

No. 05-61184

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF MISSISSIPPI, *et al.*  
(Simpson County School District),

Defendant-Appellant

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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BRIEF FOR THE UNITED STATES  
AS APPELLEE

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellee United States of America believes that oral argument in this case is not warranted because the appeal is straightforward and the parties' positions are adequately presented in the briefs.

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BRIEF FOR THE UNITED STATES  
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**STATEMENT OF JURISDICTION**

The district court possessed jurisdiction over this case pursuant to 28 U.S.C. 1331, as the case arose under the Constitution and laws of the United States. This Court possesses jurisdiction over the appeal under 28 U.S.C. 1292(a)(1), because the district court order at issue on appeal is a refusal to dissolve an injunction.

**STATEMENT OF THE ISSUES**

1. Whether the district court clearly erred in denying Simpson County School District's motion for a declaration of unitary status and dismissal of the case in the area of faculty and staff assignments.
2. Whether comity and federalism considerations mandate dismissal of the

case.

### **STATEMENT OF THE CASE**

Defendant-appellant Simpson County School District (the District) appeals from an October 21, 2005, order of the United States District Court for the Southern District of Mississippi granting in part and denying in part the District's motion for a declaration of unitary status and dismissal. In that order, the district court granted the District's request for a declaration of unitary status in the areas of student body composition, transportation, extracurricular activities, and facilities in light of the District's proof of compliance with the consent decree in those areas and the lack of objection from the Government. R. Vol. 9 at 2739. The court's order, however, denied the District's motion for a declaration of unitary status in the area of faculty and staff assignments. The court determined that although the District's failure to comply with the 1983 Consent Decree was inadvertent, the noncompliance "does bear on whether the District has demonstrated its commitment to this aspect of the desegregation plan." R. Vol. 9 at 2740. Accordingly, the court concluded that the "better course" was to retain jurisdiction over this aspect of the case, and re-evaluate the District's position one year later. R. Vol. 9 at 2740.

### **STATEMENT OF FACTS**

1. In 1970, the United States District Court for the Southern District of Mississippi ordered the District to cease operating a racially dual school system and prepare and implement a desegregation plan, and granted additional relief

concerning employment practices, student transfers, and transportation. R. Vol. 1 at 7-15. In 1982, the district court granted intervention as of right to a group of black parents (Plaintiff-Intervenors), who alleged that the District was violating the court order with respect to its employment practices, student transfers, and special education. R. Vol. 1 at 17. In August 1983, the parties entered into a Consent Decree (the 1983 Consent Decree), which, *inter alia*, required the District to (1) institute a recruiting program “directed at increasing substantially the number of black applicants for positions as administrative personnel”; (2) establish detailed employment procedures, including advertising outside the District for designated periods of time and recruiting statewide; (3) hire at least four identified black persons for administrative positions and “offer the first available vacancy as school principal \* \* \* to a qualified black applicant”; and (4) pay monetary relief to 21 school district employees. R. Vol. 1 at 16-32, 35-36. The 1983 Consent Decree also provided that the United States and Plaintiff-Intervenors would join a motion by the District for a declaration of unitary status and dismissal of the lawsuit upon determining that the District had fully complied with the district court’s orders for three years after entry of the Decree. R. Vol. 1 at 31-32.

In 1992, the United States investigated a complaint against the District and determined that it unlawfully discriminated against a black applicant for a principal position. R. Vol. 1 at 141. The parties agreed to a Consent Decree to resolve the dispute, which the district court approved on March 3, 1993. R. Vol. 1



at 140-147. In addition to providing more specific relief, the Consent Decree reiterated that the District was to follow the employment provisions of the 1983 Consent Decree. R. Vol. 1 at 146.

