Nos. 05-41205, 05-41292

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

HEARNE INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Intervenor-Appellee

v.

STATE OF TEXAS, TEXAS EDUCATION AGENCY,

Defendants-Appellants

MUMFORD INDEPENDENT SCHOOL DISTRICT, PETE J. BIENSKI, JR.,

Defendants-Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

This Court has already scheduled oral argument in this case. The United States agrees that oral argument would be helpful in deciding the issues in this case.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

RULES:

STATUTES:

STATUTES (continued): **PAGE**

MISCELLANEOUS:

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1345. For a more extensive discussion of the district court's jurisdiction, see Section I of the Argument portion of this brief. This Court has jurisdiction over the timely notices of appeal pursuant to 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction over this controversy.

2. Whether the district court properly permitted appellee Hearne Independent School District to intervene in this case.

3. Whether the district court abused its discretion in enjoining the Texas Education Agency from approving or funding interdistrict transfers from the Hearne Independent School District to the Mumford Independent School District that have the effect of reducing or impeding desegregation in Hearne, in violation of the court's injunction.

4. Whether the district court abused its discretion in enjoining Mumford from further interfering with the court's injunction by accepting interdistrict transfers that reduce or impede desegregation in Hearne.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. The Original United States v. Texas Lawsuit

This appeal arises out of a school desegregation suit filed by the United States against the State of Texas and the Texas Education Agency (TEA), as well as various school districts and school officials, in 1970. *United States* v. *Texas*, 321 F. Supp. 1043, 1045 (E.D. Tex. 1970). As the district court found in the first decision published in this case, prior to 1954 the State of Texas operated a dual school system with separate schools for black students and white students, pursuant to the State's constitution and statutes. *Id.* at 1047. By 1970, when this lawsuit was filed, Texas continued to operate a number of all-black schools. Particularly

relevant to this appeal, the district court found that the school district defendants had engaged in a pattern of allowing student transfers, resulting in white students transferring out of predominantly black districts into predominantly white districts and black students transferring out of districts with bi-racial enrollment into predominantly or totally black districts. *Ibid.* The district court concluded that the existence of school districts drawn according to state law prior to the Supreme Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), combined with state laws allowing students to transfer freely between school districts, had the effect of "creat[ing] and maintain[ing] all-black school districts" as well as "offer[ing] students an escape from school districts undergoing the process of desegregation." 321 F. Supp. at 1055.

Pursuant to its "broad powers to fashion appropriate relief" in a case in equity such as this, *id.* at 1055, the district court ordered a State-wide desegregation plan, *id.* at 1059-1061. The court found that part of its order must operate directly against TEA in light of the "contribution to the continuation of vestiges of segregation made by TEA as exemplified by its support of or acquiescence in both territorial and scholastic transfers." *Id.* at 1058.

In a supplemental opinion clarifying its earlier order, the district court stated that, in accordance with this Court's dictates regarding student transfers in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir. 1969), it was "essential" that TEA "review all student transfer requests and that it refuse to approve or support any such requests the cumulative effect of which, in

terms of the Order in this case, 'will reduce or impede desegregation, or which will reenforce, renew or encourage the continuation or acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.'" *United States* v. *Texas*, 330 F. Supp. 235, 243 (E.D. Tex. 1971). The district court's order was affirmed in substantial part by this Court, with some modifications. See *United States* v. *Texas*, 447 F.2d 441 (5th Cir. 1971). The final order was further modified by the district court, as explained *infra*.

2. "Order 5281"

On August 9, 1973, the district court further amended its order, and it is this final amended order that is at issue in this appeal (see Mum. R.E. Tab D).[1] "Order 5281," as it is referred to by the parties and the district court, clarified the ongoing duties of the defendants in the area of, *inter alia*, student transfers (Mum. R.E. Tab D at 2-6), stating:

> Defendants shall not permit, make arrangements for or give support of any kind to student transfers, between school districts, when the cumulative effect, in either the sending or receiving school or school district, will be to reduce or impede desegregation, or to reinforce, renew, or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.

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[1] Citations to "Mum. R.E. __" are to the Record Excerpts filed by Mumford; citations to "Mum. Br. __" are to pages in Mumford's brief as appellant; citations to "TEA Br. __" are to pages in TEA's brief as appellant; citations to "USCA5 at __" are to pages in the sequentially paginated district court record lodged with this Court.

Order 5281 Section A(1), Mum. R.E. Tab D at 2-3. The court identified three classes of exceptions to the general transfer rule, allowing the defendants to grant transfers regardless of the race, color, or national origin of students where (1) students are transferring to county or multi-county day schools for the deaf; (2) special education students are transferring where the special education classes for which the students are qualified are unavailable in their home district; and (3) students qualify for some other hardship exception. Order 5281 Section A(2), Mum. R.E. Tab D at 3.

In addition, the district court provided certain "guidelines to determine the cumulative effect of student transfers in the various school districts of Texas," stating that the defendants shall not approve transfers, excluding transfers qualifying for a hardship exception, "where the effect of such transfers will change the majority or minority percentage of the school population, based on average daily attendance in such districts by more than one percent (1%), in either the home or the receiving district or the home or the receiving school." Order 5281 Section A(3), Mum. R.E. Tab D at 3-4. The court further ordered that TEA "shall review all student transfers and shall notify the sending and receiving districts promptly of all transfers which do not appear to comply with the terms of this order." Order 5281 Section A(5), Mum. R.E. Tab D at 5. Moreover, the court ordered that, where TEA has informed a school district that certain transfers are in violation of the court's order, and either the receiving school district continues to accept the transfers or the sending district refuses to provide suitable educational opportunities for the

students in question, TEA shall refuse to fund the offending district the amount of money funding the transferring students. Order 5281 Section A(6), Mum. R.E. Tab D at 5-6. The order also states that defendants shall refuse to distribute to the offending district any transportation funds that might accrue on account of transfer students accepted in violation of the order. Order 5281 Section A(7), Mum. R.E. Tab D at 6.

3. The Instant Enforcement Action Against TEA And Mumford Independent School District

On July 25, 2003, Hearne Independent School District (Hearne or Hearne ISD) moved to intervene in the underlying litigation and later filed a complaint in intervention alleging that TEA and Mumford Independent School District (Mumford or Mumford ISD) have violated Order 5281 and seeking to join Mumford ISD as a defendant in the action. USCA5 at 97-106, 160-177. On August 14, 2003, the district court granted the motion and accepted the complaint, adding Mumford as a Defendant. See USCA5 at 159. On April 9, 2004, the United States also moved to enforce Order 5281 against TEA by requiring TEA to halt funding for students attending Mumford who had transferred from neighboring Hearne. *United States* v. *Texas*, No. 71-5281, 2005 WL 1868844, at *3 (E.D. Tex. Aug. 4, 2005); see USCA5 at 318-328. The United States sought an injunction preventing TEA from (1) providing Mumford with funding for numerous transfers that reduce or impede desegregation in Hearne; (2) providing Mumford with funding for 151 specific transfers whom Mumford misrepresented as qualifying for a "hardship

exception" to Order 5281; and (3) providing Mumford with transportation funding until Mumford could show that it has ceased transporting transfer students that reduce desegregation in Hearne. *Ibid.*

On the same day, the United States filed a motion seeking injunctive relief against Mumford and its superintendent Pete Bienski preventing Mumford and Bienski from further interference with the operation of Order 5281. *Ibid.*; see USCA5 at 329-338 The United States alleged that (1) Mumford has been interfering with the operation of Order 5281 and ought to be enjoined from doing so under the All Writs Act, 28 U.S.C. 1651(a); (2) Mumford has operated "in active concert or participation" with TEA in violating Order 5281 and that Order 5281 ought to be enforced against Mumford; and (3) Mumford's continued acceptance of transfer students from Hearne has thwarted enforcement of Order 5281 and ought to be enjoined by the district court pursuant to the court's inherent authority. *Ibid.* The United States requested an injunction prohibiting Mumford from (1) enrolling any students residing within Hearne ISD where the transfer of such students impedes desegregation; and (2) sending buses into Hearne to pick up students residing there whose transfer impedes desegregation in Hearne. USCA5 at 337.

After holding a five-day bench trial in January 2005, and accepting extensive briefing from all parties, the district court issued a Memorandum Opinion on August 4, 2005. In its opinion, the district court made the following findings of fact with respect to the history of student assignment in Hearne and student transfers from Hearne to Mumford over the last several decades and into the present.

a. History Of Student Assignment In Hearne

Prior to 1970, Hearne assigned its students to schools on the basis of race, with white students assigned to one set of schools and black students assigned to another. *Texas*, 2005 WL 1868844, at *5. In response to a 1970 desegregation order from a Western District of Texas district court, Hearne assigned all lower grade elementary students to the formerly all-white Eastside Elementary School, all higher grade elementary students to the formerly all-black Blackshear School, and all high school students to the formerly all-white high school. After being ordered to desegregate, Hearne adopted an "ability grouping" system of assigning students to classrooms in its elementary schools. *Id.* at *6. Under this system, classrooms were racially identifiable, with white students placed almost exclusively in the highest ability classes and black students placed almost exclusively in the lower ability classes. The then-principal of Blackshear found that ability grouping tended to segregate students and was not an effective way to educate students, and thus ceased ability grouping at Blackshear in 1984. *Ibid.*

The district court found that the decision to end ability grouping was not well received by some parents, who threatened to leave the school system if ability grouping was not reinstated. *Ibid.* Concerned that Hearne would lose students, the Board of Trustees of Hearne ordered that ability grouping be reinstated at Blackshear in the mid- to late-1980s. The Blackshear principal again observed detrimental effects of the grouping, including the segregation of students by race. Thus, in 1990, Hearne again abandoned ability grouping at Blackshear in favor of a

heterogenous grouping system. Under the new system, Hearne schools no longer had separate classes that were predominantly white or black. The district court heard testimony it deemed credible from an expert who testified that "a school where predominantly black students end up in the lower ability group still suffers from the lingering effects of segregation." *Ibid.*

After Hearne finally discontinued ability grouping at Blackshear in 1990, parents again objected, repeatedly warning the principal that they would pull their children out of Blackshear. *Id.* at *7. Beginning in 1991 or 1992, Hearne parents began transferring their children out of Hearne in earnest. The district court found that even Hearne school board members transferred their children out of Blackshear, and that their decision raised questions in the community about the district, further exacerbating the transfer problem. *Ibid.*

b. Numerical Effect Of Transfers On Hearne And Mumford's Respective Enrollments

In the years following Hearne's cessation of ability grouping, increasing numbers of students began to transfer out of Hearne. *Ibid.* Between 1990 and 2000, Hearne's overall enrollment and white student enrollment declined each year, while Hearne's black student enrollment did not experience a decline each year. In Mumford, the overall student enrollment steadily increased every year from 1990 to 2000, while Mumford's resident student population did not increase significantly. During that time, Mumford's enrolled white student population increased significantly, jumping 80% from 1990 to 1991 and 133% from 1991 to 1992. *Ibid.*

In assessing whether student transfers from Hearne to Mumford have impeded desegregation in Hearne, the district court analyzed the breakdown of the respective student populations, making a number of factual findings and concluding that the transfer of white students from Hearne to Mumford has impeded the desegregation of Hearne and should be enjoined. Following is a summary of the district court's findings regarding student enrollment and the effect of transfers on student enrollment in Hearne and Mumford.

