No. 00-30232

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLIFFORD EUGENE DAVIS, JR. et al.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, Etc., et al.,

Defendants

EAST BATON ROUGE PARISH SCHOOL BOARD, a Corporation,

Defendant-Appellee

v.

CITY OF BAKER SCHOOL BOARD,

Defendant-Movant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

ANITA S. HODGKISS
Deputy Assistant Attorney General

DENNIS J. DIMSEY
MARIE K. McELDERRY
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3068

TABLE OF CONTENTS

PAGE

STATEMENT REGARDING ORAL ARGUMENT

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 8

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THIS COURT LACKS JURISDICTION OVER THE APPEAL . . . 11

A. Finality Of The District Court's Determination 13

B. The District Court's Order Is Not Separable From And Collateral To The Rights Asserted In The Case 14

C. Delayed Review Will Not Have Irreparable Consequences 15

D. This Appeal Presents No Serious And Unsettled Question Of Law 18

E. The Cases Cited By Appellant Are Inapposite 20

II. THE DISTRICT COURT DID NOT ERR IN RULING THAT THE CITY OF BAKER JOINS THIS LITIGATION AS A DEFENDANT SUBJECT TO ALL EXISTING ORDERS IN THE CASE 24

CONCLUSION 28

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES:

Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990) 20-21

Brown v. New Orleans Clerks & Checkers Union Local No. 1492, 590 F.2d 161 (5th Cir. 1979) 22

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 1, 9, 11-12

Davis v. East Baton Rouge Parish Sch. Bd., 78 F.3d 920 (5th Cir. 1996) 2, 23

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 12, 13

Fowler v. Merry, 468 F.2d 242 (10th Cir. 1972) 11

Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) . . . 28

Goldin v. Bartholow, 166 F.3d 710 (5th Cir. 1999) 8

Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971) 18

Liddell v. Board of Educ., 693 F.2d 721 (8th Cir. 1981) . . . 11

Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989) 21

Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990) 27

Prop-Jets, Inc. v. Chandler, 575 F.2d 1322 (10th Cir. 1978) 11, 22

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) . . . 12

Rives v. Franklin Life Ins. Co., 792 F.2d 1324 (5th Cir. 1986) 22

Ross v. Houston Indep. Sch. Dist., 559 F.2d 937 (5th Cir. 1977), aff'd in part, vacated in part, 583 F.2d 712 (5th Cir. 1978) 6, 17, 18

CASES (cont.): **PAGE**

Shanks v. AlliedSignal, Inc., 169 F.3d 988 (5th Cir. 1999) 20

Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211 (5th Cir.), cert. denied sub nom. West Feliciana Parish Sch. Bd. v. Carter, 396 U.S. 1032 (1970) 17

Stout v. Jefferson County Bd. of Educ., 446 F.2d 1213 (5th Cir. 1972), cert. denied sub nom. Stripling v. Jefferson County Bd. of Educ., 410 U.S. 928 (1973) 18, 26-27

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 2

Thompson v. Drewry, 138 F.3d 984 (5th Cir. 1998) 9, 13, 24

United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) 6

United States v. Taylor, 632 F.2d 530 (5th Cir. 1980) 11

United States v. Texas, 158 F.3d 299 (5th Cir. 1998) 19

Valley v. Rapides Parish Sch. Bd., 173 F.3d 944 (5th Cir. 1999) 6, 10, 16, 18

Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir.), cert. denied, 525 U.S. 1041 (1998) 9

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 6, 11, 19, 26

CONSTITUTION AND STATUTES:

28 U.S.C. 1291 . . . . . 1, 9, 11

28 U.S.C. 1292(b) 8

28 U.S.C. 1331 1

La. Const. Art. VIII § 13(D) 4-5

La. Rev. Stat. Ann. § 17:58(E) 4

STATUTES (cont.): **PAGE**

La. Rev. Stat. Ann. § 17:58.2(E) 4, 5

La. Rev. Stat. Ann. § 17:58.2(F) 5

La. Rev. Stat. Ann. § 17:72 . . . . . 4, 5

La. Rev. Stat. Ann. § 17:72.1 5

La. Rev. Stat. Ann. § 17:72 H.1(e)(i) 5

1995 La. Acts 973 3

1995 La. Acts 973 § 2 4

RULES:

Fed. R. Civ. P. 13 25

Fed. R. Civ. P. 14 25

Fed. R. Civ. P. 19(a) 5

Fed. R. Civ. P. 21 5

Fed. R. Civ. P. 35 21

MISCELLANEOUS:

15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.18 (2d ed. 1992) 11

STATEMENT REGARDING ORAL ARGUMENT

In light of the fact that this Court does not have jurisdiction over this appeal, the appeal should be dismissed without oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30232

CLIFFORD EUGENE DAVIS, JR. et al.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

EAST BATON ROUGE PARISH SCHOOL BOARD, Etc., et al.,

Defendants

EAST BATON ROUGE PARISH SCHOOL BOARD, a Corporation,

Defendant-Appellee

v.

