Nos. 08-40858, 09-40047

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

and

GI FORUM & LULAC,

Intervenors-Appellees

v.

STATE OF TEXAS, *et al.*,

Defendants-Appellants

_____

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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellants' request for oral argument.

TABLE OF CONTENTS

PAGE

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

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

STATUTES (continued): **PAGE**

STATE CODES:

STATE CODES (continued): **PAGE**

FEDERAL RULES:

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1345. On July 24, 2008, the court entered a judgment simultaneously with its order granting plaintiffs-intervenors' Motion to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment (LEP Order). R.E. 11

(Judgment), R.E. 10 (*United States* v. *Texas*, 572 F. Supp. 2d 726 (E.D. Tex. 2008) (LEP Order)).[1] On December 17, 2008, the court entered a judgment in conjunction with an order granting in part and denying in part Defendants' Motion to Modify Order (Modification Order). R.E. 14 (Judgment), R.E. 13 (*United States* v. *Texas*, No. 6:71-CV-5281, 2008 WL 5334404 (E.D. Tex. Dec. 17, 2008) (Modification Order)). Defendants the State of Texas, Texas Education Agency, and Texas Commissioner of Education (collectively, State Defendants) filed a timely notice of appeal with respect to the LEP Order on August 18, 2008, R.E. 12, and a timely notice of appeal with respect to the Modification Order on January 15, 2009, R.E. 15. This Court has jurisdiction in Appeal No. 09-40047 to review the Modification Order under 28 U.S.C. 1292(a)(1), but lacks jurisdiction in Appeal No. 08-40858 to review the interlocutory LEP Order. This Court's lack of jurisdiction over the LEP Order is discussed in Argument I of this brief.

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[1] "R. __" refers to the page number following the Bates stamp "USCA5" on documents in the official Record on Appeal. "R.E. __" indicates the tab number of documents in appellants' Record Excerpts. "__ Tr. __" refers to the volume and pages of the trial transcript. "Br. __" indicates the page number of appellants' opening brief. "I-__" refers by number to Intervenors LULAC and GI Forum's exhibits. "D-__" refers by number to the appellants' exhibits. "Doc. __" indicates the docket entry number of documents filed in the district court.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the LEP Order (Appeal No. 08-40858).

2. Whether the district court abused its discretion in finding State Defendants in violation of the Equal Educational Opportunities Act (Appeal No. 08-40858).

3. Whether the district court abused its discretion in concluding that *Samnorwood Independent School District* v. *Texas Education Agency*, 533 F.3d 258 (5th Cir. 2008), did not constitute a significant change in law that required limiting application of the Modified Order to the nine all-black school districts in the original lawsuit (Appeal No. 09-40047).

STATEMENT OF THE CASE

1. The Original United States v. Texas Lawsuit

This appeal arises out of a school desegregation suit filed by the United States in 1970 against the State of Texas, Texas Education Agency (TEA), and Texas Commissioner of Education, as well as various all-black and all-white independent school districts and local school officials. *United States* v. *Texas*, 321 F. Supp. 1043, 1045-1047 (E.D. Tex. 1970). The United States alleged that defendants denied African-American children, in elementary and secondary

schools statewide, equal educational opportunity, in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination based on race, color, or national origin by any program receiving federal financial assistance. *Texas*, 321 F. Supp. at 1045. The amended complaint specifically focused on defendants' "actions in connection with the creation and continued maintenance of nine all-black school districts." *Ibid*.

In the first published decision in this case, the district court found that prior to 1954 the State of Texas operated a dual school system, pursuant to the State's constitution and statutes, with separate schools for black and white students. *Texas*, 321 F. Supp. at 1047. Texas continued operating a number of all-black schools in 1970, when this lawsuit commenced. *Id.* at 1047-1050. According to the court, state law and TEA's implementing policies allowing students to transfer freely between school districts resulted in the creation and maintenance of all-black school districts with inferior educational facilities, personnel, and curricula, in violation of Title VI and the Fourteenth Amendment. *Id*. at 1048, 1055-1056.

Because TEA's policies "encouraged or resulted in the continuation of vestiges of racially segregated public [schools]" and TEA was the "chief supervisory body of public elementary and secondary education in Texas and * * * initial recipient and distributor of Federal financial assistance to school districts

throughout the State," the district court placed primary responsibility on TEA for "obtaining school desegregation in compliance with constitutional responsibility." *Texas*, 321 F. Supp. at 1056-1058. Acknowledging that local school officials ordinarily were capable of eliminating segregation within their jurisdictions, the court stated that the remedy in this case must nonetheless include state involvement because TEA needed to reevaluate its policies that contributed to the continuation of the vestiges of discrimination, and TEA had the authority to "compel compliance with Federal law at all levels of the public education system." *Id*. at 1058.

Thus, the court not only ordered the desegregation of the nine all-black school districts, but also ordered State Defendants to fulfill their affirmative duties under Title VI and the Fourteenth Amendment and take the steps outlined in the order to ensure that their policies and practices do not encourage discriminatory treatment of students based on race, color, or national origin. *Texas*, 321 F. Supp. at 1059-1060. The court ordered TEA to submit a plan showing how the agency intended to fulfill its obligations under federal law and required TEA to include in the plan provisions for sanctions against local districts for violations of federal standards. *Id*. at 1058. The court retained jurisdiction over this matter "for purposes of enforcing or modifying this Order." *Id*. at 1062.

In a supplemental opinion, the district court ordered TEA to take further actions concerning, among other areas, student transfers, changes in school district boundaries, school transportation, and curriculum, to ensure that students receive equal educational opportunity. *United States* v. *Texas*, 330 F. Supp. 235, 242-250 (E.D. Tex. 1971). With respect to curriculum development, the court considered evidence concerning "the maintenance of separate schools for children of Mexican-American ancestry throughout the state" and determined that "equal education[al] opportunity should be afforded to Spanish-speaking students." *United States* v. *Texas (LULAC I)*, 506 F. Supp. 405, 410 (E.D. Tex. 1981) (describing evidence underlying the court's original remedial order), rev'd, 680 F.2d 356 (5th Cir. 1982). Based on this evidence, the court ordered TEA to study the needs of minority students and submit a plan describing what State Defendants would do to improve educational opportunity for minority students and "close[] the gap * * * caused by past discrimination" through "special programs for children whose primary language is other than English." *Texas*, 330 F. Supp. at 247, 249.

On appeal, this Court affirmed the district court's original order, 321 F. Supp. 1043, and affirmed in part the district court's supplemental opinion, 330 F. Supp. 235. *United States* v. *Texas*, 447 F.2d 441, 441 nn.1-2 (5th Cir. 1971), cert.

denied, 404 U.S. 1016 (1972). The district court, thereafter, further modified TEA's obligations under the remedial orders. See Amendments to Modified Order of July 13, 1971, filed Aug. 9, 1973 (Doc. 39). The modifications by this Court and the district court left intact the district court's directive that State Defendants have a duty to eliminate the vestiges of past discrimination and compensate victims, and the requirement that the State Defendants develop "programs and curricul[a] designed to meet the special educational needs of students whose primary language is other than English." *Texas*, 447 F.2d at 443, 448. The foregoing decisions relating to the content of the remedial order will be referred to collectively in this brief as the "Modified Order."

2. LEP Proceedings (Appeal No. 08-40858)

a. Section G of the Modified Order required TEA to "institute a study of the educational needs of minority children in order to insure equal educational opportunities of all students," and to submit a report including "[r]ecommendations of specific curricular offerings and programs which will insure equal educational opportunities for all students regardless of race, color or national origin." *Texas*, 447 F.2d at 448. The order required that "[t]hese curricular offerings and programs * * * include specific educational programs designed to compensate minority group children for unequal educational opportunities

resulting from past or present racial and ethnic isolation, as well as programs and curricul[a] designed to meet the special educational needs of students whose primary language is other than English." *Ibid*.

In 1972, LULAC and GI Forum (collectively, Intervenors) moved to intervene on behalf of Mexican-Americans with children who were "subjected to segregation and discrimination and other denials of equal educational opportunity in public schools." See GI Forum-LULAC Complaint in Intervention, filed July 10, 1972, at 3 (Doc. 19); see also *id*. at 7-10. In 1975, Intervenors filed a motion to enforce Section G of the Modified Order and added a new claim under the then newly-enacted Equal Educational Opportunities Act of 1974 (EEOA).[2] See *LULAC I*, 506 F. Supp. at 410, 431. In their request for relief, Intervenors sought an order requiring TEA to implement a plan that would provide all limited English proficiency (LEP) students with bilingual instruction and compensatory programs to overcome the effects of past unavailability of bilingual instruction. *Ibid*. On July 2, 1975, the United States endorsed Intervenors' 1975 motion. See Brief of the United States at 8 n.35, *United States* v. *Texas*, 680 F.2d 356, Nos. 81-2196,

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[2] The EEOA provides that "[n]o State shall deny equal educational opportunity to an individual on account of his * * * national origin, by * * * the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. 1703(f).

