77-3375

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 77-3375

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

LINCOLN PARISH SCHOOL BOARD, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Louisiana

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
ORAL ARGUMENT	1
STATEMENT	2
1. Procedural History	2
2. Facts	4
3. Opinion of the District Court	7
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE COURT'S FINDING THAT THE LINCOLN PARISH SCHOOL BOARD EXERCISES NO JURISDICTION OVER THE LABORATORY SCHOOLS IS UNSUPPORTED	10
II. THE RESOLUTION OF THE DESEGREGATION OF THE LABORATORY SCHOOLS SHOULD BE ACCOMPLISHED AS PART OF THE EXISTING SCHOOL DESEGREGATION ACTION	13
CONCLUSION	21

TABLE OF AUTHORITIES

Case:	Page
Augustus v. School Board of Escambia County, Florida, 507 F.2d 152 5th Cir. 1975)	18
Birdex Copeland v. Lincoln Parish School Board, No. 76-1197 (W.D. La.)	Passim
Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. den. 425 U.S. 974 (1976)	18
Ellis v. Board of Public Instruction of Orange County, Florida, 465 F,2d 878 (5th Cir. 1972), cert. den. 410 U.S. 966 (1973)	15
Fowler v. Southern Bell Telephone & Telegraph Co., 343 F.2d 150 (5th Cir. 1965)	11
Gentry v. Smith, 487 F.2d 571 (5th Cir. 1973)	20, 21
Georgia Southern & F. Ry. Co. v. Atlantic Coast LIne R.R., 372 F.2d 473 (5th Cir.), cert. den., 389 U.S. 851 (1967)	11
Green v. County School Board, 391 U.S. 430 (1968)	15
Hines v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1973)	17, 18, 19, 20
Jackson Tool & Die, Inc. v. Smith, 339 F.2d 88 (5th Cir. 1964)	12
Schuteen v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970)	20
Southeast Mortgage Co. v. Mullins, 514 F.2d 747 (5th Cir. 1975)	11

Page

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) ---------- 15

United States v. Burket, 402 F.2d 426 (5th Cir. 1968) ---------- 12

United States v. Seminole County, 553 F.2d 992 (5th Cir. 1977) ---------- 15

United States v. State of Georgia, 466 F.2d 487 (5th Cir. 1972) ---------- 19

United States v. State of Mississippi, 476 F.2d 941 (5th Cir. 1973), modified, 499 F.2d 425 (5th Cir. 1974) (en banc)---- 19

Rules:

F.R. Civ. P. Rule ----------

Rule 12(b) ---------- 11
Rule 19 ---------- 21

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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the court erred in denying the United States' motion based on factual findings contrary to allegations contained therein, when the court's action was taken without holding an evidentiary hearing.

2. Whether the court erred in holding that the United States' motion for modification of an existing desegregation order must be filed as a new complaint.

ORAL ARGUMENT

The issues presented by this appeal are not complex. In addition, due to the fact that the order herein appealed was entered without a hearing, there is little factual record for review. Accordingly, the United States suggests that oral argument is not necessary for this Court to properly consider this appeal.

STATEMENT

1. Procedural History

The original complaint in United States v. Lincoln Parish School Board was filed on June 8, 1966. R. 1. It sought the desegregation of the public school system in Lincoln Parish. When freedom of choice desegregation proved ineffective, the United States moved for a new plan, which was adopted August 1, 1969, and sought to desegregate the school system through the use of attendance zones and feeder patterns. R. 8. That plan was modified for the 1970-71 school year on August 7, 1970. R. 17.

On November 9, 1976, a group of black parents filed a suit styled Birdex Copeland v. Lincoln Parish School Board, No. 76-1197. The children of the adult plaintiffs in Copeland, all of whom reside in the city of Grambling, attend an all-black "laboratory school" on the campus of Grambling University. See record in Copeland appeal, Vol. II, p. 1, 5. 1/

1/ The record on appeal in the Copeland case is contained in volumes II, III, IV, and Exhibits of the record filed under No. 77-3375. For purposes of this brief the Record on Appeal relating to United States v. Lincoln Parish School Board will be referred to as "R." The Record on Appeal in Copeland v. Lincoln Parish School Board will be referred to as "Copeland R."

