No. 21-30514

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRACIE T. BOREL, ON BEHALF OF HER MINOR CHILDREN, AL AND RB;
GENEVIEVE DARTEZ, ON BEHALF OF HER GREAT-GRANDCHILD, DD,

Plaintiffs-Appellees

v.

SCHOOL BOARD SAINT MARTIN PARISH,

Defendant-Appellant

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee

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

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Given both the lengthy procedural history of the case and the fact-specific issues presented in this appeal, the United States respectfully requests that this case be set for oral argument.

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INTRODUCTION AND STATEMENT OF THE ISSUES

In 2014, this Court held that the district court retained jurisdiction in this school desegration case, notwithstanding the fact that the case had been on the district court's inactive docket for several decades. *Thomas* v. *School Bd. St.*

Martin Par., 756 F.3d 380, 386 (5th Cir. 2014). This Court remanded the case to the district court to determine "whether the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (citation omitted).

On remand, the district court and the parties worked to identify and address those vestiges of discrimination, mindful that "decrees in school desegregation cases are not intended to operate in perpetuity," and that local control should be restored after the effects of past discrimination have been sufficiently remedied. *Thomas*, 756 F.3d at 387 (citation and internal quotation marks omitted). The parties negotiated, and the district court entered, multiple consent orders which were consolidated into a single Superseding Consent Order in 2016 that was intended to ensure that the St. Martin Parish School District transitioned to a fully unitary system. Indeed, since this Court's 2014 remand, the District has been declared unitary in the areas of transportation, staff assignment, facilities, and extracurricular activities. See ROA.2243, 7107, 7109, 15587.[1]

But not all vestiges of discrimination have been eliminated to the extent practicable, nor has the St. Martin Parish School Board sufficiently complied with the terms of the Superseding Consent Order. As a result, in June 2021 the district

[1] Citations to "ROA._" are to documents in the electronic record on appeal in this case. Citations to "R.E. Tab _, ROA._" are to documents included in the record excerpts filed by the appellant.

court correctly denied the School Board's motion for unitary status as to student assignment and quality of education regarding discipline.

In an effort to avoid the detailed factual findings that the district court made, the Board now reverses course and argues—notwithstanding this Court's 2014 decision remanding this case to the district court and the Board's subsequent agreement to multiple consent orders—that the district court never had jurisdiction on remand to do anything other than dismiss this case. That argument is foreclosed by the law of this case and is, in any event, meritless. The district court's extensive factual findings in its June 2021 memorandum ruling make clear that vestiges of discrimination remain to be remedied.

While the United States shares the Board's desire for federal court involvement in the District to end, such action is not warranted until the Board complies in good faith with the consent orders to which it has agreed and eliminates the remaining vestiges of *de jure* discrimination in its school system. The Board cannot seek through this appeal to avoid the obligations it undertook in the Superseding Consent Order—obligations the district court appropriately determined were not being met. Accordingly, the district court properly declined to declare the District unitary and entered further relief, including the closure of Catahoula Elementary School, to bring the District into compliance with the Superseding Consent Order.

The United States as intervenor-appellee will address the following issues:

1. Whether the district court properly exercised remedial jurisdiction in entering the parties' agreed-upon 2016 Superseding Consent Order and subsequently ordering the closure of Catahoula Elementary School to bring certain elementary schools into compliance with the terms of the Superseding Consent Order.

2. Whether the district court correctly denied the School Board's motion for unitary status with respect to student assignment and quality of education regarding discipline.[2]

STATEMENT OF THE CASE

1. Relevant District Court Litigation From 1965 To 1974

a. In 1965, private plaintiffs successfully sued the St. Martin Parish School Board to enjoin its maintenance of racially segregated schools. *Thomas* v. *St. Martin Par. Sch. Bd.*, 245 F. Supp. 601 (W.D. La. 1965) (entering a stipulated violation and permanent injunction). The district court initially adopted the parties' agreed-upon freedom of choice plan to govern student assignments, but, consistent with the Supreme Court's subsequent decision in *Green* v. *County School Board of New Kent*, 391 U.S. 430 (1968), this Court later held that plan to

[2] The United States takes no position on any other issues presented in this appeal.

be constitutionally inadequate. *Hall* v. *St. Helena Par. Sch. Bd.*, 417 F.2d 801, 809 (5th Cir. 1969).

In 1969, the district court approved a desegregation plan establishing attendance zones, mandating the desegregation of faculty and staff, creating a majority-to-minority transfer policy, and requiring periodic reporting to the court. R.E. Tab 5, ROA.280-284; see *Thomas* v. *School Bd. St. Martin Par.*, 756 F.3d 380, 382 (5th Cir. 2014) (discussing procedural history).

In the district court's 1969 Memorandum Opinion approving this plan, the court stated that Catahoula Elementary "would remain all white." R.E. Tab 4, ROA.275. The court justified that approval by observing that the attendance zone for the school "has served that particular area for many years," that "[n]o Negroes live in the area, and none has chosen to attend this school under freedom of choice." R.E. Tab 4, ROA.275. It did so despite the fact that the U.S. Department of Health, Education and Welfare (HEW) had submitted a plan to the district court that would have "bus[ed] fifty Negro children from the St. Martinville zone to the Catahoula zone." R.E. Tab 4, ROA.276. The court rejected this plan as "wholly unwarranted and not required by Constitutional standards." R.E. Tab 4, ROA.276.

b. In 1974, the district court issued an order directing the parties to file briefs that addressed "[w]hether or not this school system has achieved a unitary status, has maintained such status for a period of two years, and the decree of th[e]

Court should be dissolved." *Thomas*, 756 F.3d at 382 (brackets in original). The court then issued a decree (1974 Order) that stated that the Board had "achieved a unitary school system and * * * operated [it] as such for a period in excess of three * * * years prior to this date" and accordingly "dissolved" all "regulatory injunctions." R.E. Tab 8, ROA.782; see *Thomas*, 756 F.3d at 382-383. The 1974 Order permanently enjoined the Board from operating a dual school system, required certain reports to be filed, placed the case on the court's inactive docket, and retained jurisdiction "for a period of two years." R.E. Tab 8, ROA.783.

Even after the case was placed on the inactive docket in 1974, Judge Putnam did not appear to regard the case as resolved. To the contrary: he wrote to the Board's lawyer in 1978 to inform the Board that "there is no doubt that if the school board * * * should violate the injunction directed to them [or] fail[] to implement the plan of desegregation which we approved they would be subject to contempt of court and other penalties." ROA.1187 (citation and alteration omitted).

2. The District Court's 2009 Reassignment Of This Case And This Court's 2014 Decision Holding That The District Court Retained Remedial Jurisdiction

Following Judge Putnam's death in 2002, the chief district court judge noted in 2009 that this case remained on the court's inactive docket and reassigned it for further proceedings. *Thomas* v. *St. Martin Par. Sch. Bd.*, 879 F. Supp. 2d 535, 537

(W.D. La. 2012). After the case was reassigned, the Board filed a motion to dismiss arguing that the 1974 Order constituted a final judgment. *Id.* at 543. The district court denied the motion, reasoning that the 1974 Order had not sufficiently found "that the School Board has remedied the vestiges of past segregation to the extent practical" and that the suit therefore "remains alive." *Id.* at 551.

The Board appealed and this Court affirmed. *Thomas*, 756 F.3d at 386-388. The Supreme Court's decision in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), dictated that the district court had been correct in denying the motion to dismiss. This Court explained that the statement in the 1974 Order that the Board had "achieved a unitary school system" was "susceptible to being read as stating that the school system was presently unitary but had not yet eliminated the vestiges of past discrimination." *Thomas*, 756 F.3d at 386. Consistent with the outcome in *Dowell*, where the Supreme Court addressed a similarly ambiguous order, this Court remanded the case to the district court for further proceedings. *Id.* at 387. The Court reiterated that the governing inquiry is "whether the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (quoting *Dowell*, 498 U.S. at 250).

3. Litigation On Remand From 2014 To The Entry Of The 2016 Superseding Consent Order

a. Once remanded to the district court in 2014, the case returned to active litigation. In discovery and through negotiation, the parties assessed whether the

Board had achieved unitary status in the areas known as the "*Green* factors," including: (1) student assignment; (2) faculty assignment; (3) staff assignment; (4) transportation; (5) extracurricular activities; and (6) facilities. *Green*, 391 U.S. at 435-442. The parties also considered ancillary factors including "quality of education." See *Freeman* v. *Pitts*, 503 U.S. 467, 473 (1992); *Tasby* v. *Estes*, 643 F.2d 1103 (5th Cir. 1981).

