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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Principal and Response Brief of Cross-Appellant Gardendale City Board of Education

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Summary of the Argument

There are only two possible grounds on which a district court may stop a city from creating a school system separate from a county system still under a desegregation decree. First, a new system may be enjoined if it has independently violated the constitutional rights of students. Second, absent a violation a new school district—under specific circumstances—may be enjoined if its departure would impede the dismantling of the parent

district's racially dual system. The lower court partially enjoined Gardendale from operating because it found both bases were present.

In fact neither was. The court erred in holding that Gardendale violated the Fourteenth Amendment because a school board cannot be liable for the statements of third parties on a public Facebook page over which it had no control. That holding was also error because the putative constitutional right the court thought violated by the statements of others does not exist: there is and never has been a Fourteenth Amendment right to be shielded from offensive messages.

The factual finding underlying this legal conclusion—that Gardendale's separation efforts were motivated by race—was clear error because it was based on unauthenticated evidence of these same actions and statements by persons over whom Gardendale had no authority. They were instead the statements of private persons, none of whom were on the Gardendale Board and who collectively comprised a small fraction of the city's population. The court also erred by reading racism into comments expressing opinions about the socioeconomic and political potential of a smaller, more local school system.

Since there was no constitutional violation, the district court lacked the power to stop Gardendale from enjoying its state-law right to form a new school system because its parent district, the Jefferson County system, was held by this Court to have fully dismantled its former racially dual system 41 years ago. The lower court believed that governing caselaw

allowed it to enjoin a new system's formation for as long as a desegregation case may last, but the Supreme Court granted that power only to ensure the successful dismantling of a dual system. That dismantling was accomplished here decades ago.

Yet even if such a power did still lie in the district court, it was improperly utilized because Gardendale's departure would have little impact on the County's desegregation. Under Gardendale's proposal, the County's black student population would rise by only 1.5%—a smaller impact than any case in which a new district was enjoined. And although some students would have to change schools after the separation, roughly 85% of those students would be white, and the reassigned black students would bear no greater burden than their peers.

Further, the district court's imposing a multi-million-dollar price tag on the transfer of Gardendale High School was an abuse of discretion because there was no evidence that transfer of the high school would have any racially disproportionate impact on the County. In other words the effects of the new system operating the high school without paying a substantial fee for it would not fall unequally on black students. For that reason, imposing a price on the high school was not a remedy tailored to any desegregation issue and so exceeded the court's authority.

Finally, Plaintiffs' arguments fail even if the finding of adverse impact on the County were correct, because enjoining the new system would not be a remedy tailored to the minimal effects separation would have.

Argument

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

1. Gardendale did not violate the Fourteenth Amendment and was not motivated by racial animus.

A. *Gardendale cannot be liable for a constitutional violation absent a finding of state action and disparate treatment.*

An equal-protection claim requires proof that a plaintiff was treated less favorably than similarly situated persons outside his protected class, and that the state itself intentionally discriminated against him. *See Sweet v. Sec'y of Dep't of Corr.*, 467 F.3d 1311, 1318-19 (11th Cir. 2006); *Watson v. Louis*, 560 F. App'x 911, 913 (11th Cir. 2014) (unpublished opinion). The lower court's judgment was error because neither element exists here.

First, without state action there can be no liability under the Fourteenth Amendment. "Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (citing *Moose Lodge v. Irvis*, 407 U.S. 163 (1972)). The Equal Protection guarantee applies "only to action by the government," a fundamental limitation that "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.*; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982); *Washington v. Davis*, 426 U.S. 229, 239 (1976). "A major consequence" of this doctrine is "to require

courts to respect the limits of their own power as directed against state governments." *Lugar* at 936-37.

Because a violation can arise only from conduct by the government itself, the state-action rule does not allow for normal vicarious liability. *Yates v. Cobb County Sch. Dist.*, 2017 U.S. App. LEXIS 7919, *13 (11th Cir. May 4, 2017) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). School boards may be liable in a § 1983 case "only where a policy or custom of the municipal entity is the moving force behind the constitutional deprivation." *Id.* A school board cannot be liable simply because of the actions of an employee; there is no such thing as *respondeat superior* liability in this kind of case. *Id.*

The lower court erred by ignoring these fundamental limits on the reach of the Equal Protection Clause. The court held that the Gardendale Board had violated the Constitution, but the court premised that holding on the acts of private citizens and wrongly attributed them to Gardendale. The court's rationale was that "the Gardendale district" had abridged the rights of black students because "words and actions *associated with* Gardendale's separation effort sent a message of inferiority" to them. Doc. 1152 at 15 (emphasis added). The "words and deeds" that the court thought "associated with" the Gardendale Board were (1) comments on a public Facebook page by private individuals and (2) the FOCUS Gardendale flyer with the schoolgirl and the list of cities. Doc. 1141 at 175-77.

Social-media comments and a political flyer do not satisfy the state-action rule—especially when they were not the work of the Gardendale Board. The Facebook page was never controlled by the Board, and none of the comments the court cited as showing racism were posted by a sitting member of the Board. Likewise the FOCUS flyer was not created, promulgated, or ratified by the Gardendale Board or any sitting member thereof. The statements and conduct of those the court called "organizers" reflected the thoughts and wishes of private citizens unsupported by state power. For their conduct Gardendale cannot be liable.

The lower court also premised the violation on the Board's not "disavow[ing]" the Facebook comments, but mere silence meets neither the state-action element nor the disparate-treatment element of an equal-protection claim. Doc. 1141 at 138-51, 175-80. As to the latter, the Board's behavior toward North Smithfield students in this respect was the same as toward any others. By not attacking prior statements on Facebook that referred to North Smithfield or Center Point students, the Board was treating those students no differently than other similarly situated students. The Board did not officially respond to Facebook comments about any student, so in this respect the Board's reserve treated every race equally.

