

BRIEF FOR APPELLANTS

In the
Supreme Court of the United States
October Term, 1976.

No. 7511

NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE,

Appellant,

v.

THE TRANSITIONAL DESEGREGATION PLAN
OF TUCKAHOE, ET AL.

Appellee.

On Writ of Certiorari to the United States
Court of Appeals for the Thirteenth Circuit.

BRIEF FOR APPELLANTS.

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Opinions Below.

The United States District Court for the District Court of Douglass denied the Appellant's motion to intervene under Fed. R. Civ. P. 24(a) (SF.5). The court denied the Appellant's motion to intervene on the ground that the class was adequately represented, this question having been decided by the court upon its original holding that the class action was maintainable under Rule 23.

In adopting The Transitional Desegregation Plan ("the Plan") as its final decree, the district court approved the proposed plan both as a proper settlement under Rule 23(e), and as lawful on its merits (SF.6).

Jurisdiction.

This Court's jurisdiction of this case is derived from United States Code Title, 28, § 1254(3).

Constitutional Provisions and Rules Involved.

The texts of the following constitutional provisions and rules relevant to the determination of this case are set forth in the Arguments: U.S. Const. amend. 14; Fed. R. Civ. P. 24(a) and 24(b).

Questions Presented.

I. Should intervention as a matter of right have been allowed where, as here, the motion was timely filed, the Appellant could show an interest in the subject matter, the Appellant's interest would be impaired by the disposition of this action and the interests were not adequately represented by the existing parties?

II. Should the district court have exercised its discretion and decided whether permissive intervention should have been allowed under Rule 24(b) where, as here, it erroneously denied the Appellant's right to intervene under Rule 24(a)?

III. Did the district court abuse its discretion when it entered a final judgment on an unconstitutional Plan that would be totally ineffective in

dismantling the dual operated school system which fastens and supports racial segregation?

Statement of the Case.

In 1960, Black American parents initiated a class action suit against the Board of Education of Tuckahoe, Douglass seeking the orderly but expeditious desegregation of racially segregated public schools (SF.1). The original action, known as *D.T. Calhoun, et al. v. R.S. Coker, et al.* was brought under old Fed. R. Civ. P. 23(a)(3) [New Fed. R. Civ. P. 23(b)(2)] (SF.4). Following a full exploration of the allegations, the federal district court ordered the Tuckahoe School Board to prepare a desegregation plan that complied with the standards set forth in the Denver and Detroit decisions. Subsequently the Court of Appeals for the Thirteenth Circuit affirmed the Total Integration Plan.

Due to the Total Integration Plan's massive unpopularity in both the Black and White communities, the district court appointed a Bi-racial Committee in May, 1975 to mediate settlement talks between community factions. Mediation sessions were held regularly thereafter, and these meetings resulted in the drafting of the Transitional Desegregation Plan of August 26, 1975 (SF.2).

The Transitional Plan made the following provisions:

1. Of the school district's current sixty percent (60%) Black student population, sixty percent (60%) of them would remain in schools ninety percent (90%) or more Black. More specifically, of the sixty percent (60%) Black student population, seventy-three percent (73%) attend schools that are eighty to one-hundred percent (80-100%) Black, while fifty-nine percent (59%) are in ninety-five to one hundred percent (85-100%) Black schools (SF.2).
2. The school board would have to take all necessary steps including the appropriation and expenditure of additional funds—up to double the per pupil average in schools that are predominantly White—to ensure that achievement averages on standardized tests in schools with predominantly Black enrollments are brought up to and maintained on a level equal with achievement levels at predominantly White schools. The failure of the Tuckahoe school district to obtain this progress toward achievement parity would justify the immediate reopening of the suit for the purpose of reinstating the Total Integration Order (SF.2,3).
3. The plan incorporated the mandatory Thirteenth Circuit provisions of majority (White) to minority (Black) transfer and faculty and staff desegregation.

On June 18, 1975, a hearing was held for the purpose of assessing the adequacy of representation and for selecting the attorneys of record. All parties and persons were granted an opportunity to object to representation of record. No objections were advanced (SF.5). Thereafter, by voluntary agreement, the Legal Defense Fund, Inc. (the LDF) and the Tuckahoe branch of the National Association for the Advancement of Colored People (NAACP) were determined to be counsel for the Plaintiffs. Moreover, they were to be the exclusive representatives of the Plaintiffs in all their dealings with the Defendants and the court (SF.5). At that crucial time, the LDF recognizing that the Plan would not achieve racial desegregation after exten-

sively reviewing the Plan, reversed its position and directed its staff attorney not to sign the Plan (SF.5).