Notably, on remand, the Board did not immediately move for a declaration of fully unitary status. Instead, as discussed, see pp. 10-11, *infra*, it entered into consent agreements governing faculty and staff assignment, facilities, and transportation. It did, however, file a motion in November 2015 seeking a declaration of unitary status as to student assignment and quality of education with respect to graduation pathways. ROA.1678. The United States opposed the motion with respect to student assignment and cross-moved for further relief in this area. ROA.2178, 2271.

The Board acknowledged in its motion both that the attendance zone for Catahoula Elementary had been left "untouched" by the 1969 plan, and that, at the time of the Board's motion, the school remained "overwhelmingly white," with Black students making up only 7% of Catahoula's enrollment. ROA.1692, 1694. The Board argued that "the continued existence of Catahoula Elementary as a

nearly one-race school should not prohibit the Board from obtaining a declaration of unitary status." ROA.1695.

In opposing the motion (ROA.2282), the United States explained that in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court had insisted upon school authorities achieving "the greatest possible degree of actual desegregation," which necessarily includes "the elimination of one-race schools." *Id.* at 26. The United States argued that the Board had not achieved such desegregation, because it had operated Catahoula Elementary as an all-white school during *de jure* segregation and was continuing to operate it as an essentially all-white school by failing to take meaningful steps to desegregate its student body. ROA.2283.

b. The district court scheduled an evidentiary hearing in January 2016 to consider the Board's motion. ROA.2466. Before the hearing, however, the private plaintiffs and the Board reached settlement agreements on all outstanding issues. ROA.2483, 2498, 2534. The Board's counsel then told the court that it was "no longer" arguing "for a finding of unitary status in the area of student assignment." ROA.2532-2533.

After the parties jointly moved for entry of a consent order governing student assignment, the district court held a hearing on whether the order was appropriate and likely to effectively eliminate existing vestiges of discrimination.

ROA.17314. Over three days, the court "reviewed the draft of th[e] consent decree with the parties several times," "heard evidence on the decree," and "visited several of the schools affected by the decree." ROA.17428; see also ROA.2663. The court reiterated to the parties "that the proposed consent order contains provisions the effect of which will not be known until they are put into effect, such as the change of school district boundaries and the increased encouragement and facilititation of majority-to-minority transfers." ROA.2661. The court stressed that, consistent with expert testimony at the hearing, it had to reserve the possibility of further relief "if the efforts outlined in the proposed consent decree are not successful in bringing about the desegregation of racially identifiable schools." ROA.2661.

On January 21, 2016, after extensive discussions with the parties and the incorporation of revisions made at the court's request, the court entered the parties' consent order regarding student assignment. ROA.2663, 17428-17431. The student assignment consent order was one of many agreed-upon orders that the district court entered between October 2015 and February 2016 addressing various *Green* factors, including faculty and staff assignment, facilities, transportation, and quality of education (*i.e.*, discipline and academic achievement). ROA.2422, 2584, 2818, 2846.

c. In November 2016, the court consolidated the operative consent orders into a single Superseding Consent Order. R.E. Tab 9 - R.E. Tab 12. As relevant here, the 2016 Superseding Consent Order imposed detailed requirements on the School Board in the areas of student assignment and student discipline.

i. Student Assignment

The portion of the Superseding Consent Order dealing with student assignment (Student Assignment Consent Order) states that "the 'fundamental' inquiry and 'critical beginning point' in assessing a school district's compliance with a desegregation decree is determining whether its schools remain racially identifiable." R.E. Tab 10, ROA.3889 (quoting *Freeman*, 503 U.S. at 474). As a "reasonable starting point" for assessing whether a school remains racially identifiable, the Student Assignment Consent Order adopts a +/-15 percent deviation standard from district-wide student enrollment by race for the comparable grade levels. R.E. Tab 10, ROA.3890. Under this desegregation standard, each school has a broad, 30-percentage point range for compliant student enrollment demographics. Thus, where Black students make up 46% of the relevant elementary school population, elementary schools with Black student enrollment between 31% to 61% meet the desegregation standard and are not considered racially identifiable. R.E. Tab 10, ROA.3890.

In the 2015-2016 school year, when this standard was first adopted, 10 of the 16 schools in the District (as highlighted below) were racially identifiable and did not meet the +/-15 percent desegregation standard:

Table 1: Actual Enrollment as of Oct. 1, 2015
*deviations from the +/-15% desegregation standard described below in Section VI.A are highlighted in yellow and in italics

School (Grades Served)	White	Black	Other	Total
Breaux Bridge Primary (PK-2)	196 (34%)	*382 (66%)*	5 (1%)	583
Breaux Bridge Elementary (3-5)	137 (31%)	*294 (67%)*	5 (1%)	436
Catahoula Elementary (PK-8)	216 (92%)	*16 (7%)*	4 (2%)	236
Early Learning Center (PK-1)	118 (30%)	*268 (67%)*	12 (3%)	398
Parks Primary (PK-4)	398 (72%)	*142 (26%)*	12 (2%)	552
Cecilia Primary (PK-2)	488 (62%)	258 (33%)	42 (5%)	788
St. Martinville Primary (2-5)	159 (26%)	*431 (71%)*	18 (3%)	608
Stephensville Elementary (PK-8)	129 (97%)	*2 (1.5%)*	2 (1.5%)	133
Teche Elementary (3-5)	347 (67%)	187 (34%)	25 (5%)	559
Elementary School Totals	*2188 (51%)*	*1980 (46%)*	*125 (3%)*	*4293*
Breaux Bridge Junior High (6-8)	100 (29%)	*239 (70%)*	5 (2%)	344
Cecilia Junior High (6-8)	366 (65%)	*168 (30%)*	32 (6%)	566
Parks Middle (5-8)	240 (62%)	139 (36%)	6 (2%)	385
St. Martinville Junior High (6-8)	103 (26%)	*280 (70%)*	17 (4%)	400
Middle School Totals	*809 (48%)*	*826 (49 %)*	*60 (4%)*	*1695*
Breaux Bridge Senior High (9-12)	451 (54%)	361 (43%)	24 (3%)	836
Cecilia Senior High (9-12)	498 (62%)	271 (34%)	29 (4 %)	798
St. Martinville Senior High (9-12)	305 (40%)	445 (58%)	20 (3%)	770
High School Totals	*1254 (52%)*	*1077 (45%)*	*73 (3%)*	*2404*
Juvenile Continuing Education Program (K-12)	18 (60%)	9 (30%)	3 (10%)	30
Other School Totals	*18 (60%)*	*9 (30%)*	*3 (10%)*	*30*
TOTAL:	*4269 (51%)*	*3892 (46%)*	*261 (3%)*	*8422*

R.E. Tab.10, ROA.3888. In the Student Assignment Consent Order, the parties and the court agreed that the Stephensville Elementary Attendance Zone is so geographically isolated that no further practicable measure can achieve desegregation. R.E. Tab 10, ROA.3896. But the parties and the court agreed that the +/-15 percent desegregation standard should apply elsewhere in the District. Indeed, ending the racial identifiability of elementary schools in the St. Martinsville Attendance Zone—namely, Catahoula Elementary, the Early Learning

Center, and St. Martinville Primary—is a major focus of the order. The Student Assignment Consent Order states that "Catahoula was a White school during *de jure* segregation and has continued to be a virtually all-White school ever since," and that St. Martinville Primary is "racially identifiable as Black." R.E. Tab 10, ROA.3887, 3894.

To achieve the +/-15 percent desegregation standard, the Board agreed, among other measures, to (i) modify the St. Martinville and Catahoula Attendance Aones so that all students in the modified attendance zone would attend Catahoula Elementary for grades two through five and St. Martinville Junior High School for grades six through eight; (ii) eliminate grades six through eight from Catahoula Elementary; and (iii) promote the M-to-M Program.[3] R.E. Tab 10, ROA.3881. The order notes that "[t]he parties anticipate that the agreed upon remedial measures regarding M-to-M transfers * * * will bring St. Martinville Primary and grades 2-5 at Catahoula Elementary into compliance with the +/- 15% desegregation standard." R.E. Tab 10, ROA.3895. In a later order, the court also approved a STEM Program at St. Martinville Primary as a desegregation tool to attract white students. ROA.4098.

