In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.
Respondents.

MOTION AND BRIEF AMICUS CURIAE OF THE CLEVELAND, OHIO CITY SCHOOL DISTRICT IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS

The Cleveland, Ohio, Board of Education, a political subdivision of the State of Ohio, respectfully moves, pursuant to Rule 42 of the Rules of this court, for leave to file a brief *amicus curiae* in support of both petitioners Columbus Board of Education in case No. 78-610 and Dayton Board of Education in Case No. 78-627.

Applicant Cleveland Board of Education is interested in the disposition of these cases because the opinions of this court should control the disposition of applicants' own appeal presently pending before the Sixth Circuit Court

of Appeals, *sub nom, Reed* v. *Rhodes* and docket no. 76-2602, 76-2603 and 78-3218.

Applicant does not propose to review either the law or the facts in the cases at bar, but to point out a few relevan. facts, which apply to applicant, the largest school system in the State of Ohio, and to point out a basic controlling question of constitutional law which is relevant to the cases at bar, as well as to many other cases, and which has not been presented by the parties.

On August 31, 1976, District Judge Frank J. Battisti of the Northern District of Ohio found the Cleveland School District, the largest public school district in Ohio, guilty of violating the Federal Constitutional equal protection rights of a class consisting of all the black school children in the district. His opinion, of considerable length, was based on what he described, in detail, as some 163 acts of school officials, extending back at least 50 years, wherein he found segregative intent in what otherwise appeared to be routine administrative steps taken in the assignment of students (and, in a few cases, faculty), and the construction, utilization and abandonment of schools. The court did not consider admitted and undisputed evidence of non-segregative motivation for every challenged act of the board and likewise did not consider undisputed probative evidence of the demonstrated integregative conduct of the present and prior boards and superintendents.

The district court's opinion, *sua sponte,* admitted that its order involved a controlling question of law as to which there was substantial ground for difference of opinion under 28 U.S.C. § 1292 (b), and authorized an interlocutory appeal.

A single judge of the Sixth Circuit Court of Appeals,

sitting during a recess of the Sixth Circuit, granted a stay order, after a hearing, on the ground that there was a substantial probability of success on the appeal. The stay order was thereafter vacated by a panel of the Sixth Circuit but the same panel, after hearing the appeal, remanded the case for new findings of fact and conclusions of law in the light of *Washington* v. *Davis,* 426 U.S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977).

Nine months later the district judge entered a second opinion on liability, reaffirming his earlier opinion, without any additional evidence. While purporting to comply with the mandates of *Washington* v. *Davis* and *Arlington Heights,* no real attempt was made to follow their guidelines nor the evidentiary record before him on those guidelines.

He found "a one hundred percent present incremental segregative effect" from the challenged acts even though many had occurred over a generation ago at long since closed schools. The second opinion, as the first, did not review the administrative reasons for the challenged acts nor the substantial, undisputed evidence of non-segregative and integregative conduct on the part of the Board of Education and school officials. The second opinion gave brief lip service to but generally ignored the evidentiary standards for determining segregative intent mandated by *Arlington Heights,* although evidence of such was amply supported by the record before him. The District Judge also then issued a remedial order, ordering the system to prepare a system-wide desegregation plan calling for massive pupil reassignment.

A second appeal of the liability order, as well as the remedial order to the Sixth Circuit, was argued in June,

1978. They remain undecided, although the Sixth Circuit, following the granting of certiorari in the cases at bar, granted a stay of the implementation of the desegregation plan and obviously awaits the ruling of this Court before deciding the Cleveland case below.

For the foregoing reasons Applicant respectfully requests that this motion for leave to file an amicus brief be granted. Filed herewith is applicant's brief as *amicus curiae.*

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE CLEVELAND, OHIO CITY SCHOOL DISTRICT IN SUPPORT OF PETITIONERS

Interest of Amici

The interest of *amici* appears from the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioners in both cases at bar.

ARGUMENT

Principles of Judicial "Activism" at the District and Circuit Court Level, Rather than Adherence to Precedent and the Mandates of this Court, Governed the Decisions Below in Columbus, and the Sixth Circuit, and Cleveland.

The careful effort by District Judge Rubin in the *Dayton* case to follow the mandates of this Court is clearly described by the merits brief of the Dayton Board in their case at bar, No. 78-627. The failure of District Judge Duncan in the *Columbus* case to follow the same mandates is likewise clearly described by the merits brief of the Columbus Board in their case at bar, No. 78-610.

The briefs of both Boards thoughtfully and completely analyze the opinions of the Sixth Circuit on the two appeals and persuasively demonstrate that the opinions of that Circuit, in the *Dayton* and *Columbus* appeals, likewise fail to follow the commands of this Court.