After sifting through numerous exhibits submitted by the various parties, many of which the court found contained conflicting evidence, the district court opted to rely principally on four documents for the purpose of its quantitative analysis: (1) Exhibit 212, which contains a yearly breakdown of student enrollment at Hearne and Mumford from 1990-1991 through 2003-2004; (2) Exhibit 218, which contains various demographic profiles of Hearne and Mumford based on the information provided in Exhibit 212; (3) Exhibit 237, which was prepared by the United States Department of Justice and contains a numerical analysis of the effect of transfers on Hearne, based on enrollment data provided by TEA for the years 1996-1997 through 2003-2004; and (4) Exhibit 239, which was also prepared by the United States and contains a summary of data from TEA relating to the number of transfers to Mumford from Hearne and overall for the years 1998-1999 through 2002-2003. 2005 WL 1868844, at *10.

The district court found that Mumford's student enrollment grew considerably as a result of accepting transfer students, most of whom transferred

from Hearne. *Ibid.* Whereas Mumford enrolled a total of 57 students in 1990, by 2002-2003, Mumford enrolled 500 students, 80% of whom resided *outside* the school district. Before Mumford began accepting transfers in such great numbers, it did not even operate a high school, but has built new school facilities and opened a high school since it started accepting transfers in such large numbers. *Ibid.* The district court also found that Mumford facilitated and encouraged student transfers from Hearne by providing transportation services to transfer students. In 1996, Mumford ran two of its four buses into Hearne in order to transport students to Mumford; by 2004, Mumford was running all five of its buses into Hearne in order to transport students back to Mumford. *Id.* at *11.

The district court analyzed the proffered data in order to determine the effect of the transfers on the racial make-up of both Hearne and Mumford. The court found that "Mumford ISD's white enrollment has ballooned over time," growing by 3,540 percent from 1990 to 2000. *Ibid.* During the same time, Hearne's white enrollment decreased by 68 percent. *Ibid.* The court found that, in recent years, more than half of the white public school students living in Hearne transferred out of the district to other public schools, and that "[t]he great majority" of them transferred to Mumford. *Id.* at *11-*12.

The district court went on to examine the effect of the transfers from Hearne to Mumford on Hearne's relative *proportion* of white and black students, which is the starting point for examining whether the transfers have impeded desegregation. Based on its analysis of the demographic evidence, the court found that the data

"proves that the white student transfers from Hearne to Mumford, and TEA's continued funding of those transfers, have resulted in a significant reduction in the proportion of white students attending Hearne – resulting in the enrollment profile of Hearne not resembling the racial profile of the resident population." *Id.* at *20. The court found that the "effect of transfers on the proportion of Hearne's white enrollment is far greater in any given year than the decline in the number of white students living in Hearne." *Ibid.* In support of this finding, the district court calculated the effect of the white student transfers from Hearne to Mumford, by school year, from 1998 through 2003. *Id.* at *20-*26.

The court evaluated the effect of transfers from Hearne to Mumford on the racial make-up of the student population in Hearne by (1) determining Hearne's resident population profile; (2) determining Hearne's actual enrollment profile; (3) determining what Hearne's enrollment profile would have been absent any white transfers to Mumford; and (4) analyzing the difference between the racial profile of Hearne without white student transfers to Mumford and Hearne's actual enrollment profile. *Id.* at *21. The district court went to great pains to render its calculations transparent and mathematically sound, *id.* at *21-*26, including extensively discussing how and why the calculations offered to the district court by Mumford were "disingenuous," "misleading," "mistaken," "incorrect," "wrong," and arising from "inconsistent usage and misunderstanding of basic arithmetic," *id.* at *26-*32.

Based on its calculations, the district court found that "the proportion of white students enrolled at Hearne significantly declines each year, from 22.57

percent in 1998-99 to 12.98 percent in 2003-04." *Id.* at *22. During the same time, the district court found that "the proportion of Black student enrollment grows during this same period, from 50.71 percent in 1998-99 to 55.64 percent in 2003-04." *Ibid.* Comparing those proportions to the resident student population in Hearne, the district court found that "the proportion of white students enrolled at Hearne is significantly less tha[n] the proportion of white resident population, and the proportion of black students enrolled at Hearne is significantly greater than the proportion of black resident population." *Ibid.*

The court determined that "transferring white students to Mumford had the effect of lowering the proportion of white student enrollment in Hearne, and increasing the proportion of black student enrollment in Hearne, every year." *Id.* at *25. The court further found that, as the white resident population of Hearne has decreased somewhat over the years, the relative effect of the transfers to Mumford has increased. *Id.* at *31. The court found that "the cumulative effect of the transfers from Hearne to Mumford *alone* – taking into account demographic changes and private decisions to home-school students or to send students to private schools – has been to significantly diminish the proportion of Hearne's white enrollment." *Id.* at *20.

c. Qualitative Effects Of Transfers To Mumford On Hearne ISD

In addition to examining the quantitative effects of the Hearne-to-Mumford student transfers on the proportion of black and white students remaining in Hearne, the district court made findings about the social, financial, and academic

effects of the transfers on Hearne ISD. *Id.* at *32-*34. The court found that the transfers "have resulted in members of Hearne and neighboring communities perceiving Hearne as 'basically a black school district,' comprising mainly or exclusively black students." *Id.* at *32. The court further found that, "[h]and-in-hand with the perception of being a 'black' school district, Hearne has also developed a reputation apparently based on negative stereotypes," *ibid.* – a reputation the district court found to be undeserved, *id.* at *34-*35. The court found evidence that Hearne parents widely perceived Hearne schools to be unsafe and to suffer from discipline problems. *Id.* at *32-*33. The court concluded, moreover, that, although there is "no substantial basis" to support these perceptions, such perceptions "affect parents' school choices and the exodus of students, particularly white students, from a small overall white population is making it much harder for Hearne to retain any remaining white students." *Id.* at *33.

The district court further found that the transfers have "hurt Hearne academically." *Ibid.* The court specifically found that Mumford has targeted Hearne's higher-performing students and that many such students have actually transferred from Hearne to Mumford. *Ibid.* The evidence demonstrated that Mumford sought to recruit students with high standardized test scores and that the resulting transfer of such students has made it more challenging for Hearne to prepare for the requirements of such tests. *Id.* at *33-*34.

The district court found that the transfers have hurt Hearne financially, resulting in a loss to the district of approximately $5,500 for each transferring

student. *Id.* at *34. The funding loss, the district court found, has adversely affected the educational programs offered by Hearne. Finally, the district court found that the Hearne-to-Mumford transfers "diminish the social benefits derived from interaction among students of different races in Hearne." *Ibid.* A former superintendent of Hearne testified that the transfers have created "a racial division in Hearne because your school is normally the focal point of a small community, and nothing is being done with the transfer issue to help us bring the community together in more of a community atmosphere." *Ibid.*

4. TEA's Administration And Oversight Of Transfers From Hearne To Mumford

a. TEA's Hardship Exemptions

In order to track interdistrict transfers, as required by Order 5281, TEA requires each school district to inform TEA of the number of transfers it accepts every year, as well as which of the transfers qualify for one of TEA's hardship exemptions. *Id.* at *7. In calculating whether particular transfers impede desegregation in violation of Order 5281, TEA does not factor in the transfers that qualify for hardship exemptions. TEA allows hardship transfers for a number of reasons, including where student health or safety is involved, where a student's parent or guardian is employed by the receiving school district, and where a student has two working parents and the student's home district has no childcare facilities. *Ibid.*

In monitoring the effect of interdistrict transfers on desegregation, TEA uses a 1% guideline as an early warning system; where a non-exempt transfer changes the ethnic balance of the student population in the sending or receiving district or school, TEA engages in further analysis to determine the "cumulative effect" of the transfer. *Id.* at *8. Where TEA determines that a transfer reduces desegregation in one district by moving it more toward one race, TEA notifies both districts and works with the districts to resolve the matter. *Ibid.* Prior to 2002, school districts filed written forms notifying TEA of their transfers. *Id.* at *9. Beginning in the spring of 2002, TEA implemented an automated electronic system to track transfers. *Ibid.*

TEA requires that transfers be renewed every school year, and that any transfer student qualifying for a hardship exemption must re-establish the basis for his or her exemption every year. *Id.* at *14.

b. Mumford's Fraudulent Reporting Of Transfers To TEA

Since at least 1992, TEA has annually sent all Texas school districts a letter directing each district to list its accepted transfer students on an enclosed form and return the form to TEA. *Id.* at *12. TEA requires this reporting so that the Agency may comply with Order 5281. *Ibid.* Although Mumford accepted a number of transfers in the early- to mid-1990s, Mumford did not report *any* transfers to TEA before 1998. *Id.* at *13. In 1998 – after TEA became aware of the fact that Mumford was not reporting its transfers – Mumford filed its first transfer report. The 1998 report claimed that Mumford had *no* transfers for the 1998-1999 school

year. Superintendent Bienski signed the form, although he later stated that he knew at the time that he was reporting false information to TEA. *Ibid.*

After TEA was informed by officials from Hearne ISD that Mumford was accepting transfers from Hearne, TEA called Bienski to inquire about Mumford's claim to have no transfers. *Ibid.* Thereafter, Bienski submitted a revised transfer report, stating that Mumford had accepted 143 transfer students, all of whom were from Hearne. In its revised 1998 transfer report, Mumford claimed that 56 of its 143 transfers qualified for a hardship exemption, and that 23 of those 56 students qualified for a health or safety hardship exemption. After TEA analyzed the effect of the transfers on desegregation in Hearne, TEA informed Mumford that the transfers had too great an effect on Hearne and instructed Mumford not to accept any new white transfers from Hearne who do not qualify for a hardship exemption. *Ibid.*

Three months after receiving instructions from TEA regarding transfers from Hearne, Mumford submitted its transfer report for the 1999 school year. *Ibid.* In the report, Mumford stated that, of the 86 transfer students who had not qualified for a hardship exemption the previous year, 63 now qualified for such an exemption. *Ibid.* The following year, when Mumford submitted its transfer report for the 2000 school year, it claimed that *all* of Mumford's transfer students qualified for hardship exemptions. *Id.* at *14. Indeed, Mumford claimed that 177 of its transfer students qualified for health or safety exemptions – up from just 23

such students in 1998. *Ibid.* Moreover, TEA later determined that Mumford failed to report some of its transfers for the 2000 school year. *Id.* at *13, *14 n.41.

