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

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

United States of America v. Arkansas Department of Educ., et al
Rosie L. Davis v. Arkansas Department of Educ., et al
Mary Turner, et al v. Arkansas Department of Educ., et al
Larry Milton, et al v. Arkansas State Board of Educ., et al

On Appeal from the United States District Court
for the Western District of Arkansas,
El Dorado and Texarkana Divisions
Case Nos. 1:66-cv-01095; 4:88-cv-04082; 4:92-cv-04040; 1:88-cv-01142;
Honorable Susan O. Hickey, District Judge

# Joint Petition for Rehearing En Banc

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## RULE 35(b)(1) STATEMENT

Camden Fairview School District, Hope School District, and the Plaintiffs-Appellees[1] request en banc review of *United States v. Junction City School District*, 2021 WL 3745740 (8th Cir., Aug. 25, 2021), which conflicts with the following decisions of the United States Supreme Court and this Court: *United States v. Knote*, 29 F.3d 1297 (8th Cir. 1994), *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984), *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995), and *Milliken v. Bradley*, 418 U.S. 717 (1974). The full court's consideration "is therefore necessary to secure and maintain uniformity of the court[s'] decisions." Fed. R. App. P. 35(b)(1)(A).

Resolving such clear conflicts "'is of such significance to the full court that it deserves the attention of the full court.'" United States Court of Appeals for the Eighth Circuit, Internal Operating Procedures, § IV(D) (quoting *Western Pacific Railway Corporation v. Western Pacific Railway Company*, 345 U.S. 247, 262-63 (1953)). Indeed, the fact that the panel has issued two 2-1 opinions clearly shows that the issues involved in this

[1] Junction City and Lafayette County school districts elected not to pursue rehearing en banc.

appeal present a close enough question that en banc review is appropriate.

## BACKGROUND

Arkansas law historically required that students attend school in the district in which they reside. Until *Brown v. Board of Education*, 347 U.S. 483 (1954), Camden, Fairview, and Hope operated racially dual school systems as required by Arkansas law. *Brown* had little actual effect, however, given "freedom of choice" plans that allowed black and white students to continue to attend separate schools for the next 15-20 years. In 1968, the Supreme Court ruled that "freedom of choice" was unconstitutional. *See Raney v. Board of Ed. of Gould, Ark. Sch. Dist.*, 391 U.S. 443, 447 (1968) ("[O]ur decision[s] establish[ ] that [freedom of choice] plan[s are] inadequate to convert to a unitary, nonracial system.") (internal citations omitted). Choice is not, accordingly, a "*new* problem for the school districts." 2021 WL * 6. It has been on the table for over 70 years and continues to fester.

In 1988, Hope was sued by black students and staff alleging racial discrimination; a similar lawsuit was filed that year against Camden, Fairview, and another Ouachita County school district, Harmony Grove.

In 1989, the Arkansas General Assembly adopted a choice program that allowed interdistrict transfers as long as the movement was integrative. *See* Act 609 of 1989, the Public School Choice Act (hereafter, the "1989 Act"). Its restriction on segregative transfers evidenced the legislature's recognition that "choice" transfers had been used as a vehicle to maintain segregated schools in the then-not-too-distant past.

Both cases were settled, and the District Court approved their consent decrees. See JA817, *Davis* Decree and JA1488, *Milton* Decree. The *Davis* Decree stated its intent "to remedy any past discrimination based upon race and to prevent any like discrimination from occurring in the future." JA831. The *Milton* Decree directed both Camden-Fairview and Harmony Grove to "refrain from adopting student assignment plans or programs that have an interdistrict segregative effect on either district." JA1506.

The 1989 Act remained in effect for 24 years, until repeal and revision in 2013. The choice law was again revised in 2015 and 2017. Each revision decreased the number of districts allowed to opt out of choice. None required transfers to facilitate integration or promote

desegregation, thereby removing a participating district's ability to prevent transfers that have a segregative impact.

The 2013 Act allowed districts to declare an exemption from participation if they were "subject to [a] desegregation order . . . remedying the effects of past racial segregation." The 2015 Act narrowed the exemption, recognizing exemptions only for districts that "submit[ted] proof from a federal court . . . that the school district has a genuine conflict under an active desegregation order." The 2017 Act further restricted the number of districts qualifying for exemption by requiring that a district's order contain language that "explicitly limits the transfer of students between school districts." The 2017 Act also gave the Arkansas Department of Education ("ADE") the authority to decide whether or not the proof submitted by a district conflicted with participating in choice.[2]

Camden-Fairview and Hope were exempt from choice through the end of the 2017-18 school year. ADE recognized Camden-Fairview and Hope's exemptions from participating in choice during those years.

