UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

E.L., a minor, by LA'SHIEKA WHITE the mother, legal guardian, and next friend of E.L., Plaintiff, v. VOLUNTARY INTERDISTRICT CHOICE CORPORATION, Defendant.	**JURY TRIAL DEMANDED** Case No.: 4:16-cv-00629-RLW **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

Plaintiff E.L. asks this Court to enjoin and declare unconstitutional Defendant VICC's policy that categorically prohibits African-American children—and only African-American children—from transferring to magnet schools in the City of St. Louis. Compl., Prayer for Relief ¶¶ 1-2. As a direct consequence of this racially discriminatory policy, E.L. is prevented from transferring to magnet schools in the City of St. Louis, and enrolling at charter schools in the city—including Gateway Science Academy. *Id.* ¶¶ 1, 9-11, 26-28, 36, 38, 45. VICC moves to dismiss E.L.'s complaint arguing that E.L. has failed to state a claim for relief, and he lacks Article III standing to pursue his claims in federal court. *See* Mem. in Support of VICC's Motion to Dismiss (Motion) at 9-20. For the reasons that follow, the motion to dismiss should be denied.

I

E.L.'S CHALLENGE TO VICC'S OVERT DISCRIMINATION AGAINST BLACK CHILDREN IS NOT PRECLUDED BY THE *LIDDELL* LITIGATION

Contrary to VICC's assertions, neither settlement reached in the *Liddell* litigation is a *court*-mandated remedy. "Consent decrees are entered into by *parties* . . . on *their* precise terms . . . . Thus the decree itself cannot be said to have a purpose; rather the parties have purposes." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (emphasis added). Settlement agreements—like the ones reached here in 1983 and 1999—have even less federal imprimatur. *See Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003). Moreover, the Eighth Circuit has specifically recognized that actions taken pursuant to the 1999 settlement are not federal court-imposed obligations. "[T]he Board's obligations regarding *Liddell* flow from the parties' final settlement in that litigation . . . . As with consent decrees, settlement agreements are creatures of private contract law. Accordingly, in performing under the *Liddell* agreement, the Board is not performing duties

mandated by a federal civil rights statute." *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 255 F.3d 478, 482 (8th Cir. 2001) (citation omitted).

Race-based measures do not satisfy strict scrutiny just because they happen to be contained in a consent decree (or settlement). "[T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates . . . the Fourteenth Amendment." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986); *see also Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991) (consent decree does not necessarily satisfy strict scrutiny). The Defendant must prove "the Consent Decree is a narrowly tailored measure[ ] that further[s] compelling government interests." *Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998) (quotations omitted).

These cases universally hold that a consent decree *cannot* immunize its race-based terms from future challenges by non-parties; VICC either disagrees with these cases or is not aware of them. *See* Motion at 9-13; *but see Martin v. Wilks*, 490 U.S. 755 (1989) (discussed *infra* Part. I.B.). Because neither the lack of an explicit "unitary status" finding nor the settlement agreement(s) bar E.L.'s equal protection claim, VICC's motion to dismiss should be denied.

A. A "Unitary Status" Finding Is Not a Prerequisite to Challenging Discriminatory Terms Agreed to in a Settlement

E.L. can challenge race-based remedies in a consent decree *before* a unitary status declaration. In *Ho by Ho v. San Francisco Unified Sch. Dist.*, the Ninth Circuit affirmed the right of non-parties to challenge race-based terms in a school consent decree,[1] even though the school

[1] The consent decree was entered into pursuant to a Fourteenth Amendment challenge to San Francisco's racially segregated schools. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 36 (N.D. Cal. 1983).

district had not attained unitary status. 147 F.3d at 859 (no unitary status); *id.* at 865 (consent decree's race-based remedies must still satisfy strict scrutiny). In *Vaughns v. Bd. of Educ. of Prince George's Cnty.*, 742 F. Supp. 1275, 1285 n.27 (D. Md. 1990), the parties—including the United States—agreed that non-parties could challenge the terms of a consent decree despite there being no unitary status finding.[2] The Fifth, Sixth, and Eleventh Circuits have also squarely permitted challenges to race-based terms in a consent decree under the Equal Protection Clause. *See Dean v. City of Shreveport*, 438 F.3d 448, 456-57 (5th Cir. 2006); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 227 (6th Cir. 1993); *In re Birmingham Reverse Discrimination Emp't Litig.*, 20 F.3d 1525, 1544 (11th Cir. 1994).

