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In the Supreme Court of the United States

AUGUST SPECIAL TERM, 1958

No. 1, Misc.

JOHN AARON, ET AL., PETITIONERS

v.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS

ON 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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

The prior course of the proceedings in this case are fully set forth in the petitioners' application to Mr. Justice Whittaker, filed on August 22, 1958. The facts which pertain to the merits of the controversy, *i. e.,* the facts which bear upon the question whether

there was adequate legal basis for the district court's order suspending the operation of the previously approved plan of desegregation, are stated in the opinion of the court of appeals, reprinted in the Appendix, *infra,* pp. 21–37.

In this brief, filed in response to the invitation of the Court, we shall discuss, first, our reasons for believing that the Court has full power to grant the relief which is sought, and, secondly, the basis for our conclusion that this relief should be granted.

DISCUSSION

The Government is primarily interested in the preservation and maintenance of public education in accordance with the Constitution. The Government believes that the Nation must be sympathetic and understanding of the difficult problems that have to be dealt with by school districts in bringing about nonsegregation in the schools and cannot fail to appreciate the adjustments that have to be made in school systems which have been operated under a different assumption for a long term of years. It recognizes that plans for implementation of the Court's decree may be modified in accordance with equitable principles. As the Government reads the opinions of this Court in *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294, the decision so provides. The Government considers that the Court has allowed wide latitude to carry into effect the decision in accordance with the conditions in the locality and the problems involved. However, there are certain primary considerations:—first, that there be a prompt start; sec-

ond, that the action be taken and continued in good faith and by all reasonable means, under the circumstances, to accomplish the plan; third, that opposition to the decision expressed in violence and unlawful acts does not, solely or of itself, justify the abandonment or modification of the plan; and, fourth, that any change of a plan once placed into effect must provide for active steps and progress toward its objectives during any period of modification.

In the light of these basic considerations, this brief is narrowly addressed to the issues before the Court in this particular proceeding.

I

THIS COURT HAS FULL POWER TO ACT AT THIS TIME UPON PETITIONERS' APPLICATION FOR RELIEF, AND, IN DOING SO, IT SHOULD CONSIDER THE MERITS OF THE CONTROVERSY

A. THE COURT HAS FULL POWER TO PASS UPON THE APPLICATION

There is no doubt that this Court has full power to act upon the present application to vacate the stay, even though a petition for certiorari has not yet been filed by respondents. In comparable cases in which delay would be prejudicial, individual Justices have exercised the power to consider a stay before the Court has been formally seized of the matter through the filing of a petition for certiorari or the taking of an appeal. See, *e. g., Rosenberg* v. *United States,* 346 U. S. 273, 285–286, 324; *Land* v. *Dollar,* 341 U. S. 737, 738; *Fahey* v. *Mallonee,* 332 U. S. 245, stay granted by Mr. Justice Rutledge, Sup. Ct. Journal, Oct. Term, 1946, p. 86 (Dec. 9, 1946); *Johnson* v. *Stevenson,* 335

U. S. 801. As these same cases show, the full Court also has the power to pass upon stay applications, and it has exercised that authority when the occasion arose. Cf. *United States* v. *Ohio,* 291 U. S. 644.

In two recent cases involving school problems, the Court has affirmatively exercised its stay powers in a similar situation. In *Tureaud* v. *Board of Supervisors,* 346 U. S. 881, a stay was granted of a Fifth Circuit judgment "which is to be brought here for review in a petition for certiorari." And in *Lucy* v. *Adams,* 350 U. S. 1, the Court reinstated an injunction which had been stayed by the district court (pending appeal) and which a circuit judge had refused to reinstate.[1]

The Court's plenary authority to grant or deny stays, interim injunctions, or other preliminary relief flows from its position as the highest judicial tribunal in the nation with both appellate and supervisory jurisdiction over the lower federal courts. The court of appeals' judgment will come before this Court on petition for certiorari,[2] and Section 2106 of Title 28 vests the Court with full power to affirm, modify, vacate, set aside or reverse that judgment. The All-Writs Statute (28 U. S. C. 1651) grants the Court full authority to issue all writs necessary or

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[1] The district court had enjoined officials of the University of Alabama from denying admission to Autherine Lucy and another; the same court then stayed its injunction pending an appeal; a judge of the court of appeals thereafter denied a motion to vacate the suspension and to reinstate the injunction.