[2] The 2017 Act contemplates state legislative override of federal court orders, a constitutional concern raised by the districts but not yet resolved by the District Court. That issue remains open.

Following passage of the 2017 Act, ADE determined that Hope did not qualify for an exemption because the *Davis* Decree did not contain language "explicitly limit[ing]" interdistrict transfers. Camden-Fairview was only granted a partial exemption, for transfers to or from Harmony Grove.

Camden-Fairview then received 15 choice transfer applications; all applicants were non-black, and all but one requested transfer to Smackover School District. In 2018, Camden-Fairview's black student enrollment was 60.4%, and it educated 80.0% of the black students enrolled in public schools in Ouachita County. Smackover, which contains territory in Ouachita and Union Counties, had 17.6% black enrollment.

Hope received 69 applications in 2018, all but two from non-black students. All but one of those applicants requested transfers to Spring Hill School District. In 2018, Hope's black student enrollment was 45.5%, and it educated 92.2% of the black students enrolled in public schools in Hempstead County. Spring Hill's black enrollment was 1%. Spring Hill enrolled only six black students in 2018.

After unsuccessfully appealing ADE's decisions to the State Board of Education, Camden-Fairview and Hope requested relief from the district court. It modified both districts' decrees "to explicitly prohibit the segregative inter-district transfer of students . . . to other school districts, unless such a transfer is requested for education or compassionate purposes and is approved by [the district's] school board on a case-by-case basis." See, e.g., JA1046. The State appealed. The panel originally affirmed the district court. The State then petitioned for rehearing. The same panel then reversed the district court's orders. Camden-Fairview and Hope now seek en banc review.

## ARGUMENT

### I. En Banc Review is Appropriate

En banc review is warranted in order to "secure or maintain uniformity of the court's decisions." The new opinion is inconsistent with this Court's prior rulings in *Knote* and *Liddell*, as well as the Supreme Court's rulings in *Jenkins* and *Milliken*.

#### A. The majority's opinion is inconsistent with *Knote*.

The 1989 Act—which prohibited segregative interdistrict transfers—was in effect when the decrees were entered. In finding that

modification was appropriate, the District Court expressly relied on this Court's decision in *Knote*, *see* JA1039, JA1655-1666, which states unequivocally that the "contexts" and "circumstances" under which the orders were fashioned "cannot be ignored." *Id*. at 1300.

As both the District Court and panel originally found, the "contexts" and "circumstances" under which the decrees were negotiated, agreed to, and approved made it absolutely unnecessary to account for or prohibit actions that were simply not possible under state law as it existed at the time: segregative transfers were not allowed, thus there was no need to "expressly" bar them.[3]

The panel originally affirmed the district court's orders, citing *Knote* with approval.

> Where possible, courts should interpret the parties' intent from the consent decree's unambiguous terms. *Pure Country Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir. 2002). However, the circumstances and context surrounding the order cannot be ignored. *United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994); *see also, Mays v. Bd. of Educ. of Hamburg Sch. Dist.*, 834 F.3d 910, 918 (8th Cir. 2016). "This is because a consent decree is a peculiar sort of legal instrument that cannot be read in a vacuum. It is a kind of

[3] The fact that other cases may have different language in their decrees, 2021 WL *6 n. 4, says nothing about the "contexts" and "circumstances" of these cases, which is what this Court's precedents require.

> private law, agreed to by the parties and given shape over time through interpretation by the court that entered it." *Knote*, 29 F.3d at 1300 (cleaned up). We give a large measure of deference to the interpretation of the district court that entered the consent decree.

*United States v. Junction City Sch. Dist.*, 984 F.3d 608, 615 (8th Cir. 2020). The new majority opinion makes no mention of *Knote*.

*Knote* also states that

> even if the structure, language, and contexts of the decree did not combine to render the district court's interpretation of the text permissible, the district court "has [the] inherent equitable power to modify a consent decree if satisfied that the decree 'has been turned through changing circumstances into an instrument of wrong.'"

