No. 16-3242

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

E.L., a minor, by LA'SHIEKA WHITE
the mother, legal guardian, and next friend of E.L.,

Plaintiff - Appellant,

v.

VOLUNTARY INTERDISTRICT
CHOICE CORPORATION,

Defendant - Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri
Honorable Ronnie L. White, District Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Federal Statute

State Statute

Rule of Court

Miscellaneous

Page

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Voluntary Interdistrict Choice Corporation (VICC) enforces a transfer program that prohibits African-American children who live in St. Louis County from transferring to St. Louis magnet schools *because* they are African-American. S.A. 6 ¶ 20. VICC has voluntarily chosen to extend this African-American transfer ban twice, and the program will continue to exist until at least 2022. S.A. 6 ¶ 21. The discriminatory program exists today only because VICC has unilaterally made the decision to continue it. S.A. 6 ¶ 22. No court order made VICC continue the discriminatory program, no previous decision required VICC to extend it, and no court has determined that the program satisfies the Constitution.

E.L., an African-American boy who seeks to have the same opportunity to attend St. Louis schools as his white neighbors, challenges VICC's African-American transfer ban under the Equal Protection Clause. S.A. 1 ¶ 1; *id.* 11-12 Prayer for Relief ¶¶ 1-2. VICC argues that E.L should be denied his day in court because he lacks standing to challenge the ban and that his claim is otherwise barred. Brief for Appellee (VICC Br.) at 18-56. VICC is wrong. For the reasons that follow, the decision below should be reversed and remanded to give E.L. his day in court.

I

E.L. HAS STANDING TO CHALLENGE VICC'S DISCRIMINATORY AFRICAN-AMERICAN TRANSFER BAN

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

VICC's brief misstates E.L.'s Article III injury, which E.L. has explained time and again: unequal treatment on the basis of race. S.A. 1 ¶ 1 (asking the Court to "vindicate his right to be free from racial discrimination"); Mot. for Prelim. Inj., ECF No. 10-1, at 2 (describing E.L.'s "interest in equal treatment under the law"); Oppo. to VICC's Mot. to Dismiss, ECF No. 22, at 8 (establishing that E.L.'s injury is "denial of equal treatment"); Appellant's Opening Brief (Op. Br.) at 9 ("E.L. presses this appeal to ensure that he has the same opportunities as his white neighbors"). VICC's attempt to recast E.L.'s injury as his inability to attend Gateway Science Academy (Gateway) is a fiction of VICC's creation. E.L. has never asked a court to order Gateway to enroll E.L.; he only seeks—and has only ever sought—to be treated equally on the basis of race.

VICC refuses to treat E.L., and other similarly situated African-American children, equally with respect to race. It insists it must continue to treat African-American children like E.L. differently from his white, Hispanic, and Asian neighbors. This is the constitutional injury E.L. asks this Court to redress.

The Supreme Court has stated that E.L.'s *actual* injury—discriminatory treatment on the basis of race—is one of most serious injuries in constitutional law. *Cf. e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) (discussing the constitutional and "moral imperative of racial neutrality"). Here, VICC's unequal treatment manifests itself in multiple ways: it denies E.L. the opportunity to enroll in St. Louis charter schools as a matter of right, and it makes him ineligible to transfer to a St. Louis magnet school.

VICC contends that E.L. lacks an Article III injury, because he *might* be able to attend Gateway after jumping through multiple African-American-specific hoops. *See* VICC Br. at 20-23 (suggesting that E.L. sue Gateway in state court and apply for a waiver of the residency requirement). By ignoring E.L.'s actual injury, however, VICC misses that its African-American hoop jumping suggestion would actually exacerbate E.L.'s injury. His civil rights lawsuit is not premised on his inability to attend Gateway, but rather the differential treatment he suffers because he is African-American. E.L.'s white neighbors can attend Gateway through a straightforward application of Missouri law—without requesting a waiver or suing in state court. VICC's suggestion that E.L. go, hat in hand, begging for a waiver and suing in state court, while his white neighbors enroll as a matter of right, is offensive.

A race-based barrier is plainly sufficient to confer E.L. with Article III standing. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*,

508 U.S. 656, 666 (1993) ("[I]njury in fact . . . is the denial of equal treatment resulting from the imposition of the [race-based] barrier, not the ultimate inability to obtain the benefit."). VICC's response is that these race-based barriers are imposed by Article III's case or controversy requirement. VICC Br. at 22 n.14. Article III did not impose these racial barriers.

