IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CASE NO. 3:80-cv-00035-PPS
SOUTH BEND COMMUNITY SCHOOL CORPORATION,	)	
Defendant.	)	

PETITIONERS' JEANETTE MCCULLOUGH, MARK COSTELLO, STACY GATES, AND SAVE CLAY, INC.'S MOTION TO INTERVENE

The Petitioners seek to intervene pursuant to Federal Rule of Civil Procedure 24(b) to offer evidence and present argument for application of specific terms of the Consent Decree in this matter in order to prevent discrimination against the substantial minority population impacted by the closing of Clay High School by the South Bend Community School Corporation ("SBCSC").

The Petitioners

The Petitioners are Mark Costello and Jeanette McCullough, elected Trustees of the South Bend Community School Corporation ("SBCSC"), Stacy Gates, parent and guardian of minor M.F., a currently-enrolled Clay High School student, and Save Clay, Inc., an Indiana non-profit corporation, (collectively "the Petitioners").

Summary of basis for intervention

Through its actions and votes, SBCSC has plainly shown that it has disregarded the Consent Decree's requirements with respect to the impact of the closing of Clay High School as it relates to the 40 percent minority population currently attending Clay High School. To date, SBCSC has proffered no plan to its own Trustees or the public regarding where the students at Clay High School will be transferred to after the 2024-2025 school year and have acted in bad faith in announcing the closure without such a plan. Without a transition plan in place, the proposed closure of Clay High School will likely violate the existing terms of the Consent Decree. Since all the factors for permissive intervention weigh in favor of the Petitioners, this court should grant this motion.

INTEREST OF PARTIES

Save Clay, Inc. is a not-for-profit corporation dedicated to pursuing the continual operation of Clay High School and protecting the interests of any students displaced as a result of the proposed closure of Clay High School by SBCSC.

Mark Costello and Jeanette McCullough are duly elected Trustees of the South Bend Community School Corporation who voted against the closure of Clay High School. Both Mr. Costello and Ms. McCullough voted against the closure of Clay High School on April 17.

Stacy Gates is the mother of M.F., a Black female SBCSC student entering her junior year at Clay High School. In 2018, Ms. Gates, her spouse Cherese, and Ms. Gates' two daughters specifically moved into the Clay School District catchment from the Washington High School District to pursue better opportunities for both M.F and her sister, including a safer school

environment, athletic programs and better academics. Ms. Gates' other daughter is a graduate of Clay High School.

In the Fall of 2019, M.F. attended Clay International School for grades six (6) through eight (8) and begin attending Clay High School in the Fall of 2021. M.F. is enrolled in Clay High School's exclusive arts program, and currently plays on Clay High School's Varsity volleyball team. M.F. was ranked the #5 player in the Northern Indiana Conference. M.F. has been continually coached by Coach Warren Bynum since her time at Clay International School. Coach Bynum was named Coach of the Year by the Northern Indiana Conference in 2022.

Prior to attending Clay International School and Clay High School, M.F. attended LaSalle Academy and rode the bus roughly ninety (90) minutes each way to school on a school bus. Today, M.F. walks to school, which is located roughly five (5) minutes away from her home.

The disruption caused by the announced closing has and will continue to have a significant impact on M.F.'s educational opportunities in her last year at Clay High School, as both students and faculty will leave to seek other educational and job opportunities elsewhere, and the timeline of the closing means M.F. will be forced to attend another school for her senior year of high school. The announced closing raises significant concerns by both Ms. Gates and M.F. for M.F.'s academic, athletic, and social opportunities going forward. M.F. does not wish to attend another school and is concerned about maintaining the balance of good academics and a good athletic program at any future school she will be forced to attend, should Clay High School be closed in the Fall of 2024. M.F. is also concerned with the tolerance and inclusivity of any future school that she would be forced to attend for her senior year.

