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

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, *et al.*,

Plaintiff-Appellee

v.

JUNCTION CITY SCHOOL DISTRICT, *et al.*,

Defendant-Appellees

v.

ARKANSAS DEPARTMENT OF EDUCATION, *et al.*,

Intervenors-Appellants

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

UNITED STATES' RESPONSE TO THE PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The district court issued an order in 2019 exempting the Junction City School District (JCSD or Junction City) from compliance with a 2017 Arkansas

school choice law. Add.1.[1] It did so by granting a Rule 60(b)(5) modification to a 1970 remedial order that the United States obtained against JCSD in this desegregation case. Add.1, 8. The 1970 Order enjoined JCSD from operating a dual school system, and, specifically, ordered the school district to integrate bus routes and classrooms that were segregated on the basis of race. Add.73-77. To obtain a modification of the 1970 Order under Rule 60(b)(5), it was JCSD's burden to show that changes to state law impeded JCSD's ability to comply with its desegregation obligations. Because JCSD made no such showing, the district court abused its discretion in issuing the 2019 modification, and the panel erred in affirming it. While this case does not meet the demanding standards for rehearing en banc under Federal Rule of Appellate Procedure 35, the United States respectfully suggests that to correct the error below, the panel, rather than the full Court, should grant rehearing.[2]

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[1] Citations to "Add._" refer to documents contained in the Addendum filed by the appellants, while citations to "JA.__" refer to documents contained in the Joint Appendix.

[2] The United States is a party only to the case involving JCSD, and as such, takes no position as to the modification of the consent decrees involving the other school districts in this consolidated appeal.

BACKGROUND

A. Procedural History

1. Junction City School District Demographics

JCSD is located in Union County, Arkansas, along the border with Louisiana, and operates two schools. Students from kindergarten to sixth grade attend Junction City Elementary School, while Junction City High School enrolls students in grades 7-12. JA.280. During the 2017-2018 school year, JCSD enrolled 673 students, 37.6% of whom were Black, 58.8% of whom were white, and 3.6% of whom were from another racial or ethnic group. JA.280 n.2.[3]

2. United States v. *JCSD Litigation*

The United States sued JCSD in 1966. JA.290-297. At that time, JCSD operated two schools—separated by only six city blocks—that each enrolled students in grades 1-12. JA.276-277. The Rosenwald School served only Black students, and the Junction City School exclusively served white students. JA.277, 299-300. While the district court issued an order in 1966 requiring JCSD to eliminate its dual system, JCSD continued to resist full integration. JA.277-278, 305-322. By 1970, all students in grades 1-8 had been assigned to attend the

[3] A significant number of students enrolled in JCSD live in Louisiana and attend pursuant to a 2014 agreement between JCSD and Louisiana. During the 2017-2018 school year, 180 Louisiana students (51.7% of whom are Black) attended JCSD schools. JA.281.

Junction City Elementary School, and all students in grades 9-12 had been assigned to attend Junction City High School. JA.45, 278-279. But both schools continued to segregate students by race in classroom and teacher assignments, as well as in bus assignments, with Black bus drivers for Black students and white bus drivers for white students along overlapping routes. JA.45-46, 279. In 1970, the United States moved for further relief to address these problems. JA.42, 279.

a. The district court held an evidentiary hearing, and, in November 1970, issued an order (1970 Order) enjoining JCSD "from assigning students to, or maintaining any homeroom, classroom or other school-related activity on the basis of race, color or national origin." Add.75-76. The order directed JCSD "to take immediate steps to reassign students to homerooms and individual classes on a non-racial" basis at both schools. Add.76. The order likewise required JCSD to provide bus transportation "on a non-segregated and * * * non-discriminatory basis" and to "immediately redraw their bus routes and reassign students to the busses on a non-racial basis." Add.76. Finally, the order required JCSD to file a report within 30 days reflecting the "racial make-up of each classroom during each period of the day and also the race of the teacher," as well as the number and race of students riding each bus, the race of each driver, and a map of all assigned bus routes. Add.76-77. The classroom assignment, bus assignment, and reporting provisions are the only specifically-enumerated obligations in the 1970 Order.

b. In 1974, the district court moved the United States' case against JCSD to its inactive docket, stating that "jurisdiction was retained and the case might be re-opened at any time by appropriate and meritorious petition." JA.57. The case remained dormant until 2018, when JCSD filed a motion seeking an order from the district court "confirming that it has a conflict with participating in all state law school choice programs due to JCSD's continuing desegregation obligations" and asking the court for either a declaratory judgment, clarification of its 1970 Order, or modification of that order. JA.10-25. JCSD argued that Arkansas's School Choice Act, Ark. Code Ann. § 6-18-1906 (2017), if applied to the school district, would have a segregative impact and would compel JCSD to violate its obligations under the 1970 Order. JA.24-26.

