No. 21-30244

In the United States Court of Appeals for the Fifth Circuit

M. C. MOORE, AS FATHER AND NEXT FRIEND TO MINORS JOYCE MARIE MOORE, JERRY MOORE, AND THELMA LOUISE MOORE; HENRY SMITH, AS FATHER AND NEXT FRIEND TO MINORS BENNIE SMITH, CHARLES EDWARD SMITH, SHIRLEY ANN SMITH, AND EARLINE SMITH,

Plaintiffs - Appellants

v.

TANGIPAHOA PARISH SCHOOL BOARD, A CORPORATION,

Defendant - Appellee

v.

MELISSA STILLEY, SUPERINTENDENT, TANGIPAHOA PARISH SCHOOL SYSTEM,

Interested Party – Appellee

On Appeal from the United States District Court
Eastern District of Louisiana Civil Action No. 65-15556

BRIEF OF THE STATE OF LOUISIANA AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. This list may assist the judges of this Court as they evaluate possible disqualification or recusal:

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INTEREST OF *AMICUS CURIAE*[1]

Louisiana writes as *amicus curiae* in support of the Appellee Tangipahoa School Board. For over sixty years, the district court has intruded on Louisiana's "core" responsibility for the education of children in Tangipahoa School District by directing the actions of the School Board. *See Horne v. Flores*, 557 U.S. 433, 448 (2009) (recognizing "public education" as an "area[] of core state responsibility"); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State.").

Louisiana created the School Board as a local political subdivision of the State and endowed it with authority to make policies in the best interest of students in Tangipahoa public schools. *See, e.g.*, La. Const. art. VIII § 9(A) ("The legislature shall create parish school boards and provide for the election of their members."); *id.* § 44 (defining "political subdivision" as "including a school board"); La. Rev. Stat. § 17:81(A)(1) ("Each local public school board shall serve in a policymaking capacity that is in the best interests of all students enrolled in schools under the board's jurisdiction.").

[1] Under Federal Rule of Appellate Procedure 29(a)(2), Louisiana, as a State, is not required to obtain the parties' consent or the Court's leave to file this brief.

The structural injunctions and continuing federal supervision that have been in place in this case since 1965 "eviscerate[]" Louisiana's authority over the Tangipahoa School District, subverting the State's entire body of law that would otherwise govern. *See In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019) ("[S]tructural reform decree[s] eviscerate[] a State's discretionary authority over its own programs and budgets" and "result in the entire subversion of the legislative, executive and judicial powers of the individual states." (quoting *Missouri v. Jenkins*, 515 U.S. 70, 128–29 (1995) (Thomas, J., concurring))).

Courts, of course, have authority to remedy a constitutional violation, but that authority does not last forever. *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 387 (5th Cir. 2014) ("[D]ecrees in school desegregation cases 'are not intended to operate in perpetuity . . . .'" (quoting *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991))). Once "having righted the wrong," a court lacks jurisdiction to continue issuing remedies. *United States v. Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987). If it nonetheless proceeds, the court's *ultra vires* actions disobey the principles of "federalism" by imposing limits on the State "[tighter] than the limits of the Constitution." *Id.*;

accord Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (declining "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism").

This is precisely what has happened in this case. For years, the district court has issued injunctive remedies that impose tighter limits on the State than those required by the Constitution. The State urges the Court to review the district court's jurisdiction to preserve federalism's careful balance between the States and the federal government. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government" in which their power is "balance[d]." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))).

SUMMARY OF THE ARGUMENT

In school desegregation cases, courts have jurisdiction to remedy the constitutional violation and its "vestiges," meaning conditions proximally caused by the original violation. In 2007 when Plaintiffs sought remedies for new racial imbalances after the case had been dormant for seventeen years, the district court had an independent

obligation to ensure that it still had jurisdiction. The court, however, never stopped to determine if there was a causal link between the 1965 constitutional violation and the 2007 imbalances. Nor does one exist. The nearly twenty years of dormancy in this case severed any causal chain flowing from the 1965 violation. The Court should remand to the district court with instructions to dismiss claims of racial imbalances from 2007 to the present for lack of jurisdiction, or alternatively, to determine whether, as of 2007, the racial imbalance was caused by the 1965 violation.

