17-12338

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

LINDA STOUT et al.,

Appellants/Cross-Appellees,

v.

JEFFERSON COUNTY BOARD OF EDUCATION et al.,

Appellees/Cross-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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Motion for Leave to File Brief of *Amici Curiae* Southeastern Legal Foundation and Center for Equal Opportunity In Support of Cross-Appellant Gardendale City Board of Education and Reversal

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISLCOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, proposed *amici* make the following disclosure:

Southeastern Legal Foundation (SLF) is a non-profit Georgia corporation and constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion. SLF has no parent companies and no publicly-held corporation has 10% or greater ownership in SLF.

Center for Equal Opportunity (CEO) is a non-profit Virginia corporation and CEO has no parent companies and no publicly-held corporation has 10% or greater ownership in CEO.

The following is a complete list of trial judge(s), attorneys, persons, associated persons, firms, partnership, or corporations known to proposed *amici* that have an interest in the outcome of this particular case or appeal:

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- Martin, Dr. Patrick, Superintendent of the Gardendale Board
- McCondichie, Roger, Intervenor Plaintiff
- McDonald, Yawanna Nabors, counsel for intervenor
- McGuire, Dale, Intervenor Plaintiff
- McLeod, Aaron G., counsel for Gardendale Board
- NAACP Legal Defense and Educational Fund, Inc.
- Nelson, Janai S., counsel for Appellants
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- U.W. Clemon, LLC

- Ziegler, Alan K.

/s/ Kimberly S. Hermann

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29 and Rule 29-1 of the Eleventh Circuit Rules, Southeastern Legal Foundation (SLF) and Center for Equal Opportunity (CEO) move this Court for leave to file the accompanying proposed *amici curiae* brief in support of the Cross-Appellant Gardendale City Board of Education. In support of this Motion, SLF and CEO submit the following:

A. SLF and CEO have an interest in this case.

Founded in 1976, SLF is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the state and federal courts, including the Supreme Court of the United States. *See Util. Air Regulatory Grp., et al. v. EPA*, 134 S. Ct. 2427 (2014) and *Murray Energy Corp. v. U.S. Department of Defense*, 817 F.3d 261 (6th Cir. 2016), *petition for cert. granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299). SLF also files dozens of *amicus curiae* briefs each year with federal circuit courts and the Supreme Court.

The Center for Equal Opportunity (CEO) is a think tank formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a

multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. E pluribus unum . . . out of many, one. CEO has also participated as *amicus curiae* in cases presenting the constitutionality of race-based governmental action as a way of advancing its goals. *See, e.g., Schuette v. Coal. To Defend Affirmative Action, Integration, & Immigrant Rights & Fight for Equality By Any Means Necessary*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SLF and CEO seek to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Both SLF and CEO have a particular interest in ensuring that federal courts terminate desegregation decrees and relinquish their control of local school systems once the school district has fully integrated. This interest is shown in CEO's urging of the Justice Department to ask federal courts to terminate such decrees where appropriate, publication of numerous papers and articles on the topic, and repeated letters to federal judges who have such cases on their dockets urging them to see if dismissal is appropriate.

The interest is also shown in SLF's continued dedication in the courtroom to protecting and preserving the principles fundamental to America's dual system of government – state sovereignty and separation of powers – and participation in desegregation cases as *amicus curiae*. *See Freeman v. Pitts*, 503 U.S. 467 (1992).

B. An *amici curiae* brief filed by SLF and CEO is both desirable and relevant to the disposition of the case.

SLF and CEO seek leave to file their *amici curiae* brief because there are matters of law that might otherwise escape the Court's attention which makes their brief both desirable and relevant to the disposition of the case.

Specifically, proposed *amici* file because of their concerns regarding the continued encroachment on the constitutionally reserved power of local and state governments to control their educational systems by federal courts that continue their supervision over local school districts decades after desegregation. Despite some discussion at the district court level, the parties' briefs devote little time to the issue of federalism and the need to return control of the schools in Gardendale City to its citizens. Proposed *amici*'s brief discusses in detail how the Constitution, America's federalist tradition, and our Country's history provide for State control over school systems and why the United States Supreme Court's current jurisprudence demands a return of control to the local and state governments.

