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No. 77-5870

In the Supreme Court of the United States

OCTOBER TERM, 1977

BILL M. AND CYNTHIA BARNETT, ET AL., PETITIONERS

v.

JOSE CISNEROS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners, parents of a student in a Texas school district, seek to intervene in and reopen a school desegregation suit in which the United States is an intervenor-plaintiff.

1. The original complaint in this case was filed in July 1968. Nearly two years later, in June 1970, the United States District Court for the Southern District of Texas entered a judgment holding that the Mexican-American students in the Corpus Christi Independent School District were an identifiable minority entitled to invoke the constitutional protection against school segregation announced by this Court in *Brown* v. *Board of Education,* 347 U.S. 483. The court further found that the Corpus Christi school system was segregated as to both blacks and Mexican-Americans in violation of the Fourteenth

Amendment. *Cisneros* v. *Corpus Christi Independent School District,* 324 F. Supp. 599. At the request of the court, the United States participated in fashioning a plan designed to remedy that segregation. After an extended hearing and the submission of various proposed plans, the district court issued its remedial decision in July 1971. 330 F. Supp. 1377. The court of appeals, sitting *en banc,* affirmed the district court's finding of unconstitutional segregation, but remanded for exploration of possible alternate remedial plans that would minimize the need for student transportation. 467 F. 2d 142 (C.A. 5). This Court denied a petition and cross-petition for certiorari. 413 U.S. 920, 922. On remand, the district court implemented a final desegregation plan in three stages: the elementary schools (grades 1-6) during the 1975-1976 school year; the junior high schools (grades 7-9) during the 1976-1977 school year; and the senior high schools (grades 10-12) during the 1977-1978 school year.

On January 3, 1977, petitioners, on behalf of themselves and their minor daughter, filed in the district court a "Motion for Leave to Reopen and Intervene" (Pet. Exh. A). On examining that motion, the district court concluded that it addressed points no different from those canvassed in an earlier intervention motion filed by Melvin Polk and numerous other parents of school-aged children in Corpus Christi. On January 24, 1977, the court denied petitioners' motion for the same reasons it had previously denied the Polk motion (Pet. Exh. B). A copy of the district court's earlier order is attached to this Memorandum (App., *infra*). Appeals from the denials of petitioners' motion and the Polk motion were consolidated at the parties' request. On September 14, 1977, the court of appeals affirmed (Pet. Exh. D; 560 F. 2d 190). Only petitioners have sought further review in this Court.

2. The court of appeals correctly concluded that petitioners had demonstrated neither an unconditional right to intervene nor an abuse of discretion by the district court in denying them permissive intervention.

a. Petitioners allege (Pet. 5) that, under 20 U.S.C. (Supp. V) 1654 and 20 U.S.C. (Supp. V) 1717, they have an unconditional right to intervene pursuant to Rule 24(a)(1), Fed. R. Civ. P. The statutes cited provide:

> A parent or guardian of a child * * * transported to a public school in accordance with a court order * * * may seek to reopen or intervene in the further implementation of such court order * * * if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

In the first place, the statutes only address themselves to situations in which the time or distance of travel surpasses a certain threshold level. In its order regarding the Polk motion to intervene, the district court explicitly stated that the movants had "not fulfilled the conditions established" in the statutes, and therefore had not demonstrated that they were entitled to seek intervention in accordance with Section 1654 and 1717 (App., *infra*, p. 5a).[1] Moreover, the statutory language is permissive, not mandatory. As the district court noted (App., *infra*, p. 5a) and as the court of appeals agreed (Pet. Exh. C, p. 31), even if the time or distance of travel is sufficiently great, the statutes provide only that a parent "*may seek*" to reopen or intervene (emphasis added). This does not

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[1]In explaining its decision on petitioners' motion, the court incorporated by reference its reasoning in the Polk order (Pet. Exh. B).

confer an unconditional right of intervention within the meaning of Rule 24(a)(1).[2]

The court of appeals also correctly concluded that petitioners' interest was "adequately represented by existing parties," and that therefore petitioners could not successfully assert a right to intervene under Rule 24(a)(2). The court upheld the district court's finding that (Pet. Exh. C, p. 31; App., *infra*, p. 3a)

> the Defendant School District and the school officials named in this action have offered the most vigorous legal and factual argumentation in support of the very interests and issues that the Movants now claim have gone begging in the past.

