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 OPENING BRIEF

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SUMMARY OF THE CASE AND REASONS FOR ORAL ARGUMENT

This is a Fourteenth Amendment challenge to a racially discriminatory policy enforced by Defendant-Appellee Voluntary Interdistrict Choice Corporation. The challenged policy prohibits African-American children—and *only* African-American children—who reside in St. Louis County from transferring to magnet schools in the City of St. Louis. As a result of that policy, and as a necessary consequence of state law, African-American children are also ineligible to attend charter schools in the City of St. Louis. Plaintiff-Appellant E.L. is an African-American child who seeks the opportunity to attend St. Louis schools on an equal basis as his "non-African-American" neighbors.

The district court dismissed E.L.'s complaint. According to the lower court, E.L. lacked standing to challenge the policy because the intervening state law cuts off the chain of causation that prevents E.L. from attending a charter school. The court also ruled that E.L. is prohibited from challenging the racially discriminatory policy because it was agreed to in a 1999 Settlement ending a school desegregation lawsuit.

This case involves important constitutional issues that touch on a nearly forty-year-old desegregation lawsuit. For these reasons, E.L. believes that oral argument will aid the Court in its deliberations and respectfully requests 20 minutes to state his case.

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Appellant E.L. submits this opening brief supporting reversal of the order below dismissing his case with prejudice, and requesting this Court to remand the case to the district court for a decision on the merits.

JURISDICTIONAL STATEMENT

This appeal arises from the district court's judgment and order of dismissal dated July 15, 2016, granting judgment in favor of Defendant-Appellee Voluntary Interdistrict Choice Corporation (VICC) and dismissing the complaint of Plaintiff-Appellant E.L. *See* S.A. 270-71.

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1343(a) (redress deprivation of civil rights); 28 U.S.C. § 2201 (authorizing declaratory relief); and 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"). Venue in the district court was proper pursuant to 28 U.S.C. § 1391(e), because VICC resides in that district, and because a substantial part of the events or omissions giving rise to E.L.'s claim occurred or will occur in that district.

The district court's entry of judgment dismissing E.L.'s complaint constitutes a final judgment resolving all relevant claims under Rule 54(a) of the Federal Rules of Civil Procedure. E.L. filed a timely Notice of Appeal on July 20, 2016, within sixty days of the district court's entry of judgment. S.A. 271. The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether E.L. has standing under Article III of the Constitution to challenge VICC's county-to-city transfer policy, which makes African-American children ineligible to transfer to magnet schools in the City of St. Louis.

Most apposite cases: *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Bennett v. Spear*, 520 U.S. 154 (1997); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496 (1982); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002).

2. Whether E.L.'s claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution is barred by the 1999 Settlement Agreement reached in *Liddell v. Bd. of Educ. of the City of St. Louis*, No. 4:72CV100SNL, 1999 WL 33314210 (E.D. Mo. Mar. 12, 1999).

Most apposite cases: *Martin v. Wilks*, 490 U.S. 755 (1989); *Bauer v. Transitional Sch. Dist. of the City of St. Louis*, 255 F.3d 478 (8th Cir. 2001); *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991); *Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998); *Detroit Police Officers Ass'n v. Young*, 989 F.2d 225 (6th Cir. 1993).

STATEMENT OF THE CASE

In 1980, this Court ruled that St. Louis schools had engaged in system-wide racial discrimination against African-Americans in violation of the Equal Protection Clause. *Adams v. United States*, 620 F.2d 1277, 1291 (8th Cir. 1980). It ordered the schools to desegregate. *Id.* at 1297. Three years later, the district court approved a settlement agreement designed to integrate St. Louis schools, and this Court approved the district court's decision. *See Liddell v. Bd. of Educ. of the City of St. Louis*, 567 F. Supp. 1037 (E.D. Mo. 1983), *aff'd*, *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984).

Fifteen years later, the district court approved a final Settlement Agreement ending federal supervision over St. Louis schools. *Liddell*, 1999 WL 33314210. That Settlement Agreement permitted the race-based transfers to continue for ten years, after which time VICC could voluntarily choose to end the program or continue it. VICC has twice chosen to continue the program—once in 2007 and again in 2012. The race-based transfers, including the prohibition on African-American children transferring to city magnet schools, will continue through at least the 2018-2019 school year.

Prior to August, 2016, E.L. had attended Gateway Science Academy in the City of St. Louis. He was eligible to attend that school, because, until recently, he lived in the City of St. Louis. *See* Mo. Ann. Stat. § 160.410(1) (requiring charter schools to

enroll "[a]ll pupils resident in the district in which it operates"). After his family moved out of the City and into St. Louis County, E.L.'s mother, La'Shieka White, sought to continue E.L's. education at Gateway Science Academy. She was informed that E.L. is ineligible to enroll because he is African-American. It was at this time that La'Shieka became aware of VICC's race-based policy and its prohibition on African-American students transferring to magnet schools in the City of St. Louis.

In addition to enrolling all resident pupils, Missouri charter schools must also enroll "[n]onresident pupils eligible to attend a district's school under an urban voluntary transfer program." Mo. Ann. Stat. § 160.410(2). Since VICC's race-based transfer program qualifies as an "urban voluntary transfer program" under the statute, St. Louis charter schools must enroll any St. Louis County resident eligible to transfer to magnet schools under VICC's discriminatory policy. Because E.L. is African-American, he is ineligible to transfer to either St. Louis magnet schools or, by virtue of operation of Mo. Ann. Stat. § 160.410(2), St. Louis charter schools, including Gateway Science Academy.

E.L. filed this suit challenging VICC's policy as unconstitutional under the Equal Protection Clause. He does not allege that the 1999 Settlement Agreement is illegal, or that St. Louis schools have attained "unitary status." He only challenges VICC's present enforcement of a single provision in the 1999 Settlement

Agreement—the prohibition on African-Americans transferring to magnet schools in the City of St. Louis.

