No. 21-30514

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees

v.

SCHOOL BOARD SAINT MARTIN PARISH,

Defendant-Appellant

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee

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

UNITED STATES' OPPOSITION TO APPELLANT'S OPPOSED MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

The St. Martin Parish School Board has moved under Rule 8 of the Federal Rules of Appellate Procedure for a stay pending appeal of either all district court proceedings in this case or of the district court's June 2021 order from which the Board appeals. Mot. 1.[1] The Board filed its notice of appeal in this case on August 19, 2021. R.E. Tab 2, ROA.16917. Yet it did not seek a stay in the district court until December 28, 2021, and did not file for a stay in this Court until February 9, 2022. Doc. 445. This Court should deny the Board's motion.

First, the Board is wrong that its interlocutory appeal divested the district court of continuing jurisdiction in this case. Second, the Board cannot satisfy the traditional standard for granting a stay under Rule 8. All four factors weigh against granting a stay, particularly where the Board has not shown that it is likely to prevail on the merits or will suffer irreparable harm absent a stay. Indeed, the Board represents (Mot. 25) that it does not seek to reopen the elementary school (Catahoula) primarily at issue on appeal pending this Court's merits decision. Moreover, briefing on appeal will be complete as of next month. Although the

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[1] "Mot. _" refers to the Board's Motion To Stay Pending Appeal; cites to R.E. Tab _, ROA._, are to record excerpts filed by the appellant; "Doc. _, at _" refers to the docket entry number and relevant pages of the district court filings in *Thomas* v. *St. Martin Parish School Board*, No. 6:65-cv-11314 (W.D. La.).

Board is not entitled to a stay, this Court could set the case for the first available oral argument date.

FACTS AND PROCEDURAL HISTORY

1. In 1965, private plaintiffs successfully sued the St. Martin Parish School Board to enjoin its maintenance of racially segregated schools. *Thomas* v. *St. Martin Par. Sch. Bd.*, 245 F. Supp. 601 (W.D. La. 1965) (stipulated violation and permanent injunction). The district court initially adopted the parties' agreed-upon freedom of choice plan to govern student assignments, but, consistent with the Supreme Court's subsequent decision in *Green* v. *County School Board of New Kent*, 391 U.S. 430 (1968), this Court later held that plan to be constitutionally inadequate. *Hall* v. *St. Helena Par. Sch. Bd.*, 417 F.2d 801, 809 (5th Cir. 1969). In 1969, the district court approved a desegregation plan establishing attendance zones, mandating the desegregation of faculty and staff, creating a majority-to-minority transfer policy, and requiring periodic reporting to the court. R.E. Tab 5, ROA.280-284; see *Thomas* v. *School Bd. St. Martin Par.*, 756 F.3d 380, 382 (5th Cir. 2014) (discussing procedural history).

In the district court's 1969 Memorandum Opinion approving this plan, the court stated that Catahoula Elementary "would remain all white." R.E. Tab 4, ROA.275. The court stated that the attendance zone for the school "has served that particular area for many years," that "[n]o Negroes live in the area, and none has

chosen to attend this school under freedom of choice." R.E. Tab 4, ROA.275. The U.S. Department of Health, Education and Welfare (HEW) had submitted a plan to the district court that would have "bus[ed] fifty Negro children from the St. Martinville zone to the Catahoula zone." R.E. Tab 4, ROA.276. The court rejected this plan as "wholly unwarranted and not required by Constitutional standards." R.E. Tab 4, ROA.276.

2. In 1974, the district court issued an order directing the parties to file briefs that addressed "[w]hether or not this school system has achieved a unitary status, has maintained such status for a period of two years, and the decree of th[e] Court should be dissolved." *Thomas*, 756 F.3d at 382 (brackets in original). The court then issued a decree (1974 Order) that stated that the Board had "achieved a unitary school system and * * * operated [it] as such for a period in excess of three * * * years prior to this date" and accordingly "dissolved" all "regulatory injunctions." R.E. Tab 8, ROA.782; see *Thomas*, 756 F.3d at 382-383. The 1974 Order permanently enjoined the Board from operating a dual school system, required certain reports to be filed, placed the case on the court's inactive docket, and retained jurisdiction "for a period of two years." R.E. Tab 8, ROA.783.

