No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents,

vs.

THE STATE OF MISSOURI, *et al.*,
Respondents,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

In 1987, the federal trial court ordered an unprecedented doubling of a school property tax levy to help fund the most expensive court-ordered desegregation program in the United States. An appeals court affirmed, but modified, the judicial taxation scheme. In April, 1990, this Court, in *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651 (1990), affirmed the modified scheme but reversed the trial court's direct levy. In July, 1990, the trial court approved a teacher salary settlement negotiated by the parties which mandated a court-*authorized* $.96 property tax increase — ostensibly in accordance with this Court's *Jenkins* decision. Taxpayers sought intervention to challenge this latest taxation decree. The trial court granted intervention, but the appeals court dismissed taxpayers' appeal after briefing and argument.

The questions presented* are these:

1. Did the Court of Appeals misapply Supreme Court precedent in dismissing Petitioners' appeal as untimely, thereby depriving nonparty taxpayers of their due process right to appellate review of increased property taxes levied through the injunctive power of a federal court?

2. Did the lower courts misinterpret this Court's 1990 *Jenkins* holding when they sanctioned an indirect judicial tax increase of $.96 as a *first* step for additional desegregation funding?

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* These taxpayers also appear as petitioners in No. 92-69, filed with this Court on July 8, 1992. That petition presents two questions concerning the proper extent of refunds of those property taxes directly levied by the trial court in 1987 and 1988 and reversed by this Court in *Jenkins*.

LIST OF PARTIES AND RULE 29.1 LIST

Petitioners are Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., Coulas and Griffin Insurance Agency, Inc., Lucille Trimble, Berlau Paper House, Inc., and Andrew J. Winningham. These Petitioners are individual and corporate taxpayers who own property within the Kansas City, Missouri School District ("KCMSD") subject to the $.96 court-authorized levy at issue. Kansas City Mantel & Tile Co., Coulas & Griffin Insurance Agency, Inc., and Berlau Paper House, Inc., are Missouri corporations with no parent companies, subsidiaries or affiliates as contemplated by Rule 29.1.

Respondents representing the plaintiff class of schoolchildren below are Kalima Jenkins, by her next friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by this next friend, Maurice Dydell, Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, Barbara Pugh; and Cynthia Winters, by her next friend, David Winters.

The American Federation of Teachers, Local 691 is an intervenor in the District Court proceedings and was a joint appellee.

Respondents representing the State defendants in addition to the State itself are the Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; the Missouri State Board of Education; Roseann Bentley, Rev. Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, Gary D. Cunningham, Rebecca M. Cook, and Sharon M. Williams, Members of the Missouri State Board of

Education; and Robert E. Bartman, Commissioner of Education of the State of Missouri.

A named party below in addition to Respondent School District of Kansas City, Missouri is Claude C. Perkins, Superintendent.**

** The listing of School District Respondents are as they appeared in the Court of Appeals. The present Superintendent of the School District of Kansas City, Missouri is Walter L. Marks.

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review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned matter on June 25, 1992.

OPINIONS BELOW

The June 25, 1992 opinion of the United States Court of Appeals for the Eighth Circuit (Appendix, A1-A6) has not yet been reported. The District Court's October 23, 1990 intervention order (App., A14-A18) and the District Court's July 23, 1990 settlement and taxation order (App., A25-A30) are unpublished.

JURISDICTION

The judgment of the Court of Appeals' dismissing Petitioners' appeal (App., A7-A8) was entered on June 25, 1992. No petition for rehearing or suggestion for rehearing *en banc* was filed. The jurisdiction of this Court to review the judgment and opinion of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

U.S. Const. amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On July 3, 1990, the District Court[1] announced a proposed settlement by the parties in the underlying desegregation action of certain issues involving School District of Kansas City, Missouri ("KCMSD" or "district") employee salary raises, including a $.96 property tax increase to partially fund the higher salaries. This tax increase would be levied through the trial court's injunction authorizing the school board to raise the levy without referendum approval.[2] This order set forth a procedure for nonparty response to the proposed settlement and tax increase, specifically the filing of written objections and a public hearing.

School board members were not apprised of the proposed tax increase until *after* settlement was reached. They did not

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[1] United States District Court for the Western District of Missouri, the Honorable Russell G. Clark, Senior Judge.

[2] The authority for this indirect levy derives from the District Court's judicial taxation scheme, *Jenkins v. State of Missouri*, 672 F. Supp. 400, 413 (W.D. Mo. 1987), as modified by the Court of Appeals, *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988) ("*Jenkins II*"), and affirmed by this Court, *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 1666 (1990) ("*Jenkins II*"). The Court's affirmance of this modified judicial taxation scheme was not without controversy. *See id.*, 110 S. Ct. at 1667 (Kennedy, J., concurring) ("Today's casual embrace of taxation imposed by the . . . federal judiciary disregards fundamental precepts for the democratic control of public institutions.") The *Jenkins II* decision was handed down on April 18, 1990. The District Court's proposed tax increase followed less than three months later.

participate in the decision to levy a tax increase pursuant to *Jenkins II* until it was already structured into the settlement. At the press conference announcing the proposed settlement, the board president stated that board members would not decide whether to approve the proposed levy until after extensive study and a public hearing.

Petitioners are individuals and businesses who own real property within the district. Through counsel, they complied with the District Court's nonparty procedure and timely filed their written objections to the proposed property tax increase. On July 17, 1990, Petitioners appeared before the trial court to oppose final approval of the tax increase as well as the unrepresentative litigation strategy employed by the parties to accomplish it. (The school board had held a public hearing on July 12, 1990 at which Petitioners maintained their opposition.)

The Taxation Injunction

The District Court approved the settlement decree on July 23, 1990 and authorized the $.96 tax increase. (App., A26 & A28.) The trial court found "the tax rate of $4.96 . . . a reasonable maximum tax levy rate for KCMSD to yield sufficient revenue to fund" KCMSD's share of the $68 million in salary increases approved in the settlement. (App., A29.) The court enjoined enforcement of any and all state laws that would prevent the school board "from increasing its tax levy rate to that level in order to fund these salary increases which movants contend, and the evidence . . . indicates, are essential to comply with this Court's desegregation orders." (*Id.*)

At its meeting of August 20, 1990, the school board adopted the $.96 levy increase, and a $4.96 total levy,[3] pursuant to the July 23, 1990 injunction.

[3] This $4.96 levy is comprised of (a) the $2.05 voter-approved levy which

(Footnote 3 continued on next page)

The Appeal

Once it became clear no party—including the State of Missouri—would be seeking review of the District Court's taxation decree, Petitioners timely appealed. (App., A19.) Their August 22, 1990 "protective notice of appeal" explained that it was

> necessitated by the fact that this [July 23, 1990 District Court] order, which permits the KCMSD to increase property taxes another $0.96 without a vote of the people or any meaningful community input in the taxation process, will not be appealed by any party in this desegregation litigation even though this order impairs the interests of KCMSD property taxpayers, who thus far have been denied intervention in this case.

(App., A20.) The notice was filed to protect these taxpayers' "right to seek judicial review" of the July 23, 1990 court order and the August 20, 1990 school board vote. (*Id.*) Petitioners described the trial and appellate courts' previous denials of taxpayer intervention to challenge earlier taxation decisions (App., A21), and expressed their intent to "once again" seek intervention "[n]ow that the School Board has actually adopted the increased levy . . . ." (*Id.*)[4]

(Footnote 3 Continued)

existed prior to the District Court's September 15, 1987 taxation decree; (b) the $1.95 increase ordered by the District Court in 1987, affirmed and modified by the Eighth Circuit in 1988, reversed by this Court in 1990, and eventually ratified by the Kansas City school board; and (c) the $.96 levy increase enjoined by the District Court in 1990 and the subject of this appeal.

[4] At this time, these taxpayers already had pending before the District Court a motion to intervene to seek refunds of the court-ordered property taxes reversed by this Court in *Jenkins II*. (App., A21.) This motion was filed on June 15, 1990, but not granted until October 29, 1990.