3. Arkansas Law Regarding School Choice

Arkansas law regarding participation in school choice has varied over time. Under the Arkansas School Choice Act of 1989, students were allowed to apply to attend a nonresident school district but could not "transfer to a nonresident district where the percentage of enrollment for the student's race exceeds that percentage in his resident district." See Ark. Code Ann. § 6-18-206; JA.62. The 1989 Act remained in place until it was repealed by the Arkansas Public School Choice Act of 2013. Ark. Code Ann. § 6-18-1906 (2013); JA.64-76. The 2013 Act did not contain an automatic bar on transfers between districts based on their respective

racial compositions, but instead allowed districts to declare themselves exempt from participating in choice if doing so would conflict with an existing federal desegregation plan or order. JA.74.

In 2015, the legislature eliminated a school district's ability to self-exempt and instead required a district to submit proof of a conflict with a desegregation order to the Arkansas Department of Education (ADE) before receiving an exemption. Ark. Code Ann. § 6-18-1906 (2015); JA.77-78. This provision was amended again in 2017 to require school districts seeking exemptions to submit proof of a desegregation plan or order "that explicitly limits the transfer of students between school districts." Ark. Code Ann. § 6-18-1906 (2017); JA.85. The current statute also establishes a numerical limit on school choice transfers from a district, restricting annual transfers to no more than 3% net of a district's total enrollment for the preceding school year. See Ark. Code Ann. § 6-18-1906(b)(1)(A)(2017).

4. JCSD's Request For Exemption From Arkansas's School Choice Law

a. JCSD successfully pursued exemptions from school choice for the 2013-2014 school year through the 2017-2018 school year. The ADE denied JCSD's request for an exemption for the 2018-2019 school year. In a January 2018 letter to JCSD, the ADE explained that because "it does not appear that [JCSD] is subject to any limitations explicitly limiting the interdistrict transfer of students"

the district would be required to participate in school choice for the 2018-2019 school year. JA.106. After unsuccessfully attempting to convince the ADE to change course (JA.107-140), JCSD filed a motion in the district court in June 2018 seeking modification of the 1970 Order to exempt the district from participating in school choice (JA.10). The ADE and the Arkansas State Board of Education (collectively, Arkansas) intervened in the district court to oppose modification. JA.370. The United States took no position on the merits. JA.288.

After conducting a hearing, the district court issued an order in January 2019 granting Junction City's motion to modify the 1970 Order to prohibit "the segregative inter-district transfer of students from Junction City to other school districts, unless such a transfer is requested for education[al] or compassionate purposes and is approved by Junction City's school board on a case-by-case basis." Add.18. The order explicitly defined segregative transfers as "a student transfer from a resident school district to a non-resident school district where the percentage of enrollment for the transferring student's race exceeds that percentage in the student's resident district." Add.4 n.1.

The district court found that repeal of the Arkansas School Choice Act of 1989, followed by passage of the 2013, 2015, and 2017 Acts, qualified as a significant change in law that warranted modification of the 1970 Order under Rule 60(b)(5). Add.11. The court acknowledged that the 1970 Order did not

address student transfers between school districts, but found that "the 1970 Order clearly intended to prohibit any racial discrimination occurring within Junction City, including preventing student transfers which result in segregation of Junction City's student body." Add.12 (emphasis omitted). The court did not make any factual findings specifically explaining how transfers under Arkansas's school choice law would result in the segregation of JCSD's schools. Instead, the court defined and presumptively prohibited as "segregative" any transfer by a white JCSD student to a district with a higher percentage of white student enrollment, as well as any transfer by a Black JCSD student to a district with a higher percentage of Black students. Add.4 n.1.

b. Arkansas appealed. The consolidated appeal involves not only JCSD, but also three other Arkansas school districts that sought and received similar modifications to their desegregation consent decrees. The United States did not file a brief during the panel's initial consideration of this appeal. See Letter for the United States as Appellee (filed June 27, 2019).

