No. 23-30063

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VERNON SMITH, ETC.,

Plaintiff

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee

v.

SCHOOL BOARD OF CONCORDIA PARISH,

Defendant-Appellee

v.

DELTA CHARTER GROUP, INCORPORATED,

Intervenor-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that this appeal can be resolved on the briefs but does not object to oral argument if it would aid this Court's review.

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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. On December 2, 2022, the district court denied intervenor-appellant Delta Charter Group, Inc.'s motion to modify a consent order

previously issued in the case. ROA.2665-2677 (corrected order).[1] Delta filed its notice of appeal on January 25, 2023. ROA.2689-2690. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

Delta intervened in this litigation to satisfy its obligations under state law and obtain court approval to open a charter school within the Concordia Parish School District, which was operating under active desegregation orders. The parties jointly proposed, and the district court entered, a consent order in 2013 that included certain race-conscious enrollment conditions designed to enable Delta to open its charter school without impeding the district's ability to satisfy its desegregation obligations. The district court later found Delta in deliberate noncompliance with the consent order, and on appeal, this Court affirmed.

While that appeal was pending and again, at the request of Delta and the other parties, the district court entered a second consent order in 2018 that set forth additional conditions to ensure Delta's compliance going forward. Among those conditions was the agreed-upon use of specific race-conscious enrollment policies. Last year, Delta moved to modify that consent order and eliminate the requirement

[1] "ROA.__" refers to the Record on Appeal by page number. "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket. "Br. __" refers to appellant's opening brief and page number.

to use such policies. The district court denied Delta's motion. This appeal presents three issues:

1. Whether, under Federal Rule of Civil Procedure 60(b)(5), the district court abused its discretion in denying Delta's motion to modify the 2018 consent order, where Delta was unable to show that a significant change in factual conditions or law renders continued enforcement of the order without modification detrimental to the public interest.

2. Whether Delta should be estopped from challenging the constitutionality of the race-conscious enrollment policies required under the 2018 consent order, where Delta previously took the position that such policies are permissible in the context of this case and successfully persuaded the district court to adopt that position and enter the jointly proposed consent order.

3. Whether the district court has the remedial authority to require Delta to abide by certain race-conscious enrollment policies, where the evidence shows that the policies are necessary to protect the Concordia Parish School District's ability to comply with the court's desegregation orders.

STATEMENT OF THE CASE

1. The Concordia Parish School District Currently Operates Under Multiple Active Desegregation Orders

The Concordia Parish School District is "a relatively small school system with a limited number of schools." ROA.1290-1291. Currently, fewer than 3000

students attend the district's 11 schools. ROA.2629. The district previously "engaged in unconstitutional racial discrimination," and thus, has long operated under a set of desegregation orders. *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 331, 335 n.5 (5th Cir. 2018); see also ROA.2679-2683 (summarizing the orders). Among the requirements imposed by these orders are the obligations to "take all reasonable and necessary steps to overcome the effects of prior discrimination," avoid student assignments that result in "monoracial" classroom populations, and approve student transfers to other schools in the district only where "the cumulative effect of those transfers does not adversely impact desegregation efforts at those schools or reinforce the dual school system." ROA.2345, 2680-2681.

The Concordia Parish School District has not yet reached unitary status—meaning that it has not yet "eliminated the vestiges of prior *de jure* segregation to the extent practicable" and shown good-faith compliance with the district court's desegregation orders for a reasonable amount of time. *Anderson* v. *School Bd. of Madison Cnty.*, 517 F.3d 292, 297 (5th Cir. 2008). Recently, however, the district court has taken steps to ensure that the district "act[s] more urgently to fulfill its desegregation obligations." ROA.2678. It ordered the district to jointly propose with the United States "a robust plan for action and progress" towards achieving unitary status. ROA.2678, 2684. Those parties have done so, proposing a plan of

work that includes "multiple site visits to all District schools" and "interviews of school-level and District-level administrators" by December 2023, and an evidentiary hearing, if necessary, on any motion by the district for a declaration for full or partial unitary status by the end of 2024. Doc. 326, at 1; Doc. 326-2, at 1, 4.

2. Delta Intervenes In This Action To Obtain Court Approval For Opening A New Charter School

In September 2012, Delta moved to intervene in this case to obtain court approval for opening a new public charter school in Concordia Parish. ROA.177-204. Delta already had obtained approval from the Louisiana Board of Elementary and Secondary Education (BESE) to operate a "Type 2 charter school" in Concordia Parish starting in Fall 2013. ROA.178; see also ROA.189.[2] However, Louisiana requires charter schools to "[b]e subject to any court-ordered desegregation plan in effect for the city or parish school system" in which they operate. La. Rev. Stat. Ann. § 17:3991(C)(3) (2019). Accordingly, Delta moved to intervene in this litigation "for the purpose[] of filing a Motion for Authorization to Operate a Charter School" (ROA.177-179), and it attached a copy of its proposed motion for authorization to open The Delta Charter School of Math, Science, and Technology (Delta Charter School) as an exhibit (ROA.183-186).

[2] Unlike other types of Louisiana charter schools, Type 2 charter schools may enroll students from anywhere in the State. See *Smith*, 906 F.3d at 330 n.1.

The district court granted Delta's request for intervention and ordered that Delta's motion for authorization be filed on the court docket. ROA.249.

In its motion for authorization, Delta recognized that because the Concordia Parish School District operates under a set of desegregation orders, the district court "ha[d] the authority to render a decision as to the authority to open any new public school or charter school in Concordia Parish." ROA.251. To obtain its requested authorization, Delta assured the court that its charter school "w[ould] not have a negative impact on Concordia Parish School District's ability to comply with its desegregation plan." ROA.252, 254. Delta promised to "ensure" that its charter school is "racially integrated" by, among other steps, "employ[ing] a preferential lottery" that enrolled a minimum of 40% minority students. ROA.253; see also ROA.271 (stating in the charter school's admission rules that "minorities may be given preferences" in the lottery process "[i]f necessary to achieve a forty percent minority student percentage in a given class"). Delta also told the court that it would "tweak any of its programs or policies in order to comply with th[e] Court's desegregation decree[s]." ROA.261.

The district court set a hearing on Delta's motion. ROA.280, 292-293. Before the hearing took place, the parties jointly moved in January 2013 for entry of a consent order that was designed to enable Delta Charter School to operate without "imped[ing] the Concordia Parish School Board's ability to fulfill its

obligations" under the court's desegregation orders. ROA.308. The court entered the parties' consent order the next day. ROA.315-321 (2013 Consent Order).

The 2013 Consent Order memorialized Delta's "agree[ment] that it is governed by and that it will comply with the desegregation obligations mandated by this case." ROA.316. Under the order, Delta could enroll "approximately 230 students" in the charter school's first year and reach a total of "approximately 300 students" by its fourth year. ROA.316. The composition of that student population had to "reflect the racial demographics of the Concordia Parish School District." ROA.317. If "black student enrollment in Delta Charter School [fell] 10% or more below the black student enrollment in the Concordia Parish School District," Delta was required to analyze the causes of that outcome, propose ways for "modify[ing] [the school's] enrollment rate," and submit its analysis and proposal to the court and the other parties prior to the start of the next school year. ROA.317.

3. Delta Deliberately Does Not Comply With The 2013 Consent Order

a. One year later, the Concordia Parish School Board moved for an order that would compel Delta's compliance with the 2013 Consent Order. ROA.353-363. The Board argued that Delta was violating the order by "failing to enroll a sufficient number of black students," "increasing its student enrollment" beyond the level set in the 2013 Consent Order, and "failing to meet desegregation

standards for faculty and administrators." ROA.354. The Board pointed out that, based on Delta's most recent status report, its charter school had a "15.7% black student enrollment," far below the 40% mark that Delta had committed to achieve. ROA.362. And as a result of Delta's noncompliance with the 2013 Consent Order, schools in the Concordia Parish School District had suffered a "loss of white students" to the charter school, which frustrated "the School Board's ability to satisfy its desegregation obligations." ROA.361. After the Board filed its motion, "[y]ears of discovery and failed negotiations followed," during which time, "Delta continued to operate and to enroll predominantly white (greater than 80%) student bodies." *Smith*, 906 F.3d at 330; see also *id.* at 332 (describing "Delta's consistent failure to achieve its enrollment targets").

