Nos. 19-1340, 19-1342, 19-1348, 19-1349

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America		Plaintiff-Appellee
v.	No. 19-1340	
Arkansas Department of Educ., et al		Intervenors-Appellants
Junction City School District, et al		Defendants-Appellees
Rosie L. Davis		Plaintiff-Appellee
v.	No. 19-1342	
Arkansas Department of Educ., et al		Intervenors-Appellants
William Dale Franks		Defendants-Appellees
Mary Turner, et al		Plaintiffs-Appellees
v.	No. 19-1348	
Arkansas Department of Educ., et al		Intervenors-Appellants
Lafayette County School District, et al		Defendants-Appellees
Larry Milton, et al		Plaintiffs-Appellees
v.	No. 19-1349	
Arkansas State Board of Educ., et al		Intervenors-Appellants
Camden Fairview School District, et al		Defendants-Appellees

APPELLEES' JOINT BRIEF

On Appeal from the United States District Court
for the Western District of Arkansas
The Honorable SUSAN O. HICKEY, Chief District Judge

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SUMMARY OF THE CASE

The primary issue presented is whether the District Court abused its discretion when it modified decrees in four cases over which it had continuing jurisdiction. Its orders give effect to an Arkansas policy allowing school districts to opt out of school choice when it interferes with desegregation obligations. ARK. CODE ANN. § 6-18-1906(a)(1) (2018) (exemption if there is a "conflict with a provision of an enforceable desegregation court order or a district's court-approved desegregation plan"). Each order simply "allow[s]" districts "to claim an exemption from school choice beginning with the 2019-2020 school year." *See, e.g.*, JA670. As such, they "promise realistically to convert [to] a system without a 'white' school and a '[black]' school, but just schools." *Green v. County School Board of New Kent County*, 391 U.S. 430, 442 (1968). They do not fashion "inter-district remedies" within the meaning of applicable precedent. And they comport with the rules governing judicial remedies, which allow Article III Courts to take race into account and differ from those applying to voluntary policy decisions.

The State asked for oral argument. The Plaintiffs and Districts do not believe it is necessary, but if granted will participate.

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Beck, Peter, *How* Brown v. Board of Education *Actually Ended: The Forgotten Final Chapter of the Twentieth Century's Most Famous Case*, 1 CTS. & JUST. L.J. 78 (2019) 36

Fenter, Glen, *Deja Vu All Over Again* (n.d), https://arktimes.com/wp-content/uploads/2019/04/pdf-dejavu.pdf 54-55

Whitehurst, Grover J., et al., *Balancing Act: Schools, Neighborhoods and Racial Imbalance* (Brookings Institution 2017), http://www.brookings.edu/wp-content/uploads/2017/11/es_20171120_schoolsegregation.pdf 11

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STATEMENT OF THE ISSUES

Did the District Court abuse its discretion or commit errors of law when it held modification was justified?

> *Smith v. Board of Education of Palestine-Wheatley School District*, 769 F.3d 566 (8th Cir. 2014).
>
> *United States v. Knote*, 29 F.3d 1297 (8th Cir. 1994).

Did the District Court appropriately recognize the obligation to eliminate the sources and effects of segregation, "root and branch"?

> *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).
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> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
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> *Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979).

Did the District Court fashion an inappropriate "inter-district" remedy?

> *Milliken v. Bradley*, 418 U.S. 717(1974).
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> *Missouri v. Jenkins*, 515 U.S. 70 (1995).
>
> *Edgerson ex rel. Edgerson v. Clinton*, 86 F.3d 833 (8th Cir. 1996).
>
> *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Are the Modification Orders appropriately tailored judicial remedies?

> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
>
> *United States v. Paradise*, 480 U.S. 149 (1987).
>
> *Davis v. Hot Springs School District*, 833 F.3d 959 (8th Cir. 2016).

Do the Modification Orders give effect to Arkansas policy decisions and do transfers remain available under appropriate circumstances?

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

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Norwood v. Harrison, 413 U.S. 455 (1973).

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STATEMENT OF THE CASE

The State and Amici present an incomplete and misleading description of these cases and the contexts within which the decrees were negotiated and entered.

Procedural History

Four school districts ("Districts") are subject to "an enforceable desegregation court order or a . . . court-approved desegregation plan." ARK. CODE ANN. § 6-18-1906(a)(1) (2018). They are: Junction City School District No. 1 ("JCSD"), JA52 ("JCSD Order"); Hope School District ("HSD"), JA817 ("HSD Consent Decree"); the former Lewisville School District, now Lafayette County School District (LCSD), JA 1118 ("LCSD Consent Decree"); and Camden Fairview School District ("CFSD"), JA1470 (CFSD "*Milton* Order"), and JA1539 (CFSD "*Lancaster* Order"). Three of the four were brought by private party plaintiffs ("Plaintiffs"). JCSD's case was brought by the United States.

Given their underlying desegregation obligations, each District sought school choice exemptions for the 2018-2019 school year. The Arkansas Department of Education and Arkansas State Board of Education ("State") denied their requests. *See, e.g.*, JA106.

The Districts asked the District Court for "relief from participating in school choice and confirming . . . a conflict with participating in . . . school choice programs

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due to . . . continuing desegregation obligations." *See, e.g.*, JA22-23. The Plaintiffs supported these motions. JA975. The United States took no position on the merits, stating this would be premature until JCSD demonstrated that choice would have a segregative impact. JA287-88. JCSD and the other Districts subsequently offered evidence to that effect. *See, e.g.*, JA1712 (demographic information for the Districts and surrounding districts); JA1851 (demographic information of choice transfer applicants).

Pursuant to FED. RULE CIV. P. 60(b), the Court found that "significant change[s] in facts or law warranted revision of the decree[s]." *See* JA660; JA1030; JA1403; JA1645. Acknowledging the evidence of segregative impact, it stated that choice would "allow[] inter-district student transfers to a nonresident school district where the percentage of enrollment for the transferring student's race exceeds that percentage in the student's resident district." JA800.

The State filed notices of appeal. It also asked that the orders be stayed. *See, e.g.*, JA674. The District Court denied the motions, finding the arguments made repeated those already advanced and rejected, stressing that the State "ha[s] not demonstrated that [it is] likely to succeed on the merits of their appeal." *See, e.g.*, JA795. The State then asked this Court for a stay. *See* Arkansas's Motion for Stay Pending Appeal, Nos. 19-1340, 19-1342, 19-1348 & 19-1349, Mar. 11, 2019 ("State

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Stay Motion"). The Districts and Plaintiffs opposed that request, arguing there was no abuse of discretion and that the State had not met its burden, likelihood of success on appeal. *See* Joint Response to Motion for Stay Pending Appeal, Mar. 21, 2019 ("Joint Response").

This Court denied the request without explanation. Order, April 8, 2019.

Factual History

Arkansas Transfer Laws Prior to the 1989 Act. It is generally true that "[a]s in most states, school attendance in Arkansas has historically been tied to residency." *See* Opening Brief of the Arkansas Department of Education and Arkansas State Board of Education, p. 11 ("State Brief"). But Arkansas has a history of allowing exceptions to that rule, primarily in the form of attempts to mandate segregation and prevent integration. In 1931, for example, it authorized the equivalent of the current "legal transfer," permitting movement between districts, provided both approve the request. *See* ARK. STAT. ANN. §§ 80-1517 & 1518 (1947); ARK. CODE ANN. § 6-18-316 (2018).

Two years after *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), Arkansas approved Initiated Measure No. 2, the Pupil Enrollment Act of 1956, which authorized school districts to determine their own "rules, regulations and decisions" for pupil assignment. ARK. STAT. ANN. §§ 80-1521 (1960). That

measure was repealed and replaced by the Pupil Assignment Act of 1959, which declared that "efficient maintenance and public support of the public school system require . . . a more flexible and selective procedure for . . . assignment of pupils." ARK. STAT. ANN. § 80-1525 (1980). In particular, the state disavowed "any general or arbitrary reallocation of pupils . . . in the public school system according to any rigid rule of proximity or residence." *Id.*

The Act tipped its hand regarding its true motivations, stressing the need to preserve "order and good will" and "the sovereignty and police power of the State of Arkansas." *Id. Cf. Cooper v. Aaron*, 358 U.S. 1 (1958) (resistance and violence in the wake of *Brown*); *Little Rock School District v. Pulaski County Special School District No. 1*, 584 F. Supp. 328 (E.D. Ark. 1984) (legislature authorized Governor to close schools to prevent desegregation and subsequent closure of the four Little Rock high schools in 1958-59); ARK. CONST. amend. 44, § 1 ("interposing the sovereignty of the State of Arkansas" and proclaiming the need to "oppos[e] in every Constitutional manner the Un-Constitutional decisions of May 17, 1954 and May 31, 1955").[1]

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[1] Amendment 44 was repealed in 1990, barely. *See* ARKANSAS SECRETARY OF STATE, ARKANSAS ELECTION RESULTS 1990, p 77. https://www.sos.arkansas.gov/uploads/elections/1990_Election_results.pdf (50.96% for repeal, 49.04% for retention).The vote in each county where the Districts are located was overwhelmingly against repeal: Union County (JCSD),

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That history is critical to understanding these cases. These measures created "freedom of choice," which allowed parents to decide which school their children would attend post-*Brown*. That system – which closely tracks the current school choice regime – played an integral role in the JCSD litigation and provides important perspectives for each case regarding the "contexts in which the parties were operating" and "the particular circumstances surrounding the order[s]." *United States v. Knote*, 29 F.3d 1297, 1300 (8th Cir. 1994).