Upon reviewing the Transitional Desegregation Plan, the national office of the NAACP ordered, in conformity with its long established organizational policies, the Tuckahoe branch to repudiate the Agreement (SF.5). It refused, and instead directed its counsel to sign it. Thereafter, the national office suspended the branch's officers. Despite the immediate efforts of the national office to regain control of its runaway branch which flaunted national policy, the district court ruled that the Plan would be summarily enforced on the grounds that a settlement agreement once entered into cannot be repudiated by either party. The LDF then filed a motion on behalf of the NAACP to intervene in the class action under Fed. R. Civ. P. 24(a) and in accordance with Fed. R. Civ. P. 5(a), 5(b) and 7(b), on the basis that the interests of the NAACP membership affected by the order were not adequately, or, indeed, to any degree, actually represented (SF.5).

The district court denied the NAACP's motion to intervene on the ground that the class was adequately represented, the court having decided in its original holding that the class action was maintainable under Fed. R. Civ. P. 23 (SF.5).

In adopting the plan as its final decree, the district court found that it was "fair, adequate and reasonable." Further, the district court held that the proposed plan was both a proper settlement under Rule 23(e) and lawful on its merits.

Summary of Argument.

The district court committed reversible error when it denied the Appellant's motion to intervene as a matter of right under Fed. R. Civ. P. 24(a). The Appellant was a proper party to intervene because the Appellant has a large and actively concerned membership within the plaintiff class whose constitutional rights were and are being violated. The Appellant demonstrated that its motion was timely, that it had a major interest in the subject matter, that its membership will be inescapably, unconstitutionally and unjustly impaired by the disposition of the action, and finally that the interests of its membership was not adequately represented if such interests were represented at all. Even assuming *arguendo* that the NAACP's motion was properly denied, the Appellant asserts that the district court judge abused his discretion by not allowing permissive intervention under the liberal interpretation given to Fed. R. Civ. P. 24(b).

Further, the district court's action was contrary to holdings of prior case decisions in that the court adopted the blatantly unconstitutional Transitional Plan which perpetuates segregated schools and resuscitates the dead and wholly discredited doctrine of "separate but equal."

The Appellant moved to intervene to protect the members within the plaintiff class who may be bound. The NAACP is the only organization that has taken an appeal in order to protect the large and unrepresented plaintiff class which may be subjected to judicially sanctioned, in deed judicially created, racial segregation in the Tuckahoe school system.

ARGUMENT.

I.

The Appellant was denied due process and its rights under Rule 24(a) when the District Court refused to allow it to intervene to protect its members' interests.

In the proceedings below, the NAACP moved that it be allowed to intervene in order to protect its members' interests in the suit denominated as *D.T. Calhoun v. R.S. Coker*. Appellant's need to intervene was predicated upon the following facts:

1. The unwillingness on the part of counsel of record to persistently negotiated for complete desegregation of the Tuckahoe, Douglass school district.
2. The abandonment on the part of counsel of record to fully represent the membership according to the NAACP's binding national mandates concerning school desegregation.
3. This abandonment arose when counsel of record insisted upon signing an unconstitutional desegregation plan which denied due process to members within the plaintiff class. Because of this abandonment the NAACP members, and others, were left without adequate representation.

The district court denied the NAACP's motion to intervene on the ground that the class was adequately represented, the court having decided that motion by its original holding that the class action was maintainable under Fed. R. Civ. P. 23 (SF.5). (It is readily apparent and logical that the district court, in ruling that the class was adequately represented, believed that the NAACP would have been a proper intervenor had the court found otherwise.)

When the district court denied the appellant's motion to intervene under Fed. R. Civ. P. 24(a) it committed reversible prejudicial error. The lower court's action does substantial violence to Fed. R. Civ. P. 24(a) and flatly ignores prior case decisions interpreting this rule. In the case at bar, the NAACP is appealing the court's error in denying its rights to intervene under Fed. R. Civ. P. 24(a).

Intervention in a federal court is governed by Fed. R. Civ. P. 24. Specifically, Rule 24(a) governs nonstatutory intervention as a matter of right. It provides as follows:

Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Judicial construction of this rule has led to the identification of four important requirements that must be satisfied before intervention as a matter of right is allowed. These requirements have consistently been labeled as timeliness; showing of an interest in the subject matter of the action; showing that the protection of the interest may be impaired by the disposition of the

action and showing that the interest is not adequately represented by an existing party. Since the district court based its decision entirely upon the adequacy of legal representation, Appellant's position is that judicial review as to the other requirements is unnecessary. Consideration is given to other intervention requirements only for purposes of demonstrating to this Court that intervention was otherwise proper.

