No. 13-31262

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OLESS BRUMFIELD, as next friend of Ervin Brumfield, Merita Brumfield, Preston Brumfield, and Alan Brumfield; JOHN DEMLY, Rev.; as next friend of Dorothy Ceasar, Mary Ceasar, and King Johnson Caesar; WOODROW W. WILEY, JR., as next friend of Donna Wiley, Pamela Wiley, and Woodrow W. Wiley, III; VERGIE DELORIS LEWIS, as next friend of Kerry Lynn Sims; ROBERT LEWIS, as next friend of Anthony Lewis and Anice Lewis; HARVEY JOHNSON, as next friend of Ricky Johnson; MOSES WILLIAMS, as next friend of James Lee Williams, Jesse Lee Williams, Brenda Fay Williams, Matra Lucille Williams, and Rhonda Renee Williams, on behalf of themselves and other similarly situated,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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(*Continuation of caption*)

WILLIAM J. DODD, Superintendent of Public Education of the State of Louisiana; ET AL.,

Defendants

MITZI DILLON; TITUS DILLON; MICHAEL LEMANE; LAKISHA FUSELIER; MARY EDLER; LOUISIANA BLACK ALLIANCE FOR EDUCATIONAL OPTIONS

Movants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellee United States agrees with appellants that the Court can resolve this case without oral argument.

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IN THE UNITED STATES COURT OF APPEALS
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No. 13-31262

OLESS BRUMFIELD, *et al.*,

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v.

WILLIAM J. DODD, Superintendent of Public Education of the State of Louisiana, *et al.*,

Defendants

MITZI DILLON; TITUS DILLON; MICHAEL LEMANE; LAKISHA FUSELIER; MARY EDLER; LOUISIANA BLACK ALLIANCE FOR EDUCATIONAL OPTIONS,

Movants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The district court has jurisdiction over this case under 28 U.S.C. 1331 and 1343(a)(3). This is an appeal from a district court decision on November 15, 2013

(R.E. 19-26), denying a motion to intervene as of right.[1] Appellants filed a timely notice of appeal on December 5, 2013 (R.E. 16-17). This Court has jurisdiction under 28 U.S.C. 1291 to review the denial of a motion to intervene as of right. See *Trans Chem. Ltd.* v. *China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 821 (5th Cir. 2003).

STATEMENT OF THE ISSUE

Whether the district court correctly denied appellants' motion to intervene as of right after finding that appellants' interests would be unaffected by the relief the United States currently seeks, without prejudice to appellants' renewing their motion should the United States seek different relief.

STATEMENT OF THE CASE

1. This case began in 1971, when black families, on behalf of all black schoolchildren in Louisiana, challenged the Louisiana State Board of Education's practice of providing assistance to private schools in a manner that impeded desegregation. The State's practice frustrated implementation of desegregation orders entered against many local parishes across the State. In 1975, the district court found the State's support of segregated schools to be in violation of the Equal Protection Clause. See *Brumfield* v. *Dodd*, 405 F. Supp. 338, 348 (E.D. La. 1975).

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[1] "R.E. ___" refers to pages within the consecutively numbered Record Excerpts filed with appellants' opening brief. "Appellants' Br. ___" refers to pages of appellants' opening brief. "ROA." refers to the record on appeal.

The court not only barred the specific practice then at issue, but required the State to create a certification process for private schools seeking public assistance in order to ensure that the State did not in the future support segregated schools. See *id.* at 349-353.

A 1985 consent decree between plaintiffs, the State, and the United States (which had intervened), approved by the district court, elaborated on the certification process, which has become known as *Brumfield* certification (ROA.993-999). Since 1985, the State has provided the United States and plaintiffs' counsel with information that permits them to verify that state aid does not support segregated schools. Twenty-three schools in the State are under current desegregation orders to which the United States is a party, while approximately 12 others are under desegregation orders to which the United States is not a party (ROA.793 & n.13).

2. In April 2012, the State instituted a policy, the Louisiana Scholarship Program, known as the voucher program, under which it provides funding and assigns students to participating schools. See La. Rev. Stat. §§ 17:4011-17:4025. Because of the possibility that this "voucher" program could negatively affect the many desegregation orders still in effect in Louisiana, the United States sought information from the State about the program (ROA.33). When the State refused to provide that information, in January 2013, the United States asked the district

court for, and received, an order compelling certain discovery (ROA.130-131; see also ROA.224 (denying motion for reconsideration)).

