UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

United States v. Arkansas Department of Educ., et al
Rosie Davis v. Arkansas Department of Educ., et al
Mary Turner, et al v. Arkansas Department of Educ., et al
Larry Milton, et al v. Arkansas State Board of Educ., et al

On Appeal from the United States District Court
for the Western District of Arkansas
The Honorable SUSAN O. HICKEY, District Judge

Opening Brief of the Arkansas Department of Education and Arkansas State Board of Education

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

KA TINA R. GUEST
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov
Dylan.Jacobs@arkansasag.gov

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

The four modification orders below violate two bedrock legal principles. Both errors require reversal.

First, more than forty years ago, the United States Supreme Court held that in school desegregation cases lower courts cannot impose *inter*district remedies in cases that only involve *intra*district violations. Thus, in other words, absent a finding of an *inter*district violation—that is, a finding that officials segregated multiple school districts along racial lines—a district court cannot order relief affecting more than one district. Instead, in intradistrict cases that involve allegations of discriminatory conduct in a single district, a district court may only grant relief as to that particular district. The modification orders here violate that fundamental principle. Indeed, despite the absence of an interdistrict violation, the district court nevertheless imposed a race-based interdistrict student transfer limitation.

Second, the district court's modification orders violate the Equal Protection Clause because those orders make race—and race alone—the sole factor for determining whether a child can exercise school choice.

To address those errors, Appellants the Arkansas Department of Education and Arkansas State Board of Education request 15 minutes of oral argument per side.

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STATEMENT OF JURISDICTION

The original plaintiffs below sued the various parties for alleged violations of the United States Constitution. The district court had jurisdiction under 28 U.S.C. 1331, and in Case No. 19-1340, additionally under 28 U.S.C. 1345.

These four cases culminated in various orders and consent decrees, dating as far back as the 1960s, over which the district court retained jurisdiction for purposes of future enforcement. To avoid participating in school choice, in the summer of 2018, the four school-district defendants filed motions seeking either a declaratory judgment or, alternatively, clarification or modification of those previous orders. Except in the case where they were already parties, the Arkansas Department of Education and Arkansas State Board of Education (collectively, "Arkansas") intervened to oppose those motions.

On January 17, 2019, the district court entered four nearly identical orders modifying each case's previous order and imposing race-based student-transfer restrictions on each school district. Arkansas filed timely notices of appeal from those orders on February 15, 2019. The four modification orders are final judgments, and this Court has appellate jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES PRESENTED

The questions presented are:

1. Did the district court err in concluding a modification of decades-old desegregation orders was warranted on the basis of a change in Arkansas's school choice laws, when those original orders had nothing to do with interdistrict student transfers?

Apposite Authority: *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992); *Davis v. Hot Springs Sch. Dist.*, 833 F.3d 959 (8th Cir. 2016)

2. Did the district court err in imposing interdistrict relief where no interdistrict violations were found (or even alleged), in violation of United States Supreme Court precedent?

Apposite Authority: *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 433 U.S. 267 (1977)

3. Do the district court's modification orders treating students differently solely on the basis of race violate the Equal Protection Clause of the Fourteenth Amendment?

Apposite Authority: *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)

STATEMENT OF THE CASE

A. Facts

1. Junction City, Hope, and Lafayette County

Three of the cases—Junction City, Hope, and Lafayette County—are identical for present purposes. Brought decades ago, each case involved allegations of *intra*district constitutional violations. That is, the plaintiffs in each of those cases alleged that a single school district engaged in discriminatory practices affecting only that district, such as discriminatory classroom assignments and teacher hiring practices. Such violations are doctrinally distinct from *inter*district violations, where officials engage in discriminatory practices affecting multiple districts, causing racial segregation across district lines. An example would include intentionally drawing school district residential zones to place minority students predominately in one school district and white students predominately in another.

Indeed, as the districts conceded below, each of these three cases was purely "'intra-district' in nature in that no other school districts were parties, and the original complaint[s] alleged discriminatory practices within" the districts. JA13, JA831, JA1053. The plaintiffs did not allege that any of these three districts committed an interdistrict violation. Nor has any court ever found any facts that would support an interdistrict violation, let alone held that these districts committed one.

Junction City. In 1966, the United States and student parents sued the Junction City School District seeking to dismantle the district's then-existing dual school system. ADD1. Thereafter, in 1969, Junction City's dual school system was consolidated. ADD2.

A year after consolidation, in 1970, the United States sought "further relief against Junction City on the grounds that Junction City [had] failed to remedy its within-school segregation and its segregated transportation system." ADD3. To remedy that alleged intradistrict violation, the district court entered the 1970 Junction City order at issue here.[1] As relevant here, that order: 1) enjoined Junction City "from assigning students to, or maintaining any homeroom, classroom or other school-related activity on the basis of race, color, or national origin"; 2) required Junction City "to take immediate steps to reassign students to homerooms and individual classes on a non-racial and nondiscriminatory basis"; and 3) enjoined Junction City "from failing and refusing to provide bus routes and assign students to bus routes . . . on a non-segregated and otherwise nondiscriminatory basis." ADD75-76.

[1] As the *Rufo* standard applies to the 1970 order regardless of whether the 1970 order is considered as a consent decree or another kind of order, the district court treated the 1970 order the same as the consent decrees in the other three cases. ADD8.

That case then sat dormant for nearly half-century, until defendant Junction City suddenly asked the district court to modify its consent decree so as to prohibit it from participating in school choice.