After receiving complaints from Hearne's superintendent, TEA noticed in 2001 that Mumford had claimed a disproportionately high number of hardship exemptions compared to other districts of similar size. *Id.* at *14. TEA officials spoke with Bienski about Mumford's claimed hardship exemptions, and informed him that a number of the claimed exemptions did not in fact qualify for an exemption. With respect to the claims for safety exemptions, for example, TEA informed Bienski that the superintendents of *both* the sending and receiving districts were required to acknowledge the validity of a claimed safety issue. *Ibid.* But Mumford had not contacted the superintendent of the sending district about *any* of its 89 alleged safety exemptions. *Id.* at *15. With respect to the health exemptions, TEA informed Bienski that a transferring student must have medical documentation explaining the reasons for a medically-motivated transfer. *Id.* at *14. But, again, Mumford failed to provide the necessary documentation for *any* of its 31 alleged health-related transfers. *Id.* at *15. Finally, TEA determined that *none* of Mumford's 31 alleged childcare-related exemptions qualified for an exemption. In short, not a single one of Mumford's claimed childcare, health, or safety exemptions actually qualified for such an exemption. Moreover, the district court found that TEA's 2002 investigation of Mumford's transfers demonstrated that Mumford *purposely* misrepresented 151 transfers as qualifying for hardship exemptions to Order 5281. *Ibid.*

The district court also found that TEA determined that Mumford encouraged parents of transferring students to claim hardship exemptions in order to justify their child's transfer to Mumford. *Ibid.* Specifically, Mumford sent a notice to parents advising them: "To ensure that your child's transfer request is approved, please check an exemption on the transfer form, if applicable." The form identified three possible exemptions – childcare, Mumford employees' children, and health or safety – and stated that the health or safety exemption "can be used by *all* students" instructing parents to state "the reason you feel that your child is safer at Mumford than in their [sic] home district." *Ibid.*

During the course of its investigation in July and August 2002, TEA instructed Mumford not to accept any new transfers after May 1, 2002, because of the effect of the transfers on Hearne. *Id.* at *16. Ignoring this instruction, Mumford enrolled 36 new transfer students for the 2002 school year. TEA then appointed a monitor to keep track of Mumford's transfer students. The monitor determined that Mumford accepted an additional two new transfer students after the 2002 school year began, in contravention of TEA's directives. *Ibid.*

c. TEA's Treatment Of Mumford's Transfers

When TEA implemented its new computerized system for keeping track of interdistrict transfers in 2002, TEA decided that it would continue to fund all transferred students that each district had enrolled during the 2000-2001 school year regardless of their effect on desegregation in their home or receiving districts. *Id.* at *16. TEA refers to these 2000-2001 school year transfers as "baseline"

transfers. During the summer of 2002, as part of its investigation into the transfer practices in Mumford, TEA officials worked with Mumford to determine which students qualified as "baseline" transfer students. At the time, superintendent Bienski understood that TEA would continue to fund all baseline transfers regardless of whether those transfers complied with Order 5281 and regardless of the fact that Mumford and TEA had actual knowledge prior to the 2000 school year that its transfers from Hearne were impeding desegregation in Hearne. *Ibid.*

In the course of determining how many transfer students in Mumford qualified as baseline transfers, TEA discovered that, although Mumford had reported accepting about 200 transfers during the 2000 school year, it had in fact accepted 348 transfers for that year. *Id.* at *17. A TEA official testified that TEA believed that Mumford had been intentionally dishonest in reporting its transfers for the 2000 school year and that superintendent Bienksi was attempting to evade the requirements of Order 5281. Nevertheless, TEA decided to fund *all* 348 transfers from the 2000 school year as baseline transfers regardless of their effect on desegregation in Hearne. The following year, TEA discovered that a number of additional transfers were not properly reported to TEA and decided to "grandfather" those transfers; *i.e.*, TEA would continue to fund them regardless of their effect on desegregation. See TEA Br. 21. In addition to funding all of the "baseline" transfers, TEA decided to fund all siblings of the baseline interdistrict transfers in Texas regardless of their effect on desegregation in the sending or receiving district. *Texas*, 2005 WL 1868844, at *17.

In the 2001-2002 school year, 233 white students transferred out of Hearne, and 164 of those students transferred to Mumford. *Id.* at *12. Of those 164 transfer students, 160 did not qualify for any hardship exemption under Order 5281. In the 2002-2003 school year, 187 white students transferred out of Hearne, and 130 of those students transferred to Mumford. Of those 130 transfer students, 120 did not qualify for any hardship exemption. *Ibid.* Nevertheless, pursuant to TEA's baseline and sibling policies, TEA continued to fund 93 of these white student transfers from Hearne who did not qualify for a hardship exemption.[2] *Id.* at *19.

The district court determined that, "contrary to TEA's assertions otherwise, TEA's decision to 'baseline' white transfers from Hearne to Mumford has contributed to the substantial segregative effect on Hearne's enrollment." *Id.* at *20. The district court further found that the "the evidence shows that transfers *are* reducing desegregation in Hearne, that Mumford is enrolling the great majority of such transfers from Hearne, and that TEA continues to provide Mumford with funding for them while acknowledging that the transfers violate No. 5281." *Id.* at *16.

[2] Those 93 transfer students represent a significant portion of the white students in Hearne as the district court found that only 186 white students were enrolled in the Hearne schools in the 2002-2003 school year.

5. District Court's Conclusions Of Law

a. TEA Is Violating Order 5281

The district court first determined that TEA is violating Order 5281 by funding transfers from Hearne to Mumford that reduce desegregation in Hearne. *Id.* at *35. In support of this conclusion, the district court determined that the cumulative effect of transfers from Hearne to Mumford have reduced desegregation in Hearne, and that TEA is providing funding to Mumford for such transfers.

In determining the effect of transfers from Hearne to Mumford on desegregation in Hearne, the district court noted that, although the court may begin with a quantitative analysis, "the effect of the transfers 'ultimately must be measured qualitatively' to judge whether they increase the racial identifiability of schools." *Id.* at *36 (quoting *Lee* v. *Eufaula City Bd. of Educ.*, 573 F.2d 229, 233 (5th Cir. 1978)). The court further noted that whether transfers increase the racial identifiability of a school "depends on whether the 'increment of change in the racial composition of a school seems [likely] to alter significantly general perceptions of a school's racial identity or the behavior of persons who rely on such factors in determining whether or not to send their children to a particular school.'" *Ibid.* (quoting *Lee* v. *Lee County Bd. of Educ.*, 639 F.2d 1243, 1261 (5th Cir. 1981)).

The district court first determined that "student transfers from Hearne by themselves have significantly altered the racial make-up of Hearne's enrollment, increasingly marginalizing the white student population and transforming the

district into a predominately African-American district when it would not otherwise be so." *Id.* at *37. The court further determined that the change in the racial make-up of Hearne's student population was not due to any demographic changes. *Ibid.* The court went on to determine both that Hearne is perceived by parents and school administrators and teachers in and around the district as a "predominately black district" and that transfers have fueled this perception. *Id.* at *38.

Moreover, the district court specifically found that "[t]he transfers and Hearne's desegregation history are tightly linked." *Ibid.* The court explained that Hearne reacted to the need to dismantle its racially dual system by adopting ability grouping in its elementary schools, and that the ability grouping tended to segregate students by race. When Hearne finally ceased ability grouping, "parents of white students objected and transfers out of the district, particularly of white students, began." *Ibid.* Since the transfers began, an increasing proportion of Hearne's white students have transferred out of Hearne to other public schools, and the district court found that these transfers have "hamper[ed] Hearne's ability to realize the benefits of a unitary system." *Ibid.* The court further determined that the financial effect on Hearne resulting from the transfers to Mumford has been detrimental to Hearne and "weighs in favor of enjoining the transfers." *Ibid.*

In summary, the district court found that "the cumulative effect of transfers from Hearne was to reduce and impede desegregation there," and that "[t]he transfers interfere with the ability to finally remedy the prior systemic discrimination against African-American students in Hearne, and also deny the

students remaining in Hearne the social and academic benefits that would otherwise accrue from the enrollment of Hearne's diverse resident public-school student population," *id.* at *38.

With respect to TEA's funding practices, the district court concluded that:

> Transfers from Hearne are reducing desegregation there by significantly diminishing Hearne's white enrollment and causing Hearne's schools to become racially identifiable as black schools. The vast majority of transfers from Hearne went to Mumford, as are the vast majority of white transfers from Hearne. TEA recognizes that the transfers of white students from Hearne reduce desegregation there; indeed, TEA has instructed Mumford not to accept new transfers because of the transfers' effect on Hearne's white enrollment. Yet, TEA continues to fund significant numbers of white transfers from Hearne to Mumford who do not qualify for any exception authorized by No. 5281.

Id. at *39. The district court rejected TEA's "novel interpretation" of Order 5281 that TEA may not fund only those transfers that a district accepts *after* receiving notice from TEA that its transfers violate Order 5281. *Ibid.* Such an interpretation, the court found, is flatly inconsistent with the injunction of Order 5281 itself. *Ibid.* Moreover, the district court pointed out that "Mumford's misconduct also shows the flaw in TEA's interpretation, because Mumford's persistent fraudulent conduct made it impossible for TEA's imagined system to work." *Id.* at *40. The court also noted that, even under TEA's proposed interpretation of Order 5281, TEA is violating the order by continuing to fund white transfers who joined Mumford after TEA instructed Mumford to stop taking any more white transfers in 2001. *Ibid.*

b. Mumford Is In Active Concert And Participation With TEA In Violating Order 5281

With respect to Mumford, the district court found that "Mumford is in active concert and participation with TEA in its violation of the provisions of No. 5281 and, therefore, must be enjoined from accepting further transfers that reduce desegregation in Hearne." *Id.* at *40. As the court noted, under Federal Rule of Civil Procedure 65(d), an order granting an injunction binds not only the parties to the action, but also "those persons in active concert or participation with them" so long as such persons "receive actual notice of the order." *Ibid.* The district court found that Mumford received actual notice of Order 5281's transfer provisions "several times from TEA." *Ibid.* The court also found that officials from Mumford and from TEA admitted that TEA and Mumford worked together to establish Mumford's "baseline" transfers – transfers the district court determined to violate Order 5281. Thus, the court concluded, Mumford should be enjoined from continuing to interfere with Order 5281's injunction against permitting, making arrangements for, or giving support of any kind to transfers that reduce desegregation in any district. The court further concluded that it should do this by "prohibiting Mumford from continuing to enroll any and all transfer students whose transfers reduce desegregation at Hearne." *Ibid.*

The court went on to find that the injunction against Mumford is appropriate because, "[t]hrough its pattern of fraudulent conduct since first accepting transfers in the 1990s, Mumford has demonstrated a consistent and persistent willingness to

circumvent the requirements of No. 5281 whenever possible." *Id.* at *41. The court found that Mumford's consistently fraudulent reporting to TEA about its transfers "make[s] it impossible for the court-ordered system to function effectively," and that Mumford "defied TEA directives to stop accepting new transfers" even after its fraudulent reporting was discovered. *Ibid.* Indeed, "Mumford to this day continues to interfere with No. 5281 by seeking out and accepting hundreds of transfers from Hearne that it knows violate No. 5281." *Ibid.* Thus, the district court found that it was empowered under the All Writs Act, 28 U.S.C. 1651(a), to enjoin interference with its injunction, and specifically with the transfer provisions of Order 5281. *Ibid.* In addition, the court found that it could act pursuant to its "inherent authority to preserve its ability to render an effective judgment" by enjoining a third party from "action threatening the viability of its Order." *Id.* at *42.

