No. 13-1469

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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Little Rock School District — Plaintiff-Appellant

v.

State of Arkansas, *et al.* — Defendants-Appellees

v.

Wilson Community Development Corporation., *et al*. — Intervenors-Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CASE NO. 4:82-CV-00866
Honorable D. Price Marshall, District Judge

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# APPELLANT'S OPENING BRIEF AND ADDENDUM

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## Summary of the Case and Request for Oral Argument

The Little Rock School District ("LRSD") filed this interdistrict desegregation case in 1982 to remedy interdistrict constitutional violations in Pulaski County, Arkansas. The State of Arkansas was found guilty of interdistrict constitutional violations. In 1990, this Court approved a comprehensive settlement agreement, known as the 1989 Settlement Agreement. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1376 (8th Cir. 1990). In proceedings below, LRSD moved to enforce the 1989 Settlement Agreement alleging the State of Arkansas should have sought and obtained district court approval before authorizing open-enrollment charter schools in Pulaski County. The district court granted summary judgment to the State, and LRSD appeals.

LRSD respectfully requests oral argument of 20 minutes per side due to the complex issues and substantial public interest in this case.

TABLE OF CONTENTS

## I.

## Table of Authorities

### Cases

**Statutes**



**Rules**

## II.

## Jurisdictional Statement

### A. District Court Jurisdiction.

The Little Rock School District ("LRSD") filed this interdistrict desegregation case in 1982 to remedy interdistrict constitutional violations in Pulaski County, Arkansas. The district court had jurisdiction under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201 and 2202. In 1990, this Court approved a comprehensive settlement agreement, known as the 1989 Settlement Agreement. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1376 (8th Cir. 1990). A consent decree embodying the 1989 Settlement Agreement was entered on April 29, 1992. *Knight v. Pulaski County Special Sch. Dist.*, 112 F.3d 1255, 1257-58 (8th Cir. 1997). The district court retained ancillary jurisdiction to enforce the consent decree. *See Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 131 F.3d 1255, 1257-58 (8th Cir. 1997).

### B. Appellate Court Jurisdiction.

On 17 January 2013, the district court granted the State of Arkansas summary judgment denying with prejudice LRSD's request for declaratory and injunctive relief pertaining to the State's creation of open-enrollment charter schools in Pulaski County, Arkansas. **Add. 30**. LRSD timely filed its notice of appeal on 15 February 2013. **App. 19**. This Court has jurisdiction pursuant 28

U.S.C. § 1292(a)(1) to review the district court's interlocutory order denying LRSD's request for injunctive relief.

## III.

## Statement of the Issues

**A. THE STATE OF ARKANSAS MAY NOT UNILATERALLY CREATE AN INTERDISTRICT SYSTEM OF CHARTER SCHOOLS THAT COMPETES WITH THE INTERDISTRICT SYSTEM CREATED BY THE CONSENT DECREE.**

*Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 921 F.2d 1371 (8th Cir. 1990)*

*Berry v. Sch. Dist. of the City of Benton Harbor, 56 F.Supp.2d 866 (W.D. Mich. 1999)*

**B. SUMMARY JUDGMENT WAS IMPROPER WHERE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO LRSD DEMONSTRATED A NEGATIVE ON THE M-TO-M AND MAGNET PROGRAMS.**

*Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)*

*Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785 (8th Cir. 2012)*

**C. LACHES IS INAPPLICABLE BECAUSE LRSD ESTABLISHED GOOD CAUSE FOR DELAY AND LACK OF PREJUDICE TO THE STATE.**

*Roederer v. J. Garcia Carrion, S.A., 569 F.3d 855 (8th Cir. 2009)*

*Siegerist v. Blaw-Knox Co., 414 F.2d 375 (8th Cir. 1969)*

## IV.

## Statement of the Case

On 19 May 2010, LRSD filed a Motion to Enforce 1989 Settlement Agreement, along with a supporting brief and 73 exhibits, alleging that the State's creation of open-enrollment charter schools in Pulaski County violated the consent decree. **App. 62 and 1346.** The State moved to dismiss LRSD's motion arguing that the district court lacked jurisdiction over open-enrollment charter schools in Pulaski County. **App. 2578** ("[N]o court anywhere has found [a state's decision to create charter schools] to be within their jurisdiction to control.").

By order entered 15 August 2011, the district court stated that it was not ready to resolve the issue of jurisdiction and that it would "revisit" the issue "after the parties do some limited discovery and make further argument." **App. 2633**. The district court then established a schedule for discovery and briefing consistent with Fed. R. Civ. P. 56 with LRSD as the moving party. Oral argument was scheduled for 29 March 2012. **App. 2634**.

On 14 February 2012, LRSD filed its Motion for Summary Judgment, incorporating by reference its Motion to Enforce 1989 Settlement Agreement and adding an additional 29 exhibits. LRSD's motion was also accompanied by a supporting brief and a statement of material facts that included 122 paragraphs. **App. 2868-3977.** The State and Charter Intervenors filed their responses on 12

March 2012. **App. 3978-4468, 4897-4947 and 4948-83.** LRSD filed a summary judgment reply on 29 March 2012. **App. 4984-88.**

The district court heard oral argument on 29 March 2012. While the State had not moved for summary judgment, the parties agreed that the district court could interpret the consent decree and rule as a matter of law for LRSD or the State. By order entered 17 January 2013, the district court ruled for the State interpreting the 1989 Settlement Agreement not to bar the State's unilateral creation of open-enrollment charter schools in Pulaski County, requiring LRSD to prove that open-enrollment charter schools in Pulaski County have had a material adverse effect on the 1989 Settlement Agreement and finding that LRSD failed to meet its burden. **Add. 29**. The district court also held as a matter of law that LRSD's charter school claim was barred by the equitable doctrine of laches. **Add 19**. LRSD filed a timely notice of appeal on 15 February 2013. **App. 5292-93.**

## V.

## Statement of Facts

### A. The Defendants' Constitutional Violations.

In 1984, the district court found the State, the Pulaski County Special School District ("PCSSD") and the North Little Rock School District ("NLRSD") guilty of interdistrict constitutional violations including acting in concert for the purpose of preserving residential segregation. *Little Rock School District v. Pulaski County Special School District,* 584 F.Supp. 328, 353 (E.D. Ark. 1984). Additionally, the district court made specific liability findings against the State Board of Education ("State Board") and reaffirmed the State Board's remedial responsibilities in *Little Rock School District v. Pulaski County Special School District*, 597 F.Supp. 1220, 1227-28 (E.D. Ark. 1984). *See Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 409 (8th Cir. 1985). This Court affirmed the district court's imposition of remedial responsibilities on the State through the State Board. *LRSD v. PCSSD,* 778 F.2d at 411-12 n.4.

To remedy the defendants' constitutional violations, the district court ordered consolidation of LRSD, NLRSD and PCSSD, but this Court reversed finding consolidation "exceeds the scope of the violations." *Id.* 778 F.2d at 434. This Court directed the district court to modify its remedy consistent with, among others, the following "principles":

* * *

5. Each district encourage voluntary intra- or interdistrict majority-to-minority transfers and that the State pay the cost of transportation and pay both the sending and receiving district a financial incentive;

6. The Court consider creating a *limited number* of magnet schools with the State being required to pay one-half the cost of educating magnet students and to pay regular state aid to the student's home district;

* * *

*Id.* 778 F.2d at 435-36 (emphasis supplied).

**B. The Consent Decree.**

**1. M-to-M Stipulation.**

Consistent with this Court's remedial principles, the parties submitted the Majority-to-Minority ("M-to-M") Stipulation to the district court on August 26, 1986. "Beginning in the 1987-88 school year *and continuing thereafter*," the M-to-M Stipulation requires LRSD, PCSSD and NLRSD to "permit and encourage voluntary majority-to-minority interdistrict transfers." **App. 69.** The M-to-M Stipulation allows students in the racial majority at their school and district to transfer to a school and district where they would be in the racial minority. **App. 69-70.** Currently, LRSD and NLRSD are majority black, and PCSSD is majority non-black. Thus, the M-to-M stipulation allows black LRSD and NLRSD students to transfer to majority non-black PCSSD schools, and non-black PCSSD students to transfer to LRSD and NLRSD schools that are majority black.

The M-to-M Stipulation requires the State Board to "pay the full cost of transporting students opting for interdistrict transfers." **App. 73.** The State also pays a financial incentive to both the sending and receiving district. **App. 73-74; 92-93.** The financial incentive serves to encourage the districts to promote voluntary interdistrict transfers, particularly to interdistrict schools. *LRSD v. PCSSD*, 778 F.2d at 436; *LRSD v. PCSSD*, 934 F.Supp. 299, 301 (E.D. Ark. 1996), *aff'd LRSD v. PCSSD*, 109 F.3d 514 (8th Cir. 1997).