E.L.'s complaint alleges VICC's policy violates his right to equal protection of the laws, because he is denied the same opportunities as other students because of his race. E.L. has never sought an order that he is entitled to enroll at either magnet or charter schools or any specific school. His complaint only seeks to secure his constitutional right to equal treatment. In addition to his complaint, E.L. moved for a preliminary injunction to ensure his continued education at Gateway Science Academy. That injunction asked the district court to enjoin VICC's policy, so that E.L. would have the same opportunities as his white neighbors—including the eligibility to enroll at Gateway Science Academy. The motion did not ask the court to order E.L.'s enrollment at any particular school.

The district court dismissed E.L.'s complaint and denied the preliminary injunction as moot. It held that E.L. lacks standing to challenge VICC's race-based county-to-city transfer policy. According to the lower court, E.L. only challenged his inability to attend Gateway Science Academy. The court ruled that because VICC maintains no authority over charter schools, it is unable to redress E.L.'s injury. With respect to the interplay between VICC's policy and Mo. Ann. Stat. § 160.410(2), the court held that VICC has "no ability [sic] grant Plaintiff to [sic] waiver to allow her [sic] admission to Gateway." S.A. 268.

The district court also ruled that E.L. is unable to challenge the race-based transfer restrictions. *See id.* at 260-65. It held that E.L. is categorically unable to challenge terms in a Settlement Agreement which arise out of a "court-imposed remedy for an adjudicated violation of the Equal Protection Clause in a contested *de jure* school desegregation class action." *Id.* at 262. As a result, the lower court held that E.L.'s claim was barred by the 1999 Settlement in *Liddell*. *Id.* at 265.

This appeal followed. E.L. does not appeal the preliminary injunction, because the 2016-2017 school year has already begun, and E.L.'s mother believes it would cause him undue stress to only temporarily be permitted to switch schools and to do so mid-school year. E.L. presses this appeal to ensure he has the same opportunities as his white neighbors now and in the future.

SUMMARY OF ARGUMENT

E.L. has Article III standing. His injury is undeniable. 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. E.L. is an African-American boy who seeks to have the same opportunity to attend St. Louis schools as his white neighbors. Thus, he is being denied equal opportunity on the basis of race, an injury sufficient to confer Article III standing. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 666. In addition, E.L. is injured as a result of the race-based restrictions in VICC's county-to-city

transfer policy. E.L. is injured because he is ineligible to transfer to St. Louis magnet schools, and is injured because he is ineligible to enroll in St. Louis charter schools, including Gateway Science Academy.

Nor is there any doubt that VICC causes E.L.'s injury. Without the race-based ban against African-American children, E.L. could seek to transfer to a magnet school, or enroll in any St. Louis charter school. It is of no moment that the latter harm is triggered only by function of a Missouri statute—Mo. Ann. Stat. § 160.410(2), because the chain of causation *begins* with VICC's race-based policy. *See Nat'l Audubon Soc'y*, 307 F.3d at 849. Indeed, VICC's policy is the only policy that treats children differently on the basis of race—and it is that policy which prevents E.L.'s enrollment in St. Louis schools. A declaration from the Court that VICC's African-American ban is unconstitutional and enjoining its continued enforcement would redress E.L.'s injuries. He would be treated equally with respect to his race, and would be permitted to attend St. Louis schools, just like his "non-African-American" neighbors are currently allowed to do. *See Wieland v. Dep't of Health & Human Servs.*, 793 F.3d 949, 956 (8th Cir. 2015).

The 1999 Settlement in *Liddell* does not bar E.L.'s suit. The ban on African-American transfers is not required by order of this or any court. *See Donaghy*, 933 F.2d at 1459 (explaining the fundamental nature of settlements). Plaintiffs are able to bring equal protection challenges to current enforcement of particular provisions

contained in settlements (or consent decrees), even if they were previously approved by a federal court. *See Wilks*, 490 U.S. 755; *Donaghy*, 933 F.2d 1448; *Detroit Police Officers Ass'n*, 989 F.2d at 227. There is nothing particular about school desegregation lawsuits that upsets this precedent. *See Ho by Ho*, 147 F.3d at 865.

Because E.L. has Article III standing to challenge VICC's African-American transfer ban, and because the 1999 Settlement does not bar E.L.'s suit, the Court should reverse the lower court's dismissal, and grant E.L. his day in court to prove his claims.

STATEMENT OF THE FACTS

A. E.L.

E.L. is a bright nine-year-old student who had attended Gateway Science Academy (Gateway) until August of this year. S.A. 1 ¶ 1; *id.* at 7 ¶ 31. He is African-American. *Id.* at 1 ¶ 1. For the past two years, E.L. and his mother La'Shieka White lived in a cramped two-bedroom apartment along with her two-year-old son, her eight-month-old daughter, and La'Shieka's husband in the City of St. Louis. *Id.* at 7 ¶ 29.

E.L.'s saving grace was Gateway Science Academy, an excellent charter school located within city limits. *Id.* at 6 ¶ 23. Gateway provides its students with an innovative world-class education, rich in math, science, and technology. *Id.* at 6 ¶ 24. The school focuses on preparing students to become bold inquirers, problem solvers, and ethical leaders, who are ready for post-secondary education. *Id.* E.L. attended

Gateway from kindergarten through third grade, and was beloved by his friends, teachers, and administrators. *Id.* at 7 ¶ 29. He excelled academically, as exemplified by his 3.79 GPA. *Id.* at 7 ¶ 32.