BACKGROUND

This court case involves a continual effort by the United States of America ("Department of Justice") to desegregate the schools owned and operated by SBCSC. In *United States v. South Bend Community School Corp.,* 692 F. 2d 623, 625 (7th Cir. 1983) ("South Bend I"), the Federal District Court stated the following background:

> The United States filed this suit in February 1980 against the South Bend Community School Corporation, its superintendent, its Board of School Trustees and the 7 members thereof alleging that defendants had engaged in various acts of discrimination with the intent and effect of segregating students and faculty on the basis of race in the South Bend, Indiana public school system…The Government sought an injunction prohibiting defendants from discriminating on the basis of race or color in operating the schools within territory served by the South Bend Community School Corporation and requiring defendants to develop and implement a desegregation plan which would remove all vestiges of prior discrimination. The district court, simultaneously entered a consent order submitted by the parties and calling for defendants to develop and implement a desegregation plan for student assignments by the beginning of the 1981-1982 school year. The crux of the plan was to provide that black students in each school would be within 15% of the total percentage of black students in the school system. The plan was also to ensure that student transportation or school closings would fall equitably on all racial groups. Faculty assignments were to be adjusted by the beginning of the 1980-1981 school year so that the faculty of each school would reflect the racial composition, teaching experience and teaching disciplines of the faculty as a whole. The plan was also to provide for ancillary relief with respect to staff training, curriculum evaluation and revision, equal quality facilities, and substantially equal discipline practices. (internal citations and quotations omitted).

In *South Bend I*, the 7th Circuit upheld a District Court's denial of two separate motions to intervene in this very action from the National Association for the Advancement of Colored People ("NAACP") and Clay Quality Education II Inc., a separate non-profit corporation comprised of parents and students of Clay High School, on grounds that gross negligence was not shown by the proposed intervenors. *South Bend I*, 692 F. 2d, at 629. "Although Clay Quality Education II and the NAACP were not allowed to intervene, their objections to the proposed

consent decree led the parties to the suit—the Department of Justice and the South Bend school board—to renegotiate the terms of the consent decree. The renegotiated consent decree was submitted on April 3, 1981, and approved by the district court on April 17, 1981." Indiana University South Bend, Brookins v. South Bend Community School Corporation (SBCSC) collection (Civil Rights Heritage Center) https://archives-stage.dlib.indiana.edu/html/VAE2092.html (last accessed June 15, 2023).

One year later, the 7th Circuit upheld the District Court's denial of a group of parents' class action motion to intervene in this same consent decree action, noting that the standard for gross negligence or bad faith had also not been reached in that case. *United States v. South Bend Community School Corp.*, 710 F. 2d 394 (7th Cir. 1983) ("South Bend II").

The terms of the Consent Decree of 1981 ("Consent Decree") have been continually adhered to by the parties, with multiple amendments having been jointly agreed upon by the parties over the last forty-two (42) years. Currently, SBCSC provides annual reports to the U.S. Department of Justice on the status of the consent decree implementation. The most recent joint stipulation modifying the Consent Decree occurred on July 7, 2020. As part of its terms, The Consent Decree specifies that "[t]he desegregation plan for student assignments provides that the percentage of Black students in each school shall be within fifteen percentage points of the total percentage of Black students in the School Corporation." According to the last annual report mandated by the Consent Decree released by SBCSC in 2022, the Black population of Clay High School currently sits at 42.04%, within the required range under the consent decree. Furthermore, the Consent Decree states that "[i]f the closing of any school is necessary for purposes of integration, such closing shall be designed so that all racial groups share as equally as possible."

On April 17, 2023, the board members of the South Bend Community School Corporation voted to close Clay High School after an initial announcement that it was considering closing the school at its March 21, 2023 meeting. According to the WNDU 16 News Now, "over 100 people attended [the April 17 meeting], asking the board to consider other options. One board member shared a plan that he believed would have been more effective, but that was shot down. Others said there should be a written transition plan in place before a decision is even made. Some students then spoke, sharing the sentimental values that the school holds for them. The school board passed the vote 4 to 3." Monica Murphy, South Bend School Board votes to close Clay High School, WNDU 16 News Now, https://www.wndu.com/2023/04/18/south-bend-community-school-board-votes-close-clay-high-school-4-3/ (April 17, 2023).

At the meeting, "Trustees Stephanie Ball, Kate Lee, Leslie Wesley and John Anella voted for the plan…. Trustees Stuart Greene, Jeanette McCullough and Mark Costello voted against consolidation." Carley Lanich, South Bend school board votes to close Clay High School, consolidate district, South Bend Tribune, https://www.southbendtribune.com/story/news/education/2023/04/17/south-bend-community-school-board-votes-to-close-clay-high-school-consolidate-district/70121075007/ (April 17, 2023). Trustee Stuart Greene, who represents a district that contains Clay Township, stated after his no vote that SBCSC "need[s] a plan…we need to know something about implementation" regarding the closure of the school. *Id.* As of the filing of this brief, Petitioners have failed to obtain a copy of said plan from SBCSC through the Indiana Access to Public Records Act. Petitioners have also not received any details related to the plan to transition the students and faculty of Clay High School to another facility.