**2. Magnet Stipulation.**

The parties submitted the Magnet Stipulation to the district court on February 16, 1987. **App. 77.** The Magnet Stipulation created six interdistrict magnet schools, four elementary schools (Booker, Carver, Gibbs and Williams), one middle school (Mann) and one high school (Parkview). **App. 77; Add. 34.** The Magnet Stipulation requires the Stipulation Magnets to have a student population "which is fifty-percent (50%) black and fifty percent (50%) non-black" and prescribes a method for allocating magnet seats among the three districts. **App. 81.** It requires the State to pay the actual cost of transporting magnet students and one-half of the cost of educating magnet students. **App. 79; 92-93.** In addition, each districts' magnet students are included in the district's average daily membership for the purpose of determining the district's regular state education funding. **App. 90.** The purpose of the Stipulation Magnet schools was to

encourage voluntary interdistrict transfers and improve racial balance and to provide academic benefits through special programs. *See Liddell v. State of Missouri*, 731 F.2d 1294, 1310 (8th Cir. 1984).

**3. The 1989 Settlement Agreement.**

The 1989 Settlement Agreement, among other things, incorporated the M-to-M Stipulation and the Magnet Stipulation and resolved numerous funding issues related to those agreements. **App. 90-94.** As a part of the 1989 Settlement Agreement, the State expressly "committed" to the principle that "[t]he ADE and the Districts should work cooperatively to promote the desegregation goals of the State and the Districts . . . ." **App. 103***; see also* **App. 348***, AG Opinion 8 March 2000* ("In the Agreement that settled the Pulaski County desegregation case, the State and the [State] Board [of Education] committed 'to promote the desegregation goals of the State and the [Pulaski County] districts.'"); **App. 421***, AG Opinion 5 January 2001* (same). The district court and this Court have recognized that increasing participation in the M-to-M and magnet programs as a goal of the interdistrict remedy. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 934 F.Supp.299, 301 (E.D. Ark. 1996) (adopting an interpretation of the consent decree agreement that rewards effective recruiting of M-to-M students because "the primary purpose of the M-to-M concept was to promote voluntary interdistrict transfers."), *aff'd Little Rock Sch. Dist. v. Pulaski*

*County Special Sch. Dist.*, 109 F.3d 514, 516 (8th Cir. 1997) ("The district court's interpretation . . . will promote voluntary interdistrict transfers to interdistrict schools, and it will provide a financial incentive to both districts to receive M-to-M transfer students.").

The district court initially rejected the 1989 Settlement Agreement, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 726 F.Supp. 1544 (E.D. Ark. 1989), but this Court reversed the district court and ordered that the 1989 Settlement Agreement be approved. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371 (8th Cir. 1990). A consent decree embodying the 1989 Settlement Agreement was entered on April 29, 1992. *Knight v. Pulaski County Special Sch. Dist.*, 112 F.3d 1255, 1257-58 (8th Cir. 1997).

**4. Jacksonville Splinter District.**

In 2003, the State Board authorized an election to create a "splinter district" by detaching the Jacksonville area from the PCSSD. On the motion of PCSSD, the district court directed the State Board to rescind its order authorizing the election. The district court found that the proposed Jacksonville splinter district violated the 1989 Settlement Agreement and this Court's orders in *LRSD v. PCSSD,* 805 F.2d 815 (8th Cir. 1986) and *LRSD v. PCSSD*, 778 F.2d 404 (8th Cir. 1985). **Docket No. 3792 and App. 254-71.** In particular, the district court held that it violated the consent decree because it removed from the interdistrict system created by the

consent decree "students residing in the proposed detachment area who might, through M-to-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the Pulaski County Special School District, the Little Rock School District, and North Little Rock School District." **App. 257.** The district court warned the State Board that "they cannot use state statutes as a shield to avoid complying with all Court orders and contractual agreements that govern and control the desegregation obligations of the parties in this case." **App. 264.** The State did not appeal the district court's decision. *See LRSD v. PCSSD*, 378 F.3d 774 (8th Cir. 2004).

### C. Open-Enrollment Charter Schools in Pulaski County.

#### 1. The Charter Schools Act.

The Arkansas Charter Schools Act of 1999 ("Charter Schools Act") authorizes the State Board to approve applications for open-enrollment charter schools. *See* Ark. Code Ann. § 6-23-101, *et seq.* Open-enrollment charter schools are public schools operated by non-profit or governmental entities based on a "charter" -- an initial five-year contract between the State Board and the operating entity. *See* Ark. Code Ann. § 6-23-103(2). An open-enrollment charter school "may draw its students from any public school district in the state." *See* Ark. Code Ann. § 6-23-103 (8)(B). Public school districts are not eligible to operate open-enrollment charter schools. *See* Ark. Code Ann. § 6-23-103 (4) and **App. 282**,

ADE Rules and Regulations Governing Public Charter Schools ("Charter Rules"), § 5.04 (October 2009).

The Charter Schools Act requires the applicant to first submit its application to the local school board for the public school district where the open-enrollment charter school will be located. *See* Ark. Code Ann. § 6-23-302(d)(1). If the local school board does not approve the application, the applicant may appeal to the State Board. The State Board must hear the appeal within 45 days of receipt of the applicant's notice of appeal. *See* Ark. Code Ann. § 6-23-302 (d)(2). The local school board and other affected school districts may present arguments for or against the application. At the conclusion of the hearing, the State Board may approve a charter with or without conditions. The State Board's decision is final. **App. 284-85**. Nine of the 11 open-enrollment charter schools in Pulaski County were authorized by the State over the objection of the LRSD, PCSSD and/or NLRSD. **App. 4911**. *State's Response to LRSD's Material Facts, ¶ 43* [(admitting that LRSD objected to Academics Plus, LISA Academy, Covenant Keepers, ESTEM elementary, middle and high schools, and Little Rock Prep.)]. *See also* **App. 296-300; 349-50; 667-73; 689-94; 706-07; 756-58; 784-85; 1443-45; 1649-50, 1463; 1812-25, 1840-45; 2002-97; 2102-33; 2191-95**.[1]

[1] LRSD approved two "no excuses" charters, Dreamland and SIA Tech. Dreamland is now closed.

The Charter Schools Act mandates that the State Board consider the impact of a proposed open-enrollment charter school on the ability of public school districts to comply with desegregation orders or to maintain a desegregated system of public schools. Ark. Code Ann. § 6-23-106. The Act expressly prohibits the State Board from approving an open-enrollment charter school "that hampers, delays, or in any manner negatively affects the desegregation efforts of a public school district or public school districts in this state." Ark. Code Ann. § 6-23-106(c).

**2. The "Magnet" Charters.**

The State Board has approved two types of open-enrollment charter schools in Pulaski County. First, the State Board has approved charter schools that attract students by offering specialized programs. LRSD refers to these as "magnet" charters. The "magnet" charters are Academics Plus, LISA Academy, ESTEM, and LISA Academy North. **App. 1365-83, 1386-1416.** With the exception of ESTEM, these schools are located near white, affluent neighborhoods and provide little or no student transportation. **App. 1371-72, 1375-76, 1379, 1382, 1386-89; App. 2970; App. 3963-64; App. 3122; App. 3341.** ESTEM is located in downtown Little Rock near black neighborhoods and provides transportation via the city bus system. App. 1386-87.

The "magnet" charters enroll a disproportionately low percentage of black students. **App. 4213, Add. 33; App. 519.** According to data provided by the State for 2010-11, Academics Plus was 19.6 percent black; LISA Academy was 31.1 percent black; ESTEM was 47.7 percent black; and, LISA Academy North was 32.5 percent black. For comparison, in 2010-11 LRSD was 67 percent black; PCSSD was 43 percent black; NLRSD was 59 percent black; and Pulaski County public schools overall (including charter schools) are 56.8 percent black. **App. 4213, Add. 33.**

The "magnet" charters also enroll a disproportionately small percentage of economically disadvantaged students. In 2010-11, Academics Plus was 27.7 percent economically disadvantaged; LISA Academy was 26.9 percent economically disadvantaged; ESTEM was 32.1 percent economically disadvantaged; and, LISA Academy North was 25.7 percent economically disadvantaged. **App. 4214-15, 4217, 4219.** For comparison with the stipulation magnet schools, in 2010-11, Booker was 74.1 percent economically disadvantaged; Carver was 72.8 percent economically disadvantaged; Gibbs was 41.2 percent economically disadvantaged; Williams was 44.2 percent economically disadvantaged; Mann was 56.3 percent economically disadvantaged; and, Parkview was 44.17 percent economically disadvantaged. **App. 4918.**

### 3. The "No Excuses" charters.

The second type of charter schools target economically disadvantaged students who are performing below grade level and promise to implement a "no excuses" model to improve student achievement. The "no excuses" charter schools located within the LRSD are Dreamland, Covenant Keepers, Little Rock Prep, and SIA Tech. The "no excuses" charters in LRSD are located in black neighborhoods and primarily serve black, economically disadvantaged students. **App. 1378, 1384-85, 1389-402.** In the most recent year for which the State provided data, Dreamland was 89.4 percent black and 97.8 percent economically disadvantaged; Covenant Keepers was 70 percent black and 80.3 percent economically disadvantaged; Little Rock Prep was 93.8 percent black and 80.0 percent economically disadvantaged; and SIA Tech was 77.9 percent black and 100 percent economically disadvantaged. **App. 4213, 4215, 4220 and App. 4915-16.** The "no excuses" charters, like the "magnet" charters, do not provide student transportation. **App. 1378, 1384, 1390, 1393, 1396, 1398, 1405; App. 2970; App. 3122.**

## VI.

## Summary of the Argument

### A. THE STATE OF ARKANSAS MAY NOT UNILATERALLY CREATE AN INTERDISTRICT SYSTEM OF CHARTER SCHOOLS IN PULASKI COUNTY THAT COMPETES WITH THE INTERDISTRICT SYSTEM CREATED BY THE CONSENT DECREE.

