No. 09-5474

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF TENNESSEE, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

LORETTA KING
Acting Assistant Attorney General

MARK L. GROSS
SARAH E. HARRINGTON
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 305-7999
Facsimile: (202) 514-8490
Attorneys for the United States

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to the appellants' request for oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-5474

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF TENNESSEE, et al.,

Defendants-Appellants

ON APPEAL FROM THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. 1331. The district court denied appellants' motion to vacate the remedial injunctions entered in this case pursuant to Federal Rule of Civil Procedure 60(b) on February 18, 2009. R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss.[1]

---

[1] References to "R. __, __, at __" are to the documents entered on the district court docket sheet, identified by docket entry number, name, and page number; references to "TN App. __" are to pages in the appendix filed by appellant the State of Tennessee; references to "U.S. App. __" are to pages in the appendix filed by the United States along with this brief, which contains a hearing

Appellants filed a timely notice of appeal on April 15, 2009. R. 2374, Notice of Appeal. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUE

Whether the district court abused its discretion in refusing to vacate the remedial injunctions entered in this case where the moving party failed to demonstrate any change in the governing law or other relevant change in circumstances.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. In January 1992, the United States filed this case against the State of Tennessee and various officials pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. 1997, alleging that the State was engaged in a pattern or practice of violating the rights under the Fourteenth Amendment of the residents of Arlington Development Center (ADC or Arlington), who are individuals with intellectual disabilities.[2] R. 1, Complaint. Specifically, the

---

transcript not available through the district court's ECF system; references to "TN Br. __" are to pages in appellants' opening brief.

[2] Throughout this brief, the United States refers to the residents of Arlington as individuals with "intellectual disabilities" rather than as individuals with "mental retardation." The terms are intended to be synonymous; the United States uses the phrase "intellectual disabilities" because that is the term preferred by such individuals and their advocates.

complaint alleged that the State failed to ensure that the residents of ADC were not subjected to abuse and neglect, were free from undue bodily restraint, and received adequate medical care. R. 1 at 3-4.

In March 1992, the State filed a motion to dismiss the complaint, arguing that ADC residents were not entitled to any substantive due process protections. R. 6, Mot. to Dismiss; R. 7, Memo in Support of Mot. to Dismiss. At a hearing before the district court on the motion, the State argued that the residents of Arlington had no constitutional rights whatsoever – not even a right to be fed – because most of the residents had been placed in the physical custody of the State by a parent or guardian rather than through a judicial proceeding. R. 34, Tr. of Oral Argument on Mot. to Dismiss, at 16-20, U.S. App. 778-782. The United States disagreed, arguing that the residents of Arlington were entitled to substantive due process rights as outlined by the Supreme Court in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). R. 34, Tr. of Oral Argument on Mot. to Dismiss, at 33-41, U.S. App. 795-802.

The district court denied the State's motion to dismiss in August 1992. R. 35, Order Denying Mot. to Dismiss; *United States* v. *Tennessee*, 798 F. Supp. 483 (W.D. Tenn. 1992). In July of the following year, the State filed a second motion to dismiss, again arguing that the residents of ADC have no substantive due

process rights. R. 115, Mot. to Dismiss; R. 116, Memo in Support of Mot. to Dismiss. The United States again opposed the motion. R. 133, Memo in Opp. to Mot. to Dismiss.

The district court held a two-month trial in 1993 and issued an oral opinion on November 22, 1993, R. 225, Tr. of Oral Opinion, TN App. 242-289, followed by supplemental findings of fact on February 17, 1994, R. 251, Supp. Findings of Fact, TN App. 290-337. In its oral opinion, the district court found that the residents of Arlington were entitled to the substantive due process protections outlined in *Youngberg*. R. 225, Tr. of Oral Opinion at 14-16, TN App. 255-257. Specifically, the court found that the State has a constitutional duty to "provide adequate food, shelter, clothing and medical care" to the residents of Arlington. R. 225, Tr. of Oral Opinion at 16, TN App. 257. The court also found that the State had a duty to "provide reasonable safety for all residents" in the facility and to ensure "conditions of reasonable care and safety, reasonable nonrestrictive confinement conditions and such training as may be required by these interests." R. 225, Tr. of Oral Opinion at 16, TN App. 257. The court found that the State had failed to comply with its duties under the Fourteenth Amendment, R. 225, Tr. of Oral Opinion at 27, TN App. 268, including by providing such inadequate

medical care to ADC residents so as to create "an active risk of death" to such residents, R. 225, Tr. of Oral Opinion at 28, TN App. 269.

In its supplemental findings of fact, the district court elaborated on the constitutionally deficient conditions at Arlington. For example, the court found that "ADC residents are subjected to serious harm and undue risks of harm due to inadequate supervision" by Arlington staff. R. 251, Supp. Findings of Fact, at 4, 8, TN App. 293, 297. The court found that the conditions at Arlington had resulted in 6,100 reported injuries to ADC residents in the previous three years alone, including many "serious" injuries such as "major fractures" and loss of sight. R. 251, Supp. Findings of Fact, at 4-8, TN App. 293-297. The court also found that the State failed to ensure that residents were not subject to undue restraints, and that the use of such restraints exposed ADC residents to "significant risk of harm." R. 251, Supp. Findings of Fact, at 9-10, TN App. 298-299. In addition, the court found that the medical care and health services provided at Arlington were "grossly deficient," causing "illnesses, deformities, suffering and death" among the residents. R. 251, Supp. Findings of Fact, at 16, TN App. 305. The court further found that the feeding practices at Arlington were "dangerous, life-threatening, result in harm to residents, and continue to place residents at unreasonable risk of harm." R. 251, Supp. Findings of Fact, at 19, TN App. 308.

In September 1994, the United States and Tennessee agreed on the terms of a remedial order to correct the constitutional violations at Arlington. R. 338, Remedial Order, TN App. 338-398. The district court approved the negotiated remedial order as a full and appropriate remedy for the constitutional violations and entered judgment for the United States in August 1995. R. 414, Judgment. The State did not appeal that final judgment.

In 1995, the district court extended the finding of liability and remedial order in this case to a parallel case challenging conditions at Arlington that had previously been filed by a plaintiff class represented by People First of Tennessee of individuals who had resided, were residing, or were at risk of residing at Arlington. See R. 306, Order (No. 92-2213 W.D. Tenn.), TN App. 446-454. The court also granted People First of Tennessee and the Parent Guardian Association of Arlington Development Center the status of intervenors in this case. R. 306, Order (No. 92-2213 W.D. Tenn.), TN App. 446-454.

Not long after the entry of judgment and adoption of the negotiated and agreed-upon remedial relief in this case, the district court found that the State had failed to comply with the ordered relief. The district court held the State in contempt in 1995 for its failure to comply, finding that the State had "abandoned its goal of achieving compliance with its own Stipulated Remedial Order and its

own Plan of Correction." *United States* v. *Tennessee*, 925 F. Supp. 1292, 1298 (W.D. Tenn. 1995). Indeed, the United States and intervenors have filed seven motions for contempt over the years, which have led to additional Plans of Corrections, settlement agreements, and consent orders, none of which the State has faithfully implemented. See R. 286, 385, 408, 509, 921, 1774, 2234 (written and oral contempt motions).