E.L. does not need to upend the entire 1999 settlement by seeking a unitary status declaration when his complaint only challenges VICC's enforcement of the race-based county-to-city transfer restriction. Whether St. Louis schools are unitary is a separate question from whether VICC's ban on black student transfers (still) serves to remedy past discrimination against black students. E.L. can litigate the latter question without addressing the former. *See Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992) (plaintiff can challenge consent decree as it applies to him). Regardless of the current status of St. Louis schools, VICC must show that its prohibition on black children transferring to St. Louis schools is the least restrictive means of remedying intentional

[2] *See also United States v. Coffee Cnty. Bd. of Educ.*, 134 F.R.D. 304, 308 (S.D. Ga. 1990) (denying intervention to a non-party in part, because they could file "separate action in this Court seeking injunctive relief"); *Mannings v. Sch. Bd. of Hillsborough Cty., Fla.*, 796 F. Supp. 1491, 1494 (M.D. Fla. 1992) ("parties who were not involved, and who were not in privity with those involved, can not be denied their day in court"); *Allen v. Sch. Bd. for Santa Rosa Cnty., Fla.*, 787 F. Supp. 2d 1293, 1297 (N.D. Fla. 2011) (non-parties to a consent decree may assert a "violation of their own civil rights through either facial challenges to particular provisions that impact those rights or as-applied challenges to the school's enforcement of the consent decree"); *Drinkwater v. Sch. Comm. of Boston*, 550 N.E.2d 385, 386 (Mass. 1990) (rejecting "any notion that [Plaintiff] is bound by a judgment of a Federal court in a case to which she was not a party").

discrimination. *See Young*, 989 F.2d at 228 ("The plan, as well as the decree incorporating it, is no longer narrowly tailored. It no longer serves the same compelling state interests as it once did under the changed circumstances of almost two decades."). Neither the compelling interest finding nor the narrow tailoring inquiry requires this Court to address the dual or unitary nature of St. Louis schools.[3]

Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738 (8th Cir. 2011) and *Missouri v. Jenkins*, 515 U.S. 70 (1995) do not help VICC. *See* Motion at 9-10. Neither case concerns whether a non-party to a settlement can challenge the race-based measures adopted in that settlement prior to a "unitary status" declaration. In *Little Rock*, the court reviewed whether the parties to a consent decree had fulfilled their obligations to eliminate the vestiges of past discrimination. *Little Rock*, 664 F.3d at 743. *Jenkins* is further off-point. There, the Supreme Court rejected a district court-imposed remedy—imposed against the party to the consent decree—even though there had not yet been a unitary status declaration. *Jenkins*, 515 U.S. at 73-74.

For all its bluster, VICC's entire "unitary status" argument rests on a single out-of-circuit, district court case that has yet to be followed. VICC's lone on-point authority is *Hampton v.*

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[3] Although it does not impact E.L.'s suit either way, VICC is incorrect that a unitary status is the only way to end a school district's obligations to remedy past discrimination. "[I]t is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution." *Bd. of Educ. of Oklahoma City Pub. Schs. v. Dowell*, 498 U.S. 237, 245 (1991). Magic words do not end a school district's obligation to remedy an equal protection violation; "a precise statement" is needed. *Id.* at 246. This Court's order in 1999 was clear, precise, and unequivocal. "[T]his case is dismissed with prejudice as to all parties and all claims, in accordance with this memorandum and order. All prior injunctions issued in this case are dissolved." *Liddell v. Bd. of Educ. of City of St. Louis*, No. 4:72CV100 SNL, 1999 WL 33314210, at *9 (E.D. Mo. Mar. 12, 1999). The Court dismissed all pending motions—including the motion that sought a declaration of unitary status—as moot. *Id.* That the Court approved the settlement does not transform a case "dismissed with prejudice," *id.*, into a case with ongoing federal-court obligations. At most it binds the *parties* to the settlement; it does not, and cannot, act as a shield against future litigants—especially those not yet born—who seek to challenge the measures agreed to by the parties. *Wilks*, 490 U.S. at 768.

