No. 14-31010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OLESS BRUMFIELD; *et al.*,

Plaintiffs

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

LOUISIANA STATE BOARD OF EDUCATION,

Defendant-Appellee

(See inside cover for continuation of caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

VANITA GUPTA
Acting Assistant Attorney General

MARK L. GROSS
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-2195

(Continuation of caption)

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

Movants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

While the issues on appeal are not difficult and could be resolved on the briefs, the United States does not oppose oral argument.

TABLE OF CONTENTS

PAGE

STATEMENT REGARDING ORAL ARGUMENT

STATEMENT OF JURISDICTION.....2

STATEMENT OF THE ISSUES.....2

STATEMENT OF THE CASE.....3

SUMMARY OF THE ARGUMENT 9

ARGUMENT

I THE VOUCHER PROGRAM ORDERS AT ISSUE ARE NOT APPEALABLE UNDER 28 U.S.C. 1292(a)(1) 10

II NO BASIS EXISTS TO VACATE THE VOUCHER PROGRAM ORDERS 17

A. Standard Of Review 18

B. The District Court Rulings Concerning The Voucher Program Are Not Void 18

1. No Jurisdictional Defect.....19

2. No Due Process Violation 26

C. No Significant Change In Law Or Fact Requires Vacating The Voucher Program Orders.....27

1. Rule 60(b)(5).....27

2. Rule 59(e).....33

TABLE OF CONTENTS (continued): **PAGE**

CONCLUSION.....35

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES: **PAGE**

Aurora Bancshares Corp. v. *Weston*, 777 F.2d 385 (7th Cir. 1985).....13

Board of Educ. v. *Dowell*, 498 U.S. 237 (1991)..... 30-31

Brumfield v. *Dodd*, 405 F. Supp. 338 (E.D. La. 1975).....*passim*

Brumfield v. *Dodd*, 749 F.3d 339 (5th Cir. 2014) .....*passim*

Callon Petroleum Co. v. *Frontier Ins. Co.*, 351 F.3d 204 (5th Cir. 2003).....26

Carson v. *American Brands, Inc.*, 450 U.S. 79 (1981).....14, 16

Carter v. *Fenner*, 136 F.3d 1000 (5th Cir.),
cert. denied, 525 U.S. 1041 (1998).....19, 26

Commodity Futures Trading Comm'n v. *Preferred Capital Inv. Co.*,
664 F.2d 1316 (5th Cir. 1982) 14

Demahy v. *Schwarz Pharma, Inc.*, 702 F.3d 177 (5th Cir. 2012),
cert. denied, 134 S. Ct. 57 (2013).....18

EEOC v. *Neches Butane Prods. Co.*, 704 F.2d 144 (5th Cir. 1983).....14

Federal Deposit Ins. Corp. v. *SLE, Inc.*, 722 F.3d 264 (5th Cir. 2013) 18

Freeman v. *Pitts*, 503 U.S. 467 (1992).....31

Frew v. *Hawkins*, 540 U.S. 431 (2004) 30

Gulfstream Aerospace Corp. v. *Mayacamas Corp.*, 485 U.S. 271 (1988).....13

Guy v. *Crown Equip. Corp.*, 394 F.3d 320 (5th Cir. 2004).....34

Hamilton v. *Robertson*, 854 F.2d 740 (5th Cir. 1988).....13

Horne v. *Flores*, 557 U.S. 433 (2009) 29-30

CASES (continued): **PAGE**

Hunt v. *Bankers Trust Co.*, 799 F.2d 1060 (5th Cir. 1986) 13

In re Sessions, 672 F.2d 564 (5th Cir. 1982) 10, 13

Ross v. *Marshall*, 426 F.3d 745 (5th Cir. 2005),
cert. denied, 549 U.S. 1166 (2007) 18

Rufo v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992) 25, 28

Samnorwood Indep. Sch. Dist. v. *Texas Educ. Agency*,
533 F.3d 258 (5th Cir. 2008) 25

Schiller v. *Physicians Res. Grp., Inc.*, 342 F.3d 563 (5th Cir. 2003) 33

Sierra Club v. *Glickman*, 67 F.3d 90 (5th Cir. 1995) 14

Shelby Cnty. v. *Holder*, 133 S. Ct. 2612 (2013) 28-29

Switzerland Cheese Ass'n v. *E. Horne's Mkt.*, 385 U.S. 23 (1966) 15-16

Templet v. *Hydrochem, Inc.*, 367 F.3d 473 (5th Cir.),
cert. denied, 543 U.S. 976 (2004) 33

United States Aid Funds, Inc. v. *Espinosa*, 559 U.S. 260 (2010) 18-19, 23, 26

United States v. *Texas*, 601 F.3d 354 (5th Cir. 2010) 25

Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002) 8, 32

STATUTES:

28 U.S.C. 1292(a)(1) .....*passim*

La. Rev. Stat. § 17:4015 32

La. Rev. Stat. §§ 17:4011-17:4025 4

RULES: **PAGE**

Fed. R. Civ. P. 59(e).....18, 27, 33

Fed. R. Civ. P. 60(b)(4).....*passim*

Fed. R. Civ. P. 60(b)(5).....*passim*

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-31010

OLESS BRUMFIELD; *et al.*,

Plaintiffs

UNITED STATES OF AMERICA,

Intervenor-Appellee

v.