3. In 2009, the chief district court judge noted that this case remained on the court's inactive docket and reassigned it for further proceedings. *Thomas* v. *St. Martin Par. Sch. Bd.*, 879 F. Supp. 2d 535, 537 (W.D. La. 2021). Following

reassignment, the Board filed a motion to dismiss arguing that the 1974 Order constituted a final judgment. *Id.* at 543. The district court denied the motion, reasoning that the 1974 order had not sufficiently found "that the School Board has remedied the vestiges of past segregation to the extent practical" and that the suit therefore "remains alive." *Id.* at 551.

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

4. Once remanded to the district court in 2014, the case returned to active litigation. In discovery and through negotiation, the parties assessed whether the Board had achieved unitary status in the areas known as the "*Green* factors,"

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

As relevant here, in November 2015, the Board filed a motion for unitary status as to student assignment and quality of education with respect to graduation pathways. Doc. 146. The United States opposed the motion with respect to student assignment and cross-moved for further relief in this area. Doc. 152; Doc. 160.

In its 2015 motion, the Board acknowledged both that the attendance zone for Catahoula Elementary had been left "untouched" by the 1969 plan, and that, at the time of the Board's 2015 motion, the school remained "overwhelmingly white," with Black students making up only 7% of Catahoula's enrollment. Doc. 146-1, at 11, 13. The Board argued that "the continued existence of Catahoula Elementary as a nearly one-race school should not prohibit the Board from obtaining a declaration of unitary status." Doc. 146-1, at 14.

In opposing the motion (Doc. 160, at 9), the United States explained that in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Supreme Court had insisted upon school authorities achieving "the greatest possible degree

of actual desegregation," which necessarily includes "the elimination of one-race schools." *Id.* at 26. The United States argued that the Board had not done so, because Catahoula Elementary had operated as an all-white school during *de jure* segregation, and it continued to operate as an essentially all-white school because the Board had failed to take meaningful steps to desegregate the school. Doc. 160, at 10.

The district court scheduled an evidentiary hearing in January 2016 to consider the Board's motion. Doc. 168. Before the hearing, however, private plaintiffs and the Board reached settlement agreements on all outstanding issues. Docs. 170-171, 175. The Board's counsel then told the court that it was "no longer" arguing "for a finding of unitary status in the area of student assignment." Doc. 174, at 2-3.

Over the following year, the court entered a series of consent orders negotiated by the parties covering various issues, including student assignment, faculty and staff assignment, facilities, transportation, and quality of education, including discipline and academic achievement. Docs. 166, 178, 193-194.

In November 2016, the court consolidated the operative consent orders into a single Superseding Consent Order. R.E. Tab 9-R.E. Tab 12. Since August 2019, the district court has granted the Board unitary status in certain areas covered by the Superseding Consent Order, including transportation, staff assignment, and

facilities, and also found the Board unitary in the area of extracurricular activities. See Docs. 157, 281-282, 381.

5. Between September 2020 and January 2021, the Board filed motions seeking a declaration of unitary status and dismissal of the case in the remaining areas of court supervision—namely, student assignment, faculty assignment, and quality of education, including both academic achievement and discipline. Docs. 338, 365. Private plaintiffs opposed the motions for unitary status in each of these areas and also cross-moved for further relief as to each. Docs. 342, 374. The United States opposed the motion for unitary status as to student assignment and discipline, but took no position as to faculty assignment or academic achievement. Doc. 373; Doc. 401, at 13-14. The United States supported private plaintiffs' request that the court order Catahoula Elementary School closed. Doc. 401, at 11.

