No. 06-60799

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANNEISHA KEYS, *et al.*,

Proposed Intervenors-Appellants

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

THE COVINGTON COUNTY SCHOOL DISTRICT, *et al.*,

Defendant-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the Court can resolve this case on the briefs and that oral argument is not necessary.

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331 and 1343(a)(3) because the case involved civil rights issues arising under the Constitution and laws of the United States.

On August 22, 2006, proposed intervenors filed a notice of appeal of the district court's August 8, 2006, denial of their motion for intervention as of right and permissive intervention under Federal Rule of Civil Procedure 24(a) and (b). R.E. 16.[1] This Court has appellate jurisdiction under 28 U.S.C. 1291 to review the denial of the motion to intervene as of right. See *Trans Chem. Ltd.* v. *China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 821 (5th Cir. 2003); *Edwards* v. *City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc). This Court should dismiss, for lack of jurisdiction, the appeal of the district court's denial of permissive intervention. The district court did not abuse its discretion in denying permissive intervention and thus, under this Court's "anomalous rule," the Court lacks jurisdiction over the appeal insofar as it challenges the denial of permissive intervention. See *ibid.*

[1] "R. ___" refers to pages within the Official Record on Appeal. "R.E. __" refers to pages within the consecutively numbered Record Excerpts filed with appellants' opening brief. "Tr. __" refers to pages in the Transcript Of Motion Hearing not included in appellants' Record Excerpts. "Br. __" refers to pages of appellants' opening brief. "D. Br. __" refers to the pages of the School District's Brief as Defendant-Appellee.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in concluding that appellants' motion for intervention as of right and permissive intervention was untimely.

2. Whether, even if appellants' motion was timely, the district court erred in denying their motion to intervene as of right under Federal Rule of Civil Procedure 24(a).

STATEMENT OF THE CASE

This longstanding school desegregation case was originally filed by the United States on December 12, 1966. R.E. 2. On December 27, 1966, the district court enjoined the Covington County School District from discriminating on the basis of race and issued a desegregation plan. R.E. 2. On November 7, 1969, this Court adopted a new desegregation plan for the District, *United States* v. *Hinds County Sch. Dist.*, 423 F.2d 1264 (5th Cir. 1969) (addressing several school systems, including Covington County's), which it modified on July 21, 1975, *United States* v. *Hinds County Sch. Dist.*, 516 F.2d 974 (5th Cir. 1975) (addressing Covington County Schools).

On November 25, 2003, the United States filed a Motion for Further Relief. R.E. 28-32. At a pre-trial conference on August 12, 2005, the district court urged

the parties to pursue settlement. R.E. 29. The United States and the School District then entered into settlement negotiations that continued until March 2006. Those negotiations resulted in an agreement, and on March 8, 2006, the district court entered a consent decree jointly submitted by the United States and the District. R.E. 35-44.

On June 19, 2006, appellants filed a motion to intervene in the case pursuant to Rule 24(a) and (b). R.E. 45-57. The United States and the School District filed responses opposing the motion to intervene. R. 209-229; R. 192-205.

On August 8, 2006, the district court held a hearing on the motion. R.E. 16. In a decision from the bench, the district court denied the motion to intervene. R.E. 20-27. The court ruled the motion to intervene was untimely and that the United States adequately represented the interests of the proposed intervenors. R.E. 21-24.

STATEMENT OF THE FACTS

1. Pre-Consent Decree Student Assignments In Covington County

Pursuant to the desegregation plan in effect before the March 8, 2006, Consent Decree, Covington County is divided into distinct student attendance zones. R. 33-34. The District operates six schools, and students are assigned to a school based on the attendance zone in which they live. R. 33-34; D. Br. 3.

Students living in the Hopewell zone attend Hopewell Elementary for grades K-6. R. 34; D. Br. 4. The Hopewell zone does not have its own middle school or high school, and consequently, students from Hopewell Elementary are bused to different schools for grades 7-12. R. 34; D. Br. 4. Prior to the March 8, 2006 Consent Decree, most Hopewell students who had completed sixth grade attended Collins Middle School and then Collins High School. R. 33-34; D. Br. 4. The remaining Hopewell students attended Mount Olive Attendance Center for grades 7-12. R. 34; D. Br. 4.

The three other attendance zones each have schools that serve all students within the zone. R. 33-34; D. Br. 4. Students in the Collins zone attend Collins Elementary for grades K-4, Collins Middle for grades 5-8, and Collins High School for grades 9-12. R. 33; D. Br. 4. Students in the Mount Olive zone go to Mount Olive Attendance Center for grades K-12. R. 34; D. Br. 4. Students in the Seminary zone go to Seminary Attendance Center for grades K-12. R. 34; D. Br. 4.

The State of Mississippi rates public schools based on a five-level scale. See Tr. 89. Level 1 signifies a low-performing school, Level 2 under-performing, Level 3 successful, Level 4 exemplary, and Level 5 superior performing.

Seminary Attendance Center is a Level 5 school, while all the other schools in Covington County are Level 3 schools. Tr. 89.

In the 2003-2004 school year, the student enrollments, by race, for each school in the district were as follows:

School	Non-Black	Black	Total
Collins El. (K-4)	202 (35%)	379 (65%)	581
Collins Middle (5-8)	159 (31%)	350 (69%)	509
Collins High (9-12)	137 (27%)	373 (73%)	510
Hopewell El. (K-6)	9 (3%)	287 (97%)	296
Mount Olive (K-12)	195 (38%)	322 (62%)	517
Seminary (K-12)	1005 (92%)	86 (8%)	1091
Total Overall	1,707 (49%)	1,797 (51%)	3,504

See R.E. 66.