A. Clearly, the motion to intervene was timely filed.

1. The inception of the suit is not solely dispositive

In determining whether a motion to intervene is timely, consideration must be given to Mr. Justice Blackmun's language in the landmark case of *NAACP v. New York*, 413 U.S. 345, 365, 366 (1972).

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. . . .

The leading case *Smith Petroleum Services, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (1970), decided by the Fifth Circuit of Appeals, held:

Whether an application for intervention is timely does not depend solely upon the amount of time that may have elapsed since the institution of the action. . . . The trial court may take into account all the circumstances contributing to delay in the application for intervention.

See, e.g., *Iowa State University Research Foundation v. Honeywell, Inc.*, 459 F.2d 447, 449 (8th Cir. 1972); *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960). Further, in *NAACP v. New York*, *supra* this Court considered and discussed four factors that led to the conclusion that a motion to intervene was untimely filed. This Court's language in *NAACP v. New York* indicates this Court's holding that the amount of time that may have elapsed since the institution of an action is not solely dispositive in the determination of timeliness. Therefore, in the case at bar, the fact that the NAACP moved to intervene sometime after the commencement of the suit does not, of itself, negate the timeliness of its motion.

2. Appellant affirmatively acted at the critical stage

This Court identified the "critical stage" as a test in determining timeliness of a motion to intervene. The "critical stage" is that point in the proceedings where the would-be intervenor becomes cognizant of its representative's failure to adequately protect its interests. At that stage of the proceedings it is incumbent upon the would-be intervenor to take affirmative steps to protect its interest. Often, the incompetence or inability of a believed representative only becomes apparent after the preliminary stages of an action. The "critical stage" in this action occurred when the local counsel abandoned its legal, organizational and moral commitment to fully represent its membership in the negotiations for complete desegregation and contemplated signing an agreement that would ratify the continued dual school system. The NAACP took the following affirmative steps to protect its members' interests at this "critical stage":

1 It immediately instructed the branch to repudiate the agreement;

- 2) It subsequently suspended the branch officers when they wilfully defied the National's mandate and;
- 3) It timely moved to intervene.

Since there was only one critical point and at this point the NAACP affirmatively acted, the test as established by *NAACP v. New York, supra* has been clearly and adequately fulfilled.

3. There are "unusual circumstances" warranting intervention

This Court, in *NAACP v. New York, supra* articulated the "unusual circumstances warranting intervention" test for determining the timeliness of a motion to intervene. This test considers whether the appellant's alleged personal injury, substantiated its claims of inadequate representation, and would be foreclosed from re-litigating the suit.

In the present case the appellants alleged an injury direct and immediate to its members. As a result of the Transitional Plan, sixty percent (60%) of the Black student population will remain in schools ninety percent (90%) or more Black (SF.2). Moreover, of the sixty percent (60%) Black student population, seventy-three percent (73%) attend schools that are eighty to one hundred percent (80-100%) Black, and fifty-nine percent (59%) are in ninety-five to one hundred percent (95-100%) Black schools (SF.2). Therefore, the Transitional Plan makes a violent assault on the equal protection rights of NAACP members. In *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) this Court ruled that school authorities are clearly charged with the affirmative duty to take whatever steps are necessary to convert to a unitary system in which racial discrimination is eliminated root and branch. This Court further held in *NAACP v. New York, supra* that the appellants were unable to substantiate its claim of inadequate representation. However, in the present case, the appellants can demonstrate that the counsel of record did not vigorously protect its membership's interest.

The Tuckahoe branch was, of course, fully aware of the NAACP's longstanding policy on school desegregation which is binding on local branches. When the Tuckahoe NAACP signed the settlement agreement with the knowledge that sixty percent (60%) of the Black students would remain in schools ninety percent (90%) or more Black, they undertook this action squarely and wrongfully against NAACP national policy. The NAACP's General Counsel's statement of June 1973 stated:

The NAACP has a longstanding policy opposing the misuse and distortion of the neighborhood school concept. . . . There is no inherent virtue in having a black child sit next to a white child, as such. However, where the segregation is found to have resulted from governmental action, then that separation makes the education 'inherently' unequal. It has been clearly established that practically all school segregation has resulted from governmental action of one kind or another. The only way to make certain that Black Americans receive an equal education opportunity is to put them in the same classrooms with whites.

