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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

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INTRODUCTION

On July 12, 2023, this Court requested that the parties file supplemental briefs on the impact of the Supreme Court's recent decision in *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (*SFFA*), on this case. As explained below, nothing in that opinion calls

into question a district court's authority to enter (and retain) a consent order to prevent third parties, like Delta, from impeding a school district's ability to comply with active desegregation orders. To the contrary, *SFFA* supports the district court's exercise of discretion in this case because it confirms a court's authority to issue race-conscious relief when necessary to remediate past racial discrimination. Here, the 2018 Consent Order seeks to put an end to Delta's continued interference with this very type of remediation process by the Concordia Parish School District. See U.S. Appellee Br. 37-43.[1]

Nor does *SFFA* aid Delta's belated attempt to challenge the 2018 Consent Order as not narrowly tailored. Rather, the order simply seeks to ensure Delta's future compliance with the 2013 Consent Order and to counteract the effects of Delta's years of violating that order—misconduct that, as this Court recognized, "substantially impacted Concordia's compliance with ongoing desegregation orders." *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 330, 335 (5th Cir. 2018).

Delta's reliance on *SFFA* also is unavailing because the issue the Supreme Court confronted and the analysis in which it engaged are not relevant

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[1] "U.S. Appellee Br. __" refers to the United States's appellee brief and page number. "Reply Br. __" refers to Delta's reply brief and page number. "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.

to the dispute here. *SFFA* considered whether two universities, in their efforts to admit diverse student bodies, had impermissibly considered race in their admissions processes. Delta offers no explanation for why the Supreme Court's analysis of *that* question should inform this Court's determination of whether the district court abused its discretion in denying Delta's motion to modify the 2018 Consent Order, which aimed to prevent further interference with the school district's court-ordered efforts to remedy the effects of past *de jure* segregation. *SFFA*'s consideration of an entirely different issue has no applicability here—and indeed, none of the bases on which the Court relied when holding that the universities' policies violated the Equal Protection Clause are present in this case.

For these reasons, the Supreme Court's decision in *SFFA* does not undermine the district court's denial of Delta's motion to modify the 2018 Consent Order.[2]

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[2] As discussed in the United States's Brief as Appellee (at 22-35), there is no need for this Court to decide whether, absent Delta's history of impeding the Concordia Parish School District's desegregation efforts, the race-conscious enrollment policies in the 2018 Consent Order might violate the Equal Protection Clause under *SFFA*. Rather, Delta's appeal fails on threshold grounds because (1) Delta failed to show that, 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, and (2) Delta is estopped from challenging the constitutionality of that order, which it asked the district court to enter even while it was contesting on appeal whether it was bound by the terms of the 2013 Consent Order. See *Smith*, 906 F.3d at 330, 334-335.

ARGUMENT

SFFA DOES NOT CALL INTO QUESTION THE DISTRICT COURT'S AUTHORITY TO KEEP THE 2018 CONSENT ORDER IN PLACE

A. SFFA *Supports The District Court's Remedial Authority To Maintain The 2018 Consent Order To Prevent Delta From Further Impeding The Concordia Parish School District's Desegregation Efforts, And The 2018 Consent Order Is Narrowly Tailored To Accomplish That Objective*

1. Contrary to Delta's suggestion in its Reply Brief (at 1-5), *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), supports the district court's exercise of its remedial authority to continue preventing Delta from interfering with the Concordia Parish School District's compliance with ongoing desegregation orders. *SFFA* affirms that district courts have the authority to order race-conscious relief to "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 143 S. Ct. at 2162; see also *id.* at 2167 (noting the permissibility of "race-based benefit[s]" in employment discrimination cases when necessary to make "members of the discriminated class 'whole for [the] injuries [they] suffered'" (quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)) (second and third alterations in original)). And the case law cited in *SFFA* further confirms that "remedying the effects of past or present racial discrimination" can "justify a government's use of racial distinctions." *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996); see also

Parents Involved in Cmty. Schs. v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 737 (2007) (recognizing that "remedying the effects of past intentional discrimination" is a "compelling interest," and that "the obligation to disestablish a school system segregated by law can include race-conscious remedies"); *SFFA*, 143 S. Ct. at 2162 (citing cases).