JCSD. The United States's Complaint averred that JCSD was "operat[ing] the public schools of the School District on a racially segregated basis," asking that JCSD be ordered "to provide equal educational opportunities to all students in all public schools without regard to the students' race or color." JA295. The District Court ordered JCSD "to eliminate racial segregation in [its] public schools . . . with all deliberate speed and within a reasonable time" and invited JCSD to file a proposed desegregation plan. JA344. Consistent with the Pupil Assignment Act of 1959, JCSD offered a solution relying on "freedom of choice." JA349.

The United States emphasized repeatedly that under "freedom of choice" in JCSD "no Negro student has ever attended school with a white student." JA305;

47.12% for, 52.88% against; Hempstead County (HSD), 43.9% for, 56.1% against; Lafayette County (LCSD), 47.22% for, 52.78% against; Ouachita County (CFSD), 43.08% for, 56.92% against. *Id.*

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JA358 ("No Negro student has ever been assigned to Junction City School."); *id.* ("No white student has ever been assigned to Rosenwald School."; *id.* ("No student in [JCSD] has ever attended a school where his race is in the minority."). It was against this backdrop that it sought an order requiring "consolidat[ion of] Junction City High School and Rosenwald High School," JA364, *i.e.*, elimination of schools that had previously been maintained "solely on the basis of race." JA366. The District Court "cancelled and disapproved" the August, 1967 Decree and Plan, finding it "unacceptable as a plan of procedure for the operation of a school on a constitutional basis" in the light of *Green*. JA 32. It directed JCSD "to propose an alternative plan for the conversion of the school system to a unitary system in accordance with the decisions of the Supreme Court made May 27, 1968," *id.*, *i.e.*, with *Green* and its companion case from Arkansas, *Raney v. Board of Education of the Gould School District*, 391 U.S. 443 (1968).

Given consolidation, the parties did not need to address issues posed by freedom of choice, and the 1970 order did not mention them. It did, however, enjoin JCSD from "assigning students to, or maintaining any homeroom, classroom, or other school-related activity on the basis of race, color, or national origin." JA54-55. As such, it "clearly intended to prohibit any racial discrimination occurring within

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Junction City, including preventing student transfers which result in segregation of Junction City's student body." JA 666.

The State neither mentions nor discusses the role freedom of choice played and how it informed the 1970 Order. The Court below did not make that mistake. *See* JA654-55.

HSD. As Plaintiffs made clear in their complaint, "[t]his is an action for an injunction against the defendants' continuation of racial discrimination in *any and all* of its school operations, including faculty assignments, student assignments and student treatment within the school system." JA806 (emphasis added). The HSD Consent Decree stated explicitly that "it is the intent of the Decree to remedy *any* past discrimination upon race and to prevent *any* like discrimination from occurring in the future." JA818 (emphasis added). It also "'enjoin[ed], forbid[], and restrain[ed] the defendants from hereafter engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including . . . student assignments.'" *Id.* The District Court quoted and emphasized the significance of each of these provisions. JA1031.

The State notes correctly that the Decree "did not allude to inter-district violations or suggest the possibility of inter-district relief." State Brief, p. 6. But it fails to note that freedom of choice was repealed in 1989. JA60. It does admit that

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its functional replacement, the Public School Choice Act of 1989 ("1989 Act"), was in place when the Decree was entered. State Brief, p. 11. But it ignores multiple statements by the District Court regarding why such language was not included, alleging that "[t]he district court . . . carefully avoided any discussion of the substance of the underlying orders" and "were silen[t] regarding inter-district transfers [given] the fact that children of all races were not allowed to exercise school choice until 2013." State Brief, p. 16.

Careful review of each order establishes that the District Court did examine the "substance of the underlying orders." *See, e.g.*, JA1031 (quoting the "relevant part[s]" of the Decree; JA1079-81 (discussing at length the "explicit terms" of the Decree). It also examined the impact of the 1989 Act. JA1038 ("'[f]rom entry of the 1990 *Davis* Decree through the 2013 legislative session, Hope was able to rely on the restrictions articulated in the 1989 Act as a means of preventing private choice from interfering with its efforts to desegregate.'"); JA1039 ("it was unnecessary for the parties to draft the *Davis* Decree in a way that explicitly barred segregative inter-district student transfers because that limitation was contemplated by the school choice law in place at the time"). This tracks closely statements by the CFSD Plaintiffs, who litigated these cases "with full knowledge of the history of school

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choice in Arkansas" and "were . . . acutely aware of the safeguards included within the initial school choice measure enacted in 1989." JA1600.

LCSD. The LCSD Complaint alleged that the Lewisville School District had "created or allowed to be created a racial environment within the public school system" that "is pervasive, especially in its impact and teaching of and upon black pupils." SA14. As the State admits, and the Court below stressed, the Decree enjoined its successor, LCSD, from "engaging in *any* policies, practices, customs or usages of racial discrimination in . . . student assignments" and required LCSD "to 'maintain a unitary, racially non-discriminatory school system wherein all schools are effectively and suitably desegregated and integrated.'" State Brief, p. 7 (quoting Decree, JA1119 & 1122; LCSD Modification Order, JA1406-07). It also required, which the State does not acknowledge, that LCSD "maintain a desegregation and integration policy 'which promotes pupil . . . integration rather than one of passive acceptance of desegregation between students of all races without regard to socio-economic status.'" JA1407 (quoting JA1122).

The State claims the Decree was concerned only with "'the treatment of black and minority pupils *within the school system*.'" State Brief, p. 7 (quoting Decree). As LCSD stressed, the Court below recognized, and the State fails to note, that reflected the fact that "'[f]rom entry of the 1993 *Turner* Decree through the 2013

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legislative session, LCSD was able to rely on the restrictions articulated in the 1989 Act as a means of preventing private choice from interfering with its efforts to desegregate.'" JA1416. That is, the 1989 Act was designed to avoid what the Order described as "passive acceptance" of private decisions preventing attainment of a unitary system. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (government should not become "'passive participant' in . . . racial exclusion practiced by [private parties]").

CFSD. CFSD is different in two respects. The first, which the State ignores, is that the complaint made clear why many communities and schools in Arkansas have historically been racially identifiable and remain so today. The complaint noted that "segregative acts" included decisions that "caused [low income] housing to be located on sites selected on the basis of race." SA5-6. It also stressed that zoning and related decisions played a role in "encouraging black students to either attend schools located near [low income] housing or . . . locating school facilities near or adjacent thereto." SA6. This had the net "effect of concentrating black population within the boundaries of the Camden School District and the further effect of discouraging continued white population within the boundaries of the Camden School District." *Id.*

This was typical when *de jure* segregation was the rule. *See Cato v. Parham*, 297 F. Supp. 403, 406 (E.D. Ark. 1969) (correlation between "neighborhood schools" and the fact that "Negro schools would tend to be established in Negro neighborhoods and white schools would tend to be established in white neighborhoods"). It also helps explain why "in Arkansas . . . more than 15 percent of schools have substantially higher shares of black students compared to what the surrounding neighborhood would indicate" and found that Arkansas is one of the states that are "outliers in terms of racial imbalance." Whitehurst, Grover J., et al., *Balancing Act: Schools, Neighborhoods and Racial Imbalance*, pp. 2, 24 (Brookings Institution 2017).[2] *Cf. Turner v. Key*, 2017 WL 6539290 * 3 (E.D. Ark., Sept. 28, 2017) ("the current districts in these two counties have gotten blacker and whiter. This is a fact."); *id.* * 4 ("Mineral Springs has shown with clarity that all of the districts in Howard County and Hempstead County are re-segregating. So the data are there."); *id.* ("all of the districts . . . in Hempstead County are re-segregating").

The second salient difference, which the State does note, is that the complaint contained claims regarding actions that had an "inter-district, segregative impact." SA5. The *Milton* Order addressed movement between the newly consolidated CFSD

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[2] http://www.brookings.edu/wp-content/uploads/2017/11/es_20171120_schoolsegregation.pdf

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and Harmony Grove School District. JA1521. It expressly required that "[b]oth school districts shall refrain from adopting student assignment plans or programs that have an inter-district segregative effect on either district." JA1523.

