No. 14-31010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OLESS BRUMFIELD, et al.,

Plaintiffs

UNITED STATES OF AMERICA,

Intervenor - Appellee,

v.

LOUISIANA STATE BOARD OF EDUCATION,

Defendant - Appellee,

and

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

Movants - Appellants.

APPELLANTS' REPLY BRIEF

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

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Throughout its brief, Appellee re-writes history and seeks to minimize the impact of its aggressive recent actions in this decades-old case. What the government now characterizes (Br. at 11) as a mere "discovery matter" actually was initiated with guns blazing when it asked the court on August 22, 2013 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.241).

Through the subsequent proceedings, the trial court modified prior injunctions entered in 1975 and (through a consent decree) in 1985. This appeal is from an order refusing to vacate the modifications of those injunctions. As a result, contrary to Appellee's assertions, the appeal is properly before this Court pursuant to 28 U.S.C. § 1292(a)(1).

Nor are those modifications slight, as Appellee urges. The district court extended its jurisdiction to a brand-new remedial educational program in the complete absence of any allegation, much less proof, that the program is discriminatory, that it provides financial assistance to segregated private schools, or even that it violates any prior orders in this case. The orders then were expanded to impose new requirements upon the State in its implementation of the program. Subjecting the program to monitoring by the

U.S. Department of Justice and to supervision by a federal district court places a cloud of perpetual uncertainty over the vital educational opportunities the program provides, it marks a major affront to the principles of federalism, and it represents an improper exercise of federal court jurisdiction. For all of those reasons it was error for the court below to refuse to vacate its orders.

Argument

I. THIS COURT HAS JURISDICTION OVER THE APPEAL.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which vests jurisdiction in the courts of appeals for interlocutory appeals of orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."

Appellee makes two arguments about why this is not such an order. First (Br. at 10), that the order below is one that directs or denies discovery, which is not appealable under the statute. Second (*id.* at 11), that the court's order "does not make any determination regarding the validity of the voucher program."

The first argument is a serious stretch and the second is beside the point. It is quite clear that what the court did below was to modify existing injunctions (which falls squarely within § 1292(a)(1)) to sweep the voucher program within its jurisdiction and to impose reporting requirements on the program. The motion from which this appeal is taken was to vacate those modifications (ROA.1080-97). An order refusing to modify an injunction falls within the clear language of § 1292(a)(1).

A. Explicit modification and refusal to dissolve. As this Court held in *Sierra Club v. Glickman*, 67 F.3d 90, 94 (5th Cir. 1995), "the question is whether the district court's order explicitly continued or refused to dissolve the existing injunction. An affirmative answer halts our inquiry and establishes our jurisdiction." The district court's order did just that.

The motion occurred in the context of a pair of longstanding permanent injunctions. In *Brumfield v. Dodd*, 405 F. Supp. 338, 349 (E.D. La. 1975), the court "permanently enjoined" the defendants "from distributing or otherwise making available textbooks, library books, transportation, school supplies, equipment, and any other type of assistance, or funds for such assistance, to any racially discriminatory private school or to any racially segregated private school." The court then ordered the implementation of a certification process to ensure compliance with the injunction. *Id.* at 349-54.

In 1985, the court approved a consent decree "to modify the certification process and to include provisions for the continued monitoring of certified process" (ROA.996).[1] The defendants explicitly were "enjoined from failing to implement" (*id.*) certain modifications of the certification process. The consent decree recited that "[a]ll prior Orders and Judgments of this Court, except as

[1] This Court has held repeatedly that "a consent decree may constitute an injunction for purposes of § 1292(a)(1)." Roberts v. St. Regis Paper Co., 653 F.2d 166, 170 (5th Cir. 1981); accord, U.S. v. City of Miami, Fla., 664 F.2d 435, 445 (5th Cir. 1981). Here, the consent decree expressly contains an injunction.

specifically modified by this Consent Decree, remain in full force and effect" (ROA.1000).

