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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Reply Brief of Cross-Appellant Gardendale City Board of Education

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Aaron G. McLeod
Stephen A. Rowe
Russell J. Rutherford
Counsel for Gardendale City Board of Education
ADAMS AND REESE LLP
1901 6th Ave. N., Suite 3000
Birmingham, AL 35203
(205) 250-5000

Cross-Appellant Gardendale City Board of Education discloses the following **amended certificate** under FRAP 26.1 and Eleventh Circuit Rule 26.1-4:

- Adams and Reese LLP, counsel for Gardendale Board
- Bishop, Colvin, Johnson & Kent, LLC, counsel for Jefferson County Board
- Bradley Arant Boult Cummings LLP
- Bouyer, Dr. Martha V.J., member of Jefferson County Board
- Calvert, Tracy
- Campbell, Andrew P., counsel for intervenor
- Campbell Guin, LLC, counsel for intervenor
- Carter, Alfornia, Appellant
- Carter, Catrena, Appellant
- Carter, Lonnell, Appellant
- City of Gardendale, Alabama
- City of Graysville, Alabama
- Clemon, U.W., counsel for Appellants
- Colvin, Jr., Gerald D., counsel for Jefferson County Board
- Colvin, Whit, counsel for Jefferson County Board
- Dixon, Ronnie, member of Jefferson County Board
- Gamble, Christopher
- Gardendale City Board of Education, Cross-Appellant
- Gardner, Kelly, counsel for DOJ Civil Rights Division

- Guin, John C., counsel for intervenor
- Haikala, Madeline H., district-court judge
- Hogue, Dr. Michael, member of Gardendale Board
- Jefferson County Board of Education
- Johnson, Jr., Carl E., counsel for Jefferson County Board
- Kelly, Sharon D., U.S. attorney
- Kemmitt, Christopher, counsel for Appellants
- **Lee, Richard, former Gardendale Board member (to be deleted from this certificate due to his death)**
- Lin-Luse, Monique, counsel for Appellants
- Lucas, Christopher, member of Gardendale Board
- Mann, Oscar S., member of Jefferson County Board
- Martin, Alice H., U.S. Attorney
- 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.
- Parnell, K. Mark, counsel for Town of Brookside
- Parnell Thompson, LLC
- Percia, Veronica R., counsel for DOJ Civil Rights Division
- Perkins, Giles G., counsel for Gardendale Board

- Pike, Donna J., member of Jefferson County Board
- Pouncey, Dr. Warren Craig, Superintendent for Jefferson County Board
- Ray, Sandra, Appellant
- Reeves, Alene, Appellant
- Reeves, Ricky, Appellant
- Ross, Deuel, counsel for Appellants
- Rowe, Stephen A., counsel for Gardendale Board
- Rudloff, Andrew Ethan, counsel for Jefferson County Board
- Rutherford, Russell J., counsel for Gardendale Board
- Segroves, Christopher, member of Gardendale Board
- Simons, Shaheena A., counsel for DOJ Civil Rights Division
- Singleton, Natane, counsel for DOJ Civil Rights Division
- Smith, Jacqueline A., member of Jefferson County Board
- Spital, Sam, counsel for Appellants
- State of Alabama Board of Education
- Stout, Linda, Appellant
- Sweeney, Jr., Donald B.
- Thompson, Mary H., counsel for Town of Brookside
- Town of Brookside, Alabama
- U.W. Clemon, LLC
- Ziegler, Alan K.

Gardendale certifies under Eleventh Circuit Rule 26.1-3(b) that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

s/ Aaron G. McLeod
Aaron G. McLeod
Counsel for Cross-Appellant
Gardendale City Board of
Education

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"This Court believes that both the Eleventh Circuit Court of Appeals and the Supreme Court would find that the age of this case diminishes the likelihood that Gardendale's separation would impede the county's effort to fulfill its desegregation obligations."[1]

1. Plaintiffs and the County appear to have conceded that Gardendale did not violate the Constitution.

The County's brief offers no defense of the lower court's holding Gardendale liable for violating the Equal Protection Clause, and Plaintiffs fail to respond to several arguments on this issue. Gardendale contended that this legal conclusion was error because, among other reasons, the right the court thought was violated does not exist, and because it is logically impossible for a student's equal-protection rights to be violated by the Gardendale Board when that body has never wielded power over any student's education. Gardendale Br. at 21-24. Not one student—ever—has been subjected to the Gardendale Board's authority since Gardendale has yet to operate a school. Plaintiffs say nothing about this. They do not articulate how a cognizable right of Black students has been abridged by some official act of Gardendale, so this point is conceded. Plaintiffs' Response Br. at 11, 23-27; *see Manso v. Fed. Detention Ctr.*, 182 F.3d 814, 820 n.7 (11th Cir. 1999); *Chubbuck v. Indus. Indem.*, 1992 U.S. App. LEXIS 1420, *3 (9th Cir. 1992).