That requirement was *not* limited to movement between the two and reflected a key aspect of the litigation the State ignores: the extent to which choice transfers "have encouraged white flight" and have "continued the trend toward . . . racially identifiable school districts." SA7, SA10.

Safeguards in the 1989 Act made it unnecessary to address those questions in either the *Milton* or *Lancaster* Orders. JA1653-57. In that respect, the CFSD case is "identical to the other orders at issue," State Brief, p. 10, albeit not in the manner the State intends. As the District Court emphasized:

> Students have a constitutional right to attend a desegregated public school. *See Jackson v. Marvell Sch. Dist. No. 22*, 389 F.2d 740, 746 (8th Cir. 1968); *Cato*[, 297 F. Supp. at] 410 (noting students' constitutional right to be educated in racially non-discriminatory schools). Thus, the Court finds that the public's interest in seeing the enforcement of its duly enacted laws is secondary to the public's interest in protecting students' constitutional right to attend desegregated public schools.

JA1711.

The 1989 Act. The State's discussion of the 1989 Act and its successors fails to account for two critical realities.

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First, it ignores *why* the 1989 Act included the safeguards at issue in *Teague ex rel. T.T. v. Arkansas Board of Education*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012), *vacated as moot sub nom. Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013). As the *Teague* Court noted:

> [T]he limitation . . . was inserted . . . in response to and in light of this state's discrimination in its public K-12 educational programs, and with the primary intention of complying with the Supreme Court's mandates in the *Brown* cases. The [1989 Act] follow[ed] swiftly on the heels of decisions in both the Eastern District of Arkansas and the Eighth Circuit which held that a student transfer law that did not control for potential segregative effects is unconstitutional.

Teague, 873 F. Supp. 2d at 1064. It refused, in turn, to sever the offending provisions, concluding that "the Arkansas General Assembly's intent in passing the [Act] was to permit student transfer in order to provide choices for parents and students and to foster better school performance – as long as those transfers do not adversely affect the desegregation of either district." *Id.* at 1069.

Second, the contention that *Teague* "correctly concluded that race-based transfer restrictions . . . violate the Equal Protection Clause," State Brief, p. 11, ignores a key aspect of the *Teague* appeal: this Court's decision to allow the Little Rock School District ("LRSD") to participate as Amicus Curiae. *See* LRSD's Motion for Leave to File an Amicus-Curiae Brief, *Teague v. Cooper*, Nos. 12-2413 and 12-2418 (Sept. 14, 2012). It made that request for reasons especially pertinent

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here, maintaining the constitutionality of the 1989 Act restrictions was not governed by *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), a decision parsing *policy* decisions. LRSD was allowed to argue that the restrictions in the 1989 Act were not policies, but were rather *remedial* and that "challenges to desegregation remedies are controlled by the unanimous Supreme Court decision in *Swann [v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)]." LRSD Brief, p. 3.

This Court's decision to dismiss and vacate meant it did not rule on this question. The Districts have repeatedly made this point. *See, e.g.*, Joint Response, p. 21 n. 11. The State has never even acknowledged it, much less made any attempt to dispute it.

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SUMMARY OF ARGUMENT

Each Modification Order detailed the history, the rationales informing any decision to settle rather than fully litigate, and the constitutional obligations of the Districts *and* the State. The District Court fulfilled its obligation to examine *both* the "written document" and "the context in which the parties were operating." *Knote*, 29 F.3d at 1299-1300. It made no mistakes of law, and did not abuse its discretion when it found modification was appropriate and suitably tailored.

The orders recognize an overarching federal "constitutional right . . . to attend a unitary school system." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (*Milliken I*). They do not fashion inter-district remedies. Each gives effect to an option created by state law: exemption from choice in order to comply with desegregation obligations. The orders do not bind any other school district or in any way interfere with their governance or internal operations. *Id.* at 732, 744 (rejecting remedy that "set aside" the "boundaries of separate and autonomous school districts"). They do not authorize the Districts to engage in conduct or practices designed to have a tangible effect beyond their boundaries. *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995) (rejecting a remedial scheme designed to create "desegregative attractiveness"). And they do not interfere with the ability of "state and local authorities" to "manag[e] their own affairs." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (*Milliken II*).

Rather, they give force to a limitation on state and local authority that the state itself created in order to avoid a "constitutional violation." *Id*. at 282.

The orders do not "create" or "perpetuate" a constitutional violation. The District Court did not order, and the Districts did not "voluntarily adopt[] student assignment plans that rely upon race to determine which public schools certain children may attend." *Parents Involved,* 551 U.S. at 709-10. These are not cases where discretionary policy decisions pose the spectre of government deciding to "treat people differently because of their race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Rather, an Article III Court simply crafted a constitutionally permissible remedy.

Finally, the orders allow transfers under appropriate circumstances. Each was crafted to deal with a specific evil: the creation and perpetuation of racially identifiable schools. Each barred transfers that exacerbated that problem, i.e., "segregative inter-district transfers." And each carved out a crucial exception, authorizing even segregative transfers "for education or compassionate purposes." The State and its Amici are wrong when they assert that the orders "deny rights" and prevent all transfers. Rather, they acknowledge and give effect to a prohibition that is official State policy.

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ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Held that Material Changes in Fact and Law Justified Modification.

"Rule 60(b) of the Federal Rules of Civil Procedure authorizes modification of consent decrees." *Smith v. Board of Education of Palestine-Wheatley School District*, 769 F.3d 566, 568 (8th Cir. 2014) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). Specifically, it authorizes a court to "relieve a party from [an] order" when "applying it prospectively is no longer equitable." This Court has held that "'a significant change in circumstances warrants revision of the decree.'" *Smith*, 769 F.3d 566, 570 (8th Cir. 2014) (quoting *Rufo*, 502 U.S. 367, 383 (1992)). The "party seeking modification . . . 'must establish'" that there has actually been "'a significant change in facts or law.'" *Little Rock School District v. Pulaski County Special School District No. 1*, 56 F.3d 904, 914 (8th Cir. 1995) (quoting *Rufo*, 502 U.S. at 393). The court considering the request must, in turn, "determine 'whether the proposed modification is suitably tailored to the changed circumstances.'" *Id.* at 914 (quoting *Rufo*, 502 U.S. at 391).

The District Court found that repeal of the 1989 Act eliminated a safeguard in effect when three of the four decrees were entered and that all four Districts – and Plaintiffs – relied on for twenty-four years. It held this was a significant change justifying modification. *See, e.g.*, JA1036-41. It then determined that the

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modifications were "suitably tailored." JA1041-45. Review is accordingly governed by the normal Rule 60(b) standard, "abuse of discretion." *Mays v. Board of Education of Hamburg School District*, 834 F.3d 911, 918 (8th Cir. 2016).

The State argues that the District Court violated these rules and the orders should be subjected to *de novo* review. None of their contentions withstand careful scrutiny.

A. Repeal of the 1989 Act and Passage of the 2013, 2015, and 2017 Acts Were Significant Changes in Fact and Law and the Appropriate Standard of Review Is Abuse of Discretion.

The District Court considered both changes in law and changes in fact, noting that "'modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent,'" *see e.g.*, JA1654 (quoting *Rufo*, 502 U.S. at 388), and that modification "may also be warranted when changed factual conditions make compliance with the decree substantially more onerous or when a decree proves to be unworkable because of unforeseen obstacles." *See, e.g.*, JA1654 (citing *Rufo*, 502 U.S. at 384).

The District Court stressed that the Legislature had diminished the protections built into each act and it had continuously chipped away at the definition of a "district with desegregation obligations." JA1647-49. In particular, it noted the 1989 Act's "express[] prohibit[ion] [on] all segregative inter-district transfers" and that this

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prohibition was in effect when the underlying orders were entered. JA1655. It also took notice of the 2017 Act's revision of the exemption provision requiring "districts [to] submit proof to the ADE 'that the school district has a genuine conflict under an active desegregation order . . . *that explicitly limits the transfer of students between school districts*.'" *See, e.g.*, JA1649 (emphasis in original).[3]

The District Court concluded that these changes warranted modification. *See, e.g.*, JA1655. It also held that the 2017 Act's language requiring an explicit bar against inter-district transfers presented "an unforeseen obstacle that causes the *Milton* and *Lancaster* Orders to be unworkable, as the parties drafted the . . . Orders at a time in which including language prohibiting all inter-district transfers was unnecessary." *See, e.g.*, JA1656 (citing *Rufo*, 502 U.S. at 384).