[3] Under the M-to-M transfer program, the District is to "encourage and permit" students who are in the majority race at their zoned school to transfer to a school where the student would be in the racial minority. R.E. Tab 10, ROA.3898.

Finally, the Student Assignment Consent Order states that "[t]he parties agree and the Court finds that the remedial measures" included in the order "are designed to eliminate the vestiges of the prior discrimination and to address the Plaintiff Parties' concerns regarding the District's operations in the area of student assignment." R.E. Tab 10, ROA.3891. The order explains that the court could find, on the basis of "the parties' representations and the expert reports and testimony," that the order "is a good faith effort toward desegregation." R.E. Tab 10, ROA.3884. The order further states, however, that "fulfillment of the terms of the Consent Order shall not bind the Court to make a finding of unitary status" given that "the impact of some of the Consent Order's provisions will not be known until they are put into effect, such as the change of attendance zone boundaries, and the increased encouragement and facilitation of majority-to-minority ("M-to-M") transfers." R.E. Tab 10, ROA.3884.

ii. Student Discipline

The portion of the Superseding Consent Order addressing discipline (Discipline Consent Order) states that its provisions are intended to ensure "that the District administers student discipline in a fair and non-discriminatory manner, addresses disproportionate assignment of exclusionary sanctions to Black students, and provides all students with an equal opportunity to learn in a safe, orderly, and supportive environment." R.E. Tab 12, ROA.3986. The Discipline Consent Order

requires the District to "ensure that students remain in the regular classroom environment to the greatest exent possible." R.E. Tab 12, ROA.3986. It further prohibits the District from administering exclusionary disciplinary consequences prior to attempting and documenting non-exclusionary measures. R.E. Tab 12, ROA.3986. The Discipline Consent Order requires that the District work to eliminate all racial disparities in discipline identified in the baseline year, the 2015-2016 school year. R.E. Tab 12, ROA.3988, 3997.

To comply with the order, the District must show "continuous progress" across three school years in the elimination of racial disparities in discipline. R.E. Tab 12, ROA.3997. The order defines "[c]ontinuous [p]rogress" to "at a minimum" include reductions in:

> i. the percentage of Black students who receive one or more Office Discipline Referrals ("ODRs");
>
> ii. the percentage of Black students who receive one or more [in-school suspension (ISS)] or [out-of-school suspension (OSS)]; [and]
>
> iii. the number of instructional days that Black students lose as consequences for discipline (e.g., ISS or OSS).

R.E. Tab 12, ROA.3987-3988.

4. The Board's Motions For Unitary Status Leading To The Present Appeal And The District Court's June 2021 Memorandum Ruling

Beginning in August 2019, the district court granted the Board unitary status in certain areas covered by the Superseding Consent Order. To date, the District has been declared unitary in the areas of transportation, staff assignment, facilities, and extracurricular activities. See ROA.2243, 7107, 7109, 15587.

Between September 2020 and January 2021, the District moved for a declaration of unitary status and dismissal of the case in the remaining areas of court supervision, *i.e.*, student assignment, faculty assignment, and quality of education, including both academic achievement and discipline. ROA.8478, 9098. Private plaintiffs opposed the motion for unitary status in each of these areas and also cross-moved for further relief as to each. ROA.8998, 14533. The United States opposed the motions for unitary status as to student assignment and discipline and took no position as to faculty assignment or academic achievement. ROA.14492, 15816-15817. The United States supported private plaintiffs' request for further relief as to the closure of Catahoula Elementary School. R.E. Tab 3, ROA.16796.

In a 160-page memorandum ruling issued in June 2021, after a six-day hearing on the motions (ROA.15793-15802, 16395), the district court found that the school system was not unitary in student assignment, faculty assignment, and quality of education with respect to discipline and graduation pathways. R.E. Tab

3, ROA.16906-16907. The court found that additional relief was needed in these areas, including the court-ordered closure of Catahoula Elementary, and asked the parties to attempt to negotiate the substance of such relief. R.E. Tab 3, ROA.16906-16907. We summarize below the district court's detailed factual findings regarding student assignment and student discipline.

a. Student Assignment

Before evaluating whether the District had achieved unitary status in the area of student assignment, the district court acknowledged that "a school system is not required to have 'a racial balance in all of the schools.'" ROA.16629 (quoting *Ross* v. *Houston Indep. Sch. Dist.*, 699 F.2d 218, 227-228 (5th Cir. 1983)). The court determined that the Board in this case, however, had failed to achieve unitary status as to student assignment for several reasons.

First, the court found that the Board had failed to achieve the agreed-upon +/-15 desegregation goal in the elementary schools in the St. Martinville Zone—that is, Catahoula Elementary, the Early Learning Center, and St. Martinville Primary. The court found that the persistent racial imbalance that remains in the St. Martinville Zone is a product of the underlying constitutional violation, and that "the white racial identifiability of Catahoula results directly from the fact that the District intentionally built the school in a white town for white students." R.E. Tab 3, ROA.16791. The court further found that the reason St. Martinville Primary and

the Early Learning Center continue to be majority Black, racially identifiable schools is because "the District continues to operate Catahoula" as a majority white, racially identifiable school. R.E. Tab 3, ROA.16791. The court also found that the continued racial segregation in these elementary schools is not the product of changes in the racial demography of relevant neighborhoods (R.E. Tab 3, ROA.16791), and that the ongoing racial identifiability of elementary schools in the St. Martinville Zone means that approximately one-third of Black elementary students in the District remain in racially identifiable schools. R.E. Tab 3, ROA.16770-16771.

Second, the court found that the District had failed to show that it complied with the student assignment order "in good faith." R.E. Tab 3, ROA.16793. Among other detailed findings, the court found that the District had "d[one] little more than inform parents that M-to-M transfers were an option" and that any promotion efforts were insufficient to attract students to the STEM program in the St. Martinville Zone. R.E. Tab 3, ROA.16793-16794. The court also found that the District "failed to implement the STEM program in a way that meaningfully differentiates [St. Martinville Primary] from other schools in the District." R.E. Tab 3, ROA.16794. The court explained that "after the District saw little success in attracting families to the STEM program in the first two years, it effectively

gave up on promoting the program as a desegregative tool and largely has not advertised the program since 2018." R.E. Tab 3, ROA.16794-16795.

Third, the court found that the District did not demonstrate "a good-faith ongoing commitment to integration." R.E. Tab 3, ROA.16795. Based on school officials' admissions, the court found that, following a declaration of unitary status, the District intends "to stop providing free transportation" to students enrolled in schools through the M-to-M transfer program "because it is no longer obligated to" do so. R.E. Tab 3, ROA.16795. In addition, the court found that the District has failed "to so much as consider permissible options to maintain the current levels of desegregation after it is declared unitary." R.E. Tab 3, ROA.16795. The court found that the District's failure to consider legally permissible options to maintain desegregated schools violates the terms of the Student Assignment Consent Order, which requires the parties to work to "agree to a legally adequate student transfer policy to continue the promotion of desegregative student transfers at the end of the consent order." R.E. Tab 3, ROA.16795 (citation omitted).

b. Student Discipline

The court also found that the District was not entitled to a declaration of unitary status in the area of discipline because it had failed to comply with relevant provisions of the Discipline Consent Order in several significant ways. In particular, the court found that the District has not reduced its reliance on

exclusionary discipline and is not using and documenting its use of non-punitive interventions. R.E. Tab 3, ROA.16871. As a result, the District is not in compliance with the Discipline Consent Order, which mandates that exclusionary discipline be administered only under limited circumstances and requires that schools document the use of non-punitive and preventative strategies before resorting to exclusionary measures. R.E. Tab 3, ROA.16871.

First, the court found that the District had not made continuous progress in reducing its reliance on exclusionary discipline. The court noted that Black students lost 5761 days of instruction in the 2015-2016 baseline year because of the District's use of in-school and out-of-school suspensions (ISS and OSS). R.E. Tab 3, ROA.16871-16872. In 2017-2018, the District adopted an "Alternative to Suspension" program to avoid sending students to OSS, but the court found that this program also removes students from their regular schools and classrooms. R.E. Tab 3, ROA.16871-16872. In the 2018-2019 school year, the court found that Black students still lost 5673 days of instruction as a result of the imposition of one of three forms of exclusionary discipline: ISS, OSS, or the "Alternative to Suspension" program. Accordingly, the court found there had been no "meaningful reduction" in lost instructional days from the baseline year. R.E. Tab 3, ROA.16871-16872.