SLF and CEO believe that the arguments set forth in their proposed *amici curiae* brief will assist the Court in resolving the issues before it. Specifically, the

issues of federalism and separation of powers that proposed *amici* focus on in their brief are directly relevant to this case. As proposed *amici* explain, federal courts lack the constitutional power to continue to control local school systems in the absence of a constitutional violation. Gardendale argues, and proposed *amici* agree, that creation of the new school district does not violate the Constitution. If this Court agrees with Gardendale, then the issues presented in proposed *amici*'s brief move front and center. Regardless, the issues surrounding federal court supervision of local school systems, including Jefferson County, will continue to arise until ended.

WHEREFORE, Southeastern Legal Foundation and Center for Equal Opportunity move this Court for entry of an order granting leave to file the SLF and CEO *amici curiae* brief, which is conditionally filed herewith.

Respectfully submitted this 18th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, that this motion complies with word limit of Fed. R. App. P. 27(d)(2)(A) because this motion contains 924 words.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in proportionally spaced typeface using Microsoft Word 2013 in Time New Roman 14-point font.

This 18th day of August, 2017.

/s/ Kimberly S. Hermann

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Counsel for Amici Curiae
Southeastern Legal Foundation and
Center for Equal Opportunity

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Motion for Leave to File Brief of *Amici Curiae* Southeastern Legal Foundation and Center for Equal Opportunity In Support of Cross-Appellant Gardendale City Board of Education with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

This 18th day of August, 2017.

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/s/ Kimberly S. Hermann

Counsel for Amici Curiae
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RULE 29(c)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than Southeastern Legal Foundation and Center for Equal Opportunity, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

RULE 29(a) STATEMENT

All parties were notified of *amici curiae*'s intention to file this brief on August 15, 2017. Cross-Appellant Gardendale City Board of Education consented to the filing of this brief. No other party responded to *amici curiae*'s request for consent.

STATEMENT OF IDENTITY OF *AMICI*

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before federal and state courts.

The Center for Equal Opportunity (CEO) is a non-profit research and educational organization devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. CEO supports color-blind public policies and seeks to block the expansion of racial preferences in all areas, including voting.

SLF and CEO file this *amici curiae* brief as an Exhibit to their Motion for Leave to File Brief of *Amici Curiae* Southeastern Legal Foundation and Center for Equal Opportunity in Support of Cross-Appellant Gardendale City Board of Education and Reversal.

STATEMENT OF THE ISSUES

1. A school board does not violate the Fourteenth Amendment unless it takes official action—beyond mere words—that injures the rights of a student. The district court held Gardendale liable for a constitutional violation based on statements made by private parties on a public Facebook page that the Board never controlled. Was that error?

2. The power to enjoin a new school district's separation from a system still involved in a desegregation case depends on either a constitutional violation by the new system or potential injury to the existing district's dismantling of its former racially dual school system. Jefferson County was held by this Court to have fully dismantled its dual system 41 years ago. Was it error for the lower court to partially enjoin Gardendale's formation?

3. Even if the district court still had the power to enjoin a separation, exercise of that power is proper only if there would be substantial adverse impact on desegregation. It was undisputed at trial that Gardendale's separation would affect the racial balance of the County system's student population by less than 2%. Was it error for the court to view that as a substantial adverse impact?

4. A district court's remedial authority must be tailored to fit the constitutional harm at stake, and here the transfer of the four schools in Gardendale would have no racially disproportionate or discriminatory effect. Yet the district court refused

to let Gardendale operate the high school unless it pays the County system millions of dollars for it or builds another one. Did that exceed the court's authority?

5. Even if separation would cause some small impact on the County, a remedy must be tailored to fit that impact. Wholly enjoining Gardendale's operation violates that requirement. Was the court correct in refusing to grant Plaintiffs the full injunction they sought?

SUMMARY OF THE ARGUMENT

Q: Where, in the Constitution is there mention of education?