First, VICC *is* a proper defendant in this case. *See infra* Arg. I.C (discussing redressability). Second, VICC's contention that E.L. invoked the wrong forum miscasts his federal constitutional claim. VICC argues that state law "ought not be litigated for the first time in federal court," VICC Br. at 22,[1] but fails to show how E.L.'s Fourteenth Amendment claim is state law. Regardless, federal jurisdiction is plainly appropriate where, as here, a plaintiff is alleging that VICC's policy violates the Constitution. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 486 (1954) (using the Equal Protection Clause to invalidate state laws"); *see also* 28 U.S.C. § 1331 (conferring federal district courts with jurisdiction of "all civil actions arising under the Constitution").

VICC's discriminatory policy also manifests itself in magnet school admissions. Contrary to VICC's claims, E.L. repeatedly identifies the race-based restrictions in the

[1] VICC also invokes the canon of statutory avoidance to divest this Court of jurisdiction to hear E.L.'s constitutional lawsuit. That canon provides a way for courts to reach a decision on the merits; it does not concern a court's jurisdiction. *See infra* Arg. I.D.

magnet school program as a separate injury. S.A. 1, 3-4, 8 ¶¶ 1, 10-11, 38. In his complaint, E.L. requested an injunction against the race-based restrictions in the transfer program, because they prohibit African-American county students from "transferring to *schools* in the City . . . ." S.A. 11-12 Prayer for Relief ¶¶ 1-2 (emphasis added). E.L. sought an injunction against VICC's discriminatory treatment that prevents him from attending many St. Louis schools—charters and magnets. E.L. did not ask for admittance to any particular school.

E.L. has alleged that he intends to halt a racially discriminatory system for which he is plainly ineligible because of his race. S.A. 1 ¶ 1; S.A. 3 ¶ 9; S.A. 14-15, 19. Accordingly, he is under no obligation to also allege that he intends to submit a futile application under that racially discriminatory system. *See Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 542-43 (3d Cir. 2011) (lack of allegations regarding intent to attend a certain school are "irrelevant for purposes of standing"). Nor must E.L. actually submit the application under a regime that categorically rejects transfer requests from African-American county residents like E.L. *See Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 516 (1982); *cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) (plaintiffs not required "to show that they have applied for, or have been denied, a permit").

VICC pilfers stray facts from *Patsy* and *Gratz v. Bollinger*, 539 U.S. 244 (2003), without any principled explanation of their relevancy. *Patsy* stands for the

proposition that a Section 1983 plaintiff like E.L. need not "exhaust state judicial or administrative remedies before proceeding in federal court." *Bressman v. Farrier*, 900 F.2d 1305, 1310 (8th Cir. 1990) (citing *Patsy*, 457 U.S. at 500-07). And *Gratz* demonstrates that a plaintiff may establish standing if he shows that he is "able and ready" to apply after the race-based criterion ceases to exist. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 161 (2d Cir. 2012) (citing *Gratz*, 539 U.S. at 262).

VICC's reliance on *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002), is further off point. The race-based policy there had not been applied to plaintiffs, because it had "never been executed before suit." *Id.* at 655. When the school district subsequently implemented the policy, "race was *not* considered as an admissions factor." *Id.* (emphasis added). By contrast, the African-American transfer ban at issue here has been in place for three decades. Naturally, a plaintiff may lack standing to challenge a policy that has never been administered in a racially discriminatory way, but that is no help for VICC which has administered the racially discriminatory program for the past seventeen years, and unilaterally extended it until at least 2022.

VICC's misunderstanding of equal protection law is further revealed by its belated argument that "in any discussion of 'benefits and burdens,' the focus must be

on the City victims this remedial program was intended to benefit."[2] VICC Br. at 24. The Supreme Court has, time and again, rejected this argument, and invalidated laws that discriminate against some, even if they "benefit" others. *See, e.g.*, *Gratz*, 539 U.S. at 270 (invalidating admissions policy that mechanically distributed one-fifth of the points needed for admissions only to applicants of certain races). In any event, E.L. welcomes this discussion. VICC should have every opportunity on remand to prove that its discrimination against County-residing African-American children like E.L. is necessary to benefit the African-American children in the City (where E.L. lived less than a year ago). *But see DeFunis v. Odegaard*, 416 U.S. 312, 342 (1974) (Douglas, J., dissenting) ("The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.").

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

VICC does not dispute that E.L.'s inability to transfer to magnet schools is caused by its discriminatory policy. That alone suffices to show causation. VICC's

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[2] VICC claims that the "transfer of black students from the County to the City" would result in a "segregative act." VICC Br. at 24. That is demonstrably false here, as Gateway, one school which E.L. may not attend, is predominantly white. In 2014, white students outnumbered black students at Gateway Science Academy 352-21. *See* National Center for Education Statistics-Gateway Science Academy/St. Louis, https://nces.ed.gov/globallocator/sch_info_popup.asp?Type=Public&ID=290059203174.

efforts to rebut that E.L. has met a "relatively modest" burden of causation also fails with respect to his ineligibility for St. Louis charter schools. *Bennett v. Spear*, 520 U.S. 154, 171 (1997). VICC misses the leading Supreme Court decision, *Bennett v. Spear*, which held that the causation element is satisfied if the defendant produced plaintiff's injury by placing a "determinative or coercive effect upon the action of someone else." 520 U.S. at 169.