The court also found that racial disparities in discipline persisted. For example, in the 2018-2019 school year, a Black student in the District was 3.75 times more likely than a white student to be referred to an alternative school; 2.23 times more likely to receive ISS; 1.97 times more likely to receive OSS; 1.88 times more likely to receive an office referral; and 1.96 times more likely to lose a day of instruction. R.E. Tab 3, ROA.16852-16853.

Second, the court found that disciplinary data showed that the District has a low rate of documented non-punitive behavioral supports, meaning that the District is either not using such supports or, at best, is not documenting their use prior to resorting to exclusionary measures. R.E. Tab 3, ROA.16871-16872. The court thus found that the District has neither complied in good faith with the requirements of the Discipline Consent Order, nor eliminated the vestiges of discrimination in the imposition of discipline. R.E. Tab 3, ROA.16875.

SUMMARY OF ARGUMENT

I. The Board primarily argues on appeal that the district court lacked remedial authority to enter the 2016 Superseding Consent Order because there was nothing left to remedy in this case as of 1974. The Board's argument is foreclosed by its litigation conduct and the law of this case. It is also foreclosed by the district court's findings that the racial identifiability of the elementary schools in the St. Martinville Attendence Zone results from the fact that "original purpose of the

configuration of elementary schools in the St. Martinville Zone," including Catahoula, "was to segregate races," R.E. Tab 3, ROA.16793, and that the schools continued to be racially identifiable as a result of a lack of demographic change in the community.

The Board's litigation conduct over the past seven years undercuts its newfound jurisdictional argument. In 2014, this Court held that the district court retained remedial jurisdiction in this case because the district court had never directly found that the Board had eliminated all vestiges of past discrimination. *Thomas* v. *School Bd. St. Martin Par.*, 756 F.3d 380, 387 (5th Cir. 2014). This Court remanded the case to the district court to consider "whether the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (citation omitted). On remand, the Board did not claim that it had fully remedied the underlying constitutional violation in this case as of 1974. Rather, it voluntarily "agree[d] * * * [to] remedial measures" that were "designed to eliminate the vestiges of the prior discrimination." R.E. Tab 10, ROA.3891. By agreeing to the entry of the Superseding Consent Order, and its underlying orders, the Board affirmatively abandoned and waived the argument it presses on appeal—that is, that there was no longer a constitutional violation to be remedied.

The law of the case also forecloses the Board's argument that the years of inactivity in this case after 1974 "severed any causal chain flowing from the 1965

liability." Br. 14. Contrary to the Board's argument that the district court's remedial jurisdiction "dried up" because of the passage of time (Br. 33), this Court held that the district court retained jurisdiction over this case to determine whether "the vestiges of *de jure* discrimination had been eliminated as far as practicable." *Thomas*, 756 F.3d at 388 (quoting *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 250 (1991)). This Court directed the district court to undertake that inquiry and proceed accordingly, not simply to dismiss this case.

The Board's final jurisdictional argument—that the racial identifiability of Catahoula Elementary is not a vestige of discrimination and is not properly subject to remedial efforts—also fails. The Board relies on a 1969 order in this case, but the Board expressly agreed in the Student Assignment Order to take steps to address the fact that "Catahoula was a White school during *de jure* segregation and has continued to be a virtually all-White school ever since." R.E. Tab 10, ROA.3887. In its June 2021 memorandum ruling, the district court also made the uncontested factual finding that the purpose of the "configuration of elementary schools in the St. Martinville Zone," including Catahoula, "was to segregate races." R.E. Tab 3, ROA.16793.

The 1969 order that allowed Catahoula Elementary to continue operating as an all-white school neither precluded the parties from later agreeing to remedies for the St. Martinville Attendance Zone that included Catahoula, nor prohibited the

district court from ordering further relief that required Catahoula's closure. As the Supreme Court subsequently held in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), courts are to "make every effort to achieve * * * actual desegregation" and must "scrutinize" the continued maintenance of one-race schools, placing the burden on school officials to demonstrate that "their racial composition is not the result of present or past discriminatory action." *Id.* at 26. Here, the district court had jurisdiction to address the vestiges of discrimination in student assignment at elementary schools in the St. Martinville Zone and to take further action as necessary to move the District toward achieving unitary status.

II. The Board cannot show any error, much less clear error, in the district court's findings that the District had not achieved unitary status in student assignment or discipline. The Board failed to show that it has complied in good faith with the terms of the Superseding Consent Order and has eliminated the vestiges of discrimination to the extent possible. As to student assignment, the record amply supports the district court's detailed factual findings that the Board has failed to sufficiently desegregate the elementary schools in the St. Martinville Zone and has not effectively used the M-to-M transfer program and STEM program as desegregative tools. As to student discipline, the record likewise supports the district court's detailed factual findings that the Board has failed to

meaningfully reduce the use of exclusionary punishments and to address persistent racial disparities in student discipline.

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION TO ENTER CONSENT ORDERS IN 2015 AND 2016 AND ORDER ADDITIONAL RELIEF IN 2021

The Supreme Court has long made clear that, in a suit to enforce the constitution's ban on racially segregated schools, a school district may be released from a federal district court's jurisdiction only after the court has determined that the district has: (1) fully and satisfactorily complied with the court's decrees for a reasonable period of time; (2) eliminated the vestiges of prior *de jure* segregation to the extent practicable; and (3) demonstrated a good-faith commitment to the whole of the court's decrees and to those provisions of the law and the constitution that were the predicate for judicial intervention. *Board of Educ. of Okla. City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 249-250 (1991); *Freeman* v. *Pitts*, 503 U.S. 467, 491, 498 (1992); *Missouri* v. *Jenkins*, 515 U.S. 70, 87-89 (1995); *Anderson* v. *School Bd. of Madison Cnty.*, 517 F.3d 292, 297 (5th Cir. 2008).

In 2014, this Court held that the district court retained remedial jurisdiction in this case because at no point had the district court made an unambiguous determination that the School Board had in fact eliminated all vestiges of discrimination. *Thomas* v. *School Bd. St. Martin Par.*, 756 F.3d 380, 387 (5th Cir.

2014). In particular, the 1974 Order did not constitute such a determination. To the contrary: as this Court explained, the 1974 Order continued to place affirmative obligations on the School Board, and that such obligations "would have been anomalous if [the district court] had found that the School Board had reached unitary status in the sense of eliminating all vestiges of past discrimination." *Ibid.* Thus, this Court remanded the case to the district court to consider "whether the vestiges of *de jure* segregation had been eliminiated as far as practicable." *Id.* at 388 (citation omitted).

After this Court held that the district court retained remedial jurisdiction, the Board did not seek further review of that holding by petitioning for rehearing en banc or seeking a writ of certiorari. Nor did the Board pursue a declaration in the district court that it had achieved unitary status and eliminated all vestiges of *de jure* segregation. Instead, the Board on remand agreed to the entry of a series of consent orders intended to rid St. Martin Parish's schools of the vestiges of discrimination. The Board's arguments before this Court as to the district court's purported lack of remedial jurisdiction fail because they have been waived, are forclosed by the law of this case, and are, in any event, meritless.

A. Standard Of Review

This Court applies de novo review to jurisdictional determinations. *Karim* v. *Finch Shipping Co.*, 265 F.3d 258, 264 (5th Cir. 2001).

B. The Board Waived Its Ability To Challenge The District Court's Continuing Remedial Jurisdiction By Agreeing To Entry Of The Superseding Consent Order

When this case was remanded to the district court, the Board did not insist, as it now does on appeal, that the District has been unitary since 1974 and that the district court lacked authority to do anything other than dismiss this case. Instead, the Board entered into a series of consent decrees addressing student assignment, faculty and staff assignment, transportation, and quality of education to "facilitate both the Board's fulfillment of its affirmative desegregation obligations and the termination of judicial supervision." R.E. Tab 9, ROA.3872. The Board admitted that "full compliance with t[he] Superseding Consent Order will support a finding that the District has complied with both the letter and spirit of the orders and desegregation law, and that the vestiges of past discrimination have been eliminated to the extent practicable." R.E. Tab 9, ROA.3873-3874.