LOUISIANA STATE BOARD OF EDUCATION,

Defendant-Appellee

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

Movants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE

STATEMENT OF JURISDICTION

Movants-appellants (Intervenors) contend that this Court has jurisdiction over their appeal under 28 U.S.C. 1292(a)(1). They are mistaken. Intervenors are appealing the district court's August 4, 2014, decision (ROA.1148-1157), denying a motion to vacate the district court's order of April 8, 2014 (ROA.1075-1079). Br. 1.[1] Because neither the August 2014 order nor April 2014 order qualifies as a grant or modification of an injunction or a refusal to grant or modify an injunction within the meaning of Section 1292(a)(1), this Court lacks jurisdiction and should dismiss this appeal. See pp. 10-17, *infra*.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction over the appeal under 28 U.S.C. 1292(a)(1).

2. Whether the district court erred in exercising jurisdiction over Louisiana's voucher program or acted in a manner inconsistent with due process.

3. Whether the district court abused its discretion in finding that no significant change in law or fact warrants vacating its orders concerning the voucher program.

---

[1] "Br. ___" refers to pages of Intervenors' opening brief. "ROA.___" refers to the record on appeal.

STATEMENT OF THE CASE

This appeal does not involve a direct challenge to the Louisiana Scholarship Program, known as the "voucher program." There is currently no order affecting the State's implementation of the voucher program in any manner. The sole issue the district court decided below was whether the United States may obtain information from the State of Louisiana relating to the voucher program in a timely manner. This information is essential to the federal government's ability to satisfy its obligation under the prior court orders in this case to ensure that the State's provision of aid through the implementation of the voucher program is neither supporting discriminatory private schools nor impeding the desegregation of public schools in the State.

1. This case began in 1971, when black families, on behalf of all black schoolchildren in Louisiana, challenged the Louisiana State Board of Education's practice of providing assistance to racially discriminatory or racially segregated private schools in a manner that impeded desegregation of the public schools. In 1975, the district court found the State's support of segregated private schools violated the Equal Protection Clause. See *Brumfield* v. *Dodd*, 405 F. Supp. 338, 348 (E.D. La. 1975). In support of its decision, the district court performed detailed analyses of the impact of state assistance to private schools in six public school districts. *Id.* at 342-346. The court ruled that "[t]he operation of the

[private] academies has significantly interfered with the integration of the public schools," *id.* at 346, and "undermin[ed] the effectiveness of the court orders" requiring desegregation, *id.* at 342. The court not only barred the specific assistance then at issue, but also required the State to create a certification process for private schools seeking public assistance to ensure that the State did not in the future provide state aid to support either discrimination or racial segregation in private schools or impede desegregation in public schools. See *id.* at 349-353.

A 1985 consent decree between plaintiffs, the State, and intervenor United States further elaborated on the certification process (known as *Brumfield* certification). The consent decree set forth a timetable for and the types of information that the State needed to retain and provide to the United States and plaintiffs. ROA.997-999. Between 1985 and 2012, the State provided the United States and plaintiffs' counsel with information that permitted them to verify that the State was complying with its obligations in this case and with applicable federal law.

2. In 2012, the State instituted its voucher program statewide. Under this program, the State plays a direct and significant role in funding and assigning students from public schools to voucher schools. See La. Rev. Stat. §§ 17:4011-17:4025. Because of the possibility that implementation of the voucher program could interfere with the State's obligations in this case and hinder the

desegregation of schools throughout the State, the United States sought information from the State about the program. ROA.34-36. When the State refused to provide that information, the United States asked the district court for, and received, an order compelling this discovery. ROA.127-133, 236-237.

In August 2013, the United States filed a Motion for Further Relief, seeking judicial review of vouchers to be given by the State to students attending schools in districts operating under desegregation order. ROA.241-256.[2] In response to the United States' motion, the district court ordered the State to provide "an analysis of the voucher awards for the 2013-2014 school year respecting impact on school desegregation in each school district presently under a federal desegregation order." ROA.425. On September 18, 2013, the court also ordered the parties to submit briefs addressing (1) whether the 1975 *Brumfield* order applies to the voucher program "so as to require the State to obtain authorization from the Court prior to implementation," and (2) "[i]f the desegregation order applies to the Program, is there any need to amend existing orders to ensure a process of review

[2] The United States' request was originally framed as a requirement for courts overseeing desegregation orders to approve future vouchers to students in school districts operating under such orders. ROA.249. On September 23, 2013, the United States filed a supplemental brief informing the district court that the only relief the United States now sought was the creation of a process under which the State would, on a regular and timely basis, provide the information needed to assess and monitor the voucher program's implementation consistent with the desegregation orders in this case. ROA.426.

of the Voucher Program or similar ones in the future[.]" ROA.424-425.

On September 30, 2013, Intervenors – parents of several children currently receiving vouchers and the Louisiana Black Alliance for Educational Options – sought to intervene to oppose the United States' Motion for Further Relief. ROA.488. The district court accepted the proposed Intervenors' brief as an amicus brief and denied the motion to intervene without prejudice to renewal of the motion later. ROA.611-655, 823-824. Intervenors appealed the denial of their motion to intervene. ROA.879-881.

3. Meanwhile, on November 22, 2013, the district court conducted a hearing on the questions presented in its September 18, 2013, order, related to the United States' request that the court create a process for gathering information from the State about the voucher program. After the hearing, the court held that (1) the voucher program "fall[s] under the ambit of" the 1975 order and 1985 consent decree in *Brumfield* in which the United States was a party; (2) the United States was therefore entitled to information about the voucher program from the State; and (3) the parties shall submit proposed processes by which that information could be provided. ROA.1222-1223; see also ROA.878 (Nov. 25, 2013, order). The district court made clear that while the United States was entitled to the information it sought, any order the court issued regarding the State's production of information would not include "any requirements for withholding [voucher]

awards while [the] produced data is being reviewed." ROA.1012.

