No. 13-31262

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OLESS BRUMFIELD, as next friend of Ervin Brumfield, Merita Brumfield, Preston Brumfield, and Alan Brumfield; JOHN DEMLY, Rev.; as next friend of Dorothy Ceasar, Mary Ceasar, and King Johnson Caesar; WOODROW W. WILEY, JR., as next friend of Donna Wiley, Pamela Wiley, and Woodrow W. Wiley, III; VERGIE DELORIS LEWIS, as next friend of Kerry Lynn Sims; ROBERT LEWIS, as next friend of Anthony Lewis and Anice Lewis; HARVEY JOHNSON, as next friend of Ricky Johnson; MOSES WILLIAMS, as next friend of James Lee Williams, Jesse Lee Williams, Brenda Fay Williams, Matra Lucille Williams, and Rhonda Renee Williams, on behalf of themselves and other similarly situated,

Plaintiffs - Appellees

and

UNITED STATES OF AMERICA,

Intervenor - Appellee,

v.

WILLIAM J. DODD, Superintendent of Public Education of the State of Louisiana; ET AL.,

Defendants,

and

MITZI DILLON; TITUS DILLON; MICHAEL LEMANE; LAKISHA FUSELIER; MARY EDLER; LOUISIANA BLACK ALLIANCE FOR EDUCATIONAL OPTIONS

Movants - Appellants.

APPELLANTS' OPENING BRIEF

On appeal from the U.S. District Court for the Eastern District of Louisiana

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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RECOMMENDATION ON ORAL ARGUMENT

In the interest of time, Appellants believe that the issue presented can be determined upon the record and that oral argument is not necessary. The parties' positions are clear and the record uncomplicated. *See* Fed. R. App. P. 34(a)(2)(C).

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the district court denying intervention in a civil case. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291. The notice of appeal was timely filed on December 5, 2013.

STATEMENT OF THE ISSUE

Did the district court err as a matter of law in denying intervention of parents whose children receive scholarships under the Louisiana Scholarship Program ("Scholarship Program") where the federal government seeks to impede implementation of the program?

STATEMENT OF THE CASE

Appellants are 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"). On September 30, 2013, Scholarship Families sought to intervene in this case to protect the educational options provided by the Scholarship Program from a motion filed by the United States that threatens to end or significantly disrupt the Scholarship Program. Scholarship Families appeal from a denial by the district court of their Motion to Intervene.

I. History of the Case

The underlying litigation in this case began nearly 40 years ago when black students attending public schools in Louisiana brought a civil rights lawsuit challenging a statute authorizing state officials to provide books, school materials, and student transportation funds to Louisiana schools. *Brumfield v. Dodd*, 405 F. Supp. 338, (E.D. La. 1975). The district 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. The court then established a certification procedure in which any private school wishing to receive assistance had to provide, *inter alia*, statistics on the racial composition of the school's students and faculty to the Louisiana Department of Education in order to determine the school's eligibility for state assistance under the challenged statute ("*Brumfield* certification"). *Id.*

Between 1975 and 1985, the district court entered several orders relating to the litigation, none of which are germane to this appeal. *See, e.g., Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), Amended Order, March 1, 1976; ROA.856-858; *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), Order and Judgment, April 19, 1976; ROA.859-860.

In 1985, the district court approved a consent decree that clarified and refined the *Brumfield* certification procedure. The consent 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." *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975), Consent Decree, Jun. 10, 1985 ¶ 8; ROA.997-998. The order also continued to require private schools seeking state assistance to submit an initial application and annual updates regarding the school's racial composition and non-discrimination policies. *Id.* at ¶ 3; ROA.995-996.

From 1985 to the present, the State has fully complied with the Consent Decree. There has been no allegation nor any finding by the district court that the State has ever violated the Consent Decree.

The *Brumfield* litigation is not technically a desegregation case, as this litigation was initiated when Plaintiffs challenged a state statute that provided textbooks, transportation, and other services to private schools, some of which were segregated. When there is state aid to private schools that the government has not shown are discriminatory, then federal judicial relief is not appropriate. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 470-471 (1975). The confusion over the nature of this case has colored the United States' actions and the trial court's perception of its jurisdiction, as described *infra*.