The District Court observed that it was impossible for the Districts to comply with a law attempting to govern the language of a desegregation order that was not in effect when they were entered. *See, e.g.*, JA1657 ("the ADE and SBE do not argue, and there is no evidence in the record to indicate, that the parties to the *Milton* and *Lancaster* Orders contemplated that the 1989 Act would be repealed and replaced with a school choice law that requires that the . . . Orders contain specific restrictive

[3] The Districts and Plaintiffs argued that provision is unconstitutional. The District Court noted that given the modifications fashioned, it "is unnecessary to address" that argument, JA1423, and it remains open.

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language that was specifically built into the 1989 Act."). It then found that the underlying orders "clearly intended to prohibit any racial discrimination [from] occurring within the [Districts], including preventing student transfers which result in segregation of the [Districts'] student bod[ies]." *See e.g.*, JA1656.

The orders were neither "sudden," State Brief at 15, nor lacking "any discussion of the substance of the underlying orders." *Id.* at 16. The District Court had and displayed "a complete understanding of" the matters before it. *Knote*, 29 F.3d at 1300. It found that, given all of the facts and circumstances, "significant change[s] . . . warrent[ed] revision." *Rufo*, 502 U.S. at 383. Review is accordingly governed by the normal Rule 60(b) standard, "abuse of discretion." *Mays*, 834 F.3d at 918; *Davis v. Hot Springs School District*, 833 F.3d 959, 963 (8th Cir. 2016); *White v. National Football League*, 585 F.3d 1129, 1136 (8th Cir. 2009).

B. The District Court Did Not Embrace An Erroneous View of the Law.

The State notes an exception to the normal rule: a district court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark, Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 562 n. 2 (2014); *accord*, *Smith*, 769 F.3d at 568 (*de novo* review of "the appropriate legal standard").

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The State argues that the District Court "erred as a matter of law" because it did not show that "'the change in law has an *actual effect* on the . . . consent decree . . . making future application inequitable.'" State Brief, p. 24 (quoting *Davis*, 833 F.3d at 964). Relying on "principles of contract interpretation," it asserts that the focus should be on "'unambiguous terms of the consent decree, read as a whole.'" *Id.*

That ignores an important command from this Court that the District Court took into account:

> The Eighth Circuit has instructed that courts interpreting a consent decree "are not to ignore the context in which the parties were operating, nor the circumstances surrounding the order . . . because a consent decree is a "[peculiar] sort of legal instrument that cannot be read in a vacuum. It is a kind of private law, agreed to by the parties and given shape over time through interpretation of the court that entered it."

JA1039 (quoting *Knote*, 29 F.3d 1300). The State never acknowledges this principle and brushes aside the contexts within which the *actual* parties worked as they fashioned the decrees "with full knowledge of the history of school choice in Arkansas" and "acute[] aware[ness] of the safeguards included within the initial school choice measure enacted in 1989." JA1600.

The District Court thus did not err in finding that the common, overarching purpose of each order was the prevention of racial discrimination and segregation of

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students and that changes in the school choice laws had an actual effect on those orders. JA654 & 664 (enjoining JCSD from "maintaining and operating racially segregated schools" and from "assigning students to, or maintaining any homeroom, classroom, or other school-related activity on the basis of race or national origin" and finding "the 1970 Order clearly intended to prohibit *any* racial discrimination occurring . . . including preventing student transfers which result in segregation of [JCSD's] student body"); JA1039-1040 (HSD, same); JA1406-07 & 1417 (LCSD, same); JA1646 & 1655-56 (CFSD, same).

Modifying those orders to reflect that purpose following a significant change in the law governing such transfers is not error.

C. The District Court Carefully Considered the Details of Each Decree and the Contexts Within Which They Were Negotiated and Entered.

The State argues *de novo* review is called for when the district court "'reli[es] solely on the written document.'" State Brief, p. 21 (quoting *White*, 585 F.3d at 1141). They acknowledge the standard changes when "extrinsic evidence" is taken into account. *Id.* (quoting *Missouri v. Independent Petrochemical Corporation*, 104 F.3d 159, 161 (8th Cir. 1997)). They then assert that "the district court relied on no such evidence in this case." *Id.*

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That is incorrect. The District Court evaluated a considerable body of information beyond the decrees. *See, e.g.*, JA1031-33 (discussing the 1989 Act, its repeal, and successor acts and amendments, none of which were mentioned in the decree); JA1034 (noting the August 1, 2018 "*evidentiary* hearing" and "*evidence* and *witness testimony*, much of which is . . . relevant and applicable to the instant motion") (emphasis added); JA1088 (noting the introduction, and consideration by the Court, of "affidavits from various parents . . . who wish to utilize school choice").

Indeed, as the District Court stressed when it denied the requests for a stay, the State complained that "the Court erred by looking beyond the four corners of the . . . Decree[s]." JA1080. The State makes the same mistake here, arguing that "[t]o conclude that the orders in these cases related to inter-district transfers the district court reached beyond their text." State Brief, p. 25.

They cannot have it both ways. Each order comported with this Court's commands. The District Court looked carefully at the decrees *and* their contexts. Its discussion was lengthy, detailed, and meticulously reasoned. It is accordingly entitled to the deference this Court routinely grants in such cases.

D. It Was Both Proper and Appropriate for Chief Judge Hickey to Enter These Orders.

The State invokes statements made in *Knote*, and repeated in *Asarco, LLC v. Union Pacific Railroad Company*, 762 F.3d 744 (8th Cir. 2014), to fashion a "rule"

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this Court did not intend and has not followed. "[W]e give a large measure of deference to the interpretation of the district court that actually entered the decree." *Knote*, 29 F.3d at 1300; *Asarco*, 762 F.3d at 749. The State interprets this to mean discretion is appropriate only when the same *judge* issues the ruling interpreting or modifying an order of the *court*. State Brief, p. 21 ("the district court here did not enter any of the decrees at issue").

That does violence to the statutes conferring jurisdiction, which speak of the "the district courts," not individual "district judges." *See, e.g.*, 28 U.S.C. § 1331 (federal question); *id.* § 1332 (diversity). Even if that were not the case, this Court has not embraced that interpretation.

Smith, for example, was originally assigned to the Honorable Henry Woods, who oversaw entry of the Settlement Agreement. It was then reassigned to the Honorable Susan Webber Wright, who entered the March, 2013 order granting a motion to modify or terminate the decree. This Court did not mention any of this. Rather, it cut to the chase and declared that "[t]he question, then, is whether the *district court* abused its discretion in applying the *Rufo* standard when it granted the motion to modify or terminate the consent decree." *Smith*, 769 F.3d at 573 (emphasis added).

In *Davis* the disparity between filing, entry, and assessment of the Rule 60(b)(5) motion was even more pronounced. The case was originally assigned to the Honorable Oren Harris. It was reassigned to the Honorable H. Franklin Waters, who approved the Settlement Agreement. It was then reassigned to the Honorable Jimm Larry Hendren, who entered multiple orders. *See, e.g., Davis v. Hot Springs School District*, 2013 WL 12209820 (W.D. Ark., June 10, 2013). Judge Hendren then recused and the case was held by the Honorable Susan O. Hickey for one month. It was then assigned to the Honorable Robert T. Dawson, who entered the order eventually appealed to this Court, *Davis v. Hot Springs School District*, 2015 WL 13307440 (W.D. Ark., Mar. 31, 2015).

The case remained with the District Court where it was brought and it was an order of that *court*, entered by the fifth judge to which the case was assigned, that was appealed. Despite that multiplicity of *judges*, this Court confirmed that "[w]e review . . . the *district court's* Rule 60(b)(5) ruling for abuse of discretion." *Davis*, 833 F.3d at 963 (emphasis added).

Ironically, *Davis* is now with the judge whose actions the State questions. Each of her lengthy and detailed rulings here fully explored the details of the decrees, their contexts, the applicable statutes, and the precedents. The State disagrees with her decisions. That is its right. But it is simply wrong when it alleges that her

carefully crafted orders do not comport with a proper reading of the precedents, which state repeatedly that deference is owed and the operative standard is abuse of discretion.

II. The District Court Acknowledged and Gave Effect to an Overarching Constitutional Command.

Each order denying the stay request made it clear that while Arkansas "has an interest in seeing that its duly enacted laws are carried out . . . the protection of constitutional rights necessarily serves the public interest." *See, e.g.*, JA1091. They then declared that the goal was to protect *every* student's "constitutional right to attend a desegregated public school." *Id.*

The District Court was correct. Arkansas has the obligation to "eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15; *Morrilton School District No. 32 v. United States*, 606 F.2d 222, 229 (1979).

A. Unrestricted School Choice Is Constitutionally Suspect.

The District Court recognized an overarching federal "constitutional right . . . to attend a unitary school system." *Milliken I*, 418 U.S. at 746. The practices to be avoided include both "roots" and "branches." *Green*, 391 U.S. at 438. It is not enough to eliminate constitutional and statutory commands creating and maintaining segregated schools. It is also necessary to avoid collateral practices whose "natural and foreseeable consequence[s]," *Columbus Board of Education v. Penick*, 443 U.S.