CITY OF BAKER SCHOOL BOARD,

Defendant-Movant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

The jurisdiction of the district court in this school desegregation case is based upon 28 U.S.C. 1331. As set out more fully herein, the district court's November 30, 1999, order is not a final judgment appealable under 28 U.S.C. 1291. Nor does it come within the group of interlocutory orders that are appealable as collateral orders within the meaning of Cohen v.

Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Accordingly, this Court does not have jurisdiction to review the district court's order, and, therefore, the appeal should be dismissed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review the district court's order, whereby the court denied the City of Baker's motion to intervene as a plaintiff, but granted the motion of the Davis plaintiffs to join the City of Baker as a defendant.

2. Whether the district court erred in ruling that the City of Baker joins this litigation as a defendant subject to all existing orders in the case, including the 1996 Consent Decree.

STATEMENT OF THE CASE

As this Court noted, "[p]rior to 1954, the East Baton Rouge Parish school system was racially segregated as a matter of law." Davis v. East Baton Rouge Parish Sch. Bd., 78 F.3d 920, 922 (5th Cir. 1996). In 1956, plaintiffs-appellees Clifford Eugene Davis, et al., filed a school desegregation case, Davis v. East Baton Rouge Parish School Board, C.A. No. 1662 (M.D. La.), pursuant to which "the district court has maintained continuing jurisdiction * * * under Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971) * * * to ensure that the East Baton Rouge Parish School Board * * * fulfills its duty to eliminate all vestiges of

segregation from its school system." 78 F.3d at 922.[1/] As a result, the East Baton Rouge Parish School Board has operated its schools, including those located within the City of Baker, subject to orders of the district court in that litigation, including a consent decree approved by the court in 1996.

In 1995, the City of Baker, which has historically been part of the East Baton Rouge Parish and the East Baton Rouge Parish School District, was authorized by Louisiana state legislation to begin a process leading to establishment of a separate school district. 1995 La. Acts 973. One of the state law prerequisites for separating from the East Baton Rouge Parish School District and operating an independent school district is that Baker School Board obtain a final judgment in this case which "shall permit the operation of a city of Baker municipal school system and the separation of the city of Baker municipal school system from the East Baton Rouge Parish school system." La. Rev. Stat. Ann. § 17.72 H.1(e)(i).

On August 10, 1999, the Davis plaintiffs sought to join the City of Baker School Board as a party defendant, pursuant to Federal Rules of Civil Procedure Rules 19(a) and 21, in order to ensure that the establishment of a separate school district in the City of Baker did not impede the ongoing desegregation in this case. On September 2, 1999, the Baker School Board sought to intervene as a plaintiff for the sole purpose of obtaining a

---

[1/] The United States was permitted to intervene in 1980 after participating as amicus curiae.

judgment declaring it to be a separate, unitary school system and either dismissing it from this case or allowing it to be treated separately for purposes of desegregation. The district court denied Baker's motion to intervene as a plaintiff but granted the Davis plaintiffs' motion to join Baker as a defendant in this case.

On February 24, 2000, Baker filed a timely notice of appeal from that order (R. 1210). Baker also sought extraordinary relief from this Court, which was denied on April 18, 2000 (No. 00-30305).

STATEMENT OF THE FACTS

The City of Baker is located within East Baton Rouge Parish, Louisiana, and children who reside within the City of Baker have traditionally attended schools within the jurisdiction of the East Baton Rouge Parish School Board. In 1995, the Louisiana legislature enacted enabling legislation designed to authorize the City of Baker to separate from the East Baton Rouge Parish school system and establish a municipal school system to educate students living within the city's jurisdiction. 1995 La. Acts 973, § 1. As relevant to this litigation, that legislation enacted Louisiana Revised Statutes Annotated Sections 17:58.2(E) and 17:72. Louisiana Revised Statute Section 17:72 established a municipal school system in the City of Baker on the effective date of the Act and provided a procedure for conducting elections for members of the school board. The Act required a constitutional amendment in order to become effective. 1995 La.

Acts 973, § 2. That constitutional amendment, providing that the Baker municipal school system and others should "be regarded and treated as parishes and shall have the authority granted parishes," became effective on November 23, 1995. La. Const. Art. VIII, § 13(D).

In 1997, the Louisiana legislature passed another statute to amend and reenact Revised Statutes Section 17:58.2(E) and to enact Revised Statutes Sections 17:58.2(F) and 17:72.1. 1997 La. Acts 1434. Among the amendments made to Revised Statutes Section 17:72 was a requirement that the Baker School Board obtain a final judgment in this case which "shall permit the operation of a city of Baker municipal school system and the separation of the city of Baker municipal school system from the East Baton Rouge Parish school system." La. Rev. Stat. Ann. § 17.72 H.1(e)(i).

On July 26, 1999, Baker obtained a declaratory judgment in an action under state law providing that, "in the event that a city of Baker municipal school system is established in accordance with La. R.S. 17:72," ownership of all of the school property and school buildings located within the incorporated limits of the City of Baker, as well as ten school buses, that are owned by the EBRP School Board shall be transferred to the City of Baker School Board. City of Baker Sch. Bd. v. East Baton Rouge Parish Sch. Bd, No. 459706 (19th Jud. Ct. 1999).