2. On November 9, 2001, the District moved for a declaration of unitary status and dismissal of the case. R. Vol. 1 at 1-6. Discovery revealed, however, that the District was violating the 1983 Consent Decree by considering current employees for vacancies in administrative positions without advertising the vacancies outside the District, and advertising for applicants outside the District only if there were no qualified applicants among its current employees. R. Vol. 3 at 616-617. As a result, the District failed to consider any black applicants for three principal vacancies.<sup>1</sup> R. Vol. 3 at 688-689. The District refused to conform its practices to the requirements of the 1983 Consent Decree. Consequently, on April 1, 2003, the United States moved to enforce the Decree. R. Vol. 3 at 610-614, 687-691. While the court's ruling on the United States' motion was pending, the United States learned that the District intended to fill four assistant principal vacancies in the same manner. R. Vol. 4 at 1002-1003. The United States therefore moved for a temporary restraining order requiring the District to fill the vacancies according to the procedures established by the 1983 Decree. R. Vol. 4 at 997-1001. On July 17, 2003, the district court issued the temporary restraining order. R. Vol. 4 at 1004-1005.

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<sup>1</sup> Only two black employees in the District had the requisite administrative certification and both were already administrators. R. Vol. 9 at 2615-2616.

On July 28, 2003, the district court granted the United States' April 1, 2003, motion, holding that, although the District's internal promotion procedure was not intentionally discriminatory, it nevertheless violated the 1983 Consent Decree. R. Vol. 4 at 1011-1019. The court held that from 1984 to 2003 the District violated the Consent Decree by offering administrative and other positions to District employees first, and advertising the positions outside the District only if it found no qualified applicants from the District's current employees. R. Vol. 4 at 1013-1016. The court therefore ordered the District to re-open the three principal positions for the 2004-2005 school year and advertise the vacancies outside the District. R. Vol. 4 at 1019.

On December 15, 2003, the United States filed a response in opposition to the District's November 9, 2001, motion for a declaration of unitary status and dismissal, which was still pending before the district court. The United States objected to the District's claim of unitary status in the areas of faculty and staff assignments, transportation, and extracurricular activities. R. Vol. 4 at 1094-1114. Following discovery, on August 2, 2005, the United States withdrew its objection to a declaration of unitary status in the areas of transportation and extracurricular activities, but maintained its objection in the area of faculty and staff assignments "because the District has not complied with the 1983 Consent Order for a reasonable period of time." R. Vol. 9 at 2596.

On August 19, 2005, the United States filed an amended opposition to the District's motion for a declaration of unitary status and dismissal. In its

opposition, the United States noted that Personnel Director Lillie Hardy acknowledged in testimony at a July 2003 motions hearing that, from 1984 to 2003, the District's unlawful internal promotion system resulted in the hiring of only four black administrators — one of whom received the position only after threatening a lawsuit. R. Vol. 9 at 2601, 2604, 2617. The United States also noted in its opposition that in the recent two years of compliance with the Decree, the District hired two black administrators, whereas it had hired only four black administrators in the entire previous twenty years of noncompliance. R. Vol. 9 at 2601, 2604, 2621. The United States argued that if the District resumes its prior practice of considering current employees first for administrative positions, as the Superintendent testified is his preference, black applicants again would be almost completely precluded from initial consideration because there is only one current non-administrative black employee with the necessary administrative certification, and all of the District's current assistant principals are white. R. Vol. 9 at 2601, 2604, 2618-2619, 2633.

3. By order dated October 21, 2005, the district court granted the District's motion for a declaration of unitary status in the areas of student body composition, transportation, extracurricular activities, and facilities, but denied the District's motion for a declaration of unitary status in the area of faculty and staff assignments. R. Vol. 9 at 2738-2741. The district court observed that the District "acknowledges that this court found [the District] in violation of the consent decree regarding certain employment issues [*i.e.*, its failure to advertise

administrative positions outside the District] in July 2003.” R. Vol. 9 at 2740.

In reaching its decision, the court applied the Supreme Court’s holding in *Freeman v. Pitts*, 503 U.S. 467 (1992). In *Freeman*, the Court held that in determining whether to relinquish jurisdiction in a desegregation case, the court should “consider the good-faith compliance of the district with the court order over a reasonable period of time.” *Id.* at 498. The district court stated that

the court acknowledges its finding that the District’s recent violation of the consent decree was inadvertent, and does not question the District’s good faith in general. However, the fact of that violation is not entirely irrelevant, as the District suggests, but does bear on whether the District has demonstrated its commitment to this aspect of the desegregation plan.