Indeed, the district court's published opinions reflect the thorough presentations submitted by the school district.

b. The denial of an application for permissive intervention under Rule 24(b) is subject to reversal on appeal only if the district court has abused its discretion. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524. The court of appeals properly determined that no abuse of discretion occurred in this case. As indicated above, the district court accurately found that petitioners sought to relitigate facts and issues that had already been decided by the district court and the court of appeals in proceedings in which petitioners' interest was adequately represented. In addition, petitioners' motion was filed more than eight years after the Corpus Christi desegregation suit was initiated, and petitioners offered no explanation for the belated nature of their attempted entry into the case.

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[2]Furthermore, petitioners seek intervention not merely to challenge the remedial features of the district court's desegregation plan, but also to relitigate the question of the school district's original liability (Pet. 7, 14-15), an issue not comprehended within the judicial scrutiny authorized by 20 U.S.C. (Supp. V) 1654 or 1717.

For the forgoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOSE CISNEROS, ET AL.

v.

CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT, ET AL.

C.A. No. 68-C-95

ORDER

Melvin Polk, individually and as parent and next friend of his children, Barbara and Rabiario, and numerous other individuals as parents and as next friends, who are representatives of (a) Negroes; (b) Mexican-Americans; (c) "Others," consisting of citizens not in (a) or (b), who have children attending public schools within the Corpus Christi Independent School District; and (d) "Others A" who have children in private schools to escape the "tyranny of forced 'bussing'," filed a "Motion for Leave to Intervene and Interpose a Plea in Bar and Plea in Abatement" herein on or about August 22, 1975. An amended motion for leave to intervene was filed by them on August 26, 1975. On September 15, 1975, a letter was received by the Clerk of this Court from the attorney representing the Movants, requesting the Court to withhold action on said motion to intervene until a further amended motion could be filed. On December 19, 1975, a "Second Amended Motion for Leave to Intervene and Interpose a Plea in Bar and Plea in Abatement" was filed. In a letter dated April 21, 1976, counsel for Movants requested that the Court withhold action on the motion to allow filing of still another amended motion and supporting brief. Finally, on May 26, 1976, a "Third

Amended Motion for Leave to Intervene and Interpose a Plea in Bar and Plea in Abatement" was filed. On June 15, 1976, Movants' counsel submitted another proposed "Order and Final Judgment" in connection with the most recent amended motion. Movants have not requested further delay or required further response from the present parties to this suit. So, it appears this matter is finally ripe for action.

Plaintiffs have filed opposition to the earlier motion to intervene on January 7, 1976, and supplemented that opposition on January 30, 1976. The United States also resisted any intervention by a memorandum filed March 2, 1976. It is not necessary to require further written opposition to each of the several motions to intervene filed by Polk, et al. Defendants Corpus Christi Independent School District, et al., have filed no pleading or memorandum pertaining to such proposed intervention.

Rule 24 of the Federal Rules of Civil Procedure provides the general standard governing intervention and prescribes the requirements for intervention of right [Rule 24(a)] and for permissive intervention [Rule 24(b)]. The Fifth Circuit Court of Appeals has specifically addressed the problem of intervention in the context of school desegregation cases and has stated that once the motion to intervene has been filed, the district court should,

> "determine whether these matters had been previously raised and resolved and/or whether the issues sought to be presented by the new group were currently known to the court and parties in the initial suit. If the court determined that the issues these new plaintiffs sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it could deny the intervention. If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed."

Hines v. Rapides Parish School Board, 479 F. 2d 762, 765 (5th Cir. 1973). *See also Lee v. Macon County Board of Education*, 482 F. 2d 1253 (5th Cir. 1973); *Calhoun v. Cook*, 487 F. 2d 680 (5th Cir. 1973); *Davis v. Board of School Commissioners of Mobile County*, 517 F. 2d 1044 (5th Cir. 1975).