At all times until the government's revisionist depiction of the present proceedings as a "discovery matter," the parties and the court below consistently characterized and understood the relief sought and given as modifications of the 1975 and 1985 injunctions. Of course, in its Memorandum in Support of Motion for Further Relief, Appellee requested a new, additional injunction against the voucher program (ROA.241). It noted the 1975 injunction is "still in effect" (ROA.242-43). Consequently, the trial court submitted two questions to the parties:

> (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.424-25 (emphasis added).

Thus, from the outset, the court viewed the proceedings as seeking to modify the earlier injunctions, which of course ultimately it proceeded to do. The United States understood it the same way. In its Response to September 30, 2013 Motion to Intervene, Appellee acknowledged, "The result of the Motion—if the United States prevails—will be a process for *monitoring* the Program to ensure that the State provides necessary information to the United

States on a timely basis *and that the State implements the Program in compliance with federal law*, including the desegregation orders in this case (ROA.534 (emphasis added)). The United States characterized the court's questions as "whether the orders in this case apply to the Program and whether those orders should be *amended* to ensure a process for review of the Program" (ROA.536 (emphasis added)).[2]

On November 22, 2013, the court granted in part the Motion for Further Relief, as amended, "for the oral reasons stated" (ROA.878). The transcript from the proceedings makes clear that the court was ordering the parties to propose ways to modify the existing injunctive orders. The Court ruled that "the voucher program to private schools would still fall under the ambit of the original consent decree and subsequent injunctive orders and amendments to court orders in this case" (ROA.1222). Thus, "this is a situation where . . . it gives the opportunity of both sides to suggest a process, or improvements in the process, modifications to the orders. . . ." (ROA.1223). Specifically, the court instructed "we need a process here to now deal with this new system of state aid," the "type of modification that could reasonably satisfy the concerns that both sides raises" (*id.*). See also ROA.1224 ("put forward some type of

[2] In reversing the trial court's denial of intervention, this Court also appears to have understood the motion as seeking "an amendment to the original decree in this action from 1975." Brumfield v. Dodd, 749 F.3d 339, 343 (5th Cir. 2014).

modification"); ROA.1226 ("get motion proposals on modifying the orders here"; "proposals concerning modifications of the process"). The court's orders could not be more plain: it was not resolving a "discovery matter," it was modifying prior injunctive orders and instituting a new process.

In turn, on April 7, 2014, the district court issued an order requiring the State of Louisiana to provide data pertaining to the voucher program "for the 2014-2015 school year, and for all future school years" (ROA.1075). Even if the order was not a modification of existing injunctions so as to confer appellate jurisdiction under § 1292(a)(1), the requirements themselves would be sufficient to constitute an injunction subject to interlocutory appeal. The case closest on point is *U.S. v. Texas*, 601 F.3d 354 (5th Cir. 2010), in which the trial court ordered the State to establish a monitoring system and language program under federal law. The Court held, "We find these instructions to be sufficiently coercive to constitute a mandatory injunction appealable under Section 1292(a)(1)." *Id.* at 362; see also *Roberts*, 653 F.2d at 169 ("This court consistently has held that the appealability of an order under 28 U.S.C. § 1292 depends not on terminology but on the substantive effect of the order").

Subsequently, after they became parties to the case, Appellants submitted a Motion to Vacate Order Modifying Consent Decree (ROA.1080-97), which the court denied (ROA.1148). Thus the sequence and substance are very clear: there are two injunctions in effect in this case; the United States sought a modification of the injunction which the trial court expressly granted; and the

Appellants sought to vacate that modification, which the trial court denied. Because the trial court "explicitly continued or refused to dissolve" the existing injunction as modified, this Court's jurisdiction is established. *Sierra Club*, 67 F.3d at 94. *Accord*, *Frazar v. Hawkins*, 376 F.3d 444, 446 (5th Cir. 2004) ("The refusal to modify a consent decree is appealable under § 1292(a)(1), since consent decrees are injunctions for purposes of the statute"); *Walker v. City of Mesquite*, 38 F.3d 569, n.1 (5th Cir. 1994) ("a judicial modification of a consent decree confers appellate jurisdiction under section 1292(a)(1) to review the modification"); *Walker v. U.S. Dep't of Hous. and Urban Dev.*, 912 F.2d 819, 828 (5th Cir. 1990) ("The judicial modification amends an injunctive order; thus we retain appellate jurisdiction to review the modification under section 1292(a)(1)").