At the district court hearing on June 18, 1975, for the purpose of choosing the attorney of record, the Legal Defense Fund, Inc. and the Tuckahoe

branch were agreed upon. The NAACP made no objections because it knew that the local branch was well aware of the NAACP's policy and stance on school desegregation and believed that it would carry out national policy. Further, the national office believed that the local could and would represent its membership—not only according to NAACP guidelines but forcefully and professionally within the freedom-providing provisions of the United States Constitution and the large body of case law interpreting and expounding that document. The NAACP National was sadly mistaken.

4. Appellant was bound by the district court's final judgment.

Finally, this Court considered the appellant's ability to relitigate the suit as an element in determining timeliness. While the appellants in *NAACP v. New York, supra* were free to renew their motion to intervene following the entry of summary judgment, the appellants in the case at bar were bound by the district court's final judgment. As a consequence, the NAACP has been placed in a fatally prejudiced position. It is being forced to make a collateral attack on the final judgment without having been allowed to become a party to the original action by intervention. The issues in the present case are most difficult, if not impossible, to relitigate from the final judgment since the Transitional Plan binds the entire plaintiff class (inclusive of the large and unrepresented NAACP membership).

B. Appellant can show an interest in the subject matter.

The general rule is: when an absentee would be substantially affected in a practical sense by the determination made in an action, he should be entitled to intervene. See, e.g., *Louisell and Hazard, Pleading and Practice: State and Federal*, 749-50 (1962), 4 *Moore Federal Practice Spec. Supp.* 1, 2 (1966). The members within the plaintiff class will be substantially affected if the inadequate Transitional Plan is adopted. Fed. R. App. 4 limits the time when an appeal may be taken. The NAACP is the only organization that has so moved to protect the interests of its membership within the plaintiff class. The limitation of this rule makes it even more compelling for the NAACP to intervene since others are barred from appealing this action.

In the landmark case, *Cascade Natural Gas Corp. v. El Paso National Gas*, 386 U.S. 129 (1967), this Court held that interest in the subject matter can be shown in various ways. El Paso was ordered three years prior to this Court's decision to divest its interest in Pacific Northwest, whose acquisition by El Paso was found to violate § 7 of the Clayton Act. Three appellants were denied intervention by the court, California, a State, where El Paso sells most of its gas, Southern California Edison, a large industrial user of natural gas that purchases from El Paso, and, finally, Cascade Natural Gas whose sole supplier was Pacific Northern (the company that El Paso had acquired and had been given a mandate to divest its interest). This Court decided that California and Southern California Edison could intervene as a matter of right. This court stated that “. . . [w]e need not decide whether Cascade could have intervened as a right under that Rule. There is now in effect a

new version of Rule 24(a) which in subsection (2) recognizes as a proper element in intervention "an interest" in the transaction which is the subject of the action. . . . We conclude that the rule is broad enough to include Cascade." *Cascade, supra* at 136.

In the present subject matter, the NAACP has shown a long history of interest, involvement and accomplishment. Since and before *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the NAACP has concentrated upon financing litigation aimed at ending racial segregation. The NAACP has developed a vast and nationally recognized corporate expertise in the field of school desegregation. *NAACP v. Button*, 37 U.S. 415 (1963). Without a doubt no other organization is so situated and equipped as the NAACP to handle the great and continuing problems that are presented when a school board has been found to violate the constitutional requirements of the 14th Amendment.

The NAACP has a duty to its membership, who are components of the present plaintiff class, to assure them that the dual operated school system, which perpetuates racial discrimination, in Tuckahoe, Douglass is dismantled immediately. The district court erred when it refused to recognize the colossal interests that the NAACP has shown as a group towards school desegregation and the interest that it shows now for its membership in the present case.

C. Appellant's membership interests will be impaired by the disposition of the action.

The local counsel's inadequate, indeed nonexistent, representation is evidenced by his ratification of the unconstitutional Transitional Plan. Since the NAACP did not have the authority to dismiss the counsel of record, its only alternative was to intervene in order to protect its membership interests.

The advisory committee stated in the notes on amendments that:

If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument; if the representation was in fact inadequate, he would not be 'bound' by the judgment when it was subsequently asserted against him as *res judicat*, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. * * * This reasoning might be linguistically justified by original Rule 24(a)(2); but it could lead to poor results. * * * A class member who claims that his 'representative does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its term extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

See, e.g., Cound, Friedenthal, Miller, *Civil Procedure (Supp. 1974)*. Notes on Amendments to Federal Rule 24, 80, 81.

