Memorandum to the Conference

Re: 93-1823 - Missouri v. Jenkins

March 28, 1995

As I read Steve’s memo, it is a more elaborate and better articulated statement of the reasoning of the four justices who voted to DIG or affirm this case when we discussed it at conference. I disagree with crucial parts of his memo, as discussed below and in my currently circulating draft for the five of us who voted to reverse. The way to resolve the matter is the way we customarily do; Steve should circulate his views in favor of a dismissal, and if he picks up a majority for them we will follow the course he suggests.

As to the merits, I think that the issue of the scope of the District Court’s authority was presented and passed upon below, was raised in the petition for certiorari, and was briefed by respondents. Below, the State challenged the salary order as beyond the District Court’s authority. App. to Pet. for Cert. A-86 ("The State claims that the Court should not approve desegregation funding for salaries because such funding would be beyond the scope of the Court’s remedial authority"). The State renewed that claim on appeal. Jenkins v. Missouri, 11 F.3d 755, 766 (1993) ("The State argues first that the salary increase remedy sought exceeded that necessary to remedy the constitutional violations, and alternatively, that if the district court had lawful authority to impose the increases, it abused its discretion in doing so"); id., at 767 ("The State’s legal argument is that the district court should have denied the salary increase funding because it was contrary to Milliken II and Swann in that it does not directly address and relate to the State’s constitutional violation"). The State repeated this claim in Question 2 of its Petition for Certiorari. Pet. for Cert. i, 23-27; Memorandum at 2 ("The language of Question Two in the petition is broad enough to encompass the issue"). Here, respondents have defended the scope of the District Court’s remedial authority. See Brief for Respondent KCMSD 40-49; Brief for Respondent Jenkins 41-49. In turn, the draft opinion holds that the scope of the District Court’s remedial authority to order the salary increases is an issue properly before the Court, draft 11-13, and the salary order, which was "grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD," is beyond the
District Court's permissible remedial authority, draft at 24 (citing Milliken II, 433 U. S., at 280).

Sincerely,

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