Unanswered is one question. Why? Why were instructions so clear as those of *Dayton* and guidelines so specific as those of *Arlington Heights* not followed?

Perhaps the Cleveland case provides an answer.

On October 13, 1978, *The Cleveland Press* of Cleveland, Ohio, published the text of a speech that District Judge Battisti had given before an "exclusive" organization in Cleveland. In that speech the District Judge cogently and unequivocally described the judicial philosophy that guided his judgment in the Cleveland school desegregation case. He espoused the role of an "activist", i.e., a judge who, in any "public law" litigation, does not confine himself to "sound pronouncements of the law", but makes himself "the conscience of our society for justice". Thus

established, the courts below, not restrained by anything other than their own interpretation of appropriate social philosophy, felt no need to follow this Court's instructions but proceeded on their own to alter the very structure of state and local public school government.

Judge Battisti is not alone. He speaks for a whole current school of judicial thought. His statements find academic support in the writings of a law professor at Harvard named Chayes. Professor Chayes' principal publication to date on this subject, "The Role of the Judge in Public Law Litigation", 89 Harvard Law Review 1281, (1976) is specifically relied upon by Judge Battisti in his speech. With such academic support, District Judges throughout the United States, as Professor Chayes points out, have become increasingly motivated to take over legislative and executive functions of state, local and even the national government.

The scope of this activism is catalogued by Professor Chayes in his article, as well as the dangers which it brings. But District Judges, being human, and unrestrained by an electorate, have accepted the power without a recognition of the dangers inherent, as Lord Acton well knew, in the corruption which absolute power brings. The cautionary warnings of the good professor that his conclusions are but "preliminary hypotheses", which he himself describes "as yet unsupported by much more than impressionistic documentation", *ibid,* footnote, p. 1281, are now forgotten. Because of its significant disclosures as to how the sincerely held philosophical beliefs of the Judge who decided the Cleveland case can forge a decision that places those beliefs on a higher level than his responsibility to this Court, the speech is reprinted in its entirety as Appendix A.

Amici urge this Court not only to reiterate the clear

guidelines of *Arlington Heights* and the specific commands of *Dayton* but to advise lower courts throughout this country that this Court, and not they, interpret the Constitution's ultimate meaning, and when such meaning has been unequivocally announced, they are bound to obey its mandates not only on direct appeals but in an even-handed manner to all litigants in all cases.

Respectfully submitted,

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APPENDIX A

"This article is the basic text of a speech by Federal Judge Frank J. Battisti before a recent meeting of the 50 Club, an exclusive organization of high-ranking Cleveland business and civic individuals. The Press publishes it as an insight into Judge Battisti's judicial philosophy and his handling of the schools desegregation case, over which he has presided from its inception." The Cleveland Press, October 13, 1978.

by FRANK J. BATTISTI
Chief Judge, U.S. District Court

"From the time of Chief Justice Marshall, and for all judges, lawyers and laymen since then, the role of the court in civil cases has been seen as simply to act as a reasoning, but essentially a passive arbiter in applying the facts and the law of the case in order to settle a rather private dispute between the contesting litigants.

Today, however, the court has found itself cast in a far different role, and unlike the traditional judicial role the new role offers no definite script for a judge to follow. Complainants now crowd the federal court with charges of school segregation, employment discrimination and prison decay, to name a few (in an attempt to make the court the engine of pervasive social change). Prof. Chayes of the Harvard Law School has compared the traditional lawsuit to the new public law case in a most illuminating analysis.

The public law lawsuit, according to Professor Chayes' depiction, differs in many crucial aspects from the lawsuit with which we are all familiar.

First and foremost, fundamental rights, like freedom, liberty and equal opportunity, are at stake, not monetary injury or property damage. The consequences of the loss of these rights, therefore, are far more tragic and harmful to the community and nation as a whole.

Second, the parties to the lawsuit are, on the one hand, public officials, representing you and me, and on the other hand, representatives of a class of aggrieved or injured people, the proceeding, therefore, impacts severely on a large number of persons who are not before the court.

Also, the public official as litigant may provide the additional complication of polling his constituents prior to determining his next legal move; and thus, he will often be put in the embarrassing predicament of claiming authority to represent all of his constituents, while at the same time, attempting to deny the heartfelt needs of some of them.

Third, the type of relief requested is often a pervasive affirmative decree to eliminate the root cause of the deprivation of those fundamental rights. The relief necessary is ongoing, sometimes complex, and often takes officers of the court into areas traditionally foreign to it, such as policy planning and legislative lobbying.

