DOCKET NO. 17-12338

United States Court of Appeals

for the

Eleventh Circuit

LINDA STOUT, LONNELL CARTER, ALFORNIA CARTER, SANDRA RAY, RICKY REEVES, ALLENE REEVES, and CARTRENA CARTER, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Defendants-Appellees/Cross-Appellants,

GARDENDALE CITY BOARD OF EDUCATION,
Defendant Intervenor-Appellee/Cross-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
CASE NO: 2:65-cv-00396-MHH
(Hon. Madeline H. Haikala)

INITIAL BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants/Cross-Appellees Linda Stout, Lonnell and Alfornia Carter, Sandra Ray, Allene and Ricky Reeves, and Cartrena Carter ("Plaintiffs-Appellants") make the following disclosures of interested parties pursuant to Eleventh Circuit Rule 26.1:

1. The Hon. Madeline H. Haikala, United States District Judge, Northern District of Alabama
2. Alfornia Carter, Plaintiff-Appellant
3. Cartrena Carter, Plaintiff-Appellant
4. Lonnell Carter, Plaintiff-Appellant
5. Sandra Ray, Plaintiff-Appellant
6. Allene Reeves, Plaintiff-Appellant
7. Ricky Reeves, Plaintiff-Appellant
8. Parents of all African American students currently enrolled, or who will be enrolled, in the public schools operated by the Jefferson County (Alabama) Board of Education
9. NAACP Legal Defense and Educational Fund, Inc. ("LDF")
10. Sherrilyn Ifill, LDF Attorney for Plaintiffs-Appellants
11. Janai Nelson, LDF Attorney for Plaintiffs-Appellants
12. Jin Hee Lee, LDF Attorney for Plaintiffs-Appellants

13. Monique N. Lin-Luse, LDF Attorney for Plaintiffs-Appellants
14. Christopher Kemmitt, LDF Attorney for Plaintiffs-Appellants
15. Deuel Ross, LDF Attorney for Plaintiffs-Appellants
16. Samuel Spital, LDF Attorney for Plaintiffs-Appellants
17. U.W. Clemon, LDF Cooperating Local Attorney for Plaintiffs-Appellants
18. U.W. Clemon, LLC, Attorney for Plaintiffs-Appellants
19. White Arnold & Dowd P.C., former law firm associated with U.W. Clemon, Attorney for Plaintiffs-Appellants
20. Jefferson County Board of Education ("JCBOE"), Defendant-Appellee/Cross-Appellant
21. Jacqueline A. Smith, JCBOE Member
22. Dr. Martha V. Bouyer, JCBOE Member
23. Ronnie Dixon, JCBOE Member
24. Oscar S. Mann, JCBOE Member
25. Donna J. Pike, JCBOE Member
26. Dr. Warren Craig Pouncey, Superintendent, JCBOE
27. Whit Colvin, Attorney for JCBOE
28. Andrew Ethan Rudloff, Attorney for JCBOE
29. Carl E. Johnson, Jr, Attorney for JCBOE
30. Bishop, Colvin, Johnson, and Kent, LLC, Counsel for JCBOE

31. Gardendale City Board of Education ("GBOE"), Defendant-Intervenor/ Cross-Appellant
32. Dr. Michael Hogue, GBOE Member
33. Richard Lee, GBOE Member
34. Christopher Lucas, GBOE Member
35. Adams and Reese, LLP, Counsel for GBOE
36. Dr. Patrick Martin, Superintendent, GBOE
37. Stephen A. Rowe, Attorney for GBOE
38. Russell J. Rutherford, Attorney for GBOE
39. Christopher Gamble, Mount Olive resident
40. Aaron G. McLeod, Attorney for GBOE
41. Giles G. Perkins, Attorney for GBOE
42. United States of America, Plaintiff-Intervenor
43. Kelly Gardner, Attorney, United States Department of Justice, Civil Rights Division ("DOJ")
44. Veronica R. Percia, Attorney, DOJ
45. Natane Singleton, Attorney, DOJ
46. Shaheena A. Simons, Attorney, DOJ
47. Sharon D. Kelly, Assistant United States Attorney, Northern District of Alabama

48. City of Graysville, Alabama
49. Andrew P. Campbell, Attorney for Graysville
50. John C. Guin, Attorney for Graysville
51. Yawanna Neighbors McDonald, Attorney for Graysville
52. Campbell, Guin, Williams, Guy, and Gidiere LLC, Counsel for Graysville
53. Town of Brookside, Alabama
54. K. Mark Parnell, Attorney, Town of Brookside
55. Parnell Thompson, LLC, Counsel for Town of Brookside
56. Mary H. Thompson, Attorney for Town of Brookside
57. Roger McCondichie, Brookside resident
58. Dale McGuire, Brookside resident

We certify that no publicly traded company or corporation has an interest in the outcome of this case either in the District Court or in this Court.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants, pursuant to Federal Rule of Appellate Procedure 34 and Eleventh Circuit Rule 34(3)(c), respectfully request oral argument. This case presents important constitutional issues related to the effectuation of school desegregation orders. Oral argument will assist this Court to analyze the complex record and to resolve these important legal issues.

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STATEMENT OF JURISDICTION

This appeal arises out of a case originally filed in 1965 by Plaintiffs-Appellants (also known as the *Stout* Plaintiffs), who represent the class of parents of Black schoolchildren in Jefferson County, Alabama. The suit resulted in a permanent injunction, which barred the Jefferson County Board of Education from operating a racially-segregated school system, and required the development, implementation, and continued court supervision of a plan to desegregate Jefferson County's schools. *See* Doc. 2 ("Complaint"); Doc. 3 ("Mot. for Prelim. Inj."); Doc. 5 ("Order.")[1] In 2015, Gardendale, a city in Jefferson County, intervened as a defendant and filed a motion to create a new school system separate from the Jefferson County Board of Education. *See* Doc. 1002 ("Mot. for Intervention"); Doc. 1040, Doc. 1040-1 ("Mot. to Separate") and ("Prop. Separation Agreement"). The District Court had jurisdiction over both the original case and Gardendale's motion under 28 U.S.C. § 1331.

The District Court granted in part, and denied in part, Gardendale's motion. As explained more fully in Plaintiffs-Appellants' Response to the Clerk's Jurisdictional Questions, dated July 5, 2017, this Court has jurisdiction to review the District Court's ruling under both 28 U.S.C. § 1291 and 28 U.S.C. § 1292. In

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[1] References to the District Court record are by docket entry ("Doc.") followed by the relevant docket entry number.

the school desegregation context, this Court considers the "indicia of finality" in a district court opinion to determine whether it is an appealable, final judgment under 28 U.S.C. § 1291. *United States v. Alabama*, 828 F.2d 1532, 1537 (11th Cir. 1987). District court opinions are "for all practical purposes a final order" when they are thorough in "specificity, detail, and comprehensiveness," and when "the District Court gives detailed instructions in every area." *Id.* That standard is satisfied here because the District Court approved the creation of an entirely new school system that encompassed new zoning lines for certain schools, and required the parties to create a facilities plan for additional schools with comprehensive and detailed directions for what should be included in that plan. Doc. 1141 ("Mem. Op. & Order") at 185-190.

This Court also has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), because the District Court issued an order "granting, continuing, modifying, refusing or dissolving [an] injunction[], or refusing to modify [an] injunction[]." *See In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1260 (11th Cir. 2006). Specifically, the District Court granted in part Gardendale's request to create a splinter district, which in effect denied Plaintiffs-Appellants' request for an order enjoining the creation of the new district. *See* Doc. 1141 at 185. Alternatively, the District Court's opinion can be understood as "continuing, modifying, refusing to

dissolv[e] . . . or refusing to . . . modify" the prior injunction that had been issued in this case governing Jefferson County's schools. 28 U.S.C. § 1292(a)(1).

The District Court issued its Memorandum Opinion and Order on April 24, 2017, and, in response to a timely motion to alter or amend the judgment, it issued its Supplemental Memorandum Opinion on May 9, 2017. Doc. 1141; Doc. 1152 ("Suppl. Mem. Op."). Plaintiffs-Appellants filed a timely notice of appeal on May 22, 2017. *See* Doc. 1160 ("Notice of Appeal"); Fed. R. App. P. 4(a)(1). On August 2, 2017, this Court's clerk noted that this Court has probable jurisdiction to hear this case after issuing a Jurisdiction Question to the parties.

STATEMENT OF THE ISSUES

(1) *Wright v. Council of Emporia*, 407 U.S. 451, 470 (1972), holds "that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." Did the District Court commit legal error by permitting the Gardendale Board of Education to operate a new school district despite making a factual finding that creation of a new Gardendale school district would impede desegregation efforts of the Jefferson County Board of Education?