B. In August 2008, the State filed a motion pursuant to Federal Rule of Civil Procedure 60(b), asking the district court to terminate all remedial orders in the case. R. 2280, Mot. to Vacate; see also R. 2316, Supp. Br. in Support of Mot. to Vacate. In support of its motion, the State argued that a significant change in law had made clear that the residents of Arlington are not entitled to any substantive due process rights. The United States and the intervenors opposed the motion. R. 2301, Parent-Guardian Assoc. Response to Mot.; R. 2304, U.S. Memo in Opp. to Mot. to Vacate; R. 2306, Intervenor Mot. in Opp. to Mot. to Vacate; R. 2318, U.S. Supp. Memo in Response to State's Supp. Br.; R. 2322, Intervenor Resp. to Def. Supp. Br. The district court denied the motion, adhering to its prior conclusion that, under the law controlling this case, the residents of Arlington are entitled to the substantive due process rights outlined by the Supreme Court in

Youngberg. R. 2328, Order Denying Mot to Vacate Injunctive Relief & Dismiss. The State appealed.

SUMMARY OF ARGUMENT

More than a decade ago, the district court entered a final appealable order in this case finding the State liable for violating the constitutional rights of ADC residents and ordering remedial measures. The district court's decision at the time followed binding precedent from this Court holding that adults with intellectual disabilities who are admitted to State-run institutions at the request of their parents or guardians must be considered involuntarily committed for federal constitutional purposes. The district court's decision also faithfully implemented the Supreme Court's previous holding that individuals who are involuntarily committed to State-run institutions are entitled to certain substantive protections under the Due Process Clause.

Although the State chose not to appeal the order at the time, it now, quite belatedly, asks this Court to overturn the liability ruling and to order the district court to throw out all of the remedial orders in this case. The State reiterates exactly the argument it made before the district court as early as 1992, namely that the residents of Arlington have absolutely no constitutional rights because they were committed to ADC by their parents or guardians. Tennessee claims the right

to resurrect its prior arguments – arguments that the district court rejected and the State chose not to pursue before this Court – because it alleges a significant change in the law governing this case has occurred since the district court's finding of liability in 1993.

The State's argument, however, is unavailing. Before this Court may order Rule 60(b)(5) relief based on a change in law, a movant must at the very least demonstrate that it is perfectly clear that intervening caselaw has rendered legal what was thought to be illegal at the time the remedial order was entered. But the State does not even attempt to argue that any case from this Court or from the Supreme Court decided since 1993 has overruled the precedents the district court properly relied on at the time. Rather, the State relies on an unpublished Sixth Circuit case decided prior to 1993 and intervening cases from other courts of appeals. Of course, none of those cases has precedential value in this Court and could not, therefore, overrule published decisions from this Court or the Supreme Court. In any case, the State exaggerates the holdings of the cases on which it relies as well as their applicability to this case.

Thus, the district court did not abuse its discretion in denying the State's Rule 60(b) motion to terminate the remedial orders in this case. The district court was also correct in concluding that, even if the law had changed, it would be

inappropriate to completely vacate all of the relief that has been ordered in this case. Every individual in this country has a due process right to be free of abuse and undue bodily restraint at the hands of the State. Even if the State is not required to provide positive care and protection to individuals in its custody, it certainly is not free to abuse and unnecessarily restrain them, as Tennessee had a practice of doing to the residents of Arlington.

STANDARD OF REVIEW

This Court reviews the denial of a Rule 60(b)[3] motion for abuse of discretion. *Brown* v. *Tennessee Dep't of Fin. & Admin*., 561 F.3d 542, 545 (6th Cir. 2009).

[3] In the district court, the State failed to identify which subsection of Rule 60(b) it was relying on. The district court treated the motion as one under Rule 60(b)(5), R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss, at 4, and that is the subsection the State relies on in this appeal (see TN Br. 1, 8, 41-46).

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TENNESSEE'S MOTION TO TERMINATE ALL REMEDIAL ORDERS IN THIS CASE

A. Tennessee Has Failed To Establish A Significant Change In The Law Governing This Case

In order to prevail under its Rule 60(b)(5) motion in the district court, the State of Tennessee bore the burden of demonstrating that continued enforcement of the injunctive relief is no longer equitable due to "a significant change either in factual conditions or in law." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); see also *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009); *Deja Vu of Nashville, Inc.* v. *Metropolitan Gov't of Nashville & Davidson County*, 466 F.3d 391, 394-395 (6th Cir. 2006) (relying on *Rufo*, which concerned the ongoing validity of a consent decree, in considering the ongoing validity of an injuntion). Although the State goes to great pains to lay out its view of how the various agreed-upon remedial injunctions burden the State (TN Br. 10-15), it does not argue on appeal – nor did it argue below – that any changed factual conditions merit modification or termination of any of the remedial orders.[4] The State argues

[4] Because the State failed to argue in its opening brief – or before the district court – that any changed factual conditions warrant Rule 60(b) relief, it has waived its right to pursue such an argument. *Radvansky* v. *City of Olmsted Falls*,

(continued...)

instead that a significant change in the law governing the constitutional rights of adults with profound intellectual disabilities residing in a State-run institution requires termination of the district court's remedial orders. It is mistaken.

1. The District Court Correctly Determined In 1993 That The Residents Of Arlington Development Center Are Entitled To Certain Substantive Protections Under The Due Process Clause

The United States filed this suit against the State of Tennessee and various state officials in 1992, alleging that the State was engaged in a pattern or practice of violating the constitutional rights of the residents of Arlington Development Center (ADC or Arlington), a State-run institution. The State argued at the time that the residents of ADC – who were individuals with serious intellectual disabilities – were not entitled to any substantive rights under the Due Process Clause because the individuals were admitted to ADC by their parents or guardians rather than through a judicial process of involuntary commitment. Thus, the State argued that it would not violate the constitutional rights of Arlington residents if the State, *e.g.*, chose not to feed them or provided such substandard care as to subject the residents to a great risk of bodily harm and death because, the State alleged, they could simply choose to leave the facility at any time. The

---

[4](...continued)
395 F.3d 291, 311 (6th Cir. 2005) (a party's "failure to raise an argument in his appellate brief constitutes a waiver of the argument on appeal").

district court rejected the State's arguments, holding that the residents of ADC are entitled to certain substantive protections under the Due Process Clause and that the State had engaged in a pattern of egregiously violating those rights.

At the time the district court entered its finding of liability against the State in 1993, the Supreme Court had not squarely confronted the question whether individuals with profound intellectual disabilities who have been committed to a State institution by their parents or guardians are entitled under the Due Process Clause to food, shelter, clothing, medical care, safety, and reasonable freedom of movement.[5] The district court and the parties relied on two Supreme Court cases addressing the relative substantive due process rights of differently-situated individuals to whom the State owed different duties of care.