In a 160-page memorandum ruling issued in June 2021 after a six-day hearing on the motions (Docs. 394-398, 407), the district court found that the school system was not unitary in student assignment, faculty assignment, discipline and graduation pathways. R.E. Tab 3, ROA.16906-16907. The court found that additional relief was needed in these areas and asked the parties to attempt to negotiate the substance of such relief apart from the court-ordered closure of Catahoula Elementary. R.E. Tab 3, ROA.16906.

The Board filed a notice of appeal in August 2021 and represented to the district court that it was not seeking a stay. R.E. Tab 2, ROA.16917. Consistent with the court's June 2021 order, the parties then engaged in months of negotiations, which the Board represented were being undertaken in "good faith" (Doc. 424, at 1 (Aug. 25 2021)) and had not resulted in "an impasse on any particular issue" (Doc. 438, at 1 (Nov. 5, 2021)). On December 3, 2021, the Board agreed that the parties were "close to an agreement" and that consent orders would be jointly submitted in February 2022. Doc. 442, at 2-3.

Then the Board reversed course. On December 9, 2021, the Board held a meeting to request that counsel from the Louisiana Department of Justice enroll in the case on the Board's behalf and request a stay of proceedings before the district court. Doc. 445-1, at 11. Afterwards, the Board moved for a stay in the district court on December 28, 2021 (Doc. 445); the issue was fully briefed as of February 1, 2022. Doc. 462. On February 8, 2022, the Board met and decided not to "authorize counsel to enter into any consent orders at this time * * * and until resolution of its appeal." Doc. 466, at 1-2. The next day, the Board filed a stay motion with this Court.

ARGUMENT

This Court should deny the Board's motion for a stay pending appeal. First, the filing of this interlocutory appeal did not deprive the district court of its

ongoing jurisdiction in this case. Second, the Board cannot satisfy the standard that this Court applies in determining whether to grant a stay under Federal Rule of Appellate Procedure 8—particularly the factors requiring it to show that it is likely to prevail on the merits and will suffer irreparable injury absent a stay. Finally, because this appeal will be fully briefed as of next month, much of the relief the Board seeks can be accomplished by scheduling oral argument for the next available date.

I

THIS APPEAL DOES NOT DIVEST THE DISTRICT COURT OF CONTINUING JURISDICTION IN THIS CASE

The Board asserts that its interlocutory appeal somehow divested the district court of its jurisdiction to order the parties continue work on the terms of an order to address the issues the district court identified in its June 2021 memorandum opinion. The Board is mistaken. Absent a stay—and for the reasons explained below, there should be no stay here—the district court retained jurisdiction over this case.

Regardless of whether this Court has appellate jurisdiction under 28 U.S.C. 1292(a) over this particular interlocutory appeal—an issue disputed by the private plaintiffs—the district court was not divested of its jurisdiction. "[W]here an appeal is allowed from an interlocutory order, the district court may still proceed with matters not involved in the appeal." *Taylor* v. *Sterrett*, 640 F.2d 663, 667-668

(5th Cir. 1981). This rule "is particularly true with respect to desegregation cases." *Plaquemines Par. Comm'n Council* v. *United States*, 416 F.2d 952, 954 (5th Cir. 1969). A district court "do[es] not lose jurisdiction of the parties merely because an appeal [is] pending from the desegregation order." *Ibid.*

In this case, the district court retained jurisdiction to *enforce* its June 2021 order as well as the 2016 Superseding Consent Order. That is so because the force and validity of the 2016 Superseding Consent Order is not on appeal, and consequently, the district court retains jurisdiction to enforce its provisions. Nor did the district court, absent a stay, lose its ability to enforce its June 2021 order. See *Nken* v. *Holder*, 556 U.S. 418, 421 (2009) (A stay pending appeal merely "hold[s] a ruling in abeyance to allow an appellate court the time necessary to review it."). Indeed, the Board's own conduct in closing Catahoula Elementary and continuing for months to negotiate the scope of further relief contradicts its current position that the district court lost jurisdiction simply because it filed a notice of appeal.