II. The Louisiana Scholarship Program

In 2012, the Louisiana Legislature enacted the Louisiana Scholarship Program ("Scholarship Program") to provide low income parents with children in failing schools financial resources to send their children to a school of the parents' choice. LA. REV. STAT. ANN. §§ 17:4011-4025. The program provides scholarships for Louisiana students whose family income is below 250 percent of the federal poverty level, and who are entering Kindergarten or were enrolled in public schools receiving a grade of "C," "D," or "F" from the State (with preference for students in "D" or "F"-rated schools), to attend eligible and participating private or public schools. *Id.* at § 17:4013(2), 17:4013(2)(b). The program is entirely race-neutral. *Id.*

Families wishing to participate in the Scholarship Program submit an application to the Louisiana Board of Education. ROA.745. Each family applying to the Scholarship Program ranks in order of preference up to five schools that the family would like their child to attend. ROA.981. The Louisiana Department of Education will then place student preferences into a computer program that runs a lottery algorithm to match students to available seats according to the preferences the families indicated. ROA.982-983. Scholarship awards are based on the results of this lottery, unless a narrow statutory preference applies; viz., Louisiana gives preference to students from D

and F schools, or to students who have a sibling at a participating school. LA. REV. STAT. ANN. § 17:4015(3)(b).

The Scholarship Program is open to both public and private schools. *Id.* at § 17:4013(3). A *private* school seeking to participate must "[c]omply with the criteria set forth in Brumfield, et al. v. Dodd, et al., 425 F. Supp. 528." *Id.* In other words, the only private schools that may participate are those that have satisfied the criteria for *Brumfield* certification; viz., participating private schools have been certified by the Louisiana Department of Education as non-discriminatory and their certification has not been challenged by the United States. Because of this 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.

A *public* school wishing to participate in the Scholarship Program, on the other hand, may only "enroll scholarship recipients . . . subject to any court-ordered desegregation plan in effect for the school system in which the school is located." *Id.* at § 17:4013(3). Significantly, the limitation regarding court-order desegregation plans applies only public schools *receiving* Scholarship Program students, not to the entire Scholarship Program. *Id.* at § 17:4013(3). It does not apply to students who decide to attend private schools participating in the Scholarship Program, nor to students *leaving* public schools that are subject to desegregation plans. In short, the entire Scholarship Program is not subject to

desegregation decrees; rather, only *public* schools wishing to participate in the program remain subject to applicable desegregation decrees.

The 2012-2013 school year is the first year for which scholarships were awarded under the statewide Scholarship Program. In 2012-2013, more than 10,000 students applied for a scholarship; 4,900 were awarded a scholarship and enrolled in a *Brumfield*-certified private school. ROA.746. During the 2012-2013 school year, 117 *Brumfield*-certified private schools participated in the Scholarship Program. ROA.745. More than 90 percent of scholarship recipients were minorities, most of whom are African American. ROA.746.

Applications for scholarships for the 2013-2014 school year increased nearly 20 percent to 12,000. ROA.746. Nearly 6,800 Louisiana students have accepted scholarships. ROA.746. In this academic year, 125 *Brumfield*-certified private schools are participating in the Scholarship Program. ROA.745. More than 85 percent of students who have accepted scholarships for 2013-2014 are African American. ROA.746.

III. Course of Proceedings and Disposition in the Court Below

On August 22, 2013, the United States filed a Motion for Further Relief in this case. The Motion asked the district 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." ROA.239. In a subsequent filing, the United States noted that 23 Louisiana school districts operate under federal desegregation orders to which the United States is a party, and an additional 12 school districts may be under desegregation orders in cases where the United States is not a party. ROA.793.

The district court held a status conference on September 18, 2013 regarding the United States' Motion for Further Relief. At that conference, the district court ordered briefing on the following two issues:

> (1) 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 Educational Excellence Program ("Voucher Program") so as to require the State to obtain authorization from the Court prior to implementation?
>
> (2) 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?

ROA.422-423; ER 27-28.