At one end of the spectrum, the Supreme Court had held in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-318 (1982), that individuals with intellectual disabilities who had been involuntarily committed through state legal proceedings have a substantive due process right to safety, freedom from unnecessary bodily restraint, and any training necessary to secure those rights.[6] The Court reasoned

---

[5] As discussed *infra*, the Supreme Court still has not directly confronted that issue.

[6] The state defendant in *Youngberg* conceded that the individuals in its

(continued...)

that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause," and held that "that right is not extinguished by lawful confinement." *Id.* at 315 (internal citation omitted). Similarly, the Court found that the right to "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action" and "must also survive involuntary commitment." *Id.* at 316 (internal citation omitted). The Court also held that the individuals institutionalized in *Youngberg* were entitled to such training as was "necessary to avoid unconstitutional infringement" of their other rights. *Id.* at 318.

At the other end of the spectrum, the Supreme Court had held in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 195-201 (1989), that the State did not have a duty under the Due Process Clause to protect a boy who was not in State custody from physical abuse at the hands of a non-state actor even where the State had reason to know that the boy was at risk of suffering such abuse. The Court reasoned that, although the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,'" it does not require the State "to ensure that those interests do not

---

[6](...continued)
custody had a right under the Fourteenth Amendment to "adequate food, shelter, clothing, and medical care." 457 U.S. at 315.

come to harm through other means" such as through abuse by non-state actors. *Id.* at 195. The Court in *DeShaney* distinguished *Youngberg* by pointing out that the plaintiff in *Youngberg* was both in the State's custody and held there against his will. *Id.* at 199-200. As the Court explained: "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the" Constitution. *Id.* at 200.

Throughout the course of this litigation, the State has consistently described the intellectually disabled residents of Arlington as "voluntarily admitted" to ADC because most of them were placed in the facility by a parent or guardian, rather than through a judicial proceeding. Based on that description, the State has consistently argued that this case should be governed by the Supreme Court's decision in *DeShaney*, and that the residents of ADC are therefore entitled to no substantive protection under the Due Process Clause. The district court rejected that argument in 1993, concluding instead that the residents at Arlington – many of whom have lived there for decades now – are entitled to the rights delineated in *Youngberg*. The State did not appeal that decision.

Under the law of this Circuit both in 1993 and in 2009, the decision of the district court was correct. This Court held in 1988 that adults with intellectual disabilities who are placed in a State-run institution by a parent or guardian are, for federal constitutional purposes, *involuntarily* committed. In *Doe by Doe* v. *Austin*, 848 F.2d 1386 (6th Cir.), cert. denied, 488 U.S. 967 (1988), this Court considered a challenge to Kentucky's system of admitting adults with intellectual disabilities to state-run institutions at the behest of their parents or guardians. In order to determine whether the State's system afforded sufficient procedural protection under the Due Process Clause to such individuals, the Court first had to determine whether the individuals entered and continued to reside in the State-run institutions voluntarily, as the State in that case argued. *Id.* at 1391-1392. The Court concluded that both the initial admission and the continued residence of the individuals with intellectual disabilities who were placed in the State-run institution by their parents or guardians are "to be considered involuntary." *Id.* at 1392; see also *Doe by Doe* v. *Cowherd*, 965 F.2d 109, 111 (6th Cir. 1992) ("We held in *Austin* that mentally retarded adults are involuntarily committed when admission is made upon the application of a parent or guardian."), rev'd on other grounds, *Heller* v. *Doe by Doe*, 509 U.S. 312 (1993). The district court in the instant case was aware of this Court's decision in *Austin* when it entered its

finding of liability against the State,[7] and concluded that the residents of ADC are entitled to the substantive due process protections delineated by the Supreme Court in *Youngberg*. See *United States* v. *Tennessee*, 798 F. Supp. 483, 485-487 (W.D. Tenn. 1992).

2. Developments In The Law Since 1993 Have Not Undermined This Circuit's Controlling Law Governing This Case

Fifteen years after the district court's 1993 finding that the residents of Arlington are entitled to the substantive due process protections outlined in *Youngberg*, the State filed a motion to terminate the remedial orders in this case based on an alleged change in the governing law. But the State has not identified any case from this Circuit or the Supreme Court holding, or even indicating, that individuals with intellectual disabilities who are admitted to State-run institutions by a parent or guardian are not entitled to any substantive rights under the Due Process Clause. Nor could it as neither court has issued a decision addressing that issue in the intervening decade and a half. The State attempts to manufacture a significant change in law by (1) claiming that this Court's decision in *Austin* does

---

[7] *Austin* was discussed during the hearing on the State's 1992 motion to dismiss. R. 34, Tr. of Oral Argument on Mot. to Dismiss, at 44, U.S. App. 806. Although the case name was transcribed as "Joe Videll v. Austin" in the hearing transcript, it is clear from the context that counsel for the United States was discussing *Doe by Doe* v. *Austin*.

not apply to this case, (2) relying on an unpublished Sixth Circuit case that was decided before 1993 and is not directly applicable in any case, and (3) exaggerating the holdings of cases from other Circuits (see TN Br. 45-46). Because all of those arguments are unavailing, the district court was correct in adhering to its view that the residents of ADC are there involuntarily, and are therefore entitled to *Youngberg* protections.

a. This Court's Involuntariness Holding In Austin *Governs This Case*

This Court's holding in *Austin* that adults with intellectual disabilities who are admitted to a State-run institution by their parents or guardians must be considered involuntarily committed for federal constitutional purposes directly undermines the foundation of the State's argument that such individuals are not entitled to any substantive due process rights.[8] Rather than arguing that *Austin* has been overruled by this Court or the Supreme Court, the State argues (TN Br. 38-41) that *Austin*'s involuntariness holding "is irrelevant" to this case because *Austin* involved a challenge to the procedural protections afforded to adults with intellectual disabilities who are admitted to State-run institutions. But the fact that the plaintiffs in *Austin* were challenging the procedural protections governing the

[8] As of today, all of the remaining residents at ADC are adults. See R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss, at 2 n.3.

commitment of individuals with intellectual disabilities rather than attempting to enforce their substantive rights does not diminish the holding that those individuals must be considered involuntarily committed for federal constitutional purposes. The question whether the plaintiffs were voluntarily committed or involuntarily committed was antecedent to the question what protections they were due under the procedural component of the Due Process Clause. The same is true with respect to the question what substantive protections they are entitled to under the Due Process Clause. *Austin*'s involuntariness holding, therefore, governs the result in this case to the same degree that it governed the result in *Austin*. Indeed, this Court affirmed in a subsequent case that *Austin* "held" that "mentally retarded adults are involuntarily committed when admission is made upon the application of a parent or guardian" without limiting that holding to the context of any particular constitutional right. *Cowherd*, 965 F.2d at 111.

