IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

DOSSIE WAYNE KEMP, *et al.*

PLAINTIFFS

v. **No. ED-1048**

LEE ROY BEASLEY,
et al.

DEFENDANTS

REV. FRANK TOWNSEND, *et al.*

PLAINTIFFS

v. **No. 89-cv-1111**

LEE ROY BEASLEY,
et al.

DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO INTERVENE AND DECLARE EL DORADO SCHOOL DISTRICT UNITARY

The Constitution forbids school districts from separating schoolchildren based on their race. But it does not require school districts to preserve a particular racial balance, let alone forbid private choices that may incidentally produce a racial imbalance. Yet that's what the Court and the parties erroneously assumed when they used a long-satisfied desegregation order to justify exempting the El Dorado School District from school choice. Because that holding was wrong and because it thwarts the State's school-choice policy, this Court should let the Arkansas Department of Education and State Board of Education intervene and should end all supervision over El Dorado.

I. Background

A decade after *Brown v. Board of Education*, El Dorado was still segregating. *Kemp v. Beasley*, 352 F.2d 14, 16 (8th Cir. 1965). White and black students were sorted into different

schools, and the schools that black children were assigned to had fewer resources. *Id.* So when El Dorado rejected black students' applications to transfer to the white schools in 1964, those students sued, and this Court rightly ordered desegregation. *Id.*

In response, El Dorado proposed a so-called "freedom of choice" policy allowing all students to pick their elementary, junior high, and high schools. *Id.* at 16-17. But that policy failed to fully integrate the District. *Kemp v. Beasley*, 423 F.2d 851, 856 (8th Cir. 1970) (hereinafter "*Kemp III*") (noting that elementary schools remained segregated). After several revisions to the "freedom of choice" policy and appeals, *see id.* at 851-56, this Court prohibited that policy. *See* Doc. 35-1 ¶ 1. The Court also reaffirmed that El Dorado's junior high and high schools must remain desegregated. *Id.* ¶¶ 2-3; *see Kemp III*, 423 F.2d at 855-56. And it finalized a plan to desegregate the elementary schools too. Doc. 35-1 ¶ 4.

Thankfully, El Dorado fulfilled those desegregation obligations long ago; "[r]ace is not a factor in faculty assignments, student assignments, or busing assignments." September 2022 Compliance Letter, Ex. A at 2. And since El Dorado desegregated its schools *circa* 1971, there have been no allegations that it has backslid into segregative practices. Still, this Court has retained supervision over the District for the intervening half century. As part of its management, this Court has approved a magnet program, *see id.* (attaching 2003 order), a school-board downsizing, *see* Doc. 28, and a school-district rezoning, *see* Doc. 32.

And at the parties' request and without any outside input, this Court later expanded the original order's scope. The original order prohibited an *intradistrict* "choice" policy that was designed to perpetuate the segregation of El Dorado's schools. *See generally Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968) (describing how "choice" policies were used to stonewall court desegregation orders). But in 2016, El Dorado and plaintiffs' counsel requested

an order declaring the District entirely and perpetually exempt from Arkansas's *interdistrict* school-choice law. Docs. 35, 37; *see also* Ark. Code Ann. 6-18-1903 (school-choice law). This Court agreed, adopting the parties' unchallenged, erroneous legal assertion that the Constitution bars El Dorado from participating in school choice because any voluntary interdistrict "movement would have a segregative impact." Doc. 41, at 3. Indeed, despite this Court effectively enjoining Arkansas's school choice law on the grounds that it was unconstitutional as applied to El Dorado, the State was never made a party to the litigation.