Copeland plaintiffs alleged that the failure of the Lincoln Parish School Board to construct a school in their community, coupled with the continued existence of the all-black "laboratory school" was discriminatory and violated the existing desegregation order in United States v. Lincoln Parish School Board by prolonging the process of desegregation. Copeland R., Vol. II, p. 5-7.

On January 10, 1977, the United States filed a motion to consolidate the Copeland case with United States v. Lincoln Parish School Board, R. 61, which motion was granted on January 31, 1977. R. 58. Also on that date the United States was appointed amicus curiae with full rights of a party in the Copeland case. R. 74.

On July 22, 1977, the United States filed a motion to add parties defendant and to modify the existing desegregation plan. The motion was filed in both the original suit, No. 12071, and in the Copeland suit. That motion sought to add to the original desegregation case the public officials responsible, with the school board, for operation of the laboratory schools on the campuses of Grambling State University and Louisiana Tech University. R. 90.

The motion requested the court to modify the injunction entered in the original desegregation suit so to require the desegregation of the laboratory schools and to enable the school

board to complete the desegregation of public education in the parish. On August 4, 1977, the school board filed its response, R. 106, which suggested that the school board could provide no relief in the issues presented regarding the laboratory schools, R. 108, and recommended that the United States be required to file a new complaint against the parties the United States sought to add to the desegregation suit. R. 107.

On November 1, 1977, the district court denied the United States' motion. R. 121.[2/]

2. Facts

The Motion filed by the United States alleged that there are two laboratory schools located within the boundaries of Lincoln Parish. R. 94. The Alma Brown laboratory school, it was alleged, is located on the campus of Grambling University and is attended almost solely by black students. R. 94. The motion stated that the other laboratory school, A.E. Phillips, is

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2/ The court's entry was erroneously styled Copeland v. Lincoln Parish School Board, No. 76-1197, instead of being properly styled United States v. Lincoln Parish School Board, No. 12071. However, the language of the entry unequivocally states "The United States has moved to add additional parties defendant to the action. The motion is DENIED." The order also said that the United States should seek its relief "in a separate suit rather than in the pending ones." R. 121. This language shows that although the minute entry was apparently mis-styled, the entry denied the relief sought by the United States in its Motion filed July 23, 1977.

On November 30, 1977, the court issued an opinion and judgment in the Copeland case, finding for the school board. Copeland R. Vol. IV, p. 724. That judgment was appealed by the plaintiffs.

located on the campus of Louisiana Tech University and is attended almost solely by white students. Id. The motion alleged that the schools were initially established, and operated, as part of the dual system of public schools, and have never been desegregated.

The motion stated that authority over the laboratory schools is shared by the local school board and the Louisiana State Department of Education. R. 94. The local board, the motion alleged (R. 95):

> (i) employs the principal and teachers at the laboratory schools with funds allocated by the State for that purpose, (ii) contributes the same amount from local taxes to the salaries of faculty employed at the laboratory school as it does to other teachers employed by the parish, (iii) furnishes instructional supplies and materials to the laboratory schools on the same basis as it does to other schools, and (iv) is responsible for the transportation of students to and from the laboratory schools.

The motion stated that supervision of the operation of the laboratory schools rests with the President of the college at which each is located, R. 96; in this regard, the United States sought to add to this action these two college presidents. The motion also sought to add as defendants members of the State Board of Elementary and Secondary Education, and the State Superin-

tendent of Education, who, the motion alleged, have overall responsibility over the public education within the state. R. 95.

The response filed by the Lincoln Parish School Board did not specifically deny any of the factual allegations made in the United States' Motion. That response, however, did state that the board is "not a party who can provide the relief sought on the issues regarding the laboratory schools." R. 108.

The original decree in this desegregation action, entered on July 29, 1966, prohibited the board from taking any action in support of racially segregated schools. That order did not list schools affected by the order. The desegregation plan entered by the court on August 1, 1969, adopted the desegregation plan submitted by the school board. R. 8. This plan, as subsequently modified in minor respects, is the plan which the school board is presently implementing. The plan did not refer to either of the laboratory schools, so consequently, unlike the rest of the public schools in the district, neither school, at present, is operating under specific boundaries set out in the decree.

