Appeal Nos. 20-3574, 20-3658, 21-1262

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DERIC JAMES LIDDELL, et al.,

Plaintiffs/Appellees/Cross-Appellants

v.

STATE OF MISSOURI, et al.,

Defendants/Appellants/Cross-Appellees.

Appeal from United States District Court for the Eastern District of Missouri
(4:72-cv-00100-HEA)
The Honorable Henry Edward Autrey

LIDDELL AND CALDWELL/NAACP PLAINTIFFS/APPELLEES/CROSS-APPELLANTS' JOINT PRINCIPAL AND RESPONSE BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In 1999, following a fairness hearing, the District Court approved a desegregation settlement agreement ("DSA") to resolve this historic, decades-old St. Louis public school desegregation case. In the DSA, the St. Louis Public Schools ("SLPS" or the "District") agreed to continue operating various intradistrict desegregation programs. Funding for these programs was to be derived from the proceeds from a local desegregation sales tax ("DST") approved by the voters of the City of St. Louis and amendments to the State's statutory scheme of school funding. For seven years, the SLPS received all the DST revenue to fund the operation of these intradistrict desegregation programs. Beginning in 2006, however, the State of Missouri began breaching the DSA by diverting DST revenue away from the SLPS and to non-party charter schools. In response to Plaintiffs' Motion to Enforce the Settlement Agreement, the District Court erroneously concluded that the State could continue diverting DST revenue, or its equivalent in State aid, to charter schools if they were operating "desegregation programs"—even though as non-party, non-constitutional violators, charter schools did not have any obligations to undertake desegregation remedies and, therefore, legally could not receive remediation funding. This Court should reverse and remand with instructions that all DST revenue be remitted to the SLPS to fund desegregation programs and that all State aid to the District be fully restored.

Plaintiffs request twenty minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff/Appellee/Cross-Appellant NAACP makes the following disclosure:

1. The parent companies of the corporation: None.

2. Any publicly held company that owns ten percent (10%) or more of the corporation: None.

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JURISDICTIONAL STATEMENT

The District Court originally had federal question jurisdiction over this desegregation case under 28 U.S.C. § 1331. Based on the terms of the DSA, which were incorporated into the Settlement Order, the District Court retained ancillary jurisdiction to adjudicate claims for specific performance brought by Plaintiffs against the State of Missouri. A30; JA194, 334.[1] *See Gilbert v. Monsanto Co.*, 216 F.3d 695, 699 (8th Cir. 2000) (holding that a court retains ancillary jurisdiction to enforce a settlement agreement if the terms of the agreement are incorporated into the dismissal order). On November 24, 2020, the District Court entered an Opinion, Memorandum and Order granting in part and denying in part Plaintiffs' Motion to Enforce the Settlement Agreement. A1-11; JA745-755. On December 30, 2020, the Caldwell/NAACP Plaintiffs timely filed their Notice of Appeal under Federal Rule of Appellate Procedure 4(a)(1)(B). JA822. On February 4, 2021, the District Court granted the Liddell Plaintiffs' Motion to join the Caldwell/NAACP Plaintiffs' Notice of Appeal. JA1063. This Court has jurisdiction over the District Court's final decision under 28 U.S.C. § 1291.

[1] References to Plaintiffs' Addendum are designated as "A," while references to the parties' Joint Appendix are designated as "JA."

STATEMENT OF THE ISSUES PRESENTED ON CROSS-APPEAL

I. Whether the District Court erred in finding that the State did not violate the DSA by enacting—contrary to the terms of the DSA and the findings of the Settlement Order—a new statute (Senate Bill 287) that purported to redirect specifically designated intradistrict desegregation funding to newly-created, non-party charter schools that admittedly had not assumed any desegregation remediation obligations, could not have engaged in any public school segregation, and could not legally receive such desegregation remediation funding.

- *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074 (8th Cir. 2008)
- *Liddell v. Special Admin. Bd. of the Transitional Sch. Dist. of St. Louis*, 894 F.3d 99 (8th Cir 2018)
- *Missouri v. Jenkins*, 515 U.S. 70 (1995)
- *Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781 (8th Cir. 1984)

II. Whether the District Court erred in finding that the DSA permitted non-party charter schools to receive intradistrict desegregation remediation funding when charter schools never assumed any legal obligation to operate the specific intradistrict desegregation remediation programs required by the DSA and Settlement Order and, as non-parties that never operated any segregated school or participated in segregation in education, could not legally receive any desegregation remediation funding.