On September 23, 2013, the United States subsequently supplemented its Motion for Further Relief, appearing to withdraw its request for an outright injunction, demanding instead the creation of a preclearance process that threatens to end or greatly disrupt the Scholarship Program. ROA.424-428. The United States later clarified its requested relief in response to the questions the district court ordered briefed. Specifically, the United States now argues that "the orders in this case apply to the State of Louisiana's funding and

assignment of students to schools through the Louisiana Scholarship Program." ROA.779. Moreover, according to the United States, the *Brumfield* orders require the State to provide information about the Scholarship Program to the United States "to enable the United States to evaluate whether the State's actions are consistent with its obligations in this case. Those obligations prohibit the State both from providing assistance to racially discriminatory or racially segregated schools *and* from taking action through its aid to private schools that impedes or frustrates desegregation in the more than 30 school systems that are still subject to federal desegregation orders." ROA.779-780. The United States then proposed a modification of the orders in this case to create a preclearance process for the Scholarship Program. ROA.797-799.

On September 30, 2013, Scholarship Families filed a Motion to Intervene for the purpose of opposing the United States' Motion for Further Relief. ROA.481-484. The individual Movants are guardians of schoolchildren who are receiving scholarships and attending eligible private schools in parishes that are subject to federal desegregation orders. All of the children previously were attending public schools rated "C" or below by the State, and would be eligible to continue receiving scholarships in subsequent school years. *See* LA. REV. STAT. ANN. § 17:4013(2)(C). The Louisiana Black Alliance for Educational Options is a non-profit, membership organization whose mission is to increase access to high quality educational options for Black children, and many of

whose members receive scholarships. Collectively, the Scholarship Families have a significant and continuing interest in the ongoing receipt of vouchers under the Scholarship Program, an interest that is clearly affected by the ongoing litigation in this case.

In the Motion to Intervene, Appellants responded to the two questions posed by the trial court. Appellants argued categorically that *Brumfield* does not apply by its own terms to the Scholarship Program, that the trial court has no jurisdiction over the Scholarship Program, and that it has no authority to subject the State or the Scholarship Program to desegregation decrees in other cases. ROA.489-492.

The United States opposed the Motion to Intervene, arguing that the Scholarship Families did not meet the criteria for intervention of right or permissive intervention. ROA.529-536.

On November 15, 2013, the district court denied Scholarship Families' Motion to Intervene. The court wrote: "The Court does not find the need at this time to determine whether the interest in continuing receipt of vouchers would satisfy the requirements of either intervention of right or permissive intervention, since the United States is no longer seeking injunctive relief at this time." ROA.826; ER 24. Scholarship Families were instead granted *amicus curiae* status.

Scholarship Families timely appealed the district court's denial of intervention in this case. ROA.877-878. This Court granted expedited review of the appeal.

At a hearing on November 22, 2013, at which Appellants were present but were not allowed to present oral argument, the trial court announced its view that the Scholarship Program falls within the ambit of the *Brumfield* orders. ROA.1054. The court directed the parties to present proposed modified orders to govern the Scholarship Program by January 7, 2014 and scheduled a status conference for January 22, 2014. ROA.876, 1056. The Justice Department stated its view that any new orders should be effectuated prior to the 2014-15 school year. ROA.1060. Applications for the Scholarship Program for 2014-2015 are already in progress.

SUMMARY OF THE ARGUMENT

For the first time, thousands of low-income, mostly minority Louisiana children have an opportunity to pursue high-quality educational opportunities through the Louisiana Scholarship Program. No interest could be more important, tangible, or immediate. Yet when the United States placed those opportunities in jeopardy through its actions in this case, the families were not permitted to defend them. The basis for denial of intervention was that the government receded from its demand for an injunction, but its subsequent demands pose no less of a threat to the program and the precious opportunities

it provides. The result is that while the existing parties argue over what orders the trial court should impose, no party is arguing that the trial court lacks authority to issue *any* orders because it has no jurisdiction over this program. So long as the trial court exercises such jurisdiction, the program and the opportunities it provides are in grave danger. The Scholarship Families have an enormous stake in defending the program and are not adequately represented by the existing parties. They should be granted intervention as quickly as possible so they may take all necessary steps to bring an end to the proceedings below.

ARGUMENT AND AUTHORITIES

I. Standard of Review

Denials of intervention of right are reviewed *de novo*. *Ross v. Marshall*, 426 F.3d 745, 752 (2005).