Jefferson Cnty. Bd. of Educ., 72 F. Supp. 2d 753 (W.D. Ky. 1999). In *Hampton*, the district court shielded race-based remedies required by a consent decree from an equal protection challenge by non-parties. This out-of-circuit, district court case is obviously not precedential, but it is also not persuasive. No court has cited the decision for its legal conclusions. Moreover, E.L. is not seeking to dissolve the settlement like the plaintiffs in *Hampton*. But if the Court follows *Hampton*, the proper remedy is to invite E.L. to file a motion to modify the settlement, not dismiss the case. *See id.* at 783; *see also Martinez v. City of St. Louis*, 327 F. Supp. 2d 1002 (E.D. Mo. 2003), *aff'd*, 539 F.3d 857 (8th Cir. 2008) (complaints challenging race-based components of a consent decree allowed to proceed; parties later filed motions to modify consent decree).

B. VICC's Collateral Attack Argument Is Without Merit

Even if VICC's race-based restrictions are mandated by the settlement agreement, E.L. is permitted to challenge its terms. It is hornbook law that one cannot be bound by a judgment in which he is not made a party. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

The collateral attack argument VICC presses in its motion to dismiss, Motion at 10-11, is foreclosed by the Supreme Court's decision in *Wilks*, 490 U.S. 755. Like VICC here, the defendants in *Wilks* attempted to dismiss the complaint "as impermissible collateral attacks on the consent decrees." *Id.* The Supreme Court disagreed. It held that a voluntary settlement "cannot possibly 'settle' . . . the conflicting claims of another group . . . who do not join in the agreement." *Id.* at 768. The *Wilks* Court also foreclosed the argument that parties challenging the terms of the settlement must rely on the factual findings and conclusions of law reached in the settlement. *See id.* at 769.

VICC would deny E.L. his day in court because, a decade before E.L. was born, parties in another lawsuit agreed to discriminate against black children. *See* Motion at 10-11. Its only authority for doing so is a pre-*Wilks*, out-of-circuit decision, involving *parties* to the litigation, who

later attempted to directly challenge the settlement. *See id.* at 11 (citing *Garcia v. Bd. of Educ.*, 573 F.2d 676, 679 (10th Cir. 1978)). The case is inapplicable in a post-*Wilks* world. "[I]t is well settled that no voluntary settlement—whether entered as a consent decree, approved under Rule 23(e), or agreed to in private—can dispose of the claims of a non-consenting third party." *United States v. Brennan*, 650 F.3d 65, 118 (2d Cir. 2011); *see also United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990) ("If new events amount to discrimination, the courts remain open to fresh litigation to enforce the right of all to be treated without regard to race, sex, and national origin.").[4]

C. Any Argument That the Prohibition on Black Students Transferring Into City of St. Louis Schools Satisfies Strict Scrutiny Is Premature

Sprinkled throughout VICC's motion to dismiss are vague assertions that its prohibition on black students transferring to City of St. Louis schools satisfies strict scrutiny. *See* Motion at 3 ("'Magnet schools' . . . are a classic desegregation tool"); *id.* at 4 ("the ongoing remedial requirements of the Agreement are 'approved . . . [as] an appropriate remedy'"); *id.* at 10 ("the compelling governmental interest . . . still squarely applies"). None of these arguments are appropriate at this time. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (quotation omitted)).