Hope. The Hope School District case originated more than thirty years ago. In 1988, a group of employees and students filed that case alleging "racial discrimination regarding Hope's treatment of African American students and faculty." ADD19.

In 1990, the parties agreed to settle that case. In the subsequent Hope consent decree, Hope and other defendants specifically "assert[ed] that they have not violated any federal or state laws or constitutional provisions regarding their treatment of the Plaintiffs, or any students, staff or applicants in the past or present." ADD78. The decree also recited Hope's continued belief that because it had not committed any such violations, "Court relief is not warranted." *Id.* Nevertheless, the parties agreed that it was in everyone's interest "to "resolve this action" and "avoid further expense and litigation." *Id*. And consistent with the underlying intradistrict allegations, the 1990 Hope consent decree enjoined Hope from "engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including, but not limited to, faculty assignments, student assignments, and the treatment of black and other minority pupils within the school

system." ADD79. Like the underlying complaint, it did not allude to interdistrict violations or suggest the possibility of interdistrict relief.

Subject to the terms of the 1990 consent decree, the district court subsequently dismissed that case. ADD78. It was reopened in 1994 based on allegations that Hope had not fulfilled its obligations with regard to faculty policies and student discipline, and Hope was ordered to comply with the decree's provisions. *See* Dist. Ct. Doc. 69. As before, the 1994 proceedings did not concern interdistrict relief or transfers. The case was again dismissed in 1999. *See* Dist. Ct. Doc. 94.

The case then sat dormant for fourteen years until Hope sought approval to modify certain school board election zones. Dist. Ct. Doc. 97. The district court approved that request in 2013. *See* Dist. Ct. Doc. 97. That case then remained dormant again until Hope sought to avoid participating in school choice.

Lafayette County. The Lafayette County case was brought in 1992 against Lewisville School District No. 1, a school district that no longer even exists. That case involved allegations of racially discriminatory staffing and student assignment decisions. JA1096. As in Junction City and Hope, the Lewisville plaintiffs did not allege *any* interdistrict violations and, as above, in a consent decree agreed to less than a year later, the school district defendants expressly "den[ied] that they ha[d]

discriminated against the plaintiffs" and expressed a desire merely to avoid "further expenses." ADD90.

Reflecting the litigation's scope and the parties' agreement, the 1993 consent decree was limited to intradistrict behavior. The bulk of the decree concerns employment practices, not students. *See* ADD91-95 at ¶¶ 5-9, 15-16. The portions of the decree dealing with students, as relevant here, enjoined Lewisville from "engaging in any policies, practices, customs or usages of racial discrimination in any school operation including, but not limited to . . . student assignments, and the treatment of black and other minority pupils *within the school system*." ADD91 (emphasis added). The decree also required Lewisville to "maintain a unitary, racially non-discriminatory school system wherein all schools are effectively and equitably desegregated and integrated." ADD94.

Subject to that decree's terms, the district court dismissed the case with prejudice. The case then sat dormant for more than a decade, until Lewisville was consolidated with the former Stamps School District and the combined entity became the Lafayette County School District. Dist. Ct. Doc. 26. The district court concluded that the Lafayette County School District "became [Lewisville's] successor in interest" as a result of the consolidation and inherited that former district's consent decree obligations. ADD43. Save for the district court's treatment of that consolidation, the case remained dormant until Lafayette County asked the

district court to prevent its students from leaving for districts that better suited their needs.

2. Camden-Fairview

The Camden-Fairview case differs only in that it originally involved allegations of interdistrict constitutional violations within a single Arkansas county and culminated in a consent decree barring interdistrict transfers between the Camden-Fairview and Harmony Grove School Districts. ADD101-03. No violations were found nor even alleged—interdistrict or otherwise—as to any other districts. Nor did the district court ever find any facts that would support such a finding.

The Camden-Fairview case originated more than three decades ago, when a group of Ouachita County, Arkansas, residents filed suit against the then-Camden School District, the then-Fairview School District, and the Harmony Grove School District, along with other local and state parties. ADD55. They alleged that the districts had "acted in concert to deny African-American children equal educational opportunities by establishing, maintaining, and perpetuating racially discriminatory school systems." ADD55-56. The plaintiffs principally "sought an order consolidating the three defendant [Ouachita County] school districts." ADD56. Ultimately, the parties agreed that the consolidation of only Camden and Fairview would suffice to "effectively desegregate" the Ouachita County schools. Dist. Ct. Doc. 138 at 2 n.1. The Camden and Fairview school districts were consolidated in

a state proceeding on October 16, 1990, creating the present Camden-Fairview School District. *See* Dist. Ct. Doc. 225 at 4.

Following consolidation, on November 27, 1990, the parties agreed to, and the district court entered, a consent decree settling the plaintiffs' claims. ADD56. As relevant here, that order provided that "Harmony Grove shall not permit the transfer of white students from [Camden-Fairview] into the district without the written permission of" Camden-Fairview and "[b]oth school districts shall refrain from adopting student assignment plans or programs that have an inter-district segregative effect on either district." ADD98-99.

