IN THE

Supreme Court of the United States

October Term, 1961

No. 468

In the Matter of the Application
of
STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,
Petitioners,
against
WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District No. 9, New Hyde Park, New York,
Respondents,
directing them to discontinue a certain school practice,
and
HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARY PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,
Intervenors-Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF CERTIORARI

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Preliminary Statement

This brief is submitted by petitioners in reply to the joint brief of respondents and intervenors-respondents opposing certiorari. It will be confined primarily to a

consideration of the argument made in Point II of the joint brief opposing certiorari (beginning on p. 24 of that brief), which urges this Court to deny the petition herein solely on the basis of what respondents and intervenors-respondents claim are technical errors in the petition.

Petitioners believe that a lengthy reply to Point I of the joint brief opposing certiorari is unnecessary. In that point, respondents and intervenors-respondents argue that the saying of the Regents' Prayer in the public schools of the New York school district involved in this proceeding is "in harmony with prior rulings of this Court", because the Prayer is similar in language to many "public utterances", and because of the decision of this Court in *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624. Petitioners respectfully submit that the fatal defect in this argument is that it equates religious indoctrination of public school children by means of a state-composed prayer to incidental references to God made by the officials of a religious people.

As for the *Barnett* case, in which this Court struck down as unconstitutional a regulation of the West Virginia Board of Education requiring participation of public school teachers and children in the Pledge of Allegiance, petitioners submit that the interpretation by respondents and intervenors-respondents of this Court's decision in that case is merely a refinement of the defective argument referred to hereinabove. There is nothing unconstitutional in the Pledge of Allegiance, or the saying of that Pledge in State public schools. On the other hand, the First Amendment, particularly as it is interpreted in *McCollum* v. *Board of Education,* 333 U. S. 203, and *Zorach* v. *Clausen,* 343 U. S. 306, does prohibit religious instruction and worship in public schools. Respondents and intervenors-respondents would have us accept the theory advanced by the Jehovah's Witnesses that the addition of the phrase "under God" to the Pledge of Allegiance converts the saying of the

Pledge into a religious activity, such as the saying of the Regents' Prayer. That theory, however, is merely another way of equating an incidental reference to God with religious indoctrination. It flies in the face of common sense, and, in any event, in the *Barnett* case it was rejected by this Court.

POINT I

Petitioners respectfully submit that they have properly invoked the jurisdiction of this Court.

In Point II of their joint brief, respondents and intervenors-respondents argue that petitioners have improperly invoked the jurisdiction of this Court for two alleged reasons: (1) the petition herein refers to 28 U. S. C. § 1254, instead of 28 U. S. C. § 1257; and (2) petitioners seek review by writ of certiorari instead of by appeal. Petitioners submit that it is respondents and intervenors-respondents who are in error, and not petitioners.

(1)

It is, of course, true that the petition refers inadvertently to 28 U. S. C. § 1254 instead of 28 U. S. C. § 1257, but this is not to say that petitioners did not properly invoke the jurisdiction of this Court. The petition does set forth all of the essential jurisdictional facts—*i.e.*, the existence of a final judgment of the highest court of the State of New York, and the announcement of that judgment within less than 90 days prior to the filing of the petition. If the petition is looked upon as a form of pleading—which, petitioners submit, it is—and if a proper pleading sets forth facts, then the writ would seem to be a proper pleading.

Moreover, if the petition is examined in the light of Rule 23 of this Court—more particularly, Paragraph 1(a) (iii) of that rule—it will be seen that the petition complies with the rule, since the petition does set forth "the statuory

provision *believed* to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari." The worst that can be said about the petition is, neither that it fails to show jurisdiction, nor that it fails to comply with Rule 23, but that petitioners' belief as to the applicable law was erroneous. What the argument of respondents and intervenors-respondents boils down to is that the determination of a question of law in a proceeding before this Court should depend upon what one of the parties *believes* to be law instead of what actually *is* the law. Indeed, it may be said, that in this particular proceeding, if there was any doubt about the applicable law, or any defect in the statement thereof, that doubt has been removed and the defect cured by the joint brief of respondents and intervenors-respondents, which makes it quite clear that the correct section for invoking jurisdiction of this Court, on the basis of the facts set forth in the petition, is 28 U. S. C. § 1257.