81-2310, and 81-2330 (5th Cir. Nov. 17, 1982). Also, on January 28, 1978, the United States filed a motion to enforce Section G of the Modified Order and for supplemental relief that sought similar, but not identical, relief to Intervenors' request. *Ibid.*; see also *LULAC I*, 506 F. Supp. at 410.

The district court found no basis for liability under Section G of the Modified Order, but concluded that State Defendants violated the Equal Protection Clause of the Fourteenth Amendment and the EEOA by failing to take appropriate action to address the language barriers of LEP students and by failing to remove the disabling vestiges of past *de jure* discrimination against Mexican-American students. See *LULAC I*, 506 F. Supp. at 410-411, 415-417, 428-434.

The court issued a remedial order requiring State Defendants to improve and expand their programs of bilingual instruction for Mexican-American LEP students. See *United States* v. *Texas (LULAC II)*, 523 F. Supp. 703, 709 (E.D. Tex. 1981). State Defendants moved to vacate the order, arguing that a recently enacted state statute, the Texas 1981 Bilingual and Special Language Programs Act (S.B. 477), created a new program addressing the learning difficulties of LEP students and should be given a chance to work before it can be evaluated for success or failure. See *id*. at 738. The court denied the motion, see *id*. at 740, and State Defendants appealed.

This Court reversed and remanded. See *United States* v. *Texas (LULAC III)*, 680 F.2d 356, 374 (5th Cir. 1982). The Court concluded that there was insufficient factual support for the district court's equal protection findings once State Defendants were allowed to withdraw their stipulations regarding the historical discrimination against Mexican-American students, and that the district court's injunction was rendered moot by enactment of S.B. 477. See *id*. at 370-372. Consequently, this Court held that the district court erred in denying State Defendants' motion to vacate the remedial order, explaining that the court's "refusal to reconsider its injunction order in light of the 1981 Act imposed a judicial gloss on the new legislative scheme without testing that scheme against the requirements of section 1703(f) as elaborated by *Castaneda* [v. *Pickard*, 648 F.2d 989 (5th Cir. 1981)]." *LULAC III*, 680 F.2d at 372.

b. On February 9, 2006, Intervenors filed a Motion for Further Relief, as a successive motion to their 1975 motion to enforce. R. 7534-7554 (Doc. 588). Intervenors claimed that, in the years since the State enacted S.B. 477, TEA had violated Section G of the Modified Order and Section 1703(f) of the EEOA by failing to adequately monitor the State's bilingual education and English as a Second Language (ESL) programs and, as a result of the lack of monitoring, had, *inter alia*, denied equal educational opportunity to LEP students above the

elementary level. See *ibid*. Intervenors sought both declaratory and injunctive relief. R. 7550-7552.

Intervenors requested that the court "declare the monitoring, supervision, and enforcement acts of Defendants insufficient * * * to ensure that LEP students receive appropriate educational programs and equal educational opportunities required by [the Modified Order and the EEOA]." R. 7551. They also requested "an order for injunctive relief requiring TEA to design, sufficiently staff, and promptly implement a program for monitoring of programs for LEP students, including the bilingual education/ESL program, which has at least * * * [seven specific] minimal components," including, *inter alia*, "on-site monitoring." R. 7550. In addition, Intervenors requested "an order for injunctive relief requiring TEA to propose comprehensive changes in the program for LEP students above the elementary level including, but not limited to, supplementary compensatory services for all LEP students in the subject matter curriculum," and "requiring Defendants to propose a plan to commit adequate resources to implementing their program for LEP students." R. 7551-7552.

Opposing Intervenors' Motion for Further Relief, State Defendants asserted that the district court did not have jurisdiction over Intervenors' EEOA claim and that the State and TEA were entitled to Eleventh Amendment immunity with

respect to the EEOA claim. R. 7564-7565 (Doc. 590). On May 30, 2006, the district court rejected defendants' immunity argument, finding that they waived immunity by consenting to this litigation and that Congress abrogated the State's immunity in the EEOA. R.E. 3 at 7.

State Defendants moved for reconsideration of this order on June 16, 2006, and requested staying the proceeding if the court denied its motion so that they could appeal the immunity ruling. R. 8268-8284 (Doc. 640). On August 11, 2006, the district court denied the motion for reconsideration, rejecting State Defendants' immunity claim and forum objection, and stayed the proceedings as to the State and TEA. R.E. 6 at 12-16.[3] On the same day, State Defendants filed a Motion to Dismiss, arguing that Intervenors' Motion for Further Relief failed to satisfy the requirements for the district court's continuing jurisdiction; the motion improperly joined the EEOA claim to this case; Intervenors lacked associational standing to bring the EEOA claim; an EEOA claim cannot be alleged against the Commissioner of Education; and the EEOA exceeds Congress's authority under Section 5 of the Fourteenth Amendment. R. 8459-8478 (Doc. 660). On October

[3] On October 13, 2006, the district court granted State Defendants' motion to lift the stay. R. 8904-8905 (Doc. 691). State Defendants' motion stated that they wished to forgo an interlocutory appeal of the district court's rejection of their immunity defense. R. 8702-8703 (Doc. 671).

12, 2006, Intervenors amended their Motion for Further Relief to specify facts to support their associational standing. R. 8837-8838 (Doc. 689). The district court, on October 23, 2006, denied the motion to dismiss, holding that it had jurisdiction over the EEOA claim; the EEOA applied to the Commissioner of Education; and Intervenors established associational standing to assert the EEOA claim. R.E. 7 at 3-9.

After a five-day bench trial, the district court denied Intervenors' Motion for Further Relief. R.E. 8 at 7-33 (*United States* v. *Texas* (*LULAC IV*), No. 6:71-CV-5281, 2007 WL 2177369 (E.D. Tex. July 27, 2007), vacated by *United States* v. *Texas* (*LULAC V*), 572 F. Supp. 2d 726 (E.D. Tex. 2008)). The court stated that the evidence showed that TEA was responding in good faith to LEP demands. R.E. 8 at 33. On August 13, 2007, Intervenors filed a Motion to Amend Findings of Fact and Conclusions of Law and To Alter or Amend Judgment, arguing that the district court erred in failing to evaluate TEA's ESL program for secondary students separately from the bilingual program for primary students. R. 9228 (Doc. 730). Intervenors asserted that the evidence supported finding that secondary LEP students were being denied equal educational opportunity, and that the district court should order defendants to separately evaluate the ESL program. R. 9234-9236.

c. On July 24, 2008, the district court vacated its July 27, 2007, order. See *LULAC V*, 572 F. Supp. 2d at 730. Applying the standard in *Castaneda*, 648 F.2d at 1009, for determining the "appropriateness of a particular school system's language remediation program" under Section 1703(f) of the EEOA, the district court agreed with Intervenors that State Defendants' actions violated both the Modified Order and the EEOA. *LULAC V*, 572 F. Supp. 2d at 755-756. The court concluded that because State Defendants violated the EEOA on broader grounds, remedial action should be based upon the statute rather than the Modified Order. *Id.* at 756, 759. Specifically, the court found that under *Castaneda*'s three-prong inquiry,[4] State Defendants had failed to make reasonable efforts to implement its monitoring program effectively (prong two), and that the poor performance of LEP students in secondary schools reveals that State Defendants are failing to provide them with equal educational opportunity (prong three). *Id.* at 764-781. The court concluded that State Defendants "must soon rectify the monitoring failures and begin implementing a new language program for secondary LEP students." *Id*. at

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[4] Under *Castaneda*, compliance with Section 1703(f) is determined by asking (1) "[is] the program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field?"; (2) "[i]s it reasonably calculated to implement that theory?"; and (3) "[h]as it, after being used for a time sufficient to afford it a legitimate trial, produced satisfactory results?" *LULAC III*, 680 F.2d at 371.

782. The court, however, did not mandate or prohibit any specific act. Rather, the court ordered State Defendants to develop a plan to ensure compliance with the EEOA. The court emphasized that it "will defer to Defendants and their course of action as much as possible, but the Court must ensure the rights of LEP students under the EEOA." *Ibid*.

3. Modification Proceedings (Appeal No. 09-40047)

On August 18, 2008, State Defendants filed a Motion to Modify Order, pursuant to Federal Rule of Civil Procedure 60(b)(5). R. 9440-9453. State Defendants argued that this Court's recent decision in *Samnorwood Independent School District* v. *Texas Education Agency*, 533 F.3d 258 (2008), constitutes a change in law, requiring the district court to alter the Modified Order so as to make TEA responsible for monitoring only the nine all-black defendant school districts in the original lawsuit. R. 9440-9441. The United States opposed the motion. R. 10459-10465.

On December 17, 2008, the district court granted in part and denied in part State Defendants' Motion to Modify Order. R.E. 13 at 1. Although this Court held that the student transfer provisions of the Modified Order and TEA's related regulations could not apply prospectively to the two school districts in *Samnorwood*, the district court rejected State Defendants' contention that the

decision required revising the Modified Order to exempt all but the nine all-black school district defendants from its application. R.E. 13 at 13.