(2) The District Court further found that Gardendale was motivated by intentional racial discrimination—specifically, the desire to exclude Black

schoolchildren—in creating a new district. Did the District Court err in approving the formation of a new Gardendale school system despite that factual finding?

STATEMENT OF THE CASE

The City of Gardendale is a small, predominantly white municipality in Jefferson County, Alabama. In 2015, Gardendale sought to prevent the racial integration of its schools by seceding from the Jefferson County School District ("JCSD"). After a bench trial, the District Court expressly found that Gardendale's secession effort was motivated by intentional racial discrimination, and that its request to operate a new school district would undermine desegregation efforts in Jefferson County. The District Court's factual findings are unassailable. Under controlling precedent, they permit of only one result: an order prohibiting Gardendale's secession. Yet, the District Court misinterpreted that precedent. As a result, even though the District Court recognized that Gardendale's secession was motivated by the intent to circumvent an existing desegregation order and exclude Black children from Gardendale's schools, the court permitted Gardendale to secede.

The Jefferson County School District is operated by the Jefferson County Board of Education ("JCBOE"). JCBOE runs 56 schools, including four public schools located within Gardendale's city limits. JCSD, which is 47.5% Black and 43.5% white, is governed by a long-standing desegregation decree. Over the

previous two decades, the racial demographics of Jefferson County have shifted, leaving the county school system with a lower percentage of white students. Majority-white municipalities with separate school systems have been largely impervious to the county's changing demographics, however, remaining segregated while the African American population in other areas of Jefferson County has increased. *See, e.g.*, Doc. 1131-6 at 12 ("Decl. of William S. Cooper"). Some Gardendale residents are concerned about the significant increase in the proportion of Black students in the Jefferson County School District; they fear that Gardendale might become a predominantly Black city. Doc. 1141 at 138. As the District Court explained, "[t]hese citizens prefer a predominantly white city." *Id.*

Motivated by a desire to avoid further integration of Gardendale's public schools and the city itself, Gardendale residents launched an effort to secede from JCSD and create an independent municipal school system. Gardendale's secession was opposed by Plaintiff-Appellants, the United States Department of Justice ("DOJ"), the Jefferson County Board of Education, and multiple Plaintiff-Intervenors.

Following a five-day bench trial, the District Court found that: (1) Gardendale failed to carry its burden of showing that its secession would not impede desegregation efforts in Jefferson County, and (2) Gardendale's secession was motivated by intentional racial discrimination. Notwithstanding these

findings, the District Court granted in part Gardendale's motion to operate a separate school system. Specifically, the court permitted Gardendale to operate a new school system comprised of the two elementary schools within its municipal boundaries. The court ordered that the middle school and high school in Gardendale remain JCBOE schools, while allowing Gardendale to file a renewed motion to operate those schools after three years. The decision to permit Gardendale to secede from the Jefferson County School District is the subject of the instant appeal.

I. Procedural History

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), ruling that "[s]eparate educational facilities are inherently unequal" and deprive Black schoolchildren "of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* at 495. Despite *Brown*, segregation persisted. School boards ignored the ruling, made half-hearted, ineffectual attempts to comply, or defied outright the Court's edict. State and local governments employed an array of stratagems to avoid desegregation. *See, e.g. Griffin v. School Bd. of Prince Edward Cty.*, 377 U.S. 218 (1964) (holding that county school board's actions were unconstitutional where county responded to *Brown* by closing public schools and supporting private, white-segregated schools); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (ruling that a North

Carolina anti-busing statute that impeded desegregation was unconstitutional). One of these stratagems was the secession of mostly-white towns from larger and more diverse county school systems to avoid racial integration. *See Wright v. Council of Emporia*, 407 U.S. 451 (1972) (prohibiting municipal secession from county school district following enactment of countywide desegregation decree). Jefferson County was not an outlier in this regard.

Plaintiffs-Appellants sued JCBOE on June 4, 1965 because it continued to operate a segregated school system eleven years after *Brown*. On June 24 of that year, the District Court found that JCBOE was operating a segregated school system and ordered it to desegregate. *See* Doc. 5.[2] Shortly thereafter, the United States, through the Department of Justice, intervened as a plaintiff. *See* Doc. 8 ("Mot. of United States to Intervene"). Between 1965 and 1968, the JCBOE utilized a "freedom of choice" desegregation plan. Doc. 1141 at 12; *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966). Plaintiffs-Appellants challenged the "freedom of choice" plan, and the Fifth Circuit ordered a zoning-based desegregation plan for the first time in *United States v. Jefferson County*

[2] The electronic docket does not include the vast majority of early docket entries. Plaintiffs-Appellants have attached the paper docket as part of the Appendix. Some entries, like the docket entry above, are not clearly numbered in the paper docket. In these circumstances, Plaintiffs-Appellants have identified the entries by date and attempted, to the best of their ability, to discern the correct docket number.

Board of Education, 417 F.2d 834, 836 (5th Cir. 1969). Later that year, this case was consolidated with twelve other desegregation cases throughout the six states which comprised the Fifth Circuit, *sub nom, Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211,1219 (5th Cir. 1969). Pursuant to the mid-school year mandate of *Singleton,* the District Court entered its comprehensive "*Singleton*" desegregation order on February 2, 1970. *See* Doc. 131 ("Order").

Between February and July of 1970, three all-white cities—Pleasant Grove, Vestavia Hills, and Midfield—and the predominately-white city of Homewood withdrew from the Jefferson County School District and formed separate municipal school districts. Plaintiffs-Appellants challenged these secessions, and in response, the Fifth Circuit ordered the District Court to "implement a student assignment plan" that included both JCBOE and each of the municipal school districts that had separated from the county. The District Court issued its order on September 8, 1971. *See* Doc. 226 ("1971 Order"). The 1971 Order set forth a comprehensive desegregation plan, which remains the primary operative order in this case.

One of the separating school districts, the City of Pleasant Grove, refused to comply with the 1971 Order's requirement to purchase buses for the transportation of Black students. As a result, the District Court enjoined operation of the Pleasant Grove school district, and the Fifth Circuit affirmed that decision. *Stout v.*

Jefferson Cty. Bd. of Educ., 466 F.2d 1213 (5th Cir. 1972). As the Fifth Circuit explained, "'where the formulation of splinter school districts . . . have the effect of thwarting the implementation of a unitary school system, the District Court may not . . . recognize their creation.'" *Id.* at 1214 (citation omitted).

In the period since Pleasant Grove's court-ordered dissolution, three more municipalities—each with predominantly white residents—have seceded from the Jefferson County school system. These separations have "contributed to significant demographic shifts in Jefferson County." Doc. 1141 at 66. Gardendale now aspires to be the fourth municipality to secede since the 1971 Order. On March 3, 2014, the Gardendale City Council established a municipal school system, headed by a new Gardendale Board of Education ("GBOE"). GBOE moved to intervene in this case on March 13, 2015, following an abortive attempt to evade federal review by filing a state court lawsuit.[3] *Id.* at 107. On December 11, 2015, Gardendale filed a motion to operate a municipal school system and a proposed plan of separation. *Id.* at 115.

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[3] Although binding Circuit authority required Gardendale to prove to the District Court that its separation would have a "lack of deleterious effects on desegregation" in Jefferson County, *see Ross v. Houston Indep. Sch. Dist.*, 583 F.2d 712, 714 (5th Cir. 1978), Gardendale first filed a lawsuit in state court to force Jefferson County to relinquish control over the public schools located within Gardendale's city limits. Doc. 1141 at 107. The District Court enjoined the state court suit after Gardendale moved to intervene in this case. *See id.*

Pursuant to Gardendale's proposal, GBOE would create an independent school system and assume control of the four JCBOE schools located within Gardendale's municipal boundaries: Snow Rogers Elementary, Gardendale Elementary, Bragg Middle School, and Gardendale High School. The high school is a $51 million, state-of-the-art facility that was built by JCBOE in 2010 for the education of students in and around Gardendale.[4] *Id.* at 69. According to Gardendale's proposal, GBOE would receive each of these schools free of charge.

The plan would also change the Gardendale school attendance zones. At present, the four schools in Gardendale educate students from Gardendale, the towns of Brookside and Graysville, and the unincorporated areas of North Smithfield Manor-Greenleaf Heights ("North Smithfield") and Mount Olive. Under Gardendale's proposal, the school attendance lines would be re-drawn at the municipal boundaries. Students from outside the city limits would be phased out over a thirteen-year period with the exception of students from North Smithfield, who would be permitted to stay for the "indefinite future." *Id.* at 128.

