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,

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

Because of the novelty and public importance of the issues presented, Appellants believe the Court may benefit from oral argument.

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STATEMENT OF JURISDICTION

This is an appeal of a final order of the district court denying Appellants' Motion to Vacate Order Modifying Consent Decree pursuant to Fed. R. Civ. P. 60(b)(4), 60(b)(5), and 59(e). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1292(a)(1). The notice of appeal was timely filed on August 27, 2014.

STATEMENT OF ISSUES

In the context of a case filed more than 40 years ago and a consent decree entered 30 years ago halting state funding of transportation and textbooks for segregated private schools, which Appellee United States has invoked to secure new judicial orders relating to a school voucher program that it has not even contended much less demonstrated is discriminatory, was it error for the trial court to refuse to vacate its order modifying the consent decree.

(A) under Fed. R. Civ. P. 60(b)(4) or 59(e) on the grounds that the judgment is void for lack of subject matter jurisdiction and/or because the court acted in a manner inconsistent with due process of law; or

(B) under Fed. R. Civ. P. 60(b)(5) or 59(e) on the grounds that applying the consent decree to the voucher program is not equitable because of a significant change in factual and/or legal conditions that renders such enforcement detrimental to the public interest?

STATEMENT OF THE CASE

This appeal involves a case that arrested discriminatory action by the State of Louisiana in the 1970s through limited orders that properly continue to constrain a narrow range of State action today but which has been put to an unintended and perverse use by the court below. Because the facts and case history are intertwined, Appellants present them together.

A. The background litigation. When a party to this case receives any notice from the court below, it is accompanied by a "WARNING: CASE CLOSED on 4/20/76." And indeed, the docket of the U.S. District Court for the Eastern District of Louisiana depicts this case as "Date filed: 05/11/1971" and "Date terminated: 04/20/1976." Yet this was the vehicle chosen by the United States to subject an entirely nondiscriminatory school voucher program enacted 36 years after the case was "terminated" to indefinite federal judicial and executive surveillance.

Although sometimes referred to as a "desegregation" case, in fact *Brumfield v. Dodd* was one of a number of cases directed toward widespread state efforts to resist such orders by making state aid directly available to white "segregated academies." *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973). Specifically, as the district court described it, the lawsuit was brought to prevent public officials from administering Louisiana statutes to provide books, school materials, and student transportation funds to all-white, segregated private schools. *Brumfield v. Dodd*, 405 F. Supp. 338, 340 (E.D. La. 1975). 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 state and parish officials.[1] *Id.* at 347. On that basis, the court found that the statutes as applied violated the equal protection guarantee of the 14th Amendment. *Id.* at 348.

Accordingly, 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. It also mandated a procedure by which state officials could certify private schools to be eligible for such assistance.[2] *Id.*

In 1985, the district court approved a consent decree providing, *inter alia*, 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." ROA.999-1000. The order also required *Brumfield*-certified private schools to provide certain information on an annual basis, including student enrollment and faculty employment statistics by race. ROA.997-998.

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[1] Parishes are the Louisiana equivalent of school districts.

[2] We refer to that process below as "Brumfield certification."

Since 1985—that is, for 30 years—the State has fully complied with the consent decree. There has been no allegation nor any finding that the State has ever violated the consent decree nor that it has acted with anything but good faith.

B. Public education in Louisiana. The educational landscape in which this litigation takes place is bleak, especially for black schoolchildren. Among students in the Louisiana public schools, 45 percent are black. The state's average annual per-pupil expenditure is $10,723, which is roughly commensurate with the national average and significantly higher than the nearby deep-South states of Alabama, Arkansas, and Mississippi. But the investment has not yielded optimal results. On the 2012-13 National Assessment of Educational Progress, only 26 percent of Louisiana fourth graders were proficient or above in math, compared to a U.S. average of 41 percent; likewise in reading, only 23 percent were at or above proficiency level, compared to 34 percent nationwide.[3]

Academic achievement disparities between white and black students are especially striking. On the 2012-13 statewide math assessment, only 51.8 percent of black students were proficient, compared to 76 percent of white students. The statewide reading assessment yielded similar results: while only

[3] http://ballotpedia.org/Public_education_in_Louisiana (visited Dec. 8, 2014). This website compiles statistics from a variety of public sources, primarily federal, state, and local governments.