Thereafter, in February 2002, the district court declared Camden-Fairview unitary, finding it had fully satisfied all its "court ordered obligations." JA1488. As a result, it dismissed the case with prejudice and issued a consent order incorporating the terms and conditions of the parties' December 2001 settlement agreement. JA1489. As particularly relevant here, that settlement agreement included a clause providing that the student-transfer limitation described above "shall remain in full force and effect to prevent future 'white flight' from [Camden-Fairview] to [Harmony Grove]." ADD106. The settlement agreement also provided that the attendance of white children who resided in Camden-Fairview and whose parents were employed at Harmony Grove, under a state statute permitting such attend-

ance, would "be declared to be violative of" that transfer limitation "unless said attendance is with the written consent of CFSD." ADD107.

That case then sat dormant for seven years until a teacher at Harmony Grove—whose daughter would have attended Camden-Fairview—sued Camden-Fairview for denying her child permission to attend Harmony Grove despite previously granting a similar transfer. *See Lancaster v. Guess*, Case No. 1:09-CV-1056 (E.D. Ark.), Doc. No. 2. The parties later jointly moved to dismiss that case, and that student was permitted to transfer. ADD115-16. Upon consent of the parties, the district court then entered an order reaffirming the 1990 student transfer limitation, but modified it to prohibit the children of white employees from transferring to Harmony Grove without the district court's permission. *See* ADD115-16. The case again became dormant until Camden-Fairview asked the district court to block students from transferring to districts—other than Harmony Grove—that better meet their needs.

Thus, as relevant here, inasmuch as it affects student transfers from Camden-Fairview to districts other than Harmony Grove, the district court's modification order is identical to the other orders at issue. That is, like in the other cases, the underlying order says nothing about interdistrict transfers, with the exception of transfers to a single district that was previously alleged to have engaged in interdistrict violations with Camden-Fairview.

3. Arkansas School Choice Law

This appeal arises out of the intersection of those four school-desegregation cases with Arkansas's "school choice" law. As in most states, school attendance in Arkansas has historically been tied to residency; students attended the school district within which they resided.

In 1989, Arkansas adopted the Arkansas Public School Choice Act. That Act allowed children to apply to attend a non-resident school district, but it generally prohibited children from transferring to a non-resident district where the percentage of enrollment for the child's race was greater than the percentage in the child's resident district. ADD3. For example, under that Act, a white student generally could not transfer from a majority-minority district to a majority-white district, while a black student could. Similarly, a minority student generally could not transfer from a majority-white district to a majority-minority district.

But in 2012, a federal district court correctly concluded that the race-based transfer restriction in the 1989 school-choice law violated the Equal Protection Clause because it discriminated on the basis of race without satisfying strict scrutiny. The court therefore invalidated the 1989 Act. *See Teague ex rel. T.T. v. Arkansas Board of Education*, 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012), *vacated as moot sub nom. Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013).

That decision prompted the Arkansas General Assembly to repeal the unconstitutional 1989 Act and enact a race-neutral school-choice law, the Public School Choice Act of 2013. ADD3; JA61-62. But as relevant here, that law allowed school districts to continue to unilaterally bar their resident students from exercising school choice if the district claimed to be subject to *any kind* of desegregation order. *See* ADD4; JA74. Then, in 2015, the Arkansas General Assembly modified that provision and required districts claiming an exemption to submit proof that participating in school choice conflicted with a desegregation order. ADD4; JA81. But under that amendment, state officials were required to accept a school's *claimed* conflict, whether or not it *actually* existed. Thus, in other words, under that provision, even if a district's desegregation order had absolutely nothing to do with interdistrict student transfers, that district could still unilaterally bar students from pursuing other educational opportunities.

Correctly recognizing that school districts (including those at issue here) were abusing that unreviewable discretion, the Arkansas General Assembly in 2017 amended the Public School Choice Act to close that loophole and require the Arkansas Department of Education to review a school district's exemption claim. ADD4; JA85. Consequently, unlike under the previous statute, when a district claims a conflict, it must actually exist. *See* ADD4-5.

B. Procedural History

1. State administrative proceedings

From 2013-2017, the four districts in this case (collectively referred to as "the Districts") falsely claimed to be subject to desegregation orders barring their participation in school choice. *See, e.g.,* ADD5. But under then-existing law, Arkansas was required to accept those representations, and consequently, with few exceptions, students in the Districts were unable to exercise school choice. *Id*.

The 2018-2019 year was different. After the Districts received numerous school-choice transfer applications, they again professed to have a conflict with the decades-old orders at issue here and notified the Arkansas Department of Education that they intended to block those transfers. *Id*. But this time, pursuant to the 2017 amendment to the Public School Choice Act, the Department of Education was required to review those claims for legitimacy. It correctly concluded that, save for the partial restriction in the Camden-Fairview order, the decades-old orders did not prohibit interdistrict transfers, and denied the Districts' exemption request. *Id*. The Districts appealed the Department of Education's decision to the State Board of Education, which affirmed. *Id*.