A: There is none; education is a matter reserved for the States.[1]

At its core, this is a case about power – the power of the States to establish education policy within their borders and the power of the People of those States to govern themselves. It is about the struggle between the constitutionally reserved power of Gardendale City's citizens to create a new municipal school system and the power of federal courts to continue supervising local school districts decades after desegregation. But even more, it is a case about the founding principles that those powers imbue – state sovereignty and separation of powers – and whether federal court supervision over local school districts still satisfies constitutional requirements.

[1] United States Sesquicentennial Commission, The History of the Formation of the Union under the Constitution (1943).

Time and time again, the Supreme Court has acknowledged that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (*Milliken I*) (citing *Wright v. Council of the City of Emporia*, 407 U.S 451, 469 (1972)). Such power is constitutionally reserved to the States. U.S. Const. amend. X.

Beginning in the 1960's and resulting from both the Supreme Court's frustration with school systems that did not act with "all deliberate speed" to end *de jure* segregation and the gravity of the constitutional violation and harm caused by *de jure* segregation, the Court "permitted the lower courts to exercise … sweeping powers" over local school systems when crafting appropriate remedies. *Missouri v. Jenkins*, 515 U.S. 70, 125 (1995) (*Jenkins II*). In 1991, after several decades of deferring to the lower courts and permitting them to retain control over local school systems even after dual systems were fully dismantled, the Supreme Court started to push lower courts to return control to the local and state governments. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991) (emphasis added). In each desegregation case following *Dowell*, the Supreme Court has reiterated that our Constitution provides for local and state control over schools

and education, that such extreme uses of judicial power by the lower courts contradicts our history and traditions, and that federal court control should have been temporary and used only to remedy constitutional violations.

"From the very first, federal supervision of local school systems was intended as a *temporary* measure to remedy past discrimination." *Id*. (emphasis added). The time has come to return control of schools to the States. This case provides an opportunity to "revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition[.]" *Freeman v. Pitts*, 503 U.S. 467, 506 (Scalia, J., concurring) (1992).

ARGUMENT

I. The Constitution, America's federalist tradition, and our Country's history provide for State control over school systems.

"Federalism was the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S 549, 575 (1995). Under the federal system created by the Framers, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quotation omitted). "Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013); *see also* U.S. Const. amend. X ("The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

In Federalist No. 45, James Madison counseled: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, 289 (James Madison) (C. Rossiter ed. 1961). "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id*. That the States were left free to exercise their powers, have their own governments and were "endowed with all the functions essential to [a] separate and independent existence" was no accident. *See Gregory*, 501 U.S. at 457 (quoting *Texas v. White*, 74 U.S. 700 (1869)). Rather, the comity inherent in this system "secures to citizens the liberties that derive from the diffusion of sovereign power." *Lopez*, 514 U.S. at 576 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)); *see also Shelby Cty.*, 133 S. Ct. at 2623 (quoting *Bond v. United States*, 131 S. Ct. 2355 (2011)). ("This 'allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.'")

As Justice O'Connor explained in *Gregory v. Ashcroft*, the federalist structure "assures a decentralized government that will be more sensitive to the

diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." 501 U.S. at 458. This idea that state sovereignty allows the People to be involved through their state governments, while key to understanding the true reasons for our system of dual sovereignty, is neither new nor novel, but it is commonly forgotten – even by the Framers at times. James Madison "reminded" his countrymen that "the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other." The Federalist No. 46, at 291(James Madison) (C. Rossiter ed. 1961).

"[F]ederalism enhances the opportunity of all citizens to participate in representative government." *Fed. Energy Regulatory Comm'n (FERC) v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in the judgment and dissenting in part). As James Madison stated, "the ultimate authority … resides in the people alone." The Federalist No. 46, at 291. The exercise of this authority through participation in local government, especially on issues that are the subject of robust democratic debate, is "a cornerstone of American

democracy." *FERC*, 456 U.S. at 789. "It gives [the People] a voice in decisions that will affect the future development of their own community." *James v. Valtierra*, 402 U.S. 137, 143 (1971). It is hard to find decisions that will affect a community's future more than those related to educating our children.

