IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

LARRY MILTON, *et al.*,

PLAINTIFFS,

v. **No. 1:88-CV-1142**

MIKE HUCKABEE, *et al.*, **DEFENDANTS.**

AND

DOUGLAS LANCASTER, *et al.*,

PLAINTIFFS,

v. **No. 1:09-CV-1056**

DR. JERRY GUESS, in his capacity as Superintendent of Camden-Fairview School District No. 16, *et al.*, **DEFENDANTS.**

BRIEF IN SUPPORT OF MOTION TO TERMINATE CONTINUED SUPERVISION

Federal court supervision of schools is an extraordinary remedy with an expiration date. Setting education policy is ordinarily left to state and local governments. But 60 years ago, with far too many school districts flouting the mandate of *Brown v. Board of Education*, the Supreme Court okayed judicial intervention to ensure desegregation. Still, the Court has made clear that judicial intervention must be limited: Courts may act only to remedy past *de jure* segregation. And as the Jim Crow era recedes further into the history books, court oversight must also become a thing of the past.

In the Camden-Fairview School District, segregation thankfully ended two decades ago. Yet to preserve a particular racial balance, a prophylactic consent decree remains on the books, preventing white children (but not black children) from transferring to a neighboring district that better meets their needs. That decree interferes with the State's chosen policy of school choice.

Even worse, it denies a group of schoolchildren educational opportunities solely because of their race. It is past time for this court-mandated racial discrimination to end.

I. Three Decades of Court Supervision over Camden-Fairview

More than 30 years ago, a group of Ouachita County parents sued to seek consolidation of their children's local school districts, Camden, Fairview, and Harmony Grove. Complaint, No. 88-1142, Doc. 291-1. Those districts, the plaintiffs alleged, had "encouraged white flight from Camden District" by "permitting interdistrict transfers of white students for racial reasons." *Id.* ¶ 11(B).

That suit terminated in a series of consent decrees. Among other things, Camden and Fairview consolidated. Doc. 220. And Harmony Grove agreed to not accept white transfer students from the new Camden-Fairview without Camden-Fairview's permission. Doc. 262-1 at 2.

In 2002, Camden-Fairview was declared unitary and nearly all consent decrees were terminated. Doc. 254. But "to prevent future 'white flight,'" the Court's final order left in place the prohibition on white transfers to Harmony Grove. *Id.* ¶ 10. It also forbade Harmony Grove from accepting as transfers the white children of its employees, though doing so was allowed by state law. *Id.*

Several years later, Camden-Fairview approved the transfer of children from an influential white family to Harmony Grove—while simultaneously rejecting another white child's transfer application. Complaint, No. 09-1056, Doc. 2. That child's family sued, alleging equal protection violations. *Id.* This second suit terminated with another settlement agreement that tightened the Court's grip: now, no white children can transfer to Harmony Grove without a court order. Doc. 19.

When Camden-Fairview and Harmony Grove first agreed to bar white transfers, that restriction tracked state law: a 1989 school-choice act provided that no student could transfer to a

district with a higher "percentage of enrollment for the student's race." Act 609 of 1989, sec. 11(a).

But the law has changed. In 2007, the Supreme Court reaffirmed that schools cannot tell "schoolchildren . . .where they [can] and [cannot] go to school based on the color of their skin." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007). A few years later, a court in the Western District of Arkansas held that, under *Parents Involved*, Arkansas's 1989 "white flight" restriction violated the Fourteenth Amendment and invalidated it. *Teague ex rel. T.T. v. Ark. Bd. of Educ.*, 873 F. Supp. 2d 1055 (W.D. Ark. 2012). Even if most white students would "'choice out' to 'whiter' schools," a "fear of [that] 'white flight' [could] not, in and of itself, justify the overbroad restriction[] on school transfer." *Id.* at 1067-68. Arkansas revoked that unconstitutional race-based transfer restriction the next year. *See Teague v. Cooper*, 720 F.3d 973, 975-76 (8th Cir. 2013).