On August 10, 1999, plaintiffs-appellees Davis, et al., filed a motion to join the City of Baker School Board as a party defendant, pursuant to Federal Rules of Civil Procedure 19(a) and

21 (R. 1083). Plaintiffs-appellees argued that because the City of Baker and all of the school property and buildings within the City of Baker "have always been a part of the [East Baton Rouge Parish School District] for purposes of adjudication of the ongoing lawsuit designed to remedy the constitutional violation of the EBRPSD and ha[ve] been an integral part of the remedial measures taken in" Davis, "[a]ny injunction running against the EBRPSD but not the Baker School Board, is likely to be partial, incomplete, and ineffective in controlling the actions of all responsible officials" (R. 1083 at 3). Plaintiffs noted specifically that the parties needed a means of determining "what impact the formation of a new 'splinter district' would have on student assignment, faculty and staff assignment, transportation, facilities, extracurricular activities and issues of educational quality and all other areas relevant to an ongoing federal desegregation lawsuit" (R. 1083 at 3). In a memorandum in support of their motion, plaintiffs cited the well-established case law recognizing the "potential for the formation of 'splinter' school districts to frustrate or interfere with relief in school desegregation cases" (R. 1083 at 3-4, citing, e.g., Wright v. Council of City of Emporia, 407 U.S. 451, 464 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484, 489-490 (1972); Ross v. Houston Indep. Sch. Dist., 559 F.2d 937, 942 (5th Cir. 1977), aff'd in part, vacated in part, 585 F.2d 712 (5th Cir. 1978); and Valley v. Rapides Parish Sch. Bd., 173 F.3d 944 (5th Cir. 1999) (en banc)).

On September 2, 1999, the Baker School Board sought to intervene as a plaintiff in this case and attached a proposed complaint in intervention seeking a declaratory judgment that:

> the City of Baker School System is a separate and distinct system established to educate children residing within the Parish of East Baton Rouge, specifically within the current or future city limits of the City of Baker; that the City of Baker School System be declared unitary; and that the City of Baker School Board be dismissed from the instant litigation, or in the alternative, that the City of Baker School System * * * be severed from the instant litigation and be treated separately in terms of the desegregation effort ongoing within the Parish of East Baton Rouge.

R. 1113 at 1; see also R. 1113 at 5-6.

The United States opposed the Baker School Board's motion to intervene on grounds of ripeness, and argued that, if joined, Baker's participation should be limited to whether the creation of a separate school system in Baker would adversely affect the EBRP school system's ability to desegregate (R. 1125). Alternatively, the United States argued that if Baker were to be made a party to the litigation, it should be as a party defendant since its interests are more closely aligned with the defendant EBRP School Board than with the parties plaintiff (R. 1125 at 7-8).

The district court entered an order on November 30, 1999, denying Baker School Board's motion for intervention, but granting private plaintiffs' motion to join Baker as a defendant (R. 1157 at 2). The court noted that after careful consideration, it had concluded that "the only proper position of the Baker School Board in this litigation is that of party

defendant" which "shall be bound by all prior orders of the court, including the Consent Decree dated August 1, 1996," and which "shall further be required to pass all jurisprudential 'tests' set forth in the case law" for a school district seeking to separate itself from a school district undergoing desegregation (R. 1157 at 2).

The court denied Baker School Board's motion for reconsideration of that decision (R. 1162, R. 1195). The court also denied what it construed to be Baker School Board's request for a finding that would enable it to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (R. 1206). The court stated that, although it "desires to 'materially advance the ultimate termination of the litigation,' it is quite clear that an immediate appeal on the issue of Baker School Board's status as a party plaintiff or party defendant will not do so" (R. 1206 at 2). The court found further that Baker's status as a plaintiff or defendant is not a controlling question of law, and that, even if it were, there is no substantial ground for a difference of opinion on that issue (R. 1206 at 2). The court stated that "Baker School Board is now a party to this litigation and may fully participate in these proceedings as a party defendant" (R. 1206 at 2).

STANDARD OF REVIEW

This Court must satisfy itself that it has jurisdiction over this appeal before it may consider the merits. Goldin v. Bartholow, 166 F.3d 710 (5th Cir. 1999). If this Court

determines that it has jurisdiction, the district court's conclusions that Baker should be joined as a defendant and that it is bound by all prior orders in the case involve questions of law that are subject to de novo review. Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 891 (5th Cir.1998), cert. denied, 525 U.S. 1041 (1998).

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction over this appeal. The district court's order is neither a final judgment terminating the case that is appealable under 28 U.S.C. 1291, nor does it come within the small class of interlocutory orders that are treated as final under the collateral order doctrine. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). This order does not meet the test established by this Court for appealability as a collateral order. Thompson v. Drewry, 138 F.3d 984, 986 (5th Cir. 1998).