Since the announcing of the closure, more than thirty (30) full-time teachers, faculty, and staff members at Clay High School have either retired or transferred to other schools in the St. Joseph County area, significantly impacting the quality of the education of the students at Clay High School. Additionally, Clay High School marks the tenth-announced closing, merger or consolidation of schools by SBCSC in the last twenty (20) years.

LEGAL STANDARD

This Court's consideration of a motion to intervene is governed by Federal Rule of Civil Procedure 24. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); see also *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) ("[A]ppellate courts have turned to ... Fed. R. Civ. P. 24."). Federal courts may permit intervention by litigants who have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "Fed. R. Civ. P. 24(a) and (b) require that the motion to intervene be timely." *CE Design Ltd. v. King Supply Co.*, 791 F. 3d 722, 726 (7th Cir. 2015). "[I]n exercising its discretion to grant or deny permissive intervention, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003).

ARGUMENT

Permissive Intervention is warranted and should be granted to Petitioners in this case for five reasons. First, this motion is made in a timely manner; second, denial of intervention would substantially prejudice the Petitioners' interests; third, granting of intervention would substantially benefit the Department of Justice's interests; fourth, the Petitioners share a common

goal with the main action--seeking to achieve integration of schools operated by SBCSC; and fifth, the Petitioners' interests are no longer adequately represented by SBCSC because SBCSC has committed gross negligence and acted in bad faith by voting to close Clay High School with no transition plan in place.

1. Factors used to determine whether permissive intervention warrant granting Intervenor's Motion

The Court is given broad deference in determining which factors should be used to determine whether permissive intervention should be granted in this case, and the consideration of the interests of the parties ultimately weigh in favor of granting the petition to intervene. The 7th Circuit has stated that "Rule 24(b)(1) is vague about the factors relevant to permissive intervention[.]" *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019). The *Kaul* court has noted that the rulings in the 7th Circuit "have never gone so far as to confining the district court's discretion to only the two mandatory factors in Rule 24(b)(3) or to prohibit consideration of the elements of intervention as of right as discretionary factors." *Id.* at 804. A mandatory right to intervene in a federal case is governed by Federal Rule of Civil Procedure 24(a)(2). "To intervene in a federal lawsuit under Federal Rule of Civil Procedure 24(a)(2), a proposed intervenor needs to meet four elements: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Id.* At 797. Ultimately, any decision on permissive intervention requires the Court to give "thorough consideration of the interests of all the parties." *Id.* at 804.

Other Federal Circuit Courts have noted that where a litigant "timely presents such an interest in intervention," the Court may consider:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

2. Intervenor's Motion is Timely

In reviewing the first factor in timeliness, this Motion to Intervene is timely filed because less than two months have passed since the announced closing of Clay High School, the actual closing has not occurred yet, and Petitioners interests would be severely prejudiced if their motion were denied.

"A prospective intervenor must move to intervene as soon as it knows or has reason to know that [its] interests might be adversely affected by the outcome of the litigation." *CE Design Ltd.*, 791 F.3d at 726. The 7th Circuit "consider[s] the following factors to determine whether a motion is timely: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Sokaogon Chippewa Community v. Babbitt*, 214 F. 3d 941, 949 (7th Cir. 2000).

First, despite the timeframe between the entry of the initial consent decree and this motion to intervene, this motion is timely because the consent decree contains a continuing obligation on the SBCSC to apply its provisions to the operations of SBCSC. Even now, the SBCSC is required to submit annual reports on the status of the consent decree implementation.

The most recent of these reports was filed on November 21, 2022. The Petitioners' interest became ripe in this case at the announcement by SBCSC of the closure of Clay High School at its April 17, 2023 meeting, held just over two months ago.

Second, SBCSC would not be prejudiced in this action if intervention were granted because it would preserve the status quo for the operation of SBCSC, rather than mandate considerable changes to its operations in a short timeframe. To reduce prejudice when granting permissive motions to intervene, "the court can even place conditions on the scope of permissive intervention, allowing more voices to be heard without overcomplicating the case with additional claims, defenses, discovery, and conflicting positions." *Kaul*, 942 F. 3d at 803.

In this case, the Petitioners do not seek to make additional claims or defenses or conduct fishing expeditions via discovery. Rather, Petitioners merely wish to make arguments applying the existing consent decree terms to the closing of Clay High School.

