NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2139

PHILA. CITY COUNCIL; ANNA C. VERNA, PRESIDENT OF CITY COUNCIL; DAVID COHEN, CHAIR, LAW AND GOVERNMENT COMMITTEE OF CITY COUNCIL; FRANK DICICCO, COUNCILMAN; JANNIE L. BLACKWELL, COUNCILWOMAN; MICHAEL A. NUTTER, COUNCILMAN; JOAN L. KRAJEWSKI, COUNCILWOMAN; DONNA REED MILLER, COUNCILWOMAN; MARIAN B. TASCO, COUNCILWOMAN; W. WILSON GOODE, JR., COUNCILMAN; JAMES F. KENNEY, COUNCILMAN; ANGEL L. ORTIZ, COUNCILMAN; BLONDELL REYNOLDS BROWN, COUNCILWOMAN; SHIRLEY M. KITCHEN, STATE SENATOR; W. CURTIS THOMAS, STATE REPRESENTATIVE; HAROLD JAMES, STATE REPRESENTATIVE; JAMES R. ROEBUCK, STATE REPRESENTATIVE; JOHN TIMOTHY KEARNEY; HANNAH LOUISE KEARNEY, A MINOR; DINA LYNN SCHLOSSBERG; WENDELL HARRIS; ROSE LENTZ; DELORES SHAW; PATRICIA RAYMOND; DEBORAH TONEY; PARENTS UNITED FOR BETTER SCHOOLS; PARENTS UNION FOR PUBLIC SCHOOLS; PHILADELPHIA STUDENT UNION; PHILADELPHIA BRANCH NAACP; JEROME W. MONDESIRE, PRESIDENT OF THE PHILADELPHIA BRANCH NAACP; NATIONAL CONGRESS FOR PUERTO RICAN RIGHTS - PHILADELPHIA CHAPTER; RAY ALVAREZ, PRESIDENT, NATIONAL CONGRESS FOR PUERTO RICAN RIGHTS - PHILADELPHIA CHAPTER; INSTITUTE FOR THE STUDY OF CIVIC VALUES; NATIONAL ORGANIZATION FOR WOMEN - PHILADELPHIA CHAPTER,

Appellants

v.

MARK S. SCHWEIKER, HON. GOVERNOR; CHARLES R. ZOGBY, SECRETARY OF EDUCATION; THE SCHOOL REFORM COMMISSION; JAMES E. NEVELS; CHAIRMAN; JAMES GALLAGHER; SANDRA GLENN; MICHAEL MASCH; DANIEL WHELAN, MEMBERS, SCHOOL REFORM COMMISSION

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 02-cv-00998)
District Judge: Honorable Ronald L. Buckwalter

Argued: July 11, 2002

Before: BECKER, Chief Judge, McKEE, and GREENBERG, Circuit Judges.

(Filed July 17, 2002)

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OPINION OF THE COURT

BECKER, Chief Judge.

This appeal arises out of a lawsuit brought in the District Court for the Eastern District of Pennsylvania by the Philadelphia City Council; a majority of its members; several state legislators; children and parents of children enrolled in the Philadelphia School; and several advocacy groups interested in the Philadelphia Public Schools. Named as defendants are Pennsylvania's Governor, its Secretary of Education, and the members of the School Reform Commission ("SRC") created pursuant to Acts 46 and 83 of the Pennsylvania General Assembly, *see* Act of Apr. 27, 1998, P.L. 270, No. 46 §§ 2-3; Act of Oct. 30, 2001, P.L. 828, No. 83 § 1 (codified as amended at 24 P.S. §§ 6-691-6-696). Acts 46 and 83 authorize the SRC to take over the operations of the School District of Philadelphia if and when a Declaration of Distress is made by the Secretary. The suit challenges the creation and powers of the SRC and the procedures by which the recent "takeover" of the Philadelphia school system was effected, on a number of state law, federal law, state constitutional, and federal constitutional grounds.

This opinion addresses the plaintiffs' appeal from orders entered by the District Court granting the defendants' motion to abstain essentially on the basis of the doctrine of "*Pullman* abstention" (which takes its name from the seminal Supreme Court case *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)), staying the federal

proceedings pending litigation in state court, and dismissing plaintiffs' motion to reconsider. The plaintiffs also contend that the District Court erred in failing to consider their motions for a temporary restraining order and a preliminary injunction. Although the factual and procedural history of the case is extensive, it need not be chronicled here, for it is well known to the parties (and indeed to the general public, for the facts underlying this lawsuit and the progress of the suit itself and of related suits have been widely publicized). Moreover, as was agreed by the parties at the conclusion of oral argument, the public interest will be better served by a prompt disposition of this appeal than by a lengthy opinion which will perforce take a long time to draft. Accordingly, we limit our discussion to background materials and a statement of our *ratio decidendi*.