More recently, the State has adopted broad school-choice policies letting *any* student "apply for admission . . . in *any* school district." Ark. Code Ann. 6-18-1901(b)(3) (emphasis added) (findings). Yet to avoid conflicting with the judicial power, the current school choice law acknowledges that contrary desegregation orders still govern. *Id.* 6-18-1901(b)(3), -1906(a). Consequently, white children residing in the Camden-Fairview School District remain unable to partake of the same educational opportunities as their peers.

II. Arkansas Has an Interest in Protecting Camden-Fairview Schoolchildren from Race Discrimination

More than a year ago, the Eighth Circuit signaled that it's time for Camden-Fairview's transfer restrictions to end. In related school-choice litigation, that court noted that decades-old desegregation orders, including Camden-Fairview's, "raise[] red flags" and advised this Court to "hold a unitary status hearing and consider removing these cases from the federal docket." *United*

States v. Junction City Sch. Dist., 14 F.4th 658, 668 (8th Cir. 2021) (internal quotation marks omitted).

Despite that admonition, Camden-Fairview indicated in a recent letter to the Arkansas Department of Education that it has no plans to pursue termination. *See* Letter to ADE, Ex. A at 3. That flouts the Eighth Circuit's directive. Camden-Fairview's desire to "prevent future 'white flight'" and preserve a particular racial balance cannot justify the consent decree's race-based transfer provision. *See infra* Part III.A. Because there is no ongoing *de jure* segregation, the time to relinquish judicial control has come. *See infra* Part III.B.

Since Camden-Fairview will not move to defend its schoolchildren, the State of Arkansas must. Bound by the Supremacy Clause to defend the federal Constitution, Arkansas has "significant sovereign interests" in preventing "violations of [the] constitutional rights of its citizens." *Pennsylvania v. Porter*, 659 F.2d 306, 316 (3d Cir. 1981). Moreover, the State bears the heavy responsibility of ensuring that *all* children in Arkansas have an adequate education. Ark. Const. art. 14, sec. 1. It need not wait for Camden-Fairview to act or for a frustrated parent (with significantly fewer resources) to sue before pursuing legal remedies allowing it to fulfill its constitutional obligations. *Porter*, 659 F.2d at 315-16.

The State informed Camden-Fairview's counsel of its plans to seek termination of the transfer restriction on February 14 and March 13. *See* Letter to Counsel, Ex. B.

III. Camden-Fairview's Transfer Restriction Racially Discriminates and Must End

Motions to terminate consent decrees or declare a school district unitary typically require some showing of changed circumstances. *See, e.g.*, *Cody v. Hillard*, 139 F.3d 1197, 1199 (8th Cir. 1998) (test for termination); *Freeman v. Pitts*, 503 U.S. 467 (1992) (test for unitary status). But this case is unique: Camden-Fairview *already* showed circumstances had changed 20 years ago. Indeed, this Court found all parties "fully compli[ant]" with the consent decrees and held that the

"racially dual system of education . . . had been dismantled and eliminated." No. 88-1142, Doc. 254 ¶ 6. It did not find that Camden-Fairview or its neighbor, Harmony Grove, had further work to do. *Cf. Freeman*, 503 U.S. at 496-97 (explaining the typical justification for partial retention of judicial oversight).

At that point, this Court should have terminated all judicial supervision. Instead, it let the parties leave the transfer restriction in place as a prophylactic measure "to prevent *future* 'white flight'" that might have a "segregative impact." Doc. 254 ¶ 10 (emphasis added). In other words, this Court allowed the parties to restrict future "private choices" that might undermine their desired racial balance. *Freeman*, 503 U.S. at 495.

That choice was legally dubious in 2002 and is patently unconstitutional today. And at any rate, the time for judicial management of Camden-Fairview has expired. This Court should return control over Camden-Fairview schools to policymakers and parents. *Cf. Bryant v. Woodall*, 2022 WL 3465380, at *2 (M.D.N.C. Aug. 17, 2022) (terminating injunction that contradicts Supreme Court precedent because "[n]either this court, nor the public, nor [the parties] have the right to ignore the rule of law as determined by the Supreme Court").