As to the state-action element, the Board's silence was not state action because there was no duty on the Board to speak. A governmental entity's "acquiescence" in another's acts is "insufficient to create government action" in a § 1983 case. *Smith v. N. La. Med. Review Ass'n*, 735

F.2d 168, 173 (5th Cir. 1984) (citing multiple cases); *Becnel v. City Stores Co.*, 675 F.2d 731, 732 (5th Cir. 1982) (noting that a state's "mere acquiescence does not convert private action into state action") (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)). The Board owed no one a constitutional duty to affirmatively seek out and decry comments made on the Internet before the Board ever existed. The lower court said the Board's "silence is deafening" but was silent itself as to why the Board was obligated to disavow private citizens' free speech. Doc. 1141 at 177. Even if the Board had known of the comments, the Fourteenth Amendment did not demand that it denounce them.

Any other outcome would eviscerate the state-action rule. It would be strange jurisprudence indeed to hold that a school board is not liable for acts or statements made by private parties but is liable for failing to *react* to private speech. *See Becnel* at 732 (reasoning that finding state action due to a state's "inaction" would "utterly emasculate" the divide between private and state conduct). The vicarious-liability rule reinforces this point: if liability for affirmative conduct by the Board's own employees is not allowed under *Monell* and *Yates*, the Board can hardly be liable for not disagreeing with comments made by ordinary citizens on a public website.

Beyond these insurmountable legal flaws, the court's holding defies simple logic. Gardendale never wielded the power of the state over a single student's education. Gardendale has never yet educated a single student or operated a school or otherwise had the authority to affect anybody's right to

equal access to schools. It is therefore logically impossible for Gardendale to have violated a student's right to nondiscriminatory education. Gardendale did nothing more than intervene in an aged desegregation lawsuit and seek the court's permission to separate. It cannot be the case that in the very act of seeking approval, the Board violated the Constitution. Without that approval the Board was powerless to affect any student's rights, so for this additional reason, the court's holding was a mistake.

B. ***The putative right the district court held was abridged does not exist.***

There is no Equal Protection right to be shielded from offensive messages. "A constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly. There is no constitutional right to be free from emotional distress." *Shinn v. College Station Indep. Sch. Dist.*, 96 F.3d 783, 786 (5th Cir. 1996); *cf. Martin v. LaBelle*, 7 F. App'x 492, 495 (6th Cir. 2001) (holding that actions causing discomfort or upset feelings do not furnish a § 1983 claim).

This limitation applies specifically to racially charged speech. Use of a "racial epithet" without other conduct depriving a victim of rights "does not amount to an equal protection violation." *Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir. 1999). Where the conduct at issue "consists solely of speech, there is no equal protection violation." *Id.* The Fifth Circuit held likewise in a school context, refusing to hold a school official liable for using "racial epithets" or for "unwillingness to respond to complaints of racial

mistreatment" without actual harassing conduct in which school officials "participated." *Priester v. Lowndes County*, 354 F.3d 414, 423-24 (5th Cir. 2004).

This Court agrees that "offensive or derogatory statements, even if racially tinged or racially motivated, do not violate equal protection guarantees" unless they become pervasive harassment or are accompanied by other conduct. *Watson v. Louis*, 560 F. App'x 911, 913 (11th Cir. 2014) (unpublished opinion) (citing cases from the Fifth, Seventh, and Eighth Circuits); *Brims v. Barlow*, 441 F. App'x 674, 678 (11th Cir. 2011) (unpublished opinion) ("isolated use" of a racial epithet "does not rise to the level of a constitutional violation" without more) (citing cases).

The lower court reasoned that black students' rights were violated because a "message of inferiority" was supposedly conveyed to them—but there is no constitutional right so delicate that it can be breached by an offensive message. Words alone, even if spoken by the Board, do not violate the Constitution. The district judge thought *Brown v. Board of Education* stands for the rule that comments which make black (or other) students feel inferior violate the Equal Protection Clause. Doc. 1141 at 3, 8, 180. That is not so. *Brown* held that the legal separation of students by race violated the Equal Protection Clause; its dicta about the emotional impact of that injury did not create a new right to be kept safe from affront. *See Brown v. Bd. of*

Educ., 347 U.S. 483, 493-95 (1954).[9] There is no such right. So even if some statement fairly attributable to Gardendale had caused feelings of inferiority in students, no right was violated. The Constitution is not a therapeutic document.

C. *The factual finding of racial motivation was clear error.*

(i) *Assuming the evidence relied on by the district court was admissible, it was not enough to find the Board was motivated by race.*

A close corollary to the state-action argument is that it is fundamentally unfair to blame Gardendale for someone else's supposed racism. A finding of discriminatory intent requires some *official* action by the party so charged. *See, e.g.*, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977) (speaking of "official action" that must be used to prove discriminatory intent); *United States v. Tex. Educ. Agency*, 600 F.2d 518, 528 (5th Cir. 1979) (concerning proof of intent by reference to the acts of officials). As this Court has stated, for a plaintiff to prove present intent to discriminate, the burden rests on him to show that "the *District* acted" with discriminatory purpose. *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1349 (11th Cir. 2005) (emphasis added). A plaintiff must show that the "decisionmaker" selected a course of action "at least in part because of, not merely in spite of, its adverse effects." *Id.* (internal punctuation omitted) (citation omitted).

[9] And at any rate, the "feeling of inferiority" *Brown* referred to arose from the separation of the races by force of law, not comments made by private citizens. *See id.* at 494.

None of this was proven at trial. Although the court said it "reasonably inferred" that the "small group" of people who posted on Facebook "were not alone," Doc. 1152 at 42, the court offered no reason for inferring racist motives in the hearts of the Gardendale Board members, other than the lack of a denunciation of the prior statements of others. The court identified no policy or measure adopted by the Board as being animated by racism, nor any statement made by the Board as betraying secret bigotry. Instead the court relied on the same evidence cited above, i.e. the Facebook posts—some of which were made by non-residents—and the FOCUS flyer, to find that a "desire to control the racial demographics" of the new system "motivated the grassroots effort to separate." Doc. 1141 at 138-39.