To the extent the district court retains jurisdiction to remedy present racial imbalances, the court properly granted the Tangipahoa Parish School System unitary status and released it from active court supervision, and this Court should affirm.

ARGUMENT

I. THE DISTRICT COURT FAILED TO DETERMINE WHETHER IT HAS REMEDIAL JURISDICTION.

It is well established that "judicial powers may be exercised only on the basis of a constitutional violation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). "[F]ederal-court decrees must directly address and relate to the constitutional violation itself." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (*Milliken II*). "Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.*

In the parlance of school desegregation cases, the constitutional violation—"purposeful separation of races in public education," *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987)—continues until "vestiges" of *de jure* segregation are sufficiently eradicated. *United States v. Lawrence Cty. Sch. Dist.*, 799 F.2d 1031, 1044 (5th Cir. 1986) (emphasis omitted) (quoting *Taylor v. Ouachita Par. Sch. Bd.*, 648 F.2d 959, 967–68 (5th Cir. 1981)).

"[V]estiges of segregation that are the concern of the law in a school case . . . must be so real that they have a causal link to the *de jure* violation being remedied." *Freeman v. Pitts*, 503 U.S. 467, 496 (1992); *accord Missouri v. Jenkins*, 515 U.S. 70, 117 (U.S. 1995) (Thomas, J., concurring) ("In order for a 'vestige' to supply the ground for an exercise of remedial authority, it must be clearly traceable to the dual school system."); *Milliken v. Bradley*, 418 U.S. 717, 750 (1974) (*Milliken I*) (explaining that the segregation plan "had no causal connection with the distribution of pupils by race"); *United States v. Fordice*, 505 U.S. 717, 728 (1992) ("[P]olicies and practices [must be] traceable to [the State's] prior *de jure* dual system," and "existing racial identifiability . . . attributable to the State").

But racial imbalance that is caused by "demographic factors" is not a vestige of segregation. *Freeman*, 503 U.S. at 469 ("[A] school district is under no duty to remedy an imbalance that is caused by demographic factors."). "Racial balance is not to be achieved for its own sake, but is to be pursued only when there is a causal link between an imbalance and the constitutional violation." *Id.*

Here, in 2007 when Plaintiffs asked to revive this long-dormant case, the district court failed to establish a causal link between the modern-day racial imbalances that Plaintiffs sought to remedy and the 1965 *de jure* segregation. By doing so, the district court assumed its own remedial jurisdiction. The early procedural history of this case makes that clear.

In 1965 when Plaintiffs filed their Complaint, the School Board answered by filing a plan to desegregate Tangipahoa public schools. ROA.107 (docket nos. 1, 8). The court issued a consent decree adopting the School Board's proposed plan. *Id.* (docket no. 9). In 1967, the court entered another consent decree "permanently enjoin[ing]" the School Board "from "discriminating on the basis of race or color" and establishing a "freedom of choice plan."[2] *Id.* (docket nos. 13, 22); *Moore v. Tangipahoa Par. Sch. Bd.*, 290 F. Supp. 96, 96 (E.D. La. 1968) (discussing the July 12, 1967 Order).