In denying the NAACP's motion to intervene and by subsequently entering a final judgment, the district court transgressed both the letter and spirit of Rule 24(a). In adopting the plan as its final decree, the district

court approved the Transitional Plan both (a) as a proper settlement under Rule 23(e), and (b) and lawful on its merits (SF.6). Hence, the erroneous final judgment order precluded the possibility of relitigating the merits of the Transitional Desegregation Plan while signalling the finale of the court's jurisdiction over the subject matter. This court has repeatedly admonished against actions which are tantamount to a "rush to judgment." In *Green v. County School Board of New Kent*, 391 U.S. 430 (1968) this Court held ". . . whatever plan is adopted will require evaluation in practice, and the court should *retain jurisdiction until it is clear that state imposed segregation has been completely removed* [emphasis added]," and further:

Brown II contemplated that the better course would be to retain jurisdiction until it is clear that disestablishment has been achieved . . . the district courts should retain jurisdiction in school segregation cases to ensure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved. [*Raney v. Board of Education*, 391 U.S. 443, 449 (1968).]

Prior case decisions clearly hold that jurisdiction must be retained. In the case at bar not only does the district court relinquish its duty to retain jurisdiction, it further violates *Green, supra* and *Raney, supra* by delegating its authority and duty to a Bi-Racial Committee. Such relinquishment of jurisdiction, history has shown, is an open invitation to chaos, possible violence, and a continuation of constitutionally prohibited segregation.

D. The interests of the NAACP membership were not adequately represented by the existing parties.

It should be noted that the 1966 Amendment of Fed. R. Civ. P. 24(a) subjects the right to intervene in all cases, in which no statutory right exists, to the concluding phrase "unless the applicant's interest is adequately represented by existing parties." Hence, intervention of right other than statutory intervention, can only be obtained if the applicant's interest is not adequately represented by existing parties. Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of nonfeasance in his duty of representation.

In *Hines v. Rapides Parish School Board*, 479 F.2d 762, 765 (5th Cir. 1973), a test for intervention was established:

[the] proper course for parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in prior action. The petition for intervention would bring to the attention of the district court the precise issues which the new group sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated. . . . 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 intervention. If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed.

The directive from *Hines, supra* created a dual obligation on the part of the would-be intervenor and upon the district judge. It required that the intervenor describe with preciseness those issues that tended to frustrate the goals of the unitary school system. It further required that the district judge review those issues and make a determination by having a hearing on the merits of the issues. In a later case decided by the same circuit, *Calhoun v. Cook*, 487 F.2d 680, 684 (1973), the court held that a hearing was mandatory for those intervenors who met the test set out by *Hines, supra*. This hearing on the motion to intervene had a dual purpose: 1) to afford a hearing on the merits, and 2) to establish a record as a basis from which an appeal could be taken.

The following are the precise issues that the NAACP sought to represent by intervening in the original action. The manner in which the Transitional Plan tended to frustrate the goals of a unitary system are exemplified below.

1. Sixty percent (60%) of the Black students will remain in schools ninety percent (90%) or more Black, while twenty-seven to thirty (27 to 30) schools within the district will have less than ten percent (10%) Black enrollment. The goal of the Transitional Plan is to increase that ten percent (10%) Black enrollment to a maximum of thirty percent (30%). This arbitrary quota does not take into consideration that the racial ratio of Tuckahoe schools is 3:2 (or sixty percent [60%] Black to forty percent [40%] White).

This Court held in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971) that:

[t]he objective today remains to eliminate from public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'

In a school district similar to Tuckahoe's where Black students are sixty percent (60%) of the population and Whites are forty percent (40%), a plan that deliberately intends to leave sixty percent (60%) of the Blacks in schools ninety percent (90%) or more Black is direct and convincing evidence that the school board is intentionally taking minimal steps to desegregate the schools and that such a plan inherently frustrates the goals of a unitary system.

2. The Transitional Plan frustrated the goal of a unitary school system when it adopted the following provision:

The school board will take all steps including . . . expenditure . . . up to double the per pupil average in schools that are predominantly (60 percent or more) White . . . to ensure that achievement averages on standardized tests in schools with predominantly (75 percent or more) Black enrollment are brought up to and maintained on a level equal with achievement levels at predominantly White schools. Measurable progress toward the second year can be obtained by the fourth school year. The failure to do so . . . will justify the . . . reopening of the suit . . . in order to reinstate the Total Integration Order [SF.3].