The State offers little in the way of reasoning in support of its contention that *Austin* is inapposite to this case other than the statement (TN Br. 39) that "[p]rocedural due process is not the same thing as substantive due process." While that is true, an institutionalized individual's voluntary or involuntary status does not change depending on whether a court is considering such individual's procedural or substantive rights under the Due Process Clause. The State claims

(TN Br. 40) that the district court "conflat[ed]" the question whether an individual is involuntarily admitted to an institution with the question what substantive protections he or she is entitled to once a resident. But the State ignores the fact that this Court in *Austin* held *both* that adults with intellectual disabilities admitted to a State-run institution by a parent or guardian are involuntarily *admitted*, and that such individuals remain involuntarily *committed* after their admission. The state defendant in *Austin* claimed – as does the state defendant here – that the intellectually disabled residents in question could simply leave the facility if they were unhappy with the conditions or with their treatment. In response, this Court in *Austin* reasoned:

> [T]he notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement, coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be "lost in the shuffle." We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.

848 F.2d at 1392 (internal citation omitted). That reasoning applies equally to the residents of Arlington, many of whom have lived there for most of their adult lives. ADC residents remain involuntarily committed in spite of the ability of their

parents or guardians to initiate procedures for their release just as the residents in *Austin* did.

By its own reasoning, the Supreme Court's holding in *Youngberg* governs Tennessee's treatment of the residents of Arlington. As the State in *Youngberg* condede, "[w]hen a person is institutionalized – and wholly dependent on the State – * * * a duty to provide certain services and care does exist." 457 U.S. at 317. Thus, when the State of Tennessee acted on the petition of parents or guardians to place individuals with intellectual disabilities in this institution and force them to stay there, it, "by the affirmative exercise of its power so restrain[ed their] liberty that it render[ed them] unable to care for [themselves], and at the same." *DeShaney*, 489 U.S. at 200. By then "fail[ing] to provide for [such individuals'] basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – [the State] transgresse[d] the substantive limits on state action" established by the Constitution. *Ibid.*

Indeed, the State's contention that the residents of Arlington who were admitted at the request of a parent or guardian may leave whenever they choose rings especially hollow in light of the language of the State's statute governing the release of institutionalized individuals with intellectual disabilities. That law permits such individuals to petition for their own release only when they were

admitted on their *own* application and when they possess legal and actual capacity to make such decisions. Tenn. Code Ann. § 33-5-303. Thus, the individuals at issue in this case must rely on their parents or guardians to petition for their release in order to leave Arlington. That is exactly the situation addressed in *Austin*.

b. The Remaining Law From This Circuit Supports The District Court's Liability Determination

In addition to disavowing the holding in *Austin*, the State also attempts to rely on a different case from this Court, *Higgs* v. *Latham*, No. 91-5273, 1991 WL 216464 (6th Cir. Oct. 24, 1991). That case was also decided prior to the district court's finding of liability in this case, and was in fact relied on by the State in its 1992 motion to dismiss the United States' complaint (see TN Br. 25 n.6). The State argues on appeal (TN Br. 24-26) that this Court held in *Higgs* that "*DeShaney* limits substantive due process rights under *Youngberg* to those patients who have been involuntarily confined by the state." For the reasons discussed *supra*, even if the unpublished decision in *Higgs* had any precedential value – which it does not, see, *e.g.*, *United States* v. *Keith*, 559 F.3d 499, 505 (6th Cir. 2009) – any such holding would not apply to the residents of ADC, who are involuntarily confined under the binding precedent of *Austin*.

Moreover, even if this Court had not held in *Austin* that individuals with intellectual disabilities admitted to state-run institutions by their parents or guardians are involuntarily committed for federal constitutional purposes, the State's description of the holding in *Higgs* is overly broad. The Court in *Higgs* held that an individual who voluntarily checked *herself* into a hospital for mental health treatment and was then sexually assaulted by a fellow patient was not entitled to *Youngberg* protections. But the Court did not – and could not – make any determination about the substantive due process rights of individuals with intellectual disabilities who are institutionalized by their parents or guardians.

The State would lump into one category every institutionalized individual who was not committed through a procedure state law labels "voluntary" commitment. Such an imprecise demarcation ignores the wide range of individuals in the wide variety of situations falling between the court-sanctioned involuntary commitment in *Youngberg* and the completely noncustodial relationship in *DeShaney*. Indeed, the disparate holdings in *Higgs* and *Austin* reflect the differences between the respective plaintiffs in each case. The plaintiff in *Higgs* was an adult woman who was hearing voices and experiencing hallucinations and ultimately admitted herself to a State-run hospital for treatment. 1991 WL 216464, at *1-2. The plaintiffs in *Austin* – like the residents of

Arlington – were adults with severe and profound intellectual disabilities who were institutionalized by other individuals. 848 F.2d at 1389-1392. In general, individuals with mental illness are not similarly situated to individuals with intellectual disabilities in terms of their relative ability to care for themselves and to make decisions about their care and placement. Cf. *Heller* v. *Doe*, 509 U.S. 312, 321-328 (1993) (recognizing the significant differences bewteen individuals with intellectual disabilities and individuals with mental health problems). Thus, the reasons this Court relied on in *Austin* to hold the plaintiffs' commitment involuntary simply do not apply in the same way to adults who do not have intellectual disabilities. Hence, the *Higgs* panel found that the plaintiff's hospital admission was voluntary. Any consequences flowing from the *Higgs* Court's voluntariness determination – such as the plaintiff's lack of *Youngberg* protections – necessarily do *not* apply to individuals such as the residents of Arlington who were involuntarily committed per the holding in *Austin*.

The nuance required to determine the relative constitutional rights of individuals under the State's care is reflected in this Court's recent decision in *Lanman* v. *Hinson*, 529 F.3d 673 (6th Cir. 2008). The panel in *Lanman* considered whether a voluntarily admitted psychiatric patient was entitled to *Youngberg* protections from abuse and restraint by employees of the State. *Id.* at

677-683. Although the panel acknowledged the prior unpublished opinion in *Higgs*, *id.* at 682 n.1, the Court declined to adopt a bright line rule depriving all individuals voluntarily admitted to the State's care of all substantive due process rights. The Court explicitly rejected the argument advanced by Tennessee here – that, because the plaintiff was voluntarily admitted to the State's institution and was "theoretically free to leave at any time, he was not owed *any* duties under the Fourteenth Amendment." *Id.* at 682. Although the Court in *Lanman* declined to decide whether the plaintiff in that case was entitled to all of the protections outlined in *Youngberg*, it did hold that the Due Process Clause provided him, "as a patient of a state care institution, with the constitutional right recognized in *Youngberg* to freedom from undue bodily restraint in the course of his treatment" as well as the right "to be free from physical abuse at the hands of the State." *Id.* at 681, 688-689. Indeed, the panel held that the resident's "status as voluntary or involuntary is irrelevant to his constitutional right to be free from the State depriving him of liberty without due process." *Id.* at 682 n.1.