After considering the parties' proposals and conferring with the parties, the district court issued an order on April 8, 2014, setting forth the process for the State to provide the United States necessary information regarding the voucher program. ROA.1075-1079. The order specified the type of information that the State was to produce and a schedule for providing it. ROA.1075-1079. The district court did not enjoin the voucher program. The court's order has had no impact on the implementation of the voucher program.

Two days later, this Court held that Intervenors were entitled to intervene as of right. See *Brumfield* v. *Dodd*, 749 F.3d 339, 346 (5th Cir. 2014). In reaching this decision, the Court stated that "there is as of yet no order requiring a change in the voucher program[,] * * * [b]ut the parents do not need to establish that their interests will be impaired[;] [r]ather, they must demonstrate only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Id.* at 344 (emphasis omitted).

4. On May 5, 2014, Intervenors filed a motion to vacate the district court's April 2014 order. ROA.1080. Intervenors argued that the reporting order was void under Federal Rule of Civil Procedure 60(b)(4) because the United States had not yet shown that the voucher program actually violated the Constitution. ROA.1086. Intervenors also argued that (1) applying the *Brumfield* order to the

voucher program was not equitable under Federal Rule of Civil Procedure 60(b)(5) because the voucher program was separate from the state action at issue in the original *Brumfield* order; and (2) in light of *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), the voucher program could not be characterized as state aid to private schools. ROA.1091-1092.

The district court denied Intervenors' motion to vacate on August 4, 2014. The court rejected Intervenors' argument that the court lacked subject matter jurisdiction over the voucher program, holding that the "voucher program clearly falls under the injunction and consent decree in this case, granting the Court subject matter jurisdiction." ROA.1152.

In addition, the court found that *Zelman* does not qualify as a change in law that renders application of the court's April 2014 order inequitable because that decision was issued 12 years before the district court's reporting order. ROA.1153. The court also distinguished *Zelman* from this case on multiple grounds. Unlike this case, *Zelman* involved an Establishment Clause challenge to a school district's voucher program that permitted use of vouchers in religious schools, and the issue in that case was whether the parents of children receiving vouchers exercised a "true private choice" protected by the First Amendment in selecting a private school. ROA.1155. In *Zelman*, the school district provided tuition assistance directly to parents of children qualifying for the vouchers, and

the parents would forward the financial assistance check to the private school that they, not the State, selected. ROA.1153-1154. By contrast, according to the district court, the State here (1) selects which schools may participate in the voucher program; (2) parents may only express a preference for specific schools; (3) the State assigns students to voucher schools they will attend through a lottery system involving the parents' preferences; and (4) the State pays the students' tuition directly to the private schools. ROA.1153-1155.

SUMMARY OF THE ARGUMENT

This appeal is premature. The district court has not entered any order affecting the implementation of the State of Louisiana's school voucher program, and has not enjoined (and is not being asked to enjoin) the program or the award of a voucher to any student. Indeed, it has yet to consider whether any state action under the voucher program is unlawful. The district court has ordered the State only to produce information about the voucher program so that the United States can satisfy its obligation to assess the State's compliance with the orders in this case. This kind of order, designed to move the case forward, is not an order granting or modifying an injunction under 28 U.S.C. 1292(a)(1). Thus, the Court should dismiss this appeal for lack of jurisdiction.

Alternatively, if this Court finds that it has jurisdiction under Section 1292(a)(1), the Court should affirm the district court's denial of Intervenors'

motion to vacate. The district court has established more than an "arguable basis" for finding that it has subject matter jurisdiction over the voucher program. To the extent that Intervenors argue that the United States has not yet proven the voucher program is unlawful or that the scope of relief exceeds the court's authority, those arguments are not only premature at this time, but also irrelevant, because the United States is not now asking the district court to enjoin the voucher program or the award of a voucher to any student. Lastly, Intervenors fail to demonstrate that a significant change in law or fact warrants vacating the district court's orders.

ARGUMENT

I

THE VOUCHER PROGRAM ORDERS AT ISSUE ARE NOT APPEALABLE UNDER 28 U.S.C. 1292(a)(1)

Under 28 U.S.C. 1292(a)(1), this Court may review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Orders that direct or deny discovery, however, are not appealable under Section 1292(a)(1). See *In re Sessions*, 672 F.2d 564, 566 (5th Cir. 1982). Intervenors contend (Br. 1) that the Court has jurisdiction over their appeal under Section 1292(a)(1). That assertion is incorrect. Intervenors have appealed the district court's August 4, 2014, order, denying Intervenors' motion to vacate the district court's decision of April 8, 2014, which required the State to provide information concerning the State's administration of the voucher

program. But these orders relate to a discovery matter, and cannot be treated as orders granting or modifying, or refusing to grant or modify an injunction within the meaning of Section 1292(a)(1). The Court, therefore, should dismiss this appeal for lack of jurisdiction.

1. The underlying April 2014 order cannot be treated as an interlocutory order granting or modifying an injunction under Section 1292(a)(1). On its face, the order directs the State only to produce information concerning the voucher program. ROA.1075-1079. The order does not make any determination regarding the validity of the voucher program. Nor does the United States at this time seek an order that will affect the implementation of the voucher program. The United States does not oppose the voucher program, and is not seeking to challenge the voucher program or to have the voucher program declared invalid. The order simply directs the State to provide information concerning the private schools that have applied for and been deemed by the State to be eligible to participate in the voucher program, as well as information about students who have applied for vouchers and the State's assignment of voucher students. ROA.1075-1079.