2. The Districts' federal court motion for a hodgepodge of relief.

Rather than seek state-court review of the Department of Education and State Board of Education's decisions, the Districts filed motions for declaratory

judgment or to clarify or modify the orders in these long-dormant cases. *E.g.*, JA10. Wrongly arguing that participating in school choice would violate their decades-old desegregation orders, they asked the district court to hold that they were prohibited from participating in school choice. Except for the Camden-Fairview case, where it was already a party, the Department of Education and State Board of Education (collectively referred to as "Arkansas") intervened to oppose the Districts' motions. *E.g.*, JA370.[2]

3. Preliminary injunction proceedings

The Districts also sought preliminary injunctions in each case. They asked the district court to preliminarily enjoin Arkansas's school-choice law and exempt them from participation for the 2018-2019 school year. The central premise of the preliminary-injunction motions was that the Districts would suffer irreparable harm (due to a loss of funding or otherwise) if forced to participate in school choice for the 2018-2019 school year. *E.g.*, JA372. At a subsequent preliminary injunction hearing, numerous parents testified about the harm their children would suffer if the Districts were granted an injunction. One parent, for example, testified that she applied for her child to transfer from Hope to the nearby Springhill School District because of the increased "educational opportunity" and her "child's experience

[2] Because the district court's orders in each case denying the preliminary injunctions, granting the modifications, and denying a stay pending appeal are generally identical and the Junction City case is listed as the lead, the orders in that case are generally cited for ease of reference.

with bullying" at Hope. JA525. Another parent testified about numerous problems her children had while attending Lafayette County, including the school's failure to get her daughter medical attention when she had a seizure. JA570-72. She further testified that she had actually taken a job as a janitor at the Emerson-Taylor School District so that her children could attend that school instead of Lafayette County. *Id*.

The district court rejected the Districts' arguments and denied preliminary relief. JA390. The Districts all participated in school choice for the 2018-2019 year, save for the Camden-Fairview/Harmony Grove restriction.

4. The district court's modification order.

On January 17, 2019—more than five months after it denied preliminary relief—the district court suddenly modified the various orders in these cases "to explicitly prohibit the segregative inter-district transfer of students from [the Districts] to other school districts, unless such a transfer is requested for education or compassionate purposes and is approved by [the District's] school board on a case-by-case basis." ADD18. The district court did not explain what comprised "education or compassionate purposes."

While the district court acknowledged no such limitation had previously existed, it declared that the change in Arkansas's school-choice laws justified modifying the decades-old orders under the two-pronged test set forth in *Rufo v. In-*

mates of Suffolk County Jail, 502 U.S. 367 (1992). ADD13. In fact, in what amounts to the entirety of its analysis, the district court simply announced that the modification was appropriate because the orders, "by [their] explicit terms, clearly intended to prohibit *any* racial discrimination occurring within the [Districts], including preventing student transfers which result in segregation of [the Districts'] student bod[ies]." ADD28 (emphasis in original).

In so doing, the district court carefully avoided any discussion of the lack of any evidence that school-choice transfers constitute "racial discrimination" or might somehow result in "segregation." ADD12. Nor did it make any factual findings that would support its bald assertions. *Id.* Instead, the district court simply announced—*sans* evidence, fact-finding, analysis, or explanation—that "segregation" occurs any time "a student transfer[s] 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." ADD4 n.1.

The district court also carefully avoided any discussion of the substance of the underlying orders. Rather, the district court simply attributed the various orders' silence regarding interdistrict transfers to the fact that children of all races were not allowed to exercise school choice until 2013. *E.g.*, ADD11-12. The district court then declared that there would have been no reason for those various or-

ders to explicitly include race-based interdistrict student-transfer restrictions. Yet the district court made no effort to reconcile that declaration with the fact that—contrary to its rationale—the Camden-Fairview order *did* explicitly contain an interdistrict limitation with respect to Harmony Grove, but no other districts. Likewise, the district court declined to acknowledge that none of the other cases involved any allegation of unlawful interdistrict behavior. To the contrary, as explained above, those cases (and orders) strictly involved *intra*district conduct, like homeroom assignments and teacher hiring.

Moreover, recognizing that federal courts may only order interdistrict remedies to remedy interdistrict violations—undisputedly absent in these cases—the district court declared its race-based interdistrict transfer prohibition to be an intradistrict remedy. *See* ADD15-16 (citing *Milliken v. Bradley*, 433 U.S. 267 (1977)). The district court did not cite any authority supporting that alchemistic formulation. Instead, it simply declared that a lack of contrary authority—*i.e.*, a lack of cases specifically holding that prohibiting interdistrict transfers is an interdistrict remedy—somehow justified its conclusion. *See* ADD15.

Indeed, the best support the district court could muster for its approach was to say that its orders were not interdistrict because they do not "directly restrict any other district's ability to participate in school choice" with school districts other than the Districts involved here. *Id*. The district court then labeled the "other

school districts' [in]ability to receive . . . transfer students" from the Districts a "minor intrusion," rather than a "direct impact." ADD16. The district court did not explain that distinction. Nor did it cite any authority for the proposition that a remedy with an interdistrict effect is not an "interdistrict remedy" as long as it is "minor" or does not "directly impact" other school districts.

Thereafter, Arkansas filed notices of appeal. *E.g.*, JA671.

5. Stay proceedings

So that children would not be denied educational opportunities during this appeal, Arkansas asked the district court to stay its order pending appeal. *E.g.*, JA674. In its motions, Arkansas explained that the district court's new race-based transfer restrictions mirrored the restriction invalidated in *Teague, supra,* and violated Equal Protection. Additionally, Arkansas explained that the district court's "direct impact/minor intrusion" theory not only lacked support but explicitly ran afoul of the holding in *Missouri v. Jenkins*, 515 U.S. 70 (1995). Under *Jenkins*, even remedies with wholly intradistrict effects are impermissible if they have an interdistrict purpose. *Jenkins*, 515 U.S. at 81. Arkansas also explained—and introduced evidence—that absent a stay, children would be denied access to better educational opportunities for the entire 2019-2020 school year. JA677-99.