R. Vol. 9 at 2740. Accordingly, “after much deliberation,” the court determined that “the better course in the circumstances of this case is to retain jurisdiction for the present time and re-evaluate the District’s position in one year.” R. Vol. 9 at 2740.

### **STANDARD OF REVIEW**

Whether a school district has achieved unitary status is a finding of fact that this Court reviews under the clearly erroneous standard. *Flax v. Potts*, 915 F.2d 155, 157 (5th Cir. 1990). “Factual findings in school desegregation cases are entitled to great deference on review, especially when, as in this case, the presiding judge has supervised the case for many years.” *Id.* at 158. Accordingly, this Court should not overturn the district court’s finding unless “on the entire evidence it is left with the definite and firm conviction that a mistake has been

committed.”<sup>2</sup> *United States v. Texas Ed. Agency*, 647 F.2d 504, 506 (5th Cir. 1981) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

## SUMMARY OF ARGUMENT

1. The district court’s decision denying the District’s motion for a declaration of unitary status in the area of faculty and staff assignments and dismissal of the case was not clearly erroneous. Contrary to the District’s contention that the applicable standard is whether there is evidence of intentional racial discrimination, controlling precedent provides that a school district seeking a declaration of unitary status must establish that it has complied in good faith with the court’s desegregation orders for a reasonable period of time and has eliminated the vestiges of prior discrimination to the extent practicable. The District has failed to satisfy the first element with regard to faculty and staff assignments as it has complied with the Consent Decree for only two years after twenty years of non-compliance.

2. Comity and federalism considerations do not warrant dismissal of the case. Because the District failed to satisfy the legal standard for a declaration of

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<sup>2</sup> The District’s argument (Br. 15) that this appeal is subject to the more searching *de novo* standard of review is without merit. Contrary to its contention that the district court entered no finding of fact as to whether the District was unitary, the court specifically discussed that issue as it relates to faculty and staff assignments – including its July 2003 finding that the District’s hiring practices violated the 1983 Consent Decree – and concluded that it should retain jurisdiction and evaluate the District’s position in one year. R. Vol. 9 at 2740.

unitary status in the area of faculty and staff assignments, resumption of local control is not warranted. Moreover, the District's contention that the Consent Decree has impeded its ability to hire qualified black applicants for administrative positions is belied by the record. If the District believed that the Consent Decree was hampering its efforts, it should have moved the district court to modify the Decree.

## **ARGUMENT**

### **I**

#### **THE DISTRICT COURT DID NOT CLEARLY ERR IN DENYING THE DISTRICT'S REQUEST FOR A DECLARATION OF UNITARY STATUS IN THE AREA OF FACULTY AND STAFF ASSIGNMENTS BECAUSE THE DISTRICT FAILED TO SATISFY THE APPLICABLE STANDARD**

The District's primary argument (Br. 17-22) is that the district court erred in denying unitary status in the area of faculty and staff assignments and in maintaining jurisdiction over the case because the District's violation of the 1983 Consent Decree was inadvertent and there is no current evidence of intentional racial discrimination with regard to such assignments. This argument fails to demonstrate that the district court committed clear error as it misstates the applicable legal standard for determining whether a school system has achieved unitary status. The district court applied the proper legal standard, and its refusal to issue a declaration of unitary with respect to this aspect of the District's operations is plainly correct.

The Supreme Court has stated that "[t]he duty and responsibility of a school

district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system.” *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). In determining whether a school district has met its desegregation obligations, warranting a declaration of unitary status and dismissal of the case, a court should consider whether the district has complied in good faith with the district court’s desegregation orders for a reasonable period of time, and has eliminated the vestiges of prior discrimination to the extent practicable. See *id.* at 498; *Board of Educ. v. Dowell*, 498 U.S. 237, 248, 249-250 (1991). The school district has the burden of demonstrating that it has satisfied both prongs of this test. See *United States v. Fordice*, 505 U.S. 717, 739 (1992) (“*Brown* and its progeny \* \* \* established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system.”). The district court, moreover, “should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.” *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 439 (1968).