The State attempts to dismiss (TN Br. 48-49) the relevance of *Lanman*'s holding that voluntarily admitted mental health patients have a substantive due process right to be free of undue bodily restraint and physical abuse at the hands of the State, 529 F.3d at 688-689, by alleging that claims of abuse and unjustified

restraint at ADC "ha[ve] long since dissipated" in the years since this case was filed. However, the State offers no factual support for its claim that abuse and improper restraint of residents never occurs at Arlington anymore. To do so for the first time on appeal would be improper in any case as the State has not sought a termination or modification of the remedial orders in this case based either on an alleged change in facts or on a claim that any underlying constitutional violations have been remedied. The question presented in this appeal is whether the district court abused its discretion in determining that the governing law has not changed since 1993. The district court in 1993 found the Arlington residents were entitled under the Constitution to certain substantive due process protections, *including* the right to be free of abuse and undue bodily restraint. That is consistent with this Court's 2008 decision in *Lanman*.

Thus, the holding in *Lanman* confirms that there is a continuum of substantive due process protection owed by the State to its citizens that is dependant on the circumstances of both the individual involved and the particular relationship between the individual and the State. That principle is similarly manifest in other cases from this Circuit assessing the various duties owed by the State to individuals in various non-institutional settings. Those cases establish that substantive due process rights do attach to individuals in some situations that

do not involve incarceration, involuntary commitment, or institutionalization of any kind. This Court has held that "two exceptions have been recognized to the general rule that the Due Process Clause does not create an affirmative duty to protect." *Jones* v. *Union County*, 296 F.3d 417, 428 (6th Cir. 2002); see also *Jackson* v. *Schultz*, 429 F.3d 586, 590 (6th Cir. 2005). The first exception applies when an individual is in the State's custody, *Jackson*, 429 F.3d at 590, or when some other type of "special relationship" exists between the individual and the State such that the State's restraint of the individual exposes him or her to harm, *Jones*, 296 F.3d at 428. The second exception applies when the State "through some affirmative conduct places the individual in a position of danger." *Jones*, 296 F.3d at 428; see also *Jackson*, 429 F.3d at 590. A determination of whether one or the other exception applies requires an analysis of the particular situation in which a claim to substantive due process rights arises. See, *e.g.*, *Stemler* v. *City of Florence*, 126 F.3d 856, 867-869 (6th Cir. 1997) (substantive due process duty owed to woman whom police forced into car with abusive boyfriend at traffic stop), cert. denied, 523 U.S. 1118 (1998); *Meador* v. *Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir.) (duty to protect children in foster care from third-party harm even where children's guardian placed them in foster care voluntarily), cert. denied, 498 U.S. 867 (1990).

Although cases which address the "special relationship" and "state-created danger" exceptions, such as *Jones* and *Jackson*, do not directly control the liability issues in the instant case because their facts are quite different, they do support the district court's approach of determining the constitutional rights owed to the Arlington residents by considering the circumstances of their institutionalization. Those cases also support the district court's conclusion that the State owed a duty of care and protection to the residents of Arlington once it agreed to take them into physical custody. When Tennessee accepted individuals with profound intellectual disabilities into ADC as full-time residents, it did so with the understanding that those individuals could not care for themselves. When Tennessee subsequently failed to feed those individuals properly, subjected them to physical abuse and unnecessary restraint, and endangered their lives by providing seriously substandard medical care, the State subjected those individuals to harm through its affirmative actions. Whether this case is governed by *Austin*, *Lanman*, *Jones*, or *Jackson*, the State violated the substantive due process rights of Arlington residents.

c. Cases From Other Circuits Do Not Undermine The Controlling Law In This Court

In support of its argument that the governing law has changed since 1993, the State relies primarily on cases from other Circuits. The State wisely does not attempt to argue that cases from other Circuits are binding on this Court in the face of contrary Sixth Circuit precedent. Instead, the State falsely asserts (TN Br. 9; see also TN Br. 29-30) that the district court "conceded that 'decisions from other circuits have converged into a consensus' that substantive due process rights turn on whether state custody is voluntary or not." The district court made no such concession. The passage of the district court's opinion cited by the State is unambiguously a *description* of the State's argument below. The full sentence cited in part by the State reads:

> In addition to their argument that decisions from other circuits have converged into a consensus, Defendants contend that changes to the Sixth Circuit's local rules, which had discouraged citation to unpublished authorities, now make available for citation the unpublished Sixth Circuit decision in Higgs v. Latham, 946 F.2d 895 (Table), 1991 WL 216464 (6th Cir. 1991).

R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss, at 9. Such a description of the position of a litigant is quite clearly *not* an endorsement of that position.

In any case, the State exaggerates the holdings of the cases from other courts and their relevance to this case, continuing its refusal to acknowledge the consideration of relevant circumstances required to determine the extent of substantive due process rights available to differently-situated individuals in the physical custody of a State. Three of the cases the State relies on involve adults who voluntarily committed themselves to State-run hospitals for psychiatric treatment. See *Monahan* v. *Dorchester Counseling Ctr.*, 961 F.2d 987 (1st Cir. 1992), *Wilson* v. *Formigoni*, 42 F.3d 1060 (7th Cir. 1994), and *Goodman* v. *Parwatikar*, 570 F.2d 801 (8th Cir. 1978). As discussed above, this Circuit has held that adults with intellectual disabilities whose parents or guardians have admitted them to a State-run institution – individuals such as ADC residents – must be considered involuntarily committed for federal constitutional purposes. *Austin*, 848 F.2d at 1391-1392. Thus, cases addressing the constitutional rights of individuals without intellectual disabilities – in particular individuals who placed *themselves* in the State's physical custody – have no bearing on the constitutional rights of Arlington residents.

The State attempts to undermine the holding of *Austin* by relying on two cases from other circuits in which parents of deaf children placed them in State-run residential schools. See *Stevens* v. *Umsted*, 131 F.3d 697 (7th Cir. 1997);

Walton v. *Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc). In both cases, the courts held that the State was not required by the Due Process Clause to protect the children from sexual assault by other students because their parents had voluntarily placed the children in the schools. *Stevens*, 131 F.3d at 701-703; *Walton*, 44 F.3d at 1298-1299. This Court need not decide whether such holdings would be the law in this Circuit, however, because this Court in *Austin* specifically held that cases governing consent given by a parent on behalf of his or her minor child have no bearing on the validity of "consent" given by a parent on behalf of his or her adult child with intellectual disabilities (or by a guardian on behalf of such an adult ward). 848 F.2d at 1392-1393.[9]

Moreover, the three cases on which the State relies that do involve individuals with intellectual disabilities do not stand for the broad proposition that such individuals are not entitled to any substantive due process rights when they are institutionalized by a parent or guardian. The Second Circuit held in 1984 that residents at a hospital for individuals with intellectual disabilities were entitled to

---

[9] Even less relevant are two other cases relied on by Tennessee – *Lee* v. *Pine Bluff School District*, 472 F.3d 1026 (8th Cir. 2007), and *Wooten* v. *Campbell*, 49 F.3d 696 (11th Cir. 1995), cert. denied, 516 U.S. 943 (1995) – both of which involved a state actor's alleged failure to prevent harm to children who were *not* in the custody of the State. Those situations are governed by *DeShaney*, and have no relevance to the instant case in which adults in the physical custody of the State suffer grievous harm as a result of actions by state actors.