I.

At the threshold, the defendants challenge our appellate jurisdiction (advanced by the plaintiffs under 28 U.S.C. § 1291) on the grounds that the principal order appealed from, which grants a stay, is not a final order. We disagree. Under our jurisprudence an abstention-based stay order can be a final order under § 1291 even when the District Court retains jurisdiction. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712-13 (1996); *see also Hovsons, Inc. v. Sec'y of Interior*, 711 F.2d 1208, 1211 (3d Cir. 1983) (holding that *Pullman*-abstention stays are appealable final orders). As explained in 17A Wright, Miller & Cooper, *Federal Practice & Procedure* § 4243, at 68 (2d ed. 1988):

> Since the federal court is to retain jurisdiction, its abstention order does not look like a final judgment. Nevertheless the consequences of abstention to the litigants are often so great that the appellate courts have provided

immediate review . . . .

See also 19 James Wm. Moore et al., *Moore's Federal Practice* § 202.11[6], at 202-56 (Matthew Bender 3d ed.) ("Generally, an order granting abstention is appealable when its purpose and effect is to surrender jurisdiction to a state court."). Because the District Court's decision essentially left the matter up to the Pennsylvania Supreme Court, we treat it as a final order that is appealable.[1]

II.

We turn to the abstention issue. The defendants ask that we treat the District Court's ruling as a combination of abstention under *Pullman*, *supra*, and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), urging that although a court's decision to abstain is usually classified by reference to one of the discrete categories of abstention doctrine, the Supreme Court has noted that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of

[1] Plaintiffs also assert a procedural grievance. They submit that the District Court failed to address their motions for a preliminary injunction ("PI") and a Temporary Restraining Order. The plaintiffs filed their motion for a PI on March 4. At a March 11 conference, the PI hearing was scheduled for April 1. The plaintiffs contend that the District Court rushed them to respond to the defendants' abstention motion (permitting only 48 hours) and then abruptly entered its abstention order on March 27, and canceled the April 1 PI hearing. The plaintiffs then moved to reconsider, but the Court declined to do so. The plaintiffs now ask us to remand to the District Court and direct that it rule on the PI motions it never considered. However, the District Court did rule on a subsequent plaintiffs' motion by plaintiffs for a PI by Order of May 1, 2002, and so the plaintiffs' contention is without merit. While the appeal from the denial of a preliminary injunction is properly before us under 28 U.S.C. § 1292(a), the denial is presumably abstention-based, and hence we treat it in conjunction with our discussion of the appeal from the stay order.

considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Because we are satisfied that the District Court's abstention was proper under *Pullman*, we need not decide whether the District Court's order was also justified under the doctrine of *Burford* abstention, or some amalgam of the two doctrines.

One of the main purposes of *Pullman* abstention is "to avoid deciding a federal constitutional question when the question may be disposed on questions of state law." *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 103 (3d Cir. 1999). In other words, *Pullman* abstention "is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (internal quotations and citation omitted). We have identified the rationale for *Pullman* abstention as "twofold: (1) to avoid a premature constitutional adjudication which could ultimately be displaced by a state court adjudication of state law; and (2) to avoid 'needless friction with state policies.'" *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 149 (3d Cir. 2000) (quoting *Pullman*, 312 U.S. at 500).

The first step in the *Pullman* analysis is determining whether three "special circumstances" exist:

> (1) There are uncertain issues of state law underlying the federal constitutional claims brought in federal court;
> (2) The state law issues are amenable to a state court interpretation that

> would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and
> (3) A federal court's erroneous construction of state law would be disruptive of important state policies.

Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 631 (3d Cir. 1991). If all three of these circumstances are present, the district court must then exercise its discretion as to whether abstention is appropriate "by weighing such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." *Planned Parenthood*, 220 F.3d at 150 (quoting *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996)). We refer to these considerations, *infra*, as the "discretionary factors."

In reviewing a district court's decision to abstain under *Pullman*, we apply a multi-pronged standard of review. *See Chez Sez*, 945 F.2d at 631. The district court's determinations as to the first two special circumstances – whether state law is uncertain and whether the law is susceptible to a construction that would obviate or narrow the constitutional issue presented – are essentially legal decisions that we review *de novo*. *Id.* The district court's appraisal of the third circumstance – whether an erroneous decision of state law by the federal court would disrupt important state policies – "is more discretionary in nature and thus, if it is adequately explained, will be accorded greater deference by the appellate court." *Id.*; *see also Artway*, 81 F.3d at 1271 n.35. Finally, if we agree that the district court was correct on the three special circumstances, "the remaining question is whether the trial judge abused his discretion in" considering the

aforementioned discretionary factors. *Chez Sez*, 945 F.2d at 631 (citation omitted).