The district court scheduled an evidentiary hearing on the Board's motion to compel Delta's compliance for Monday, February 13, 2017. ROA.832. On the Friday before the hearing, Delta moved under Federal Rule of Civil Procedure 60(b)(2), (4), (5), and (6) to modify the 2013 Consent Order. ROA.1055-1086. In its motion, Delta acknowledged that the court's "role in determining what conditions or obligations apply to Delta Charter's continued operation should be guided by a determination of whether the charter school is adversely impacting the racial balance in Concordia Parish School District." ROA.1062-1063. But Delta argued that "federal courts should not impose race-conscious injunctive relief

absent a showing that racial imbalance has been caused by a constitutional violation." ROA.1065. Citing the Supreme Court's decision in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), Delta suggested that it would be improper to enjoin a charter school "from accepting students just because the transfer may increase racial imbalance" in other schools operating under desegregation orders. ROA.1065. At the evidentiary hearing, the court declined to consider Delta's eleventh-hour motion because doing so would impose "unfair and undue prejudice" on the other parties. ROA.1288.

The evidentiary hearing lasted three days and featured testimony from eight witnesses. ROA.2698-2741, 2791-2877, 2906-3001, 3005-3126, 3138-3225, 3231-3275. The testimony and other evidence revealed that Delta had violated the 2013 Consent Order in multiple ways. Delta had enrolled many more students than was permitted under the order. See ROA.308, 2846-2855, 3378, 3385, 3397. The demographics of that student body had not come close to reflecting the demographics of the Concordia Parish School District. Indeed, the student population in Delta Charter School was on average 17.8% Black and 80.6% white, in contrast to the student population in the district, which was on average 46.75% Black and 51.75% white. ROA.3405, 4132. And despite Delta's failure to achieve a level of Black student enrollment that came within 10% of the district's, Delta had neither analyzed the causes of that outcome, proposed ways for modifying its

enrollment rate, nor provided to the court and the other parties any analysis of or proposal for addressing that failure—as required by the 2013 Consent Order. ROA.2711-2713; see ROA.317. As the evidence at the hearing showed, these and other failures by Delta had "a negative impact on the district's ability to desegregate." ROA.3028.

The district court thus held that Delta had failed to "adhere to the terms of the consent judgment into which it voluntarily entered," and that Delta's "deliberate noncompliance ha[d] substantially impacted Concordia's compliance with ongoing desegregation orders." ROA.1289; see also ROA.1292 (describing Delta as having "move[d] rapidly forward with its own agenda while only winking at its court ordered obligations"). Indeed, as the court pointed out, moving the Concordia Parish School District towards unitary status was a "delicate matter" given the "relatively small" size of the school system. ROA.1290-1291. Thus, to "test whether Delta c[ould] ever comply with its obligations," and to ensure that operation of its charter school would "not alter the desegregation efforts of Concordia to a significant degree," the court ordered certain remedies "beginning with the 2017-2018 school year." ROA.1292, 1295; see also ROA.1295 (characterizing "the 2017-2018 school year as an opportunity [for Delta] to prove its profession of good faith"). This included a revised cap on the total number of

students Delta could enroll from Concordia Parish and the appointment of a Special Master. ROA.1292-1295.

b. Delta appealed the district court's ruling, raising two arguments. First, Delta contested the court's "authority to enforce the preexisting desegregation order" in the absence of a finding that Delta had previously operated a segregated school or contributed to an interdistrict constitutional violation. *Smith*, 906 F.3d at 334. Second, Delta challenged the court's ruling as unsupported by evidence that "Delta had either itself violated the Constitution or impeded the Board's desegregation efforts." *Id.* at 335.

This Court rejected both arguments. First, the Court held that the district court derived remedial authority from the 2013 Consent Decree itself, to which Delta had expressly agreed to be bound and which imposed requirements that "ar[ose] out of and serve[d] to resolve a longstanding desegregation effort in Concordia Parish properly overseen by the district court." *Smith*, 906 F.3d at 334-335. Accordingly, "[t]o enforce the consent decree, the district court did not need to find that Delta violated the Constitution"; rather, the court needed to find only that Delta had "violated the consent decree." *Id.* at 335; see also *id.* at 334 (finding that "the only question presented [was] whether a court can enforce desegregation obligations incorporated into a consent decree against a party that entered that decree").

Second, the Court found "considerable evidence" showing that Delta had violated the 2013 Consent Order and "substantially impacted Concordia's compliance with ongoing desegregation orders." *Smith*, 906 F.3d at 335. As the Court pointed out, "Delta disproportionately drew away white students and white teachers from Concordia Parish, making it more difficult for the Board to achieve its desegregation obligations." *Ibid.* For example, in the town of Ferriday, which is "the only 'zone' in Concordia Parish that is majority African American," the schools there "lost 20% of their white students to" Delta Charter School in its first year of operation. *Ibid.* Those schools "continued to lose 5 to 10% of their white students to Delta [Charter School] each year over the next three years." *Id.* at 335-336. Accordingly, save for one aspect of the relief that was found to exceed the scope of the 2013 Consent Order, the Court affirmed the district court's order. *Id.* at 334-336.

Judge Ho joined the majority opinion and wrote a concurring opinion. *Smith*, 906 F.3d at 337-339 (Ho, J., concurring). Responding to Delta's contention that a district court may not require a charter school to adopt race-conscious admissions policies when the school has "never been found guilty of segregation," Judge Ho agreed with the other members of the panel that the question was "not properly before [the Court] on appeal." *Id.* at 337. He stated, however, that "[o]n

remand, Delta is entitled to a fair hearing on its constitutional challenge to the racial balancing requirements" in the 2013 Consent Order. *Ibid.*

4. Delta Jointly Moves For The Entry Of A Second Consent Order That Requires It To Use Race-Conscious Admissions Policies

While Delta's appeal was proceeding in this Court, Delta joined the Concordia Parish School District and the United States in moving for entry of a second consent order, specifically addressing Delta's enrollment process, that would help to assure Delta's future compliance with all "applicable [c]ourt [o]rders." ROA.1535-1545. The proposed consent order would set parameters for Delta Charter School's enrollment processes starting in the 2018-2019 school year and continuing thereafter "until further order of the court." ROA.1535. Under those processes, Delta would be limited to enrolling 350 students who reside in the Parish and 500 students overall, and Black student applicants would receive "the highest enrollment preference" in Delta's admissions lottery. ROA.1541. When filling open seats in grades 1 through 12, Delta would admit Black student applicants first. ROA.1543. And when enrolling a new kindergarten class, Delta would generally admit Black and white students at a one-to-one ratio. ROA.1542. These and other proposed requirements were designed to help Delta satisfy its obligation under the 2013 Consent Order to enroll a student body that "reflect[s] the racial demographics of the Concordia Parish School District." ROA.1544.

The district court granted the parties' joint motion and entered their proposed consent order. ROA.1546-1547 (2018 Consent Order).[3] Almost immediately, Delta began enrolling a much more diverse student population. See ROA.2670 (noting Delta Charter School's "improve[ment]" following the 2018 Consent Order). As shown in the table below, two years after entry of the 2018 Consent Order, Delta reported that, for the first time, the demographics of Delta Charter School's student body came within 10% of the demographics reported for the Concordia Parish School District. And with the 2018 Consent Order still in place, Delta has sustained that performance.