The remedy stage of the proceedings takes on new meaning because the court cannot rely on the facts proferred by the parties, who are themselves not experts in planning the sort of remedy needed, and, because an easily conceptualized and implemented remedy is not available, it is necessary for the court to call in special masters and advisory committees.

The court must be the active center of a team effort that must be assembled to reform social institutions or processes, that may not be completely understood by any

single person. Only by being an active participant can the court assure that the careful evaluation is undertaken that is essential to the implementation of a remedy — one that is efficient and in compliance with constitutional standards.

However, I should add that the court's role in public law litigation is not one of volition, rather it is one of mandate. The judiciary becomes the enforcer of constitutional obligations because the elected officials have either failed or are unable to perform their constitutional duties.

Let me turn now to the Cleveland school desegregation case, which is a classic example of a public law proceeding, without discussing its facts or applicable law.

All the ingredients are present; multiple parties, elected government officials, party representatives asserting the interest of thousands or millions of citizens, pervasive constitutional violations from a long history of intentional segregative conduct, difficult and protracted remedial planning that has created the need for outside experts and a master, we have it all — and it has made life rather difficult for many of us.

First, the school case makes absolutely clear that the Constitution is the true mainstay of a democracy as we know it. As every schoolboy knows, the Constitution was initially adopted without a bill of rights. Those provisions were finally incorporated in order to foreclose the possibility of majority tyranny.

The protection of affirmative rights granted by the Constitution is the most important function of the court. Justice Powell accurately reflected this role in stating: 'the irreplaceable value of the power articulated by Chief Justice Marshall lies in the protection it has afforded the con-

stitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'

A second feature of the school case is the ironic fact that the very individuals and institutions which have been found liable of impairing constitutional rights are those which are the primary, if not the sole, source of relief. And, aggravating the situation in this and similar proceedings, are the conflicting signals bombarding the defendants, who are public officials. They feel caught, no doubt, between a rock and a hard place.

These public law suits are often plagued by parties who think they continually have to look over their shoulders at the ballot box. This sorely tests the ability and will of such officials to comply with judicial orders.

Another problem is the politicization of the judiciary. The judge faces the dilemma of having glaring media attention, but not having the opportunity to utilize it. In this form of litigation, the publicity may be not only one-sided, but it may also feed back into the political calculus of certain public officials and reinforce their sensitivity to the will of an uninformed electorate.

All of the attributes of a free fair press are thus lost if a crucial player has an ethical gag rule forbidding public rebuttal.

A more perplexing structural problem for the court is the lack of clear guideposts to be followed when, by necessity, a judge becomes involved in the remedial stages of public law litigation. Equity doctrines often have all the substance of a Grimm's Fairy Tale.

Judicial discretion today is not unbridled, and one consequence of the increase in public law litigation is a de-

veloping definition by the Supreme Court and lower courts of the scope of the courts' equitable powers.

However, no clear or exhaustive definition exists yet, and a federal judge involved in the remedying of a constitutional violation is put in the frustrating position of continual delays in the implementation of a remedy (and the aggrieved parties suffer), while the appellate courts attempt to define the limits of the equitable powers involved.

Fourth, a public law lawsuit, like the school case, presents difficult problems of federalism for the federal judge. One aspect of the problem is that the federal court in fashioning a remedy, after holding public officials liable for constitutional violations, must often issue orders that run counter to and, because of the supremacy clause, supersede, local or state laws.

Another aspect of the federalism problem is that the court's remedy impedes the 'carrot and stick' enforcement methods of the executive branch of the federal government — the use of federal funding. Federal funds are usually needed to implement desegregation, but the local officials are not eager to use federal funds for that purpose.

Officers of the court may then be compelled to intervene to secure federal funds. This often requires the establishment of conditions or programs for their use. Such officers may also be required to act to ensure that the federal funds, when received, are used for the intended purposes.

As a result, the court becomes unwillingly, but necessarily, an administrator, lobbyist, legislator, and regulator — all roles outside the traditional judicial function, and all roles which do indeed strain the limited resources of any federal court.

The active and exposed role of the court in public litigation subjects the court to public questioning of the legitimacy of its actions. This questioning is an inevitable result of the change in judicial function brought about by the increasing prevalence of public law lawsuits.

Perhaps, but I hope not, judicial action will achieve legitimacy only by responding to, or serving as, the conscience of our society for justice. Perhaps, but I hope not, the court can no longer rely for legitimacy solely on sound pronouncements of the law.

The school case, despite all of its controversy and problems, is a sterling example of the foresight of our Founding Fathers who promised, and have secured, 'One nation, indivisible, with liberty and justice for all.'

When I came on the federal bench, I came with the solemn pledge to uphold the principles of the Constitution that have made America the unique democracy that it is." (emphasis in original)