STATEMENT OF THE CASE

A. History of this Case and the State's Resistance to Fund Desegregation Programs.

For more than 140 years, the SLPS engaged in unconstitutional racial segregation. Finally, in 1972, Mrs. Minnie Liddell filed suit against the SLPS alleging that her children's constitutional right to an equal education without regard to race was being violated by segregation mandated by Missouri state law. *See Liddell v. Bd. of Educ. of St. Louis*, 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd and remanded*, *Adams v. United States,* 620 F.2d 1277 (8th Cir. 1980). Although the United States Supreme Court had issued its ruling in *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954) almost 20 years earlier, the majority of SLPS students were still being educated in racially isolated schools. *Liddell*, 469 F. Supp. at 1329. Until 1976, the Missouri Constitution mandated separate education for Black children. *See* Mo. Const. art. XI, §§ 1 and 3 (1875); Mo. Const. art. IX, §. 1(a) (1976). When this Court first took up the merits of this case in 1980, it found that St. Louis elementary and secondary schools were still segregated. *Adams*, 620 F.2d at 1280. In 1980, the District Court similarly found that the school districts in the St. Louis metropolitan area (St. Louis City and St. Louis County) had been established to create a dual educational system—a predominately white district in St. Louis County and a predominately Black district in the City of St. Louis. *Liddell by Liddell v. Bd. of Educ.*, 121 F.3d 1201, 1213 (8th Cir. 1997).

In 1983, the original parties, joined by 23 suburban school districts, numerous State officials, the U.S. Department of Justice, and the Caldwell/NAACP Plaintiffs, agreed on a comprehensive plan to desegregate SLPS's unconstitutionally dual school system. *Liddell v. Bd. of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983). The plan provided for a voluntary suburban transfer program, magnet schools, intradistrict quality education programs to remedy the lingering effects of the illegal dual system, capital improvements within the SLPS, and improved vocational education. *Id.* The plan eventually received court approval and would govern this case for the next 15 years. A13; JA317.

As the primary constitutional violator, the State of Missouri bore the larger responsibility for funding the desegregation remedy, and that obligation stayed firmly in place despite the State's repeated efforts to fight it. *See, e.g., Liddell v. Bd. of Educ.*, 667 F.2d 643, 654 (8th Cir. 1981); *Liddell v. Bd. of Educ.*, 677 F.2d 626 (8th Cir. 1982); *Liddell v. State of Mo.*, 717 F.2d 1180 (8th Cir. 1983); *Liddell v. State of Mo.*, 731 F.2d 1294 (8th Cir. 1984) (en banc); *Liddell by Liddell v. Bd. of Educ.*, 126 F.3d 1049, 1055 (8th Cir. 1997). The State so vigorously fought its obligations to the plaintiff schoolchildren that one district judge went so far as to describe the State's defiance of court orders as a "deliberate policy" of the State. Order, *Liddell v. Bd. of Educ.,* No. 4:72-cv-00100 (Mar. 4, 1981).

In 1996, the State moved for a declaration that the St. Louis Board of Education ("City Board") no longer operated a segregated school system and for

relief from its funding obligations under the plan. Unwilling to declare that the effects of segregation had been remedied, the District Court declined to issue such an order and instead appointed Dr. William Danforth as Settlement Coordinator to lead the settlement discussions in the hopes that the parties could reach a negotiated resolution. A13; JA317.

After three years of protracted negotiations, the parties agreed to the terms of the DSA in 1999. JA152-291. On March 12, 1999, District Judge Stephen N. Limbaugh, Sr. entered a final judgment and order approving of and incorporating the DSA ("Settlement Order"), finding that the DSA "represents a fair, reasonable and adequate resolution to this historic case." A22; JA326.

B. The DSA, Settlement Order, and Senate Bill 781 Provide that Revenue Generated by the DST be Used Exclusively by the District to Fund Intradistrict Desegregation Programs.