Percentage of Black Students / Percentage of White Students		
School Year	**Delta Charter School**	**Concordia Parish School District**
2013-14	15.2% / 84.8%	52.2% / 46.2%
2014-15	17.9% / 79.7%	51.3% / 46.9%
2015-16	19.6% / 78.7%	51.3% / 46.6%
2016-17	17% / 80.4%	50.8% / 46.7%
2017-18	16% / 81.4%	51% / 46.3%
2018-19	29.3% / 70.7%	50.1% / 47.3%
2019-20	33.8% / 66%	47.9% / 48.7%
2020-21	40.5% / 58.6%	48.3% / 48.7%
2021-22	40.5% / 58%	47.5% / 49%
2022-23	40.1% / 58.2%	48% / 48.3%

[3] The district court later amended the 2018 Consent Order to clarify how Delta's enrollment processes should operate when applicants "identif[y] as multiple races on their Delta application." ROA.1553-1572; see also ROA.1573.

ROA.335; ROA.379; ROA.452-453; ROA.627; ROA.634; ROA.678; ROA.858; ROA.1354; ROA.1495; ROA.1599; ROA.1627; ROA.1658; ROA.1684; ROA.1698; ROA.2162; ROA.2197; ROA.2620; ROA.2629.[4]

5. Delta Moves To Modify The 2018 Consent Order And Eliminate The Race-Conscious Admissions Policies It Requires

On May 6, 2022, Delta filed a motion seeking dismissal from the case, arguing that it "is not undermining the desegregation obligations of the Concordia Parish Schools," it has "complied with the Orders of the Court," and its use of a "race-based lottery program is unconstitutional." ROA.2319. The United States pressed for discovery on the first two issues. ROA.2498-2501. The district court set a telephone status conference with the parties (ROA.2505), at which Delta "offered to limit its motion to [a] single legal inquiry": whether the use of race in Delta Charter School's admissions process should be "discontinu[ed]," thus relieving Delta of "any duty to achieve certain demographics within [its] student population" (ROA.2671). The court granted Delta leave to file this "alternative motion." ROA.2537.

Delta proceeded to file a motion to "discontinu[e] the use of race as a factor in Delta's Enrollment Process and to relieve Delta of any obligation to achieve a

[4] For the 2018-2019 and 2019-2020 school years, Delta did not identify the total number of white students enrolled in Delta Charter School. Rather, it only offered the number of "Black" and "Non-Black" enrolled students. ROA.1658.

targeted racial quota or percentage." ROA.2545. Delta's motion specified no legal basis for seeking such relief. Rather, the motion simply argued that because Delta Charter School "never was segregated by race like the Concordia Parish Schools were," the race-conscious admissions policies required under the 2018 Consent Order were unconstitutional under *Parents Involved*. ROA.2549-2551.

The district court denied Delta's motion. ROA.2665-2676.[5] It concluded that the motion "amount[ed] to a request to modify the 2018 Consent Order," and thus analyzed the motion under Federal Rule of Civil Procedure 60(b)(5). ROA.2671-2674. That rule permits modification of a consent order where prospective application of the order "is no longer equitable." Fed. R. Civ. P. 60(b)(5). Citing the Supreme Court's decision in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the district court held that Delta's motion failed because Delta had identified no "change in factual or legal circumstances" that warranted modification of the Order under Rule 60(b)(5). ROA.2673-2674. Rather, Delta had simply argued that the race-conscious enrollment policies were impermissible under the Supreme Court's "fifteen-year-old plurality opinion in *Parents Involved*." ROA.2673. That opinion, the court held, "fails to rise to the kind of significant legal change the Supreme Court contemplated in *Rufo*."

[5] The district court issued an initial ruling denying Delta's motion (ROA.2652-2664), and then issued a corrected version of the ruling the same day (ROA.2665-2677). This brief cites the court's corrected order.

ROA.2673. Indeed, as the court pointed out, *Parents Involved* "hardly constitute[d] a *change* in the law," given that Delta had "attempted to rely on [the opinion] in its previous unsuccessful attempt on appeal to modify the 2013 Consent Order." ROA.2673 n.5 (emphasis added). The court further found that Delta had failed to show that modification was warranted under Rule 60(b)(5) based on a failure of the 2018 Consent Order "to achieve its intended result." ROA.2674.

Even if Delta had been able to satisfy the Rule 60(b)(5) standard, the district court concluded that Delta's reliance on *Parents Involved* was "without merit." ROA.2673 n.5. As the court explained, *Parents Involved* does not govern here because, unlike in that case, Delta Charter School operates within a school district that is "under an active desegregation order." ROA.2673 n.5. The district court also pointed to this Court's earlier decision holding that courts (including the district court here) have "remedial authority to enforce desegregation obligations incorporated into consent decrees against a party that entered that decree." ROA.2673 n.5 (citing *Smith*, 906 F.3d at 334). That remedial authority permitted the court to order certain relief, including Delta's use of a "race-conscious enrollment process," to ensure that "the existence of [Delta Charter School] [does] not undermine Concordia's ongoing desegregation obligations." ROA.2673 n.5.

Accordingly, the district court denied Delta's motion to modify the 2018 Consent Order. ROA.2675-2676. Regarding Delta's prior motion for dismissal from the case, the court denied that request as moot in light of Delta's decision to "narrow its requested relief" and "file a different motion." ROA.2671. However, recognizing Delta's "significant progress and [the] success it ha[d] achieved in the composition of [Delta Charter School's] student population," the court *sua sponte* modified the 2018 Consent Order and increased Delta's enrollment cap for students domiciled in Concordia Parish from 350 to 450 students. ROA.2674-2677. Such a change, the court found, accommodated Delta's "desire to expand its footprint within the Concordia Parish community without harming Concordia's ongoing desegregation obligations." ROA.2675.

Delta timely appealed. ROA.2689-2690.

SUMMARY OF ARGUMENT

This Court should affirm.

1. The district court did not abuse its discretion in denying Delta's motion to modify the 2018 Consent Order. As a threshold matter, Delta fails to offer any explanation for how or why the district court abused its discretion in determining that Delta failed to satisfy the requirements for modification under Rule 60(b)(5). That rule permits modification when prospective application of a consent order "is no longer equitable." Fed. R. Civ. P. 60(b)(5). Parties seeking such relief must

identify a significant change in factual conditions or law that renders continued enforcement of the consent order without modification detrimental to the public interest. The court denied Delta's motion based on its failure to make such a showing. On appeal, Delta all but ignores this aspect of the court's opinion, raising no argument that this conclusion was erroneous and thereby waiving the issue. Consequently, this Court should affirm the district court's ruling based on the lack of any showing that the court abused its discretion in denying Delta's motion for modification when Delta failed to satisfy the requirements of Rule 60(b)(5).

2. Apart from Delta's failure to show that the district court was wrong to reject its request under Rule 60(b)(5), this Court should find Delta estopped from challenging the constitutionality of the race-conscious enrollment policies set forth in the 2018 Consent Order. Early in this litigation, Delta was steadfast in its position that such policies are permissible under state and federal law, and also necessary to ensure that Delta Charter School's operation does not frustrate the Concordia Parish School District's desegregation efforts. And Delta successfully persuaded the district court to adopt this position and issue the 2013 and 2018 Consent Orders, *both* of which were premised on the understanding that Delta would afford Black student applicants a preference in the charter school's admissions lottery. Having benefited from those court actions by being allowed to open and continue operating its charter school, Delta should not be permitted to

switch positions now and seek elimination of the race-conscious enrollment policies on the basis that, in actuality, those policies have been unconstitutional all along.

