

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VERNON SMITH ON BEHALF OF IRMA J. SMITH,

Plaintiff

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

SCHOOL BOARD OF CONCORDIA PARISH,

Defendant-Appellee

v.

DELTA CHARTER GROUP INCORPORATED,

Intervenor-Appellant

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because appellant has waived its principal argument on appeal by failing to raise it in the district court, and the only rulings that are properly before this Court are subject to a deferential standard of review and can easily be resolved on the briefs.

TABLE OF CONTENTS

	PAGE
STATEMENT REGARDING ORAL ARGUMENT	
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
1. <i>Concordia Parish School District Has Continuing Desegregation Obligations</i>	3
2. <i>Delta Voluntarily Intervened And Subjected Itself To The District Court’s Desegregation Orders In Order To Obtain State Approval To Operate As A Public Charter School</i>	3
3. <i>Delta Agrees To A Consent Order Authorizing Delta’s Operation Under The Desegregation Orders In This Case</i>	6
4. <i>Delta Repeatedly Failed To Comply With The 2013 Order</i>	7
5. <i>The Court Holds A Hearing On The School Board’s Motion For Further Relief</i>	10
6. <i>The Court Issues A Decision Finding Violations Of The 2013 Order</i>	15
7. <i>The Court Orders Remedies For Delta’s Noncompliance</i>	16
SUMMARY OF THE ARGUMENT	17

TABLE OF CONTENTS (continued)

PAGE

ARGUMENT

I DELTA HAS WAIVED THE ARGUMENT THAT IT IS NOT SUBJECT TO THE DESEGREGATION ORDERS IN THIS CASE.....21

II THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT DELTA VIOLATED THE 2013 CONSENT ORDER, IMPEDING DESEGREGATION IN CONCORDIA PARISH.....23

A. *Standard Of Review*23

B. *The Evidence Amply Supports The District Court’s Finding That Delta Violated The 2013 Order*24

1. *Limits On Enrollment*24

2. *Demographic Requirements*26

C. *The District Court Did Not Clearly Err In Finding That Delta’s Noncompliance Hindered Desegregation In Concordia Parish*29

III THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A REMEDY.....30

A. *A Court Has Broad Discretion To Remedy Noncompliance*.....30

B. *The Court’s Remedy Is Amply Supported By The Evidence And Carefully Tailored To Address Delta’s Violations*31

C. *The District Court’s Remedy Supports Louisiana Charter School Laws*.....35

TABLE OF CONTENTS (continued)

PAGE

CONCLUSION36

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Anderson v. School Bd. of Madison Cty.</i> , 517 F.3d 292 (5th Cir. 2008).....	23
<i>Carty v. State Office of Risk Mgmt.</i> , 733 F.3d 550 (5th Cir. 2013).....	21
<i>Cleveland v. Union Parish Sch. Bd.</i> , 570 F. Supp. 2d 858 (W.D. La. 2008).....	4
<i>Columbus Bd. of Educ. v. Penick</i> , 443 U.S. 449 (1979).....	31
<i>Cowan v. Cleveland Sch. Dist.</i> , 748 F.3d 233 (5th Cir. 2014)	23, 30, 34
<i>Green v. County Sch. Bd. of New Kent Cty.</i> , 391 U.S. 430 (1968)	33
<i>ICEE Distributors, Inc. v. J&J Snack Foods Corp.</i> , 325 F.3d 586 (5th Cir. 2003)	21
<i>Maverick Recording Co. v. Harper</i> , 598 F.3d 193 (5th Cir.), cert.denied, 562 U.S. 1080 (2010).....	21
<i>Miller v. Nationwide Life Ins. Co.</i> , 391 F.3d 698 (5th Cir. 2004).....	21, 23
<i>Milliken v. Bradley</i> , 418 U.S. 717 (1974).....	18, 21
<i>Samnorwood Indep. Sch. Dist. v. Texas Educ. Agency</i> , 533 F.3d 258 (5th Cir. 2008)	31
<i>Swann v. Charlotte-Mecklenburg Bd. of Educ.</i> , 402 U.S. 1 (1971)	31
<i>United States v. Alcoa, Inc.</i> , 533 F.3d 278 (5th Cir. 2008)	30
<i>United States v. Paradise</i> , 480 U.S. 149 (1987).....	31, 35
<i>United States v. Texas</i> , 457 F.3d 472 (5th Cir. 2006)	31
<i>Valley v. Rapides Par. Sch. Bd.</i> , 702 F.2d 1221 (5th Cir. 1983).....	30-31

CASES (continued):

PAGE

Williams v. City of Dothan, Ala., 818 F.2d 755 (11th Cir. 1987).....24

STATUTES:

28 U.S.C. 1292(a)(1).....2

28 U.S.C. 13311

28 U.S.C. 1343(3)1

42 U.S.C. 19831

28 La. Admin. Code Pt. CXXXIX, § 2701 (2017)3

28 La. Admin. Code Pt. CXXXIX, § 2801(C) (2017).....34

La. Rev. Stat. Ann. § 17:3972(A) (2017)35

La. Rev. Stat. Ann. § 17:3973 (2017).....16

La. Rev. Stat. Ann. § 17:3973.2(b)(ii) (2017)3

La. Rev. Stat. Ann. § 17:3983(A)(4)(c) (2017)22

La. Rev. Stat. Ann. § 17:3991 (2017) (2017)16

La. Rev. Stat. Ann. § 17:3991(C)(3) (2017)..... *passim*

La. Rev. Stat. Ann. § 17:3993(D) (2017) 16, 28

IN THE UNITED STATES COURT OF APPEALS
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No. 17-30548

VERNON SMITH ON BEHALF OF IRMA J. SMITH,

Plaintiff

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

SCHOOL BOARD OF CONCORDIA PARISH,

Defendant-Appellee

v.