Gardendale's motion to operate a separate municipal school system was opposed by Plaintiffs-Appellants, DOJ, and JCBOE. Additionally, the City of

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[4] The District Court noted that "[t]he new Gardendale High School is appropriately regarded as one of Jefferson County's desegregatory tools." Doc. 1141 at 171.

Graysville, the Town of Brookside, and two parents from the unincorporated community of Mount Olive moved for limited intervention in order to oppose Gardendale's separation. *Id.* at 133. To resolve the dispute, the District Court held a bench trial on December 1-2 and 7-9, 2016. *Id.* at 137.

II. The Trial Evidence and the Court's Factual Findings

The trial evidence adduced by the parties focused on two issues: (1) whether GBOE's creation and operation were motivated by the intent to exclude Black schoolchildren from Gardendale schools, and (2) whether Gardendale could satisfy its legal burden to prove that its separation would not impede Jefferson County's desegregation efforts.

The court answered the first question in the affirmative: "[T]he Court finds that race was a motivating factor in Gardendale's decision to separate from the Jefferson County public school system." Doc. 1141 at 138. Specifically, "[t]he record demonstrates that the Gardendale Board is trying to evade the Court's desegregation order because some citizens in Gardendale want to eliminate from Gardendale schools the black students whom Jefferson County transports to schools in Gardendale." *Id.* at 151.

The court answered the second factual question in the negative, finding that "Gardendale has not demonstrated that its separation will not impede Jefferson

County's effort to . . . eliminate the vestiges of past discrimination to the extent practicable." *Id.* at 162.

A. The Evidence of Gardendale's Discriminatory Intent in Seeking to Secede from the Jefferson County School District to Create a Significantly Whiter School System

The record amply supported the District Court's factual finding that GBOE's desire to exclude Black children from Gardendale schools motivated its motion to separate from Jefferson County. At the time of Gardendale's separation efforts, Jefferson County's schools were in the midst of a significant demographic change. In 2000, the county school system was 75.6% white and 23.0% Black. Doc. 1141 at 67. In 2015, following a pair of municipal separations and the repeated annexation of majority-white areas by majority-white municipalities that were not part of the Jefferson County school system, the county schools were 43.4% white and 47.3% Black. *Id.* The demographics of Gardendale's student population has followed a similar but more gradual trajectory. Twenty years ago, the student population within Gardendale's city limits was 92% white and 8% Black; today 20% of the student population is Black. *Id.* at 92. The City of Gardendale, however, remains 88.4% white. *Id.* at 74. Gardendale's schools have a higher percentage of Black students than the percentage of Black residents in the municipality because of the 1971 Order. That desegregation order provides for the busing of students from the mostly-Black North Smithfield community to

Gardendale's schools and also permits some students from majority-Black schools in Jefferson County to transfer to Gardendale's schools.

As the District Court found, "some Gardendale citizens are concerned because the racial demographics in Gardendale are shifting, and they worry that Gardendale, like its neighbor Center Point, may become a predominantly black city. These citizens prefer a predominantly white city." *Id.* at 138. The Gardendale citizens referenced by the District Court include key individuals responsible for organizing the separation effort, two of whom became inaugural members of the Gardendale Board of Education. Doc. 1124 at 168:17-169:3, 183:17-184:15 ("Dec. 1, 2016 Trial Tr."); Doc. 1131-35 at 19:2-13, 104:10-107:14, 110:11-20 ("Joint Trial Ex. 20, Mar. 16, 2016 Chris Segroves Dep. Tr."). In particular, organizers of the separation effort made clear their concern that Gardendale's schools did not reflect the overwhelmingly white character of the city. As one organizer commented before the separation, "A look at our community sporting events, our churches are great snapshots of the community. A look into our schools, and you'll see something totally different." Doc. 1141 at 140. Another organizer explained that creating a separate school system would provide "better control over the geographic composition of the student body." *Id.* at 177.

On another occasion, a separation organizer noted: "It likely will not turn out well for Gardendale if we don't do this. We don't want to become what [Center Point] has." *Id.* at 88. Community members repeatedly echoed these sentiments on a public Facebook page created for the purpose of supporting the separation effort. *See, e.g.*, *id.* at 141 ("did you know we are sending buses to Center point [*sic*] and busing kids to OUR schools in Gardendale as well as from [North Smithfield]!"); *see also id.* at 80-89, 128, 137.

The goals of Gardendale's separation were vividly illustrated by a flyer disseminated in the community during the separation effort. *Id.* at 93; *see also* Doc. 1132-13 ("Pls.' Trial Ex. 11, Gardendale Advertisement"). The flyer depicts a white elementary school student and asks, "What path will Gardendale choose?" Doc. 1141 at 94. Two choices are provided. The top of the flyer lists several well-integrated or predominantly Black municipalities that have not formed municipal school systems. The bottom lists cities that "chose to form and support their own school system." *Id.* at 95. Each of these cities have school systems that are predominantly white and have been since 1970. The flyer characterizes them as "some of the best places to live in the country." *Id.* A Black resident of North Smithfield explained the message of the flyer as follows: "[i]f you do not want the undesirables and problem children, you best be forming your own [school] system." *Id.*

The racial motivation underlying Gardendale's separation effort is confirmed by the fact that organizers initially proposed excluding surrounding communities that are predominately Black from the new school district, but including Mt. Olive, which is 97% white. *Id*. at 81, 164. Indeed, when Gardendale commissioned a feasibility study for a public-school system in the city, the author included Mount Olive students in the study but not students from any other community.[5] *Id.* at 92.

State Senator Scott Beason was also a leader in the effort to create a separate school system for Gardendale. Named Plaintiff Sandra Ray testified that, having heard news reports that Senator Beason referred to African Americans as "aborigines," she had serious concerns about his involvement in the Gardendale school system. Doc. 1128 at 1270:20-1271:17. ("Dec. 9, 2016 Trial Tr."). The organizers of the separation effort succeeded, and on March 3, 2014, the Gardendale City Council adopted an ordinance that created the Gardendale City School System.

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[5] Although separation organizers spoke to State Senator Scott Beason, who was prepared to sponsor legislation that would annex Mount Olive into Gardendale, practical obstacles related to the local fire district have impeded Gardendale from including Mt. Olive in its separation plan. Doc. 1131-47 at 48-51 ("Joint Trial Ex. 24, Mar. 18, 2016 Scott Beason Dep. Tr.").

The actions of this new school district have reflected the same racial discrimination that motivated its creation. In early 2014, the Gardendale City Council solicited applicants for the Board of Education and selected five members, each of whom is white and two of whom were lead separation organizers. Doc. 1141 at 98. In so doing, the Board passed over a highly qualified Black applicant, Dr. Sharon Porterfield Miller, even though she had more educational experience than all but one member chosen for the Board. *Id*. at 99. Dr. Miller testified at trial that she believed that race was a factor in Gardendale's decision not to select her. *Id.* at 100.

When Gardendale first drafted a separation plan in March 2015, it excluded the majority-Black North Smithfield community that had attended Gardendale schools since 1971. *Id.* at 115. In a volte-face, Gardendale included North Smithfield in the separation plan that it presented to the District Court in December 2015. *Id.* at 116. The change was motivated by the 1971 Order in this case, which Gardendale understood to require that a separating school district meet a certain ratio of student enrollment by race. *Id.* at 123. Without the Black students from North Smithfield, Gardendale could not meet that ratio. *Id.* at 123-24. Yet, GBOE's superintendent—who had never worked with a Black teacher and had never hired a Black teacher or administrator in his seventeen-year career in education—did not even consult with the North Smithfield community before

proposing their inclusion in the new Gardendale district. *Id*. at 101 n.52, 121. He failed to do so even though North Smithfield's residents would be deprived of a voice on their local school board, and its students would be forced to attend a different elementary school. *Id.* at 122.

When North Smithfield's inclusion in the proposed school district became public, members of the Gardendale community voiced their displeasure to the superintendent and on the Facebook page created by proponents of the separation. *Id*. at 128. One of the separation organizers defended the move to unhappy residents, explaining that "[t]his has the hallmarks of a specific, technical, tactical decision aimed at addressing a recognized roadblock to breaking away." *Id*. at 130. But he characterized the inclusion of North Smithfield students as a "bitter . . . pill to swallow," and he acknowledged that Gardendale residents would differ in their opinions as to whether it was too bitter to justify the ultimate goal of separation. *Id*. at 131. Another organizer "described the inclusion of the children from North Smithfield as 'the price' Gardendale had 'to pay to gain approval for separation.'" *Id*. at 176.