Applying this standard, the district court correctly held that the District had not yet achieved unitary status in faculty and staff assignments. With regard to good-faith compliance, the Supreme Court has defined a “reasonable period of time” of compliance as “the time required to remedy the effect of past intentional discrimination.” *Dowell*, 498 U.S. at 248. The district court’s finding that that time has not yet passed is not clearly erroneous, when, as here, the District has complied with the decree’s requirement of outside advertising for only two years

after twenty years of admitted non-compliance. R. Vol. 4 at 1013-1016. Indeed, the Decree itself contemplates at least three years of compliance. R. Vol. 1 at 31-32 (“If the plaintiff and the intervenors determine that the defendants have complied fully with the Court’s orders in this case for a period of three years after entry of this consent decree, they shall at that time join a motion by defendants for a declaration of unitariness and dismissal of this lawsuit.”). Three years of compliance is also the period of time that district courts in this Circuit have long considered to be the minimum necessary to demonstrate unitary status. See, e.g., *Singleton v. Jackson Mun. Separate Sch. Dist.*, 541 F. Supp. 904, 906-907 (S.D. Miss. 1981); *Pickens v. Okolona Mun. Separate Sch. Dist.*, 380 F. Supp. 1036, 1041 (N.D. Miss. 1974).<sup>3</sup>

The District does not even attempt to make the case that it satisfies the above legal standard, contending instead (Br. 18, 24) that it warrants a declaration of unitary status in the area of faculty and staff assignments because there is no evidence of current intentional racial discrimination in that area. The District argues (Br. 20-22, 23-24) that in the absence of such evidence, this Court should dismiss the case. As an initial matter, the District fails to mention that for many

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<sup>3</sup> Because the district court based its decision to retain jurisdiction upon its finding that the District did not sufficiently demonstrate its compliance with the faculty and staff assignment requirements of the Consent Decree, the court did not address whether the District had eliminated all vestiges of past discrimination, the second requirement for unitary status. Should this Court conclude that the district court’s decision regarding the District’s compliance is incorrect, it should remand the case for a determination whether the District has eliminated all vestiges of discrimination with respect to faculty and staff assignments.



years it operated an unconstitutional dual system. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971) (holding that failure of officials in an historically dual system to take affirmative steps to dismantle its dual school system constitutes a continuing violation of the Equal Protection Clause). The Consent Decree in this case was entered to eliminate the District's dual school system, including its discriminatory employment practices. Indeed, it is reasonable to conclude that the District's failure to hire more black employees with the requisite administrative certification is a direct result of its failure to follow the Decree's requirement that it advertise available positions outside the District. The District's failure to comply with the provisions of the 1983 Consent Decree regarding faculty and staff assignments is thus more than a mere "technical violation" (Br. 19, 20) that this Court should overlook.

The District's "no current discrimination" standard for a declaration of unitary status finds no support in the law. In fact, the two cases upon which the District primarily relies — *Dowell* and *Singleton* — stand for the opposite proposition. See *Dowell*, 498 U.S. at 248, 249-250 (setting forth standard for determining unitary status); *Singleton*, 541 F. Supp. at 907 ("Once a school district has operated a *fully desegregated, unitary* school system for three years, the school desegregation case should be dismissed.") (emphasis added). Far from "dispos[ing] of this case" in the District's favor (Br. 26), *Singleton* supports the proposition that to satisfy its desegregation obligations and achieve unitary status, a school district must adhere to the district court's orders for a reasonable period

of time and take all practical steps to eliminate the vestiges of past discrimination, not merely cease intentional discrimination.<sup>4</sup> See *id.* at 914 (noting that local control of schools should resume only if the school district “maintain[s] good faith compliance with federal court desegregation decrees for the requisite period of time”). The absence of intentional racial discrimination becomes relevant only *after* a school district has attained unitary status. See *Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307, 1313 (5th Cir. 1991) (noting that in a suit filed after a system is declared unitary, “the plaintiffs bear the burden of proving that the school board acted with the intent to discriminate”); *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987) (“Attaining unitary status, however, means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate.”).