Because E.L.'s family members regularly heard gunshots and were repeatedly victimized by crime, La'Shieka moved her family to Maryland Heights in St. Louis County. *Id.* at 7 ¶¶ 30, 33. The family's new home is spacious; their new neighborhood is safe. *Id.* The new home has a backyard in which E.L. can walk the dog, and no one in the family has heard a gunshot since the move. *Id.*

Because of E.L.'s success at Gateway, La'Shieka asked school officials if E.L could continue his education at the school after the family moved. *Id.* at 8 ¶ 35. She was informed that African-American students residing in her neighborhood did not have the opportunity to attend Gateway. *Id.* at 8 ¶ 36. La'Shieka was shocked that a policy which explicitly discriminates on the basis of race could still exist today. Jason L. Riley, *A St. Louis Desegregation Policy That Segregates*, Wall St. J., May 10, 2016.[1] She started a petition, and after collecting the support of over 130,000 signatures,[2] decided to challenge the discriminatory transfer policy in federal court.

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[1] http://www.wsj.com/articles/a-st-louis-desegregation-policy-that-segregates-1462919325

[2] *See* La'Shieka White, *Don't Let Race Determine My Son's Enrollment*, Change.org, https://www.change.org/p/dese-don-t-let-race-determine-my-son-s-enrollment.

B. Statutory Framework

VICC uses state funds to administer its race-based transfer policy. S.A. 2-3 ¶ 7. Under the policy, African-American students residing in the City of St. Louis are eligible to transfer to schools in the County of St. Louis. *Id.* at 3 ¶ 8. The policy also allows any "non-African-American" student residing in certain county school districts—*e.g.*, Pattonville—to attend magnet schools in the City of St. Louis. *Id.* at 3 ¶ 9. As provided in VICC's Magnet School Guide, non-African-Americans of E.L.'s age have the option of transferring to ten different magnet schools in St. Louis. *Id.* at 27. Because E.L. is African-American, he does not have the same choices. *Id.* at 3 ¶ 10. The handout that Gateway officials used to explain the school's admission policies to La'Shieka accords with VICC's race-based restrictions in its Magnet School Guide. S.A. 7 ¶ 28.

C. The *Liddell* Settlement Agreements

When La'Shieka sought to challenge the discriminatory policy on E.L.'s behalf, she learned that it originated from a decades-old settlement, when a "system-wide remedy" was needed for a "system-wide violation." *Adams*, 620 F.2d at 1291. That case involved a class of black parents, who argued that St. Louis was operating a "dual system" of segregated schools that violated the Equal Protection Clause. *See id.* This Court agreed, and ordered the district court to retain jurisdiction in order to ensure "that the [desegregation] plan effectively integrates the entire St. Louis School system

and to ensure that the plan is, in fact, being carried out." *Id.* at 1297. On remand, the parties reached a settlement agreement that was approved by a federal district court. *See Liddell*, 567 F. Supp. 1037, *aff'd*, *Liddell*, 731 F.2d 1294. The desegregation plan included a voluntary interdistrict transfer plan, which allowed African-American students living in the City to transfer to schools in the County, and white students living in the county to transfer to schools in the City.

Over a decade later, but two decades before this lawsuit, Missouri moved for a finding of unitary status. *Liddell*, 1999 WL 33314210, at *1. Before deciding on that motion, the district court approved a new settlement agreement, and then dismissed the case with prejudice, dissolved all prior injunctions, and dismissed all pending motions as moot. *Id.* at *9.

D. VICC's Enforcement of the 1999 Settlement Agreement

The 1999 Settlement Agreement created the Voluntary Interdistrict Choice Corporation—transforming the transfer program from a federally supervised program into a voluntary program under the auspices of VICC. S.A. 5 ¶ 17. VICC is governed by a board comprised of superintendents of local school districts and uses state funds to administer the race-based transfer program at issue. *Id.*

As the administrator of the transfer program, VICC has unilaterally altered the contours of the program's race-based transfer policy. *Id.* at 6 ¶ 22. For example, under the 1999 settlement agreement, county-to-city transfers are only permitted for

white students. *Id.* at 5 ¶ 18. According to VICC's magnet school application, however, such transfers are permitted for all students—as long as they are "non-African-American." *Id.* at 3 ¶ 10. Moreover, the original settlement agreement, by its own terms, was only required to operate for ten years—leaving the extension of the program to VICC's sole discretion. *Id.* at 6 ¶ 21. VICC's Board of Directors unanimously approved an initial five-year extension in 2007 and then approved another extension of the same length in 2012. *Id.* The African-American transfer ban will continue to operate through at least the 2018-2019 school year. *Id.*

E. Procedural History

After Gateway administrators told La'Shieka that VICC's transfer policy prevented E.L. from attending the school because of his race, E.L. filed a civil rights lawsuit in federal court to vindicate his right to equal protection. Shortly after filing the complaint, E.L. sought a preliminary injunction, which would have allowed him to attend Gateway on the same basis as his white neighbors. ECF No. 10 at 12. VICC opposed the motion, and simultaneously filed its own motion to dismiss the case. S.A. 34-36. The United States District Court for the Eastern District of Missouri

dismissed the case, and denied the preliminary injunction motion as moot.[3] *Id.* at 37-49. This appeal followed.[4]

I

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

"Article III standing is a threshold question in every federal court case." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003). "The heart of standing . . . is the principle that in order to invoke the power of a federal court, a plaintiff must present a 'case' or 'controversy' within the meaning of Article III of the Constitution." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). The requirement ensures that the plaintiff has a "personal stake in the

[3] VICC also filed an attorneys' fee motion against E.L.—a nine-year-old civil rights plaintiff represented free-of-charge by a public interest organization—and called his mother La'Shieka—who had independently gathered over a hundred thousand signatures in a petition to stop discrimination against her son—a "puppet" of the organization. *See* ECF No. 32 at 6.