Moreover, the district court made clear that it was ordering the State only to produce information about the voucher program so the United States could assess the program's compliance with *Brumfield*. ROA.1177, 1290. The court reiterated at a status hearing that it wanted to clarify, "so there is no misunderstanding here,"

that the court was only creating "a process where the information is provided, and then from there the parties can do whatever they think they need to do with that information." ROA.1302; see also ROA.1303. In fact, the court held that it would *not* enjoin the voucher program or the award of vouchers to any students pending the United States' assessment of the produced data. ROA.1012; see also ROA.1302-1303. The United States has not challenged that ruling.[3]

Based on the text and the practical effect of the April order as well as the district court's repeated statements that it was ordering only the production of information, the April 2014 reporting order more closely resembles a discovery order than an injunction covered by 28 U.S.C. 1292(a)(1). The order does not dispose of any claims on the merits, and the State continues unimpeded to issue vouchers under the program. Although Intervenors assert (Br. 15-28) that the April order modifies the existing *Brumfield* orders, the April order does nothing more than require the production of information. It simply moves the case forward, just as any discovery order does.

---

[3] Nor would the State be obligated to provide this information indefinitely. ROA.1290, 1301. The court stated that once the government has the necessary information regarding the State's implementation of the voucher program over three or four years, the United States will need to decide if the record supports finding a violation of the *Brumfield* orders. ROA.1301. Thus, depending on the data, the State's reporting obligations concerning the voucher program could well end in a few years.

2. It is well established that discovery orders are not appealable under Section 1292(a)(1). The Supreme Court held in *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 279 (1988), that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." This Court has applied *Gulfstream* with full force. In *Hamilton* v. *Robertson*, 854 F.2d 740, 741 (5th Cir. 1988), this Court found that it did not have appellate jurisdiction under Section 1292(a)(1) to review the district court's order that enjoined the plaintiff from filing any new lawsuits in that federal district without first obtaining leave of court. In reaching this decision, the Court stated that Section 1292(a)(1) "does not authorize appeals from orders that compel or restrain conduct pursuant to the court's authority to control proceedings before it, *even if the order is cast in injunctive terms*." *Ibid.* (quoting *Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1066 (5th Cir. 1986)) (emphasis added).

This Court has specifically stated that "orders denying or directing discovery are interlocutory and are not appealable" under Section 1292(a)(1). *In re Sessions*, 672 F.2d at 566; see also *Aurora Bancshares Corp.* v. *Weston*, 777 F.2d 385, 386 (7th Cir. 1985) (stating discovery orders are not immediately appealable under 1292(a)(1) because they are not injunctions under Section 1292(a)(1) "even though they have the form of an order to do or not do something"). Moreover, as the

Court stated, although "it is extremely difficult to obtain a reversal on a discovery matter once an entire case has proceeded to final judgment," that result does not override federal policy against piecemeal appeals to make discovery orders immediately appealable. *EEOC* v. *Neches Butane Prods. Co.*, 704 F.2d 144, 148 (5th Cir. 1983).

The Court explained in *Sierra Club* v. *Glickman* that Section 1292 "is intended to carve out limited exceptions" to the general final judgment rule, and hence the exceptions to it are to be "construed narrowly." 67 F.3d 90, 94 (5th Cir. 1995) (citing *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981)). "Thus, only when the interlocutory order of the district court specifically and explicitly grants or denies an injunction is such order immediately appealable under § 1292(a)(1)." *Ibid.* If the order "is not explicit, but merely has the practical effect of granting or denying injunctive relief," Section 1292(a)(1) allows an appeal only if the appellant shows both that the interlocutory order might have a "serious, perhaps irreparable, consequence" on them, and that the order can be "effectually challenged" only by immediate appeal. *Ibid.* (citation omitted); accord *Commodity Futures Trading Comm'n* v. *Preferred Capital Inv. Co.*, 664 F.2d 1316, 1318-1319 (5th Cir. 1982).

3. Here, the April 2014 order addresses only the production of information, and does not settle or even address any claims on the merits. Accordingly,

Intervenors have not – and cannot – argue that the reporting obligations the order imposes on the *State* cause *Intervenors* any serious, irreparable consequences that can be vindicated only by immediate appeal. Intervenors call the State's reporting obligations "cumbersome," but do not explain how these obligations directed at the State affect Intervenors. Br. 21. Tellingly, although the State had initially opposed providing information about the voucher program, it has not appealed the order.

The April order is similar to the order at issue in *Switzerland Cheese Ass'n* v. *E. Horne's Market*, 385 U.S. 23, 25 (1966), where the Supreme Court found that an order that does not "decide anything about the merits of the claim" is not an appealable interlocutory order within the meaning of Section 1292(a)(1). In *Switzerland Cheese*, plaintiffs, alleging violations of trademark law, moved for a permanent injunction on summary judgment. *Id.* at 23. The district court denied plaintiffs' summary judgment motion due to genuine issues of material fact in dispute. *Id.* at 23-24. On appeal, the court of appeals dismissed for lack of jurisdiction, holding that the order was not an interlocutory order under Section 1292(a)(1). *Id.* at 24. Plaintiffs argued in the Supreme Court that the district court's denial of their motion for summary judgment was appealable under Section 1292(a)(1) because its practical effect was to deny them the permanent injunction they sought in their summary judgment motion. *Ibid.*

The Supreme Court in *Switzerland Cheese* held that a denial of summary judgment based on material facts in dispute is nothing more than a step in the processing of the case and does not fall within Section 1292(a)(1). 385 U.S. at 25. The Court stated that the order merely continues the case and does not reach the merits of the claim. *Ibid.* Moreover, although the district court order seemed to fit into the language of Section 1292(a)(1), the Supreme Court rejected plaintiffs' appeal because they could obtain permanent injunctive relief after trial and therefore the "interlocutory order lacked the 'serious, perhaps irreparable, consequence' that is a prerequisite to appealability under § 1292(a)(1)." *Carson*, 450 U.S. at 85 (discussing the Court's reasoning in *Switzerland Cheese*).