The DSA obligated the SLPS to continue established intradistrict desegregation programs operated solely by the District and implemented in accordance with the 1983 agreement. These programs included, but were not limited to, all-day kindergarten, summer school, college prep and preschool programs, and magnet school programs within the District. JA154-164. The parties recognized the need for increased funding and agreed that these intradistrict desegregation remedies were to be funded through two separate sources: (1) revenue from the DST, a local 2/3 of 1-cent sales tax approved by St. Louis City voters on February 2, 1999; and (2) the State public school foundation formula funding as set forth in Senate Bill

("SB") 781. A13-15; JA165-166, 317-319. Through these two sources, the DSA provided that the District would receive "a minimum in additional funding" for desegregation remediation, which again included all the proceeds generated by the DST. JA165-166. The City Board refused to enter into the DSA absent an express condition that the DST and additional funding under the foundation formula would produce a combined $60 million per year "for the St. Louis City Public Schools" based on current SLPS enrollment. JA165.

The DST was passed by the voters specifically to fund intradistrict desegregation programs. The campaign literature explained the purpose of the tax was to fund these programs. JA654-676. In fact, the literature assured the voters that "[i]f the sales tax increase is passed and a settlement is reached and approved by the court, the funds raised by this tax increase will go ONLY to the St. Louis Public Schools to fund the City's portion of the desegregation programs." JA660. The literature was reviewed and approved by Dr. Danforth, the Settlement Coordinator. JA676.

Given the arduous course of litigation leading up to the DSA, and given the State's historical "policy" of seeking to avoid any responsibility for its unlawful conduct, Plaintiffs sought protections within the four corners of the DSA to prevent the State from escaping its future obligations and to make clear that all proceeds from the DST belonged to the SLPS. The State agreed in Sections 22.B and 11.4 of the DSA, respectively, that it would "not seek in any proceeding to limit or diminish

the financial relief provided" under the agreement and that "any statutory or administrative changes" to the funding formula or any source of State funding "having a disproportionate adverse financial impact" on the City Board "shall be disregarded." JA168-169, 195. It also agreed in Section 18.4 that all proceeds from the DST "shall be unconditionally assigned to the City Board." JA187. And it agreed in Section 22.B that it would not file a motion to alter or amend the consent decree "for any reason whatsoever." JA197.

At the fairness hearing on March 9, 1999, a critical issue was whether the DSA was properly funded, as several individuals objected on the grounds that the DSA provided inadequate funds for SLPS schools. A19; JA323. Based on the evidence and representations of the parties, including the State, the District Court concluded that the DSA was adequately funded to ensure that the City Board's obligations under the agreement could be fulfilled. A22-23; JA326-327.

The Settlement Order, which incorporates the DSA, reiterated that the two separate funding sources were prerequisites to resolving the dispute. The District Court found that "[f]unding is grounded in SB 781, which provides that funding will be derived from the local sales tax approved by the voters and the amendments in SB 781 to the State's statutory scheme of funding." A23; JA327. The District Court declared that the "passage of SB 781 was an extraordinary feat ... Without the financing provided by the bill, a settlement would not have been possible." A28; JA332. According to the District Court, SB 781 was enacted to "provide long-term

funding of on-going programs to implement school desegregation." A25; JA329. At the hearing, Missouri's Attorney General accepted blame on behalf of the State for past segregation in its public schools and "noted that the continued funding provided for by the state legislature in SB 781 was evidence that this was not an empty apology." A17; JA321. The District Court found that the parties understood and agreed that "that City Board will receive a minimum of $60m a year from State aid under Senate Bill 781 and the new sales tax." A15; JA319. Proceeds from the DST "would generate approximately $20m per year for the public schools." A14; JA318. The State agreed "to provide the funds as set forth in SB 781," and all signatories "agreed to the financial terms," including that "the revenue generated by the sales tax shall be paid directly to, or assigned by the Transactional District to City Board." A23; JA327.

The District Court further recognized "the strong support for the agreement expressed by the voters of the City of St. Louis in passing the new sales tax by an overwhelming majority." A13; JA328. The voters "approved by almost a two to one margin a sales tax increase to supplement the funding provided by the Missouri legislature." A25-26; JA329-30.

No party or non-party appealed from the Settlement Order, which was a final judgment for purposes of SB 781. A30; JA334.

SB 781 (previously codified at Mo. Rev. Stat. § 163.031 before being repealed) established the State's obligation for future funding for intradistrict

desegregation remedies. That portion of SB 781 became effective once the District Court entered its final judgment approving the DSA. JA155 ("This Agreement is intended to provide a complete substitute for and modification of all substantive remedial obligations placed upon the City Board by the above-referenced orders, subject to financing pursuant to Missouri Senate Bill 781").