And four other recent cases—involving the Camden Fairview, Lafayette, Junction City, and Hope school districts—underscore the problem with allowing school districts (and titular plaintiffs' counsel) to agree to unilaterally exempt themselves from state law without adversarial analysis. In those cases, the same set of lawyers who represent the District and titular plaintiffs here sought an El Dorado-style modification of four long dormant decrees. But there, unlike here, the State objected. And when this Court erroneously modified those decrees to exempt those four districts from school choice on the same grounds that this Court articulated here, the Eighth Circuit reversed. *United States v. Junction City Sch. Dist.*, 14 F.4th 658 (8th Cir. 2021). Indeed, that Court squarely rejected the assertion that the Constitution requires districts "to maintain some sort of racial balance" and that, to maintain such a balance, federal courts are not entitled to interfere with private transfer decisions. *Id.* at 668 n.5. Moreover, particularly relevant here, in reaching that conclusion, the Eighth Circuit admonished this Court that it should reexamine those "long-dormant cases" and "consider removing [them] from the federal docket" to avoid similar attempts by Districts to avoid their legal obligations. *Id.* at 668.

That same analysis applies here. El Dorado's segregative policies that justified federal-court supervision half a century ago no longer exist. Ex. A. And private choices to transfer are

not a constitutional problem, even if they alter the racial balance of a school. Yet El Dorado has informed the Department of Education that it does not plan to seek termination of the original consent decree's provisions on "student assignment" and intradistrict "freedom of choice" or the 2016 order exempting the District from Arkansas's interdistrict school choice law. *Id.* at 3.

II. The State May Intervene to Defend Its Interests in Education Policy

Arkansas's Department of Education and Board of Education are entitled to intervene in any case that might "impede [their] ability to protect [their] interest[s]" if "existing parties" do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2). This case checks both boxes. As long as it remains under judicial supervision, El Dorado is exempt from Arkansas's chosen policy of interdistrict school choice. And the District's 2016 request illustrates that it can't be trusted to adequately represent the State's sovereign interests.

1. The State's Interests. Ongoing supervision raises "federalism concerns." *Horne v. Flores*, 557 U.S. 433, 448 (2009). Our constitutional structure ordinarily leaves education policy in the hands of state policymakers, not federal judges. *Id.* For good reason: "[w]hen the school district and all state entities participating with it in operating the schools [may] make decisions in the absence of judicial supervision," they are more "accountable to the citizenry" and "the political process." *Freeman*, 503 U.S. at 490 (majority op.). Conversely, ongoing judicial supervision "bind[s] state and local officials to the policy preferences of their predecessors" and "deprive[s] future officials of their designated legislative and executive powers." *Horne*, 557 U.S. at 449 (internal quotation marks omitted).

That's the case here. Arkansas has adopted broad school-choice policies letting any student "apply for admission . . . in any school district." Ark. Code Ann. 6-18-1901(b)(3) (findings). As the General Assembly explained when authorizing interdistrict choice, "[g]iving more options to parents and students" ensures that "the educational needs of [each] student[]" will be "satisf[ied]."

Id. at -1901(b)(2). Yet this Court's 2016 order decrees otherwise. As long as this Court retains supervision over El Dorado, it thwarts the State's policy choices.

2. Inadequate Representation. As El Dorado's 2016 request for exemption from school choice illustrates, the State cannot count on the District to "represent [its] interest[s]." Fed. R. Civ. P. 24(a)(2). El Dorado is apparently content to remain under federal supervision, even though it long ago desegregated. *See Horne*, 557 U.S. at 448-49; *Junction City*, 14 F.4th at 667. Indeed, rather than seek to free itself of judicial oversight, it "expand[ed] the consent decrees (and concomitantly expand[ed] federal oversight) to a whole new arena of school operations." *Junction City*, 14 F.4th at 668. Thus, to ensure that a party to the case represents its sovereign interests, the State must itself step in.

III. Segregation in El Dorado Ended a Half-Century Ago and Federal Supervision Must Be Terminated

To terminate judicial supervision over El Dorado, it is enough to show that the school itself no longer discriminates. Indeed, the Supreme Court has explained that "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to . . . affect the racial composition of the schools," supervision "by a district court should not be necessary." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

Fortunately, El Dorado stopped discriminating long ago; since this Court's desegregation order more than 50 years ago, El Dorado has eliminated "the vestiges of past discrimination . . . to the extent practicable." *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (internal quotation marks and alterations omitted); *see also Green*, 391 U.S. at 435 (instructing courts to examine a formerly segregated school's "faculty, staff, transportation, extracurricular activities and facilities"). The District has consistently reported to the Department of Education that "[r]ace is not a factor in faculty assignments, student assignments, or busing assignments made within [the District]." Ex.