[2] The stay issued by the court of appeals assumes that the respondents will file a petition for certiorari.

appropriate in aid of its jurisdiction. And the Court likewise has a general supervisory authority over the federal judicial system. See *Rosenberg* v. *United States,* 346 U. S. 273, 285–287; *Calvaresi* v. *United States,* 348 U. S. 961. It goes without saying that this complex of powers cannot be defeated by postponing the filing of a petition for certiorari until appropriate interim relief can no longer be afforded.

B. IN PASSING UPON THE APPLICATION, THE COURT SHOULD WEIGH THE PROBABILITY OF A REVERSAL OF THE JUDGMENT BELOW

As indicated in the stay order of the court of appeals, the only purpose of a stay of that court's judgment at this stage of the litigation would be to give this Court an opportunity to consider whether or not to review the judgment below, and, if so, to consider the merits. It is therefore fully appropriate for the Court—now convened in an extraordinary Special Term to consider the application for relief—to determine whether or not it will grant certiorari to review the judgment below, and even to consider whether it would affirm if certiorari were granted. In *Lucy* v. *Adams,* 350 U. S. 1, the Court obviously considered the merits in passing upon the stay application,[3] and it apparently did so in *Tureaud* v. *Board of Supervisors,* 346 U. S. 881. See also *Johnson* v. *Stevenson,* 335 U. S. 801; *Rosenberg* v. *United States,* 346 U. S. 273 (in which the Court, on a motion to vacate a stay, extensively considered the merits). In this case, too, if at this Special Term the Court

[3] Cases dealing with the invalidity of school segregation were cited in the *per curiam* opinion.

finds no reason to review the judgment below or if it agrees that that decision is correct, there could be no further reason for the stay granted by the court of appeals. In its *per curiam* opinion of last June 30th, the Court recognized the "vital importance of the time element in this litigation" and the need for judicial action "in ample time to permit arrangements to be made for the next school year." 357 U. S. 566, 567.

If there should be any doubt of the propriety of considering the merits at this time when only the application for relief is before the Court, it would be appropriate to call upon the present respondents (the Board of Directors of the Little Rock, Arkansas, Independent School District, and the Superintendent of Schools) to file a petition for certiorari at once, instead of waiting for thirty days as they may do under the Eighth Circuit's stay order. In *Ex parte Quirin,* 317 U. S. 1, the petitioners filed such petitions during the course of argument (317 U. S. at 6) and those petitions were promptly considered and granted (317 U. S. at 18).[4]

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[4] We believe that actually there is no occasion for doubt. It is settled practice that the courts, in determining whether a judgment should be stayed in the interest of the losing party (here, the respondents), will make a determination as to whether there is any substantial likelihood that such party can prevail on the merits. See *Virginian Ry.* v. *United States*, 272 U. S. 658, 673–674; *Air Line Pilots Ass'n, Internat'l* v. *Civil Aeronautics Bd.*, 215 F. 2d 122, 125 (C. A. 2); *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924, 927 (C. A. 3); *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. 2d 885, 892–893 (C. A. 6); *Embassy Dairy, Inc.* v. *Camalier*, 211 F. 2d 41, 43–45 (C. A. D. C.)

II

THE RELIEF SOUGHT BY PETITIONERS SHOULD BE GRANTED BECAUSE THERE IS NO LIKELIHOOD THAT RESPONDENTS CAN PREVAIL ON THE MERITS

A. THERE IS NO LEGAL BASIS FOR REVERSAL OF THE COURT OF APPEALS' DECISION

At the outset, it should be stressed that this case involves a petition to postpone the effective dates of a school plan duly adopted and in effect, not an issue as to whether a plan or particular type of plan should be accepted or approved.

The decision of the district court rested upon two basic misconceptions: first, as to the governing principles laid down by this Court for determining when a delay in carrying out a school desegregation plan may be allowed; and, secondly, as to the extent to which constitutional rights may be nullified or impaired because of hostile actions taken by those opposed to the exercise of such rights.

First. (*a*) On May 17, 1954, this Court unanimously declared that racial segregation in public schools is unconstitutional. *Brown* v. *Board of Education,* 347 U. S. 483, 495, and companion cases. Because the five cases before the Court arose under different local conditions and involved a variety of local problems, the Court requested further argument on the question of relief. It invited the Attorney General of the United States and the Attorneys General of all states in which racial segregation in public schools was required or permitted to appear as *amici curiae* to present their views. Comprehensive briefs on the question of relief were submitted to the Court by the parties and the *amici,* and the oral argument extended over a period of four days (April 11–14,

1955). The Court's opinion and judgment were announced on May 31, 1955. *Brown* v. *Board of Education,* 349 U. S. 294. Any analysis of the Court's opinion must take into consideration the arguments which were made to the Court, some of which were accepted and others rejected.