[1] Doc. 1152 at 38.

Even if not conceded, Plaintiffs' response is largely that Gardendale mischaracterized the district court's rationale as to the state-action element of an equal-protection violation. Plaintiffs' Response Br. at 23-26. Plaintiffs overlook that Gardendale cited *both* opinions below since the violation decision appeared in the Supplemental Opinion that Plaintiffs did not appeal. Doc. 1152 at 2, 15. But rather than belabor what the lower court did or did not say, Gardendale offers the following table for cross-reference.

Gardendale's Arguments	District Court's Rationale
The court held Gardendale liable for words and actions of others associated with the separation effort, like Facebook comments and a political ad, instead of state action by the Gardendale Board itself. Br. at 13 & n.8, 19-20.	"[T]he Court found that the Gardendale district 'violated the Equal Protection Clause anew' because the words and actions associated with Gardendale's separation effort sent a message of inferiority to black public school students . . . ." Doc. 1152 at 15; Doc. 1141 at 138-51, 175-80 (citing Facebook posts and the ad).
The lower court erred because there is no right to be shielded from a "message of inferiority." Br. at 13, 22-24.	*See id.*; *see also* Doc. 1141 at 180 ("The messages of inferiority in the record in this case assail the dignity of black school children.").
The court wrongly believed that Gardendale had some duty to disavow statements made by others. Br. at 20-21.	"No member of the board has disavowed the belittling language of exclusion used by separation organizers and supporters." Doc. 1141 at 177.

Since Plaintiffs advance no further rejoinder to the substance of Gardendale's argument that words and actions "associated with" the separation effort do not satisfy the state-action rule, this Court should reverse the lower court's legal conclusion that Gardendale violated the Constitution.

2. The Court cannot reach the merits of many of the County's arguments because it did not cross-appeal.

A. *An appellee cannot seek greater relief than it received below without cross-appealing.*

It is a familiar rule of appellate review that an appellee which does not cross-appeal is barred from attacking the lower court's judgment. As the Supreme Court put it long ago:

> [A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . .

United States v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924).

The Court has reaffirmed this principle: "[A]n appellee who does not cross-appeal may not 'attack the decree . . . .'" *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quoting *Am. Ry. Express*). This Court recognizes the same rule that "[a]bsent a cross-appeal, an appellee may not attempt to enlarge his own rights or decrease the rights of his adversary." *Trustees of*

Atlanta Iron Workers v. So. Stress Wire Corp., 724 F.2d 1458, 1459 (11th Cir. 1983).

This rule applies to preservation of specific issues. *See Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 n.44 (11th Cir. 2002) (noting that the plaintiffs had not cross-appealed the lower court's determination "on this issue" and had thus "not preserved this issue for appeal"), *overruled on other grounds*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

B. ***The County did not cross-appeal but argues here for more relief than it received below.***

In the district court the County argued that Gardendale's motion to separate should be denied in full. Doc. 1093 at 1-2, 36. But Gardendale's motion was granted in part when the court allowed Gardendale to separate and assume operation of two of the four schools at stake—and the County did not file a cross-appeal of that decision. Doc. 1141 at 185. The Plaintiffs appealed and Gardendale cross-appealed, but no other party joined in. *See* Doc. 1160; Doc. 1164.

Yet here the County's brief urges exactly what it cannot. From start to finish the County asks this Court to reverse the partial grant of Gardendale's motion, beginning with the Statement of the Issue, where the County asks whether Gardendale "should . . . be permitted to operate nonetheless." County Br. at 1. That is exactly what is not at issue for the County. Then, in its Summary of the Argument, the County says that

"Gardendale's secession request *should have been* denied in its entirety." County Br. at 2 (emphasis added).

The County's Argument is replete with similar statements, including a sustained attack on Gardendale's separation plan as inadequate under the law as the County sees it. *Id.* at 8-24. For example, the County claims that under *Ross*, Gardendale's plan was not sufficiently specific and complete, and that the plan will cause adverse financial impact. *Id.* at 8-19, 27-30. But the County largely fails to explain how the points it makes relate to *affirming* the lower court's judgment. The County may only defend the lower court's decision to allow separation. So it is a mystery why the County devotes so much ink to arguing that Gardendale did not meet its "heavy burden" of offering a plan with all the details the County thinks were required. *See id.* at 8-24.

The County goes for broke in its Conclusion, where it asks the Court to "reject the appellate relief sought by Gardendale and, instead, find that the operation of the Gardendale school district should be properly denied." *Id.* at 33.