A at 2. All students, regardless of race, "have only one attendance option." *Id.* The District's "facilities are substantially equal for constitutional purposes." *Id.* And the District has robust "equal employment policies." *Id.* Unsurprisingly, no party has accused it of segregating since this Court's final desegregation order. Because El Dorado stopped segregating decades ago, this Court should declare El Dorado unitary and relinquish its jurisdiction over the case. *Junction City*, 14 F.4th at 668. Or, at a minimum, as explained below, this Court should immediately vacate its unlawful 2016 order.

IV. This Court's 2016 Order Exempting El Dorado from School Choice Must Be Vacated.

Even though El Dorado has not segregated for decades, this Court expanded its supervision in 2016 and exempted the District from school choice. In doing so, the Court adopted the parties' arguments that, even without state-sponsored discrimination, private choices that "would have a segregative impact" violate the Constitution. Doc. 41 ¶ 9; *see also* El Dorado's Brief, Doc. 35 ("[T]he State may not allow private decisions to promote or achieve the same unconstitutional result."); Plaintiffs' Brief, Doc. 42 (adopting El Dorado's brief).

That decision was wrong. The Supreme Court has confirmed that federal-court authority to remedy "racial imbalance" is limited to undoing "unlawful *de jure* polic[ies]." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). "Where resegregation is a product not of state action but of private choices"—such as voluntarily transferring to another district—"it does not have constitutional implications" and does not necessitate remediation. *Id.* at 495; *see also Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) ("The mere fact that a school is black does not mean that it is the product of a constitutional violation."). Because both sides of the "v." here were happy to "sidestep" the State's school-choice laws, this Court didn't get an accurate picture of the law. *Horne*, 557 U.S. at 449 (internal quotation marks omitted).

The very goals of the 2016 order illustrate why it is not constitutionally mandated. Court supervision over schools was an extraordinary remedy necessary to overcome state-sponsored segregation. *See Freeman*, 503 U.S. at 503-05 (Scalia, J., concurring) (tracing the history of desegregation remedies). Once school districts drop their discriminatory policies and demonstrate a commitment to integration, courts can "[r]eturn[] schools to the control of [the] local authorities" who retain the power to set education policy under our constitutional structure—as indeed they must. *Id.* at 490 (majority opinion); *accord Horne*, 557 U.S. at 448.

Yet an order preventing *private* choices does not have an obvious end date, as the 2016 order illustrates. That order looked to "the demographics of [El Dorado] and the surrounding districts" when determining that school choice "would have a segregative impact." Doc. 41. But predicting and managing "demographic shifts" is "beyond the authority and beyond the practical ability of the federal courts to try to counteract." *Freeman*, 503 U.S. at 495. Nor can the State try to change the demographic composition of a school district; doing so would itself create constitutional problems. *Cf. Parents Involved in Cmy. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007); *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954); *Shelley v. Kramer*, 334 U.S. 1 (1948). Thus, forbidding private choices that may cause a racial imbalance would "require ongoing and never-ending supervision" by this Court—exactly what the Supreme Court has forbidden. *Freeman*, 503 U.S. at 495.

Finally, even if it wasn't clear that the 2016 Order was impermissible at the time, the Eighth Circuit's recent decision shuts the door on the matter. *See Junction City*, 14 F.4th at 667. Even if the Court requires a hearing or additional time to assess whether El Dorado ought to be released from federal supervision entirely, there is no question that vacatur of the 2016 Order is warranted. *See* Fed R. Civ. P. 60(b)(5).

Conclusion

El Dorado has not segregated in over a half-century. And though the District and plaintiffs may worry that school choice might cause a racial imbalance, this Court cannot supervise private choices. This Court should thus let the State intervene and should terminate its supervision over El Dorado.

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Respectfully Submitted,

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