81-3439

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BERYL N. JONES, et al.,

Plaintiffs

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

JUNE PHILLIPS,

Applicant for Intervention-Appellant

v.

CADDO PARISH SCHOOL BOARD, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES ON REHEARING EN BANC

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STATEMENT REGARDING JURISDICTION

Because the district court properly denied the motion to intervene, this Court does not have jurisdiction and the appeal should be dismissed. Weiser v. White, 505 F.2d 912 (5th Cir.), cert. denied, 421 U.S. 993 (1975).

QUESTION PRESENTED

Whether the district court properly denied June Phillips' motion to intervene to challenge the consent decree negotiated by the United States and the School Board in this school desegregation case.

STATEMENT

Because the opening brief and the majority and dissenting opinions of the panel recite the history of this litigation in

detail, this statement will address only those facts essential to the United States' arguments.

A. Facts

This school desegregation action was filed in 1965 by plaintiffs purporting to represent a class of black parents and students in Caddo Parish (R. 1).[1/] This Court sanctioned the United States' intervention in United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd 380 F.2d 385 (5th Cir.) (en banc), cert. denied, 389 U.S. 840 (1967).

Plans to desegregate the Caddo Parish School system have been disapproved in United States v. Jefferson County Board of Education, supra; Hall v. St. Helena Parish School Board, 417 F.2d 801 (5th Cir.), cert. denied, 396 U.S. 904 (1969), and Jones v. Caddo Parish School Board, 421 F.2d 313 (5th Cir. 1970).

On June 1, 1973, a bi-racial committee appointed by the district court filed with the court a plan to desegregate the school system. The private plaintiffs initially filed objections to the plan. Shortly thereafter, original counsel for the plaintiffs, Jesse Stone, moved to strike as counsel lawyers from the NAACP Legal Defense Fund because of their objections to the plan and to substitute Murphy Bell as counsel for the plaintiffs. This motion was granted on July 13, 1973. The United States noted that the plan would leave intact some 34 one-race schools, but concluded: "The present posture of this law suit considered, the United States of America, intervenor herein, interjects no objection to ordering implementation of this plan." Upon motion of plaintiffs' new

1/ "R." references are to the record.

counsel, the district court then struck the objections to the plan and on July 20, 1973, ordered implementation of the consent decree. Jones v. Caddo Parish School Board, 499 F.2d 914 (5th Cir. 1974).

Approximately four months later, lawyers from the NAACP Legal Defense Fund filed a motion to intervene on behalf of a class of black students in Caddo Parish together with a complaint challenging the constitutionality of the desegregation plan. After the district court held that the motion was untimely and the intervenors were already adequately represented, this Court remanded the case to the district court for an evidentiary hearing on the motion to intervene. Ibid. On remand, no hearing was requested or held.

On July 20, 1976, the Citizens Advisory Committee, appointed to monitor implementation of the plan, reported on several deficiencies in the Board's implementation. The district court appointed a special master to investigate and report on progress under the plan.

In September 1976, the Board filed a motion to have the system declared unitary and the action dismissed. In October 1977, the United States opposed the motion as premature since the special master had yet to report and noted several deficiencies in the implementation of the 1973 decree. Plaintiffs, through counsel William Jefferson, also filed a memorandum in opposition to the Board's motion, noting shortcomings in the Board's implementation of the 1973 plan. This was the only paper filed by plaintiffs between 1974 and the present. On December 30, 1977, the district court declared the system unitary and dismissed the action (R. 2442).

The United States, relying for the first time on the ground that the 1973 decree had allowed too many one-race schools, moved to amend the district court's judgment (R. 2443), but none of the original plaintiffs either appealed or moved to amend the judgment. A year and a half later, on June 30, 1980, the district court entered a minute order, stating in part (R. 2510):

> If the original plaintiffs still have a viable interest in this case, their counsel should contact the court, in writing, within thirty (30) days of this order. If the plaintiffs' counsel does not respond, this Court will consider that the plaintiffs acquiesce in having their interests represented by the United States as plaintiff-intervenor.

This notice was sent to all past and present counsel of record. No representative came forward (R. 2993).

During this period, the United States and the Board entered negotiations to resolve the issues raised by the United States' motion to amend the judgment of unitariness. At no point during these negotiations did anyone purporting to represent private plaintiffs attempt to participate in the negotiations. During February, March and April 1981, when the decree was taking shape, numerous public meetings were held (R. 2883, 2827). The negotiations concluded on May 5, 1981, with the signing by the United States and the Board of a settlement agreement. Two days later, in response to the joint motion of the parties, the district court entered the agreement (R. 2584, 2606). The court ordered

the clerk to provide public notice of the terms of the decree and of the opportunity for any interested person to file written objections within ten days (R. 2543). The decree was published in two local newspapers and was reported by three local television stations.

By the close of the ten day period, thirteen objections had been received, including one from Ms. Phillips who argued that the decree failed to provide enrichment programs for black students (R. 2656). On May 22, 1981, four days after expiration of the period for objections, Phillips filed a motion to intervene individually and on behalf of a class of black students (R. 2724). In this motion she raised for the first time her complaint that the decree left too many black students in one-race schools. On May 27 and June 8, she filed supplemental motions to intervene (R. 2763, 2812). Also on June 8, the United States and the Board each filed memoranda opposing Phillips' motion to intervene (R. 2825, 2891).