Here, VICC's race-based policy imposes a coercive effect upon charter schools. Charter schools are obliged to follow state law to receive state funding. Thus, it is irrelevant that VICC may not take any future action against Gateway. VICC Br. at 27. VICC has already taken the relevant coercive action. It adopted the discriminatory program, then extended it, then extended it again, all the while administering and enforcing its discriminatory provisions.

Charter schools are obligated to follow state law, which compels them to admit students who are eligible to transfer under VICC's policy. *See* Mo. Ann. Stat. § 160.410(2). Thus, the handout that Gateway administrators delivered to E.L.'s mother strengthens causation. It demonstrates that Gateway agrees with E.L. and that the statutory text is clear and unambiguous. It is VICC's racially discriminatory policy that prevents his enrollment in St. Louis charter schools, not the clear and

unambiguous statute concerning charter school enrollment.[3] Indeed, after this lawsuit was filed, VICC explained that E.L.'s ineligibility to attend charter schools is a "straightforward application of how [VICC's] program works." Robert Patrick, *Woman Sues St. Louis Area School Transfer Program, Claiming Discrimination Against Black Son*, St. Louis Post-Dispatch, May 4, 2016.[4]

C. A Favorable Court Decision Would Plainly Redress E.L.'s Injury and Ensure Equal Treatment on the Basis of Race

VICC argues that E.L.'s injury is not redressable by the Court because: "If VICC had never extended the transfer program, [E.L.'s] position would be exactly the same as it is now because no students, including [E.L.], would be eligible for transfer

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[3] *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928 (8th Cir. 2012), is not implicated here. Invoking diversity jurisdiction, the plaintiff in *Miller* alleged violations of Minnesota state statutes. *Id.* at 931-32. Under Minnesota law, however, "a strict showing of causation is not required" to prevail under those statutes. *Id.* at 935. Accordingly, the plaintiff's state law claims "*cannot* allege a causal connection . . . sufficient for purposes of Article III." *Id.* at 936 (emphasis added). Moreover, the plaintiff failed to show how the toxicology report had a coercive effect on the state's decision to charge him with a probation violation. *Id.* (state chose to file probation charges, state chose to incarcerate, state chose to use a particular toxicology test, state interpreted that test, state determined the cutoff levels, etc.). Here, in stark contrast, E.L. brings only a federal constitutional claim, and has alleged VICC is the cause of his constitutional injury. S.A. 10-11 ¶¶ 46-58. E.L. has shown that VICC's policy is the sole cause of his ineligibility for St. Louis magnet schools, and how it has a coercive effect on his ineligibility for St. Louis charter schools. *See supra* Arg. I. B; Op. Br. at 15-19.

[4] http://www.stltoday.com/news/local/education/woman-sues-st-louis-area-school-transfer-program-claiming-discrimination/article_f01bc9c5-a536-59e0-8cd9-3770ea43560c.html

under the 'urban voluntary transfer program' administered by VICC." VICC Br. at 30. Again, VICC mistakenly believes that E.L. seeks a right to transfer. He does not. He seeks the right to equal protection of the laws, and if VICC stopped discriminating, by stopping the discriminatory program altogether, his injury would be fully redressed.

VICC is also a proper defendant in the lawsuit. It might be true that VICC cannot voluntarily alter the transfer program without the written consent of numerous non-party entities. VICC Br. at 29 n.17. But redressability focuses on whether a plaintiff's injury can be redressed by a favorable decision from the *court*, not as VICC appears to believe, on whether the injury can be redressed by a defendant's voluntary actions outside of court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Here, an injunction would prevent VICC from enforcing the discriminatory transfer guidelines, thereby fully redressing E.L.'s injury.[5]

D. Sound Jurisprudence Is No Reason To Deny E.L. the Opportunity To Challenge VICC's Discriminatory Policy

VICC's "sound jurisprudence" argument is not an argument grounded in Article III. *See Lujan*, 504 U.S. at 560-61 (Article III standing requires injury,

[5] *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), is readily distinguishable. An injunction would not redress the injury of hearing "So help me God" at a presidential inauguration, because no law mandates the inaugural ceremony or requires the President to utilize the services of the Chief Justice. By contrast, VICC is the entity charged with administrating the unconstitutional transfer policy, and it is the entity that decides to continue enforcing it.

causation, and redressability). At most, it goes toward prudential standing, but E.L. 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).