6. District Court's Injunction

In a separate order accompanying the district court's August 4, 2005, opinion, the court ordered that TEA is "permanently enjoined from providing funding to Mumford Independent School District for the student transfers to it whose cumulative effect is to reduce or impede desegregation at Hearne Independent School District, including those transfers currently enrolled at Mumford Independent School District." USCA5 at 6978. The court further permanently enjoined Mumford "from enrolling any transfer students from Hearne Independent School District, including those transfers currently enrolled at

Mumford Independent School District, that reduce desegregation in the Hearne Independent School District." *Ibid.* The district court also ordered TEA to appoint a monitor "to determine whether No. 5281 is properly implemented" at Mumford for the next three school years, and ordered the monitor to provide annual reports to the court with his or her findings. *Id.* at 6979.

Mumford filed a motion seeking a stay of the district court's order. See USCA5 at 6983-6985. The United States, Hearne ISD, and TEA all opposed the motion. See USCA5 at 6989-6992, 7004-7008, 7023-7025. The district court denied Mumford's request for a stay and issued an order clarifying exactly which transfer students Mumford is enjoined from enrolling: "Mumford is enjoined from accepting any white transfers from Hearne that do not qualify for any legitimate hardship exceptions." USCA5 at 7019.

Mumford filed a timely notice of appeal and sought an emergency stay from this Court. The United States and Hearne ISD opposed the stay. On August 12, 2005, this Court granted the emergency stay and issued an expedited briefing schedule. TEA filed its own notice of appeal and the two appeals were consolidated. On September 15, 2005, this Court faxed a letter to all counsel of record requesting that the parties address two issues: "(1) the basis for the district court's jurisdiction over this controversy; and (2) the authorization for appellee school district's intervention in a case that has been 'administratively closed' and to which the appellee was apparently never a party."

SUMMARY OF ARGUMENT

This appeal arises from a straightforward enforcement action intended to halt intentional disobedience of and interference with a valid desegregation order. The district court had jurisdiction over the current controversy pursuant to its retention of jurisdiction over implementation of the original desegregation order. The existence of a separate desegregation case against Hearne had no effect on the court's ongoing supervisory power over its statewide decree. Moreover, the district court correctly permitted Hearne to intervene in this action in spite of the fact that the case had been temporarily placed on the court's inactive docket because Hearne satisfied the requirements for permissive intervention.

Defendant TEA has knowingly failed to comply with its obligation under the court's order to monitor interdistrict transfers in Texas and to refuse to approve or fund any such transfers that have the cumulative effect of reducing or impeding desegregation in either district. TEA does not make a meaningful attempt to argue that its behavior with respect to transfers from Hearne to Mumford has not violated the unambiguous command of the desegregation injunction. Rather, TEA offers a novel legal argument, claiming that it should have discretion to decide whether and how to obey the clear terms of the injunction. Controlling law leaves no doubt that entities such as TEA that are under the command of a valid desegregation order must comply with the terms of that order. There is no basis in law or logic for concluding that the object of such an injunction should be permitted to intentionally disregard the requirements of the injunction without interference from the district

court. Moreover, in ordering a remedy for the identified violations of its prior injunction, the district court acted well within its broad equitable powers. TEA has offered nothing but specious arguments in support of its claim that the district court exceeded the scope of its inherent authority to effectuate the commands of its legitimate orders.

Furthermore, the district court correctly found that Mumford has engaged in a vast pattern of fraud and obfuscation intended to circumvent the requirements of the order. The district court was well within its authority in concluding that it may and must enjoin such ongoing interference in order to protect the effectiveness of its desegregation order. Mumford has offered no legitimate argument in defense of its intentionally fraudulent behavior, and the district court's order enjoining the continuation of such behavior was far from an abuse of discretion.

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION OVER THIS CONTROVERSY

The district court had jurisdiction over the original desegregation suit filed by the United States against TEA pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1345. See also 42 U.S.C. 2000c-6. As TEA acknowledges, the district court had jurisdiction over the current controversy pursuant to the court's retention of jurisdiction over implementation of Order 5281. See *United States* v. *Texas*, 321 F. Supp. 1043, 1062 (E.D. Tex. 1970) ("This court retains jurisdiction for all purposes including the

entry of any and all further orders which may become necessary for the purpose of enforcing or modifying this Order.").

Mumford argues (Mum. Br. 33-39) that the district court did not have jurisdiction over this controversy because Hearne is subject to a separate desegregation order in the Western District of Texas. *United States* v. *TEA*, No. 70-80 (W.D. Tex.). In particular, Mumford alleges (Mum. Br. 35) that Order 5281 "specifically carved out school districts (such as HISD) that were already governed by court-ordered desegregation plans." In support of this argument, Mumford points to language in the district court's original 1970 order stating: "This Court can conceive of no other effective way to give the plaintiffs the relief to which they are entitled under the evidence in this case than to enter a uniform state-wide plan for school desegregation, made applicable to each local county and city system *not already under court order to desegregate* and to require these defendants to implement it." 321 F. Supp. at 1057 (emphasis added). Mumford claims that the italicized language indicates that the district court did not intend to give TEA authority over transfers into or out of a school district such as Hearne that is under a separate desegregation order. Mumford is wrong for three reasons.

First, a careful reading of the district court's 1970 order reveals that the language in question is not an explanation by the district court of the scope of the relief ordered in this case; rather, it is part of a block quote from an Alabama district court opinion that Judge Justice relied on to support his decision to impose a state-wide remedy. See *ibid.* (quoting *Lee* v. *Macon County Bd. of Educ.*, 267 F.

Supp. 458, 478 (M.D. Ala. 1967)). In other words, the language exempting school districts from the state-wide remedy is language of another district court judge talking about school districts in another State. In that case, the district court was explaining why a case originally brought against one school board had been expanded to include state-wide relief against officials of the State of Alabama. Such relief was necessary, the court explained, because state officials had failed to discharge their affirmative duty to dismantle dual school systems in every school district not already under the supervision of a federal court in a desegregation suit. See *Macon County*, 267 F. Supp. at 478. The circumstances of that law suit are not the same as the circumstances of the instant case. And the limits set by the Alabama district court in the Alabama desegregation order have no bearing on the application of the Texas desegregation order in the instant case.

Second, Section A(4)(d) of Order 5281, as modified in 1973, instructs TEA to take several factors into account in determining whether interdistrict transfers have the cumulative effect of reducing desegregation. Among those factors is: "whether the sending or receiving school district is operating under the provisions of an order issued by another District Judge requiring said school district to eliminate segregation on the ground of race, color, or national origin." If the district court did not intend Order 5281 to apply to TEA's supervision of transfers involving school districts under a separate desegregation order, it would defy logic for the court to instruct TEA to consider whether such a separate desegregation order exists in determining whether transfers violate the Order.

Finally, application of Order 5281 in no way interferes with the objectives or operation of the desegregation order against Hearne in the Western District of Texas. Mumford correctly states (Mum. Br. 36) that the 1971 version of Order 5281 includes a section confirming that nothing in the order "shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suit." But Mumford incorrectly concludes from this language that the district court in the instant case was precluded from deciding the instant controversy because of the desegregation order pending against Hearne in the Western District of Texas. Nothing in Order 5281 or the instant controversy interferes with implementation of the separate order against Hearne. That order is directed to actions *undertaken by Hearne* with respect to interdistrict transfers. The instant controversy is directed to actions undertaken by Mumford and TEA with respect to interdistrict transfers. Thus, nothing in the district court's order or injunction will have any effect on Hearne's obligations under the separate desegregation order.

Nor does the instant controversy interfere with the objectives of the separate order against Hearne. Indeed, the district court in the instant case is seeking to effectuate the desegregation of Hearne. Thus no principle of comity or abstention would counsel in favor of removing the district court's longstanding jurisdiction over implementation of its order, especially where the separate action against Hearne is inactive. Indeed, this Court's decision in *Ross* v. *Houston Independent School District*, 559 F.2d 937 (5th Cir. 1977), supports the actions of the district

court in the instant case. This Court in *Ross* concluded that, as a matter of conservation of judicial resources, legal proceedings to resolve desegregation issues should remain in the court in which the dispute was currently active. *Id.* at 945. That is exactly what happened below.[3]

The district court's retention of jurisdiction in the instant case is common practice in school desegregation cases and is consistent with this Court's instruction that, until a defendant affirmatively demonstrates that it operates a unitary system, "a district court overseeing the desegregation effort must retain jurisdiction to insure that the present effects of past segregation are completely removed." *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1434 (5th Cir. 1983).

II

THE DISTRICT COURT PROPERLY ALLOWED HEARNE INDEPENDENT SCHOOL DISTRICT TO INTERVENE IN THIS ACTION

Although the district court docket sheet for the instant case notes that, on October 2, 2000, the case was "administratively closed," that entry merely indicates that the district court judge ordered that the case "should be placed upon the inactive docket of the court, subject to restoration to the active docket for good cause shown." See Oct. 2, 2000, Order, Docket Entry No. 329. The district court

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[3] Moreover, Mumford's argument that the district court should have refrained from entertaining this dispute is, as Mumford states, an argument about comity. But comity is distinct from subject matter jurisdiction; the fact that principles of comity may dictate district court abstention in a particular case does not mean that the district court lacks subject matter jurisdiction over the matter in question.

neither closed the case nor relinquished jurisdiction. Rather, it followed a common practice in longstanding desegregation cases in this Circuit. Indeed, in *United States* v. *Lawrence County School District*, 799 F.2d 1031, 1035, 1037 (5th Cir. 1986), this Court upheld the continued jurisdiction and renewed activity of a district court in a desegregation case after the case had been placed on the inactive docket and remained inactive for ten years before the United States initiated a new enforcement action. The instant case is no different, except that it remained inactive for less than three years rather than for ten years.

Hearne sought to intervene pursuant to Federal Rule of Civil Procedure 24, which permits an entity to intervene in an ongoing action either as of right or permissively. Neither TEA nor the United States opposed Hearne's motion to intervene and the district court granted it.

The district court was correct in granting Hearne's motion for permissive intervention. A district court's decision whether to grant a motion for permissive intervention is reviewed by this Court for abuse of discretion. *LULAC* v. *Clements*, 884 F.2d 185, 189 (5th Cir. 1989). An entity is entitled to permissive intervention when "(1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* at 189 n.2. The district court did not abuse its discretion in allowing Hearne to intervene because Hearne met all three criteria. Indeed, in the district court, no party challenged whether Hearne satisfied these requirements;

rather, Mumford argued, with no support, that Hearne should not be allowed to intervene because it could not state a "cognizable claim." USCA5 at 190-191. In fact, however, the district court correctly determined that Hearne was entitled to permissive intervention and appropriately exercised its discretion in permitting such intervention. Hearne demonstrated that it was being injured both by TEA's failure to adhere to its obligations under Order 5281 and by Mumford's fraudulent actions in attempting to evade the requirements of Order 5281.