The Gardendale Board's intent to exclude Black students is also reflected in its actions and inactions regarding policies that would affect the racial composition of an independent Gardendale school district. At the end of 2014, the GBOE superintendent drafted an inter-district transfer policy that included numerous

provisions, only one of which addressed racial desegregation transfers. *Id.* at 143. The president of GBOE singled out the racial desegregation transfer provision for review by the district's legal team to determine its "applicability/appropriateness for GBOE." *Id.* at 144. Subsequent drafts of the racial desegregation transfer provision added caveats "designed to minimize or eliminate racial desegregation transfers." *Id.* By the time of trial, GBOE had failed to vote on a transfer policy despite binding court precedent requiring that it do so. *Id.* at 144-45. As a result, the GBOE superintendent was unable to say which of the many draft inter-district transfer policies might be implemented by the Board. *Id.* at 145. The District Court explained that "[t]his official action—or lack thereof—dovetails with the separation organizers' expressed interest in eliminating from the schools within Gardendale's municipal limits students who are bussed into Gardendale from other areas of Jefferson County." *Id.*

GBOE adopted a similarly evasive approach toward its inclusion of the North Smithfield community in the separation plan. According to the December 2015 separation plan, North Smithfield students "will be able to attend Gardendale schools for the indefinite future." *Id.* at 149. But no GBOE representative ever explained the meaning of the term "indefinite future" to the North Smithfield community. *Id.* at 150. At trial, the superintendent and a member of GBOE testified that, in their understanding, the phrase meant that North Smithfield

students could attend Gardendale schools so long as their tax dollars flow to the Gardendale school system. *Id.* However, the desegregation order in this case provides the sole mechanism by which tax dollars from North Smithfield can flow to Gardendale. Thus, if Gardendale is released from the desegregation order—a position for which its counsel advocated below, *see, e.g.*, Doc. 1090; Doc. 1104; —students from North Smithfield have no assurance that they will continue to attend the schools that they have attended for nearly five decades. *See* Doc. 1141 at 150.

Furthermore, GBOE has never voted on the separation plan that includes North Smithfield students despite the fact that Gardendale's counsel submitted it to the District Court. *Id.* at 149. As the District Court explained:

> Rather than make a commitment to the students in North Smithfield, the Gardendale Board has been waiting to see whether its attorneys could persuade the Court that the 1971 desegregation order does not govern Gardendale's separation. If Gardendale does not need the students from North Smithfield to separate, then the Board has no incentive to keep those students in the Gardendale system.

Id. at 149-50. By delaying a vote, GBOE has "allowed itself the flexibility" to change its separation plan and exclude the predominantly Black students from North Smithfield. *Id.* at 150.

In sum, the District Court found that GBOE was created for, and operated with, the goal of excluding Black children from the school district. As such, the District Court found that Gardendale's separation from Jefferson County

constituted an independent constitutional violation under the Fourteenth Amendment. *Id.* at 180.

B. Gardendale's Failure to Carry Its Burden Under Established Precedent as to the Effect of Its Secession on Desegregation Efforts in Jefferson County

Even absent the compelling evidence of intentional discrimination described above, the District Court could not grant GBOE's separation motion unless it made the "essentially factual determination" that Gardendale's separation would not impede JCBOE's desegregation efforts. *Wright*, 407 U.S. at 470; *see* Doc. 1141 at 150-80. As the party petitioning to separate, GBOE bore the burden of proof on this issue. *See id.* at 162. "Consistent with *Wright*, to determine whether Gardendale has carried its burden," the District Court examined three factors: "anticipated post-separation racial demographics, facilities and the programs available in those facilities, and the message that Gardendale's proposed separation sends to African-American students who have attended schools in the Gardendale zone pursuant to this Court's desegregation order." *Id.* at 163. As the court determined, each of these factors weighed against granting Gardendale's motion to separate. *See id.* at 162-80.

First, the court determined that Gardendale's separation would have a negative impact on the post-separation racial demographics of Jefferson County and would inflict a series of related, collateral consequences on the county. *Id.* at

162-63. If Gardendale separated, JCSD's student population would immediately become 1.5%-1.8% more Black. *Id.* at 165. Further as the District Court found, this initial impact understates the demographic consequences of the separation because every previous splinter district from Jefferson County subsequently annexed additional white communities. *Id.* at 166. "[T]hese separations and annexations have altered the racial composition of the Jefferson County student population continually since 2000." *Id.* Because the districts that have seceded and the areas they have annexed tend to be affluent and "produce significant tax income" for the county, the process of secessions and annexations "has repeatedly shifted the geographic, demographic, and economic characteristics of Jefferson County." *Id.* These changes significantly complicate JCBOE's efforts to plan and to comply with its desegregation obligations. *Id.* at 166-67. And, consistent with previous school districts that have seceded, Gardendale has already evinced an interest in annexing Mount Olive and other predominantly white communities north of the municipal limits. *Id.*

GBOE's separation would also cause the JCSD students who are removed from the proposed Gardendale zone to leave their modestly desegregated schools in Gardendale and attend schools that are "extremely segregated." *Id.* The burden of this move would fall most heavily on Black students. *Id.* The separation would

also harm the Black students who currently attend Gardendale schools as desegregation transfers but would be excluded under GBOE's separation plan. *Id.*

Second, the court determined that the loss of programs and facilities attendant to Gardendale's separation would have an adverse effect on JCBOE's desegregation obligations. *See* Doc. 1141 at 168-74. Gardendale High School is an integrated high school with unique facilities and programs—including one of the county's best career tech programs. *Id.* at 170, 171-72. If GBOE appropriated the high school, it would cost JCBOE at least $55 million to build a new comparable facility, thereby depriving the county of money it could otherwise spend on facilities or programming.[6] *Id.* at 171-72. The loss of Gardendale High School would also thwart JCBOE's ability to obtain the important desegregation objective of closing the nearby Fultondale High School—an outdated facility that was built for Black students when JCSD was still a *de jure* racially-segregated school system. *See Id.* at 69 n.26.

While the middle and elementary school facilities in Gardendale are older, these schools have also played an important role in JCBOE's desegregation efforts because many Black students have chosen to attend them through JCBOE's

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[6] Alabama state law concerning the transfer of facilities in school district separations requires the "same or equivalent school facilities" for students who are excluded from the new municipal school district and remain in the county school system. Ala. Code §16-8-20.

majority-to-minority desegregation transfer program. *Id.* at 174. Because Gardendale is adjacent to many African American communities, its schools are the best transfer option for many Black students who wish to attend schools, like Snow Rogers Elementary, Gardendale Elementary, and Bragg Middle School, with superior academic track records for Black students. *See id.*

Third, the court determined that the review prescribed by *Wright*—the timing of the decision to separate and the message that separation will send to the impacted Black students—militated against the approval of Gardendale's separation. "During Gardendale's separation effort, both words and deeds have communicated messages of inferiority and exclusion. The message cannot be lost on children who live in North Smithfield." Doc. 1141 at 175. As detailed above, the message sent to Black children from North Smithfield and Center Point was unequivocal, humiliating, and demeaning. At different times, these children were described as the "bitter pill" Gardendale residents needed to swallow, or the "price" Gardendale had to pay, in order to separate. *Id.* They were told by white residents that the Gardendale schools that Black children had attended for fifty years were "OUR schools"—not theirs—and that they should have been removed long ago. *Id.* at 130, 176. Integrated or majority-Black communities were held up as a cautionary tale of what Gardendale residents "don't want to become." *Id.* at 177.

The predominantly Black North Smithfield students were used as a pawn in Gardendale's plans to create a whiter school district: they were excluded from the new district when Gardendale believed that route was permissible and then included (as the "bitter pill") when Gardendale decided it needed more Black students to meet its desegregation obligations. And the Gardendale Board amplified these exclusionary messages, refusing to vote on plans or policies that might contribute to the matriculation of Black students to Gardendale's schools. As the District Court determined, "[t]he message from separation organizers and from the Gardendale Board is unmistakable. . . . The message is intolerable under the Fourteenth Amendment. . . . The messages of inferiority in the record of this case assail the dignity of black school children." *Id.* at 179-80.

III. The District Court's Orders Permitting Gardendale to Secede from Jefferson County

On April 24, 2017, the District Court issued a 190-page opinion granting in part, and denying in part, Gardendale's motion to separate. The court recognized that a new district seeking to secede from a parent district operating under a desegregation order "must demonstrate that its operation will not harm the parent district's effort to fulfill its obligation to eliminate the vestiges of segregation to the extent practicable." Doc. 1141 at 162 (citing *Wright*, 407 U.S. at 459). The court also recognized that Gardendale had failed to meet this burden and that Gardendale

had created and operated a municipal school district for the purpose of excluding Black school children. *Id.* at 138, 150, 161-62, 178-80.