Significantly, the Board did not seek a judgment that it had already eliminated all vestiges of discrimination at some point prior to 2014. Nor did it carry its burden of proof, consistent with Supreme Court and Fifth Circuit precedent, in making any such showing. *Freeman*, 503 U.S. at 494; see also *Ross* v. *Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) ("Public school officials * * * must demonstrate to the district court overseeing their desegregation efforts that current segregation is in no way the result of [their] past

segregative actions." (citation and internal quotation marks omitted; brackets in original)). Instead, in the Student Assignment Consent Order, later encompassed in the Superseding Consent Order, the Board voluntarily "agree[d]" to undertake steps "designed to eliminate the vestiges of the prior discrimination." R.E. Tab 10, ROA.3891. In so doing, it affirmatively represented to the district court that it was "no longer" arguing "for a finding of unitary status in the area of student assignment." ROA.2532-2533. That representation confirmed that the district court had subject-matter jurisdiction over this case. Indeed, the Board's argument here is not truly about "jurisdiction," so much as it is about whether the facts show that there are remaining vestiges of *de jure* segregation that the court retains the power to remedy.

It is of course true that the district court's powers depended on there being a constitutional violation and "the nature of the violation determines the scope of the remedy." *Freeman*, 503 U.S. at 489 (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Thus, it is true also that any "remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Ibid.* But by entering into the Superseding Consent Order (and its underlying consent orders), the Board effectively conceded that the original constitutional violation in this case remained unremedied and the district court had jurisdiction to enter a remedial order.

By agreeing post-remand to the entry of the Superseding Consent Order, the Board waived its right to litigate the issue of whether, at the time the order was entered, vestiges of discrimination remained. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (stating that parties "waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation" by entering into consent decrees); see also *Biziko* v. *Van Horne*, 981 F.3d 418, 420 n.1 (5th Cir. 2020) ("[I]ntentional relinquishment or abandonment" of an argument constitutes waiver with "no *right* to raise" such arguments on appeal. (citation omitted)).

Moreover, having entered the parties' agreed-upon Superseding Consent Order as an order of the court, the district court had full authority to enforce the terms of the parties' contractual bargain, including through the entry of further relief as necessary. *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 522 (1986) ("[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."). Through its own actions in signing the Superseding Consent Order, the Board agreed that it was subject to the district court's remedial jurisdiction. See *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 334-335 (5th Cir. 2018) (rejecting the argument of a charter school that it was not subject to the district court's remedial authority, because the school agreed to

the terms of a consent decree and the "court can enforce desegregation obligations incorporated into a consent decree against a party that entered that decree"). This Court should not permit the Board to reverse course simply because it no longer wants to do what it said it would do—that is, comply with the terms of the Superseding Consent Order.

C. The Board's Argument That District Court Lacks Remedial Jurisdiction Is Also Foreclosed By The Law Of This Case

The Board also argues that the years of inactivity in this case following issuance of the 1974 Order "severed any causal chain flowing from the 1965 liability." Br. 14. But that argument is foreclosed by the law of this case. "The law-of-the-case doctrine bars reexamination of issues of law or fact decided on appeal in subsequent proceedings" and "applies when an appellate court previously decided the issue 'either expressly or by necessary implication.'" *United States* v. *Smith*, 814 F.3d 268, 273 (5th Cir. 2016) (quoting *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981)).

In 2014, this Court specifically held that the 1974 Order did not terminate the district court's remedial jurisdiction in this case. This Court explained that, as in *Dowell*, "an order expressly terminating jurisdiction is not by itself effective to dismiss a desegregation case, nor does it transform an ambiguous finding of unitariness into an unambiguous one." *Thomas*, 756 F.3d at 386. This Court affirmed the district court's denial of the Board's motion to dismiss and instructed

that the district court on remand was to consider whether "the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (quoting *Dowell*, 498 U.S. at 250). In remanding to the district court for that inquiry, the Court necessarily rejected the argument the Board now makes, which is that the period of inactivity after the 1974 Order by itself "severed any causal chain flowing from the 1965 liability," such that "the district court had no authority to remedy anything." Br. 26-27. If the Board were correct, this Court would have simply remanded with directions to dismiss the case. But this Court did not do so. Instead, it remanded with instructions for the district court to determine whether vestiges of *de jure* segregation persisted in the school system and to proceed accordingly.

As the Board concedes, the constitional violation in school desegregation cases "continues until 'vestiges' of *de jure* segregation are sufficiently eradicated." Br. 20-21 (citing *United States* v. *Lawrence Cnty. Sch. Dist.*, 799 F.2d 1031, 1044 (5th Cir. 1986)). This is not a matter, as the Board argues, of a court "invok[ing] remedies against [a] public bod[y] without [a] liability judgment[]." Br. 27 (quoting *Brumfield* v. *Louisiana State Bd. of Educ.*, 806 F.3d 289, 302 (5th Cir. 2015)). The district court found, and the Board stipulated to, liability in 1965. Nor could liability reasonably have been contested. Thus, the district court had to determine whether "the vestiges of *de jure* segregation had been eliminiated as far as practicable," and answer that inquiry in the affirmative, before dismissing the

case. *Thomas*, 756 F.3d at 388 (quoting *Dowell*, 498 U.S. at 250). Rather than litigate that question before the district court, the Board agreed to the terms of the Superseding Consent Order. The direct causal link to the 1965 liability in this case is the Board's agreement to a Superseding Consent Order aimed at eliminating all remaining vestiges of discrimination from its operation of a dual school system.

D. The Board's Argument That The District Court Lacks Remedial Jurisdiction To Address Vestiges Of Discrimination At Catahoula Elementary, And Throughout The St. Martinville Zone, Is Meritless

1. The Board's further argument (Br. 28-34) that the district court lacks remedial jurisdiction to address vestiges of discrimination with respect to student assignment in the St. Martinville Zone, including at Catahoula Elementary, also fails. On remand, the Board in 2015 initially moved for a declaration of unitary status as to student assignment, making the explicit argument that "the continued existence of Catahoula Elementary as a nearly one-race school should not prohibit the Board from obtaining a declaration of unitary status." ROA.1695. But the Board abandoned that motion. Instead, it told the district court that it was "no longer" seeking "a finding of unitary status in the area of student assignment." And it expressly urged the court to enter the Student Assignment Consent Order. ROA.2532-2533.

The Student Assignment Consent Order concedes that vestiges of discrimination in student assignment remained and required a remedy. The Order

states that "[t]he parties agree and the Court finds that the remedial measures" the Order includes "are designed to eliminate the vestiges of the prior discrimination and to address the Plaintiff Parties' concerns regarding the District's operations in the area of student assignment." R.E. Tab 10, ROA.3891. The Student Assignment Consent Order further notes that "Catahoula was a White school during *de jure* segregation and has continued to be a virtually all-White school ever since," and that St. Martinville Primary is "racially identifiable as Black." R.E. Tab 10, ROA.3887, 3894.

The elementary schools in the St. Martinville Attendance Zone continue to be at issue in this case because the Board, in representations to a court and in binding legal documents, conceded that vestiges of discrimination continued to exist as of 2016 and admitted that more could be done to counter the racial identifiability of its schools. The Student Assignment Consent Order reflects the parties' and the district court's judgment that, in order to remedy the effects of *de jure* segregation in the District, and the racial identifiability of elementary schools in the St. Martinville Attendance Zone in particular, changes in student assignment had to occur across all three elementary schools in that zone (the Early Learning Center, St. Martinville Primary, and Catahoula).

Now, the Board makes the bald assertion on appeal that the "[t]he racial percentages of Catahoula Elementary School students are not a 'vestige' of

anything." Br. 33. But that argument is belied not only by the concessions contained in the Student Assignment Consent Order, but also by the factual findings that the district court made in its June 2021 memorandum ruling. The district court found that "[t]he District built Catahoula as a one-race school during the era of de jure segregation in a one-race white town to segregate the white students from Black students." R.E. Tab 3, ROA.16762. The court further found that "the white racial identifiability of Catahoula results directly from the fact that the District intentionally built the school in a white town for white students," such that the racial imbalance that remains in the St. Martinville Zone "is a product of the previous constitutional violation." R.E. Tab 10, ROA.16791. The court also found that the "extent of the Black racial identifiability of [St. Martinville Primary] and [the Early Learning Center] is a result of the fact that the District continues to operate Catahoula." R.E. Tab 10, ROA.16791. See also *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189, 208 (1973) ("[I]ntentionally segregative school board actions in a meaningful portion of a school system, as in this case, create[] a presumption that other segregated schooling within the system is not adventitious.").