II. Scholarship Families Satisfy Requirements for Intervention of Right.

Under Federal Rule of Civil Procedure 24(a)(2), a motion to intervene as of right is proper when: (1) the motion is timely; (2) the proposed intervenor asserts a claim or an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may as a practical matter impair or impede the potential intervenor's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervenor's interest. Fed. R. Civ. P. 24(a)(2); *see Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004). The inquiry under Rule 24(a)(2) is "a flexible one, which focuses

on the particular facts and circumstances surrounding each application," and "must be measured by a practical rather than technical yardstick." *U.S. v. Perry County Bd. of Ed.*, 567 F.2d 277, 279 (5th Cir. 1978) (quoting *U.S. v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975)). "Intervention should generally be allowed where 'no one would be hurt and greater justice could be attained.'" *Ross*, 426 F.3d at 753 (*quoting Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)). Appellants fully satisfy the criteria for intervention of right.

A. Scholarship Families' Motion to Intervene is Timely.

The motion is timely. Courts consider four factors when judging the timeliness of a motion to intervene: (1) the length of time the applicant knew or should have known of their interest in the case; (2) prejudice to existing parties caused by the applicants' delay; (3) prejudice to the applicants if their motion is denied; and (4) any unusual circumstances. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977). "To determine whether a motion to intervene is timely, courts must consider the totality of the circumstances." *U.S. v. Covington County Sch. Dist.*, 499 F.3d 464, 465 (5th Cir. 2007); *accord NAACP v. N.Y.*, 413 U.S. 345, 367 (1973).

The Scholarship Families' interest in this case did not arise until the United States filed its Motion for Further Relief on August 22, 2013, at which time Scholarship Families took immediate steps to intervene in this action.

Obviously, the issues presented in this case could not have been known to the original parties, or previously resolved by the Court, because the Scholarship Program was only enacted last year. Although the United States' Motion for Further Relief was completely unexpected, Scholarship Families rapidly organized to protect their rights and to secure counsel, culminating in the filing of their Motion to Intervene barely one month after the United States filed its Motion for Further Relief. *Compare Covington*, 499 F.3d at 466 (finding intervention untimely where applicants waited 15 weeks after entry of consent decree). In other words, there was no practical delay between the time Scholarship Families recognized their interest in this case and the time they took action to protect that interest by filing a Motion to Intervene in this action.

Moreover, there is no prejudice to the existing parties owing to any delay by Appellants. "This factor is concerned only with the prejudice caused by the applicants' delay, not the prejudice which may result if the intervention is allowed." *Edwards v. City of Houston*, 78 F.3d 983, 1002 (5th Cir. 1996). Because there was no delay between the time the Scholarship Families learned of the possible harm and their efforts to intervene, this factor is satisfied. Moreover, as of the time intervention was sought, the parties had not yet even filed briefs on the threshold questions posed by the trial court.

By contrast, the Scholarship Families' interests will be seriously threatened if they are not permitted to intervene. As described more fully in

Part B, *infra*, the Scholarship Families have a direct and tangible interest in the subject matter of this action. And as more fully described in Part D, *infra*, their interests are not adequately represented by the existing parties.

Further, given not only the unprecedented nature of the United States' efforts to invoke a decades-old federal decree to thwart an entirely new, race-neutral program but also its efforts to extend the trial court's remedial authority to dozens of ongoing desegregation cases, there are sufficiently unusual circumstances present so that the Scholarship Families' motion clearly was timely.

B. Scholarship Families Have Asserted a Clear Interest in this Case.

The Scholarship Families have asserted an interest in this litigation that is "direct, substantial, [and] legally protectable." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 542, 463* (5th Cir. 1984). As the Supreme Court recognized 60 years ago, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an 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). Most children receiving scholarships are black, and thus are among the intended beneficiaries not only of *Brown* but also the original *Brumfield* litigation. Given that attending a public school that received a C, D, or F grade from the State is a precondition to receiving a

scholarship to transfer to a private school, it is reasonable to say that the children have not received high-quality educational opportunities prior to the Scholarship Program.