2. Recent Litigation

On November 25, 2003, the United States filed a Motion for Further Relief. R.E. 28-33. The United States alleged that the District continued to operate one

school (Seminary Attendance Center) as a racially identifiable white school and one school (Hopewell Elementary) as a racially identifiable black school. R.E. 29-30.

The Motion for Further Relief also alleged that the District completed school construction projects without regard to the impact on desegregation, provided superior facilities at Seminary, maintained an identifiably white staff at Seminary and an identifiably black staff at Hopewell, and used race as a factor for selecting students who will participate in certain extracurricular activities or receive certain awards. R.E. 30-31. The United States requested that the district court order the Covington County School District to "formulate, adopt and implement a plan approved by [the district court] that promises realistically to work now to eliminate the vestiges of discrimination, to the extent practicable." R.E. 31.

On April 29, 2005, the United States moved for summary judgment on the issue of the School District's use of race in some extracurricular activities. R.E. 14. The parties reached an agreement on the issue, and the district court entered a consent decree resolving the motion on June 30, 2005. R.E. 14.

On August 12, 2005, the district court held a pre-trial conference. R.E. 14. The court urged the parties to pursue settlement and postponed the trial from

September 19, 2005, to January 16, 2006. R.E. 14; R. 92.[2] The court also suggested that the School District hire a desegregation expert to consult directly with the Justice Department's expert to work out an agreement. R. 92. The district court ordered the parties to "report in 30 days of their progress toward hiring a consultant and the progress the consultants [were] making." R.E. 14.

3. Publicity Of Settlement Negotiations

The August 17, 2005, issue of The News-Commercial, a local newspaper serving Covington County, carried a large front-page headline proclaiming "Schools, JD [Justice Department] may settle case." R. 92. The caption above the article explained: "Case delayed four months while settlement is discussed." R. 92. The article reported that Judge Starrett had raised the possibility of settlement, and "suggested that the [school] district hire a consultant to work with the Justice Department consultant and possibly reach a settlement." R. 92. The News-Commercial reported that the School Board agreed at its August 15, 2005, meeting to hire Dr. Christine Rossell to "work with her Justice Department counterpart in hopes of working out an agreement." R. 92.

The article further stated that "about twenty members of the Covington County NAACP and the Concerned Citizens group" attended the August 15, 2005,

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[2] Trial was later postponed until March 13, 2006. R.E. 15.

School Board meeting to express "their obvious displeasure with the move to settle the case." R. 92. One member of the NAACP read a statement calling on the School Board to implement certain changes, particularly consolidation of the County's high schools. R. 93. Local NAACP president Charles Magee also spoke at the meeting. R. 93.

On October 2, 2005, another local paper — the Hattiesburg American — published two articles about the case. R.E. 133. One of the articles reported that Dr. Rossell "is responsible for working with U.S. Justice Department officials on a potential solution for the county's school desegregation case before its Jan. 16 trial date." R.E. 134. Accompanying the article was a bullet summary of the case titled "Key dates in civil rights case." R.E. 136. The summary reported that in August 2005, "[c]onsultant Christine Rossell [was] hired by the county school district to work with the Justice Department to resolve the case without a trial." R.E. 136. The next entry in the summary, listed as "Coming up December 2005," states that "[t]he court has set a pretrial conference at which time the parties could announce a settlement." R.E. 136.

4. Settlement

After more than six months of negotiations, the United States and the District agreed on a settlement, and on March 8, 2006, the district court entered a

consent decree jointly submitted by the United States and the District. R.E. 35-44. The district court concluded that the Consent Decree was "reasonable," "consistent with all legal requirements, including furtherance of desegregation," and "in the interest of justice." R.E. 35.

On the day the district court entered the Consent Decree, the local newspaper — The News-Commercial — carried a summary of the decree on the front page. R. 206. Appellant Peggy Keys learned about the decree on March 8, 2006, the day it was entered. R.E. 206-207. Likewise, appellants' lead witness, local NAACP President Charles Magee, read the March 8, 2006, article in The News Commercial and also heard radio and television news reports about the decree. R.E. 193.

The Consent Decree requires that, beginning in the 2006-2007 school year, all Hopewell students graduating from Hopewell Elementary will go to Seminary Attendance Center, the District's only Level 5 school. R.E. 35; Tr. 89. Students in the Hopewell area are predominantly African American. R.E. 66. The Hopewell area does not have its own schools for grades 7-12. R. 34; D. Br. 4. Hopewell-area students in those grades previously attended Collins schools (Collins Middle and Collins High) or Mount Olive Attendance Center, all majority-black schools. R. 33-34; D. Br. 4. Their attendance at Seminary, instead

of a majority-black school, will result in greater minority representation at the County's predominantly white school.

The Consent Decree addresses the marginally increased distance which students from the Hopewell area will have to travel by bus in order to attend Seminary. R.E. 39.[3] Under the decree, the School District must comprehensively analyze the bus routes for Hopewell students to reduce the length of all such routes to the extent practicable. R.E. 36-39. Soon after entry of the Consent Decree, the School District purchased two new $58,000 buses and hired two new bus drivers to more efficiently transport students from the Hopewell area to Seminary. Tr. 88-89.