449, 464 (1979), are to prevent the attainment of "a unitary, racially nondiscriminatory school system wherein all schools are effectively and equitably desegregated and integrated." LCSD Decree, JA1122.

Thus, while the Supreme Court has not categorically barred choice, "the general experience under 'freedom of choice' . . . to date has been such as to indicate its ineffectiveness as a tool for desegregation." *Green,* 391 U.S. at 440. Those findings mirror those of this Court. *See, e.g. Kemp v. Beasley*, 389 F.2d 178, 181 (8th Cir. 1968) ("It becomes judicial hypocrisy to approve a plan which simply continues the *status quo* under the guise that the segregation is no longer coerced. Where 'freedom of choice' does not implement, or produce meaningful advance toward the ultimate goal of a racially integrated school system, it cannot be said to *work* in the constitutional sense.").

School choice in Arkansas is especially problematic. *See Raney*, 391 U.S. at 447 (Arkansas school district "plan is inadequate to convert to a unitary, nonracial school system"); *Kemp v. Beasley*, No. 1:89-cv-01111-SOH, Doc. 41, Order (Aug. 31, 2016), ¶¶ 8 & 9 (school choice under the 2015 Arkansas Public School Choice Act would have "the natural and probable consequence" of "a segregative impact" on the El Dorado School District). That is especially so when choice serves as a vehicle for white flight. As this Court has noted, "[a]lthough the possibility of white

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flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation . . . it may be taken into account in an attempt to promote integration." *Clark v. Board of Education of Little Rock School District*, 705 F.2d 265, 271 (8th Cir. 1983). *See also Edgerson ex rel. Edgerson v. Clinton*, 86 F.3d 833, 837 (8th Cir. 1996) ("since 19[90], Arkansas law has prohibited transfers that would negatively affect the racial balance in the [Hope] and [Spring Hill] districts, and those districts have refused to grant choice transfers").

Choice, accordingly, is a policy option with a suspect history that must be carefully controlled.

B. Private Parental Decisions Are Not Inevitably Benign.

The State complains that "[t]he district court's approach likewise fails because its order rests on a baseless assumption that a parent's desire to enroll a child in a school that better suits his or her needs is 'racial discrimination.'" State Brief, p. 27. Amici echo that contention. Brief of *Amici Curiae*, Nos. 19-1340, 19-1342, 19-1348 & 19-1349, pp. 15-16 ("Amici Brief").

As a threshold matter, the cases they cite regarding "private choice" and "parent-driven changes in a school's composition" do not apply. *See* State Brief, p. 27 (citing and quoting *Freeman v. Pitts*, 503 U.S. 467, 495 (1992); *Jenkins*, 515 U.S. at 102 (1995); *City of Pasadena Board of Education v. Spangler*, 427 U.S. 424, 435-

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36 (1976)); Amici Brief, pp. 7-9 (same). *Freeman* focused on "changing residential patterns" and their effect "on the racial composition of schools." *Freeman*, 503 U.S. at 495. *Jenkins* simply repeated this point, citing *Freeman*. 515 U.S. at 102. In a similar vein, *Spangler* attributed the "racial mix of some Pasadena schools" to "people randomly moving into, out of, and around the [Pasadena] area." 427 U.S. at 435-36.

The cases before this Court do not involve "continuous and massive demographic shifts." *Freeman*, 503 U.S. at 495. Rather, they are about the deliberate choice to live in one district and send your child to school in another. As such, they fall squarely within the Supreme Court's admonition that "freedom of choice plans" that are not carefully controlled are "inadequate to convert to a unitary, nonracial school system." *Raney*, 391 U.S. at 447. Indeed, contrary to the State's assertion that "white flight" is "not *de jure* segregation," State Brief, p. 36, what the *Jenkins* Court actually stressed was that "[t]he record here does not support the District Court's reliance on 'white flight' as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregation attractiveness." 515 U.S. at 96. That is not the situation here.

The State also ignores a critical reality: choice requests do not actually require any justifications, much less documented educational or compassionate needs.

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Unlike "legal transfer" and the exception crafted by the District Court, choice requests do not require parents to articulate a reason. Rather, they are premised on an assumption made explicit by Amici: that parents – and parents alone – have the right under Arkansas law "to decide for themselves whether their resident district is up to their standards and, if not, find another school district that meets their needs." Amici Brief, p. 1 n. 1.

The State and Amici approach these matters as if all choice requests are benign. State Brief, pp. 14-15; Amici Brief, pp. 20-22. There are two problems with that. First, neither "good intentions" nor "a permissible purpose" matter when invoked "to sustain an action that has an impermissible effect." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973).

Second, it is not invariably true that choice requests are predicated on sound rationales. The State and Amici fail to acknowledge evidence documenting that many requests cannot be explained on educational or compassionate grounds. For example, HSD Superintendent Hart testified that several requests were predicated on the inability of a white student to find someone to "date" or invite for "sleepovers." *See* JA506. Stressing that those "are not adequate reasons to request a transfer," *id.*, he was asked "[i]s there a term that you have heard and that is used to commonly to describe that situation?" *Id.* He responded, "[y]es, sir. Typically it is

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referred to as white flight." *Id.* On cross examination he stressed that the District had received many such requests. JA508. And he provided a detailed response to and refutation of the claims by the Black family that their son had been "bullied." JA1882-83.

Care should be exercised when imputing improper motives. That said, the assumptions that all choice requests are for valid reasons, and that white flight is not a continuing problem, are contradicted by the facts. The Districts documented pervasive white flight: the overwhelming majority of recent requests are by white parents seeking to move their children to schools that are predominantly white. *See, e.g.*, JA842 (noting HSD received 69 total applicants, of which only two were black students). They also provided evidence regarding segregative effect. Both Superintendent Hart and LCSD Superintendent Edwards testified that if forced to participate in choice "our district would become blacker . . . and [o]ur surrounding districts will become whiter." JA503; JA556.

The Supreme Court has cautioned that it is unwise to "[a]dhere[] to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system.'" *Penick*, 443 U.S. at 464. Unrestricted private choice is one such policy and practice, and this Court should not subject the parties to such a regime.

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III. The Modification Orders Do Not Fashion or Impose an "Inter-district" Remedy.

The State and its Amici's second argument regarding error of law, which they advance as an independent point for reversal, is that the District Court embraced an "erroneous view of the law" when it held "that a race-based restriction on inter-district student transfers was not an inter-district remedy." State Brief, p. 20; Amici Brief, pp. 12-15.

The District Court did not commit legal error. It correctly evaluated that claim eight times (twice for each case) and, "upon consideration," correctly rejected it eight times. *See, e.g.*, JA1041-45; JA1081-83.

The District Court approved and adopted the Districts' proposed remedy: to modify the decrees "to explicitly prohibit the segregative inter-district transfer of students . . . to other school districts, unless such a transfer is requested for educational or compassionate purposes and is approved by the [District's] school board on a case-by-case basis." *See, e.g.*, JA1046. It made it clear that its goal was to "include the necessary language required by the 2017 Act, thereby letting [each district] prohibit segregative inter-district transfers . . . to other school districts." JA1422. The objective was two-fold: to declare that segregative inter-district choice transfers interfered with the Districts' ability to comply with binding federal court orders, and to comport with a restriction inserted into the Public School Choice Act

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regime in 2017, that such orders must "explicitly" prohibit such transfers. *See* Act 1066, § 4, JA 85 (codified at ARK. CODE ANN. § 6-18-1906(A)(1) (2018)). The Orders are both consistent with precedent and suitably tailored.

A. The District Court Orders Comport with the Commands of both the Supreme Court and This Court.

The District Court acknowledged that the orders would have "indirect effects" on other districts. *See, e.g.*, JA1421. But it stressed that they "would not directly restrict any other school district's ability to participate in choice or to receive students from other districts that are otherwise eligible to participate in school choice." *See, e.g.*, JA1422. That is, consistent with precedent, the orders do not "'restructure or coerce local governments or their subdivisions.'" *See, e.g.*, JA1421 (quoting *Liddell v. State of Missouri*, 731 F.2d 1294, 1308 (8th Cir. 1984)).

The gist of the State and Amici's complaint is that, "[w]ith the partial exception of Camden-Fairview," there were no allegations or findings of any inter-district constitutional violation. State Brief, pp. 28-29; Amici Brief, p. 12. That is incorrect. The problems posed by freedom of choice were central aspects of the JCSD litigation. Inappropriate student assignment policies were key elements in each case, directly addressed in the original complaints, and expressly acknowledged in the decrees. The District Court recognized this, and each order expressly accounted for it. Notably, neither the State nor Amici discuss the details of what the

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District Court actually held, much less acknowledge, or address, the evidence placed in the record.