The district court denied those motions. JA802. In so doing, it declared that if it believed Arkansas would succeed on the merits of this appeal, it would not

have granted modifications in the first place. JA791. It further declared that Arkansas had failed to show irreparable harm because—without a stay—parents seeking better educational opportunities could place their children in private schools, homeschool their children, or "mov[e] their residence." JA798. Indeed, given those so-called *choices*, the district court declared a parent's inability to access better schools "is self-imposed" harm. JA1466.

Arkansas subsequently requested a stay pending appeal that this Court denied. To comply with the district court's order (pending reversal by this Court) and avoid running afoul of the Equal Protection Clause by treating students different based solely on race, Arkansas granted the Districts complete exemptions from school choice for the 2019-2020 school year.

STANDARD OF REVIEW

The district court entered the modification orders that led to this appeal pursuant to Federal Rule of Civil Procedure 60(b)(5). "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 Cty. Special Sch. Dist., No. 1*, 56 F.3d 904, 914 (8th Cir. 1995) (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992)). If the movant carries this burden, the district court "must then determine whether the proposed modification is suitably tailored to the changed circumstance." *Id*. (quoting *Rufo*, 502 U.S. at 391).

While the district court's ultimate exercise of equitable judgment is reviewed for abuse of discretion, the legal conclusions underlying its modification orders are reviewed de novo. And a district court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)) (internal quotation marks omitted); *see United States v. Fonder*, 719 F.3d 960, 961 (8th Cir. 2013) ("A district court abuses its discretion when it makes an error of law.") (quoting *United States v. Weiland*, 284 F.3d 878, 882 (8th Cir. 2002)). Thus, as relevant here, this Court reviews de novo the district court's legal conclusion that a race-based restriction on interdistrict student transfers was not an interdistrict remedy. If that conclusion is

incorrect, then the district court necessarily abused its discretion and reversal is required.

Further, this Court need not defer to the district court's interpretation of the underlying orders. "When, as here, a district court's interpretation of a consent decree is based solely on the written document, [this Court] reviews the [district] court's interpretation *de novo*." *White v. Nat'l Football League*, 585 F.3d 1129, 1141 (8th Cir. 2009). While a district court's interpretation may receive greater deference when it "is based on extrinsic evidence," the district court relied on no such evidence to interpret the decrees in this case. *Missouri v. Indep. Petrochem. Corp.*, 101 F.3d 159, 162 (8th Cir. 1997). Along similar lines, although this Court "typically afford[s] a large measure of deference to the interpretation of the district court that actually entered the decree," such deference is inapplicable here because the district court here did not enter any of the decrees at issue. *ASARCO, LLC v. Union Pac. R.R.*, 762 F.3d 744, 749 (8th Cir. 2014) (quoting *United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994)). And to the extent the modification orders rest on a misinterpretation of the original orders, the district court abused its discretion in entering the modification orders.

SUMMARY OF ARGUMENT

The district court's decision to modify four—decades-old—consent decrees to prohibit interdistrict transfers based *solely* on a student's race violates precedent and Equal Protection.

First, the district court's suggestion that modification was warranted based on changes in Arkansas's school-choice law—from a race-based regime that a federal district court declared unconstitutional to today's race-neutral school-choice law—had no actual effect on the decades-old desegregation orders in these cases because, with one limited exception explained above, these cases involved intradistrict conduct having nothing to with interdistrict student transfers. The district court nevertheless ignored the text of these orders and instead reimagined them as intended to disallow interdistrict student transfers unless limited on the basis of students' race.

Second, the district court impermissibly imposed an interdistrict remedy where no interdistrict violation was alleged or found. The Supreme Court has made clear that, where a remedial order's effect or purpose is interdistrict in nature, it cannot be imposed absent a finding of an interdistrict violation. The district court agreed that an interdistrict remedy would be impermissible in these cases because, as relevant here, they are all intradistrict in nature. But the district court ruled that prohibiting interdistrict student transfers on the basis of a student's race

is *not* an interdistrict remedy. It reached that illogical ruling (*i.e.*, "interdistrict prohibition" ≠ "interdistrict remedy") because such an interdistrict prohibition supposedly causes only a "minor intrusion," rather than a "direct effect" on other school districts. Such a distinction, however, is foreclosed by Supreme Court precedent. To reverse, this Court needs to hold only that prohibiting interdistrict student transfers is an interdistrict remedy.

Third, the district court court's race-based transfer restrictions themselves violate the Constitution. The Supreme Court has made clear that all government-imposed race discrimination is subject to strict scrutiny. While desegregation orders may serve a compelling government interest when imposed to remedy past *de jure* segregation, the district court's modification orders were not entered for that reason. Rather than seeking to remedy any past wrongdoing, the district court imposed its race-based transfer restrictions in order to prevent future demographic changes based on private parental choices. Such a restriction violates Equal Protection, and must be reversed on that basis.

ARGUMENT

I. Arkansas's school-choice laws had no effect on the underlying orders, so changes to those laws did not warrant revising the orders.

The district court erred as a matter of law in concluding that changes to Arkansas's school-choice laws warranted revising the orders at issue here. While *Rufo* held that "a change in the law" may justify relief under Rule 60(b)(5), "the movants still retain the burden to show that the change in the law has an *actual effect* on the section of the consent decree targeted, making future application inequitable." *Davis v. Hot Springs Sch. Dist.*, 833 F.3d 959, 963-64 (8th Cir. 2016) (emphasis added). The Districts did not show such an "actual effect" here. Nor could they have made such a showing since—with the very narrow exception of the provision in the Camden-Fairview order related to Harmony Grove—the decrees at issue had nothing to do with interdistrict student transfers. Thus, reversal is warranted.