A. The Constitution Forbids Camden-Fairview's Racial Balancing

Racial classifications are "pernicious." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Fourteenth Amendment promises all Americans equal treatment, regardless of their race or ethnic background. *Id.* Policies departing from this fundamental principle must survive the most searching review. *Parents Involved*, 551 U.S. at 720.

For grade schools, very few discriminatory policies can survive. The Supreme Court has confirmed only one "compelling interest" justifying consideration of race: "remedying the effects of past intentional discrimination." *Id.* But that interest is narrow; it is limited to undoing "unlawful *de jure* polic[ies]" causing "racial imbalance." *Freeman*, 503 U.S. at 494. By contrast,

"[w]here resegregation is a product not of state action but of private choices"—such as voluntarily transferring to another district—"it does not have constitutional implications" and does not necessitate remediation. *Id.* at 495; *see also Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) ("The mere fact that a school is black does not mean that it is the product of a constitutional violation."). Once a school district has eliminated "the vestiges of prior segregation," any "use of race must be justified on other grounds." *Parents Involved*, 551 U.S. at 725 n.12 (plurality op. of Roberts, C.J.). Because Camden-Fairview long ago dismantled segregation and because the transfer restriction targets non-state action, that restriction is not remedial.

Beyond that, the Supreme Court has left open the possibility that racial diversity *may* be a compelling interest—but categorically rejected the type of crude racial categorization present here. In *Parents Involved*, Justice Kennedy split from a four-Justice plurality over whether schools could pursue diversity for its own sake. *Compare id.* at 730-31 (Roberts, C.J.) (rejecting racial proportionality as a compelling end), *with id.* at 788-89 (Kennedy, J., concurring in part and concurring in judgment) (approving diversity, broadly defined, as a compelling interest). But even Justice Kennedy believed that race should be only "one component of that diversity," not the sole inquiry. *Id.* at 798. And a five-Justice majority agreed that schools could not "classify students by race and rely upon that classification in making school assignments," *id.* at 711 (majority op.), at least unless that classification was a "last resort to achieve a compelling interest." *Id.* at 790 (Kennedy, J.).

Camden-Fairview's transfer restriction fails under this diversity rationale too. It refuses to consider students holistically but simply sorts them into "black" and "white" groups and assigns educational opportunities accordingly. *See id.* at 740-41 (Roberts, C.J.) (discussing *Grutter*'s

approval of a holistic approach); *id.* at 791 (Kennedy, J.) (approving "a more nuanced, individual evaluation of school needs and student characteristics that might include race"). And it fails to justify that classification as a necessary "last resort." Thus, it is patently unconstitutional.

B. Precedent Indicates that Judicial Management Must End Now

This Court should terminate the transfer restriction because it is unconstitutional. *See supra* Section III.A. It should terminate the restriction for another reason too: The restriction is a prophylactic measure designed to prevent future *de facto* resegregation. But without ongoing *de jure* segregation, courts can't monitor a school district for all time. After three decades of judicial management, it's time for policymakers to retake control of Camden-Fairview. *Junction City Sch. Dist.*, 14 F.4th at 668.

Allowing courts to supervise school desegregation was an extraordinary remedy necessary to overcome districts' intransigence. *Freeman*, 503 U.S. at 503-05 (Scalia, J., concurring) (tracing the history of desegregation remedies). But when state-sponsored violations cease, so must judicial management. Indeed, the Supreme Court has instructed district courts to withdraw supervision as much as possible. For instance, the Court endorsed a district court's decision to revisit and partly terminate a desegregation order a school had complied with for 17 years with few complaints. *Id*. at 473, 496 (majority op.). And it cautioned future courts against presuming that any racial imbalance in school districts "once *de jure* segregated" necessitated "ongoing and never-ending supervision." *Id.* at 495. Instead, it noted that "[a]s [a] *de jure* violation becomes more remote in time," it's less likely that any "racial imbalance . . . is a vestige of the prior *de jure* system." *Id.* at 496. Without a clear link between *de jure* and *de facto*, continued supervision would be improper.