The District also agreed to publicize its Majority-to-Minority transfer program and provide transportation "in an efficient manner" to students who participate in the program. R.E. 36. By August 8, 2006, 13 students had signed up for the Majority-to-Minority transfer program, and the School District had purchased two $45,000 minibuses to provide transportation for this program. Tr. 89.

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[3] The travel time between Collins Middle School, where the majority of Hopewell area seventh graders would have attended school if the pre-Consent Decree desegregation plan were in effect, and Seminary Attendance Center is ten to twelve minutes. Tr. 89-90.

The Consent Decree further requires the School District to "develop a compensatory enrichment program to enhance education at Hopewell Elementary School * * * for the students who reside in the Hopewell Elementary School attendance zone." R.E. 37. The decree provides that "[t]he District shall encourage white students who reside in other attendance zones to attend the Hopewell Elementary School by publishing notice of the compensatory enrichment education program in the local newspaper twice a year and by advertising through the local newspaper and in-school announcements, with specific dates and times, opportunities for prospective white students and their parents or guardians to visit Hopewell Elementary School to learn about the program and the school." R.E. 38.

Pursuant to the requirements of the decree, the School District established a pre-kindergarten at Hopewell. Tr. 86-87. As of August 8, 2006, the District had enrolled 40 students in the program, purchased equipment and was in the final stages of hiring two new teachers. Tr. 87. The District plans to add three new classrooms to house the program in the 2007-2008 school year. Tr. 87-88.

Additionally, the Consent Decree requires the School District to submit any plans for construction or renovation at Seminary Attendance Center to the United States before beginning work on the plans. R.E. 39. The decree also requires the

District to conduct a "facilities organization study" prior to commencing any construction or renovation at Seminary. R.E. 39. The decree gives the United States the right to file objections to proposed construction or renovation within 45 days of the District's submission of plans. R.E. 39.

5. Motion To Intervene

On June 19, 2006 — more than three months after entry of the Consent Decree — appellants filed their motion to intervene, asserting they had an interest in achieving "maximum desegregation" and that the United States was not protecting that interest. R.E. 50-51. The United States and the School District opposed the motion. R. 192-205; R. 209-229.

On August 8, 2006, the district court held a hearing on the motion. R.E. 16. Two witnesses testified for the proposed intervenors.

One of those witnesses was Charles Magee, president of the Covington County NAACP. R.E. 137-138. Mr. Magee testified that he had contacted the Department of Justice about problems with desegregation in the Covington County School District. R.E. 142. He explained that between November 2002 and March 2006 he spoke with Department of Justice personnel about the case at least once a month. R.E. 146.

On cross-examination, Mr. Magee admitted that, throughout his involvement in the case, he was aware that settlement between the Department of Justice and the District was a possibility. R.E. 187. He acknowledged that he had read a newspaper article on August 17, 2005, reporting that the Justice Department and the District might settle the case. R.E. 188. He also admitted that he had attended a meeting on August 15, 2005, to express displeasure with the move to settle the case. R.E. 188-189. Mr. Magee testified that until the Consent Decree was entered on March 8, 2006, he was satisfied with the Justice Department's representation in the case. R.E. 198.

In response to questioning by the court, Mr. Magee said that he had no knowledge of any collusion between the Justice Department and the District. R.E. 200. Mr. Magee also testified that he was not aware of any wrongdoing or nonfeasance by the Justice Department in this case. R.E. 200-201. He asserted, however, that he should have been given the opportunity to participate in settlement negotiations. R.E. 200-201.

Appellant Peggy Keys also testified at the hearing. She stated that she has lived in Covington County all her life and has two children who attend Covington County schools. R.E. 204-205. Ms. Keys is married to a member of the Covington County Board of Supervisors (Arthur Keys) and is the sister-in-law of a

member of the County School Board (Andrew Keys). R.E. 181-182. Ms. Keys testified that she read local newspaper articles about the case — specifically in the Hattiesburg American and The News-Commercial — and attended NAACP meetings where the case was discussed. R.E. 206. She stated that she relied specifically on Mr. Magee, the NAACP president, for information about the case. R.E. 213.

Ike Stanford, the superintendent of the Covington County School District, testified as a witness for the District. He explained that the District had established a pre-kindergarten program at Hopewell Elementary to comply with the Consent Decree, and had purchased materials and was in the process of hiring teachers for that program. Tr. 87-88. He also testified that the District was planning to add an elementary science lab at Hopewell. Tr. 99. He stated that the District had purchased buses and hired drivers to transport students from the Hopewell zone to Seminary soon after the court entered the decree. Tr. 88-89. He explained that Seminary is designated a Level 5 school by the State Department of Education, while the other schools in the District are designated Level 3 schools. Tr. 89. He testified that the bus ride between Collins and Seminary is about ten to twelve minutes. Tr. 89-90.

STANDARDS OF REVIEW

This Court reviews *de novo* a district court's decision to deny an application for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). *Saldano* v. *Roach*, 363 F.3d 545, 550 (5th Cir. 2004). Orders denying permissive intervention are subject to review for "clear abuse of discretion," and will be reversed only if "extraordinary circumstances" are shown. *Trans Chemical Ltd.* v. *China Nat'l Mach. Import & Export Corp.*, 332 F.3d 815, 822 (5th Cir. 2003). A "district court's determination of whether the requested intervention is timely may be reversed only for abuse of discretion." *Jones* v. *Caddo Parish Sch. Bd.*, 735 F.2d 923, 926 (5th Cir. 1984) (en banc).