3. Finally, even if this Court were to reach the merits of Delta's arguments, it should reject them as meritless. Delta primarily relies on the Supreme Court's decision in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), to argue that its race-conscious enrollment policies are unconstitutional. But unlike the admissions policies in that case—which did not seek to remedy the effects of past school segregation, but instead, were "directed only to racial balance, pure and simple," *id.* at 726—the 2018 Consent Order seeks to ensure that Delta operates in a way that avoids interfering with the Concordia Parish School District's efforts to comply with its desegregation obligations. Courts have broad remedial authority in such a circumstance, and as the evidence in this case makes clear, race-conscious enrollment policies can sometimes provide the only means by which a court can ensure that the operation of a new charter school does not impede the desegregation efforts of the public school district in which the charter school sits.

Delta offers an assortment of arguments for why the race-conscious enrollment policies are unconstitutional. But those arguments misapprehend the remedial context of this case, the applicable law, and the continued risk that, absent

use of these policies, Delta Charter School will further frustrate the district's ability to comply with the district court's desegregation orders and reverse the progress Delta has made operating under the 2018 Consent Order.

ARGUMENT

THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF DELTA'S MOTION TO MODIFY THE 2018 CONSENT ORDER

A. Standard Of Review

On appeal, "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez* v. *Crosby*, 545 U.S. 524, 535 (2005). Specifically, this Court reviews a district court's denial of a Rule 60(b)(5) motion for abuse of discretion and its underlying legal conclusions de novo. *Frew* v. *Janek*, 780 F.3d 320, 326 (5th Cir. 2015), cert. denied, 577 U.S. 1137 (2016).

That deferential standard means that "[i]t is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so *unwarranted* as to constitute an abuse of discretion." *Cooper* v. *Noble*, 33 F.3d 540, 544 (5th Cir.) (alteration in original) (quoting *Seven Elves, Inc.* v. *Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)), supplemented, 41 F.3d 212 (5th Cir. 1994). "The burden is on the moving party to prove that modification is warranted, regardless of whether the party seeks to lessen its own responsibilities under the decree, impose a new and more effective remedy, or vacate the order entirely." *League of United Latin Am. Citizens, Dist. 19* v. *City of Boerne*, 659 F.3d 421, 438

(5th Cir. 2011) (*LULAC*). In an institutional reform case, this deferential standard recognizes that the district court "is intimately involved in the often complex process of institutional reformation" and "has the personal knowledge, experience, and insight necessary to evaluate the parties' intentions, performances, and capabilities." *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987).

B. The District Court Correctly Held That Delta Failed To Satisfy The Requirements For Modification Under Federal Rule Of Civil Procedure 60(b)(5), And On Appeal, Delta Has Waived Any Argument Challenging That Ruling

This Court can and should resolve this appeal on the straightforward ground that Delta identifies no flaw in the district court's Rule 60(b)(5) analysis, which found that Delta had not carried its burden to show that the prerequisites for modifying the 2018 Consent Order are satisfied here. Indeed, because Delta failed to address the issue at all in its opening brief, Delta has waived any argument that the court's ruling constitutes an abuse of discretion. In any event, Delta's failure to demonstrate "a significant change either in factual conditions or in law" that renders continued enforcement of the order "detrimental to the public interest" bars Delta's effort now to contest the constitutionality of the order's agreed-to race-conscious enrollment policies. *Horne* v. *Flores*, 557 U.S. 433, 447 (2009) (citation omitted).

1. To Obtain Its Requested Modification, Delta Had To Satisfy Rule 60(b)(5) And Show That Continued Application Of The 2018 Consent Order Is No Longer Equitable

The district court correctly concluded that Delta's motion "amount[ed] to a request to modify the 2018 Consent Order" and thus was subject to the requirements of Rule 60(b)(5). ROA.2671; cf. *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 332 n.2 (5th Cir. 2018) (commenting that "Delta remains free to move to modify the [2013 Consent Decree] on remand"). Admittedly, Delta did not use the term "modify" in its motion, instead framing it as a request for an order "discontinuing the use of race as a factor in Delta's Enrollment Process." ROA.2454; see also ROA.2548-2549 (discussing the "Enrollment Process" in the 2018 Consent Order). But the effect of such an order would have been to modify the 2018 Consent Order and eliminate the provisions that required Delta to use race-conscious enrollment policies. See *Smith*, 906 F.3d at 330 ("[A] party is bound by the terms of a consent decree that it voluntarily entered.").

While a district court has inherent equitable authority to modify a consent order, "that power is not unfettered." *Alberti* v. *Klevenhagen*, 46 F.3d 1347, 1366 (5th Cir. 1995). Rather, such authority must be exercised pursuant to Rule 60(b). See *LULAC*, 659 F.3d at 437 ("Consent decrees are subject to Federal Rule of Civil Procedure 60(b)."); *Alberti*, 46 F.3d at 1366 (stating that "modification of a consent decree is governed by the same standards that govern modifications of

judgments as set forth in Federal Rule of Civil Procedure 60(b)"); see also *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004) (describing Rule 60(b)(5) as "encompass[ing] the traditional power of a court of equity to modify its [consent] decree in light of changed circumstances"). This Court has long made this point clear, commenting that "if [Rule] 60 is inapplicable, we know of no legal doctrine or rule of civil procedure that even arguably could * * * empower[] a district court to hear, * * * years after entry of a consent decree that acts as a final judgment, a motion to reconsider" that decree. *Cook* v. *Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980). And indeed, in Delta's earlier motion to modify the 2013 Consent Order, it specifically cited Rule 60(b) as the basis for its request. See ROA.1055.

The district court also correctly concluded that, to obtain its requested modification, Delta had to satisfy the requirements of Rule 60(b)(5). ROA.2673. As relevant here, Rule 60(b)(5) permits modification when prospective application of a consent decree "is no longer equitable."[6] The Supreme Court indicated in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that Rule 60(b)(5) often will be the relevant subsection when a party seeks "modification of a consent

[6] Neither of the other bases for relief under Rule 60(b)(5) apply here, as there is no "judgment [that] has been satisfied, released, or discharged," and Delta's motion was not "based on an earlier judgment that has been reversed or vacated."

decree." *Id.* at 383. And none of the other subsections in Rule 60(b) applies to Delta's motion.[7]

2. Delta Waived Any Argument That The District Court Abused Its Discretion In Holding That Delta Failed To Satisfy The Requirements Of Rule 60(b)(5), But Regardless, The Court Did Not Err

a. As this Court has noted, "[m]odification of a consent decree * * * is not a remedy to be lightly awarded." *Ruiz*, 811 F.2d at 860. To establish that prospective application of a consent decree "is no longer equitable," Fed. R. Civ. P. 60(b)(5), the moving party must identify "a significant change either in factual conditions or in law." *LULAC*, 659 F.3d at 437 (quoting *Rufo*, 502 U.S. at 384); see also *Horne*, 557 U.S. at 451 (describing "the correct legal standard" under Rule

[7] Relief under Rule 60(b)(1), (2), and (3) is unavailable because Delta failed to file its motion within one year of entry of the 2018 Consent Order. See Fed. R. Civ. P. 60(c)(1). And Delta failed to offer any allegations or arguments to warrant application of Rule 60(b)(4) or (6). Rule 60(b)(4) permits a party to seek modification where a "judgment is void." Delta not only failed to identify any such judgment, it also made no effort to show that this case falls into either of the two categories to which Rule 60(b)(4) applies: cases involving a "violation of due process that deprive[d] a party of notice or the opportunity to be heard," or those where the district court "lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 271 (2010) (quoting *Nemaizer* v. *Baker*, 793 F.2d 58, 65 (2d Cir. 1986)); see also *Securities & Exch. Comm'n* v. *Novinger*, 40 F.4th 297, 302 (5th Cir. 2022). As for Rule 60(b)(6), it allows a party to seek modification for "any other reason that justifies relief." But the moving party must identify "'extraordinary circumstances' suggesting that the party is faultless in the delay" in seeking relief. *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (quoting *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)). Delta made no such a showing in its motion.