II

THE BOARD'S MOTION FOR A STAY SHOULD BE DENIED

In considering whether to grant a stay under Rule 8, this Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Freedom from Religion Found., Inc.* v. *Mack*, 4 F.4th 306, 311 (5th Cir. 2021) (quoting *Nken* v. *Holder*, 556 U.S. 418, 426 (2009)). Under this "traditional standard," the first two factors "are the most critical." *Nken*, 556 U.S. at 434. The last two factors "merge when the [federal] Government is the opposing party." *Id.* at 435. The Board bears the burden of showing that a stay is justified. *Id.* at 433-434. Here, none of the factors support the issuance of a stay.

A. The Board Is Unlikely To Succeed On The Merits

The Board primarily argues (Mot. 14-23) that it is likely to succeed on the merits because there was nothing left to remedy in this case as of 1974. But the Board's argument is foreclosed by the law of this case. In 2014, this Court held that the district court retained remedial jurisdiction. The Board then voluntarily entered a series of consent orders to remedy the vestiges of past discrimination and subsequently failed to comply with those orders. The Board takes aim at the district court's remedial jurisdiction but does not seriously contest the district court's detailed findings regarding the Board's failings.

1. In 2014, this Court held that the district court retained remedial jurisdiction because the district court had never directly found that the School Board had eliminated all vestiges of discrimination. *Thomas* v. *School Bd. St.*

Martin Par., 756 F.3d 380, 387 (5th Cir. 2014). This Court remanded the case to the district court to consider "whether the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (citation omitted). On remand, the Board did not argue that it had fully remedied the underlying constitutional violation. Instead, in the Student Assignment Consent Order, later encompassed in the Superseding Consent Order, it voluntarily "agree[d]" to undertake steps "designed to eliminate the vestiges of the prior discrimination." R.E. Tab 10, ROA.3891.

It is of course true that the district court's powers depended on there being a constitutional violation and "the nature of the violation determines the scope of the remedy." *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992) (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). It is true also that any "remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Ibid.* But by entering into the Superseding Consent Order (and its underlying consent orders), the Board effectively conceded that the original constitutional violation in this case remained unremedied. By agreeing post-remand to the entry of the Superseding Consent Order, the Board has waived its right to litigate the issue of whether, at the time the order was entered, vestiges of discrimination remained. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (stating that parties "waive their right to litigate the

issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation" by entering into consent decrees).

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

2. The Board also argues that the years of inactivity in this case following issuance of the 1974 Order "severed any lingering causal chain flowing from the 1965 liability." Mot. 18-19. But that argument is foreclosed by the law of this case. "The law-of-the-case doctrine bars reexamination of issues of law or fact decided on appeal in subsequent proceedings" and "applies when an appellate court previously decided the issue 'either expressly or by necessary implication.'" *United States* v. *Smith*, 814 F.3d 268, 273 (5th Cir. 2016) (quoting *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981)).

In 2014, this Court specifically held that the 1974 Order did not terminate the district court's remedial jurisdiction in this case. The Court explained that, as

in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), "an order expressly terminating jurisdiction is not by itself effective to dismiss a desegregation case, nor does it transform an ambiguous finding of unitariness into an unambiguous one." *Thomas*, 756 F.3d at 386. The Court affirmed the district court's denial of the Board's motion to dismiss and instructed that the district court on remand was to consider whether "the vestiges of *de jure* segregation had been eliminated as far as practicable." *Id.* at 388 (quoting *Dowell*, 498 U.S. at 250). In remanding to the district court for that inquiry, the Court necessarily rejected the argument the Board makes now, which is that the period of inactivity after the 1974 Order automatically means that "no more vestiges of the 1965 liability remained" and that "[t]here is nothing left to remedy." Mot. 18-19.