In reaching its conclusion, the district court relied on the fact that this Court expressly limited its holding to the facts of the *Samnorwood* case, which involved two school districts that were non-parties to the original lawsuit, were unitary before this lawsuit commenced in 1970, and had never been found by a court to have acted with discriminatory intent. R.E. 13 at 7-8. The district court also found that the unique characteristic of these school districts – their unitary status prior to 1970 – distinguished this case from prior decisions of this Court involving school districts that were not parties to the original lawsuit. R.E. 13 at 11. In those cases, this Court held that the provisions of the Modified Order at issue could not be applied to the school districts because the evidence did not support finding that the school districts intentionally discriminated, but the Court stopped short of prohibiting prospective application of the Modified Order as it did in *Samnorwood*. R.E. 13 at 11. Accordingly, the district court revised the Modified Order to exempt the two *Samnorwood* school districts and similarly-situated school districts from enforcement of the Order by TEA. R.E. 13 at 13.

Lastly, the district court stated that the modification that State Defendants requested would "eradicate the statewide responsibilities of TEA under the

Modified Order." R.E. 13 at 11. The court said that *Samnorwood* does not support such an extensive modification because this Court, in fact, affirmed the Modified Order's statewide approach with its narrow holding. R.E. 13 at 12-13. The district court further said that it would not make the "drastic changes" sought by State Defendants "absent more explicit direction from the Fifth Circuit or Supreme Court." R.E. 13 at 13. According to the district court, if State Defendants seek to eliminate TEA's statewide duties under the Modified Order, they should present evidence showing that they have "complied in good faith with the desegregation decree from the time it was entered and have eliminated the vestiges of past discrimination to the extent practicable." R.E. 13 at 13 (citing *Freeman* v. *Pitts*, 503 U.S. 467, 491-492 (1992)).

STATEMENT OF FACTS[5]

1. Background And TEA's Monitoring Responsibilities

In 2003, the Texas legislature passed House Bill 3459 (H.B. 3459), which amended Texas Education Code § 29.062(a) to require TEA to "evaluate the effectiveness of [the State's bilingual education and special language] programs

[5] This Statement of Facts relates only to the LEP appeal (No. 08-40858). There was no evidentiary hearing regarding the modification appeal (No. 09-40047).

. . . based on the academic excellence indicators adopted under Section 39.051(a)." *United States* v. *Texas (LULAC V)*, 572 F. Supp. 2d 726, 735 (E.D. Tex. 2008). Section 39.051 provides that "[p]erformance on the [academic excellence] indicators * * * shall be compared to state-established standards * * * and must include" drop-out rates, graduation rates, and standardized test passing rates. Tex. Educ. Code § 39.051(b)(1)-(3) (Vernon 2008).

In addition, H.B. 3459 "limited TEA's compliance monitoring function, stating that TEA 'may monitor compliance with requirements applicable to a process or program provided by a school district . . . only as necessary to ensure: [] compliance with federal law and regulations.'" *LULAC V*, 572 F. Supp. 2d at 735 (citing Tex. Educ. Code § 7.028 (Vernon 2006)) (emphasis omitted). Section 29.062(b), however, continues to require TEA to monitor bilingual and special language programs with respect to specific categories like program coverage and testing materials, as well as to monitor language proficiency assessment committees, which initially identify LEP students. Tex. Educ. Code § 29.062(b)(1)-(9) (Vernon 2006). Texas law further requires TEA to apply sanctions if a school district "fails to satisfy appropriate standards," including the academic excellence standards. *Id*. § 29.062(e).

TEA must also establish a procedure for identifying school districts that are required to offer a bilingual or special language programs. Tex. Educ. Code § 29.053(a) (Vernon 2006). In practice, bilingual programs are offered in kindergarten through sixth grade, while ESL programs are offered in seventh through twelfth grade (secondary education). *LULAC V*, 572 F. Supp. 2d at 736. These programs are significantly different; bilingual instruction teaches course materials in both English and the student's native language, while ESL instruction teaches materials in modified English for easier comprehension by LEP students. *Id.* at 735.

In 2003, TEA replaced its previous monitoring program, which was not effectively implemented according to the state Auditor's Office, with the Performance Based Monitoring Analysis System (PBMAS). *LULAC V*, 572 F. Supp. 2d at 736. The PBMAS collects data and evaluates school districts' performance in four areas: bilingual education and ESL, career and technology education, special education, and the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6301. *LULAC V*, 572 F. Supp. 2d at 737. Annually, the PBMAS generates a set of performance indicators for each school district, based mostly on student passage rates on the Texas Assessment of Knowledge and Skills, a statewide achievement test. *Ibid*. And every year, "the state sets standards for

student passage rates in five subject areas and compares districts' performance to these standards to generate indicators." *Ibid.* (citing D-2 at 7; D-3 at 7). TEA then "assigns each district a performance level based upon the deviation of the district's passage rates from these passage rate standards." *Ibid.*

2. Problems With The PBMAS

The district court identified two overall problems with TEA's monitoring procedures: (1) the kind of data collected by the PBMAS renders the performance indicators generated by the system inaccurate and inadequate for detecting any deficiencies with a particular school's LEP program; and (2) TEA's inadequate response to problems flagged by the PBMAS contributes to the denial of educational opportunity. *LULAC V*, 572 F. Supp. 2d at 737-743.

Specifically, the court found that data collected by the PBMAS show that some school districts are likely under-reporting the number of LEP students. *LULAC V*, 572 F. Supp. 2d at 737-738. Yet TEA does not independently verify this information or investigate schools districts reporting high percentage of parental denials of LEP services, thereby casting doubt on the accuracy of the performance indicators generated by the PBMAS using these numbers. *Id.* at 737-738; see also I-1; 3 Tr. 219. The court also found that by comparing the bilingual-ESL indicators to state standards for *all* students, TEA has no procedure for

comparing the performance of LEP students to English proficient students. *LULAC V*, 572 F. Supp. 2d at 738 (citing D-2 at 7; D-3 at 7). The court further concluded that the PBMAS's aggregation of scores for multiple grade levels as well as for entire school districts distorted the performance indicators and masked problems with specific schools. *Id.* at 737-739.

With respect to on-site visits, the court determined that TEA had not conducted *any* on-site monitoring and had *no* bilingual-ESL certified monitors at the time of the trial. *LULAC V*, 572 F. Supp. 2d at 741. The court also considered other ways TEA monitors LEP students, such as monitoring that it performs under NCLB and the Texas accountability rating system. *Id.* at 741-742. The court found that although some of these monitoring programs disaggregate student performance data, they do not overcome the deficiencies in the PBMAS because they do not target relevant criteria for evaluating LEP students. *Ibid.*

3. Achievement Of LEP Students

The district court also found the evidence showed that LEP students have much higher retention and drop-out rates when compared to the general student body population, see *LULAC V*, 572 F. Supp. 2d at 742-743; LEP students have much lower passage rates on standardized tests than all students, *id.* at 747-751; "LEP students fail to progress through or exit LEP programs at a reasonable time,

id. at 751-752; and LEP students participate in advanced courses at a "far lower rate than all students," *id.* at 752.

SUMMARY OF ARGUMENT

1. Appeal No. 08-40858 concerns the obligations of State Defendants to ensure that the needs of LEP students in Texas are addressed. The district court found that State Defendants, in violation of the Equal Educational Opportunities Act of 1974, have not taken appropriate action to overcome the language barriers of LEP students in secondary school. In particular, the court determined that TEA's program for monitoring the performance of LEP students – the Performance Based Monitoring Analysis System – fails to adequately identify problems with the LEP programs in schools. As a result, these problems have continued, and LEP students in secondary school have substantially higher drop-out and retention rates and lower scores on standardized achievement tests.

The district court allowed State Defendants the opportunity to propose their own plan to meet the EEOA requirements. Instead of submitting a proposed plan, however, State Defendants appealed the LEP Order. Because the district court did not set forth any terms or minimum standards that must be in the proposed plan, the LEP Order is not an appealable interlocutory injunction under 28 U.S.C. 1292(a)(1). The Court should, therefore, dismiss the appeal of the LEP Order.

2. If the Court nevertheless determines that it has appellate jurisdiction over the LEP Order, it should reject the varied defenses offered by State Defendants – ranging from jurisdictional arguments based on the Eleventh Amendment and ancillary jurisdiction to a defense based on compliance with the No Child Left Behind Act and a challenge to whether State Defendants are even subject to Section 1703(f) of the EEOA. Tellingly, State Defendants devote most of their brief to these arguments because the district court's extensive factual findings, supported by substantial evidence, are not clearly erroneous.