SUMMARY OF ARGUMENT

This Court should affirm the denial of appellants' motion to intervene as of right and should dismiss, for lack of appellate jurisdiction, the motion for permissive intervention.

Timeliness is a threshold requirement for both intervention as of right and permissive intervention. The district court did not abuse its discretion in ruling that the motion to intervene was untimely. Appellants filed their motion years after they knew or should have known of their interest in the case, ten months after they knew settlement negotiations had begun, and more than three months after the

district court entered the Consent Decree. The United States and the School District would suffer substantial prejudice as a result of appellants' delay. By failing to intervene in a timely fashion, appellants permitted the United States and the District to expend time, resources and effort settling this litigation. Because the motion to intervene was untimely, the district court properly denied the motion for both permissive intervention and intervention of right.

Even if appellants had moved to intervene in a timely fashion, the district court did not err in denying their motion to intervene as of right. Appellants are not entitled to intervene as of right because the United States has adequately represented the only legally protectable interest they have in this litigation — the interest in a desegregated school system.

The other "interests" that appellants invoke in support of intervention are not legally protectable interests. Appellants' asserted interest in "maximum desegregation" is not legally cognizable. Nor do they have legally protectable interests in the specific policy goals — a consolidated high school located in Collins or recision of the requirement that children from Hopewell Elementary attend Seminary — they seek to advance.

Appellants' legally protectable interest in achieving desegregation in the School District was adequately represented by the United States. Because the

United States and appellants have the same interest in achieving desegregation, the United States only could have failed to represent appellants' interest if it had engaged in "collusion or nonfeasance." See *United States* v. *Franklin Parish Sch. Bd.*, 47 F.3d 755, 757 (5th Cir. 1995). Clearly, it did not.

The mere fact that the United States reached a compromise with the School District in this case does not, as appellants imply, show that the federal government's representation was inadequate. Indeed, this Court has indicated a strong preference for settlement in school desegregation cases. The March 8, 2006, Consent Decree advances desegregation in the School District and, unsurprisingly, embodies a compromise that reflects the parties' calculations regarding the risks of litigation.

ARGUMENT

This Court should affirm the denial of the motion to intervene as of right and should dismiss, for lack of appellate jurisdiction, the portion of the appeal challenging the denial of the motion for permissive intervention.

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT APPELLANTS' MOTION TO INTERVENE WAS UNTIMELY

In determining whether a motion to intervene is timely, this Court considers: (1) the length of time the applicants knew or should have known of their interest in the case; (2) prejudice to existing parties caused by the applicants' delay; (3) prejudice to the applicants if their motion is denied; and (4) any unusual circumstances. *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977); *Effjohn Int'l Cruise Holdings, Inc.* v. *A&L Sales, Inc.*, 346 F.3d 552, 560-561 (5th Cir. 2003). None of these factors weighs in favor of allowing intervention here. Consequently, the district court did not abuse its discretion in concluding that appellants' motion to intervene was untimely.

Timeliness is a prerequisite for both permissive intervention and intervention as of right. *Jones* v. *Caddo Parish Sch. Bd.* (*Caddo Parish II*) 704 F.2d 206, 218 (5th Cir. 1983). Consequently, this Court should dispose of the entire appeal on the basis of the timeliness issue alone. The district court's denial of appellants' motion to intervene as of right should be affirmed. See *Trans Chem. Ltd.* v. *China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 821 (5th Cir. 2003). Under this Court's "anomalous rule," however, the Court should dismiss

the portion of the appeal challenging the denial of appellants' motion for permissive intervention. See *Edwards* v. *City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc).

A. Appellants Filed Their Motion To Intervene Long After They Knew Or Should Have Known Of Their Interest In The Case

The first factor this Court considers in assessing timeliness is the amount of time it took proposed intervenors to file their motion to intervene after they knew or should have known of their interest in the case. *Effjohn*, 346 F.3d at 560-561; *Jones* v. *Caddo Parish Sch. Bd.* (*Caddo Parish III*), 735 F.2d 923, 933-934 (5th Cir. 1984) (en banc); *Caddo Parish II*, 704 F.2d at 220. "Intervention after entry of a consent decree is reserved for exceptional cases." *Caddo Parish II*, 704 F.2d at 221.

Appellants knew or should have known of their interest in this case well before they filed their motion to intervene. This school desegregation lawsuit was originally filed more than 40 years ago in 1966. R.E. 2. Additionally, the United States filed its Motion for Further Relief in November 2003, more than two and a half years before appellants attempted to intervene.

Appellant Peggy Keys testified that she has two children in Covington County schools and has lived in Covington County all her life. R.E. 205. NAACP

President Charles Magee, appellants' lead witness and the individual from whom Ms. Keys received much of her information about the case, testified that he was in frequent contact with the Justice Department about the litigation starting in November 2002. R.E. 146.

Moreover, by August 2005, appellants were aware, or at least should have been aware, that the United States and the School District were engaged in settlement discussions concerning the desegregation issues raised in the government's Motion for Further Relief. Appellants also knew or should have known that the trial date was delayed twice while the parties' negotiations were ongoing. R.E. 14-15; Br. 9-11.