Open-enrollment charter schools in Pulaski County compete with the M-to-M and magnet programs and attract students that would otherwise participate in those programs. It is the law of the case that this type of diversion of students from the M-to-M and Magnet programs violates the 1989 Settlement Agreement.

This Court authorized a "limited number" of interdistrict magnet schools in Pulaski County. The parties agreed that there should be six interdistrict magnet schools. The parties also agreed to a process by which any party may obtain district court approval for additional interdistrict magnet schools. The 1989 Settlement Agreement does not limit the district court's ability to permit or require the creation additional interdistrict magnet schools in accordance with the agreed process.

Open-enrollment charter schools are interdistrict magnet schools. The State should have followed the process stipulated by the parties to obtain district court approval before authorizing open-enrollment charter schools in Pulaski County.

The State has a duty under the 1989 Settlement Agreement to in good faith promote the goal of increasing participation in the M-to-M and magnet programs. Instead of taking steps to increase participation in the M-to-M and magnet programs, the State created a competing system of interdistrict magnet schools that has decreased participation those programs.

Finally, the district court improperly allocated the burden of proof. The State and/or the Charter Intervenors should bear the burden of obtaining the district court's approval of open-enrollment charter schools by proving they would have no negative effect on the interdistrict remedy.

### B. SUMMARY JUDGMENT WAS IMPROPER WHERE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO LRSD DEMONSTRATED A NEGATIVE EFFECT ON THE M-TO-M AND MAGNET PROGRAMS.

The district court erred in failing to view the evidence in the light most favorable to LRSD. LRSD presented evidence of a decline in non-black participation in the M-to-M and magnet programs that coincided with the growth of "magnet" charters in Pulaski County. LRSD also presented evidence that "magnet" charters' location, total enrollment, non-black enrollment, and transportation policies caused the decline in non-black participation. This evidence created fact issues for trial concerning the impact of open-enrollment charter schools on the interdistrict remedy.

### C. LACHES IN INAPPLICABLE BECAUSE LRSD ESTABLISHED GOOD CAUSE FOR DELAY AND LACK OF PREJUDICE TO THE STATE.

There was good cause for LRSD's decision about when to proceed to litigation. First, the charter schools claimed that their enrollment was too small to have any significant impact on the interdistrict remedy. It was reasonable for LRSD to wait until the cumulative effect became material before seeking relief from the district court. Second, the parties attempted to settle the charter school issues, and LRSD filed suit only after settlement negotiations failed.

The State and Charter Intervenors were not prejudiced by the timing of LRSD's decision to proceed with litigation. They do not argue that evidence or witnesses have been lost. LRSD had made known its objections to open-enrollment charter schools well before moving for relief in the district court, and the State and Charter Intervenors chose to move forward with full knowledge that charter schools may be subject to district court approval.

## VII.

## Argument

### A. THE STATE OF ARKANSAS MAY NOT UNILATERALLY CREATE AN INTERDISTRICT SYSTEM OF CHARTER SCHOOLS IN PULASKI COUNTY THAT COMPETES WITH THE INTERDISTRICT SYSTEM CREATED BY THE CONSENT DECREE.

#### 1. Standard of Review.

"The meaning of the terms in the Settlement Agreement, and their application to the facts in this case, are legal questions over which [this Court] exercise[s] plenary review." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 83 F.3d 1013, 1017 (8th Cir. 1996).

#### 2. The Consent Decree Governs the Interdistrict Movement of Students in Pulaski County.

The State must seek and obtain district court approval before implementing education policies in Pulaski County that remove students from the interdistrict M-to-M and magnet programs created by the consent decree. **App. 254-71.** This question was settled in 2003 when the district court (the Honorable Billy Roy Wilson) rejected the State Board's attempt to create a Jacksonville splinter district. The district court adopted the reasoning of Arkansas' then Attorney General, Governor Mike Beebe, in a 4 June 2003 opinion letter to the State Board:

> As a general matter, the Settlement Agreement and the PCSSD's existing desegregation plan were written in the context of the PCSSD having control over the schools in the proposed

> detachment area, having the benefit of the local revenue derived from taxes on property within the proposed detachment area, *and having available the students residing in the proposed detachment area who might, through M-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the PCSSD, the LRSD or the NLRSD*. In light of this, any detachment of a significant amount of territory from the PCSSD could almost certainly be expected to have an "impact" on the PCSSD's ability to comply with its desegregation plan and have an impact on the operation of the Settlement Agreement, including the Agreement's provisions concerning M-M students and the Magnet schools in LRSD.

**App. 276.** (emphasis supplied). Judge Wilson explained that "the Arkansas legislature cannot properly enact legislation that in any way appreciably limits the role of the Court in this desegregation case or that attempts to reduce the constitutional authority of the Court to that of a safety net for state sponsored detachment schemes . . . that . . . appear to be constitutionally infirm on a number of different grounds." **App. 263.** Finding that "the State Board of Education . . . failed to obtain this Court's prior approval of the proposed new school district in northeast Pulaski County . . .," Judge Wilson concluded that "the state violated its obligations under the '89 settlement agreement and the obligation under the Eighth Circuit's decision in the 1986 case . . . ." **App. 263.**

The State did not appeal the district court's Jacksonville splinter district decision, *see Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 378 F.3d 774 (8th Cir. 2004), and that decision is now the law of the case. *See Little Rock Sch.*

*Dist. v. North Little Rock Sch. Dist.*, 148 F.3d 956 at 966 n.3 (8th Cir. 1998) ("We did not so interpret Sections II.E. and II.L. in our previous decision, however, and that decision has become the law of the case."); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F.Supp.2d 988, 1034 (E.D. Ark. 2002) ("On April 10, 1998, Judge Wright entered an order (docket no. 3144) approving the Revised Plan which was *not* appealed as is now a *final consent decree that represents the law of the case.*" (emphasis in original). It is an undisputed fact that open-enrollment charter schools in Pulaski County attract students "who might, through M-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the PCSSD, the LRSD or the NLRSD. " **App. 276.** Neither the State nor the Charter Intervenors deny that open-enrollment charter schools in Pulaski County attract students who might otherwise participate in the M-to-M or magnet programs. *See* **App. 2859.** ("[O]pen-enrollment public charter schools offer an alternative to the LRSD for those who seek public education in Little Rock."). Accordingly, the State was required to seek and obtain the district court's approval before taking action that has the impact of removing students from the interdistrict system created by the M-to-M and magnet stipulations. *See* **App. 269.** ("[I]t's the effect and impact rather than the intent which is the critical inquiry under these circumstances.").

In addition to being the law of the case, Judge Wilson's interpretation of the consent decree represents the only reasonable interpretation of the consent decree read as a whole. *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir.2002) ("When construing a consent decree, courts are guided by principles of contract interpretation and, where possible, will discern the parties' intent from the unambiguous terms of the written consent decree, read as a whole."). The consent decree unambiguously prohibits the State from creating a competing system of interdistrict magnet schools in Pulaski County in the form of open-enrollment charter schools.[2] *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371, 1389 (8th Cir. 1990). It provides:

> New magnets or expansion of magnets already existing may be provided for in subsequent school years beginning 1988-89 under the provisions of the Order of September 3, 1986. *Any party* may present applications for a magnet school or program not later than the beginning of each school year preceding the proposed year of implementation. The Committee's decision and recommendation shall be submitted to the parties no later than November 15. The MRC shall make its recommendation to the Court not later than December 15.

**App. 78.** (emphasis supplied). This is a clear expression of the parties' intent to limit the number of interdistrict magnet schools in Pulaski County to those

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[2] While the "magnet" charters raise concerns different from the "no-excuses" charter schools, *see* **App. 1403-07**, both types of charter schools may draw students from all three districts, and therefore, are interdistrict "generic magnet schools." *See LRSD v. PCSSD*, 921 F.2d at 1389.

approved by the MRC and the district court – as required by this Court. *Little Rock School District v. Pulaski County School District,* 778 F.2d 404 at 436 (8th Cir. 1985) ("The district court may require a *limited number* of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing.") (emphasis supplied).

The 1989 Settlement Agreement did not limit the district court's jurisdiction to determine the appropriate number of interdistrict magnet schools in Pulaski County. In approving the 1989 Settlement Agreement, this Court explained:

> It is important to recall, at this point, the various uses that the phrase "magnet schools" can have. In compliance with the direction in our 1985 en banc opinion, 778 F.2d at 436, the parties stipulated to the creation of six interdistrict magnet schools. The State is required to pay half the necessary capital outlays to establish these schools, and half the cost of educating the students attending them. Each district must contribute towards their operating expenses in appropriate proportions. *See* 659 F.Supp. at 370. *The settlement plans and the settlement agreement contemplate additional interdistrict facilities, to be distinguished from "magnet schools" specifically so called.* These interdistrict schools will, it is hoped, attract voluntary transfers because of the excellence and distinctive nature of their programs. They will be, as the parties put it, "generic magnet schools." *The settlement plans and the settlement agreement do not purport to limit the District Court's ability to require the creation of such additional interdistrict schools.* They limit only how such new schools may be funded. This funding may include payments by the State for majority-to-minority transfers, but it may not include the imposition on the State of a share of the capital costs of these new facilities. We see nothing facially unconstitutional or improper about such an agreement. *The agreement does not bar the creation of additional*

> *interdistrict schools; it simply provides that, when created, they will not be funded in the same way as the six stipulation magnets.*

*LRSD v. PCSSD*, 921 F.2d at 1389 (emphasis supplied). Thus, the 1989 Settlement Agreement did not affect the district court's jurisdiction to determine the appropriate number of interdistrict magnet schools in Pulaski County. *See Appeal of LRSD*, 949 F.2d 253, 256 (8th Cir. 1991) (Among the crucial elements of the settlement agreement with respect to which no retreat should be approved were "(2) operation of the *agreed number* of magnet schools according to the agreed timetable; (3) operation of the *agreed number* of interdistrict schools according to the agreed timetable. . . ." (emphasis supplied)).