3. Appeal No. 09-40047 concerns whether this Court's decision in *Samnorwood Independent School District* v. *Texas Education Agency* constitutes a significant change in law that warrants limiting application of the Modified Order to the nine all-black school districts in the original lawsuit. The district court did not abuse its discretion in finding that the decision does not require the drastic modification State Defendants request. A fair reading of the *Samnorwood* opinion reveals that its holding was limited to the unique facts of the case; namely, that the case involved two school districts that, *inter alia*, had voluntarily desegregated three years before this action commenced. With repeated references to the development of desegregation law since 1971, State Defendants attempt to question the relevance of the Modified Order. This is inappropriate. A motion

under Federal Rule of Civil Procedure 60(b)(5) concerns changed circumstances and must be brought in a timely manner. It does not require plaintiffs or the district court to reestablish the need for the Modified Order. If State Defendants seek to terminate the Modified Order, they should file an appropriate motion to do so and make the showing required by the Supreme Court for termination.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO REVIEW THE INTERLOCUTORY LEP ORDER

This Court has jurisdiction to review "final decisions of the district court[]." 28 U.S.C. 1291. It is undisputed, however, that the LEP Order is not a final appealable order under Section 1291. Instead, State Defendants invoke (Br. 1-2) appellate jurisdiction based on 28 U.S.C. 1292(a)(1), which provides jurisdiction for appellate review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. 1292(a)(1). This Court has cautioned that "[i]nterlocutory appellate jurisdiction is the exception rather than the rule," and "[i]nterlocutory appeals are not favored and the statutes allowing them must be strictly construed." *In re Ingram Towing Co.*, 59 F.3d 513, 515 (5th Cir. 1995).

In the July 24, 2008, judgment in the LEP proceeding, the court ordered that "for the 2009-2010 academic year and thereafter, Defendants establish a monitoring system and establish a language program that fulfill the requirements of [Section 1703(f) of the EEOA]." R.E. 11 at 1. "Towards the end of satisfying [the judgment]," the court ordered State Defendants "to submit a monitoring plan addressing the failures of [its current monitoring system] and to submit a proposed new language program for secondary LEP students by January 31, 2009, or earlier, if an earlier date is necessary to begin implementing modifications to monitoring and the secondary program by the 2009-2010 academic year." R.E. 11 at 1. The court also stated that, in order to expedite its review, "Defendants are encouraged to release the proposed plans to the other parties for comment prior to submitting the plans to the Court." R.E. 11 at 1-2.[6]

State Defendants argue (Br. 1-2) that the judgment contains two bases for interlocutory appellate jurisdiction: the court's order that State Defendants (1) change their monitoring and language programs to comply with the EEOA by the 2009-2010 school year; and (2) submit a proposed plan to the court by January 31,

[6] This Court stayed enforcement of the LEP Order pending appeal, but ordered the parties to address this jurisdictional issue in their merits briefs.

2009. State Defendants read too much into this judgment; neither passage can fairly be characterized as an injunction under Section 1292(a)(1).

When the passage ordering State Defendants to change its monitoring and language programs by the 2009-2010 school year is read in context with the rest of the judgment, it is clear that the court did not expect or require State Defendants to make any changes in its LEP programs until after submitting a satisfactory proposed plan. R.E. 11 at 1-2. Thus, the 2009-2010 deadline was just that – a deadline – and State Defendants were not ordered, or expected, to implement any changes until the court approved State Defendants' proposed plan. State Defendants' comparison (Br. 1) of this order to make changes by the 2009-2010 deadline to the original remedial order in this case is misplaced. Unlike the judgment at issue, the original remedial order set forth a list of actions to be taken (or forbidden to be taken) by State Defendants immediately and continuously (*e.g.*, "Defendants are enjoined from granting 'incentive aid' payments * * * to districts which are enlarged by annexations or consolidation actions in violation of this Order."). See *United States* v. *Texas*, 447 F.2d 441, 444 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

State Defendants' second basis for appellate jurisdiction is similarly unavailing. They contend (Br. 1-2) that, although the district court stated that it

would defer to State Defendants' proposed "course of action as much as possible," the court required the proposed plan to meet the minimum standards in the court's LEP opinion. They further assert (Br. 2) that this case is analogous to *Morales* v. *Turman*, 535 F.2d 864, 867 n.6 (5th Cir. 1976), rev'd on other grounds, 430 U.S. 322 (1977), in which this Court held that ordering a party to include in its proposed plan minimum standards articulated by the district court, despite allowing some flexibility in the terms of the plan, constitutes an appealable injunction under Section 1292(a)(1).

Morales, however, is distinguishable. In *Morales*, which involved a state juvenile justice system, the district court's opinion specified conditions that must be met for the juvenile facilities to satisfy constitutional standards. See *Morales* v. *Turman*, 383 F. Supp. 53, 85, 88, 105, 119, 121, 125-126 (E.D. Tex. 1974). For example, with respect to creating a statewide monitoring system, the court specified that the system should include, among other things, investigation and attempted resolution of complaints by juveniles and staff, and reporting to the court, counsel, and staff of the Texas Youth Council, any violations of the court's order or other matters deemed appropriate by the monitor. *Id*. at 121.

In contrast, the district court in this case emphasized that it would defer to State Defendants' proposed course of action, whenever possible, and refrained

from specifying any conditions that must be in their proposed plan. See *United States* v. *Texas (LULAC V)*, 572 F. Supp. 2d 726, 782 (E.D. Tex. 2008); see, *e.g.*, *id*. at 765 (declining, despite Intervenors' request, to require defendants to conduct onsite monitoring in all circumstances); *id*. at 767 (providing "an example, not a mandate" of how to improve the State's performance indicators for LEP students); *id*. at 775 ("[B]ecause of the bilingual program's recent success in decreasing the margin of performance [for primary LEP students], the Court will defer to the state for the time being."); *id*. at 779 ("TEA must take appropriate action to achieve equal participation in advanced academic courses either through the international baccalaureate or other appropriate programs."); *id*. at 781 ("TEA and Texas, not the Court or Intervenors, have the responsibility to overcome language barriers among LEP students on a statewide basis; the Court must defer to the agency and legislature's political solutions."); *id*. at 782 ("As a nonbinding option, the secondary LEP program could consist of a variation of the current ESL program with substantially enhanced remedial education.").

Indeed, the only action that the district court ordered State Defendants to take was to submit a proposed plan by January 31, 2009. R.E. 11 at 1. It did not mandate or prohibit any specific action. Nor did it require State Defendants to negotiate or consult with Intervenors, the United States, or any other entity. Cf.

Board of Pub. Instruction of Duval County v. *Braxton*, 326 F.2d 616, 618-619 (5th Cir.) (order enjoining defendants from specific acts and requiring parties to meet and negotiate a plan to implement the prohibitions was immediately appealable), cert. denied, 377 U.S. 942 (1964); *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1057 (5th Cir. 1997) (same). In its order denying Defendants' Motion for Stay of Proceedings Pending Appeal, the district court reaffirmed that it has not issued an injunctive order. R. 10650 ("[A]ll Defendants have been ordered to accomplish by January 31, 2009, is to submit a plan for compliance with the EEOA."). Neither this Court nor any other circuit has held that an order to submit a remedial plan alone constitutes an appealable injunction under Section 1292(a)(1). See *Jackson by Jackson* v. *Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 988 (10th Cir. 1992) (stating that an order to propose a plan is not immediately appealable under 1292(a)(1)); *Sherpell* v. *Humnoke Sch. Dist. No. 5 of Lonoke County*, 814 F.2d 538, 539-540 (8th Cir. 1987); *Groseclose* v. *Dutton*, 788 F.2d 356, 359-361 (6th Cir. 1986); *Hoots* v. *Pennsylvania*, 587 F.2d 1340, 1348-1351 (3d Cir. 1978). Accordingly, the Court should dismiss the appeal of the LEP Order for lack of jurisdiction.

II

THE DISTRICT COURT DID NOT ERR IN FINDING THE STATE DEFENDANTS IN VIOLATION OF THE EQUAL EDUCATIONAL OPPORTUNITIES ACT

A. Standard Of Review

The district court's order granting Intervenors' motion to alter or amend a judgment, pursuant to Federal Rules of Civil Procedure 52(b) and 59(e), is reviewed for abuse of discretion. See *Ross* v. *Marshall*, 426 F.3d 745, 763 (5th Cir. 2005), cert. denied, 549 U.S. 1166 (2007); *Golden Blount, Inc.* v. *Peterson Co.*, 438 F.3d 1354, 1358 (Fed. Cir. 2006) (stating that although the Fifth Circuit has not articulated the standard of review for a grant of a Rule 52(b) motion, the court likely would review order for abuse of discretion).[7] A district court "abuses its discretion 'when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *Hinojosa* v. *Butler*, 547 F.3d 285, 292 (5th Cir. 2008). Findings of fact are clearly erroneous if this Court is "left with a definite and firm conviction that a mistake has been made." *Exxon Corp.* v. *Crosby-Mississippi Res., Ltd.*, 154 F.3d 202, 207 (5th Cir. 1998).

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[7] Rule 52(b) authorizes a court to amend its findings or to make additional findings and to amend its judgment accordingly upon motion by a party, while Rule 59(e) authorizes a court to alter or amend judgment upon motion by a party. Fed. R. Civ. P. 52(b), 59(e).