*Knote*, 29 F.3d at 1302 (internal citations omitted). The State, which purposely enacted a law that could not have been anticipated, has "turned through changing circumstances [the districts' decrees] into an instrument of wrong." *Id.* This language from *Knote* tracks with the majority's citation to *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992), which supports modification of a consent decree in cases where "a change in law . . . make[s] legal what the decree was designed to prevent." 2021 WL 3745740 *7 (citing *Rufo*, 502 U.S. at 384, 388).

The revised opinion rewards the State's legislative maneuvering with complete disregard to both the circumstances in existence when the

decrees were entered and the substantial evidence that choice in these districts will lead to white flight, i.e., segregative movement to whiter neighboring districts. As Judge Melloy correctly noted in his dissent,

> [a] plain reading of the consent decrees shows that they were intended to prohibit all forms of racial segregation. It was reasonable for the authors of the decrees to rely on existing laws to frame the agreements and not include provisions for actions already prohibited by those laws.

2021 WL 3745740 *10 (citing *Knote*, 29 F.3d at 1300).

The districts and Plaintiffs relied on the 1989 Act in fashioning their consent decrees. The district court, in turn, relied on the precedent set by *Knote*. In repeatedly stressing the absence of a specific reference to interdistrict transfers in the original decrees, the majority now essentially takes the position that circumstances surrounding a consent order, specifically the laws in effect at the time the order is negotiated and approved, mean nothing. As Judge Melloy correctly stressed, the claim that there was no substantial change in circumstance to warrant modification absolutely "fail[s] to accord proper weight to the context that gave rise to the decrees." *Id*. at *9.

Whether *Knote* remains good law, and whether the context and circumstances surrounding entry of a consent decree may continue to be

used to interpret such decrees, are issues "of such significance to the full court that [they] deserve[ ] the attention of the full court."

B. The modification orders did not create interdistrict remedies.

Respectfully, the Districts believe the new majority fundamentally misreads *Jenkins* and *Milliken*. Those cases involved court-ordered transfers of students from adjacent districts. In *Milliken*, the district court ordered, and the court of appeals approved, a "'desegregation plan involv[ing] the crossing of the boundary lines between the Detroit School District and adjacent . . . school districts for the limited purpose of providing an effective desegregation plan.'" *Milliken*, 418 U.S. at 735 (internal citations omitted). The Court rejected that approach, stressing that "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in this country." *Id.* at 741. In *Jenkins*, the Court condemned "desegregation attractiveness," 515 U.S. at 94, stressing that "[i]n effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the inter-district transfer of students." *Id.* at 92.

The opposite situation is present here. The district court's orders **prohibit** interdistrict transfers. The interdistrict transfer program at issue was created by the Arkansas legislature, not the district court. That statutory regime properly contemplates that districts subject to court orders should be exempt from participation in choice, but imposes a new restriction on the exercise of that option. As noted above, because the newly required language was not present, and the need for it not foreseen when the decrees were fashioned, the district court modified them to include the now-required language. Simply prohibiting Camden-Fairview and Hope from participating in an interdistrict choice program is not an interdistrict remedy.

Regarding *Jenkins* specifically, the Court noted that "[t]he record [did] not support the District Court's reliance on 'white flight' as a justification for a permissible expansion of its intradistrict remedial authority." *Jenkins*, 515 U.S. at 96. This record contains significant evidence of white flight from Camden-Fairview and Hope during just a single year of participation in choice. *See* supra at 5. Hope superintendent Bobby Hart's testimony supports the assertion that the transfers were racially motivated. *See* JA506 (noting transfer requests

predicated on the inability of a white student to find someone to "date" or invite for "sleepovers."). Additionally, as the panel initially and correctly recognized, "[t]he evidence in the record is contrary to the dissent's assertions that there are 'no facts' to support a finding . . . that interdistrict transfers would have little to no impact on Camden-Fairview's and Hope's racial demographics," noting the testimony of "[m]ultiple superintendents with decades of experience in southern Arkansas schools" and the number and race of students who sought transfers in 2018. 984 F.3d at 616.

The new panel opinion also does not address *Liddell*. Judge Melloy wrote in dissent that "[i]nterdistrict remedies occur when a district court restructures or coerces local governments or their subdivisions. 2021 WL 3745740 *11 (citing *Liddell*, 731 F.2d at 1308; *Hills v. Gautreaux*, 425 U.S. 284, 298 (1976)). The District Court relied on *Liddell* in finding that the modification orders did not create an interdistrict remedy because they did not "restructure" or "coerce" school districts that neighbor Camden-Fairview or Hope.