3. Opinion of the District Court

The district court's order denying the motion filed by the United States is here set out in its entirety (R. 121):

> This action was filed seeking enforcement of and further relief in the decree issued in Civil Action No. 12071, United States v. Lincoln Parish School Board. The United States has moved to add additional parties defendant to the action. The motion is DENIED.
>
> The reason for the additional parties is to litigate issues of discrimination and segregation in the laboratory schools at Grambling State University and Louisiana Tech University. These issues are not adjuncts to the issues of discrimination and desegregation in schools under the jurisdiction of the Lincoln Parish School Board. Actions No. 76-1197 and No. 12071 were concerned only with schools under the jurisdiction of the School Board. Thus, the interests of justice and clarity require that the United States seek its relief in a separate suit rather than in the pending ones.

SUMMARY OF ARGUMENT

The court's decree of August 7, 1970 retained continuing jurisdiction of the school desegregation case "for the purpose of enforcing or modifying" the order. R. 33. The United States' motion sought to modify that order, so as to require the desegregation of the laboratory schools located on the campuses of Grambling and Louisiana Tech. The district court's order that the modification sought must be the subject of a new lawsuit was erroneous.

To the extent that the district court relied on a finding, implicit in its order, that the Lincoln Parish School Board plays no part in the operation of the laboratory schools, that finding is unsupported by the record. Such a finding is contrary to allegations in the United States' motion, which alleged substantial specific involvement of the local school board in the operation of the laboratory schools. Such a factual finding could properly be made only after the receipt of evidence refuting those allegations, and the absence of a hearing renders the court's finding erroneous.

The racial enrollment figures for the laboratory schools demonstrate that the schools remain as vestiges of the dual system of public education. For that reason, the United States has attempted to secure the desegregation of those schools.

The record indicates that the laboratory schools were initially brought under the jurisdiction of the original desegregation suit, but were not included in orders which enacted specific desegregation plans. To this extent, this case is the proper one in which to resolve the issue of the continuing segregation at those schools; the district court's requirement of new litigation is unwarranted.

Even if the laboratory schools were never previously part of this action, any effective desegregation of those schools will most likely require modifications of the desegregation plan presently in effect. For this reason, the desegregation of those schools must be litigated as part of this suit, rather than in a new suit. The district court's order in this case would likely result in duplicative litigation, as any remedy directed to the laboratory schools in a new suit would then require action in the original desegregation suit to accommodate the effects of such relief in the pre-existing desegregation order. Principles established by this Court direct district courts to avoid duplicative litigation in issues affecting school desegregation, by requiring issues concerning the final achievement of a unitary system to be litigated as part of the original desegregation case.

ARGUMENT

I. THE COURT'S FINDING THAT THE LINCOLN PARISH SCHOOL BOARD EXERCISES NO JURISDICTION OVER THE LABORATORY SCHOOLS IS UNSUPPORTED.

The district court stated that the reason it chose to deny the United States' motion to address the segregation in the laboratory schools as part of the existing desegregation case was that these schools are not under the school board's jurisdiction. R. 121. This finding not only is contrary to the unrefuted allegations contained in the motion filed by the United States, but also contrary to evidence developed during the discovery held prior to the entry of the court's order.

The United States' motion alleged that the Lincoln Parish School Board played a substantial role in the operation of the laboratory schools, by employing the staffs at those schools, by contributing to the salaries of those teachers tax revenues in an amount equal to that added to the salaries of other teachers in the parish, by supplying instructional material to these schools as it does with other schools in the parish, and by providing transportation for students attending the laboratory schools. R. 95.

The response of the school board does not deny any of these assertions; nor does it refer to any evidence in the record. Accordingly, the court's order denying the motion appears to have been handled as a judgment on the pleadings. In such cases, facts alleged by the party

opposing the judgment must, for purposes of review, be taken as true. Southeast Mortgage Co. v. Mullins, 514 F.2d 747 (5th Cir. 1975). Accordingly, if we assume all the allegations of the United States concerning the participation of the local school board in the operation of the laboratory schools are true, many aspects, both operational (materials, transportation) and financial (local tax revenue to teachers) are controlled by the local school board. Such assistance obviously involves the local school officials in the operation of the laboratory schools.