Third, Petitioners would be severely prejudiced by a denial of intervention on the grounds that SBCSC's announcement to close Clay High School severely impacts the plans for education of the children of Clay High School. To date, no plan of any kind has been produced for the public proving that SBCSC's closing of Clay High School would increase integration, cut costs, or otherwise improve the efficiency of operations by closing Clay High School. Since the closing was announced SBCSC has given Ms. Gates and other parents a very short amount of time to review and find suitable educational options for their children. As of the date of this filing, SBCSC has not announced where students will be attending school after Clay High School's planned closure in the Fall of 2024. Without knowing the alternatives to their child's public education, Ms. Gates and other parents are left with performing a considerable amount of

legwork themselves in determining what other educational options exist for the students at Clay High School going forward.

Notably, when the Consent Decree was first entered into by SBCSC and the United States in 1980,

> the school board enlisted community support for the development of its new student assignment plan. A Citizen's Advisory Committee was formed, and over 300 citizens, many of them residents of Clay Township, volunteered to serve on subcommittees. Subcommittees met over 150 times between February and December 1980, and nearly 200 people actively participated in the meetings. All meetings were open to the public and were given extensive newspaper publicity. The subcommittees' recommendations were subsequently reported to the school board by the Citizen's Advisory Committee.

South Bend I, 692 F. 2d at 625.

Regarding this current announcement of the closing of Clay High School, no similar level of community engagement with the public has occurred. The public has been given no evidence of what actions SBCSC will take to prepare before, during, and after the closure of Clay High School. To date, only a handful official meetings have occurred related to school consolidation by SBCSC since consolidation talks were first announced in February of 2023. *See* Carley Lanich, South Bend is looking at closing schools and reshaping feeder patterns. Why now?, South Bend Tribune, https://www.southbendtribune.com/story/news/education/2023/02/24/south-bend-community-school-corporation-consolidation-talks-are-picking-up-why-now/69914882007/ (Feb. 24, 2023). Though SBCSC "anticipate[d] bringing a formal proposal to the school board in late March," no formal proposal for the closure of Clay High School has been given to the public or the board members. *Id.*

Fourth and finally, the unusual circumstances of SBCSC's announcement of closure of Clay High School with no plan for where students will be educated in the very near future warrants granting intervention. Here, to deny intervention would be to leave roughly 628

students of Clay High School (264 of which are Black) without any sort of plan for their education in the near future.

3. Intervenors' Interest Share a Common Question of Law with the United States

This motion to intervene shares a common question of law and fact that the closure of Clay High School would result in substantial roadblocks to integration of the minority student community educated by SBCSC, in contrast with the integration goals of the Consent Decree.

"Under Federal Rule of Civil Procedure 24(b)(1) a district court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact." *Kaul*, 942 F.3d at 803 (internal quotations omitted). The original 1980 Consent Decree stated that "The United States agrees that the local school authorities can best develop a specific plan to achieve desegregation provided, however, that such a plan fully meets constitutional standards." And currently, the Consent Decree requires that the "desegregation plan for student assignments provides that the percentage of Black students in each school shall be within fifteen percentage points of the total percentage of Black students in the School Corporation."

The Petitioners' aim to achieve an integrated education and ensure that the students at Clay High School are given the best possible education, devoid of any impact of racial segregation or prejudice is a common question in line with the main action of desegregation of the SBCSC schools in this case. Without a transition plan in place, the delicate balance of integrated student populations by race currently in place throughout SBCSC-operated schools is jeopardized by the proposed closure of Clay High School. The last annual report filed by SBCSC states that "[t]otal Black student enrollment for all high schools is 34.82%." *See,* Defendant's document 199-1, 2022 ANNUAL REPORT ON THE STATUS OF CONSENT DECREE IMPLEMENTATION, at 7 (filed Nov. 21, 2022). The Annual Report notes specifically that in

2022, Clay High School had a 42% black student population. The other three high schools operated by SBCSC had respective Black enrollment percentages of 24.29% (Adams High School), 34.48% (Riley High School), 55.61% (Rise Up Academy), 49.76% (Washington High School), and 35.93% (South Bend Virtual School). *Id*. As of 2022, Rise Up Academy is not within the 15% Range required by the Consent Decree, and many of SBCSC's other schools are on the cusp of violating the Consent Decree's 15% range requirement.

Without a transition plan in place for the students at Clay High School, no one can be certain that the Consent Decree will be complied with if Clay High School were to close at the end of the 2023-2024 academic year.