60(b)(5) as focused on whether there has been a significant change either in factual conditions or law). That significant change must "make compliance with the decree substantially more onerous" or "unworkable because of unforeseen obstacles," or otherwise make continued "enforcement of the decree without modification * * * detrimental to the public interest." *LULAC*, 659 F.3d at 437 (quoting *Rufo*, 502 U.S. at 384). A party may be able to satisfy its obligation to establish a significant change in circumstances "by showing that the decree was not meeting its intended purpose." *Id.* at 438. But a substantial change will not be found "when a party bases its request on events that were anticipated when it entered into the decree." *United States* v. *City of New Orleans*, 731 F.3d 434, 439 (5th Cir. 2013). If the moving party demonstrates that a substantial change in factual conditions or law has occurred, then the district court must "consider whether the proposed modification is suitably tailored to" the new circumstances. *LULAC*, 659 F.3d at 437 (quoting *Rufo*, 502 U.S. at 383).

b. On appeal, Delta makes no attempt whatsoever to explain how the district court abused its discretion in holding that Delta failed to carry its burden under Rule 60(b)(5). Consequently, Delta has waived any suggestion of error by the district court on this issue, and this Court should affirm on the basis that the correctness of the court's ruling is uncontested. See *United States* v. *Elashyi*, 554

F.3d 480, 494 n.6 (5th Cir. 2008) ("An appellant that fails to adequately brief an issue in his opening brief waives that issue."), cert. denied, 558 U.S. 829 (2009).

Instead of addressing the district court's Rule 60(b)(5) analysis, Delta proceeds directly to challenge as unconstitutional the race-conscious enrollment policies set forth in the 2018 Consent Order. Br. 15-24. This effort fails because, as this Court has made clear, "*before* [a] modification is made, the district court must find a substantial change in circumstances," *Alberti*, 46 F.3d at 1369 (emphasis added), and Delta offers no basis for concluding that the district court could or should have found such a change. Instead, Delta simply argues that the race-conscious enrollment policies are unconstitutional under *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007). See Br. 15-23. But as the district court pointed out, *Parents Involved* "hardly constitutes a *change* in law warranting modification of the 2018 Consent Order" because the opinion issued 11 years before the parties asked the court to enter the 2018 Consent Order. ROA.2674 n.5 (emphasis added). And Delta has long been aware of the decision, having "attempted to rely on *Parents Involved* in its previous unsuccessful attempt on appeal to modify the 2013 Consent Order." ROA.2674 n.5.

Nor has Delta offered any evidence of a substantial change in factual circumstances. For example, the district court rejected any suggestion that the

2018 Consent Order is "fail[ing] to achieve its intended result," either by "imped[ing] Delta's efforts to operate a school within Concordia Parish" or "undermin[ing] Concordia's desegregation efforts" (ROA.2673-2674), and Delta takes no issue with that conclusion. To the contrary, the evidence shows that, in enforcing and amending the order, the court has been cognizant of the need to ensure that the order remains "suitably tailored" to Delta's and the school district's interests—indeed, in the ruling at issue, the court accommodated Delta's "desire to expand its footprint" by increasing the charter school's enrollment cap for students domiciled in Concordia Parish because it was possible to do so "without harming Concordia's ongoing desegregation obligations." ROA.2675. Thus, because Delta failed to "demonstrate a significant factual or legal change that justifies relief, much less one that was unanticipated when [it] entered the consent judgment[]," *Securities & Exch. Comm'n* v. *Novinger*, 40 F.4th 297, 307 (5th Cir. 2022), the court did not abuse its discretion in denying Delta's motion to modify.

Absent that "significant change either in factual conditions or in law" that renders continued enforcement "detrimental to the public interest," *Horne*, 557 U.S. at 447 (citation omitted), Rule 60(b)(5) does not provide a route for Delta to contest the constitutionality of the 2018 Consent Order's race-conscious enrollment policies. As the Supreme Court has instructed, "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order

rests." *Ibid.* Therefore, while this Court may "review the denial" of Delta's Rule 60(b) motion, it "lack[s] jurisdiction to review the substance" of the 2018 Consent Order from which Delta's motion "seeks relief." *Anderson* v. *City of New Orleans*, 38 F.4th 472, 478 (5th Cir. 2022).

Accordingly, even if Delta had not waived the issue of whether the district court abused its discretion in its Rule 60(b)(5) ruling, Delta still would be unable to contest the legal premise on which the 2018 Consent Order rests—namely, that in the context presented here, entering a consent order requiring Delta to use race-conscious enrollment policies was a permissible exercise of the court's remedial authority.[8]

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[8] In a footnote, Delta implies that Rule 54(b) might provide a ground on which the district court could have modified the 2018 Consent Order. Br. 10 n.8. However, "'[a]rguments subordinated in a footnote are insufficiently addressed in the body of the brief' and thus are forfeited" on appeal. *Denton Cnty. Elec. Coop., Inc.* v. *National Lab. Rels. Bd.*, 962 F.3d 161, 167 n.4 (5th Cir. 2020) (alteration in original; citation omitted); see also *ibid.* (summarizing the requirements for an appellant's opening brief under Federal Rule of Appellate Procedure 28(a)(8)(A)); *United States* v. *Tracts 31a, Lots 31 & 32, Lafitte's Landing Phase Two Port Arthur*, 852 F.3d 385, 389 n.5 (5th Cir. 2017); *Arbuckle Mountain Ranch of Tex., Inc.* v. *Chesapeake Energy Corp.*, 810 F.3d 335, 339 n.4 (5th Cir. 2016). In any event, Delta's suggestion lacks merit. "Rule 54(b) permits a district court to 'revise[] at any time' an order that is not final." *Frew* v. *Young*, 992 F.3d 391, 397 (5th Cir. 2021) (emphasis and citation omitted). The 2018 Consent Order, however, was a final order because it resolved the parties' post-judgment dispute over Delta's deliberate noncompliance with the 2013 Consent Order, and there was no immediate prospect of further action on the issue. See, *e.g.*, *Flores* v. *Garland*, 3 F.4th 1145, 1153 (9th Cir. 2021); *Autotech Techs. LP* v. *Integral Rsch. & Dev. Corp.*, 499 F.3d 737, 745 (7th Cir. 2007), cert. denied, 552 U.S. 123 (2008); see

C. Delta Is Estopped From Arguing That The Race-Conscious Enrollment Policies In The 2018 Consent Order Are Unconstitutional

Apart from finding that Delta failed to show that the district court abused its discretion under Rule 60(b)(5), this Court should find Delta estopped from challenging the constitutionality of the race-conscious enrollment policies in the 2018 Consent Order.

1. Judicial estoppel prevents a litigant "from playing fast and loose with the courts" by barring the party "from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Hall* v. *GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (internal quotation marks omitted) (quoting *Ergo Science, Inc.* v. *Martin*, 73 F.3d 595, 598 (5th Cir. 1996)). Accordingly, estoppel requires a two-part showing: "the estopped party's position must be 'clearly inconsistent with its previous one'" and "th[e] party must have convinced the court to accept that previous position." *Gabarick* v. *Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (quoting *Hall*, 327 F.3d at 396).