On August 28, 1990, Petitioners filed a motion for leave to intervene for the limited purpose of seeking appellate review of the taxation order. The KCMSD, the *Jenkins* Plaintiffs and the American Federation of Teachers, Local 691 opposed intervention and moved to dismiss the appeal.

Intervention

After extensive briefing, the District Court granted intervention on October 23, 1990. (App., A14.) The court found that taxpayers satisfied the interest, impairment and inadequacy of representation requirements of Fed. R. Civ. P. 24(a)(2) and noted that the determination of timeliness in granting a request for intervention "is left to the trial court's sound discretion." (App., A16.) The court agreed that "the taxpayers' property rights and interests were not actually impaired until the School Board levied the tax increase on August 20, 1990." (App., A17.) Though "unusual," the trial court found post-judgment intervention to be appropriate in these circumstances. (*Id.*)

Petitioners received a copy of the intervention order on October 26, 1990 and immediately notified the Eighth Circuit. Apparently, however, the appeals court already had dismissed the appeal "for lack of jurisdiction" because Petitioners' "request for intervention ha[d] not yet been ruled" by the District Court. (App., A13.)

Rehearing

Petitioners timely sought rehearing of the dismissal and filed a second notice of appeal within thirty days of the District Court's intervention order. The Court of Appeals did not formally grant the rehearing request, but through telephone contact and a clerk's memorandum to counsel (App., A12) directed the parties to brief the intervention and timeliness of appeal questions in addition to the propriety of the court-

authorized tax increase. The issues concerning both jurisdiction and the merits were orally argued before the Eighth Circuit panel.

The Eighth Circuit's Decision

The Court of Appeals' opinion (App., A1) and judgment (App., A7) were filed June 25, 1992 along with a Nunc Pro Tunc Order vacating the earlier October 26, 1990 dismissal. (App., A10.) The court deemed Petitioners' "protective" notice of appeal "ineffective" to confer jurisdiction (App., A5), and found the motion to intervene untimely. (App., A6.) The appeals court disregarded the District Court's analysis in granting intervention, concluding instead that the ruling could not "breathe life into rights already foregone." (*Id.*)

REASONS FOR GRANTING THE WRIT

In 1987 and 1988, the lower courts denied taxpayers' initial attempts to intervene in this desegregation case to challenge the constitutionality of judicial taxation; the courts permitted their participation as *amici curiae*. (App., A21.) Since then, the District Court has granted taxpayers intervention on four occasions under varying and unique circumstances.[5]

The intervention and appeal circumstances now before this Court are perhaps the most unusual yet. They provide this Court the opportunity to instruct the lower courts and the parties as to how taxpayers' rights and interests will be protected in this litigation now that it is absolutely clear no party in the case will adequately represent taxpayers against secretly negotiated, unilateral property tax increases tailored to usurp this Court's guidelines in *Jenkins II*. This case also allows the Court to better define its holding in *Jenkins II* with regard to the power of federal trial courts to enjoin local tax increases to fund remedies for constitutional wrongs.

There are special and important reasons for granting this writ. The District Court's post-judgment grant of intervention was proper under Fed. R. Civ. P. 24(a)(2) and taxpayers' timely notice of appeal protected their due process right to appellate review of the new judicially authorized tax increase. *See* U.S. Const. amend. V; Fed. R. App. P. 4(a). The Court of Appeals misapplied this Court's precedent in *NAACP v. New York*, 413 U.S. 345 (1973) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) in dismissing Petitioners' appeal. This Court should settle the important question of federal law raised, *viz.*, whether under the peculiar circumstances here Petitioners moved in a timely fashion to protect their due process interests, including appellate review, in challenging another court-sanctioned tax.

[5] In addition to the intervention decision at issue here, the District Court granted taxpayers intervention (i) in January of 1989 to seek refunds of court-ordered income taxes reversed by the Eighth Circuit; (ii) in October of 1990 to seek refunds of court-ordered property taxes reversed by this Court; and, most recently, (iii) in January of 1991 to oppose the State of Missouri's motion to compel the KCMSD to set even higher tax levies.

Moreover, in approving this $.96 tax increase, the lower courts misapplied this Court's limited grant of authority for judicial taxation in *Jenkins II*. This Court should settle the important due process and Article III questions implicated by federal court injunctions which authorize local taxing authorities to raise property taxes without referendum approval and in violation of state constitutional law.

Petitioners timely moved to protect their interests. They are entitled to appellate review of the new unilateral tax increase. They are entitled to protection from court-enjoined tax increases negotiated by desegregation litigants as a *first* step in increasing desegregation funding.

I.

IN DISMISSING THE APPEAL, THE COURT OF APPEALS MISAPPLIED THIS COURT'S *NAACP V. NEW YORK* AND *MCDONALD* PRECEDENTS AND VIOLATED TAXPAYERS' DUE PROCESS RIGHTS ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT.

The Court of Appeals was unaware of the District Court's grant of intervention when it initially dismissed Petitioners' appeal on the grounds that "none [of the taxpayers] are parties to the action in the district court, and their request for intervention has not yet been ruled by the district court." (App., A13.) In fact, Petitioners *had* been granted post-judgment intervenor status, *had* become parties to the action, and *were* entitled to appeal the taxation decree. Petitioners' timely filing of a "protective"

notice of appeal, pending the grant of intervention, provided the parties with due process notice and preserved jurisdiction for appellate review of the July 23, 1990 order. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36 (1967); *United States v. American Telegraph & Telephone Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). *See also Thompson v. Freeman*, 648 F.2d 1144, 1147 n.5 (8th Cir. 1981) (nonparty permitted to appeal district court's jurisdiction to bind it to terms of injunction).

A proper reading of Fed. R. Civ. P. 24(a)(2) and Fed. R. App. P. 4(a) recognizes that post-judgment intervention is appropriate in "unique situations" where "the intervenor can prosecute an appeal that the existing party has determined not to take." 7C Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* Section 1916 at 451 & 454 (1986). In these unique situations, "intervention is granted solely so that the intervenor can prosecute an appeal." *Id.*, Section 1923 at 517. "Intervention after judgment is unusual . . . [but] may be allowed . . . where it is the only way to protect the intervenor's rights; *e.g.*, where the intervenor would be bound by the judgment and the party purporting to represent him fails to appeal." 3B *Moore's Federal Practice* Para. 24.13 (1987). *See Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The facts presented here constitute a unique and unusual situation. *See Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. banc 1985), *cert. denied*, 478 U.S. 1022 (1986) (post-judgment intervention "justified" and protective notice of appeal conveyed jurisdiction under "peculiar facts of this case"); *Smuck v. Hobson*, 408 F.2d 175, 181-182 (D.C. Cir. 1969).

A. Taxpayers Satisfied Rule 24(a)(2)'s Interest, Impairment And Inadequacy Of Representation Requirements.

The District Court found Petitioners possessed "a significant, direct and personal property interest" impaired by the July 23, 1990 taxation decree (App., A16); no party—particularly the State of Missouri—would adequately represent this interest by challenging "the settlement and tax increase procedure." (*Id.*)

While no one challenges these conclusions, the State's changing stance in this litigation also substantiates the timeliness of Petitioners' post-judgment intervention. The State is described as taxpayers' "representative." (*Id.*) The State's decision to unite, for the first time, with the other parties in seeking unilateral taxation made taxpayers' post-judgment motion to intervene timely and their protective notice of appeal essential. *See American Telegraph & Telephone Co., supra*, 642 F.2d at 1295 (post-judgment intervention justified for the limited purpose of appeal where the government no longer shared prospective intervenor's interest in appeal).