B. Practical effect. Even if the order below did not explicitly continue or refuse to dissolve an existing injunction, this Court would still have jurisdiction over the appeal. "If the district court's order is not explicit, but merely has the practical effect of granting or denying injunctive relief, § 1292(a)(1) permits an appeal provided the litigant can further establish 'that [the] interlocutory order of the district court might have a "serious, perhaps irreparable consequence," and that the order can be "effectively challenged" only by immediate appeal'." *Sierra Club*, 67 F.3d at 94 (citing *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)).

No matter how narrowly one could possibly read the orders in this case, unquestionably they do two things: (1) they sweep the voucher program within existing injunctions (*see, e.g.* ROA.1152) ("The voucher program clearly falls under the injunction and consent decree in this case")), and (2) they impose obligations upon the State regarding that program. On their face, they establish a modification of the prior injunctions; and in light of orders that by their terms operate in perpetuity, the practical effect is that of a permanent, mandatory injunction.

As this Court recognized in overturning the trial court's denial of intervention to the scholarship families, *Brumfield*, 749 F.3d at 344-45 ("The parents have established that their interests might be impaired by this action"), surely the court's orders may have a "serious, perhaps irreparable consequence." *See Sierra Club*, 67 F.3d at 94. The government observes that the voucher program itself has not yet been enjoined, and it insists it has not even been affected, which raises the question of why the Justice Department made such a fuss in the first place.

The reality is that by asserting jurisdiction over the program and issuing orders and establishing a "process" to administer the program, the trial court has placed it in perpetual jeopardy. In finding in its order of January 22, 2014 that "the information sought by the United States is appropriate and attainable under the injunction order in this case," the court went on to add a chilling admonition: "However, it will not prejudice the existing order to allow the

State's voucher program to proceed while the United States assesses whether student assignments violate the orders issued in this case, provided the State fully and timely produces the requested information" (ROA.1011 (emphasis in original)). In other words, the government may use the data to contest *individual* scholarships, and the program may be halted in its entirety if the State fails to provide the information in a timely fashion. That threat reiterated the warning made by the court in the November 22, 2013 hearing in which it ordered the parties to submit proposed modifications to prior orders: "I'm not going to kick kids out of school right now" (ROA.1227). And it was made explicit in the April 7, 2014 order that is the subject of this appeal: "**The State shall take steps to ensure that OneApp does not to** (sic) **send award notifications until the State has delivered the above information to the United States timely**" (ROA.1077 (emphasis in original)).

The import of those warnings and orders is clear: the scholarship program, and individual scholarship awards, are hostage to the State's compliance with the modified orders, to the Justice Department's and trial court's acceptance of the State's compliance, and to whatever actions the Justice Department might decide to take in reaction to the information that is provided. All of which traces back, as a necessary consequence, to the trial court's exercise of jurisdiction over the voucher program and issuance of orders pertaining to the program.

Which leads in turn to the second inquiry under the "practical effect" test: that the order can be effectively challenged only by immediate appeal. *Sierra Club*, 67 F.3d at 94. If the government's argument under 28 U.S.C. § 1292(a)(1) is correct, then Appellants can *never* appeal the matter unless and until the voucher program as a whole is enjoined. It cannot appeal the delay or denial of individual scholarships. It cannot appeal more onerous requirements imposed on the program. The court's exercise of jurisdiction over the program, no matter how profoundly unlawful---and orders issued pursuant to that jurisdiction, no matter how injurious, so long as it is shy of a complete prohibition—cannot be challenged, even though the orders already in place and the power to issue additional ones will operate ad infinitum.

Section 1292(a)(1) exists precisely to avoid such a perverse and unjust result. So long as the order at issue is an explicit modification or refusal to modify an existing injunction, or the order has the practical effect of an injunction coupled with a potential for grave harm, the order is reviewable. Those requirements are readily met here.