First, the order determining that the City of Baker School Board should be joined in the litigation as a defendant subject to all prior orders entered in this school desegregation case provides only an interim step in deciding whether Baker should be permitted to separate from the East Baton Rouge Parish school system, and, if so, what desegregation obligations it should have with regard to the parish schools. Second, the order is not collateral to the merits of the case. Its correctness cannot be determined in a vacuum without a determination of the larger questions concerning Baker's future relationship to the parish

school system. Third, appellant has failed to demonstrate that a delay in reviewing the correctness of the district court's order will result in irreparable loss. The order can be reviewed following a final determination concerning the City of Baker School Board's request for a final order from the district court permitting it to operate as a separate school district. Such permission is required under state law. The order can be reviewed subsequently in the context of all the findings that the district court must make before it can grant such permission under well-established case law regarding a school district that seeks to break away from a district undergoing desegregation.

Finally, the appeal does not present any serious, unsettled question. The case law is clear as to what Baker must establish to demonstrate that its operation as a separate school district "will not adversely impact the plan of desegregation under which the district now operates." Valley v. Rapides Parish Sch. Bd., 173 F.3d 944, 945 (5th Cir. 1999) (en banc). Baker's contention that it is a stranger to the 1996 Consent Decree in this case and cannot be bound by that decree is based upon its refusal to acknowledge its historic role as a part of the East Baton Rouge Parish school system, including the fact that it was represented on the parish school board at the time the decree was entered.

2. Even if this Court were to determine that the order is an appealable collateral order, the district court followed well-established principles in determining that the City of Baker School Board should be a defendant rather than a plaintiff and

that it should be bound by all prior orders in the litigation. Since the process of dismantling the dual school system of which the City of Baker has historically been a part has not been completed, the newly-formed Baker School Board remains subject to the existing orders affecting the parish school system until it has met its burden of showing that its separation will not adversely affect the parish's desegregation. Wright v. Council of City of Emporia, 407 U.S. 451 (1972). The district court was not, therefore, required to make a separate finding that the City of Baker School Board engaged in a constitutional violation before ruling that it is subject to the prior orders in this case.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE APPEAL

Appellant does not contend that the district court's order is a final decision terminating the litigation that is subject to review under 28 U.S.C. 1291. Such a contention would, in any event, be futile. "Ordinarily orders granting or denying joinder or substitution are not final." 15B Charles Wright et al., Federal Practice and Procedure, § 3914.18 (2d ed. 1992). United States v. Taylor, 632 F.2d 530, 531 (5th Cir. 1980), citing Fowler v. Merry, 468 F.2d 242 (10th Cir. 1972) (denial of joinder appealable only after ultimate final judgment); Prop-Jets, Inc. v. Chandler, 575 F.2d 1322 (10th Cir. 1978) (grant of joinder not appealable under 28 U.S.C. 1291); Liddell v. Board of Educ., 693

F.2d 721, 723 n. 6 (8th Cir. 1981) (same).

Rather, appellant argues that the order is appealable under the collateral order doctrine established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Cohen permits appeal of "a narrow class of decisions that do not terminate the litigation, but must * * * nonetheless be treated as 'final.'" Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). The Supreme Court has "stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule * * * that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." Id. at 868 (citations omitted).

The Supreme Court "has expressly rejected efforts to reduce the finality requirement of [Section] 1291 to a case-by-case [appealability] determination." Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 439 (1985). Thus, appealability is to be determined for the "entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted * * * by a prompt appellate court decision." Digital Equip. Corp., 511 U.S. at 868 (citations omitted).

The standard applied by this Court to determine whether an order qualifies as a collateral, appealable order contains the following elements:

> 1) the order must finally dispose of a matter so that the district court's decision may not be

> characterizable as tentative, informal or incomplete; 2) the question presented must be serious and unsettled; 3) the order must be separable from, and collateral to, rights asserted in the principal suit; and 4) there should generally be a risk of important and probably irreparable loss if an immediate appeal is not heard.

Thompson v. Drewry, 138 F.3d 984, 986 (5th Cir. 1998). Appellant has failed to meet the "stringent" conditions for collateral order appeal. Digital Equip. Corp., 511 U.S. at 868.

A. Finality Of The District Court's Determination

Appellant is correct that the district court finally decided that it should be joined as a party defendant rather than be allowed to intervene as a party plaintiff. In that respect, the district court's order is not "tentative, informal or incomplete." Thompson v. Drewry, 138 F.3d at 986. But the portion of the district court's order providing that Baker enters the litigation subject to all prior orders entered in the case, including the 1996 Consent Decree is "incomplete," because it is only a starting point in the determination of the issue that Baker seeks to present in the context of the Davis litigation. As a condition under state law for becoming a separate school district, Baker is required to obtain an order from the district court in this case permitting its separate operation. Litigation on that issue has not begun because Baker has short-circuited it through its efforts to obtain review in this Court of the district court's joinder order. If the district court ultimately permits Baker to operate a separate school district, it will undoubtedly enter an order tailored to the situation that exists

at that time. The court's statement that Baker is bound by all prior orders in the case, including the 1996 Consent Decree, is to a large extent an interim step on the way to a final order disposing of Baker's request for separate status.