Both elements are present here. In stark contrast to its current posture, Delta's consistent, prior position dating back to its motion to intervene in this case

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also *Walker* v. *HUD*, 912 F.2d 819, 825 (5th Cir. 1990) (finding an order enforcing a consent decree to be a final decision). Consequently, Delta was required to seek modification via Rule 60(b), not Rule 54(b).

had been that Delta Charter School's use of race-conscious enrollment policies is not only permissible under state and federal law, but also necessary to ensure that the school's operation does not impede the Concordia Parish School District's ability to satisfy its desegregation obligations. See pp. 6-7, 13, *supra*. Indeed, this Court specifically pointed out that Delta had "repeatedly argued before the district court that a 'Type 2 charter school is subject to any court-ordered desegregation plan in effect for the city or parish school system,'" and that the district court's "role in determining what conditions or obligations apply to Delta Charter's continued operation should be guided by a determination of whether the charter school is adversely impacting the racial balance in Concordia Parish School District." *Smith*, 906 F.3d at 334.

Not only did Delta persuade the district court to accept that position in adopting the 2013 Consent Order, but then, while the previous appeal was pending, Delta *again* urged that same position in jointly moving for entry of the 2018 Consent Order. See, *e.g.*, ROA.1535 (urging the district court to adopt the proposed "reasonable and sound enrollment process, which advances the goals of desegregation at Delta Charter School"); see also *New Hampshire* v. *Maine*, 532 U.S. 742, 755 (2001) (finding a party estopped based on its position in an earlier consent judgment). The 2013 Consent Order required Delta to enroll a student body that "reflect[ed] the racial demographics of the Concordia Parish School

District," and to refrain from taking action that "impede[s] the Concordia Parish School Board's ability to fulfill its [desegregation] obligations." ROA.308. Delta had previously told the court that it would accomplish these goals by granting Black student applicants a preference in its admissions lottery. ROA.185, 195. For its part, the 2018 Consent Order, too, required the use of race-conscious enrollment policies to ensure Delta complied with the 2013 Consent Order and state law, and to prevent further interference with the Concordia Parish School District's efforts to comply with the court's desegregation orders. ROA.1540-1547.

Delta's course of conduct satisfies the requirements for estoppel. Delta voluntarily moved to intervene in the case and then joined the other parties in asking the district court to issue the 2013 and 2018 Consent Orders on the basis that they were legally permissible and practically necessary. See *Hall*, 327 F.3d at 398-399 (observing that circuit case law permits judicial estoppel where "a party makes an argument 'with the explicit intent to induce the district court's reliance'" (citation omitted)). And in granting the parties' request and issuing the orders, the district court accepted the "necessary predicate" that Delta's use of such policies was constitutional in the context presented here. *Gabarick*, 753 F.3d at 553; see also *City of New Orleans*, 731 F.3d at 439 (noting that "[c]onsent decrees cannot be approved without due consideration by the district court").

Estoppel is further warranted because Delta "would derive an unfair advantage or impose an unfair detriment on the opposing part[ies] if not estopped." *United States* v. *Farrar*, 876 F.3d 702, 709 (5th Cir. 2017) (quoting *Zedner* v. *United States*, 547 U.S. 489, 504 (2006)). As this Court recognized, Delta "expressly agreed that 'it [would be] governed by and that it [would] comply with the desegregation obligations mandated by this case'" in order "to assure its ability to operate within Concordia Parish." *Smith*, 906 F.3d at 334. In joining Delta in moving for entry of the 2018 Consent Order, the United States and the Concordia Parish School District agreed to waive further litigation on the conditions under which Delta Charter School should be permitted to operate, in exchange for Delta's agreement to comply with "a clearly defined roadmap" designed to "achieve [the parties'] [respective] goal[s]." *Frew*, 780 F.3d at 328. If this Court permitted Delta to renege on that agreement and argue, years later, that certain terms in the 2018 Consent Order have been unlawful all along, it would unfairly deprive appellees of "the benefits for which they bargained [and] the judicially enforceable obligations upon which they relied in entering into the consent decree." *Frazar* v. *Ladd*, 457 F.3d 432, 438 (5th Cir. 2006), cert. denied, 549 U.S. 1118 (2007).

2. Delta offers three meritless arguments why it should not be estopped from challenging the constitutionality of the race-conscious enrollment policies. First, Delta contends that estoppel is inappropriate because the 2018 Consent Order

contains "constitutional infirmity [that] is now court-ordered." Br. 25. However, for the reasons discussed below, ordering such relief was a permissible exercise of the district court's remedial authority. See pp. 39-48, *infra*. And in any event, the fact that Delta persuaded the court to accept its prior legal position *supports* the application of judicial estoppel.

Second, Delta argues that it had no choice but to "participate in the [2018] consent process" because the court had already found Delta in violation of the 2013 Consent Order. Br. 25. But Delta's position regarding the lawfulness of race-conscious enrollment policies predates entry of the 2018 Consent Order. And as Delta acknowledges, if it actually believed that the use of race-conscious enrollment policies was unconstitutional, Delta could have refrained from jointly moving for entry of the 2018 Consent Order and instead simply permitted "court-ordered measures [to be] imposed on it" (Br. 25), which Delta could then have challenged on appeal.

Third, Delta asserts that its motion to modify was not "a product of bad faith." Br. 26. Even accepting this as true, Delta cites no authority for the proposition that lack of bad faith bars application of judicial estoppel. While some courts credit a party's explanation that its change in position resulted from inadvertence or a reasonable mistake of law, see *In re Coastal Plains, Inc.*, 179 F.3d 197, 206-207 (5th Cir. 1999) (collecting cases), neither circumstance is

present here. To the contrary, Delta was plainly aware of the Supreme Court's decision in *Parents Involved* before it agreed to be bound by the terms of the 2018 Consent Order. See p. 9, *supra*. Accordingly, Delta should be held to the legal position that it consistently and repeatedly urged before the district court, and which it successfully persuaded the court to adopt.

D. The Race-Conscious Enrollment Policies In The 2018 Consent Order Are Constitutional

Even if this Court were to reach the merits of Delta's appeal—which it should not—it should find that the race-conscious enrollment policies in the 2018 Consent Order are constitutional here. Case law confirms, and Louisiana law recognizes, that a district court has broad remedial authority to enjoin a third party from taking actions that interfere with a party's efforts to comply with a court order. Where such interference occurs because a charter school is drawing disproportionately high numbers of white students away from a school district under active desegregation orders, thereby frustrating the district's ability to comply with those orders, the Constitution permits a court to order the charter school to abide by certain race-conscious enrollment policies, as the district court did here. Indeed, the facts of this case powerfully demonstrate that such relief may offer the only means of ensuring that the charter school's operation does not interfere with the district's desegregation obligations. Delta's litany of arguments

to the contrary should be rejected, as they misapprehend the remedial context of this case, misconstrue federal and state law, and misrepresent the factual record.

1. The District Court's Power To Issue The 2018 Consent Order Derived From Its Remedial Authority To Ensure Compliance With Its Past Orders

Delta challenges the race-conscious enrollment policies in the 2018 Consent Order as unconstitutional under *Parents Involved*, but that decision dealt with an entirely different situation than that presented here. *Parents Involved* concerned two school districts' use of "voluntarily adopted student assignment plans that rel[ied] upon race to determine which public schools certain children may attend." 551 U.S. at 709-710. The school district in Seattle, Washington considered students' race when "allocat[ing] slots in oversubscribed high schools," while the school district in Jefferson County, Kentucky did so when "mak[ing] certain elementary school assignments and * * * rul[ing] on transfer requests." *Id.* at 710. Neither school district employed these practices to remedy past *de jure* segregation and move towards unitary status. Rather, the Seattle school district had "never [been] segregated by law," and the Jefferson County district already had achieved unitary status. *Id.* at 737. Thus, because the two districts' student assignment plans were, in the eyes of the Supreme Court, "directed only to racial balance, pure and simple," in both "design and operation," the Court concluded

that the plans could not satisfy strict scrutiny and violated the Fourteenth Amendment. *Id.* at 726, 745.