Here, the Concordia Parish School District was engaged in this type of court-ordered remediation process, and case law makes clear that the district court had the authority to enjoin Delta from interfering with that process. In desegregation cases, courts bear an "affirmative duty to take whatever steps might be necessary to convert" a previously segregated school system into "a unitary system in which racial discrimination [has] [been] eliminated root and branch." *Green* v. *County Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 437-438 (1968). To fulfill that duty, courts have the authority "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration" of their desegregation orders. *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)) (alteration in original); see also *Augustus* v. *School Bd. of Escambia Cnty.*, 507 F.2d 152, 156 (5th Cir. 1975).

For example, as this Court already recognized in the last appeal, "[a] district court asked to authorize a new charter school will consider whether the proposed

school would undermine [an] ongoing desegregation order and may impose conditions on the school's operation if necessary." *Smith* v. *School Bd. of Concordia Par.*, 906 F.3d 327, 331 (5th Cir. 2018) (citing cases). The district court did exactly that here. It adopted the 2013 Consent Order to ensure that the operation of Delta's charter school would not impede the Concordia Parish School District's desegregation efforts. U.S. Appellee Br. 6-7. And then, after Delta's deliberate noncompliance with that order "substantially impacted Concordia's compliance with ongoing desegregation orders" and made it "more difficult for the [school district] to achieve its desegregation obligations," *Smith*, 906 F.3d at 335, the district court adopted the 2018 Consent Order to stop Delta from interfering further (see U.S. Appellee Br. 13-14). Such action was well within the court's remedial authority. See *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."); see also U.S. Appellee Br. 37-43.

2. Delta also invokes *SFFA* in arguing that the 2018 Consent Order impermissibly imposes requirements that are "not narrowly tailored" to address "any discrimination on Delta's part." Reply Br. 5 & n.1. However, Delta already has waived any argument that the 2018 Consent Order fails to satisfy strict scrutiny (U.S. Appellee Br. 44 n.10), and Delta cannot raise the argument for the first time in its Reply, see *Benefit Recovery, Inc.* v. *Donelon*, 521 F.3d 326, 329 (5th

Cir.), cert. denied, 555 U.S. 882 (2008). Even if this Court were to overlook Delta's waiver, *SFFA*'s narrow-tailoring analysis of higher-education admissions policies designed to enroll diverse student bodies does not apply to the factual context presented here.

But if this Court were to consider the issue, Delta's argument rests on a mischaracterization of the basis for the 2018 Consent Order, which was to remedy Delta's interference with the Concordia Parish School District's efforts to dismantle what had been a dual school system and to assure Delta's compliance going forward. The 2018 Consent Order is narrowly tailored to accomplish these goals. As this Court recounted, early on, Delta failed to comply with the 2013 Consent Order's requirement that "Delta's enrollment * * * reflect the racial demographics of the Concordia Parish School District." *Smith*, 906 F.3d at 336. Instead, the Court emphasized, Delta had enrolled "a predominantly white student body" by "disproportionately dr[awing] away white students and white teachers from Concordia Parish" and then "failed to submit the required reports explaining and addressing its shortcoming." *Id.* at 332, 335-336.

Consequently, to ensure that Delta complies with its obligations and enrolls a student population that "reflect[s] the racial demographics" of the school district—which Delta agreed to do in 2013 as a condition of opening its charter school (ROA.317; U.S. Appellee Br. 6-7)—the parties, including Delta, jointly

asked the district court to enter an additional consent order. That 2018 Consent Order required Delta to adopt specific race-conscious enrollment policies, and the district court approved that approach. U.S. Appellee Br. 13, 39-43. These changes to Delta's enrollment policies are narrowly tailored and simply seek to redress the harm stemming from Delta's years of deliberate noncompliance and ensure that the charter school's operation poses no obstacle to the school district's ongoing efforts to achieve unitary status.