III.

A.

We are satisfied that the requirements for *Pullman* abstention have been met. The first *Pullman* prong turns on the existence of unclear issues of state law. Plaintiffs' complaint is suffused with alleged violations of state law. Plaintiffs contend that all of the violations are clear, but we disagree. The District Court's opinion lists as unclear a number of issues of state law, which we rescribe in the margin.[2] We agree with its characterization of a sufficient number of them to meet the first *Pullman* prong.

Turning to the second prong, the plaintiffs contend that the District Court never identified the supposed limiting construction of Acts 46 and 83 that would avoid the

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[2] 1. What power does the General Assembly of Pennsylvania have to override or preempt statutory provisions which deal with matters of local concern?
2. Do Acts 46 and 83 which pertain only to cities of the first class (Philadelphia) violate the Pennsylvania constitutional provision to be free from special legislation?
3. Does contracting out the operation of the Philadelphia public schools to for-profit agencies undermine the right and nature of "public" education as that term is defined by Pennsylvania law?
4. Does Act 83 give the SRC the power to suspend existing Pennsylvania statutory rights?
5. What is the criteria under Act 46 for determining distress under the provision "has failed or will fail to provide for an educational program in compliance with the provisions of this act, regulations of the State Board of Education or standards of the Secretary of Education?"
6. To what extent do Acts 46 and 83 appropriate taxing authority to the school district and does this undermine the taxing authority vested in City Council as set forth in the Home Rule Charter?

plaintiffs' constitutional challenge. But there is no legal requirement that the District Court make such a construction.[3] What suffices here is the District Court's identification of the possibility that a limiting construction could obviate the need for federal constitutional inquiry, which we find sufficient. We focus particularly on the question of the proper scope of the Secretary's "distress" determination, which lies at the core of plaintiffs' due process/vagueness challenge. This seems especially appropriate for a state court construction, and the state court's interpretation of this provision could markedly limit the scope of any federal constitutional issues.

We note in this regard that plaintiffs appear to assume that *Pullman* abstention is appropriate only if interpretation of the state law issues could *save* the statute from constitutional attack. However, while a potential saving construction is one basis for abstention, it is not the only one. Rather, abstention is appropriate when resolution of the state law issues would obviate the need for constitutional inquiry altogether, such as where a state court invalidates the challenged law on state law or constitutional grounds. *See Pullman*, 312 U.S. at 501 ("If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not

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[3] Indeed, it would seem untoward to force the abstaining court to identify precisely what this limiting construction must be. The very point of abstaining is to give the state courts the first opportunity to construe the statute. It seems problematic for an abstaining federal court to hint at what it thinks is the appropriate limiting construction: this hint could be interpreted by the state court as indicating that this identified construction is the only constitutionally permissible construction of the statute. This could hardly be said to advance one of the underlying policies of abstention – the avoidance of "needless friction" with state courts. *Pullman*, 312 U.S. at 500.

arise."); Erwin Chemerinsky, *Federal Jurisdiction* § 12.2, at 690 (2d ed. 1994) (noting that one of the purposes behind *Pullman* abstention is "avoiding unnecessary constitutional rulings"; "[i]f the state court invalidates the state law, then there is no need for the federal court to reach the constitutional question"). In this sense the plaintiffs are hoist on their own petard. Throughout their complaint they allege that Acts 46 and 83 violate numerous state law and constitutional provisions. If this is indeed so, then the acts are illegal under state law or unconstitutional under the state constitution, and a federal court would not need to decide whether they violate the federal Constitution.

The plaintiffs also submit that "abstention is not required for interpretation of parallel state constitutional provisions." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984). However, the plaintiffs have not attacked Acts 46 and 83 solely on the basis of "parallel state constitutional provisions." Rather, they have attacked the acts as violations of state *law* and state constitutional provisions that have no parallel in the federal Constitution. *See, e.g.*, Article IX, §2 ("[A]mendment or repeal of a home rule charter shall be by referendum."), and Article III, § 32 (prohibition on "special" legislation). This case thus differs from *Midkiff*, where the parties attacked the state's action on a provision of the Hawaii Constitution that contained "only a parallel requirement that a taking be for a public use." 467 U.S. at 237 n.4.