However, at the time the court entered its order, there were several depositions on file which dealt, in part, with the issue of the school board's actions concerning the operation of the laboratory schools. A trial court may, in its discretion, consider matters of record when determining a motion for judgement on the pleadings, which is then treated as a motion for summary judgment. Fowler v. Southern Bell Telephone & Telegraph Co., 343 F.2d 150 (5th Cir. 1965); Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R.R., 373 F.2d 493 (5th Cir. 1967), cert. den., 389 U.S. 851 (1967); F.R. Civ. P., Rule 12(b).

The depositions on file fully support the allegations in the United States' motion.[3/] Superintendant Judd acknowledged

3/ The depositions of Thomas Judd, Superintendent of the Lincoln Parish Schools, and Morelle Emmons, former Superintendent, were filed with the court on July 8, 1977. These were taken in conjunction with discovery in the Copeland case. However, an attorney for the United States examined the deponents on the operation of the laboratory schools. The original copies of the depositions appear at Copeland R. Vol. III, p. 294 (Judd) and p. 389 (Emmons).

that the Lincoln Parish School Board provides materials (dep. at 39), pays a certain increment from local revenues to teachers at the laboratory schools (dep. 40), and may provide money for trips for children at the laboratory schools (dep. 39). Former Superintendent Emmons also supported the allegation that the board provided transportation to the laboratory schools, as well as lunches (dep. 5, 23), approved the list of teachers for the laboratory schools (dep. 24), and provided text books and library books (dep. 25).[4/] Accordingly, both the pleadings, and the discovery on file to date, contradict the court's finding that the Lincoln Parish School Board has no jurisdiction over the operation of the laboratory schools. To the extent that the court relied on that finding in dismissing the United States' motion, such reliance is erroneous. At the very least, the extent of the evidence favoring the allegations made by the United States required a full evidentiary hearing be held, and evidence to the contrary be received, before a court could properly enter findings contrary to the allegations in the United States' motion. The entry of such findings, without evidentiary support, is reversible error. See Jackson Tool & Die, Inc. v. Smith, 339 F.2d 99 (5th Cir. 1964); United States v. Burket, 402 F.2d 426, 429 (5th Cir. 1968).

4/ Both Superintendent Judd and former Superintendent Emmons testified at the hearing on the Copeland motion. The transcript of that hearing is not yet available. To the extent that their testimony may further explain the basis of the court's order on the United States' motion, the United States may, when the transcript becomes available, address that issue in a supplemental brief.

II. THE RESOLUTION OF THE DESEGREGATION OF THE LABORATORY SCHOOLS SHOULD BE ACCOMPLISHED AS PART OF THE EXISTING SCHOOL DESEGREGATION ACTION

The district court held that the relief sought by the United States must be sought "in a separate suit." R. 121. To the contrary, the relief sought by the United States should properly be addressed only in the context of the existing suit.

The motion filed by the United States seeks to complete the process of effectively desegregating the public schools in the district. As the list of attendance figures in the motion shows, the schools operating totally under the jurisdiction of the Lincoln Parish School Board appear well desegregated. R. 93. However, as the statistics appearing at R. 94 demonstrate, the two laboratory schools are segregated by race. During 1975-76, the laboratory schools had the following enrollments (R. 94):

	B	W
Alma Brown Elementary	361	10
Alma Brown High	363	3
Total	724	13
A. E. Phillips		244

Although the desegregation of the laboratory schools has been on the periphery of United States v. Lincoln Parish School

Board, it has never been squarely addressed.[5/] However, the record indicates that the laboratory schools have been in existence since the dual system was in effect, and that they now operate under a "freedom of choice" policy whereby any student in the school district may choose to attend either laboratory school. R. 94.

The statistics on enrollments demonstrate that the "freedom of choice" assignment system for the laboratory schools has not effectively desegregated those schools, and that they remain as vestiges of the dual system which must be eliminated.