VICC does not dispute the facts that give rise to E.L.'s claim. E.L. is an African-American who resides in St. Louis County. Compl. ¶ 5. VICC administers a program that prohibits African-

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[4] VICC's "release provisions" argument is essentially a reiteration of its "collateral attack" argument. *See* Motion at 12-13. VICC offers neither precedent nor principle to show how a non-party can be bound by the terms of the settlement between the parties based on the language in the settlement. Surely, it cannot be a contractual argument. "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Indeed, the 1999 Settlement Agreement (SA) specifically contemplates that a "third party" may bring a "constitutional or civil rights violation" challenging the terms in the settlement. SA at 45.

American children in St. Louis County from transferring to magnet schools in the City of St. Louis. Compl. ¶ 7; Motion at 7. E.L. is ineligible for the transfer program because of his race. Compl. ¶ 38. Whether VICC's discrimination against this nine-year old African-American child satisfies the constitutional requirements of strict scrutiny is not a matter to be decided on a motion to dismiss. When challenging race-based measures enforced from a settlement agreement, a district court must give plaintiffs "precisely the opportunity that *Wilks* requires: the opportunity to prove that the race-conscious measures taken pursuant to the consent decree were invalid because the consent decree (1) did not serve a remedial purpose, or (2) was not tailored narrowly enough." *Donaghy*, 933 F.2d at 1458.

Moreover, there is good reason to believe VICC's 30-plus years of discrimination against African-Americans is no longer justified. Regardless of whether the county-to-city transfer program is still (or ever was) necessary to eliminate the vestiges of past segregation,[5] it is highly doubtful the ban on African-American transfers is still narrowly tailored to that purpose. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (VICC must provide an "exact connection between justification and classification." (citation omitted)). VICC can argue that it is, but its conclusory statements do not suffice at the motion to dismiss stage. *See Ho by Ho*, 147 F.3d at 865 ("It will be incumbent on [the school district] . . . to produce evidence more concrete than the conclusory statements in its affidavits. The 'vestiges' to be proved by it must be tied to the discriminating practices and policies that justified the consent decree fifteen years ago.").

[5] Even VICC seems confused about this point. It is "phasing out" the race-based restrictions, and hopes to eliminate them by 2021. Motion at 5-6. VICC fails to explain how something necessary to remedy past discrimination can be phased out—or eliminated altogether—without violating the Constitution. Similarly, VICC describes the five-year extensions of the race-based transfer restrictions as an "option" that it "exercised" under the settlement agreement. *Id.* at 7. But how can banning black kids from transferring be "necessary" if VICC had the option not to do it?

II

E.L. HAS STANDING TO CHALLENGE VICC'S DISCRIMINATORY POLICY

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), the Supreme Court explained that Article III standing requires injury, causation, and redressability. Applying this familiar tripartite test, E.L. plainly has standing to challenge VICC's discriminatory policy. He is a child who is prohibited from going to the same schools as his white neighbors. The VICC policy imposing this race-based barrier is a "denial of equal treatment," which plainly establishes injury for Article III standing. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). That injury is directly traceable to VICC's discriminatory transfer policy, and will be redressed by a favorable court decision.

E.L.'s injuries include being deprived of the opportunity to attend Gateway Science Academy this year, and being denied the opportunity of magnet school transfers and charter school admissions now and in the future. *See* Compl. ¶¶ 1, 9-11, 26-28, 36, 38, 45. Each injury is traceable to VICC's policy prohibiting black students from transferring to City of St. Louis schools. A ruling that VICC's uncompromising ban on black student transfers is unconstitutional would redress all of E.L.'s injuries. Accordingly, Article III does not shield VICC's discriminatory policy from the Equal Protection Clause and the "moral imperative of racial neutrality." *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring).

A. E.L. Has Suffered a Serious Injury by Being Denied Equal Treatment on the Basis of Race

"The Supreme Court has clearly ruled that the denial of equal protection by withholding a benefit conferred on others is an injury that supports standing." Wright, Miller & Cooper, 13A Fed. Prac. & Proc. Juris. § 3531.4 (3d ed.) (citing *Heckler v. Mathews*, 465 U.S. 728, 736-40 (1984)).