On June 17, 1981, the district court denied the motions to intervene and on July 2, 1981, it overruled all objections to the consent decree and ordered its implementation (R. 3026, 3038). On July 16, Phillips filed a notice of appeal from the order of June 17, denying her motion to intervene and from the order of July 2, overruling her objections to the consent decree (R. 3078).

On May 6, 1983, a divided panel of this Court dismissed Phillips' appeal, holding that the district court had not abused

its discretion in finding her motion to intervene untimely. On October 11, 1983, this Court ordered rehearing of the case en banc.

1. The consent decree and motion to intervene

The consent decree, signed by the district court on May 7, 1981, dealt comprehensively with the desegregation of the Caddo Parish schools. It contemplated reduction of the number of one-race schools in the system from thirty-three to fourteen (R. 2912). In fact, the number of one-race schools has now been reduced to fifteen. It promised to reduce the number of whites attending one-race schools from 5,831 to 945 and the number of black students in such schools from 14,054 to 8,975 (ibid.). The figures for September 1983, show that 327 whites and approximately 11,000 blacks remain in one-race schools.[2/]

The consent decree ordered the Board to undertake a variety of remedies to promote the interrelated goals of desegregation and enhanced quality of education. These remedies include majority-to-minority transfers, attendance zone changes and student reassignments, school closings and new construction, and the development

2/ Part of the discrepancy between the projected and actual number of blacks in one-race schools is attributable to the conversion through demographic changes of Fair Park High School from a predominantly white to a predominantly black school. This adds 1352 black students to this statistic. In addition, the complete effect of the decree cannot be measured until various educational enhancement and voluntary transfer programs have had an opportunity to work. Furthermore, there has been a one year delay in construction of the Huntington School, which was slated to open in 1983, but is now scheduled to open in 1984.

of seven magnet schools and one laboratory school and special educational programs. The decree established a timetable for implementation beginning in the autumn of 1981 with the establishment of magnet schools and concluding in 1983-1984 with the opening of the new Huntington School. (R. 2576).

In her motions to intervene, Phillips contended that the consent decree failed to require special programs at the all-black schools that would remain under the decree, allowed the survival of too many one-race schools, failed generally to promote desegregation of the system, placed an undue burden on black students by requiring various attendance zone changes, and limited admissions to magnet and laboratory schools. She also contended that notice should have been given before entry of the decree to the class that she sought to represent.

2. The district court's decisions

Phillips has appealed from two orders of the district court; the first of June 17, 1981, denying her motion to intervene and the second of July 2, 1981, overruling her objections to the consent decree.

With regard to Phillips' motion to intervene, the district court concluded that she had failed to satisfy the timeliness requirement of Rule 24(a)(2), Fed. R. Civ. P., and had failed to carry her burden of demonstrating that the United States had not represented her interests adequately. On the matter of timeliness, the court recounted that Phillips had not filed a motion to intervene or otherwise opposed the 1973 consent decree, had not responded to the minute entry of June 3, 1980, and had not sought intervention during the highly publicized negotiations conducted by the United States and the Board from February to May 1981. The court concluded that Phillips sought to

> substitute her judgment for the considered opinion of the * * * School Board, The Department oof Justice and this court that the Consent Decree will constitutionally desegregate the Caddo Parish School system. She asks that the court allow her to second guess the months of turmoil and negotiations carried on by the parties, after she took no steps to participate in that process. This the court cannot allow. (R. 2936).

The district court also concluded that Phillips had failed to establish that her interests had not been represented adequately by the parties to the settlement (ibid.). Relying on Hines v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1973) and Pate v. Dade County School Board, 588 F.2d 501 (5th Cir.), cert. denied, 444 U.S. 835 (1979), the court concluded that the issues presented

by Phillips had all been considered and addressed by the United States and the Board and that, as a result, there remained no issue that Phillips could best represent. The court then addressed separately the issues of special programs, magnet schools, zone changes, one-race schools and the burden that the decree placed on black students and concluded that Phillips' contentions with regard to each lacked merit (R. 2937-2941).

In the same memorandum, the court rejected Phillips' contention that this was a class action requiring notice to the class before a decree could be entered (R. 2939). The court held that a class was never certified and that the United States had never been certified as a class representative, nor purported to act as such. The court also concluded that the attention and publicity attending the negotiation of the consent decree were sufficient to alert all interested parties to the terms of the decree (ibid.).

Finally, the court disposed of Phillips' contention that she was entitled to a hearing under Calhoun v. Cook, 487 F.2d 680 (5th Cir. 1973). The court distinguished Calhoun as a case in which there was a dispute whether all parties to the suit had agreed to the settlement. The court found no doubt that the United States and the Board had reached a settlement (ibid.).