5/ The original complaint filed by the United States on June 8, 1966 in this action states that Lincoln Parish operates ten white schools and nine black schools, R. 2, which was admitted by the defendants. Suppl. R. 1. Although neither of these pleadings specifically states which schools were in existence at that time, the United States' Motion for Supplemental Relief filed on July 15, 1968, states that for the 1968-69 year, the school board is operating ten schools "traditionally maintained for white students and nine schools traditionally maintained for Negro students," and lists A. E. Phillips, "Grambling Elementary," and "Grambling High". Suppl. R. 5.

This motion culminated in the revision of the desegregation plan from "freedom of choice" to the zoning and pairing approach which essentially is still in force. The court adopted the plan proposed by the school board, which did not refer to the laboratory schools, and rejected the plan prepared by the Department of Health, Education, and Welfare, which referred to the laboratory school at Grambling (Alma Brown) but not the school at Louisiana Tech (Phillips). See Suppl. R. 14, 18. The court's order adopting the plan submitted by the school board did not refer to the laboratory schools. R. 8.

Former Superintendent Emmons, in deposition, suggested that the freedom of choice assignment plan which is now in use at the laboratory schools originated as part of the court order which established freedom of choice for all public schools in the district. (Dep. 27).

Accordingly, the United States' motion, seeking to secure a modification of the present plan so to effectively desegregate public schools which the existing plan does not desegregate, is consistent with procedures followed in cases previously decided by this Court. See Ellis v. Board of Public Instruction of Orange County, Florida, 465 F.2d 878 (5th Cir. 1972), cert. den. 410 U.S. 966 (1973), United States v. Seminole County, 553 F.2d 992 (5th Cir. 1977). The failure of a "freedom of choice" plan to desegregate formerly de jure schools is grounds for modification. See Green v. County School Board, 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The jurisdiction which the district court retains, R. 32-33, permits the district court to entertain actions to modify its injunctive decrees to provide for effective desegregation.

Even if the laboratory school were not specifically subject to the previous court decrees entered in this case, the desegregation of the laboratory schools which the United States seeks to secure will most likely affect the specific desegregation plan under which the Lincoln Parish schools presently operate. In addition, the continued existence of the segregated nature of those schools will continue to impede the complete desegregation of the district until the laboratory schools are desegregated. Accordingly,

because the desegregation of the laboratory schools would require a modification of the existing court order, principles established by this Court require that such desegregation be litigated as part of the existing suit.

As alleged in the United States' motion, the laboratory schools enrolled a total of 981 students, 724 black and 257 white. R. 94. The total enrollment at the public schools operated totally by the Lincoln Parish school board was 4742, with 1988 black students (42% of the total) and 2740 white students (58% of the total). R. 93. Accordingly, if the desegregation plan were modified so as to account for the students in the laboratory schools, the total number of students which the plan would cover would increase by approximately 20%.

Although, due to the fact that there has been no hearing on our motion, the record is not yet clear on this point, it appears that the school board relies on the laboratory school at Grambling to educate the approximately 280 children living in that area; there is no other public school located there. See dep. of Emmons at 12, 20, dep. of Judd at 11, 37, 41. In addition, although the Alma Brown school has grades K-12, the A. E. Phillips school has only grades K-8. In the event that desegregation of the laboratory schools is ordered, it

is likely that adjustments would have to be made in the desegregation plan to achieve an integrated education for many of the students who now attend the Grambling schools.[6/]

This discussion demonstrates that modifications in the existing plan are necessary before a unitary system of public education is secured. In instances where questions are raised concerning the ability of a court order to achieve a unitary system, this Court has adopted procedural rules designed to eliminate "undue confusion and a multiplicity of lawsuits." Hines v. Rapides Parish School Board, 479 F.2d 762, 765 (5th Cir. 1973). In Hines, this Court held that when persons who were not parties to the original lawsuit seek to allege that the existing court order does not achieve a unitary system, such issues must be litigated as part of the existing lawsuit. Such intervention, this Court reasoned, was permissible because the court originally entering the desegregation order in that case had retained jurisdiction over "any ... matters pertaining and incidental to the preservation of a unitary public school

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6/ It is unclear at this point precisely how the court would achieve desegregation for the students located in Grambling. We merely suggest that it may be difficult to achieve such desegregation within the existing laboratory schools, and that the plan must be modified to direct the school board to account for those students in their plans.

system." 479 F.2d at 765. This retained jurisdiction covered the allegations of the prospective intervenors that the existing court order had failed to achieve a unitary system. Id. See also Augustus v. School Board of Escambia County, Florida, 507 F.2d 152 (5th Cir. 1975); Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975), cert. den., 425 U.S. 944 (1976).