This is not the relief that the County received below—it is much more. The County's brief thus explicitly asks this Court to award it something it did not receive below and to take away from Gardendale the partial relief the district court granted. It is too late for the County to do so, having failed to cross-appeal. As grounds for reversal, this Court may not reach any of the County's arguments.

C. *Because Plaintiffs argued only desegregation impact and racial motivation in their opening brief, financial issues have not been preserved for review.*

Though the County did not cross-appeal, it might expect it can ride Plaintiffs' coattails since they did appeal one of the court's two decisions (the April Memorandum Opinion). Doc. 1160.[2] If so, the County errs. It is another familiar maxim that arguments "not properly presented in a party's initial brief" are "deemed waived." *Bank of Am., N.A. v. Mukamai*, 571 F.3d 1156, 1163 (11th Cir. 2009) (citing *United States v. Fiallo-Jacome*, 874 F.2d 1479 (11th Cir. 1989)).

In their opening brief Plaintiffs sought reversal of the April Memorandum Opinion on two grounds: racial motivation and impact on desegregation. *See* Plaintiffs' Initial Br. at 29-53. They did not raise the specter of adverse financial impact on the County school system. *Id.* Plaintiffs have thus not preserved any issue based on financial considerations because they did not brief it, and the County has not preserved the issue because the County did not cross-appeal. *See Sikes*, 281 F.3d at 1367 n.44.

As a result, no party before this Court has preserved the issue of any negative financial impact that Gardendale's separation could have on the County system. In support of reversal, this Court may not consider it.

[2] The "corrected" notice of appeal, in which Plaintiffs deleted any mention of Doc. 1152, the Supplemental Opinion. *See also* Doc. 1158.

3. Cross-Appellees cite the wrong standard and fail to show a substantial adverse impact on desegregation.

A. Ross *does not apply, and even if it did, it is distinguishable.*

As Gardendale has demonstrated, the *Wright* line of cases, including *Scotland Neck*, *Ross I*, and *Ross II*,[3] does not apply because unlike in all of them, the Jefferson County school system has, according to this Court, fully dismantled its prior racially dual system. *See Stout v. Jefferson County Bd. of Educ.*, 537 F.2d 800, 802, 803 (5th Cir. 1976); Gardendale Br. at 35-39. There is no need to recapitulate that analysis here.[4]

Yet even if *Ross I* and *II* still applied, the Supreme Court has interposed more recently to caution that what may have been "axiomatic" in 1977[5] is no longer so in 2017. Since "returning schools to the control of local authorities at the earliest practicable date" is and must be "the court's end purpose" in a desegregation case, it is natural that "with the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish." *Freeman v. Pitts*, 503 U.S. 467, 489-91 (1992). The Court emphasized this theme: "As the *de jure* violation

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[3] 407 U.S. 451 (1972), 407 U.S. 484 (1972), 559 F.2d 937 (5th Cir. 1977), and 583 F.2d 712 (5th Cir. 1978), respectively.

[4] Cross-Appellees mistake the difference between what *Stout* held in 1976 and what is still called "unitary status." This Court explained the distinction in 1988, when the Court noted that it had held the County system fully dismantled but had not yet declared it unitary because of a need for continued supervision. *See Stout v. Jefferson County Bd. of Educ.*, 845 F.2d 1559, 1561 n.4 (11th Cir. 1988) (citing *Stout*, 537 F.2d at 802). Gardendale noted this distinction. Gardendale Br. at 35 & n.14, 36-38.

[5] *See Ross*, 559 F.2d at 944.

becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." *Id.* at 496. Indeed, the lower court itself recognized that "the age of this case diminishes the likelihood that Gardendale's separation would impede the county's effort" to desegregate. Doc. 1152 at 38.

Given these strictures, the applicability of *Ross* hinges on the facts of that case, in another state, nearly 40 years ago. In two salient respects, the circumstances here are much otherwise. First, in *Ross* the Court noted that the splinter district was organized "soon after" a desegregation plan was approved for the parent district. 559 F.2d at 939. That is not the case here. As Gardendale has already shown, its efforts to form a new system come some 40+ years after the 1971 decree that still governs the County, so it cannot be said that Gardendale's efforts to separate were animated by a desire to avoid forced integration as in *Ross* (and *Wright*). Gardendale Br. at 37 & n.15.