Youngberg protections regardless of whether they were considered voluntarily admitted or involuntarily committed. *Society for Good Will to Retarded Children, Inc.* v. *Cuomo*, 737 F.2d 1239, 1245-1247 (2d Cir. 1984). The court reasoned that, "[e]ven granting that the State of New York was not required to build schools for the mentally retarded or admit voluntary residents, once it chose to house those voluntary residents, thus making them dependent on the state, it was required to do so in a manner that would not deprive them of constitutional rights." *Id.* at 1246. Thus, the Court held that the residents were entitled to "safe conditions[,] freedom from undue bodily restraint," and any training necessary to safeguard those rights regardless of "whether they are voluntary or involuntary residents." *Id.* at 1246, 1249-1250.

The State acknowledges the holding in *Society for Good Will*, but argues (TN Br. 28) that two subsequent decisions from the Second Circuit have essentially overruled that holding. However, the State misconstrues the holdings of those cases. Both *Brooks* v. *Giuliani*, 84 F.3d 1454, 1456-1460 (2d Cir.), cert. denied, 519 U.S. 992 (1996), and *Suffolk Parents of Handicapped Adults* v. *Wingate*, 101 F.3d 818, 820-821 (2d Cir. 1996), cert. denied, 520 U.S. 1239 (1997), arose out of the decision by New York State and local governments to stop funding the program that paid for out-of-State residential placements for people

with serious intellectual and physical disabilities for whom no in-State placement was available. The cases did *not* involve issues related to the level of treatment or care those individuals were entitled to under the Due Process Clause while in a residential placement. Rather, the question before the court was whether they had a substantive due process right to *remain* in a particular type of State custody (in out-of-State placements) when the State chose to terminate funding for that program. *Suffolk*, 101 F.3d at 822-824; *Brooks*, 84 F.3d at 1465-1467.

Far from overruling the holding of *Society for Good Will*, the court in *Brooks* found that, while *Society for Good Will* governed questions related to "the level of care required by the Due Process Clause," *DeShaney* governed the State's obligations when "the government disclaims any entitlement to continued funding and ends th[e relevant] funding." *Brooks*, 84 F.3d at 1466. Because the plaintiffs in *Brooks* were not challenging the level of care the residents were receiving, but were challenging the State's decision to cease funding the individuals' particular residential placements, *Society for Good Will* was not controlling. The same was true in *Suffolk*. 101 F.3d at 822-824. In other words, the lawsuits in *Brooks* and *Suffolk* were intended to halt the defendants' efforts to terminate their custody of the individuals with disabilities. The Second Circuit held that the Due Process Clause does not entitle individuals to continued funding for a State custody

program where the State has chosen to terminate such funding. *Suffolk*, 101 F.3d at 824; *Brooks*, 84 F.3d at 1466; cf. *D.W.* v. *Rogers*, 113 F.3d 1214, 1217-1219 (11th Cir. 1997) (no substantive due process right to be taken into custody by the State). That holding is not applicable to this case, which concerns the care and treatment – or, more accurately, the utter lack of care and treatment – provided by the State of Tennessee to the residents of ADC.[10]

The State also overstates (*e.g.*, TN Br. 31) the Third Circuit's holding in *Torisky* v. *Schweiker*, 446 F.3d 438 (3d Cir. 2006). There the court considered whether adults with intellectual disabilities who had been voluntarily admitted to a State-run institution by parents or guardians were entitled to *Youngberg* protection when the State closed its institution and transferred the individuals to privately run facilities. *Id.* at 441-442. As Tennessee notes, the court in that case stated that individuals who are "free to leave state custody" are not entitled to *Youngberg* protection. *Id.* at 441. However, the court went on to explain that it must "look[] beyond the label of an individual's confinement to ascertain whether the state has deprived an individual of liberty in such a way as to trigger *Youngberg*'s protection." *Id.* at 447; see also *id.* at 446 ("Indeed, even commitments formally

---

[10] In the instant case, the parties agreed at the outset that the State could have closed ADC without running afoul of the Constitution. See R. 34, Tr. of Oral Argument on Mot. to Dismiss, at 28, 41, U.S. App. 790 ,803

labeled as 'voluntary' may arguably amount to *de facto* deprivations of liberty from their inception."). That approach is consistent with the approach taken by this Court in *Austin* (and by the district court in this case), which concluded that individuals such as the residents at Arlington are *not* free to leave the State's physical custody for purposes of considering their due process rights. 848 F.2d at 1391-1392. In *Torisky*, the Third Circuit determined that the institutionalized individuals at issue *did* have substantive due process rights under *Youngberg* during their transfer from one facility to another. Contrary to Tennessee's suggestion (TN Br. 41 n.10), the court in that case did not consider what rights those individuals would have had if they had remained in the State-run institution.

Thus, even if this Court were inclined to consider cases from other circuits, the State is incorrect that such cases constitute a "consensus" that individuals in the situation of Arlington residents do not have substantive due process rights regarding their care and treatment. On the contrary, cases from other circuits confirm that a determination of what substantive due process rights attach in a given situation requires a careful consideration of the individuals and circumstances involved, and eschew the sort of rough lines the State would have this Court draw. In any case, no decision from another circuit does or could undermine the binding holding of *Austin* that individuals such as the residents of

ADC are involuntarily committed for federal constitutional purposes. And the Supreme Court has made clear that involuntarily committed individuals are entitled to the substantive due process rights outlined in *Youngberg*.

B. The State Failed To Meet Its Burden Under Rule 60(b) Of Showing That Continued Enforcement Of The Remedial Orders In This Case Would Be Inequitable

As explained in the preceding pages, the State's argument that there has been a change in the law governing this case is based on various exaggerations and misinterpretations of the cases on which they rely. However, even if this Court agreed with the State's view of the development of the law since 1993, the State has still failed to demonstrate that there has been a significant change in controlling law sufficient to permit – let alone require – relief under Rule 60(b)(5).

1. The State Has Failed To Establish That A Significant Change In Law Since 1993 Would Relieve It Of Its Decision Not To Appeal The District Court's Original Liability Finding

In order to prevail on its motion to terminate the remedial orders in this case under Federal Rule of Civil Procedure 60(b)(5), Tennessee was required to demonstrate that "it is no longer equitable that the judgment should have prospective application." Tennessee attempted to do so by arguing that there has been "a significant change" in the governing law. See *Rufo*, 502 U.S. at 384. A party seeking to modify or terminate a remedial order or decree long after the time

for appealing has expired is required to demonstrate a significant change in the governing law because parties "may not use a Rule 60(b) motion as a substitute for an appeal, or as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise." *Hopper* v. *Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) (internal citations omitted). As the Supreme Court has explained, a party cannot be relieved of a free and calculated decision not to appeal an adverse ruling merely "because hindsight seems to indicate to him that his decision not to appeal was probably wrong considering the [later] outcome of [another] case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackerman* v. *United States*, 340 U.S. 193, 198 (1950).