Phillips also appeals from the July 2, 1981 order rejecting her objections to the consent decree. In a memorandum opinion issued that same date, the district court discussed the thirteen

objections to the decree, including those of Phillips. The court characterized Phillips' objections as focusing on the decree's lack of specificity regarding educational enhancement programs and the failure to provide for pre-school educational programs. The court found that the decree made ample provision for educational enhancement programs and that Phillips' concern regarding preschool programs, while legitimate, did not allege any failure to desegregate the system (R. 3026).

3. The panel decision

On May 6, 1983, a divided panel of this Court dismissed Phillips' appeal. Jones v. Caddo Parish School Board, 704 F.2d 206. The majority held that the lawsuit was not a class action and could, therefore, be settled by the United States and the Board, as the sole remaining parties. It further held that Phillips' motion to intervene was properly denied without a hearing as untimely. The panel majority reasoned that Ms. Phillips could not remain silent through 16 years of litigation before seeking intervention some 15 days after entry of a consent decree. The majority noted, id. at 218, that Phillips' motion to intervene attacked the 1973 decree, yet she waited 8 years to raise this objection. The majority also found significant that Phillips failed to challenge the 1977 declaration that the system was unitary and she did not seek to intervene while the United States and the Board conducted well-publicized negotiations,

including meetings with the community, in early 1981. Ibid. The majority concluded that because of her active role in the educational affairs of Caddo Parish, Phillips was aware of her interest in this case long before she sought to intervene. The majority concluded that Phillips' great and unexplained delay made her motion to intervene prima facie untimely. Id. at 222. In addition, the majority held that because this is not a class action, Phillips is not prevented by principles of res judicata from bringing a separate lawsuit. Id. at 217.

Judge Goldberg, in dissent, disagreed with the majority that untimeliness could be determined in this case without a hearing. He argued that timeliness under Rule 24(a)(2) must be measured from the point at which the representation of the intervenor's interest by existing parties became inadequate.

Judge Goldberg found that Phillips had alleged facts that, if true, showed that she had a greater and therefore distinct interest in a desegregated school system that was not adequately represented by the United States in negotiating the 1981 consent decree. He concluded that a hearing was necessary to determine whether Phillips could reasonably have known prior to publication of the 1981 consent decree that her interest was not adequately represented.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in finding Phillips' motion to intervene untimely on its face. Phillips' motion to intervene, which was filed over two weeks after the United States and the School Board presented a proposed consent decree to the district court, alleged that the United States had failed to represent adequately her interest in eliminating one-race schools. Her allegation, however, addressed segregation that survived the 1973 consent decree between the private plaintiffs and the Board, to which the United States did not object. Phillips' contention, therefore, actually amounts to an allegation that the United States' representation first became inadequate in 1973 when it failed to object to the consent decree that left 34 one-race schools.

Because the United States agrees that timeliness under Rule 24(a)(2), Fed. R. Civ. P., must be measured from the date that the alleged inadequacy of representation first arose, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), Phillips' motion was properly found untimely on its face. United States v. Louisiana, 669 F.2d 314 (5th Cir. 1982). Moreover, even if timeliness is measured from some later point in the litigation, Phillips' unexplained delay remains inexcusable. Although she was aware of the United States' and the Board's well-publicized efforts to produce a consent decree, she failed to move for intervention until four days after expiration of the period for objecting to the decree.

Application of the factors for measuring timeliness articulated by this Court in Stallworth v. Monsanto, 558 F.2d 257 (1977), confirms that the district court correctly denied Phillips' motion. The United States and the Board would suffer substantial prejudice as a result of Phillips' delay. By failing to intervene in a timely fashion, Phillips permitted the United States and the Board to expend time, resources and effort setting this litigation in the belief that they were the only interested parties remaining in the litigation. Granting her motion would have required the parties to litigate the United States' motion to amend the judgment of unitariness.

Phillips, by contrast, has not suffered measurable prejudice by denial of her intervention. Her interest in eliminating one-race schools was served by the 1981 decree, which has already eliminated 19 one-race schools. In addition, because she was not a party to the decree she remains free to file a separate lawsuit seeking further desegregation.

The district court also did not abuse its discretion in denying Phillips' intervention, since her interest was adequately represented by the United States which shared the same interest in dismantling the dual school system. The United States, therefore, could only have failed to represent Phillips' interest if it colluded with the School Board, represented an interest that was actually adverse to Phillips, or failed to perform adequately as

a representative. Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969).

Phillips' assertions boil down to a contention that the United States did not advocate adequately her interest in reducing the number of one-race schools. The United States contends, however, that by negotiating the elimination of 19 of the 34 one-race schools it fully represented Phillips' interest. The decree appears even more adequate in view of the fact that it is a consent decree that properly reflects the parties' calculations regarding the risks of litigation and embodies a compromise. See United States v. City of Miami, 664 F.2d 435 (5th Cir.) (en banc); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977). Because Phillips failed to allege any facts that could, if true, make the compelling showing necessary to establish inadequate representation by the United States in a school desegregation case, the district court properly denied her motion without a hearing.