SB 781 also provided for the creation of charter schools. However, unlike the conditional formula funding provisions, the creation of charter schools was not contingent on final settlement approval. Consequently, even if the DSA had not been approved by the District Court, charter schools would have been authorized. *See* Mo. Rev. Stat. § 160.400.1 The charter schools funding provisions only required the SLPS to pay to charter schools, on a per pupil basis, certain State and federal funding, but did not provide for payment of any sales tax revenue received by the SLPS. Section 7.2(1) of SB 781 states as follows:

> A school district having one or more resident pupils attending a charter school shall pay to the charter school an annual amount equal to the product of the equalized, adjusted operating levy for school purposes for the pupils' district of residence for the current year times the guaranteed tax base per eligible pupil, as defined in section 163.011, RSMo, times the number of the district's resident pupils attending the charter school plus all other state aid attributable to such pupils, including summer school, if applicable, and all aid provided pursuant to section 163.031, RSMo.

JA311 (Section 7.2(1)). In other words, Section 7.2(1) only required the District to pay charter schools a representative portion of the State aid (which included State

aid based on the operating levy) that was attributable to resident pupils attending charter schools.

Section 11.2 of the DSA provides that "full funding of SB 781 will in fact be provided in the future" on a "per pupil" basis, and Section 11.3 states that "the State contractually guarantees the City Board" would receive "full funding of SB 781 on a per pupil basis." JA166-168. Nothing in the DSA provides that the District would receive DST revenue on a "per pupil" basis. On the contrary, Section 18(a) (Transitional District) states that "[t]he parties agree, and the Court's order approving the agreement shall state, that: ... "4. the revenues from any and all taxes imposed through a ballot measure submitted by the Transitional District, and any resulting State and federal aid, (excluding any attributable to transfer students) shall be unconditionally assigned to the City Board upon receipt by the Transitional District."[2] JA 186-187.

Consistent with the DSA's unambiguous language, the District Court's Settlement Order states: "**IT IS FURTHER ORDERED** that the revenues from any tax imposed through a ballot measure submitted by the Transitional District, and any resulting State and federal aid (excluding any attributable to transfer students),

[2] Section 18(b) of the DSA likewise provides that "[u]pon such a determination [that the Transitional District is no longer needed], the Transitional District is dissolved and any and all taxes and other receipts approved for the Transitional District are assigned to the City Board." JA187.

shall be unconditionally assigned to the City Board upon receipt by the Transitional District." A31; JA335.

There is no provision in the DSA or Settlement Order that permits the State to reduce any DST revenue that was paid to the District to operate intradistrict desegregation remediation programs. Nor is there any provision of SB 781 that authorizes any such reduction. In fact, this Court has already determined that SB 781 did not require the District to pay any portion of its DST revenue to charter schools. *Liddell v. Special Admin. Bd. of the Transitional Sch. Dist. of St. Louis*, 894 F.3d 99, 963-64 (8th Cir. 2018).

Appellants admit that charter schools were not a party the underlying litigation and were not found to be constitutional violators. They also admit that charter schools were not a party to the DSA.

When SB 781 was enacted, charter schools were not public schools but instead were "independent, publicly supported schools." JA305 (Section 4.1). It was not until 2005 that charter schools were statutorily labeled as "public schools." It was not until 2005 that charter schools were statutorily labeled as "independent public schools." *See* Mo. Rev. Stat. § 160.400.1. Even after the statutory change, charter schools are independent schools and are not a part of the District. Between 1999 and 2006, the District received all revenue generated by the DST without any reduction or obligation to pay any of that revenue to charter schools. A35-36; JA340-341. All DST revenue was paid, unencumbered, to the District for the

exclusive benefit of SLPS students through the continuation of desegregation remediation programs. No party objected to those payments. *Id.*

The DSA does not even mention or reference charter schools. Similarly, the Settlement Order does not mention charter schools. No court has ever recognized charter schools as being part of the remedial construct of this case, either in the 1983 settlement or the DSA.