B. The Court Of Appeals Misapplied *NAACP v. New York* When It Held Taxpayers' Intervention To Be Untimely.

This Court's standard for evaluating the timeliness of an intervention request was made clear in *NAACP v. New York, supra:*

> Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id., 413 U.S. at 365-366 (footnotes omitted). The timeliness requirement is designed not to punish an applicant for failing to act more promptly, but to ensure the original parties will not be prejudiced by the applicant's failure to apply sooner. *See* 26 *Federal Practice L.Ed., Parties* Section 59-375 (1984). Where timely intervention is sought for the limited purpose of bringing an appeal, there is no prejudice to the parties. The Court of Appeals' decision in essence "punished" taxpayers because they participated in the court-ordered fairness hearing *first* and *then* moved to intervene once this process proved fruitless.[6]

Taxpayers diligently complied with every procedure established by the trial court for objecting to the settlement agreement and its unilateral tax. Rather than sitting on their hands, as the Eighth Circuit's opinion intimates, Petitioners moved promptly in seeking intervention once the District Court authorized the settlement and the school board approved the tax hike. The District Court agreed that it was not until the court approved the tax increase on July 23, 1990 and the school board actually voted on August 20, 1990 to raise the levy that taxpayers' interests were sufficiently impaired to satisfy federal intervention requirements. (App., A17.)

The determination of timeliness under Rule 24(a)(2) is left to the trial court's "exercise of its sound discretion." *NAACP v. New York*, 413 U.S. at 366. The timeliness of a motion to

[6] In *NAACP v. New York*, the applicants for intervention were provided with sufficient public notice of clearly-delineated court action which directly affected their rights and interests well before any attempt was made to intervene. This Court held that these applicants were untimely because they had waited more than three months after it became "obvious that there was a strong likelihood" that their interests were imperiled. 413 U.S. at 367. There, applicants did not move to intervene or otherwise "take immediate affirmative steps to protect their interests. . . ." *Id.* This conduct is certainly distinguishable from that of Petitioners.

intervene "is measured from the point in time at which it becomes clear that intervention is necessary." *United Airlines, Inc. v. McDonald, supra*, 432 U.S. at 394. The "point in time" governing review of the trial court's exercise of discretion is August 20, 1990, when the tax increase was *adopted* by the taxing authority, not, as the Eighth Circuit believes, on July 3, 1990, when the settlement and tax increase were originally *proposed.* (App., A5.)

The District Court's sound intervention analysis is in accord with Rule 24(a)(2) and controlling case law. The Court of Appeals' conclusion to the contrary must be corrected.

C. The Court Of Appeals Misapplied *McDonald* And Other Circuits' Precedent When It Held Taxpayers' Appeal To Be Untimely.

The Eighth Circuit erroneously read *United Airlines, Inc. v. McDonald, supra*, as imposing on Petitioners and other post-judgment intervenors the duty to file a *motion to intervene* within the 30-day window for bringing an appeal under Fed. R. App. P. 4(a). (App., A6.) The District Court, however, correctly concluded that *McDonald* "[did] not pronounce that post-judgment intervention must be made within the 30-day period from which a judgment may be appealed. Timeliness of the motion to intervene is a matter of discretion for the trial court." (App., A18.)

In *McDonald*, class certification was denied by the trial court and putative members of the class sought post-judgment intervention for the purpose of appealing this denial of certification. This Court held that

> [t]he critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests

> of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.

Id., 432 U.S. at 394. The *McDonald* Court went on to hold that "[t]he critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395-96 (citing *NAACP v. New York, supra*). Applying this standard to the facts presented in *McDonald*, the Court found the intervention request timely because it was filed within the time period in which the named plaintiffs could have taken an appeal. *Id.* However, this Court did not establish Rule 4(a)'s 30-day appeal deadline as the standard for determining the timeliness of post-judgment intervention.

The Eighth Circuit also ignored the clear import of the Fifth Circuit's majority opinion in *Baker v. Wade, supra*, relying instead on Judge Rubin's vigorous dissent. (App., A4-A5.) In *Wade*, the appeals court granted a motion to intervene filed *in that court* by a member of the appellant class who was not the class representative *after* the class counsel withdrew its appeal. The court allowed intervention because of the "special circumstances" of the case. *Wade*, 769 F.2d at 291.

Judge Rubin's dissent actually bolsters Petitioners' position. He reasoned that a motion to intervene filed in a district court by a nonparty who seeks to prosecute an appeal "is significantly different from a motion filed in an appellate court by a nonparty who seeks to intervene in an existing appeal. . . ." *Id.* at 296 (Rubin, J., dissenting). Judge Rubin continued:

> When the motion to intervene is filed in a district court, to enable the would-be intervenor to prosecute an appeal, evidence may be taken on such matters as whether the application is timely, whether the applicant's interest is adequately represented by existing parties, the nature and

> sufficiency of the would-be intervenor's interest, and any other questions pertinent to intervention. . . .

Id. Applying Judge Rubin's analysis to Petitioners' "special circumstances" only reinforces the District Court's conclusion.[7]

Despite its assertion to the contrary, the Court of Appeals *has* placed these taxpayers in a "procedural box from which there is no escape." (App., A5.) Petitioners could not move to intervene until they suffered an impairment of a justiciable interest. Fed. R. Civ. P. 24(a)(2). According to the District Court, this impairment did not occur until the trial court entered its taxation decree and the school board actually voted to levy the new property tax on August 20, 1990. (App., A17.) Yet, according to the appeals court, Petitioners' failure to seek *and obtain* intervention prior to the expiration of Fed. R. App. P. 4(a)'s 30-day appeal deadline—in this case, by August 22, 1990—effectively foreclosed their right to appellate review of the taxation decree.

The Eighth Circuit's opinion suggests Petitioners might have been granted intervenor status in time to notice an appeal if they had moved to intervene before August 22, 1990, and "asked for an expedited decision," and then sought an extension of time in which to bring an appeal under Fed. R. App. P. 4(a)(5). (App., A6). The court grimly confesses that, because the motion to intervene was not filed until August 28, 1992, "[w]e have no way

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[7] The Court of Appeals also relied on *Moten v. Bricklayers, Masons and Plasterers Union of America*, 543 F.2d 224 (D.C. Cir. 1976), when it initially dismissed the appeal (App., A13), though it did not cite the case in its recent opinion. *Moten* is clearly distinguishable in that, there, post-judgment intervention was sought by an employer group that not only had full knowledge of their impaired interests during *three years* of litigation, but also participated in settlement negotiations. Petitioners, on the other hand, were not participants in the agreed-to tax increase.

of knowing whether they would have received such a ruling in time to appeal . . . ." (*Id.*)

This is rather disingenuous. Rule 4(a)(5)'s maximum 30-day extension would provide no meaningful relief. Petitioners' previous requests for intervention all took considerably longer than sixty days before they were granted.[8] In fact, during this very time period, Petitioners already had another motion to intervene that had been pending with the District Court since June 15, 1990. (App., A21.) That motion was not granted until October 29, 1990, six days *after* this motion to intervene was granted.

Under any reasonable set of circumstances, these taxpayers would not have been parties, *i.e.*, granted intervention status, until after the expiration of the appeal deadline, even if extended a month. Thus, the eventual notice of appeal still would have been filed by a "nonparty" and still would have been "protective" in a manner no different than the actual circumstances now before the Court.

The Eighth Circuit has adopted a thoroughly unjust interpretation of the rules, one that will severely limit, if not altogether deprive, post-judgment intervenors of their due process right to appellate review of trial court decisions. *See* U.S. Const. amend V. This serious misapplication of precedent denied Petitioners due process of law and must be reversed by this Court.

[8] *See* footnote 5, *supra*.

II.

IN ENJOINING ANOTHER SCHOOL PROPERTY TAX INCREASE WITHOUT REFERENDUM APPROVAL AS A *FIRST* STEP FOR INCREASED DESEGREGATION FUNDING, THE LOWER COURTS MISINTERPRETED THIS COURT'S *JENKINS II* DECISION.

All parties and all courts in this case have acknowledged that "the imposition of a tax increase by a federal court [is] an extraordinary event." *Jenkins II*, 110 S. Ct. at 1663. This Court held that "[b]efore taking such a drastic step" the trial court is "obliged to assure itself that no permissible alternative would have accomplished the required task." *Id.* Even while affirming the District Court's September 15, 1987 direct levy of taxes in *Jenkins II*, the Court of Appeals modified the future operation of the unilateral property taxation scheme "to more closely comport with limitations upon our judicial authority . . . ." 855 F.2d at 1229.[9]

The unilateral $.96 property tax increase enjoined by the July 23, 1990 settlement decision (App., A29) raises important questions of federal law: Was this "drastic step" consistent with due process? Did the tax levying process employed—a secretive settlement negotiation process leading up to a pro forma court hearing—respect the value of citizen input and "closely comport with limitations upon [the lower courts'] judicial authority"? Did the parties and the lower courts assure themselves that there existed "no permissible alternative"?