This action on the part of the school board is an attempt to reinstate a policy of separate but equal education, which was decisively repudiated over two decades ago as "inherently unequal." Studies have shown that doubling or even tripling the per pupil money expenditures in predominantly Black schools is not necessarily the key to raising achievement scores to their White counterparts.¹

Imposing time constraints on the expenditures fails to take into account the impact that segregated schools have had on the learning processes of Black students. Further, it fails to take into account the home environment of Black children, their learning style, and the inadequacy of school facilities where they are taught. The provision also sets guidelines on how Blacks must achieve on standardized tests. Failure to achieve the above stated goal would cause the Total Plan to be implemented. It was the controversy over the unacceptability of the Total Plan that led to the forming of the Bi-racial Committee for the purposes of establishing a plan that would meet the Constitutional guidelines and needs of the parties. Out of the Bi-racial Committee emerged the suspect Transitional Plan which is not only unacceptable because it violates the spirit and letter of previous decisions on school desegregation. See, e.g., *Brown, supra*; *Green, supra*; *Swann, supra*. The NAACP is hard-pressed to understand why the district court would accept a Plan (Transitional) with provisions that would force upon the community the very Plan (Total) which it openly declared unacceptable. This is further evidence that the Plan, as written, does not in good faith go towards fulfilling the goals intended for a unitary system.

3. In ordering the implementation of the Transitional Plan, the court further frustrated the goal of a unitary system by erroneously construing the meaning and intention of the majority to minority transfer policy (SF.6).

A majority to minority transfer policy, as defined by *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir. 1969), means that a school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available and where his race is in the minority. The court erroneously defined majority as White and minority as Black. This definition gives the possibility of two fallacious interpretations, both tending to frustrate the meaning as defined by *Singleton, supra*. The court could have meant that White students comprised the majority racial group in the school district. If so, this interpretation is plainly erroneous. (Blacks, clearly, compose sixty percent [60%] of the district) (SF.1). The only other possible interpretation would mean that majority students (Whites) would be the only students that would be able to participate in the voluntary transfer program. If this was the intent of the court, then such a misconstruing of majority to minority transfer definitely frustrates all attempts towards a unitary system.

Unequivocally, the NAACP was able to meet its obligations by setting forth with exactitude the issues which frustrated and minimized the goals of a unitary school system. It was then incumbent upon the district court judge to make an assessment of the adequacy of the parental group's prior represen-

1. "Equal Educational Opportunity," *Harvard Educational Review* (Cambridge, Mass.: Harvard University Press, 1969).

tation. In order to make this assessment, the district judge was charged with the duty, outlined in *Hines, supra* to afford a hearing on the merits of the motion to intervene. In violating the mandates established by the landmark *Hines* case, the district court judge denied the NAACP due process of law. Further, it precluded the possibility that the NAACP on behalf of its membership could appeal an inadequate final judgment. Intervention should be allowed because no other party has taken an appeal in accordance with Fed. R. App. P. 4. The NAACP's members whose Constitutional rights have been violated by the Plan must have their rights to appeal protected. See, e.g., *Zuber, infra*. By ignoring leading case authority in denying the motion to intervene, the district court judge committed reversible error.

II.

Even assuming *arguendo* that the district court had accurately denied the NAACP's right to intervene under Fed. R. Civ. P. 24(a), nevertheless it should have exercised its discretion and decided whether intervention (permissive) could have been allowed under 24(b).

The NAACP's motion for intervention from the record below shows that intervention was denied solely on the grounds of adequacy of representation (SF.5). The procedural record from below does not show the court exercising its discretion and examining the record and facts of the case for permissive intervention under Fed. R. Civ. P. 24(b).

In the leading case from the Fifth Circuit, *Calhoun v. Cook, supra* the Court of Appeals enumerated the factors a lower court should consider in deciding whether an applicant's motion for intervention had met the requisite preciseness defined in *Hines v. Rapides School Board, supra*. The court stated that should any precise petitions be presented, the court shall afford the opportunity for hearings and shall make findings based upon record evidence adduced at such hearings in accordance with Fed. R. Civ. P. 24. In the case at bar, the lower court entered the order for denial of the motion without opinion. The record is insufficient to show what the court took into consideration in deciding the motion. On the original motion, the NAACP was capable and prepared to meet the standards set out by *Hines, supra*. The holding in *Calhoun, supra* makes it mandatory that the judge have a hearing and make findings for any potential intervenor. The NAACP on remand has a right to such hearings.