Second, the State expressly "committed" to the principle that "[t]he ADE and the Districts should work cooperatively to promote the desegregation goals of the State and the Districts . . . ." **App. 103***; see also* **App. 348**, *AG Opinion 8 March 2000* ("In the Agreement that settled the Pulaski County desegregation case, the State and the [State] Board [of Education] committed 'to promote the desegregation goals of the State and the [Pulaski County] districts.'"); **App. 421-23**, *AG Opinion 5 January 2001* (same). One goal of the consent decree was to increase participation in the M-to-M and magnet programs. *See DN 2337, p. 10* ("The State's application of loss funding and growth funding encourages the PCSSD to lose students to neighboring predominately white districts, not to LRSD. This is contrary to the Eighth Circuit's intent to encourage voluntary majority-to-

minority transfers between the Districts and to require the State to pay for such transfers."). The State Board's unilateral authorization of interdistrict charter schools in Pulaski County is inconsistent with its commitment to promote the goals of the consent decree. To encourage participation, the consent decree required the districts to cooperate and recruit students to participate in the M-to-M and magnet programs and provided financial incentives for the districts to increase participation in the programs. **App. 73-75; App. 79-80, 84;** *see Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 934 F.Supp.299, 301 (E.D. Ark. 1996) (adopting an interpretation of the consent decree agreement that rewards effective recruiting of M-to-M students because "the primary purpose of the M-to-M concept was to promote voluntary interdistrict transfers."), *aff'd Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 109 F.3d 514, 516 (8th Cir. 1997) ("The district court's interpretation . . . will promote voluntary interdistrict transfers to interdistrict schools, and it will provide a financial incentive to both districts to receive M-to-M transfer students.").

The State's duty to promote the decree's goal of encouraging participation in the M-to-M and magnet programs necessarily prohibits the State from creating a competing system of interdistrict charter schools in Pulaski County. Any other interpretation would be inconsistent with the implied duty of good faith and fair dealing. *See Cantrell-Waind & Assoc., Inc. v. Guillaume Motorsports, Inc.*, 968

S.W.2d 72, 74 (Ark. 1998) ("A party has an implied obligation not to do anything that would prevent, hinder, or delay performance"); *In re Vylene Enterprises, Inc.*, 90 F.3d 1472, 1477 (9th Cir. 1996) ("Naugles' construction of a competing restaurant within a mile and a half of Vylene's restaurant was a breach of the covenant of good faith and fair dealing."); *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1405 (11th Cir. 1998) (question of fact whether competing hotel violated implied covenant of good faith and fair dealing).

Therefore, read as a whole, the consent decree unambiguously prohibited the State from creating new interdistrict charter schools in Pulaski County that hinder the districts' efforts to recruit students to participate in the M-to-M and magnet programs. *Pure Country, Inc.*, 312 F.3d at 958; *Cantrell-Waind & Assoc., Inc.*, 968 S.W.2d at 74. This Court authorized and the parties agreed to a "limited number" of interdistrict magnet schools in Pulaski County. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 778 F.2d 404, 436 (8th Cir. 1985); *Appeal of LRSD*, 949 F.2d at 256; **App. 78.** All parties agreed to promote the M-to-M and magnet programs and to encourage participation in those programs. **App. 73-75; App. 79-80; App. 103.** The State's duty to encourage participation in the M-to-M and magnet programs prohibits the State from creating a competing system of interdistrict magnet schools in Pulaski County. *See Cantrell-Waind & Assoc., Inc.*, 968 S.W.2d at 74.

The State argued below that the consent decree does not address charter schools, and thus, the district court lacked jurisdiction over them.[3] **App. 2578.** To support this argument, the State cited a parenthetical that appears on three occasions in provisions related to funding to be provided to LRSD. **App. 94, 110, 112.** For example, section II, paragraph F of the 1989 Settlement Agreement provides:

> The settlement payments described in this agreement are exclusive of any funds for compensatory education, early childhood development or other programs that may otherwise be due LRSD (*or any successor district or districts to which students residing in territory now within LRSD may be assigned or for the benefit of such students if the State or any other entity becomes responsible for their education*), PCSSD or NLRSD under present and future school assistance programs established or administered by the State. The State will not exclude the Districts from any compensatory education, early childhood development, or other funding programs or discriminate against them in the development of such programs or distribution of funds under any funding programs.

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[3] As for the Charter Intervenors, they conceded that the consent decree granted the district court jurisdiction over interdistrict magnet schools in Pulaski County. *See* App. 2652, *quoting LRSD v. PCSSD,* 921 F.2d at 1380. According to the Charter Intervenors, they should not be subject to the consent decree because it is "unconstitutional" and because "freedom of choice" will "help reverse patterns of segregation." App. 2860. *But see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 379 F.Supp. 1102, 1104 (D.C. N.C. 1974) ("'Freedom of choice' was a synonym for segregation for many years, and though a high ideal in theory, it should not be resurrected at this late date . . ."). The district court has scheduled a two-week hearing beginning 9 December 2013 to review the constitutionality and continuing efficacy of the consent decree. *See Grutter v. Bollinger,* 539 U.S. 306, 339, 342 (2003).

**App. 94** (emphasis supplied). *See also* **App. 110** *(regarding desegregation payments) and* **App. 112** *(regarding desegregation loan)*. Based on this parenthetical, the State concluded, "Clearly, the settlement agreement contemplated that LRSD would not maintain exclusive control over delivery of publicly funded education services in its boundaries; and that the State maintained its control over the direction of public education in Little Rock." **App. 2575.** The district court agreed with the State concluding that "LRSD may be correct that these provisions were meant to guarantee desegregation funding to students then being served by LRSD no matter what entity was educating them. But the premise of this guarantee is that some entity of other than LRSD might be doing so." **Add. 12.**

The district court's interpretation of this parenthetical phrase fails to construe the consent decree as written. *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 451 F.3d 528, 537 (8th Cir. 2006) (Gruender, C.J., concurring in part and dissenting in part) (*citing Holland v. N.J. Dep't of Corr.*, 246 F.3d 267, 281 (3rd Cir. 2001) ("A court should interpret a consent decree as written and should not impose terms when the parties did not agree to those terms."). When the parties express their intention in clear and unambiguous language, it is the Court's duty to construe the contract in accordance with the plain meaning of the language employed. *Id.* The plain meaning of parenthetical phrase is that LRSD students are

guaranteed funding under the 1989 Settlement Agreement even if another entity becomes responsible for their education. **App. 94, 110 and 112.** The phrase says nothing about the *how* another entity may become responsible for the education of LRSD students, and it does not authorize the State unilaterally remove students from the interdistrict system created by the consent decree. The district court's interpretation of the parenthetical is at odds with this Court' s decisions affirming the district court's ongoing jurisdiction over interdistrict schools in Pulaski County. *LRSD v. PCSSD*, 921 F.2d at 1389; *Appeal of LRSD*, 949 F.2d at 256. It is also inconsistent with the Magnet Stipulation which provided the State Board a process to obtain the district court's approval to operate new interdistrict magnet schools in Pulaski County. **App. 78.** The district court's interpretation renders the Magnet Stipulation process for opening new interdistrict magnet schools superfluous and should be rejected. *See Southway Corp.v. Metropolitan Realty and Development Co., LLC*, 206 S.W.3d 250, 254 (Ark. App. 2005) ("A construction which neutralizes any provision of a contract should never be adopted if the contract can be construed to give effect to all provisions."); *Fryer v. Boyett*, 978 S.W.2d 304, 306 (Ark. App. 1998) ("Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible.").