Nonetheless, the District Court ruled that it would permit Gardendale to operate a new elementary-only school system that put it in charge of numerous Black schoolchildren based on four "practical considerations." *Id.* at 181. The court's decision was premised on its view that Gardendale's failure to satisfy its burden of proof gave the court the option to deny Gardendale recognition, but did not mandate that result. *Id.* at 162. The court did not, however, identify any case in which a splinter district failed to meet its legal burden but was still permitted to secede. Nor did the court identify any case in which a city violated the Fourteenth Amendment by creating a school district with a racially discriminatory purpose, but nonetheless was allowed to create and operate a new district.

Under the terms of the District Court's order, Gardendale may operate Snow Rogers Elementary School and Gardendale Elementary School beginning in 2017-2018; those schools would be zoned for students residing within Gardendale's municipal boundaries. *Id.* at 184. The court further ordered the parties to develop a new desegregation order that would apply only to the nascent GBOE. *Id.* JCBOE would continue to operate Bragg Middle School and Gardendale High School, but the court permitted GBOE to renew its motion to operate a K-12

system after three years if it maintained good-faith compliance with the new desegregation order.[7] *Id.*

On May 2, 2017, Plaintiffs-Appellants moved the District Court to alter or amend its judgment. Doc. 1151 ("Pls.' Am. Mot. to Alter or Am. J. and Mem."). Plaintiffs-Appellants contended, *inter alia*, that the court's remedy was foreclosed by the law of the case, that the remedy did not cure Gardendale's constitutional violation, and that it gave the court's imprimatur to Gardendale's unconstitutional conduct. *Id.* at 14-24. The court denied Plaintiffs-Appellants' motion on May 9, 2017. Doc. 1152. On May 23, 2017, Plaintiffs-Appellants filed a notice of appeal and a motion to stay all proceedings. Doc. 1159; Doc. 1160. The same day, GBOE filed a notice of appeal, and joined in the motion to stay the proceedings. Doc. 1162 ("Transmittal to U.S. Court of Appeals, Eleventh Circuit"). On June 1, 2017, the District Court stayed the relevant parts of its April 24, 2017 Order. Doc. 1174.

IV. Standard of Review

Both issues presented in this appeal concern challenges to the District Court's remedial order in this desegregation case. The factual findings of the District Court may not be set aside unless they are shown to be "clearly

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[7] The court's order included several other components that are not relevant to the instant appeal. *See id.* at 185.

erroneous." Fed. R. Civ. P. 52(a)(6). The court's remedial order is reviewed for abuse of discretion. *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 888 F.2d 82, 83 (11th Cir. 1989). However, "an error of law is an abuse of discretion per se." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). A clear error of judgment also constitutes an abuse of discretion. *See United States v. Whatley*, 719 F.3d 1206, 1219 (11th Cir. 2013).

SUMMARY OF THE ARGUMENT

Controlling precedent establishes a clear test for determining whether a newly created school district may secede from a parent district operating under a federal desegregation order: secession is permitted only if the formation of the new district will not impede the dismantling of the racially-discriminatory, dual school system in the parent district. The burden is on the proponents of the seceding district to show that desegregation efforts in the parent district will not be undermined. As this Court's predecessor stated in a prior appeal in this very case, the "District Court may not . . . recognize [the] creation" of the splinter district if its proponents do not satisfy this burden. *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (hereinafter "*Stout I*").

Here, the District Court correctly found that the proponents of secession in Gardendale had not met their burden of showing that the separation would not undermine desegregation efforts in Jefferson County. Yet, the court nonetheless

concluded that it had the remedial discretion to allow Gardendale to splinter a portion of its schools from Jefferson County. The District Court recognized that its ruling was inconsistent with *Stout I*, but concluded that *Stout I* had been overruled in relevant part by *Wright v. Council of Emporia*, 407 U.S. 451 (1972). That was clear error. *Wright* not only cited *Stout I* with approval, it specifically endorsed the holding of *Stout I*, i.e., "a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Id*. at 470. That rule has likewise been reaffirmed in binding Fifth Circuit precedent since *Wright*. Because Gardendale failed to show that its request to secede would not undermine desegregation in Jefferson County, the only remedial option available to the District Court was to deny Gardendale's secession request in its entirety.

The District Court's order must also be reversed because Gardendale's secession was motivated by intentional discrimination. The District Court unambiguously found that Gardendale's secession was motivated by the desire to exclude Black children from its schools, and that its separation effort violated the Fourteenth Amendment. Consequently, Gardendale's actions have "no legitimacy at all under our Constitution," *City of Richmond v. United States*, 422 U.S. 358, 378 (1975), and its secession may not be permitted. In sum, one cannot cure the constitutional infirmity inherent in the creation of a public-school system for the

purpose of excluding Black children by allowing the formation of a school system created for the purpose of excluding Black children.

ARGUMENT

I. Recognition of the Gardendale School District Is Foreclosed by Binding Precedent and by the Law of the Case.

The District Court correctly determined that Gardendale failed to prove that its separation would not impede the desegregation of Jefferson County's schools. Doc.1141 at 158-59. Under controlling law, that should have been the end of the matter. As the District Court recognized, the Fifth Circuit's decision in *Stout I* "'did not give the trial court a choice as to whether it 'may or may not' recognize [a] splinter district's creation'" where the district failed to meet its burden of proof. Doc. 1152 at 37 (citation omitted). Instead, "the district court may not . . . recognize [its] creation." *Stout I*, 448 F.2d at 404.

Yet, the District Court nonetheless allowed Gardendale to secede from the Jefferson County School District. Although the court (temporarily) prohibited Gardendale from operating Gardendale High School or Bragg Middle School, it permitted Gardendale to separate from JCSD, create its own school district, and immediately begin operating Gardendale Elementary School and Snow Rogers Elementary School. Doc. 1141 at 185. The District Court concluded that it had the authority to permit Gardendale's secession because it understood the Supreme Court's decision in *Wright* to represent a "change in controlling authority" with

respect to a district court's authority to recognize splinter districts. Doc. 1152 at 37. The District Court further stated that it did "not believe it its [sic] bound under the law of the case doctrine to follow the mandatory language in *Stout I*." *Id*. at 39.

But, as explained below, *Wright* did not overrule *Stout I*. *Wright* not only cites *Stout I* favorably, the holding in *Wright* is indistinguishable from *Stout I*: "We hold . . . that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Wright*, 407 U.S. at 470. *Wright* certainly did not "directly overrule" *Stout I*. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). Consequently, *Stout I*—which barred the District Court from recognizing Gardendale both as a matter of precedent and under the law-of-the-case doctrine—remains binding case law. *See id.*

Indeed, the holding of *Stout I* is enshrined in Fifth Circuit cases that postdated and expressly relied upon *Wright*. As stated in one of those cases: "The division of a school district operating under a desegregation order can be permitted only if the formation of the new district will not impede the dismantling of the dual system in the old district." *Ross v. Houston Indep. Sch. Dist.*, 583 F.2d 712, 714 (5th Cir. 1978) (citing, *inter alia*, *Wright*); *see also Stout v. Jefferson Cty. Bd. of Educ.*, 466 F.2d 1213, 1215 (5th Cir. 1972) (hereinafter "*Stout II*").

Because the District Court's order is grounded in its misinterpretation of these controlling legal principles, its decision must be reversed. *See Alikhani*, 200 F.3d at 734 ("an error of law is an abuse of discretion per se").

A. Controlling Law Prohibits District Courts from Approving a Splinter District if the District Cannot Prove that Its Secession Would Not Undermine Desegregation Efforts in the Parent District.

The law governing seceding districts has its origins in *North Carolina State Board of Education v. Swann*, a school desegregation case where the Supreme Court addressed the legality of a facially-neutral state law that prohibited the "[i]nvoluntary bussing of students." 402 U.S. at 44 & n.1. In operation, the law obstructed a desegregation remedy ordered by a federal district court. The Supreme Court struck the law down, holding, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the . . . disestablishing of a dual school system, it must fall." *Id.* at 45. Significantly, the Court did not hold that a district court had the discretion to determine whether or not to invalidate a law under these circumstances; the Court held that the law "must fall." *Id.*

Two months later, the Fifth Circuit decided two cases that applied this principle in the context of a splinter district that sought permission to secede from a parent district operating under a desegregation order. *See Lee v. Macon Cty. Bd. of Educ.*, 448 F.2d 746 (5th Cir. 1971); *Stout I*, 448 F.2d 403. Both cases adopted

a legal standard consistent with the standard applied by *Swann*. In *Lee*, the Fifth Circuit addressed a desegregation dispute where a splinter district had asserted its independence from the parent district, and the district court had refused to recognize the splinter district as an independent school system. The Fifth Circuit agreed that the district court's approach "was the proper way to handle the problem raised by [a splinter district]'s reinstitution of a separate school system." *Lee*, 448 F.2d at 752. *Lee* held that "[t]he city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district." *Id.* As the Court observed, if such separations "were legally permissible, there could be incorporated towns for every white neighborhood in every city." *Id.*