Education is an area "'where States historically have been sovereign,' *Lopez*, 514 U.S. at 564, and [one] 'to which states lay claim by right of history and expertise,' *id*. at 583 (Kennedy, J., concurring))." *Jenkins II*, 515 U.S. at 112 (O'Connor, J., concurring). Notably, the Federal government has no constitutionally delegated power to establish or supervise education. And despite the continuous efforts by some to create a national university and assert federal jurisdiction over education, our Nation's Founders and early Presidents recognized the lack of constitutional authority to do so. For example, during his sixth annual address to the Nation, Thomas Jefferson spoke of the constitutional problems with federal jurisdiction over education: "I suppose an amendment to the constitution, by consent of the States, necessary, because the objects now recommended are not among those enumerated in the constitution, …." Thomas Jefferson, Sixth Annual Message (Dec. 2, 1806).[2] Years later, when discussing potential national jurisdiction over education, James Madison explained that the only "authorized

[2] http://avalon.law.yale.edu/19th_century/jeffmes6.asp (last visited August 16, 2017).

means" of asserting such jurisdiction was through a constitutional amendment. James Madison, First Inaugural Address (Mar. 4, 1809);[3] *see also* James Madison, Seventh Annual Message (Dec. 5, 1815).[4] James Monroe, put it bluntly when he stated in the context of internal improvements, simply that "Congress do[es] not possess the right." James Monroe, First Annual Message (Dec. 2, 1817).[5]

The lack of constitutional authority was again noted during the 1866 debates on bills providing for a department of education. Notably, Representative Andrew Rogers (NJ) observed: "[T]there is no authority under the Constitution of the United States to authorize Congress to interfere with education of children of the different States in any manner, directly or indirectly." Cong. Globe, 39th Cong., 1st Sess. 2968 (1866).[6] He continued: "I am content, sir, to leave this matter of education where our fathers left it, where the history of the country has left it, to the school systems of the different towns, cities, and States." *Id*.

Recognizing the inherent constitutional flaw with federal control over our children's education, the United States Supreme Court "ha[s] long observed, 'local autonomy of school districts is a vital national tradition.'" *Freeman*, 503 U.S. at 490 (1992) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977));

[3] http://www.presidency.ucsb.edu/ws/?pid=25805 (last visited August 16, 2017).
[4] http://www.presidency.ucsb.edu/ws/?pid=29457 (last visited August 16, 2017).
[5] http://www.presidency.ucsb.edu/ws/?pid=29459 (last visited August 16, 2017).
[6] https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=89.

see also Jenkins II, 515 U.S. at 99. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken I*, 418 U.S. at 741-42. This is because "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id*. (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *see also Dowell*, 498 U.S. at 248 (same).

II. Continued federal court supervision of local school systems offends our democratic and educational tradition, and usurps the constitutionally reserved power of the States to control education within their borders.

While it is true that "no state law is above the Constitution," *Milliken I*, 418 U.S. at 744, it is also true that "[f]ederal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States." *Jenkins II*, 515 U.S. at 131 (Thomas, J., concurring). Recognizing its proper role in a federalist system and the correlated desire for the *States* to take responsibility to correct the indisputable constitutional violations of *de jure* segregation, the Supreme Court ordered that the States and localities desegregate their schools "with all deliberate speed." *Brown v. Bd. of Educ.*, 349 U.S. 294, 299-301 (1955).

In the decades following *Brown*, the Supreme Court's "impatience with the pace of desegregation and with the lack of a good-faith effort on the part of school boards led [the Court] to approve … extraordinary remedial measures[,] *Jenkins II*, 515 U.S. at 125, such as "desegregate[ing] faculty and staff according to specific mathematical ratios … order busing, to set racial targets for school populations, and to alter attendance zones," *id*. at 124.