VICC does not dispute that E.L.—who unlike his white neighbors cannot enroll in city schools (whether magnet or charter) as a result of VICC's discriminatory policy—has suffered the requisite injury-in-fact. *See* Motion at 14-18 (arguing causation and redressability). Nor could it. VICC's policy denies equal protection by withholding a governmental benefit to African-Americans *because* they are African-American.

If E.L. were white, Hispanic, Asian, or any other race but African-American, he could enroll in Gateway Science Academy. It is *only* VICC's odious policy that mandates this result. E.L.'s inability to go to Gateway Science Academy in the same manner as his white neighbors is injury sufficient to establish Article III standing. *Ne. Fla.*, 508 U.S. at 666. "The 'injury in fact . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

E.L.'s ineligibility for Gateway Science Academy is not the only injury he suffers as a result of this policy. E.L. is also denied the opportunity to ever attend a magnet school in the City of St. Louis, even though his white neighbors are given that opportunity.[6] That is why Plaintiffs seek an injunction "prohibiting Defendant from using race in future student transfer decisions." Compl. at 12. It is of no moment that E.L. has yet to apply to a magnet school—after all, his first choice is Gateway. He is "able and ready" to apply to magnet schools. *Ne. Fla.*, 508 U.S. at 666. E.L. is not required to submit an application before challenging the constitutionality of the laws governing applications. *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982).

B. E.L.'s Ineligibility to Attend the Same Schools as His White Neighbors Is Directly Traceable to VICC's Discriminatory Policy

[6] Plaintiff's complaint repeatedly identifies the race-based restrictions in the magnet school program as causing a discrete injury separate from E.L.'s ineligibility to enroll at Gateway. Compl. ¶¶ 1, 10-11, 38.

E.L.'s injury is not just "fairly traceable" to VICC's discriminatory policy, it is a direct consequence of that policy. *Allen v. Wright*, 468 U.S. 737, 751 (1984). VICC's transfer policy explicitly forbids E.L. from transferring to magnet schools in the City because he is black. Compl. ¶ 8; Exhibit A. Defendant makes no effort to respond to E.L.'s inability to transfer into magnet schools administered by Defendant, but that inability is directly traceable to Defendant's discriminatory policy.

E.L.'s inability to enroll in Gateway Science Academy is also directly traceable to VICC's discriminatory transfer policy. Although VICC's transfer policy discriminates against black students "only" with respect to magnet school transfers, state law requires charter schools to enroll any student eligible to transfer into a magnet school under VICC's discriminatory policy. *See* Mo. Ann. Stat. § 160.410(2). If VICC did not prohibit black students from transferring to magnet schools, Gateway would have no discretion but to enroll E.L. VICC's transfer policy is the but for cause of E.L.'s ineligibility to attend Gateway. This is a straightforward reading of Missouri law.[7] The fact that a racially neutral state law serves as a conduit for Defendant's racially discriminatory policy does not destroy the chain of causation. "[W]hat matters is not the 'length of the chain of causation,' but rather the 'plausibility of the links that comprise the chain.'" *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)).[8]

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[7] Notwithstanding its litigation-prompted gloss, VICC previously admitted its responsibility for E.L.'s inability to enroll at Gateway. *See* Robert Patrick, *Woman sues St. Louis area school transfer program, claiming discrimination against black son*, St. Louis Post-Dispatch, May 4, 2016, http://www.stltoday.com/news/local/education/woman-sues-st-louis-area-school-transfer-program-claiming-discrimination/article_f01bc9c5-a536-59e0-8cd9-3770ea43560c.html (VICC explained E.L.'s. ineligibility to Gateway as "a straightforward application of how the program works.").

[8] Obviously, if VICC is just one of multiple contributors to E.L.'s injury, Article III's causation (continued...)

