Secession Reversed: Eleventh Circuit Strikes Down *Sua Sponte* Court Order for the Gardendale School Board's Secession

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An Eleventh Circuit reversal in a decades old school desegregation case has resulted in the city of Gardendale, Alabama being prevented from forming its own school system due to a finding that racial motives were involved in an attempt to separate from the Jefferson County school system.[1]

In 1965, Linda Stout's father sued the Jefferson County Board of Education on her behalf for operating a segregated school system eleven years after the U.S. Supreme Court's decision in *Brown v. Board of Education.*[2] The district court ordered the school system to create a plan for desegregation starting in the 1965–66 school year, and entered a comprehensive desegregation order in 1970 after slow, half-hearted desegregation efforts.[3] After four predominantly white cities withdrew from the school system and formed their own school districts, the Fifth Circuit (being the predecessor to the Eleventh Circuit) declared that "where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not . . . recognize their creation."[4] In 1972, the Supreme Court ruled that "a new school district may not be created where its effect would be to impede the process of dismantling a dual system" and that "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[5]

In 2012, residents of Gardendale, a predominantly white community in Jefferson County, started a movement to create a separate school system,

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[1] Stout v. Jefferson Cty. Bd. of Educ. (*Stout*), 882 F.3d 988 (2018); Kent Faulk, *Court rules Gardendale can't form school system, finds racial motives; city to appeal*, AL.COM (updated Feb. 13, 2018), http://www.al.com/news/birmingham/index.ssf/2018/02/federal_appeals_court_rules_ga.html.

[2] *Stout*, 882 F.3d at 992.

[3] *Id.*

[4] *Id.* at 993 (quoting Stout v. Jefferson Cty. Bd. Of Educ. (*Stout I*), 448 F. 2d 403, 404 (5th Cir. 1971)).

[5] *Id.* (quoting Wright v. Council of the City of Emporia, 407 U.S. 451, 462, 470 (1972)).

and leaders of this movement used social media "to discuss the changing racial demographics of their schools as they campaigned . . . ."[6] These members maintained a Facebook page titled "Gardendale City Schools" and later became members of the Gardendale Board or an advisory board.[7] On this page, a post by one of these leaders stated: "A look around at our community sporting events, our churches are great snapshots of our community. A look into our schools, and you'll see something totally different."[8] Another leader listed among benefits of a new system "better control over the geographic composition of the student body [and] protection against the actions of other jurisdictions that might not be in our best interests."[9] Another post stated that "non-resident students are increasing at a [*sic*] alarming rate in our schools," and that "[t]hey consume the resources of our schools, our teachers and our resident students, then go home" without "contribut[ing] financially."[10] Secession supporters "frequently derided" Center Point, a predominantly black community that was previously predominantly white, and stated "'we don't want to become what' Center Point has become."[11] A flier was circulated depicting a white elementary school student, listing "several well-integrated or predominantly black cities that had not formed municipal systems followed by a list of predominantly white cities that had," and asking, "Which path will Gardendale choose?"[12]

In 2015, the Gardendale Board of Education moved the district court to permit it to create a new system.[13] The district court found that the Board acted with a discriminatory purpose to exclude black children from the system and, alternatively, that the secession of Gardendale would impede the efforts of the Jefferson County Board to fulfill its desegregation obligations.[14] However, the court permitted them to succeed by devising a partial secession that neither party requested,[15] listing four "practical considerations" as reasoning for the decision.[16]

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[6] *Id.* at 991.
[7] *Stout*, 882 F.3d at 995.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 996.
[11] *Id.*
[12] *Id.* at 997–98.
[13] *Stout*, 882 F.3d at 991–92.
[14] *Id*. at 992.
[15] *Id.*
[16] *Id.* at 1003. The "practical considerations" were that (1) families and students might blame North Smithfield students for the failure of the secession, (2) permitting secession would allow for better supervision of the Gardendale zone, (3) the court should honor parents' wishes to control their children's education, and (4) the court could consider the interests of