The Court has carefully reviewed the contentions of the Movants as set out in their motions, supporting briefs and proposed pleas in intervention. The Court finds that those contentions essentially involve issues and facts previously litigated and determined adversely to the positions of Movants. The common bond of the diverse groups who constitute the named Movants herein, and others they may purport to represent, appears to be their disagreement with the earlier findings and orders entered during the course of this litigation and their opposition to the plan under which the Defendant School District is presently operating. The Court finds that such common opposition does not present anything particularly new to this Court, and that, throughout these proceedings, the Defendant School District and the school officials named in this action have offered the most vigorous legal and factual argumentation in support of the very interests and issues that the Movants now claim have gone begging in the past.

Furthermore, this Court is subject to the directives issued by the Court of Appeals for the Fifth Circuit concerning the development of a plan for the desegregation of Corpus Christi schools. 467 F. 2d at 152-53. The Fifth Circuit specifically affirmed the findings of Judge

Woodrow Seals that the Mexican-American children of Corpus Christi "are segregated in violation of the Constitution" and that "action by the school district has . . . resulted in a severely segregated school system in Corpus Christi." 467 F. 2d at 144-45, 148. These findings, in light of the quoted language of the Court of Appeals, have now become facts which neither the Corpus Christi Independent School District nor this District Court can disregard. The School District became bound by such facts over five years ago. This Court has already given exhaustive consideration to the procedures which the appellate court has outlined in working out the plan which has been in effect during the past school year. The Court attempted to minimize student transportation requirements and was able to reduce the "length and time of travel for students" below what was initially considered to be necessary. It will continue to seek ways to comply with the Fifth Circuit's directives with as little transportation and disruption as it can during any further implementation. However, there is no way that the development of a completely desegregated school system can be avoided.

The extreme untimeliness of the present motion is apparent. This suit was filed on July 22, 1968, and no explanation is offered by Melvin Polk and the others who have joined with him for their failure to move to intervene in this action at an early time and while the issues of fact were being determined. Also significant, though to a lesser degree, is the fact that Movants have themselves been the occasion of an additional delay of approximately ten months—from August 22, 1975, when they filed their first motion to intervene, to the present day—in obtaining a ruling on this issue which, allegedly, affects their interests so gravely.

One other argument raised by the motion to intervene merits discussion. Movants contend that they have the right to intervene under 20 U.S.C. §1654, which reads:

> "A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process."

As Plaintiffs have pointed out, a similar provision from the Education Amendments of 1974 appears in 20 U.S.C. §1717. But the statute referred to is "conditional" rather than "unconditional," and thus falls under the permissive intervention provision of Rule 24(b)(1). The carefully chosen wording of section 1654 leaves no doubt about this matter: "*may*," "*seek* . . . to intervene," "in . . . *further* implementation," "*if* the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process." Intervenors have not fulfilled the conditions established in that statute, and, for the reasons previously discussed, have generally failed to show that they are entitled to intervene of right.

In sum, the Court finds that the would-be Intervenors are not entitled to intervene as a matter of right under Rule 24(a) and that they should not be allowed permissive intervention under Rule 24(b). Considered under either subsection of Rule 24, the Court finds that the intervention is extremely untimely. The Court finds that the interests of the intervenor group have been adequately represented throughout these proceedings and that the intervenors do not offer any indication of raising a

"significant claim" concerning any matter that this Court presently has the power to review. Intervention at this time is not justified concerning previously adjudicated issues of fact and law; clearly, such intervention would severely disrupt the orderly flow of judicial proceedings and would substantially prejudice the rights of the present parties to this action.

For the foregoing reasons, the motion for leave to intervene is hereby denied. IT IS SO ORDERED.

SIGNED this 24th day of June , 1976.

/s/ OWEN D. COX

UNITED STATES DISTRICT JUDGE