Nor do they accurately depict the Supreme Court's rulings in *Milliken I*, *Milliken II*, or *Jenkins*. The District Court stressed that "[t]he Supreme Court has interpreted" the general rule on which the State relies "to mean that 'district courts may not restructure or coerce local governments or their subdivisions.'" JA1421 (quoting *Liddell*, 731 F.2d at 1308). "In other words, absent proof of an inter-district violation, a court-imposed remedy exceeds its scope when it is 'imposed upon governmental units that were neither involved in nor affected by the constitutional violation.'" *Id.* (quoting *Milliken II*, 433 U.S. at 282).

That displayed an acute awareness why those orders were inter-district. In *Milliken*, the district court ordered, and the court of appeals approved, a "'desegregation plan involv[ing] the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan.'" *Milliken I*, 418 U.S. at 735 (quoting *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973)). The Court rejected that approach, stressing that "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in this country." *Id.* at 741.

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In *Jenkins* the Court condemned "desegregation attractiveness," 515 U.S. at 94, stressing that "[i]n effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the inter-district transfer of students." *Id.* at 92. Unlike these cases, the record there did not support a finding that "white flight" had occurred. *Id*. at 96. The remedy was not accordingly "suitably tailored" to rectify that problem. Rather, it sought to "attract[] minority students from the surrounding [districts] and redistribute them within KCMSD." *Id*. at 94.

None of those evils are present here. The orders do not "restructure" adjacent school districts. They do not "'require mandatory inter-district reassignment of students.'" State Brief, p. 31 (quoting *Jenkins*, 515 U.S. at 93). They do not seek to project themselves into other districts and lure their students away. *Id*. (quoting *Jenkins* and condemning "a magnet program designed to achieve . . . inter-district transfer of students"). They do instruct that adjacent districts may not accept transfers from the Districts if they invoke their state-conferred right to be exempt. That is not, however, "coercion" within the meaning of *Milliken* or *Jenkins*. Properly parsed, the orders themselves do not "prohibit any school district from accepting transfers from the Districts." *Id.* at 32. Rather, that bar was created when Arkansas made the decision to authorize exemptions.

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B. The Orders Are Suitably Tailored to Deal with Segregative Choice Transfers.

The District Court determined that the modifications were "suitably tailored." JA1041-45. As it stressed, "students have a constitutional right to attend a desegregated public school," citing cases that focused on problems posed by the continuing presence of racially-identifiable schools. *Jackson*, 389 F.2d at 742-43; *Cato*, 297 F. Supp. at 409. Indeed, in *Jackson* this Court stressed that a freedom of choice remedy should be examined with care lest it interfere with the "full attainment of the constitutional rights of all students in the District." 389 F.2d at 744-45.

These are, admittedly, "old" cases. *See, e.g.*, State Brief, p. 1 (cases "dating as far back as the 1960s"). *Brown*, of course, was also "old" when it was reopened twenty-five years later "in order to review and mandate compliance." *Brown v. Board of Education of Topeka, Kansas*, 84 F.R.D. 383, 391 (D. Kan. 1979). And it remained open for an additional twenty years, during which one solution embraced mirrored a key aspect of these cases, "'encouraging student transfers that would increase integration.'" Beck, Peter, *How* Brown v. Board of Education *Actually Ended: The Forgotten Final Chapter of the Twentieth Century's Most Famous Case*, 1 CTS. & JUST. L.J. 78, 90 (2019) (quoting Topeka Remedy Plan).

In this respect, age does not matter. As the United States argued below, the Districts have "an affirmative duty to desegregate, and that duty constitutes a

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continuing responsibility not to impede the process of dismantling its former dual system" that "is not limited in time or duration, but imposes a continuing legal obligation to desegregate until the vestiges of segregation have been eliminated." JA285. "Under reasoning adopted by the Eighth Circuit, inter-district transfers in school desegregation cases must be denied where they have a 'segregative effect.'" *Id.* (citing *Edgerson*, 86 F.3d at 837).

This Court has stressed that it is inappropriate to "turn a blind eye to any lingering effects of the past, state-mandated dual system within individual school districts." *Edgerson*, 86 F.3d at 836. The District Court was "uniquely situated . . to appraise the societal forces at work in the communities where [it] sit[s]." *Penick*, 443 U.S. at 470 (Stewart, J., concurring). That is what it did here, determining that the decrees should be modified to prohibit segregative inter-district transfers and qualify the Districts for exemption under the 2017 Act, while allowing an avenue for transfers to be approved if circumstances warrant.

The Districts offered evidence of the racial makeup of the students requesting school choice transfers out of the Districts for the 2018-19 school year. *See, e.g.*, JA1106-07. The record shows: 13 transfer applications from CFSD, of which zero were black, JA1514; 69 transfer applications from HSD, of which two were black, JA842; five transfer applications from JCSD, of which zero were black, JA22; and

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42 transfer applications from LCSD, of which zero were black. JA1108. The Districts also presented data that showed the destination districts were substantially whiter. *See, e.g.*, JA1093-94 (noting LCSD has 61.1% black enrollment, Spring Hill has 1.0% black enrollment, and the Taylor schools in Emerson-Taylor-Bradley have 3.7% black enrollment).

The District Court's focus on the "segregative" nature of the transfers must be understood in the light of the problem the orders were designed to address. The Districts documented current district demographics. They demonstrated a distinctive pattern: the overwhelming majority of choice requests are being made by white families seeking to move to majority-white districts.

There are then two "'condition[s that] *currently* offend[] the Constitution,'" Amici Brief, p. 6 (quoting *Edgerson*, 86 F.3d at 837). The first is the continuing legacy of *de jure* segregation: majority-minority communities and school districts. The second is the potential for white flight, which impedes the ability of the Districts to comply with the obligations they embraced. Viewed in this manner, a "segregative" choice transfer is one that makes an already black school blacker. It is also one that appears to, if not in fact does, reflect white flight rather than actual educational or compassionate needs.

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It was then necessary for the District Court to take into account the demographics of the districts that transferring students sought to attend. That was not, as it emphasized, because it was "try[ing] to affect the racial demographics of any [neighboring] school district[s]." JA793. This was not an exercise in impermissible "racial balancing" within the meaning of *Parents Involved*. Rather, the goal was to "ensure that [the Districts] can comply with [their] desegregation obligations under the [orders and decrees] in light of recent statutory changes in the Arkansas Code." JA793.

The State also does not account for an underlying reality of consent decrees: the parties may agree to relief that is "broader . . . than the court could have awarded at trial." *Local No. 93, International Association of Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986). It has the power to enforce its decrees precisely because that "vindicates an agreement that the state officials reached to comply with federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 413, 439 (2004). A consent decree "is a federal-court order that springs from a federal dispute and furthers the objectives of federal law." *Id.* at 438.

> [E]ven if the structure, language, and contexts of the decree did not combine to render the district court's interpretation of the text permissible, the district court "has [the] inherent equitable power to modify a consent decree if satisfied that the decree 'has been turned through changing circumstances into an instrument of wrong.'"

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Knote, 29 F.3d at 1302 (internal citations omitted).

The orders do just that. The Plaintiffs seek to vindicate a constitutional right to attend integrated schools. The Districts seek to honor their obligations, whether ordered by the court or assumed when they agreed to settle. To the extent the orders are race-based and/or take into account "racial demographics," State Brief, p. 33, they do so, as was the case in *Jenkins*, for the actual, permissible purpose of "remov[ing] the racial identity of the various schools." 515 U.S. at 91. That was the purpose of the 1989 Act's restrictions, and it is that remedial justification that animates official Arkansas policy: transfers should not be allowed when they conflict with a federal court order or decree. The orders do not fashion inappropriate inter-district remedies within the express terms or clear intent of *Milliken I*, *Milliken II*, or *Jenkins*.

IV. The Modification Orders Are Appropriately Tailored Judicial Remedies and Neither Create Nor Perpetuate a Constitutional Violation.

Rule 60(b) modifications "must not create or perpetuate a constitutional violation." *Rufo*, 502 U.S. at 391; *LRSD*, 56 F.3d at 914 (quoting *Rufo*). The State and Amici argue that "the district-court's race-based student transfer restrictions violate the Equal Protection Clause." State Brief, p. 34; Amici Brief, pp. 15-16. They are wrong.

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The District Court modified the orders to include language required by the 2017 Act so that the Districts could obtain exemptions from school choice. *See, e.g.*, JA 1661. To the extent the District Court used "segregative" as a modifier, that was consistent with the expressed goal of the 1989 Act, which allowed integrative transfers, i.e., ones that *remedied* a constitutional violation and did not create one. As the Districts previously stressed, in the wake of the 2013 Act, school choice was "implemented" by the State "as an all or nothing program, either a district participates or it doesn't." *See, e.g.*, *Milton, et al. v. Clinton, et al.*, Case No. 1:88-cv-1142, W.D. Ark., CFSD's Memorandum Brief in Support, ECF No. 263, p. 13, n. 6. The Districts were forced to allow all transfers, regardless of their impact, or allow none. The State's focus on "segregative" transfers is accordingly misleading. Under the orders all transfer requests that actually articulate an educational or compassionate basis – regardless of the race of the applicant, and regardless of their impact – must be heard and evaluated by the resident District school board. For these reasons, the State's Equal Protection argument lacks merit.