In August 2013, the United States asked the district court for additional relief to remedy the State's continuing failure to provide information that would permit the United States to assess whether the voucher program is being implemented consistent with the State's obligations in this case (ROA.236). On September 18, the district court, among other things, ordered the State to provide "an analysis of the voucher awards for the 2013-14 school year respecting impact on school desegregation in each school district presently under a federal desegregation order" (ROA.423). On September 23, 2013, the United States informed the court that, in light of the information already provided by the State and the information the court had ordered the State to produce, the only relief the United States now sought was the creation of a process under which the State would provide the information needed to assess and monitor the voucher program's implementation consistent with the orders in this case on a regular and timely basis (ROA.424-426).[2]

Nonetheless, on September 30, movants-appellants – parents of children currently receiving vouchers to attend private schools – sought to intervene for

[2] The appellants, without explanation, inaccurately characterize this as a request for "the creation of a preclearance process that threatens to end or greatly disrupt the Scholarship Program." Appellants' Br. 7.

limited purposes. Specifically, they told the court, they sought to intervene only to oppose the August motion for further relief filed by the United States (ROA.445, 486). Their moving papers did not acknowledge that the United States no longer sought the relief described in that motion; nor did their papers explain how the movants' interests could be affected by the relief now being sought. Accordingly, the United States informed the court that, in its view, the movants did not meet the requirements for intervention, as the mere request for information from the State did not affect their interests (ROA.529).

3. The district court denied the motion to intervene without prejudice to renewal of the motion later (ROA.821-822). The court observed that the only interest the movants claimed would warrant intervention was "to protect * * * the ability to continue receiving scholarships" (ROA.826) (internal quotation marks omitted). The district court found no need to determine whether such an interest would warrant intervention, since the United States was not seeking any relief that would threaten the retention of the movants' vouchers (ROA.826). After recounting the procedural history, the court concluded:

> Because the Motion that Proposed Intervenors sought to oppose no longer requests the remedy Proposed Intervenors objected to, they lack the necessary interest to intervene. The only remaining issues in the case, at this time, [involve] the sharing of information between the United States and the State of Louisiana. These issues simply do not [affect] the interests of Proposed Intervenors.

ROA.827.

The court did, however, state that, should the United States decide ultimately to seek relief that would threaten their interests, the movants would be free to renew their motion at that time (ROA.828). Additionally, the court permitted the movants to file the same brief as *amici curiae* that they had proposed to file as intervenors (ROA.828).

4. The district court subsequently determined that the United States was entitled to additional information from the State and instructed the parties to submit proposed processes by which that information could be provided (ROA.876).[3] The district court held a January 22, 2014, telephonic status conference with Counsel for the United States and the State (ROA.1005). Following the conference, the court instructed the parties to submit further proposals. It stated that, while the United States was entitled to the information it sought, any order the court issued in response to the pending motion would not include "any requirements for withholding awards while produced data is being reviewed." See Doc. No. 258, at 2.

[3] While these events occurring after the order that is on interlocutory appeal are arguably not properly part of this Court's appellate review, because the appellants discuss them in their brief, we set out them out here for the sake of completeness. See Appellants' Br. 10, 17-18.

SUMMARY OF ARGUMENT

Appellants moved to intervene for the sole purpose of opposing injunctive relief that the United States no longer sought at the time of the motion nor seeks currently. Appellants did not argue below that the relief the United States actually does seek – the disclosure of information, including on the effects of Louisiana's voucher school program on the desegregation of schools subject to desegregation orders – adversely affects their interests or otherwise warrants intervention. Accordingly, any such arguments on appeal are waived.

Even if this Court were to consider appellants' new argument – that the relief the United States actually seeks would so affect their interests as to permit intervention as of right – that argument lacks merit. Appellants make no showing that the information disclosure the United States seeks could affect their access to the voucher program. The district court made clear that, should the United States seek relief that could have such an effect, appellants may renew their intervention motion at an appropriate time. Accordingly, speculation about what relief might be sought in the future is insufficient to warrant immediate intervention as of right.

Appellants' intervention motion was properly denied for the additional reason that their articulated interests are adequately represented by the State. The State has vigorously opposed all relief sought by the United States in this case, and it can be expected to do so in the future. Appellants contend they would make

additional arguments for the same result, but this Court has made clear that differences in litigation strategy do not suffice to show lack of adequate representation.

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT THE MOVANTS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT

As the district court properly found, no party currently requests relief that implicates appellants' interests. Accordingly, the district court correctly denied appellants' request to intervene as of right. The district court's denial of appellants' motion to intervene is reviewed *de novo*. *Ross* v. *Marshall*, 426 F.3d 745, 752 (5th Cir. 2005), cert. denied, 549 U.S. 1166 (2007); *Saldano* v. *Roach*, 363 F.3d 545, 550 (5th Cir.), cert. denied, 543 U.S. 820 (2004).[4]

Intervention as a matter of right requires that: (1) "the motion to intervene is timely"; (2) the potential intervenor "asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene"; (3) the disposition of the case "may impair or impede" the potential intervenor's "ability to protect her interest"; and (4) the existing parties "do not adequately represent" the potential intervenor's interests.