While Rule 24(a) gives a broad scope to intervention as a matter of right, intervention under Rule 24(b) is still of great importance for it authorizes permissive intervention when both an applicant's claim or defense and the main action have a question of law or fact in common. Granting of intervention in many of the discretionary cases will facilitate the disposal in one action of matters involving the same questions of law and/or facts. The liberal interpretation that should be given to this rule encourages one action or hearing rather than a multiplicity of actions or hearings. Rule 24(b) states:

Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action

have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

One of the controlling standards for permissive intervention under its liberal interpretation is that "the applicant's claim or defense and the main action have a question of law or fact in common." In exercising its discretion, the court should have looked to the broad span of issues that the NAACP has in fact in common with the existing parties.

Tuckahoe, Douglass' school system violates the Equal Protection Clause of the 14th Amendment.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

It has operated and continues to operate racially segregated schools and has been directed by the lower court to dismantle the dual system quickly and effectively according to prior case decisions. The issue or question of law upon which the NAACP desires to intervene is exactly the same as for the present parties: **THE END OF ALL RACIALLY SEGREGATED SCHOOLS WITH THE ULTIMATE GOAL OF A UNITARY SCHOOL SYSTEM INCLUSIVE OF ALL CHILDREN.**

The liberal application of permissive intervention has allowed many parties an opportunity to intervene who may not have met the criteria for intervention as a matter of right. See, e.g., *Holcomb v. Aetna Life Insurance Co.*, 255 F.2d 577 (10th Cir. 1958); *U.S. v. Martin*, 267 F.2d 764 (10th Cir. 1959); and *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55 (5th Cir. 1964). In cases where a motion to intervene was made as a matter of right, the courts have also taken into consideration whether the party could have intervened under Fed. R. Civ. P. 24(b). The NAACP asserts that the court abused its discretion by not exercising its ability to hear the motion under Fed. R. Civ. P. 24(b) which allows for a more liberal interpretation and intervention.

In conclusion, the NAACP acknowledges that it was permitted to submit an amicus curiae brief. However, notice must be taken of the severe limitations of an amicus brief. By filing an amicus brief, the NAACP was handicapped in four crucial ways:

- 1) The NAACP was unable to protect the interests of its membership.
- 2) The NAACP's mere filing of an amicus brief does not enable it to attack the final decision.
- 3) It prevented the NAACP from examining the good faith of either party.
- 4) And finally, no determination can be made as to the consideration that the court gave to appellant's amicus brief.

Due to the severe limitations of the amicus brief, the NAACP members within the plaintiff class needed representation by the NAACP as a party to the suit, rather than as a friend of the court. The amicus brief is not the means by which a party with extensive real interests in the outcome of litigation protects its interests.

III.

The district court abused its discretion when it erroneously entered the final judgment.

- A. It is essential to the right of review by appeal that the party seeking review should have or represent an interest in the controversy.

The NAACP is a nonprofit membership corporation, whose basic aims and purposes are to secure the elimination of all racial barriers which deprive Black citizens of the privileges and burdens of equal citizenship rights in the United States. The NAACP has underwritten the cost of many desegregation cases and has shown through the years that it has the ability, the expertise, and the dedication to litigate such cases. The NAACP shows its interest not only through its history, but also through its membership in the plaintiff class, who will be irreparably injured if the Transitional Plan is adopted in its entirety. The NAACP not only has members within the plaintiff class who will be injured but it is also the most competent organization which has a membership and policy foundation on which to base its objections to the Transitional Plan.

In the case at bar, the NAACP (the National), was not a party to the action below. The plaintiff class was represented by the local chapter, the Tuckahoe branch of the NAACP. Due to the local's refusal to repudiate the unconstitutional Transitional Plan, the National made a motion to intervene to protect members within the plaintiff class. The timely motion having been denied leaves the plaintiff class in a prejudiced position. No other group has so moved to protect the plaintiff class by taking an appeal from the final judgment. In *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), the court held that:

. . . intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here at least one of the rights which cannot be protected without intervention is the right of appeal.

In *Zuber v. Allen*, 387 F.2d 862, 863 (D.C. Cir. 1967), the court held that:

. . . these Appellants having now sought to stay the effect of the order of the district court following summary judgment, and it having appeared to the satisfaction of the court that although there is no reason to believe that the interest of Appellants were not adequately represented in the district court proceeding, it is not clear that those interests will receive the protection of appellate review, and on that these Appellants should be entitled to be admitted as intervenors in the action in the district court for the purpose, if they be so advised of prosecuting an appeal from the judgment of the district court. . . .