II. THE ORDERS SHOULD BE VACATED.

This Court should vacate the trial court's orders pertaining to the voucher program for either or both of two reasons: the court has no jurisdiction over the program (Fed. R. Civ. P. 60(b)(4)), and 40 years of factual and legal evolution have rendered extension of the prior injunctions in this case to the voucher program manifestly unjust (Rules 60(b)(5) and 59(e)).

The government (Br. at 19) seeks sanctuary in dicta from a bankruptcy case for the proposition that it need assert only an "arguable" basis for subject-matter jurisdiction.[3] However minimal the standard, the trial court's assertion of jurisdiction does not meet it. The cases are quite clear that there is no such thing as "bootstraps jurisdiction," in which federal courts have roving commissions to right perceived injustices or sweep unrelated matters within their jurisdiction—especially when the jurisdiction is bootstrapped to encompass an area of inherently State concern and control such as education.

That is exactly what the trial court is doing. At the November 22, 2013 hearing, the trial court ruled that "the voucher program to private schools would still fall under the ambit of the original consent decree and subsequent injunctive orders and amendments to court orders in this case" (ROA.1222). How can it be, when it did not exist? The original textbook and transportation program that was the subject of the original *Brumfield* litigation was proven to be unlawfully discriminatory, based in large part on its impact on school

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[3] The cited case, United States Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010), discusses how lower courts have dealt with subject-matter jurisdiction under Rule 60(b)(4), citing Nemaizer v. Baker, 793 F.2d 58, 65 (2nd Cir. 1986) for the "arguable basis" language. It is clearly dicta, however, because the Supreme Court goes on to say, "This case presents no occasion to engage in such an 'arguable basis' inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void because United does not argue that the Bankruptcy Court's error was jurisdictional." Id., 559 U.S. at 271. Here, by contrast, the trial court's error is jurisdictional.

desegregation in Louisiana. *Brumfield*, 405 F. Supp. at 340-47. Based on extensive evidence, the court found it

> likely that a large number of private, segregated schools created for the specific purpose of avoiding racial integration of the public schools have in the past and continue in the present to receive significant assistance in the form of textbooks, library books and free transportation from the Louisiana State Department of Education and local parish school boards.

Id. at 347. As is appropriate, *see, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), the scope of the constitutional violation dictated the scope of the remedy:

> Because La. R.S. 17:351, 352 and 158 are implemented by defendants so as to allow substantial state assistance to racially segregated private schools, the statutes run afoul of the equal protection clause of the Fourteenth Amendment and are thus unconstitutional as applied. Norwood v. Harrison, [413 U.S. 455 (1973)]. Accordingly, the defendants must be enjoined from providing textbooks, library books, other school material and transportation on publicly subsidized school buses to private, racially segregated schools and/or to students attending such schools.

Brumfield, 405 F. Supp. at 348. These are the "four corners" within which the scope of the decree must be discerned, "and not by reference to what might satisfy the purposes of one of the parties. . . ." *U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971).

It strains credulity for the district court to conclude that the scholarship program created in 2012 in La. Rev. Stat. Ann. §§ 17:4011-4025 would "fall under the ambit" of the *Brumfield* litigation. It is not an amendment to the statutes at issue in *Brumfield*. It was enacted four decades later. No allegation

has been made or proven that the program is discriminatory in any way. No allegation has been made or proven that any public aid is flowing to segregated private schools. Quite to the contrary, the program itself assures that the participating schools are *Brumfield*-certified. *Id.* at § 17:4021(2). No allegation is even made or proven that the program has disrupted ongoing desegregation orders.[4] In fact, no factual findings relating to the voucher program have been made *at all*.[5] As the Supreme Court ruled categorically in *Milliken v. Bradley*, 433 U.S. 267, 282 (1977), it is an "inherent limitation upon federal judicial authority" that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." Appellee neither contends nor has proven that the voucher program violates the Constitution or flows from the original violation, hence the district court has no jurisdiction over it. *Horne v. Flores*, 557 U.S. 433, 454 (2009) (courts must "ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law").