Likewise, the court below did not settle any claims on the merits or restrain any facet of the voucher program, including the State's ability to award vouchers. The voucher program has continued without any change for the 2014-2015 school year. The district court ruled only on the production of information (ROA.878), and the April 2014 order merely directs the State to provide information about the voucher program (ROA.1075-1079). The production of information, the court said, "may benefit the State, [or] it may not." ROA.1303. Indeed, it is uncertain if the district court will ever need to decide whether the *Brumfield* orders require *any* modification to the administration of the voucher program. As in *Switzerland Cheese*, nothing will prevent Intervenors from opposing any future request for an

injunction affecting the voucher program and from appellate review were the court to order such relief. Intervenors therefore cannot show, at this time, that the April order's reporting obligations imposed on the State in any way cause Intervenors serious, irreparable consequences.

Because the April 2014 order is not an appealable interlocutory order under Section 1292(a)(1), and the August 4, 2014, order is a denial of Intervenors' motion to vacate the April 2014 order, the August order does not qualify as an order refusing to modify or dissolve an injunction within the meaning of Section 1292(a)(1). It would be nonsensical if Intervenors are able to appeal an order pursuant to Section 1292(a)(1), when that order refuses to vacate a prior order that does not itself qualify as appealable under Section 1292(a)(1). In other words, an order refusing to vacate an earlier non-appealable discovery order cannot be appealed under Section 1292(a)(1). Accordingly, the Court should dismiss this appeal for lack of jurisdiction.

II

NO BASIS EXISTS TO VACATE THE VOUCHER PROGRAM ORDERS

If the Court exercises jurisdiction over Intervenors' interlocutory appeal, the Court should affirm the district court's denial of Intervenors' motion to vacate. Intervenors have not shown that the district court erred in finding that it had authority to order the State to produce information concerning the voucher

program – information that would allow the United States to fulfill its *Brumfield* obligation to ensure that the voucher program complies with federal law. Nor have the Intervenors presented any significant change in law or fact justifying vacating the district court's April 2014 reporting order.

A. Standard Of Review

This Court reviews de novo a district court's ruling under Federal Rule of Civil Procedure 60(b)(4). See *Federal Deposit Ins. Corp.* v. *SLE, Inc.*, 722 F.3d 264, 267 (5th Cir. 2013). The Court generally reviews an order denying a motion for relief under Federal Rules of Civil Procedures 60(b)(5) and 59(e) for abuse of discretion, but reviews questions of law de novo. See *Demahy* v. *Schwarz Pharma, Inc.*, 702 F.3d 177, 181 (5th Cir. 2012), cert. denied, 134 S. Ct. 57 (2013). A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. See *Ross* v. *Marshall*, 426 F.3d 745, 763 (5th Cir. 2005), cert. denied, 549 U.S. 1166 (2007).

B. The District Court Rulings Concerning The Voucher Program Are Not Void

Federal Rule of Civil Procedure 60(b)(4) provides that a court "may relieve a party * * * from a final judgment, order, or proceeding" if the "judgment is void." A judgment is not void "simply because it is or may have been erroneous." *United States Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 270 (2010) (citation omitted). Instead, Rule 60(b)(4) applies only in the "rare instance where a

judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives the party of notice or the opportunity to be heard." *Id.* at 271. Intervenors argue that the district court erred in denying Rule 60(b)(4) relief on both grounds: (1) the district court lacks subject matter jurisdiction over the voucher program, and (2) the court's rulings violate due process because the record does not contain proof that the voucher program is being operated in a discriminatory manner. Br. 15. Both arguments lack merit.

1. No Jurisdictional Defect

a. When considering Rule 60(b)(4) motions that assert that a judgment is void because of a jurisdictional defect, federal courts "generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa*, 559 U.S. at 271 (citation omitted). For purposes of Rule 60(b)(4), therefore, a judgment is void if a court entered an order outside its legal powers. See *Carter* v. *Fenner*, 136 F.3d 1000, 1005-1006 (5th Cir.) (stating that a judgment is void if the court lacked jurisdiction over the subject matter or of the parties), cert. denied, 525 U.S. 1041 (1998). In light of these principles, the question for this Court is a narrow one: whether the district court lacked subject matter jurisdiction to order the State to produce information relating to the voucher program in order to determine if state

aid is provided to private schools in a manner consistent with the State's continuing obligations in this case.

The district court specifically considered whether it had subject matter jurisdiction over the voucher program and found more than an "arguable basis" for invoking its jurisdiction. See ROA.424-425, 1222-1223. The court concluded it had jurisdiction over the voucher program only after directing the parties to address the question of subject matter jurisdiction in their briefs (ROA.424-425); reviewing the parties' and Intervenors' briefs (ROA.576-591, 611-654, 781-801); and conducting a hearing on this point (ROA.1222-1223). Relying on the language of the 1975 *Brumfield* order, the district court concluded that the original order covers all state aid to private schools, including textbooks, school supplies, transportation, and "any other forms of assistance and funding." ROA.1223 (quoting *Brumfield* v. *Dodd*, 405 F. Supp. 338, 349 (E.D. La. 1975)). The court then reasoned that if the State implements the voucher program in a manner to re-establish the vestiges of "segregated school systems," that would violate the 1975 order and 1985 consent decree. ROA.1223. Accordingly, the district court held that the United States is entitled to information concerning the voucher program in order to determine if the state aid provided to private schools under the voucher program supports segregation or impedes desegregation in any school district. ROA.1222-1223.