Finally, there is no dispute that the State is a constitutional violator and that it has continuing obligations pursuant to the consent decree. *Little Rock Sch. Dist.*

*v. State of Arkansas*, 664 F.3d 738, 758 (8th Cir. 2011), *reh'g denied* (Feb. 21, 2012) (referring to the State, the Court stated, "Nevertheless, notice and a formal hearing are required before the court terminates a constitutional violator's desegregation obligations."). The State's past policies of racially segregated schools *and neighborhoods* are among the reasons the interdistrict movement of students in Pulaski County is governed a federal consent decree. *LRSD v. PCSSD,* 778 F.2d at 423. The consent decree remains in place until the State pleads and proves that it complied with the consent decree in good faith and eliminated the vestiges of its past discrimination to the extent practicable. *LRSD v. State*, 664 F.3d at 744. *See Freeman v. Pitts,* 503 U.S. 467, 492, (1992) (*quoting Bd. of Educ. of Okla. City Pub. Sch. v. Dowell,* 498 U.S. 237, 249–50 (1991)). The consent decree remains a valid and enforceable contract between the parties, as well as an order of the district court. As a matter of law, the State breached the parties' agreement and violated the consent decree by unilaterally creating a competing system of interdistrict charter schools in Pulaski County that removes students from the interdistrict system created by the consent decree. **App. 263.**

**3. The State Agreed to Promote the Interdistrict Remedy.**

The district court finding that "the [1989] Settlement Agreement contains no bar against charter schools" fatally infects its entire decision. **Add 11**. Based on this finding, the district court concludes that "LRSD and Joshua's entitlement to

relief on the charter issues must turn, instead, on the effect of these schools on the stipulation magnets and M-to-M transfers." **Add. 17**. The district court then proceeded to consider whether LRSD proved that charter schools "interfere materially" with the M-to-M and magnet programs. **Add. 21**. However, the State had a duty to do more than "not [] interfere materially" with the remedy it agreed to. **Add. 21**. The State had a duty to "promote" the interdistrict remedy, including working to increase participation in the M-to-M and magnet programs. **App. 94**. Thus, the issue the district court should have decided was whether the State breached its duty to promote the interdistrict remedy, interpreted in light of the implied covenant of good faith and fair dealing. *Cantrell-Waind & Assoc., Inc.*, 968 S.W.2d at 74.

There is no dispute that open-enrollment charter schools in Pulaski County compete with the M-to-M program and magnet schools for non-black students. **Add. 9 and 23-24; App. 4913-14**. This alone establishes a breach of the State's duty to in good faith "promote" the interdistrict remedy. *In re Vylene Enterprises, Inc.*, 90 F.3d at 1477; *Camp Creek Hospitality Inns, Inc.*, 139 F.3d at 1405. Instead of taking steps to increase participation in the M-to-M and magnet programs, the State created a competing system of interdistrict magnet schools that has decreased participation the programs. *See Section B, infra.*

### 4. The Burden was on the State and/or the Charter Intervenors to Prove that Charter Schools Have No Negative Effect on the Interdistrict Remedy.

The district court's finding that "the [1989] Settlement Agreement contains no bar against charter schools" also caused the district court to improperly allocate the burden of proof. **Add 11**. LRSD has never argued that the 1989 Settlement Agreement barred charter schools from Pulaski County. LRSD has consistently argued that charter schools in Pulaski County require district court approval, and as a part of the approval process, the district court may impose such terms and conditions on charter schools to prevent any negative effect on the M-to-M and magnet programs. *See* **App. 66-67; App. 2875-76**. To obtain the district court's approval, the State and/or the Charter Intervenors bear the burden of proving that open-enrollment charter schools in Pulaski County would have no negative effect on the interdistrict remedy. *Berry v. Sch. Dist. of the City of Benton Harbor*, 56 F.Supp.2d 866, 872 (W.D. Mich. 1999).

The district court in *Berry* explained why a charter school, which has never been adjudicated a constitutional violator, bears the burden of proof. It stated:

> If the intervenor charter schools were private institutions or operated in non-defendant districts, the court would have no basis for interfering in the way in which these schools operated or recruited their students or staff. The court, however, both can and must assure that the defendant State of Michigan, which that has been adjudicated liable, may not, by funding these schools, have a detrimental effect on the efficacy of the remedial order. In addition, the burden on charter schools who attempt to obtain funding from the State to operate in a

> district under a desegregation order, while different from public school academies in other districts, is not different from the burden on other public schools in the districts subject to this court's remedial order. It is thus eminently fair and reasonable to impose such burdens.

*Id. See Cleveland v. Union Parish Sch. Bd.*, 2009 WL 2476562 (W.D. La. 2009)*; Cleveland v. Union Parish Sch. Bd.*, 570 F.Supp.2d 858 (W.D. La. 2008). The *Berry* decision is consistent with case law imposing the burden of proof on parties seeking to modify a consent decree. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) ("[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist*., 56 F.3d 904, 914 (8th Cir. 1995) (same).

Therefore, the district court's erroneous interpretation of the consent decree caused the district court to place the burden on LRSD to prove that charter school materially interfered with the interdistrict remedy. **Add. 29**. The burden of proof should have been on the State and/or Charter Intervenors to prove that each proposed charter school would not negatively affect the interdistrict remedy. *See Berry*, 56 F.Supp.2d at 872. Accordingly, the district court's order should be reversed, and the case should be remanded to the district court with instructions that the State and/or Charter Intervenors bear the burden of proving that the efficacy of the interdistrict remedy will not be negatively affected by open-enrollment charter schools in Pulaski County.

#### 5. Conclusion.

The State was found guilty of interdistrict constitutional violations, and as a result, there is an interdistrict remedy in place the State is obligated to support. The district court erred as a matter of law by interpreting the consent decree to allow the State to unilaterally create a system of interdistrict charter schools in Pulaski County that compete for non-black students with M-to-M and magnet programs. Accordingly, the order of the district court should be reversed. The Court should rule as a matter of law that the State violated the consent decree by creating interdistrict charter schools in Pulaski County and remand for proceedings consistent with that ruling. On remand, the State and/or Charter Intervenors should bear the burden of proving charter schools have no negative effect on the interdistrict remedy, and the district court should be directed to impose such terms and conditions on open-enrollment charter schools in Pulaski County as necessary to avoid any negative effect on the M-to-M and magnet programs.

### B. SUMMARY JUDGMENT WAS IMPROPER WHERE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO LRSD SHOWED CHARTER SCHOOLS HAVE HAD A NEGATIVE EFFECT ON THE M-TO-M AND MAGNET PROGRAMS.

#### 1. Standard of Review.

This Court reviews de novo a district court's grant of summary judgment. *Gorvik v. Unum Life Ins. Co. of Am.*, 702 F.3d 1103, 1109 (8th Cir. 2013).

### 2. Summary Judgment Standard.

The standard to be applied by a district court in reviewing a motion for summary judgment is now well-settled:

> Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). . . . "On a motion for summary judgment, 'facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.' " *Ricci v. DeStefano,* ——U.S. ——, 129 S.Ct. 2658, 2677, 174 L.Ed.2d 490 (2009) *quoting Scott v. Harris,* 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (internal quotations omitted).

*Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011).

The district court did not adhere to this standard. It weighed the evidence on disputed facts and reached a conclusion rather than viewing all evidence in the light most favorable to LRSD. For example, the district court acknowledged evidence that enrollment in the stipulation magnets declined following the State's expansion of "magnet" charters in Pulaski County. **Add. 24-25**. Along with evidence of temporal proximity, LRSD submitted additional evidence (discussed below) explaining how and why competition from "magnet" charters caused the decline in magnet school enrollment. This created a genuine issue of material fact for trial. *See Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002) (holding temporal proximity alone sufficient to establish causation). However, the

district court disregarded LRSD's evidence and concluded, "Given the undisputed transfer numbers and the undisputed testimony from principals, LRSD and Joshua have not created a genuine issue of material fact on causation." **Add. 25**. Where, as here, the district court failed to view the evidence in the light most favorable to the nonmoving party, summary judgment should be reversed. *See Estate of Pepper v. Whitehead*, 686 F.3d 658, 667 (8th Cir. 2012) (reversing summary judgment where district court did not view the facts in the light most favorable to the nonmoving party).

**3. No Evidence was Excluded by the District Court.**

The district court's opinion does not exclude any of LRSD's evidence. LRSD's motion was supported by a Statement of Material Facts with 122 paragraphs and 102 exhibits. The State disputed many of the facts and exhibits submitted by LRSD, *see* **App. 4897-4947**, but the district court did not find any of LRSD's facts or exhibits "cannot be presented in a form that would be admissible in evidence." Fed.R.Civ.P. 56(c)(2). *See Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012) ("[T]the standard is not whether the evidence at the summary judgment stage would be admissible at trial—it is whether it could be presented at trial in an admissible form."). In *Gannon*, this Court affirmed the district court's overruling of Gannon's objection because Gannon "[did] not even attempt to argue that the information contained in Hung's statement could not have

been presented in an admissible form at trial." *Id.* Similarly, neither the State nor the Charter Intervenors argued that LRSD's facts or exhibits could not be presented in an admissible form at trial. *See, e.g.,* **App. 4924** (no "reliable proof") *and* **App. 4979** ("based on inadmissible opinions that do not involve the facts of this case."). Thus, this Court should consider all of LRSD's evidence and view that evidence in the light most favorable to LRSD. *Torgerson*, 643 F.3d at 1042.

#### 4. The Evidence Viewed in the Light Most Favorable to LRSD Demonstrated a Negative Effect on the M-to-M and Magnet Programs.

The evidence viewed in the light most favorable to LRSD demonstrated that open-enrollment charter schools in Pulaski County are having a negative effect – decreasing the participation of non-black students – in the M-to-M and magnet programs. The district court failed to consider LRSD's evidence explaining how and why "magnet" charters have undermined a carefully balance remedy based on voluntary interdistrict transfers by way of the M-to-M and magnet programs. This evidence will be discussed in detail below.