In sum, the district court did not clearly err in finding that the District failed to prove that it warrants a declaration of unitary status in the area of faculty and staff assignments, where the evidence indicates that it complied with the 1983 Consent Decree for merely two years after twenty years of non-compliance. The district court viewed this evidence and took the modest step of retaining

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<sup>4</sup> Indeed, in a concession completely at odds with its argument, the District acknowledges (Br. 20, 22) that Supreme Court precedent requires a court to determine that the local authorities have complied with a desegregation decree for a reasonable period of time and have eliminated the vestiges of past discrimination as conditions precedent to dissolving the decree. Without explanation, the District goes on to assert (Br. 20) that notwithstanding its noncompliance with the Consent Decree, it has satisfied this standard.

jurisdiction and extending the Decree for one more year, at which time it will reconsider its decision. This Court thus should not be “left with the definite and firm conviction” that the district court made a mistake in finding that the District has not yet achieved unitary status in the area of faculty and staff assignments. Instead, this Court should defer to the judgment of the district court, which has supervised this case for over twenty years.

## II

### **THE COMITY AND FEDERALISM CONSIDERATIONS THE DISTRICT RAISES ARE INAPPOSITE AND DO NOT WARRANT DISMISSAL OF THE CASE**

Because the District failed to satisfy the legal standard for a declaration of unitary status in the area of faculty and staff assignments, its remaining policy-based argument (Br. 22-26) that comity and federalism considerations justify dismissal warrants little discussion. As a threshold matter, the District mischaracterizes (Br. 22) the situation as “obsessive intrusion into state and local affairs” by “non-elected attorneys from the Department of Justice in Washington, D.C.” and cites (Br. 22-23) a series of wholly inapplicable statutes and doctrines. In fact, this case has long been supervised by a federal district court overseeing implementation of a Consent Decree entered into by the parties and approved by the court. It was the district court, not the Department of Justice, that ruled that the District had not yet achieved unitary status in the area of faculty and staff assignments — a decision that was not clearly erroneous for the reasons set forth above. The Department of Justice merely responded to the District’s motion for a

declaration of unitary status. Indeed, the Department agreed that the District had achieved unitary status in all areas except for the one at issue in this appeal.

The District's legal boilerplate (Br. 20, 24-25) that the purpose of a desegregation order is the return of a school system to local control is true, but hardly helpful to its case. As this Court has explained, resumption of local control presumes that the school board has met the requirements for a declaration of unitary status. See *Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1454 (5th Cir. 1993) (noting that after *Freeman*, local courts have discretion to terminate a desegregation case if the requirements for unitary status are met, and stating that "*Freeman* created a framework in which equitable decrees will not remain in effect perpetually and school districts can be returned to local control").

Finally, for the District to contend (Br. 25) that it has actively recruited qualified black applicants and been impeded from hiring them by the Consent Decree's requirements strains credibility. As the record shows, the District's compliance with the Decree's advertising requirements over the past two years has led it to hire two black administrators, whereas it hired only four black administrators during the previous twenty years of noncompliance. If the District believed that its efforts to hire black administrators were somehow impeded by the Consent Decree, the proper course of action would have been to move the district court to modify the Decree. See *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1022 (6th Cir. 1994) (holding that modification of consent decree "was an appropriate exercise of \* \* \* the court's inherent power to modify a consent

decree to effectuate the purposes of the decree”); *Williams v. Edwards*, 87 F.3d 126, 131-132 (5th Cir. 1996) (court has inherent power to modify consent decree to accommodate changed conditions).

### **CONCLUSION**

This Court should affirm the district court’s order denying the District’s motion for a declaration of unitary status and dismissal of the case with respect to faculty and staff assignments.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with an electronic copy on disk of the same, were served by first-class mail, to the following counsel of record:

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I further certify that on September 7, 2006, an electronic copy on disk and seven hard copies of the BRIEF FOR THE UNITED STATED AS APPELLEE were transmitted to the Court.

\_\_\_\_\_  
CHRISTOPHER C. WANG  
Attorney

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 3,938 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of Trend Micro OfficeScan (version 7.0) and is virus-free.

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Date: September 7, 2006