[4] E.L. is no longer seeking a preliminary injunction to keep him at Gateway, because the district courts decision has already deprived him—on racial grounds—of the chance to stay at the school he has attended his entire life. This August, E.L. started school at Parkwood Elementary School in the Pattonville School District. E.L. appeals the memorandum order granting VICC's Motion to Dismiss, because he continues to seek declaratory and injunctive relief that requires VICC to treat him equally with respect to his race. He seeks to have the same opportunities to attend St. Louis magnet and charter schools as his "non-African-American" neighbors.

outcome of the controversy," so as to avoid advisory opinions concerning abstract disagreements. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Article III requires a plaintiff to show "(1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). E.L. has satisfied each requirement. E.L. has suffered one of the most tangible, concrete, and serious injuries possible—the "denial of equal treatment" on the basis of race. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 666. That injury manifests itself in at least two additional ways: by making it more difficult for E.L. to attend charter schools— including Gateway—because he is African-American, *and* by making E.L. ineligible to transfer to magnet schools because of his race.[5] But the ultimate injury for which E.L. seeks redress is the same under either manifestation: "the denial of equal treatment resulting from the imposition of" a racial barrier. *Id.*

That injury is both traceable to VICC's discriminatory transfer policy, and fully redressable by a court order enjoining the policy. Because VICC's transfer policy is

[5] E.L. properly pled his ineligibility to transfer to magnet schools on the same basis as children of other races. *See* S.A. 1, ¶ 1; *id.* 3-4, ¶¶ 10-11; *id.* 8, ¶ 38. E.L. reserves the right to choose the best school for him; he just wants the same opportunity to choose those schools as his "non-African-American" neighbors.

the only one that discriminates on the basis of race, it logically follows that VICC's policy causes E.L.'s injury—unequal treatment on the basis of race. It similarly follows that a court order enjoining VICC's race-based transfer policy would redress his injury.

A. By Being Denied the Same Opportunities as His "Non-African-American" Neighbors, E.L. Is Treated Unequally on the Basis of Race

Throughout this litigation, E.L. has alleged one of the most serious injuries in constitutional law: unequal treatment on the basis of race. *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"). It is well-established—indeed, hornbook law—that the injury alleged in E.L.'s complaint is sufficient to confer an Article III court with jurisdiction to hear the case. Wright, Miller & Cooper, 13A *Fed. Prac. & Proc. Juris.* § 3531.4 (3d ed. 2005) ("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.").

Here, it is undisputed that VICC's policy explicitly confers burdens and benefits on the basis of race. VICC's own handbook states that its policy allows "non-blacks" to take advantage of its transfer policy, but that blacks are categorically prohibited from doing so. Applied here, E.L.'s neighbors in Maryland Heights, Missouri, are

eligible to participate in VICC's transfer program if they are white, Hispanic, Asian, or Native American; E.L. is ineligible because he is African-American.

The fact that E.L. has not submitted a futile application to transfer to a magnet school does not deprive him of standing. Whether E.L. "'actually applied' for admission as a transfer student is not determinative of his ability to seek injunctive relief in this case." *Gratz*, 539 U.S. at 260-61. It is far too simplistic to say that E.L. is injured because VICC denied his application to transfer. Rather, E.L. is injured because VICC has "denied him the opportunity to compete for admission on an equal basis" with those of other races. *Id.* at 262.

Similarly, VICC's suggestion that E.L. lacks the requisite injury to sue in federal court because he has not sued Gateway in state court is both wrong and pernicious. E.L's "injury 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." *Ne. Fla.*, 508 U.S. at 666. VICC posits that E.L. should go through the additional barriers of asking school administrators (again) if he could attend Gateway, applying for a waiver, and then suing Gateway in state court. E.L.'s non-African-American neighbors, on the other hand, do not have to jump through any of these hoops.

Just as *Plessy* was not solely about railcars, and *Brown* was not solely about attending certain Topeka schools, E.L.'s lawsuit is not solely about Gateway or city magnet schools. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)

("The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (educational opportunity "is a right which must be made available to all on equal terms"). It is about equal treatment—*i.e.*, E.L.'s eligibility to attend those schools based on the content of his character, not on the color of his skin.

B. VICC's Discriminatory Policy Causes E.L.'s Injury

E.L. has met the "relatively modest" burden of establishing that his injury is fairly traceable to VICC's discriminatory policy. *Bennett*, 520 U.S. at 168-69. E.L. is injured because he is being treated differently on the basis of race. *See supra* at I.A. This injury is directly traceable to VICC's policy, which is the only policy that either party can point to that imposes differential treatment on the basis of race.

Additionally, the ineligibility of E.L. to transfer to magnet schools is a direct application of VICC's discriminatory policy. S.A. 19 (magnet school guide). As stated above, VICC's policy allows "non-African-American" county residents of E.L's age the option to choose among ten separate magnet schools in the City of St. Louis. VICC's policy denies E.L. the same option.

E.L.'s forced departure from Gateway Science Academy—the only school he has attended—is also traceable to VICC's discriminatory policy. Gateway administrators gave E.L.'s mother a handout that adopted the express race-based

restrictions in VICC's policy. S.A. 7 ¶ 28. E.L.'s ineligibility to attend Gateway is thus a "straightforward application" of VICC's program, as VICC admitted before it switched course during litigation. Robert Patrick, *Woman Sues St. Louis Area School Transfer Program, Claiming Discrimination Against Black Son*, St. Louis Post-Dispatch, May 4, 2016.[6]

VICC's transfer policy, which discriminates against black students in magnet school transfers, prevents St. Louis charter schools from enrolling "non-African-American" St. Louis County residents. *See* Mo. Ann. Stat. § 160.410(2) (requiring charter schools to enroll any student eligible to transfer into magnet schools under VICC's transfer policy). The fact that state law serves as a conduit by which VICC's policy discriminates against hopeful charter school students, instead of "just" aspiring magnet school students, does not make the discrimination any less traceable to VICC. *See Nat'l Audubon Soc'y Inc.*, 307 F.3d at 849 ("[W]hat matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain.") (internal quotations marks omitted).