Seven days later, the Fifth Circuit decided *Stout I*, where it resolved the same issue in an earlier appeal from this case. In *Stout I*, the Court explicitly relied on *Swann*'s rejection of "state-imposed limitation[s]" that "impede the disestablishing of a dual school system." *See Stout I*, 448 F.2d at 404. Applying *Swann* to the splinter-district context, *Stout I* held that "where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not . . . recognize their creation." *Id.*

Within a year of the Fifth Circuit's decision in *Stout I*, the Supreme Court decided *Wright*. 407 U.S. 451. The district court opinion in *Wright* aligned with *Stout I*, holding that "this Court *must* withhold approval [for a proposed splinter district] 'if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system.'" *Wright v. Sch. Bd. of Greensville Cty.*, 309 F. Supp. 671, 680 (E.D. Va. 1970) (quoting *Monroe v. Bd. of Comm'rs of Jackson*, 391 U.S. 450, 459 (1968)) (emphasis added). On appeal, the Fourth Circuit reversed, ruling that the district court could not deny recognition to the splinter district unless the "dominant purpose" of the proposed separation was discriminatory. *See Wright*, 407 U.S. at 461. The Supreme Court granted certiorari and reversed the Fourth Circuit's decision. In so doing, the Supreme Court cited both *Lee* and *Stout I* with approval, and held that the district court's approach—which tracked *Lee* and *Stout I*— "was proper." *Id.* at 462.

Wright made clear that the district court bore primary responsibility for determining the effect of a proposed separation "upon the process of desegregation," and that rendering this "essentially factual determination" "is a delicate task that is aided by sensitivity to local conditions." *Id.* at 466, 470. However, the Court made equally clear that once a district court balances the relevant factors and makes the factual determination that a proposed separation

will impede desegregation, the court is obligated to halt the splinter district: "We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Id.* at 470.

After *Wright*, the Fifth Circuit (in opinions that are controlling here)[8] continued to reaffirm the rule that district courts may not permit splinter districts if the effect would be to impede desegregation efforts in the parent district. Indeed, while the Supreme Court was considering *Wright*, *Stout* was remanded to the District Court, which dissolved the splinter district of Pleasant Grove because it stood as an impediment to the desegregation of Jefferson County's schools. *See Stout II*, 466 F.2d at 1215. Pleasant Grove appealed, and the Fifth Circuit "held this case for the Supreme Court's determination" in *Wright*. *Id.* Following the issuance of *Wright*, the Fifth Circuit "affirm[ed] the district court's determinations as regards the splinter school districts." *Id.* The panel noted that *Wright* had cited *Lee* and *Stout I* "with approval," and predicated its ruling on the Supreme Court's decision in *Wright* "and its reliance on our prior *Stout [I]* order." *Id.* It held that Pleasant Grove could not be recognized as a separate school district unless and until it "demonstrates to the district court's satisfaction by clear and convincing

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[8] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

evidence that it" would not impede the desegregation of Jefferson County. *Id.* *Stout II* also reaffirmed *Stout I*'s holding that a "district court may not . . . recognize the[] creation" of a splinter school district if doing so would impede the parent district's desegregation efforts. *Id.* at 1214. Thus, the *Stout I* standard that the District Court in this case found to have been "change[d]" by *Wright*, *see* Doc. 1151 at 36-37, was in fact expressly reaffirmed in a binding Circuit opinion that relied on *Wright* to reach its conclusion.

Six years later, the Fifth Circuit again reiterated the rule set forth in *Stout I*. In *Ross v. Houston Independent School District*, 583 F.2d 712 (5th Cir. 1978), the district court enjoined the creation of a splinter district where the parent district was "suffering from the 'white flight' phenomenon" and where formation of the proposed splinter district "would exacerbate this problem" and "act as a catalyst to increase white flight." *Id.* at 715. The Fifth Circuit affirmed the district court's ruling, and held that "[t]he division of a school district operating under a desegregation order can be permitted only if the formation of the new district will not impede the dismantling of the dual school system in the old district." *Id.* at 714 (citations omitted). "In such a situation, the proponents of the new district must bear a heavy burden to show the lack of deleterious effects on desegregation." *Id.* Because the proposed splinter district "had not borne that burden" in *Ross*, the district court was obligated to deny its separation request. *See id.*

B. The District Court Erred by Concluding that *Stout I* Is No Longer Good Law.

As the foregoing discussion makes clear, *Stout I* was not overruled by *Wright*. On the contrary, *Wright* endorses *Stout I*'s (and *Lee*'s) holding, as do the Fifth Circuit's subsequent decisions in *Stout II* and *Ross*. These cases stand for a simple proposition: a district court may not recognize a splinter district if doing so would impede desegregation efforts in the parent district. *See Wright*, 407 U.S. at 467; *Ross*, 583 F.2d at 714; *Stout II*, 466 F.2d at 1214-15; *Stout I*, 448 F.2d at 404; *Lee*, 448 F.2d at 752.

The District Court acknowledged that *Stout I* prohibited district courts from recognizing a splinter district's creation where it would impede the parent district's desegregation efforts; however, the court believed that *Wright* overruled *Stout I* and provided district courts with the discretion to recognize splinter districts even under those circumstances. *See* Doc. 1152 at 36-37, 39. The discussion in the previous section shows why that conclusion is untenable. More specifically, the District Court made three errors: it misinterpreted *Wright*; it failed to follow binding Fifth Circuit decisions postdating *Wright* in *Stout II* and *Ross*; and it failed to acknowledge that *Stout I* and *Stout II* control the resolution of this issue because they are the law of the case.

First, the District Court misidentified *Wright*'s governing legal standard. As discussed, *Wright* (like *Stout I*) held that a district court "may not" recognize a

splinter district if the district would impede desegregation efforts in the parent district: "We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system." *Wright*, 407 U.S. at 470. Despite its extensive reliance on *Wright*, the District Court failed to cite this unequivocal language setting forth *Wright*'s holding. *See* Doc. 1141 at 158-83.

Instead, the District Court stated that the "pertinent part" of *Wright*, Doc. 1152 at 36, is the following statement: "a district court, in the exercise of its remedial discretion, may enjoin [the separation] from being carried out." *Wright*, 407 U.S. at 460. The District Court interpreted this statement as giving "the trial court a choice as to whether it 'may or may not' recognize a splinter district's creation." Doc. 1152 at 37. That interpretation is foreclosed by the unequivocal holding of *Wright* set forth above, and it fails to recognize the context in which the "may enjoin" statement appears in *Wright*. That statement was a response to the local officials' argument on appeal: namely, that the City of Emporia was "a separate political jurisdiction entitled under state law to establish a school system independent of the county," and therefore, "its action *may be enjoined only* upon a finding that" the state law is invalid, that the city boundaries were drawn to exclude African Americans, or that the racial disparity between the city and the county itself violated the Constitution. *Wright*, 407 U.S. at 459 (emphasis added).

In other words, this portion of the Court's opinion refers to "the power of the district court to enjoin Emporia's withdrawal" in the absence of an independent constitutional violation. *Id.*

In this context, the Court's "may enjoin" statement in *Wright* conveys only that the district court had the authority to enjoin Emporia in the absence of "an independent constitutional violation" so long as its separation "would impede the dismantling of the dual system." *Id.* at 459, 460. At this point in the opinion, the Court had not yet addressed the question whether a district court *must* bar the creation of a splinter district if that district's secession would impede desegregation efforts in the parent. The court's focus was limited to the question of whether a district court *could* bar the creation of a splinter district that was valid under state law. That *Wright* did not seek to alter the rule announced in *Stout I* is confirmed by the language of *Wright*'s holding and by its approving citation to the rule established in other federal courts—including *Lee* and *Stout I*—that "splinter school districts may not be created" where the effect of the separation impedes desegregation. *Id.* at 462; *see id*. at 470.

The District Court made an additional interpretive error in discussing *Wright*'s statement that "'[t]he weighing of these factors to determine their effect upon the process of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district

judge.'" Doc. 1152 at 36 (quoting *Wright*, 407 U.S. at 466) (additional citations omitted). The District Court erroneously read this statement from *Wright* as granting permission to a district court to choose "whether it may or may not recognize a splinter district's creation." Doc. 1152 at 37.

