10. The traditional function of a stay is to maintain the status quo existing before the commencement of the

proceedings, until the party whose legal status has been altered is given an opportunity to appeal. But the effect of the stay issued by the court below was to alter the status quo by excluding petitioners from the schools they attended during the past year. Thus, the stay of mandate is in the same category as the denial by Judge Lemley of petitioners' motion to stay his order. Consequently, this Court has authority to stay the order issued by Judge Lemley and thereby maintain the status quo pending final decision by this Court. See, *Lucy v. Adams*, 350 U. S. 1.

11. If the stay order is permitted to stand and Judge Lemley's order remains in force petitioners' rights will be effectively destroyed, the damage will be irreparable and the order of a Federal Court will in fact "be whittled away."

WHEREFORE, petitioners pray that the stay order of the Court of Appeals for the Eighth Circuit be vacated and that the order of Judge Lemley be stayed and for such other relief as may be necessary to protect petitioners' declared constitutional rights.

The petitioners respectfully request an opportunity for oral argument of the above application at a time and place suitable to your convenience.

Respectfully submitted

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