IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

OLESS BRUMFIELD., *et al.*, ***Plaintiffs*,** **and** **THE UNITED STATES OF AMERICA,** ***Plaintiff-Intervenor*,** **v.** **WILLIAM J. DODD, Supterintendent of Public Education, *et al.*,** ***Defendants*.**	**No. 71-1316** **Judge Ivan L.R. Lemelle** **Magistrate Judge Joseph C. Wilkinson Jr.**

MEMORANDUM IN RESPONSE TO NOVEMBER 22 ORDER

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DEFENDANTS' MEMORANDUM IN RESPONSE TO ORDER OF NOVEMBER 22, 2013

Defendants (the "State") respectfully submit this Memorandum in response to the order entered by the Court on November 22, 2013, Doc. No. 244, requiring the parties "to submit a proposal for a modification of the existing process for sharing information regarding the State's Voucher Program . . . ." The State has consulted with counsel for the United States in an attempt to develop a joint proposal, but the parties were unable to agree. While the State is willing to share relevant information in its possession on a schedule that does not disrupt the operation of the Scholarship program, the State will not agree to terms that would cede its sovereign authority over the Scholarship program or the public schools, it will not agree to permit the United States to participate in the administration of the program, and it will not agree to demands for information that the State does not have or schedule changes that would disrupt the Scholarship program.

INTRODUCTION

For nearly forty years, this Court has supervised the State's provision of aid to private schools in Louisiana. Under the Court's orders, the State must follow detailed procedures to verify that private schools receiving state aid do not discriminate or segregate on the basis of race. The United States and the other Plaintiffs review the State's decisions certifying private schools as eligible for aid, and may object to any certification if they believe that the private school discriminates or segregates. No such objection has been filed in over thirty years.

At the November 22 hearing, the Court indicated that it believed that some modification to the injunction may be required. The State respectfully requests that the Court reconsider that view. Modifications to structural relief imposed against State programs are not permitted unless a significant change in circumstances jeopardizes achievement of the purpose of the injunctive

decree. The State respectfully maintains its view that the Scholarship program does not constitute such a change in circumstances. While the Scholarship program does constitute State aid subject to the orders and decrees in this case, it does not promote or otherwise make more likely private school discrimination. To the contrary, the Scholarship program actually *furthers* the purpose of the injunction in this case because the governing statute requires all participating private schools to be *Brumfield*-certified, it requires participating schools to accept any and all students who are awarded Scholarships, regardless of their race, and the State does not take the student's race into account in awarding scholarships. Contrary to the repeated claim made by the United States, the State does not "assign" Scholarship students to participating private schools; rather, Scholarship awards are based on parental choice. While the United States apparently believes that the State should restrict the choices made by families participating in the Scholarship program based on their race and the racial composition of the schools they wish to attend, *see* United States' Memorandum in Response to State's Analysis Filed November 21, 2013 ("U.S. Mem. Re Expert Analysis"), Doc. No. 248 at 3, the central purpose of the injunction in this case is to *prohibit* State support for the exclusion of children from private schools based on their race, not to *mandate* it. For this reason, the State respectfully maintains that modification of the decree is neither necessary nor appropriate.

If the Court declines to reconsider its initial view that some modification is required, the State respectfully submits in the alternative that the Court should adopt a plan whereby the State shares additional information with the United States, permitting it to conduct a three-year retrospective review of the effect of the Scholarship program. The State has already provided data enabling the United States to assess the impact of the Scholarship program during the 2012-13 and 2013-14 school years. Under the State's proposal, it would provide the United States

with data on Scholarship students and public school enrollment for the 2014-15 school year. Three years' worth of this information provides the United States with more than enough data to assess the impact of the Scholarship program. Once the State has provided this information, the burden should shift to the United States to demonstrate that implementation of the Scholarship program violates the injunction or federal law. In light of the State's decades of complete compliance with the Court's orders, and the Court's recognition that this case should be brought to a close when appropriate, *see* Transcript of November 22, 2013 Hearing ("11/22/13 Tr.") 51, the State respectfully submits that the Court should vacate all injunctive relief and dismiss this case if the United States cannot meet this burden.

In all events, the United States' proposal in its November 15 brief should be rejected because it does not further the goals of the litigation and unreasonably disrupts the Scholarship program.

STATEMENT

I. The Louisiana Scholarships for Educational Excellence Program

The purpose of the Louisiana Student Scholarships for Educational Excellence Program is to provide low-income parents whose children would otherwise attend a failing public school with the financial resources to send their children to the school of their choice. The program was originally launched in New Orleans in 2008, and the Louisiana Legislature expanded it statewide in 2012. La. Act No. 2 (Reg. Sess. 2012), *codified at* LA. REV. STAT. ANN. §§ 17:4011, *et seq*.

Eligible students are permitted to attend any participating school selected by their parent or guardian, subject only to the availability of slots at the school or schools of their choice. *See* LA. REV. STAT. ANN. § 17:4015(3). To be eligible for a scholarship under the program, students must have a family income that does not exceed 250 percent of the federal poverty level

guidelines and (i) be entering kindergarten, (ii) have been enrolled the previous school year in a low-performing public school with a C, D, or F grade, or (iii) have received a scholarship under the program for the previous school year. *See* LA. REV. STAT. ANN. § 17:4013(2). No consideration whatsoever is given to the race of eligible students. *See* Declaration of John White, Doc. No. 236-1 at ¶¶ 9-10.

Contrary to the United States' repeated assertions, the State does not "assign" students to private schools. Second Declaration of John White at ¶ 12. Families choose which private school students will attend under the Scholarship program. The State's role in the Scholarship program is limited to three functions: verifying eligibility, conducting a lottery to determine whether the student will receive an award when necessitated by excess demand, and disbursing the student's scholarship to his or her school on a quarterly basis. The State *never* imposes a binding assignment and *never* prohibits a student from attending a school. The only authority that "assigns" a child to a school is the child's local school district, which gives every student under its jurisdiction a *public* school assignment. *Id.* Faced with a public school assignment from the school district and a scholarship award from the State, families decide where their students will attend school. *Id.*

Although the law does not empower the State to assign students to any school, public or private, it does vest the Louisiana Department of Education ("the Department") with the authority to administer the Scholarship program. To that end, it authorizes the Department to adopt a process for awarding Scholarships "according to the time line established by the department." LA. REV. STAT. ANN. § 17:4015(4). Pursuant to that power, the Department has

already developed a time line for the 2014-15 school year for implementation of the program statewide.[1]

The awards process for the 2014-15 Scholarship program began in November 2013. Second Declaration of John White at ¶ 4. Schools wishing to participate in the program have already submitted their "Intent to Participate" form, an application document that indicates the number of seats the school has available for Scholarship students. *Id.* The State is reviewing these applications to ensure compliance with statutory and regulatory "participation criteria," by verifying, among other things, that the school is *Brumfield*-certified, as required by Louisiana Revised Statute Annotated § 17:4021(A)(2). *Id.* By January 10, 2014, the State plans to have a list of "participating schools" to include on the Scholarship application form. *Id.*

Families will submit their applications for the first of two rounds between January 13 and February 28. *Id.* at ¶ 5. Families may apply for seats at up to five participating schools and may rank their preferences among those five schools. *Id.* Parents and schools enter these applications into the Scholarships for Educational Excellence Database ("SEE Database"), and the Department begins the process of verifying each applicant's eligibility by reference to other Department databases. *Id.* at ¶ 6. In particular, the Department will use the Student Information

[1] The statewide Scholarship process runs in tandem with the Orleans Parish school assignment process. Second Declaration of John White at ¶ 13. Students living in Orleans Parish seeking to attend a public school or to participate in the Scholarship program receive a scholarship through a lottery. *Id.* In addition to applying for a scholarship to attend an Orleans Parish public school, eligible students residing in Orleans Parish may apply for a scholarship to attend a private school either inside or outside of Orleans Parish. *Id.* Eligible students residing outside of Orleans Parish may also apply for scholarships to attend private schools within Orleans Parish. *Id.* The process for Orleans Parish schools varies in certain respects from the process for schools outside of Orleans Parish. Because Orleans Parish is not under a desegregation decree, the State will describe the statewide process, but it will identify certain logistical challenges presented by coordinating with the parallel Orleans Parish schedule. *See id.*

System Database ("SIS Database"), specifically the October 1, 2013, and February 1, 2014, enrollment data, to ensure that students are eligible based on prior enrollment and grade level. *Id.* Once all applications are in, the State will assess the demand for each school and finalize the number of scholarships seats allocated to each participating school. *Id.* at ¶ 9.

If an eligible student requests a seat at a participating school at which the supply of seats exceeds demand, that student will automatically receive a scholarship to attend that school unless he or she is awarded a scholarship to a participating school that he or she ranked higher. *Id.* But where family demand exceeds the supply of seats, the State must conduct a lottery to distribute awards, based on the family's expressed preferences. *Id.* Scholarship awards are based on the results of this lottery except in cases where one of the narrow statutory preferences applies. *See* LA. REV. STAT. ANN. § 17:4015(3)(b) (requiring the State to give preference to students who attended a D or F public school and permitting the State to give a preference to, for example, siblings of students already enrolled at a participating school). During the second week of April 2014, the families and the participating schools will be sent award notifications. Second Declaration of John White at ¶ 9.

A child may enter Round 2 of the application process if he or she missed Round 1 or if he or she would like to try again to obtain admission to a different school. The timeline for Round 2 is similar to the timeline for Round 1. Families will submit applications between April 14 and May 9, and the lottery is scheduled to run around the week of May 26. *Id.* at ¶ 10. If a family that received an award for Round 1 wishes to apply for Round 2, then it must relinquish the Scholarship awarded in Round 1 upon receiving an award in Round 2. It must make the decision to apply for a new award by the end of the Round 2 application window. *Id.* Round 2 award notifications will be sent to families during the first week of June. *Id.*

After each round is complete, families receiving a Scholarship award have four choices: the parents may apply for a different scholarship in the second round (if they received the award in Round 1); they may enroll their student in the private school for which he or she received a scholarship award; they may enroll their child in his or her assigned public school; or they may make independent arrangements for their student, such as home schooling or enrolling him or her in a private school (without a State scholarship), charter school, or statewide school. *Id.* at ¶ 11. Each of the last three options remains open until the second week of September, with one possible exception. *Id.* If a family fails to enroll its student in the private school for which he or she received a scholarship award by the "registration deadline," the school may decide to revoke the child's guarantee, and the scholarship may go to a student on the waitlist. *Id.*

II. Proceedings on the United States' Motion for Further Relief

Plaintiffs brought this lawsuit in 1971 to challenge State aid to racially segregated[2] private schools. The injunction in this case requires the State to certify private schools as non-discriminatory before providing State support, to annually review the schools' eligibility for State support, and to share certain information with the United States and private plaintiffs. *See* Memorandum in Opposition to the United States' Motion for Further Relief ("State Mem."), Nov. 7, 2013, Doc. No 236 at 7-8.

[2] For purposes of this brief, the State defines "segregation" as "[t]he unconstitutional policy of separating people on the basis of color, nationality, religion, or the like." BLACK'S LAW DICTIONARY 1479 (9th ed. 2009). The United States has defined the term "segregation" in terms of "a school's racial demographics," but it acknowledged that this definition "does not connote a legal designation." U.S. Mem. Re Expert Analysis at 2 n.2. The injunction in this case clearly reflects the legal definition of the term, prohibiting the State from providing aid to private schools that maintain a policy of excluding students based on their race.

The United States has acknowledged that the State has complied with its certification obligations, *see* 11/22/13 Tr. at 7:9-16, and it has disavowed, at least for the time being, any allegation "that the State is in violation of the Court's orders in this case." *Id.* at 10:23-25; *see also* U.S. Mem. Re Expert Analysis at 1-2. Nevertheless, it has filed a motion for further relief seeking information about the Scholarship program "to evaluate whether the state's actions are in compliance with and consistent with the obligations in this case." 11/22/13 Tr. at 6:2-4. The United States' proposal for evaluating the State's compliance has been a moving target. While its November 15 brief in support of its motion focused on racial balance at public schools, United States' Memorandum in Response to the Court's September 18, 2013 Order ("U.S. Reply"), Doc. No. 238 at 6, its December 23 filing raises new concerns about the racial composition of participating *private* schools, even though the United States has never objected to the State's certification of *any* participating private school, U.S. Mem. Re Expert Analysis at 3.

At the November 22 hearing on the United States' motion, the Court made three preliminary legal rulings. First, the Court held that the support the State provides to private schools through the Scholarship program "fall[s] under the ambit of the original consent decree and subsequent injunctive orders and amendments to court orders in this case." 11/22/13 Tr. at 49:19-21. Second, the Court held that the parties are obligated to ensure that "the voucher program is not being used to promote segregation." *Id.* at 49:24-25. Finally, the Court held that any process for carrying out that obligation must not "disrupt[] the voucher program unreasonably." *Id.* at 50:22. The Court also stated that it would "like to put this case to rest." *Id.* at 51:17-18. Thus, any proposed modification should be designed to bring about an orderly conclusion to the case.

The Court also instructed the parties to propose a discovery schedule. *Id.* at 52:9-10, 16-24. Consistent with that direction, the State has discussed its discovery plans with the United States, explaining that it expects that the discovery it will require can be accomplished within sixty days. The United States has not yet provided the State with an estimate of how much discovery it anticipates seeking or how much time that discovery will take. The State is hopeful that the parties can reach an agreement on a discovery schedule before the January 22 status conference.

ARGUMENT

I. NO MODIFICATION IS NECESSARY OR WARRANTED, AS THE EXISTING PROCESS ENSURES THAT THE SCHOLARSHIP PROGRAM IS NOT BEING USED TO PROMOTE SEGREGATION.

During the November 22 hearing, the Court disagreed with the State's position that "the existing process is sufficient," 11/22/13 Tr. at 50:10-12, and therefore directed it to propose *modifications* to that process, *id.* at 51:3-5. In compliance with this directive, the State proposes modifications in the alternative in Part II. Having closely reviewed the legal rulings issued by the Court at the hearing, however, the State respectfully requests that the Court reconsider its initial inclination to modify that process. As explained below, the existing process is fully consistent with all of the legal rulings the Court made at the end of the hearing, and no modification is necessary or warranted.

"[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). Here, the "significant change" that the United States presumably invokes is the adoption and

implementation of the Scholarship program. But the United States has not shown, nor could it, that the Scholarship program justifies revision of the existing injunction. The United States has made no showing that "the decree [is] not meeting its intended purpose." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011).

The Court explained that the purpose of the injunction and the certification process it mandates, as they relate to the Scholarship program, is to ensure that the program is not "being used to assign children to segregated school systems in the private arena." 11/22/13 Tr. at 50:13-16. The United States has not alleged, much less proved, that any of the private schools participating in the Scholarship program are racially segregated. To the contrary, it has acquiesced, without objection, in the State's certification that each participating school does *not* segregate or discriminate on the basis of race.

Moreover, the existing process is fully consistent with the three legal rulings made by the Court at the November 22 hearing. First, the Court held that the support the State provides to private schools through the Scholarship program must comply with the existing orders in this case. 11/22/13 Tr. at 49:18-21. There is no dispute on this point; the State has never suggested that the orders in this case have no application to the Scholarship program. Indeed, both the statute governing the Scholarship program and the State's filings in this case acknowledge that the program constitutes state aid to private schools covered by the *Brumfield* injunction. *See* LA. REV. STAT. ANN. § 17:4021(A)(2); State Mem. at 4, 14-17; *see also* U.S. Reply at 4. For this reason, and as required by the statute and the injunction in this case, the State verifies that all schools receiving scholarship funds are *Brumfield*-certified. Second Declaration of John White at ¶ 4.

Second, the Court held that the Court and the parties must ensure that the Scholarship program is not being used to support segregated to discriminatory private schools. 11/22/13 Tr. at 49:22-25; *see also id.* at 38:22-25. The present *Brumfield* certification process does just that, and the United States has not suggested otherwise. That process was designed by this Court in 1975 and adapted by the parties in 1985 to provide oversight to ensure that State support, in whatever form, was not going to racially discriminatory private schools. *See* 1975 Order, Doc. No. 68 at 1; Consent Decree, Doc. No. 182 at 1-2. The State has faithfully adhered to that process over the years, and every school currently receiving State aid has applied for and received a certification and has annually submitted compliance reports. Declaration of John White, Doc. No. 236-1 at ¶¶ 4, 6. The United States has reviewed every *Brumfield* application and annual compliance report,[3] *id*. at ¶¶ 5, 7, and, since 1981, there has been no objection to the State's decision to certify a school as non-discriminatory. State Mem. at 9.[4] In fact, all parties agree that the State has complied with its obligation not to support discriminatory private schools. Counsel for the United States stated that the State is in compliance with its obligations under the orders of this Court, 11/22/13 Tr. at 7:7-16, and suggested that its cooperative oversight with the State over the past several decades has been successful, *id.* at 8:6-12. Even in its most recent filing, when the United States raised new concerns about the racial composition

[3] In its response to the State's Request for Admission, the United States admitted that it had reviewed each *Brumfield* application and annual report with one exception and had not objected to any certification decisions. The United States indicated that it could not locate a copy of the 2012-13 compliance report for Good Shepherd Nativity Mission School in the box of reports the State delivered to the United States in April 2013. In response, the State provided the United States with a new copy of the report on December 26, 2013.

[4] The United States has raised questions and concerns from time to time about *applicants* for certification. *See* Declaration of John White, Doc. No. 236-1 at ¶ 5. In those cases, the State has worked with the applying private school and the United States to resolve those questions and concerns before the State certifies the school as non-discriminatory, with the result that all *Brumfield*-certified schools have passed United States' scrutiny. *Id.*

of participating private schools, the United States disavowed any current objection to the eligibility of those schools. U.S. Mem. Re Expert Analysis at 1-2, 3. These concerns do not justify any modification of the injunctions because the existing annual compliance review provides the United States with ample opportunity to object to schools' eligibility for state aid if it believes that those schools are segregating on the basis of race. It is telling that the statistics cited in the United States' expert analysis are derived from the racial composition data provided to the United States in those annual compliance reports, yet they have never prompted an objection to any *Brumfield* certification decision.[5]

In view of the fact that all agree that the *Brumfield* certification process has been adequate for all other forms of State support since 1985, it is incumbent upon the United States to show that the Scholarship program constitutes a "significant change in circumstances" that "warrants revision of the decree." *Rufo*, 502 U.S. at 383. Specifically, in the context of this case, the United States must show that the Scholarship program somehow renders the existing process inadequate to accomplish the goal of ensuring that State support is not going to a segregated private school system. *Id*. Although the United States argued at the hearing that the Scholarship program is different in kind from other forms of State support, 11/22/13 Tr. at 15:14-25, its arguments in that regard related to the program's effect on *public* schools, *id.* at 47:12-17, and were based on the false premise that the State "assigns" students to particular schools, *id.* at 15:21-22, 47:9-17. There is no evidence to support the notion that the Scholarship program attracts racially segregated private schools or somehow leads *Brumfield*-certified private

[5] Existing orders do not require the State to send the annual compliance reports to the United States on a regular basis; however, the State does so as a matter of courtesy, and the United States has the power to request copies at any time. State Mem. at 8; Consent Decree at ¶ 9.

schools to begin discriminating on the basis of race. To the contrary, the Scholarship program requires participating schools to surrender control over their admissions policy for a certain subset of their seats. The schools must take all comers, regardless of race, and they have no control over which eligible students receive awards. *See* LA. REV. STAT. ANN. § 17:4022. For this reason, participation in the Scholarship program provides additional affirmative evidence of a non-discriminatory admissions policy, lessening, rather than heightening, the need for federal oversight over State aid to participating Scholarship schools.

Third, the Court held that the process for ensuring that no State aid flows to racially segregated private schools must not "disrupt[] the voucher program unreasonably." 11/22/13 Tr. at 50:22. There is no dispute that the existing process is fully consistent with this objective.

Because the existing process achieves the objectives this Court has identified – that is, ensuring that State support does not go to discriminatory or segregated private schools – there is no need to modify it.

II. IN THE ALTERNATIVE, THE STATE PROPOSES A PROCESS THAT WILL PROVIDE THE UNITED STATES THE INFORMATION IT NEEDS TO EVALUATE THE SCHOLARSHIP PROGRAM WITHOUT DISRUPTING IT.

If the Court decides that modification is necessary, the State proposes a process that provides for increased information sharing over the next school year, followed by an opportunity for the United States to prove that the Scholarship program contravenes a law or an order in this case, and then, if the United States cannot meet its burden, termination of all outstanding relief in this case.

Under this proposal, in addition to the certification and review process and information sharing already required by current orders, the State would take the following steps:

1. By October 15, 2014 (absent good cause shown for an extension), the State will provide the United States the following information for each 2014-15 Scholarship applicant, drawn from the SEE Database and verified by the Department:

a. Name
b. Student ID number
c. Address
d. Grade level for the 2014-15 school year[6]
e. Race[7]
f. Public school, if any, the student attended during the 2013-14 school year
g. Public school district for (f) above
h. Whether the student participated in the Scholarship program during the 2013-14 school year, and if so, the school the student attended
i. Whether the State denied a scholarship to the applicant
j. Reason for denial of scholarship, if applicable
k. Reason, if any, for preference in award of scholarship (*e.g.*, sibling)
l. School for which State offered a Scholarship award for the 2014-15 school year.
m. Parish where the participating school in the award is located
n. Whether the student enrolled in the participating school with the assistance of a State scholarship

2. By December 31, 2014 (absent good cause shown for an extension), the State will provide the United States with a copy of the October 1 Enrollment Report. The Enrollment Report will include, among other data, the following information for each public school district in Louisiana identified by the United States as operating under a desegregation order: [8]

[6] Note that the grade level for each student is self-reported. The school in which the student ultimately enrolls may elect to place that student in a different grade. The State will update this information in the SEE database only if it receives notice from the school that the student's grade level has changed. Second Declaration of John White at ¶ 8.

[7] Note that racial information for each student is self-reported. It is not possible for the State to verify the accuracy of the reported racial information. Second Declaration of John White at ¶ 8.

[8] If a school district attains unitary status by December 31, 2014, the State will not be obligated to provide data for that district.

a. School district name
b. Names of and grade levels served by each school in the district
c. Total enrollment of the district as of October 1, 2014, by race
d. Total enrollment of each school as of October 1, 2014, by grade level and race

In addition, the State will provide a list of public school addresses for schools in the districts the United States has identified as operating under a desegregation order.

3. If, by the end of the 2014-15 school year, the United States cannot demonstrate that the State's implementation of the Scholarship Program violates the Constitution, a federal law, or an order of this Court, the Court will dissolve all outstanding injunctive relief and dismiss the case.

In proposing this procedure, the State maintains its view that the information the United States has requested is not relevant to the objective of this lawsuit – ensuring that State aid does not go to discriminatory or segregated private schools. Although the data concerning Scholarship students identifies the private schools they have chosen to attend, it provides virtually no insight into whether those schools discriminate or segregate on the basis of race because participating schools have no control over which students apply for or receive scholarships. Indeed, the only helpful role that the data plays is to identify the schools that are open to taking Scholarship students regardless of race. And the data on public school enrollment has absolutely no bearing on whether the private schools receiving State support are discriminatory or segregated.

The data *will*, however, enable the United States to examine the impact of the Scholarship program on the racial composition of public schools, which is its stated goal, 11/22/13 Tr. at 9:1-

3.[9] The State has already provided this data for the 2012-13 and 2013-14 school years. Accordingly, at the conclusion of the State's proposed process, the United States will have three school years' worth of data on the effects of the Scholarship program. This is more than sufficient to enable the United States to assess whether implementation of the Scholarship program gives rise to a violation of the Constitution or the injunction in this case. *Cf. Anderson v. School Bd. of Madison County*, 517 F.3d 292, 297 (5th Cir. 2008) (school district seeking unitary status establishes good faith compliance by reporting to the district court for three years and operating as a unitary system for several years). As explained further in Part IV, if this data does not establish that the State is acting in contravention of the Constitution, a federal law, or an order of this Court, then the outstanding injunctions should be vacated and the case dismissed.

III. THE UNITED STATES' PROPOSAL SHOULD BE REJECTED BECAUSE IT UNREASONABLY DISRUPTS THE SCHOLARSHIP PROGRAM.

The United States' proposal is inconsistent with this Court's November 22 rulings and with the principles the Supreme Court has identified to guide modifications to injunctions in the context of institutional reform litigation. The proposal does not further the goal of the litigation. Moreover, the United States' demand that it be permitted to review individual Scholarship awards before they are issued to families and the schedule changes the United States has requested will unreasonably disrupt, if not destroy, the Scholarship program, significantly reducing parental choice and undermining the program's goal of providing higher quality education for all Louisiana children. Finally, the United States' proposed process would burden the State with impossible obligations and raises serious federalism concerns.

[9] To be sure, the State maintains its view that neither the orders in this case nor the governing case law provide any basis for the United States to demand information about the impact of the Scholarship program on racial composition in public schools. State Mem. at 15-16, 20 n.6; 11/22/13 Tr. at 23-25.

A. The United States' Proposed Process Does Not Advance the Purpose of this Lawsuit: Ensuring that State Aid Is Not Being Used To Promote Private School Segregation.

The process proposed by the United States does not further the goal of ensuring that that "the voucher system is [not] being used to assign children to segregated school systems in the private arena." 11/22/13 Tr. at 50:13-15. Granting the United States the right to object to individual Scholarship awards will not increase its ability to block state aid to racially segregated private schools. The United States already has, through the existing *Brumfield* certification process, the right to object to *any* State aid (including but not limited to Scholarship awards) flowing to any private school that it believes discriminates or segregates on the basis of race. The additional right to object to individual Scholarships to private schools that are *Brumfield*-certified as non-discriminatory simply does not advance the purpose of the injunction or this lawsuit. And information concerning the race or other characteristics of the students who have selected a particular private school tells the United States nothing about whether that school discriminates.

Although the United States has provided few details on the criteria it will employ in deciding which Scholarship awards to permit and which to challenge, there is no reason to believe that it will limit its objections to circumstances where it believes that the participating private school is segregated. After all, if the United States thought that a particular participating private school discriminated, it would hardly limit its response to objecting to some Scholarship awards. Surely, it would instead object to the continued *Brumfield*-certification of the school so as to cut off *all* State aid.

The United States' initial motion papers confirm that its objections will not turn on whether the participating private school discriminates, but will instead focus on the demographic

impact on the *public* schools that Scholarship children would otherwise attend. The United States highlighted Scholarship awards granted for the 2012-13 school year to six black children from Cecilia Primary School in St. Martin Parish and six white children from Independence Elementary School in Tangipahoa Parish. United States' Memorandum in Support of its Motion for Further Relief, Doc. No. 203-1 at 6 n.8; *see also* State Mem. at 33. The United States' objection had nothing to do with the private schools selected by those families. Rather, the United States apparently wanted to force those children to remain at their respective failing schools over their parents' objections because their departure changed those public schools' racial composition (albeit by less than one percentage point). *See* State Mem. at 33. If those children had been of a different race, the United States presumably would not have objected as their departure would have moved the racial composition of the schools a hair closer to district-wide demographics.

In its more recent filing, the United States indicated, for the first time, that it might object to scholarship awards based on the racial composition of the *private* school for which the scholarship is designated. U.S. Mem. Re Expert Analysis at 3. It would object, however, *not* because the racial composition provides evidence of discrimination, but merely because the recipient's race might be overrepresented (based on district demographics) at the private school that he or she attends. *See id.* ("[T]he United States did not file objections with this Court regarding the certifications of these Voucher Schools for the 2013-14 school year and is raising no legal objections to the assignment of students to these Voucher Schools at this time . . . ."). Although the Scholarship program was designed to enable parents to select the best school for their children, the United States suggests that the State should override the families' choices and "take account of the racial composition of the Voucher Schools as it funds and assigns students

to these schools through the Voucher Program." *Id*. This new proposal is premised on the mistaken notion that the State "assigns" students to schools. The State lacks the authority to assign students to any school on any basis. *See* Second Declaration of John White at ¶ 12. The most the State can do is to make a Scholarship offer, which the family may accept or reject at will, *supra* at 4, 7, and the State certainly may not alter that offer based on the student's race, *see* LA. REV. STAT. ANN. § 17:4013. More critically, the United States' proposal would fundamentally change the nature of the program, from one in which parents are empowered to choose the best education for their children to one in which the State is moving children between schools, even against their families' expressed preferences, in order to achieve a desired racial balance.

Whether the United States focuses on the racial composition of the failing public schools the applicants seek to escape or the racial composition of the private schools they wish to attend, it is inevitable the vast majority of the race-based challenges the United States would mount to individual Scholarship awards will be directed against black families. During the 2012-13 school year, over 90 percent of scholarship recipients come from minority families, and in 2013-14, over 85 percent are African American. Declaration of John White, Doc. No. 236-1 at ¶ 13. The State strongly believes that it is equally wrong to block Scholarship awards to eligible children of other races, but there is a special irony in the fact that the United States would inflict this harm on so many black children and families, all in the name of *Brown v. Board of Education*. To put the United States' position in context, consider a typical case – a low-income black student who attends a failing public school at which the black student population is slightly below the district average and who seeks to attend a private school at which the black student population is slightly above the district average. The United States would apparently require the

State to override her parents' choice, leaving two potential less desirable outcomes. At best, she might receive a scholarship to a different private school, but that would mean she could not attend the private school her family selected for any number of reasons the United States cannot possibly take into account during its proposed review – because the preferred school's location enables her parents to pick her up after school each day, because it performs better in areas of study of particular interest to the student, because its educational philosophy reinforces values her family shares, because more children in her community attend the preferred school, providing a stronger support network. At worst, she might be relegated to the failing public school her parents sought to escape.

True enough, the United States *could* object to individual Scholarship awards if those awards were used to fund discriminatory private schools, but that standard would not require a case-by-case review of each award. Instead, following the existing process, the United States could object to *Brumfield* certification of the private school when it reviews the applications and annual compliance reports for participating schools. If the State agreed, or this Court determined, that the private school was in fact discriminatory, it would follow, under the existing orders and State law, that the State would disqualify the school from participation in the Scholarship program.

B. The United States' Process Is Inconsistent with the Court's Ruling that Any Modification Must Not Disrupt the Voucher Program Unreasonably.

If the State were compelled to adopt the process the United States has proposed, it would severely cripple, if not destroy, the Scholarship program. Second Declaration of John White at ¶ 16. Two features of the proposal are especially disruptive: the provision for advance review of individual Scholarship awards before they are issued to families, and the forty-five day delay the

United States would build into the existing schedule to accommodate its review of individual Scholarship awards. The State has designed a schedule that gives parents the most opportunity to provide the best education for their children. By building in months of uncertainty and eliminating the second round lottery, the United States' plan would severely undermine the core purpose of the Scholarship program.

The most fundamental problem with the United States' proposal is that it purports to give the United States authority to review Scholarship awards. The only purpose of this review period is to provide the United States with the opportunity to object to awards it does not like. The State cannot accede to any process that would give the United States an opportunity to object to Scholarship awards – regardless of the timeframe for the objection, and regardless of whether the State is permitted to notify parents in advance. Whatever criteria the United States applies to examine these awards, the State will *never* voluntarily accede to depriving an eligible child of an award that child receives through the lottery to attend an eligible participating school (and certainly not on account of that child's race). Consequently, *every* objection will lead to litigation, and it is unrealistic to think that such litigation can be resolved in time for that child to enjoy the benefit of his or her scholarship in the upcoming school year, much less in time for the family and school to prepare for the year. And even if it were possible to litigate Scholarship objections prior to the start of the school year, the uncertainty that would inevitably flow from such litigation would undoubtedly have a significant negative impact on the families and schools participating in the program.

In addition to this fundamental flaw, the schedule that the United States seeks to impose is utterly inconsistent with the timeline the Department of Education has adopted to provide families with the most opportunity to choose the best education for their children. As described

above, the Department's schedule consists of two rounds of applications. Second Declaration of John White at ¶ 3. The first round applications are submitted between January 13 and February 28. *Id.* at ¶ 5. During March, the Department conducts the lottery to determine which students will receive scholarships to one of the schools they have chosen. *Id.* at ¶ 9. On April 7, families will be notified of scholarship awards, and one week later the period for Round 2 applications begins. *Id.* During April and May, the Department conducts the second lottery, and award notifications are sent during the week of June 1. *Id.* at ¶ 10.

The schedule the Department has developed has two primary virtues. First, final round Scholarship awards go out in early June. A June completion date leaves the families time to prepare for the school year – for example, by buying uniforms and participating in summer reading programs, or making alternate educational arrangements if they did not receive a scholarship. *Id.* at ¶ 14. The Department also has time to work with families and schools to promote sibling unification, and to extend scholarship offers to students on the waiting list as families relinquish their awards. *Id.* And although the June completion date is later than the date when many private schools finalize their enrollment, schools have time to make staffing decisions and to determine whether or not they need to hold Scholarship seats open or fill them with tuition-paying students. *Id.*[10]

[10] These advantages became all the more apparent after the State tried to run three rounds of lotteries for the 2013-14 Scholarship program. Families participating in the third round did not receive their award notifications until early August. Perry Aff., Doc. No. 206-1 at ¶ 9. The State received extensive feedback from schools and families that this late notification date did not leave them enough time to prepare for the school year. This information prompted the State and OneApp to decide to run only two rounds in the coming year. Second Declaration of John White at ¶ 14.

The second benefit of the schedule is that it provides for two rounds of Scholarship awards. Extra rounds are especially beneficial to families, who may have missed the initial application deadline for the first round because it happens so early (January 13-February 28), or who may not have decided whether they wish to leave their current school, or who may have an experience in the second half of the school year that changed their mind. *Id.* at ¶ 15. Moreover, first round applicants who did not get a placement or who are unhappy with the school placement they received in the first round get the opportunity to try again. *Id.* Finally, because some first round awardees give up their seats before the second round, seats open up for second round applicants. Simply put, more families end up happier after the second round. *Id.* A second round benefits schools, too. Due to the way preference ranking works, some schools end up with open seats after the first round. *Id.* Those seats may be filled by students who did not receive scholarships the first round or who changed their mind about their preferences. *Id.* In short, having two rounds leads to a more efficient allocation of seats: fewer seats are left open, fewer families end up with scholarships they do not want, and fewer families end up without scholarships they do want. *Id.*

There is no doubt that the forty-five-day review period the United States seeks would completely change the schedule the Department has developed, eliminating the benefits the schedule offers to families and schools. It would be impossible for the Department to complete two rounds of awards before the start of the school year, as adding forty-five days to each round would result in families receiving their award notifications for the second round on August 30. *Id.* at ¶ 16. (School start dates for the 2014-15 school year will range from early August to early September. *Id.* at ¶ 14.) Moreover, the proposed review period would almost certainly end the coordination between the statewide application process and the Orleans Parish application

process. The Orleans Parish application schedule is the result of complicated negotiations between numerous government entities and is, at least in part, dictated by administrative regulation and orders issued in *Berry v. Pastorek*, No. 10-4049 (E.D. La.) (Zainey, J.), addressing special education in the Orleans Parish school district. Second Declaration of John White at ¶ 13.

These disruptions seriously undermine the purposes of the Scholarship program. The number of applicants to the statewide program would be substantially reduced because of the loss of the second round. The loss of the second round would also make it less likely that students receive scholarships to attend their preferred private schools. Orleans Parish almost certainly would not be able to change its schedule, and as a result, Orleans Parish families wishing to wait for the results of the statewide lottery would be forced to risk a less desirable public school placement, if they do not receive a Scholarship award. *Id.* And the United States' review would leave all concerned – families, schools, and the Department – in a state of uncertainty over the summer as everyone waited for the United States to decide which scholarships it would challenge.

The proposal unreasonably disrupts the program because the burdens it imposes are unnecessary. The United States claims that advance review of awards ensures that it receives the information it requires in a "timely manner" so that it can avoid "disrupt[ing] the educational process for students who may be going to the voucher schools." 11/22/13 Tr. at 10:16-21. But this advantage is illusory; litigation over any objection seeking to deprive an eligible child of an award that child received through the lottery will disrupt the educational process for affected families even in the unlikely event that it could be completed before the start of the upcoming school year. While the United States has also asked the Court to prohibit the State from

notifying families of Scholarship awards during the period of the time during which would be permitted to object to such awards, that does not minimize the disruption to families, but rather leaves them in complete ignorance as to the status of their Scholarship application. It is hard to understand what purpose is served by this suggestion other than shielding the United States from criticism from families when it decides to object to certain awards.

Ultimately, the United States presents a false dichotomy between receiving "timely information" from the State and "disrupt[ing] the educational process." The United States presents two scenarios: it receives information about the awards before the school year begins and "works out" its concerns over the summer, or it receives information about the awards after the school year begins and then attempts to force the State to revoke the awards the United States does not like (presumably based on the race of the recipients). The United States ignores a third, much less disruptive choice: it could retrospectively review three years of data concerning the impact of the Scholarship program on public schools, and then, if that data reveals constitutional problems that justify relief, the State could implement appropriate reforms to the program rather than revoking individual awards. The State's proposal in this regard would "satisfy the concerns" the United States raises, 11/22/13 Tr. at 50:24-25, without requiring fundamental changes to the Scholarship program at the expense of families with children in failing schools, and without depriving eligible children of Scholarship awards to which they are entitled.

C. The United States' Proposed Process Would Impose Onerous Practical Burdens on the State and Violate Settled Principles of Federalism.

The United States' proposal is inconsistent with the principles the Supreme Court has established for determining whether a modification "is suitably tailored to the changed circumstance," *Rufo*, 502 U.S. at 391, because it imposes onerous, costly, and, in some cases,

impossible burdens on State officials, all without regard to principles of federalism. The Court explained that "the public interest and considerations based on the allocation of powers within our federal system require that the district court defer to local government administrators, who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Id.* at 392 (internal quotation marks and alteration omitted). When considering proposed additional relief that impinges upon the operation of a State program, the public interest dictates that the Court be sensitive to practical realities that make compliance onerous. *Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004); *Rufo*, 502 U.S. at 392-93. As explained above, any requirement that would introduce Department of Justice oversight or regulation to the State's process for awarding individual Scholarships would violate these norms.

In addition, the United States' proposal includes some demands the State simply cannot fulfill. As the State has repeatedly explained to counsel for the United States, the State has neither the legal authority nor the resources to maintain records on which public school a Scholarship student would have attended in the coming year absent the Scholarship award, Second Declaration of John White at ¶ 7, making it impossible to provide that information for each applicant, as the United States has requested.[11] Individual school districts manage public school assignments, and obtaining and maintaining up-to-date information on these assignments

[11] In its impact analyses, the State relied on the student's prior enrollment as a proxy for current year public school assignments. Declaration of Christine Rossell, Exhibit A, Doc. 236-2 at 3-4; Supp. Declaration of Christine Rossell, Exhibit A, Doc. 242-1, at 5. Prior enrollment becomes a less reliable proxy the longer a student participates in the program, and it provides no information at all for students who began kindergarten in the Scholarship program. To the extent that the United States considers the student's public school assignment to be relevant to this case, which the State denies, State Mem. at 15-16, 20-21 n. 6, the United States is free to request it from the school districts.

would be a monumental undertaking for the State. *Id.* Over 530 schools are located in parishes under desegregation orders alone. *Id.* In these districts, the feeding patterns are constantly changing as residential patterns and demographics shift. *Id.* School districts are not required by law to provide assignment information to the State, *id.*, and so the United States is no less capable of attaining this information than the State is. If anything, the United States is better positioned than the State, as it is a party to twenty-two of the desegregation cases in Louisiana in which public school assignments remain relevant. *See* U.S. Reply at 15 n.13. Instead of expanding this case to include matters outside the scope of the *Brumfield* injunction, the United States should seek the information it desires from the entities responsible for creating and maintaining that information – the school districts themselves.

Even the information the State regularly gathers is not available by the deadlines the United States has asked the Court to impose. As the State has previously explained, *see* Declaration of Kim Nesmith, Doc. No. 216-2 at ¶¶ 5-9, the State cannot provide the October 1 public school enrollment data by October 20, as requested by the United States, *see* U.S. Reply at 20. The deadline for school districts to provide this data to the Department of Education is October 31. Declaration of Kim Nesmith, Doc. No. 216-2 at ¶ 5. Both because some school districts miss the deadline and because the Department must conduct quality control and validation procedures to eliminate to the extent possible the human and technological errors that inevitably are introduced into the data during this process, the Department does not ordinarily have quality-controlled data on the racial composition of the relevant public schools until sometime between mid-November and late December. *Id.* at ¶ 9. In order to complete the quality control process by the deadline the United States proposes, the State would have to

impose a much earlier reporting deadline on the school districts, resulting in less accurate data and a significant burden on the districts. *See id.* at ¶ 5.

In addition to imposing difficult, if not impossible, practical burdens on the State, the United States' proposal raises serious federalism concerns. There is no basis for requiring the State to prepare an expert impact analysis for the United States. *But see* U.S. Reply at 20 (requesting that the Court order the State to do so). To the extent the United States believes that such an analysis is necessary to carry out its enforcement obligation, it must bear that burden itself. Both the Federal Rules of Civil Procedure and the Constitution prohibit the United States from foisting this burden off onto the State's shoulders. No party to civil litigation is obliged to manipulate and analyze data for its opponent; rather, parties' discovery obligations are limited to producing information in the party's possession in the form in which it is maintained. *See* FED. R. CIV. P. 34(b)(2)(E)(i) ("A party must produce documents as they are kept in the usual course of business . . . .").[12]

And the Constitution prohibits the federal government from conscripting the State into service to assist in the enforcement of federal law. *See Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address

[12] *Sanders v. Levy*, 558 F.2d 636, 642 n.7 (2d Cir 1976) (explaining that Rule 34 does not provide for "the sorting or analysis of . . . data"), *rev'd on other grounds*, *sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *see Sanders*, 558 F.2d at 642 ("Under [Rule 33], a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery."); *see also Barnes v. District of Columbia*, 281 F.R.D. 53, 55-56 (D.D.C. 2012) (noting that "ordering a party . . . to perform analyses it hasn't yet performed is somewhat unusual"); *United States v. Mobil Corp.*, 499 F. Supp. 479, 482 (N.D. Tex. 1980) (declining to allow the United States "to require an employer to do that which the government could with equal ease do for itself" – namely, "manipulat[e] data in existing records"); 8B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2174 (3d ed.) ("[A] party cannot ordinarily be forced to prepare its opponent's case.").

particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); *see also City of Abilene v. EPA*, 325 F.3d 657, 661-62 (5th Cir. 2003) (citing *Printz*); *AT&T Commc'ns v. BellSouth Telecomm., Inc.*, 238 F.3d 636, 658 (5th Cir. 2001) ("[T]he conscription of state officials to execute federal regulatory programs . . . diminishes the accountability of state and federal officials and thereby violates constitutional principles of federalism." (internal quotation marks and alterations omitted)). Thus, while the State may not violate the Constitution and must comply with the orders of the Court, it has no obligation to carry out the United States' monitoring responsibilities on the United States' behalf. *Printz*, 521 U.S. at 907.

Moreover, in order to grant the relief requested by the United States, the Court would have to override a state statute that vests the Department with discretion to develop a time line for awarding scholarships. LA. REV. STAT. ANN. § 17:4015(4). It would have to strip the Department of its discretionary authority to implement the process that it has determined would best achieve the objectives of the program. And it would have to do so even though the United States has disavowed both its challenge to the Scholarship program itself, *see* 11/22/13 Tr. at 4:7-10, and any allegation that the State has violated federal law or the Court's orders. *See id.* at 10:23-25; U.S. Mem. Re Expert Analysis at 1-3. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." (citation omitted)).

In short, even if the implementation of the Scholarship program could be deemed to be a change in circumstances justifying modification of the injunction in this case, the United States' proposal is not "suitably tailored" to that change. *See Rufo*, 502 U.S. at 391. It is largely

preoccupied with the impact of the Scholarship program on public schools, rather than with the *Brumfield* credentials of participating private schools. It threatens to alter fundamentally the Scholarship program by stripping parents of the right to decide for themselves which school would be best for their children. And it imposes burdens on the State that raise both daunting practical problems and serious federalism concerns.

IV. THE COURT SHOULD TERMINATE THIS CASE IF THE UNITED STATES IS UNABLE TO PROVE A VIOLATION OF THE LAW AFTER IT HAS RECEIVED INFORMATION FOR THE NEXT SCHOOL YEAR.

At the November 22 hearing, this Court pointed out that there have been no objections to the State's compliance with its detailed obligations under the Court's orders for over thirty years. *See* 11/22/13 Tr. at 26:19-27:6. The United States has conceded that the State is currently in full compliance with the Court's orders, and there is no evidence that the State's management of the Scholarship program has jeopardized its unbroken record of compliance. *Id.* at 7:12, 15-16. In light of this record, the State respectfully submits that if the United States is not able to demonstrate any violation of federal law or the Court's orders after it has been provided with three years of data since the Scholarship program has been in effect – to say nothing of the four decades of data on the non-discriminatory record of the private schools receiving State aid – this Court should vacate all outstanding injunctive relief against the State and dismiss this case. *See id.* at 51:17-19 (Court's statement that an orderly end to the litigation would be appropriate "at some point").

An injunction must be terminated or modified if its continued enforcement is contrary to the public interest. FED. R. CIV. P. 60(b)(5). In the context of institutional reform litigation, injunctive relief necessarily disrupts the allocation of powers between the federal and state governments. While federal court management of state operations has been sustained where

necessary to vindicate federal law, that state of affairs was always meant to be exceptional and temporary. Thus, continued enforcement is always contrary to public interest once a durable remedy has been implemented. There has been no ongoing violation of federal law in this case for nearly four decades. If the United States is unable to identify such a violation, control of private school funding should be returned to the State.

A. Injunctive Relief in Institutional Reform Litigation Should Not Continue Indefinitely Because Principles of Federalism Require Federal Courts To Return Control to the State Once a Durable Remedy Has Been Implemented.

Rule 60(b)(5) empowers courts to "relieve a party or its legal representative from a final judgment, order, or proceeding [if] . . . applying it prospectively is no longer equitable." FED. R. CIV. P. 60(b)(5). The Supreme Court has explained that "Rule 60(b)(5) serves a particularly important function in . . . 'institutional reform litigation.' " *Horne v. Flores*, 557 U.S. 433, 447 (2009). Institutional reform litigation is characterized by detailed decrees, which often "requir[e] the state officials to take some steps that the [federal law] does not specifically require." *Frazar v. Ladd*, 457 F.3d 432, 439 (5th Cir. 2006) (quoting *Frew v. Hawkins*, 401 F. Supp. 2d 619, 634-35 (E.D. Tex. 2005)); *see also Horne*, 557 U.S. at 448 (observing that decrees sometimes "go well beyond what is required by federal law"). Rule 60(b)(5) enables courts to ensure that decrees with no sunset provision do not outlive their usefulness, "improperly depriv[ing] future officials of their designated legislative and executive powers." *Frew v. Hawkins*, 540 U.S. 431, 441 (2004). Unless subject to termination, institutional reform decrees "lead to federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Id.*

Long-term federal court supervision is inconsistent with "the allocation of powers within our federal system." *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248

(1991). State governance promotes expertise, innovation, and democratic accountability. "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities." *Frew*, 540 U.S. at 442. These officials require the leeway to exercise that competence, because, while "[t]he basic obligations of federal law may remain the same," there is more than one way to discharge them. *Id*. Additionally, the obligations of federal law captured in federal court decrees exist in tandem with other demands of governance, requiring an exercise of discretion to allocate resources among competing obligations and policy goals. *See Horne*, 557 U.S. at 447-48. In selecting among different means of complying with federal duties, states "depend[] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442. Long-standing or inflexible decrees inhibit this process. *Horne*, 557 U.S. at 449 ("Injunctions of this sort bind state and local officials to the policy preferences of their predecessors . . . .").

The effect of long-term federal court supervision is especially harmful in the context of education. Education is a traditional "core state responsibility." *Horne*, 557 U.S. at 448. "Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Dowell*, 498 U.S. at 248; *see also Milliken v. Bradley* ("*Milliken I*"), 418 U.S. 717, 741-42 (1974). Accordingly, the Supreme Court has exhorted district courts to be vigilant to ensure that decrees directed at state administration of education are not "aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Milliken v. Bradley* ("*Milliken II*"), 433 U.S. 267, 282 (1977). This vigilance includes a duty to ensure that decrees do not outlive their

usefulness. *Dowell*, 498 U.S. at 249 (Courts must not "condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future.").

Specifically, "[t]he federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Frew*, 540 U.S. at 442. The Supreme Court reaffirmed this principle most recently in *Horne*, holding that continued enforcement of institutional reform decrees is always in some measure "detrimental to the public interest," due to its effects on the allocation of power in our federalized system of government. *See Horne*, 557 U.S. at 453 (quoting *Rufo*, 502 U.S. at 384).

Critically, *Horne* clarified that the objects of the decree" may not extend beyond ensuring compliance with the Constitution and redressing past noncompliance. *Id*. at 450; *see also Dowell*, 498 U.S. at 248 ("Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." (internal quotation marks omitted)). The High Court criticized the Court of Appeals for "concern[ing] itself only with determining whether [the State's program] complied with the original declaratory judgment order," rather than "inquiring broadly into whether changed conditions in [the school district] provided evidence of an [English Language Learner] program that complied with [the governing federal statute]." *Horne*, 557 U.S. at 451. In short, once the State violation of federal law (in this case, State aid to segregated private schools in the 1970s) has been eradicated, a durable remedy has been implemented, and the only proper course is to return control to the State. *Id*. at 450.

B. In View of the State's Decades Long Record of Compliance and in the Absence of Any Evidence of a Current Violation of Federal Law or the Injunction, Continued Enforcement of the Injunctive Relief Is Inequitable.

The State has complied in good faith with the decrees that have issued in this case and will continue to abide by its Fourteenth Amendment obligation to refuse aid to private schools that discriminate on the basis of race. While the Court "need not accept at face value the profession of" the subject of the decree that it will remain in compliance with federal law in the future, *Dowell*, 498 U.S. at 249, mere speculation that a complying party will default on its obligations as soon as the decree is lifted should not prevent the Court from providing the relief to which the party is otherwise entitled. *See, e.g.*, *John B. v. Emkes*, 710 F.3d 394, 413 (6th Cir 2013). Instead, the Supreme Court has explained that "the . . . passage of time enables the District Court to observe the good faith of" the defendant "in complying with the decree." *Dowell*, 498 U.S. at 249. This good faith compliance, in turn, must inform the district court's decision on a request to dissolve the decree. *Id.* When the district court is satisfied that "the state has achieved compliance with the federal-law provisions whose violation the decree sought to remedy" and that "the State would continue that compliance in the absence of continued judicial supervision," it must terminate the decree. *John B.*, 710 F.3d at 412.

The State has a multi-decade record of compliance with the decrees in this case, compelling the conclusion that a durable remedy has been implemented. The State immediately implemented the certification procedure described in the 1975 Order to ensure that all schools receiving aid going forward did not discriminate on the basis of race and that schools that continued to discriminate would return resources provided by the State. Since at least 1977, the State has complied with the Court's directions to continue the certification process for all new applicants for state funding. *See* Minute Entry, Mar. 30, 1977, Doc. No. 136. And consistent

with the 1985 Consent Decree, the State has monitored state-supported private schools to ensure continued eligibility. Although in the early years of this case, the United States and the State occasionally disagreed about whether certain private schools qualified for state aid, the parties complied with the terms of the order by submitting those disputes to the Court. And since 1981, the Plaintiffs have never even found occasion to seek review of the State's individual *Brumfield* certification decisions, much less to challenge the State's compliance with review and reporting procedures.

To the extent the United States believes that the implementation of the Scholarship program may give rise to cause for concern, by this time next year, the State will have provided information reflecting the impact the program has had over three school years. After two years of operation, the United States' expert acknowledges that only fifteen public schools in desegregation districts have experienced a change in racial composition that takes them away from the district average – and even then, only by one or two percentage points. Expert Report of Erika Frankenburg, Doc. No. 248-2 at 8-9. If the United States cannot prove a violation of federal law after three years, continued federal judicial supervision of the State's program will not be justified. If three years of scrutiny – coming on the heels of four decades of compliance with the Court's orders – do not reveal a violation of the law, it will be clear that a durable remedy is in place.

Finally, in addition to this record, the nature of the constitutional obligation should satisfy the Court that the State will continue to comply with that obligation in the absence of court supervision. After this suit was filed in the early 1970s, the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), definitively established that States may not provide aid to private schools that engage in racial discrimination. As the docket in this case

demonstrates, this unambiguous rule does not require explication or step-by-step implementation by a court. The U.S. Constitution itself is enough to secure ongoing compliance.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court reconsider its decision to modify existing relief in this case. In the alternative, the State respectfully requests that this Court adopt the process proposed by the State in Part II. And in either event, the State respectfully submits that the Court should hold that unless the United States can demonstrate a violation of federal law or the Constitution following receipt of information concerning implementation of the Scholarship program in the 2014-15 school year, all outstanding injunctive relief will be vacated and the case dismissed.

January 7, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 7th day of January, 2014, that the foregoing Defendants' Memorandum in Opposition to the United States' Motion for Further Relief was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing to all counsel.

s/ Michael W. Kirk