B. The District Court Had Jurisdiction Over The Equal Educational Opportunities Act Claim

State Defendants argue (Br. 26-37) that the district court erred in exercising jurisdiction over Intervenors' EEOA claim because (1) State Defendants have Eleventh Amendment immunity against such claims and (2) Intervenors should not have been allowed to pursue their EEOA claim in this litigation. These claims are without merit.

1. No Eleventh Amendment Bar

a. The district court did not err in rejecting State Defendants' Eleventh Amendment defense. *United States* v. *Texas (LULAC V)*, 572 F. Supp. 2d 726, 733 (E.D. Tex. 2008).

Significantly, this lawsuit is an action by the United States against State Defendants in which private plaintiffs have intervened. The Eleventh Amendment does not bar actions against States by the United States. See *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 498 (5th Cir. 2003) ("States retain no sovereign immunity as against the Federal Government."). The United States has supported Intervenors' claims throughout this proceeding, and State Defendants have had to litigate the EEOA claim not only against Intervenors but also the United States. See *LULAC V*, 572 F. Supp. 2d at 732; see also R.E. 8 at 3

n.5. Accordingly, it would be an unnecessary formality to require the United States to amend its complaint to include an EEOA claim. Moreover, this Court has recognized that the Eleventh Amendment is no bar to an action by the United States to seek relief "for the benefit" of a private party, such as this case. See *Mississippi Dep't of Pub. Safety*, 321 F.3d at 499 (Eleventh Amendment did not bar United States from seeking make-whole relief for the benefit of a private party).

Even if the presence of the United States as plaintiff is not dispositive, State Defendants are not entitled to invoke sovereign immunity because, as the district court correctly found, Congress abrogated States' immunity in the EEOA, 20 U.S.C. 1703(f). R.E. 6 (Mem. Op. in Support of Order Denying Mot. for Reconsideration and Staying District Court Proceedings Against State Defs. at 25-36). Although the Eleventh Amendment ordinarily renders States immune from suits in federal court by private citizens, Congress may abrogate a State's immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). State Defendants concede (Br. 28) that Congress unequivocally expressed its intent to abrogate States' sovereign immunity to claims under the EEOA, and they argue only that Section 1703(f) is

not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

"Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel*, 528 U.S. at 80, that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518, empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728.

Section 5 legislation, however, must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In

concluding that Section 1703(f) meets *City of Boerne*'s congruence and proportionality standard, the district court correctly determined that Section 1703(f) exhibits the necessary congruence and proportionality between the injury to be remedied or prevented – denial of equal educational opportunity due to limited English proficiency – and the means to be adopted – requiring state educational agencies to take "appropriate action" to overcome that denial. R.E. 6 at 25-33; see also *Hibbs*, 538 U.S. at 728 (distinguishing Section 5 prophylactic legislation from substantive redefinition of the Fourteenth Amendment).

Comparing the EEOA to the Family Medical Leave Act, which the Supreme Court found to be a narrowly tailored prophylactic measure aimed at eliminating one aspect of employment discrimination, *Hibbs*, 538 U.S. at 738, the district court found that Section 1703(f) is similarly limited in targeting "one discrete aspect of education policy – English language proficiency." R.E. 6 at 30. The court also found that Section 1703(f)'s requirement for state educational agencies to take "appropriate action" to remedy language barriers facing LEP students provides the same flexibility to States as the "reasonable modification" requirement in the American With Disabilities Act upheld by the Supreme Court in *Lane*, 541 U.S. at 532, as congruent and proportional. R.E. 6 at 30-31.

It appears that State Defendants' only disagreement (Br. 30) with the district court's congruence and proportionality analysis is their belief that Congress may proscribe only intentional discrimination pursuant to Section 5 of the Fourteenth Amendment. The Supreme Court, however, has rejected this argument. See *Kimel*, 528 U.S. at 81. The Court reaffirmed this principle in *Hibbs*, where it upheld Congress's authority to combat employment discrimination even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose. 538 U.S. at 735-740. Most recently, the Supreme Court stated that "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

b. State Defendants' *Ex parte Young* argument (Br. 30) with respect to defendant Texas Commissioner of Education is similarly meritless. Even the absence of a valid abrogation or waiver would not mean that States may ignore the EEOA or, if they do, that private parties have no remedy in federal court. The Supreme Court, in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001), reaffirmed that Eleventh Amendment immunity does not authorize States to violate federal law. For a holding that "Congress did not

validly abrogate the States' sovereign immunity from suit by private individuals for money damages * * * does not mean that persons with disabilities have no federal recourse against discrimination." See also *Alden* v. *Maine*, 527 U.S. 706, 754-755 (1999) ("The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a concomitant right to disregard the Constitution or valid federal law."); *Osteen* v. *Henley*, 13 F.3d 221, 223 (7th Cir. 1993) ("The immunity that the Eleventh Amendment grants does not go so far as to allow state officials to ignore federal law with impunity.").

It was to reconcile these very principles – that States have Eleventh Amendment immunity from private suits, but that they are still bound by federal law – that the Supreme Court adopted the rule of *Ex parte Young*. See *Alden*, 527 U.S. at 756. The Court held in *Ex parte Young*, 209 U.S. 123, 159-160 (1908), that when a state official acts in violation of the Constitution or federal law, he is deemed to be acting *ultra vires* and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective relief, see *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974), against an official in his or her official capacity, see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). By limiting relief to prospective injunctions against officials, the rule of *Ex parte Young*

avoids courts entering judgments directly against the State but, at the same time, prevents the State (through its officials) from continuing illegal action.

In support of their argument, State Defendants cite (Br. 30), without elaboration, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 47, 73-76 (1996). This case, however, is distinguishable from *Seminole Tribe*. While the Court in *Seminole Tribe* affirmed that the Eleventh Amendment did not bar actions against state officials in their official capacities seeking prospective injunctive relief, it held, as a matter of statutory construction, that "Congress did not intend" to "authorize federal jurisdiction under *Ex parte Young*" to enforce the Indian Gaming Regulatory Act. 517 U.S. at 75 & n.17. In *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635, 645-648 (2002), however, the Court subsequently reaffirmed the general availability of *Ex parte Young* actions to enforce federal statutes, and clarified the holding in *Seminole Tribe* in this regard. See *id*. at 647 (stating that *Ex parte Young* is presumed to apply unless Congress "display[s]" an "intent to foreclose jurisdiction under *Ex parte Young*"). Nothing in the EEOA suggests that Congress intended to withhold jurisdiction from federal courts to enforce the Act's provisions under *Ex parte Young*.

2. Remaining Jurisdictional Claim Meritless

State Defendants contend (Br. 32) that the district court erred in asserting that it retained jurisdiction over the EEOA claim after this Court's decision in *United States* v. *Texas (LULAC III)*, 680 F.2d 356 (5th Cir. 1982). According to State Defendants, the district court's jurisdiction over the EEOA claim ended when this Court "concluded [in *LULAC III*] the intervenors' * * * action should have been vacated as moot." Br. 32. A close reading of this Court's opinion, however, reveals that State Defendants are wrong.

In *LULAC III*, this Court addressed in detail eleven stipulations between the State and Intervenors that provided the crux of the factual support for the district court's finding of Texas's historical segregation of Mexican-American students. 680 F.2d at 362-371. The Court held that State Defendants were entitled to withdraw those stipulations because counsel for State Defendants exceeded her authority in agreeing to those stipulations and the stipulations were "too conclusory." *Id.* at 370-371. Without the factual basis supplied by the stipulations, the Court found that the remaining evidence showed only that "Mexican-American students have in the past been segregated in 2.1 percent of the state's schools" and that does not support imposing a statewide remedy under the Modified Order. *Id.* at 371.

The Court then turned to the EEOA claim. The Court disagreed with the district court's ruling that only bilingual education would satisfy the requirements of 20 U.S.C. 1703(f), but found that the evidence supported finding a violation of Section 1703(f) in some school districts. See *LULAC III*, 680 F.2d at 371-372. Specifically, the Court concluded:

> At trial, plaintiffs' experts presented abundant testimony supportive of the court's finding that the 1973 Texas bilingual program was pedagogically unsound, largely unimplemented, and unproductive in its results. * * * The evidence was even more overwhelming concerning TEA's lack of implementation of the existing, under-funded program. Despite evidence that bilingual programs were not actually bilingual in many school districts, sanctions were not being imposed. In fact, the state apparently lacked an adequate monitoring instrument, and limited English-speaking students were not being adequately identified. * * * Undoubtedly there was some evidentiary support for a conclusion that in some areas local programs for remedying the educational handicaps of limited English-speaking students were deficient.

Ibid. The Court, however, found that the district court erred in denying State Defendants' "post-trial motion to vacate the injunctive remedy on the ground of mootness," because the Texas Legislature had recently enacted the 1981 Bilingual and Special Language Programs Act (S.B. 477) that went "significantly beyond the 1973 scheme and track[ed] the court's eventual remedial order quite closely." *Id.* at 372. Accordingly, this Court reversed and remanded with directives to the district court to determine what questions in this case are "subject to resolution on

a statewide basis" and "in the event that individual school districts are made parties hereafter, to give serious consideration" to motions to change venues. *Id.* at 374.