DELTA CHARTER GROUP INCORPORATED,

Intervenor-Appellant

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This case arose under 42 U.S.C. 1983, and the district court had jurisdiction under 28 U.S.C. 1331 and 1343(3). On May 31, 2017, the district court entered an

interim ruling that intervenor had violated a 2013 consent order. ROA.1265.¹ On June 8, 2017, the district court entered its remedial order. ROA.1267. Intervenor filed its notice of appeal on June 30, 2017. ROA.1299. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether Delta Charter Group, Inc. (Delta) has waived its argument on appeal that it cannot be subject to the district court's desegregation orders, where it not only failed to raise that argument below but also repeatedly took precisely the opposite position in the district court, including by entering into a 2013 consent order in which Delta explicitly agreed that, as required by Louisiana law, it would be subject to the desegregation orders.

2. Whether the district court clearly erred in finding that Delta had violated the 2013 consent order.

3. Whether the district court abused its discretion in constructing a remedy for violations of the 2013 consent order.

¹ "ROA._" refers to the record on appeal.

STATEMENT OF THE CASE

1. *Concordia Parish School District Has Continuing Desegregation Obligations*

The Concordia Parish school district is a relatively small school system in eastern Louisiana with about 3300 students and 11 schools. ROA.1272. The parish has long been under a desegregation order. As of 2012, 49.5% of the students in Concordia Parish were African American, while 49% were white. ROA.303, 1562.

2. *Delta Voluntarily Intervened And Subjected Itself To The District Court's Desegregation Orders In Order To Obtain State Approval To Operate As A Public Charter School*

In September 2012, Delta moved to intervene in this longstanding desegregation case to secure court approval for opening its public charter school in Concordia Parish. ROA.164. Delta had previously obtained authorization from state officials to operate a "Type 2" charter school in Concordia Parish. ROA.165, 233. Under state law, a Type 2 charter school may draw students from anywhere in Louisiana, La. Rev. Stat. Ann. § 17:3973.2(b)(ii) (2017), but has discretion to establish residency requirements restricted to a single parish, 28 La. Admin. Code Pt. CXXXIX, § 2701 (2017). Louisiana authorizes Type 2 charter schools only on the condition that they "[b]e subject to any court-ordered desegregation plan in

effect for the [relevant] city or parish school system.” La. Rev. Stat. Ann. § 17:3991(C)(3) (2017).

Delta specifically recognized that its opening was subject to the existing desegregation orders in Concordia Parish, and argued as much to the court. See, *e.g.*, ROA.171. For example, Delta admitted that the district court had “the authority to render a decision as to the authority to open any new public school, including public charter schools in Concordia Parish.” ROA.164; see also ROA.170, 238. Delta further stated that “the appropriate test” for deciding whether to authorize a new charter school is whether the school “would undermine” desegregation orders and “promote resegregation.” ROA.245 (quoting *Cleveland v. Union Parish Sch. Bd.*, 570 F. Supp. 2d 858 (W.D. La. 2008)); see also ROA.186.

In its motion to intervene, Delta stated it would enroll an estimated 230 students from Concordia Parish in kindergarten through the ninth grade, and that it would add approximately 23 new students each year for three years as it added grades 10, 11, and 12. ROA.171, 244. Projecting a loss to the school district of only about “6% of the school board’s student population and funding,” Delta claimed its operation would “not undermine desegregation” efforts in Concordia Parish. ROA.190, 249.

Delta proposed enrollment limits by race, explaining that, “[t]o ensure that the Delta Charter School is a racially integrated school,” it “will employ a preferential lottery to enroll a minimum of forty (40%) percent minority (non-white) students.” ROA.172; see also ROA.187, 244. The lottery and minority student recruitment efforts, Delta assured, would create “a racially balanced integrated school.” ROA.187-188, 247-248. Delta further promised it would “endeavor to recruit minority teachers” and “comply with whatever reporting requirements the court may order.” ROA.188, 247. It offered “to tweak any of its programs or policies in order to comply with this Court’s desegregation decree.” ROA.189, 248.

The Concordia Parish School Board and the United States initially opposed approval of the new charter school. ROA.214, 261, 281. Delta’s campus is in the Ferriday region, a predominantly African-American neighborhood. Because the area has very few white students—of 1344 students in the four Ferriday public schools for the 2012-2013 school year, fewer than 88 were white—Delta’s enrollment of even a relatively small number of white students could leave some Ferriday schools with nearly 100% minority enrollment. ROA.2059.

3. *Delta Agrees To A Consent Order Authorizing Delta's Operation Under The Desegregation Orders In This Case*

Delta and the other parties negotiated a consent order that the district court entered on January 4, 2013. ROA.302. Under the order, "Delta Charter Group agree[d] that it [was] governed by and that it [would] comply with the desegregation obligations mandated by this case." ROA.303. The 2013 order's stated goal was "[t]o ensure that [Delta] me[t] its desegregation obligations consistent with orders entered in this case." ROA.303. Delta specifically committed in the decree to "take no action that [would] impede the Concordia Parish School Board's ability to fulfill its obligations to comply with the Orders in this case." ROA.303. The 2013 order provided that Delta would conduct outreach and recruitment efforts to obtain African-American faculty and students. ROA.304.

The parties agreed on specific enrollment requirements. The 2013 order stated that Delta would "serve 23 students per grade, with an overall enrollment of approximately 230 students in its first year. Each year, [Delta] will add one grade until it serves approximately 300 students in grades K-12." ROA.303. Delta further agreed in the 2013 order that it would "incorporate a preference for a student who seeks to enroll at Delta Charter School from a Concordia Parish school where his/her race is overrepresented compared to the overall racial

demographics of the District.” ROA.304. The order further required that “Delta Charter Group’s student enrollment will reflect the racial demographics of the Concordia Parish School District.” ROA.304.