The district court erred in ruling that VICC did not cause E.L.'s injury because E.L. *might* have still been able to enroll after applying for a waiver or suing Gateway

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[6] 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's statement that "[t]his particular student's ineligibility is a straightforward application of how the program works and the rules that we must abide by").

in state court. S.A. 267. That holding confounds one of E.L.'s injuries, which is not the inability to attend Gateway *per se*, but the inability to do so on the same basis as his white, Hispanic, Asian, and Native American neighbors. Those neighbors are not required to repeatedly ask Gateway administrators to allow their son into Gateway nor are they required to sue Gateway in state court before being allowed to attend the school. E.L. should not have to do so just because he is African-American. *See 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.").

For that same reason, E.L. should not be required to request a waiver—which he only needs to do *because* he is African-American. This is a civil rights challenge to VICC's transfer policy brought under Section 1983. Hence, "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action." *Patsy*, 457 U.S. at 502.

Nor can the fact that VICC is not the only actor responsible for racial discrimination against E.L. immunize its actions from review. *See Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015) (Article III's causation requirement is satisfied even if Defendant is one of multiple contributors to Plaintiff's injury); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (same); *Connecticut v. American Elec. Power Co. Inc.*, 582 F.3d 309, 345-47 (2d Cir. 2009)

(same), *rev'd on other grounds*, 564 U.S. 410 (2011). An injury may be fairly traceable to a defendant, even "though other factors may also cause" the injury. *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011).

The Supreme Court's decision in *Bennett*, 520 U.S. 154, is illustrative. There, plaintiffs challenged a biological opinion issued by the Fish and Wildlife Service in accordance with the Endangered Species Act of 1973, concerning the operation of the Klamath Irrigation Project by the Bureau of Reclamation, and the project's impact on two varieties of endangered fish. *Id.* at 157. The plaintiffs' injury, the government contended, was not fairly traceable because it was another actor, the Bureau, that "retain[ed] ultimate responsibility for determining whether and how a proposed action shall go forward." *Id.* at 168. The Supreme Court rejected that argument, noting that although the causation requirement is not satisfied if the injury is the result of the independent action, "that does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Id.* at 169. VICC's race-based transfer policy is not only itself discriminatory, but also produces a coercive effect on Gateway and other St. Louis charter schools. As E.L. explained in the complaint, Gateway officials rebuked his mother's attempt to keep him at Gateway by providing her with a handout which adopted VICC's race-based transfer policy as part of Gateway's own enrollment policy. S.A. 7 ¶ 28.

VICC's creative argument to shield its policy from review by a federal court is inconsistent with the purposes of Article III. Virtually every injury is the result of many causes. Yet, under VICC's theory, a would-be defendant could escape judicial review by pointing to another party that also caused a plaintiff's injury. Such a theory, if adopted, would transform Article III from safeguard against advisory opinions into a impenetrable barrier against judicial review.

C. A Court Order Enjoining VICC's African-American Transfer Ban Would Fully Redress E.L.'s Injury

It is 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. If VICC's African-American transfer ban were enjoined, E.L. would be eligible to attend both magnet schools and charter schools on the same basis as his "non-African-American" neighbors. The district court ruled that VICC cannot grant E.L. a waiver to attend Gateway nor can VICC comply with Gateway's statutory imperative not to base admission on race. S.A. 268. But, as stated above, E.L. would not have to request a waiver nor file a lawsuit on statutory grounds if he were not African-American. A favorable ruling would redress E.L.'s injury because he would be eligible on equal terms with his "non-African-American" neighbors—he would not have to beg for a waiver.

VICC is the proper 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 PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). For example, although it was Congress that passed the Affordable Care Act, it was the Department of Health and Human Services' "enforcement" and "threatened enforcement" of the challenged provisions that made it the proper defendant to redress plaintiff's injuries. *Wieland*, 793 F.3d at 949. Here, VICC enforces and administers the settlement agreement through its own discriminatory transfer policy, which it has already voluntarily extended twice for a total of ten years, and may do so again in the future. S.A. 6 ¶ 21. An injunction prohibiting VICC from denying equal treatment to African-American children will redress E.L.'s injury: the denial of equal treatment *because* he is African-American.

II

THE 1999 SETTLEMENT DOES NOT BAR E.L.'S CHALLENGE TO VICC'S ENFORCEMENT OF ITS BAN ON AFRICAN-AMERICAN STUDENT TRANSFERS

E.L. challenges VICC's enforcement of the county-to-city transfer restrictions, which bar African-American children—and only African-American children—from transferring to St. Louis magnet schools. S.A. 11-12 ¶¶ 1-2. These explicit race-

based restrictions violate E.L.'s right to equal protection of the laws guaranteed by the Fourteenth Amendment. Neither this Court nor the district court mandated those race-based restrictions. They began as the result of a settlement entered into nearly twenty years ago to end the *Liddell* litigation. *See Liddell*, 1999 WL 33314210. The African-American ban was then extended twice by VICC on its authority. S.A. 6 ¶¶ 21-22. Accordingly, the discrimination against African-American children like E.L. only continues because VICC continues to perpetuate it.[7] Indeed, in the court below, VICC described the five-year extensions of the African-American transfer ban as an "option" that it "exercised" under the settlement agreement. ECF No. 20 at 7.