Courts view other race-focused remedies with a similarly skeptical eye. Take "race-conscious admissions policies." *Grutter*, 539 U.S. at 342. Though the Supreme Court okayed

affirmative action in higher education in 2003, it predicted that "25 years from [then], the use of racial preferences [would] no longer be necessary." *Id.* at 343. Indeed, two decades later, it's reconsidering the permissibility of affirmative action. *See Students for Fair Admissions v. Univ. of N.C.*, No. 21-707 (U.S.); *Students for Fair Admissions v. President & Fellows of Harv. College*, No. 20-1199 (U.S.). Similarly, the Eighth Circuit has explained that "affirmative action consent decrees are not favored unless they are temporary and will terminate when the manifest [racial] imbalances have been eliminated." *Brotherhood of Midwest Guardians, Inc. v. City of Omaha*, 9 F.3d 677, 680 (8th Cir. 1993) (internal quotation marks omitted) (alteration in original).

Or consider the Voting Rights Act. Back in the Civil Rights Era, the VRA's "stringent" requirement that certain jurisdictions obtain preclearance before amending their election laws was "justified" by the ongoing "blight of racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 545 (2013) (internal quotation marks omitted). But that "extraordinary legislation was intended to be temporary, set to expire after five years." *Id.* at 546. When Congress instead extended the preclearance provision to apply for *sixty-five years*—long after "[t]hings ha[d] changed in the South"—the Supreme Court declared the provision unconstitutional. *Id.* at 540, 549 (internal quotation marks omitted). To the extent any "racial discrimination in voting" persisted, the remedy had to "speak[] to current conditions," not a Jim Crow era long past. *Id.* at 557.

For the same reasons, this Court should end its supervision over Camden-Fairview and terminate the transfer restriction. This Court found Camden-Fairview unitary two decades ago. Indeed, no plaintiff has alleged ongoing segregation in over 30 years. At most, the parties and this Court worried two decades ago that allowing transfers would make Camden-Fairview a disproportionately minority school. But to justify managing the district "30 years after the last

official state action," this Court "must do more than show that" Camden-Fairview has a large minority "population." *Jenkins*, 515 U.S. at 118 (Thomas, J., concurring). And as none of the parties can make such a showing, the Court must remove Camden-Fairview's "case[] from the federal docket." *Junction City*, 14 F.4th at 668.

Conclusion

The Constitution prohibits race discrimination—whether it targets minorities who have faced discrimination in the past or the white majority. Camden-Fairview's transfer restriction denies certain white children the school-choice option that Arkansas grants all other children, white or black, across the State. This Court should end that discrimination today.

Dated: March 15, 2023

Respectfully Submitted,

TIM GRIFFIN
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MOTION TO TERMINATE CONTINUED SUPERVISION

Pursuant to Fed. R. Civ. P. 60(b)(5), the State Defendants move to terminate paragraph 1(C) of the Consent Order entered November 27, 1990, as modified by this Court's Order of July 26, 2010.

Dated: March 15, 2023

Respectfully Submitted,

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Exhibit A

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December 15, 2022

VIA EMAIL ONLY – Shastady.Wagner@ade.arkansas.gov
Arkansas Department of Education
Division of Elementary and Secondary Education
Attn: Shastady R. Wagner
4 Capitol Mall, Room 302-A
Little Rock, AR 72201

Re: Unitary Status Desegregation Obligations of Camden Fairview School District

Dear Ms. Wagner:

I am writing as the attorney for Camden Fairview School District ("CFSD"). Please consider this correspondence CFSD's quarterly report regarding its unitary status obligations, in compliance with Section 3-A.10 of the Rules Governing Standards for Accreditation of Arkansas Public Schools and School Districts.

Details of the District's Outstanding Desegregation Obligations.

CFSD is a defendant in *Milton, et al. v. Clinton, et al.*, Case No. 88-1142, U.S. Dist. Ct., W.D. Ark., El Dorado Division. The District has operated in accordance with various orders entered over the years in that case. A consent order entered in the *Milton* case on November 27, 1990, a copy of which was provided with CFSD's September 15, 2022 status report, addressed the following with respect to CFSD:

1. Prohibition on transfers of white students from CFSD to Harmony Grove School District ("HGSD") and directive to HGSD to maintain an open admission policy for black CFSD students;
2. CFSD and HGSD's agreement to "refrain from adopting student assignment plans or programs that have an interdistrict segregative effect on either district"; and
3. CFSD and HGSD's agreement to "work cooperatively to create interdistrict policies and programs to end the ravages of segregation."