Even if that were true—and as shown below it is false—it is not important. What motivated the grassroots organizers does not bespeak the motivations of the Gardendale Board or the city as a whole in seeking to separate. The lower court identified no legal basis on which to impute to Gardendale the conduct of private persons from before there was a Board.[10] This Court can reverse a factual finding if it is "clearly erroneous, is based on clearly erroneous subsidiary findings of fact, or is based on an erroneous

[10] The court itself noted this problem by admitting that not every citizen favoring a new system was animated by racism. Doc. 1141 at 139 n.79. Yet the court never explained why the actions of some besmirch the motives of all. Dr. Hogue, now the Board president, swore to his desire to see every child succeed and enjoy equal treatment. Doc. 1155 at 168.

view of the law." *Holton* at 1350 (citations omitted). The lower court's finding was based on the erroneous view that the law permits a court to hold a school board accountable for Facebook comments and political efforts to which it is a stranger, simply because it did not react to them. The Board had no control over the conduct the court found objectionable, so the Board cannot be blamed for it.

Another reason the court's finding was clear error is that the comments were not racist. Because the evidence was nearly all documentary and thus involved no credibility determination at trial, the lower court had no better grasp of the comments' meaning than what can be divined from the written page. Many of the Facebook comments express desires to improve test scores, shrink class sizes, and reduce the number of students whose parents do not pay Gardendale property taxes. Doc. 1092-20; Exhibit A. In fact the lower court acknowledged that such non-racial considerations animated many comments. Doc. 1141 at 141 & n.80. And other comments flatly denied any racist motive. Doc. 1092-20 at 21, 29 (Tim Bagwell post); Exhibit A at 29; Exhibit B at 7. Robust as the conversations were, these comments did not express racism and did not license the district court to infer it.

The FOCUS flyer was not a racist message either. It unfavorably compared five cities without their own school system, three of which are majority white, to cities that had their own system. Doc. 1141 at 94 n.43. It was clear error for the court to infer racist animus from that document

because none is apparent on its face. The flyer does not slight any city because it is majority black. The district court simply consulted a census for the cities listed and inferred a racial message. *Id.* at 177. But there was no proof that the flyer's authors intended any such thing. The court's inference lacked a foundation in competent evidence, and the court never explained why statistics in a census allowed it to infer racial intent in the hearts of the flyer's authors. *Id.*

Yet even so, supposing every comment on the Facebook page had revealed bigotry, and had the FOCUS flyer been blatantly racist, this would still not be enough to blame Gardendale itself. If, contrary to the evidence, all 760 members of the Facebook page lived in Gardendale and were all racists, they would represent only 5% of Gardendale's population. Doc. 1141 at 74, 81. It was error to find that any racial motives by so few applied to the actions of the community at large or the Board in particular. *See id.* at 139 n.79, 141 n.80. And it was likewise error to make this finding despite the actual plan that Gardendale submitted to the court, a plan that specifically *included* a mostly black community outside the city limits.

Finally, the lower court's decision cannot rest on what the court blames the Gardendale Board for directly, namely its not having passed a formal resolution to educate North Smithfield students forever, something the court characterized as lack of "meaningful, binding commitment" to those students. Doc. 1141 at 149-51. There are several reasons this was clear error. First, the plan Gardendale actually submitted for approval *does*

include North Smithfield, without a time limit, so long as tax dollars follow those students—which is exactly what the lower court ordered in 1971 and has been the case all along. If the court adopts that plan, its order will become just as binding on Gardendale as any resolution passed at a Board meeting (in fact more so). The Board's superintendent confirmed this as Gardendale's intent under oath at trial, as did a Gardendale Board member. Doc. 1156 at 174-75, 185; Doc. 1155 at 111-12. The question arises: how much more binding can such commitment by Gardendale be? If this finding is upheld, it will stand, apparently, as the first time any court has forbade the formation of a new school system that would *retain* its non-resident black students, merely because the school board had not passed a formal resolution adopting the plan it had submitted for court approval.

What is more, in not passing a formal resolution regarding North Smithfield, the Board treated those students no differently than any other students who would attend Gardendale schools. The Board chose to submit a plan for court approval before formally adopting it, out of deference to the court's authority. In so doing it treated all students alike, so it cannot be rightly found to have acted with discriminatory intent.

In sum, the underlying findings of fact the lower court relied on for its detection of racist motives are clear errors because they are contrary to the evidence in the record and are based on an incorrect view of the law. Gardendale urges this Court to reverse them.

(ii) *Much of the evidence the court relied on was inadmissible.*

If the Court is persuaded that the record does not support the racial-motivation finding, it may pass over the evidentiary errors. But if doubt is entertained on that point, an additional ground for reversing the finding is that the court abused its discretion in admitting the Facebook statements since they were largely not authenticated and were irrelevant.

Gardendale objected to the Facebook exhibit on relevance, authentication, and hearsay grounds.[11] Doc. 1155 at 195-97. The evidence was not authenticated because, as to most of them, Plaintiffs never made a showing under Rule 901 that the dozens or hundreds of Facebook posts Plaintiffs offered had in fact been made by the persons whose names appeared with each post—that a post under the name of Misti Boackle, for example (which the district court quoted), was written by that person. Doc. 1092-20 at 18; Doc. 1141 at 82. Gardendale concedes that posts by Chris Lucas, a Board member who testified at trial, were properly authenticated. Doc. 1155 at 193-94. But the remaining posts that the court relied on throughout the Opinion appear to have been made by persons who did not testify at trial and as to whom Plaintiffs did not offer admissible foundational evidence.

Not requiring that showing was error. Multiple circuit courts have required that Rule 901 be satisfied before easily manipulated Internet or

[11] The court acknowledged the evidence was problematic but expressly relied on it. Doc. 1141 at 83 n.38.

social-media evidence is admitted. "The relevance of . . . Facebook records hinges on the fact of authorship," as one court put it, and satisfying the authentication rule means more than simply showing that a printed exhibit was in fact downloaded from the Facebook page that appears on it (which is not contested here). *See United States v. Browne*, 834 F.3d 403, 409-10 (3d Cir. 2016) (citing cases). Authentication also requires that evidence be introduced sufficient to support a finding that the putative Facebook authors in fact were the real ones. *See United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014) (holding the court had erred in admitting an unauthenticated web page).

This error was highly prejudicial because the lower court relied on and quoted extensively from various Facebook posts without evidence to show that those posts were written by Gardendale residents—and some of them indicate they were not. *See* Doc. 1092-20 at 16; Ex. A at 16 (posts by Kelli Wyatt and Amy Sokira indicating they live outside the city). Gardendale has thus been found racist on the strength of Internet posts without a proper showing that they were written by real people who lived there.