The 2013 order included reporting requirements. Delta was required to submit comprehensive enrollment and staffing reports 30 days prior to each school year. ROA.305. If, at that time, “the percentage of black student enrollment in Delta Charter School is 10% or more below the black student enrollment in the Concordia Parish School District,” Delta agreed to “analyze the causes of this enrollment rate, propose how to modify the enrollment rate, and submit the analysis and proposal to the Court and the parties by July 15 of each year.” ROA.304. Additional enrollment and staffing data were due each October 15. ROA.305.

4. *Delta Repeatedly Failed To Comply With The 2013 Order*

After executing the 2013 consent order, Delta successfully sought an amended charter from the state board of education to increase the size of its student body. ROA.1540. When Delta opened in 2013, it had 323 students, despite the consent order’s limit of “approximately 230 students” for the school’s first year of operations. ROA.321. Of these 323 students, 274 (or 84.8%) were white and 49 (or 15.2%) were African American. ROA.322. In all grades but the seventh, the total numbers of African-American students were in the single digits. ROA.322.

The first-grade class of 36 students only had one African-American student.

ROA.322.

In June 2014, Concordia School Board filed a motion for further relief.

ROA.340. The School Board alleged that Delta had not met its obligations in minority enrollment, had continually increased the size of its student body above the limits in the 2013 order, and had not met desegregation requirements for faculty and administrators. ROA.340-341. Furthermore, the School Board explained that Delta was harming desegregation efforts in Concordia Parish.

ROA.348. Among other things, Delta had enrolled many white students who formerly attended some of the most disproportionately minority schools, Ferriday schools, making it harder to desegregate those schools. ROA.348. The School Board requested that Delta be enjoined from accepting any more non-African-American students until its enrollment fell within ten percentage points of the district-wide percentage of African-American students. ROA.341.

Delta opposed the motion for further relief, claiming that it had met its obligations by taking “affirmative steps to recruit and enroll black students” and admitting those African-American students who applied. ROA.354-355. After it agreed to the enrollment limits in the consent order, and without consulting the court, Delta negotiated permission for enlarged enrollment from the Louisiana Board of Secondary and Elementary Education. It then pointed to state approval as

adequate authority to exceed the consent order's enrollment restrictions.

ROA.356, 1417. Delta claimed that no further relief was warranted "absent a showing that [Delta] ha[d] taken some affirmative step to inhibit Concordia Parish School Board's ability to fulfill its desegregation obligations." ROA.356-357. A period of discovery ensued, and Delta filed further reports, but did not comply with the student demographic requirements or the cap on total student enrollment.

ROA.366, 368, 621.

Delta submitted a status report in July 2014, showing that it enrolled 380 students, 303 (or 79.7%) of whom were white and 68 (or 18%) of whom were African American. ROA.366, 368. Again, in all grades but one, African-American students numbered in single digits. ROA.366. Delta nevertheless maintained it had "fulfilled its obligations to comply in good faith with the desegregation obligations mandated by this case." ROA.371.

Delta did not submit another status report until October 2015. ROA.611. Although it continued to fall short of its minority enrollment obligations in 2015, 2016, and 2017, Delta's reports in those years did not "analyze the causes of the enrollment rate, propose how to modify the enrollment rate, and submit that analysis and proposal," as required by the 2013 order. ROA.304, 1426.

A hearing on the Board’s motion for further relief was set for Monday, February 13, 2017.² On Friday, February 10, Delta filed a motion for partial relief from the 2013 consent order. ROA.1042. Delta argued that its operation had no adverse impact on desegregation in Concordia Parish and that the consent order was “no longer necessary.” ROA.1049-1050. Delta requested that the court “relieve Delta” of any obligation to “limit the number of overall students or the number of students by race.” ROA.1052. Delta acknowledged, however, that “[a] Type 2 charter school is ‘subject to any court-ordered desegregation plan in effect for the city or parish school system.’” ROA.1046 (quoting La. Rev. Stat. Ann. § 17:3991(C)(3) (2017)).

5. *The Court Holds A Hearing On The School Board’s Motion For Further Relief*

On February 13, 2017, the first day of the hearing, the court addressed Delta’s motion for partial relief from the 2013 consent order, rejecting it as untimely. ROA.1042, 1270. Consideration of the motion without allowing the other parties time to respond, the court held, would “constitute unfair and undue prejudice” as it was “totally improper, on the Friday before [the Monday hearing], to file a new motion.” ROA.1042, 1269-1270, 1662. The court also excluded the

² The parties engaged in extensive negotiations and discovery between Concordia School Board’s June 2014 motion for further relief and the hearing. Accordingly, the hearing was repeatedly delayed.

testimony of Delta's expert witness because it was not timely disclosed.

ROA.1270.

Throughout the hearing, Delta affirmed that it "understood that it had to comply with the terms of the order." ROA.1417, 1500. Delta's counsel declared that it was "governed by the obligations set forth in the consent order" and "the court has the authority to review that." ROA.1500; see also ROA.1418. Delta also told the court that the school had "moved this court for authorization to open the charter school as required by law and intends to and has been attempting to comply with the desegregation obligations." ROA.1499.

The court heard testimony from School Board members, Delta employees, and the United States' expert on school desegregation. Evidence established that in every year of its operation, Delta's African-American enrollment was 30 percentage points or more below district-wide African-American enrollment in Concordia Parish schools. ROA.1725.