In any case, the presence of Hearne ISD as an intervenor in this action has no effect on the validity of the district court's decision or the remedies it ordered. The United States – the original plaintiff in this case – filed its own motions to enforce Order 5281 against TEA and Mumford and participated in the trial below. USCA5 at 318-328, 329-338. The presence of the United States is sufficient to support the relief ordered by the district court. See *United States* v. *Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (in discussing standing of plaintiff-intervenors, court states that, "since the court can act on the motion of original parties, or even *amicus curiae*, to take the action necessary to protect and effectuate its judgment, questions of standing pose little procedural difficulty"). As the district court found: "The proper procedural method for seeking relief from a third party's interference with an existing desegregation order is by motion in the preexisting civil action in which the court order was entered. That was the exact procedure followed in *Valley* v. *Rapides Parish School Board*, 646 F.2d 925, 935-936 (5th Cir. 1981)), and in prior proceedings in this case, see *United States* v. *Texas*, 356 F.Supp. at 470 (involving

transfers to Highland Park school district)." *United State* v. *Texas*, No. 71-5281, 2005 WL 1868844, at *41 (E.D. Tex. Aug. 4, 2005) (citing *Valley*, 646 F.2d 925). Mumford acknowledged in the district court that Hearne's complaint in intervention was separate from the United States' motion to enforce Order 5281 against Mumford when it filed separate responses to Hearne's complaint and the United States' motion, USCA5 at 180-194, 982-1002, and again when it filed a motion to consolidate the two, USCA5 at 622, 627-632. Moreover, in responding to the United States' motion, Mumford never challenged the district court's ability to enforce Order 5281 against Mumford as a matter of personal jurisdiction and cannot do so now. See Fed. R. Civ. P. 12(h) (defense of lack of personal jurisdiction is waived if not asserted in a party's first defensive motion).

III

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S INJUNCTION AGAINST TEA

Since 1970, TEA has been subject to an injunction ordering it to, *inter alia*, monitor student transfers in order to prevent interdistrict transfers that have the effect of impeding or reducing desegregation in either the sending or receiving district. As affirmed and modified by this Court in 1971, and further modified by the district court in 1973, the relevant mandate of "Order 5281" states:

> [TEA] shall not permit, make arrangement for or give support of any kind to student transfers, between school districts, when the cumulative effect, in either the sending or receiving school or school district, will be to reduce or impede desegregation, or to reinforce, renew, or encourage the continuation of acts and practices resulting in

> discriminatory treatment of students on the ground of race, color, or national origin.

Order 5281 at Section A(1), Mum. R.E. Tab D at 2-3. The language of the injunction is clear and unambiguous. Indeed, none of the parties to this appeal disagrees with the district court about the obligation the order imposes on TEA: namely, that TEA may not approve or provide funding for interdistrict transfers the cumulative effect of which is to reduce or impede desegregation in one of the districts. The district court's conclusion that TEA has been violating Order 5281 rests not on a legal interpretation of its order but on factual determinations about the segregative effects of the transfers in question and TEA's role in supporting those transfers. As the district court stated, "Determining whether TEA is violating No. 5281 requires two inquiries: (1) Whether the cumulative effect of transfers [is] to reduce desegregation in Hearne, and (2) Whether TEA is providing Mumford with funding for accepting such transfers." *United State* v. *Texas*, No. 71-5281, 2005 WL 1868844, at *36 (E.D. Tex. Aug. 4, 2005). Essentially, the appellants take issue with two aspects of the district court's decision: first, they disagree with the district court's conclusion that transfers from Hearne to Mumford have in fact reduced desegregation in Hearne; and second, they are dissatisfied with the means employed by the district court to remedy the identified violation of Order 5281.

A. The District Court Correctly Concluded That TEA Violated Order 5281 By Funding Transfers From Hearne To Mumford That Had The Cumulative Effect Of Reducing Or Impeding Desegregation In Hearne

1. The District Court Correctly Concluded That Transfers From Hearne To Mumford Reduced Or Impeded Desegregation In Hearne

The district court was justified in concluding that the cumulative effect of transfers from Hearne to Mumford had the effect of reducing desegregation in Hearne. This Court has repeatedly found that a district court's assessment of the desegregative impact of official action on a school district is a factual finding rather than a legal conclusion, and must be reviewed by this court under the abuse of discretion or clearly erroneous standard.[4] *Hull* v. *Quitman County Bd. of Educ.*, 1 F.3d 1450, 1453 n.2 (5th Cir. 1993); *United States* v. *Hendry County Sch. Dist.*, 504 F.2d 550, 554 (5th Cir. 1974); see also *Ayers* v. *Fordice*, 111 F.3d 1183, 1213 (5th Cir. 1997) (district court's conclusion regarding whether proposed remedial action is likely to desegregate a school reviewed for abuse of discretion); *Price* v. *Denison Indep. Sch. Dist.*, 694 F.2d 334, 353, 364 (5th Cir. 1982) (district court's conclusion about whether a school district is segregated is not a question of law but should be supported by factual determinations and conclusions). As the Supreme Court has stated in discussing the clearly erroneous standard of review:

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[4] *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401 (1990) ("When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.").

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

The district court's finding in this case that the transfers from Hearne to Mumford reduced desegregation in Hearne was not clearly erroneous and was in harmony with the instructions this Court has previously given as to how a district court should measure the desegregative effect of interdistrict transfers.[5] In *Lee* v. *Eufaula City Board of Education*, 573 F.2d 229 (5th Cir. 1978), this Court instructed that, although school desegregation "can first be measured quantitatively, using percentages as a rough rule of thumb," *id.* at 233 (quoting *Davis* v. *Board of Sch. Comm'rs*, 393 F.2d 690, 693 (5th Cir. 1968)), "[i]n measuring the cumulative effect of a student transfer program on desegregation, the Court must do so from a qualitative viewpoint, without blind deference to an objective mathematical formula," *id.* at 232. See also *United States* v. *Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1305 (11th Cir. 1989) ("Thus *Eufala* mandates a comparison of the racial composition of [the school in question] as it would exist without the transfers with the present enrollment including the transfers, and then a determination, from a

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[5] Amicus STAR-Texas devotes many pages in its brief (STAR Br. 3-4, 10-13) to complaining about how TEA implements Order 5281. But this appeal does not concern the validity or invalidity of TEA's regulations. Rather, this appeal concerns the district court's implementation of Order 5281, not TEA's.

qualitative standpoint, of whether the difference undermines desegregation efforts at the school."); *Ross* v. *Houston Indep. Sch. Dist.*, 583 F.2d 712, 714 (5th Cir. 1978) (holding that "many variables must be considered in determining whether desegregation will be impeded or advanced"). This Court has also held that a court evaluating the desegregative effect of interdistrict transfers should consider whether the "increment of change in the racial composition of a school seems []likely to alter significantly general perceptions of a school's racial identity or the behavior of persons who rely on such factors in determining whether or not to send their children to a particular school." *Lee* v. *Lee County Board of Education*, 639 F.2d 1234, 1261 (5th Cir. 1981).

a. The District Court's Quantitative Analysis Was Correct

The district court explicitly followed the analysis outlined by this Court, first comparing quantitatively the racial composition of Hearne after the transfers with what it would have been without the transfers, and then determining qualitatively whether the difference undermines desegregation efforts at the school. See 2005 WL 1868844, at *36. In conducting its quantitative analysis of the effect of transfers from Hearne to Mumford on the racial profile of Hearne, the district court explained every step of its mathematical analysis both so that the process would be transparent and as a means of explaining why the numerical analysis offered at trial by Mumford was mistaken and misleading.[6] See 2005 1868844, at *26-*32.

[6] Though Mumford now criticizes the district court (Mum. Br. 70-71) for spending (continued...)

Using data provided by TEA for the 1998-1999 school year through the 2003-2004 school year, the district court found that "the proportion of white students enrolled at Hearne significantly declines each year, from 22.57 percent in 1998-99 to 12.98 percent in 2003-04." *Id.* at *22. The district court further found that, during the same time period, the proportion of black student enrollment in Hearne rose from 50.71 percent to 55.64 percent. The district court compared these numbers to the racial profile of the resident population and found that "the proportion of white students enrolled at Hearne is significantly less tha[n] the proportion of white resident population, and the proportion of black students enrolled at Hearne is significantly greater than the proportion of black resident population." *Ibid.* The district court noted that, while the white population of Hearne decreased somewhat from 1998 to 2004, the number of white students transferring from Hearne to Mumford increased during that time. *Id.* at *31.

The court then isolated the effect of the white transfers from Hearne to Mumford on the racial profile of the enrolled student population in Hearne. *Id.* at *24-*26. The court determined that, "if there had been no white transfers to Mumford, the racial profile in Hearne would look significantly different than it

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[6](...continued)
many pages on explaining the method behind its quantitative analysis, it did so precisely because the court found that Mumford's proffered quantitative analysis was "disingenuous," "misleading," "mistaken," "incorrect," "wrong," and arising from "inconsistent usage and misunderstanding of basic arithmetic." 2005 WL 1868844, at *26-*32.

actually was" because "transferring white students to Mumford has the effect of lowering the proportion of white student enrollment in Hearne, and increasing the proportion of black student enrollment in Hearne, every year." *Id.* at *25. Based on these findings, the court concluded that "the cumulative effect of the transfers from Hearne to Mumford *alone* – taking into account demographic changes and private decisions to home-school students or to send students to private schools – has been to significantly diminish the proportion of Hearne's white enrollment." *Id.* at *20.

Though TEA does not challenge the district court's quantitative findings of fact, Mumford claims (Mum. Br. 71-76) that they are clearly erroneous because the court calculated the effect that the white transfers from Hearne to Mumford have had on the racial profile of Hearne rather than focusing on the effect of all transfers from Hearne to Mumford on that profile. But the purpose of Order 5281 is not to halt or even scrutinize all interdistrict transfers throughout the State of Texas. As Mumford points out repeatedly, parents of school children can have a number of legitimate reasons for wanting to transfer their children out of their home school district. The objective of Order 5281 is first, to monitor whether interdistrict transfers reduce or impede desegregation in either of the districts involved, and second, to halt those transfers that do reduce or impede desegregation. The order is unambiguous: where transfers have been found to reduce or impede desegregation,

TEA must withhold funding *not* from all transfers, but from those transfers that have a negative effect on desegregation.[7]

The district court's method of quantitative analysis is in perfect keeping with the desegregation order it devised. The district court determined that the proportion of white students actually *enrolled* in Hearne had shrunk from 22.57 percent in 1998-1999 to 12.98 percent in 2003-2004 – a drop that was measurably greater than the drop in the white resident population during the same time period – while the *enrolled* black student population grew from 50.71 percent to 55.64 percent during the same time period. This data demonstrated that the "the proportion of white students enrolled at Hearne is significantly less tha[n] the proportion of white resident population, and the proportion of black student enrollment at Hearne is significantly greater than the proportion of black resident population" because of

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[7] Mumford castigates the district court (Mum. Br. 73) for failing to take into account the number of Hispanic students who did or did not transfer from Hearne to Mumford. But, as both TEA and Mumford acknowledge in their briefs, the underlying desegregation case was directed at a *de jure* system of segregating black students from white students throughout Texas. As this Court has held, at the time this lawsuit was initiated, Texas had at no time segregated Hispanic students from "Anglo students" by law. *United States* v. *Texas*, 654 F.2d 989, 992 (5th Cir. 1981). Thus, the proportion of Hispanic students enrolled in Hearne or transferring out of Hearne does not effect how Order 5281 operates or should be implemented. In light of the fact that the instant dispute does not involve Hispanic student transfers at all, Amicus STAR-Texas's assertion (STAR Br. 9) that Order 5281 is "indiscriminately applied to Mexican-American students" is incorrect.

the *total* number of students transferring out of Hearne, regardless of their race.[8] 2005 WL 1868844, at *22. Because the district court determined that Hearne's enrolled student population had become more heavily black, the court appropriately examined the effect of the white student transfers to Mumford on the racial profile of Hearne's enrolled student population. This is entirely consistent with the mandate of Order 5281, and Mumford's continued insistence that the district court and this Court focus solely on the demographics of the transferring students rather than on the demographics of the district in which desegregation is alleged to have been impeded reveals their lack of understanding of the purpose of Order 5281.

b. The District Court's Qualitative Analysis Was Correct

Both TEA and Mumford disagree with the district court's findings as to the qualitative effect of Hearne-to-Mumford transfers on desegregation in Hearne. But the district court's qualitative findings – based on undisputed statements of fact and witness testimony found to be credible by the district court – are correct and far from clearly erroneous.