[2] Freedom of choice plans allowed parents to choose which school their children would attend regardless of race and "became widespread in the South after pupil-placement laws and other anti-integration measures were struck down." *Free Choice and Free Transfer Plans for School Desegregation*, 82 Harv. L. Rev. 111, 111–12 (1968). They were largely unsuccessful at achieving integration because, while some Black families chose formerly all-white schools, white families did not choose formerly all-Black schools. *See id.*

When freedom of choice plans were later found inadequate,[3] the court ordered the School Board to propose a new plan establishing "geographic attendance zones, or pairing of classes, or both." *Moore v. Tangipahoa Sch. Bd.,* 298 F. Supp. 283, 284 (E.D. La. 1968). In 1969, the court adopted the School Board's proposed plan with "constitutionally required" modifications. *Moore v. Tangipahoa Par. Sch. Bd.*, 304 F. Supp. 244, 252 (E.D. La. 1969).

For the next twenty years, the court issued orders—often consent decrees—modifying and adding to the 1969 Decree. *See* ROA.110–133. In 1989, the court ordered "the parties prepare a joint composite order evidencing the intent and substance of all of [the court's] prior orders." ROA.133 (abbreviations spelled out) (docket nos. 510, 511). Instead, the School Board filed a proposal, and Plaintiffs opposed it. *Id.* (docket nos. 513, 514). The School Board then "revised" its proposal, also opposed by Plaintiffs. *Id.* (docket nos. 515, 516). That same day, however, the court held a hearing on Plaintiffs' "motion to *confirm* [the School Board's']

[3] *See, e.g.*, *Green v. New Kent Cty.*, 391 U.S. 430 (1968); *Henry v. Clarksdale Municipal Separate Sch. Dist.*, 409 F.2d 682 (5th Cir. 1969); *United States v. Greenwood Municipal Separate Sch. Dist.*, 406 F.2d 1086 (5th Cir. 1969); *Adams v. Mathews*, 403 F.2d 181 (5th Cir. 1968); *Graves v. Walton Cty. Bd. of Educ.*, 403 F.2d 181 (5th Cir. 1968).

revised proposed composite order" and took the matter under advisement. *Id.* (emphasis added) (docket no. 517). In July 1990, the court declined to adopt the School Board's revised composite order with "leave to re-urge." *Id.* (docket no. 519).

For the next seventeen years, the case went dark. *See id.* (noting 1991 reassignment of case to "Section B" (docket no. 520) and 1992 receipt of School Board's October 1991 progress report (docket no. 521)). No action was taken by either party or court. The School Board thought that the School District was unitary and free to take actions without first seeking the court's approval. *See* School Board's Resp. to Mot. for Status Conference, ROA.151 ("For many years, there have been no controversies with respect to the desegregation suit started back in the mid sixties and the school system has operated essentially as a unitary system using objective hiring criteria and maintaining the schools' attendance zones that best accomplish the desegregation of the schools.").

Plaintiffs' lack of action during that time indicates that they believed the same thing. But in 2007, "[t]hough there ha[d] not been recent litigation between the parties," Plaintiffs nonetheless urged the Court to remedy a number of racial imbalances that had arisen in the

intervening years.[4] *See* ROA.134–40. They alleged that the imbalances were vestiges of segregation and asked for a status conference with parties and "other designated persons as soon as practicable." ROA.139.

While it appears no argument was made to the court regarding the proximate cause of the 2007 racial imbalances, the district court had "an independent obligation" to determine whether a causal link existed between the 1965 purposeful separation of races in Tangipahoa public schools and the 2007 racial imbalances, "even in the absence of a challenge from any party." *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *Freeman*, 503 U.S. at 469 ("Racial balance . . . is to be pursued only when there is a causal link between an imbalance and the constitutional violation.").

[4] Plaintiffs asserted racial imbalances in (1) student populations; (2) individual classrooms; (3) the number of Black teachers, administrators, staff, and coaches at schools with majority white student populations; (4) the quality of school facilities and curricula; and (5) the building and improving of schools. Plaintiffs also asserted that the School Board had violated the Court's prior orders by failing to give notice of its construction projects and interfering with the Compliance Officer that the court had appointed in 1977. *See* ROA.134–40.