The Scholarship Families also have a well-recognized 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); *Graves v. Walton County Bd. of Educ.*, 686 F.2d 1135, 1142 n.5 (5th Cir. 1982) ("This Court has long recognized the intense interest of parents in the education of their children, and it has been solicitous of their right to be heard"); *see also Jones v. Caddo Parish Sch. Bd.*, 499 F.2d 914, 917-18 (5th Cir. 1974) ("If it should be found in fact that appellants represent a class of black citizens . . . whose constitutional rights are not properly protected by plaintiffs, they should be authorized to intervene as a matter of right"); *U.S. v. Coffee County Bd. of Educ.*, 134 F.R.D. 304, 309 (S.D. Ga. 1990) (finding parent intervenors in desegregation case "have an interest that falls squarely within even the narrowest definition of 'interest'"). Indeed, the Scholarship Families' interest in this case is more direct, tangible, and immediate than any existing party, because the very interest in educational opportunity that led to the initiation of this litigation many decades ago is once again at stake.

Finally, because of their own constitutional rights, the Scholarship Families have standing to assert the State's 10th Amendment rights, which are

plainly implicated by the sweeping orders sought by the United States. As the Supreme Court held unanimously in *Bond v. U.S.*, federalism "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated government power cannot direct or control their actions." 131 S.Ct. 2355, 2364 (2011). The Scholarship Families, if allowed to intervene, will assert the 10th Amendment rights to rein in the exercise of powers that exceed the constitutional authority of the federal courts.

C. Disposition of this Case will Impair and Impede Scholarship Families' Ability to Protect the Educational Opportunities of Their Children.

The disposition of this case, as a practical matter, will impede and impair the Scholarship Families' ability to protect their children's educational opportunities. See *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004). The threat is not hypothetical. The district court already has indicated that it will impose federal judicial oversight over the program ROA.1054-1055.[1] The contours of that oversight are being determined, without input or argument from those who have the most at stake, while this appeal is pending.

[1] At the initial arguments, the trial judge also evidenced hostility on policy grounds toward the Scholarship Program. *See* ROA.1030-1031 ("But, as a practical matter, those of us who see, particularly in times of budgetary constraints, and more and more restrictions in that regard, as a practical matter, even though I'm not here to decide that issue, the more we take monies away from public institutions, the more chances those institutions may go away"); ROA.1060 (the State's attorney "can't make the decision for the governor, who's out there on TV talking about how perfect [the Scholarship Program] is. Nothing's perfect in this world. I hope [the governor] understands that").

The sole basis for the denial of intervention was that the United States backed off its initial demand for an injunction. ROA.826; ER 24. But subsequent filings demonstrate that the United States continues to seek relief that would imperil the program. In its January 7, 2014 Proposed Process for Sharing Information Regarding the State of Louisiana's Voucher Program, the United States proposed what amounts to a preclearance process for current and future administration of the Scholarship Program. The United States' proposal would require the State, "at least 45 days prior to notifying any applicant of his or her voucher school assignment for the subsequent school year,"[2] to furnish far more extensive information than required by the existing *Brumfield* orders. ROA.933. Among other things, the information would include identifying the public schools the applicant schoolchildren would have attended (no. 9); student enrollment in that school by race (no. 11); student enrollment in the school district by race (no. 13); and the student enrollment of the private school by race (no. 20). ROA.933-934. Further, by November of each year, the State would have to provide "a school-level analysis of the voucher enrollments for the current school year and their impact on school desegregation in each school district then operating under a federal desegregation order." ROA.934.

[2] The United States repeatedly uses the terms "assign" and "assignment" to refer to private schools that students receiving scholarships attend. Apart from conducting a lottery, the State plays no role whatsoever in determining which private schools students will attend. Those choices are made entirely by the Scholarship Families.

Additionally, by December each year the State would be required to provide "an analysis of the voucher enrollments for the current school year and their impact on segregation in *private* schools" (emphasis added).[3] ROA.934.