56.5 percent of black students were proficient, 80 percent of white students were. The racial academic gap manifested in high school graduation rates, which were 80.2 percent for whites and only 66 percent for blacks.[4]

In an effort to improve educational opportunities, especially for low-income and minority schoolchildren, the State of Louisiana in recent years has embarked upon what has been characterized as the most aggressive education reform program in the nation.[5] Those efforts include the creation of the Recovery District in New Orleans, an A-F ranking of public schools and other transparency and accountability measures, pay for performance, and the voucher program at issue here. As of the 2012-13 school year, Louisiana academic outcomes had improved significantly, especially in New Orleans.[6]

C. The Louisiana Scholarship Program. In 2012, the Legislature enacted, and Gov. Bobby Jindal signed into law, the Louisiana Scholarship Program, referred to in this litigation as the voucher or scholarship program, to provide resources to low-income families with children in poor-performing public schools to send their children to schools of the families' choice. La. Rev. Stat. Ann. §§ 17:4011-4025. The program provides scholarships for Louisiana

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[4] http://eddataexpress.ed.gov/state-report.cfm?state=LA (visited Dec. 8, 2014). These statistics are published by the U.S. Department of Education.

[5] http://reportcard.studentsfirst.org/state/Louisiana (visited Dec. 8, 2014). StudentsFirst is a national education reform advocacy group.

[6] *See* Danielle Dreilinger, "School Performance Scores Improve Across Louisiana," *The Times-Picayune* (Oct. 24, 2013).

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 a preference for students in "D" or "F"-rated public schools, to attend eligible participating public or private schools. *Id.* at § 17:4013(2).

Families wishing to participate in the Scholarship Program submit an application to the Louisiana Board of Education. ROA.747. Each family applying for the program ranks in order of preference up to five schools that the family would like their child to attend. ROA.983. The Louisiana Department of Education then inputs 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.984-985. Scholarship awards are based on the results of this lottery, unless a narrow statutory preference applies, such as students attending "D" or "F"-rated schools or who have a sibling attending a participating school. La. Rev. Stat. Ann. § 17:4015(3)(b).

Throughout the case, the United States has asserted falsely that the State "assigns" students to schools. As the foregoing statutory process makes clear, the State's role is entirely neutral and passive. Once it has determined student and school eligibility, the State merely performs a match-making service, employing a blind lottery to match students with their family's school preferences. No student is forced by the State to attend a particular school, and of course students are free to return to public schools anytime they wish.

The Scholarship Program is open to both private and public 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.* at § 17:4021(2). In other words, the only private schools that may participate are those that have satisfied the criteria for *Brumfield* certification; i.e., they have been certified by the Louisiana Department of Education as non-discriminatory and the United States has not challenged that certification.

A *public* school wishing to participate in the 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 public school is located." *Id.* at § 17:4013(3). Again, throughout the case the United States has attempted to obfuscate the matter by implying that the Scholarship Program *as a whole* is subject to ongoing school desegregation decrees. But the statute makes clear that only *public schools* receiving scholarship students are subject to ongoing desegregation orders, not the entire Scholarship Program. It does not apply to private schools (to which the *Brumfield* certification requirement applies) nor to students *leaving* public schools that are subject to desegregation orders. The statute subjects only public schools wishing to participate in the Scholarship Program to applicable desegregation decrees.

The first scholarships were awarded for the 2012-13 school year. More than 10,000 children applied and 4,900 were awarded scholarships and enrolled in *Brumfield*-certified private schools, 117 of which participated in the program.

ROA.747-748. More than 90 percent of the scholarship recipients were minorities, most of whom were African-American. ROA.748.

Applications for the 2013-14 school year increased nearly 20 percent to 12,000. *Id.* Nearly 6,800 students were awarded scholarships, attending 125 *Brumfield*-certified private schools. ROA.747-48. More than 85 percent of the children receiving scholarships in the 2013-14 school year were black, ROA.748, which is nearly twice their representation among the Louisiana public school population.