VICC's "sound jurisprudence" arguments do not pass the straight-face test. For one, 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).

VICC resurrects arguments—and the same case citations—that were debunked by E.L. and then abandoned by VICC at the trial court. Namely, E.L. noted that three of the four cases that VICC cites, VICC Br. at 31-32, actually proceeded to the merits. *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 authorization to conduct certain jury trials).[6] After

[6] In the remaining 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.* (continued...)

E.L. noted this at the trial court, Opp. to Mot. to Dismiss at 14 n.12, ECF 22, VICC abandoned its reliance on these cases. *See* VICC's Reply in Support of Mot. to Dismiss, ECF 24. Although VICC has resurrected its reliance on those cases, VICC Br. at 31-32, the decisions have not changed.

VICC speculates that there might be "disruption" if it were enjoined from discriminating on the basis of race. VICC Br. at 33. VICC does not explain why "disruption" is reason to divest this Court of jurisdiction. And VICC does not explain how ending the race-based aspects of the transfer policy will be disruptive, save for a bald conclusion that ending the policy will interrupt the "education[] of current students and caus[e] disruptions to schools throughout the City and County." VICC Br. at 30. By VICC's own account, there "are now just 140 students transferring, less than 10% of the peak number." VICC Br. at 8. Although that undercuts VICC's speculation that an injunction would be disruptive, it supports the need for an injunction. "Injustice anywhere is a threat to justice everywhere." Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963).[7]

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[6] (...continued)
Located at RR2, Indep., Buchanan Cnty. Iowa, 959 F.2d 101 (8th Cir. 1992).

[7] https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html

II

E.L. MAY CHALLENGE THE AFRICAN-AMERICAN STUDENT TRANSFER BAN

A. St. Louis Schools Do Not Need To Be Declared Unitary for E.L. To Challenge VICC's Enforcement of the African-American Student Transfer Ban

VICC rests the bulk of its argument that E.L. is categorically prohibited from challenging the African-American student transfer ban on his failure to seek to have St. Louis schools declared unitary. The argument is a red herring, and the authority VICC cites in support is irrelevant. E.L. does not dispute the current status of St. Louis schools, he does not seek to have St. Louis schools declared unitary, and there is no requirement that he do so before challenging VICC's discriminatory program.

A precise statement is needed where the parties seek to "terminate or dissolve" a consent decree. *Bd. of Educ. of Oklahoma City Pub. Schs., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okla. v. Dowell*, 498 U.S. 237, 246 (1991). Nothing in *Dowell* holds that a plaintiff is obligated to seek unitary status before challenging a single provision that currently discriminates against him.[8] VICC is unable to find any decision that holds otherwise.

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[8] VICC's misquotation of *Dowell* highlights the deficiency it sought to paper over. *Compare Dowell*, 498 U.S. at 246 ("If such *a decree* is to be terminated or dissolved") (emphasis added), *with* VICC Br. at 38 ("before a court-ordered school desegregation *remedy* may be 'terminated or dissolved' ") (emphasis added).

To be sure, *Parents Involved* holds that a school district that achieves unitary status must justify its race-based remedial measures on "some other basis." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007). That point is not in dispute—if the factual predicate for the race-based measures are not present, then the government may not use race. But that is far different from VICC's claim that *Parents Involved* held that race-based measures may *only* be challenged after a declaration of unitary status. VICC Br. at 40 (claiming *Parents Involved* held that "then, and only then" may race-based measures be challenged). Again, VICC's attempt to stretch its authority only highlights its lack of authority.

The 1999 Settlement Agreement includes vastly more provisions than the African-American student transfer ban. *See* Op. Br. at 21. Many of those provisions have no impact on E.L., and he has no interest in seeing them eliminated or modified. It is certainly plausible that some requirements in the 1999 Settlement are still tailored to eliminating the vestiges of past discrimination. The African-American student

transfer ban is not—if it ever was.[9] E.L. may challenge it without upending the 1999 Settlement Agreement because it currently denies him equal protection of the laws.

B. VICC's Attempt To Distinguish *Wilks* and Its Progeny Is Baseless

Targeted equal protection challenges to specific race-based terms contained in settlement and consent decrees are common. The Supreme Court has made clear that "[a] voluntary settlement in the form of a consent decree . . . cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group." *Martin v. Wilks*, 490 U.S. 755, 768 (1989). Unable to distinguish *Wilks* on any principled basis, VICC argues that factual distinctions suffice to undermine this important Supreme Court precedent.