Second, there is little resemblance between the racial numbers in *Ross* and those here. *Contra* County Br. at 19. In *Ross* there was a substantial Hispanic minority, so the parent district had a total minority population of 64.9% and a white population of 35.1%, whereas the proposed new district, if allowed, would have been 89.6% white. *Ross*, 583 F.2d at 715. And the total minority population of the old district would rise by 2.4%. *See id.* Thus, both the percentage change in minority students and the white population

of the new district were higher in *Ross* than they are here, where Gardendale's separation plan would cause only a 1.5% increase in the County's black population, and Gardendale's system would be roughly 71% white and 25% Black. Doc. 1118 at 5; Doc. 1126 at 61, 91-92; Doc. 1156 at 124-25; Doc. 1157 at 64.[6] *Ross* is therefore not on point, and whatever it may have deemed "axiomatic" about racial numbers in 1977, it is no longer true today, where the disparities are smaller and the prior dual system such a distant memory.

Finally, beyond these factual differences is the matter of what *Ross* did and did not hold. The County pretends that *Ross I* mandated, as a rigid yardstick for every new system, all the factors the County explores at length. *See* 559 F.2d at 944-45. *Ross* did no such thing. The Court noted that the new district there "ha[d] never been tested by the criteria" of *Wright* and *Scotland Neck* and remanded the case for that to happen. The Court explained that the new system would have to "establish what its operations will be" as to "each significant facet of school district operation." *Id.* at 944. The Court introduced the following items with "for example," and that is what they were—examples. Nowhere did *Ross* state that the factors it recited were prerequisites for all separating districts, so the County errs in treating them like the Decalogue. Gardendale's proposal

[6] Plaintiffs cite cases purporting to show that a school-by-school analysis is required, but those cases did not involve splinter districts; they addressed interdistrict desegregation transfers. *See United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1304-05 (11th Cir. 1989); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1401-02 (11th Cir. 1993).

included provisions on student assignment, transition zones, special-needs children, career tech, employee and interdistrict transfers, facilities, equipment, faculty and staff, and taxes. Doc. 1040-1 at 1-14; Doc. 1129-10 at 4-6. *Ross* did not hold that such a plan is so insufficient as to justify denying a new system the right to exist.

B. *No party has rebutted Gardendale's showing that there will be no substantial adverse impact on desegregation.*

(i) *Cross-Appellees have shown no evidence of racially significant effects.*

Both Plaintiffs and the County fail to cite record evidence showing that the impacts they complain of will fall unequally on minority students. For example, the County refers to a loss of desegregation "options," County Br. at 26, but scratch beneath the surface, and the actual testimony and evidence cited speaks of enhancing "diversity," the imaginary loss of the career-tech program at the high school, and a plan to merge the Fultondale and Gardendale zones that was vigorously opposed by residents. *See, e.g.*, Doc. 1128 at 133-35; Doc. 1126 at 75;[7] Doc. 959 at 8 n.6. The County does not cite evidence that minority students will bear a burden uncommon to the entire student population, nor any impairment to their equal access to schools. Gardendale has already explained that transferring Gardendale High School will not deprive County students (roughly 133

[7] The County cites the page number in the top-right corner. For record material, Gardendale cites the pagination produced by the CM/ECF system, along the top margin. Thus, Doc. 1126 at 75 is the same as the County's cite to Doc. 1126 at 729.

outside Gardendale) of use of the career-tech facility, *see* Gardendale Br. at 48; Doc. 1040-1 at 7; Doc. 1157 at 151-52; Doc. 1155 at 164-65, and has shown that increasing "diversity," laudable though that may be, is not a basis for a court's remedial authority. "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). This lack of racially significant effects is the fundamental reason why it was error to partially enjoin Gardendale's operation and impose a multi-million-dollar fee for the high school. *See* Gardendale Br. at 40-41 & n.18, 45-47.

What is more, the County incompletely cites the record on a key point: racial-desegregation transfer students who attend Gardendale schools but do not live in Gardendale. County Br. at 25-26 n.11. Read in full context, the testimony cited explains that under Gardendale's plan, there *will* indeed be racial-desegregation transfers allowed from County schools to Gardendale schools. Doc. 1156 at 314-20; Doc. 1129-10 at 5-6 (setting out the desegregation transfer policy). The County's alarm that a separation will mean the end of desegregation transfers is a false one.[8]

Plaintiffs' arguments fare no better. Plaintiffs apparently agree with Gardendale that the lower court found only two impacts on desegregation,

[8] The County upbraids Gardendale for proposing such transfers be conditioned on available space, but that is the kind of desegregation transfer the lower court, by the County's agreement, approved for Trussville in 2005. *See* Doc. 899 at 10 & Ex. B.