On August 17, 2005, the local newspaper — The News-Commercial — published a front page article reporting that the United States and the School District had entered into settlement negotiations at the urging of the district court. R. 92-93; see *NAACP* v. *New York*, 413 U.S. 345, 367 & n.19 (1973) (explaining that a district court can reasonably conclude that an applicant knew or should have known about the pendency of an action from, among other signs, a newspaper article). This article explained that, at the suggestion of the district court, the School Board had hired an expert to confer directly with the government's expert to try to settle the case. R. 92.

Appellants' lead witness, Charles Magee, acknowledged that he read this article. R.E. 188. Mr. Magee also testified that he met with the School Board on August 15, 2005, along with approximately 20 other members of the Covington County NAACP and the Concerned Citizens Group, to express displeasure with the move to settle the case. R.E. 188.

Peggy Keys, the only proposed intervenor who testified at the hearing, is a member of the Covington County NAACP. R.E. 205. She testified that she reads the local newspapers — the Hattiesburg American and The News-Commercial — and has attended NAACP meetings where this school desegregation case was discussed. R.E. 206. Ms. Keys is also the wife of a member of the Covington County Board of Supervisors and the sister-in-law of a County School Board member. Tr. 51-52. Ms. Keys testified that she relied on Mr. Magee for explanations about the case. R.E. 213.

As this Court made clear in *Caddo Parish III*, a post-decree motion to intervene will be considered untimely where, as here, the potential intervenors were well-aware months before entry of the consent decree that the parties were engaged in prolonged settlement negotiations over school desegregation issues. 735 F.2d at 934. Individuals who are aware of such negotiations are not permitted to simply sit back, await the outcome of those negotiations, and then jump into the

case because they are unhappy with the terms of the parties' settlement. *Ibid.* Yet that is precisely what appellants are trying to do here.

Appellants assert, however, that their motion was timely because they "only learned that their interests were not being protected by the United States when the terms of the Consent Decree were made public (on or about March 8, 2006)." Br. 22. That contention is meritless.

Appellants' argument is virtually identical to the one that this Court, sitting en banc, rejected in *Caddo Parish III*. The appellant in *Caddo Parish III*, like the appellants here, did not try to intervene until after entry of a consent decree. 735 F.2d at 932. To attempt to justify the timing of her motion to intervene, the appellant in *Caddo Parish III* asserted that until she learned the contents of the consent decree, "she 'had presumed that the United States would represent the best interests' of herself and the class she seeks to represent." *Ibid*. As this Court explained,

> [the] claim [of the appellant in *Caddo Parish III*] is not that she was unaware of the prolonged, well-publicized settlement process, but rather that she did not know the United States would agree to this decree which she claims left too many predominantly one-race schools attended by too many black students. As her counsel candidly stated on oral argument, "She knew negotiations were going on. Sure. But she had no idea to what the United States was going to agree to until she saw the Consent Decree."

Ibid. In rejecting that argument, the Court emphasized that "knowledge of an interest in the case" meant "knowledge of an interest which 'might be affected by' the outcome of the case" — not "knowledge of the actual *outcome* of the case." *Id.* at 934. In other words, the appellant in *Caddo Parish III* should have known that she had an interest in the ongoing negotiations long before she learned the details of the Consent Decree that was the product of those negotiations.

This Court should thus conclude that, as in *Caddo Parish III*, appellants here were aware at least by the time the parties entered into well-publicized settlement negotiations that their interests "'might be affected by' the outcome of the case." 735 F.2d at 934; see also *United States* v. *Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001) (concluding that knowledge of ongoing settlement negotiations weighed against finding proposed intervenors' motion timely especially where it "would not have required unusual prescience on the part of the intervenors to recognize that their interests were implicated") (citation omitted); *Campbell* v. *Hall-Mark Elec. Corp.*, 808 F.2d 775, 777 (11th Cir. 1987) (denying as untimely a motion to intervene on "the day of the district court hearing on approval of the settlement" because the proposed intervenor "was aware of settlement negotiations between the private parties, which had been under way for several months prior to the release of the final agreement").

In trying to defend their delay in seeking intervention, appellants suggest that the United States misled them about the federal government's position. The evidence does not support that allegation.

Appellants claim that "it was their understanding" that the United States' litigating position would include a request for school consolidation. See Br. 7, 16 n.16. Appellants fail to acknowledge that the United States' Motion For Further Relief did not allege that school consolidation was legally required or was the only possible remedy. See R.E. 28-33.

At any rate, appellants' argument ignores the critical distinction between a party's *litigating* position and the compromise position that a party might be willing to accept as part of *settlement*. Quite obviously, "compromise is the essence of settlement." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). In a settlement, "both parties relinquish some rights in order to gain benefits which would not otherwise be available or would be available only at the expense of further litigation." *Armstrong* v. *Board of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 316 (7th Cir. 1980), overruled on other grounds, *Felzen* v. *Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). The government's attorney represented to the district court that he had explained this "distinction between litigation and settlement discussions and the possibility that settlement discussions

could result in compromise" to people he met with in the Covington County community. Tr. 105. Appellants do not claim that the United States ever told them that it would refuse to settle the case unless the School District agreed to consolidation.