The State argued in 1992 and 1993 that the residents of Arlington were not entitled to any constitutional rights whatsoever – indeed, the State argued that it would not violate the Constitution if the State chose not to feed the individuals in its physical custody at Arlington. The district court, relying on binding precedents, rejected the State's arguments and found that the State was violating the substantive due process rights of Arlington residents. The State opted not to press its arguments before this Court on appeal. The State does not now argue that any case from the Supreme Court or from this Court decided after 1993 has altered

the governing law in this Circuit. Rather, the State relies on a change in one of this Circuit's local rules and on cases from other circuits. The State's reliance on a change in this Court's local rule governing citation of unpublished opinions is misplaced. The State argues that it was not permitted to rely on this Court's unpublished decision in *Higgs* during earlier phases of the litigation because of this Court's rule discouraging the citation of unpublished opinions and establishing that unpublished decisions had no precedential value. As the State correctly notes, this Court now expressly allows the citation of such cases, 6th Cir. R. 28(f) (2009), but still does not assign any precedential value to them, see, *e.g.*, *Keith*, 559 F.3d at 505. This rule change does not constitute a significant change in law. Indeed, it does not constitute *any* change in relevant law. Although the rule in 1992 (when the State filed its motion to dismiss) discouraged citation of unpublished opinions, the State admits (TN Br. 25 n.6) that it did in fact cite *Higgs* to the district court. Thus, permitting the citation of unpublished opinions does not permit the State to do anything that it has not already done. And the lack of precedential value in *Higgs* remains the same today as it did in 1992. In any case, as discussed pp. 22-24, *supra*, the holding in *Higgs* would not control this case even if it did have precedential value.

The State's attempt to manufacture a significant change in controlling law sufficient to warrant Rule 60(b) relief by relying on cases decided after 1993 in other circuits is equally unavailing. The State argues (TN Br. 21-29) that it was an abuse of discretion for the district court to deny Tennessee's Rule 60(b) motion because cases from other court have "clarified" that the abusive and neglectful behavior the district court found to be a violation of the substantive due process rights of Arlington residents is, in fact, perfectly legal. As discussed pp. 29-36, *supra*, however, none of the cases from other courts that the State relies on directly answers the question what substantive due process rights attach to adults with intellectual disabilities who are committed to a State-run institution by their parents or guardians. Thus, even to the extent cases from other circuits might have persuasive value to this Court, none speaks persuasively – or at all – on the issue at the heart of the district court's finding of liability in this case.

In order to prove that there was a significant change in law sufficient to merit Rule 60(b) relief, the State must demonstrate that cases decided after 1993 have caused "the foundation upon which the claim for injunctive relief was built [to] crumble[]." *Sweeton* v. *Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (en banc), cert. denied, 513 U.S. 1158 (1995). In other words, the State must show that "[n]o basis in federal law exists for the injunctive relief imposed in this case." *Ibid.*

Such a change in law exists, moreover, only when law from this Circuit or the Supreme Court has made it "unmistakably clear" that the illegal conduct intended to be remedied by the injunctive relief is not, in fact, illegal. *Doe* v. *Briley*, 562 F.3d 777, 782-784 (6th Cir. 2009); see also *Brown*, 561 F.3d at 546-547.

But the State essentially admits (TN Br. 44 ("[T]his Court has yet to address the question in a published decision.")) that no intervening case from this Court or from the Supreme Court has overruled either *Austin* or *Youngberg*. Hence, there can be no doubt that there has been no significant change in law governing this case, let alone any change that "makes unmistakably clear" that the district court's finding that the residents of Arlington are entitled to certain substantive due process rights was wrong. Although it is true, as Tennessee points out (TN Br. 42), that courts are required to consider Rule 60(b) requests with greater flexibility in the context of institutional reform litigation, see *Rufo*, 502 U.S. at 380-381, no flexibility is called for when there has simply been no change in controlling law. The district court, therefore, did not abuse its discretion in denying the State's motion.

The State attempts to circumvent the stability of the governing law of this Circuit by urging the Court (TN Br. 44-45) to upset that stability now by following cases in other courts of appeals that the State erroneously views as analogous to

the instant case. Cases from other circuits cannot overrule binding precedent from this Court.[11] Thus, if this Court were to rely on such cases to overrule the Sixth Circuit law that governs this case now, it would be *effecting* a change in the law rather than *reacting* to one. Although the State argues that it is perfectly appropriate for a litigant to use a Rule 60(b) motion to effect such change, the Supreme Court disagrees. Tennessee argues (TN Br. 45-46) that the Supreme Court in *Agostini* v. *Felton*, 521 U.S. 203 (1997), sanctioned the use of a Rule 60(b)(5) motion to create a change in law.[12] In truth, however, the Supreme Court in *Agostini* expressly stated that it was a prior case, *not* the *Agostini* litigation itself that constituted the change in law warranting Rule 60(b)(5) relief. *Id.* at 225 ("It

---

[11] Indeed, this Court has held in the context of a Rule 60(b)(6) motion that a modification is not appropriate where a question of law was undecided at the time an injunction was entered, the losing party decided not to appeal, and the Supreme Court subsequently decided a case under which the losing party would have prevailed. *GenCorp, Inc.* v. *Olin Corp.*, 447 F.3d 368, 374-375 (6th Cir. 2007). As this Court explained: "The intervening change-in-law exception to our normal waiver rules * * * exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *Id.* at 374.

[12] Tennessee asserts (TN Br. 45) that the Court in *Agostini* "dismissed the objection that Rule 60(b)(5) may be used only 'as a means of *recognizing* changes in the law,' but not 'as a vehicle for *effecting* them'" (quoting *Agostini*, 521 U.S. 238). That is not quite accurate, however. The Court did not reject the general objection that a Rule 60(b)(5) motion may not be used to effect change in the law. Rather, the Court rejected the notion that Rule 60(b)(5) was being used to effect a change in the law *in that case* because the Court found that such a change had already taken place. *Agostini*, 521 U.S. at 238-239.

was *Zobrest* [v. *Catalina Foothills School District*, 509 U.S. 1 (1993)] – and not this litigation – that created 'fresh law.'"). Although the dissenters in *Agostini* disagreed that there had been a change in law outside the confines of the *Agostini* litigation, see *id.* at 255-260, the majority was firm in its finding that such a change had already occurred prior to the litigant's filing of its Rule 60(b)(5) motion, see, *e.g.*, *id.* at 223-224 (finding that reasoning of prior cases was "abandoned" and "expressly rejected" by intervening case); *id.* at 226 (finding that premises underlying previous case were "no longer valid" due to intervening decision); *id.* at 228, 233 (basing its reasoning on "current law" and "current understanding" of relevant law). Thus, the State is mistaken in its contention that it may use this appeal to effect a change in law that it made the conscious decision not to seek through a timely appeal more than a decade ago.[13] See *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009) ("Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests.").