ARGUMENT

I

THE DISTRICT COURT PROPERLY CONCLUDED THAT MS. PHILLIPS' MOTION TO INTERVENE WAS UNTIMELY

Ms. Phillips contends that the United States failed adequately to represent her interest in eliminating one-race schools.[3/] Her assertion comes too late to be heard by this Court. The United

3/ The United States contends (infra, pp. 25-35) that it has represented Phillips' interests adequately throughout this litigation.

States took the position as early as 1973 that it would not object in this case to a consent decree that left some 34 one-race schools in the system. Under Rule 24(a)(2), Fed. R. Civ. P., timeliness must be measured from the date that the alleged inadequacy of representation first arose. Phillips' challenge to this alleged breakdown in representation first surfaced, however, some eight years later, and seven years after the failure of other potential class representatives to pursue the hearing this Court directed the district court to hold regarding the adequacy of the 1973 decree. In these circumstances, the district court's decision on timeliness was plainly correct.

Rule 24(a)(2), Fed. R. Civ. P., requires that an intervenor seeking to intervene as of right has the burden of establishing that (1) the application for intervention is timely; (2) the intervenor has an interest in the subject matter of the litigation; (3) the applicant's ability to protect that interest may be impaired or impeded by the disposition of the action; and (4) the interest of the intervenor not be adequately represented by the existing parties. A deficient showing on any of these four requirements will defeat intervention under Rule 24(a)(2). NAACP v. New York, 413 U.S. 345, 369 (1973).

A. The standard for determining timeliness

The timeliness of an application for intervention is an issue addressed to the discretion of the district court and "is to

be determined from all the circumstances." Id. at 366. Accordingly, a determination of untimeliness can only be overturned if an abuse of discretion is shown. Ibid.

This Court's thoroughly analyzed the issue of timeliness under Rule 24 in Stallworth v. Monsanto Co., 558 F.2d 257 (1977). That case, identified four factors to structure the inquiry into timeliness (id. at 264-266):

> [1] The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> * * * * *
>
> [2] The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> * * * * *
>
> [3] The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> * * * * *
>
> [4] The existence of unusual circumstances militating either for or against a determination that the application is timely.

The first of these factors is seminal. It establishes the starting point for application of the remaining factors by fixing the point from which timeliness is to be measured. Stallworth rejects heavy reliance on absolute measures of timeliness, such as the length of time the litigation has been pending and whether judgment has already been rendered and looks instead to when the would-be intervenor learned or reasonably should have learned of his interest in litigation. Id. at 266. As this Court has indicated since Stallworth, such absolute measures are relevant, but they are not decisive. See United States v. Marion County School District, 590 F.2d 146, 149 (1979).[4/] What must be determined is when the applicant could reasonably have been expected to seek to intervene and the time that lapsed thereafter before intervention was actually sought.

In some instances -- and this is one of them -- that threshold determination cannot be resolved without reference as well to the fourth criterion for intervention under Rule 24(a)(2) -- inadequacy of representation by existing parties. For, it cannot be gainsaid that one's "interest" in participating directly in another's lawsuit could well mature only after learning that the initial identity of interest in the subject matter had disintegrated and a different legal viewpoint was being asserted by the litigating party.

4/ Other courts of appeals have considered such absolute measures decisive. See e.g., Pennsylvania v. Rizzo, 530 F.2d 501 (3d Cir.), cert. denied, 426 U.S. 921 (1976); United States v. South Bend Community School Corp., 710 F.2d 394, 395 (7th Cir. 1983).

While Stallworth did not explicitly link timeliness to adequacy of representation, it noted, id. at 264, that the Supreme Court in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), had done so. In McDonald, the Supreme Court affirmed the holding of the Seventh Circuit that a member of a putative class, whose class had been denied certification, timely filed a motion to intervene for purposes of pursuing an appeal to challenge the denial of class certification. The motion to intervene was filed 18 days after entry of final judgment. This was shortly after the would-be intervenor learned that the named plaintiffs did not intend to appeal the denial of class certification. In affirming the timeliness of the motion, the Court stated, id. at 394:

> In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests. [Footnote omitted]

Accord: Piambino v. Bailey, 610 F.2d 1306, 1321 (5th Cir.) cert. denied, 449 U.S. 1011 (1980), where this Court, citing United Airlines, Inc. v. McDonald, supra, recognized that "the question of timeliness is at least partially linked to the question of adequate representation."[5/]

5/ This understanding of the linkage between timeliness and adequacy of representation is compelled by the logic of Rule 24(a)(2). The Rule provides a mechanism for representation of the interests of absentees that will be affected by the litigation. On the other hand, the requirement that a would-be intervenor demonstrate that no party in the litigation is adequately representing

B. Application of the timeliness standard

1. Ms. Phillips reasonably should have known of the alleged inadequacy of representation since at least 1974.

Application of the foregoing principles to the present case, demonstrates that Ms. Phillips' attempted intervention was out of time. Taking Phillips' allegations at face value,[6/] representation of the interest that she now seeks to assert -- reduction of the number of one-race schools -- if it ever became inadequate, did so in 1974, at the latest. As described (supra, pp. 2-3), the representatives of the class that Phillips seeks to represent signed a consent decree in 1973 that contemplated more than twice the number of schools left one-race by the 1981 decree. This number, Phillips concedes, included nearly all of the schools that she now contends must not be allowed to remain one-race (Br. 9-10).[7/] The United States, upon whom Phillips contends she relied

5/ (Continued)
his interest discourages multiple representation and promotes judicial economy and efficiency. A rule that failed to link timeliness to the requirement of inadequate representation would frustrate this purpose and invite unnecessary applications for intervention. Moreover, such applications would be denied uniformly, since a would-be intervenor cannot successfully apply for intervention until representation becomes inadequate. It would make little sense to measure timeliness from a point at which a would-be intervenor could not move successfully for intervention.