And lack of authentication was not the only flaw. The lower court also abused its discretion in admitting, over a timely objection, evidence that had no probative value or relevance to the issue of Gardendale's intent. *See* Fed. R. Evid. 401, 403; Doc. 1155 at 195-97.

The court disagreed and quoted these posts several times in the Opinion:[12]

- A post by Tim Bagwell (never a Board member) listed a separation benefit as "better control over the geographic composition of the student body." Doc. 1141 at 81, 139, 140, 143; Doc. 1092-20 at 16; Doc. 1131-44 at 6.

- A post by Misti Boackle (never a Board member) referred to "OUR schools" and complained that kids were bussed there from Center Point. Doc. 1141 at 82, 147, 175; Doc. 1092-20 at 18.

- A post by David Salters (never a Board member) noted that buses brought Center Point students to Gardendale schools and "there's your redistribution of wealth." Doc. 1141 at 82; Doc. 1092-20 at 20.

- The court quoted at length another post by Tim Bagwell where he referred to the decision to include North Smithfield as a "technical, tactical decision," but qualified this as a "supposition" on his part. Doc. 1141 at 130, 149, 176; Doc. 1132-2 at 8.

The lower court relied on these posts for its finding that "messages of inferiority and exclusion" were conveyed to North Smithfield and Center Point children. Doc. 1141 at 175-77. In the court's view, these comments "communicate[d] to black middle and high school students from North Smithfield the clear message that Gardendale has required them to be part of the city's school system only to serve the city's purposes." *Id.* at 176.

[12] All of these are in Exhibits A and B hereto.

Admitting these posts (and the FOCUS flyer) was abuse of discretion because of the irrelevance they all have in common: they have nothing to do with the Gardendale Board. None of them were written by a sitting Board member, none of them were promulgated by a Board member, and none of them were ratified by the Board. There was no evidence that the Board ever had control of any kind over these messages. Statements made by someone else "have little relevance" to a claim against the Board, as "any evidence procured off the Internet is adequate for almost nothing." *See United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000) (citations omitted); *Oliver v. Funai Corp.*, 2015 U.S. Dist. LEXIS 169998, *11-12 (D.N.J. Dec. 21, 2015) (refusing to impute knowledge to defendants based on anonymous Internet complaints on third-party websites).

To survive even deferential review, the district court's finding of racial motivation by the Board should be based on admissible evidence sufficient to bear the weight of so controversial and inflammatory an inference as racism. Instead the court found the Board was racist due to the statements of others elsewhere.

That was error, clearly made.

2. Absent a constitutional violation, the lower court lacked authority to enjoin Gardendale.

A. *The power to enjoin a separate district is limited to two situations: constitutional violation and impeding the dismantling of a dual system.*

Without an independent constitutional violation, the power of a district court to restrain a new school district from operating arises from the specific factual context of the Supreme Court's first decision on splinter districts in desegregation cases, *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). Faithful reading of the *Wright* line of splinter-district cases reveals that the injunction power exists only where a separation would impede the dismantling of a dual school system. And that process was completed here 41 years ago.

In *Wright* the City of Emporia lay within a county system under a pending desegregation order. *Id.* at 453-54. Two weeks after the district court entered a new decree to increase integration, the city started working to form a separate school system. *Id.* at 456. If allowed, the city would have operated from day one on a unitary basis, but after its departure the county system would have gone from a 66% black student body to 72% black, while the new city system would have been 48% white/52% black. *Id.* at 464. Both schools in the new system were formerly all white and were superior facilities while the schools in the remaining county system were formerly all black. *Id.* at 465. And remarkably, the city officials *conceded* that the separation effort came "in reaction to" the court order that would have forced integration. *Id.*

In a 5-4 vote with a powerful dissent, the Supreme Court held the new district properly enjoined from operating—and it stressed the particular factual circumstances that gave rise to so extraordinary an

exercise of federal judicial power. As the Court put it, "only when it became clear . . . that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system." *Id.* at 459. Thus, "[*u*]*nder these circumstances*, the power of the District Court to enjoin Emporia's withdrawal from that system need not rest upon an independent constitutional violation." *Id.* (emphasis added). This "essentially factual determination" rested on the totality of the circumstances there, *see id.* at 470, and the Court repeatedly delineated the bounds of its holding, stating five times that its decision applied when a new district's formation would "impede the process of dismantling a dual system." *Id.* at 460, 462, 466, 470.

That key phrase—the dismantling or disestablishing of a dual system—was not accidental. In the companion case of *United States v. Scotland Neck City Board of Education*, the Court used the phrase three more times to describe its holdings in both cases. 407 U.S. 484, 489-90 (1972). "If" the proposal would "impede the dismantling of a dual system" then it may be enjoined. *Id.* at 489. In *Scotland Neck*, too, the separation proposal came only a few months after a new integration plan was submitted. *Id.* at 486-87. The Court held that the plan, which would have taken formerly all-white schools out of the county and meant that instead of a 78% black student body the county would have an 89% black student body, would impede "the disestablishment of the dual school system." *Id.* at 489-90.

These cases, taken together, mean that the power to enjoin the formation of a new school district arises solely from the danger that formation would pose to a current system's ability to dismantle its *de jure* dual system and create a unitary one.[13]

B. ***The County's former dual system was completely dismantled by 1976.***

There is no such danger here. The dismantling of Jefferson County's former dual school system is an accomplished fact and has been for 41 years. In an earlier appeal, this Court held (and said four times) that Jefferson County's "former dual school system has been effectively dismantled and a unitary system substituted here." *Stout v. Jefferson County Bd. of Educ.*, 537 F.2d 800, 802, 803 (5th Cir. 1976). Despite two remaining all-black schools, this Court decided, agreeing with the district court, that "in Jefferson County the uprooting of which the Court spoke has been done and a unitary system is operating." *Id.* at 802 (referring to *Scotland Neck*, 407 U.S. at 491). Nor was this dicta as Plaintiffs claimed below, since the Court called this "our guiding light," that the County system "has been effectively desegregated and is unitary." *Id.* at 803; *see also Stout v. Jefferson County Bd. of Educ.*, 845 F.2d 1559, 1561 n.4 (11th Cir. 1988) (confirming this holding).[14]

[13] This Court uses the same phrase. *See Fort Bend Indep. Sch. Dist. v. City of Stafford*, 594 F.2d 73, 74 (5th Cir. 1979) (referring to barring a new system "which will impede the dismantling of a segregated system"); *Ross v. Houston Indep. Sch. Dist.*, 583 F.2d 712, 714 (5th Cir. 1978) (referring to not impeding "the dismantling of the dual school system").