##### a. "Magnet" Charters Undermine a Carefully Balanced Remedy Based on Voluntary Interdistrict Transfers.

First, there is no dispute that open-enrollment charter schools in Pulaski County compete with the M-to-M and magnet programs for non-black students. **Add. 9 and 23-24; App. 4913-14**. The M-to-M and magnet programs are desegregation remedies that depend on voluntary student transfers. Five of the six

stipulation magnet schools were purposely located in black neighborhoods, and their 50-50 racial balance was intentional. The parties agreed there was a sufficient non-black population to support the six interdistrict magnet schools. Instead of the "limited number" of interdistrict magnet schools authorized by this Court and agreed to by the parties, the State has unilaterally expanded the interdistrict voluntary transfer options in ways that undermine the M-to-M and magnet programs.

This Court authorized a "limited number" of interdistrict magnet schools for a reason: research shows that too many magnet schools cause segregation and white flight. Christine H. Rossell, *School Desegregation in the 21st Century*, p. 96 (2002). Dr. Rossell[4] explains:

> Although magnet schools are the only way to desegregate black schools in a voluntary desegregation plan, there is such a thing as too many magnet schools. Having a lot of magnet schools can be inefficient because the magnets compete against each other, dispersing the available whites among too many schools so that no school has enough whites to attract more whites.

Rossell, at 104. Before creating interdistrict magnet schools, "one must estimate white demand. Since one can only expect 10-20 percent of the white students to transfer to magnets in minority neighborhoods, the number of magnets must be

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[4] Dr. Rossell has in the past served as an expert witness in this case paid by the State to testify in support of PCSSD's unitary status efforts, and she was identified by the State as a potential expert witness pertaining to charter schools.

linked to the size of the white population and the number of whites realistically expected to transfer in any given school district." Rossell *id.* at 97. The State Board did nothing to assess whether the non-black population in Pulaski County was sufficient to create interdistrict charter schools with no negative effect on the M-to-M and magnet programs.

Rossell's research indicates that magnet schools should be located in black neighborhoods. She states, "Magnets should rarely be placed in white neighborhood schools because (a) they are not usually needed there – *blacks will transfer to white schools without any special incentive other than free transportation* – and (b) magnets in white neighborhoods may be a disincentive for whites to transfer out." Rossell, 97-98 (emphasis supplied). The State Board has not required the "magnet" charters to be located in black neighborhoods, although ESTEM is located in downtown Little Rock near black neighborhoods. Dr. Tom Kimbrell, Commissioner of Education, testified that the State Board approved interdistrict charter schools in Pulaski County knowing that based on the schools' proposed location the student population "could be skewed very highly to one race." **App. 3032**.

As to racial balance, Rossell's research indicates that the percentage of white parents willing to send their children to magnet schools varies inversely to the percentage of black students at a school. Rossell, at 100. *See also* Dr. David

Armor,[5] Tr. 1996-05-15, p. 138 ("It is my belief that a stable integration plan that's based on neighborhood schools with voluntary options needs to have integrated schools that are either 50/50 or even slightly majority white in order to maintain a stable white population."). According to parent surveys, if a magnet school is 50 percent white and 50 percent minority, 21 percent of white parents are definitely willing to send their children to magnet schools in black neighborhoods; the number decreases to 13 percent if the school is 75 percent minority. Rossell, *id.*

Thus, the "magnet" charters in Pulaski County have two structural defects that undermine the M-to-M and magnet programs efforts to attract non-black students. First, the "magnet" charters are more attractive to non-black parents because they have a higher percentage of non-black enrollment. *See* Jack Buckley and Mark Schneider, "Charter Schools: Hope or Hype," p. 133 (Princeton University Press 2007) ("[I]t is clear from our existing data that parents care about the racial composition of schools as reflected by their search processes . . . [D]espite an unwillingness to admit this in telephone or face-to-face interviews, they are also seeking out schools with a lower percentage of black students."). Second, they are more convenient for non-black parents because (with the exception of ESTEM) they are located in non-black neighborhoods.

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[5] Dr. Armor has been retained by the State to testify as an expert in this case. *Tr. 2012-01-12, p. 16*.

As predicted by desegregation research, the "magnet" charters enroll a disproportionate percentage of non-black students – effectively removing these non-black students from the M-to-M and magnet programs. As noted above, Academics Plus is 19.6 percent black; LISA Academy is 31.1 percent black; LISA Academy NLR is 32.5 percent black; and ESTEM is 47.7 percent black. **App. 4213**. As the "magnet" charters have grown in enrollment, the percentage of black students attending stipulation magnet schools has increased such that Booker Elementary (59 percent black), Carver Elementary (61 percent black), Mann Middle (56 percent black), and Parkview High (57 percent black) are out of compliance with the requirement of the Magnet Stipulation that they be between 50 and 55 percent black. **App. 81-82;** *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 839 F.2d 1296, 1312 (8th Cir. 1988) (Stipulation magnets may be up to 55 percent black); **App. 5186**. From 2001-02 through 2008-09, all six stipulation magnet schools complied with the racial balance requirement of the Magnet Stipulation.

**b. Open-Enrollment Charter Schools in Pulaski County Enroll More Students that the M-to-M and Magnet Programs Combined.**

Two undisputed facts should have been sufficient for the district court to find that charter schools "interfere materially" with the M-to-M and magnet programs: (1) charter schools in Pulaski County compete with the M-to-M and

magnet programs,[6] **Add. 9 and 23-24; App. 4913-14**; and (2) the State's system of interdistrict charter schools in Pulaski County is now larger than the interdistrict system created by the consent decree. Open-enrollment charter schools in Pulaski County are authorized to enroll 5518 students in the 2011-12 school year and 5618 students through the 2014-15 school year. **App. 2879; App. 4413-14**. As of October 1, 2011, open-enrollment charter schools in Pulaski County reported enrollment of 4,398 students. **App. 2880; App. 4915**. Interdistrict transfers via the M-to-M and magnet programs peaked in 2003-04 at 4,037 students. **App. 5190**. Since 2003-04, interdistrict transfers have dropped each year except one to an all-time low of 2,795 in 2012-13 – losing 665 students since 2008-09. **App. 5190**.

By comparison, the proposed Jacksonville splinter district would have enrolled between 5,750 and 6,159 students, depending on the proposed district's boundaries. **App. 4920**. In 2003-04, only 7.6 percent of students in the three Pulaski County districts elected an interdistrict transfer via the M-to-M or magnet programs.[7] Thus, of the approximately 6000 students that lived in the proposed

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[6] The State Board approved "magnet" charters knowing they would attract students who otherwise might attend a stipulation magnet. "I'm very interested in this school opening for [children on the stipulation magnets waiting lists]," one State Board member commented in approving LISA Academy. **App. 619-20.**

[7] For 2003-04, for example, 4037 students elected an interdistrict transfer via the

Jacksonville splinter district, only about 450 would have been expected to elect an interdistrict transfer via the M-to-M and magnet programs – significantly less than the 665 interdistrict transfer students the M-to-M and magnet programs have lost since 2008-09. **App. 5190**. The impact of open-enrollment charter schools in Pulaski County is also greater than the Jacksonville splinter district because all 4,398 charter school students chose to leave their neighborhood school, and but for charter schools, may have elected to participate in the M-to-M and magnet programs. **Add. 23** ("[T]he court cannot say, as a matter of law, that none of them would have attended a stipulation magnet middle school or high school if the charter option had not been available."); **App. 3077**, *Kimbrell Depo.* (If hundreds of students have left magnet schools to attend charters schools, that indicates that charter schools compete with magnet schools); **App. 3341**, *Bacon Depo.,* (ESTEM competes with Carver magnet for students interested in math and science). Thus, viewing the evidence in the light most favorable to LRSD, open-enrollment charter schools have had a greater impact on the M-to-M and magnet programs than the Jacksonville splinter district likely would have had.

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M-to-M and magnet programs. The total student population of the three districts in that year was 52,957. Thus, in that year, 7.6 percent of students elected to leave their neighborhood schools and to take advantage of the M-to-M and magnet programs. **App. 5190-91**.

In focusing on the available student transfer data, the district court erred in failing to consider the full impact of charter schools on the M-to-M and magnet programs. The M-to-M and magnet programs lose not only students who transferred directly from the M-to-M and magnet programs to charter schools, but also students who transfer from their neighborhood school, a private school, or home school to a charter school and who would have participated in M-to-M or magnet program but for the availability of a charter school. The district court considered only the first category -- students that transferred directly from the M-to-M program (20 students) or a stipulation magnet school (215 students) to an open-enrollment charter school. **Add. 22-26**. The district court completely ignored the second category. While it is impossible to know the exact number, it is certain that some of the 4,398 charter school students (and probably more than 7.6 percent of them)[8] would have participated in the M-to-M and magnet programs but for the availability of a charter school. Thus, viewing the evidence in the light most favorable to LRSD, the district court erred as a matter of law in concluding that the impact of charter schools on the M-to-M and magnet programs was "marginal, not material." **Add. 22**.

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[8] If 7.6 percent of the overall student population of the three Pulaski County school districts elected M-to-M or magnet transfers, it is reasonable to assume that the percentage would be higher among students who have already demonstrated their willingness to leave their neighborhood school for another educational option.