Contrary to appellants' assertion, they had ample warning that any settlement might not include consolidation of the County's high schools. As appellants concede, the School District's staunch opposition to consolidation was widely known and publicized from the summer of 2005 until entry of the decree. See Br. 8-9. Mr. Magee testified that he understood, throughout the time that settlement negotiations were ongoing, that the School Board was advocating retention of the current school attendance zones with the same boundaries. R.E. 156. Before settlement negotiations began, the School Board, at its June 15, 2005 meeting, instructed its attorney to "be as cooperative as possible with the Justice Department regarding school desegregation, while still pressing the case to retain current schools within the same boundaries." R. 155. School District officials publicly argued against consolidation. See Br. 7-8. Appellants admit that the School Board remained "resolute * * * in opposing any change in the school configurations," at their August 15, 2005 meeting, after settlement negotiations had begun. Br. 7. At a School Board meeting in January 2006, while settlement

negotiations were ongoing, a board member moved "to establish a policy that the district would offer transportation for minority to majority transfers, provided that none of the Justice Department's plans are adopted." R.E. 180. Thus, the position of the School Board on consolidation, well-known to appellants, gave them ample warning that, if the ongoing negotiations resulted in settlement, the compromise might involve something other than consolidation of all the high schools in the County.

Moreover, appellants unreasonably delayed filing their motion even after they learned on March 8, 2006 (see Br. 22), that the district court had entered the Consent Decree. Appellants waited nearly 15 more weeks – until June 19, 2006 – before seeking intervention. R. 73. In *Caddo Parish III*, in which this Court upheld the denial of intervention on timeliness grounds, the appellant had delayed only two weeks after entry of the decree before filing her motion to intervene. 735 F.2d at 926. Appellants concede they knew the terms of the Consent Decree almost as soon as it was entered on March 8, 2006 (R.E. 193; R.E. 206-207), and therefore knew by that point that their "interests"[4] were not fully aligned with

[4] As explained below, appellants assert "interests" in this case that are not legally protectable. See pp. 33-35, *infra*. The only legally protectable interest that appellants have in this case is their interest in a desegregated school system. The United States has adequately protected that interest. See pp. 35-40, *infra*.

those of the United States (Br. 22); yet they still waited three more months before attempting to intervene in this case.

B. Appellants' Long Delay In Seeking Intervention Would Prejudice The United States And The Covington County School District

This Court's en banc decision in *Caddo Parish III* illustrates the prejudice that the United States and the School District would suffer as a result of appellants' long delay in filing their motion to intervene. The type of prejudice at issue here is precisely analogous to the prejudice that this Court found in *Caddo Parish III* in upholding a ruling that an applicant's motion to intervene was untimely. In *Caddo Parish III*, as here, the appellant knew settlement negotiations were ongoing between the United States and School District, but waited to file her motion to intervene until after those negotiations produced a consent decree. 735 F.2d at 932.

This Court held in *Caddo Parish III* that the prejudice to the parties from the undoing of a consent decree arrived at through long and complex settlement negotiations was "apparent." 735 F.2d at 932. The Court determined that, if the prospective intervenor objecting to the consent decree between the United States and a school district "is made a party, there can be no consent decree without her agreement." *Id.* at 935. The Court noted that inclusion of an additional party after

a consent decree was entered may make a new settlement "impossible." *Ibid.* At the very least, "the lengthy and difficult process will have to begin all over again from square one or worse." *Ibid.*

The prejudice to the United States and the School District in this case is even more apparent than it was in *Caddo Parish III*. In addition to undoing a consent decree that is the product of lengthy settlement negotiations, granting appellants' motion to intervene would effectively eliminate any possibility of settlement. Appellants have expressed no interest in compromise. In their motion to intervene, appellants did not seek to be included in renewed settlement negotiations, but rather, asked the district court to "set the matter of the Motion for Further Relief for hearing and final resolution." R.E. 55. This Court has expressed a preference for settlement in school desegregation cases "because the spirit of cooperation inherent in good faith settlement is essential to the true long-range success of any desegregation remedy." *Caddo Parish II*, 704 F.2d at 221.

The prejudice to the parties is also increased by the more than three-month lapse between March 8, 2006, when the district court entered the Consent Decree, and June 21, 2006, when appellants moved to intervene. During this three-month period, the District took steps to satisfy its obligations under the decree. See D. Br. 17, 26; see pp. 9-13, *supra*. In reliance on the Consent Decree, the School

District has implemented a pre-school program at Hopewell, purchased equipment for that program, and hired two new teachers to run it. Tr. 86-88. The District also bought new buses and hired new bus drivers to transport seventh graders from the Hopewell zone to Seminary. Tr. 88-89. Additionally, the District enrolled 13 students in its Majority-to-Minority transfer program and purchased two new buses to provide transportation for these students. Tr. 89.

C. Appellants Are Not Prejudiced By The District Court's Denial Of Their Motion To Intervene

Appellants have waived any argument that they suffered prejudice as a result of the denial of their motion to intervene. Although acknowledging that this Court considers prejudice to the prospective intervenor as a factor in determining timeliness, the section of appellants' brief discussing timeliness fails to explain what alleged prejudice appellants will suffer from the denial of their motion to intervene. See Br. 19-23. A failure to present an argument in the opening brief constitutes a waiver of that issue on appeal. See *United States* v. *Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005).

At any rate, appellants are not prejudiced by the denial of their motion to intervene. Appellants' only legally protectable interest in this case is in a desegregated school system. See pp. 33-35, *infra*. As explained below (pp. 35-40,

infra), the United States adequately represented that interest. See *Lelsz* v. *Kavanagh*, 710 F.2d 1040, 1046 (5th Cir. 1983) ("[A]s we see it, critical to the [prejudice] inquiry is adequacy of representation. If the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight.").