The court, however, never paused to consider its own jurisdiction, instead launching a renewed odyssey of litigation in a case that was dormant for almost two decades. At the status conference, the court set a deadline for "motions requiring expedited consideration, such as a motion for preliminary injunction." ROA.160. As expected, Plaintiffs filed motions for further injunctive relief. *See* ROA.211–14; ROA.216–23; ROA.229–36. And the School Board asked the court for permission to carry out already planned projects. *See, e,g.*, ROA.161–63; ROA.340–43.

In 2008, the court directed the School Board to propose a new desegregation plan. ROA.3559. In 2010, after rounds of evidentiary hearings, the court adopted the proposed plan with modifications. *See* ROA.3559–89. Since then, the School Board has faced never-ending rounds of litigation. Only now, in 2021, more than sixty years after the liability finding and initial remedy, will it finally be relinquished from active court supervision. *See* ROA.14986 (initiating "a three-year probationary or provisional period").

By failing to determine the cause of the 2007 racial imbalances, the court assumed its own jurisdiction and likely forced the School Board to remedy imbalances caused by demographic factors, the very duty that

the Supreme Court said does not exist. *See Freeman*, 503 U.S. at 469. The liability found in this case gives the court authority to remedy nothing beyond conditions proximally caused by the 1965 violation. Because the almost twenty years of dormancy severed the causal chain flowing from the 1965 violation, the district court lacks jurisdiction to issue further remedies in *this* case. If a post-1965 constitutional violation has caused present racial imbalances, the proper procedure—indeed the constitutionally required procedure—is to file a new Complaint.

The post-2007 adoption of consent decrees does not alter this conclusion. After all, parties cannot consent to extend a court's jurisdiction beyond its constitutional limits. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court.").

The Court should remand this case to the district court with instructions to dismiss all post-1992 claims for lack of jurisdiction. In the alternative, the Court should remand so that the district court can

determine whether, in 2007, a causal link existed between the 1965 violation and the racial imbalances. *See Thomas*, 756 F.3d at 388 (remanding to determine if "vestiges of *de jure* segregation had been eliminated as far as practicable" (quoting *Dowell*, 498 U.S. at 250).

II. IF THE DISTRICT COURT RETAINS JURISDICTION, IT PROPERLY GRANTED PROVISIONAL UNITARY STATUS AND RELEASED THE SCHOOL BOARD FROM ACTIVE COURT SUPERVISION.

To the extent that the 1965 violation caused any present racial imbalances in the Tangipahoa School District, the district court's March 30, 2021 opinion properly analyzed the factors for granting unitary status and relinquishing the School Board from active supervision. As that court recognized, the overall inquiry is whether "(1) the school district has complied in good faith with desegregation orders for a reasonable amount of time, and (2) the school district has eliminated the vestiges of prior *de jure* segregation to the extent practicable." ROA.14946 (citing *Hull v. Quitman Cty. Bd. Of Educ.*, 1 F.3d 1450, 1454 (5th Cir. 1993)). The standard to be met is *not* a perfect balance of races at every school that precisely matches the balance of the full district. *See Anderson v. Sch. Bd. of Madison Cty.*, 517 F.3d 292, 297 (5th Cir. 2008).

In making their determinations, "[d]istrict courts must not confuse the consequences of *de jure* segregation with the results of larger social forces or of private decisions." *Jenkins*, 515 U.S. at 117 (Thomas, J., concurring) (citing *Freeman*, 503 U.S. at 496). Geographic factors or decisions of private actors may result in school populations that do not reflect the full demographics of the Parish, but this does not prove discrimination or justify federal supervision on its own.

The district court's opinion centered on whether unitary status had been achieved in the areas of employment practices, student assignment among schools, and facilities. To the extent that the 1965 violation caused any present racial imbalance in those three areas, the court below correctly found that provisional unitary status was justified.