The United States' expert described Delta's impact on the parish's desegregation efforts. Ferriday schools, which have very few white students, suffered when Delta opened. Ferriday Upper and Lower Elementary Schools lost, respectively, approximately 31% and 22% of their white students. ROA.1737. Ferriday's junior high lost 20% of its white students. ROA.1737. In addition, about 14% of the white students at Concordia's math and science magnet school,

the parish's most integrated school, transferred to Delta. ROA.1740. Many of Delta's white students also came from schools in the parish's Vidalia area, where schools have a racial balance close to the district-wide average. Because of transfers from the magnet school and Vidalia schools to Delta, hundreds of white students who had previously attended well-integrated schools now attend a predominantly white school. Not only is Delta now "overwhelmingly white," but the school has had "a negative impact on the district's ability to desegregate" because of the transfer of white students from the predominantly black Ferriday schools. ROA.1742.³

The evidence introduced at the hearing showed that Delta had missed several opportunities to comply with the 2013 order. For one thing, Delta's increased total enrollment made it harder to achieve the decree's demographic requirements. For example, the United States' expert explained that in 2016, if Delta were limited to

³ Delta's school buildings previously housed Huntington Academy, a formerly all-white "private segregation academy" established in the 1970s. ROA.1506-1507, 1745. Huntington closed in 2010. ROA.1745. The association with Huntington—Delta's seven member board includes three members with Huntington affiliations—perhaps diminished Delta's reputation as a welcoming school for African Americans. See ROA.1434-1436, 1443, 1692. The United States' expert stated that Huntington's four-decade history as a school for white students weighed "in the minds of the community, both the white and the black community" as a barrier to integration. ROA.1745; see also ROA.1784. And a 75%-to-85% white faculty has also bolstered perceptions of Delta as a white school. ROA.1778-1780.

about 300 students and retained its 89 African-American students, approximately 30% of its students would have been African American. ROA.1728. The expert testified that this “suggests that 40 percent”—the level at which, according to the 2013 order, Delta need not report a deviation from the demographic requirements—“isn’t an unreachable goal.” ROA.1728.

Delta also failed to implement recognized “best practices” for attracting minority enrollment. ROA.1746. Transportation, for example, was “critical” as black families in the parish are less likely than white families to have cars. ROA.1746, 1765, 1786, 2706. Although Delta had promised in its state charter application to provide transportation, it has not yet done so. ROA.1765.

Delta failed to address other barriers hindering minority recruitment. The United States’ expert compared African-American enrollment at Delta with that at Concordia’s magnet school—which is, like Delta, a school of choice. The comparison suggests that Delta could have easily enhanced its recruitment to achieve results more like those at the magnet school. She concluded that Concordia’s magnet school was better able to recruit black students and to maintain an integrated student body largely because of better advertising—including mailers, ads, and notes sent home with children. ROA.1747; see also ROA.1785. Delta’s recruitment efforts, the expert stated, were hindered by an “ad hoc” recruitment committee. ROA.1450, 1750, 1766. Delta’s board vice-president

had no experience with minority recruitment and Delta never retained a consultant to advise it on recruitment—although it hired consultants for other aspects of its operations. ROA.1414, 1456. Delta had never used mailers or visited families in its heavily minority neighborhood. ROA.1429-1432, 1458. Delta did not arrange to meet with families from the local Head Start program or area black churches. ROA.1466, 1468. Nor did Delta follow up with black families who attended its recruitment events. ROA.1465. Moreover, the face that Delta presented to the community did not include African Americans. Delta failed to create a promised biracial committee, and its board was overwhelmingly white, as were its administrators. ROA.1444-1445, 1469, 1471, 1497, 1580.

Some simple administrative changes, too, could have made a difference. Delta did not maintain a formal, ranked waitlist. ROA.1450. Instead, it turned to a “stack of applications” to fill open spots. ROA.1451. In comparison, the magnet school maintained a waitlist and held spots open in an incoming class to allow for minority transfers in subsequent years. ROA.1748.

In the face of this evidence, the district court did not credit Delta representatives’ testimony at the hearing that its efforts amounted to “good faith” compliance with the 2013 order. The court rejected counsel’s argument that because Delta “could not compel attendance,” racial enrollment targets “are essentially going to be an impossibility.” ROA.1501. Similarly, the court was

troubled by Delta's assertion—when asked to explain the enlargement of its student body to around 500 at the time of the hearing (ROA.1500, 1539, 1727)—that the enrollment limits in the 2013 order were nothing but “an estimate.” ROA.1539.

At the end of the hearing the court found that Delta was not in compliance with the 2013 order. ROA.1991. The order's requirements, the court determined, were “not an estimate,” and “not optional, and the court order speaks for itself. It's a clear document that was agreed to by all parties.” ROA.1991.

6. *The Court Issues A Decision Finding Violations Of The 2013 Order*

The district court issued an interim ruling on May 31, 2017, finding that Delta had violated the 2013 order and impeded desegregation. ROA.1265. It ordered that Delta limit its enrollment of Concordia students for the 2017-2018 school year to no more than 350. ROA.1265.

On June 8, 2017, the court issued another decision reiterating that Delta “did not adhere to the terms of the consent judgment into which it voluntarily entered” and that “deliberate noncompliance has substantially impacted Concordia's compliance with ongoing desegregation orders.” ROA.1271. “Delta's attempts to comply,” the court held, “have not at this point been in good faith.” ROA.1273.

In particular, the court rejected Delta's argument that it could exceed the 2013 consent order's enrollment limits simply by obtaining permission from state

education officials. ROA.1271. Instead, the court held, “it was and is incumbent upon Delta to seek authorization from this court first” when seeking to change its obligations under the 2013 order. ROA.1273. The court also found it disingenuous that, while relying on state law to justify its behavior, Delta ignored state law in other respects. ROA.1271. Delta did not show compliance with state requirements for enrollment of “at risk” students who qualified for free or reduced lunch. ROA.1271 (citing La. Rev. Stat. Ann. §§ 17:3991, 17:3973 (2017)). And it did not take advantage of state law provisions authorizing it to seek transportation services from the local school district. ROA.1271-1272 (citing La. Rev. Stat. Ann. § 17:3993(D) (2017)). Instead, the district court found, “Delta provides no transportation for any students to facilitate its supposed efforts” to increase minority enrollment. ROA.1273. The court further found that “Delta has clearly not complied with the consent order to say the least, and it has attempted to move rapidly forward with its own agenda while only winking at its court ordered obligations. This will stop.” ROA.1273-1274.