Essentially, three lines of argument were made to the Court on the question of relief. On the one side, the plaintiffs contended that there was no justification, legal or factual, for any delay in enforcing their constitutional right to enter non-segregated public schools, and that the Court should require desegregation "forthwith". On the other side, the defendants and some of the *amici* pointed out that racial segregation in public schools had been in existence in more than one-third of the states and in the District of Columbia for almost a century; that during its existence it enjoyed the sanction of decisions of the Court and was believed by many people to be necessary in order to preserve amicable relations between the races; and that school segregation was part of a larger social pattern of racial relationships which reflected the mores and folkways prevalent in large areas of the country. They contended, therefore, that the Court should not go beyond its declaration of the constitutional principle, and that it should leave implementation of the principle to the voluntary conduct of the communities and individuals concerned, without imposing any limitation as to time. The United States, however, proposed a middle course. It suggested that the cases be remanded to the lower courts with directions to require the defendant school boards either to admit the plaintiffs forthwith to non-segre-

gated public schools or to propose promptly for the lower court's consideration and approval an effective plan for accomplishing desegregation as soon as practicable. It proposed that the defendants should bear the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required, and that no program should receive judicial approval unless it called for an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible.

This Court unanimously rejected the two extreme views and accepted, in essence, the proposed middle course. It stated explicitly that "the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling." 349 U. S. at 300. If additional time for carrying out the ruling is requested, it added, the "burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* The Court specifically enumerated factors which the lower courts might consider as justifying the allowance of additional time: "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U. S. at 300–301. The factor of community hostility or

opposition to desegregation was not included in the list. The Court dismissed in a single sentence the suggestion that the plaintiffs should forego their "personal and present" right (cf. *Sweatt* v. *Painter,* 339 U. S. 629, 635) not to be segregated while attending public schools until such time as others in the community might be agreeable:— "* * * it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U. S. at 300.

In short, the Court made it clear that mere popular hostility, where it exists, can afford no legal justification for depriving Negro children of their constitutional right. The Court was explicit in its insistence that there be "good-faith compliance at the earliest practicable date." Where additional time was sought, it could be allowed only where necessary in order "to effectuate a transition to a racially non-discriminatory school system." Additional time, where permitted, must be for the purpose of enabling the authorities to take necessary constructive measures—measures looking towards full compliance. The Court thus indicated that it will not countenance delay as a mere interlude during which little or nothing would be done to effectuate transition to a nonsegregated system.

(*b*) On the face of it, the district court's decision in the present case rests on the consideration of factors which this Court ruled out as inadmissible.

The Little Rock plan of school desegregation [5] was

[5] The full details of this plan are set out in *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8) and *Faubus* v. *United States*, 254 F. 2d 797 (C. A. 8).

carefully worked out over a period of three years. Under the plan, complete desegregation was not to be effected until 1963. Previously challenged by these petitioners as being too slow, it was nonetheless approved by the district court and by the court of appeals as being "in present compliance with the law" as expressed by this Court's mandate.

The plan, ordered put into effect "forthwith,"[6] has been in operation for an entire school year. In the instant proceeding, however, the district court ordered a suspension in the operation of the plan theretofore approved. The justification, in the district court's words, is "the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years."[7] The manifestation of this opposition by certain "overt acts which have actually damaged educational standards" is given as a further reason.

This Court's mandate, however, required a prompt beginning, and, thereafter, progress with "all deliberate speed." The Court countenanced the possibility of delay only to the extent that time might be necessary in order to work out constructive measures for accomplishment of the transition. It declared that the constitutional principles might not yield

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[6] See *Aaron* v. *Cooper*, 156 F. Supp. 220, 225 (E. D. Ark.).

[7] The opinion suggests, in this connection, that "the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan" after the completion of certain pending litigation in the state courts of Arkansas.

"simply because of disagreement with them." As it recently stated the proposition in another context (exclusion of Negroes from grand jury service in Orleans parish, Louisiana), "local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws." *Eubanks* v. *Louisiana,* 356 U. S. 584, 588.[8]

The district court's disposition of this case, as the court below has held, cannot be squared with these admonitions. It does not require constructive measures of implementation; it endorses a moratorium in order to "wait and see" what may happen.