In this case, the United States, although not filing as an intervenor, is in fact alleging that the existence and condition of the laboratory schools prevents the achievement of a unitary system. Such a motion, based on this Court's decision in Hines v. Rapides Parish and similarly decided cases, should have been decided by the district court in a manner designed to eliminate, rather than create, new actions independent of, but related to, the existing desegregation case. Just as in Hines v. Rapides Parish, the court here retained jurisdiction "for the purpose of modifying this order," jurisdiction which the United States cited in its motion. R. 92. See also R. 104.

Although this Court has not been presented with desegregation of laboratory schools as part of a pre-existing desegregation case, the United States has successfully litigated as adjuncts to ongoing school desegregation cases somewhat analogous circumstances concerning the existence of public

aid to segregated private academies, and the effects of these academies on the process of desegregation. For example, in United States v. State of Mississippi (Smith County School District), 476 F.2d 941 (5th Cir. 1973), modified, 499 F.2d 425 (5th Cir. 1974) (en banc), the United States moved for supplemental relief in an ongoing school desegregation case to challenge a lease arrangement between the local school board and a segregated private academy. The district court had retained jurisdiction over the desegregation action, and addressed the issue of assistance to the segregated academy as a possible impediment to the achievement of the unitary system, the aim of the original desegregation order. See 476 F.2d at 942, 499 F.2d at 429. See also United States v. State of Georgia (Baker County School District), 466 F.2d 487 (5th Cir. 1972).

This case should have been permitted to proceed in a similar manner. As in State of Mississippi, the United States alleged both that the existence of the laboratory schools was impeding the final achievement of a unitary system, R. 96, and that the school district was contributing to the operation of the segregated schools. The recitation by this Court of the procedures used in the private

school cases suggests that these same procedures are appropriate in this case as well, requiring the district court to address the issue of the laboratory schools as part of the ongoing desegregation case.

The United States' attempts to add to the original school desegregation case parties necessary for desegregation of the laboratory school is consistent with the basis of Hines v. Rapides Parish School Board. These additional parties are necessary if the court is to order complete relief in this case concerning the operation of the laboratory schools. The Presidents of Grambling and Louisiana Tech would ultimately be responsible for carrying out the directions of the court concerning admission policies designed to desegregate those schools, and the state officers would be responsible for implementing any orders concerning state aid to these schools. Since one basis of the federal rules concerning joinder of parties is to eliminate the necessity of relitigation and to secure complete adjudication of issues in one action, see Schutten v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970), Gentry v. Smith, 487 F.2d 571, 579-580 (5th Cir. 1973), all parties necessary for complete relief should have been brought into the original school desegregation case. The elimination of the new and

potentially duplicative litigation which the district court order in this case would require is contrary to the basis of Rule 19,[7/] as well as the principle of Hines v. Rapides Parish.

CONCLUSION

For the reasons stated above, the United States requests that this Court vacate the district court's denial of the motion to add parties defendant and for modification of injunction, and remand this case to the district court with directions (a) to order the addition of parties the United States sought to join and (b) to address the desegregation of laboratory schools as part of United States v. Lincoln Parish School Board, No. 12071.

Respectfully submitted,

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7/ As stated by this Court in Gentry v. Smith, 487 F.2d at 579-580:

> In deciding joinder motions under Rule 19, courts emphasize pragmatic considerations rather than rigid formalisim: the maximum effective relief with the minimum expenditure of judicial energy.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief for the United States on counsel of record by mailing two copies to the following addresses:

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This 20th day of January, 1978.

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