---

[4] Below, appellants additionally asked for permissive intervention (ROA.454-455). They do not argue on appeal that the district court abused its discretion in denying that request.

Saldano, 363 F.3d at 551. Here, the appellants' asserted interest in the case is the protection of their entitlement to vouchers to attend private schools. They offered no argument below for why the disposition of the United States' request for information would impair that interest. Their arguments before this Court are therefore waived, and in any event are unavailing. The district court's order denying intervention as of right can also be affirmed for the alternative reason that there is no indication that the State inadequately represents appellants' interest in their entitlement to vouchers.

A. Appellants Have Waived The Arguments They Now Make For Why Their Interests Could Be Impaired

While appellants now argue that any judicial oversight over the voucher program impairs their interests, they did not raise this argument below, and so it is waived on appeal.

Before the district court, appellants moved to intervene only "for the limited purpose of opposing the Motion for Further Relief filed by the United States on August 22, 2013" (ROA.445, 486). But by the time the appellants made their motion, the United States was no longer seeking the relief that the appellants opposed. Accordingly, the district court could not have granted the precise relief appellants requested; they sought intervention only to oppose a request for relief that was no longer pending.

Nor did the appellants offer the district court any reason that they should be

permitted to intervene to oppose the relief the United States actually sought. To show their interest in the matter, they pointed only to the request for injunctive relief from the August 22, 2013, motion papers, never acknowledging that the United States was no longer seeking such relief (ROA.445-446). They argued that "[t]heir ability to continue receiving scholarships and to pursue high-quality educational opportunities chosen by their parents would be directly and gravely impaired if the Court awards the injunctive relief sought by the United States" (ROA.447). They did not acknowledge that such injunctive relief was no longer being sought; nor did they argue – as they do now – that mere judicial oversight of the voucher program without any imminent threat of an injunction could jeopardize their interests.

"As a general principle of appellate review," this Court "refuse[s] to consider issues not raised below" unless "the issue is a purely legal one and the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice." *Conley* v. *Board of Trs.*, 707 F.2d 175, 178 (5th Cir. 1983); accord *Noatex Corp.* v. *King Constr. of Houston, L.L.C.*, 732 F.3d 479, 486 (5th Cir. 2013). For the reasons described below, the asserted error appellants now urge is, at the very least, not "obvious," and appellants have made no showing that a miscarriage of justice will result if it is not reviewed.

B. Appellants Have No Cognizable Interest In The Proceedings Currently Taking Place

Even if this Court were to consider the arguments appellants make for the first time on appeal regarding their interest in the proceedings below, such arguments are unavailing. For intervention as of right to be granted, the impact a proceeding has on an intervenor's rights must be "direct," not remote or "contingent" on some other event occurring. *Ross* v. *Marshall*, 456 F.3d 442, 443 (5th Cir. 2006) (citing *Restor-A-Dent Dental Labs., Inc.* v. *Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984)), cert. denied, 549 U.S. 1166 (2007). Here, appellants can show only that their rights might be affected should the United States ultimately request relief it does not currently seek.

The only question pending before the district court, both at the time the appellants made their motion and now, is the manner in which the State will provide information to private plaintiffs and the United States regarding the effects of the voucher program on school desegregation efforts and the student bodies at Louisiana's schools. Appellants have no personal stake in the resolution of the question of how those data will be supplied. Movants will continue to have the same access to the voucher program, regardless of the information the State must turn over and the process by which it does so.

There is no basis for appellants' assertion that an order requiring the State to turn over information regarding voucher applicants before new vouchers are

awarded would "wreak havoc on the Scholarship Program." Appellants' Br. 18. Appellants offer no evidence or argument – other than rhetoric from the State – that any information disclosure that the district court might order would have any concrete impact on any child's receipt of a voucher. Quite to the contrary, the district court has made clear that any order it issues regarding the process by which the State will disclose information will not have the effect of impeding any child's receipt of a voucher.