The district court, relying on the testimony of Mumford's expert witness Dr. Michael Say, considered a number of factors "in determining whether transfers qualitatively reduce desegregation." 2005 WL 1868844, at *36. Those factors included: (1) whether Hearne is perceived in the community as a predominantly

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[8] Mumford is simply incorrect in alleging (Mum. Br. 77) that the district court failed to take into account Hearne's diminishing white resident student population. See 2005 WL 1868844, at *21-*22.

one-race school district; (2) whether transfers are interfering with the Hearne's ability to remedy a constitutional violation and otherwise fulfill its desegregation obligations; (3) the desegregation history of Hearne; (4) the financial effect of the transfers on Hearne; (5) the conduct of Mumford in securing transfers and reporting them to TEA; (6) whether Mumford was taking steps to circumvent Order 5281; (7) whether Mumford disregarded directives from TEA not to accept new transfers; and (8) whether Mumford had wholly failed to report transfers to TEA. Considering this array of qualitative factors is in line with instructions this Court has given in the past. See *Ross*, 583 F.2d at 714-715 (holding that "many variables must be considered in determining whether desegregation will be impeded or advanced," including the presence of "white flight" and the financial effect of transfers on the sending district). In evaluating these factors – factors, again, proposed by Mumford's own expert – the district court correctly found that "the Say factors unanimously point toward the conclusion that the cumulative effect of transfers from Hearne was to reduce and impede desegregation there." 2005 WL 1868844, at *39. In criticizing the district court's qualitative analysis and its reliance on a variety of factors in conducting that analysis, Mumford utterly ignores that fact that the district court relied on the factors suggested *by Mumford's own expert*, Dr. Say. Mumford offers no argument that the district court should not have relied on the methodology of Mumford's expert and this Court should credit the district court's legitimate mode of analysis.

The district court heard and credited the testimony of three different Hearne school officials who testified that Hearne is perceived as "basically a black school district." *Id.* at *32. These witnesses further testified that the continued loss of white students who transfer to other districts has reinforced this perception of the school district. *Ibid.* The district court found that this perception contributed to the development of unjustified negative stereotypes about Hearne, such as that Hearne had safety problems. *Id.* at *32-*33. The district court further found that the community's perception of Hearne as a black school district, combined with the resulting negative stereotyping, has "affected parents' school choices, and the exodus of students, particularly white students, from a small overall white student population is making it much harder for Hearne to retain any remaining white students." *Id.* at *33. The district court followed this Court's instructions, and its conclusions may not be disturbed unless clearly erroneous.

In evaluating the remaining "Say factors," the district court found that the "transfers and Hearne's desegregation history are tightly linked," *Texas*, 2005 WL 1868844, at *38, and that transfers from Hearne to Mumford have hurt Hearne academically, financially, and socially, *id.* at *33-*34. Moreover, the district court found that the "transfers impair Hearne's ability to remedy its prior constitutional invalidity and otherwise fulfill its desegregation obligations." *Id.* at *38. Finally, Mumford's record of bad faith strongly supports the district court's conclusion. As the court found:

> The evidence undisputably establishes that, despite its acceptance of student transfers, Mumford failed to report any such transfers to TEA until 1998; Mumford was dishonest to TEA in 1998, reporting that Mumford had no transfers when it had at least 143; in 2000, it disingenuously reported to TEA that it had only 200 transfers when it had at least 348; it fraudulently reported to TEA regarding whether its transfers qualified for hardship exceptions to No. 5281; it steered parents towards claiming hardship exceptions when Mumford officials knew that the transfers did not qualify for such exceptions; it facilitated transfers from Hearne by sending all five of Mumford's buses into Hearne to transport the transfers to Mumford; it advertised the opportunity to transfer to Mumford in the Hearne newspaper; it sent notices to Mumford parents containing information for new transfers to Mumford and expected those parents to spread the word to other parents; it defied TEA directives to stop accepting new transfers because of their effects on Hearne; and it persistently tried to evade the requirements of No. 5281.

Id. at *38.

The district court's findings of fact are fully supported by the evidence, and are not clearly erroneous. Moreover, this Court has held that "[a] trial judge's insight into local conditions is to be accorded substantial deference." *Valley* v. *Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1226 (5th Cir. 1983); see also *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1441 (5th Cir. 1983) ("From the beginning, appellate courts considering school-desegregation cases have relied heavily on their counterparts at the district level who enjoy far greater familiarity with local conditions and needs."). Indeed, TEA makes only a meager attempt (TEA Br. 51-54) to convince this Court that the district court erred in finding that Hearne is perceived in the community as a black school district. Rather than attempting to undermine the evidence on which the district court relied, TEA merely states and restates that transfers from Hearne to Mumford comprised white,

black, and Hispanic students. But the diversity of transfers from Hearne to Mumford does not undermine the district court's factual findings either about the numerical effect of the transfers on the racial profile of Hearne's student population, or about the qualitative effect those transfers had on desegregation in Hearne. By focusing only on the fact that the demographics of departing students was not uniform, TEA attempts to distract this Court's focus from the appropriate inquiry in this case: whether the student population remaining in Hearne suffered a set-back in desegregation.

Moreover, Mumford's pervasive reliance on this Court's decision in the *United States* v. *Texas* appeal concerning the annexation of the Forest Springs subdivision by Livingston ISD from Goodrich ISD to support its argument that Hearne-to-Mumford transfers have not reduced desegregation in Hearne fails to acknowledge that, in that very opinion, this Court drew a bright line between annexation cases and interdistrict transfer cases. In criticizing the district court for "import[ing] the 1% transfer standard into the boundary change portion of the decree," this Court wisely noted that:

> [C]ommon sense suggests why, even if a 1% rule was justifiable for student transfers, the decree distinguished between student transfers and boundary changes. Student transfers are much easier for school districts to implement and would have afforded a convenient subterfuge for parties bent on undermining desegregation efforts. Boundary changes, on the other hand, are permanent, and they irrevocably affect district population, tax base, size and allocation of resources.

158 F.3d 299, 307 (5th Cir. 1998). By simply lifting language from that decision out of the annexation context and insisting that it also controls this dispute about transfers, Mumford ignores the very lines drawn by this Court in that decision.

Finally, Mumford's contention (Mum. Br. 83-84) that the district court's conclusion about the resegregating effect of white transfers from Hearne to Mumford was incorrect because that effect was caused by private choice misses the mark as well. It has been clear in this case from the district court's very first opinion that the segregating pattern of interdistrict student transfers never resulted from the State or its subdivisions forcing parents to transfer their children to one-race schools in neighboring districts. Rather, such transfer decisions have always been made by private individuals; the district court correctly found a constitutional violation in the State's facilitation of these private transfer decisions that had the effect of perpetuating the past *de jure* segregation of white and black students. Moreover, it is simply not true that there was no governmental action involved in creating the resegregating effect at work in Hearne. As the district court found, Mumford's intentional interference with TEA's implementation of Order 5281 has contributed to the current reduction in desegregation in Hearne.

Because the district court's findings of fact regarding the effect of transfers on Hearne were supported by the evidence and "plausible in light of the record viewed in its entirety," those findings are not clearly erroneous and this Court may not disturb them even if it believes that it would have weighed the evidence

differently had it been sitting in the district court's place. *Anderson*, 470 U.S. at 573-574.

2. Whether Any Entity Had A Segregative Purpose Is Irrelevant In Determining Whether TEA Violated Order 5281

TEA and Mumford attempt to cloud the clear legal principals at stake in this case by arguing that TEA cannot be found to have violated Order 5281, and Mumford cannot be found to have interfered with the enforcement of Order 5281, unless the district court finds that they acted with an intent to discriminate on the basis of race. But the respective intentions of TEA and Mumford are irrelevant here. The district court did not find that TEA or Mumford violated the Fourteenth Amendment. Rather, the court found that TEA violated the clear mandate of the court's injunction directing TEA not to approve or fund interdistrict transfers that have the cumulative effect of impeding or reducing desegregation in one of the districts. And TEA admits that it did in fact approve and fund such transfers. See TEA Br. 37 (discussing transfers TEA determined to have been improper under Order 5281). This Court has held that, in situations where, as here, a valid desegregation order has been entered in order to remedy past de jure segregation, "cases requiring proof of intentional discrimination * * * simply do not apply." *Davis*, 721 F.2d at 1436.

Nor must the plaintiffs demonstrate or the district court find that the resegregative effect of the transfers at issue in this case are identifiable vestiges of past de jure segregation. This Court and the Supreme Court have left no doubt that,

where a desegregation order remains in place, the burden is on the school district – or in this case, TEA – to demonstrate that any current racial imbalance "'is not traceable, in a proximate way,' to the prior constitutional violation." *Hull*, 1 F.3d at 1454 (quoting *Freeman* v. *Pitts*, 503 U.S. 467 (1992)); see also *Davis*, 721 F.2d at 1434. Neither Mumford nor TEA made a genuine attempt to meet this burden before the district court and may not now fault the plaintiffs for failing to take on what is undeniably the defendants' burden. Nor may the defendants fault the district court for failing to acquire evidence on its own as to whether the resegregating effect of the transfers is a vestige of prior de jure segregation. In fact, although the plaintiffs were under no obligation to demonstrate such a link, they did present evidence that the transfers out of Hearne began in response to Hearne's decision to halt ability grouping in its elementary grades because such grouping had the effect of segregating students on the basis of race, and the district court credited the testimony in support of those contentions. See 2005 WL 1868844, at *6-*7. Indeed, the court ultimately found as a matter of fact that "[t]he transfers and Hearne's desegregation history are tightly linked." *Id.* at *38.