VICC now eschews its previous statement that E.L.'s situation is a "straightforward application" of its discriminatory policy, arguing that Gateway Science Academy destroys any "causal connection" between Plaintiff's injury and "anything done by VICC." Motion at 15. That is incorrect. "An injury may be 'fairly traceable' to a defendant for causation purposes even when that defendant's actions are not 'the very last step in the chain of causation.'" *Wieland v. Dep't of Health & Human Servs.*, 793 F.3d 949, 954 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)). VICC's cited authority is off-point; its cases involve a third party's *discretionary* choice, which can sever the chain of causation. *See, e.g.*, *Lujan*, 504 U.S. at 568 (speculative whether a court decision requiring the Secretary of Interior to "consult" with the wrongdoers would change the latter's behavior); *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 936 (2012) ("many factors" in the way of causal relationship between a private company's alcohol test and the state's ultimate rescission of probation).

Here, VICC's discriminatory policy injures Plaintiff by producing a "determinative or coercive effect upon the action of" Gateway Science Academy. *Id.* Gateway's decision to follow VICC guidelines as a matter of state law was hardly an unfettered choice. Plaintiff has therefore satisfied the "relatively modest" burden of establishing that E.L.'s injury is fairly traceable to VICC's discriminatory policy. *Bennett*, 520 U.S. at 171.[9]

VICC digs itself a deeper hole when it argues that E.L. may have been eligible for a waiver

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[8] (...continued)
requirement is satisfied. *See Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013); *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011).

[9] If the Court believes Gateway has discretion not to apply state law and is an indispensable party, it should grant leave for Plaintiff to add Gateway as a Defendant rather than dismiss the case. *See* Fed. R. Civ. Proc. 15(a)(2) ("The court should freely give leave when justice so requires.").

under state law or could have filed a lawsuit in state court seeking to enroll at Gateway. *See* Motion at 14-16.[10] Such additional hurdles would be independent equal protection violations directly traceable to VICC's discriminatory transfer policy. If E.L. were white, he would not have had to go through the rigmarole of requesting a waiver at all—and the imposition of additional burdens suffices to establish Article III standing. *See Ne. Fla.*, 508 U.S. at 666. In any event, E.L. is not required to exhaust state remedies before bringing a constitutional challenge in federal court. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy*, 457 U.S. at 502.

E.L.'s injury—the inability to go to City schools on the same basis as his white neighbors—is directly traceable to Defendant's policy, which only allows students to transfer to schools in the City if they are white. VICC was right the first time: E.L.'s ineligibility to attend city schools is a "straightforward application" of its discriminatory transfer policy. *See* Robert Patrick, *supra*, note 7.

C. Each of E.L.'s Injuries Would Be Redressed by an Injunction Prohibiting VICC from Discriminating Against Black Children

It is also likely, rather than speculative, that E.L.'s injury would be "redressed if [he] were granted the remedy [he] seek[s]." *Wieland*, 793 F.3d at 956. Plaintiff is asking this Court to enjoin the race-based transfer restrictions in the current VICC policy. Compl. at Prayer for Relief ¶ 2. If E.L. prevails, his race will cease to hinder his educational opportunities. Absent the discriminatory VICC policy, E.L. could transfer to any city magnet school and, under state law, would automatically be eligible to enroll at Gateway and other City charter schools.

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[10] VICC's traceability argument hits bottom when it argues that this Court should employ the statutory canon of constitutional avoidance in ruling on E.L.'s Article III standing. *See* Motion at 15 n.12. Constitutional avoidance is a method of interpreting statutes when deciding the merits of cases raising constitutional controversies, not a basis for barring constitutional claimants from having their day in court. *See Bond v. United States*, 134 S. Ct. 2077, 2085 (2014).

Plaintiff's injury is redressed even if VICC follows up on its threat to end the program rather than administer it on a race-neutral basis. *See* Motion at 17-18. E.L.'s right to equal treatment "is not co-extensive with any substantive rights to the benefits denied to him," and can be redressed by "withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740.