Contrary to State Defendants' assertion, this Court did not vacate the district court's order with directions to dismiss so as to require Intervenors to start anew in order to assert the EEOA claim. Instead, the Court concluded that there was evidence to support finding that the 1973 Texas bilingual program violated the EEOA, but reversed the district court's statewide injunctive remedy on mootness grounds in order to allow "testing [S.B. 477] against the requirements of section 1703(f)." *LULAC III*, 680 F.2d at 372.

Indeed, this Court expected the district court to retain jurisdiction over the EEOA claim when it directed the district court to determine whether S.B. 477 is valid under the EEOA; if part of the remedy for any EEOA violation should be statewide; and if venue is proper "in the event that individual school districts are made parties hereafter." *LULAC III*, 680 F.2d at 374. Implicit in this Court's holding is the understanding that the EEOA claim had not been finally resolved and was to remain a part of this litigation. Otherwise, there would no reason for the Court to give those instructions for the district court on remand.

Footnote 24 of the opinion, cited by State Defendants (Br. 32), does not alter this conclusion. In that footnote, the Court merely stated that the decision would not foreclose other issues regarding the "reach and manner of application of [Section] 1703(f)" not raised in that appeal. *LULAC III*, 680 F.2d at 371 n.24. Thus, as shown by the remand order, the Court had not resolved the jurisdictional question, as asserted by State Defendants.

State Defendants' argument (Br. 33) that the district court's jurisdiction over the EEOA was "sever[ed]" when the district court did not revisit the appropriateness of a statewide remedy for an EEOA violation until 2006, is similarly without merit. The district court and plaintiffs acted reasonably in affording State Defendants the opportunity to seek to achieve compliance with the EEOA under S.B. 477, as directed by this Court. To be sure, Intervenors did not file their motion for further relief until 2006, three years after the passage of H.B. 3459 and implementation of the Performance Based Monitoring Analysis System (PBMAS). But no intervening decision of this Court or the district court removed the unresolved EEOA claim from the case. Thus, the district court acted properly by ordering State Defendants to propose a remedial plan only after conducting an evidentiary hearing regarding Intervenors' Motion for Further Relief and determining the nature and extent of the Section 1703(f) violation. See *Swann* v.

Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

Despite having litigated the EEOA claim in this action for over twenty years and never objecting to inclusion of EEOA claim until 2006, State Defendants now challenge (Br. 33-37) the district court's exercise of ancillary jurisdiction over the EEOA claim. Federal courts may exercise ancillary jurisdiction "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Peacock* v. *Thomas*, 516 U.S. 349, 354 (1996) (citation omitted). This case falls easily into both categories of ancillary jurisdiction: first, the violations of the EEOA and Modified Order are "factually interdependent"; and, second, exercising jurisdiction over the EEOA claim enabled the district court to "effectuate" the Modified Order. Thus, the district court acted properly in exercising jurisdiction over the EEOA claim.

C. A Statewide EEOA Remedy Is Appropriate

State Defendants contend (Br. 37-44) that a statewide remedy is unwarranted here. In other words, they contend that the State should not be subject to the requirements of 20 U.S.C. 1703(f). In support of their argument,

they assert that this Court disapproves of a statewide EEOA remedy and that state actors should not be responsible for LEP programs offered by local school districts. *Ibid*. These arguments, however, fly in the face of congressional determination that state educational agencies and officers are obligated to take steps to "overcome language barriers that impede equal participation by its students" in its schools. 20 U.S.C. 1703(f).

First, State Defendants' argument ignores the fact that the EEOA imposes obligations on States and local agencies to ensure that the needs of LEP students are addressed. 20 U.S.C. 1703(f), 1720(a). Section 1703(f), the basis of the EEOA claim here, provides: "*No State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by * * * the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. 1703(f) (emphasis added). "[E]ducational agency" is defined as "a local educational agency or a '*State* educational agency.'" 20 U.S.C. 1720(a) (emphasis added), while "State educational agency" is defined as "the agency primarily responsible for the State supervision of public elementary schools and secondary schools," 20 U.S.C. 7801(41). State educational agencies

are also subject to suit in federal court. 20 U.S.C. 1706. Thus, Congress undeniably contemplated statewide remedies under Section 1703(f).

Second, State Defendants incorrectly argue (Br. 38) that they have no obligations under state law that would subject them to EEOA liability. As the district court stated, Texas law imposes on TEA a variety of obligations that relate to helping LEP students overcome language barriers: establishing procedures for identifying school districts that are required to offer bilingual and special language programs, Tex. Educ. Code § 29.053 (Vernon 2006); establishing statewide standardized criteria for identifying LEP students who are eligible for services, Tex. Educ. Code § 29.056 (Vernon 2008); and monitoring and evaluating the effectiveness of local district LEP programs, Tex. Educ. Code § 29.062 (Vernon 2006). The State also mandates the basic content and methods of instruction of these language programs. Tex. Educ. Code § 29.055 (Vernon 2006).

In addition, local school districts must report to TEA the numbers of LEP students identified at each school by the language proficiency assessment committee, Tex. Educ. Code § 29.053(b) (Vernon 2006), and can offer only the kind of language instruction approved by TEA, *id.* § 29.053(d)(2). Any school district seeking an exception from providing a bilingual program must obtain TEA's approval. *Id.* § 29.054(a)-(b). State law also provides for the composition

of language proficiency assessment committees, the responsibilities of the committees, and the information on which they can base their decisions. *Id.* § 29.063.

Thus, under federal and state law, State Defendants have a substantial role in implementing and overseeing LEP programs in the State's schools. Even if local personnel are responsible for the day-to-day implementation of the State's LEP programs, the State may not abdicate its oversight obligations, at least where, as here, state law assigns such responsibilities to the State. See, *e.g.*, *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1043 (7th Cir. 1987) (Illinois Board of Education, which had authority under state law to supervise local school districts, was subject to requirements of Section 1703(f)); *Idaho Migrant Council* v. *Board of Educ.*, 647 F.2d 69, 71 (9th Cir. 1981) (Idaho State Board of Education, which had supervisory authority over schools under state law, could be held liable for violations of the EEOA). As these courts held, state agencies with supervisory authority over local districts may not avoid liability for local LEP programs on the ground that they do not have control over the daily operation of the LEP programs. *Gomez*, 811 F.2d at 1043; *Idaho Migrant Council*, 647 F.2d at 71; see also *United States* v. *Yonkers*, 96 F.3d 600, 621 (2d Cir. 1996), cert. denied, 521 U.S. 1104 (1997). This liability is not vicarious liability, as argued by State Defendants (Br.

40). It is liability for failing to take appropriate action, as required by federal law, to ensure that the needs of LEP students are met.

D. The District Court Did Not Err In Finding State Defendants Violated The Modified Order And EEOA

1. Funding Conditions In The No Child Left Behind Act Have Not Supplanted EEOA's Compliance Standard

The district court found *Flores* v. *Arizona*, 516 F.3d 1140 (9th Cir. 2008), cert. granted, 129 S. Ct. 893 (2009), persuasive with respect to analyzing distinct bilingual and ESL programs and applying NCLB requirements to EEOA implementation. *LULAC V*, 572 F. Supp. 2d at 759-762.[8] State Defendants contend (Br. 44-47) that *Flores* is distinguishable and, in particular, the Ninth Circuit's analysis of NCLB is flawed. Despite the factual differences between the two cases, the district court did not err in agreeing with the Ninth Circuit that compliance with NCLB does not demonstrate that the State is taking appropriate steps to overcome language barriers under the EEOA. See *LULAC V*, 572 F. Supp. 2d at 759-762.

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[8] Based on *Flores*, the court concluded that it committed "clear and manifest error" when it considered the combined performance data for elementary and secondary LEP students, see R.E. 8 at 28-29, in its July 27, 2007, order denying Intervenors' Motion for Further Relief. *LULAC V*, 572 F. Supp. 2d at 762. When it considered the achievement of secondary LEP students alone, the court found that "[a] majority of the individual LEP students in secondary schools are failing, despite TEA's twenty-five year trial." *Ibid.*

a. The EEOA And NCLB Are Fundamentally Different, Although Complementary, Statutory Schemes

The EEOA is an equality-based civil rights statute that requires *all* States to "take appropriate action to overcome language barriers that impede equal participation by [their] students," 20 U.S.C. 1703(f). The EEOA focuses on ensuring that States provide "equal educational opportunity" to LEP students, 20 U.S.C. 1703, through programs and resources that are reasonably calculated to help them become proficient in English. Accordingly, EEOA litigation typically focuses on the adequacy of a State's programs, including factors such as class size, teacher training, time spent in classrooms, instructional materials, tutoring, and state oversight and funding. The EEOA is enforced by individuals through a private right of action and by the Attorney General. 20 U.S.C. 1706, 1709.

NCLB, on the other hand, is a voluntary funding program that focuses on the overall academic improvement of disadvantaged students. See 20 U.S.C. 6301. Title III of NCLB authorizes federal grant funds to help States "ensure that children who are limited English proficient * * * attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. 6812(1).