Whether the change in Arkansas's school-choice law had any effect on the orders at issue depends, of course, on the scope of those orders as originally entered. This Court looks to "principles of contract interpretation" when construing consent decrees, including the need to "discern the parties' intent from the unambiguous terms of the written consent decree, read as a whole." *Little Rock Sch. Dist. v. Arkansas*, 664 F.3d 738, 747 (8th Cir. 2011) (quoting *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir. 2002)). A consent decree's

scope "is discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *see Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 281 (3d Cir. 2001) ("A court should interpret a consent decree as written and should not impose terms when the parties did not agree to those terms.").

To conclude that the orders in these cases related to interdistrict transfers, the district court reached beyond their text. Indeed, the district court conceded that—except for the Camden-Fairview order—the orders "contain[] no language expressly prohibiting inter-district student transfers." ADD11. Given that, the district court instead focused on language concerning intradistrict conduct, declared that language was "clearly intended to prohibit *any* racial discrimination occurring within the [Districts]," and announced that "includ[ed]" an obligation to "prevent[] student transfers" that could "result in segregation of [the Districts'] student bod[ies]." ADD12. It then declared that "it was unnecessary for the parties to" the various decrees to draft them "in a way that explicitly barred segregative inter-district student transfers because that limitation was contemplated by the school choice law in place at the time." ADD28. Thus, in other words, the district court suggested that race-based restrictions would have been included in the original orders if Arkansas's then-existing school-choice laws had not already imposed such restrictions.

That suggestion fails because there is no reason to believe the orders at issue were designed to do anything other than settle the actual intradistrict claims at issue. In fact, with the sole—and very limited—exception of the restriction on transfers to Harmony Grove in the Camden-Fairview order, these cases strictly concerned alleged intradistrict violations. And the orders must be interpreted in light of the fact that they "reflect[] a compromise between hostile litigants" to settle particular claims brought at a particular time. *Mahers v. Hedgepeth*, 32 F.3d 1273, 1275 (8th Cir. 1994). Yet far from considering the claims actually at issue in each case, the district court speculated that if the law had been different decades ago, the plaintiffs would have brought—and the parties would have agreed to settle—entirely different claims. But commonsense provides a far more likely reason those orders do not mention interdistrict transfers: The underlying cases had nothing to do with interdistrict transfers.

Moreover, the fact that the Camden-Fairview order *does* contain an interdistrict restriction underscores that, whatever the law might have been decades ago, where parties intended to impose such a restriction, they did so. Indeed, the district court utterly failed to explain that fundamental inconsistency. Nor did the district court explain why—if the Camden-Fairview order were originally intended to bar interdistrict transfers between Camden-Fairview and *any* other school—that order is expressly limited to Harmony Grove. *Cf. Wintermute v. Kan. Bankers Sur. Co.*,

630 F.3d 1063, 1068 (8th Cir. 2011) ("A basic tenet of contract law is that each word in the agreement should be interpreted to have a meaning, rather than to be redundant and superfluous.") (alteration omitted) (internal quotation marks omitted) (quoting *Jones v. Sun Carriers, Inc.*, 856 F.2d 1091, 1095 (8th Cir. 1988)).

The district court's approach likewise fails because its order rests on a baseless assumption that a parent's desire to enroll a child in a school that better suits his or her needs is "racial discrimination." ADD12. In fact—even exempting the district court's failure to cite *any* evidence to support that assumption—that approach fails as a matter of law because private parental choices "do[] not have constitutional implications." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); *see Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) ("external factors" such "as demographic changes independent of *de jure* segregation" "do not figure in the remedial calculus"). Indeed, district courts are not permitted to police parent-driven changes in a school's composition, like school-choice transfers. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 435-36 (1976). Nor for that matter does a school district engage in racial discrimination where it fails to "prevent[] student transfers which would" modify a school's racial makeup. *Freeman*, 503 U.S. at 495. As a result, parental decisions authorized by the school-choice law cannot justify the district court's decision.

Likewise, the district court's assumption that any change in a school's racial

composition (relative to other districts) is "segregative" did not support modification. A174; *see* A166 n.1 (defining as "segregative" any transfer where a transferring "student's race exceeds that percentage in the student's resident district"). To the contrary, even if net transfers resulted in a slight change in a district's racial composition relative to its neighboring schools, such a slender change would not constitute unlawful interdistrict "segregation of [the Districts'] student bodies." ADD12. Nor did the district court find that it would. Instead, avoiding that analysis altogether, the district court simply defined any change in racial demographics as "segregative. And the district court's failure to support that suggestion requires reversal.

II. The district court did not find an interdistrict violation, yet it imposed an interdistrict remedy.

An interdistrict transfer prohibition is an interdistrict remedy, and the district court erred as a matter of law in imposing such a remedy absent any allegation—let alone a finding—of an interdistrict violation. Reversal is, therefore, required.