Plaintiffs' Response Br. at 34, 37, but Plaintiffs fail to rebut Gardendale's challenge that the lower court's rationale lacked any basis in the facts. The first impact is the roughly 600 students who would be reassigned by the County upon separation, and as to that Plaintiffs have no answer for the bare fact that about 85% of those students are white. Doc. 1141 at 168-69. Sending those students to certain majority-black schools (one of the scenarios Gardendale proposed at trial, but it would be the County's decision) would thus actually further integration.[9]

This bears emphasis. Several County schools (Bryan Elementary, Mount Olive Elementary, Bagley K-8, and either Corner High or Minor High) would become *more* diverse as a result of a predominately white body of students being reassigned after Gardendale's departure. *See* Doc. 1156 at 128-31; Doc. 1157 at 93-94 (adverse expert agreeing that three schools would become more diverse with Gardendale's departure). And the evidence at trial also established that even considering only the County schools affected by the separation, there would be minimal impact on the overall racial percentages of those schools' populations. *See* Doc. 1157 at 93-94.[10]

[9] Another option is to send Black students to a mostly white school and white students to a mostly Black one, but Gardendale does not believe that comports with *Brown*, notwithstanding the Supreme Court's decision in *Green v. School Board of New Kent County*, in which it required students to be assigned on the basis of race, in the name of putting an end to student assignment on the basis of race. 391 U.S. 430, 437-38 (1968).

[10] As noted above, Plaintiffs cite cases regarding a school-by-school analysis, but those cases involved interdistrict desegregation transfers, not new districts. *See United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1304-05 (11th Cir. 1989); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1401-02 (11th Cir. 1993).

Plaintiffs' response is to repeat that Black students will bear a disproportionate burden—but they cite only the district court's April Opinion, when it was Gardendale's whole point that the court clearly erred in failing to identify evidence that Black students would bear any greater burden than others when 85% of reassigned students are white. Plaintiffs' Response Br. at 38-40. Plaintiffs have begged the question instead of answering it.[11]

As to the second impact, the transfer of the high school, Gardendale has shown above that it will continue to be open to County students for career-tech programs and desegregation transfers, and Plaintiffs cite no evidence contradicting this. Plaintiffs' Response Br. at 41-42. The high school will still be a "desegregative tool" of the County because Gardendale will, as this Court mandated, continue to participate in the County's desegregation. *See Stout v. Jefferson County Bd. of Educ.*, 466 F.2d 1213, 1214 (5th Cir. 1972). Though Plaintiffs claim Gardendale "offers no meaningful response" on this, Gardendale's first brief addressed the point. Gardendale Br. at 46-49.

Finally, while Plaintiffs say Gardendale "fails to so much as mention" the "timing" and "message" of the separation effort, Plaintiffs' Response

[11] Sending a mostly white group of students to a majority-Black school also cannot be deemed a burden on the group's Black students without a tacit assumption that they are less able to learn when in the racial majority than white students. Gardendale rejects that possibility as impermissible bias without foundation in the record.

Br. at 46, Gardendale believes its treatment of this in its opening brief was sufficient, even if Plaintiffs overlooked it. Gardendale Br. at 19-21, 23-28, 37.

In that brief Gardendale challenged Cross-Appellees to point out how any claimed impact on the County system from the separation will hamper desegregation by unequally burdening minorities. Show us, Gardendale urged, us and the Court, exactly how the relatively minor effects of forming a new system will impair the equal-protection rights of Black children. Show us that evidence.

And they have not.

(ii) *The County's policy arguments are misplaced.*

The County recites what it believes Gardendale's separation will cost it, enumerating such things as changes to poor or non-poor student ratios, special-education population, personnel cuts, transportation costs, and operational expenses. County Br. at 23-24, 27-30. These arguments are curious because they have nothing to do with race. Many of the County's complaints would apply with equal vigor to any separation, even where no desegregation concerns arise. The transfer of facilities, buses, teachers, or tax dollars to the new system may be, after a fashion, a burden on the County, but if so that burden is a function of the state law that allows cities to form their own school district—it has nothing to do with desegregation. (And after all, this Court's concern is for the rights of students, not what is best for school-board administrators.)

What the County is really arguing against is the wisdom of the Alabama law that allows cities to form school systems and separate from their encompassing county, and especially against a new system assuming operation of school buildings without paying an exit fee or bounty to the old system. County Br. at 27-32.[12]

With all such arguments, this Court can have nothing to do. The County's lamentations on the effects of municipal separations would be all very well if this were the floor of the Alabama State House. But this is a federal desegregation lawsuit, and the only basis here for the exercise of authority is the danger of racially discriminatory state action by a school board. Absent that danger, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). As this Court has warned, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *McCall v. United States*, 642 F.3d 944, 951 (11th Cir. 2011) (internal punctuation omitted); *Deen v. Egleston*, 597 F.3d 1223, 1233 (11th Cir. 2010) ("It is not the province of the federal courts to substitute their personal notions of sound public policy for those chosen by the legislature."). Failing to establish that the consequences of Gardendale's separation would be racially significant, the County cannot use this 52-year-old case as a forum for its grievances against state law. Costs for the County there may be (for

[12] Neither the County nor Plaintiffs appealed the district judge's order stating that Alabama law allows exactly that. Doc. 1152 at 12; Doc. 1160.