D. Department of Justice attack and subsequent judicial proceedings.

Despite the fact that the Scholarship Program's participants are overwhelmingly black, all of whom by definition come from low-income families and (unless they were enrolling in Kindergarten) were attending average or poor-performing public schools, the United States on August 22, 2013 filed a "Motion for Further Relief" in *Brumfield*. 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.241. In a subsequent filing, the United States recited 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.795,

n. 13. The Motion for Further Relief did not assert that any of the private schools enrolling scholarship students were discriminatory, which was the focus of the *Brumfield* litigation, but rather that the program was "impeding" the desegregation process in the other cases. ROA.249.

The district court held a status conference on September 18, 2013 regarding the Motion for Further Relief. At that conference, the district court ordered briefing on (1) whether the 1975 "desegregation order" in *Brumfield* applies to the Scholarship Program "so as to require the State to obtain authorization from the Court prior to implementation," and (2) if so, "is there any need to amend existing orders to ensure a process of review" of the program. ROA.424-25.

The Justice Department's motion to halt the program evoked a fierce backlash from across the political spectrum. *See, e.g.*, "The Justice Department Bids to Trap Poor, Black Children in Ineffective Schools," *Washington Post* (Sept. 9, 2013) ("it's bewildering, if not downright perverse, for the Obama administration to use the banner of civil rights to bring a misguided suit that would block these disadvantaged students from getting the better educational opportunities they are due"); Grover J. Whitehurst, "The DOJ Attempt to Block School Vouchers in Louisiana Undermines Civil Rights," published at brookings.edu/research/papers/2013/09/11-doj-block-louisiana-school-vouchers-whitehurst ("if the DOJ persists in actions that have the effect of denying poor black parents whose children are trapped in underperforming

schools the opportunity to choose something different and possibly better, then this is the civil rights division of the DOJ suppressing civil rights—ironic and tragic in the extreme"); "Louisiana Gov. Jindal Fighting Back Against Obama Administration Bid to End School Voucher Program," published at foxnews.com/politics/2013/09/05/louisiana-gov-jindal-fighting-back-against-obama-administration-bid-to-end/; Rich Lowry, "Holder's Voucher Travesty," published at nationalreview.com/article/357533/holders-voucher-travesty-rich-lowry.

In a "supplement" to its original Motion, the United States on September 23, 2013 withdrew its demand for a permanent injunction and asked instead to establish a pre-clearance process for the Scholarship Program, including an analysis of voucher awards and their impact on desegregation decrees around the state. ROA.426-30. The United States reiterated that demand in its response to the two questions posed by the district court. ROA799-801. The United States has never withdrawn its original Motion for Further Relief.

On September 30, 2013, Appellants filed a Motion to Intervene for the limited purpose of opposing the United States' Motion for Further Relief. ROA.483-86. The individual Appellants are families whose children previously were enrolled in public schools rated "C" or below and who have received vouchers to attend private schools in parishes that are subject to continuing desegregation orders. Appellant Louisiana Black Alliance for Educational Options is a nonprofit membership organization whose mission is to increase

access to high-quality educational options for black schoolchildren, many of whose members are participating in the Scholarship Program.

The district court denied the Motion to Intervene on November 15, 2013. ROA.823-30. Appellants were instead granted *amicus curiae* status, but were not allowed to present argument at the hearing on November 22, 2013 at which the district court considered the two questions it presented. *Id*. At that hearing, the court announced its conclusion that the Scholarship Program falls within the ambit of the original *Brumfield* orders, and directed the parties to present proposed modified orders to govern the Scholarship Program. ROA.878.