District courts exceed their "authority in fashioning interdistrict relief where the surrounding school districts had not themselves been guilty of any constitutional violation." *Missouri v. Jenkins*, 515 U.S. 70, 87 (1995) (citing *Milliken v. Bradley*, 418 U.S. 717, 746-47 (1974)). Absent "an interdistrict violation and interdistrict effect," the Court has explained, "there is no constitutional wrong calling for an interdistrict remedy." *Milliken*, 418 U.S. at 745. With the partial exception of Cam-

den-Fairview, the plaintiffs below *never alleged* that the Districts committed inter-districts constitutional violations. Nor has any court has *ever* found that three of the Districts ever committed interdistrict violations. And even with respect to Camden-Fairview, any alleged interdistrict violation was limited to a single district in the same county. Thus, as relevant here, the orders in these cases are strictly intradistrict in nature. For this reason, the district correctly recognized that modifying the orders to impose an interdistrict remedy would be "impermissible." ADD17.

Despite that, the district court modified the various orders and imposed a race-based interdistrict transfer limitation. It modified the orders "to explicitly prohibit the segregative inter-district transfer of students from [the Districts] to other school districts, unless such a transfer is requested for education or compassionate purposes and is approved by [the District's] school board on a case-by-case basis." ADD18. It defined "segregative" interdistrict transfers as "student transfer[s] 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." ADD4 n.1. In other words, the district court's modification orders limit interdistrict transfers based upon (1) the race of the student wishing to transfer, and (2) the relative racial makeup of the transferor and transferee school districts. Yet the district court concluded this race-based interdistrict transfer prohibition is permissible because it is not an interdistrict remedy.

To support that conclusion, the district court declared that only "remedies where courts directly order action that directly impacts multiple school districts" constitute interdistrict remedies. ADD15. As an example of an interdistrict remedy, it pointed to the forced consolidation and interdistrict magnet plan imposed in *Edgerson ex rel. Edgerson v. Clinton*, 86 F.3d 833 (8th Cir. 1996), and the interdistrict student bussing plan imposed in *Milliken*. ADD16. But the district court did not justify its apparent assumption that those remedies represent the full scope of interdistrict remedies or otherwise explain how those examples establish that restricting interdistrict transfers is any less interdistrict. And in denying Arkansas's stay motion, the district court conceded as much, suggesting that its "observation was not meant to be exhaustive, but simply served to identify examples of specific remedies that have been found to be interdistrict." JA792 n.6.

As to the modification orders' interdistrict effects, the district court declared that its modification orders do not "directly restrict any other district's ability to participate in school choice" with school districts other than the Districts involved here. ADD16. It did acknowledge that the modification orders affect "other school districts' ability to receive . . . transfer students" from the Districts. *Id.* But it branded that impact as a "minor intrusion" because it was less extreme than the "direct impact" that would come from forced consolidation or interdistrict bussing. ADD17. Yet that hardly makes the orders' race-based interdistrict transfer re-

strictions any less interdistrict. Rather, as above, it just suggests that interdistrict remedy is *less extreme* than other possible interdistrict remedies.

Further, the Supreme Court has squarely rejected the district court's purported distinction between direct and indirect effects when determining whether a remedy is interdistrict in nature. *Missouri v. Jenkins*, for instance, explained that *Milliken v. Bradley* had "determined that a desegregation remedy that would require mandatory interdistrict reassignment of students throughout the Detroit metropolitan area was an impermissible interdistrict response to the intradistrict violation identified." 515 U.S. 70, 93 (1995) (citing *Milliken*, 418 U.S. at 746-47). The Court then added that nothing in *Milliken* "suggests that the District Court in that case could have circumvented the limits on its remedial authority by requiring the State . . . to implement a magnet program designed to achieve the same interdistrict transfer of students that we held was beyond its remedial authority." *Id*. at 94. Under *Milliken*, then, requiring or prohibiting interdistrict student transfers is an interdistrict remedy outside the limits of a federal court's authority to remedy intradistrict constitutional violations.

Similarly, *Jenkins* itself reversed a district court's order "creat[ing] a magnet district . . . in order to serve the interdistrict goal of attracting nonminority students" from a suburban district to an urban one where no interdistrict violation had been found. *Id.* (emphasis omitted). Indeed, as *Jenkins* explained, in so doing, the dis-

trict court had improperly "devised a remedy to accomplish *indirectly* what it admittedly lack[ed] the remedial authority to mandate directly: the interdistrict transfer for students." *Id.* at 92 (emphasis added). Thus, the district court's suggestion that it could impose a remedy affecting school districts other than the Districts—so long as it did so indirectly—conflicts with precedent. Indeed, the district court's modifications are even more of an interdistrict remedy than the remedy in *Jenkins*. Whereas in *Jenkins* the district court only acted on the single school district before it, albeit for the purpose (and with the effect) of attracting students from non-party school districts, here, the district court's modification orders directly prohibit any school district in the state from accepting transfers from the Districts.

Jenkins additionally underscores that absent an interdistrict violation, a district court "exceeds its remedial authority if it orders a remedy with an interdistrict purpose." *Id.* at 97. There, the remedial order's goal was to affect the racial composition of both the urban and suburban schools by enticing nonminority suburban students to return to the urban district. *Id.* at 76-79. Given that goal, the order was interdistrict in nature, albeit perhaps—in the district court's parlance—indirectly so. *Id.* at 92.

Here, the district court did not dispute that remedial orders with an interdistrict purpose constitute an interdistrict remedy under *Jenkins*. Yet it suggested that the race-based interdistrict transfer prohibitions at issue here do not have an inter-

district purpose. JA792. Rather, the district court declared that the purpose of those race-based transfer restrictions is to "ensure that [the Districts] can comply with [their] desegregation obligations under the [original orders] in light of recent statutory changes in the Arkansas Code." *Id*. But that is nonsense; the obligation to avoid interdistrict transfers did not exist *until* the district court modified the orders to include that obligation. The Districts sought a preliminary injunction because, if forced to participate in school choice for the 2018-2019 school year, they claimed they would suffer irreparable harm by being forced to violate their (pre-modification) desegregation obligations. The district court rebuffed this argument, assuming it denied the Districts' request for declaratory judgment—which it later did—the Districts had no such obligations. *See* JA389. Moreover, by modifying the orders to *add* a prohibition on student transfers, the district court further acknowledged that those orders did not previously impose such an obligation. The purpose of the modifications was, therefore, not to ensure that the Districts could comply with any existing obligations, but to create new interdistrict ones.

Equally unpersuasive is the district court's declaration that its modification orders were not designed to affect the "racial demographics of [the Districts] relative to the surrounding districts." JA793. Indeed, the orders' plain text underscores that they were designed to do exactly that. The district court did not enjoin just any interdistrict transfers, but only those it termed "segregative" ones. And whether an

interdistrict transfer is "segregative," as the district court defined that term, turns entirely on the racial compositions of the student's home district *and the non-resident district* to which the student wishes to transfer. ADD4 n.1. Hence, as a result of the modification orders, a minority student may transfer to a non-resident district with a lower percentage of minority student enrollment. But that same student cannot transfer to a district with a higher percentage of minority student enrollment. If the district court truly did "not mean[] to affect the racial demographics of any school district around" the Districts, JA793, then it would not have restricted transfers based solely on those other districts' racial demographics. Thus, the modification orders themselves underscore that they are intended to maintain an interdistrict racial balance.

In the end, to reverse the district court's modification orders, this Court need do nothing more than hold, as *Jenkins* requires, that prohibiting interdistrict transfers is an interdistrict remedy. The district court's race-based interdistrict transfer limitation is an interdistrict remedy in both its effect and purpose. The district court exceeded its remedial authority in imposing it and reversal is required.

III. The district court's race-conscious transfer restrictions violate Equal Protection.

Reversal is likewise required because the district court's race-based student transfer restrictions violate the Equal Protection Clause. Modifications of orders

and consent decrees "'must not create or perpetuate a constitutional violation.'" *Little Rock Sch. Dist.*, 56 F.3d at 914 (quoting *Rufo*, 502 U.S. at 393).

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court, applying strict scrutiny, held that blanket race-based student assignments in public schools are not "narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity" and violate Equal Protection. 551 U.S. 701, 726 (2007). Applying that principle, in 2012, another district court in the same district as the court that issued the modification orders below held that the race-based student transfer limitations in Arkansas's 1989 school-choice law were unconstitutional. *See Teague v. Ark. Bd. of Educ.*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012), *vacated as moot sub nom. Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013). As that court explained, even if the restrictions were designed to remedy past discrimination, the 1989 law was not narrowly tailored because it "applie[d] state-wide without regard to whether a resident or non-resident school district ha[d] a history of *de jure* or *de facto* segregation" and it prohibited interdistrict transfers "based solely on a student's race . . . ." *Id.* at 1066-67. Though that case was mooted by Arkansas's passage of the 2013 school-choice law, its reasoning remains valid.

Under those same principles, to survive strict scrutiny, the modification orders must both serve "the compelling interest of remedying the effects of past in-

tentional discrimination" and be narrowly tailored to that end. *Parents Involved*, 551 U.S. at 720. But the modifications are not designed to eliminate the vestiges of *de jure* discrimination—like segregated classrooms or unlawful hiring practices—that long ago ceased to exist. Nor are they designed to remedy the effects of any past discrimination. Instead, the purpose is retaining the racial demographics of the Districts by, as Appellees concede, preventing "white flight." Resp, in Opp. to Stay at 11. "[W]hite flight," however, is "not *de jure* segregation." *Jenkins*, 515 U.S. at 96. Consequently, the district court's attempt to achieve racial balancing has no "causal link to the *de jure* violation [purportedly] being remedied," *id*., and therefore serves no compelling interest. And like the 1989 law, the modification orders are not narrowly tailored to any compelling interest because they prohibit transfers "based solely on a student's race and [lack] consideration of their individual circumstances . . . ." *Teague*, 873 F. Supp. 2d at 1067.

Indeed, underscoring that analysis, the district court conceded that its modification orders were intended to explicitly incorporate the unconstitutional 1989 school-choice law. *Compare* ADD28 (concluding that the "1989 Act . . . expressly prohibited all segregative inter-district student transfers") *with* JA35 (modifying the orders to "explicitly prohibit the segregative inter-district transfer of students"). Reversal is therefore warranted.

CONCLUSION

For the foregoing reasons, Arkansas respectfully requests that the Court reverse the district court's modification orders.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Assistant Solicitor General

KA TINA R. GUEST
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
Nicholas.Bronni@arkansasag.gov
Dylan.Jacobs@arkansasag.gov

CERTIFICATE OF COMPLIANCE

Nos. 19-1340, 19-1342, 19-1348, 19-1349
United States v. Arkansas Department of Educ., et al
Rosie Davis v. Arkansas Department of Educ., et al
Mary Turner, et al v. Arkansas Department of Educ., et al
Larry Milton, et al v. Arkansas State Board of Educ., et al

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/s/ *Dylan L. Jacobs*

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I, Dylan L. Jacobs, Assistant Solicitor General, hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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Dylan L. Jacobs