In contrast, here, the race-conscious enrollment plans required under the 2018 Consent Order are not intended to achieve "racial balance, pure and simple." *Parents Involved*, 551 U.S. at 726. Rather, as expressly acknowledged by the parties and the district court, the policies seek to ensure that Delta complies with its obligations under the 2013 Consent Order and refrains from operating its charter school in a way that could frustrate the Concordia Parish School District's ability to eliminate the vestiges of past segregation. See pp. 13-14, *supra*; see also *Smith*, 906 F.3d at 335 (stating that "the desegregation requirements [in the 2013 Consent Order] arise out of and serve to resolve a longstanding desegregation effort in Concordia Parish").

Case law makes clear that the district court had the authority to issue such relief. As a general matter, a district court has the power "to issue such commands … as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 40 (1985) (quoting *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172 (1977)). Under appropriate circumstances, that power includes the authority to enjoin "persons who, though not parties to the original action or engaged in wrongdoing,

are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *New York Tel.*, 434 U.S. at 174 (citations omitted).

This authority has long applied in the desegregation context. "A court has inherent power to enter such ancillary orders as are necessary to carry out the purpose of its lawful authority," and where a desegregation order is at issue, "the court may enter an injunction against any individual who interferes with the proper execution of that order." *Augustus* v. *School Bd. of Escambia Cnty.*, 507 F.2d 152, 156 (5th Cir. 1975); see also *Banks* v. *St. James Par. Sch. Bd.*, 757 F. App'x 326, 330 (5th Cir. 2018) ("[T]he district court has the general authority * * * to assert its jurisdiction to protect its desegregation order."); *Pickens* v. *Okolona Mun. Separate Sch. Dist.*, 594 F.2d 433, 437 (5th Cir. 1979). District courts also enjoy "broad power under the All Writs Act, 28 U.S.C. § 1651 to enjoin third parties * * * from interfering with [their] desegregation orders." *Valley* v. *Rapides Par. Sch. Bd.*, 646 F.2d 925, 943 (5th Cir.), on reh'g, 653 F.2d 941 (5th Cir. 1981).[9]

[9] The Supreme Court and this Court also have recognized that the creation of a "splinter district"—where a new school district is "carv[ed] out" from "an existing district that has not yet completed the process of dismantling a system of enforced racial segregation," *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 453 (1972)—can interfere with the existing district's desegregation efforts. Case law supports district courts' remedial authority to bar the creation of a splinter

Such interference can occur when a new charter school opens in the geographic proximity of a school district under an active desegregation order. Louisiana law expressly recognizes such a risk, requiring that new charter schools "[b]e subject to any court-ordered desegregation plan in effect for the city or parish school system" in which they operate. La. Rev. Stat. Ann. § 17:3991(C)(3) (2019). And as this Court explained in Delta's prior appeal, where the activities of a proposed charter school potentially "undermine [an] ongoing desegregation order," the district court "may impose conditions on the school's operation if necessary." *Smith*, 906 F.3d at 331.

2. The District Court Appropriately Ordered The Jointly Requested Race-Conscious Relief To Prevent Delta From Frustrating The Concordia Parish School District's Ability To Comply With Active Desegregation Orders

When a district court finds that the operation of a new charter school poses a significant risk of interference with a school district's ability to comply with active desegregation orders, imposing race-conscious remedies is one permissible option within the court's remedial authority. As this Court has advised, "[w]ide latitude must be granted to a district court in its attempts to provide appropriate remedial

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district unless there has been a showing that such action will not hinder the existing district's efforts to desegregate. See, *e.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Smith*, 906 F.3d at 331; *Valley* v. *Rapides Par. Sch. Bd.*, 173 F.3d 944, 945 (5th Cir. 1999) (en banc); *Stout* v. *Jefferson Cnty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971).

relief in a school desegregation suit." *United States* v. *Mississippi*, 499 F.2d 425, 432 (5th Cir. 1974). Just as a court may order "race-conscious remedies" to disestablish "a school system [previously] segregated by law," *Parents Involved*, 551 U.S. at 737, so too may a court impose such remedies on a third party when necessary to protect a school district's ability to pursue desegregation, cf. *Davis* v. *East Baton Rouge Par. Sch. Bd.*, 721 F.2d 1425, 1440 (5th Cir. 1983) (affirming "the application of a minority quota" to magnet schools where the requirement was "designed to assure to the greatest extent possible that [such] voluntary attendance schools [do] not work to undermine the progress of desegregation" in a school district under a desegregation order). Indeed, district courts have done so in other cases (including in this circuit) to help ensure that the opening of a new charter school does not interfere with a school district's compliance with an active desegregation order. See *Cleveland* v. *Union Par. Sch. Bd.*, No. 12,924, 2009 WL 1491188, at *7 (W.D. La. May 27, 2009); *Berry* v. *School Dist. of City of Benton Harbor*, 56 F. Supp. 2d 866, 883-884 (W.D. Mich. 1999).

A contrary conclusion could leave a district court with no effective way to safeguard a school district's ability to comply with operative desegregation orders. Unfettered actions by a charter school can hamper a school district's efforts by, for example, drawing significant numbers of white students away from a school district in the midst of attempting to remedy the effects of *de jure* segregation.

This is precisely what happened before the district court entered the 2018 Consent Order. Delta opened its charter school "in the middle" of a school district that was "50 percent white and 50 percent black," but it enrolled a student body that was more than 80% white. ROA.2855, 3028. In doing so, Delta drew a "disproportionately" high percentage of Concordia Parish School District's white students to its charter school, which "negative[ly] impact[ed]" the district's "ability to desegregate." ROA.3028.

The effects of Delta's actions were most clearly felt in the "predominantly African American" school zone of Ferriday, "in the center" of which Delta Charter School sits. ROA.3083. In the school's first year, 20.3% of Ferriday's white students transferred to Delta Charter School. ROA.4137; see also *Smith*, 906 F.3d at 333. In its second year, Ferriday lost another 7.8% of its white students to Delta Charter School. ROA.4137. The consequence of these transfers was that "a set of racially identifiable black schools in the parish * * * lost high shares of its white students" who would have "otherwise attend[ed] the Ferriday schools and assist[ed] with their desegregation efforts." ROA.3024-3025.

Other schools in the Concordia Parish School District suffered similar setbacks. For example, the Concordia Magnet School had been the district's "most racially balanced school," *Smith*, 906 F.3d at 333, despite being "very small" (ROA.3206). In Delta Charter School's first year, that magnet school lost 14.7%

of its white students to Delta. *Smith*, 906 F.3d at 333; ROA.4138. Comparable effects were seen in the Vidalia school zone. Vidalia is "centrally located" in the district and home to a large population of "white students [who] are important to the district's overall desegregation efforts." ROA.3021. Vidalia schools lost "the highest number of white students to Delta Charter School," with 11.2% of Vidalia's white students transferring to the school in its first year. ROA.3021, 4136; see also ROA.3120 (expert testimony explaining that "the cumulative effect of the loss of white students from Vidalia schools impede[d] the school district's ability to desegregate").

The record thus contains ample evidence that Delta frustrated the Concordia Parish School District's desegregation efforts, drawing away precisely those students on whom the district relied to help dismantle the dual school system. "[D]etermin[ing] the[] effect" of a third party's conduct "upon the process of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge." *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 453 (1972). Here, the district court concluded (and this Court affirmed) that Delta's disproportionate enrollment of white students who had previously attended schools in the Concordia Parish School District "substantially impacted [the district's] compliance with ongoing desegregation orders." ROA.1301; see also *Smith*, 906 F.3d at 335 (stating that

"considerable evidence" supported this finding). More concerningly, there was little sign this trend would abate—as this Court pointed out, Ferriday schools were "continu[ing] to lose 5 to 10% of their white students to Delta each year." *Smith*, 906 F.3d at 335-336.