No State is required to participate in Title III. 20 U.S.C. 6826(a). To receive funds, a State must submit a plan to the Secretary stating that it "will establish standards and objectives for raising the level of English proficiency," require school districts to measure students' progress using annual measurable achievement objectives (AMAOs), and hold school districts accountable if they do not meet the established standards. 20 U.S.C. 6823(b); see 20 U.S.C. 6823(f).

A State that receives Title III funding is required to follow through with processes described in its plan and report its progress to the Secretary of the Department of Education. 20 U.S.C. 6843. But the Secretary does not decide whether the State's LEP programs are adequate. Instead, the *State* evaluates each school district's progress and requires the school district to take remedial action if its students are not meeting the AMAOs established by the State. See 20 U.S.C. 6842(b) (remedial actions include requiring school district to develop an improvement plan, modify curriculum, or replace educational personnel). The Department of Education (DOE) assists the State by monitoring the State's goals and progress and providing technical assistance upon request. 20 U.S.C. 6823(f).

The EEOA and Title III, then, function in distinct ways: the EEOA affords each student an actionable individual right to equal educational opportunity, while

Title III establishes a voluntary funding arrangement under which the Secretary works with States to reach their own academic achievement goals.

b. Several Features Of Title III Make Clear That It Is Not A Substitute For States' Obligations Under The EEOA

First, participation in Title III is voluntary. Unlike the EEOA, which requires States to take action to provide students with equal educational opportunity, 20 U.S.C. 1703, NCLB does not require States to do anything, 20 U.S.C. 6821. Only if a State chooses to apply for funding under NCLB does the State incur the obligations to develop and submit a plan, set standards for student performance, monitor school districts' progress, take appropriate remedial action, and report its progress to DOE. See 20 U.S.C. 6821, 6823, 6825, 6842. And even if a State accepts Title III funding, it is not required to serve all students because each school district's participation in Title III is voluntary. See 20 U.S.C. 6823(b)(3)(D).

Second, Title III "compliance" means adherence to the statute's process-oriented requirements. Title III does not impose specific curricula or delineate what programs States must implement. To the contrary, the Secretary is expressly prohibited from "mandat[ing], direct[ing], review[ing], or control[ling] * * * content [and] curriculum." 20 U.S.C. 7906(b); see 20 U.S.C. 1232a,

3403(b), 6849. Accordingly, the Secretary's approval of a State's plan does not reflect a judgment about the adequacy of the State's LEP programs; instead, it shows that the plan "meet[s] the [statutory] requirements." 20 U.S.C. 6823(c). Indeed, a State's plan simply does not provide sufficient detail about its LEP program to make a determination as to its adequacy for purposes of the EEOA.

Nor does a State's continued receipt of Title III funding establish that the State is offering equal educational opportunity. A State may continue to receive Title III funding even if particular school districts are not meeting the State's AMAOs, so long as it continues to work cooperatively with the DOE and to "substantially" comply with its statutory obligations. 20 U.S.C. 1234c.

Third, Title III places the responsibility for designing and assessing LEP programs on the State. The State sets its own performance standards, determines how to measure student progress, reviews testing results, and requires the school districts to make changes if they fail to meet state standards. 20 U.S.C. 6823, 6842; see 20 U.S.C. 6311(b)(2) and (3). To conclude that a State has taken appropriate action under the EEOA to afford equal educational opportunity to LEP students merely by deciding that it is meeting its own standards would be anomalous, especially because it would tie the *federal* right to varying *state* performance standards.

Fourth, the EEOA and Title III have very different enforcement schemes. The EEOA is enforced through private lawsuits brought by individuals or by the Attorney General. 20 U.S.C. 1706. The Title III provisions are enforced by the Secretary, and they contain no mechanism – administrative or judicial – for individuals to seek relief. See, *e.g.*, *Newark Parents Ass'n* v. *Newark Pub. Sch.*, 547 F.3d 199, 208-214 (3d Cir. 2008) (collecting cases).

Finally, Title III does not mention the EEOA, much less declare that compliance with its requirements satisfies a State's obligations "to take appropriate action to overcome language barriers." 20 U.S.C. 1703(f).[9] To the contrary, Title III provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. 6847; see 20 U.S.C. 7914(a). The EEOA is just such a law, for it guarantees equal educational opportunity without regard to race, color, sex, or national origin. 20 U.S.C. 1701. Title III's savings clause makes clear that Title III does not supersede the EEOA.

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[9] If Congress had intended for the mere existence of an approved NCLB plan to fulfill a State's obligations under the EEOA, it could have added a provision to 20 U.S.C. 6823 to provide that "submission of a plan pursuant to this Section that is approved by the Secretary shall fulfill a State's obligations under 20 U.S.C. 1703(f)."

c. Receipt Of Federal Funding Under Title III Is Not A Complete Defense To Liability Under The EEOA

State Defendants' argument (Br. 45-47) that they need only comply with NCLB to demonstrate compliance with the EEOA amounts to an argument for a repeal by implication, which could be found if the two statutes are irreconcilable. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 549-550 (1974). The EEOA and Title III are not irreconcilable, as confirmed by the savings clause in Title III. And the district court's judgment allows the State to choose its own program for EEOA compliance by submitting a proposed course of action, R.E. 11 at 1, just as Title III allows the State to set its own standards and targets for student performance, see 20 U.S.C. 6823(b)(2).

Even though Title III participation is not a complete defense under the EEOA, whether a State is reaching its own goals under Title III may be relevant in an EEOA suit. For example, data collected by the State as part of its assessment of student progress may be useful in judging whether a State's LEP program results in equal educational opportunity for LEP students under the third step of the *Castaneda* inquiry. See *Castaneda* v. *Pickard*, 648 F.2d 989, 1009-1010 (5th Cir. 1981). But State Defendants are not arguing this. Instead, they insist (Br. 46-47)

that mere participation in Title III satisfies the State's responsibility under the EEOA. The district court appropriately rejected that proposition.

2. The District Court's Factual Findings Are Supported By Substantial Evidence

Applying this Court's framework for assessing whether an educational agency is taking necessary steps to ensure equal educational opportunity, see *Castaneda*, 648 F.2d at 1009, the district court found that State Defendants' chosen course of action, use of the PBMAS to monitor the performance of LEP students, does not constitute appropriate action under the EEOA. See *LULAC V*, 572 F. Supp. 2d at 764-782. In particular, the court found that the PBMAS does not effectively implement the educational theory adopted by the State, and the poor achievement results of LEP students in secondary schools reveal that the PBMAS is failing. *Ibid*. In challenging the court's factual findings concerning the PBMAS, State Defendants fail (Br. 49-54) to show that the district court's findings were clearly erroneous.[10]

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[10] Although the district court found that the PBMAS system violates the Modified Order, it expressly stated that its remedial order is to be based on the EEOA rather than the Modified Order. See *LULAC V*, 572 F. Supp. 2d at 753, 755. This Court, therefore, need not address State Defendants' argument (Br. 48) that the district court erred in finding a violation of the Modified Order. In any event, to the extent that the State Defendants actions violate the EEOA, they violate the Modified Order as well.

Significantly, State Defendants do not argue that the district court's extensive and well-documented findings are not supported by the record. Instead, they contend (Br. 50-54) that the district court improperly "second-guessed the judgment of state education officials" as to parental denials, comparing LEP test scores with the scores of all students, and aggregating data across grade levels and combining them to generate district-wide performance indicators. State Defendants appear to confuse the first prong of *Castaneda*'s analysis, where courts should defer to the State's chosen educational theory so long as it is sound, and the second and third prongs concerning the effectiveness of the State's implementation of its programs and the results of the programs, respectively. *Castaneda*, 648 F.2d at 1009-1010. It was appropriate for the court to reach conclusions, based on the evidence, about whether the program implemented by TEA effectively identifies language barriers facing LEP students and whether TEA has effective procedures for eliminating such barriers.

In each instance, where the court found an aspect of the PBMAS to be deficient, the court explained how that feature of the data collection process undercuts confidence in the performance indicators generated. See pp. 20-22, *supra*. For example, the PBMAS generates drop-out rates for grades seven through twelve even though, according to two witnesses for TEA, such

aggregation would likely distort the drop-out rate because the majority of drop-outs occur in grades nine through twelve. *LULAC V*, 572 F. Supp. 2d at 739 (citing I-81 at 71, 72, 150, 151; 2 Tr. 200).

Furthermore, as found by the court, the data generated by PBMAS shows that the State's LEP programs are failing. In particular, the passage rates for secondary LEP students on standardized tests lag far behind the passage rates for all students. See p. 21, *supra*. And by TEA's own standard for evaluating the success of a LEP program, LEP students in secondary schools are not overcoming language barriers to equal educational opportunities because most are not advancing one language level per year. *LULAC V*, 572 F. Supp. 2d at 751-752; see also 5 Tr. 130-131; D-16.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO SUBSTANTIALLY LIMIT APPLICATION OF THE MODIFIED ORDER

A. Standard Of Review

This Court reviews the district court's order granting in part and denying in part State Defendants' motion to modify order, pursuant to Federal Rule of Civil Procedure 60(b)(5), for abuse of discretion. See *Frazar* v. *Ladd*, 457 F.3d 432, 435 (5th Cir. 2006), cert. denied, 549 U.S. 1118 (2007). The district court's ruling

"is entitled to deference." *Ibid*. Any questions of law underlying the district court's ruling are reviewed de novo. *Ibid*.