These questions can be answered with a resounding no. This tax increase, and the litigation subterfuge leading up to it,

[9] For a more extensive discussion of the taxation decisions and opinions in this action, *see* Petition for Writ of Certiorari at 3-7, filed July 8, 1992, *Clark v. Jenkins*, No. 92-69.

constituted an improper extension of the limited taxing power granted by this Court in *Jenkins II*.[10]

A. This Court's *Jenkins II* Decision Did Not Grant The Kansas City School Board And The District Court Unlimited Power To Increase Property Taxes Without Referendum Approval.

The past decisions of this Court and the Court of Appeals in this litigation make no less sacred—or constitutionally protected—the rights of KCMSD taxpayers to representative taxation. The Eighth Circuit modified the District Court's direct levy out of "a desire to use minimally obtrusive methods to remedy constitutional violations." *Jenkins II*, 855 F.2d at 1314. This Court sustained this commitment to democratic taxation when it stated "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Jenkins II*, 110 S. Ct. at 1661. Even in the extreme case where a court might order taxation, "the unique nature of the taxing power would demand that this remedy be used as a last resort." *Id.*, at 1677 (Kennedy, J., concurring).

Petitioners are still protected against unlawful unilateral tax increases by fundamental constitutional safeguards inherent in due process. *See* U.S. Const. amends. V & XIV. In his concurring opinion in *Jenkins II*, Justice Kennedy warned that "[w]here a tax is imposed by a governmental body other than the

[10] The Court of Appeals did not reach the merits due to the "jurisdictional defect." (App., A6.) However, "[a]s an epilogue," the court pointed out that "[w]ere we to consider" the tax issue, "no showing has been made that there was an error of law or an abuse of discretion in approving the settlement" and tax increase. (*Id.*) Because the lower courts misinterpreted *Jenkins II*, there was an error of law and an abuse of discretion warranting this Court's review.

legislature, even an administrative agency to which the legislature has delegated taxing authority, due process requires notice to the citizens to be taxed and some opportunity to be heard." 110 S. Ct. at 1671 (Kennedy, J., concurring).

In its most basic form, due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Although applying the Due Process Clause is an uncertain enterprise, courts must discover what "fundamental fairness" consists of in a given situation. *See Lassiter v. Department of Services of Durham County*, 452 U.S. 18, 24-25 (1981).

The "fairness hearing" procedures stipulated by the parties in this lawsuit were fundamentally unfair. This hearing was scheduled within just two weeks of the district's press conference announcing the proposed tax increase. At that, the average KCMSD taxpayer was given no direct notice that his property taxes were about to be raised (again)—other than reading the fine print in a tombstone newspaper advertisement. Little opportunity was afforded average citizens to educate and organize themselves for a response. Moreover, written notice and written objections were required to be filed with the federal court and specially served on the parties' attorneys before one could testify at the hearing. How many average citizens can do this?

The secretive process that resulted in the adopting of this $.96 levy increase was not "minimally obtrusive." It did not respect "the integrity and function of local government institutions" and the role of citizen input in these institutions. It could hardly be said to have provided taxpayers with a "meaningful" opportunity to protect their property interests. Affirmance of this process is tantamount to the endorsement of a scheme whereby a "District Court order . . . overrides the citizens' state law protection

against taxation without referendum approval [which] can in no sense provide representational due process." *Jenkins II*, 110 S. Ct. at 1671 (Kennedy, J., concurring).

At the very least, the power to order increases in local tax levies on real estate in the KCMSD is limited in that "it can be exercised only after exploration of every other fiscal alternative." *Jenkins II*, 855 F.2d at 1310. The availability and sufficiency of fiscal alternatives involves "whether the school board has considered alternative sources of revenue, such as the submission of a referendum or legislative authorization for the board to impose other taxes." *Id.*

The property tax increase settlement was a *first step* not a last resort. The parties came to the District Court for another desegregation tax increase before the ink was dry on this Court's *Jenkins II* opinion. They made no attempt to explore other alternatives to secure funds through less drastic means. They did not ask the Missouri General Assembly to look at education funding in Missouri. The school board did not place before district patrons a proposed property tax increase to fund teachers' salaries even though teacher salaries are among the most successful of proposals. No attempt was made to regain the trust of Kansas City taxpayers and seek community involvement in the function of this local government institution. In fact, school board members refused even to discuss tax increases in public, contending they were relevant only within the context of this ongoing desegregation litigation.

B. This Court Should Enunciate Specific Principles To Guide The Parties And The Lower Courts Regarding Future Judicially Authorized Property Tax Increase Proposals.

Justice Kennedy, in his *Jenkins II* concurrence, cautioned against sanctioning the "casual embrace of [judicial] taxation . . should there arise an actual dispute over the collection of taxes as here contemplated . . . ." 110 S. Ct. at 1667 (Kennedy, J., concurring). That "actual dispute" has arisen in this appeal. The parties' closed-door settlement leading to the court-enjoined levy increase further illustrates that, unless this Court lays down clearer guidelines, KCMSD taxpayers will be at the mercy of incessant demands by *all* parties for higher levies to fund rising desegregation costs. It is inevitable because it is so easy.[11]

In addition to reversing this tax increase, the Court should enunciate more definitive principles governing future proposals to increase KCMSD property tax levies outside the standard requirements of Missouri constitutional and statutory law, to-wit:

1. *The parties must truly explore all other fiscal alternatives before proposing to the District Court a property tax increase.* Presently, the *first* option for the parties is to run to the District Court for a "tax increase permit."

2. *Before a property tax increase is proposed to the District Court, an attempt should be made to obtain referendum approval.* The parties, and particularly the KCMSD, must begin now the process of reestablishing some connection between the district and its patrons. Some semblance of accountability must develop.

3. *Before a property tax increase is proposed to the District Court, an attempt should be made to elicit the input of KCMSD*

[11] Other district courts are indicating a willingness to exercise this new Article III taxation power. *See, e.g., Kroll v. St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991). In *Kroll*, the trial court threatened to impose a $.25 increase in property taxes if the county failed to fund renovation and reconstruction of handicapped accessible facilities "through an increased sales tax or in some other way . . . ." *Id.*, 766 F. Supp. at 753.

taxpayers. The airing of taxpayer concerns and suggestions must be accomplished through a process which fairly, timely and genuinely considers taxpayers' thoughts. The July 17, 1990 hearing ordered below was not meaningful.

4. *The financial situation of all Kansas City taxpayers should be taken into account when the courts consider the "reasonable limitation" of any proposed tax increase. See Jenkins II*, 110 St. Ct. at 1663; 855 F.2d at 1314. Comparisons to upper middle-class suburban or unique rural school district levies is not a fair comparison of a "reasonable" KCMSD levy, particularly where overall cost-per-student State funding allocations are ignored.

5. *On remand, the District Court should order the KCMSD to commission a study to determine the actual economic impact these court-ordered or -authorized levy increases are having on the school district's tax base*. Throughout this litigation, various parties have complained about the "economic devastation" of various tax increase proposals. Yet no one really knows how significant is the cause-and-effect relationship between higher school taxes and business and residential flight from the urban district.

6. *The KCMSD and the Jenkins Plaintiffs must begin to show some degree of fiscal responsibility in the funding, expansion and implementation of the desegregation remedy*. The perception of the KCMSD is that of a school district completely out of control. Money is no object. Accountability to the public does not exist.

In sum, the political process must be restored in the operation of the Kansas City, Missouri School District. With the quick and easy use of judicial taxation there will never be any incentive for these litigants to explore funding alternatives that present less intrusive burdens on KCMSD taxpayers and more closely adhere to democratic principles. This Court must correct this serious, unconstitutional abuse of power.