Instead, appellants cast their interest at a more abstract level, as an interest in avoiding any "federal judicial oversight over the program," see Appellants' Br. 16, that might eventually lead to "further demands for injunctive relief and to challenges to individual scholarship awards," *id.* at 18. But such a possibility is too attenuated and speculative to warrant intervention now. "By definition, an interest is not direct when it is contingent on the outcome of a subsequent lawsuit." *Ross*, 456 F.3d at 443. Accordingly, this Court has found an abstract interest in "accelerating [a school system's] release from federal control, without any articulation of present or potential injury from that control" insufficient to warrant intervention. *United States* v. *Franklin Parish Sch. Bd.*, 47 F.3d 755, 757 (5th Cir. 1995). As the district court correctly found, it would be more appropriate for appellants to intervene to oppose relief that threatens their interests if and when it is actually sought.

This Court has found that parents have insufficient interest to intervene in desegregation proceedings that actually do pose the possibility of school reassignments. See *United States* v. *Perry Cnty. Bd. of Educ.*, 567 F.2d 277, 278-279 (5th Cir. 1978); accord *Graham* v. *Evangeline Parish Sch. Bd.*, 223 F.R.D. 407, 433-434 (W.D. La. 2004), aff'd, 132 F. App'x 507, 512 (5th Cir. 2005). Here, where the asserted interest in a school placement is not threatened by any pending request for relief, appellants do not come close to showing a sufficient interest to warrant intervention as of right.

C. Appellants' Cognizable Interests Are Fully And Adequately Represented By The State

Finally, even if appellants' continued receipt of vouchers were actually at issue, which it is not, appellants offer no reason to think the State has not and cannot fully and adequately represent their interests. While the district court did not reach this question, this Court can affirm on this ground as well.

As appellants acknowledge, the State has opposed and can be expected to continue to "tenaciously" oppose any threatened disruption to the voucher program. See Appellants' Br. 20. And while the United States has not asked that any child lose a voucher, the State has made clear that it would vigorously oppose such a request. Accordingly, the State fully and adequately represents appellants' cognizable interests and can be expected to do so in the future.

Appellants do not contest this. Instead, they point to two irrelevant

considerations. First, they note that the State cannot bring an action to assert the rights of its citizens. Appellants' Br. 20. They do not explain why this would affect the State's ability to represent the interests of those benefiting from the voucher program. Second, they assert that they would make additional arguments the State is not making. *Id.* at 21-22. Even assuming the truth of this claim – which, in our view, is overstated in light of the State's aggressive filings that make many of the very attacks on the district court's continuing jurisdiction that appellants seek to make, compare ROA.971-977 with Appellants' Br. 22[5] – the possibility that appellants would make different litigation choices does not warrant a finding that the State is not adequately representing their interests. See *Pate* v. *Dade Cnty. Sch. Bd.*, 588 F.2d 501, 503-504 (5th Cir.) (rejecting argument that parents can intervene where a school board decides not to appeal), cert. denied,

[5] The appellants similarly exaggerate the importance of the State's concession that the district court has jurisdiction over the voucher program. See Appellant's Br. 21. All the State conceded in the cited document was that schools participating in the voucher program would have to comply with the letter of the 1985 consent decree. See ROA.951. As the State noted, that requirement stems not only from the orders entered in this case, but also from the state legislation creating the voucher program. And there is no basis for the appellants' contention that the State "appeared to concede" that certain arguments for the unconstitutionality of remedial measures based on *Shelby County, Alabama* v. *Holder*, 133 S. Ct. 2612 (2013), do not apply to judicially imposed rather than legislative obligations. See Appellant's Br. 23. In fact, the State expressly refused to make that concession, though it withdrew its argument based on *Shelby County* because the United States was no longer seeking the relief that inspired it (ROA.1027).

444 U.S. 835 (1979); accord *United States* v. *Mississippi*, 958 F.2d 112, 116 (5th Cir. 1992) ("[A]ppellants are not entitled to intervention as of right simply because they would have voted differently.").

Rather, this Court has consistently permitted parents to intervene in school desegregation cases only where they can show that the party purportedly representing their interests actually has interests "adverse" to theirs or "has acted in bad faith." *Mississippi*, 958 F.2d at 115; accord *Franklin Parish Sch. Bd.*, 47 F.3d at 757 ("When the 'party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance.'") (quoting *Kneeland* v. *National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1288 (5th Cir.), cert. denied, 484 U.S. 817 (1987)). Appellants do not attempt to make such a showing, nor could they succeed in doing so.

Instead, appellants cite to decisions holding that, where corporations seek to intervene in proceedings affecting their interests, their burden of showing inadequacy of representation is "minimal." See Appellants' Br. 19 (citing *Ross*, 426 F.3d at 761, and *Heaton* v. *Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002)). This Court has never permitted parents to intervene in school desegregation cases so freely or, as here, so prematurely.

CONCLUSION

This Court should affirm the order below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 3472 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

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Date: March 4, 2014