A second consent order, entered on August 1, 1991, resolved board governance and Voting Rights Act issues by establishment of single member zones and resolved desegregation issues by consolidation of the former Camden School District and Fairview School District. *See* December 10, 2001 Settlement Agreement, ¶¶ 3-4, a copy of which was provided with CFSD's September 15, 2022 status report. The August 1, 1991 consent order also included commitments to decrease

the test score disparity between Black and white CFSD students and to house all students of the same grade in a single facility. HGSD was again directed to maintain an open admission policy for Black CFSD students. A new CFSD high school was built with funding assistance from the State of Arkansas.

A settlement agreement between all parties to the case, entered on December 10, 2001, states as follows:

> [t]he provisions of paragraph 1(C) of the consent order of November 27, 1990, in regard to HGSD shall remain in full force and effect to prevent future "white flight" from CFSD to HGSD. In addition, existing state law permits the attendance of nonresident children at a school district where those children's parents are employees of the school district. A.C.A. 6-18-203. Where this statute is applied to permit the attendance of white children resident in CFSD at HGSD, it has a segregative impact upon CFSD. Such attendance should, therefore, be declared to be violative of paragraph 1(C) of the above consent order unless said attendance is with the written consent of CFSD. The declaration of unitary status sought herein should otherwise have the result of dismissing with prejudice HGSD from this litigation.

See December 10, 2001 Settlement Agreement, ¶ 10. The 2001 Settlement Agreement further stipulated that CFSD could file "a motion moving the Court for a court order declaring unitary status and dismissing all parties with prejudice." The 2001 Settlement Agreement contemplates entry of a final consent order following a fairness hearing, which order would declare CFSD unitary, dismiss the Milton case "with prejudice to all parties and their Court ordered obligations except for the specific terms and obligations of this instant settlement agreement." *Id*. at ¶ 15. The resulting consent order, entered on February 1, 2002, states specifically that "CFSD has materially reduced the test score disparity between black and white students within the district, and it has satisfied all other court obligations, and is hereby declared unitary in status." *See* February 1, 2002 Consent Order, ¶ 2, a copy of which was also provided with CFSD's September 15, 2022 status report. The 2002 Consent Order incorporated the terms of the 2001 Settlement Agreement "as set forth word for word." *Id*. at ¶ 3.

In 2009, new litigation was initiated against CFSD in *Lancaster v. Guess, et al.*, Case No. 1:09-cv-1056, U.S. Dist. Ct., W.D. Ark., El Dorado Division. The Lancaster case was resolved by an order issued on July 26, 2010, which provided that:

1. "The remedial provisions set forth in paragraph 1[C] of the November 27, 1990 consent order, and paragraph 10 of the February 1, 2002 order [adopting and incorporating the December 10, 2001 Settlement Agreement] remain in full force and effect at this time." *See Lancaster* 2010 Order, ¶ 2.

2. "Paragraph 10 of the February 1, 2002 order is, however, modified to require that CFSD obtain approval of this Court prior to granting its written consent to the attendance at HGSD of the child of a CFSD resident who is an employee of HGSD, pursuant to A.C.A. § 6-18-203." *Id*. at ¶ 3.

The *Lancaster* 2010 Order concludes with a statement that the District Court "retains jurisdiction of this case solely for the purpose of enforcing the parties' settlement agreement; and of the aforesaid [*Milton*] Case No. 88-1142 for the purpose of enforcing its orders therein.

Description of the District's Efforts Towards Obtaining Full Unitary Status and Release from Court Supervision.