[14] Of course the Court did not use the word "unitary" in the modern sense of a vestiges case like the Supreme Court's more recent jurisprudence. *See, e.g.*, *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245-46 (1991).

It is therefore the law of this case that the County's former dual system is effectively dismantled—in the sense that *Wright* and *Scotland Neck* intended. If there were any doubt of this Court's holding fitting into the analytical category established in those cases, it is laid to rest by the Court's specific reference to *Scotland Neck*. The "uprooting" and "dismantling" of the former dual system is a legal certainty in Jefferson County.

C. *Because the County's dual system has been dismantled and the facts here are so different, the* Wright *line of cases does not apply.*

Unlike in *Wright* and *Scotland Neck*, Gardendale has not attempted to separate from a parent district still in the throes of disestablishing its former dual system. This is incontrovertible. As opposed to the facts in those cases (and other cases Plaintiffs relied on like *Ross v. Houston Indep. Sch. Dist.*, 559 F.2d 937 (5th Cir. 1977) and 583 F.2d 712 (5th Cir. 1978)), the County system here has been judicially declared dismantled. There is no more dual system; it's been gone for four decades. That was not true in the splinter-district cases like *Wright* and *Ross*. And that is why the incredible power *Wright* vested in district courts—the power to deny existence to a state entity—cannot be wielded here. The district court misread *Wright* as affording it the authority to enjoin new districts throughout the entire life of a desegregation case, even one as old as this one, so long as any vestige of segregation remains. Doc. 1141 at 33-37. That is not what *Wright* or *Scotland Neck* held. There is no such authority once a school system has outgrown the embryonic stages of desegregation.

Another reason *Wright* does not apply is that the concerns animating that decision are not present. Gardendale's effort to separate did not come on the heels of an order that would have finally integrated the County's schools like in *Wright*.[15] Gardendale schools have been subject to the 1971 Order since . . . well, 1971. It is not possible that the Board's motion to separate, 44 years after that Order, came in response to it. Thus the "message" that Emporia's separation would have conveyed to black students left behind, 407 U.S. at 466, has no analogue here. Gardendale didn't try to leave the County to avoid forced integration—and crucially, the black students *Wright* spoke of were those *excluded* from the new district. *See id.* Gardendale's plan included North Smithfield, a distinction the lower court failed to appreciate.

A proper understanding of *Wright* and its descendants does not mean courts lose the ability to supervise a new system that leaves one still under a desegregation order. Indeed, this Court has recognized that in allowing separations, district judges may require separating systems to "accept a proper role" in the county's ongoing desegregation. *Stout v. Jefferson County Bd. of Educ.*, 466 F.2d 1213, 1214 (5th Cir. 1972). A new district must assist in its parent district's desegregation, and the lower court acknowledged this in anticipating an order that would have governed Gardendale's participation in the County's efforts. Doc. 1141 at 185. It is

[15] And *Ross*, 559 F.2d at 939 (noting the proposed new district came "soon after" a new desegregation plan).

only the momentous power of denying a school board the right to operate that expires when a parent district successfully dismantles its dual system.

This reading of *Wright* is reinforced by the imperatives of federalism and local control. Enjoining a validly created state agency from operating imposes the supreme burden on our system of shared sovereignty.[16] According to one Justice, desegregation decrees have "trampled upon principles of federalism and the separation of powers" when they should have been temporary, and such "extravagant uses of judicial power" are at odds with the history "of the equity power and the Framers' design." *Missouri v. Jenkins*, 515 U.S. 70, 114, 125-26 (1995) (Thomas, J., concurring). And a circumscribed timeframe for issuing injunctions against new districts better respects the Supreme Court's recent emphasis on "local autonomy of school districts" as a "vital national tradition" that must be restored at the earliest practicable date. *Id.* at 99; *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).[17] The Court has warned that judicial supervision of a once-segregated district should "not extend beyond the time required to remedy" past discrimination. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). Still less should the authority to deny existence to a new, never-segregated district extend beyond the strictest necessity of its use.

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[16] The dissent in *Wright* agreed. 407 U.S. at 478.

[17] *See also* 1 William J. Rich, *Modern Constitutional Law* § 12:9 (3d ed. Westlaw 2015) (noting that with *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991), the Court began to "push[] lower courts to end their oversight of local school boards").

The district court read *Wright* to allow injunctions against new districts for as long as a desegregation case endures (five decades and counting here). The court erred. That interpretation of the splinter-district caselaw is not supported by *Wright* itself, is contrary to the warnings of more recent cases on the need to end federal supervision, and is undercut by the lower court's own recognition that this case is nearing its conclusion. Doc. 1152 at 11-12, 23. This Court should reverse the lower court's *ultra vires* actions as the wrongful exercise of a power that has long since expired.

3. Assuming the *Wright* line of cases still applies, separation would have little impact on the County's desegregation.

If the splinter-district cases are nevertheless applied, the injunction was still error because the evidence at trial established that Gardendale's separation would have little effect on the County's desegregation. The test is whether separation would have "a substantial adverse effect on desegregation of the county school district." *Lee v. Macon County Bd. of Educ.*, 448 F.2d 746, 752 (5th Cir. 1971). The test is not whether a separation would have *any* impact.

A. *The court found that Gardendale's formation would have only two relevant impacts on the County system, and neither justified the injunction.*

It must be emphasized that despite language in its original 190-page Opinion, the district court clarified in its Supplemental Opinion that it had found only "two ways" in which Gardendale's plan "would harm Jefferson

County's desegregation efforts." Doc. 1152 at 23. And it must be emphasized that even as to those two impacts, the district court believed the appellate courts "would find that the age of this case *diminishes the likelihood that Gardendale's separation would impede the county's effort*" to desegregate. *Id.* at 38 (emphasis added). The lower court was right: *Freeman* warned 25 years ago that with the passage of time, "it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." 503 U.S. at 496.