A divided panel affirmed. *United States* v. *Junction City Sch. Dist.*, 984 F.3d 608, 618 (8th Cir. 2020); *id.* at 618-625 (Kobes, J., dissenting). The majority reasoned that "laws influencing the consent decrees have clearly changed since the Districts entered into the agreements," that the agreements were "intended to prohibit all forms of racial segregation," and that it was reasonable for the parties

to "rely on existing laws to frame the agreements and not include provisions for actions already prohibited by those laws." *Id.* at 615-616. The majority also repeatedly emphasized that it affords a "large degree of deference" to the district court that entered the decree. *Id.* at 615, 618.

Judge Kobes, in dissent, would have held that the district court abused its discretion in modifying the decrees because "the Districts cannot point to a 'section of the consent decree' 'that the change in law has an actual effect on.'" *Junction City Sch. Dist.*, 984 F.3d at 618 (Kobes, J., dissenting) (quoting *Davis* v. *Hot Springs Sch. Dist.*, 833 F.3d 959, 964 (8th Cir. 2016)). The dissent noted that the decrees addressed the separation of students based on race only in "internal school operations" that are "unrelated to student transfers" to an outside district, and that each school superintendent had testified before the district court that "they could comply with the Act and offer a nondiscriminatory school environment." *Ibid.* The dissent further observed that all five students who lived within JCSD boundaries and sought to enroll in another district for the 2018-2019 school year had been attending private schools, so that JCSD's "demographics did not change." *Ibid.* According to the dissent, "[i]nstead of granting relief from the decrees, what really happened was the district court used its equitable power to grant relief from otherwise valid Arkansas law," without justification in the record for doing so. *Ibid.* The dissent also emphasized its disagreement with the degree of deference

that the majority afforded to the district court, explaining that where the district court made no factual findings, there was nothing to which the Court could defer. *Id.* at 622.

c. Arkansas subsequently filed a petition for rehearing en banc, and this Court requested a response by appellees.

B. Legal Framework

1. District Courts Have Broad Remedial Authority In Desegregation Cases

It is well-established that district courts have broad authority to grant further relief in school desegregation matters. "[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). "Failure on the part of school authorities to implement a constitutionally prescribed unitary school system brings into play the full panoply of the trial court's remedial power." *Valley* v. *Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1225 (5th Cir. 1983). "To discharge this weighty responsibility, the court is obliged to expunge from the public schools all vestiges of unlawful segregation." *Ibid.*

At the same time, it is well-established that "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16. The "principle that the nature and scope of the remedy are to be determined by

the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." *Missouri* v. *Jenkins*, 515 U.S. 70, 88 (1995). Federal courts therefore cannot issue orders that are not "tailored to curing a constitutional violation that has been adjudicated." *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992).

2. Well-Settled Principles Guide The Scope Of Permissible Modifications To Remedial Orders Under Federal Rule Of Civil Procedure 60(b)

Consent decrees and remedial orders are subject to modification pursuant to Federal Rule of Civil Procedure 60(b). Under Rule 60(b)(5), "a court may modify a consent decree providing for prospective relief upon a showing that 'a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.'" *Parton* v. *White*, 203 F.3d 552, 555 (8th Cir. 2000) (quoting *Rufo*, 502 U.S. at 393).

"A party seeking modification of a consent decree 'must [first] establish that a significant change in facts or law warrants revision of the decree.'" *Little Rock Sch. Dist.* v. *Pulaski Cnty. Special Sch. Dist., No. 1*, 56 F.3d 904, 914 (8th Cir. 1995) (quoting *Rufo*, 502 U.S. at 393). This Court has explained that a Rule 60(b)(5) modification may be appropriate when changed facts or law make "compliance with the decree substantially more onerous, a decree proves to be unworkable because of unforeseen obstacles, or enforcement of the decree without

modification would be detrimental to the public interest." *Parton*, 203 F.3d at 555. If the movant carries this burden, the court "must then determine whether the proposed modification is suitably tailored to the changed circumstance." *Little Rock Sch. Dist.*, 56 F.3d at 914 (quotation marks omitted).