Additionally, there are four fatal problems with their contentions.

First, the District Court was barred from considering the argument and this Court will not hear it. "Generally, the Eighth Circuit 'will not consider an argument

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raised for the first time on appeal.'" JA1084 (quoting *United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016)).

The District Court stressed that "[d]espite having the opportunity to do so, [the State] did not argue in their underlying brief that modification of the [orders and decrees] would improperly deny equal protection to students" and that "nothing in their underlying brief . . . could be remotely construed as an argument that [the] proposed modification[s] . . . should be rejected because [they] would deny equal protection to students." *Id.*, JA 1085. The State had the opportunity to contest this when it asked for a stay pending appeal. They did not. They did not argue that the District Court was wrong, and they did not invoke any exceptions to the general bar.

The Districts and Plaintiffs pointed out that the State "totally ignore[d] what the District Court held and why" and that their claim should be rejected "[b]ased on this Court's precedents." Joint Response, pp. 21-22. The State acknowledged this only in passing when it stated that "review would be appropriate to prevent a manifest injustice to the children of Arkansas." Arkansas's Reply in Support to Motion for Stay Pending Appeal, Nos. 19-340, 19-1342, 19-1348 & 19-1349, p. 8 ("Arkansas's Reply"). It never explained what that manifest injustice might be. Presumably, it is some combination of the contention that the orders harm students because they are race-based and/or deprive them a choice to which they are somehow

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"entitled." It is, of course, impossible to respond to arguments not made. That said, there is no "manifest injustice" under either theory.

Second, the cases they rely on do not stake out the proposition embraced and are contradicted by the appropriate precedents. Both *Parents Involved* and *Teague* held that the government cannot make a voluntary choice to rely on race-based considerations when pursuing allegedly salutary goals, absent a compelling interest and an approach that is narrowly tailored. Chief Justice Roberts stressed that "[t]he school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend." *Parents Involved*, 551 U.S. at 709-10. In a similar vein, the *Teague* Court noted that Arkansas had of its own accord adopted a variety of school choice options, including the 1989 Act. *Teague*, 873 F. Supp. 2d at 1058-61. Both courts stressed that "when the government [voluntarily] distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved*, 551 U.S. at 720; *Teague*, 873 F. Supp. 2d at 1064.

That is not the issue here. Rather, it is whether race-based *remedies* are appropriate to cure or prevent constitutional violations. In such situations "[t]he objective is to dismantle the dual school system. 'Racially neutral' assignment plans . . . may be inadequate; such plans may fail to counteract the continuing effects of

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past school segregation." *Swann*, 402 U.S. at 28. This reflects the "well established [rule] that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, 480 U.S. 149, 166 (1987). Indeed, *Paradise* makes it clear that such remedies may employ quotas, a practice otherwise routinely condemned.

There is a pronounced and crucial difference between rules governing remedial actions and those structuring simple policy choices. These cases fit comfortably within "a district court's equitable powers to remedy past wrongs . . . for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15. "The notion that this Court should craft special and narrow rules for reviewing judicial decrees in racial discrimination cases was soundly rejected in *Swann*." *Paradise*, 480 U.S. at 191 (Stevens, J., concurring). The District Court acknowledged this, stating it had been "argue[d] in response that the United States Supreme Court has instructed that courts 'may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.'" JA793-94. *Accord*, *Brown v. Board of Education of Topeka, Kansas*, 671 F. Supp. 1290, 1296 (D. Kan. 1987) (citing *Swann* and expressing approval of "racially conscious student assignments").

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The State did not contest this when requesting a stay pending appeal. And it neither acknowledges nor disputes it in its current brief.

The third fatal flaw is that the state implicitly concedes that the standards for policies and remedies differ. The State admits that "desegregation orders may serve a compelling interest when imposed to remedy past *de jure* segregation" but then argues that the "modification orders were not entered for that reason." State Brief, p. 23. That is simply untrue.

Fourth, and critically, this Court embraced this distinction in *Davis*, where it stressed that the parties pressing *Teague* "failed to show why" that decision's holding "would matter." *Davis*, 833 F.3d at 964. The reason was simple:

> [T]here has been no ruling that the 1989 Act is unconstitutional as incorporated in a judicial decree remedying the effects of past discrimination and the school districts have not demonstrated why the reasoning that drove the district court's decision in *Teague* would render it impermissible for individual school districts to implement in the context of a consent decree the practices outlined by the 1989 Act.

Id.

In other words, this Court has recognized that there is a difference between race-based policies and race-based remedies. The orders here are not policy decisions. Indeed, to the extent any policy is involved, it is Arkansas's decision that choice should be limited "in response to and in light of [Arkansas's] discrimination in its public K-12 educational programs, and with the primary intention of

complying with the Supreme Court's mandates in the *Brown* cases." *Teague*, 873 F. Supp. 2d at 1064. Each order was a remedy designed to do just that. As such they are constitutional and should be affirmed.

V. The Modification Orders Give Effect to a Policy Decision Made by Arkansas and Transfers Remain Available Under Appropriate Circumstances.

The State and Amici argue that students have been denied a vital "right" and that the orders frustrate valid Arkansas policies. Neither contention is true.

A. There Is No "Right" to Choice Transfers.

School choice is not a right. It is a privilege. A claim of right requires more than a "unilateral expectation." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Rather, there must be a "legitimate claim of entitlement." *Id.* Neither parents nor students in Arkansas are "entitled" to a choice transfer by the simple act of filing an "application." *See* ARK CODE ANN. § 6-18-1905 (2018). This privilege is limited. *See, e.g., id.* § 6-18-1903(c) & (d) (detailing certain restrictions and limitations). In particular, it is subject to constitutional mandate, the exemption provision. *Id.* § 6-18-1906(a)(1). Arkansas has accordingly recognized that choice should not be exercised when it conflicts with the "constitutional right . . . to attend a unitary school system." *Milliken I*, 418 U.S. at 746. Simply put, the "right" championed does not exist.

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Parents can make important decisions about the care and upbringing of their children, including where they go to school. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But those rights are not absolute: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). "[T]he family itself is not beyond regulation in the public interest" and the "rights of parenthood are [not] beyond limitation." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Indeed, Arkansas has numerous restrictions on parental choice in educational matters, such as the immunization requirement, ARK. CODE ANN. § 6-18-702 (2018), that "act[] to guard the general interest in youth's well being" and, "as *parens patriae* . . . restrict parent's control . . . in many . . . ways." *Prince*, 321 U.S. at 166.

Even if that were not the case, "[i]t is axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood*, 413 U.S. at 465. This is true even when motives are arguably benign. "[G]ood intentions as to one valid objective do not serve to negate a State's involvement in violation of a constitutional duty. 'The existence of a permissible purpose cannot sustain an action that has an impermissible effect.'" *Id.* at 466. As the Court has emphasized, "[t]he Constitution cannot control such

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prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Ironically, if the goal is a fact-sensitive, appropriately tailored scheme for assessment and approval of transfer requests, the best option is the one fashioned by the District Court, which commands they be entertained, and honored, when premised on actual educational or compassionate needs. The State and Amici fail to recognize and account for this, and that is fatal to their case.

B. Inter-district Transfers Remain Available Under Appropriate Circumstances.

The State made much ado below, and in its motion for a stay pending appeal, about harms inflicted on it and on parents and children. *See, e.g.,* State Stay Motion, pp. 18-21. It largely abandons that field in its brief, creating a vacuum Amici seek to fill by advancing various contentions.

The first, which informs virtually every point they make, is that they, and they alone, have the right to make binding decisions about where their children go to school. *See* Amici Brief, p. 1 n. 1. That is simply not true. As a variant, Amici argue that "private choice" is sacrosanct and should be allowed even if "those choices could result in segregative effects." *Id.*, pp. 8-12. The cases on which they rely have

no bearing, and it is simply not true that school demographics matter "only if they result from state action, not from private choices made by parents." *Id.*, p. 8.

Second, they allege that the goal of the orders is to prevent "an immediate and massive shift in demographics resulting in 'segregative effects.'" *Id.*, p. 10. That is patently untrue and displays a fundamental misunderstanding of these cases and the decrees. The District Court addressed the extent to which unrestricted choice would exacerbate preexisting problems. Amici never acknowledge, must less address, evidence presented to the District Court. They make no attempt to parse the original complaints. They pay scant attention to the rationales the District Court articulated as the bases for its conclusion that choice would frustrate the purposes of the decrees and impede compliance with them.