CFSD currently operates five campuses: the Early Childhood Education Center serves pre-school and Special Education Offices, Fairview Elementary serves grades K-3, Ivory Intermediate School serves grades 4-5, Camden Fairview Middle School serves grades 6-8, and Camden Fairview High School serves grades 9-12. (CFSD's September submission mistakenly stated that the District has six campuses; undersigned counsel apologizes for the typo). From entry of the 1990 Consent Decree in *Milton* until the declaration of unitary status in the 2002 Consent Order, CFSD complied with all directives contained in the former document. CFSD has implemented and maintained non-discriminatory policies governing student and faculty assignments and has maintained a seven-member board of directors, all of whom are elected from zones drawn in compliance with state and federal law, including the Voting Rights Act. CFSD believes the 2001 Consent Order constitutes "full unitary status," with the qualification that inter-district movement of white students from the desegregated CFSD to HGSD had a continuing segregative impact. The Court in the later *Lancaster* Order found that movement under state law of the children of white residents of CFSD to HGSD, by whom they were employed, had a segregative impact. Such inter-district movements were, therefore, barred without the written consent of CFSD. (*See Milton*, December 10, 2001 Settlement Agreement, ¶ 10). CFSD continues to operate in compliance with the Court's prohibitions on segregative movement of students from CFSD to HGSD.

Detailed Plan Including the District's Progress Toward Meeting Its Obligations.

As stated in its September submission, CFSD believes it is currently in compliance with all of the provisions listed above and has been declared unitary as to all issues, although the Court retained jurisdiction to enforce its orders regarding transfers between CFSD and HGSD. Pursuant to the 2001 Settlement Agreement, the 2002 Consent Order, and the 2010 *Lancaster* Order, CFSD will continue to request a partial exemption from participation in school choice, which operates to prohibit transfers of CFSD students to HGSD, by submitting the appropriate documentation to the Department of Elementary and Secondary Education ("DESE") each year by January 1. CFSD has equal employment opportunity policies and does not discriminate in its operations.

Timeline for Reaching a Determination of Full Unitary Status and Release from Court Supervision.

As stated in its September submission, CFSD does not believe additional orders from the Court are necessary or appropriate at this time. With respect to student transfers between CFSD and HGSD, CFSD believes there has been no significant change in circumstances since entry of the 2010 *Lancaster* Order.

If you have any questions regarding this correspondence, please do not hesitate to contact

me. Thank you very much for your courteous attention.

Sincerely,

/s/ Whitney Moore

Whitney F. Moore

Exhibit B

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March 14, 2023

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Re: LARRY MILTON V. MIKE HUCKABEE (No. 88-CV-1142)
DOUGLAS LANCASTER V. DR. JERRY GUESS (No. 09-CV-1056)
ROSIE L. DAVIS V. WILLIAM DALE FRANKS (No. 88-CV-4082)
UNITED STATES V. JUNCTION CITY SCHOOL DISTRICT (No. 66-CV-1095)
MRS. RUTHIE B. LOVE V. JUNCTION CITY SCHOOL DISTRICT (No. 70-CV-51)
MARY TURNER V. LEWISVILLE SCHOOL DISTRICT (No. 92-CV-4040)

Dear Ms. Moore,

We write to follow up on our February 14 and March 13 telephone conversations concerning the consent decrees or judicial orders binding the Camden-Fairview, Hope, Junction City, and Lafayette School Districts. As we discussed, over a year ago, the Eighth Circuit concluded that those consent decrees and orders should not remain in place. *United States v. Junction City Sch. Dist.*, 14 F.4th 658, 666, 668 (8th Cir. 2021) (advising the parties to "hold a unitary status hearing and consider removing these cases from the federal docket"). That's because desegregation remedies are time-limited: once state-sponsored violations cease, so must judicial management. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003); *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

We understand from our conversations that the Hope, Junction City, and Lafayette School Districts are considering seeking termination of the orders and decrees binding them and that, at least some of those Districts, are willing to do so in the very near future. The State of Arkansas would strongly support such efforts and offers our assistance to the Districts, as necessary.

But we also understand that Camden-Fairview has no intention of seeking termination in the near future. That's particularly troubling because Camden-Fairview's consent decree explicitly classifies children based on race and violates the Fourteenth Amendment. Because Camden-Fairview does not plan to seek termination, I write to advise you that the State intends to do so shortly.

Regards,

Nicholas J. Bronni
Solicitor General of Arkansas

cc: schilds@walkerandchilds.com
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