But, this passage from *Wright* does not describe a district court's *remedial* discretion; it describes the district court's *fact-finding* discretion. Specifically, the passage describes the process by which a district court should determine the effect of a secession "upon the process of desegregation." This discussion comes at the conclusion of a section of the *Wright* opinion analyzing whether or not Emporia's separation would affect the county school system's desegregation efforts. *See Wright*, 407 U.S. at 466. There is no dispute that district courts are charged with this "essentially factual determination." *Id.* at 470. And, here, the District Court made that "essentially factual determination" by determining that Gardendale failed to meet its burden of showing that its secession will not impede Jefferson County's desegregation efforts. Doc. 1141 at 158-83. Having made that factual determination, the Supreme Court has established the sole remedy: the "new school district may not be created." *Wright*, 407 U.S. at 470.

The District Court also erred by failing to recognize that it was bound by circuit authority postdating *Wright*. District courts within a circuit are bound by the precedent of that circuit, *see In re Hubbard*, 803 F.3d 1298, 1309 (11th Cir.

2015), and circuit precedent remains binding unless "a clearly contrary opinion of the Supreme Court" or the en banc court is issued. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir. 2007) (citation omitted). Here, *Stout II* imposed the same legal standard as *Stout I*, and it did so subsequent to, and in reliance on, *Wright*. *See Stout II*, 466 F.2d at 1214 ("Likewise, where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not . . . recognize their creation.") (quoting *Stout I*, 448 F.2d at 404). *Ross* applied the same standard six years later. 583 F.2d at 714.

Ross and *Stout II* have never been overruled and remain binding Circuit precedent. *See In re Hubbard*, 803 F.3d at 1309. Even if *Ross* and *Stout II* had misinterpreted *Wright* (and they did not), they were binding on the District Court and are binding here unless overruled by this Court en banc or by the Supreme Court. Thus, the District Court was obligated to follow the rule established in *Stout I* and reaffirmed in *Stout II* and *Ross*. As the District Court itself acknowledged, this rule prohibited the creation of a new Gardendale School District. *See* Doc. 1152 at 37.

Finally, the District Court erred by failing to recognize that *Stout I* and *Stout II* govern the resolution of this issue because they are law of the case. Under the law-of-the-case doctrine, "'[o]nce a case has been decided on appeal, the rule

adopted is to be applied, right or wrong, absent exceptional circumstances, in the disposition of the lawsuit.'" *Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984) (citation omitted); *see also This That & the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1283 (11th Cir. 2006) ("[T]he law-of-the-case doctrine bars relitigation of issues that were decided either explicitly or by necessary implication.").

Here, *Stout I* adopted the rule that a trial court "may not . . . recognize the[] creation" of a splinter district where the separation would impede the desegregation efforts of the parent district. 448 F.2d at 404. *Stout II* then reaffirmed that rule. 466 F.2d at 1214-15. "When a court decides a question of law"—as the Fifth Circuit did in *Stout I* and *Stout II*—the law of the case doctrine governs unless: 1) a subsequent trial produces new and substantially different evidence; 2) there has been a change in controlling authority; or 3) the prior decision was clearly erroneous and would result in a manifest injustice. *See This That & the Other*, 439 F.3d at 1283.

None of these exceptional circumstances apply here. As discussed, the District Court erred in concluding that "there was a change in controlling authority." Doc. 1152 at 37. *Wright* did not overrule *Stout I*, and it could not have overruled *Stout II*, which was decided after *Wright*. The District Court similarly erred in concluding that "the fact that this case has sat dormant for years"

constituted a change in circumstances so as to satisfy the "manifest injustice" exception to the law-of-the-case doctrine. Doc. 1152 at 39.

The District Court offered no explanation for why the recent inactivity in the case would make it a "manifest injustice" to follow the rule set forth in *Stout I* and *Stout II*. The District Court's reasoning is especially perplexing because, as that court recognized, some circumstances have *not* changed for Black students in Jefferson County: a half-century after Plaintiffs-Appellants filed this suit, Gardendale sought to create a splinter district motivated by its desire to "exclude from the district children who attend Gardendale schools by court order." Doc. 1141 at 175. There is certainly no "manifest injustice" in refusing to recognize a district formed with the purpose of excluding African American children.

In sum, as a matter of both controlling precedent and the law-of-the-case doctrine, the District Court had no remedial discretion once it correctly found that Gardendale's secession would impede desegregation efforts in Jefferson County. Its only remedy was to deny Gardendale's request in its entirety.

C. The "Practical Considerations" Identified by the District Court Do Not Support Its Remedial Order.

Because the District Court failed to recognize that its discretion was cabined by binding Supreme Court and Circuit case law, the court did not stop its inquiry after finding that Gardendale's separation would impede the desegregation of Jefferson County. Instead, it concluded that four *ad hoc* "practical considerations"

supported the creation of a Gardendale splinter district, albeit one that initially encompasses only two of the four schools that Gardendale had sought to include in its new school district. Doc. 1141 at 180-83.

These "practical considerations" find no support in the precedent of this Court or the Supreme Court. Instead, the case law makes clear that the District Court's prescribed role is to determine whether the splinter district has satisfied its burden of proof, and to reject its bid for secession if it has not. *See Wright*, 407 U.S. at 467; *Ross*, 583 F.2d at 714; *Stout II*, 466 F.2d at 1214-15; *Stout I*, 448 F.2d at 404; *Lee*, 448 F.2d at 752.

The District Court's contrary approach defeats the very purpose of the heavy burden of proof imposed on secession districts in this context. *See Ross*, 583 F.2d at 714 (stating that "proponents of the new district must bear a heavy burden to show the lack of deleterious effects on desegregation"); *Stout II*, 466 F.2d at 1215 (the proponent of a splinter district in Jefferson County must "demonstrate[] to the district court's satisfaction by clear and convincing evidence that it" would not impede the desegregation of the county). By its nature, the burden of proof ensures that district courts cannot recognize the creation of *any* new district unless that new district has presented persuasive evidence that doing so will not impede desegregation. That burden is consistent with the moral and constitutional imperative to desegregate our nation's schools that had previously been subject to

de jure racial segregation, and the unfortunate reality that desegregation has still not been achieved in many counties well over a half century after *Brown*. Here, however, the District Court turned the burden on its head, permitting Gardendale to secede based on "practical considerations" even though Gardendale did not satisfy its significant burden.

The District Court's approach is particularly problematic given the court's finding that Gardendale's request to secede was motivated by intentional discrimination. As the District Court found, the Gardendale school system was formed for the purpose of excluding Black children, Doc. 1141 at 143, 180-83, and "[t]he messages of inferiority in the record [from the separation organizers and from the Gardendale Board] assail the dignity of black school children." *Id.* at 180. The Supreme Court has made clear that "[t]he impact [of segregation] is greater when it has the sanction of law." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). Here, the District Court's decision to recognize a Gardendale school district gave the "sanction of law" to Gardendale's efforts to exclude Black children. In so doing, the court's order exacerbates the message of inferiority conveyed by Gardendale's actions. The Supreme Court and this Court's predecessor have repeatedly denied splintering based on its effect on desegregation even absent any finding that the secession was motivated by discriminatory intent. *See Wright*, 407 U.S. at 467; *Ross*, 583 F.2d at 714; *Stout II*, 466 F.2d at 1214-15;

Stout I, 448 F.2d at 404; *Lee*, 448 F.2d at 752. Those cases apply *a fortiori* when, as here, the secession was motivated by discriminatory purpose.

Finally, the "practical considerations" cited by the District Court are not only legally irrelevant given Gardendale's failure to meet its burden, those considerations are unpersuasive on their own terms.

First, the District Court feared that denying Gardendale recognition will harm *the plaintiff class* because Gardendale families may blame Black students for the court's decision. Doc. 1141 at 180. The Plaintiffs-Appellants respectfully reject the court's efforts to define their self-interests, and assert that the plaintiff class's interests are best served by refusing to recognize splinter districts that fail to advance desegregation in Jefferson County, and which were created for the purpose of excluding Black students.

Second, the District Court asserted that its remedy is intended to advance the interests of the 33,000 students in Jefferson County's schools who do not attend Gardendale schools. *Id.* at 182. The District Court stated that Jefferson County may be approaching the end of its period of federal supervision—at least for some of the *Green* factors—and that denying Gardendale's request may delay Jefferson County's ability to achieve unitary status with respect to those factors. *Id.* at 182-83. But the District Court's reasoning is speculative because the parties have neither collected the data necessary to make such a determination nor presented

such evidence to the court. Doc. 1114. As a result, the court lacked the record necessary to address this subject. *See Ross*, 583 F.2d at 714; *Stout II*, 466 F.2d at 1214. Indeed, after Gardendale's superintendent Dr. Patrick Martin toured eleven Jefferson County schools in November 2015, he provided the following assessment of Jefferson County's progress to the Gardendale Board: "Our team's takeaways from the week are that (1) if Jefferson County really does aim to gain Unitary Status there is going to be an excessive amount of work to be done across the entirety of the county, and (2) we need to do everything to make sure we are not lumped into that process." Doc. 1141 at 110. Notably, Jefferson County was a party to the litigation below and opposed recognition for Gardendale. *See* Doc. 1093 ("JCBOE Obj.to the Proposed Plan for Separation of the Gardendale Sch. System").