### c. The Racial Impact of the Charter Schools Failure to Provide Transportation.

The district court further erred in failing to consider the racial impact of the State's failure to require open-enrollment charter schools in Pulaski County to provide student transportation to and from school. LRSD presented evidence that the failure of charter schools to provide student transportation disproportionately affects black students who are more likely than non-black students to be economically disadvantaged and to require that transportation be provided for them to attend a school outside their neighborhood. **App. 3164-65; App. 2982**, *Kimbrell Depo.* (Lack of transportation is "one limiting factor for students with low economic status." Kimbrell was aware that in Pulaski County economically disadvantaged students are disproportionately African-American students); **App. 488-89** ("[economically disadvantaged students] do not live in the area nor do they have the means to get to our school. Many have expressed interest but [do] not have the means to get to our school."]; **App. 3122**, *Morris Depo.* (economically disadvantaged students in Pulaski County lack reliable transportation and have no way to attend a charter school); **App. 2904**. Meredith P. Richards, Kori J. Stroub and Jennifer Jellison Holme, *Can NCLB Choice Work? Modeling the Effects of Interdistrict Choice on Student Access to High-Performing Schools* (Century Foundation 2011) ("A growing body of research highlights the importance of transportation inequities, finding that transportation is a significant barrier to

accessibility, particularly for non-white and low-income individuals, who are less likely to own personal vehicles and more likely to rely on public transportation."). Viewing this evidence in the light most favorable to LRSD, the lack of transportation to "magnet" charters disproportionately prevents black, economically disadvantaged students from attending these schools.

**d. The Stipulation Magnet Schools Have Suffered a Loss of Non-Black Students.**

The loss of non-black students has resulted in declining overall enrollment in the magnet schools and the stipulation magnet schools having empty seats *and* waiting lists. Overall, the stipulation magnet schools have been losing students since a peak in 2006-07 – dropping from 3,932 to 3,428 in 2012-13 (a loss of 504 non-black students). The total loss of 504 non-black students represents a loss of 624 white students offset by a gain of 195 students identified as "other". **App. 5186**.

Because the stipulation magnets must have an enrollment of between 50 and 55 percent black, they have both empty seats and waiting lists. A stipulation magnet school with 55 percent black enrollment may have empty seats with black students on the waiting list who may only be admitted along with a non-black student so that the racial balance percentage does not rise above 55 percent black.[9]

[9] Black students are not removed from stipulation magnet schools to maintain

Historically, about 90 percent of the students on waiting lists for stipulation magnet schools are black. **App. 784-85**. As of October 1, 2010, LRSD magnets had 363 empty seats, and 3028 students on waiting lists: 2658 black and 370 non-black. " **App. 2283-84**. In 2012-13, there were only 974 white students enrolled in stipulation magnet schools. In 2010-11 (the most recent data provided by the State), the "magnet" charters enrolled 1,326 white students – almost four times the number needed to fill empty seats in the stipulation magnets. **App. 4215, 4217, 4219**.

Thus, viewing the evidence in the light most favorable to LRSD, the loss of non-black students to "magnet" charters has contributed to the overall loss of magnet school students and to black students being denied admission to stipulation magnet schools because of the magnet schools racial balance requirement and a shortage of non-black applicants. "Magnet" charters' location, total enrollment, non-black enrollment, and transportation policies provide substantial evidence that competition from "magnet" charters caused the stipulation magnets' decline in non-black enrollment and overall enrollment. Accordingly, the district court erred as a matter of law in finding that LRSD failed to create a genuine issue of material fact on causation.

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racial balance following the loss of non-black students. Thus, the loss of non-black students has resulted in four of the six stipulation magnet schools exceeding 55 percent black. **App. 5186**.

### e. Evidence Cited by the District Court.

The district court rejected LRSD's evidence of causation citing "the undisputed transfer numbers and the undisputed testimony from the principals . . . ." **Add. 25**. The district court cites general statements by three of the six stipulation magnet principals to the effect "that his or her school is functioning well" and asserts that "LRSD and Joshua have pointed to no evidence that the system of stipulation magnet schools have been hampered, much less hobbled, by competition from open-enrollment charters." **Add. 24**. In addition to the evidence of the impact on racial balance, LRSD also presented evidence, including testimony from principals, that the loss of non-black students was having a negative impact on the educational environment at the stipulation magnet schools.

The district court had before it research explaining why high poverty schools fail, why all students benefit from attending "middle class" schools, and how segregated housing results in black students "overwhelmingly bear[ing] the brunt of attending high poverty schools." **App. 2237-41, 2247**. The district court also had before it evidence that most black LRSD students attend predominately black, high poverty schools, *see* **App. 5166-74; App. 2275** and that the stipulation magnet schools provide black, economically disadvantaged students their only opportunity (transportation provided) to attend a "middle class" school. **App. 3964-65; App. 2982; App. 488-89; App. 3122; App. 2904**. Finally, the district

court had before it evidence that the students leaving the stipulation magnet schools tended to be more affluent and higher performing academically than the students that replaced them, **App. 475-484; App. 2276-2282; App. 2880-81, Add. 31-32**. *LRSD Exhibits 63, 64 and 65,* and as a result, the percentage of economically disadvantaged students attending the stipulation magnet schools has increased significantly since 2006-07. **App. 4918**. In fact, Booker (74 percent economically disadvantaged) and Carver (73 percent economically disadvantaged) are now high poverty schools.[10] **App. 4918**.

Consistent with this evidence, the Principals of Booker and Carver testified that the loss of more affluent students has made their jobs more difficult. Booker Principal Cheryl Carson testified that as her economically disadvantaged population had increased the number of academically proficient students has decreased. **App. 3874, 3877**. Similarly, Carver Principal Diane Barksdale testified that students lost to charter schools have been replaced by economically disadvantaged students. **App. 3821-22**. Barksdale noted one impact of the increasing percentage of economically disadvantaged students was "less

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[10] *See* Ark. Code Ann. § 6-20-2305(b)(4)(A)(ii) (providing for additional funding for school districts where 70 percent or more of students qualify for free or reduced-price meals). *See also* 20 U.S.C. § 1021(11)(A)(ii)(I) (defining a "high-need school" to include schools where 60 percent or more of students qualify for free or reduced-price meals); 42 U.S.C. § 1769(g)(3)(A)(ii) (defining a "high-poverty school" as a school where 50 percent or more of students qualify for free or reduced-price meals).

participation in the PTA." **App. 3822**. *See,* **App. 2239**, Richard D. Kahlenberg, *Turnaround Schools That Work: Moving Beyond Separate But Equal* (Century Foundation 2009). ("Parents are an important part of a school community. Students benefit when parents regularly volunteer in the classroom and know how to hold school officials account when things go wrong. Low-income parents, who may be working several jobs, may not own a car, and may have had a bad experience themselves as students, are four times less like than non-affluent parents to be members of the PTA.").

**5. Conclusion.**

The evidence viewed in the light most favorable to LRSD demonstrated that open-enrollment charter schools in Pulaski County are having a negative effect – decreasing the participation of non-black students – in the M-to-M and magnet programs. The district court ignored LRSD's evidence explaining how and why competition from "magnet" charters caused the undisputed decline in participation in the M-to-M and magnet programs. The district court improperly weighed the evidence rather than viewing the evidence in the light most favorable to LRSD. Accordingly, the district court should be reversed.

## C. LACHES IS INAPPLICABLE BECAUSE LRSD ESTABLISHED GOOD CAUSE FOR DELAY AND LACK OF PREJUDICE TO THE STATE.

### 1. Standard of Review.

This Court reviews de novo a district court's grant of summary judgment. *Gorvik v. Unum Life Ins. Co. of Am.*, 702 F.3d 1103, 1109 (8th Cir. 2013).

### 2. LRSD had Good Cause for Delay.

For laches to apply, the State bore the burden of proving that (1) LRSD unreasonably and inexcusably delayed filing the lawsuit and (2) the State was prejudiced by the delay. *Brown-Mitchell v. Kansas City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001). The issue of laches is generally an issue of fact not appropriate for summary judgment. **Add. 17**, *citing Royal Oaks Vista, LLC v. Maddox*, 372 Ark. 119, 124, 271 S.W.3d 479, 483 (2008).

The district court states that "laches prevents rewinding the situation to 2001 when the first open-enrollment charter based in Pulaski County was being considered by the State Board of Education." **Add. 17**. In 2001, however, and at least through 4 June 2003, LRSD and Arkansas Attorney General were in agreement that it violated the 1989 Settlement Agreement to remove from the interdistrict system created by the consent decree students "who might, through M-M transfers and other reassignment, be available to lessen racial disparities in individual schools in the PCSSD, the LRSD or the NLRSD." **App. 276; Add. 45**.

The State Board ignored the Attorney General's opinion and approved Academics Plus to open in the 2001-02 school year based on Academics Plus' desegregation analysis. Academics Plus purported to quote a U.S. Department of Education publication on charter schools stating, "In many cases, the limited number of students enrolled in a charter school does not have a significant impact on the attendance patterns and enrollment in the appropriate LEA's (local education agency) other schools, and does not adversely affect compliance with the desegregation order." **App. 360**. Every charter applicant that followed essentially copied Academics Plus' desegregation analysis and claimed its limited enrollment would result in no material impact on desegregation. **App. 561-62; App. 1012; App. 1036; App. 1252; App. 1514; App. 1760; App. 1942**.