E.L. does not seek to upend the 1999 Settlement, which contains a myriad of requirements ranging from funding, facilities, city-to-county transfers, accreditation, and other requirements. *See, e.g.*, S.A. 42 (funding provisions). He only challenges VICC's *enforcement* of a single requirement in the 1999 Settlement, found in a single paragraph of that document, that VICC had the option to end or continue, which denies African-American children the same opportunities as students of other races. S.A. 6 ¶¶ 21-22. E.L. argues that requirement no longer serves a compelling

[7] VICC previously argued both that the race-based restrictions are mandated by this Court and that it is "phasing out" those restrictions. VICC never explained, however, how something necessary to remedy past discrimination can be phased out—or eliminated altogether—without violating the Constitution. *Compare* ECF No. 20 at 1 (restrictions are "phasing out"), *with id.* at 9 (arguing the transfer program cannot be challenged on equal protection grounds).

governmental interest, and is not narrowly tailored to a compelling interest.[8] *Id.* at 10-11 ¶¶ 50-58.

This lawsuit is the proper vehicle to challenge whether the racially discriminatory requirement in a twenty-year old settlement currently satisfies the Constitution. *See Ho by Ho*, 147 F.3d 854 ("It will also be the task of the School District to demonstrate that paragraph 13 is still a remedy fitted to a wrong—to show that the racial classifications and quotas employed by paragraph 13 are tailored to the problems caused by vestiges of the earlier segregation."); *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.).

A. As a Matter of Law, the 1999 Settlement Is Not a Court-Imposed Remedy

VICC's discrimination against African-American St. Louis County children like E.L. is not insulated from the Constitution simply because it was agreed to in the 1999 Settlement Agreement. "[T]he entry of an affirmative action consent decree does not

[8] It is highly doubtful that a ban on African-American transfers was ever narrowly tailored to remedying discrimination against African-American children. And contrary to VICC's arguments below, this Court's approval of the 1984 Settlement does not, as a matter of law, hold otherwise. *Donaghy*, 933 F.2d at 1459 (consent decree does not necessarily satisfy strict scrutiny). In any event, E.L. does not argue that it was unconstitutional *ab initio*. E.L. only argues that the ban fails to serve a compelling governmental interest, and is not narrowly tailored to a compelling governmental interest today. *Id.* at 10-11 ¶¶ 50-58.

guarantee that the decree serves a remedial purpose or is narrowly tailored." *Donaghy*, 933 F.2d at 1459. The court below, however, disagreed. It ruled that school desegregation settlements represent a *sui generis* species of law, to which the ordinary rules do not apply. It held that E.L. could not challenge the 1999 Settlement because it "involved a *court-imposed* remedy for an adjudicated violation of the Equal Protection Clause in a contested *de jure* school desegregation class action." S.A. 262 (emphasis added).

The lower court mischaracterizes the 1999 Settlement. As a matter of law, settlements are not "court-imposed." "[T]he district court's enforcement jurisdiction alone is not enough to establish a judicial 'imprimatur' on the settlement contract." *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003). This is true even where the settlement arises from a class action, or where the court has incorporated the settlement into an order or judgment. "A class action settlement, like an agreement resolving any other legal claim, is a *private* contract negotiated between the parties." *Id.* at 992 (citing 5 *Moore's Federal Practice* § 23.82[1] (3d ed. 2000) (emphasis in original)).

There is no dispute that this Court found St. Louis schools to be in violation of the Equal Protection Clause by systematically segregating and discriminating against African-American children. *Adams*, 620 F.2d 1277. Further, there is no dispute that this Court ordered St. Louis to take affirmative measures to integrate the schools, and

even approved the original settlement reached by the parties to remedy the constitutional violation. *See Liddell*, 731 F.2d at 1326. Yet, neither this Court's approval of the earlier settlement, nor the lower court's approval of the 1999 Settlement, transforms the specific measures agreed to in that private contract into an unassailable court-imposed remedy. "[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*, 933 F.2d at 1459 (measures adopted pursuant to a court ordered consent decree can be challenged as violating the Equal Protection Clause).

This Court has already recognized the fundamental nature of the 1999 Settlement. In *Bauer*, this Court ruled that it lacked jurisdiction to hear an appeal by the Board of Education of the City of St. Louis. 255 F.3d at 483. The Board sought to remove a lawsuit against it to federal court on the grounds that the lawsuit would affect the 1999 Settlement Agreement, which it argued was a federal court-imposed remedy. *Id.* at 480-81. This Court rejected that argument.

> The fact that the district court incorporated that settlement into its final order simply makes the settlement more analogous to the consent decree . . . . 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.

Id. at 482 (citing *In re County Collector*, 96 F.3d 890 (7th Cir. 1996), *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1188 (8th Cir. 1984)).

As a matter of law, the lower court was wrong to find that the 1999 Settlement was a court-imposed 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). Because the 1999 Settlement was a party-imposed obligation—and not a federal court-imposed one—the specific measures agreed to may be challenged as violating the Fourteenth Amendment. *Detroit Police Officers Ass'n*, 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; to pass constitutional muster, they must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of their legitimate purpose.'" (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984))).

B. Equal Protection Challenges to Race-Based Terms in Settlement Agreements (Or Consent Decrees) Are Commonplace

In *Wilks*, 490 U.S. 755, the Supreme Court heard a challenge to consent decrees entered into between the City of Birmingham and NAACP plaintiffs. The "decrees set forth an extensive remedial scheme" that, in part, directed the city to hire black firefighters. *Id.* at 759. Years later, white plaintiffs filed suit alleging the consent

decrees violated their constitutional rights under the Equal Protection Clause. *Id.* at 760. 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 in the form of a consent decree . . . cannot possibly 'settle,' voluntarily or otherwise, the conflicting claims of another group." *Id.* at 768. The *Wilks* Court went further to foreclose the argument that parties challenging the terms of the settlement, must rely on the factual findings and conclusions of law reached in the settlement. The Court held that the plaintiffs' arguments were not "barred to the extent they were inconsistent with the consent decree." *Id.* at 769.