Third, the District Court stated that it was attempting to honor the wishes of families in Gardendale who wanted to splinter for reasons unrelated to racial discrimination, especially emphasizing statements from three Black residents of Gardendale at trial supporting Gardendale's request to secede. *See* Doc. 1141 at 183; Doc. 1152 at 25-30. However, only one of those three residents testified under oath; the statements of the other two residents were made after trial and, thus, are "not evidence." Doc. 1152 at 29. Further, as the District Court acknowledged, Black residents of Gardendale "are not in the same position as the

parents of African-American students who live outside of the City of Gardendale," as they would not be excluded from Gardendale's schools. Doc. 1152 at 29. The wishes of three Black residents in Gardendale cannot override the constitutional rights of Black students in Jefferson County who do not live in Gardendale and who continue to attend a school district characterized by the vestiges of *de jure* segregation.

In any event, as *Wright* made abundantly clear, "[t]he existence of a permissible purpose" that the District Court identified from the commentary of three Black Gardendale residents "cannot sustain an . . . impermissible effect." *Wright*, 407 U.S. at 462; *cf. United States v. Tex. Educ. Agency*, 579 F.2d 910, 914-15 (5th Cir. 1978) (holding that the "intent" in desegregation cases that violates the Constitution is the intent to maintain segregated schools, which "is not excusable on the ground that such treatment was inspired by benevolent motives") (citation omitted). Thus, even if Gardendale's motivations were completely benign—and, as discussed above, the motivations of the city as a whole were decidedly not benign—that could not justify the deleterious effects of its secession.

Fourth, the District Court referenced "the interests of [ ] students" from three communities that attend Gardendale schools but do not live inside the municipal boundaries. Doc. 1141 at 184. But the court did not even attempt to explain how the interests of students from those communities were advanced by

allowing Gardendale to secede. Two of the communities intervened below (the Cities of Graysville and Brookside on behalf of their residents attending Gardendale schools), as did two residents from the third community (unincorporated Mr. Olive). *Id.* at 133. All three opposed Gardendale's separation. *See* Doc. 1056; Doc. 1057. Further, while the court noted that these students' interests "particularly" "relate[d] to the new Gardendale High School," Doc. 1141 at 184, this concern does not support the court's decision to recognize Gardendale. At present, Jefferson County has retained control of Gardendale High School under the District Court's remedy, as it would have done if the court had denied Gardendale's separation motion entirely. Students from these communities will continue to attend Gardendale High School just like they did before. If, however, the court permits Gardendale to separate entirely in three years—a possibility discussed by the court, *see id.* at 186—these students will be harmed when Gardendale High School is no longer a part of Jefferson County Schools.

Finally, in its supplemental opinion, the District Court alluded to the need for Jefferson County and Gardendale "to heal." Doc. 1152 at 28. But, there is no "healing" for Black students when a court provides legal sanction to the "messages of inferiority" sent by the separation organizers and the Gardendale school board, messages which "assail the dignity of black school children." Doc. 1141 at 180.

Nor is the community healed when a splinter district jeopardizes desegregation efforts in the county.

Under the law, courts cannot consider the effect that remedying a constitutional violation in a desegregation case will have on public sentiment, public relations, or public peace in the community. *See Cooper v. Aaron*, 358 U.S. 1, 16 (1958). To be sure, this case does not involve violent resistance to desegregation, but *Cooper* stands broadly for the proposition that dissatisfaction and even conflict cannot trump the constitutional imperative to desegregate. *See, e.g.*, *Calhoun v. Bd. of Educ. of Atlanta*, 188 F. Supp. 401, 408 (N.D. Ga. 1959) (citing to *Cooper* for the proposition that that the "possibility of threat of friction or disorder among pupils or others" cannot be a rationale to avoid a desegregation plan). For similar reasons, concerns about white flight—while they "may be cause for deep concern"—cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484, 491 (1972).

In sum, Gardendale did not meet its burden to show that its separation would not impede desegregation efforts in Jefferson County. Under controlling precedent, that meant the only permissible remedy was to deny Gardendale's motion in its entirety. The District Court's contrary determination rests on both an error of law (its misinterpretation of precedent), and a clear error of judgment with

respect to its analysis of "practical considerations" as a justification for its wholly inappropriate remedy. One of those practical considerations was squarely foreclosed under the law; the other three considerations involved the District Court asserting that the "true" interests of three parties to this litigation were antithetical to the positions adopted by the parties themselves. As a result, the District Court's order constitutes an abuse of discretion, and it should be reversed. *See Alikhani*, 200 F.3d at 734; *Whatley*, 719 F.3d at 1219.

II. The District Court's Finding of Intentional Discrimination Constitutes an Additional Basis for Denying Gardendale's Request to Secede from Jefferson County.

As clearly stated above, the controlling precedent dictates a reversal of the District Court's order. A reversal is also indubitably mandated by the District Court's independent finding that Gardendale *intentionally discriminated* against Black children in its attempt to separate from the larger Jefferson County School District. In order to enjoin a seceding school district, a district court does not have to find intentional discrimination. *See* Part I, *supra*; *see also Lee v. Chambers Cty. Bd. of Educ.*, 849 F. Supp. 1474, 1486 n.6 (M.D. Al. 1994). However, when a district court does make incontrovertible factual findings of unconstitutional

intentional racial discrimination against Black schoolchildren, as the court did here, it must provide a remedy that wholly rectifies that unconstitutional conduct.

As the Supreme Court has explained, "[a]n official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). That rule is dispositive here. The District Court found that "race was a motivating factor in Gardendale's decision to separate from the Jefferson County public school system." Doc. 1141 at 138. "The record demonstrates that the Gardendale Board is trying to evade the Court's desegregation order because some citizens in Gardendale want to eliminate from Gardendale's schools the black students whom Jefferson County transports to schools in Gardendale." *Id.* As such, Gardendale's actions have "no legitimacy at all under our Constitution." *Richmond*, 422 U.S. at 378. Indeed, the District Court recognized that Gardendale's separation effort was, in and of itself, both "subject to the Equal Protection Clause of the Fourteenth Amendment" and violative of that clause. Doc. 1141 at 180 n.90.

Because the District Court went further than necessary and found an independent constitutional violation, Supreme Court precedent required a remedy that "closely fit the constitutional violation," and would "place persons unconstitutionally denied an opportunity or an advantage 'in the position they

would have occupied in the absence of'" Gardendale's unconstitutional conduct. *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).[9] The District Court did not provide such a remedy here. Instead, the court permitted Gardendale to open a new school system whose creation was motivated by intentional racial discrimination. To be sure, the District Court only permitted Gardendale (at least initially) to operate two of the four schools it had sought, but this does not remedy the constitutional violation. In the absence of Gardendale's discrimination, Black schoolchildren who attend Gardendale schools would be under the supervision of the Jefferson County Board of Education, which was not just created for racially discriminatory reasons, but instead is endeavoring under court order to desegregate its schools. Under the District Court's Order, that will no longer be true. In addition, far from remedying the message of inferiority sent to Black students by Gardendale's separation efforts, the District Court gave it legal sanction. *See* Doc. 1141 at 185-87.

The Court's remedy was also improper because it fails to bar like discrimination in the future. *See Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430,

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[9] "School district lines and the present laws with respect to local control[ ] are not sacrosanct and if they conflict with the Fourteenth Amendment, federal courts have a duty to prescribe appropriate remedies." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

438 n.4 (1968) (courts have "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future'") (citation omitted); *see also Virginia*, 518 U.S. at 547 (noting that the proper remedy for unconstitutional exclusion aims to bar similar discrimination in the future). The District Court's order leaves the Gardendale Board of Education in a position of authority that it would not occupy were its motion denied. In so doing, the court's order conveys a powerful message to other municipalities that they may be permitted to secede in the future even if their secession is motivated by intentional racial discrimination in violation of the Fourteenth Amendment.

Appellants respectfully submit that this Court cannot allow Gardendale's discriminatory conduct to remain without an adequate remedy—especially in this case, with its past history of *de jure* racial segregation in Jefferson County. Affirming the District Court's approval of a separate Gardendale school district not only eviscerates the longstanding precedent that a discriminatory effect prohibits the creation of splinter district, but also would permit discriminatory intent to be ignored in the creation of a splinter district. This Court, therefore, must act now to protect the constitutional rights of Jefferson County's Black children and ensure that every child is afforded educational opportunities that are free from discrimination.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request this Court to reverse the District Court's approval of a new Gardendale School District.

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