On April 7, 2014, the district court issued an order requiring the State of Louisiana to provide, on an annual basis, extensive information pertaining to the Louisiana Scholarship Program. ROA.1075-79. Specifically, among other things, the court required (1) copies of all *Brumfield* compliance reports for private schools participating in the Scholarship Program or seeking to participate; (2) enrollment by race for all participating private schools; (3) the names, school district, previous public schools attended, race, and list of private schools in order of preference for all applicants to the Scholarship Program; (4) data for returning Scholarship Program students even though they are not required to file applications; (5) enrollment data; (6) individual and aggregate racial data for enrollment reports; and (7) enrollment by race for each public school in Louisiana. *Id.* The required data far exceeded the requirements of the original 1975 *Brumfield* order and the 1985 Consent Decree.

Shortly thereafter, on expedited appeal, this Court reversed the trial court on Appellants' Motion to Intervene. The Court observed that ultimately there is no real difference between the relief sought in the United States' Motion for Further Relief and its supplemental memorandum, *Brumfield v. Dodd*, 749 F.3d 339, 342-43 (5th Cir. 2014); and that "if a modification of the decree requiring court approval means anything, it signifies that the government will have the ability to attempt to adjust *some* element of the Scholarship Program" in a way that could harm the interests of the families receiving scholarships. *Id.* at 343-44 (emphasis in original). "Further, the parents are staking out a position significantly different from that of the state, which apparently has conceded the continuing jurisdiction of the district court." *Id.* at 346.

Upon joining the litigation, Appellants promptly filed a Motion to Vacate Order Modifying Consent Decree based on Fed. R. Civ. P. 60(b)(4), 60(b)(5), and 59(e). ROA.1080-94. On August 1, 2014, the district court denied the Motion in its entirety, ROA.1148-57, holding, *inter alia*, that the "voucher program clearly falls under the injunction and consent decree in this case, granting the Court subject matter jurisdiction." ROA.1152. This timely appeal followed.

SUMMARY OF THE ARGUMENT

It is not so much the particulars of the district court's order that offend the Constitution and threaten the precious educational opportunities provided by the Scholarship Program to the Appellant schoolchildren, it is the court's very

exercise of jurisdiction over the program. As this Court recognized in its decision allowing Appellants to intervene to defend the program, once the court's 1975 order "is modified to require prior court approval of the Program's implementation, then some parents are at risk of losing vouchers or their full range of school choices." *Brumfield*, 749 F.3d at 344. The continued specter of litigation places a cloud of permanent risk and uncertainty over a program that has delivered to many black schoolchildren in Louisiana access to high-quality educational opportunities for the first time in their lives.

The Court should vacate the district court's orders relating to the Scholarship Program pursuant to Fed. R. Civ. P. 60(b)(4) for lack of subject-matter jurisdiction because they lack the essential predicate of any assertion that the Scholarship Program is discriminatory, and because the program does not flow from the statutes that were the subject of the original litigation.

Alternatively, should the Court find that the Scholarship Program falls within the district court's jurisdiction in this case, it should vacate the orders pursuant to Fed. R. Civ. P. 60(b)(5) and 59(e) because of the array of changed legal and factual circumstances that render those orders manifestly unjust.

The outcome of this case has vitally important ramifications for minority schoolchildren across the nation. Hundreds of school districts, mostly but not all in the South, are subject to desegregation cases that have not yet been closed. If government officials can dust off those decrees to create obstacles for options such as charter schools and vouchers, such actions will have the perverse effect

of thwarting the constitutional promise of equal educational opportunities that animated those decrees in the first place.[7]

ARGUMENT

The trial court's ruling on a Rule 60(b)(4) motion is reviewed *de novo*. *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998). Although a district court's decision on a motion to alter or amend a judgment under Rule 59(e), or on a motion to vacate under Rule 60(b)(5), is generally reviewed for abuse of discretion, when the ruling involves a question of law, as here, the standard of review is *de novo*. *Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir. 2000); *Frazar v. Ladd*, 457 F.3d 432, 435 (5th Cir. 2006).