7. *The Court Orders Remedies For Delta’s Noncompliance*

To remedy Delta’s noncompliance, the court placed certain restrictions on student enrollment. Although the court ordered that Delta limit its enrollment of Concordia Parish students to 350, it made clear that Delta could enroll additional students from parishes that were not under desegregation orders. ROA.1274. The

court's ruling requires that before enrolling students from parishes that are still under desegregation orders, Delta must first obtain permission after input from the affected school boards. ROA.1274. At Delta's request, the court deferred implementation of its 350-student enrollment limitation for Concordia Parish until the 2018-2019 school year. ROA.1295, 1297. It permitted the school to retain, for the upcoming 2017-2018 school year, all students enrolled at the conclusion of the previous school year. ROA.1297. For the incoming kindergarten class starting school in 2017, the court required Delta to enroll African-American and white students in equal numbers and to enroll no more than 30 kindergarteners. ROA.1297-1298.

The court's remedial ruling imposed a few additional requirements. It required Delta to establish a diversity committee, create a properly documented waitlist for admission, provide quarterly reports on recruitment efforts, and consider whether acceptance of a student applicant would negatively affect a desegregation order in the student's home school or home district. ROA.1275-1276. The court also appointed a special master to oversee implementation of these requirements. ROA.1275.

SUMMARY OF THE ARGUMENT

Delta dedicates most of its opening brief (Br. 7-9, 11-20, 28) to an argument that it never raised in the district court and thus has waived on appeal. For the first

time, Delta now contends on appeal that subjecting it to the desegregation orders in this case constitutes an impermissible interdistrict remedy under *Milliken v. Bradley*, 418 U.S. 717 (1974).

Delta's new argument is not properly before this Court. Not only did Delta fail to raise the argument below, but it consistently took precisely the opposite position in the district court.

Delta voluntarily intervened in this desegregation case so that it would be permitted, under state law, to operate as a Type 2 public charter school in Concordia Parish. Once it had intervened, Delta then negotiated a settlement with the other parties that was entered as a consent order in 2013. That order included conditions on Delta's operation of a charter school in Concordia Parish and explicitly stated that "Delta Charter Group agrees that it is governed by and that it will comply with the desegregation obligations mandated by this case." ROA.303. Both before and after the entry of the 2013 consent order, Delta repeatedly advised the district court that Louisiana's charter school law required that it be subject to the desegregation orders in this case. Delta further acknowledged on several occasions—including in filings and oral arguments in 2017—that it was bound by and would comply with the terms of the 2013 consent order that it had negotiated with the other parties.

Delta's position below was not surprising, given Louisiana's charter school law, which mandates that "[a] charter school shall * * * [b]e subject to any court-ordered desegregation plan in effect for the [relevant] city or parish school system." La. Rev. Stat. Ann. § 17:3991(C)(3) (2017). Delta's new position on appeal could be viewed as an attack on this state law requirement as well as on the 2013 consent order.

But this court need not and should not wrestle with such issues. Particularly in light of its repeated representations to the district court that it was properly bound by the 2013 order, Delta may not, for the first time on appeal, present new, entirely inconsistent arguments.

The only issues that are properly before this Court are straightforward and factbound: (1) did the district court clearly err in concluding that Delta violated the 2013 consent order to which it had agreed, and (2) did the district court abuse its discretion in fashioning a remedy for Delta's violations. The answers to both questions are "no."

After agreeing to specific desegregation obligations, Delta immediately violated the 2013 order's requirements that it limit its total student enrollment and admit black and white students in numbers proportional to their representation in the Concordia Parish school district. Indeed, in its five years of operation, Delta has never kept the commitments it made in the 2013 consent order. The violations

were, the court found, easy to see by comparing the school's enrollment figures with the order's plain language. "[T]he court order speaks for itself," the court correctly observed. ROA.1991.

Having found that Delta repeatedly violated the 2013 order and, indeed, failed to act in good faith, the district court had broad discretion to craft an appropriate remedy. As the remedial rulings are closely tied to Delta's original agreement and amply supported on the record, the court acted well within its discretion. Indeed, the well-developed record shows that Delta should be able to meet most of its obligations simply by observing the enrollment restrictions to which it agreed in the 2013 order. Several other helpful measures are available including providing transportation (as amended state laws now require), setting up formal procedures and personnel for recruitment and outreach (instead of relying on ad hoc arrangements), and maintaining a formal, ranked waitlist (instead of a "stack of applications" (ROA.1451)). Thus, with reasonable efforts Delta can meet its obligations and begin to bring its vision of providing innovative public education opportunities to black and white students equally.

ARGUMENT

I

DELTA HAS WAIVED THE ARGUMENT THAT IT IS NOT SUBJECT TO THE DESEGREGATION ORDERS IN THIS CASE

This Court should not consider on appeal arguments not raised below. A “district court cannot have erred as to arguments not presented to it.” *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir. 2004); see also *Maverick Recording Co. v. Harper*, 598 F.3d 193, 198 (5th Cir. 2010) (holding constitutional claim waived where insufficiently presented to the district court and not ruled on below), cert. denied, 562 U.S. 1080 (2010); *ICEE Distributors, Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 595 n.29 (5th Cir. 2003) (holding choice of law issue waived for failure to raise it in the trial court); *Carty v. State Office of Risk Mgmt.*, 733 F.3d 550, 555 (5th Cir. 2013) (holding party waived immunity from liability by not raising it below).

In this appeal, Delta now asserts for the first time (Br. 7-9, 11-20, 28) that it should not be subject to the extant desegregation orders in Concordia Parish. Delta argues that it is essentially a “small independent school district[]” and may not be subject to a desegregation decree as are other public schools in Concordia Parish. Br. 13. Such a requirement, Delta asserts, is an improper interdistrict remedy under *Milliken v. Bradley*, 418 U.S. 717 (1974).