VICC has no support for its claim that unconstitutional terms negotiated into a settlement agreement are unredressable by a federal court. *See* Motion at 16 (arguing the court "cannot 'redress' her injury because her injury stems from [the settlement]"). Not only are terms in settlement agreements (or consent decrees) routinely challenged, *see supra* Arg. I.A. and cases cited therein, but the settlement agreement itself anticipates that it might be challenged by non-parties asserting constitutional claims. SA at 45.

Nor is VICC the improper party to redress E.L.'s injury. "[W]hen a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it." *New Hampshire Right to Life P.A.C. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). For example, although Congress passed the Affordable Care Act, it was the Department of Health and Human Services' "enforcement" and "threatened enforcement" of the challenged provisions that made the injury redressable. *Wieland*, 793 F.3d 949. The Eighth Circuit's decision in *Wieland* was hardly groundbreaking. VICC is not immune "from a suit to enjoin it from enforcing an unconstitutional statute which requires segregation of the races." *McCoy v. Louisiana State Bd. of Educ.*, 332 F.2d 915, 917 (5th Cir. 1964).

Here, VICC enforces and administers the settlement agreement through its own

discriminatory transfer policy.[11] "Giving effect to otherwise unconstitutional terms simply because of their ratification by settlement would effectively create a safe haven for impermissible restrictions." *Stephens v. Cnty. of Albemarle*, No. CIV.A.3:04CV00081, 2005 WL 3533428, at *6 (W.D. Va. Dec. 22, 2005). An injunction prohibiting VICC from denying equal treatment to black children will redress Plaintiff's injury.

D. "Sound Jurisprudence" Is No Reason to Deny E.L. His Day in Court

Defendant's "sound jurisprudence" argument further reflects its misunderstanding of the requirements of Article III standing. *See* Motion at 18-19. Plaintiff is suing under Section 1983, and courts "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). None of VICC's cited authority is remotely relevant.[12]

VICC hopes to frame E.L.'s claim as one that pits a rogue mother who failed to go through state protocols against the thousands who came together to draft "the most successful [settlement]

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[11] Although VICC's enforcement of the Settlement Agreement is enough to establish redressability, VICC has, on its own volition, extended the agreement twice for a total of ten years, and could vote to extend the program even further. *See* Compl. ¶¶ 21-22.

[12] The court reached the merits in three of the four cases cited by VICC. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) ("the record before [the Court] amply supports the conclusion that several of the [plaintiffs] have met their burden of proof regarding their standing"); *Chavez-Castillo v. Holder*, 771 F.3d 1081, 1085 (8th Cir. 2014) (rejecting Fourth Amendment claim); *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449, 1450 (8th Cir. 1990) (bankruptcy judge lacks statutory authority to conduct certain jury trials). In the fourth case, the plaintiff lacked standing in a forfeiture proceeding because he had no possessory interest in the property. *United States v. One Parcel of Prop. Located at RR2, Indep., Buchanan Cnty. Iowa*, 959 F.2d 101 (8th Cir. 1992). VICC's footnoted cases fare no better. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002), helps E.L. There, the Ninth Circuit dismissed plaintiffs' equal protection challenge because the race-based terms had yet to be implemented and there were significant question as to whether they ever would be. Here, by contrast, the black student ban has been in place for over 30 years (administered by VICC for the last seventeen), and VICC has the discretion to prolong it indefinitely into the future.

of its kind in the Nation." *See* Motion at 19-20. In fact, E.L. is challenging one paragraph of VICC's own operating policy, that VICC itself is "phasing out" and is currently used by only 140 (non-black) students. E.L.'s lawsuit should not require any modification of the settlement; he only requests a declaration from this Court that the government cannot deny black children the same governmental benefits as white children, and an injunction forbidding VICC from enforcing its black student ban. E.L.'s lawsuit is a straightforward equal protection challenge to a "straightforward application" of VICC's discriminatory transfer policy. *See* Robert Patrick, *supra*, note 8. E.L. is entitled to his day in court.

CONCLUSION

For the foregoing reasons, VICC's motion to dismiss should be denied.

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Respectfully submitted,

s/ Joshua P. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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