B. The District Court's Order Is Not Separable From And Collateral To The Rights Asserted In The Case

Appellant argues (Br. 13-14) that the binding effect of the 1996 Consent Decree on the City of Baker School Board is collateral to the merits of the case. This Court cannot, however, review in the abstract the district court's determination that Baker should be joined as a defendant, rather than being permitted to intervene as a plaintiff, and that it is bound by all of the outstanding orders in this case, including the 1996 Consent Decree. That order presents issues that are intertwined with the larger question whether Baker's proposed separation from the East Baton Rouge Parish school system would adversely affect the East Baton Rouge Parish school system's ability to desegregate. As the district court properly recognized, its order permitting the Baker School Board to take "a seat at the table" means that it "may fully participate" in the proceedings in Davis (R. 1157 at 2; R. 1206 at 2). As part of its participation, it may seek to meet the "well established standards" a proposed splinter school district must meet in order to permit its separation from a school district that remains under a desegregation obligation. See Response of Judge John V. Parker to the Petition for Extraordinary or Prerogatory Writ of Certiorari at 3 (No. 00-30305).

Baker's assertion (Br. 13) that the district court's ruling "has no impact on the relief that the City of Baker School Board has or will seek before the District Court" (emphasis in original) is based upon the misguided view that the relief it seeks can be granted without any consideration of the impact of its proposed separate status on the ability of the East Baton Rouge Parish school system to desegregate. To the contrary, as we show below (pp. 16-17, infra), the Baker School Board may not be accorded separate status until the district court ascertains the effect the proposed separation will have on the ongoing desegregation effort in the East Baton Rouge Parish school system. Moreover, Baker is incorrect in contending (Br. 14) that "[t]his Court's review of the applicability of the 1996 Consent Decree to the City of Baker School Board will not impede the progress of the desegregation of the East Baton Rouge Parish School System." The effect of the City of Baker School Board's proposed separation creates uncertainty about the future contours of desegregation within the parish school system that cannot be abated while this Court has jurisdiction over the appeal.

C. Delayed Review Will Not Have Irreparable Consequences

In arguing that the order it seeks to appeal is collateral, Baker makes several statements that belie its claim that immediate appeal is necessary to avoid irreparable consequences. Baker admits (Br. 13) that the question whether it is bound by the 1996 Consent Decree does not foreclose it from obtaining the relief it seeks, largely because no provision of the 1996 Consent

Decree prohibits it from requesting and obtaining a separate school system. Baker asserts only that application of the 1996 Consent Decree "may * * * impair the ability of the City of Baker School Board to obtain a swift and equitable hearing of its claim" (Br. 13). But it is Baker that is causing the delay by bringing this appeal, as well as its earlier petition for a prerogatory writ of certiorari. As the district court found in denying Baker's request for certification of appealability under 28 U.S.C. 1292(b), an immediate appeal of its order will not only fail to materially advance the ultimate termination of this litigation, but it will also prevent it from even getting off the ground.

Baker also argues (Br. 14-16) that it is irreparably harmed by the portion of the district court's order stating that it will be bound by the 1996 Consent Decree because that ruling amounts to the imposition of a remedial decree upon a party that has not been alleged or proven to have violated state or federal law. This argument is based upon Baker's refusal to appreciate the impact of the fact that the City of Baker was a part of the East Baton Rouge Parish school system while it was segregated by law and during the period in which it has been under the order of a federal court to desegregate. It cannot operate a separate school district until it obtains an order from the district court in this litigation permitting it to do so. And obtaining that permission depends upon Baker’s ability to "demonstrate that implementation and operation of the proposed district will not

adversely impact the plan of desegregation under which the district now operates." Valley v. Rapides Parish Sch. Bd., 173 F.3d 944, 945 (5th Cir. 1999) (en banc).

To meet that standard, the Baker School Board must first show the availability of, and its support for, procedures that will avoid any adverse impact upon the present East Baton Rouge Parish School District desegregation plan. Ibid. Second, it must make a "definitive statement" as to how the new system will work with the East Baton Rouge Parish school system regarding all school district operations pertinent to fulfillment of the East Baton Rouge Parish School District's desegregation plan. Ross v. Houston Indep. Sch. Dist., 559 F.2d 937, 944-945 (1977), aff'd in part, vacated in part, 583 F.2d 712 (5th Cir. 1978), citing Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1217-1219 (5th Cir.), cert. denied sub nom. West Feliciana Parish Sch. Bd. v. Carter, 396 U.S. 1032 (1970). Finally, "the burden remains on [Baker School Board] to establish that its implementation and operation will meet the tests outlined for permitting newly created districts to come into being for parts of districts already under an ongoing court desegregation order." Ross, 559 F.2d at 945.

A decision that the district court's order is unreviewable, far from causing irreparable harm, will actually permit the process that appellant seeks to get under way.