As the district court found back in 2016, the School Board has established a firm track record of *not* assigning school staff to individual schools in such a way as to establish any school as "black" or "white." ROA.14957. Indeed, the court would have granted unitary status in this area at that point "but for lack of documentation about two or three unresolved grievances." ROA.14958. In April 2019, the district court again found that the School Board was acting in good faith, but kept the

Board under supervision to ensure continued compliance with its orders regarding hiring and promotion of staff. ROA.14959.

Since that time, "[t]here have been no administrative or court findings of noncompliance on employment issues." *Id.* The existence of a few complaints in this area—not unusual in a school district—does not establish otherwise. The standard for achieving provisional unitary status is not perfection, but instead whether the school system shows "credible evidence of good faith compliance with court orders relative to race-based employee grievances 'for a reasonable period and to the extent practicable.'" ROA.14961 (quoting *Hull*, 1 F.3d at 1454).

In the realm of staff assignments, even a staff pool that falls short of a previous consent decree's targets can achieve unitary status if the pool is reasonably diverse. *Anderson*, 517 F.3d at 304. "[E]xtensive minority recruitment efforts," which the school system here has, also support such a finding. *Id.* Thus, the district court did not err in granting provisional unitary status in the area of employment practices.

The district court also correctly found that the Tangipahoa School District has improved the racial balance of its student assignments, with twenty of its schools in compliance with the court's consent decrees

regarding acceptable student balancing. ROA.14969. The School District made progress, before the pandemic, in reducing its absence, suspension, and expulsion rates; subsequent increases in absences during the 2020–21 school year are attributable to the pandemic rather than to any discrimination. ROA.14969–70.

Once again, the standard is not perfection. The Constitution does not require "any particular degree of racial balance or mixing" provided that students are not being excluded from schools on the basis of race. *See Swann*, 402 U.S. at 24) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."). Even largely one-race schools can be acceptable if the school system can "satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." *Id.*

Plaintiffs' brief argues that the court "acknowledged . . . that the present [student assignment policies]" do not meet unitary status requirements," Pl. Br. at 12–13, but does not explain in what way those policies fell short. In fact, the district court concluded that "the cumulative effect of [the School Board's] programs shows consistency

towards achieving unitary status through very practical, reasonable and good-faith means." ROA.14972.

Finally, the district court properly found a record of good faith compliance with orders related to facilities. ROA.14975. As early as 2017, the court concluded that "[p]hysical facilities and equipment at schools previously identifiable as majority black schools are largely comparable to [the same] at other schools in the system." *Id.* The School Board also directed the majority of its recent 2010–2017 capital expenditures to improving majority-black schools, spending more per pupil at those schools compared to majority-white schools. ROA.14976.

Alleged deficiencies in the School District's facilities, such as the use of temporary buildings, do not in themselves justify a denial of unitary status unless it can be shown that the use of such buildings is "a vestige of past discrimination"; Plaintiffs here "have failed to establish that [facilities issues were] a vestige of past discrimination." *See Anderson*, 517 F.3d at 303. More recent developments regarding the school's facilities likewise do not undermine the district court's findings. "[The School Board's] facility plan was substantially developed to address current student enrollment, projected growth, prioritized needs at noted

facilities, and replacement of temporary classroom buildings." ROA.14980.

In Tangipahoa Parish, the "state-imposed dual system" of public education was eliminated long ago, and as described above, the School Board has consistently shown good faith in its efforts to ameliorate racial imbalance not caused by the 1965 violation. The School Board should no longer be subject to federal supervision.

CONCLUSION

The district court lacks jurisdiction to remedy any present racial imbalances in the Tangipahoa School District. The Court should remand to the district court with directions to dismiss all claims from 2007 to the present. Alternatively, the Court should remand to the district court to determine, as of 2007, whether racial imbalances were proximally caused by the 1965 violation. To the extent that the district court retains jurisdiction to remedy present racial imbalance, the Court should affirm the district court's order finding unitary status and ending active court supervision.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on December 24, 2021, I filed the foregoing brief with the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 3,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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Dated: December 24, 2021