B. The Question That SFFA *Addressed And The Analysis In Which The Court Engaged Are Not Relevant To Delta's Challenge On Appeal*

Delta further errs in relying on *SFFA* because the Supreme Court's opinion does not address the merits question on appeal—namely, whether the district court had the remedial authority to require Delta to use (and to continue using) certain race-conscious admissions policies to halt its interference with the Concordia Parish School District's compliance with its desegregation obligations. Rather, *SFFA* considered whether two universities' consideration of race to help admit diverse student bodies was permissible under the Equal Protection Clause. *SFFA*, 143 S. Ct. at 2166-2175. Indeed, in analyzing the universities' policies, the Court emphasized that "neither university [had] defend[ed] its admissions system as a remedy for past discrimination—their own or anyone else's." *Id.* at 2174 n.8. Thus, in short, *SFFA* resolved a different legal question, which arose in a dissimilar factual context.

Delta offers no explanation for why *SFFA*'s analysis of the equal-protection claim there should apply to Delta's challenge to the district court's remedial authority here. But even if Delta could show that *SFFA*'s analysis applies—and it does not—the district court still did not abuse its discretion in denying Delta's motion to modify. None of the bases on which the Court found an equal-protection violation in *SFFA* is present here. In holding that the universities' consideration of race failed strict scrutiny, the Court concluded that "the interests the[] [universities] view as compelling cannot be subjected to meaningful judicial review." *SFFA*, 143 S. Ct. at 2166; see also *ibid.* (finding it "unclear how courts are supposed to measure any of [the universities'] goals"). By contrast, the Court emphasized, such review *is* possible in school desegregation cases because "courts can determine whether any race-based remedial action produces a distribution of students 'compar[able] to what it would have been in the absence of such constitutional violations.'" *Id.* at 2167 (quoting *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977)) (alteration in original).

Indeed, the district court engaged in just such a review here and determined that Delta's use of specific race-conscious enrollment policies had "success[fully]" reshaped the "composition of [Delta's] student population," such that its demographics reflected those of the Concordia Parish School District. ROA.2674; see also ROA.2670; *Smith*, 906 F.3d at 336. As a result, the operation of Delta's

charter school was no longer undercutting the school district's efforts to dismantle its dual school system. See ROA.2675 (increasing Delta's enrollment cap for students domiciled in Concordia Parish from 350 to 450 students—an increase that could be accommodated "without harming Concordia's ongoing desegregation obligations").

The Court in *SFFA* also cited the absence of a "logical end point" in the universities' consideration of race. *SFFA*, 143 S. Ct. at 2170 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 342 (2003)). As above, that concern does not exist here. The district court recently adopted a plan of work to help the Concordia Parish School District take "more urgent[] [action] to fulfill its desegregation obligations and free itself from th[e] [c]ourt's supervision." ROA.2678; see also Doc. 336 (order adopting a proposed plan of work); Doc. 337 (plan of work). Under that plan, any evidentiary hearing on a motion by the school district for a declaration of full or partial unitary status would take place by the end of 2024. Doc. 337, at 4. If, after this process concludes, the district court finds that the school district has achieved unitary status, Delta, of course, would be relieved of its obligation to use the race-conscious enrollment policies in the 2018 Consent Order.

Finally, Delta has not argued that any of the other factors on which the Court in *SFFA* relied—the absence of a "meaningful connection" between the universities' consideration of race and their goals for doing so, the universities'

"unavoidabl[e]" use of race "in a negative manner," and their engagement in "racial stereotyping," *SFFA*, 143 S. Ct. at 2167, 2175—are present here. Accordingly, no aspect of *SFFA*'s analysis applies to this case, aids Delta's arguments, or is relevant to the questions presented in this appeal.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for the United States as Appellee, 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 July 27, 2023, I electronically filed the foregoing SUPPLEMENTAL 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 SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE 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: July 27, 2023