Given the position taken by the charter schools (and accepted by the State Board), it was reasonable for LRSD to attempt to determine the point at which the cumulative effect of charter schools on the consent decree became material.[11] The district court's finding that the current charter school enrollment of 4,398 students does not have a material effect, while LRSD believes it to be erroneous, demonstrates the difficulty. Laches is inapplicable where the plaintiff chose to

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[11] LRSD's decision to seek relief on charter schools was also impacted by Academics Plus' near closure due to financial problems in 2005. **App. 1372; App. 488-89**. It was not clear that charter schools could overcome their financial issues.

delay suit until its right to relief had clearly ripened. *Roederer v. J. Garcia Carrion, S.A.*, 569 F.3d 855, 859 (8th Cir. 2009). The cumulative impact of open-enrollment charter schools in Pulaski County is analogous to the progressive encroachment of a trademark. Under the doctrine of progressive encroachment, the time of delay is to be measured not from when the plaintiff first learned of the potentially infringing mark, but from when such infringement became actionable and provable. *Id., citing* 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 31.19 (4th ed.2009) (owner of a mark "has no obligation to sue until the likelihood of confusion looms large" and "cannot be guilty of laches until his right ripens into one entitled to protection"(quotation omitted)).

Similarly, LRSD's delay should not be measured from the approval of Academics' Plus for the 2001-02 school year. LRSD believes its claim became actionable when the State Board approved five new charter schools in Pulaski County for the 2008-09 school year and approved an expansion of Academics Plus. By letter dated 30 September 2008, LRSD put the State on notice that "open-enrollment charter schools in Pulaski County provide a means for the interdistrict movement of students in Pulaski County without regard to the impact on traditional public schools and contrary to the 1989 Settlement Agreement." **App. 1642**. LRSD specifically stated that the State needed to consider the cumulative impact of multiple open-enrollment charter schools in Pulaski County. **App. 1642**.

Thus, the district court is wrong in stating, "For about nine years, insofar as the record reveals, LRSD and Joshua made no argument to the State Board or this Court that the open-enrollment charters require this Court's approval or they would violate the [1989] Settlement Agreement." **Add. 18**. The district court acknowledged that LRSD appeared before the State Board "and repeatedly expressed concern about the impact of these new schools on desegregation efforts." **Add. 18**. Even so, the district court stated, "This is not the same, however, as arguing the Settlement Agreement had been and was being violated." **Add. 18**. This is a distinction without a difference – if the charter schools have a negative effect on the interdistrict remedy, they violate the consent decree. *See Berry*, 56 F.Supp.2d at 872.

The district court further erred in failing to consider the fact that LRSD delayed filing suit until 2010 because the parties were in settlement negotiations. LRSD put the district court on notice of the settlement negotiations in its Status Report filed 11 September 2009, which also noted LRSD's concerns about open-enrollment charter schools in Pulaski County. **App. 5-9**. LRSD reported that "[t]he parties are currently involved in settlement negotiations . . . ." **App. 5**. Those settlement negotiations eventually reached an impasse due to LRSD's concerns about open-enrollment charter schools in Pulaski County, and LRSD filed suit shortly thereafter. For purposes of laches, the district court should not have

considered the time the parties were involved in settlement negotiations. LRSD's delay was proper since the parties attempted to engage in conciliatory negotiations rather than resort immediately to litigation. *Siegerist v. Blaw-Knox Co.,* 414 F.2d 375, 381 (8th Cir. 1969).

**3. No Prejudice Resulted from LRSD's Delay.**

The State and Charter Intervenors do not assert that LRSD's alleged delay resulted in prejudice -- meaning their defense to LRSD's claim has been prejudiced by the loss of evidence or unavailability of witnesses. *See Hukkanen v. International Union of Operating Engineers*, 3 F.3d 281, 286 (8th Cir. 1993) ("[T]he Union does not allege the delay in prosecuting the claim prejudiced its defense in the form of lost evidence or unavailability of witnesses."); *Baker v. Baker*, 951 F.2d 922, 927 (8th Cir. 1991) ("Prejudice which supports laches can be demonstrated in the loss of evidence which would support the position of the defendant.").

The district court found the State and Charter Intervenors were prejudiced because they "changed their positions – the State by chartering and paying hundreds of thousands of dollars to fund these schools, and the charters by securing facilities, hiring faculty and staff, enrolling children and doing all that was required to educate children." **Add. 18**. Again, the district court misconstrues LRSD's argument. LRSD does not seek to "bar" charter schools from Pulaski

County. **Add. 17**. LRSD does not expect the district court to order charter schools shuttered. LRSD has simply requested that the district court impose terms and conditions on charter schools as necessary to prevent a negative impact on the M-to-M and magnet programs. These may include, for example, requiring transportation paid for by the State and requiring the use of a weighted lottery to increase black enrollment at the "magnet" charters.[12] These types of terms and conditions will not result in the loss of the State and/or Charter Intervenors' investments.

The district court failed to give due weight to the fact that LRSD made known its opposition to the unconditional approval of nine of the 11 open-enrollment charter schools in Pulaski County. **App. 4911,** *State's Response to LRSD's Material Facts, ¶ 43* [(admitting that LRSD objected to Academics Plus, LISA Academy, Covenant Keepers, ESTEM elementary, middle and high schools, and Little Rock Prep.)]; *See also* **App. 296-300; 349-50; 667-73; 689-94; 706-07; 756-58; 784-85; 1443-45; 1649-50, 63; 1812-25, 1840-45; 2002-97; 2102-33; 2191-95**. Forewarning of a plaintiff's objections generally prevents a defendant from making a laches defense. *Roederer*, 569 F.3d at 859.

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[12] Ark. Code Ann. § 6-23-306, as amended by Act 463 of 2001 (effective February 28, 2001), specifically authorized a weighted lottery where necessary to comply with a desegregation order.

Moreover, the Charter Intervenors were well-aware that district court approval was required for them to operate in Pulaski County. In its 2001 desegregation analysis, Academics Plus cited an U.S. Department of Education publication, "Applying Federal Civil Rights Laws to Public Charter Schools." **App. 360**. That publication includes a section on "Schools Affected by Desegregation Plans or Court Orders" that warns prospective charter school operators, "If your jurisdiction is under a desegregation order, the appropriate [Local Education Agency] may need to have the court approve any new school, including a charter school." **App. 2297**. Accordingly, Academics Plus stated in its application, "Pulaski Charter School, Inc., requests that if the State Board of Education cannot grant approval for the Academics Plus (A+) Charter School, that it grant an approval that is conditional upon a favorable ruling or directive from the federal court that oversees the desegregation order in Pulaski County." **App. 361**.

The Charter Intervenors also cannot be prejudiced because their charters require them to comply with federal law and to ensure that they have no negative impact on desegregation. **App. 280**, *Charter Rules, § 3.05* (Oct. 12, 2009)("The application, in addition to any terms and conditions agreed upon by the State Board, will serve as the terms and conditions of the charter."); **App. 2759-65**; *DN4634, Ex. 1, pp. 23-24.* Moreover, Arkansas Code Annotated section 6-23-105 and 106 give the State Board authority to unilaterally modify charters, after notice

and a hearing, if it finds that a charter school has a negative impact on a desegregation decree. *See also* Ark. Code Ann. § 6-23-104(a)(3) ("A charter for a public charter school shall ensure that information required under § 6-23-404 is consistent with the information provided in the application and any modification that the State Board of Education may require."); Ark. Code Ann. § 6-23-104(b) ("Any revision or amendment of the charter for a public charter school may be made only with approval of the State Board."). As State Board Chairman Luke Gordy stated in moving to approve LISA Academy's charter, "[I]f . . . it does negatively affect deseg[regation], then we have every right to rescind the charter." **App. 620**.

Finally, the district court's laches decision fails to consider the impact on the Joshua Intervenors – African-American students in the three districts. The district court has in the past been reluctant to apply laches "[b]ecause the Joshua Intervenors are a class composed of all African-American school children in the Pulaski County school districts." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 237 F.Supp.2d 988, 1083 (E.D. Ark. 2002). The Court should likewise decline to apply laches in the present case. "The defense of laches cannot be invoked to defeat justice, and should be applied only where the enforcement of the right asserted will work injustice." *Winget v. Rockwood*, 69 F.2d 326, 333 (8th Cir. 1934).

## VIII.

## Conclusion

LRSD respectfully requests that the district court's 17 January 2013 Order be reversed; that the Court rule as a matter of law that the district court has jurisdiction to protect the integrity of the interdistrict remedy in Pulaski County; that the State and/or Charter Intervenors must seek and obtain the district court's approval to operate interdistrict charter schools in Pulaski County; that the State and/or Charter Intervenors bear the burden of justifying interdistrict charter schools in Pulaski County by proving they will have no negative effect on the interdistrict remedy; that the district court may impose such terms and conditions as necessary to ensure that interdistrict charter schools in Pulaski County will have no negative effect on the interdistrict remedy.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of Rul3 32(a)(7)(B). It contains 13,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Pursuant to Eighth Cir. R. 28A(h), the electronic version of the brief is in PDF format, and was generated by printing to Adobe PDF from the original word processing file.

## CERTIFICATE OF SERVICE

I certify that on May 9, 2013, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the parties of record.

By: */s/ Christopher Heller*
Christopher Heller