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No. 76-1140

# In the Supreme Court of the United States

OCTOBER TERM, 1976

DON YOUNG, ET AL., PETITIONERS

*v.*

MIDLAND INDEPENDENT SCHOOL DISTRICT, 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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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioners, parents of students in a Texas school district, seek review of the denial of their petition for a writ of mandamus. That petition asked the court of appeals to set aside a consent decree entered in a school desegregation suit brought by the United States. This consent decree (Pet. App. 22a-26a) implemented two decisions of the court of appeals requiring desegregation of the Midland Independent School District.[1] Since petitioners are not parties to the underlying school desegregation case, the court of appeals properly declined to hear their objections to the consent decree.

[1] *United States* v. *Midland Independent School District*, 443 F. 2d 1180 (C.A. 5); *United States* v. *Midland Independent School District*, 519 F. 2d 60 (C.A. 5), certiorari denied, 424 U.S. 910.

1. Petitioners were not entitled to use mandamus to abrogate the consent decree in a case to which they are not parties. At approximately the same time as they sought mandamus from the court of appeals, they also moved to intervene, in the district court, in the underlying school desegregation case brought by the United States. The district court has denied their motion to intervene (App., *infra*, p. 1a). Petitioners are entitled to appeal that denial, and, if the court of appeals should direct that they be made parties to the case, they would be entitled to challenge the consent decree. Under these circumstances petitioners' request for extraordinary relief was properly denied. *Ex Parte Fahey*, 332 U.S. 258.

2. In any event, petitioners' arguments against the consent decree are insubstantial. They apparently contend (Pet. 4-5) that a 1968 judgment in a school desegregation suit brought by private persons operated as a bar to the suit brought in 1970 by the United States. But the United States was neither a party nor in privity with a party to the 1968 litigation, and that judgment therefore could not preclude a subsequent action by the United States.

The 1971 and 1975 decisions of the court of appeals, holding that further relief is required,[2] relied on *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, and *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, cases decided after the 1968 private suit. It is settled that school districts must comply with such subsequent decisions of this Court (see, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F. 2d 878 (C.A. 5), certiorari denied, 410 U.S. 966), and petitioners do not suggest any reason why this

[2]See note 1, *supra*.



principle was not properly applied by the district court in approving the consent decree in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

APRIL 1977.

## APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA

*vs.*

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL.

MO-70CA-67

*ORDER DENYING MOTION TO INTERVENE*

The motion to intervene filed October 29, 1976, by Don and Betty Young, Jon and Barbara Edmonson, Bobby and Barbara McKee, and Don and Gwyn Sparks is DENIED.

The Court notes parenthetically, that a petition for a writ of mandamus to the Fifth Circuit Court of Appeals to set aside the Consent Decree upon the same ground on which intervention is requested was summarily denied on November 29, 1976.

SO ORDERED this 11th day of February, 1977.

/s/ Dorwin Suttle

UNITED STATES DISTRICT JUDGE

FILED:
February 14, 1977
Dan W. Benedict, Clerk
By BOWING PAPER, Deputy