Since *Wilks*, there have been many challenges to terms agreed to in settlements (or consent decrees) that were designed to remedy race-based discrimination. The Fifth, Sixth, and Eleventh Circuits have 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*, 989 F.2d at 227; *In re Birmingham Reverse Discrimination Emp't Litig.*, 20 F.3d 1525, 1544 (11th Cir. 1994). This Court is no different. *See Donaghy*, 933 F.2d at 1459. "[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 City of Chicago*, 897 F.2d at 244 ("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.); *Reed v. United Teachers Los Angeles*, 208 Cal. App. 4th 322, 329 (2012) ("In our view, these cases ineluctably establish that neither a consent decree nor a trial court's approval of a consent decree can abrogate a third party's rights.").

This Court's decision in *Donaghy* is particularly instructive. In that case, the City of Omaha entered into a consent decree with the United States to remedy the city's past racially discriminatory hiring practices. 933 F.2d at 1450-52. Later, a white police officer challenged the race-based hiring practices agreed to in the consent decree as violating his right to equal protection of the laws. *Id.* at 1454. This Court ultimately rejected that challenge, but it did so on the merits. This Court clarified that plaintiffs challenging race-based terms in a consent decree must have "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." *Id.* at 1458.

The plaintiff in *Donaghy* was given the opportunity to prove that particular race-based measures contained in the consent decree violated his right to equal protection. After a trial, the district court ruled that he did not prove his case, and this Court affirmed that judgment. *Id.* at 1456, 1461 ("[T]he City demonstrated that the

consent decree plan was remedial and narrowly tailored."). But at least the plaintiff had his day in Court.

In contrast, E.L. has not been given the same opportunity. E.L. does not seek to upend the Settlement Agreement. He only seeks to show that VICC's decision to continue enforcing a single provision—which denies African-Americans living in St. Louis County the opportunity to transfer to schools in the City—fails to remedy past discrimination against black children and is not tailored to that purpose.

C. A School Desegregation Settlement Is Not Exempt from the General Rule Permitting Later Equal Protection Challenges to the Current Enforcement of Specific Terms

According to the lower court, *Wilks* and its progeny do not apply to school desegregation cases. S.A. 262 ("Most of the cases cited by Plaintiff involve consent decrees adopted to address claims of employment discrimination."). Thus, in one fell swoop, the lower court distinguished the vast majority of appellate precedent permitting challenges to terms contained in discrimination-based settlements and consent decrees. Yet the court offered no *reason* why school desegregation lawsuits receive different treatment than employment discrimination lawsuits. Both involve the same constitutional right—the right to equal protection of the laws. And, after all, the *Wilks* Court did not couch its holding in terms that would only apply to employment discrimination class actions. *See Wilks*, 490 U.S. 768-69.

It cannot be that *Wilks* doesn't apply in a school setting. In *Allen v. Sch. Bd. for Santa Rosa Cnty.*, the court permitted a later challenge to specific terms in a consent decree entered into by a school board to remedy an Establishment Clause violation. 787 F. Supp. 2d 1293, 1297 (N.D. Fla. 2011). *Vaughns v. Bd. of Educ. of Prince George's Cnty.*, 742 F. Supp. 1275 (D. Md. 1990), is also instructive. That case involved a broad student and teacher desegregation consent decree. *Id.* at 1279. When a teacher later brought suit to challenge specific terms in that decree, the parties—including the United States—agreed that the teacher could challenge specific terms of a consent decree despite there being no unitary status finding. *Id.* at 1285 n.27 ("The parties do not dispute plaintiff teachers' right to bring suit here regardless of whether or not this Court finds the Board's policy was required by a court-approved consent decree."). And in *Reed*, the court permitted a challenge to a consent decree entered to remedy students' right to equal education opportunities. 208 Cal. App. 4th at 329. Each case involved education and the courts applied *Wilks* faithfully.

Neither can the sub-issue of school desegregation provide a basis for distinguishing *Wilks*. Multiple courts have recognized the right of plaintiffs to bring challenges to specific race-based terms in school desegregation consent decrees years after they were entered. In addition to *Vaughns* cited above, *United States v. Coffee Cnty. Bd. of Educ.*, involved a lengthy and bitter school desegregation effort in Coffee County, Georgia. 134 F.R.D. 304 (S.D. Ga. 1990). The underlying case resulted in

a "court-ordered" desegregation plan. *Id.* at 306. The school district was never declared "unitary." *Id.* Years later, plaintiffs sought to intervene in the lawsuit to oppose modifications to the underlying court order. *Id.* The court denied that request, in part, because the plaintiffs "may resort to filing a separate action in this Court seeking injunctive relief." *Id.* at 308. Similarly, in *Mannings v. Sch. Bd. of Hillsborough Cnty.* the court permitted a state court challenge to terms contained in a consent decree to proceed over objections from the parties in an ongoing school desegregation lawsuit. 796 F. Supp. 1491 (M.D. Fla. 1992). Although the court relied principally on the Anti-Injunction Act, it noted that "parties who were not involved, and who were not in privity with those involved, can not be denied their day in court." *Id.* at 1494.

While these cases help demonstrate E.L.'s right to bring suit to challenge specific terms in a race-based school desegregation consent decree, *Ho by Ho*, 147 F.3d 854, is directly on point. *Ho by Ho* involved a challenge to a school desegregation consent decree entered into pursuant to an Equal Protection Clause 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). That underlying case, was a class action alleging that San Francisco schools were violating the Equal Protection Clause of the Fourteenth Amendment. *Id.* The class included "all children of school age who are or may in the future become eligible to attend the

public schools of the [San Francisco School] District." *Id.* The consent decree approved by the district court contained many different requirements—including student assignment, teacher assignment, discipline, housing, and parent participation. *Id.* at 40-42. The court approved the decree and retained jurisdiction to enforce its terms. *Id.* at 42, 51. In each of these respects, the *San Francisco NAACP* litigation is identical to the *Liddell* litigation.