[7] *See, e.g.*, William G. Howell and Paul E. Peterson, *The Education Gap: Vouchers and Urban Schools* (2002) at 27 ("particularly with regard to student achievement, we find that school choice has the greatest impact on African American students); Preston C. Green, III, "Racial Balancing Provisions and Charter Schools: Are Charter Schools Out On a Constitutional Limb?" 2001 *B.Y.U. Educ. & Law Jrnl.* 65, 66 (2001) ("[A] high percentage of charter schools have a disproportionately high percentage of racial minorities. In fact, rigid enforcement of charter school racial balancing provisions might prevent the development of charter schools that will benefit minority communities").

I. THE COURT SHOULD VACATE THE ORDERS PURSUANT TO FED. R. CIV. P. 60(b)(4).

Pursuant to Rule 60(b), "[o]n motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." This Court has "recognized two circumstances in which a judgment may be set aside under Rule 60(b)(4): 1) if the initial court lacked subject matter or personal jurisdiction; and 2) if the district court acted in a manner inconsistent with due process of law." *Callon Petro. Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003). Although either is a basis for relief from a judicial order, the district court's orders violate both criteria: (1) the court lacks subject-matter jurisdiction over the Scholarship Program; and (2) it violates due process to extend the court's prior orders to the Scholarship Program absent an allegation and proof that the Program is discriminatory.

The black-letter law dictating the outcome of this case was set forth by the U.S. Supreme Court in *Milliken v. Bradley*, 433 U.S. 267, 282 (1977): "federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, 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." Such a finding is a prerequisite to exercising jurisdiction in this case. *See, e.g.*, *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"). If a consent decree is not limited to reasonable and necessary implementations of federal law, "it may improperly deprive future officials of their designated legislative and executive powers." *Id.* at 450; *accord*, *Frew v. Hawkins*, 540 U.S. 431, 441 (2004).

The condition that violated the Constitution in this case was "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 state and parish officials. *Brumfield*, 405 F. Supp. at 347. The court's remedy was precisely and narrowly tailored to that violation, enjoining "assistance . . . to any racially discriminatory private school or to any racially segregated private school." *Id.* at 349. No one disputes that the 1975 injunction and the 1985 Consent Decree, and compliance with those orders, was intended to be fully curative of the constitutional violation.[8] "The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials." *Frew*, 540 U.S. at 442.

[8] The fact that the district court deemed the case closed in April 1976 suggests that it intended that the 1975 injunction and certification process fully resolved the constitutional violation.

The Scholarship Program to which the United States and district court seek to stretch the court's jurisdiction was not even a twinkle in the eye of State policymakers when this case was adjudicated 40 years ago. Nor does it in any way "flow" from the constitutional violation, except in the sense that it can be said to be part of the State's efforts to undo the enduring educational effects of past discrimination. It is aimed entirely at low-income students attending average or poor-performing public schools, the overwhelming majority of whom are black. The Scholarship Program is literally 180 degrees from the program that was the subject of this litigation.

"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 been adjudicated." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992). The United States has not contended that the Scholarship Program is discriminatory in any way, shape, or form. Nor could it conceivably do so; for after all, the statute by its own terms requires all participating private schools to be *Brumfield*-certified.[9] Any possible application of *Brumfield* to the Scholarship Program is satisfied in its entirety

[9] We do not understand the government to contend that by requiring participating private schools to be *Brumfield*-certified, the statute creating the Scholarship Program conferred jurisdiction over the program upon the district court. It is axiomatic that a state statute cannot enlarge a federal court's jurisdiction. *See, e.g.*, *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317 (1943).

by that statutory requirement. The United States' Motion for Further Relief thus lacks the essential predicate for federal judicial intervention: allegations and proof that the Scholarship Program is discriminatory or otherwise unlawful.

The government is essentially trying to "bootstrap" jurisdiction over the textbook and transportation statute to encompass the Scholarship Program. That it may not do. This Court's recent decision in *U.S. v. Texas*, 601 F.3d 354 (5th Cir. 2010), is dispositive of the issue here. In that case, which arose in the context of nine all-black school districts, a permanent injunction providing for district court supervision of the State's educational system and policies was issued in 1971. *Id.*, 601 F.3d at 357. Shortly thereafter, Mexican-American students intervened to assert various claims. In 2006, 35 years after the initial order, the intervenors filed a motion for further relief under the 1971 order. The district court initially denied relief, then reconsidered and ordered relief including a monitoring system. *Id.* at 358-59.