The first of the two adverse impacts the court found was that students displaced by Gardendale's plan would be assigned (by the County) to schools "with student populations that are much less racially diverse" than their current schools. Doc. 1152 at 23. This was an erroneous basis on which to enjoin Gardendale's separation because there is no constitutional right to attend a school that is more "diverse" than another. It is not a constitutional harm to move from one school open to all races to another school open to all races but which has a less evenly mixed population. The Supreme Court and this Court have stated time and again that racial balance is not the goal of desegregation and is not a basis for the exercise of judicial power:

- "The aim of the Fourteenth Amendment . . . is not to achieve racial integration in public schools." *Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975).

- "[R]acial balance is not required in remedying a dual system." *Wright*, 407 U.S. at 465.

- The idea of a "constitutional right" to a "particular degree of racial balancing or mixing" has been "expressly disapproved." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)).

- "Even in the context of mandatory desegregation, we have stressed that racial proportionality is not required." *Parents Involved in Community Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 732 (2007) (plurality opinion) (citation omitted).

These authorities suffice to show that a movement of students from one integrated school to another integrated but less "diverse" school is not a constitutionally cognizable burden. Racial balancing is not authorized by the Fourteenth Amendment, so the transfer of students to schools with less evenly balanced populations cannot be regarded as an adverse impact on the County's progress.[18]

[18] The Equal Protection right is "equal racial access to schools," not "access to racially equal schools." *See Freeman v. Pitts*, 503 U.S. 467, 503 (1992) (Scalia, J., concurring). There is a rich history of scholarly criticism of such broad readings of the Fourteenth Amendment. *See, e.g.*, David J. Armor, *Forced Justice: School Desegregation and the Law* 17-19 (1995); Raoul Berger, *Federalism: The Founders' Design* 158-63 (1987); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 132-54, 198-200 (2d ed. 1997); George W. Carey, *In Defense of the Constitution* 184-86 (Rev. ed. 1995); Lino A. Graglia, *Disaster by Decree: The Supreme Court's Decisions on Race and the Schools* 14-17, 21 (1976); Raoul Berger, *The Fourteenth Amendment: Facts vs. Generalities*, 32 Ark. L. Rev. 280, 287-89 (1978-79); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 58 (1955); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5, 132, 139 (1949).

Another fundamental reason the displacement of students would not adversely impact the County is that the reassignment of students would not be racially significant—that is, the court never found that the burden, if any, caused by the reassignment would fall more heavily on black students than white students. Doc. 1141 at 167-69. For example, 256 students at Bragg Middle School in Gardendale would be reassigned to other schools by the County. *Id.* at 168. 40 of those, or 15.6%, are black, and Gardendale offered evidence of where the County might send them. *Id.* at 167-68. The two scenarios Gardendale offered involved schools less evenly balanced than Bragg Middle. *Id.* Likewise there would be 366 non-resident high-school students reassigned to other schools less balanced; 56 of those 366 students, or 15.3%, are black. *Id.* at 168-69.

The court's statement that the "burden of separation falls most heavily on the black students" was clear error because there was no evidence of it. The court did not find—nor was any evidence offered—that the burden of separation was racially disproportionate quantitatively or qualitatively. Far more white students than black ones would be reassigned, so in raw numbers the burden is not unfairly placed on a minority. Nor did the court find that the quality of the burden was harder upon black students than otherwise: why is it more of a "burden" for a black child to attend a less balanced school than for a white child? The court gave no answer. Reassigned students would either go to a school where their race was in the majority or where they would swell the ranks of their racial minority—and

there was no evidence that black children are less able than their white peers to withstand the transition. *Id.* at 168.

Consequently, even assuming transfer to a less "diverse" school is a legally recognized burden, the undisputed evidence was that the burden did not fall on any minority more heavily than on white students. The impact of the separation on reassigned students would have, in the end, no racial significance.

The second impact the court noted—the transfer of Gardendale High School to the new system as required by state law—is addressed *infra* in Section 4.

B. *Looking more broadly at the evidence, Gardendale's departure would have little effect on the County.*

Going beyond the two impacts the court found, Gardendale's formation would have minimal effect on the County's racial numbers. The lower court agreed that allowing Gardendale's separation would cause the County's black student population to rise only 1.5%—and even if North Smithfield students aren't included despite Gardendale's plan, the number rises by only 1.8%. Doc. 1141 at 165. Even adverse experts agreed the overall demographic shift from Gardendale's departure "is actually quite small." Doc. 1126 at 122.

This is a far cry from the shifts that courts once found large enough (with other factors) to deny formation to a new district. *See, e.g.*, *Wright*, 407 U.S. at 464 (a 6% increase in black students); *Scotland Neck*, 407 U.S. at

489-90 (an 11% increase); *Lee v. Chambers County Bd. of Educ.*, 849 F. Supp. 1474, 1485 (M.D. Ala. 1994) (a 20% increase); *cf. United States v. Texas*, 158 F.3d 299, 311-12 (5th Cir. 1998) (allowing an altered district boundary despite a 2.7% increase).

Putting this 1.5% increase in context further undercuts its significance: the lower court admitted that the County is nearing unitary status and even stated that it is "unlikely" that this Court would find Gardendale's separation impedes the County's progress. Doc. 1152 at 11, 23, 38. Jefferson County is in a different position than the defendants still taking apart dual systems twenty, thirty, or forty years ago. With the County so close and the impact so small, the numbers do not justify the lower court's ruling.

In this connection, the court's speculation as to the potential annexation of Mount Olive (a mostly white area) to Gardendale was improper. For one thing, the court itself recognized that annexation was "unlikely" at this time. Doc. 1141 at 165; Doc. 1155 at 31. For another, it is unfair to hold the Gardendale Board responsible for demographic changes due to someone else's possible actions when the court did not find those actions would be prompted by the separation (unlike potential white flight in *Wright*, 407 U.S. at 464). "External factors" beyond the Board's control "should not be part of the remedial calculus" in a desegregation case. *See Manning v. Sch. Bd. of Hillsborough County*, 244 F.3d 927, 933 n.8 (11th Cir. 2001).