A party seeking modification of a consent decree because of a change in law must show some degree of conflict between the changed law and the decree. Where the change in law does not have an "actual effect" on compliance with "the section of the consent decree targeted," the decree does not "warrant[] revision," and a Rule 60(b)(5) modification predicated on the changed circumstances is not permissible. See *Davis*, 833 F.3d at 963-964 (citing *Rufo*, 502 U.S. at 393).

ARGUMENT

THIS COURT SHOULD GRANT PANEL REHEARING BUT NOT REHEARING EN BANC

On the record before this Court, the district court abused its discretion in modifying the 1970 Order, and the panel likewise erred in affirming the modification. But this error did not create the kind of exceptional conflict with existing precedent that warrants rehearing en banc. Instead, the United States respectfully suggests that panel rehearing is appropriate here.

A. The District Court Abused Its Discretion In Modifying Junction City's 1970 Remedial Order

JCSD did not show—and the district court did not find—that changes to Arkansas's school choice laws impede JCSD's ability to comply with the 1970 Order. That order addressed concerns within JCSD, namely discrimination in classroom assignments and bus routes. Both the district court and the panel majority attempted to bridge the gap between the dictates of the 1970 Order and the modification that JCSD sought by reasoning that the 1970 Order "clearly intended to prohibit *any* racial discrimination occurring within [Junction City], including preventing student transfers which result in segregation of [Junction City's] student body." *Junction City Sch. Dist.*, 984 F.3d at 615 (quoting Add.12) (quotation marks omitted). This reasoning assumes that requiring JCSD to comply with Arkansas's school choice law necessarily will make compliance with the 1970 Order—which enjoins JCSD's operation of a dual school system—"more onerous" or "unworkable." *Parton*, 203 F.3d at 555 (quoting *Rufo*, 502 U.S. at 393).

That assumption is not supported by any record-based factual findings made by the district court. JCSD's superintendent testified before the district court that the school district is "in compliance with all desegregation orders and plans" (JA.531 (Tr. 141:23-24)), and that the district had "absolutely no intent of going back and putting any segregated practices in" (JA.537 (Tr. 147:2-3)). The court made no factual findings to indicate that operation of Arkansas's school choice law

will prevent or impede JCSD from operating a racially-unitary school district in compliance with the 1970 Order and equal protection requirements.

Without record-based findings that the school choice law will result in transfers impeding JCSD's ability to operate as a unitary system, the district court lacked a factual and legal basis for modifying the 1970 Order to excuse JCSD from complying with Arkansas law. Thus, this case is unlike *Singleton* v. *Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1218-1219 (5th Cir. 1969) (en banc), rev'd in part on other grounds *sub nom. Carter* v. *West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970), where the court prohibited a school district under a desegregation order from "consent[ing] to transfers where the cumulative effect will reduce desegregation in either [the sending or receiving] district or reinforce the dual school system."[4]

As a plaintiff in this case, and in all of its desegregation work, the United States steadfastly supports the efforts of JCSD and other school districts to eliminate all vestiges of race discrimination from their schools. Indeed, Supreme Court precedent makes clear that a school district operating under a desegregation order has an affirmative duty to desegregate, and a continuing responsibility not to

[4] The United States notes that, to date, the district court has not assessed whether JCSD has already achieved unitary status. If this panel rehears the case, it may wish to consider remanding to the district court to address in the first instance whether JCSD already has eliminated the vestiges of *de jure* segregation to the extent practicable and is entitled to a declaration of unitary status.

impede the process of dismantling its former dual system. *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979). In certain cases, this affirmative duty includes the obligation not to consent to interdistrict transfers where the cumulative effect will reduce desegregation in the sending or receiving district. See, *e.g.*, *Singleton*, 419 F.2d at 1218-1219; accord *Lee* v. *Eufaula City Bd. of Educ.*, 573 F.2d 229, 235 (5th Cir. 1978). The district court and panel erred in this case, however, in equating the affirmative duty to dismantle a dual school system with an obligation to prohibit most interdistrict transfers so as to maintain the existing racial balance within the school district—regardless of the transfers' effect on desegregation.