3. There Is No Question That TEA Approved And Funded The Transfers Found By The District Court To Reduce Or Impede Desegregation In Hearne

As the district court noted, *id.* at *36, in addition to determining whether the transfers in question reduce or impede desegregation in Hearne, the court must also determine whether TEA is funding such transfers before it may conclude that TEA has violated Order 5281. There is no dispute that TEA has funded the transfers that

the district court found to impede desegregation in Hearne or that TEA continues to fund some of those transfers. As the district court found, "TEA has steadily funded transfers to Mumford which the agency itself admitted were violations of No. 5281." 2005 WL 1868844 , at *40. TEA admits that, from at least 1998 to 2002, it provided funding to Mumford for transfers from Hearne that had the cumulative effect of reducing or impeding desegregation in Hearne. See TEA Br. 22-26. In other words, it admits that it acted in violation of Order 5281. Moreover, TEA admits that it continues to fund some of the transfer students it has determined to have been "improper[ly]" allowed and funded during those years and that it will continue to fund new transfers from Hearne to Mumford that reduce or impede desegregation in Hearne so long as those transfers are siblings of students who have already improperly transferred and been funded. See TEA Br. 16-22, 37.

No further showing is necessary to support the district court's finding that TEA violated Order 5281 by approving and funding interdistrict transfers from Hearne to Mumford that had the cumulative effect of reducing or impeding desegregation in Hearne.

B. The District Court's Chosen Remedy For TEA's Violation Of Order 5281 Was Not An Abuse Of Discretion

The bulk of TEA's brief challenges the district court's choice of remedy for the identified violation of Order 5281. A district court has broad powers in fashioning desegregation remedies, and such remedies may be reviewed only under an abuse of discretion standard. See *Valley*, 646 F.2d at 938 ("The fashioning of

relief in a school desegregation case is an exercise of the district court's discretion in creating an equitable remedy as a response to the denial of constitutional rights. Where local school officials have failed to remedy past wrongs, the power of the district court is broad."); see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

TEA advances a novel legal theory, unsupported by any decision of this Court – or of any court, for that matter – claiming that it should be accorded deference in determining whether and how to comply with the district court's unambiguous injunction. To bolster this erroneous claim, TEA relies on decisions discussing the original formulation of desegregation orders and instructing that district courts should balance individual and collective interests and should consider the interests of state and local entities in managing their own educational systems. See TEA Br. 35-36 (citing *Milliken* v. *Bradley*, 418 U.S. 717 (1974), and *Missouri* v. *Jenkins*, 515 U.S. 70 (1995)). But those cases do not speak to the remedy a district court may adopt in the face of a bald violation of a longstanding valid desegregation injunction. That is exactly what the district court was faced with in the instant case: TEA simply did not comply with its clear obligations under Order 5281.

As this Court found in another case dealing with resegregating interdistrict transfers: "A finding that a school district has accepted transfer students in

violation of a *Singleton* clause[9] customarily supports injunctive relief forcing an end to such transfers and compliance with the terms of the desegregation order." *Lee*, 639 F.2d at 1261. This holding is consistent with long-standing principles upholding "the inherent discretion possessed by a court to correct willful violations of its solemnly passed orders." *Dow Chemical Co.* v. *Chemical Cleaning, Inc.*, 434 F.2d 1212, 1215 (5th Cir. 1970). Indeed, this Court has explicitly stated that the same broad equitable powers a district court has in fashioning a remedy for past unconstitutional segregation extend to the district court's ability to enforce the desegregation orders it has entered. *Lawrence County Sch. Dist.*, 799 F.2d at 1044.

Although desegregation orders are not intended to operate in perpetuity, entities subject to such an order must abide by the requirements of the injunction until that injunction is modified or terminated. See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 439-440 (1976) ("[T]hose who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to the order, until it is modified or reversed."). This principle is in keeping with longstanding Supreme Court dictates that even a party subject to an invalid injunction must obey the injunction while the party seeks modification or dissolution of the injunction. See *Walker* v. *City of*

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[9] Transfer provisions such as the one in Order 5281 are based on this Court's decision in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir. 1969), and are therefore referred to as "*Singleton* clauses."

Birmingham, 388 U.S. 307, 317 (1967); see also *GTE Sylvania, Inc.* v. *Consumers Union of the U.S., Inc.*, 445 U.S. 375, 386 (1980).

The transfer provision of Order 5281 remains a valid and necessary injunction. If TEA disagrees with this provision, it may move the district court to modify or dissolve the injunction. In fact, however, in the district court, TEA *opposed* Mumford's motion (USCA5 at 1478-1480) to modify Order 5281 by eliminating the transfer provision. See USCA5 at 4539-4542. Because TEA not only failed to seek a modification of Order 5281 from the district court, but also has opposed Mumford's motion for such a modification, it cannot be heard to complain on appeal that the injunction is no longer necessary or that TEA should be permitted to essentially modify the requirements of the injunction without any interference from the district court.[10]

TEA argues that it should be permitted to continue to fund transfer students who it acknowledges violate the unambiguous mandate of Order 5281 but are nevertheless permitted and paid for pursuant to TEA's "baseline," "grandfather," and "sibling" policies. This argument has no basis in law or logic, and was specifically rejected by the district court. 2005 WL 1868844, at *39-*40. TEA claims that, in ordering TEA to cease providing funding for transfers from Hearne

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[10] Mumford's argument (Mum. Br. 91-93) that the district court erred in refusing to consider evidence that TEA had contemplated asking the court to modify the student transfer provision of Order 5281 is specious. TEA never sought any modification from the district court; that it may have contemplated doing so is not dispositive of anything in this case.

to Mumford that reduce desegregation in Hearne, the district court improperly imposed "retrospective sanctions." See TEA Br. 37. But the district court's order is entirely prospective. The undisputed evidence demonstrates that all interdistrict transfers in Texas must be approved anew every year and that TEA calculates anew every year the amount of funding it owes to each district on a per-student basis. See 2005 WL 1868844, at *7; Tex. Educ. Code Ann. § 25.036.[11] The district court's order preventing future resegregative transfers from Hearne to Mumford or the funding of such transfers is forward-looking in every respect. The fact that, as TEA asserts (TEA Br. 37), parents of transferred students have relied on assurances by Mumford that the transfers in question were valid does not provide a basis for allowing TEA to determine whether and how it should comply with the district court's injunction. As discussed *infra* at pp. 58-59, Mumford intentionally engaged in fraudulent behavior in order to circumvent the mandate of Order 5281. The students of Hearne ISD should not be made to continue to suffer the resegregative effects of Mumford's improper behavior and TEA's facilitation of that behavior. The fact that the current system is administratively convenient for TEA (see TEA Br. 18-22) and for Mumford is of no consequence. As this Court has made clear,

[11] Because the current school year is already well underway already, the United States does not advocate mid-year changes in the enrollment of the respective school districts in the event this Court affirms the district court's opinion and injunction.

"administrative inconvenience cannot serve as a roadblock to assuring compliance with the mandate of *Singleton*." *Eufaula*, 573 F.2d at 236.

IV

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S INJUNCTION AGAINST MUMFORD INDEPENDENT SCHOOL DISTRICT

The district court similarly did not abuse its discretion in enjoining Mumford from accepting any white transfers from Hearne, because the district court correctly found that (1) such transfers were reducing or impeding desegregation in Hearne, and (2) Mumford had interfered with the district court's enforcement of Order 5281 and had acted in concert with TEA in disobeying Order 5281. Mumford erroneously claims that the district court exceeded its equitable powers in enjoining it from accepting any transfers from Hearne that reduce or impede desegregation in Hearne.

A. The District Court Correctly Concluded That Mumford Has Engaged In A Pattern Of Intentionally Interfering With The Operation Of Order 5281

The district court's intent in fashioning Order 5281 is unambiguous: the order was intended to dismantle the dual school system that had been maintained throughout Texas in accordance with the Texas Constitution and had not been dismantled in the wake of *Brown*. See 321 F. Supp. at 1047-1055. The court recognized in 1970 that TEA had been complicit in a system of interdistrict student transfers that "had the effect of transferring students between administrative units so as to create and perpetuate all-black districts" in violation of the Fourteenth

Amendment. *Id.* at 1048; see also *id.* at 1050-1051, 1055. Pursuant to its broad powers in equity, see *id.* at 1055, the district court entered a statewide order against TEA preventing it from approving and funding interdistrict transfers that impeded desegregation, *id.* at 1058. The court implemented this statewide order against TEA not simply to enjoin TEA's prior unlawful behavior, however, but as a means of achieving desegregated school districts throughout the State of Texas. *Id.* at 1057-1058.

In order to comply with its obligations under Order 5281, TEA has implemented and updated a system of regulations. The foundation of these regulations is a requirement that Texas school districts accurately report to TEA information about the number of interdistrict transfers they accept every year, as well as the race and home district of those transfers, and the type of hardship exemption, if any, invoked by the transfers. See 2005 WL 1868844, at *7. As the district court found and no party meaningfully disputes, Mumford engaged in an extensive pattern of intentionally evading these regulations through fraudulent reporting of transfer information. Specifically, prior to 1998, Mumford failed to file any reports about its interdistrict transfers although it had been accepting growing numbers of such transfers for years. *Id.* at *13. In 1998, after TEA was made aware of Mumford's failure to file any transfer reports, Mumford erroneously reported having no transfers, although the district's superintendent stated under oath that he knew they did have transfers. After TEA officials called Mumford officials to inquire about Mumford's erroneous report, Mumford filed a new report for 1998

claiming that it had 143 transfer students, 56 of whom qualified for hardship exemptions. TEA then instructed Mumford not to accept any more transfers from Hearne who did not qualify for a hardship exemption, an instruction that was followed almost immediately by Mumford's filing another fraudulent transfer report, this time claiming that 63 of the 86 transfers who had not qualified for a hardship exemption the year before now qualified. *Ibid.* Mumford's pattern of fraudulently reporting the number of transfers it accepted as well as the number of those transfers who legitimately qualified for a hardship exemption continued despite specific directives from TEA both that it could not accept additional transfers from Hearne and that it was misusing the hardship exemptions either entirely with respect to some categories or in large part with respect to others. *Id.* at *13-*16. Thus, the record clearly demonstrated that Mumford intentionally evaded the application of Order 5281 to its transfer students. Given these circumstances, the district court was more than justified in concluding that, "[t]hrough its pattern of fraudulent conduct since first accepting transfers in the 1990s, Mumford has demonstrated a consistent and persistent willingness to circumvent the requirements of No. 5281 whenever possible." *Id.* at *41.

Moreover, Mumford is simply incorrect in asserting (Mum. Br. 62-65) that the district court was required to find discriminatory intent on the part of Mumford before enjoining its behavior. For the reasons discussed *supra*, a court need not find that actions interfering with a valid court desegregation order are intended to be racially discriminatory. It is sufficient that Mumford intentionally interfered with

the operation of the order; its motivations for doing so are irrelevant. *Davis* v. *East Baton Rouge Parish Sch. Bd.*, 721 F.2d 1425, 1436 (5th Cir. 1983). Similarly, Mumford is off base in asserting that the plaintiffs were required to demonstrate that the current racial makeup of Hearne is traceable to past de jure segregation. It is the defendants' burden to demonstrate that no such vestige exists. *Hull* v. *Quitman County Bd. of Educ.*, 1 F.3d 1450, 1454 (5th Cir. 1993). Mumford did not make a meaningful attempt to do so.