Second. The district court did not rely solely on its finding that there were traditions and attitudes in the community which were hostile to desegregation. It gave weight to the fact that the opposition "is more than a mere mental attitude" and has "mani-

[8] The Fourth and Fifth Circuits have both held that "local tradition" cannot excuse a failure to proceed expeditiously in compliance with this Court's decision in the school cases. *Allen* v. *County School Board of Prince Edward Co., Va.*, 249 F. 2d 462 (C. A. 4); *School Board of City of Charlottsville, Va.* v. *Allen*, 240 F. 2d 59 (C. A. 4); *Jackson* v. *Rawdon*, 235 F. 2d 93 (C. A. 5), certiorari denied, 352 U. S. 925. As Chief Judge Hutcheson stated in the *Jackson* case (235 F. 2d at 96), a school board has a duty to abolish segregation "completely uninfluenced by private and public opinion as to the desirability of desegregation in the community * * *".

fested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

This reliance upon overt manifestations of opposition to desegregation reflects the fundamental error in the district court's decision. For inherent in that ruling is the idea that the constitutional rights of some citizens may be suspended or ignored because of the antagonistic acts of others. If constitutional rights could be so easily negated, they would amount to little. Here, it should be noted, there is not the slightest suggestion that the colored children did anything to incite violence or disorderly conduct. Because they were colored, their mere presence in the school led others to engage in the conduct which the district court thought to be sufficient justification for suspending the children's constitutional rights—rights which can be enforced only while they are of school age, so that any "suspension" of their rights is actually a permanent and irretrievable deprivation.

This Court has rejected the claim that a restriction upon the rights of Negroes might be justified as a means of avoiding racial disturbance. "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted," the Court said. "But its solution cannot be promoted by depriving citizens of their constitutional rights and

privileges." *Buchanan* v. *Warley,* 245 U. S. 60, 80–81.[9]

The court below has stated in the instant case (Appendix, *infra,* p. 34), that it would create an "impossible situation" if the district court's order were sustained. "Every school district in which integration is publicly opposed by overt acts would have 'justifiable excuse' to petition the courts for delay and suspension in integration programs. An affirmance of 'temporary delay' in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means." *Ibid.*

B. BOTH THE SCHOOL AUTHORITIES AND THE DISTRICT COURT CAN ADOPT MEASURES CALCULATED TO PROTECT PETITIONERS' CONSTITUTIONAL RIGHTS

We believe that the decision of the court of appeals is correct in that it recognizes that the narrow grounds of opposition, violence and unlawful acts do not justify a postponement of the plan.

We point out additionally that, as in the case of any application for equitable relief, the respondents were obligated to do everything within their power before they could obtain relief from the court. Had an affirmative burden of proving need for additional time been assumed and the case proved on justifiable and equitable grounds, the Court would have a different problem before it.

As the court below observed (Appendix, *infra,* p. 34, the school authorities and the district court are not without means to deal with the prevailing situation and to protect petitioners' constitutional rights.

[9] Cf. *Moore* v. *Dempsey,* 261 U. S. 86, 90 (right to a fair and orderly trial may not be surrendered "to appease the mob spirit") and *Terminiello* v. *Chicago,* 337 U. S. 1, 5 (speech might not be suppressed because it "stirred people to anger, invited public dispute, or brought about a condition of unrest").

1. Respondents can obtain injunctive relief to protect them from outside interference with the performance of their constitutional duties

While it may be true, as the district court found, that "deep-seated popular opposition to the principle of integration" exists in Little Rock, it is clear that the active instigators of obstruction are limited in number. In response to interrogatories put to them by petitioners, respondents were readily able to name the individuals and the organization primarily responsible for the "campaign of opposition" to their plan.[10] Respondents can seek—and, if the practical necessities require, they have a duty to seek—injunctive relief against this band of troublemakers. This is precisely what was done by the school authorities of Hoxie School District No. 46, also in Arkansas, when their plan of desegregation met with massive interference spearheaded by a small group. Indeed, it should be noted that one of the defendants against whom injunctive relief was sought in that case,[11] Amis Guthridge, is also named by respondents here as being among the active obstructionists to school integration in Little Rock.[12]

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[10] "The persons * * * are Amis Guthridge, Robert Ewing Brown, Theo Dillaha, Sr., Will J. Brown, the Reverend Wesley Pruden, and innumerable other persons who are members of Capitol Citizens Council, an association incorporated under the laws of the State of Arkansas, all of whom are residents of Little Rock. * * *"

[11] *Hoxie School Dist. No. 46 of Lawrence Co., Ark.* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark.).