VICC's primary argument is that employment discrimination is "inapposite." VICC offers no reason why discrimination in employment is categorically distinct from discrimination in education, and E.L. can think of none. Indeed, according to the Supreme Court's leading school desegregation decision, "a school desegregation

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[9] VICC's claim—that E.L's "undisguisedly desperate" argument is that "the *Liddell* plaintiffs never met their burden to prove 'narrow tailoring' "—underscores its misunderstanding of equal protection law. VICC Br. at 48. Neither this Court nor the *Liddell* plaintiffs were ever obligated to prove that the African-American student transfer ban was narrowly tailored. *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459 (8th Cir. 1991) (explaining that court-approved settlements are no guarantee that the race-based measures satisfy strict scrutiny). E.L.'s only argument is that banning African-American students from transferring is not narrowly tailored to remedying discrimination against African-Americans today, and that this "remedy" is so far removed from ordinary notions of narrow tailoring, that it probably never was.

case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971).

Certainly challenges to race-based terms in employment consent decrees are more *common* than challenges to race-based terms in school desegregation consent decrees. But the prevalence of the former does not eliminate the viability of the latter. *Wilks* and its progeny offer a principle of American constitutional law, not a procedural mechanism for challenging terms in employment discrimination consent decrees. That principle applies universally to employment consent decrees, *see Donaghy*, 933 F. 2d at 1459, Establishment Clause consent decrees, *see Allen v. Sch. Bd. for Santa Rosa Cnty.*, 787 F. Supp. 2d 1293, 1297 (N.D. Fla. 2011), and yes, even school desegregation consent decrees, *see Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (9th Cir. 1998). VICC's distinction has no merit.

Next VICC argues that E.L. may not challenge the Settlement because it arises from a 30-year-old "adjudicated finding" of discrimination. On this point, both parties agree that *Donaghy*, 933 F.2d 1448, is instructive. In his opening brief, E.L. argued that *Donaghy* unequivocally held that third party challenges to specific provisions in consent decrees may proceed to the merits. *See* Op. Br. at 27-28. In contrast, VICC argues that *Donaghy* holds that cases involving a "formal finding of discrimination" may not proceed to the merits. VICC Br. at 47 (quoting *Donaghy*, 933 F.2d at 1459).

As is unfortunately all-too-common throughout VICC's brief, the quoted passage, and the meaning VICC attributes to it, differ significantly. The full passage explains:

> An affirmative action consent decree stands somewhere in between a voluntary affirmative action program (as in *Wygant*) and a remedial plan that a court has imposed after making a *formal finding of intentional discrimination* (as in *United States v. Paradise*, 480 U.S. 149 (1987)), for a consent decree is a hybrid that has 'attributes both of contracts and of judicial decrees.' *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n. 10 (1975)).

Donaghy, 933 F.2d at 1459 (emphasis added).

The relevant passage is intended to explain the nature of consent decrees, and has nothing to do with whether challenges may be brought to specific measures contained therein. Importantly, in each circumstance—voluntary affirmative action programs, consent decrees, *and formal findings of discrimination*—equal protection challenges to specific remedial measures may go forward. Even in *Paradise*, where there *was* a court-imposed remedial plan,[10] the Supreme Court reached the merits and held that the court-imposed remedy satisfied strict scrutiny. *See Paradise*, 480 U.S. at 167 ("[W]e conclude that the relief ordered survives even strict scrutiny analysis.").

There is no basis in law to treat an adjudicated violation of the Equal Protection Clause distinct from an agreed to violation. "A court finding of *de jure* segregation

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[10] *United States v. Paradise* is the hornbook example of a "court-imposed remedial plan." There, the district court—not the parties to a settlement (or consent decree)—created and ordered the race-conscious measures. 480 U.S. 149, 153 (1987).

cannot be the crucial variable. After all, a number of school districts in the South that the Government or private plaintiffs challenged as segregated by law voluntarily desegregated their schools without a court order." *Parents Involved*, 551 U.S. at 820 (Stevens, J., dissenting). VICC has no law, and only offers its *ipse dixit* for why this Court should treat the 30-year old finding of discrimination sufficient to justify the contemporary racial discrimination it imposes today.

VICC also misdirects the Court when it argues that E.L. is bound to the terms of the 1999 Settlement as an unnamed and unborn class member. *See* VICC Br. at 51 n.33. Children born after settlements were reached in school desegregation cases are only bound to the extent that the issues raised are "substantially identical" so that the interests of the future, unborn plaintiffs were adequately represented. *Los Angeles Unified Sch. Dist. v. Los Angeles Branch NAACP*, 714 F.2d 935, 942 (9th Cir. 1983). *Bronson v. Bd. of Ed. of Sch. Dist. of City of Cincinnati*, contrary to VICC's citation of it, explains that collateral estoppel only prevents later plaintiffs from challenging issues and evidence that had already been litigated. 510 F. Supp. 1251, 1262 (S.D. Ohio 1980); *see also Bronson v. Bd. of Ed. of Sch. Dist. of City of Cincinnati*, 525 F.2d 344, 349 (6th Cir. 1975) ("[T]here are children attending the Cincinnati schools now who either were not born in 1965 or had not started to school. Their claims were not in existence at the time of the judgment . . . and could not have been extinguished by it.").