The district court drew that false equivalence by defining, and then presumptively prohibiting as "segregative" (Add.4 n.1), any student transfer pursuant to the state's school choice law that would in any way change JCSD's racial demographics, without explaining how such a change would impede JCSD's efforts to eliminate all vestiges of discrimination from its schools. Neither the text nor the spirit of the 1970 Order provides that eradicating racial discrimination from within JCSD requires the district to maintain its existing enrollment demographics and to presumptively block interdistrict student transfers, even where the transfers do not actually impede desegregation efforts.

Even assuming the record supported some action by the district court, the court's response should have been "suitably tailored to the changed circumstance." *Parton*, 203 F.3d at 555. For example, the district court potentially could have modified the 1970 Order to require the monitoring of student transfers, leaving open the possibility that the court could prohibit or limit such transfers in the future were they to produce cumulatively segregative effects in a non-unitary district. See, *e.g.*, *Edgerson* v. *Clinton*, 86 F.3d 833, 837 (8th Cir. 1996).

Here, however, the district court's modification of the 1970 Order was an abuse of discretion. The court did not make the factual findings necessary to justify modifying the order. Nor was the modification suitably tailored to the circumstances.

B. Rehearing En Banc Is Not Warranted

Although the panel erred, this case does not meet this Court's standards for rehearing en banc. Instead, panel rehearing is appropriate. Under this Court's rules, "every petition for rehearing en banc * * * will automatically be deemed to include a petition for rehearing by the panel." 8th Cir. R. 40(A)(b).

As is noted in this Court's internal operating procedures, "[t]he issue of whether a case should be reheard en banc is separate and distinct from the issue of whether the case should be reheard by the panel." Eighth Circuit Internal Operating Procedures ("IOP") § IV(D). Panel rehearing is appropriate here for

correction of the legal error outlined above. See IOP § IV(D). ("A panel may rehear a case if it questions whether its decision was correct.").

In contrast, this case is not "of such significance to the full court that it deserves the attention of the full court." *Western Pac. Ry. Corp.* v. *Western Pac. Ry. Co.*, 345 U.S. 247, 262-263 (1953). Rehearing en banc is "not favored" and "ordinarily will not be ordered." Fed. R. App. P. 35(a). To overcome this presumption, a party must demonstrate that the panel decision conflicts with a decision of Supreme Court, a prior decision of this Court, or is otherwise of exceptional importance (such as by creating a circuit split). Fed. R. App. P. 35(b).

The panel decision here creates no such exceptional conflict. The panel majority and dissent do not reflect fundamental disagreement on the applicable principles of law, so much as they disagree over the degree of deference to be given to the district court's interpretation of the scope and meaning of the underlying remedial orders and decrees. Compare *Junction City Sch. Dist.*, 984 F.3d at 618 (relying on "the large degree of deference" to be given to the district court in finding no abuse of discretion), with *id.* at 622 (Kobes, J., dissenting) (noting that the district court made no factual findings as to which deference is owed). The degree to which a district court order is owed deference is record-specific. No deference was warranted here because the district court's modification was not supported by any factual findings showing that changes in

Arkansas law created an actual impediment to JCSD's compliance with its desegregation obligations. This issue is fact-bound. It does not involve a conflict with a decision of the Supreme Court, a prior panel of this Court, or any other court of appeals. Accordingly, there is no need to marshal the resources of the full Court to clarify the proper application of well-established Rule 60(b)(5) standards here.

CONCLUSION

For the foregoing reasons, the United States requests that the Court grant panel rehearing and deny the petition for rehearing en banc. The panel should reverse the district court's 2019 order and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing UNITED STATES' RESPONSE TO THE PETITION FOR REHEARING AND REHEARING EN BANC:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(c) and 35(b)(2) because it contains 3871 words, excluding the parts of the response 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 was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font;

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Anna M. Baldwin____
ANNA M. BALDWIN
Attorney

Date: March 19, 2021

CERTIFICATE OF SERVICE

I certify that on March 19, 2021, I electronically filed the foregoing UNITED STATES' RESPONSE TO THE PETITION FOR REHEARING AND REHEARING EN BANC with the Clerk of the Court for the Eighth Circuit using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
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