The district court also found that the racial identifiability of the elementary schools in the St. Martinville Zone was not the product of demographic changes. Instead, the court found that Catahoula Elementary, St. Martinville Primary, and

the Early Learning Center "have *never* been meaningfully desegregated, and [that] the original purpose of the configuration of elementary schools in the St. Martinville Zone was to segregate races." R.E. Tab 10, ROA.16793 (emphasis added).

2. The Board responds to these findings—and seeks a way out of its own agreements—by arguing that a 1969 order in this case precluded the district court from taking any action regarding the racial identifiability of these schools. That argument is meritless.

In the 1969 Order that the Board relies on, Judge Putnam approved a desegregation plan that allowed Catahoula to remain "all white," while also rejecting a specific busing remedy that the U.S. Department of Health, Education, and Welfare had proposed. R.E. Tab 4, ROA.275-276. But just as the 1974 Order did not find that the Board had met its affirmative obligation to eliminate all vestiges of discrimination, the 1969 Order did not either. See *Thomas*, 756 F.3d at 387.

As relevant here, the 1969 Order states that Catahoula would remain "all white," that "[n]o Negroes live in the area, and none has chosen to attend this school under freedom of choice," and that a specific proposal by HEW to bus fifty Black students from St. Martinville was not "required by Constitutional standards." R.E. Tab 4, ROA.275-276. The 1969 Order does not find that there are "no

vestiges" of discrimination to be eliminated with respect to Catahoula, nor does it contain any language contradicting the district court's June 2021 factual findings that the "original purpose of the configuration of elementary schools in the St. Martinville Zone," including Catahoula, "was to segregate races." R.E. Tab 10, ROA.16793.

The 1969 Order allowing Catahoula to continue operating as an all-white school did not preclude the parties from later agreeing, as they did, to remedies for the St. Martinville Zone that included Catahoula, nor did it prohibit the district court from ordering further relief by requiring Catahoula's closure. See *Hull* v. *Quitman Cnty. Bd. of Educ.*, 1 F.3d 1450, 1453 (5th Cir. 1993) ("Eliminating unconstitutional separate student attendance patterns has been a keystone" of the remedy in desegregation cases.); *Valley* v. *Rapides Par. Sch. Bd.*, 702 F.2d 1221, 1226 (5th Cir.) (explaining that the retention of racially identifiable schools from a dual school system is "unacceptable where reasonable alternatives may be implemented"), cert. denied, 464 U.S. 914 (1983).

Moreover, the 1969 plan failed to anticipate the Supreme Court's instruction in *Swann* that courts are to "make every effort to achieve * * * actual desegregation." 402 U.S. at 26. In *Swann*, the Court explained that when a "proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race,

[school officials] have the burden of showing that such school assignments are genuinely nondiscriminatory." *Ibid.* *Swann* requires that courts "scrutinize such schools," and places the "burden upon the school authorities * * * to satisfy the court that their racial composition is not the result of present or past discriminatory action." *Ibid.* The terms of the 1969 plan do not change the fact that "[t]he school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494.

The Board argues (Br. 31-32) that Judge Putnam carried out the *Swann* inquiry in issuing the 1969 plan, but that is not plausible. Certainly, he did not rely on *Swann* itself, since the Supreme Court's opinion in *Swann* was issued in 1971. The 1969 Order and accompanying memorandum do not discuss what purposes were served by siting Catahoula Elementary in an all-white town, nor do they discuss the purposes behind the creation of separate, Black elementary schools in St. Martinville. So they in no way show that the Board had "demonstrate[d] to the district court overseeing their desegregation efforts that current segregation is in no way the result of [their] past segregative actions." *Ross*, 699 F.2d at 225 (citation and internal quotation marks omitted; brackets in original). When the district court allowed Catahoula to continue operating as an all-white school in 1969, it required no such showing of the Board.

Moreover, the 1969 Order does not limit the scope of the district court's remedial jurisdiction to address vestiges of intentional discrimination with respect to student assignment. See also *United States* v. *West Carroll Par. Sch. Dist.*, 477 F. Supp. 2d 759, 763-764 (W.D. La. 2007) (dismantling racially identifiable schools notwithstanding earlier 1969 court order); *United States* v. *Bertie Cnty. Bd. of Educ.*, No. 2:67-cv-632, 2003 U.S. Dist. LEXIS 29823, at *12-13 (E.D.N.C. Apr. 22, 2003) (same). Indeed, the Board's argument as to the district court's inability to close Catahoula Elementary to bring the District into compliance with the Superseding Consent Order is further weakened by the Board's own agreement that Catahoula, along with the other elementary schools in the St. Martinville Zone, is subject to the parties' Student Assignment Consent Order. R.E. Tab 10, ROA.3894-3895.

In sum, the district court properly exercised remedial jurisdiction in this case when it entered the Superseding Consent Order and subsequently ordered further relief that included the closure of Catahoula Elementary.[4]

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[4] In its opening brief, the Board makes no argument in the alternative that, if the district court did possess remedial jurisdiction, it was nonetheless an abuse of discretion for the court to order the specific remedy of closing Catahoula Elementary. See *Ayers* v. *Fordice*, 111 F.3d 1183, 1193 (5th Cir. 1997) ("A desegregation remedy is an exercise of a trial court's equitable power and as such is reviewable * * * for abuse of discretion."), cert. denied, 522 U.S. 1084 (1998). Although the Board mentions as much in passing (Br. 37), it does not at all develop that argument on appeal and therefore has abandoned the issue. See *United States*

(continued…)

II

THE DISTRICT COURT CORRECTLY DENIED THE BOARD'S MOTION FOR UNITARY STATUS AS TO STUDENT ASSIGNMENT AND DISCIPLINE

"A school district seeking the termination of federal court supervision must first show that it has consistently complied with a court decree in good faith." *Anderson* v. *School Bd. of Madison Cnty.*, 517 F.3d 292, 297 (5th Cir. 2008) (citation and internal quotation marks omitted). In moving for a declaration of unitary status, the Board had to show both that it complied with the terms of the Superseding Consent Order and that it remedied the effects of state-imposed segregation to the extent practicable. *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992).

The Board failed both prongs of that inquiry. The district court correctly found both that the Board had not complied in good faith with the Superseding Consent Order and that the Board has not yet eliminated the vestiges of discrimination to the extent practicable. The Board has not shown any error, much less clear error, in the court's detailed factual findings.

(…continued)
v. *Bates*, 850 F.3d 807, 811 n.2 (5th Cir. 2017) ("Failure of an appellant to properly argue or present issues in an appellate brief renders those issues abandoned." (citation omitted)). Nor does the Board seek any relief particular to the closure of Catahoula Elementary. See Br. 80.

A. Standard Of Review

A district court's finding that a school district is not unitary "is a factual finding that [a court of appeals] review[s] for clear error." *Anderson*, 517 F.3d at 296. This Court defers to the district court's factual findings as long as they are "plausible in light of the record viewed in its entirety"; thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). This Court must be "wary" of second guessing the district court's factual findings because the factfinder "has the decided advantage of first hand experience concerning the testimony and evidence presented." *Nichols* v. *Petroleum Helicopters, Inc.*, 17 F.3d 119, 121 (5th Cir. 1994) (citation omitted). This is particularly true in desegregation cases, where "[a] trial judge's insight into local conditions is to be accorded substantial deference." *Valley* v. *Rapides Par. Sch. Bd.*, 702 F.2d 1221, 1226 (5th Cir.), cert. denied, 464 U.S. 914 (1983).

B. The Record Amply Supports The District Court's Finding That The School District Has Not Achieved Unitary Status In Student Assignment

To achieve unitary status in the area of student assignment, a school system is not required to have "a racial balance in all of the schools." *Ross* v. *Houston Indep. Sch. Dist.*, 699 F.2d 218, 227-228 (5th Cir. 1983); *Cowan* v. *Cleveland Sch. Dist.*, 748 F.3d 233, 238 (5th Cir. 2014). But as this Court has repeatedly held, the retention of racially identifiable schools from a dual system "is nonetheless

unacceptable where reasonable alternatives may be implemented." *Cowan*, 748 F.3d at 238 (quoting *Valley*, 702 F.2d at 1226). This is so even though, "[a]s the de jure violation becomes more remote in time and [] demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." *Freeman*, 503 U.S. at 496 (quoting *Valley*, 702 F.2d at 1226).

1. The district court's finding that the Board was not entitled to a declaration of unitary status in student assignment is amply supported by the record.