They do note that "annual outgoing transfers are capped at 3% of the district's enrollment." *Id.*, p. 10. But they fail to explain why that matters when the focus is the impact of choice transfers where a federal court order creates a "constitutional obligation to avoid taking *any* action with the natural and foreseeable consequence of causing segregative impact with [the District]." JA1036 (emphasis added). To the best of the Districts' and Plaintiffs' knowledge, there is no such thing as a *de minimus* constitutional violation.

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Third, Amici argue that choice is "widely practiced in Arkansas by children of all races." *Id.*. pp. 17-19. They stress, apparently without embarrassment, that "nearly 17% of the total participants are non-white." *Id.* at 18. Of course, the necessary corollary is that 83% of the transfer students are white, an overwhelming majority. They also point out the many school choice transfers of students who reside in "much larger neighboring (and majority white) districts." *Id.* They fail to note that for each of their examples the destination is an even whiter district. Amici cite Poyen (0.5% black enrollment)[4] as a school choice destination for students from Sheridan (2.0% black enrollment)[5] and Malvern (28.5% black enrollment);[6] Bauxite (2.5% black enrollment)[7] as a destination for students from Benton (9.8% black

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4 https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=poyen&pagesize=10

5 https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=sheridan&pagesize=10

6 https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=malvern&pagesize=10

7 https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=bauxite&pagesize=10

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enrollment)[8] and Bryant (16.9% black enrollment);[9] and Southside (1.3% black enrollment)[10] as a destination for students from Batesville (6.5% black enrollment).[11] *See* Amici Brief, p. 18.

Amici argue that the proportions are more favorable in "the districts where witnesses . . . supplied declarations in this case seek[ing] to transfer their children." *Id*. They offer aggregate data that does not disclose the resident districts of the transferring students and disregards the presence, or absence, of both controls for conflicts with court decrees and the State's willingness to enforce them.

The Districts, on the other hand, offered evidence of the racial makeup of the students requesting school choice transfers out of the Districts for the 2018-19 school year, showing that the destination districts were substantially whiter than the resident

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[8] https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=benton%20school&pagesize=10

[9] https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=bryant&pagesize=10

[10] https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=southside&pagesize=10

[11] https://adedata.arkansas.gov/statewide/ReportList/Districts/EnrollmentByRace.aspx?year=29&search=batesville&pagesize=10

districts. *See supra* pp. 37-38. The proper focus is, accordingly, evidence in the record documenting a current and alarming white flight problem.

Fourth, Amici ignore a critical component of the orders: they do not absolutely forbid transfers, even where those transfers have a "segregative effect." The District Court carefully crafted an exception: transfers based on "educational or compassionate purposes." The District Superintendents filed affidavits stating that each school board will "consider any [such] request submitted . . . on an individual, case-by-case factual basis" and that if they "believe a transfer is warranted on the basis of facts provided . . . will recommend to the school board that it grant [the] request." *See, e.g.*, JA702.

Neither the State nor Amici address this exception in any meaningful way, or the fact that the Districts have promised to abide by it. They do not explain why this does not assuage whatever concerns they might have, although Amici's absolutist position on parental rights indicates they almost certainly object to the fact that the resident district must approve the request.

The State identified four families desiring transfers: Landry (CFSD), JA687; Black (HSD), JA677; Livingston (JCSD), JA691; and Gardner (LCSD), JA681. To date, the Districts are aware of transfer requests from two. The Landrys' request was approved. ADD2. The second, by the Livingstons, involved contradictory claims.

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Compare JA703 ("[s]he told me that she did not have a problem with Junction City, but Parker's Chapel is closer to her home"), *with id.* (expressing educational concerns, citing school report card grades). Their post-modification request was denied when it became clear that the basis for the request was simply convenience, rather than documented educational or compassionate reasons. ADD6-9.

Amici argue that they seek "the same opportunities given to children throughout Arkansas." Amici Brief, p. 1. There are numerous problems with this. Amici include four families: Harrison (LCSD), Williams (LCSD), Klutts (LCSD), and McCoy (JCSD). With the exception of the Harrisons, each submitted school choice applications last year. JA171; JA1242; JA1272. The Districts assume that the students did transfer after the District Court allowed choice transfers for the 2018-19 school year. The Harrisons have a pending application that has not yet been heard by LCSD's board. Assuming the other transfers were granted last year, the motivations of Amici, less the Harrisons, are questionable at best.

Additionally, seven other districts are currently exempt. Amici are not accordingly alone in being ineligible for *unrestricted* choice. Finally, Amici are not "similarly situated," *Brown*, 347 U.S. at 495, with "children throughout Arkansas." They live in districts subject to desegregation decrees, and the State itself recognizes in its choice statute that this makes them different.

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None of the eight can claim that their supposed "rights" have been ignored. More to the point, each District has approved at least one appropriately documented post-order transfer request: Autrey (CFSD) (ADD1); Landry (CFSD) (ADD2); Piggee (HSD) (ADD3-5); Conti (JCSD) (ADD10-12); and Pierson (LCSD). ADD13-15. Therefore, the post-modification record clearly does not support the contention that the exception crafted by the District Court is either inappropriate or unworkable. It is not "difficult to understand exactly what the District Court believe[d] its orders will accomplish." Amici Brief, p. 23. The record demonstrates that the District Court carefully acknowledged and balanced two potentially competing demands: the need to respect constitutional commands and, where appropriate, to honor parental requests.

Finally, Amici make much ado about educational quality and the idea that choice will "foster competition" and provide "incentives" for educationally deficient districts to improve. Amici Brief, pp. 23, 24-26. A large portion of this argument is premised on "annual report card[s] for each school district." *Id.*, p. 21. The Districts and Plaintiffs argued, and presented evidence, that the state metrics regarding supposed school quality "grades" are deeply flawed. *See, e.g.,* JA703-08 (discussing why "the report cards . . . are not an adequate means of comparing schools" when race and poverty are taken into account); JA709-86 (detailed data regarding both

report card grades and demographics). That is consistent with a recent report describing an Arkansas system within which "composite letter grade[s] . . . do[] not provide adequate data," Fenter, Glen, *Deja Vu All Over Again*, p. 3 (n.d),[12] that a better approach would "reflect achievement growth . . . over the course of a year," *id*. at 4, and that critical variables like poverty, single-parent homes, and the like are not taken into account in the current report cards. *Id*. at 5-6.

The District Superintendents attested to their desire to provide the best possible education for their students. Neither the State nor Amici acknowledge or dispute that, beyond the State's complaint below that those statements and the concomitant pledge to entertain appropriate transfer requests are "self serving," Arkansas's Reply, p. 5, and that "having spent months litigating to keep students from transferring" the Districts "would suddenly relent and approve supposedly 'segregative' transfers." *Id.*, p. 11. The State is free to impugn the integrity of the Districts. But the Districts both respect their constitutional obligations and intend to comply with them. Indeed, that is the reason they initiated the chain of events leading to this appeal.

The "District Court's remedy" is not "cruel" or "ineffective." Amici Brief, p. 24. It thoughtfully balances competing demands in the light of Arkansas's

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[12] https://arktimes.com/wp-content/uploads/2019/04/pdf-dejavu.pdf.

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"complicated history . . . regarding race relations in general, and equal opportunity education in particular." *Teague*, 873 F. Supp. 2d at 1062. The Districts are perfectly willing to "compete," albeit on a level playing field where the actual constitutional rights of *all* parties are respected and the frame of reference is not simply "'whatever economic muscle [they] can muster." Amici Brief, p. 24 (quoting *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972)).

CONCLUSION

Amici concede what the State refuses to acknowledge: "Several decades ago, the school districts at issue committed a variety of constitutional violations that subjected them to federal court supervision." Amici Brief, p. 4. That "supervision" includes the "power to impose submission . . . to . . lawful mandates." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821). The District Court here has "the control . . . vested in courts to manage [its] own affairs so as to achieve the orderly and expeditious disposition of [its] cases." *Link v. Wabash Railroad Company*, 370 U.S. 626, 630-31 (1962). The State and Amici complain repeatedly that these cases are "decades" old, failing to recognize that they seek a return to the *status quo ante*, when school choice did not account for "the possibility of white flight and consequent resegregation." *Clark*, 705 F.2d at 271. They ask this Court to "turn[] a blind eye to any lingering effects of the past state mandated dual school system."

Edgerson, 423 F.2d at 838. The District Court refused to do so. That was not an abuse of discretion, and this Court should affirm each of the orders.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 12,964 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-Point Times New Roman.

I further certify that this brief was scanned for viruses and is virus-free.

/s/ Whitney F. Moore
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CERTIFICATE OF SERVICE

I, Whitney F. Moore, hereby certify that on June 27, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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