The present litigation position of the United States has two significant adverse implications for the Scholarship Families. First, by requiring information (much of which is not in the State's possession) and interposing a review process in the midst of a very tight schedule for scholarship applications and awards, the preclearance process would wreak havoc on the Scholarship Program. The State has advised that "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 goal of providing higher quality education for all Louisiana children." ROA.957. Second, the pre-clearance process demanded by the United States could give rise both to further demands for injunctive relief and to challenges to individual scholarship awards. In earlier briefing, the government stated that where it found data it considered troublesome regarding the impact of individual scholarship awards on which it

[3] The trial court held a telephonic hearing on the parties' proposals behind closed doors on January 22, 2014. The Scholarship Families' request to monitor the proceedings in their capacity as *amicus curiae* was opposed by the United States and denied by the trial court. ROA.1005. The Scholarship Families consider it outrageous that their fate is being argued and decided not only without their input but without even being allowed to witness the proceedings.

could not reach "amicable resolution" with the State, "the United States respectfully requests that this Court adjudicate any disagreements under the auspices of this case." ROA.799. Whether the result is "amicable resolution" or adjudication, if it results in delay, revocation, or rejection of scholarships, it will inflict severe and irremediable harm upon schoolchildren.

Those threats will persist so long as the trial court wrongfully is allowed to exercise jurisdiction over this program, and to boot-strap that jurisdiction to encompass the dozens of ongoing federal desegregation decrees in Louisiana. Failure to allow the Scholarship Families to intervene immediately to contest the trial court's jurisdiction thus will greatly impede their ability to protect their interests.

D. The Existing Parties in this Case Cannot and Do Not Adequately Represent the Interests of Scholarship Families.

The existing parties in this case do not adequately represent the interests of the Scholarship Families. This Court has described the burden of showing inadequacy of representation as "'minimal,' noting that a potential intervenor need only show that 'representation by existing parties *may* be inadequate.'" *Ross v. Marshall*, 426 F.3d at 761 (quoting *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002)) (emphasis in original). Here, inadequacy of representation unquestionably is inadequate.

The United States ceased to adequately represent the Scholarship Families' interests when it took a court decree intended to advance the

educational opportunities of black schoolchildren and turned it against them. The *Brumfield* litigation had a very important object: preventing the use of state funds to aid white segregation academies. That object is vindicated in the Scholarship Program through the requirement that all participating private schools must be *Brumfield*-certified. That statutory provision was probably unnecessary given that private schools must accept scholarship students on a random selection basis, and the overwhelming majority of scholarship students are black. Nonetheless, it demonstrates that there is no basis for further orders within the context of *Brumfield*. Wielding the *Brumfield* order to jeopardize high-quality educational opportunities for low-income Louisiana schoolchildren places the United States sharply at odds with the Scholarship Families.

By contrast, the State is tenaciously arguing against orders that will disrupt the Scholarship Program. However, the State does not have standing as *parens patriae* to assert the rights of their citizens. *See, e.g.*, *Mass. v. Mellon*, 262 U.S. 447, 485-86 (1923). Only the Scholarship Families have standing to assert their constitutional rights as parents and students. Given their direct, distinct, and tangible rights and interests, parents and children have repeatedly intervened to defend school choice programs. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *La. Fed. of Teachers v. State*, No. 2013-CA-0120, 2013 WL 1878913 (La. May 7, 2013); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999); *Jackson v.*

Benson, 578 N.W.2d 602 (Wis. 1998); *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006); *Owens v. Colo. Conf. of Parents, Teachers, and Students*, 92 P.3d 933 (Colo. 2004).

Equally important, the State, for reasons that are not altogether clear, has expressly conceded the trial court's jurisdiction over this program. *See* Mem. In Response to November 22 Order ("the Scholarship program does constitute State aid subject to the orders and decrees in this case") ROA.943; ("the State has never suggested that the orders in the case have no application to the Scholarship program") ROA.951; ("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") ROA.951. By conceding the trial court's jurisdiction over the Scholarship Program, the State has opened a Pandora's box that places the Program and its beneficiaries at risk.

As a threshold matter, unlike the textbook and transportation program at issue in the original *Brumfield* litigation, school vouchers do not constitute aid to private schools—they are aid to children. *Cf. Zelman*, 536 U.S. at 649 (in the First Amendment context, "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"). Even if the trial court's jurisdiction in *Brumfield* could be stretched to encompass *any* program enacted many decades after the program at issue in that case, it could not be stretched to bring within its purview a program involving aid to families rather than to schools. Yet no present party in the case is making that argument.