---

[13] Even if there were a significant change in law sufficient to warrant a modification of the remedial relief entered in this case, the State would be required to demonstrate that its Rule 60(b)(5) motion was filed within a "reasonable time." The district court declined to decide whether the motion was timely, R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss, at 11, and the State does not argue on appeal that it was. If it is necessary to determine whether the State's motion was timely filed, this Court should remand that question to the district court for consideration in the first instance.

2. The State Does Not Argue That Any Other Type Of Change Warrants Relief Under Rule 60(b)

In addition to demonstrating that a significant change in governing law has occurred, a litigant may succeed under Rule 60(b)(5) if it can demonstrate that a significant change in facts would make prospective application of a remedial order inequitable. *Horne*, 129 S. Ct. at 2593; *Rufo*, 502 U.S. at 384. The State explains (TN Br. 10-15) in great detail in its brief the various costs it shoulders in order to comply with the remedial relief to which it agreed after the original finding of liability and after the various contempt and other proceedings that followed. However, the State never argues that Rule 60(b) relief is warranted based on any factual circumstances that have changed or were unforeseen when the relief was ordered. The State is not, therefore, seeking a modification or termination of the remedial orders in this case on the basis of any changed factual circumstances. Because it did not seek such relief either before the district court or in its opening brief, it has waived its right to do so in this appeal. *E.g.*, *Radvansky* v. *City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005).

After the State filed its opening brief in this case, the Supreme Court issued its decision in *Horne* v. *Flores*, 129 S. Ct. 2579 (2009), which considered the appropriateness of granting a Rule 60(b)(5) motion based on changed factual

circumstances.[14] The party seeking Rule 60(b)(5) relief in *Horne* argued that significant changed circumstances warranted such relief because the violation of law underlying the district court's remedial order had been cured. 129 S. Ct. at 2595-2597. Tennessee makes no such argument in this case. To be sure, the State argues that there is no "ongoing violation of federal law," *id.* at 2597, in this case because, in its view, there was never any violation in the first place. But that is a very different argument from the one the Court considered in *Horne*. In that case, the State defendant argued that the underlying violation of federal law had been remedied (albeit through means other than those specified in the district court's remedial orders); it did not attempt to use Rule 60(b) to challenge the district court's prior conclusion that there had been a violation of federal law in the first place.

---

[14] The Court in *Horne* did consider one legal change that had occurred since entry of the district court's remedial orders – Congress's enactment of the No Child Left Behind Act (NCLB), 20 U.S.C. 6053e. 129 S. Ct. at 2602-2603. But it was clear that that change was not a change in governing law of the type Tennessee alleges in this case. The Court did not find that enactment of the NCLB had rendered legal what the district court had originally found to be illegal under federal law. Rather, the Court noted that the enactment of the NCLB had prompted the State to make certain changes that ended up remedying in part the original violation, and that it denoted a shift in federal policy regarding how certain underlying violations should be addressed. *Ibid.* Thus, the focus of the Court was on the changes in factual circumstances resulting from the new legislation, not on any change in governing law resulting from its enactment.

Here, Tennessee does not even attempt to argue that it has cured the constitutional violations underlying this case. Nor does it argue that the district court's remedy has proven itself a "durable remedy" permitting termination of ongoing remedial orders, *Horne*, 129 S. Ct. at 2595 – an argument it would have difficulty making in light of the numerous contempt citations that have been filed against the State for its repeated noncompliance with the court's orders. Thus, the Supreme Court's reiteration in *Horne* of the Rule 60(b)(5) standard for considering changes in factual conditions has no application in this case, in which the State erroneously argues that the legal foundation of the case has been overruled.

C. The District Court Correctly Concluded That Vacating All The Remedial Orders In This Case Would Be Inappropriate

Finally, the district court did not abuse its discretion in denying the State's motion to vacate all of the remedial orders in this case by finding in the alternative that, "even if Arlington's residents were in the facility voluntarily, this fact would at most relieve Defendants of only some – but not all – of their obligations under the Fourteenth Amendment," thereby making vacating all remedial relief inappropriate. R. 2328, Order Denying Mot. to Vacate Injunctive Relief & Dismiss, at 10. The substantive due process rights recognized in *Youngberg*

encompass both affirmative obligations – such as the provision of food, shelter, and medical care – and negative proscriptions – such as the prohibition on abuse and undue restraint. The State's argument that the residents of Arlington are not entitled to any substantive due process rights under apply only to the affirmative obligations the district court found apply under *Youngberg*. But everyone in America – regardless of his or her relative state of day-to-day liberty – is protected by the prohibition on abuse and undue restraint at the hands of the State.

This Court recently recognized the general applicability of the due process right to be free from abuse and undo bodily restraint, including when an individual places himself in the State's custody voluntarily. *Lanman*, 529 F.3d at 681-683, 688. The district court has found that Tennessee had a practice of violating those very rights at Arlington. See, *e.g.*, R. 251, Supp. Findings of Fact, at 8-10, TN App. at 297-299. Even if this Court were to agree with the State that the residents of Arlington are not entitled to the full range of rights outlined by the Supreme Court in *Youngberg*, therefore, the binding precedent of *Lanman* prevents adoption of the State's radical position that the residents have no constitutional rights at all.

Thus, if this Court finds that the district court abused its discretion in finding no relevant change in controlling law, this Court should remand the case

so that the district court can consider in the first instance how to tailor the remedial relief to address the potentially more limited constitutional rights recognized in *Lanman*. See *Brown*, 561 F.3d at 545 (noting that, in considering whether and to what extent a Rule 60(b) modification is appropriate, this Court "defer[s] to the district court's ringside view of the proceedings, including its understanding of the underlying complaint and the meaning and purpose of the settlement").

CONCLUSION

This Court should affirm the district court's denial of the State's Rule 60(b)(5) motion.

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General

/s/ Sarah E. Harrington
MARK L. GROSS
SARAH HARRINGTON
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
Telephone: (202) 305-7999
Facsimile: (202) 514-8490
Attorneys for the United States

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 11,200 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Sarah E. Harrington
SARAH E. HARRINGTON
Attorney

Date: August 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2009, by filing the foregoing with the Court's electronic filing system, I caused to be served on the following counsel a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

Michael W. Kirk
Charles J. Cooper
Brian S. Koukoutchos
Derek L. Shaffer
Cooper & Kirk
1523 New Hampshire Avenue, NW
Washington, DC 20036

Dianne Stamey Dycus
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202

Jonathan Paul Lakey
Pietrangelo Cook
6410 Poplar Avenue
Suite 190
Memphis, TN 38119

Judith Gran
Public Interest Law Center of Philadelphia
125 S. 9th Street, Suite 700
Philadelphia, PA 19107

Jack Derryberry
Ward, Derryberry & Thompson
404 James Robertson Parkway
Ste 1720
Nashville, TN 37219

Earle J. Schwarz
The Offices of Earle J. Schwarz
2157 Madison Avenue, Ste 203
Memphis, TN 38104

William Sherman
Attorney at Law
809 N. Palm Street
Little Rock, AR 72205

/s/ Sarah E. Harrington
SARAH E. HARRINGTON
Attorney