6/ The United States contends (infra, pp. 31-32 n. 13) that many of Phillips' allegations are erroneous. For purposes of this first argument, however, we need not discuss those errors.

7/ "Br." references are to June Phillips' "Fourth Supplemental Brief."

for representation, did not object to the 1973 decree. Indeed, a group of attorneys from the NAACP Legal Defense Fund unsuccessfully sought intervention to challenge the 1973 decree in the district court. This Court remanded the case to the district court for a hearing on the motion to intervene, Jones v. Caddo Parish School Board, 499 F.2d 914, (1974), but the intervenors never returned to the district court. Ms. Phillips' claim of inadequate representation (such as it is) thus ripened at that time and her efforts to intervene should have occurred then, or shortly thereafter -- and not some seven years later.

Phillips has not alleged, nor could she, that she was unaware of the 1973 decree or the fact that as of 1974 nobody was seeking to challenge the decree. As a parent with children in the school system during this period and as an educator who served as a member of the Caddo Parish School Board during 1975 and 1976, Jones v. Caddo Parish School Board, supra, 704 F.2d at 220 n. 22, she surely knew of the decree, its operation and the dormancy of any attempts to alter it.

Phillips contends that her interest was represented until May 1981 when the United States and the Board signed a second consent decree, yet, that decree served Phillips' interest more fully than the 1973 decree by reducing the number of one-race schools from 34 to 15. Indeed, Phillips does not contend that her interest was served less well by the 1981 decree than by the 1973

decree. It is simply not possible that her interest was adequately represented by the 1973 decree but not by the 1981 decree.

Even if this Court should conclude that Phillips' interest was adequately represented until 1981, it should hold that the district court did not abuse its discretion in finding her intervention untimely. In her first supplemental motion to intervene, Phillips acknowledged that she had met with government counsel regarding the case. She also found it significant that the attorney with whom she had met was replaced on the case in November 1980 and that the new attorney had principal responsibility for representing the United States in the negotiations.

Moreover, a series of well-publicized public meetings were held from February through April regarding the course of the negotiations. Thus, the community was aware of the negotiations and that the parties were moving toward a consent decree. Yet, in spite of her concern about the change in government counsel, and her awareness that a consent decree was imminent, she did not seek intervention in the case until four days after expiration of the period for objecting to the consent decree. Her delay in moving to protect her interest allowed the United States and the Board to expend considerable time, effort and resources in the belief that they were the only parties to the litigation.

The effect of this delay was exacerbated by the failure of Phillips or any other member of the class that she now seeks to

represent to respond to the express invitation of the district court in June 1980 to reenter the case. This failure to come forward allowed the United States and the Board to believe that they were the sole persons interested in participating in this litigation.

Phillips, has failed to offer any plausible explanation for her delay between 1974[8/] and 1981.[9/] Because the burden of establishing timeliness was hers, this failure is fatal to her motion to intervene. Indeed, a similar unexplained lapse proved fatal to would-be intervenors in United States v. Louisiana, 669 F.2d 314 (5th Cir. 1982). This Court held that a four year delay was untimely on its face and a hearing was not necessary. Similarly, Phillips motion is untimely on its face and fails to raise any issue of fact necessitating a hearing. See also, United States v. Perry County Board of Education, 567 F.2d 277, 280 (5th Cir. 1978).

2. Prejudice to the parties

Although Phillips' motion is untimely on its face, examination of the remaining Stallworth factors enforces the correctness of the

8/ We will assume for argument sake that her interest was adequately represented until 1974 when the would-be intervenors failed to pursue a hearing in the district court.

9/ From 1974 to 1978, nobody sought to challenge the 1973 decree on the basis that it contemplated allowing 34 one-race schools. The Citizens' Advisory Committee letter of July 20, 1976 and the responses of the United States and William Jefferson to the Board's 1976 motion to dismiss all complained that the 1973 decree had been implemented inadquately and not that the decree, itself, was inadequate.

district court's denial of her intervention. The prejudice that Phillips' delay from 1974 to 1981 caused the United States and the Board is extensive. By failing to step forward until after final judgment, Phillips has allowed the United States and the Board to expend considerable time, resources and effort settling this litigation in the belief that they adequately represented all interests ramaining in the litigation. Granting Phillips intervention would have erased all of this effort and required the parties to litigate the United States' 1978 motion to amend the declaration of unitariness. Although the United States is confident that its motion was welltaken and would have been granted, the outcome of any litigation is uncertain (infra p. 31). Thus, at best, granting intervention would have delayed adoption of a final desegregation plan and postponed a desegregated education for thousands of children in the Caddo Parish School system.