Delta never made this argument below. Rather, it consistently took the opposite position. ROA.165, 170, 238, 303. Upon intervening in this proceeding, Delta told the court that the proper test for whether the school could open was “whether operation of * * * a public charter school[] would undermine the Court’s [desegregation orders], and promote resegregation.” ROA.245 (internal quotation marks omitted). Subsequently, in the 2013 consent order, Delta “agree[d] that it is governed by and that it will comply with the desegregation obligations mandated by this case.” ROA.303. Delta thus promised to “take no action that will impede” the parish’s desegregation. ROA.303.

Delta’s position upon intervening and entering into the 2013 consent order was not surprising, given Louisiana state law, which requires that public charter schools “[b]e subject to any court-ordered desegregation plan.” La. Rev. Stat. Ann. § 17:3991(C)(3) (2017). Indeed, Louisiana anticipates that a charter school will resolve any “desegregation compliance issues,” as Delta promised to do here, before it opens. See La. Rev. Stat. Ann. § 17:3983 (A)(4)(c) (2017) (allowing delayed opening for resolution of such issues).

Nor did Delta contest the State’s requirements at any time during the decree’s implementation. On the contrary, until its brief in this appeal, Delta continued to recognize that it was subject to the parish’s desegregation requirements. Indeed, during the hearing on the school district’s motion for further

relief that led to the very orders that Delta now appeals, Delta's counsel told the court that the school had requested court approval to operate "as required by law," was "governed by the obligations set forth in the consent order," and "intends to and has been attempting to comply with the desegregation obligations."

ROA.1499-1500.

In sum, Delta not only did not make its current argument to the district court, but consistently took the opposite position. Under these circumstances, the case for waiver is especially compelling. If the basis for the doctrine of waiver is that one cannot allege error in a court's failure, sua sponte, to adopt an argument not made, see *Miller*, 391 F.3d at 701, certainly Delta cannot complain of a court's failure to *reject* its position below.

II

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT DELTA VIOLATED THE 2013 CONSENT ORDER, IMPEDING DESEGREGATION IN CONCORDIA PARISH

A. Standard Of Review

The district court's findings of fact are reviewed for clear error. *Cowan v. Cleveland Sch. Dist.*, 748 F.3d 233, 238 (5th Cir. 2014). "[G]iven the unique factual circumstances present in school desegregation cases," factual findings in such cases "are entitled to great deference." *Anderson v. School Bd. of Madison Cty.*, 517 F.3d 292, 296 (5th Cir. 2008) (internal quotation marks omitted). To the

extent that the meaning of a decree is in issue, an appellate court should also give “great deference” to a trial court’s interpretation of its own orders. *Williams v. City of Dothan, Ala.*, 818 F.2d 755, 760 (11th Cir. 1987).

B. The Evidence Amply Supports The District Court’s Finding That Delta Violated The 2013 Order

The district court found that Delta violated the 2013 order’s enrollment caps and demographic requirements by a significant number. ROA.1265, 1271-1273. These findings are amply supported by the evidence and are not clearly erroneous.

1. Limits On Enrollment

Delta violated the 2013 order’s limitations on student enrollment. The decree provides that “[i]n its first year, [Delta] will serve 23 students per grade, with an overall enrollment of approximately 230 in the first year,” and that each year thereafter, Delta “will add one grade until it serves approximately 300 students in grades K-12.” ROA.303. Delta has exceeded the enrollment caps every year (ROA.322, 366, 621, 667, 2046, 2058) and has never come close to meeting those limits. In the first year of its operations, Delta opened with 330 students, far in excess of the “approximately 230” that the 2013 order authorized. ROA.303, 1539-1540. By 2016, Delta enrolled some 500 students, greatly exceeding the order’s cap of “approximately 300.” ROA.303, 1727.

Contrary to Delta's assertions (ROA.1963), these enrollment caps were not mere non-binding estimates. The order's plain language makes clear that they are mandatory. Although the order provides a small degree of flexibility by stating that Delta would enroll "approximately 300 students," 500 students do not remotely qualify as "approximately 300." ROA.303.

Delta seeks to excuse its failure to adhere to the decree's enrollment limits by asserting that "[a]t the time the parties entered into the Consent Order, Delta's charter contract with [the State board of education] had not been finalized and executed, so several assumptions were made concerning the enrollment numbers for the charter school." Br. 5. But Delta represented to the parties and the court prior to entry of the consent order that it already had the State's approval to open the charter school in Concordia Parish. ROA.171, 176, 185. At any rate, nothing in the order remotely suggests that Delta is free to disregard the numerical cap simply by including a higher figure in its final charter. ROA.1416. As the district court correctly concluded, Delta's position is "clearly wrong in view of the court's original consent order." ROA.1271.⁴

⁴ The district court found Delta's asserted reliance on state approval particularly unsympathetic because Delta had failed to comply with state law requirements for enrollment of underprivileged students. ROA.1271. Delta argues that the court erred in noting this noncompliance with state law because, according to Delta, the court lacked authority to adjudicate alleged violations of Louisiana's
(continued...)

2. *Demographic Requirements*

Delta also violated the consent order's mandate that Delta's "student enrollment will reflect the racial demographics of the Concordia Parish School District." ROA.304. The order noted that, as of December 2012, approximately 49.5% of the school district's students were black and about 49% were white. ROA.303. Since entry of the 2013 order, the percentage of the school district's students who are black has increased to around 51%. ROA.2066. The order gives Delta a margin of permissible variance by requiring it to report a deviation from the demographic requirements only if "the percentage of black student enrollment in Delta Charter School is 10% or more below the black student enrollment in the Concordia Parish School District." ROA.304.

The evidence shows that Delta has never come close to matching the racial demographics of the district's student body, even taking into account the 10% variance permitted by the 2013 order. In each year of its operation, the percentage of black students at Delta was at least 30 points lower than the percentage in the parish school district. In its first year of operation, for example, 50% of students in

(...continued)

charter school law. Br. 21-22. But the court did not order any corresponding remedy for potential state law violations, and thus even if the court's statement about noncompliance could be considered a finding against Delta, it is a finding without consequence.

the parish were African American but Delta's enrollment was just 15%. ROA.322, 2066. In the 2016-2017 school year, when the district-wide population of black students was 51%, Delta's enrollment was just 17%. ROA.667-668, 2066.