Furthermore, although Mumford filed a pro forma motion to modify Order 5281 by terminating the order's transfer provision, USCA5 at 1478-1480 – a motion TEA opposed and the district court rejected because Mumford failed to provide "any evidence" that no vestige of discrimination remained in the State of Texas, USCA5 at 4539-4542 – it failed to move the district court to release Mumford and Hearne from the commands of the injunction by demonstrating that the districts have achieved unitary status. See *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992) (a district court overseeing a school desegregation order may relinquish incremental control). Mumford now criticizes the district court (Mum. Br. 55-56, 62) for denying Mumford's motion on the basis that Mumford had failed to show that the vestiges of TEA's prior discrimination had been eliminated statewide. But Mumford's motion to modify Order 5281 sought to terminate the interdistrict transfer provision's application *to the entire State*. USCA5 at 1478-1480. Mumford never asked the district court to relinquish oversight over interdistrict transfers between Hearne and Mumford and cannot now be heard to complain that

the district court should have done so on its own absent the presentation of any evidence about the existence or elimination of vestiges of discrimination in either district.[12]

B. The District Court Acted Well Within Its Discretion In Enjoining Mumford From Further Interference With The Operation Of Order 5281

There is no question that, under this Court's prior decisions in desegregation cases, the district court acted well within its inherent equitable powers in issuing an injunction against Mumford. This Court carefully considered whether and under what circumstances a district court may enjoin non-parties[13] from interference with a school desegregation order over which a district court retains jurisdiction in *United States* v. *Hall*, 472 F.2d 261 (5th Cir. 1972). In *Hall*, this Court upheld a finding of criminal contempt against a black student who disrupted or intended to disrupt the operation of a school newly desegregated by court order. In response to previous disruptions, the district court issued an *ex parte* injunction prohibiting students from interfering with the operation of the newly desegregated schools. The district court served Mr. Hall with a copy of the order, he violated the

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[12] Mumford claims (Mum. Br. 58-59) that Hearne should not be permitted to assert that it has not achieved unitary status because it filed various pleadings in its separate desegregation action asserting that it had achieved unitary status. It should go without saying, however, that the fact that a school district under a court-ordered desegregation decree claims to have achieved unitary status does not make it so.

[13] Although the district court joined Mumford as a defendant for the purposes of resolving the instant controversy, Mumford is not a party to Order 5281.

injunction four days later, and was found in contempt of court. *Id.* at 262-264. In upholding the contempt citation and accompanying sentence, this Court emphasized that "[c]ourts of equity have inherent jurisdiction to preserve their ability to render judgment in a case such as this." *Id.* at 265. This Court found that allowing non-parties to interfere with the implementation of the court's desegregation order would imperil both the effect of the order already entered and the court's ability to enter binding desegregation orders in the future. *Ibid.* Thus, this Court found, a district court overseeing a school desegregation suit is empowered to enter injunctions against non-parties who are interfering or threatening to interfere with implementation of the court's desegregation order. See *id.* at 265-268 ("We hold, then, that the district court had the inherent power to protect its ability to render a binding judgment between the original parties * * * by issuing an interim ex parte order against an undefinable class of persons."). Moreover, this Court specifically considered the special circumstances present in school desegregation cases, noting that "court orders in school cases, affecting as they do large numbers of people, necessarily depend on the cooperation of the entire community for their implementation." *Id.* at 266.

The injunction against Mumford in the instant case falls safely within the permissible zone of non-party injunctions laid out by this Court in *Hall*. Indeed, unlike in *Hall*, the injunction against Mumford was not issued *ex parte*,[14] as

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[14] Amicus STAR-Texas erroneously relies (STAR Br. 8) on *United States* v. *Texas*,

(continued...)

Mumford was joined as a defendant in this controversy and provided with a full opportunity to defend its actions at the trial before the district court.[15] Nor need this Court consider whether contempt citations for failure to adhere to an injunction from the district court are justified. Rather, this case presents a straightforward situation in which Mumford intentionally interfered with the implementation of Order 5281 through fraud and concealment.

Indeed, the district court previously entered an analogous injunction in this very case. In 1972, the district court entered an injunction in the instant action against a state court that was interfering with the interdistrict transfer provisions of the court's injunction. *United States* v. *Texas*, 356 F. Supp. 469 (E.D. Tex. 1972). There, the district court relied on the power conferred on federal courts by the All

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[14](...continued)
680 F.2d 356, 372-374 (5th Cir. 1982), for proposition that "TEA has no lawful basis for applying the student transfer provisions of the Order to non-party districts such as Mumford without first showing that the transfers it was seeking to regulate were related to the old dual system and then giving the affected districts an opportunity to be heard." This Court held in that case that the district court erred in imposing a desegregation remedy on a school district without first hearing from the school district. No such *ex parte* order was imposed in this case.

[15] Because the injunction was issued against Mumford after a trial at which Mumford was a full participant, the Federal Circuit's decision in *Additive Controls & Measurement Systems* v. *Flowdata, Inc.*, 96 F.3d 1390 (Fed. Cir. 1996) – upon which Mumford relies (Mum. Br. 47-49) as the sole basis for its argument that the district court could not have relied on the All Writs Act – is inapposite. The conclusion of the court in that case was based entirely on the fact that the enjoined party had not had an opportunity to defend itself before the district court. That is certainly not the case here.

Writs Act, 28 U.S.C. 1651, which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." In enjoining the state court from interference with the operation of the interdistrict transfer provisions of Order 5281, the district court noted that it was "concerned only with protecting and effectuating its judgment." 356 F. Supp. at 472.

The district court was justified in enjoining state court interference with the injunction in 1972, and was justified in enjoining Mumford's interference with the injunction in 2005. The Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172 (1977). That power, the Court noted, extends to persons who are not parties to the original action but who "are in a position to frustrate the implementation of a court order or the proper administration of justice." *Id.* at 174. As the evidence before the district court demonstrated, this is such a case. Mumford has repeatedly engaged in actions intended to circumvent the requirements of Order 5281, thereby frustrating achievement of its objectives. This Court has held that a district court "has broad power under the All Writs Act, 28 U.S.C. 1651, to enjoin third parties * * * from interfering with its desegregation orders," *Valley* v. *Rapides Parish School Board*, 646 F.2d 925, 943 (5th Cir. 1981), and that is exactly what the district court did in this case.

The authority to enjoin third parties from interfering with injunctions is also inherent in Rule 65(d) of the Federal Rules of Civil Procedure, which provides that validly issued injunctions are binding on the parties to the action as well as "those persons in active concert or participation with them who receive actual notice of the order." Accord 11A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.2d* § 2956 (2d ed. 1995). The district court found, and no party meaningfully disputes,[16] that Mumford and TEA acted in concert in determining which of the transfers from Hearne to Mumford to allow as "baseline," "grandfather," or "sibling" transfers in spite of the fact that both parties knew that such transfers violated Order 5281. See 2005 WL 1868844, at *40-*42.

C. The District Court Did Not Abuse Its Discretion In Fashioning Its Injunction Against Mumford

Mumford challenges the terms of the district court's injunction against it, asserting (Mum. Br. 89-91) that the court exceeded its broad equitable authority in prohibiting Mumford from accepting any white transfers from Hearne that do not qualify for a legitimate hardship exemption, see USCA5 at 7017-7022 (order denying stay and clarifying scope of injunction), and that the injunction is "void for

[16] Although Mumford asserts in its brief (Mum. Br. 45-46) both that TEA decided on its own to continue to fund "baseline" students and that the process of determining which of Mumford's students qualified as "baseline" students was not entirely harmonious, they do not deny that Mumford and TEA worked together – however contentiously – to come to a final number.

vagueness." This Court reviews the terms of the district court's injunction for an abuse of discretion. *Valley*, 646 F.2d at 938.

The purpose of Order 5281 is to prevent interdistrict transfers that have the cumulative effect of reducing or impeding desegregation in the sending or receiving school district. As discussed above, the district court correctly concluded that transfers from Hearne to Mumford were reducing or impeding desegregation in Hearne, in violation of Order 5281, by making Hearne an identifiably black school district. In response to this violation, the district court ordered Mumford to cease accepting the students whose transfers were creating this problem – namely, white students from Hearne. Limiting the injunction's prohibition to white transfers was by no means an abuse of discretion, but was in fact exactly tailored to remedying the identified violation.

Mumford's primary objection (Mum. Br. 89-91) to the district court's injunction is that it is "void for vagueness" because it prohibits Mumford from accepting any transfers that reduce or impeded desegregation in Hearne, and Mumford simply cannot tell which transfers have such an effect. But in its order denying Mumford's motion for a stay, and in response to Hearne's request that the district court clarify its order, the district court clarified that "Mumford is enjoined from accepting any white transfers from Hearne that do not qualify for any legitimate hardship exceptions." USCA5 at 7019. Mumford cannot maintain its voidness argument by intentionally turning a blind eye to the district court's unambiguous clarification of its injunction.

Given Mumford's well-established history of defying and circumventing TEA's system of monitoring interdistrict transfers, the district court acted well within its discretion in prohibiting all white transfers from Hearne. See 2005 WL 1868844, at *40 (noting that "Mumford's persistent fraudulent conduct made it impossible" for TEA to effectively monitor transfers to Mumford). This Court has held that "[t]he tests of practicability and good faith should inform, as they did here, a district court's exercise of its equitable powers where a desegregation decree has been in effect for some years." *Hull*, 1 F.3d at 1454. Here, the district court was justified in concluding that Mumford's history of fraud and recalcitrance would make a more nuanced prohibition impractical and likely ineffectual, because TEA would be unable to measure the effect of the transfers on desegregation in a meaningful way.[17] Moreover, Mumford has fallen far short of demonstrating a good faith effort to comply with TEA's regulations; indeed, Mumford has gone to the other end of the spectrum, demonstrating extreme bad faith in its dishonesty and disobedience. The Supreme Court has made clear that a district court must consider a school district's good faith, or lack thereof, in determining the level of

[17] The district court also determined that the school transition of the white Hearne students who had previously transferred to Mumford would be practical and smooth. See USCA5 at 7017-7022.

supervision necessary to ensure that a desegregation decree is effective. See *Freeman*, 503 U.S. at 491.[18]

CONCLUSION

This Court should affirm the district court's determination and injunction.

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[18] Furthermore, Mumford's reliance (Mum. Br. 65-69) on *Milliken* v. *Bradley*, 418 U.S. 717 (1974), is entirely misplaced. See also STAR Br. 6-7, 9 The district court in the instant dispute did not impose an "interdistrict" remedy on Mumford in order to repair the unconstitutional segregative actions of Hearne, as was the case in *Milliken*. Rather, the district court enforced a valid *statewide* desegregation order against a school district who the court found had intentionally interfered with the implementation of the statewide order.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with an electronic version of the brief on a diskette, were served via overnight mail on the following counsel of record on this 13th day of October, 2005.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned cannot certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 17,610 words. This is 3,610 more words than the 14,000 words permitted by the rules. Accompanying this Brief is a motion to file an overlength brief not to exceed 18,000 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

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