CONCLUSION

This Honorable Court should issue its writ of certiorari to review the special and important questions presented.

Respectfully submitted,

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September 22, 1992

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2461

Kalima Jenkins, by her next friend, Kamau Agyei;
Carolyn Dawson, by her next friend Richard Dawson;
Tufanza A. Byrd, by her next friend Teresa Byrd;
Derek A. Dydell, by his next friend Maurice Dydell;
Terrance Cason, by his next friend Antoria Cason;
Jonathan Wiggins, by his next friend Rosemary Jacobs Love;
Kirk Allan Ward, by his next friend Mary Ward;
Robert M. Hall, by his next friend Denise Hall;
Dwayne A. Turrentine, by his next friend Shelia Turrentine;
Gregory A. Pugh, by his next friend David Winters;
on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691

Appellee,

v.

The State of Missouri; Honorable John Ashcroft,
Governor of the State of Missouri;
Wendell Bailey, Treasurer of the State of Missouri;
Missouri State Board of Education,
Roseann Bentley,
Rev. Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis (Presiding)
Gary D. Cunningham
Rebecca M. Cook
Sharon M. Williams
Members of the Missouri State Board of Education,

Robert E. Bartman,
Commissioner of Education of the State of Missouri,
Appellees,

and

School District of Kansas City, Missouri and
Claude C. Perkins, Superintendent thereof,
Appellees,

Icelean Clark; Bobby Anderton; Eleanor Graham;
John C. Howard; Craig Martin; Gay D. Williams;
Kansas City Mantel & Tile Co.;
Coulas and Griffin Insurance Agency, Inc.; Lucille Trimble;
Berlau Paper House, Inc.; and Andrew J. Winningham,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: June 25, 1991
Filed: June 30, 1992

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Icelean Clark *et alia* appeal from the district court's[1] approval of a partial settlement in the Kansas City school desegregation case, *Jenkins v. Missouri,* No. 77-0420-CV-W-4. On July 23, 1990, the district court approved an agreement of the parties to the suit whereby the tax on property within the Kansas City, Missouri, School District would be raised $.96 per $100 of assessed valuation to pay for salary increases for KCMSD employees. The Clark group consists of various property owners within the district who object to the decision to raise taxes in this

[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

way. Before we can reach the propriety of the settlement, we must first decide whether this appeal lies, since there is question as to whether the Clark group filed an effective notice of appeal. As we conclude that it did not, we need not consider the substantive questions here presented. We dismiss the appeal.

The chronology of events leading up to this appeal is crucial to our holding. On July 3, 1990, the district court entered an order announcing a proposed settlement by the parties to the *Jenkins* litigation of certain issues involving KCMSD employee salary raises and a $.96 property tax increase that would be levied in the district, in part to fund the salary increases. The court held a hearing on the proposed settlement on July 17 and the Clark group's counsel argued against the settlement at the hearing. The district court approved the settlement on July 23, and the Kansas City school board actually voted to levy the tax on August 20.

On August 22, within the thirty day period for filing a notice of appeal, Fed. R. App. P. 4, the Clark group filed such a notice. At that point not only were they *not* parties to the suit, but they had not moved to intervene. On August 28, they finally moved to intervene "for the limited purpose of seeking appellate review of the July 23, 1990 order." The district court granted their motion on October 23, 1990, stating that the Clark group was entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2) since under the settlement they would suffer a pecuniary loss and since no party to the action adequately represented the taxpayers' interests. Order of Oct. 23, 1990, slip op. at 2-6. The district court held that the motion to intervene was timely, stating that "once final judgment was entered, the taxpayers had a legal interest which satisfied the requirements of Rule 24." *Id.* at 6.

About the time the district court granted the motion to intervene, this court dismissed the Clark group's appeal for lack of jurisdiction because the would-be appellants were not parties to the *Jenkins* suit. Order of October 26, 1990. The Clark group sought rehearing and filed a second notice of appeal on Novem-

ber 23, 1990, some four months after the order appealed from. We obtained additional briefing and heard oral argument on the jurisdiction issue and the merits of the appeal.

We conclude that our initial assessment of the matter was correct — that no effective notice of appeal has been filed to confer jurisdiction on the court. When the Clark group filed its first notice of appeal, its members were not parties to this suit and had not even asked to become parties. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). *Accord Karcher v. May*, 484 U.S. 72, 77 (1987); *United States v. City of Oakland*, 958 F.2d 300, 301-02 (9th Cir. 1992).

There are some exceptions to this rule; for instance, a non party may appeal an injunction that purports to bind the non party, *Thompson v. Freeman*, 648 F.2d 1144, 1147 n.5 (8th Cir. 1981). *See generally* 9 James W. Moore et al., Moore's Federal Practice ¶ 203.06 (2d ed. 1991). The Clark group does not argue that any exception to the rule makes intervention unnecessary. The group does, however, cite to *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986), in which a member of a defendant class was permitted to appeal a judgment after the class representative abandoned its appeal on behalf of the class. *After* filing his notice of appeal as a non party, the class member moved for, and was granted, intervenor status in the Court of Appeals, and the Fifth Circuit decided the appeal on the merits. 769 F.2d at 291-92. *Wade* is distinguishable from this case, since a party had initiated the appeal. Judge Rubin's dissent in *Wade* points out that the majority did not hold that the non party class member's appeal was properly lodged, but rather that he would be permitted to intervene in the appeal first lodged, then abandoned by the class representative. 769 F.2d at 295. There was no underlying appeal in this case for the Clark group to intervene in; and, in any case, we are not persuaded that the

Wade case was correctly decided, for reasons stated in Judge Rubin's dissent. 769 F.2d at 293-97.

We conclude that the first notice of appeal, filed before the intervention motion, was ineffective to confer jurisdiction on this court. The second notice of appeal was filed grossly out of time, with no attempt made to obtain any extension of the deadline for noticing the appeal. *See* Fed. R. App. P. 4(a)(4).

Thus, we have no jurisdiction over the appeal.

The Clark group's arguments cannot muddy these clear waters. The Clark group argues that it has been placed in a "procedural box from which there is no escape." They argue that they had no "justiciable interest" that had been "impair[ed]" until the school board voted to levy the $.96 increase on August 20, and that therefore it was impracticable for them to move for intervention before the time for appeal ran on August 22. This argument mistakes the nature of the "interest" requirement of Rule 24(a), and of the very concept of intervention. The language of the rule itself contemplates that the affected party can intervene in proceedings that "may" affect him before harm is done by execution of a court order. *See Little Rock School Dist. v. Pulaski County Special School Dist.*, 738 F.2d 82, 84 (8th Cir. 1984) ("The rule does not require, after all, that appellants demonstrate to a certainty that their interests *will* be impaired in the ongoing action. It requires only that they show that the disposition of the action '*may* as a practical matter' impair their interests.") (emphasis in original). A party claiming an interest in the litigation does not have to wait until he has suffered irreparable harm before he has an interest permitting intervention under Rule 24(a). The Clark group had clear notice as early as July 3 that all the parties to the litigation had agreed to the tax hike. On July 23 the court approved the settlement; at that time (at the very latest) the taxpayers had an interest protectible by intervention as of right.

The Clark group further argues that even if its members had moved to intervene sooner, they probably would not have received a ruling from the district court on their motion in time to file a notice of appeal. We have no way of knowing whether they would have received such a ruling in time to appeal, because they made no motion at all until the time for appeal was already gone. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (holding a motion to intervene for purposes of appeal was timely because it was filed within the period in which the parties could have taken an appeal); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 885 n.2 (8th Cir. 1981) (motion to intervene in appeal filed within time to appeal). If they had moved promptly for intervention, and perhaps had asked for an expedited decision or an extension of the time to appeal, Fed. R. App. P. 4(a)(5), the "procedural box" argument would have considerable force. Since they did none of those things, we are not troubled by this argument.

In light of the Clark group's failure to make a timely motion to intervene and the consequent failure to file a timely notice of appeal, the district court's October 23, 1990, ruling granting the group intervenor status cannot breathe life into rights already foregone.