Finally, we are satisfied that an erroneous construction of state law in this case would have the potential to disrupt important state policies, thereby fulfilling the third *Pullman* prong. It is well-known that education is a state policy of paramount importance.

See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (noting that "education is perhaps the most important function of state and local governments"). Should a federal court misinterpret any of the numerous state legal and constitutional provisions relied on by the plaintiffs, the course of Pennsylvania educational policy, particularly as directed toward the Philadelphia public schools, could be radically altered.

The plaintiffs contend that the third prong of *Pullman* is not fulfilled because Acts 46 and 83 reflect no important public "policy," but rather only "politics." We disagree, for in a representative democracy, "politics" and "policy," to the extent a distinction between the two concepts exists at all, are always intertwined. The fact that "political" considerations played a substantial role in the state's "policy" decisions does not make those policies – however wisely or unwisely adopted – any less "important" for the purposes of *Pullman* analysis.

B.

The *Pullman* discretionary factors may be dealt with summarily. Under a deferential standard of review, we can find no fault with the District Court's rejection of plaintiffs' contention that abstention is inappropriate because the present case "involves the infringement and burdening of rights to vote and to participate in the political process," "fundamental rights [which] are virtually never appropriate for abstention." Br. of Appellants at 32. While a federal court ought to take into account the nature of the federal interest asserted in deciding whether to abstain, *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (en banc), this is simply one factor that ought to be considered, not a

factor that automatically makes abstention inappropriate. At all events, the plaintiffs' case is not a straightforward voting rights case. Rather, as the SRC points out, even before Acts 46 and 83, the members of the Board of Education were appointed, not elected. And, from 1911 to 1965, members of the Philadelphia Board of Education were appointed by the Judges of the Courts of Common Pleas. Thus the source of the plaintiffs' putative voting right is at best highly elusive, if existent at all. We also note in this regard that the structure and governance of the Philadelphia School Board has always been the province of the Pennsylvania General Assembly. The right asserted here is a more vague "right to participate in the political process," a right for which the plaintiffs have identified no firm rooting in constitutional jurisprudence.[4]

Nor can we fault the District Court's evaluation of the discretionary factors. The key factor is the existence of an available state forum, but we are unpersuaded that the Pennsylvania Supreme Court's summary rejection of two cases dealing with these issues brought by other parties, notwithstanding its direct statutory jurisdiction authorizing bypass

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[4] As the comments in the text suggest, the panel is skeptical of the plaintiffs' state and federal claims in part because of the constraints on the judiciary's ability to interfere with essentially political judgments of state legislative and executive bodies, and the narrow (rational basis) standard of review of the plaintiffs' putative federal constitutional claims. That said, on the record before us in this appeal from an abstention order we cannot say that the claims pressed by the impressive array of counsel for plaintiffs are so lacking in merit that the first *Pullman* prong, *see supra* Section III.A, is not met and hence that the District Court should not have abstained but rather reached the merits. More precisely, despite our skepticism, we do not consider the plaintiffs' state law claims so clearly lacking in merit that they fail to satisfy *Pullman*'s requirement that the issues of state law presented by the case be "uncertain."

of the trial level, *see* Section 27 of Act 46, 24 P.S. §§ 6-691 & 6-696 (Historical and Statutory Notes) (West Supp. 2002), means that the Pennsylvania high court will reject the suit brought by the "marquis" parties, who are before us and who also have pressed a number of additional issues. There appear to be no standing-type issues here, as there apparently were in the cases the Pennsylvania Supreme Court declined to hear. In sum, we believe that there is an available state forum.[5]

The Orders of the District Court will be affirmed.

[5] We add that in determining whether timely and adequate state court review is available, our cases have focused on whether the state courts have jurisdiction over the plaintiffs' claims, not on whether the state court was likely to decide the merits of their case. *See Riley v. Simmons*, 45 F.3d 764, 773 (3d Cir. 1995); *Univ. of Md.-Balt. v. Peat Marwick Main & Co.*, 923 F.2d 265, 274-75 (3d Cir. 1991). Here, the Pennsylvania Supreme Court, by virtue of Section 27 of Act 46, *see* 24 P.S. §§ 6-691 & 6-696 (Historical and Statutory Notes) (West Supp. 2002), has original jurisdiction over any action "concerning the constitutionality of" Acts 46 and 83. This is not a case, therefore, in which timely and adequate state court review is unavailable due to jurisdictional constraints.

TO THE CLERK:

Please file the foregoing Opinion.

BY THE COURT:

/s/Edward R. Becker

Chief Judge