Nos. 19-1340, 19-1342, 19-1348, 19-1349

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, *et al.*,

Plaintiff-Appellee

v.

JUNCTION CITY SCHOOL DISTRICT, *et al.*,

Defendant-Appellees

v.

ARKANSAS DEPARTMENT OF EDUCATION, *et al.*,

Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

UNITED STATES' RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING

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On May 17, 2021, after granting the petition for panel rehearing, this Court directed the parties to file simultaneous supplemental briefs addressing three questions, set out below. The United States submits this supplemental brief to address those questions.

BACKGROUND

The district court issued an order in 2019 exempting the Junction City School District (JCSD or Junction City) from compliance with a 2017 Arkansas school choice law. Add.1.[1] It did so by granting a Rule 60(b)(5) modification to a 1970 nonconsensual remedial order that the United States obtained against JCSD in this desegregation case. Add.3, 18. The 1970 Order enjoined JCSD from operating a dual school system, and, specifically, ordered the school district to integrate bus routes and classrooms that were segregated on the basis of race. Add.73-77. As the United States explained in its response to the State's petition for rehearing, for JCSD to obtain a modification of the 1970 Order under Rule 60(b)(5), JCSD was required to show that changes to state law impeded JCSD's ability to comply with its desegregation obligations. U.S. Br. 13-16. Because JCSD made no such showing, the United States explained that the district court abused its discretion in issuing the 2019 modification and that the panel erred in affirming it. U.S. Br. 13-16.

On March 24, 2021, this Court granted a petition for panel rehearing filed by the Arkansas Department of Education and the Arkansas State Board of Education

[1] Citations to "Add.__" refer to documents contained in the Addendum filed by the appellants; citations to "JA.__" refer to documents contained in the Joint Appendix; and citations to "U.S. Br. __" refer to the United States' Response to the Petition for Rehearing and Rehearing En Banc.

(collectively, Arkansas), vacated its previous opinion and judgment, and denied Arkansas's petition for rehearing en banc as moot. After further review, the Court requested additional briefing and directed the parties to file supplemental briefs addressing the three questions discussed in the Argument section of this brief.[2]

1. United States v. *JCSD Litigation*

JCSD is located in Union County, Arkansas, along the border with Louisiana, and operates two schools. At present, students from kindergarten to sixth grade attend Junction City Elementary School, while Junction City High School enrolls students in grades 7-12. JA.280. During the 2017-2018 school year, JCSD enrolled 673 students, 37.6% of whom were Black, 58.8% of whom were white, and 3.6% of whom were from another racial or ethnic group. JA.280 n.2.[3]

The United States sued JCSD in 1966. JA.290-297. At that time, JCSD's two schools—separated by only six city blocks—each enrolled students in grades

[2] The United States is a party only to the case involving JCSD, and as such, takes no position as to the modification of the consent decrees involving the other school districts in this consolidated appeal. The United States' answers here solely concern JCSD and the modification of the 1970 Order involving that school district.

[3] A significant number of students enrolled in JCSD live in Louisiana and attend pursuant to a 2014 agreement between JCSD and Louisiana. During the 2017-2018 school year, 180 Louisiana students (51.7% of whom are Black) attended JCSD schools. JA.281.

1-12. JA.276-277. The Rosenwald School served only Black students, and the Junction City School exclusively served white students. JA.277, 299-300. While the district court issued an order in 1966 requiring JCSD to eliminate its dual system, JCSD continued to resist full integration. JA.277-278, 305-322. By 1970, all students in grades 1-8 had been assigned to attend the Junction City Elementary School, and all students in grades 9-12 had been assigned to attend Junction City High School. JA.45, 278-279. But both schools continued to segregate students by race in classroom and teacher assignments, as well as in bus assignments, with Black bus drivers for Black students and white bus drivers for white students along overlapping routes. JA.45-46, 279. In 1970, the United States moved for further relief to address these problems. JA.42, 279.

a. The district court held an evidentiary hearing, and, in November 1970, issued an order (1970 Order) enjoining JCSD "from assigning students to, or maintaining any homeroom, classroom or other school-related activity on the basis of race, color or national origin." Add.75-76. The order directed JCSD "to take immediate steps to reassign students to homerooms and individual classes on a non-racial" basis at both schools. Add.76. The order likewise required JCSD to provide bus transportation "on a non-segregated and * * * non-discriminatory basis" and to "immediately redraw their bus routes and reassign students to the busses on a non-racial basis." Add.76. Finally, the order required JCSD to file a

report within 30 days reflecting the "racial make-up of each classroom during each period of the day and also the race of the teacher," as well as the number and race of students riding each bus, the race of each driver, and a map of all assigned bus routes. Add.76-77. The classroom assignment, bus assignment, and reporting provisions are the only specifically-enumerated obligations in the 1970 Order.