b. Intervenors incorrectly argue that the 1975 order applies only to state aid to *segregated* private schools, and therefore the court's jurisdiction under *Brumfield* does not cover the voucher program because there is no allegation that the private schools participating in the voucher program discriminate based on race. Br. 16, 19-20. Contrary to Intervenors' assertions, the 1975 order concerned not only state aid to segregated private schools, but also the effect of such aid on desegregation in the public schools that were losing students to the private schools. Throughout the 1975 decision, the district court emphasized the decline in the enrollment of white students in public schools, parish by parish, caused in part by state aid provided to private schools. See *Brumfield*, 405 F. Supp. at 343-346. This was occurring even though federal courts had ordered Louisiana's school boards to desegregate schools "and in particular to eliminate or integrate all-black schools." *Id.* at 342.

The purpose of the *Brumfield* certification process, therefore, was to provide a process by which the United States could obtain information from the State and monitor whether state assistance to private schools complied with *Brumfield*. Accordingly, ordering the State to produce information regarding the voucher program – to enable the United States to assess the effect of student assignment through the voucher program – is consistent with the original *Brumfield* certification process. The reason for the State's reporting obligations generally and

with respect to the voucher program specifically is the same: to enable the United States to determine if the State is providing assistance to segregated private schools or impeding desegregation in public schools. The kind of information that the State must provide under the April 2014 order relates to both of these factors. Under the April order, the State must provide "*Brumfield* compliance reports" for the private schools participating in the voucher program, as well as information concerning the student voucher recipients and effect on the desegregation of the public schools they attended in the prior year. ROA.1075-1077.

As the district court recognized, it has clarified the reporting process through the years due to changed circumstances or at the request of the parties. ROA.1203. For example, the 1985 consent decree expanded on the State's obligation to report and provide information under the 1975 order. ROA.995-1000. Upon the parties' agreement that the certification process needed to be supplemented "to include provisions for continued monitoring of certified schools," the district court approved the 1985 consent decree to require the State to provide information regarding the State's financial assistance to private schools "on an annual basis" and to retain all records collected pursuant to the consent decree. ROA.996-997, 1000.

Just as the 1985 consent decree modified the State's reporting obligations in the original 1975 order due to changed circumstances – the need for continued

monitoring of certified schools – the April 2014 order adjusted the kind of information that the State must provide the United States in light of the State's implementation of the voucher program. ROA.996-1000. But, as stated above, the purpose for the State's production of information about the voucher program is the same as in the 1975 order and 1985 consent decree – to enable the United States to assess the effect of state actions on school desegregation. Moreover, the kind of violation that the voucher program reporting process is designed to detect – state aid that either supports segregated schools or impedes desegregation in public schools – is also the same. Far from Intervenors' assertions that the purpose and effect of the voucher program are completely unrelated to the purpose and effect of the state action that necessitated the 1975 order (Br. 20), the State's reporting obligations in the April 2014 order are part and parcel of the State's existing *Brumfield* reporting obligations.

c. Intervenors argue that "bootstrap[ping]" jurisdiction under *Brumfield* to the voucher program is improper because the United States has not alleged or proven that the voucher program is unlawful. Br. 17-18. Intervenors' reliance on this argument is misplaced. For purposes of Rule 60(b)(4) relief, the only question for this Court is whether the district court lacked "even an 'arguable basis' for jurisdiction." *Espinosa*, 559 U.S. at 271 (citation omitted).

As discussed above, pp. 20-23, *supra*, the district court had much more than an arguable basis for exercising its jurisdiction over the voucher program to order the reporting of data. The district court specifically found that if the State implements the voucher program in such a way that students are assigned to segregated schools, or that results in impeding desegregation in public schools, *Brumfield* would be violated. ROA.1223. Indeed, the district court stated that the court and the parties in *Brumfield* have an obligation "to take reasonable steps" to ensure that "the voucher program is not being used to promote segregation." ROA.1222. Accordingly, the district court properly held that it had the authority to order the State to produce information about the voucher program so the United States could perform its monitoring obligation to assess whether the program violates *Brumfield*.

The cases Intervenors cite are inapposite for similar reasons. In support of the argument that the district court improperly extended *Brumfield* jurisdiction to the voucher program, Intervenors cite cases involving court decrees that exceeded appropriate limits because the specific injunctive relief was not aimed at eliminating a condition that violates the Constitution or does not flow from such a

violation. Br. 17-21.[4] For example, Intervenors compare this case to *United States* v. *Texas*, 601 F.3d 354 (5th Cir. 2010). Br. 19-20. In that case, this Court held that the district court erred in modifying an injunction based on the statewide de jure segregation of black and white students to exercise jurisdiction over claims relating to discrimination against Mexican-American students, without finding de jure segregation of Mexican-American students. 601 F.3d at 363-364. Unlike *United States* v. *Texas* and the other cases Intervenors cite that address modifications to injunctions in consent decrees, the circumstances of this case at present involve only the State's temporary obligation to report and provide information. In this case, the district court has not taken any action that affects the implementation of the voucher program. ROA.1075-1079.

At this stage, the United States has not asserted that the implementation of the voucher program either results in segregation in private schools or impairs desegregation in public schools. Only if the United States sought a determination that the voucher program itself was unlawful – which it has not sought here – would it be appropriate for the district court to consider the proper scope of relief under the cases cited by Intervenors. Thus, Intervenors' assertions (Br. 21) that the

[4] See *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992); *United States* v. *Texas*, 601 F.3d 354 (5th Cir. 2010); *Samnorwood Indep. Sch. Dist.* v. *Texas Educ. Agency*, 533 F.3d 258 (5th Cir. 2008).