(2)

It is also perhaps true that the resolution of the respondent school board dated July 8, 1958 might properly be deemed a "statute" for the purposes of an appeal under 28 U. S. C. § 1257(2), on the authority of the decisions of this Court cited on page 25 of the joint brief of respondents and intervenors-respondents, but this is not to say that, even assuming such to be the true rule of construction, petitioners may not properly seek review of the decision below by writ of certiorari under 28 U. S. C. § 1257(3).

It is significant that in each of the cases cited by respondents and intervenors-respondents the person or persons seeking review were granted that review. True, they sought review by appeal under what is now 28 U. S. C. § 1257(2), but it does not follow that they would have been *denied* review if they had proceeded by writ of certiorari under what is now 28 U. S. C. § 1257(3). Particularly

significant is the earliest decision cited by respondents and intervenors-respondents in *Williams* v. *Bruffy,* 96 U. S. 76, where this Court held that the appellant, who sought review of a decision concerning a Confederate statute, could have invoked the jurisdiction of the Court *either* under what is now 28 U. S. C. § 1257(2) *or* what is now the second half of 28 U. S. C. § 1257(3).

Petitioners submit that all that the citations of respondents and intervenors-respondents prove is that petitioners could have properly invoked the jurisdiction of this Court if they had proceeded by appeal. The citations do not prove the converse—*i.e.,* that petitioners have improperly invoked the jurisdiction of this Court because they have proceeded by writ of certiorari.

In numerous cases where an appeal might have been taken under what is now 28 U. S. C. § 1257(2), but where review was initially sought by certiorari under what is now 28 U. S. C. § 1257(3), the writ has been granted by this Court. *H. P. Hood & Sons* v. *Du Mond,* 336 U. S. 525; *International Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410; *Union Brokerage Co.* v. *Hensen,* 322 U. S. 202; *Jones* v. *Opelika,* 319 U. S. 103; *Murdock* v. *Pennsylvania,* 319 U. S. 105.

Moreover, the leading textbook authorities on the subject have always assumed that where jurisdiction of this Court could be invoked by appeal, under 28 U. S. C. § 1257(2), it could also, at the option of the person or persons seeking review, be invoked by writ of certiorari under 28 U. S. C. § 1257(3). *Robertson and Kirkham,* Jurisdiction of the Supreme Court of the United States (1951 Ed.), § 10, p. 20; *Moore's Federal Practice,* Rules and Official Form As Amended (1961 Ed.), § 6, p. 39.

Respondents and intervenors-respondents point out that Congress has provided that an appeal improperly taken

may be regarded and acted on as a petition for writ of certiorari under 28 U. S. C. § 2103, whereas there is no similar statutory provision with respect to a document initially filed as a petition for writ of certiorari. Petitioners respectfully submit that the reason for this is, as shown by the cases and authorities cited immediately hereinabove, that no similar statutory provision is necessary in the latter situation.

Finally, it remains to be pointed out, that, even if 28 U. S. C. § 1257 contains the pitfall which respondents and intervenors-respondents see, and that petitioners may invoke the jurisdiction of this Court under only one of the sub-divisions thereof, petitioners still submit that they have properly invoked the jurisdiction of this Court by writ of certiorari under 28 U. S. C. § 1257(3), since that subdivision is the only sub-division which relates to "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States". Petitioners respectfully submit that the present case is certainly one in which the rights and privileges of the petitioners under the First and Fourteenth Amendments of the United States Constitution have been specially set up or claimed from the very first. As pointed out in the petition herein (pp. 6-7), petitioners made it quite clear in their Article 78 Proceeding in the New York Supreme Court, Nassau County, that their right and their children's right to separation of church and state and to freedom of religion in the sphere of public education are at stake in this case. See *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230, 231.

CONCLUSION

Petitioners respectfully submit that the substantial federal questions presented by this proceeding warrant the consideration of this Court, and they respectfully repeat the request that the petition herein for a writ of certiorari be granted.

Respectfully submitted,

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