We therefore dismiss the appeal for lack of jurisdiction. As an epilogue, we observe that though we do not reach the merits of this appeal due to jurisdictional defect, we have studied the parties' briefs and they demonstrate that we are being asked to review an order for abuse of discretion. Were we to consider this issue, suffice it to say that no showing has been made that there was an error of law or an abuse of discretion in approving the settlement.

A true copy.
Attest: /s/ Michael E. Gans
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2461

Kalima Jenkins, by her next friend, Kamau Agyei;
Carolyn Dawson, by her next friend Richard Dawson;
Tufanza A. Byrd, by her next friend Teresa Byrd;
Derek A. Dydell, by his next friend Maurice Dydell;
Terrance Cason, by his next friend Antoria Cason;
Jonathan Wiggins, by his next friend Rosemary Jacobs Love;
Kirk Allan Ward, by his next friend Mary Ward;
Robert M. Hall, by his next friend Denise Hall;
Dwayne A. Turrentine, by his next friend Shelia Turrentine;
Gregory A. Pugh, by his next friend David Winters;
on behalf of themselves and all others similarly situated;
Appellees,
American Federation of Teachers, Local 691
Appellee,
v.
The State of Missouri; Honorable John Ashcroft,
Governor of the State of Missouri;
Wendell Bailey, Treasurer of the State of Missouri;
Missouri State Board of Education,
Roseann Bentley,
Rev. Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis (Presiding)
Gary D. Cunningham
Rebecca M. Cook
Sharon M. Williams
Members of the Missouri State Board of Education,

Robert E. Bartman,
Commissioner of Education of the State of Missouri,
Appellees,
and
School District of Kansas City, Missouri and
Claude C. Perkins, Superintendent thereof,
Appellees,

Icelean Clark; Bobby Anderton; Eleanor Graham;
John C. Howard; Craig Martin; Gay D. Williams;
Kansas City Mantel & Tile Co.;
Coulas and Griffin Insurance Agency, Inc.; Lucille Trimble;
Berlau Paper House, Inc.; and Andrew J. Winningham,
Appellants.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed for lack of jurisdiction in accordance with the opinion of this court.

June 25, 1992

A true copy.
Attest: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2461

Kalima Jenkins, by her next friend, Kamau Agyei;
Carolyn Dawson, by her next friend Richard Dawson;
Tufanza A. Byrd, by her next friend Teresa Byrd;
Derek A. Dydell, by his next friend Maurice Dydell;
Terrance Cason, by his next friend Antoria Cason;
Jonathan Wiggins, by his next friend Rosemary Jacobs Love;
Kirk Allan Ward, by his next friend Mary Ward;
Robert M. Hall, by his next friend Denise Hall;
Dwayne A. Turrentine, by his next friend Shelia Turrentine;
Gregory A. Pugh, by his next friend David Winters;
on behalf of themselves and all others similarly situated;
Appellees,

American Federation of Teachers, Local 691
Appellee,

v.

The State of Missouri; Honorable John Ashcroft,
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Wendell Bailey, Treasurer of the State of Missouri;
Missouri State Board of Education,
Roseann Bentley,
Rev. Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis (Presiding)
Gary D. Cunningham
Rebecca M. Cook
Sharon M. Williams
Members of the Missouri State Board of Education,

Robert E. Bartman,
Commissioner of Education of the State of Missouri,
Appellees,
and
School District of Kansas City, Missouri and
Claude C. Perkins, Superintendent thereof,
Appellees,
Icelean Clark; Bobby Anderton; Eleanor Graham;
John C. Howard; Craig Martin; Gay D. Williams;
Kansas City Mantel & Tile Co.;
Coulas and Griffin Insurance Agency, Inc.; Lucille Trimble;
Berlau Paper House, Inc.; and Andrew J. Winningham,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

ORDER NUNC PRO TUNC

Orders granting rehearing and setting the case for oral argument were not formally entered in this appeal. However, the issues on both jurisdiction and the merits were briefed and orally argued before the panel.

Accordingly, the court's order of October 26, 1990, which dismissed this appeal, is vacated.

June 25, 1992

Order entered at the direction of the Court.
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

314-539-3600
FTS: 262-3600

Michael E. Gans
Acting Clerk

To: All Counsel of Record

From: Michael E. Gans, Acting Clerk

Re: Kansas City School Case – June 25, 1991 Special Session

Date: May 24, 1991

The Court has directed me to inform you that it has set all of the pending Kansas City School Case appeals for oral argument on Tuesday, June 25, 1991 at 9:00 am in Kansas City, Missouri. The arguments will be held in Judge Scott O. Wright's courtroom in Federal Courthouse at 811 Grand Avenue. **Please be present in Judge Wright's courtroom by 8:30 am for check in.** The panel of judges hearing the cases will be Judge Theodore McMillian, Judge Gerald Heaney and Judge John R. Gibson.

The cases to be argued are as follows:

1. No. 90-2314WM
2. No. 90-2895WM
3. No. 90-2977WM
4. No. 90-2461WM
5. No. 91-1398WM.

The Court has not completed its final review of the briefs in all of the cases. However, based on its preliminary review, the panel has indicated to me that it believes the cases all present separate and distinct issues. Each appeal will, therefore, be argued separately. Each appeal will be allotted fifteen minutes per side for argument. The Court hopes the parties can reach agreement among themselves concerning the allocation of the allotted time. If the parties have suggestions concerning the order of argument or the time allocation, they should contact me. I will pass all of your suggestions along to the panel.

Appeal No. 90-2461WM concerns the Clark group's petition for rehearing of an order of dismissal. The panel has asked me to inform you that it invites additional briefing in this appeal on the issues of the propriety of intervention and the timeliness of the appeal. These supplemental briefs are due on Tuesday, June 18. Any party wishing to make a reply to any of the supplemental briefs must do so by Monday, June 24, 1991.

If you intend to present oral argument at the Special Session, please return the enclosed calendar acknowledgment form to my office. No other notice of this session will be sent to you.

As in the past, I invite your questions and comments. If I can be of any assistance to you, please feel free to call me.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2461

Icelean Clark, et al.,
Appellants,

v.

Kalima Jenkins, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

Filed: October 26, 1990

ORDER

Appellants have filed a notice of appeal, which it described as a "protective notice of appeal," and, because none are parties to the action in the district court, and their request for intervention has not yet been ruled by the district court, the appeal is dismissed for lack of jurisdiction. *See Karcher v. May,* 484 U.S. 72, 77 (1987), and *Moten v. Bricklayers, Masons and Plasterers Intern'l Union of America,* 543 F.2d 224 (D.C. Cir. 1976).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants,

BOBBY ANDERTON, et al.,
Applicants for Intervention.

ORDER

[Filed: October 23, 1990]

Before the Court is the Property Taxpayers' ("taxpayers") motion and suggestions for leave to intervene for the limited purpose of seeking appellate review. Plaintiffs, the KCMSD and AFT Local 691 filed a memorandum in opposition. The taxpayers filed a reply to the joint memorandum in opposition. The Court will grant the taxpayers' motion to intervene for the limited purpose of seeking appellate review.

On July 3, 1990 this Court entered an order announcing a proposed property tax increase settlement involving KCMSD employee salary raises and a $0.96 property tax increase to help fund salaries. This Court's order set a procedure for non-party response to the proposed settlement and tax increase, including filing written objections and a public hearing. Taxpayers complied with the Court's procedure and filed a notice to appear and written objections. On July 12, 1990 the KCMSD held a public hearing which the taxpayers attended and voiced objections to

the property tax increase. On July 17, 1990 the Court held a fairness hearing in which the taxpayers appeared and voiced objections to the proposed property tax increase.

The taxpayer applicants are KCMSD property taxpayers. As a direct result of this Court's July 23, 1990 order authorizing a maximum property tax levy of $4.96 (per $100 assessed valuation), and the KCMSD's August 20, 1990 levy setting the tax rate at $4.96 for the 1990 tax year, taxpayers will be obligated to pay a $0.96 property tax increase. In order to preserve appellate review, on August 22, 1990 taxpayers filed a protective notice of appeal of the July 23, 1990 District Court order.