This Court reversed. The Court initially noted that the "district court retained remedial jurisdiction over all actions brought to enforce or amend" its initial order. *Id.* at 362-63. However, "to find a violation of the Modified Order, the trial court must determine that the contested action 'represents or flows' from a *de jure* segregated or discriminatory system." *Id.* at 363. Hence, "the decision below cannot be upheld absent a showing of statewide *de jure* segregation of Mexican-Americans." *Id.* The court was not "entitled to presume" such segregation absent an evidentiary hearing, it made no factual

findings, and the record would not support such a finding. "Because there is no showing of statewide *de jure* segregation of Mexican-Americans, the trial court cannot enforce [the order] under the facts and claims presented." *Id.* Indeed, absent such a finding, "the district court should not have exercised jurisdiction" over the claim "pursuant to its remedial jurisdiction over the Modified Order." *Id.* at 364.

The situation here is similar but exponentially worse. In *U.S. v. Texas*, the court's original jurisdiction was far more extensive (a statewide discrimination case that resulted "for the district court to supervise broad aspects of the State's educational system and policies," *id.* at 357), and yet even that broad mandate was insufficient to sweep in new claims. Here, by contrast, the basis of the original claim and the resulting scope of the court's remedy were far narrower. *See Brumfield*, 405 F. Supp. at 348-349 (enjoining a particular statute and establishing a process to certify compliance with constitutional requirements). As in *U.S. v. Texas*, the government here is attempting to bootstrap jurisdiction over a proven, long-ago claim to encompass a new, distinct, and unproven claim. *Cf. Samnorwood Indep. Sch. Dist. v. Texas Educ. Agency*, 533 F.3d 258, 269 (5th Cir. 2008) (decades-old desegregation order may not be extended to school districts that were not part of the original action and desegregated long ago absent showing of segregative intent).

Here, however, the claim is not only unproven but unalleged: the government does not even contend, nor could it, that the private schools

participating in the Scholarship Program are discriminatory, or that the program was adopted for the purpose of evading desegregation. Thus neither the State nor Appellants had any opportunity to rebut such allegations. The district court proceeded immediately to impose a "remedy" before any constitutional violation was even alleged much less proven, which is about as paradigmatic a violation of due process as one can imagine.

The present Motion for Further Relief takes an even more giant step beyond the situation in *U.S. v. Texas*. Here, the court below not only expanded its jurisdiction beyond the program originally at issue in this case, but attempts to bootstrap the jurisdiction of the dozens of ongoing desegregation cases to encompass the Scholarship Program. The gravamen of the Motion for Further Relief in this case really has nothing to do with any alleged or proved violations of any order in this case. Rather, all of the government's allegations and every aspect of the district court's orders pertain to *other* cases—i.e., desegregation cases around the state that have not yet been closed—over which the district court, of course, has no jurisdiction. Specifically, the court is requiring demographic information from the students participating in the Scholarship Program and the *public* schools that they otherwise would attend. ROA.1075-79. The United States evidenced no concern over whether the participating private schools are discriminatory—which is the only matter at issue in *Brumfield*—or even for that matter, whether the Scholarship Program was created to evade ongoing desegregation orders. Rather, the United States and

the district court appear concerned solely over whether the Scholarship Program violates desegregation orders in *other* cases over which the district court has no jurisdiction (and indeed, to which the State is not even a party).

Whatever the United States' motivation in choosing this case as a forum to air its grievances against this program, it is too narrow a vessel to carry that freight. "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *U.S. v. Armour & Co.*, 402 U.S. 673, 681 (1971). The district court's orders do not "directly address and relate to the constitutional violation"—state textbook and transportation aid to segregated private schools—and therefore transgress the "inherent limitation upon federal judicial authority." *Milliken*, 433 U.S. at 282.

If the United States genuinely believes that the Scholarship Program violates the Constitution, it may file a lawsuit challenging the program based on the requisite allegations, *see, e.g.*, *Samnorwood*, 533 F.3d at 269, or it can file motions for appropriate relief in desegregation cases in which it is a party (though it has a problem if the State is not a defendant in those cases).