The original panel also cited *Liddell*, recognizing the distinction between remedies that affect only the district under court supervision,

rather than those that extend to non-party districts, and finding that the only "limitations" imposed by the modification orders are "on the ability of a student to leave" Camden-Fairview or Hope. 984 F.3d at 617. "By restricting the conditions under which students can transfer out of the Districts, the district court has placed limitation on only the Districts, not on any other school district." *Id*. As the panel correctly noted:

> [t]he modification's only potential effect on other school districts is a possible decrease in transfer requests from the Districts' students. Transfers out of the Districts may still occur, no matter the race of the student, as long as there is an educational or compassionate purpose and the request is approved by the student's school board.

*Id*.

The mere fact that this case recognizes the problems caused by interdistrict transfers does not transform a proper response into an "interdistrict remedy" under this Circuit's precedents. The district court relied on precedent set in *Liddell,* and again, the full court's attention is warranted in considering whether the majority's opinion is consistent with previous precedent.

## II. The Modification Orders are Appropriate

"Rule 60(b) of the Federal Rules of Civil Procedure authorizes modification of consent decrees." *Smith v. Board of Education of*

*Palestine-Wheatley School District*, 769 F.3d 566, 568 (8th Cir. 2014) (citing *Rufo*, 502 U.S. at 380-81). The District Court found that repeal of the 1989 Act eliminated a safeguard in effect when the *Milton* and *Davis* Decrees were entered and that Camden-Fairview, Hope, and the Plaintiffs relied on for twenty-four years. It held this was a significant change justifying modification. *See, e.g.*, JA1036-41.

The District Court stressed that it was impossible for the Districts to comply with a law attempting to govern the language of a desegregation order that was not in effect when the decrees were entered. *See, e.g.*, JA1657 ("ADE and SBE do not argue, and there is no evidence in the record to indicate, that the parties to the *Milton* and *Lancaster* Orders contemplated that the 1989 Act would be repealed and replaced with a school choice law that requires that the . . . Orders contain specific restrictive language that was specifically built into the 1989 Act."). Modification was proper because the 1989 Act prohibited segregative transfers of both non-black and black students to non-resident school districts. The 1989 Act's plain language eliminated the need for the parties to draft the decrees in a way that also expressly prohibited segregative inter-district transfers.

The District Court, given the history, context, and circumstances surrounding entry of the decrees, determined that the common, overarching purpose of each order was the prevention of racial discrimination and segregation of students and that changes in the school choice laws had an actual effect on those orders. See, e.g., JA1039-1040. It noted paragraph 3 of the *Davis* Decree, which states that "it is the intent of this Decree to remedy any past discrimination based upon race and to prevent any like discrimination from occurring in the future." JA1031. Allowing segregative school choice transfers would violate Hope's obligation to "prevent any like discrimination from occurring in the future." JA818. Likewise, the *Milton* Decree directed both Camden-Fairview and Harmony Grove to "refrain from adopting student assignment plans or programs that have an interdistrict segregative effect on either district." JA1523. Allowing segregative choice transfers would violate Camden-Fairview's obligation to "refrain from adopting student assignment . . . programs that have an interdistrict segregative effect" on Camden-Fairview. The modification orders issued by the district court "give effect to and enforce the operative terms of" these

provisions of Camden-Fairview and Hope's decrees. *See Salazar v. District of Columbia*, 896 F.3d 489, 498 (D.C. Cir. 2018).

## III. The District Court is Entitled to Deference

As the panel originally and correctly recognized, the district court "did not abuse its discretion in considering and crediting evidence of white flight when it determined that a substantial change in circumstances had occurred warranting modification of the consent decrees." 984 F.3d at 617. It emphasized "the large degree of deference we must give to the district court," since "district courts are 'uniquely situated to appraise the societal forces at work in the communities where they sit." *Id.* at 618 (quoting *Edgerson on Behalf of Edgerson v. Clinton*, 86 F.3d 833, 838 (8th Cir. 1996)).

The current majority never explains why it now believes deference is not appropriate. To the extent the panel has now adopted the December dissent of Judge Kobes, in which he (incorrectly) contended that the district court "did not make any factual findings," the proper course for the panel would have been to remand to the district court for entry of findings of fact, not to reverse.