First, the Board failed to demonstrate substantial compliance with the +/-15 percent desegregation goal that the parties and the court agreed to in the Student Assignment Consent Order. Indeed, the Board does not even try to contest that four schools that are subject to the Student Assignment Consent Order—Catahoula Elementary, St. Martinville Primary, the Early Learning Center, and Celia High—have racially skewed student enrollments that fall outside of the Order's +/-15 percent desegregation standard. While the court was not troubled by Celia High's "modest deviation" from the desegregation goal, the same was not true for the elementary schools in the St. Martinville Zone. R.E. Tab 3, ROA.16769. Instead, the court emphasized that all three of those elementary schools "have consistently remained substantially outside of the +/-15% standard." R.E. Tab 3, ROA.16769.

Years of data support the district court's finding that the elementary schools in the St. Martinville Zone have persisted in their racial identifiabililty. As the court noted, Catahoula remained significantly outside the range over the course of five academic years. R.E. Tab 3, ROA.16769. The court thus found that the "school has remained identifiably white throughout the relevant time period." R.E. Tab 3, ROA.16770. The court likewise found that St. Martinville Primary (SMP) and the Early Learning Center (ELC) remained identifiably Black schools. R.E. Tab 3, ROA.16770. For the 2020-2021 school year, Black students comprised 69.8% of students enrolled at SMP, which is 24 percentage points higher than overall Black elementary-level enrollment. R.E. Tab 3, ROA.16770. And at ELC, Black students comprised 66.1% of students enrolled, which is 20.2 percentage points higher than District-wide Black elementary-level enrollment. R.E. Tab 3, ROA.16770.

Significantly, the court found both that "the white racial identifiability of Catahoula results directly from the fact that the District intentionally built the school in a white town for white students" and that "the extent of the Black racial identifiability of SMP and ELC is a result of the fact that the District continues to operate Catahoula." R.E. Tab 3, ROA.16791. The court further found that the ongoing racial identifiabity of these schools was not caused by demographic changes: to the contrary, "the cause of schools in the St. Martinville Zone

remaining racially identifiable is that the demographics *have not* meaningfully changed during the period of Court supervision." R.E. Tab 3, ROA.16792. Based on the racial identifiability of elementary schools in the St. Martinville Zone, the court found that approximately one-third of Black elementary students in the District remain in racially identifiable schools. R.E. Tab 3, ROA.16770-16771.

The district court viewed the ongoing segregation in the St. Martinville Zone as akin to the facts in *Cowan* v. *Cleveland School District*. In *Cowan*, this Court stated that:

> The retention of single-race schools may be particularly unacceptable where, as here, the district is relatively small, the schools at issue are a single junior high school and a single high school, which have never been meaningfully desegregated and which are located less than a mile and a half away from the only other junior high and high school in the district, and where the original purpose of this configuration of schools was to segregate the races.

748 F.3d at 238-239. The district court explained that as in *Cowan*, the equivalent of two schools are at issue here,[5] those schools have never been meaningfully desegregated, and the original purpose of the configuration of elementary schools in the St. Martinville Zone was to segregate races. R.E. Tab 3, ROA.16793. While the schools in this case are not as geographically close as those in *Cowan*,

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[5] The district court noted that the Early Learning Center (serving grades K through one) and St. Martinville Primary (serving grades two through five) are "essentially one elementary school located on two campuses." R.E. Tab 3, ROA.16793 n.22.

the court noted that students from Catahoula already attend middle school and high school in St. Martinville. R.E. Tab 3, ROA.16793. Moreover, the court noted that some elementary students from Catahoula are currently bussed approximately ten miles to Parks Primary one day per week to participate in a talented and gifted program, and that the distance between Catahoula and Parks Primary and Catahoula and St. Martinville Primary is approximately the same. R.E. Tab 3, ROA.16812. As in *Cowan*, the court found the ongoing segregation in elementary schools in the the St. Martinville Zone "unacceptable." R.E. Tab 3, ROA.16793.

Second, the district court had sufficient evidence to find that the Board failed to use the M-to-M transfer program as an effective desegregation tool. R.E. Tab 3, ROA.16793-16794. The primary goal of the M-to-M program was to bring "St. Martinville Primary [and] Catahoula Elementary * * * within the +/- 15 percent desegregation standard." R.E. Tab 10, ROA.3898. But during the 2018-2019 school year, only three white students participated in the M-to-M program. ROA.5520. And only one white student participated in the M-to-M program during the 2019-2020 and 2020-2021 school years. ROA.16401, 11149. The court found that this lack of participation resulted from the District's failure to effectively promote the M-to-M program to families in the St. Martinville Zone, as it was required to do under the Student Assignment Consent Order. R.E. Tab 3, ROA.16793-16794. In particular, the district court pointed to the fact that the

District's bare-bones public communications did little more than inform parents that M-to-M transfers were an option, as well as the fact that the District, by imposing a notary requirement for transfer applications, chose to impose an unnecessary barrier to using the program. R.E. Tab 3, ROA.16793.

Third, the court reasonably found that the Board failed to implement a STEM program in the St. Martinville Zone that would function as an effective desegregation tool. R.E. Tab 3, ROA.16794-16795. The District had asserted that the STEM program would "achieve racial group percentages in the St. Martinville School that are in line with the district percentages, by attracting white students [from Catahoula] to the majority black St. Martinville schools." ROA.4103. But the court found that the District implemented the STEM program without surveying families as to their interest in such a program, and did not evaluate whether another magnet theme might be more successful. R.E. Tab 3, ROA.16794.

District officials conceded both that the STEM program has not worked as a desegregation tool (see ROA.13909) and that the District failed to take any steps to address that problem. R.E. Tab 3, ROA.16794-16795. The court found that the District "effectively gave up on promoting the program as a desegregative tool" to parents and has not held any recent open houses for parents to see SMP, nor has it included information about the program in the M-to-M section of its website. R.E.

Tab 3, ROA.16794-16795. The court also found that the District had failed to provide "the Catahoula or the SMP principals with the training, knowledge, or recruitment materials necessary to promote the STEM program." R.E. Tab 3, ROA.16795.

2. In arguing that the Board was entitled to a finding of unitary status as to student assignment, the Board does not seriously contest these findings. Instead, the Board dismisses concerns over the ongoing racial identifiability of Catahoula, St. Martinville Primary, and the Early Learning Center, and well as its failure to bring those schools within the +/-15 percent deviation standard, by asserting that demographics have improved. Br. 53. But as the court found, without additional court-ordered changes, the elementary schools in the St. Martinville Zone will not further desegregate naturally over time through demographic changes. R.E. Tab 3, ROA.16814. The court rejected the argument that population growth alone would be enough to counter the ongoing racial identifiability of each school. R.E. Tab 3, ROA.16814.

The Board further argues that the district court gave insufficient weight to the fact that the parties "agreed to the attendance zones" for these schools. Br. 54. But the Student Assignment Consent Order paired the continued existence of those attendance zones with the M-to-M transfer program, and, later, with the STEM

program at SMP as desegregative tools. As the district court found, the Board failed to effectively use those tools.[6]

The Board also asserts (Br. 51-52) that the district court did not grant its motion because it viewed the Board as acting in "in bad faith by failing to consider policies that would violate the equal protection clause" in order to maintain current levels of integration after the Board was declared unitary. Not so. The district court itself stated that race-based transfers would not be permitted once the District achieved unitary status. See R.E. Tab 3, ROA.16795 n.24 ("The Court recognizes that the District will not be permitted to continue the M-to-M program after it is declared unitary." (citing *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710-711 (2007)). The Board was required, however, to demonstrate a good faith ongoing commitment to integration. *Freeman*, 503 U.S. at 498-499. The court did not clearly err in finding that the District's plans to stop providing free transportation to current students who had used M-to-M transfers undercut its ability to make the required good faith showing. R.E. Tab 3, ROA.16795.

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[6] The court also noted in the Superseding Consent Order that the effectiveness of some measures, "such as the change of attendance zone boundaries and the increased encouragement and facilitation of [M-to-M] transfers," will not "be known until they are put into effect." R.E. Tab 10, ROA.3884.

Moreover, regardless of any findings about the Board's likely conduct once it were to achieve post-unitary status, the district court's decision to deny unitary status as to student assignment was not clearly erroneous. The Board failed to show at the time that it moved for unitary status that it had in fact substantially complied with the terms of the Student Assignment Consent Order and eliminated the vestiges of discrimination to the extent practicable. Given the totality of the record before it, the district court was entitled to deny the Board's motion. There was no error here, let alone clear error.