The district court properly rejected Delta's assertion that the 2013 order's demographic requirements are merely aspirational. ROA.1991. Although Delta claims that the order required only an "attempt[] to enroll as many minority students as [Delta] could" (ROA.1419, 1499), nothing in the language of the order supports that reading. As the district court emphasized in rejecting Delta's argument, the 2013 order is "a clear document" that "speaks for itself." ROA.1991.

Delta suggested to the district court that full compliance with the order's demographic requirements was "an impossibility." See ROA.1501; see also Br. 24. The record refutes that assertion. The evidence shows that Delta had ample means to satisfy the requirements, but failed to take advantage of those opportunities.

Indeed, Delta could have taken any one of several measures to recruit more African-American students. Most notably, it could have provided transportation. ROA.1745-1746. Offering transportation would afford African-American students, whose families are less likely than white families in Concordia Parish to own vehicles, a potentially appealing opportunity to attend Delta's innovative

charter school. Even if offered only for students within a few miles from Delta, transportation would have had a meaningful impact, as most children living near the school are African American. ROA.1678, 1703, 1736. As the district court pointed out, “Louisiana charter school law permits charter schools to have transportation provided by the local school district.” ROA.1271 (citing La. Rev. Stat. Ann. § 17:3993(D) (2017)). Yet Delta ignored this option and offered no transportation. ROA.1271.⁵ At the time the court ruled, Delta’s failure to provide transportation represented an unfortunate lost opportunity for Delta to achieve an integrated student body. And, as the district court explained, Delta had a number of other recruitment methods that it could have adopted to enhance compliance with the 2013 order. ROA.1274-1276, 1429-1430, 1750-1751, 1766.

Steps such as making online applications easier to download and submit, conducting outreach and advertising on social media, mailing application packets to Concordia families with school-age students, and meetings with parents at Head Start would likely have enhanced compliance. ROA.1748, 1758-1760, 1823.

Other simple policy changes could also enhance compliance, such as organizing a

⁵ Delta claims the court made an unwarranted finding of “noncompliance” with state law here. Br. 21. That is not the case. See ROA.1271-1272; note 4, *supra*. The court simply noted that Delta ignored state law provisions authorizing transportation services and so failed to use one of the most promising means of achieving compliance with the consent decree. ROA.1271-1272.

ranked waitlist and holding open spots in a class, if there are few initial black applicants, to allow African Americans to join in later grades. Even Delta's vice president assumed in his testimony at the hearing that Delta "could get to [the order's] percentage eventually." ROA.1419.

C. The District Court Did Not Clearly Err In Finding That Delta's Noncompliance Hindered Desegregation In Concordia Parish

The district court found that Delta's noncompliance with the 2013 order "has substantially impacted Concordia's compliance with ongoing desegregation orders." ROA.1271. The record amply supports this conclusion. Most notably, Delta interfered with integration of those schools in the parish's Ferriday neighborhood. Most Ferriday schools are racially identifiable as African American, with ten percent or fewer white students. ROA.2798. Delta's primary effect on the neighborhood was to remove white students who would have otherwise attended Ferriday schools. In 2013, when Delta opened, 13 of the 59 white students in Ferriday's elementary and junior high grades transferred to Delta. ROA.2798. Others transferred to Delta in subsequent years. ROA.2798. If those students had remained in Ferriday schools, the neighborhood schools would have moved closer to overcoming their racially identifiable character. ROA.1736-1739.

In addition, many of the white students at Concordia's magnet school and Vidalia schools transferred to Delta. ROA.1740. These white students, who had

previously attended well-integrated schools, now attend an overwhelmingly white school. ROA.1742.

The evidence amply supports the district court's finding of noncompliance. Delta never met the demographic requirements of the 2013 order. And by drawing white students away from Ferriday schools, Delta hindered desegregation in Concordia Parish. In its brief on appeal, Delta never addresses the demographic evidence before the district court or otherwise explains why that evidence is insufficient to support the court's findings. Br. 26. The record here confirms that the district court's findings were not clearly erroneous.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A REMEDY

A. A Court Has Broad Discretion To Remedy Noncompliance

In reviewing a district court's desegregation orders, this Court is "limited to ascertaining whether the court abused its discretion." *Valley v. Rapides Par. Sch. Bd.*, 702 F.2d 1221, 1225 (5th Cir. 1983). The "scope of a district court's equitable power to remedy" segregation is "broad" and "flexibl[e]." *Cowan v. Cleveland Sch. Dist.*, 748 F.3d 233, 238-239 (5th Cir. 2014). A court has "inherent power to enforce" its consent order and "implement[] a remedy that address[es] [a] party's noncompliance." *United States v. Alcoa, Inc.*, 533 F.3d 278, 284 (5th Cir. 2008).

Indeed, if a court finds “that there is a violation of a desegregation decree, it *must* fashion appropriately tailored equitable relief.” *United States v. Texas*, 457 F.3d 472, 478 (5th Cir. 2006) (emphasis added). The district court has “broad equitable powers” in crafting appropriate relief as it is most familiar with the facts and history of the litigation. *United States v. Paradise*, 480 U.S. 149, 184 (1987). Where, as here, the court has developed an extensive record and presided over a case for several years, it is particularly important that this Court defer to the court’s “insight into local conditions.” *Valley*, 702 F.2d at 1226.

B. The Court’s Remedy Is Amply Supported By The Evidence And Carefully Tailored To Address Delta’s Violations

In this case, the district court carefully considered the terms of the 2013 order and evidence of noncompliance, taking into account “the nature of the violation” in determining “the scope of the remedy.” *Samnorwood Indep. Sch. Dist. v. Texas Educ. Agency*, 533 F.3d 258, 267 (5th Cir. 2008) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). The court has a duty to see that Concordia and Delta avoid actions that “perpetuate or re-establish” segregation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979). Here, the remedies serve those goals and are well “within the ambit of the district court’s expansive remedial authority.” *Valley*, 702 F.2d at 1227.