In *Ho by Ho*, plaintiffs were absent class members to the original action. They brought an original action challenging one specific paragraph in the multi-faceted consent decree. Like VICC here, the school district defended the new lawsuit on the grounds that the consent decree was res judicata. The Ninth Circuit disagreed. While plaintiffs could not challenge the consent decree *in toto*, they were permitted to challenge the current enforcement of a particular provision that violates their right to equal protection.

> The district court properly ruled that the consent decree of 1983 was res judicata binding the plaintiffs as to the decree's propriety in 1983, while leaving open the question of the propriety of paragraph 13 today . . . . It will also be the task of the School District to demonstrate that paragraph 13 is still a remedy fitted to a wrong—to show that the racial classifications and quotas employed by paragraph 13 are tailored to the problems caused by vestiges of the earlier segregation.

147 F.3d at 865; *see also Allen*, 787 F. Supp. 2d at 1297 (holding that non-parties to a consent decree could not facially attack consent decree, but could "assert the 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"); *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 517 (6th Cir. 1987) ("The reasonableness of one affirmative action remedy . . . is not determinative of the reasonableness of a different remedy.").

Here, while the lower court did not mention *Allen*, *Vaughns*, *Reed*, *Coffee Cnty.*, or *Mannings*, it did offer a basis to distinguish *Ho by Ho*. According to the lower court, *Ho by Ho* is inapposite because "the parties [in the underlying NAACP class action] entered into a consent decree prior to adjudication." S.A. 262. The court's distinction does not hold water. As a factual matter, it is only technically accurate, and as a legal matter it is irrelevant.

First, there *was* an underlying court-adjudicated violation of the Equal Protection Clause against the San Francisco Unified School District. *Johnson v. San Francisco Unified Sch. Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971). That decision was ultimately reversed by the Ninth Circuit, because the district court applied a standard of review that was changed by an intervening Supreme Court case, *Keyes v. Sch. Dist. No. 1 of Denver*, 413 U.S. 189 (1973). *Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349 (9th Cir. 1974). Nevertheless, the Ninth Circuit ordered the school district to continue to comply with the desegregation plan. *Id.* at 352. That action was ultimately voluntarily dismissed as the NAACP plaintiffs filed suit alleging broader equal protection violations.

Second, and more importantly, there is no *legal* reason to treat a consent decree differently simply because it was entered into after a party *admits* it was engaging in systemic discrimination in violation of the Equal Protection Clause, rather than from a settlement entered into because a court found a violation of the Equal Protection Clause. "A court finding of *de jure* segregation 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 in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Stevens, J., dissenting). If anything, the former scenario—where there is no dispute about the underlying constitutional violation—is deserving of more protection.

A rule like that adopted by the lower court here would encourage parties to continue to litigate actions despite egregious constitutional violations. Such a rule could have the "'serious, perhaps irreparable, consequence'" of denying plaintiffs much needed immediate relief—despite agreement as to the constitutional violation. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). Our discrimination laws are designed to encourage settlement of admitted violations. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). For that reason, no court has ever held that an adjudicated violation of the Equal Protection Clause is categorically distinct

from an admitted violation of the Equal Protection Clause. This Court should not be the first.

There is no principled basis to distinguish *Ho by Ho* and this Court should follow it. E.L. is entitled to his day in court to prove that VICC's overt discrimination against African-American children is not necessary to remedy past discrimination against African-American children. Like the school district in *Ho by Ho*, VICC will have the opportunity to prove that it must continue its discrimination against African-American children in order to remedy the vestiges of past discrimination.

III

THE LOWER COURT'S DECISION RAISES SERIOUS DUE PROCESS CONCERNS

The Due Process Clause of the Fifth and Fourteenth Amendments have long been understood to implement this country's "deep-rooted historic tradition that everyone should have his own day in court." *Wilks*, 490 U.S. at 762 (citation omitted).[9] According to the court below, however, E.L. is barred from challenging VICC's treatment of African-American children who reside in St. Louis County—all because of a seventeen-year-old settlement agreement.

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[9] This deeply rooted tradition applies to individual lawsuits like this one, and to class action lawsuits like the *Liddell* litigation. A class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Class-action adjudications "leave[] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

The lower court's ruling leaves E.L. without any avenue to challenge a race-based remedy imposed a decade before his birth, and voluntarily extended by VICC on multiple occasions. E.L. cannot enforce the 1999 Settlement Agreement, regardless of whether he can be properly deemed an unnamed class member to the original *Liddell* litigation. *See Reynolds v. Butts*, 312 F.3d 1247, 1250 (11th Cir. 2002) (unnamed, non-intervening members of a class do not have standing to enforce a consent decree); *cf. Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679-80 (8th Cir. 1992) (unnamed class member lacks standing to appeal because he did not first move to intervene in the district court). In any event, E.L. does not wish to enforce the 1999 settlement agreement; he only wants to enjoin VICC's continued enforcement of a single race-based provision that currently violates his constitutional right to equal protection of the laws.

Nor is E.L. permitted to seek relief from the 1999 Settlement. Federal Rule of Civil Procedure 60(b)(5) only allows *parties* to seek relief from court order. E.L. is not a party to the *Liddell* litigation. There is no judgment against him for which he seeks relief. He brings "an allegation of a new and separate constitutional violation" against an entity that was not a party to the *Liddell* litigation.

CONCLUSION

For the foregoing reasons, 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: September 26, 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 Opening Brief and Addendum have been scanned for viruses and are virus-free.

DATED: September 26, 2016.

s/ Joshua P. Thompson
JOSHUA P. THOMPSON

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 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.

s/ Joshua P. Thompson
JOSHUA P. THOMPSON