In light of this evidence, the district court was well within its discretion to order race-conscious relief as requested by the parties. It concluded that "remediation of the separate-and-unequal school systems" in the Concordia Parish School District required "Delta's full compliance" with the race-conscious enrollment policies set forth in the 2018 Consent Order, which afforded preferences to Black students seeking to transfer into Delta Charter School and those enrolling as kindergarteners. ROA.2675; see also p. 13, *supra*. Without such restrictions in place, Delta would have persisted in drawing disproportionate numbers of white students to its charter school, compounding the effects of Delta's years of noncompliance with the 2013 Consent Order and continuing to frustrate the district's desegregation process. See pp. 7-11, *supra*.

3. Delta's Arguments Contesting The Constitutionality Of The 2018 Consent Order Are Meritless

Delta's assortment of reasons why the race-conscious enrollment policies in the 2018 Consent Order purportedly are unconstitutional all lack merit. First, Delta argues that its use of race-conscious enrollment policies is unconstitutional because the district court never found that Delta previously "engaged in

unconstitutionally discriminatory conduct." Br. 13. No such finding was necessary, however, because the 2018 Consent Order was not intended to remedy prior segregation by Delta. Rather, it was imposed (at Delta's urging) pursuant to the court's broad remedial authority to prevent Delta from continuing to interfere with the Concordia Parish School District's efforts to comply with the court's desegregation orders. Delta also challenges the race-conscious enrollment policies as "indistinguishable from those held unconstitutional in *Parents Involved*." Br. 20 (citation omitted). But as explained above, *Parents Involved* is inapposite because the 2018 Consent Order issued in a materially different factual context and serves a remedial purpose. See pp. 36-40, *supra*.[10]

Additionally, notwithstanding the ample evidence described above, Delta disputes the risk that it might impede the Concordia Parish School District's desegregation efforts in the future. For example, Delta asserts that "[t]here is no

[10] Delta contends that the 2018 Consent Order "cannot survive strict scrutiny" but offers no arguments for why the race-conscious enrollment policies it requires are unjustified by any compelling governmental interest, or not narrowly tailored to further that interest. Br. 12-24; see also *Lewis* v. *Ascension Par. Sch. Bd.*, 662 F.3d 343, 348 (5th Cir. 2011) (describing the strict-scrutiny analysis). Consequently, Delta has waived any challenge on these bases. See *Elashyi*, 554 F.3d at 494 n.6. But even if this Court engaged in a strict-scrutiny analysis, it should find that the policies are justified by the compelling interest of ensuring that the Concordia Parish School District can comply with its desegregation obligations, see *Parents Involved*, 551 U.S. at 702 (explaining that "remedying the effects of past intentional discrimination is a compelling interest"), and that the policies are narrowly tailored to prevent Delta from frustrating the district's efforts.

evidence Delta is interfering with any desegregation obligations of the Concordia Parish Schools." Br. 14. But the only reason Delta has successfully minimized its interference with the district's obligations is that the 2018 Consent Order put a stop to its years of "deliberate noncompliance" with the 2013 Consent Order. ROA.1289; see also ROA.1540 (stating that the 2018 Consent Order will assure Delta's "compl[iance]" with "applicable [c]ourt [o]rders"). That Delta is now operating its charter school in a way that avoids hindering the district's desegregation efforts is a testament to the 2018 Consent Order's efficacy, not its irrelevance.

Delta nonetheless argues that there has been "no showing" that the race-conscious enrollment policies in the 2018 Consent Order "are necessary to prevent Delta from somehow disturbing ongoing desegregation efforts of" the Concordia Parish School District. Br. 15. The record compels a contrary conclusion. Before entry of the 2018 Consent Order, Delta claimed that it had "aggressively recruited students in the black community" and "give[n] preference[s] to black students" in its enrollment lotteries. ROA.1223. But even if this were true, the district court found that Delta had "not even come close" to enrolling a student body that reflected the demographics of the district, as mandated by the 2013 Consent Order. ROA.317, 3277. It was not until Delta began using the specific race-conscious enrollment policies jointly crafted by the parties—which prescribed how Delta

would enroll new kindergarten classes and fill student vacancies in grades one through twelve—that it was finally able to comply with that obligation.

Nevertheless, Delta contends that the objective of the 2018 Consent Order has been achieved and no likelihood of further interference with the district's desegregation obligations exists. See Br. 14 (arguing that "the racial quota has been reached"). But Delta offers no reason to trust that it will refrain from taking actions that hinder the district's efforts to comply with the court's desegregation orders, especially given Delta's past behavior of "mov[ing] rapidly forward with its own agenda while only winking at its court ordered obligations." ROA.1304. Indeed, it is entirely possible—if not probable—that without the race-conscious enrollment policies required by the 2018 Consent Order, Delta will fall back out of compliance and return to its prior practices. See pp. 7-11, 13-15, *supra*.

Next, Delta addresses the effectiveness and permissibility of the specific enrollment policies at issue. Delta suggests that it has only limited control over the demographics of its student population because, as a Type 2 charter school, Delta Charter School is "open to students residing anywhere within the state of Louisiana" and its student body "can only reflect the demographics of those parents who choose to apply for admission of their children." Br. 16. The evidence suggests, however, that as a historical matter, approximately 80% of Delta's students come from Concordia Parish. ROA.3436. And moreover, Delta's

argument serves to confirm again the effectiveness of the 2018 Consent Order: Even though Delta's student enrollment depends in part on the "independent choices of students and their parents" (Br. 10), the policies in the 2018 Consent Order successfully helped Delta achieve a level of Black student enrollment that, as Delta touted before the district court, has come "within 10% of the [B]lack student enrollment of the [district]" for "three consecutive years" (Doc. 315, at 3-10).

Delta asserts, however, that the enrollment policies in the 2018 Consent Order conflict with its obligation under state law to use "a system for admissions decisions which precludes exclusion of pupils based on race." La. Rev. Stat. Ann. § 17:3991(B)(3) (2019); see also Br. 15. Louisiana's BESE has confirmed, however, that no such conflict exists. That agency conducts annual reviews of Type 2 charter schools, including Delta Charter School, and in its most recent review, the agency deemed Delta's enrollment policies "non-discriminatory and compliant with laws and policies related to student admissions." La. Bd. of Elementary & Secondary Educ., *2020-2021 Charter School Annual Review* 20, available at https://perma.cc/D7QC-52MA.

Finally, Delta takes issue with the district court's 2017 ruling—the subject of the previous appeal to this Court—which found Delta out of compliance with the 2013 Consent Order. ROA.1297-1308. Specifically, Delta faults the court for

not providing "any explanation with regard to how the remedies the district court ordered, including the 2018 Enrollment Process, would either eliminate such alleged impact or facilitate Concordia's efforts to attain unitary status." Br. 17. However, it was unnecessary for the court to explain its rationale for requiring Delta to use the race-conscious enrollment policies, given Delta's firsthand participation in negotiating the policies and its express agreement that they were "reasonable" and necessary to assure its compliance "with Louisiana law regarding charter school admissions, and applicable [c]ourt [o]rders," including the 2013 Consent Order. ROA.1535, 1540. Moreover, the record clearly shows that Delta's use of these policies has helped it enroll a student body whose demographics more closely resemble those of the school district, thereby speeding, instead of hindering, the district's efforts to dismantle its dual school system.[11]

[11] Delta errs in suggesting, in passing, that it should be dismissed from this litigation. See Br. 5 n.5. This appeal provides no opportunity to consider whether Delta should remain a party to the case. Even if the district court had granted Delta's motion for modification, Delta still would have been a party to the case and bound by both the 2013 Consent Order and other parts of the 2018 Consent Order that it did not seek to modify.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Delta's request to modify the 2018 Consent Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 14, 2023, 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 further certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

s/ Jason Lee
JASON LEE
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,355 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

s/ Jason Lee
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Date: June 14, 2023