The Eleventh Circuit, reviewing the finding of a racially discriminatory purpose for clear error,[17] found that the court did not err in finding that the Board acted with a racially discriminatory purpose.[18] The Gardendale Board argued that the court erred by imputing the intent of private individuals to state actors, that the statements were irrelevant, and that the statements were unauthenticated.[19] The Eleventh Circuit, stating that constituent statements and conduct can be relevant in determining the intent of public officials for alleged violations of the Fourteenth Amendment, found that the district court did not find that statements of private individuals constituted state action, but that the district court understood that the statements of the leaders of the movement "translate[d] their grassroots effort into official action" by becoming members of the Board and advisory board.[20] Thus, their statements directly influenced the purpose of the Gardendale Board.[21] The Eleventh Circuit further found the statement relevant under Federal Rule of Evidence 401 and authenticated under Federal Rule of Evidence 901.[22]

The Eleventh Circuit also found that the district court did not err when it found that Gardendale's secession "would have a substantial adverse effect on the desegregation efforts of the Jefferson County Board."[23] The district court had three rationales for the finding: the Gardendale system would inherit Gardendale High, displaced students would attend less racially diverse schools, and the movement communicated "messages of inferiority" to black students.[24]

The circuit court could not fault the finding that the loss of Gardendale High would impede desegregation efforts because the school "housed a sophisticated career technical program strategically located to attract students from across the County."[25] Such a program is labeled by the Supreme Court to "have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary

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other students (like students from Mount Olive) who would be affected by the secession. *Id.* at 1003–04.

[17] *Id.* at 1006.

[18] *Stout*, 882 F.3d at 1009.

[19] *Id.* at 1008.

[20] *Id.* at 1007–08.

[21] *Id.* at 1008.

[22] *Id.*

[23] *Stout*, 882 F.3d at 1011.

[24] *Id.*

[25] *Id.*

basis, without requiring extensive busing and redrawing of district boundary lines."[26] Thus, the circuit court found that the secession would hinder the efforts to desegregate Jefferson County by forcing them to forfeit the program.[27]

The circuit court also found that the district court did not err when it found that the secession would result in fewer desegregated schools in Jefferson County, as the secession would force students at Bragg Middle School and Gardendale High School to attend a school that would be 99.59 percent white and another school that would be 85.33 percent black.[28] The circuit court also found that the third reason, that permitting the secession would send messages of inferiority to black schoolchildren, was supported by the law and the record.[29]

Finally, the circuit court found that the district court did err by *sua sponte* amending the 1971 order to permit the partial secession of Gardendale because it "misapplied the law governing both splinter districts and race discrimination" while devising a remedy "by weighing legally irrelevant–and sometimes legally prohibited–factors."[30] The circuit court stated that when a splinter district fails to propose and defend a secession plan that will not impede desegregation efforts of the school district subject to an ongoing desegregation order, "the district court may not . . . recognize [its] creation."[31] Thus, when Gardendale failed to satisfy this burden, the district court should have denied the motion.[32]

The Eleventh Circuit further noted that if this litigation, which has lasted more than half a century, is resolved, or if the Gardendale Board, for permissible purposes, satisfies its burden to develop a plan that does not impede the desegregation efforts of the Jefferson County Board, that the

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[26] *Id.* (quoting Missouri v. Jenkins, 515 U.S. 70, 92 (1995)).
[27] *Id.*
[28] *Id.* at 1012.
[29] *Stout*, 882 F.3d at 1012.
[30] *Id.* at 1013. These factors included the possibility that Jefferson County might or might not obtain a determination of unitary status, whether social tension caused by finding a constitutional violation would warrant allowing the violation to succeed in part, and suggesting the benign motivations of some Gardendale residents could cure discriminatory motivation of the Gardendale Board while giving some of the concerns of Gardendale parents special weight because of race. *Id.* at 1015–16.
[31] *Stout*, 882 F.3d at 1013 (quoting *Stout I*, 448 F.2d at 404 n.2).
[32] *Id*.

district court may not prohibit the secession.[33] Until then, though the door is open,[34] Gardendale must remain part of the Jefferson County School System.

[33] *Id.* at 1016.
[34] Kent Faulk, *Court rules Gardendale can't form school system, finds racial motives; city to appeal*, AL.COM (updated Feb. 13, 2018), http://www.al.com/news/birmingham/index.ssf/2018/02/federal_appeals_court_rules_ga.html.