b. In 1974, the district court moved the United States' case against JCSD to its inactive docket, stating that "jurisdiction was retained and the case might be re-opened at any time by appropriate and meritorious petition." JA.57. The case remained dormant until 2018, when JCSD filed a motion seeking an order from the district court "confirming that it has a conflict with participating in all state law school choice programs due to JCSD's continuing desegregation obligations" and asking the court for either a declaratory judgment, clarification of its 1970 Order, or modification of that order. JA.10-25. JCSD argued that if Arkansas's School Choice Act, Ark. Code Ann. § 6-18-1906 (2017), were applied to the school district, it would have a segregative impact and would compel JCSD to violate its obligations under the 1970 Order. JA.24-26.

2. Arkansas Law Regarding School Choice

Arkansas law regarding participation in school choice has varied over time. Under the Arkansas School Choice Act of 1989, students were allowed to apply to attend a nonresident school district but could not "transfer to a nonresident district

where the percentage of enrollment for the student's race exceeds that percentage in his resident district." See Ark. Code Ann. § 6-18-206; JA.62. The 1989 Act remained in place until it was repealed by the Arkansas Public School Choice Act of 2013. Ark. Code Ann. § 6-18-1906 (2013); JA.64-76. The 2013 Act did not contain an automatic bar on transfers between districts based on their respective racial compositions, but instead allowed districts to declare themselves exempt from participating in choice if doing so would conflict with an existing federal desegregation plan or order. JA.74.

In 2015, the legislature eliminated a school district's ability to self-exempt and instead required a district to submit proof of a conflict with a desegregation order to the Arkansas Department of Education (ADE) before receiving an exemption. Ark. Code Ann. § 6-18-1906 (2015); JA.77-78. This provision was amended again in 2017 to require school districts seeking exemptions to submit proof of a desegregation plan or order "that explicitly limits the transfer of students between school districts." Ark. Code Ann. § 6-18-1906 (2017); JA.85. The current statute also establishes an independent numerical limit on school choice transfers from a district, restricting annual transfers to no more than 3% net of a district's total enrollment for the preceding school year. See Ark. Code Ann. § 6-18-1906(b)(1)(A) (2017).

3. JCSD's Request For Exemption From Arkansas's School Choice Law

a. JCSD successfully pursued exemptions from school choice for the 2013-2014 school year through the 2017-2018 school year. The ADE denied JCSD's request for an exemption for the 2018-2019 school year. In a January 2018 letter to JCSD, the ADE explained that because "it does not appear that [JCSD] is subject to any limitations explicitly limiting the interdistrict transfer of students" the district would be required to participate in school choice for the 2018-2019 school year. JA.106. After unsuccessfully attempting to convince the ADE to change course (JA.107-140), JCSD filed a motion in the district court in June 2018 seeking modification of the 1970 Order to exempt the district from participating in school choice (JA.10). The ADE and the Arkansas State Board of Education (collectively, Arkansas) intervened in the district court to oppose modification. JA.370. The United States took no position on the merits. JA.288.

After conducting an evidentiary hearing, the district court issued an order in January 2019 granting Junction City's motion to modify the 1970 Order to prohibit "the segregative inter-district transfer of students from Junction City to other school districts, unless such a transfer is requested for education[al] or compassionate purposes and is approved by Junction City's school board on a case-by-case basis." Add.18. The order explicitly defined segregative transfers as "a student transfer from a resident school district to a non-resident school district

where the percentage of enrollment for the transferring student's race [in the receiving district] exceeds that percentage in the student's resident district." Add.4 n.1.