3. Prejudice to Ms. Phillips

The prejudice to Phillips resulting from denial of her motion to intervene is amorphous at best. Phillips' sole remaining contention regarding the inadequacy of the consent decree is that it allows too many one-race schools (Br. 7-8). She cannot and does not contest, however, that far more one-race schools were operated under the 1973 consent decree, which she did not challenge. Therefore, her interest in the elimination of one-race schools is served, rather than prejudiced, by the 1981 decree.

Moreover, she remains free, after denial of her motion to intervene, to pursue a separate lawsuit alleging that the school system is unconstitutionally segregated.[10/] The survival of alternative avenues of redress is a principal factor mitigating prejudice caused by denial of a motion to intervene. United States v. Louisiana, 90 F.R.D. 358 359 (E.D. La. 1981) (three-judge court).

10/ We adhere to, although we do not repeat, the argument in our opening brief, adopted by the panel, that this was not a class action. As a consequence, the judgment is not res judicata with regard to anyone but the two parties -- the United States and the School Board. See General Telephone Co. v. EEOC, 446 U.S. 318 (1980). This Court has frequently suggested that the proper way for parental groups to complain about a desegregation decree is to intervene in the ongoing action and not to file a separate lawsuit. E.g., Hines v. Rapides Parish, supra; Pate v. Dade County, supra. This rule, however, has been announced in situations in which parental groups sought to challenge the operation of the decree itself and, generally, to oppose steps toward desegregation. See, e.g., Pate v. Dade County, supra; United States v. Perry County, supra. If Phillips were to file a separate lawsuit, we assume that her allegation would be that the decree, while it has achieved some desegregation, has left parts of the system unconstitutionally segregated. She would, therefore, not be alleging that the decree, itself, has ordered some unlawful conduct, but that problems not addressed by the decree must be remedied. Similarly, her suit would not be barred by the doctrine that a consent decree may not be attacked in a collateral proceeding. See Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, sub nom. Ashley v. City of Jackson, No. 82-1390 (Oct. 11, 1983). This Court's decision in Thaggard, supra, illustrates our point. The white plaintiffs in Thaggard alleged that the consent decrees in that case, which established hiring and promotion goals for blacks, resulted in reverse discrimination against them. Thus, their allegation was that the decrees, themselves, mandated illegal conduct. Their suits were dismissed as impermissible collateral attacks on the decrees. Phillips, by contrast, would be permitted to allege not that the consent decree, itself, produced segregation of the system, but that parts of the system require further desegregation.

Finally, the unusual circumstances of this case militate strongly against granting intervention. The unusually long delay of Ms. Phillips in filing her motion to intervene and the numerous opportunities for her to participate over the course of this 18 year old lawsuit weigh strongly against allowing her to intervene. Moreover, this is a school desegregation case, where "voluntary resolution is preferable to full litigation because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." Armstrong v. Board of School Directors, 616 F.2d 305, 318 (7th Cir. 1980). Allowing intervention after a consent decree has been negotiated and entered would greatly disrupt and deter the voluntary settlement process that plays a uniquely significant role in school desegregation litigation. The district court correctly denied Phillips' motion as untimely.[11/]

II

THE DISTRICT COURT PROPERLY DENIED MS. PHILLIPS' MOTION TO INTERVENE BECAUSE HER INTEREST WAS ADEQUATELY REPRESENTED BY THE UNITED STATES

The limitation on intervention in Rule 24(a)(2) that excludes individuals whose interests are already adequately represented is designed "to prevent litigation from becoming hopelessly complex." United States v. South Bend Community School Corporation, supra,

11/ Phillips' untimeliness also prevents her permissive intervention. United States v. Marion County School District, supra, at 148.

710 F.2d at 396. The Rule is designed to ensure that everyone whose interest may be adversely affected by litigation has a representative in the action. Rule 24(a)(2), therefore, is expressly designed not to allow every person with an interest to intervene.

The first step in determining whether an individual's interest is adequately represented is to define the interests of both the would-be intervenor and the purported representative. This Court has repeatedly stated that the only interest justifying intervention in a school desegregation case is that of furthering the goal of dismantling a dual school system in accordance with the law. Pate v. Dade County School Board, 588 F.2d 501, 503 (1979); United States v. Perry County Board of Education, 567 F.2d 277 (1978). In addition, this court has consistently construed the interest requirement of Rule 24(a)(2) narrowly, emphasizing in Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.) cert. denied, 400 U.S. 878 (1970) that

> intervention still requires a "direct, substantial, legally protectable interest in the proceedings."

See also, United States v. Perry County Board of Education, supra, 567 F.2d at 279.

As a result of this narrow construction of the term "interest," groups that simply disagree with a tactical decision of a party to the litigation or a policy decision made by a public body representing the interest of a would-be intervenor have been denied

intervention of right and have, at most, been afforded permissive intervention. Hines v. Rapides Parish School Board, 479 F.2d 762, 763 (5th Cir. 1973); United States v. Perry County Board of Education, supra, 567 F.2d at 279; Pate v. Dade County School Board, supra, 588 F.2d at 503.