D. This Appeal Presents No Serious And Unsettled Question Of Law

Contrary to appellant's claim (Br. 17) that the district court's order presents a unique and undecided issue, this Court has repeatedly dealt with the situation of a school district seeking to break away from a district undergoing desegregation. See, e.g., Lee v. Macon County Bd. of Educ., 448 F.2d 746, 752 (5th Cir. 1971); Stout v. Jefferson County Bd. of Educ., 466 F.2d 1213 (5th Cir. 1972), cert. denied sub nom. Stipling v. Jefferson County Bd. of Educ., 410 U.S. 928 (1973); Ross v. Houston Indep. Sch. Dist., supra; Valley v. Rapides Parish Sch. Bd., supra. As recited above, there are well-established principles concerning what the proposed breakaway district must prove to become separate and what obligations it must undertake to assure that its separate existence will not impede desegregation in the district from which it has seceded.

Appellant's attempt to isolate the issue of the binding effect of the 1996 Consent Decree is a red herring. As argued pp. 13-14, supra, the ramifications of that portion of the district court's order are unknown. The only provisions of the 1996 decree that appellant raises as burdensome are reporting and programming requirements that appellant admits run only against the East Baton Rouge Parish School Board (Br. 16). Appellant's speculation (Br. 16) that the moratorium in the 1996 decree against East Baton Rouge Parish School Board's applying for unitary status could be "carried to its illogical extreme" to bar the City of Baker School Board from obtaining unitary status

ignores the district court's statement that appellant "now has a seat at the table" in Davis and can proceed to meet the well-established standards for becoming a separate school district (R. 1157 at 2; see also R. 1206 at 2 ("Baker School Board is now a party to this litigation and may fully participate in these proceedings as a party defendant.")). Moreover, at the end of the upcoming school year (2000-2001), a joint motion for unitary status may be filed, and the moratorium on the East Baton Rouge Parish School Baord moving unilaterally for unitary status will expire three years thereafter, at the end of the 2003-2004 school year (R. 843 at 7). In part because of the delay in getting their claim heard below that has been caused by Baker's attempts to have this Court review the district court's November 30, 1999, order, the earliest that the City of Baker School Board could be permitted to operate a separate school system would be for the 2001-2002 school year. That would mean that it could unilaterally move for unitary status after only three years of operation.

Even if the binding effect of the 1996 Consent Decree on appellant were a separate issue, appellant errs in arguing that it presents an unsettled issue that warrants immediate appellate review. First, appellant has not shown that that issue is not fully reviewable on appeal from a final judgment in this case. Second, appellant's attempt (Br. 17) to distinguish itself from the circumstances in Wright v. Council of City of Emporia, 407 U.S. 451 (1972), is unavailing. While it is true that

"[n]ormally, a judgment or decree cannot bind strangers to the litigation," United States v. Texas, 158 F.3d 299, 305 (5th Cir. 1998), and that a consent decree cannot impose obligations on a party that did not consent to it, the situation in this litigation is not the norm. The City of Baker has always been a part of the East Baton School Parish School District and was represented on the East Baton Rouge Parish School Board at the time the Consent Decree was signed. In that sense, it is not a total stranger to the Decree.

The district court's ruling is in conformance with established legal principles and does not present a serious and unsettled question warranting review under the collateral order doctrine by this Court.

E. The Cases Cited By Appellant Are Inapposite

Appellant cites no case in which this Court granted review under the collateral order doctrine of an order that granted a motion for joinder as a defendant. Rather, appellant (Br. 11) cites a number of cases where this Court has found jurisdiction under the collateral order doctrine of orders that are easily distinguishable from the situation in this case. An examination of those cases demonstrates the deficiencies in appellant's jurisdictional argument.

The order denying a claim of immunity from suit in Shanks v. AlliedSignal, Inc., 169 F.3d 988 (5th Cir. 1999), was found appealable as a collateral order because, by forcing the defendant to go to trial, it permanently deprived him of the

entitlement granted by the immunity doctrine to avoid the burdens of litigation. As argued p.p. 5017, supra, no similarly irreparable deprivation is involved in this case.

In contrast to the intertwined issues involved in this appeal, this Court in Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990), found that reviewing the propriety of a district court order requiring the plaintiff either to submit to an examination by a vocational rehabilitation expert or forego the right to call an expert witness at trial did not require the Court to examine the merits of the underlying claim or defense. Id. at 208. In addition, the Court found that postponement of review would cause irreparable injury to the plaintiff because, once he submitted to examination, he would lose the discovery protection granted by Federal Rules of Civil Procedure Rule 35, and alternatively, if he did not submit, he risked weakening his position on his claim. Ibid. Finally, the Court held that the "ability of a trial court to coerce a party to submit to a vocational examination and interview, without the presence of counsel, is a serious question of law that is likely to escape resolution if review is delayed." Ibid.

The order in Markwell v. County of Bexar, 878 F.2d 899, 901 (5th Cir. 1989), granting Rule 11 sanctions was found reviewable because "immediate appeal of the sanctions order w[ould] not impede the progress of the underlying litigation" where the attorney against whom the sanctions were ordered had withdrawn from representing a party to the case and was no longer connected

with the merits. In contrast, the litigation below as to whether the City of Baker School Board can operate a separate school district is in limbo, and the existence of that issue raises uncertainty concerning the future operation of the desegregation plan within the East Baton Rouge Parish school system.