The district court found that repeal of the Arkansas School Choice Act of 1989, followed by passage of the 2013, 2015, and 2017 Acts, qualified as a significant change in law that warranted modification of the 1970 Order under Rule 60(b)(5). Add.11. The court acknowledged that the 1970 Order did not address student transfers between school districts, but found that "the 1970 Order clearly intended to prohibit any racial discrimination occurring within Junction City, including preventing student transfers which result in segregation of Junction City's student body." Add.12 (emphasis omitted). The court did not make any factual findings specifically explaining how transfers under Arkansas's school choice law would result in the segregation of JCSD's schools. Instead, the court defined, and presumptively prohibited as "segregative," any transfer by a white JCSD student to a district with a higher percentage of white student enrollment, as well as any transfer by a Black JCSD student to a district with a higher percentage of Black students. Add.4 n.1.

b. Arkansas appealed. The consolidated appeal involves not only JCSD, but also three other Arkansas school districts that sought and received similar modifications to their desegregation consent decrees. The United States did not

file a brief during the panel's initial consideration of this appeal, Letter for the United States as Appellee (filed June 27, 2019).

A divided panel affirmed. *United States* v. *Junction City Sch. Dist.*, 984 F.3d 608, 618 (8th Cir. 2020); *id.* at 618-625 (Kobes, J., dissenting). Arkansas subsequently filed a petition for rehearing en banc and rehearing en banc. The United States filed a brief after the Court issued an order requesting responses to Arkansas's petition. See U.S. Br. 10.

This Court granted the petition for panel rehearing, vacated its prior opinion, and denied as moot the request for rehearing en banc. Order, *United States* v. *Junction City Sch. Dist.*, Nos. 19-1340, 19-1342, 19-1348, 19-1349 (8th Cir. Mar. 24, 2021). The Court later requested supplemental briefing on the three questions discussed below. Order, *United States* v. *Junction City Sch. Dist.*, Nos. 19-1340, 19-1342, 19-1348, 19-1349 (8th Cir. May 17, 2021).

ARGUMENT

UNITED STATES' RESPONSE TO QUESTION 1

In question 1, this Court asked:

> The United States suggests that the Court could remand the cases, in particular the Junction City case, to the district court for further proceedings. Would these proceedings allow the district court to make further "record-based findings" related to its modification of the consent decrees? If so, would such a remand be appropriate because there was already an evidentiary hearing, and what further "record-based findings" could the district court make that would justify its modification of the consent decrees?

First, it is important to note that the underlying 1970 Order in this case was not a consent decree. Rather, it was a nonconsensual remedial order that the United States obtained against JCSD after the district court held an evidentiary hearing. Add.73-77. Accordingly, when JCSD sought to modify this order and Arkansas intervened to contest the requested modification, the district court had to determine if requiring JCSD to comply with Arkansas's school choice law would make compliance with the remedial order the United States had obtained "more onerous" or "unworkable." *Parton* v. *White*, 203 F.3d 552, 555 (8th Cir.) (citing *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)), cert. denied, 531 U.S. 963 (2000). This determination required record-based findings.

But JCSD did not show—and the district court did not find—that changes to Arkansas's school choice laws impede JCSD's ability to comply with the 1970 Order. See U.S. Br. 13-14. The 1970 Order addressed concerns *within* JCSD—namely discrimination in classroom assignments and bus routes—and did not address the movement of students between JCSD and other school districts. Add.73-77. Both the district court and the panel majority attempted to bridge the gap between the dictates of the 1970 Order and the modification that JCSD sought by reasoning that the 1970 Order "clearly intended to prohibit *any* racial discrimination occurring within [Junction City], including preventing student transfers which result in segregation of [Junction City's] student body." *United*

States v. *Junction City Sch. Dist.*, 984 F.3d 608, 615 (8th Cir. 2020) (quoting Add.12) (internal quotation marks omitted). This reasoning assumed that requiring JCSD to comply with Arkansas's school choice law necessarily would impede JCSD's compliance with the 1970 Order, which enjoins JCSD's operation of a dual school system. See *Parton*, 203 F.3d at 555 (citing *Rufo*, 502 U.S. at 384).

As the United States explained in its brief responding to Arkansas's petition for rehearing, that assumption is not supported by the existing record or any factual findings made by the district court. U.S. Br. 13-14. JCSD's superintendent testified before the district court that the school district is "in compliance with all desegregation orders and plans" (JA.531 (Tr. 141:23-24)), and that the district had "absolutely no intent of going back and putting any segregated practices in" (JA.537 (Tr. 147:2-3)). The court made no factual findings to indicate that operation of Arkansas's school choice law will prevent or impede JCSD from operating a racially unitary school district in compliance with the 1970 Order and equal protection requirements, and the current record does not support any such findings.