Gardendale as well), but without evidence that those costs will have racial implications, this Court must be deaf to them.

Perhaps sensing this flaw, the County makes one gesture toward connecting its expenses to desegregation when it states that given its student composition (48.8% black), "the financial burdens outlined above will undoubtedly disproportionately impact the African-American student population in JCBE by limiting the available funds" for various projects. County Br. at 30; Plaintiffs' Response Br. at 41. The question immediately arises—how so? Surely the County does not propose to spread separation costs across only majority-Black schools. How then would minority students suffer? If the County must absorb a transition cost, it will ensure that the impact on its budget affects no one race unequally. White, Black, and other students will all alike be affected, as they are every day by the vicissitudes of the County's annual budget, the efficiency of the County Board's administration, variations in tax revenues, and any number of other factors. New districts are an occasional part of education in Alabama, and since the County cannot prove—and certainly does not plan—any racially disproportionate effects of Gardendale's departure, these protestations belong elsewhere.

(iii) *Cross-Appellees overstate the impacts on County finances.*

Both sides' experts agreed at trial on a major point: the impact of separation on the County's annual operating budget would be minimal.

Dennis Veronese, Gardendale's expert, testified that separation would cause a deficit in the County's operating budget for FY 2017 of just over $2 million—less than one percent of the County's general-fund budget. Doc. 1156 at 57-59. The County's own expert, McPherson, agreed with Veronese that the net operational loss to the County for FY 2017 would be less than one percent of the County school system's annual budget of $266,949,000. Doc. 1157 at 20-22.

In fact, the evidence is even better for the County based on what the lower court actually did. Because the court decided to limit the new Gardendale system to students living in the city (contrary to Gardendale's plan to include North Smithfield students), *see* Doc. 1141 at 185, 187 n.93, a reasonable inference from the record is that the County would, under that scenario, actually enjoy a surplus in its general-fund budget after the separation. *See* Doc. 1126 at 212-14 (testimony that a city-only attendance plan means the County would operate at a surplus).

It is therefore hard to credit the County's projections of separation costs as substantial enough to warrant denying Gardendale a new system.

4. Plaintiffs persist in looking for discriminatory intent in all the wrong places.

Gardendale will not repeat here its contentions as to the nonracial nature of the evidence the district court relied on for its racism finding. Instead, the fundamental error in which Plaintiffs have joined the lower

court is a legal one: what evidence *counts*, and what does not. Their mistake is in looking to the actions and words of private individuals to find that Gardendale's official actions were motivated by race. In this regard it is critical to recall that the only party before the lower court whose motives were in question was the Gardendale City Board of Education—not the City of Gardendale, not any advisory board, and not any individual or group of individual private citizens.

Plaintiffs' (and the district court's) mistake of law is illustrated by the very cases Plaintiffs cite, especially *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In that case, the Court offered guidance on how the purpose of a legislative body can be tested for discrimination and discussed potentially helpful factors, including disparate racial impact, the historical background of the challenged decision, the sequence of events, procedural or substantive departures from the norm, and legislative history. *Id.* at 266-67.

What Plaintiffs fail to notice is that the Court in *Arlington Heights* was speaking of this evidence *as to the defendant entity*, and did not give district courts a license to search abroad for words and deeds of nonparties. The disparate-impact element was of "the official action." *Id.* at 266. The "historical background" was that of "the decision" and referred to a prior "series of official actions." *Id.* at 267. And the procedural or substantive departures were those of the entity itself from its normal operations, *see id.* at 267, 269 & n.19, not the actions of a nonparty.

This Court uses the same measure: to prove a present intent to discriminate, "the burden rests with the Plaintiffs to demonstrate that *the District* acted with discriminatory purpose." *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1349 (11th Cir. 2005) (emphasis added).