## IV. Age or Dormancy of the Underlying Cases is Not Dispositive

The new majority notes "concerns" about the age of these decrees and the "dormancy" of the underlying cases, describing it as "entrenched federal oversight." 2021 WL 3745740 *8-9 (quoting *Shakman v. Clerk of Cook Cnty.*, 994 F.3d 832, 843 (7th Cir. 2021)). While Camden-Fairview and Hope concede that their cases have been on the docket since 1988, compliance with the constitution—not the age of the cases—should be the court's primary concern.

There is nothing unique about this. The districts acknowledged the issue in their original appellate brief, noting that *Brown* was also "old" when it was reopened twenty-five years later "in order to review and mandate compliance." *Brown v. Board of Education*, 84 F.R.D. 383, 391 (D. Kan. 1979). *Brown* then remained open for an additional twenty years, during which one solution embraced mirrored a key aspect of these cases: "'encouraging student transfers that would increase integration.'" Beck, Peter, *How* Brown v. Board of Education *Actually Ended: The Forgotten Final Chapter of the Twentieth Century's Most Famous Case*, 1 CTS. & JUST. L.J. 78, 90 (2019) (quoting Topeka Remedy Plan).

As the United States argued below, the Districts have "an affirmative duty to desegregate, and that duty constitutes a continuing responsibility not to impede the process of dismantling its former dual system" that "is not limited in time or duration, but imposes a continuing legal obligation to desegregate until the vestiges of segregation have been eliminated." JA285. One of those vestiges is the spectre of unrestricted choice. For example, it was the United States's dogged opposition to freedom of choice, and the district court's rejection of that proposed "remedy," that led to the absence of any mention of choice in the decree ultimately entered in the Junction City case. *See* Appellees' Joint Brief, at 5-7.

## V. The United States's Filing Did Not Apply to Camden-Fairview or Hope

The current majority opened by noting that, following ADE's request for rehearing, "the United States—for the first time—involved itself in the case and asked us to reconsider our opinion." 2021 WL 3745740 *4. To the extent this influenced the decision to vacate and reverse, it is essential to recognize that the United States is a plaintiff only in Junction City's case, not Camden-Fairview's or Hope's. In fact, the United States went to great lengths to reiterate that its arguments

applied only to Junction City and that it took "no position as to the modification of the consent decrees involving the other school districts . . . ." United States's Response to the Petition for Rehearing and Rehearing En Banc, at 2, fn 2.

The crux of the United States's position was that "[n]o deference was warranted . . . because the district court's modification was not supported by any factual findings showing that changes in Arkansas law created an actual impediment to **JCSD's** compliance with its desegregation obligations." *Id.* at 17-18 (emphasis added). The United States made no such argument as to Camden-Fairview or Hope, and Camden-Fairview and Hope's decrees contain different language and cover different subjects than Junction City's. And, as the United States stressed, "a school district operating under a desegregation order has an affirmative duty to desegregate," and "[i]n certain cases, this affirmative duty includes the obligation not to consent to interdistrict transfers where the cumulative effect will reduce desegregation in the sending or receiving district." *Id.* at 14-15 (internal citations omitted).

## CONCLUSION

The repeal of the 1989 Act was a significant change justifying modification, and the district court's remedy was suitably tailored to the changed circumstance. *Parton v. White*, 203 F.3d 552, 555 (8th Cir. 2000) (per curiam) (quoting *Rufo*, 502 U.S. at 393). As Judge Melloy correctly stressed, new "evidence of white flight" and the prior "lack of any need for the decrees to reference previously impermissible segregative interdistrict transfer[s]" warranted modification of the decrees. 2021 WL 3745740*9. Moreover, "the majority focuses on select details of the original decrees to the exclusion of their overall purpose in a manner that discounts the context of pervasive segregation the decrees sought to address." *Id*. at *11.

The modification orders are consistent with *Milliken* and *Jenkins*, they do not create an interdistrict remedy, and the panel erred in reversing the district court. The full court should rehear this case in order to resolve the conflicts posed by the panel majority's August 25, 2021 opinion and current Eighth Circuit and Supreme Court precedent in *Knote*, *Liddell*, *Jenkins*, and *Milliken*.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains approximately 3,884 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this filing complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-Point Century Schoolbook.

I further certify that this Response was scanned for viruses and is virus-free.

**/s/ Whitney F. Moore**
Whitney F. Moore

## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

**/s/ Whitney F. Moore**
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