The United States does not take the position that this Court should direct the district court to conduct a second evidentiary hearing with respect to JCSD. The United States is not aware of additional facts that would warrant a second hearing at this time. However, JCSD may be able to identify some new evidence or

potential factual findings that could support a modification to the 1970 Order, albeit one more "suitably tailored to the changed circumstance," *Parton*, 203 F.3d at 555 (citation omitted), than the district court's presumptive ban on what it called "segregative" transfers. Cf. *Cowan* v. *United States*, 748 F.3d 233, 240 (5th Cir. 2014) (remanding where district court ordered implementation of a freedom of choice desegregation plan but did not make supporting findings with sufficient particularity to enable appellate review). For example, JCSD may be able to justify a modification of the 1970 Order to require the monitoring of student transfers, leaving open the possibility that the district court could limit such transfers in the future if the State or other school districts encouraged "white flight," or if the transfers eventually produced cumulatively segregative effects in a non-unitary district. See, *e.g.*, *Edgerson* v. *Clinton*, 86 F.3d 833, 837-838 (8th Cir. 1996). If JCSD does so, then an additional hearing might be warranted.

UNITED STATES' RESPONSE TO QUESTION 2

In question 2, this Court asked:

> The United States also suggests that the Court could remand the cases to the district court for a determination on whether unitary status has been achieved. Please identify the legal authority you believe exists that would permit our Court to order such a hearing and the reasons you believe warrant or advise against such a hearing.

The United States suggested that the Court consider remanding to the district court to determine whether JCSD should receive a declaration of unitary status,

U.S. Br. 14 n.4, *i.e.*, that the district has eliminated the vestiges of its former dual system to the extent practicable. That suggestion is grounded in this Court's recognition that "Federal courts may not invoke their equitable power to fashion a remedy to correct a condition unless it currently offends the Constitution." *Jenkins* v. *Missouri*, 807 F.2d 657, 666 (8th Cir. 1986), cert. denied, 484 U.S. 816 (1987).

The question before this Court concerns whether the district court appropriately exercised its remedial powers in modifying the 1970 Order, which the court had issued to remedy JCSD's dual, racially discriminatory system that violated the Constitution. Underlying that question is the predicate issue of whether there is any constitutional violation that remains to be remedied. "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, 'as with any equity case, the nature of the violation determines the scope of the remedy.'" *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974) (alteration omitted) (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); see also *General Bldg. Contractors* v. *Pennsylvania*, 458 U.S. 375, 399 (1982) (stating that a remedial decree should "extend no farther than required by the nature and the extent of that violation").

To be sure, courts of appeals should not routinely defer ruling on modifications to a school desegregation order to wait for the district court to consider on remand whether the school district subject to that order has achieved

unitary status.[4] But there may be exceptional cases, such as the one here, where the existence of a persisting constitutional violation is in doubt, making a remand appropriate to address the predicate question of whether the district court has anything to remedy. The factors weighing in favor of such a remand here include:

1. The fact that it is the defendant school district (*i.e.*, the original constitutional violator), and not the plaintiff, that is seeking modification of the nonconsensual 1970 Order;
2. The fact that JCSD operates only two schools—one elementary and one high school—such that resegregated student assignments between the district's schools simply cannot occur;
3. The testimony by JCSD officials regarding the district being "in compliance with all desegregation orders and plans" and their commitment to continuing to operate non-discriminatory schools, see p. 11, *supra*, and the absence of any facts in the record suggesting a likely return to discriminatory practices by the district; and
4. The attenuated relationship between the operative provisions of the 1970 Order and the modification sought here.

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[4] For example, parties to consent decrees in desegregation cases often seek consensual modifications to those decrees, and courts should not delay consideration of these jointly sought modifications to consider whether the district has achieved unitary status.

In short, if the district court finds that JCSD has already eliminated the vestiges of its former dual system to the extent practicable, then the court has no further remedial powers to exercise.

UNITED STATES' RESPONSE TO QUESTION 3

In question 3, this Court asked:

> The State of Arkansas argues that reliance on *Liddell* v. *Missouri*, 731 F.2d 1294 (8th Cir. 1984) (en banc) was misplaced. Please explain why you believe *Liddell* is applicable or inapplicable, and include as part of your analysis whether you believe the district court issued an inter- or intra-district remedy.