Although the United States does not contend that Phillips has failed to satisfy the interest requirement, this Court's limited view narrows the purposes for which she may intervene and helps to define the role of the United States as her representative for purposes of Rule 24(a)(2). Her sole interest can be in eliminating the dual school system. This interest is identical to that of the United States, which intervened in this suit pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2. This statute empowers the United States to intervene in actions alleging violations of the equal protection clause.

Because the interests of the United States and Phillips are identical, the inquiry must focus on the adequacy of the United States' representation of the joint interest in achieving a unitary school system. To demonstrate inadequate representation, Phillips must show that the United States colluded with an opposing party, had an interest adverse to hers, or failed to act competently in the fulfillment of its duty of representation. Martin v. Kalvar Corp., 411 F.2d 552, 553 (5th Cir. 1969).

In establishing that the United States' representation has been inadequate, Phillips must overcome the presumption of adequate

representation that arises when an applicant for intervention "has the same ultimate objective as a party to the existing suit." United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978). Moreover, it requires a very strong showing to demonstrate that representation of the public interest by the United States in a school desegregation case is inadequate. See United States v. Board of School Commissioners of Indianapolis, 466 F.2d 573 (7th Cir. 1972), cert. denied, 410 U.S. 909 (1973); United States v. Board of Education of the City of Chicago, 88 F.R.D. 679, 686 (N.D. Ill. 1981).

With these principles in mind, we turn to Phillips' allegation that the United States failed adequately to represent her interest. We do not understand Phillips to contend that the United States colluded with the School Board or represented an interest that was actually adverse to hers.[12/] Any suggestion of collusion between the United States and the Board would be frivolous on its face in view of the history of arduous negotiations over the period of nearly a year that produced the consent decree. Thus, Phillips' contentions boil down to an assertion that the United States failed to advocate adequately the interest in a unitary school system.

12/ Phillips does suggest (Br. 10-12) that the consent decree was, in part, the result of a meeting between the United States Attorney for the Western District of Louisiana, J. Ransdell Keene, and officials of the Civil Rights Division. Certainly, however, it was proper for officials of the Department of Justice to speak with the Department's representative in western Louisiana. Both before and after this meeting, the negotiations for the United States were conducted exclusively by attorneys from the Civil Rights Division.

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In determining whether the United States adequately represented the interest in dismantling the dual school system, this Court should remain mindful that it is reviewing a consent decree. As stated in Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977):

> [C]ompromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement "justify each term of a settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes."

Because of the "overriding public interest in * * * [the] settlement" of litigation, id. at 1331, courts must be reluctant to upset the delicate balance that a settlement represents and should limit their inquiry into a consent decree negotiated by the United States to whether the district court abused its discretion in determining that the settlement is lawful, reasonable, constitutional and in accord with public policy. United States v. City of Miami, 664 F.2d 435, 439-442 (5th Cir. 1981) (en banc); United States v. City of Alexandria, 614 F.2d 1358, 1361 (5th Cir. 1980); Armstrong v.

12/ (Continued)
Moreover, any suggestion that the Department collapsed under pressure from the United States Attorney is belied by the timing of events. The meeting between Mr. Keene and members of the Civil Rights Division occurred on March 16, 1981, but agreement was not reached between the United States and the School Board until nearly two months later, after intensive and continuous negotiation.

Board of School Directors of the City of Milwaukee, 616 F.2d 305 (7th Cir. 1980).

Indeed, one of the most significant characteristics of a consent decree is that

> [i]t is not the result of a judicial determination after the annealment of the adversary process and a judge's reflection about the ultimate merits of conflicting claims. It does not determine right and wrong in the initial dispute.

United States v. City of Miami, supra, 664 F.2d at 440. In approving a consent decree, a court does not "reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute," Cotton v. Hinton, supra, 559 F.2d at 1330, since a settlement is

> a process of compromise in which, "in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation," United States v. Armour & Co., 402 U.S. 673, 682 * * * rather than an attempt to precisely delineate legal rights."

United States v. City of Jackson, 519 F.2d 1147, 1152 (5th Cir. 1975). See also, United States v. Texas Education Agency (Port Arthur Independent School District), 679 F.2d 1104 (5th Cir. 1982). A consent decree, therefore, may reflect each party's uncertainty regarding its liability or entitlement to relief.

The preamble to the consent decree reflects the calculations of both parties. The United States had contended in its 1978 motion to amend the judgment of unitariness that even though it had not objected to the 1973 decree, it had reserved its right to seek further desegregation. The Board countered that the 1973 consent decree embodied a final, binding plan. It argued further that if the United States withdrew from the agreement, the Board would be relieved of all obligations under the plan (R. 2549).