[12] Moreover, in addition to three other individual defendants, injunctive relief in the *Hoxie* case was sought and obtained against White America, Inc., a corporation organized and operating under the laws of the State of Arkansas, Citizens Com-

In the *Hoxie* case, the defendants challenged the authority of the School Board to seek injunctive relief. The district court responded by stating (*Hoxie School District No. 46 of Lawrence Co., Ark.* v. *Brewer,* 137 F. Supp. 364, 367 (E. D. Ark.)):

> If the defendants in fact conspired to deprive (among others) Negro pupils of their constitutional rights, then it would seem proper for the plaintiffs, so closely related as they were to the victims in this case, to bring a restraining suit. They were officials of a great state and an omission by them would, in effect, be a deprivation of rights under color of law.

The court of appeals agreed (*Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91, 101 (C. A. 8)):

> * * * [T]here is no question that * * * school board members may be protected by a federal injunction in their efforts to discharge their duty under the Fourteenth Amendment.

In similar fashion, the Court of Appeals for the Sixth Circuit sustained the right of the school authorities of Clinton, Tennessee, to petition the district court for injunctive relief against John Kasper and an organized group of followers who sought "to impede, obstruct and intimidate" them from carrying out a desegregation order of the court. *Kasper* v. *Brittain,* 245 F. 2d 92, 94 (C. A. 6), certiorari denied, 355 U. S. 834.

Even in the absence of an application for injunctive

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mittee Representing Segregation in the Hoxie Schools, an unincorporated association, and White Citizens Council of Arkansas, an unincorporated association.

relief on the part of respondents, the district court, sitting as a court of equity, had ample power to direct that such relief be sought. *Faubus* v. *United States et al.*, 254 F.2d 797 (C. A. 8), pending on petition for a writ of certiorari, No. 212, Oct. Term, 1958. If intervention by the court was indeed necessary to deal with the threat of interference, then certainly the remedy to be fashioned was one directed *at* the obstructionists, not in their favor.

2. Respondents can maintain firmer discipline within Central High School

In Paragraph 11 of their "Substituted Petition," respondents, after reciting the outside interference which they have encountered, state:

> A large majority of the pupils in Central High School have exhibited the highest type of good citizenship in their daily scholastic activities, but a small group, with the encouragement of certain adults, has absorbed the prevailing spirit of defiance and has almost daily created incidents which make it exceedingly difficult for teachers to teach and for pupils to learn. The existing pupil unrest, teacher unrest, and parent unrest, likewise make it difficult for the District to maintain a satisfactory educational program.

The group of students interfering with the plan numbered no more than twenty-five (Tr. 72).[13] Despite numerous and repeated instances of slugging, kicking, spitting, name-calling and wanton destruction of school

[13] Of these twenty-five, there were "five or ten" students who were known to be the ringleaders of the group (Tr. 64).

property,[14] only two students were expelled (Appendix, *infra,* p. 28).

Mr. J. O. Powell, Central High School's own Vice-Principal of Boys, was convinced that if the school adopted and carried out a firm policy of long-term suspension and, if necessary, permanent expulsion of serious troublemakers, the problems of the past school year would be considerably reduced (Tr. 72, 74–75). These views were shared by petitioners' two expert witnesses, Dr. Rogers, Dean of the School of Education of Syracuse University, and Dr. Salten, City Superintendent of Schools at Long Beach, New York (Tr. 366–386; 446–458).

3. There has been no showing that respondents have invoked the assistance of other responsible state agencies

The primary responsibility for maintaining order in the community and taking all other necessary measures to the end that the decree of the district court may be duly carried out rests upon the State and its officials. See *City of Chicago* v. *Sturges,* 222 U. S. 313, 322; *Sterling* v. *Constantin,* 287 U. S. 378, 404. Respondents are state officials and, as such, obligated under the Constitution to administer the public schools of the District so that public education will be available on a non-discriminatory basis. *Board of Education* v. *Barnette,* 319 U. S. 624, 637. Respondents petitioned the district court to relieve them from this obligation on the ground that opposition to the admission of colored school children had assumed serious proportions. But, according to the

[14] See Tr. 50, 51, 111–112.

record, they failed to show that they sought assistance from other duly constituted authorities of the State to aid them in the performance of their duties.

Thus, there is no evidence in the record to indicate that determined local authorities cannot handle, if necessary, any future disturbance occurring in or around Central High School. There was no showing that, prior to coming into court, respondents had even consulted with local law enforcement agencies. Nor was there any showing that they sought to enlist the aid of the Mayor of Little Rock, the City Manager, or any other official of the State.

CONCLUSION

The jurisdiction of this Court has been properly invoked. Since the decision of the court of appeals is clearly correct and there is no likelihood that respondents can prevail on the merits, the relief sought by petitioners should be granted.

Respectfully submitted.

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AUGUST 1958.