In Rives v. Franklin Life Insurance Company, 792 F.2d 1324 (5th Cir. 1986), a district court order rejecting a state court's appointment of the wife of a deceased policy holder as trustee of a claim against a life insurance company was appealable because the order affected interests protected by the full faith and credit doctrine. This Court found the collateral order doctrine applicable because the damage to the principles of the full faith and credit doctrine of avoiding conflict between different judicial systems would be "accomplished long before final judgment is rendered." Id. at 1328.

Notably, the Court in Rives stated that, if the full faith and credit issue were not implicated, it would have little difficulty with finding that the district court's order could be effectively reviewed following final judgment, since the wife would have continued to be a party to the case as guardian of her minor children even if she could not proceed as the trustee. Similarly, here, the City of Baker School Board will be a party to the Davis litigation, albeit as a defendant rather than as a plaintiff.

In support of the principle that immediate review would not have been necessary in Rives if the full faith and credit issue

were absent, the Court cited two cases, Prop-Jets, Inc. v. Chandler, 575 F.2d 1322 (10th Cir. 1978), and Brown v. New Orleans Clerks & Checkers Union Local No. 1497, 590 F.2d 161 (5th Cir. 1979). Brown involved an appeal from an order granting intervention, and Prop-Jets involved an order granting joinder of a party. In both of those cases, review was denied under the collateral order doctrine because the orders were capable of being reviewed on appeal from a final judgment and postponing review would not cause irreparable injury. Those cases are analogous to the order of the district court in this case, which, by making appellant a party to the litigation in the district court, permits appellant to participate fully in this aspect of the Davis litigation and allows it to take an appeal from a final judgment in which it can raise the issue it seeks to present prematurely here.

Appellant also cites the opinion of this Court in a prior appeal in this case. In Davis v. East Baton Rouge Parish School Board, 78 F.3d 920 (1996), this Court granted review under the collateral order doctrine of "gag orders" entered against the Capital City Press. The Court held that all four elements of the standard for granting review under the collateral order doctrine were met. The orders were conclusive and would be effectively unreviewable after final judgment. Moreover, the "subject of the orders -- the confidentiality of the Board's formulation of a proposed desegregation plan -- is completely separable from the merits of the litigation -- the desegregation of the school

system itself." Id. at 926. In addition, the Court held that "the appeal, concerning First Amendment rights of the news media to receive information about the formulation of the desegregation plan, raise[d] important and unsettled questions of law." Ibid. In contrast, here the order on appeal satisfies none of the factors enumerated in Thompson v. Drewry, 138 F.3d 984 (5th Cir. 1998).

II

THE DISTRICT COURT DID NOT ERR IN RULING THAT THE CITY OF BAKER JOINS THIS LITIGATION AS A DEFENDANT SUBJECT TO ALL EXISTING ORDERS IN THE CASE

As we have argued above, the order appealed from does not qualify as an appealable collateral order, and therefore this appeal should be dismissed. If this Court were to find, nonetheless, that it has jurisdiction to decide this appeal, it should uphold the district court's interlocutory determination that the City of Baker School Board should be a defendant in this case and that it should be bound by all prior orders entered in the litigation.

1. Appellant's "Charlie Brown" analogy is inaccurate. The City of Baker's first attempt to intervene in this litigation in 1996 was properly denied as premature since the process for its becoming a separate school district under state law was in its early stages, and the City of Baker School Board did not yet exist (R. 852 at 2-6). The fact that the City of Baker was not permitted to intervene and participate as a party during the time when the 1996 Consent Decree was being formulated does not mean,

however, that the City of Baker had no say in the negotiation of the 1996 Consent Decree. As the East Baton Rouge Parish School Board states in its brief (pp. 20-21), the citizens of the City of Baker were represented on the East Baton Rouge Parish School Board at the time of those negotiations. Since the City of Baker School Board had not yet been formed, the only appropriate role for the City of Baker to play at that time was as a part of East Baton Rouge Parish.

Moreover, the district court granted the City of Baker's second motion for intervention in 1997 into proceedings concerning East Baton Rouge Parish School Board's motion for injunctive relief prohibiting the State of Louisiana from taking any steps to implement the laws permitting Baker to begin the process of obtaining separate status (R. 897, granting R. 880). At that time, the City of Baker sought intervention into the proceeding for injunctive relief "solely for the purpose of joining the State of Louisiana and [state officials] in asserting that the motion for injunction should be dismissed and, in the event [the district court did] not dismiss the motion, to oppose the motion for injunction (R. 881 at 1)." It did not seek at that time to intervene in the case in its entirety.

And, on this -- its third -- attempt to intervene, the district court joined the City of Baker School Board as a party defendant, thus granting it a "seat at the table" to participate fully in the proceedings below (R. 1157 at 2; R. 1206 at 2). As a defendant, the City of Baker School Board will be able to have

its proposed complaint in intervention heard as a counterclaim or cross-claim pursuant to Federal Rules of Civil Procedure 13 and 14 (Third-Party Practice), and it will have full rights of appeal from any final judgment entered by the district court on that claim.