E.L.'s claim was not in existence at the time of the 1999 Settlement and that Settlement could not extinguish it. E.L. claims that VICC is currently violating his right to equal protection. He argues that VICC's enforcement and administration of the African-American student transfer ban is not supported by a compelling governmental interest and is not narrowly tailored. Neither VICC nor E.L existed when the 1999 Settlement was agreed to, VICC's administration and enforcement of the Program was not known, and no one knew whether VICC would extend the ban once, much less twice until 2022.

Assuming, *arguendo*, that E.L.'s claims against VICC were litigated in the prior action and his interests were adequately represented, the Court should still decline to bind E.L. to it because it would result in a manifest injustice. "Both [collateral estoppel and *res judicata*] are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Bronson*, 525 F.2d at 349 (quoting *Tipler v. E. I. duPont deNemours & Co., Inc.*, 443 F.2d 125, 128 (6th Cir. 1971)). Binding E.L. to that earlier decision would mean that a ten-year old African-American boy cannot challenge a policy that denies him equal opportunity because of his race, and that policy would continue to discriminate against him for at least six more years. Even if VICC's racially discriminatory policy was constitutional in 1984 or 1999, it would be a manifest injustice to allow it to continue today. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974); *Liddell by Liddell*

v. Bd. of Educ. of City of St. Louis, 142 F.3d 1106, 1109 (8th Cir. 1998); *see also infra* Arg. V (discussing due process).

Ho by Ho, 147 F.3d 854 squares perfectly with this case, and VICC's attempt to distinguish it fails. That case involved an equal protection challenge to a single paragraph in a school desegregation consent decree brought by absent class members. *Id.* VICC argues that *Ho by Ho* is "most glaringly" distinguishable because VICC, unlike the Defendant in *Ho by Ho*, was never found to be an "adjudicated constitutional violator." VICC Br. at 48.[11]

E.L. is bringing suit against the party administering and enforcing the African-American student transfer ban. Just like the plaintiffs in *Ho by Ho*, in order to challenge a specific race-based term in the school desegregation consent decree, the plaintiff must challenge the party actually administering and enforcing that provision. VICC is the actor here, and the San Francisco Unified School District was the actor in *Ho by Ho*. 147 F.3d at 856. VICC never explains why E.L. should sue the "adjudicated constitutional violator" from thirty years ago when that violator is not injuring him and the "adjudicated constitutional violation" is not the same violation injuring E.L. today.

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[11] VICC also tries to distinguish *Ho by Ho*, presumably on a less "glaringly" basis, on the grounds that "there had never been an adjudication of violation" in that case. VICC Br. at 48 n.29. For reasons explained in this brief, *see supra* at Arg. II.B. and in E.L.'s opening brief, Op. Br. at 32-34, VICC's distinction has no merit.

VICC correctly notes that the Ninth Circuit returned *Ho by Ho* to the district court and required the school district to prove that the vestiges of prior segregation still existed in order for it to continue to discriminate against the plaintiffs. VICC Br. at 48 n.29 (citing *Ho by Ho*, 147 F.3d 865). E.L. asks this Court to do the same. If VICC seeks to continue to discriminate against E.L., it must prove that it has a constitutional basis to do so.

C. The African-AmericanTransfer Ban Is Not Constitutional by Virtue of Its Inclusion in the 1984 and 1999 Settlements

VICC argues that the judicial opinions approving the 1984 and 1999 Settlements insulate the African-American student transfer ban from scrutiny. VICC Br. at 50-52. However, VICC is all over the map about *why* the courts' approval of the settlement agreements would have this effect. At different points VICC argues that the opinions create a "remedial 'exception'" to the Constitution, *id.* at 49, or E.L. is engaging in an "impermissible collateral attack," *id.* at 50, or the opinions constitute "judgment preclusion," *id.*, or are barred by "binding precedent," or, perhaps most incredibly, the Court's sign off on the settlements "automatically and implicitly" made the measures compliant with the Constitution for all time, *id.* at 49. VICC's shotgun-reasoning fails.