In the 2013 order, Delta agreed to regulate enrollment and to “take no action that [would] impede the Concordia Parish School Board’s ability to fulfill its obligations” for desegregation. ROA.303. The requirements in the court’s 2017 remedial rulings in large part reiterate the provisions of the 2013 order, and those rulings are amply supported by evidence presented in a thorough, three-day hearing.

Although Delta claims (Br. 22) that “no evidence exists to establish that the remedial measures imposed will assist” desegregation efforts, the record refutes that contention. For example, as we have explained, evidence showed that simply observing the enrollment cap required in the consent order would go a long way in bringing Delta closer to the 2013 order’s demographic requirements. See pp. 14-16, *supra*.

Given this evidence, the district court reasonably required Delta to begin moving toward compliance with the 2013 order’s demographic requirements by accepting equal numbers of black and white children in its incoming 2017 kindergarten class. ROA.1297-1298. The district court worked to minimize disruption to students, allowing the school to phase in compliance and keep all its current students through the 2017-2018 school year. ROA.1297. The district court also imposed an enrollment cap of 350 students from Concordia Parish. ROA.1275. This solution was grounded in the record, as evidence shows that a

reduced enrollment would help Delta achieve a more integrated student body.

ROA.1275-1276. These remedies are sound “in light of the circumstances present and the options available.” *Green v. County Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 439 (1968).

The court’s order also appropriately addressed recruitment. Upon reviewing evidence that Delta’s recruitment efforts for minority students were “ad hoc,” the district court ordered a diversity committee be established to ensure that Delta engages in sustained and systematic recruitment of minority students. ROA.1450, 1274-1275, 1750, 1766. Here, the remedy will ensure Delta has adequate means to enhance recruitment, but it also leaves Delta considerable freedom in administration.

The court’s order regarding transportation was fully supported by the evidence and appropriately tailored to address Delta’s failure to meet the 2013 order’s demographic requirements. After reviewing expert testimony and demographic evidence that African Americans in the parish are less likely than whites to have a car, the court correctly found that Delta’s failure to provide transportation was hindering its ability to recruit African-American students. ROA.1746, 1786, 2706. The burden of the remedial ruling’s transportation provision will likely be minimal, because state law requires charter schools to

provide transportation anyway beginning in the 2018-2019 school year. Br. 22 (citing 28 La. Admin. Code Pt. CXXXIX, § 2801(C) (2017)).

Delta suggests that the court abused its discretion in setting up a procedure to hear concerns school boards outside Concordia Parish might have about any potential resegregative effect of their students transferring to Delta. Br. 3, 20, 26-27; ROA.1274. For several reasons, this is not the case. First, Delta is incorrect in asserting that the court's ruling "forbids enrollment of students 'from other parishes NOT under current desegregation orders.'" Br. 6. Students from such parishes are not restricted. ROA. 1274 ("Additional students may be added from other parishes NOT under current desegregation orders * * *."). Second, the order does not bar Delta from enrolling students from court-supervised parishes, although Delta must obtain approval. ROA.1274. This consultation with other school districts, moreover, serves the requirement of the Louisiana charter school law that charter schools not interfere with existing school desegregation plans. La. Rev. Stat. Ann. § 17:3991(C)(3) (2017). Finally, Delta's expressed concern is premature. The court has not required hearings with any non-Concordia school boards. See ROA 1297-1298.

As the appellant, Delta has the burden to show that the district court abused its discretion in constructing a remedy. *Cowan*, 748 F.3d at 238. Delta has not come close to meeting this burden. It has not shown that any of the court's

remedial measures is impracticable or unduly burdensome. Nor has it cited evidence suggesting that the court's remedies—such as provision of transportation, an enrollment cap, or an advisory committee—would be ineffective in improving Delta's compliance with the 2013 order.

On the contrary, the district court fully developed the record with a three-day hearing, carefully crafted its remedies around specific evidence introduced during the hearing, and used, as the foundation of its remedy, the 2013 order that the parties had previously negotiated and accepted. The resulting remedial ruling is well-grounded in evidence showing that enrollment caps, transportation, and improved recruitment can enhance Delta's compliance with the consent decree. The court did not exceed the "broad equitable powers" afforded it here. *Paradise*, 480 U.S. at 184.

C. The District Court's Remedy Supports Louisiana Charter School Laws

Delta incorrectly suggests that the court's remedy will thwart the goals of Louisiana's charter school statute, which are to "allow for the 'creation of innovative kinds of independent public schools for pupils'" and to provide "a framework for * * * experimentation." Br. 11 (quoting La. Rev. Stat. Ann. § 17:3972(A) (2017)). But the court's remedial orders do not bar educational innovation or creativity—indeed, they do not constrain Delta's curriculum at all. Instead, the remedy supports the requirements of Louisiana law, which mandates

that charter schools “[b]e subject to any court-ordered desegregation plan in effect for the [relevant] city or parish school system.” La. Rev. Stat. Ann. § 17:3991(C)(3) (2017).

In agreeing to the 2013 order, Delta explicitly acknowledged that it would be subject to the court’s desegregation orders. Delta now seeks to renege on that agreement by making arguments that are, in effect, an attack on this statutory requirement. It is Delta’s new position on appeal, not the district court’s remedy, that threatens to undercut Louisiana’s charter school law.

CONCLUSION

This Court should affirm the district court’s order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 21, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all counsel are registered with the CM/ECF system and service will be accomplished through that system.

s/ April J. Anderson
APRIL J. ANDERSON
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

- (1) contains 7553 words;
- (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 has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font; and
- (3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ April J. Anderson
APRIL J. ANDERSON
Attorney

Dated: December 21, 2017