The lower court's mistake in its racism finding was, among other things, discovering what it thought to be racist animus by someone else and then blaming Gardendale for it. Plaintiffs commit the same fallacy. The "historical background" evidence they cite is not of any prior action by the Gardendale Board but other municipalities' separations with which Gardendale had nothing to do. The "sequence of events" and "legislative history" Plaintiffs recount likewise deal with the actions of "organizers," *i.e.* private citizens who lobbied for a new school system, not the prior actions or legislative history of the Gardendale Board or its proposal. Plaintiffs lean heavily on comments by David Salters and Tim Bagwell, for example, but neither of them ever sat on the Gardendale Board or ever exercised state authority, and Plaintiffs fail to explain how *Arlington Heights* or any other case allows the lower court to infer racial motives for the official actions of the Gardendale Board from the private comments and past political efforts of ordinary citizens. *Cf. Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (noting that "a judiciary must judge by results, not by varied factors which may have determined legislators' votes"); *Walsh v. Gowing*, 494 A.2d 543, 546 (R.I. 1985) ("That an

organization with a relatively narrow self-interest sponsored the bill has no bearing on judicial interpretation of the legislative intent . . . .").

Looking to Facebook comments on a page Gardendale never controlled, or to a flyer Gardendale never published, is no more logical—or just—than looking behind a bill passed by Congress to test the bona fides of those who lobbied for it. The evidence Plaintiffs cite might be probative of the intent of those who spoke and acted at the time, but it is a *non sequitur* to rely on that evidence to show that racial animus motivated someone else, like the Gardendale City Councilmembers when they incorporated the Gardendale Board, and still less by the Board itself. This is especially true given the lower court's admission that "some Gardendale citizens support separation for reasons that have nothing to do with race." Doc. 1152 at 25.

On that score it bears remembering that Chris Lucas's comment, which Plaintiffs mention because he later became a Board member, was made before the Board existed and was both racially neutral and a correct prediction of what the lower court actually did. Lucas, speaking for himself, replied to a query on Facebook by saying that Gardendale would not be required to "bring in minorities from outside of" the city "to achieve some sort of quota." Doc. 1132-2 at 167; Doc. 1092-20 at 11. He then explained that the new system would be for residents, "whatever that racial make-up is." *Id.* No racial bias is apparent from this comment, and as the lower court later decided, Lucas was right—no racial quota or ratio will be required, because that would be illegal. Doc. 1141 at 159-60.

Simply put, Plaintiffs (and the lower court) fail to meet this challenge: what is the legal warrant for finding racist motives in a public body based on prior comments by private individuals? It is not *Arlington Heights*, nor is it *Washington v. Seattle School District*, 458 U.S. 457 (1982). Plaintiffs cite *Washington* as supporting the use of statements by "sponsors" to prove discriminatory intent of an official action—but Plaintiffs misuse that case because there the citizens' group *itself* wrote the challenged initiative, and its supporters "candidly represented" that the initiative was designed to affect "school district flexibility" in no way "other than in busing for desegregation purposes." 458 U.S. at 462, 471.[13]

Washington is no help to Plaintiffs because the "FOCUS Gardendale" group did not draft the separation plan Plaintiffs challenge. The authors of the Facebook posts the lower court relied on did not draft the separation plan. That was the work of a superintendent from Illinois who hadn't even lived in Alabama until he was hired. *See* Doc. 1131-19 at 6-8, 17-18. What evidence is there that he was animated by racism? The lower court seemed to believe there was none. Doc. 1141 at 179. And as Gardendale has already pointed out, no part of that plan will discriminate against Black students or burden them in some unique way.

The question posed by this issue is a sharp one, and momentous. Is it the law in this Circuit that a school board can be held liable for violating the

[13] Plaintiffs also cite *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027 (11th Cir. 2008), but that case said nothing about proper evidence of racial intent and instead dealt with standing issues at the pleadings stage.

Constitution, based on the prior acts of private citizens? Is it the law in this Circuit that a school board can be found as acting with racial intent, on the strength of someone else's Facebook comments and political ads? If that is the law, then no matter the outcome here, every school board in Alabama, Georgia, and Florida is in jeopardy.

5. Transferring school buildings without charging a fee is consistent with the Plaintiffs' and the County's statements to the court.

Cross-Appellees dispute Gardendale's argument that the law does not permit the lower court to charge tens of millions of dollars for Gardendale High School, and while that is Gardendale's position, they give too much credit. They, too, have several times taken a similar position in public filings in this case.

Most recently, the City of Trussville in 2005 formed its own school district, with the consent of Plaintiffs and the County. *See* Doc. 898 at 1, 3. In their joint motion Plaintiffs and the County asked the lower court to allow Trussville to operate—and significantly, both of them represented that the order they proposed "reflect[ed] the parties' agreements," and further stated that they "represent to the Court that they have no objection to the entry of the proposed Order and, as well, *that it meets applicable legal standards*." Doc. 898 at 2 (emphasis added). The attached order said nothing about Trussville paying a fee for the schools. *Id.* at 5-22. The lower court adopted their order. Doc. 899 at 1-18 & Ex. A at 4-5, 9-10.