In 1991, after several decades of federal courts controlling local school boards, the Supreme Court notably paused and began to "push[] lower courts to end their oversight of local school boards." 1 William J. Rich, *Modern Constitutional Law* § 12:9 (3d ed. Westlaw 2015). In *Dowell*, the district court found that the school district had fully complied with the 30-year-old desegregation order, leaving any residential segregation as the result of private decisions. 498 U.S. at 243-44. The circuit court disagreed, reversing the decision and holding the decree had to remain in effect. *Id*. The Supreme Court reversed the circuit court's reversal and emphasized the temporary nature of federal control and supervision over local schools: "From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Id*. at 247. The Court explained that desegregation "*decrees … are not intended to operate in perpetuity*." *Id*. at 248. (emphasis added). Rather, because "[t]he legal justification for displacement of local authority by an

injunctive decree in a school desegregation case is a violation of the Constitution … [d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." *Id*. (internal quotation and citation omitted).

The following year the Supreme Court reversed an order instituting busing and programs to achieve integration in a Georgia school system where the racial imbalances resulted from private demographic shifts, not governmental action. *Freeman*, 503 U.S. 489-91. It expanded its discussion regarding the "temporary" nature of desegregation decrees. *Id*. The Court explained that district courts have a "duty to return the operations and control of schools to local authorities" and an "obligation … to provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance." *Id*. at 489-90. The principles of federalism demand as much because "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Id*. at 490.

Concurring in the Court's decision, Justice Scalia wrote separately stressing that "'[desegregation] decrees … exceed appropriate limits if they are aimed at

eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Id*. 503 U.S. at 502 (Scalia, J., concurring) (quoting *Dowell*, 498 U.S. at 247)). He continued, recognizing the extraordinary nature of continued district court control over local school systems: "We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity; that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents; and that it is desirable to permit pupils to attend schools near their homes." *Id*. at 506-07 (internal citations and quotations omitted).

In *Jenkins II*, the Supreme Court continued its discussion of the need to end federal court control over local school systems. It reviewed the history of such control and reiterated that "[its] cases recognize that local autonomy of school districts is a vital national tradition, …, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." 515 U.S. at 99, 102 (internal citations omitted).

In his concurrence, Justice Thomas declared that unlimited federal court control over local school systems "has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm." *Id*. at 114

(Thomas, J., concurring). He cautioned that "[a]s with any inherent judicial power, however, we ought to be reluctant to approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions." *Id*. at 124. "Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States." *Id*. at 131. This is especially so when the federal courts intrude to the area of education, an area that the Court has "long recognized … is primarily a concern of local authorities." "When district courts seize complete control over the schools, they strip state and local governments of one of their most important governmental responsibilities, and thus deny their existence as independent governmental entities." *Id*.

Continued federal court control "transform[s] the least dangerous branch into the most dangerous one." *Id*. at 132. "As Thomas Jefferson put it: 'Relieve the judges from the rigour of text law, and permit them, with pretorian discretion, to wander into it's equity, and the whole legal system becomes incertain.'" *Id*. at 128 (quoting 9 Papers of Thomas Jefferson 71 (J. Boyd ed. 1954)).

"The Equal Protection Clause reaches only those racial imbalances shown to be intentionally caused by the State." *Freeman*, 503 U.S. at 501 (Scalia, J., concurring). "Desegregation decrees … exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id*. at 502 (quoting *Dowell*, 498 U.S. at 247; *Milliken*

v. Bradley, 433 U.S. 267, 282 (1977) (*Milliken II*). Ending judicial control of school districts and returning power to state and local governments, does not leave school systems unaccountable. Rather, "[w]hen the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course." *Id*. at 490. It is time to "revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition," *Id*. at 506, and return control of our schools to the States.

CONCLUSION

For the foregoing reasons, and those stated by Gardendale City Board of Education in its Principal and Response Brief, *amici* respectfully requests that this Court reverse the partial injunction of the new system, and reverse the judgment of a constitutional violation, the findings of racial motivation and adverse impact on the County, and the imposition of a fee for the high school; and to then remand the case with instructions to grant Gardendale's motion to separate in full.

Respectfully submitted this 18th day of August, 2017.

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