In all, to whatever extent there may be racially significant effects from Gardendale's separation, they are lesser in degree and quality than in any splinter-district appellate decision Gardendale has located. If the minimal impacts of formation in this case are enough to trigger the "substantial adverse effects" test this Court articulated, no new district could ever form. That is not the law, and it should not be the result here.

4. The court exceeded its remedial authority in imposing a price on the transfer of Gardendale High School.

A. *The remedy was not tailored to any impact on the County's desegregation efforts.*

It is well settled that the discretion of a district court in a desegregation case has limits, including the rule that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). A remedy is justifiable, *Freeman* explained, "only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman* at 489. Courts must "tailor" the scope of the remedy to "fit the nature and extent" of the violation. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (citations omitted). The court's ordering Gardendale to pay "tens of millions of dollars" for the high school, Doc. 1152 at 13, fails this test for two reasons: transfer of the high school would not have a desegregation-specific impact on the County system, and lesser remedies would have sufficed.

The rule of fitness means that a remedy imposed on a separating district must be tailored to the impact the separation would have on the parent district's ability to desegregate. But as explained above in Section 3, there would be no racially discriminatory—or even disparate—impact arising from the high school's transfer to Gardendale: of the 366 non-resident students who would be reassigned, only 15.3% are black. Doc. 1141 at 168-69. No greater burden would be borne by black high-school students assigned to other schools than by white high-school students, far more of whom would be displaced than black students. *Id.* As a Government expert testified, the impact of separation on high-school students "actually affects both black and white students and proportionately affects white students more" on access to new facilities. Doc. 1126 at 154.

This point bears greater emphasis: the court's failure here was in not finding a link between the high school's transfer to Gardendale and any *racially* significant impact on the County's desegregation efforts. Yes, a small fraction[19] of County students would be reassigned to other high schools—but not in a racially disproportionate way, and not in a way that imposes more on black students than others. Gardendale's demographer had to guess which high schools the County might assign those students to, and the court rejected both scenarios because black students would go

[19] About 366 students out of a post-separation County enrollment of around 33,829 students. Doc. 1141 at 169; Doc. 1129-7 at 1; Doc. 1131-6 at 34.

either to a school where they are in the majority or to a school where they would add to the numbers of black students in the minority. *Id.*

This is too much. It places Gardendale between Scylla and Charybdis. The law does not require every school or any school to achieve a specific racial balance. Maximal racial integration may be a laudable ideal, but as shown above, courts cannot wield remedial power to pursue "diversity." *See* Doc. 1141 at 70, 112 n.62, 167 n.88, 168-69, 190. Every school in Jefferson County is desegregated: they are open to all students no matter their color. One race or another may be in the minority at a school to which students would be reassigned, but it is wrong to characterize this as a burden. Lack of racial balance is not a constitutional harm.[20]

What is more, a less expensive remedy would have better fit the shape of the court's worries about the high school. The court recognized that Alabama law allows Gardendale to separate without paying a fee to the County, Doc. 1152 at 12, yet with the stroke of a pen, the lower court imposed on the citizens of Gardendale a multi-million-dollar roadblock to doing what state law permitted, without considering whether less onerous solutions were at hand. If the court thought that reassigning black students would upset the County's progress, it could have approved the interdistrict desegregation-transfer policy, which would allow transfers between the County and Gardendale, that Gardendale has drafted. Doc. 1141 at 127,

[20] And even if it were, it is unreasonable to characterize the burden as existing both when black students are in the majority *and* when they are not, as the district court did here. Doc. 1141 at 167-69.

185; Doc. 1152 at 13. Such majority-to-minority transfers have been approved in this circuit for the last 40 years, even if conditioned on available space. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1218-19 (5th Cir. 1969), *rev'd on other grounds sub nom. Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970).

If the court was concerned about the continued availability to County students of the career-tech program at the high school (which would affect about 175 non-resident students), it likewise could have ordered Gardendale to keep that program open to County students without preference for Gardendale residents—a minor change to Gardendale's own proposal to allow County students to stay in the program. Doc. 1040-1 at 7; Doc. 1141 at 171 & n.89; Doc. 1157 at 151; Doc. 1155 at 164-65. The County's own superintendent testified that an arrangement like this is possible, and it has been done with other systems. Doc. 1155 at 165; Doc. 1157 at 218-19.

Such remedies would have allayed the desegregation-specific concerns the court expressed without imposing on Gardendale a tremendous price tag that apparently has no basis in splinter-district caselaw. The court called the high school a "desegregatory tool" of the County and deplored its "loss" to the County, but this was a straw man. *Id.* This Court has already ordained that new districts "accept a proper role" in the ongoing desegregation of their parent systems, *Stout*, 466 F.2d at 1214, and here the high school would continue to do just that. The high school and its special programs would remain open to County students to avoid

any substantial adverse impact on the County's progress. Gardendale's operation of the high school would thus not remove it as a "tool" from the County's desegregatory arsenal, and it was an abuse of discretion to impose on Gardendale what amounted to a Hobson's choice between paying millions of dollars for it or spending millions to build another one.

B. ***Equity does not justify the remedy either.***

The court also supported its charging a fee for the high school by invoking equity, Doc. 1141 at 190, but the court never explained why transferring the school to Gardendale without a price tag was unfair, and never explained where it derived its standard for what is equitable. The County school board did not pay for Gardendale High School; why should the Gardendale Board have to pay for it? The County board built the school using money the County commission *gave* it.[21] Doc. 1141 at 69; Doc. 1157 at 204. The County board did not borrow money to build it and owes nothing on it now. *Id.* So there is nothing inequitable about transferring the school to the Gardendale Board per Alabama law, without a fee. (And for that matter, a fee has not historically been required in separations of other districts. *See* Docs. 1001-9 at 5-7; 1001-11 at 2-4).