2. A newly formed school district that has traditionally been a part of a school district having desegregation obligations cannot, as the City of Baker School Board seeks to do here, simply divest itself of its history. Prior to being permitted to operate independently, it must undergo rigorous scrutiny to determine the effect of its separation on the ability of the remaining portion of the original district to fulfill its desegregation obligations. Since the City of Baker was a part of the East Baton Rouge School District at the time the constitutional violation that supports the outstanding desegregation decrees occurred, the district court has the power to enjoin the Baker School Board's withdrawal from the East Baton Rouge School District without finding an independent constitutional violation. Wright v. Council of City of Emporia, 407 U.S. 451, 459-460 (1972). Because the City of Baker and the parish of which it was a part "constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system." Ibid. Since that process of dismantling has not been completed, the newly-formed Baker School Board remains subject to the existing

orders affecting the parish school system until it has met its burden of showing that its separation will not adversely affect the parish's desegregation. Moreover, Baker must be willing to "accept a proper role in the desegregation of the [parish] system." Stout v. Jefferson County Bd. of Educ., 466 F.2d 1213, 1214 (5th Cir. 1972), cert. denied, 410 U.S. 928 (1978). If and when that burden has been discharged, the district court will be in a position to determine what desegregation obligations the Baker School Board should have as a separate entity.

In arguing that its creation as a separate entity under state law means that there is no privity between the City of Baker School Board and the East Baton Rouge Parish School Board, appellant is putting the cart before the horse. It cannot operate as a separate entity in the sense of being able to take over the responsibility for educating the children residing within the jurisdiction of the City of Baker until it obtains a judgment from the district court in this case permitting it to do so. Thus, for purposes of responsibility for desegregation, it is not yet a separate entity as to which the concept of privity is relevant.

The district court viewed the City of Baker School Board as a substitute party, at least in part, to the East Baton Rouge Parish School Board insofar as it seeks to become the successor in interest to the East Baton Rouge Parish School Board for the public schools within the City of Baker. Response of Judge John V. Parker to the Petition for Extraordinary or Prerogatory Writ

of Certiorari at 2 (No. 00-30305). Viewed in that way, the City of Baker School District would be in privity with the East Baton Rouge Parish School Board. See Meza v. General Battery Corp., 908 F.2d 1262 (5th Cir. 1990) (for res judicata purposes, privity exists where non-party is the successor in interest to a party's interest in property); see also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (bona fide successor corporation acquiring an employing enterprise with knowledge that the wrong done to an illegally discharged employee remains unremedied may be considered in privity with its predecessor for purposes of NLRB order reinstating employee with backpay). Given the City of Baker's participation in the parish's unlawful segregation, its knowledge that segregation has not yet been fully remedied, and the fact that the City of Baker School Board has not yet become a functioning school district, the district court's determination that the City of Baker School Board should be bound by all outstanding orders in this case is fully in accord with established legal principles and should be affirmed.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. Alternatively, this Court should affirm the district court's order joining the City of Baker School Board as a defendant that is bound by all existing orders in this case.

`

Respectfully submitted,

ANITA S. HODGKISS
Deputy Assistant Attorney General

_____
DENNIS J. DIMSEY
MARIE K. McELDERRY
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3068

CERTIFICATE OF SERVICE

I hereby certify that I have served two printed copies of the foregoing Brief for the United States and a computer-readable disk copy on the parties to this appeal by first-class mail, postage prepaid, to counsel of record at the following addresses:

Murphy J. Foster III
Victor A. Sachse III
Juliet T. Rizzo
Breazeale, Sachse & Wilson
One American Place - Suite 2300
Baton Rouge, LA 70825

Mark David Plaisance
Paul T. Thompson
3022 Ray Weiland Drive
Baker, LA 70714

Robert C. Williams
3815 Fairfields Avenue
Baton Rouge, LA 70802

John K. Pierre
Arthur Thomas
2900 Westfork Drive, Suite 200
Baton Rouge, LA 70816

Maxwell G. Kees, Sr.
General Counsel
East Baton Rouge Parish School Board
1050 South Foster Drive
Baton Rouge, LA 70806

Charles L. Patin, Jr.
Michael C. Garrard
Kean, Miller, Hawthorne, D'Armond,
McCowan & Jarman, L.L.P.
P.O. Box 3513
Baton Rouge, LA 70821

Gideon T. Carter III
123 St. Ferdinand Street
Baton Rouge, LA 70802

This 31st day of July, 2000.

Marie K. McElderry
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to the 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH Cir. R. 32.2, THE BRIEF CONTAINS 7,136 words.

2. THE BRIEF HAS BEEN PREPARED in monospaced (nonproportionally spaced)typeface using WordPerfect 7.0 (12 point); 10.5 characters per inch.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN Fed. R. App. P. 32 (a)(17), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____

Marie K. McElderry
Attorney