The Justice Department (Br. at 20) and the trial court (ROA.1223)

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[4] Indeed, the government admits as much (Br. at 25): "[T]he United States has not asserted that the implementation of the voucher program either results in segregation in private schools or impairs desegregation in public schools." As the cases cited in Appellants' Opening Brief make clear, such a concession is fatal to the assertion of jurisdiction.

[5] Those omissions are what constitute a violation of due process for purposes of Rule 60(b)(4).

hang their jurisdictional hat on a passage they attribute to the original *Brumfield* ruling, 405 F. Supp. at 349, that ostensibly enjoins "any other forms of assistance and funding." Because "that would cover voucher systems," the trial court explained, "we need a process here to now deal with this new system of state aid" (ROA.1223).

The actual language of the original *Brumfield* decision is more precise and limiting, enjoining in addition to textbooks and transportation "any other type of assistance, or funds for such assistance, *to any racially discriminatory private school or to any racially segregated private school*." *Brumfield*, 405 F. Supp. at 349 (emphasis added).

The original injunction and subsequent consent decree in *Brumfield* were drawn to completely cure the constitutional violation that was alleged and proven. That process voluntarily was incorporated into the scholarship program. No basis exists whatsoever to expand the reporting requirements or to extend them to a wholly new program.

Indeed, the new process imposed by the court below on scholarship program extends reporting requirements to *students* participating in the scholarship program and to the *public schools* they previously were attending, as well as other public school data (ROA.1076-78.). Both the original injunction and consent decree, by contrast, were limited to data relating to the

private schools receiving public aid to ensure they were nondiscriminatory.[6] Hence not only did the trial court bootstrap its jurisdiction to include an entirely new program, but to impose a new process and expand the nature of information demanded above and beyond the original remedy.

The United States cites not a single case supporting such a dramatic expansion of jurisdiction and remedy. It merely attempts to distinguish the plethora of cases cited by Appellants that stand for the propositions that (1) a court's jurisdiction and remedies are bound by the nature and extent of the original violation, *see, e.g.*, *Milliken, supra*; (2) the goal of a court decree concerning public education is to remedy the constitutional violation and return control to the State as quickly as practicable, *see, e.g.*, *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991); and (3) contemporary displacement of State prerogatives by the federal government cannot be "based on 40-year-old facts having no logical relation to the present day." *Shelby Cnty., Ala. v. Holder*. 133 S.Ct. 2612, 2617 (2013).

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[6] For that reason, the government is simply rewriting history when it says (Br. at 23) that "the purpose for the State's production of information about the voucher program is the same as in the 1975 order and 1985 consent decree—to enable the United States to assess the effect of state actions on school desegregation." In reality, although the impact of aid to segregated private schools upon desegregation was an essential part of the proof of a constitutional violation, the remedy consistently has been limited to ensuring that the program that was challenged in Brumfield would not dispense aid to segregated private schools.

Finally, Appellants are entitled to raise the important federalism implications of the trial court's assertion of jurisdiction over a program that reflects the State's effort to remediate appalling educational deprivations visited upon poor and mostly minority schoolchildren. "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. . . ." *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011). Accordingly, in cases in which individuals "sustain discrete, justiciable injury from actions that transgress" constitutional limitations, *id.* at 2365, they may challenge such actions as violating "constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated." *Id.*

Here, the district court's transgression on the principles of federalism is profound. It has intruded upon the State's good-faith educational endeavors without predicate cause. It has extended the boundaries of jurisdiction far beyond the scope of the underlying constitutional violation and fully curative remedy. This Court should rein in the trial court's excesses and allow this important program and the precious educational opportunities it provides to continue uninhibited by the unwarranted intrusion of the federal executive and judicial branches.

Request for Relief

For the foregoing reasons, Appellants respectfully ask this honorable Court to reverse the decision of the district court and to remand the matter with instructions to vacate the orders relating to the scholarship program.

Respectfully submitted,

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