B. Samnorwood Does Not Require Releasing Almost Every Texas School District From Application Of The Modified Order

Federal Rule of Civil Procedure 60(b)(5) provides that a party may obtain relief from a court order when, *inter alia*, "applying it prospectively is no longer equitable." The party seeking to modify an injunction bears the burden of establishing that a significant change in factual conditions or the law warrants revision of the injunction. See *Rufo* v. *Inmates of the Suffolk County Jail*, 502 U.S. 367, 383-384 (1992); see also *Agostini* v. *Felton*, 521 U.S. 203, 215 (1997). Modification may be justified based on a change of the law if, for example, "one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo*, 502 U.S. at 389. Relief from a court order should not be granted, however, simply because a party finds "it is no longer convenient to live with the terms" of the order. *Id*. at 383.[11]

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[11] State Defendants' argument (Br. 60-61) focuses on the alleged impropriety of applying the Modified Order to school districts that were never found to have intentionally discriminated based on race, and imposing the burden on school districts to intervene in this litigation to seek release from requirements of the order. As a general rule, however, a party cannot seek redress for injuries done to non-parties unless the parties share a close relationship and genuine obstacles prevent the third-party from seeking relief. See *Singleton* v. *Wulff*, 428

(continued...)

State Defendants argue (Br. 54-65) that the development of desegregation law in this circuit since 1971, including *Samnorwood Independent School District* v. *Texas Educational Agency*, 533 F.3d 258 (5th Cir. 2008), constitutes such a significant change in law to require limiting the reach of the Modified Order to the nine all-black school district defendants (or their successors) in the original lawsuit.[12]

Samnorwood involved two small rural school districts in the Texas panhandle. *Samnorwood*, 533 F.3d at 260. After TEA, acting pursuant to the Modified Order, imposed sanctions against both school districts for not reporting certain student transfers, both school districts intervened to challenge the sanctions and "validity of the Modified Order on its face and as applied to them." *Id.* at 263.

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[11](...continued)
U.S. 106, 113-116 (1976). Ironically, State Defendants assert (Br. 43) the importance of providing school districts an "opportunity to be heard" in court, yet they are requesting relief that is not currently being sought by any school district.

[12] Federal Rule of Civil Procedure 60(c)(1) expressly provides that Rule 60(b) motions "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Thus, notwithstanding State Defendants' repeated references to "the development of desegregation law since [1971,]" in support of their argument, the issue on appeal is only whether *Samnorwood* alone constitutes a change in law warranting modification of the Modified Order. Br. 55; see also Br. 62. Moreover, an injunction, like any other final judgment, has the attributes of "firmness and stability," and "neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided." *System Fed'n No. 91* v. *Wright*, 364 U.S. 642, 647 (1961).

This Court held that the two school districts could not be subject to a "desegregation remedy where there has been no showing or finding of a constitutional violation." *Id*. at 268. Significantly, the Court stated that had these school districts been defendants in the original 1970 lawsuit, they would not be subject to any desegregation order because both districts were desegregated over three years before this lawsuit commenced. *Id*. at 269. The Court held that both school districts would no longer be subject to the student transfer provisions in the Modified Order and TEA's regulations relating to student transfers. *Id*. at 269.

State Defendants contend (Br. 54-55) that *Samnorwood* should be read as limiting the reach of the Modified Order only to the all-black school districts that were parties to the original lawsuit. Not so. Nowhere in the decision did this Court hold that the Modified Order should be so constrained. In fact, this Court expressly limited its holding to the facts of the case:

> Our decision today only holds that the prophylactic provisions created by the Modified Order to remedy the segregative conduct on the part of TEA and all-black schools in East Texas should not be imposed on these two panhandle school districts that had long previously already desegregated and have never since been found to have acted with segregative intent.

Samnorwood, 533 F.3d at 269. The district court properly understood *Samnorwood* as limited to the unique circumstances of that case – that is, it

involved two school districts that were not parties to the original 1970 lawsuit, were unitary when the lawsuit commenced, and had never been shown to have acted with a segregative intent. R.E. 13 at 13. As the district court concluded, what distinguished *Samnorwood* from previous challenges to the Modified Order by school districts is the fact that the school districts in *Samnorwood* were unitary before this lawsuit commenced. R.E. 13 at 11. Indeed, if the defining factor was only that the school districts were not parties to the original lawsuit, as asserted by State Defendants, or the fact that these districts were not parties and no court has found that they acted with discriminatory intent, then this Court could have long ago released the school districts that have intervened in this action from application of the Modified Order.

As the district court correctly pointed out, until *Samnorwood*, this Court had never held that the Modified Order cannot prospectively be applied to a school district, a non-party to the original lawsuit, after the Court found that a certain provision of the order cannot apply to the school district because it did not act with discriminatory intent. R.E. 13 at 11. On the contrary, on three prior occasions, where this Court found that a certain provision of the Modified Order did not apply to a school district (that was not a defendant in the original lawsuit) in that particular case because the school district did not act with discriminatory

intent, the Court did not exempt those school districts from prospective application of any provision of the Modified Order. See *United States* v. *Texas* (*Hearne*), 457 F.3d 472, 484 (5th Cir. 2006); *United States* v. *Texas* (*Goodrich*), 158 F.3d 299, 311 (5th Cir. 1998); *United States* v. *Texas* (*Gregory-Portland*), 654 F.2d 989, 1006-1007 (5th Cir. 1981).

Furthermore, as the district court recognized, far from rejecting the Modified Order's statewide approach, this Court declined the two *Samnorwood* school districts' request for a ruling that the Modified Order did not apply to them simply because they were not defendants in the original actions and have not had a judicial finding of segregative intent entered against them. R.E. 13 at 7-8 (citing *Samnorwood*, 533 F.3d at 269). Instead, this Court issued a much narrower ruling that the Modified Order's student transfer provisions and TEA's related regulations could not be applied to the two school districts because, *inter alia*, they were unitary when this case was filed. R.E. 13 at 7-8 (citing *Samnorwood*, 533 F.3d at 264). The district court then revised the Modified Order so TEA would not be required to enforce any provisions of the Order against the two *Samnorwood* and similarly-situated school districts. R.E. 13 at 13-14. This is the only modification required by this Court's decision in *Samnorwood*.

State Defendants are attempting to effectively terminate the Modified Order without following the procedure required by the Supreme Court for doing so. As this Court stated, the Supreme Court set forth the standard for terminating desegregation injunctions in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995); *Freeman* v. *Pitts*, 503 U.S. 467 (1992); and *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991). See *Frazar*, 457 F.3d at 440 (citing cases). To modify or terminate a desegregation decree, the proper inquiry is: "whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Ibid*. (citing *Freeman*, 503 U.S. at 492).

State Defendants, however, assert (Br. 56-59) that this wrongly presumes that school districts in Texas were racially segregated in 1971 and places the burden on the school districts to show that they did not act with discriminatory intent in order to be released from any provision in the Modified Order. Instead, State Defendants contend (Br. 59) that "[e]ach district must be presumed to have been unitary in 1970 unless the party seeking to subject it to a federal judicial remedial decree proves that it was not." They cite no authority to support this presumption, and we are aware of none.

State Defendants cannot avoid having to satisfy the standard for dissolving desegregation orders set forth by the Supreme Court based on an overly-broad reading of *Samnorwood*, or assertions of an improper burden on school districts. As this Court stated in *Goodrich*, a case involving a school district that was a non-party to the original lawsuit and in which the Court found no evidence that the school district acted with discriminatory intent, the Modified Order, "although written broadly, as was necessary at the outset of the court's enforcement efforts, easily lends itself to the reading mandated by the [post-1971] Supreme Court" decisions. 158 F.3d at 311. If State Defendants wish to dissolve the Modified Order, in part or in its entirety, they should file an appropriate motion in the district court and demonstrate that they meet the termination standard articulated by the Supreme Court. Returning control of the school system to state and local control is the ultimate goal of any desegregation case. See *Freeman*, 503 U.S. at 490. But in order to terminate the Modified Order, State Defendants have the burden to show that judicial supervision is no longer needed. See *Hearne*, 457 F.3d at 475 (noting that State has not moved to terminate Modified Order).

CONCLUSION

This Court should dismiss the appeal of the LEP Order for lack of jurisdiction or, alternatively, affirm the district court's LEP Order (Appeal No. 08-40858). The Court should also affirm the district court's Modification Order (Appeal No. 09-40047).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2009, two copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were sent, along with a computer disk containing an electronic version of the brief, by overnight mail on each of the following persons:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 13,939 words.
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