The court was also incorrect in finding that the cost of $55 million to "replace" the high school, Doc. 1141 at 72, 171-72, was a factor weighing against separation because there is no evidence that the County will have to

[21] The high school was one of a number of new facilities the County board built at the same time using that gift. Doc. 1141 at 170.

replace that facility. Gardendale would be educating former County high-school students from within and without city limits, so the County will not have to build a school for those students. The only evidence the court cited was the County superintendent's testimony, Doc. 1157 at 137-38 (corrected transcript of Doc. 1127), but he could not and did not establish that a full-scale "replacement" facility would be necessary despite the County's having fewer students. Instead he based his $55 million estimate on his lay opinion of what the 1971 Order requires, *id.* at 137, but the court never agreed that the Order mandated a replacement school, and at any rate the superintendent has revealed that he labored under the mistake of equating the County's desegregation obligations with racial balancing. Doc. 1092-1 at 12. In sum, the lower court's implicitly finding that separation will cost the County $55 million to replace a facility it will not be forced to replace was clear error because that finding rested on nothing but a lay witness's opinion about the law—one this brief demonstrates is wrong.

And the court's remedy suffers from a more fundamental flaw: equitable power in desegregation cases depends on the need to remedy a constitutional violation. *Freeman* at 489. Without danger of an impediment to desegregation, imposing a fee for the high school was tantamount to rewriting state law to accord with the court's view of fairness. Whether to force a new system to pay the old system for buildings was a policy question for the state legislature, and the district court recognized that state law does not require such a payment. Doc. 1152 at 12. It is not within the

competence of a federal court to second-guess that policy—not without proof that the high school's operation by Gardendale would damage the County's ability to desegregate.

There was no such proof. The high school's transfer would have no racially discriminatory or disproportionate impact on the County system. That is why the court should have left the financial value of the school to the state board of education's process for handling separations, as it did with other financial issues. *See* Doc. 1141 at 3; Doc. 1157 at 183-84, 210; *Spallone v. United States*, 493 U.S. 265, 276 (1990) (noting that in devising a remedy courts "must take into account the interests of state and local authorities in managing their own affairs").

These limits on courts' remedial power in desegregation cases guard against abuse of judicial authority under the guise of constitutional interpretation. "At some point, we must recognize . . . that all problems do not require a remedy of constitutional proportions." *Missouri v. Jenkins*, 515 U.S. 70, 138 (1995) (Thomas, J., concurring). As the Court warned long ago, "[w]ith the wisdom of the policy adopted . . . the courts are both incompetent and unauthorized to deal." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). This is true for state law as well: "We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States," and even when "interpreting the Constitution," courts must "take care that we do not import . . . our own personal views of what would be wise, just and fitting . . . and confound them with constitutional

limitations." *Twining v. New Jersey*, 211 U.S. 78, 106-07 (1908) (overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

Transferring the high school as state law provided may have offended the district court's sense of fairness, but equity alone did not empower the court to exact a price where the law charges none.

5. Even if the lower court's factual findings were correct, it would have been error to deny Gardendale's motion in full.

The factual and legal predicates for the result Plaintiffs urge are missing here. As shown above, there was no constitutional violation, the racial-motivation finding was clear error, and the law does not allow injunctions against a new school system when the County's former dual system has been fully dismantled for 41 years.

Yet supposing that the factual premise of adverse impact on the County's desegregation were correct, Plaintiffs' arguments still fail because they ignore the rule of fitness explained above. The power of district courts to "restructure the operation of local and state governmental entities is not plenary," and once there is a constitutional harm, a court "is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (citations and punctuation omitted). Where the harm is supposedly an impairment of the County's desegregation, a remedy must be closely fitted to the extent of that harm.

Since the impact of Gardendale's departure would be concededly minimal—the Government's expert said it "doesn't really move the needle much"—exercising the most extreme remedy available by denying a school board the right to function would have been an abuse of discretion. Doc. 1157 at 64. Plaintiffs do not attempt to explain why this harshest of remedies is automatically the district court's only option in light of the minor statistical differences that Gardendale's operation would prompt in the County's racial numbers. There are lesser remedies available to the court, as outlined above in Section 4, remedies such as interdistrict transfers, which would address the few impacts the court found likely without denying outright the racially neutral operation of a new school system. As this Court noted, the "proper role" of a splinter district is "not an all-or-nothing matter." *United States v. Hinds County Sch. Bd.*, 560 F.2d 1188, 1192 n.7 (5th Cir. 1977). Plaintiffs say the courts must swat at every fly with a hammer. The law demands a more nuanced approach.

Desegregation precedent did not freeze in place with *Wright*, *Stout*, or other decades-old cases, and the facts assuredly haven't either. "[H]istory did not end in 1965." *Shelby County v. Holder*, 133 S. Ct. 2612, 2628 (2013). Indeed it did not: the County's dual system was fully dismantled by 1976. *Stout*, 537 F.2d at 802-03. The factual context of Gardendale's formation is far removed from that era. 40 years and more lie between, yet Plaintiffs fail to account for the difference. The injunction they seek as to Gardendale's formation is no longer allowed by the law, is not justified by the facts, and is

not compatible with the Supreme Court's admonitions to return control of schools to local officials "at the earliest practicable date." *See Freeman v. Pitts*, 503 U.S. 467, 489-90 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991). As this Court promised in 1972, splinter districts "are not forever vassals of the county board." *Stout*, 466 F.2d at 1215.

Conclusion

Gardendale seeks to create a smaller, local school system to provide better schools for children of all races. Gardendale believes the lower court erred by obstructing that effort. The speech of private individuals protected by the First Amendment cannot create liability for a school board under the Fourteenth. The legal basis for exercise of the injunctive power against new systems is decades gone in Jefferson County, and the operation of a nondiscriminatory municipal school system cannot be conditioned on a multi-million-dollar price tag in the name of pursuing greater diversity.

Gardendale asks this Court to reverse the partial injunction of the new system, and specifically asks that the Court 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. Gardendale asks the Court to then remand the case with instructions to grant Gardendale's motion to separate in full.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the word limit of Fed. R. App. P. 28.1(e)(2)(B)(i), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, because this brief contains 13,542 words.

This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Equity font. The main text is double spaced using twice the required point size (28 points).

s/ Aaron G. McLeod
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Dated: August 11, 2017

Certificate of Service

I certify that on the 11th day of August, 2017, I electronically filed this document via the CM/ECF System, which constitutes service on the following counsel of record:

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