Pursuant to Fed. R. Civ. P. 24(a)(2), taxpayers assert that they have a right to intervene for the limited purpose of seeking appellate review of the District Court's July 23, 1990 order. Alternatively, taxpayers assert that they should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(2).

Fed. R. Civ. P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is already adequately represented by the existing parties.

A party seeking intervention must assert a direct, substantial stake in the outcome of the litigation, and further, that this stake will be adversely affected. Taxpayers assert that they have an interest relating to the subject matter of this action as a direct result of this Court's order and the KCMSD's August 20, 1990 approval of a $0.96 increased property tax levy. Taxpayers submit that they will suffer direct pecuniary loss that is fairly

traceable to the actions of this Court and the parties to this litigation. "Interests in property are the most elementary type of the right that Rule 24(a) is designed to protect." *Planned Parenthood* v. *Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir. 1977). Therefore, taxpayers possess a significant, direct and personal property interest in the issues raised by this Court's order and the KCMSD levy. Disposition of the action may, as a practical matter impair or impede the taxpayers' ability to protect that interest.

Taxpayers assert that they will not be adequately represented by the State in this matter. The State is presumed to adequately represent the taxpayers. *See McLean* v. *Arkansas*, 663 F.2d 47, 48 (8th Cir. 1981). Therefore, there must be a concrete showing of circumstances that make the representation inadequate. Taxpayers claim that their interests in seeking review of this Court's order and the process by which the tax increase was accomplished will not be represented by the parties to this action. Taxpayers point out that their representative, the State, has agreed to the settlement and tax increase procedure. Taxpayers assert that no clearer showing of the State's failure to represent them can be made than by the State's acquiescence in the settlement decree and the State's failure to file a timely notice of appeal of the July 23, 1990 order. Taxpayers cite *United States v. American Telegraph & Telephone Co.*, 642 F.2d 1285 (D.C. Cir. 1980), wherein the court held that intervention was justified for the limited purpose of appeal if the government no longer shared prospective intervenor's strong interest in appealing to protect one aspect of the litigation.

Finally, Fed. R. Civ. P. 24 requires that an application to intervene in federal litigation must be "timely." The determination of timeliness is left to the trial court's sound discretion. *NAACP v. New York*, 513 U.S. 345 (1973). Taxpayers assert that their request for intervention is timely. Taxpayers state that the opportunity to seek appellate review of the legality of the tax

increase procedure did not arise until the District Court entered its July 23, 1990 order approving the settlement and authorizing the tax increase. Furthermore, the taxpayers' property rights and interests were not actually impaired until the School Board levied the tax increase on August 20, 1990.

The plaintiffs, KCMSD and AFT Local 691 urge that the taxpayers' motion to intervene is untimely because it should have become clear to the taxpayers that intervention was necessary on July 3, 1990—the date on which the Court ordered publication of a notice in the *Kansas City Star* and *Kansas City Call* concerning the proposed settlement of the salary increase dispute and the July 17th fairness hearing. However, timeliness of a motion to intervene is measured from the point in time at which it becomes clear that intervention is necessary. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). Taxpayers assert that prior to August 20, 1990, they did not have a justiciable claim regarding the issues in the July 23, 1990 order.

Taxpayers admit that intervention after judgment is unusual, but appropriate, where the intervenor would be bound by the judgment and the party purporting to represent the intervenor fails to appeal. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). In *McDonald*, a motion to intervene was filed promptly after the final judgment of a district court. The *McDonald* court considered whether the motion was timely under Fed. R. Civ. P. 24. The court allowed intervention stating: "Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal. The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after entry of final judgment. *Id.* at 395-96.

Plaintiffs emphasize that the *McDonald* plaintiff filed her motion to intervene within the 30-day period to take an appeal. In this case the taxpayers filed their protective notice of appeal on August 22, within the 30-day period to take an appeal, but

filed their motion to intervene on August 28—thirty-seven days after this Court's order. However, *McDonald* does not pronounce that post-judgment intervention must be made within the 30-day period from which a judgment may be appealed. Timeliness of the motion to intervene is a matter of discretion for the trial court. The critical fact in *McDonald* was that once the final judgment was entered, the appellant had a legal interest which satisfied the requirements of Fed. R. Civ. P. 24. In the instant case, the Court finds that once final judgment was entered, the taxpayers had a legal interest which satisfied the requirements of Rule 24.

Accordingly, it is hereby

ORDERED that the taxpayers' motion to intervene for the limited purpose of appealing this Court's order of July 23, 1990 and the property tax authorized therein is granted.

/s/ Russell G. Clark
RUSSELL G. CLARK, JUDGE
UNITED STATES
DISTRICT COURT

Date: October 23, 1990

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Appellees-Plaintiffs,
vs.
STATE OF MISSOURI, et al.,
Appellees-Defendants,
ICELEAN CLARK, et al.,
Appellants.

NOTICE OF APPEAL

[Filed: August 22, 1990]

Notice is hereby given pursuant to Fed.R.App.P. 3 and 4 that Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., Coulas and Griffin Insurance Agency, Inc., Lucille Trimble, Berlau Paper House, Inc., and Andrew J. Winningham do hereby appeal to the United States Court of Appeals for the Eighth Circuit from the District Court's final order of July 23, 1990 approving a Kansas City, Missouri School District (KCMSD) maximum tax levy rate of $4.96 for property situated within the KCMSD and enjoining enforcement of any and all laws of the State of Missouri that would prevent the Board of Directors of the KCMSD from increasing its tax levy rate by $0.96 to that level.

This is a protective notice of appeal necessitated by the fact that this order, which permits the KCMSD to increase property taxes another $0.96 without a vote of the people or any meaning-

ful community input in the taxation process, will not be appealed by any party in this desegregation litigation even though this order impairs the interests of KCMSD property taxpayers, who thus far have been denied intervention in this case. No party to this action will represent the interests of KCMSD property taxpayers by appealing this order.

On July 3, 1990, the District Court entered an order announcing a proposed settlement by the parties in this action of certain issues involving the increase of school district employees' salaries. This settlement included authorization of a $0.96 KCMSD property tax increase to fund a portion of the settlement. This order set forth a procedure for public response to the proposed settlement and tax increase, including the filing of written objections and a public hearing.

Appellants, through counsel, appeared before the Kansas City School Board on July 12, 1990 and voiced their objections to the process by which the levy increase was to be accomplished. Appellants complied with the District Court's established procedure and filed with the District Court their timely notice to appear before the court and their written objections to the proposed property tax increase. On July 17, 1990, Appellants, through counsel, appeared before the District Court to further argue against approval of the proposed property tax increase.

The District Court approved the settlement decree and tax increase by its order of July 23, 1990. On August 20, 1990, the School Board adopted the $0.96 levy increase, and a $4.96 levy, pursuant to the July 23, 1990 order.

This notice of appeal is filed to protect Appellants' right to seek judicial review of the July 23, 1990 order and the School Board's August 20, 1990 decision to set the property tax levy at $4.96. These property taxpayers have complied with the procedures set forth by the District Court for taxpayer comment and objection to the tax increase. These property taxpayers were

denied intervention in this litigation by the District Court in October, 1987, when issues concerning federal court taxation first arose; the District Court did permit their participation as litigating *amici curiae*. During the appeal of the District Court's September 15, 1987 judicial taxation decision, the Eighth Circuit Court of Appeals did not rule on these property taxpayers' motion to intervene before the Eighth Circuit, but permitted their participation in additional briefing and oral argument. On June 15, 1990, following remand to the District Court of the United States Supreme Court's April 18, 1990 decision in *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990), these property taxpayers moved to intervene before the District Court to seek refunds of unlawfully collected court-ordered property taxes. The District Court has not ruled on that intervention request.