C. After SB 287 is Enacted, the State Starts to Divert Revenue Generated by the DST to Charter Schools.

Until the enactment of SB 287, the State did what it had promised to do with respect to the DST. Consistent with the State's contractual assurances and the Settlement Order, and with the SB 781 funding formula that did not require the District to pay any DST revenue to charter schools, the District received all of the DST revenues without any reductions. Then, in 2006, "the State changed the rules of the game." *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074, 1079 (8th Cir. 2008). The State enacted legislation that diverted DST revenue from the SLPS. In SB 287, the State unilaterally revised the funding formula for all public and charter schools as follows:

> 2. Except as provided in subsections 3 and 4 of this section, the aid payments for charter school shall be as described in this subsection.
> (1) A school district having one or more resident pupils attending a charter school shall pay to the charter school an annual amount equal to the product of the charter school's weighted average daily attendance and the state adequacy target, multiplied by the dollar value modifier for the district, ***plus local tax revenues*** per weighted

> average daily attendance from the incidental and teachers' funds in excess of the performance levy as defined in section 163.011, RSMo, plus all other state aid attributable to such pupils.

JA349 (SB 287, codified as Mo. Rev. Stat. § 160.415.2(1)) (emphasis added). The term "local tax revenues" was not included in the previous version of Section 7.2(1) of SB 781 and codified as Mo. Rev. Stat. § 160.415 (1998). JA311.

SB 287, which became effective on July 1, 2006, used different funding procedures for charter schools based upon whether a charter school has declared itself as a "local education agency." If a charter school has declared itself a local education agency, the charter school would receive its funding directly from the Department of Elementary and Secondary Education ("DESE") (as opposed to from the District). DESE was required to "reduce the payment made to the school district by the amount specified in this subsection and pay directly to the charter school the annual amount reduced from the school district's payment." JA350 (Mo. Rev. Stat. § 160.415.4). Although the procedures differ under §§ 160.415.4 and 160.415.2(1), the effect is identical—since 2007, and unlike under SB 781's funding regime, revenue generated by the DST is diverted from the District and paid to charter schools on a per pupil basis. A36-37; JA341-342.

As of June 30, 2020, DESE has diverted $86,282.312 in revenue generated by the DST from the District to charter schools. A43; JA680. This has negatively impacted the District's ability to fund intradistrict desegregation remediation programs. Specifically, as set forth in the DSA, the District operates magnet schools

within the City of St. Louis. *Id.* The District provides transportation to those magnet school students regardless of where the student resides within the City. *Id.* The District's annual cost to transport magnet school students is $22,317,859. *Id.* During the 2018-2019 school year, however, the District had $18,138,870 in unreimbursed expenses associated with transporting students to and from magnet schools. A43-44; JA680-681. Unmistakably, the District is complying with its obligations under the DSA at a significant cost.

D. The Present Funding Dispute.

In 2008 and 2016, counsel for the SLPS notified the Attorney General's Office and DESE that the State was breaching the DSA by improperly diverting revenue generated by the DST from the District to charter schools. JA366-368, 370-374. Because the State ignored the District's request that it fully comply with the DSA, the Liddell Plaintiffs and the District filed a Joint Motion to Enforce the Settlement Agreement on April 11, 2016. JA47 (ECF No. 38). On March 26, 2019, the Court struck without prejudice the Motion to Enforce, finding that any Motion filed by the District was required to be filed in state court. JA57 (ECF No. 466). The District Court allowed the Liddell Plaintiffs to refile their Motion, which they did on October 15, 2019. JA67. The Caldwell/NAACP Plaintiffs subsequently moved to join this Motion (JA623), which was granted.

In the Motion to Enforce, the Liddell and Caldwell/NAACP Plaintiffs relied on provisions of the DSA and the Settlement Order in support of their position that

the parties agreed in the DSA, Settlement Order, and SB 781 that the revenue generated by the DST was to be paid only to the District to fund intradistrict desegregation remediation programs. Further, Plaintiffs argued that since the enactment of SB 287 in 2006, the State has been violating the DSA and Settlement Order by diverting revenue generated by the DST to charter schools. JA67-79; JA381-396. Intervenors filed a Response (JA397-411), the Liddell Plaintiffs filed a Preliminary Reply (JA412-427), the State filed a Response (JA428-466), the Caldwell/NAACP Plaintiffs filed a Reply (JA631-652), and the Liddell Plaintiffs filed a Reply (JA686-698). The District Court then issued an order requesting the parties submit additional briefing. JA702-704. The Caldwell/NAACP Plaintiffs filed a Supplemental Brief (JA705-710), the State filed a Supplemental Brief (JA711-721), Intervenors filed a Supplemental Brief (JA722-733) and the Liddell Plaintiffs filed a Supplemental Brief (JA734-744).