The members of the present plaintiff class are being placed in exactly the same position because no appeal other than the National's has been taken. The NAACP, though not a party below, has shown sufficient interest and reasons why it should, as a matter of right, be allowed to appeal the final decision on behalf of its members within the plaintiff class.

B. The district court judge committed error by entering a final judgment on the Transitional Desegregation Plan.

In the case at bar, the court entered a final judgment order for the approval of the Transitional Plan and further directed that the Bi-racial Committee should be the first party to handle any disagreement over the implementation of the Plan (PS.42). The court further held that no issues would be considered by the court until such procedures were followed and until the Bi-racial Committee certified to the court that it was unable to resolve the disputes (PS.42).

The NAACP realizes that it is quite proper for the court to appoint a Bi-racial Committee to serve in an advisory capacity to assist school authorities in implementing the desegregation plan and in operating and maintaining a unitary school system. However, in the case at bar, the court overextended the proper function of the Bi-racial Committee and virtually left the committee in a judicial rather than an advisory capacity.

Prior case decisions have held that federal district courts should *retain* jurisdiction in school desegregation cases to ensure that a constitutionally acceptable plan is adopted and that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, nonracially operated school system is rapidly and finally achieved. See, e.g., *Green, supra* and *Raney, supra*.

C. Considering the merits of the Plan, the district court entered a final judgment on an unconstitutional desegregation plan that would be ineffective in dismantling the dual operated school system.

The school board has the affirmative duty to implement those guidelines which will dismantle the racially operated schools. However, such a plan cannot be used to perpetuate segregation or to circumvent Supreme Court decisions on desegregation of schools.

The Tuckahoe, Douglass school system's adoption of the Transitional Plan frustrates the goals of a unitary system in the following ways:

1) As previously discussed, *supra* at 15, the Transitional Plan frustrates and violates the concepts of majority to minority transfer policy. Further the school district was aware of the fact that only .03 percent (.03%) of the total student body had participated in the program. Clearly, the school district knew the policy to be inadequate and was charged with an affirmative duty to come forward with a workable plan in order to dismantle the dual operated school system.

2) The school district has the duty to formulate and implement a student assignment plan which does not perpetuate segregation. *Swann, supra*. The Transitional Plan makes provisions which purport to aid in the desegregation of the schools. However, the plan only plans for the movement of seventeen percent (17%) of the total student population (PS.26). The intentions of the student assignment plans perpetuates segregation and racially identifiable schools by leaving sixty percent (60%) of the Black students in schools which are ninety percent (90%) or more Black (SF.2).

In a system with a history of segregation there is a presumption against legitimacy of substantially one-race schools and when a school board un-

dertakes to convert a dual system into a unitary system with the result that a *substantial number of one race schools remain*, then it is presumed that the *conversion has been incomplete*. . . . [Swann, *supra*.]

With sixty percent (60%) of the Black student population remaining in schools ninety percent (90%) or more Black, unequivocally, the conversion has been incomplete.

3) Faculty and staff desegregation is an integral part of any public school desegregation plan. Because of the inadequate record below concerning the total number of faculty and staff members within the district, it becomes impossible to determine whether the rearranging of the staff actually promotes the desegregation of the staff and faculty. The school board has the primary responsibility and duty to desegregate. Moreover, it is charged with a constitutional duty. *Lee v. Macon County Board of Education*, 482 F.2d 1253, 1254 (5th Cir. 1973). By remaining silent on the total numbers of staff and faculty members, according to racial composition, leads the NAACP to the natural conclusion that the Transitional Plan also frustrates the unitary system with its faculty and staff members provisions.

The NAACP is cognizant of the fact that there has been a variety of attitudes and responses to the desegregation of the Tuckahoe, Douglass schools. However, hostility to racial desegregation, community attitudes, and White flight to private schools are not acceptable reasons for achieving anything less than a complete removal of the dual public school system. *Lee, supra; Swann, supra*. What the NAACP is aware of and takes notice to is that the law of the land requires the conversion of a dual school system into a unitary system within which no person is effectively excluded from any school because of race or color.

Conclusion.

Wherefore, Appellants pray for a reversal of the final judgment and the declaration of the Transitional Plan as unconstitutional and a violation of the plaintiff's class rights of equal protection under the 14th Amendment. Even if this Court holds that the Plan is adequate in parts, it should reverse and remand this case to the district court to allow the Appellant to intervene as a matter of right.