April 2014 order does not "flow" from the constitutional violations or that the district court does not have jurisdiction over desegregation orders in other federal courts are not only premature at this time but also irrelevant. The district court orders on appeal have not affected the State's implementation of the voucher program in any way.

2. No Due Process Violation

Intervenors further state without elaboration that the court orders violate due process by extending *Brumfield* to cover the voucher program absent proof that that the program violates the law. Br. 15. Under Rule 60(b)(4), a judgment is void if the court that rendered it acted in a manner inconsistent with due process of law. See *Carter*, 136 F.3d at 1006. Due process requires "notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Espinosa*, 559 U.S. at 272 (citation omitted). Due process violations that warrant relief under Rule 60(b)(4) are "rare" because due process in civil cases generally requires "only proper notice and service of process and a court of competent jurisdiction." *Callon Petroleum Co.* v. *Frontier Ins. Co.*, 351 F.3d 204, 210 (5th Cir. 2003).

To the extent that Intervenors are asserting that the district court acted in a manner inconsistent with due process because it lacked subject matter jurisdiction over the voucher program, this argument is unavailing. Br. 15. As discussed

above, the district court did not err in exercising jurisdiction over the voucher program. Were the United States ultimately to decide to seek to address any state action taken under the voucher program, Intervenors, as parties in this case, will be notified and due process for them will be satisfied at that time.

C. No Significant Change In Law Or Fact Requires Vacating The Voucher Program Orders

Intervenors further argue that changed legal and factual circumstances make it inequitable to apply the 1975 order and 1985 consent decree to the voucher program. Br. 22-28. They claim that the district court erred in denying them relief under Federal Rule of Civil Procedure 60(b)(5) and 59(e), by refusing to remove the voucher program from *Brumfield's* "ambit." Br. 27-28. Although these arguments were first presented to and considered by the district court in Intervenors' amicus brief (ROA.582-589), Intervenors presented them again, pursuant to Rules 60(b)(5) and 59(e), in their motion to vacate the April 2014 order (ROA.1090-1092).

1. Rule 60(b)(5)

Rule 60(b)(5) provides that a party may obtain relief from a judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." A party seeking modification of a consent decree bears the burden of establishing that a "significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest" and

warrants revisions of the decree. *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992). Intervenors have failed to demonstrate such a significant change in fact or law.

As to a significant change in fact, Intervenors have not identified any specific factual change to warrant Rule 60(b)(5) relief. Instead, they argue generally that 40 years have passed since the court issued the 1975 order, and that "40-year-old facts hav[e] no logical relation to the present day." Br. 23-25 (quoting *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2629 (2013)). *Shelby County*, which does not involve Rule 60(b)(5), is easily distinguishable. In *Shelby County*, the Supreme Court considered specific factual changes in the jurisdictions covered by Section 5 of the Voting Rights Act, finding that "[v]oter turnout and registration rates now approach parity"; "[b]latantly discriminatory evasions of federal decrees are rare"; and "minority candidates hold office at unprecedented levels." 133 S. Ct. at 2625 (alteration in original) (citation omitted). The Court held that, in light of these changes, the coverage formula under Section 4(b) of the Voting Rights Act could no longer be used to determine which jurisdictions were subject to Section 5's preclearance requirements. *Id*. at 2625-2631.[5]

[5] Intervenors inaccurately characterize the State's reporting obligation in the April 2014 order as a "preclearance process that is very similar" to the voting preclearance process at issue in *Shelby County*. Br. 25. The April order does not (continued...)

By contrast, Intervenors do not specify or describe any particular factual change other than the passage of time and the fact that students have more schools to choose from to attend. Br. 23, 26-28. Undermining Intervenors' assertions that times have changed so drastically that court oversight under *Brumfield* is no longer necessary (Br. 24-26), 34 of the 70 school districts in Louisiana have yet to attain unitary status. ROA.245. Without more, the district court did not abuse its discretion in finding that Intervenors had not shown a significant change in facts.

As to a significant change in law, Intervenors cite *Shelby County* and *Horne* v. *Flores*, 557 U.S. 433 (2009), to argue that federal intrusion on state prerogatives is inappropriate if a great deal of time has elapsed since issuance of a consent order, or if the current remedy expands on the scope of the original relief granted. Br. 25. Although those cases were concerned with federalism issues and state authority, they do not compel the result that Intervenors assert. As discussed above, *Shelby County* is distinguishable and its holding rests on specific, significant factual changes. 133 S. Ct. at 2625.

(...continued)
affect the State's authority to award vouchers under the program. Moreover, the district court has declared that it would not impose "any requirements for withholding awards while [the] produced data is being reviewed." ROA.1012; see also ROA.1302-1303.

Intervenors also read too much into *Horne*. *Horne* does not represent a significant change in the law governing Rule 60(b)(5) motions. It merely clarified the law governing Rule 60(b)(5) motions in "institutional reform" cases, which often raise heightened federalism concerns when an injunction affects state or local budgetary decisions. *Horne*, 557 U.S. at 447-450. Although the Supreme Court in *Horne* emphasized that federalism concerns are inherent in institutional reform cases, the Court did not overturn any of its earlier rulings governing modification or dissolution of remedial orders under Rule 60(b)(5).