What it cannot do is to dust off a 40-year-old decree having nothing to do with the Scholarship Program as a means to threaten the program and impose cumbersome requirements upon it. Such requirements are in no way remedial because they do not flow from the scope and nature of the constitutional violation in *Brumfield*. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*,

402 U.S.1, 16 (1971) ("the nature of the violation determines the scope of the remedy"). Beyond those precise parameters, the district court's jurisdiction does not extend.

II. THE COURT SHOULD VACATE THE ORDERS PURSUANT TO FED. R. CIV. P. 60(b)(5) AND 59(e).

Should the Court find that the district court has jurisdiction over the Scholarship Program and that the 1975 Order and the 1985 Consent Decree apply, the Court nonetheless should vacate the court's orders below because it is no longer equitable to apply the 1975 and 1985 orders due to changed legal and factual circumstances since the original decrees were entered.

Fed. R. Civ. P. 60(b)(5) permits a party to receive relief from an order if applying the order "prospectively is no longer equitable." As the U.S. Supreme Court explained in *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 384), Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest'."

Fed. R. Civ. P. 59(e) also allows a party to "alter or amend a judgment." As this Court has observed, "Rule 59(e) has been interpreted as covering motions to vacate judgments, not just motions to modify or amend." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). Rule 59(e) does not require "a showing as onerous as Rule 60(b)." *Gonzalez v. State Fair of Tex.*, 235 F.3d 1339, n. 1 (5th Cir. 2000).

As the Supreme Court repeatedly has admonished, "Rule 60(b)(5) serves a particularly important function in what we have termed 'institutional reform litigation.'" *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 380). Such institutional reform litigation "commonly involves areas of core state responsibility, such as public education." *Id.* at 448. Institutional reform litigation also differs from other types of cases because state and local "public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." *Id.*

The two most dramatic factors supporting relief from the 1975 and 1985 *Brumfield* orders are (1) the fundamentally different nature of the Scholarship Program as contrasted with the statute that animated the *Brumfield* litigation and (2) the passage of a great deal of time since the initial constitutional violation and the current efforts to apply its remedy. In *Horne* and in *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612 (2013), the Supreme Court recently has dealt with each of those circumstances and found the current application of federal jurisdiction to be an unjustified intrusion on state prerogatives. When combined, as they are here, those factors present a powerful case against further extension of the 1975 and 1985 *Brumfield* orders.

As the Supreme Court stated in *Board of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 247 (1991), "From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." Such decrees, the Court emphasized, "are not intended to

operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Id.* at 248. *Accord*, *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995).

That was precisely the justification for Rule 60(b)(5) relief in *Horne*. In that case, the district court in 2000 and 2001 found violations of federal law concerning English-language learners. The basis for relief from the original order was that the State "is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances." *Id.*, 557 U.S. at 439. The Court observed that injunctions in institutional reform cases "often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Id.* at 448. Accordingly, the Court held that rather than rigidly enforcing the original decree, courts 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.

The district court's approach could not be further from the "flexible standard" required by *Horne*. By not merely applying but *expanding* the *Brumfield* orders to encompass the Scholarship Program, the district court implicitly assumed that nothing has changed in the State of Louisiana's thinking or conduct in the past 40 years; that its motives are malevolent, not beneficent;

that a program designed on its face (and which operates in fact) to provide educational opportunities to low-income students in poor-performing public schools and which mandates that participating private schools must be nondiscriminatory not only justifies application of remedies addressed 40 years ago to an overtly discriminatory statute but additional scrutiny above and beyond. Under *Horne* and the cases upon which it is constructed, such extraordinary judicial intrusion into State and local educational policy is intolerable.