This Court's en banc decision in *Liddell* addressed segregation in the St. Louis City School District. 731 F.2d at 1298. In *Liddell*, the Court upheld an order requiring the State of Missouri, the "primary constitutional violator" in that case, *id.* at 1303, 1307, to pay the costs of voluntary interdistrict transfers and the costs of merging city and county vocational educational programs, while reversing a requirement that Missouri pay for interdistrict transfers between the suburban county districts. *Id.* at 1297. The latter relief was rejected because it was "not geared to remedy the violation found within the city." *Id.* at 1309.

Importantly for this case, *Liddell* held that the remedy of requiring Missouri to pay for voluntary transfers from city to county schools "was closely tailored to the nature and scope of the constitutional violation." 731 F.2d. at 1305. The Court noted that it was the State itself that had mandated discrimination against Black

students in St. Louis, that the potential for integration within the City's school district was limited by the fact that almost 80% of its students were Black, and that the adjoining county districts were willing to accept voluntary transfers from within the City's school district. *Id.* at 1306-1307. This Court thus upheld the interdistrict remedy in *Liddell*, noting that it would not "restructure or coerce local governments or their subdivisions" and that "and all districts retain the rights and powers accorded them by state and federal laws." *Id.* at 1308.

In the now-vacated panel decision in this case, both the majority and the dissent relied on *Liddell*, see *Junction City Sch. Dist.*, 984 F.3d at 617-618; *id.* at 623 (Kobes, J., dissenting), while Arkansas argues that *Liddell* was abrogated by the Supreme Court's decision in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995), see Arkansas Pet. for Rehearing 10-11.

But Arkansas's argument that *Jenkins* abrogated *Liddell* is not correct. In *Jenkins*, the Supreme Court held that the district court exceeded its remedial authority in granting salary increases to virtually all instructional and non-instructional employees of the Kansas City Metropolitan School District (KCMSD) for the purpose of achieving "desegregative attractiveness" by increasing school quality and encouraging students from surrounding districts to transfer to schools in the KCMSD. 515 U.S. at 80 (citation omitted). The Court held that "[a] district court seeking to remedy an *intra*district violation that has not 'directly caused'

significant interdistrict effects, exceeds its remedial authority if it orders a remedy with an interdistrict purpose." *Id.* at 98 (citing *Milliken*, 418 U.S. at 744-745). As relevant here, there is no conflict between *Liddell* and *Jenkins*. Both decisions recognize that there may be *intra*district constitutional violations that directly cause such significant *inter*district effects (such as Missouri's actions in *Liddell*) that *inter*district relief may be appropriate. This Court's reasoning in *Liddell* remains sound and has not been abrogated by the Supreme Court's decision in *Jenkins*.

Addressing the second part of this Court's question, *Liddell* is applicable here not so much because it identifies a standard for what constitutes inter- versus intradistrict relief, but because it points to the key question in this case, which is whether district court's modification "was closely tailored to the nature and scope of the [constitutional] violation." 731 F.2d at 1305; see also *id.* at 1309. The district court here relieved JCSD from complying with an otherwise valid state law without finding that Arkansas's school choice law was itself constitutionally infirm or that it created an actual impediment to JCSD's compliance with its desegregation obligations. The modification of the 1970 Order was thus not "closely tailored" to the only constitutional violation at issue in this case—JCSD's prior operation of dual and racially discriminatory schools.

In the United States' view, the district court's modification of the 1970 Order is most reasonably classified as an intradistrict order. The modification did not require other school districts to take students from JCSD to provide them with a desegregated experience, as the order in *Liddell* (albeit voluntarily) did. *Liddell*, 731 F.2d at 1305-1306. More importantly, however, the Court need not reach this question because regardless of how the modification is labeled, it was not remedial. That is so because the district court made no record-based findings indicating that modifying the 1970 Order was necessary either to address a current constitutional violation or to eliminate the vestiges of discrimination within JCSD.

CONCLUSION

The panel should reverse the district court's 2019 order and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing UNITED STATES' RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING:

(1) complies with the type-volume limitation of this Court's order dated May 17, 2021, because it contains 3,956 words, excluding the parts of the response exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font;

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: June 14, 2021

CERTIFICATE OF SERVICE

I certify that on June 14, 2021, I electronically filed the foregoing UNITED STATES' RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING with the Clerk of the Court for the Eighth Circuit using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney