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

OLESS BRUMFIELD, et al.,

Plaintiffs,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

WILLIAM J. DODD SUPERINTENDENT OF PUBLIC EDUCATION, et al.,

Defendants,

and

LAKISHA FUSELIER, in her own behalf and as natural guardian of her children, ALBERT FUSELIER, LAKIA FUSELIER, and LAKINDRA HARRIS; MITZI DILLON and TITUS DILLON, in their own behalves and as natural guardians of their children, TAYLOR DILLON and TITUS DILLON; MARY ELDER, in her own behalf and as guardian of KAYDEN CAMBRE and PRYSTYN CAMBRE; and MICHAEL LEMANE, in his own behalf and as natural guardian of his children MICHELLE LEMANE and ABIGAIL LEMANE; and LOUISIANA BLACK ALLIANCE FOR EDUCATIONAL OPTIONS,

Applicant-Intervenors.

Civ. A. No. 71-1316

Judge Ivan L. R. Lemelle
Magistrate Judge Joseph C. Wilkinson Jr.

BRIEF AND MEMORANDUM OF POINTS AND AUTHORITIES OF SCHOLARSHIP FAMILIES ON QUESTIONS POSED IN THIS COURT'S SEPTEMBER 18, 2013 ORDER

Lakisha Fuselier, Mitzi Dillon, Titus Dillon, Mary Elder, and Michael Lemane, on behalf of themselves and the children for whom they are guardians, along with the Louisiana Black Alliance for Educational Options, on behalf of itself and its member families across the State of Louisiana (collectively, "Scholarship Families"), submit this brief in response to the questions presented by the Court in its September 18, 2013 Order.

I. RIGHTS ASSERTED BY SCHOLARSHIP FAMILIES

On May 17, 1954, the United States Supreme Court made a sacred vow that educational opportunity, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The road since then has been long, painful, and circuitous. As this Court well knows, an important part of that road has entailed the continuing effort to eliminate the vestiges of a segregated school system.

But for thousands of Louisiana schoolchildren, the overwhelming majority of them black, the promise of *Brown* was not fulfilled until the enactment of the Student Scholarships for Educational Excellence Program, La. Rev. Stat. Ann. §§ 17:4011-4025 ("Scholarship Program"). Under the program, students are eligible for full-tuition scholarships for participating private or public schools if their family income is below 250 percent of the federal poverty level and they are entering Kindergarten or were enrolled in public schools receiving grades of "C," "D," or "F" from the State (with preference for students who were attending "D" or "F"-graded

schools).[1] In other words, by definition, the scholarships provide opportunities to economically disadvantaged children to leave poor-performing schools and instead choose educational opportunities that otherwise would be unavailable to them. For those children, the scholarships and the opportunities they yield fulfill the promise of *Brown*, which recognized that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* at 493.

In its initial Memorandum in Support of Its Motion for Further Relief (Pl.-Intervenor's Mem. in Support Mot. Further Relief 1), the United States asked this Court "to permanently enjoin the State of Louisiana . . . from awarding any school vouchers . . . to students attending school in districts operating under federal desegregation orders unless and until the State receives authorization from the appropriate federal court overseeing the applicable desegregation case." It goes on to state that at least 22 school districts with ongoing desegregation decrees have students receiving scholarships (Pl.-Intervenor's Mem. in Support Mot. Further Relief 1-2). The requested relief would paralyze the Scholarship Program for hundreds if not thousands of its participants.

The United States now asserts that it seeks more modest relief (Pl.-Intervenor's Supp. to Mot. Further Relief 1-2), but it has not withdrawn its original motion. The relief now sought is amorphous, including "an annual, orderly process for reviewing implementation of the State's

[1] The State reports that more than 90 percent of the children receiving scholarships are minority. See Press Release, Office of the Governor, State of Louisiana (Sept. 5, 2013), http://www.gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&catID=2&articleID=4231&navID=3. Unsurprisingly, a recent report found that the scholarship program has positive effects on racial integration. Anna J. Egglite and Jonathan M. Mills, "The Louisiana Scholarship Program: Contrary to Justice Department Claims, Student Transfers Improve Racial Integration," *Education Next* (Winter 2014), http://educationnext.org/the-louisiana-scholarship-program/.

voucher program under the desegregation order in this case" (Pl.-Intervenor's Supp. to Mot. Further Relief 2). Especially given that the United States repeatedly (and erroneously) insists that "the state voucher law itself recognizes in providing that the Program is 'subject to any court-ordered desegregation plan in effect for the school system in which the public school is located' " (Pl.-Intervenor's Resp. Mot. to Intervene 5), we hope that the Court will excuse the Scholarship Families' deep skepticism that these proceedings will not result in harm to their children's educational opportunities. For that reason, the Scholarship Families sought to participate in this case to argue that the program is not subject to this Court's jurisdiction.

In addition to the right to equal educational opportunities protected by *Brown*, the Scholarship Families have a well-established right to direct the education of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 64 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). Because any interference by the federal government with this program would injure the families' rights, they have standing to assert federalism interests under the Tenth Amendment. *Bond v. U.S.*, 131 S.Ct. 2355, 2363-64 (2011). As the unanimous Court observed, "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* at 2364. That is exactly what the State of Louisiana did in enacting the Scholarship Program. The Court went on to add, "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions," so that it thereby "protects the liberty of the individual against arbitrary power." *Id.* Those are the constitutional principles that

should guide this Court's consideration of the two questions it has posed.

II. RESPONSES TO THE COURT'S QUESTIONS

A. Does the desegregation order issued in *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975) apply to the State of Louisiana's Student Scholarships for Education Excellence Program ("Voucher Program") so as to require the State to obtain authorization from the Court prior to implementation?

No. The terms of the Court's ruling and subsequent orders do not encompass the Scholarship Program, and it would be manifestly improper for the Court to subject the program to prior judicial authorization even if they did.

1. The Scope of *Brumfield*.

Nearly 40 years ago, black students attending Louisiana public schools brought a civil rights lawsuit challenging a statutory scheme whereby the state provided books, school materials, and student transportation funds to certain schools, including private schools that were "created for the specific purpose of avoiding racial integration of the public schools." *Brumfield v. Dodd*, 405 F. Supp. 338, 347 (E.D. La. 1975). The Court enjoined the State and named parishes from providing any "assistance . . . to any racially discriminatory private school or to any racially segregated private school." *Id.* at 349. But rather than enjoin the aid program altogether, the Court established a certification procedure in which any private school wishing to receive assistance had to provide, *inter alia*, statistics on its racial composition to the Louisiana Department of Education in order to determine the school's eligibility (what we shall refer to as *Brumfield* certification). *Id.* at 349.

A subsequent order in 1977 gave the Justice Department authority to review and

challenge *Brumfield* certifications. *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), Minute Entry, Mar. 25, 1977. In 1985, the Court approved a consent decree that required the State to "provide the Department of Justice and private plaintiffs within 60 days of the end of the appropriate fiscal year a list by category of all monies provided to each private school." *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), Consent Decree, Jun. 10, 1985 ¶ 7. Additionally, the decree provided that the State "will not provide any monies or assistance to any private school which is the subject of any court order or injunction under which any local school district or parish or any other entity is enjoined from providing assistance to the private school because of reasons related to racial discrimination." *Id.* at ¶ 8.

The Scholarship Program itself makes two references to *Brumfield* and to desegregation decrees, respectively. La. Rev. Stat. § 17:4021(A) provides, "To be eligible to participate in the program, a nonpublic school shall meet all of the following criteria: . . . (2) Comply with the criteria set forth in *Brumfield, et al. v. Dodd, et al.* 425 F. Supp. 528." In other words, the only private schools that may participate are those that have satisfied the criteria for *Brumfield* certification. Because of that provision, there is no question that to the extent that *Brumfield* by its own terms applies to the Scholarship Program at all, the program on its face complies with it.

The second provision is one that the United States repeatedly mischaracterizes, contending that "the state voucher law itself recognizes in providing that the Program is 'subject to any court-ordered desegregation plan in effect for the school system in which the public school is located' " (Pl.-Intervenor's Resp. Mot. to Intervene 5). What La. Rev. Stat. § 17:4013(3) actually says is the following: " 'Participating school' means a nonpublic school that meets program requirements and seeks to enroll scholarship recipients pursuant to this Chapter

or a public school that meets program requirements and seeks to enroll scholarship recipients pursuant to this Chapter subject to any court-ordered desegregation plan in effect for the school system in which the public school is located." This provision does not subject the *program* to desegregation decrees; rather, it requires that *public schools* wishing to participate in the program remain subject to applicable desegregation decrees. Private schools, by contrast, are subject to the eligibility criteria set forth in §17:4021(A), including *Brumfield* certification. Unless and until the United States ceases its blatant mischaracterization of the statute, the threat of grievous harm to the Scholarship Families will continue.

Although the statute requires that private schools participating in the Scholarship Program must be *Brumfield*-certified, the Court's jurisdiction under *Brumfield* does not extend to this program, for multiple reasons. First and foremost, *Brumfield* dealt with a specific program that was "created for the specific purpose of avoiding racial integration of the public schools." *Brumfield*, 405 F. Supp. at 347. That program and the Scholarship Program are separate and distinct, and divided by a span of almost four decades. No showing has been made—indeed no claim has been made—that the Scholarship Program was "created for the specific purpose of avoiding racial integration of the public schools." Such a claim would be ludicrous on its face. For reasons that will be discussed more fully in the next section, this Court's orders may not be extended to a program that did not exist when the lawsuit was brought.

Nor do the orders in this case admit to an interpretation that would require future programs (such as the Scholarship Program) to be made subject to this Court's scrutiny, absent a new lawsuit challenging the constitutionality of the program. The Court's orders flow from an injunction against the State against providing "assistance . . . to any racially discriminatory

private school or to any racially segregated private school." *Id.* at 349. Because the Scholarship Program itself requires participating private schools to be *Brumfield*-certified, there can be no basis for the Court to "authorize" the program, as posed by the Court's question.

Indeed, the Scholarship Program differs markedly from the program at issue in *Brumfield* not only in its intent and its class of beneficiaries, but also in directing "assistance" not to schools but to students. That was the seminal inquiry presented to the Supreme Court in the context of a First Amendment establishment clause challenge to the Cleveland voucher program in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The Court observed that "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citations omitted). "Because the program ensured that parents were the ones to select a religious school as the best learning environment . . . the circuit between government and religion was broken." *Id.* at 652. The Court concluded that the Cleveland voucher program represented "true private choice" because it was "part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district." *Id.* at 653.

So too are the distinctions between the program at issue in *Brumfield* and the Scholarship Program of constitutional magnitude. The former was directed toward schools for the purpose of evading desegregation; the latter is directed toward parents, who may use the aid in any (*Brumfield*-compliant) schools that they wish, and was enacted for the purpose of delivering educational opportunities to children who need them. The United States can point to no order in

this case requiring or allowing the Court to authorize educational programs other than the one that was at issue, and such an order would be impermissible in any event. "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purpose of one of the parties to it." *U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971); *accord*, *Frew v. Hawkins*, 401 F. Supp.2d 619, 662 n.76 (E.D. Tex. 2005) (declining to rule on an issue raised by the parties because it was outside the scope of the consent decree). The Scholarship Program cannot be shoe-horned into a lawsuit and set of remedies that were triggered by, justified by, and limited to a very different program and set of circumstances.

2. Constitutional Constraints.

It would exceed this Court's judicial authority to subject the Scholarship Program to prior authorization or to its *Brumfield* orders. A court's equitable orders must be contoured to the nature and scope of the constitutional violation. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979). As the Supreme Court instructed in *Milliken v. Bradley*, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or flow from such a violation." 433 U.S. 267, 282 (1977).

Here, the only constitutional violation was found in a program adopted four decades ago. The present program does not "flow" from that program. The United States' position that this Court should impose remedies before the Scholarship Program has even been alleged to present a constitutional violation, much less so adjudicated, turns the principles of due process, federalism, and the equitable powers of the judiciary on their heads.

"Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has not been

adjudicated." *Rufo v. Inmates of Suffolk Cty. Jail*, 202 U.S. 367, 389 (1992). Courts must "ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law." *Horne v. Flores*, 557 U.S. 443, 454 (2009). Hence the questions posed by the Court are premature. The United States must place at issue the constitutionality of the Scholarship Program as a predicate to relief. *Cf. Hull v. Quitman Cty. Bd. of Educ.*, 1 F.3d 1450, 1453-55 (5th Cir. 1993) (injunction in desegregation case improper where decision to close school was not shown to be discriminatory). It has not remotely done so—and given the intent, design, and circumstances of the program, it would be absurd to do so. By skipping to the penalty without first demonstrating guilt, the United States inflicts damage upon state autonomy and the interests of economically and educationally disadvantaged Louisiana schoolchildren.

Any order subjecting the Scholarship Program to prior judicial authorization, or subjecting the State to reporting requirements beyond those already in effect in this case, would represent a vast expansion of this Court's orders. Such an expansion would conflict with clear Supreme Court precedents admonishing lower courts to return authority over education to local officials as soon as possible. *See, e.g.*, *Horne v. Flores*, 557 U.S. at 450-51 (concluding that the Court of Appeals erred by failing to apply "a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied"); *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (declaring that "local autonomy of school districts is a vital national tradition" and cautioning district courts to "restore state and local authorities to the control of a school system" once the constitutional injury has been remedied).

The point of the *Brumfield* litigation was to prevent implementation of a scheme to evade desegregation and to create a system to ensure that state assistance to private schools under the

challenged program would comply with the constitutional mandate of nondiscrimination. The creation of such a system and the paucity of disputes over the last quarter-century demonstrates that the goals of *Brumfield* have been accomplished. Indeed, the State's decision to incorporate the *Brumfield* certification process into the Scholarship Program is evidence of good faith, not a red flag. To use this as an opportunity to *expand* the Court's orders—to encompass an entirely new program, most of whose beneficiaries are also the intended beneficiaries of the *Brumfield* litigation—would directly conflict with the Supreme Court's repeated instruction to return governance of public education to state and local control.

Indeed, to the extent that changed circumstances warrant a modification of court orders, here they weigh in favor of narrowing the orders, not expanding them. Positive structural and management changes by state officials, for instance, constitute a relevant change in circumstances that weighs in favor of limiting an order's enforcement. *See Horne v. Flores*, 557 U.S. at 465-66. Where the state is no longer in violation of federal law and is taking "appropriate action" to ameliorate historic issues, continued enforcement of a consent decree is inappropriate under Fed. R. Civ. P. 60(b)(5). *Id.* at 469. Long-term compliance with a desegregation decree also justifies reduced judicial intervention. *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991). Moreover, as the Supreme Court instructed in *Freeman v. Pitts*, "The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith." 503 U.S. 467, 496 (1992). Here, the State's long-term compliance with the *Brumfield* certification process, its design of the Scholarship Program to encompass that process, and its vigorous action to redress educational inequality through the Scholarship Program, all combine to make the United States'

remedial demands untenable.

Arguments against expanding the Court's orders in this case have special resonance because "[i]f not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers. They may also lead to federal oversight of state programs for long periods of time even absent an ongoing violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004). The current executive and legislative branches should not be saddled and hamstrung by the conduct of their predecessors two generations removed.

The Supreme Court's recent decision in *Horne v. Flores* is very much on point. 557 U.S. 433. In 2000, a district court ruled that the State of Arizona was in violation of federal bilingual education requirements in a particular school district. The district court subsequently expanded relief statewide. In 2006, the Legislature enacted a new bilingual education law, and representatives of the State filed a Rule 60(b)(5) motion to modify the earlier court orders. The Supreme Court held that the lower courts had not applied the correct standards to determine whether circumstances had changed so as to justify modification of the court orders. The Court noted that "institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education." *Id.* at 448. "Where 'state and local officials . . . inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents,' they are constrained in their ability to fulfill their duties as democratically-elected officials." *Id.* at 449 (citation omitted). Accordingly, the district court should "apply a flexible standard that seeks to

return control to state and local officials as soon as a violation of federal law has been remedied." *Id.* at 450-51. Here, the situation is even more striking: whereas in *Horne v. Flores* only six years passed between the initial violation and the State's policy change, here nearly 40 years have passed. Circumstances have changed significantly, not least through the adoption of a Scholarship Program addressing the educational needs of children who were poorly served in public schools.

The Court separately addressed the district court's expansion of a district-wide remedy into a statewide remedy. The Court found that the plaintiffs did not explain how the court "could justify a statewide injunction when the only violation claimed or proven was limited to a single district." *Id.* at 470-71. Moreover, "[i]t is not even clear that the District Court had jurisdiction to issue a statewide injunction when it is not apparent that plaintiffs—a class of Nogales students and their parents—had standing to seek such relief." *Id.* at 471. Accordingly, the Court ordered that on remand, the district court "should vacate the injunction insofar as it extends beyond Nogales unless the court concludes that Arizona is violating the [federal law] on a statewide basis." *Id.* at 472.

Here, of course, the initial remedy was statewide. But like the plaintiffs in *Horne v. Flores*, the plaintiffs here are attempting to expand the remedy beyond its original contours—in this case, to a different program. The Court has no jurisdiction over this program. Absent proof that the Scholarship Program is itself unconstitutional, there is no basis for any orders whatsoever directed toward it.

Those principles were applied to a different context just last Term in another case that speaks to the Court's question. In *Shelby Cty., Ala. v. Holder*, the Court invalidated section 4 of

the Voting Rights Act, which identified certain state and local jurisdictions that were subject to "pre-clearance" of changes affecting voting under section 5 of the Act. 133 S.Ct. 2612 (2013). The original criteria had not changed (although they were expanded) since the Act was passed in 1965. "States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own"—much like the United States proposes forcing the State of Louisiana to do here. *Id.* at 2624. Though the Voting Rights Act section 4 provisions, intended to be temporary, initially were justified by the emergency of voter suppression in the targeted jurisdictions, the Court ruled that the justifications were diluted as the emergency receded. "The Federal Government does not . . . have a general right to review and veto state enactments before they go into effect." *Id.* at 2623. Observing that " 'current burdens' must be justified by 'current needs,' " the Court found instead that coverage under section 4 "is based on decades-old data and eradicated practices." *Id.* at 2627. Because Congress reauthorized the formula "based on 40-year old facts having no logical relation to the present day," the section exceeded the bounds of appropriate federal remedial power. *Id.* at 2629.

Were this Court to issue orders pertaining to the Scholarship Program, it too would be basing its jurisdiction on 40-year-old facts and eradicated practices. This program does not deserve to be placed in the *Brumfield* penalty box. It is of no consequence that the United States has retreated, for the moment, from its initial demands. This Court has *no* authority to require authorization of the Scholarship Program, or any procedures or conditions pertaining to its implementation.

B. If the desegregation order applies to the Program, is there any need to

amend existing orders to ensure a process of review of the Voucher Program or similar ones in the future?

As demonstrated in response to the prior question, the *Brumfield* orders do not apply to the Scholarship Program. Hence no occasion exists to amend those orders or to create a process of review of the Scholarship Program. That does not foreclose an appropriate action by the United States if it believes the Program is unconstitutional. But this case in its existing form is not the vehicle to address an educational reform program adopted by the State to provide educational opportunities to disadvantaged children.

Of course, the United States is free to pursue relief under the existing orders as they pertain to the program at issue in *Brumfield*, and the State is equally free to seek to lift or modify those orders. But the Scholarship Program is not properly before the Court. Because of the urgent importance of the educational opportunities made possible by that program, the Scholarship Families respectfully request that the Court deny all parts of the United States' motion that attempt to extend this Court's remedial authority to the Scholarship Program.

Respectfully submitted November 6, 2013 by:

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2013, a true and correct copy of the foregoing Brief was served on all counsel of record in the above-captioned matter by electronic means through the Court's ECF system.

/s/ Jonathan Riches
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