Additionally, recent studies have shown that school closures and transfer of students from one public school to another can hinder the goals of integration. In May of 2018, the University of Chicago's Consortium on School Research released a research report entitled "School Closings in Chicago: Staff and Student Experiences and Academic Outcomes." The Executive Summary of the report stated that "a lack of proactive efforts to support welcoming school communities in integrating the populations created challenging 'us' vs. 'them' dynamics." School Closings in Chicago Staff and Student Experiences and Academic Outcomes Research Report: Executive Summary, The University of Chicago Consortium on School Research, at 4 (May 2018). Ultimately, the report's findings showed "that the reality of school closures was much more complex than policymakers anticipated; academic outcomes were neutral at best, and negative in some instances. Interviews with affected students and staff revealed major challenges with logistics, relationships, and school culture. …Welcoming school staff said they were not adequately supported to serve the new population and to address resulting divisions." *Id.* at 5.

4. Petitioners are not Adequately Represented by SBCSC

Should the court seek to analyze the factor of adequate representation in this case, the vote by the Trustees of SBCSC to close Clay High School without a plan has caused a significant divergence that does not adequately represent Petitioners' interest in delivering an integrated education to the students currently at Clay High School. Indeed, SBCSC has committed gross negligence and bad faith in announcing the closure of Clay High School prior to any transition plan being proffered to either the public or the Trustees of SBCSC.

Regarding the rule for determining adequacy of representation in the 7th Circuit, "[t]he default rule is a liberal one: The requirement of the Rule is satisfied if the applicant shows that representation of his interest may be inadequate." *Kaul*, 942 F.3d at 799 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)). The 7th Circuit has also held that, in right to intervene cases, "[w]hen the representative party is a governmental body charged by law with protecting the interests of the proposed Petitioners, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas*, 478 F. 3d at 775 (citing *South Bend I*, 692 F.2d at 627); *Kaul,* 942 F.3d at 799.

In *South Bend I,* the 7th Circuit upheld the District Court's denial of intervention to the NAACP and Clay Quality Education II, Inc. on the grounds that "the students' interests were already represented by the school board. The school board is a governmental body and its officers are charged by law with representing the interests of the students. Adequate representation of the students is therefore to be presumed where, as here, there has been no showing of gross negligence or bad faith." *South Bend I,* 692 F.2d at 627 (citing *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976)). The *South Bend I* court reasoned

"that a proposed intervenor might be less prone to agree to the facts and might take a different view of the applicable law does not mean that the school board did not adequately represent its interests in the litigation." *South Bend I*, 692 F.2d at 627 (citing *United States v. Board of School Commissioners of the City of Indianapolis*, 466 F.2d 573, 575 (7th Cir. 1972).

Additionally, in upholding the denial of the class action lawsuit intervenors in *South Bend II,* the 7th Circuit reasoned that "[i]f a parent could intervene in a school desegregation suit as of right merely by stating his concern in constitutional terms, or by denouncing the decree rather than seeking to modify it incrementally, the requirement of adequacy of representation would be a dead letter, and school desegregation suits would become unmanageable." *South Bend II,* 710 F.2d at 396.

Petitioners acknowledge that the case law of *Board of School Commissioners of the City of Indianapolis, South Bend I*, *South Bend II,* and *Ligas* at first glance seem unfriendly to Petitioners' motion. But at least one 7th Circuit judge has repudiated the holdings of these cases requiring any party seeking to intervene in a case where a governmental entity represents their interests to show bad faith or gross negligence. In concurrence, Judge Diana Sykes in *Kaul* argued that the bad faith-or-gross negligence requirement should be disregarded. *Kaul*, 942 F. 3d at 805 (Sykes, J., Concurring).

In concurrence in *Kaul*, Judge Sykes stated that the "gross negligence or bad faith…standard is incompatible with the text of the rule… Judicially created tests that operate as categorical exclusions—like the "gross negligence or bad faith" requirement—are inconsistent with the contextual, case-specific analysis contemplated by the rule." *Id.,* at 807. Judge Sykes further argued that "the origins of the gross-negligence/bad-faith standard are deeply flawed. The

standard is the product of errant doctrinal creep and has no solid foundation." *Id.,* at 807. In concurrence, Judge Sykes reasoned that:

> In the 1982 case of *South Bend Community School Corp.*, a nonprofit parents' group sought to intervene to represent the interests of the district's students. We affirmed the denial of intervention, saying this:
>
> The students' interests were already represented by the school board. The school board is a governmental body, and its officers are charged by law with representing the interests of the students. Adequate representation of the students is therefore to be presumed where, as here, there has been no showing of gross negligence or bad faith. *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976).
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> *South Bend Community School Corporation*, 692 F.2d at 627 (citation omitted).
>
> This passage rests on a serious misreading of *Rizzo*, the case cited as support for the rule that a showing of gross negligence or bad faith is required in this situation. In fact, that case never uses the terms "gross negligence" or "bad faith" or anything comparable. To be sure, *Rizzo* recognized that "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." 530 F.2d at 505. But the Third Circuit did not establish any fixed requirements for rebutting the presumption. Instead, the court undertook a practical, case-specific analysis as contemplated by the text of Rule 24(a)(2). *Id.,* at 807-808.

Judge Sykes also repudiated *South Bend I's* citation of *Board of School Commissioners of Indianapolis,* stating the following:

> Notice that the *Indianapolis* decision never holds that an intervenor must show gross negligence or bad faith by the governmental party as a prerequisite to intervention, as the *South Bend* case implied and *Ligas* expressly stated. Indeed, the term "gross negligence" is not found anywhere in the opinion. The term "bad faith" makes an appearance, but only in passing, and it's used in a purely descriptive manner. The decision notes that the intervenors did not allege bad faith by the school board; it never says as a prescriptive matter that a showing of bad faith is required. In short, there's no hint whatsoever that the court was promulgating a doctrinal test for evaluating the adequacy of representation under Rule 24(a)(2) in this category of cases. *Id.*, at 808-809.

In concurrence, Judge Sykes ultimately argued that

> In *South Bend Community School* we implied, without any support or analysis, that Rule 24(a)(2) requires a showing of gross negligence or bad faith by government counsel as a prerequisite to intervention on the side of a governmental party. In *Ligas* we elevated South Bend's unconsidered statement to a legal standard, again without support or analysis. *Id.,* at 809.

Additionally, the *Kaul* majority decision reiterated that the 7th Circuit has "cautioned courts not to deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right." *Kaul*, 942 F. 3d at 797. Finally, one of the *Perry* factors notes that, in granting a motion to intervene, the Court can review "whether changes have occurred in the litigation so that intervention that was once denied should be reexamined." *Perry,* 630 F.3d at 905.

In this case, the fact that neither the Trustees of SBCSC themselves nor the public have seen any sort of transition plan for the closure of Clay High School allow this District Court to avoid reaching the same results of the holdings in both *South Bend I* and *South Bend II* in this action. The four Trustees of SBCSC who voted in favor of closing Clay High School have acted in bad faith and with gross negligence regarding the students educated by Clay High School and other schools operated by SBCSC. This fact has been highlighted repeatedly by the opposing Trustees of SBCSC. *See* Anne Lurea, Elected county officials join Save Clay, Inc. meeting; Discuss options, WSBT 22, https://wsbt.com/news/local/officials-join-save-clay-inc-meeting-legal-discussions-continue-st-joseph-county-school-board-debate-closure-activism-class-council-board-commissioner-election-court-law-lawyer-attorney-money-funding (May 21, 2023).

Additionally, unlike prior failed interventions regarding this Consent Decree, Petitioners do not wish to either negotiate or reinterpret the terms of the consent decree entered between the United States and SBCSC. Nor do they seek SBCSC to enter a new or different consent decree or implement any new policies which may disrupt the operations of SBCSC for the upcoming

school year. And unlike *South Bend I* and *South Bend II*, intervention would not delay school openings or unquestionably hinder the operations of SBCSC. Rather, intervention would allow students of Clay High School such as M.F. to prevent substantial prejudice to her educational opportunities.

With no plan in place currently by the SBCSC to determine where students will attend going forward, such denial of permissive intervention will unduly prejudice the Petitioners, and all students who attend Clay High School, particularly those who are enrolled in the arts program at Clay High School or are enrolled in sports. By granting the Motion to Intervene, Ms. Gates and M.F. will be afforded greater opportunities to preserve their current educational experience. Similarly, with a more complete transition plan Mr. Costello and Ms. McCullough will, with the collective SBCSC Board of Trustees, be able to more efficiently and effectively operate SBCSC.

CONCLUSION

For the foregoing reasons, Petitioners' Motion to Intervene should be granted.

Respectfully submitted,

s/ Christian J. Matozzo
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