Now that the School Board has actually adopted the increased levy, Appellants will once again be moving to intervene in the District Court for the limited purpose of appealing the court's July 23, 1990 order and the School Board's August 20, 1990 tax hike. Intervention after judgment may be allowed where it is the only way to protect an intervenor's rights, *e.g.*, where, as here, an intervenor would be bound by the judgment and the party purporting to represent her fails to appeal. Moore's Federal Practice para. 24.13 (2nd ed. 1987). *See United Airlines v. McDonald,* 432 U.S. 385, 395-396 (1977). *See also United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285 (D.C. Cir. 1980) (intervention justified for limited purpose of appealing ruling where government no longer shared prospective intervenors' strong interest in appealing to protect one aspect of the litigation). Once the District Court enters a decision on Appellants' request for intervention, Appellants will file a second appeal to the Eighth Circuit and move to consolidate that second appeal with this protective appeal.

Respectfully submitted,

LANDMARK LEGAL
FOUNDATION

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by first-class U.S. mail, postage prepaid, this 22nd day of August, 1990 to:

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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,
v.
THE STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 23, 1990]

Pending before this Court are Plaintiffs' Motion for Year VI Program and Budget Modifications, filed March 21, 1990, AFT Local 691's Motion for Year VI Program and Budget Modifications, filed April 3, 1990, and KCMSD's Supplemental Motion for Approval of Salary Increases as Part of the Desegregation Plan for 1990-91, filed April 9, 1990, in which the three movants allege that in order to fully implement this Court's desegregation orders it is essential for the Kansas City, Missouri, School District ("KCMSD") to increase the level of salaries paid to its employees in order to attract and retain qualified employees essential for these purposes. Salaries in the KCMSD have been an issue in this litigation since early 1989, when plaintiffs moved this Court for funding of a comprehensive salary study for the KCMSD and that request was approved by the July 25, 1989 Order of this Court. Salary increase matters were raised before the Desegregation Monitoring Committee ("DMC") in February, 1990, heard by that Committee in March, and motions were filed in this Court between March 21 and April 9, 1990.

The State has opposed these motions, denying the movants' factual and legal contentions. Extensive discovery, including more than 25 depositions, inspection of thousands of documents, and the exchange of interrogatories preceded a hearing on the salary issues. Over four days of trial were conducted in June. These matters were widely publicized in the media. Before completion of trial the parties agreed to a compromise of disputed claims and presented to the Court this Order as proposed by them. Based on the entire record herein, the agreement of the parties and this Court having held a hearing on July 17, 1990, the Court finds the Agreement of the parties to be a fair, reasonable, and adequate settlement. It is therefore ORDERED:

1. The Kansas City, Missouri, School District is authorized to increase its salaries paid to its employees during the 1990-91 and 1991-92 school years by a total of up to $68 million. Over that two-year period, the State shall pay $34 million of that increase, and the Kansas City, Missouri, School District shall pay the remainder, with no joint and several liability.

2. The State of Missouri shall pay to the Kansas City, Missouri, School District the sum of $15 million as needed to fund salary increases for KCMSD employees for the 1990-91 school year and shall pay to KCMSD the sum of $19 million as needed to fund salary increases for KCMSD employees for the 1991-92 school year. The State shall deposit these funds in a separate interest-bearing account maintained by KCMSD with the interest earned on this account credited to the State's obligation under this Order. The proposed salary schedule for 1990-91 is attached hereto as Attachment A.

Cost of subdivision a) to e) of paragraph two shall be paid out of the $68 million authorized in paragraph one.

a. Salary increases shall be given to the following classifications of employees during the two years of this agreement:

i. Senior Curriculum Coordinators (there are nine such positions, four funded by the LRMP [two science, one foreign language, and one fine arts coordinator] and five funded by the operating budget, one social studies, one language arts, one reading, one math, and one science coordinator) from step one at $53,700 to highest step at $59,950.

ii. Central High School Computer Systems Manager from first step at $49,000 to highest step at $57,400.

iii. Central High School Computer Technician from first step of $38,000 to highest step of $44,800.

iv. Animal Assistant and Greenhouse Technician from first step of $31,000 to highest step of $33,800.

b. The KCMSD shall develop job requirements for every teaching and administrative position at every magnet school. Such job descriptions for teachers shall include experience, training or demonstrated interest in the subject matter of the theme of the magnet school. Such job descriptions for principals shall include experience, training, or demonstrated interest in the magnet theme except where the District is unable to appoint a candidate who satisfies such a criterion. In such instances the District may appoint a candidate with preferable administrative and managerial skills if it simultaneously adopts a plan by which such candidate may reasonably be expected to acquire familiarity with the theme. The Desegregation Monitoring Committee shall have the authority to monitor such plans and review their implementation. These job descriptions shall be adopted by September 1, 1990 and applicable to new teachers and administrators as well as those wishing to transfer into a magnet school. Staff assigned to magnet schools on or before September 1, 1990 shall have until September 1, 1992 to meet the requirements for their positions.

c. All staff assigned to magnet schools shall, in addition to the currently required forty hours of summer magnet theme staff development, participate in an additional forty hours of magnet theme in-service during the school year. In order to accomplish this, the teacher's school year will be extended by five days and teachers in traditional schools will also be required to participate in forty hours of staff development during the school year.

d. The KCMSD shall plan and implement procedures to assure that the existing process for evaluating principals and teachers is actually utilized starting September 1, 1990. The KCMSD shall make a good faith effort to use the results of its evaluation process to improve the quality of performance of its personnel.

e. The District may fund increases in substitute teacher pay, compensation for staff supervision of extra-curricular activities, and the staff liability insurance fund. The District may also fund a five-day new teacher training program as proposed in the pending motions.

3. In order to fund the District's share of the $68 million increase, KCMSD is hereby authorized to increase its property tax levy rate for the 1990 and 1991 tax years by 96¢ per $100 assessed valuation, so that the total KCMSD property tax levy rate in each such year may be increased to $4.96. If at the end of the 1991-92 school year any of the $68 million remains unspent, one-half of the unspent funds shall be returned to the State, and KCMSD's one-half shall be credited toward its desegregation obligations.

4. The Court finds that the highest tax levy rate ever approved by KCMSD voters was $4.23, that the average tax levy rate of the highest three school districts in Jackson County is currently $4.46, and that the highest levy rate of any school district in Jackson County is currently $5.07. Pursuant to the decision of the United States Court of Appeals for the Eighth Circuit dated August 19, 1988 and the decision of the United States Supreme

Court dated April 18, 1990, this Court finds that the tax rate of $4.96 is a reasonable maximum tax levy rate for KCMSD to yield sufficient revenue to fund KCMSD's share of the salary increases authorized by this Order, and the Court hereby enjoins enforcement any and all laws of the State of Missouri that would prevent the Board of Directors of the Kansas City, Missouri, School District from increasing its tax levy rate to that level in order to fund these salary increases which movants contend, and the evidence at the conclusion of movants' case indicates, are essential to comply with this Court's desegregation orders.

5. In order to assure that the 96¢ levy rate increase will yield sufficient revenue to fund KCMSD's share of the salary increases authorized by this Order, KCMSD may seek to remove from escrow accounts established pursuant to State law, pending the disposition of any protest litigation, any taxes paid under protest. The State shall guarantee that KCMSD will be able to refund any taxes paid under protest on issues raised by this Order, if the Court ultimately rules in favor of the protesting taxpayer.

6. It is further ORDERED, based on the agreement of the parties, that KCMSD will, throughout the pendency of this Order, collect systematically and report periodically to the DMC and the parties appropriate data regarding the results of its recruiting efforts. KCMSD also agrees that it will within three months of the date of this Order begin implementation of a reorganization of its recruiting efforts by adopting a plan and schedule intended to improve the results of its personnel recruiting.

7. In agreeing to this Order, no party waives its rights with regard to positions taken in this litigation and each party specifically preserves its rights to make whatever arguments it deems appropriate with regard to these issues after the conclusion of the 1991-92 school year covered by this Order.

/s/ Russell G. Clark
Russell G. Clark
United States District Judge

Dated: July 23, 1990

AGREED TO FORM AND CONTENT:

/s/ Arthur A. Benson II
Arthur A. Benson II
Counsel for Plaintiffs

/s/ Doyle R. Pryor
Doyle R. Pryor
Counsel for AFT
Local 691

/s/ Allen R. Snyder
Allen R. Snyder
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School District

/s/ Michael J. Fields
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State of Missouri