In order to modify a remedial order, a moving party must still establish that applying the judgment prospectively is no longer equitable because of a significant change in either fact or law that makes enforcement unnecessary or improper. *Horne*, 557 U.S. at 450. And to obtain complete relief from a remedial order, a moving party must establish both that: (1) the objective of the remedial order or decree has been "attained," *Frew* v. *Hawkins*, 540 U.S. 431, 442 (2004); and (2) it is unlikely that the prohibited actions will recur, *Board of Education* v. *Dowell*, 498 U.S. 237, 247-248 (1991). See *Horne*, 557 U.S. at 450 (explaining that continued enforcement of a judicial order is improper once a "durable remedy" has been implemented). Intervenors have not even attempted to make such a showing.

To the extent that Intervenors assert only that the 1975 order does not cover the voucher program because 40 years have passed, nothing in *Horne* requires

vacating the April reporting order. Br. 23-26. Intervenors argue that the April order "expand[s]" the State's obligations beyond the original *Brumfield* order. Br. 24 (emphasis omitted). Not so. As discussed above at pp. 20-23, *supra*, the State's reporting obligation in the April order flows directly from the State's existing *Brumfield* duty to report and provide information about state assistance to private schools. They both serve the same purpose and are designed to identify the same concerns.

Nor do the remaining cases Intervenors cite support finding a significant change in law to warrant Rule 60(b)(5) relief. In both *Dowell* and *Freeman* v. *Pitts*, 503 U.S. 467 (1992), plaintiffs subject to school desegregation decrees sought complete dissolution of the court-ordered decree. See Br. 23-26. The Court explained in *Dowell* that complete dissolution of a desegregation decree was appropriate "after the local authorities have operated in compliance with it for a reasonable period of time," and "the vestiges of past discrimination had been eliminated to the extent practicable." 498 U.S. at 248-250. And in *Freeman*, the Court held that a district court may relinquish control over those aspects of a school system in which there has been compliance with a desegregation decree, even if other aspects of the school system are not in compliance with the decree. 503 U.S. at 485. The Court in both *Dowell* and *Freeman* was considering whether dissolution of the decree was warranted because unitary status had been achieved

and thus the judgment satisfied. That situation is remarkably different from this case where the State's own obligations under *Brumfield* are at issue, and the State has not claimed that it has fulfilled those obligations and that the *Brumfield* orders should no longer apply. Moreover, 34 school districts in the State have yet to achieve unitary status. ROA.245.

Intervenors' reliance on *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), is similarly unavailing. The district court correctly found that *Zelman* offers Intervenors no support. ROA. 1153-1156. *Zelman* involved a First Amendment challenge to a school voucher program where the State of Ohio provided state aid for tuition directly to parents and the parents had complete discretion to choose where to enroll their children. *Id*. at 646. The Supreme Court held that the school voucher program at issue did not violate the Establishment Clause because the vouchers constituted aid to children and their families, rather than aid to religious private schools. *Id*. at 653, 662. By contrast, in Louisiana, the State provides funding directly to private schools participating in the voucher program. Louisiana law provides for the State to control all aspects of the voucher program: the State determines student eligibility, certifies voucher schools, reviews student applications, "place[s]" students at voucher schools through a lottery system involving the parents' school preferences, and makes payments directly to the participating schools. See La. Rev. Stat. § 4015.

2. Rule 59(e)

Intervenors assert the same basis for relief under Rule 59(e) as under Rule 60(b)(5). Br. 22-28. Altering or amending an order under Rule 59(e) is an "extraordinary remedy" used "sparingly" by courts. *Templet* v. *Hydrochem, Inc.*, 367 F.3d 473, 479 (5th Cir.), cert. denied, 543 U.S. 976 (2004). Rule 59(e) serves the "narrow purpose" of allowing a party to correct a judgment by clearly establishing either an intervening change in controlling law, a manifest error in law or fact, or the availability of new evidence that was not previously available. *Ibid.* (citation omitted); see also *Schiller* v. *Physicians Res. Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003).

Regardless of whether Intervenors claim an intervening change in law or a manifest error in law or fact, Intervenors have failed to demonstrate a basis for extraordinary relief under Rule 59(e). As discussed above, pp. 30-31, *supra*, Intervenors have made no effort to show that the objective of the 1975 order and 1985 consent decree has been attained. Moreover, Intervenors erroneously rely on cases where the district court modified an existing injunction. Here, the district court has not enjoined the voucher program. Indeed, the court's orders in this case have had no impact on implementation of the voucher program. The district court directed the State only to provide information in order for the United States to determine if the implementation of the voucher program complies with *Brumfield*.

Only if the United States concludes that the implementation of the voucher program violates *Brumfield* after reviewing the State's produced information would the United States move for relief that might affect the implementation of the voucher program. At that point, the district court would consider the appropriate scope of relief, if any, under *Brumfield*. And any order granting or denying the relief sought would be appealable. At this time, however, the United States is not seeking relief that would affect the implementation of the voucher program.

Thus, because the cases Intervenors cite are fundamentally distinguishable, Intervenors have not shown that the district court completely disregarded controlling law in denying their motion to vacate. See *Guy* v. *Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (stating that manifest error is "plain and indisputable" and "amounts to a complete disregard of the controlling law").

CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction or, in the alternative, affirm the district court's denial of Intervenors' motion to vacate.

Respectfully submitted,

VANITA GUPTA
Acting Assistant Attorney General

s/ Teresa Kwong
MARK J. GROSS
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-2195

CERTIFICATE OF SERVICE

I certify that on February 19, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on February 19, 2015, the foregoing brief was mailed to the following counsel by certified U.S. mail, postage prepaid:

Murphy Fairfax Bell, Jr.
Jackson-Bell
Suite A214
600 N. Foster Dr.
Baton Rouge, LA 70806

s/ Teresa Kwong
TERESA KWONG
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLEE:

(1) contains 7,683 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: February 19, 2015