C. The Record Amply Supports The District Court's Finding That The School District Has Not Achieved Unitary Status In Discipline

1. Based on the uncontested evidence, the Board cannot show that the district court clearly erred in finding that the District had not complied with the terms of the Discipline Consent Order and had not eliminated the vestiges of discrimination with regard to discipline to the extent practicable. Under the Discipline Consent Order, the District had to strive to eliminate all disparities identified in the 2015-2016 baseline academic year and show continuous progress across three consecutive years to reduce those disparities. R.E. Tab 12, ROA.3997. The order defined "[c]ontinuous [p]rogress" as "measureable improvement across two or more years" as indicated by reductions in the percentage of black students who received office discipline referrals, in school and out of school suspension, and the number of instructional days that Black students

lose as a consequence of disclipline. R.E. Tab 12, ROA.3987. The Discipline Consent Order also requires that exclusionary disclipline be administered only under limited circumstances, and that the District document the use of non-punitive and preventative strategies before using exclusionary discipline. R.E. Tab 12, ROA.3986.

The record amply supports the district court's finding that the District failed to comply with those requirements. First, the court found that the District has not meaningfully reduced its reliance on exclusionary discipline. As the chart below shows, Black students lost 5761 instructional days in the regular classroom in the 2015-2016 baseline school year as a result of exclusionary discipline. That number did not meaningfully decline by 2018-2019, when Black students still lost 5673 days of instruction in the classroom.

	2015-2016		2016-2017		2017-2018		2018-2019		2019-2020[45]	
Referrals by Type	**Black Students**	**White Students**	**Black Students**	**White Students**	**Black Students**	**White Students**	**Black Students**	**White Students**	**Black Students**	**White Students**
Lost Days of Instruction[46]	5,760.91	2,169.11	4,632.96	2,052.16	5,369.93	2,000.11	5,673.05	2,407.41	4,350	1,884
Office Referrals[47] (Unduplicated)[48]	1,473	890	1,240	681	1,271	712	1,468	844	1,296	675
Alternative School Referral	169	60	148	56	136	27	83	22	51	25
In-School Suspension	753	290	684	246	623	284	815	333	704	291
Out-of- School Suspension (Duplicated)[49]	1,546	699	1,516	709	1,146	499	879	418	529	274
Alternative to Suspension Program (PBC)	–	–	–	–	76	48	849	402	627	292
Non-Punitive Behavioral Supports (Duplicated)	102	34	72	27	108	36	90	41	262	110

R.E. Tab 3, ROA.16849. The court also concluded that the District could not show that it has reduced its use of exclusionary discipline by simply pointing to the introduction of a new program, the Alternative to Suspension Program, when the data showed that the District has merely "shifted the type of exclusionary discipline issued—using the Alternative to Suspension program instead of OSS." R.E. Tab 3, ROA.16872.

The evidence before the district court also showed that the District failed to meaningfully reduce racial disparities in exclusionary discipline. The court credited an analysis by private plaintiffs' expert, Dr. Anne Gregory, that showed that Black students are persistently more likely to receive exclusionary discipline, and that the trends are not substantially improving.

School Year	Alt. School	ISS	OSS	Office Referrals	Lost Days	Assigned to Detention (PBCJ)
15-16 EOY	2.92x	2.35x	1.93x	1.76x	1.92x	
16-17 EOY	2.70x	2.68x	1.88x	1.96x	2.16x	
17-18 EOY	5.08x	2.03x	1.99x	1.94x	2.00x	
18-19 EOY	3.75x	2.23x	1.97x	1.88x	1.96x	1.88x
19-20 EOY	2.16x	2.2x	2.1 x	2.00x	2.00x	2.04x

R.E. Tab 3, ROA.16853. Thus, for example, Black students were 1.92 times more likely to lose instructional days than white students in the 2015-2016 baseline school year, and 1.96 times more likely do so in the 2018-2019 school year.

The court further found that the District had a "low rate of documented non-punitive behavioral supports" and is thus "not using non-punitive supports, or at least not documenting their use, prior to using exclusionary discipline." R.E. Tab

3, ROA.16872. The court pointed to testimony by district staff that there is no system "to ensure that teachers use non-exclusionary methods of discipline," and that this lack of a tracking or monitoring mechanism both "shows a lack of commitment to using non-exclusionary discipline" and "makes it impossible for the District to ensure that the faculty and staff" consistently consider and use non-exclusionary options, as required by the Discipline Consent Order. R.E. Tab 3, ROA.18673.

In addition to failing to comply with the terms of the Discipline Consent Order, the court also found that the District has failed to eliminate the ongoing vestiges of *de jure* discrimination to the extent practicable. In so holding, the court credited a statistical analysis by Dr. Gregory showing that "the observed racial disparities in discipline are not attributable to factors such as socioeconomic status, gender, school, or grade-levels of students." R.E. Tab 3, ROA.16876. The court explained that multi-variate regression analyses like the one performed by Dr. Gregory have been found to "support an inference of motive for disparate treatment" in other areas of the law. See R.E. Tab 3, ROA.16875. The court found that Dr. Gregory's analysis shows that "the disparities are a product of racial discrimination, not other social ills or variables." R.E. Tab 3, ROA.16876.

2. The Board contests very few of the district court's extensive factual findings with respect to discipline. Indeed, it takes issue with only two of the

court's findings—one regarding the Board's Alternative to Suspension program and the other involving alleged race-based discipline—neither of which is clearly erroneous.

First, in arguing that it complied in good faith with the Discipline Consent Order, the Board argues that the district court did not adequately credit it with reducing the number of out of school suspensions because the court treated the newly implemented Alternative to Suspension program as a form of exclusionary discipline. Br. 78. But the court's characterization of this program as exclusionary was not clearly erroneous. Students sent to the program are "transported from their home school to Parks Middle School," where they complete "their normal classwork via Google Classrooms." R.E. Tab 3, ROA.16860. While there are three staff members assigned to the center, "students are not receiving traditional instruction from a teacher." R.E. Tab 3, ROA.16860. The Discipline Consent Order explicitly states that the District is to "ensure that students remain in the regular classroom environment to the greatest extent possible." R.E. Tab 12, ROA.3986. As such, the court had an ample basis for treating the Alternative to Suspension program as a form of exclusionary discipline.

Second, the Board relies on the testimony of Fred Wiltz, the District's Supervisor of Child Welfare and Attendance, to argue that it has "eliminated vestiges of past discrimination in student discipline to the extent practicable." Br.

79. To be sure, Wiltz testified that he is not personally aware of an instance where a student has been disciplined because of race, and that he would not tolerate such conduct. Br. 79. But that testimony, which the court acknowledged (R.E. Tab 3, ROA.16867), did not dictate that the district court reach a different finding as to the lack of unitary status. The Board does not contest the persistence or magnitude of the racial disparities in discipline. Nor does the Board challenge the district court's reliance on Dr. Gregory's statistical analysis to conclude that "the disparities are a product of racial discrimination, not other social ills or variables." R.E. Tab 3, ROA.16876; cf. Br. 73, 79-80 (failing to engage at all with Gregory's analysis).

Finally, in arguing that the underlying discipline data shows "strides the Board has achieved," (Br. 79), the Board repeatedly compares 2015-2016 data to 2019-2020. *E.g.*, Br. 79-80. But as the court found, "[d]ata for the 2019-2020 school year is not comparable to other years because the schools stopped offering in-person instruction in March 2020 due to the COVID-19 pandemic." R.E. Tab 3, ROA.16849. Indeed, as the Board acknowledges in its brief (Br. 74 n.4), "[n]o student was disciplined after schools were closed [on March 13, 2020] for the remainder of the year." Thus, relying on data from the 2019-2020 school year does nothing to advance the Board's argument.

The Board has failed to show the the district court committed any error, much less clear error, in concluding that it had not complied with the terms of the Discipline Consent Order, and has not eliminated the vestiges of discrimination to the extent practicable.[7]

[7] The district court noted that the parties disputed who bears the burden of proof regarding the elimination of vestiges of discrimination with respect to discipline. R.E. Tab 3, ROA.16868. As the district court concluded, regardless of which party bears the burden, the facts show that the Board has neither complied with the terms of the Discipline Consent Order, nor sufficiently eliminated the vestiges of discrimination as to discipline. R.E. Tab 3, ROA.16870-16875. Accordingly, this Court need not reach or resolve this burden of proof issue.

CONCLUSION

This Court should affirm the decision below with respect to student assignment and discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,110 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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