Thus, the United States could not be certain that trial of its motion to amend the judgment of unitariness would produce any further desegregation of the system. The further desegregation of the system accomplished by the 1981 consent decree however, is substantial and good faith implementation of the measures required under the 1981 decree will achieve a unitary school system. As discussed (supra, p. 6), it has already reduced the number of one-race schools from 34 to 15 and has reduced the number of children in one-race schools from nearly 20,000 to approximately 11,000. Moreover, further desegregation is expected as the newly constructed Huntington School opens and the voluntary transfer and magnet programs achieve full impact.[13/]

13/ We note numerous omissions and distortions in Phillips' discussion of the impact of the consent decree. First, she does not acknowledge that the decree's effect is not complete, as described above. In addition, she inflates the number of children in one-race schools by adding pre-school children who attend neighborhood early childhood centers. These centers, ironically, answer in part, Ms. Phillips' original objection to the consent decree. Further, she distorts the facts regarding the magnet

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In view of the amount of desegregation achieved by the decree, Phillips' contention that the United States was not concerned about providing a desegregated education for children in Caddo Parish is plainly false. The consent decree negotiated by the United States is clearly a sufficient desegregation remedy that reflects not only adequate but vigorous representation of Phillips' interest.

She argues that the United States abandoned its concern regarding one-race schools, yet the United States has eliminated 19 of 34 one-race schools through negotiation of the decree. Regarding the continued existence of some one-race schools, the district court correctly found (supra, p. 9) that desegregation of these schools was impractical because of the geographic isolation of schools in the Cooper Road area and the adverse effect on surrounding desegregated schools of efforts to transfer students into or out of this area. The court further stressed the special educational enhancement programs to be placed in these one-race schools and the availability to these students of voluntary transfers to magnet schools and the system-wide majority-to-minority transfer provision (R. 3029).

13/ (Continued)
schools. In the three magnet schools that she discusses (Br. 5-6), all black applicants have been accepted. With one exception, the remainder of the eight magnet schools are close to 50% white and 50% black. The exception is Herndon, which is in its first year of operation, but already has a 33% black and 66% white student population.

No further findings by the district court were required by Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), cert. dismissed sub nom. Estes v. Metropolitan Branches, Dallas NAACP, 444 U.S. 437 (1980), or Lee v. Macon County Board of Education, 616 F.2d 805 (5th Cir. 1980). Tasby required the district court to make findings regarding the feasibility of employing the desegregation tools approved in Swann v. Charlotte - Mecklenburg Board of Education, 402 U.S. 1 (1971), before adopting a plan that included a large number of one-race schools. Tasby involved a plan that was adopted after full litigation of factual and legal issues. The United States and the Board chose in the present case to by-pass the portion of the litigation that this Court found inadequate in Tasby. To require the parties to litigate issues in accordance with Tasby would disregard the parties right to compromise their lawsuit and disserve the public interest in settling litigation. See Armstrong v. Board of School Directors of the City of Milwaukee, supra, 616 F.2d at 321. Thus, a consent decree may only be disapproved if it authorizes a practice that is clearly illegal or unconstitutional as a general rule. Id. at 321-322. Because Tasby mandates a case-by-case approach to one-race schools, rather than a blanket prohibition against them, the district court properly did not reject the consent decree on the basis of Tasby, nor could it conclude, based on Tasby, that the United States failed to represent adequately the interest

in a desegregated school system.[14] For identical reasons, Phillips' reliance on Kelley v. Metropolitan County Board of Education, 687 F.2d 814 (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3553 (U.S. Jan. 25, 1983), is also misplaced.

Phillips' contention (Br. 8) that Lee v. Macon County Board of Education, supra, mandates a holding that the United States' representation was inadequate is also incorrect. In Lee, this Court held that the district court's findings were insufficient to justify a plan under which two-thirds of the elementary grade black students in the system would remain in schools over 95 percent black. A far smaller percentage of black students remain in one-race schools under this decree. In addition, Lee did not involve a consent decree. Moreover, this Court reaffirmed, id. at 809:

> Clearly, the existence of a few one-race schools does not in itself offend the constitution.

Indeed, this Court has found that a number of school systems are unitary after full implemtation of a desegregation remedy despite the presence of numerous one-race schools. See e.g., Ross v. Houston Independent School District, 699 F.2d 218 (5th Cir. 1983); Calhoun v. Cook, 522 F.2d 717 (5th Cir.); reh'g denied. 525 F.2d 1203

14/ Indeed, acceptance of an argument that a consent decree could not permit one-race schools without Tasby findings would amount to a rule that a school desegregation consent decree could never permit one-race schools.

(1975) (per curiam); Stout v. Jefferson County Board of Education, 537 F.2d 800 (5th Cir. 1976).

It is therefore clear that the consent decree's desegregation plan was constitutionally acceptable and, a fortiori, the United States' representation of Phillips' interest in desegregating the parish schools was adequate.

In sum, Phillips has failed to carry her burden of alleging facts that could, if true, amount to the required "very compelling showing that representation of the public interest by the United States is not adequate * * * ." United States v. Board of Education, supra, 88 F.R.D. at 686. The district court, therefore, properly denied, without a hearing, Phillips' motion to intervene.[15/]

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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15/ Because Phillips was properly denied intervention, she does not have standing to challenge the district court's approval of the consent decree. United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1290 (D.C. Cir. 1980).

CERTIFICATE OF SERVICE

I certify that I have served the Brief for the United States on Rehearing En Banc by mailing two copies, first class, to the following counsel of record:

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This 9th day of December, 1983.