Of course, *Horne* involved a remedial order that was not even ten years old, and even then required that the order give way to changed public policy. The case against extending federal orders to changed public policy is even stronger when the impetus for those orders fades into history. As the Supreme Court ruled in *Shelby Cnty.*, in invalidating an extension of Section 4 of the Voting Rights Act, federal intervention into State prerogatives is not warranted "based on 40-year-old facts having no logical relation to the present day." 133 S.Ct. at 2629. The intervention in that case was a voting preclearance process that is very similar to the process sought with respect to the Scholarship Program by the United States and ordered by the court below.

The Court's holding in *Shelby Cnty.* echoes in abundant case-law in the desegregation context, especially in cases where plaintiffs sought to maintain rigid racial ratios for student assignments in perpetuity. "As the *de jure* violation becomes more remote in time and these demographic changes

intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system," the Court held in *Freeman v. Pitts*, 503 U.S. 467, 496 (1992). "The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith." *Id.*; *accord*, *Dowell*, 498 U.S. at 248.

In this case, there is no question that State officials have acted in good faith for at least 30 years since the Consent Decree in 1985. The concerns that animated the *Brumfield* litigation are entirely absent here. They are even more attenuated by the limited scope of the relief sought here by Appellants. Not only do they not seek a dissolution of the 1975 and 1985 orders—much less the invalidation of part of a federal statute as in *Shelby Cnty.*—Appellants do not seek *any* change to those orders. To the contrary, the Scholarship Program itself requires *Brumfield* certification for participating private schools. Rather, Appellants seek Rule 60(b)(5) relief only insofar as the 1975 and 1985 orders require the imposition of *increased* requirements upon the Scholarship Program over and above the requirement of *Brumfield* certification of private schools, so as to justify the "further relief" ordered by the district court.

One more change in factual and legal circumstances merits consideration: the change in the nature of "school choice" between 1975 and 2014, and qualitative and constitutional differences between the textbook and transportation aid program that was the subject of the *Brumfield* litigation and the Scholarship Program adopted by the State of Louisiana. In *Zelman v.*

Simmons-Harris, 536 U.S. 639 (2002), the Supreme Court upheld against a First Amendment challenge a voucher program for low-income children in Cleveland similar in its motivation and particulars to the Scholarship Program at issue here. 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 (emphasis added).

The district court's conclusion that "the program in *Zelman* is substantially dissimilar to the Louisiana program," ROA.1154, is based on a misreading of *Zelman*. The district court notes that a lottery system is used in the Louisiana program, *Id.*, but the fact remains that no public funds reach private school coffers unless parents apply for the programs and designate private schools for their children. Hence unlike the textbook and transportation program at issue in *Brumfield*, which constituted direct aid to private schools, it is clear after *Zelman* that the Louisiana Scholarship Program is "a program of true private choice." *See Zelman*, 536 U.S. at 662. That change in law and fact justifies a modification of the *Brumfield* orders to remove the Scholarship

Program from their ambit.[10]

Cumulatively, the changes in law and factual circumstances since 1985 are abundant. The Supreme Court's decisions in cases like *Freeman*, 503 U.S. 467, *Dowell*, 498 U.S. 237, *Horne*, 557 U.S. 443 and *Shelby Cnty.*, 133 S. Ct. 2612—as well as this Court's desegregation decisions—all give meaning to the limits of federal authority over the states in this context. *Zelman* highlights the evolving nature of school choice, exemplified by the Louisiana Scholarship Program.

The *Brumfield* plaintiffs did not have high-quality educational opportunities at their disposal. Their grandchildren, thanks to the Scholarship Program and other reforms, do. It would be cruelly ironic if the fruits of the former's struggles were used to thwart the latter's progress.

For all of the foregoing reasons, to the extent that the 1975 and 1985 *Brumfield* orders apply to the Scholarship Program, they should not be construed to justify "further relief" in the form of additional obligations imposed upon a manifestly remedial and nondiscriminatory program.

[10] The district court also observes, ROA.1155, that unlike *Zelman*, the participating private schools must be certified as nondiscriminatory. Indeed! That factor only underscores that there is complete compliance with *Brumfield* and that the additional orders are manifestly unjust.

CONCLUSION

This honorable Court should reverse the decision of the district court with instructions to dissolve its further relief in connection with the Louisiana Scholarship Program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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