3. Contrary to the Board's argument (Mot. 19-23), the district court had power to enter relief as to Catahoula Elementary. The Student Assignment Consent Order concedes that vestiges of discrimination in student assignment have not been eliminated. The Order states that "[t]he parties agree and the Court finds that the remedial measures" it includes "are designed to eliminate the vestiges of the prior discrimination and to address Plaintiff Parties' concerns regarding the District's operations in the area of student assignment." R.E. Tab 10, ROA.3891. The Student Assignment Consent Order further notes that "Catahoula was a White school during *de jure* segregation and has continued to be a virtually all-White

school ever since." R.E. Tab 10, ROA.3887. In this case, the Student Assignment Consent Order reflects the parties' and the district court's judgment that, in order to remedy the effects of de jure segregation and the racial identifiability of elementary schools in the St. Martinville attendance zone, changes in student assignment had to occur across all three of that zone's elementary schools (*i.e.*, the Early Learning Center, St. Martinville Primary, and Catahoula Elementary). R.E. Tab 10, ROA.3894-3895.

The Board's assertion (Mot. 19) that the "racial makeup of Catahoula students was never a product of the 1965 liability" is belied both by the concessions contained in the Student Assignment Consent Order and by the factual findings that the district court made in its June 2021 memorandum ruling. The district court found that "the District built Catahoula as a one-race school during the era of de jure segregation in a one-race white town to segregate the white students from Black students." R.E. Tab 3, ROA.16762. The court further found that "the white racial identifiability of Catahoula results directly from the fact that the District intentionally built the school in a white town for white students," such that the racial imbalance that remains in the St. Martinville Zone "is a product of the previous constitutional violation." R.E. Tab 10, ROA.16791. The court also found that the "extent of the Black racial identifiability of [St. Martin Primary] and [the Early Learning Center] is a result of the fact that the District continues to

operate Catahoula." R.E. Tab 10, ROA.16791. See also *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189, 208 (1973) ("[I]ntentionally segregative school board actions in a meaningful portion of a school system, as in this case, create[] a presumption that other segregated schooling within the system is not adventitious.").

The district court also found that the racial identifiability of the elementary schools in the St. Martinville Zone was not the product of demographic changes. Instead, the court found that Catahoula Elementary, St. Martinville Primary, and the Early Learning Center "have never been meaningfully desegregated, and [that] the original purpose of the configuration of elementary schools in the St. Martinville Zone was to segregate races." R.E. Tab 10, ROA.16793.

The Board further argues that the district court lacked remedial jurisdiction to take any action regarding the persistent racial identifiability of the schools in the St. Martinville Zone because of a 1969 order in this case. That argument fails. In the 1969 order that the Board relies on, Judge Putnam approved a desegregation plan that allowed Catahoula to remain "all white," while also rejecting a specific busing remedy that the U.S. Department of Health, Education, and Welfare had proposed. R.E. Tab 4, ROA.275-276. But just as the 1974 Order did not find that the Board had met its affirmative obligation to eliminate all vestiges of discrimination, the 1969 Order did not either. See *Thomas*, 756 F.3d at 387.

As relevant here, the 1969 Order states that Catahoula would remain "all white," that "[n]o Negroes live in the area, and none has chosen to attend this school under freedom of choice," and that a specific proposal by HEW to bus fifty Black students from St. Martinville was not "constitutionally required." R.E. Tab 4, ROA.275-276. The 1969 Order does not find that there are "no vestiges" of discrimination to be eliminated with respect to Catahoula, nor does it contain any language contradicting the district court's June 2021 factual findings that the "original purpose of the configuration of elementary schools in the St. Martinville Zone," including Catahoula, "was to segregate races." R.E. Tab 10, ROA.16793.

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

Moreover, the 1969 plan failed to anticipate the Supreme Court's instruction in *Swann* that courts are to "make every effort to achieve * * * actual desegregation." 402 U.S. at 26. In *Swann*, the Court explained that when a "proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, [school officials] have the burden of showing that such school assignments are genuinely nondiscriminatory." *Ibid.* *Swann* requires that courts "scrutinize such schools," and places the "burden upon the school authorities * * * to satisfy the court that their racial composition is not the result of present or past discriminatory action." *Ibid.* The terms of the 1969 plan do not change the fact that "[t]he school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494.