As E.L. explained at length in his opening brief, a settlement or consent decree is not, as a matter of law, court-imposed. It is a negotiated agreement between the

parties to the settlement. *See* Op. Br. at 22-25; *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986); *Donaghy*, 933 F.2d at 1459; *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225, 227 (6th Cir. 1993). VICC fails to address this point of law, choosing instead to note factual differences between the cases unrelated to the legal point in dispute.[12]

VICC disputes E.L.'s characterization of the 1999 Settlement as a contract negotiated between the parties. VICC Br. at 47 n. 28. But it was this Court, in *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 255 F.3d 478, 482 (8th Cir. 2001), that described the 1999 Settlement as "a creature[] of private contract law." According to VICC, the Court's characterization "is not true," either because a similar African-American student transfer ban was adopted in the 1983 Settlement, VICC Br. at 47 n.28, or because the parties in *Bauer* were not challenging the ban, *id.* at 51 n.34. VICC leaves it for the reader to decipher how either feature could change the nature of the 1999 Settlement. E.L. agrees with this Court; the 1999 Settlement is a creature of private contract law.

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[12] For example, VICC distinguishes *Bloomberg* on the grounds that it was a "prison inmate lawsuit." VICC Br. at 44 n.25. E.L. originally cited *Bloomberg* for its straightforward explanation of the precedential effect of settlements. *See* Op. Br. at 23. VICC never explains how or why that point of law would change because it relates to a "prison inmate lawsuit," and E.L. can think of none.

Because the 1999 Settlement is a "creature of private contract law," VICC's argument that the African-American student transfer ban has been definitively adjudicated constitutional has no merit. Court approval of settlement terms is no guarantee that the terms satisfy constitutional requirements. *Donaghy*, 933 F.2d 1459. That is especially true where, like here, the parties have agreed to racially discriminatory terms. *See Young*, 989 F.2d at 227 ("Racial classifications and plans, even if approved as a part of a consent decree, 'are subject to the most exacting scrutiny.'" (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984)).

Court approval of race-based terms agreed to by the parties in a contract is fundamentally different than subjecting those terms to strict scrutiny. *Compare Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986), *with Parents Involved*, 551 U.S. at 720 (2007). This Court's decision upholding the 1983 Settlement and the lower Court's decision upholding the 1999 Settlement do not mean those terms satisfy the Constitution's Equal Protection Clause. Put simply, there can be no *res judicata*, because neither E.L.'s claim, nor the constitutionality of the African-American student transfer ban, were ever adjudicated.[13]

[13] For similar reasons, E.L.'s lawsuit is not an impermissible collateral attack on the either the 1983 or 1999 Settlements (or the court decisions approving them). The *Wilks* Court was presented with the same argument, 490 U.S. at 760. It was rejected. *Id.* at 768. VICC's reliance on the pre-*Wilks Garcia v. Bd. of Educ.*, 573 F.2d 676, 679 (10th Cir. 1978), is simply out-of-date. *See* VICC Br. at 51.

Assuming, *arguendo*, that the courts' decisions approving the 1983 and 1999 Settlements did demonstrate their constitutionality at that time, they do not demonstrate constitutionality in 2016. The *only* reason the African-American student ban exists in 2016 is because VICC has twice unilaterally chosen to extend it. S.A. 6 ¶¶ 21-22. As VICC readily concedes, its decision to extend the ban was voluntary—it was an option it chose to exercise under the 1999 Settlement. It was never once mandated to extend the African-American student transfer ban, much less twice. VICC makes no attempt to justify its decision to authorize the ban through 2022, nor attempt to show how it furthers a compelling interest and is narrowly tailored to that interest. *See Parents Involved*, 551 U.S. at 720 (2007).

III

VICC'S "RELEASE PROVISIONS" ARGUMENT IS MERITLESS

VICC's "release provisions" argument is essentially a reiteration of its *res judicata*/impermissible collateral attack/binding precedent argument. VICC argues it is immune from actions it takes that violate the Constitution because of boilerplate contractual provisions entered into by the parties to the 1999 Settlement. VICC Br. at 53-54. To the extent VICC argues that the release provisions insulate it because they were "incorporated by the [d]istrict [c]ourt's order," VICC Br. at 53, E.L. has explained at length why that is not a "court-imposed" remedy immune from challenge.

See Op. Br. at 22-25; *supra* at Arg. II.B-C. To the extent VICC's argument is that the Board of Education of St. Louis should immunize it from this lawsuit, it may seek to interplead or join it to this lawsuit on remand. In any event, the 1999 Settlement Agreement specifically contemplates a lawsuit alleging a "constitutional or civil rights violation" challenging the terms in the settlement. S.A. 82-83. That is precisely what E.L. is doing here.

IV

E.L. DID NOT WAIVE ANY ARGUMENT

VICC argues that the judgment below should by affirmed because E.L.'s "statement of issues and opening brief on appeal fail to address a number of the grounds for dismissal stated in the [d]istrict [c]ourt's judgment." VICC Br. at 54. Yet each failure VICC identifies stems from the 1999 Settlement and was addressed both by E.L.'s Statement of Issues and at length in his opening brief.