Nor is any challenge being made to the trial court's jurisdiction, even though its assertion of authority over the Scholarship Program flies in the face of Supreme Court precedents. The Scholarship Families' argument is summarized by the holding in *Milliken v. Bradley*, 433 U.S. 267 (1977). As the Supreme Court instructed in *Milliken*, "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." *Id.* at 282. Because this is an entirely new Program, the original orders in this case cannot be extended to it. Instead, the United States must allege that the Scholarship Program is itself discriminatory. *Accord Horne v. Flores*, 557 U.S. 443, 454 (2009) (courts must "ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law"). In other words, the United States cannot attempt to expand the remedy beyond its original contours—in this case, to an entirely different program enacted 40 years after the program at issue in this case.

The Scholarship Families also argue that, as the U.S. Supreme Court ruled last year, remedial action that displaces state decision making cannot be taken today on the basis of "40-year-old facts." *See Shelby County, Ala, v. Holder*, 133 S.Ct. 2612, 2629 (2013). In *Shelby County*, the Court struck down a preclearance process that is remarkably similar to what the United States proposes here. At oral argument on the questions the district court ordered briefed, the trial judge expressed the view that *Shelby County* has no bearing on this case because it involved congressional rather than judicial action (ROA.1009-1010) – a point the State appeared to concede. ROA.1026-1027. Again, the Scholarship Families strongly disagree. The *Shelby County* rule echoes in the realm of desegregation law and forbids federal intervention based on a 40-year-old factual predicate.

By extension, even if the trial court has jurisdiction over the Scholarship Program, it certainly has no authority to subject the Program to decrees in *other* cases. Yet that is precisely what the United States seeks: not just compliance with *Brumfield*, but with decrees in dozens of desegregation cases. The United States even wants to extend the scope of judicial scrutiny to include racial composition of *private* schools. Federal court jurisdiction is not a blank check and cannot be boot-strapped. The *Brumfield* vessel is already way past its capacity – yet by excluding Scholarship Families from the proceedings, the trial court ensured that no one would challenge its jurisdiction.

Finally, the State argued that the proper effect of the district court's orders in this case on Scholarship Program is that the participating schools must be *Brumfield*-certified. ROA.622. We disagree: that is a requirement imposed not by the orders in this case but by the Scholarship Program statute. It exhibits the State's good faith, and, as the State argues, it demonstrates that the program is in compliance with *Brumfield* if its orders do apply. But they do not. The United States pounced on the State's argument as conceding the district court's jurisdiction over the Scholarship Program, and thus as the predicate for expanded relief. ROA.781-782, 787. But it is axiomatic that a state statute cannot expand a federal court's jurisdiction. *See, e.g., Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923) ("That a remedial right to proceed in federal court sitting in equity cannot be enlarged by a state statute is likewise clear"); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943) ("[O]f course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction"); *see also Horne v. Flores*, 557 U.S. at 471 (overturning a district court's statewide injunction when the district court had issued the injunction after finding only one school district to be in violation of the Equal Educational Opportunities Act).

No existing party is arguing that the trial court has no jurisdiction over the Scholarship Program. Nor is any existing party arguing that *Shelby County* applies to preclude the remedy sought by the United States. Hence, the

Program and the opportunities it provides lack a full and complete defense. The fact that the United States has abandoned its demand for an injunction in favor of a murky, cumbersome preclearance process matters little to the children whose educational opportunities hang in the balance. No basis whatsoever exists for the trial court to take any action in the context of this case–yet no current party has taken any steps to extricate the court from its impermissible adventure.

The question of the trial court's jurisdiction is not yet before this Court. We preview it only to demonstrate that the Scholarship Families' interests are not adequately represented. The only sure way to prevent harm to the Scholarship Program and to the precious educational opportunities it provides is to promptly terminate the proceedings. If the United States believes the Scholarship Program is unlawful, it may initiate a new lawsuit and/or appropriate action in ongoing desegregation cases. In the meantime, the Scholarship Families should be granted intervention to take all appropriate actions to challenge the trial court's jurisdiction.

Judicial intervention by the trial court is imminent. The Scholarship Families must be permitted to intervene in this matter so that they can adequately represent their significant interests in this case.

CONCLUSION

For the foregoing reasons, the district court's denial of Scholarship Families' Motion to Intervene should be REVERSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE ATTACHED FILING AND EXCERPTS OF RECORD WERE ELECTRONICALLY FILED AND SERVED BY ECF AND SENT BY U.S. MAIL upon the persons identified in the below Service List on January 31, 2014.

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