Even if appellants were prejudiced in some way, any prejudice to them would be outweighed by the prejudice the parties would suffer from the unraveling of a settlement agreement arrived at through more than six months of detailed negotiation.

D. Appellants Have Failed To Prove Unusual Circumstances Justifying Their Delay

Appellants have not alleged any unusual circumstances that militate in favor of finding that their motion to intervene was timely. See Br. 19-23. They have therefore waived any argument that unusual circumstances explain their delay in attempting to intervene in this case. See *Pompa*, 434 F.3d at 806 n.4

II

EVEN IF APPELLANTS' MOTION TO INTERVENE WERE TIMELY, THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT

In order to justify intervention as of right under Rule 24(a), the applicant must meet four requirements: "(1) the applicant must file a timely application; (2) the applicant must claim an interest in the subject matter of the action; (3) the applicant must show that disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties to the litigation." *United States* v. *Franklin Parish Sch. Bd.*, 47 F.3d 755, 756 (5th Cir. 1995). All four conditions must be met in order to intervene as of right. *Saldano* v. *Roach*, 363 F.3d 545, 551 (5th Cir. 2001).

As previously explained, appellants' motion to intervene was untimely. See pp. 19-31, *supra*. Because timeliness is a necessary prerequisite for intervention, the Court can and should dispose of this appeal by relying solely on the timeliness issue. Nonetheless, even if appellants' motion had been timely, they would not be entitled to intervention as of right because the United States has adequately represented the only legally protectable interest they have in this litigation:

desegregation of the public schools.[5] For that additional reason, this Court should affirm the denial of the motion to intervene as of right.

A. Appellants' Only Legally Protectable Interest In This Litigation Is The Interest In A Desegregated School System

This Court has made clear that in order for proposed intervenors to satisfy the demands of Rule 24(a), their claimed "interest" in the case must be a "direct substantial, legally protectable interest in the proceedings." *United States* v. *Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978) (citation omitted). The "interest" for purposes of Rule 24(a) must "be one which the *substantive* law recognizes as belonging to or being owned by the applicant." *Cajun Elec. Power Coop.* v. *Gulf States Utils., Inc.*, 940 F.2d 117, 119-120 (5th Cir. 1991).

This Court adheres to a "narrow reading" of interests in school desegregation cases, and has made clear that in order for parents to assert a legally cognizable interest in a school desegregation case, the parents must demonstrate "an interest in a desegregated school system." *Perry County Bd. of Educ.*, 567 F.2d at 279; *Pate* v. *Dade County Sch. Bd.*, 588 F.2d 501, 503 (5th Cir. 1979).

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[5] Aside from challenging the district court's holding on timeliness, appellants' opening brief does not include any other grounds for overturning the denial of their motion for permissive intervention. Consequently, except for the timeliness issue, appellants have waived any challenge to denial of permissive intervention. See *Pompa*, 434 F.3d at 806 n.4 ("Any issue not raised in an appellant's opening brief is deemed waived.").

Appellants appear to argue, however, that they have an interest in achieving "maximum desegregation." Br. 27. That asserted "interest" is not a legally protectable interest. This Court has explicitly rejected a right to "maximum desegregation" in school desegregation cases, holding that the Constitution "does not require school districts to achieve maximum desegregation; that the plan does not result in the most desegregation possible does not mean that the plan is flawed constitutionally." *Anderson* v. *Canton Mun. Separate Sch. Dist.*, 232 F.3d 450, 455 (5th Cir. 2000) (quoting *Monteilh* v. *Saint Landry Parish Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988)).

In addition, appellants suggest (Br. 25-26) that they have an "interest" in attending a particular school (either Collins or Mount Olive, instead of Seminary). "Federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school." *Johnson* v. *Board of Educ.*, 604 F.2d 504, 515 (7th Cir. 1979) (citations omitted), vacated on other grounds, 449 U.S. 915 (1980). Thus, as with their desire for "maximum desegregation," appellants' preference for a particular school is not a legally protectable interest.

In claiming a right for their children to attend one of the majority-black schools, appellants argue that the Consent Decree, which requires that Hopewell-area students be bused to the Seminary Attendance Center for grades 7-12,

unconstitutionally places the burden of desegregation primarily on one race. Br. 26. Appellants' contention is meritless. None of the cases that they cite (Br. 26) supports their claim that the Consent Decree is unconstitutional. Appellants fail to acknowledge that although the decree marginally increases the travel time for Hopewell-area students in grades 7-12, the decree also provides those students a significant benefit – the opportunity to attend a school that is rated academically superior to the schools they would have attended if the decree had not been entered.

B. Appellants' Interest In Achieving A Desegregated School System Is Adequately Represented By The United States

"When the 'party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance.'" *Franklin Parish*, 47 F.3d at 757; see also *Kneeland* v. *NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987). To the extent that proposed intervenors have asserted any legally cognizable interests in desegregating the Covington County School System, those interests are adequately represented by the United States.