First, E.L. explained that whether St. Louis schools are dual or unitary is irrelevant to his lawsuit in his opening brief. *See* Op. Br. at 28-34. Second, the 1999 Settlement arises from the 1983 *Liddell* judgment, and E.L. explained why that judgment is not "barring, preclusive, or precedential" in his opening brief. *See id.* at 26-34. Third, E.L. explained why the contractual provisions of the 1999 Settlement are no bar to his claim. *See id.* at 23-26.

An examination of VICC's authority demonstrates it has no purchase here. In *Anderson v. U.S. Dep't of Labor*, the plaintiff failed to raise distinct statutes as a grounds for relief in both its docketing statement and opening brief. 422 F.3d 1155, 1174-75 (10th Cir. 2005). Nevertheless, the court chose to "consider these statutes on appeal." *Id.* at 1175. In *U.S. v. Brooks*, this Court declined to hear issues on appeal that were neither raised in the *district court* nor argued in the briefing on appeal. 175 F.3d 605, 606-07 (8th Cir. 1999). In *Bronson v. Swensen*, the Tenth Circuit declined to hear plaintiff's argument that a failure to *civilly* recognize polygamous marriages was unconstitutional, because it was neither briefed nor raised and was simply a ruse to challenge Utah's *criminal* statutes against polygamy. 500 F.3d 1099, 1104-05 (10th Cir. 2007).

In contrast, E.L.'s Statement of Issues and opening brief adequately addressed every issue for which VICC complains. VICC, in fact, responded to each of them. Underlying the doctrine of waiver is the idea that the appellee may be prejudiced and the Court may reach an inadequate result because of the lack of briefing certain issues. *Anderson*, 422 F.3d at 1175 (quoting *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000)). That is certainly not the case here. Each issue VICC identifies was present in E.L.'s opening brief, VICC's brief, E.L.'s reply, the lower court briefing, and the lower court opinion. The issues, quite simply, have been briefed at length. E.L. has

not waived any basis for the dismissal below and, even assuming he did, neither VICC nor the Court has been prejudiced. VICC's arguments should be rejected.

V

THE LOWER COURT'S DECISION RAISES SERIOUS DUE PROCESS CONCERNS

In a footnote, VICC chides E.L.'s due process concerns as "analytically incoherent." VICC Br. at 50 n.32. VICC's understanding of due process is that it is satisfied when a district court dismisses a plaintiff's suit before the merits. *Id.* (E.L."was provided ample opportunity to be heard in the [d]istrict [c]ourt."). VICC is wrong. "[T]he central meaning of procedural due process [is that] '[p]arties whose rights are to be affected are entitled to be heard." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)).

E.L.'s due process concerns emanate from his inability to challenge VICC's discriminatory treatment of African-American children—all because of a seventeen-year-old settlement agreement. *See Wilks*, 490 U.S. at 762 (describing the Nation's "deep-rooted historic tradition that everyone should have his own day in court"). E.L. is entitled to " a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971). Due process is not satisfied simply because a plaintiff is permitted to brief procedural arguments before the district court.

According to VICC, E.L. cannot challenge the race-based provisions in the 1999 Settlement. In addition, he cannot seek relief from the Court order approving the Settlement. *See* Fed. R. Civ. P. 60(b)(5). He also cannot intervene in the *Liddell* action. *See Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679-80 (8th Cir. 1992). If the lower court's opinion stands, E.L. must suffer through racial discrimination until at least 2022, when VICC *assures us*,[14] it will end the discriminatory program. VICC. Br. at 8 n.7.

E.L. is entitled to a meaningful opportunity to be heard as due process requires. This Court can avoid these due process concerns by following *Ho by Ho*, *Wilks*, *Donaghy*, and a host of other decisions permitting equal protection challenges to race-based terms in settlements. It should do so here, and grant E.L. his day in court.

[14] This is far from clear. VICC officials recently remarked that the racially discriminatory provisions might continue past 2036. *See* Dale Singer, *Race-based Student Transfer Program Could Evolve with New Criteria*, Nov. 17, 2016, http://krcu.org/post/race-based-student-transfer-program-could-evolve-new-criteria#stream/0

CONCLUSION

E.L. respectfully requests this Court to reverse the decision of the district court dismissing E.L.'s lawsuit with prejudice, and to remand the case to the district court to proceed to the merits of E.L.'s claim.

DATED: November 29, 2016.

Respectfully submitted,

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AND L.R. 28A(h)(2)

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3. Per Local Rule 28A(h)(2), Appellant's Reply Brief have been scanned for viruses and are virus-free.

DATED: November 29, 2016.

s/ Joshua P. Thompson
JOSHUA P. THOMPSON

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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