The Board argues (Mot. 20) that Judge Putnam carried out the *Swann* inquiry in issuing the 1969 plan, but that is not plausible. *Swann* was issued in 1971. The 1969 Order and accompanying memorandum do not discuss what purposes were served by siting Catahoula Elementary in an all-white town, nor do they discuss the purposes behind the creation of separate, Black elementary schools in St. Martinville. School districts "must demonstrate to the district court overseeing their desegregation efforts that current segregation is in no way the result of [their] past segregative actions." *Ross* v. *Houston Indep. Sch. Dist.*, 699

F.2d 218, 225 (5th Cir. 1983) (citation and internal quotation marks omitted; brackets in original). When the district court allowed Catahoula to continue operating as an all-white school in 1969, it required no such showing of the Board. The 1969 Order does not limit the scope of the district court's remedial jurisdiction to address vestiges of intentional discrimination with respect to student assignment. See also *United States* v. *West Carroll Par. Sch. Dist.*, 477 F. Supp. 2d 759, 763-764 (W.D. La. 2007) (dismantling racially identifiable schools notwithstanding earlier 1969 court order); *United States* v. *Bertie Cnty. Bd. of Educ.*, No. 2:67-cv-632, 2003 U.S. Dist. LEXIS 29823, at *12-13 (E.D.N.C. Apr. 23, 2003) (same). Indeed, the Board's argument as to the district court's inability to close Catahoula Elementary to bring the District into compliance with the Superseding Consent Order is further weakened by Board's own agreement that Catahoula, along with the other elementary schools in the St. Martinville Zone, is subject to the parties' Student Assignment Consent Order. R.E. Tab 10, ROA.3894-3895.

The Board has not shown a likelihood of success on its argument that the district court no longer has remedial jurisdiction in this case. Nor has the Board even attempted to show a likelihood of success as to its arguments that the district court improperly denied its motions for unitary status.

B. The Board Will Not Be Irreparably Injured Absent A Stay

The Board will not be irreparably injured absent the issuance of a stay. The district court did not enter any new injunctive relief apart from ordering the closure of Catahoula Elementary, which the Board has already closed and which it represents will remain closed until a merits ruling on appeal. Mot. 25. Briefing in this case is already underway, with appellees' merits briefs due within the next few weeks and any reply brief due before the end of March. To the extent the Board is seeking to ensure that this appeal will be resolved before the next school year, the United States does not oppose setting this case for the next available oral argument date. A stay, however, is unwarranted.

C. The Board Has Failed To Meet Its Burden On The Other Two Stay Factors

Because the Board cannot make a strong showing under the first two factors, the Court should deny the stay. *Nken*, 556 U.S. at 434. But if the Court considers the remaining factors, they too cut against granting a stay.

First, with respect to the interests of the other parties, Black students in the St. Martin Parish school system continue both to attend racially identifiable schools and to experience discrimination. See R.E. Tab 3, ROA.16875-16877. And second, because the United States is party to this litigation and opposes the stay, the public interest merges with the interest of the *federal* government. See

Nken, 556 U.S. at 435. The federal government's interest is in ensuring that the remaining vestiges of discrimination are eliminated as expeditiously as possible. A stay will delay negotiations and planning designed to remedy the ongoing constitutional violations, which have already persisted for too long. Moreover, should this Court ultimately affirm the district court's June 2021 denial of the motions for unitary status, the imposition of a stay would further delay the process of crafting an appropriate remedial agreement.

CONCLUSION

For the foregoing reasons, this Court should deny the Board's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 14, 2022, I electronically filed the foregoing UNITED STATES' OPPOSITION TO APPELLANT'S OPPOSED MOTION FOR A STAY PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the foregoing UNITED STATES' OPPOSITION TO APPELLANT'S OPPOSED MOTION FOR A STAY PENDING APPEAL complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4923 words.

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

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: February 14, 2022