In light of this, it is a bit much for the County or the Plaintiffs now to say that Alabama law requires Gardendale to pay for equivalent school facilities for reassigned County students.[14] There was not a word about the law requiring, as a condition of Trussville's operation, payment for the buildings—even with the County's admission that it had "no dedicated facilities available" to receive displaced students. Doc. 902 at 3-4.

Nor was Trussville the first time. In 2003, Leeds separated from the County by consent, and after the parties submitted a joint recommendation, they stipulated to an order approving the Leeds system—with no provision for paying the County for buildings. *See* Doc. 840 at 1-6.

Thus, Gardendale's position as to the high school, far from being "born of avarice, greed, self-absorption" or "unapologetic and without conscience," County Br. at 31, was preceded by what both the County and Plaintiffs have represented in court as appropriate. In defending the imposition of a multi-million-dollar fee for the high school—without citing a case recognizing that remedy—they seek an unprecedented result contrary to their own prior conduct. They should not be heard to reproach Gardendale now.

[14] Citing an Alabama code section dealing with annexations—not municipal separations. Ala. Code § 16-8-20.

6. Even if Plaintiffs were correct about racial motive and impact on desegregation, it would have been error to enjoin separation.

Finally, even if Plaintiffs prevail on the fact finding of racial intent and on desegregation impact, it would have been error to deny Gardendale's motion outright as Plaintiffs urge—a rebuttal Gardendale included in its opening brief. Plaintiffs say Gardendale "does not directly respond to Plaintiffs" on this point, Plaintiffs' Response Br. at 56, a remarkable statement given that the last argument section of Gardendale's brief was precisely that. *See* Gardendale Br. at 52-54. Since Plaintiffs offer no response to that section in their second brief, Gardendale sees no need to repeat its argument here.

But it will note that the "proper role" of a splinter district is "not an all-or-nothing matter," and that even "proof that [a] decision . . . was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision." *Arlington Heights*, 429 U.S. at 270 n.21; *United States v. Hinds County Sch. Bd.*, 560 F.2d 1188, 1192 n.7 (5th Cir. 1977).

Conclusion

Two things are clear from the briefest reading of desegregation law. The first is that the normal and intended state of affairs is control of public education by local officials. The second is that the grant of awesome power to federal judges to reshape school systems was justified only by defiance of

court orders to stop sending black children to one school and white children to another.

According to this Court, those days are over in Jefferson County. *De jure* segregation is dead and buried, and there is no chance that a new school district will revive the corpse. This case thus cannot be used as a forum to achieve policy goals. They may have fine names—diversity, balance, proportionality—and they may come shrouded in ersatz constitutional garb. But whatever the merit of such values, they are matters for democratic institutions and legislation. They are strangers to the text of the Constitution.

Gardendale asks this Court to expose these pretenders to constitutional doctrine. Gardendale wishes only to operate an inclusive, nondiscriminatory school system and thereby realize the Court's promise that it is not "forever [a] vassal[] of the county board."[15] Gardendale adopts and incorporates here the request for relief in its opening brief.

Respectfully submitted,

s/ Aaron G. McLeod
Stephen A. Rowe
Aaron G. McLeod
Russell J. Rutherford
Counsel for Cross-Appellant
Gardendale City Board of Education

[15] *Stout*, 466 F.2d at 1215.

Certificate of Compliance

This brief complies with the word limit of Fed. R. App. P. 28.1(e)(2)(C), excluding the parts exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, because this brief contains 6,363 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.

s/ Aaron G. McLeod
Counsel for Cross-Appellant
Dated: October 16, 2017

Certificate of Service

I certify that on the 16th day of October, 2017, I electronically filed this document via the CM/ECF System, which constitutes service on the following counsel of record:

U.W. Clemon
Christopher E. Kemmitt
Monique Lin-Luse
Deuel Ross
Sam Spital
Counsel for Appellants/Cross-Appellees
NAACP Legal Defense & Educational Fund, Inc.
clemonu@bellsouth.net
mlinluse@naacpldf.org
ckemmitt@naacpldf.org
dross@naacpldf.org
(205) 837-2898

(212) 965-2200

Whit Colvin
Carl Johnson
Andrew E. Rudloff
Counsel for Cross-Appellee
Jefferson County Board of Education
wcolvin@bishopcolvin.com
carljohnson@bishopcolvin.com
arudloff@bishopcolvin.com
(205) 251-2881

Shaheena Simons
Kelly D. Gardner
Veronica Percia
Natane Singleton
Counsel for Department of Justice
Civil Rights Division
Educational Opportunities Section
(202) 514-4092
kelly.gardner@usdoj.gov
veronica.percia@usdoj.gov
natane.singleton@usdoj.gov
shaheena.simons@usdoj.gov

s/ Aaron G. McLeod
Of counsel