The presumption of adequate representation is particularly strong where, as here, the United States is the plaintiff in a school desegregation case. Under Title

IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, the United States is charged with representing the interests of public school children by challenging state-imposed segregation in education. See *Jones v. Caddo Parish Sch. Bd. (Caddo Parish II)*, 704 F.2d 206, 221-222 n.25 (5th Cir. 1983) ("[W]e refuse to infer that the Justice Department is no longer enforcing the fourteenth amendment in active [desegregation] matters such as this one."); *United States* v. *Carroll County Bd. of Educ.*, 427 F.2d 141, 142 (5th Cir. 1970) (upholding denial of intervention as of right where "[t]his court cannot say that the representation afforded by the United States Attorney General for black parents and students and parents of Carroll County was inadequate as a matter of law"); *United States* v. *South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) ("The presumption [of adequate representation in a school desegregation case] is especially appropriate because the existing representative, namely, the Government, is charged by law with representing the interests of the absentee."); *United States* v. *Louisiana*, 90 F.R.D. 358, 364 (E.D. La. 1981) ("It is of no little importance to the Court's determination of the intervention issue that the plaintiff in this action is the United States of America and that its lawyers in the Justice Department have long, solid experience in desegregation cases."), aff'd, 669 F.2d 314 (5th Cir. 1982).

To rebut the presumption of adequate representation by the United States in a school desegregation case, appellants must "make a 'very compelling showing' that representation of the public interest by the United States is not adequate." *Caddo Parish II*, 704 F.2d at 221 n.25. In order to make that showing, appellants must demonstrate "adversity of interest, collusion, or nonfeasance." *Franklin Parish*, 47 F.3d at 757.

Appellants have failed to establish any of the three factors required to rebut the presumption that they are adequately represented by the United States in this case. They do not allege collusion between the United States and the School District. Nor do they claim nonfeasance by the United States. Appellants' lead witness at the intervention hearing, Charles Magee, admitted he had no knowledge of any collusion or nonfeasance by the government. R.E. 200-201. Appellants have also conceded that the United States "aggressively undertook discovery in the case." R.E. 48; Br. 5-6.

Appellants argue, however, that "the terms of the Consent Decree * * * show a present adversity between the Intervenors and both the School Board and the United States." Br. 24 n.17. They are mistaken.

The mere fact that appellants are unhappy with the Consent Decree does not mean their interests are adverse to those of the United States. As previously

explained, appellants' only legally protectable interest in this case is in a desegregated school district, not in the specific policy goals they seek to advance. See pp. 33-35, *supra*.

Differences between the desegregation remedies provided in the Consent Decree and the policy goals of appellants are not a legal basis for ruling that the United States' representation is inadequate. Indeed, this Court in *Caddo Parish II* rejected an argument similar to that of appellants in the present case. There, like here, the proposed intervenors asserted that the relief agreed to by the parties was inadequate. *Caddo Parish II*, 704 F.2d at 221-222 n.25. In criticizing that argument, this Court explained that the applicants' "principle dispute with the 1981 consent decree is over the type and extent of relief it provides; a disagreement that reflects more a difference in 'policy' than any genuine shortcoming in the representation provided by the United States." *Ibid*; see also *Lelsz* v. *Kavanaugh*, 710 F.2d 1040, 1046 (5th Cir. 1983) ("[W]here a would-be intervenor is not asserting a legal right of his own, but is advocating the pursuit of a particular policy, his interest will be deemed to be adequately represented by existing parties."). As in *Caddo Parish II*, appellants' dispute here is over the "type and extent of relief" provided by the Consent Decree, not in any

"shortcoming in the representation provided by the United States." 704 F.2d at 221-222 n.25.

Appellants cite *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), as support for their argument that the United States' representation was inadequate. Br. 27-28. *Liddell*, which is not binding precedent in this Circuit, is inapposite. In that case, the proposed intervenors' interests were represented by private parties, instead of the United States, which, as previously noted, has special competence in school desegregation cases. Indeed, the *Liddell* court underscored this special competence of the United States by suggesting that the district court invite the United States to intervene. 546 F.2d at 774.

Appellants also appear to argue that the United States did not adequately represent them because the negotiated Consent Decree does not wholly adopt any of the plans proposed by the experts (Br. 25-26), and because the United States allegedly "abandoned" its position in favor of high school consolidation (Br. 27). These assertions, however, do not establish inadequacy of representation for purposes of Rule 24(a).

The United States' willingness to compromise to achieve a settlement does not indicate any inadequacy in the government's representation of the appellants' interest in a desegregated school system. This Court has emphasized that

settlement is particularly desirable in school desegregation cases. Indeed, "school desegregation is one of the areas in which 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." *Caddo Parish II*, 704 F.2d at 221 (citing *Armstrong* v. *Board of Sch. Dirs.*, 616 F.2d 305, 318 (7th Cir. 1980)).

Moreover, appellants cannot plausibly deny that the Consent Decree in this case furthers desegregation. Under the decree, Hopewell-area students, who are predominantly African American, will attend Seminary Attendance Center for grades 7-12, instead of the majority-black schools at Collins and Mount Olive. As appellants acknowledge (Br. 25), the decree will thus increase the minority representation at Seminary, a predominantly white school. In addition, as appellants admit (Br. 25), the Consent Decree creates a Magnet Preschool at Hopewell Elementary, which is intended to draw whites to that school to further desegregation.

CONCLUSION

This Court should (1) affirm the district court's denial of appellants' motion to intervene as of right; and (2) dismiss, for lack of jurisdiction, that portion of their appeal that challenges the denial of permissive intervention.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complied with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 12.0 and contains 8,500 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

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Date: February 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2007, a copy of the BRIEF FOR THE UNITED STATES AS APPELLEE was sent, along with a computer disk containing an electronic version of the brief, by overnight Federal Express delivery to each of the following persons:

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