On November 24, 2020, the District Court issued its Opinion, Memorandum and Order on the Motion to Enforce, finding that that but for the DSA "to fund the remediation programs, the Agreement would not have been consummated," that "funds would be limited solely to remediation programs," and that "the Charter schools are not providing remedial constructs to racial segregation as contemplated and required by the settlement agreement." A8-10; JA752-754. After making these findings, and despite the fact that charter schools were not parties to the DSA, and despite the DSA and Settlement Order making clear the DST revenue was to be used

to fund intradistrict desegregation remediation programs without any per pupil reduction, the District Court nonetheless ruled there was no violation of the DSA with the State reducing the amount of sales tax revenue to the District from District's funds because charter school students "should be entitled to the same per pupil funding formula as District school students." A7; JA751. The District Court also found that "the tax funds must be utilized [for remediation programs] in Charter schools as well as District schools," that "all local "desegregation" tax funds, whether paid to the District or allocated to the Charter schools through a deduction from the funds given to the District, and provided to the Charter schools, shall be used solely for desegregation programs," and that "if no desegregation programs exist in the Charter schools, the funds shall be turned over to the District to continue to implement and fashion the programs contemplated by the Settlement Agreement." A10-11; JA754-755.

In the State's Motion for Stay and Injunction Pending Appeal, the State conceded that the charter schools do not operate and have not operated any "desegregation programs" or any "remediation programs." JA758-773. The State admitted that the charter schools never engaged in segregation, and they have no history of segregation to remediate." JA768. The State declared: "No one contends that the charter schools are implementing 'desegregation programs' within the meaning of Sections 1-8 of the Settlement, as the Court acknowledges" and that the DESE "has no verification procedure to assess whether and to what extent charter

schools are doing so in any event. Thus, the practical effect of the Court's order is to direct the [DESE] to immediately begin redirecting state aid from charter schools to District schools." JA769-770.

SUMMARY OF THE ARGUMENT

After decades of hard-fought litigation and three years of extensive negotiation, the parties reached a settlement in this case. A critical component of this settlement was ensuring that the District had sufficient funding to continue operating its intradistrict desegregation programs. To that end, the parties expressly agreed that the District would receive all revenue generated by the DST and additional funding from the State under SB 781. Consistent with that agreement, the DSA's plain language provides that all proceeds from the DST "shall be unconditionally assigned to the City Board."

When the DSA was submitted to the District Court for approval, the State again represented that the District would receive a minimum of $60 million per year in State aid under SB 781 and DST revenue. The State agreed to all financial terms of the DSA and promised long-term funding for the desegregation programs. Based on these assurances, the District Court approved the DSA. And for seven years, the District received all revenue generated by the DST without any reduction or obligation to pay any of that revenue to charter schools.

Then, in 2006, the State unilaterally rewrote the funding formula without approval from Plaintiffs or the District Court. The State enacted SB 287, which purportedly allowed the State to withhold State aid to the District and divert a proportionate amount of DST revenue to charter schools.

In 2008, the District became aware that the State was diverting DST revenue to charter schools in breach of the DSA. The District demanded these funds from the State. The State refused.

To justify its breach of the DSA, the State attempts to rewrite history by claiming that SB 781 required (all along) that the District share DST revenue with charter schools. This is not so. SB 781 only required the District to pay charter schools a representative portion of the State aid (which included State aid based on the operating levy) that was attributable to resident pupils attending charter schools. It did not require the District to share any revenue from the DST, which, as represented to the voters, was specifically earmarked go only to the SLPS to fund the City's portion of the desegregation programs.

The overwhelming evidence before this Court shows that the parties intended that the revenue generated by the DST was to be used exclusively by the District to remedy the effects of historical segregation.

None of these funds was intended to be shared with newly created charter schools. In 1999, charter schools were not even considered public schools. They were not constitutional violators saddled with the vestiges of racial segregation. They were not parties to the DSA. And they were not under any court-ordered mandate to implement desegregation programs.

The State has wrongfully withheld more than $86 million in funds from the District in violation of the terms of the DSA. These funds should be restored to the District so that it can satisfy its desegregation obligations.

ARGUMENTS ON CROSS-APPEAL

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE DID NOT VIOLATE THE DSA BY REDUCING THE AMOUNT OF DST REVENUE TO THE DISTRICT FROM THE DISTRICT'S STATE AID AND THEN BY DIVERTING THOSE FUNDS TO CHARTER SCHOOLS.

The District Court erred in concluding that the State did not violate the DSA by reducing the amount of DST revenue to the District from the District's State aid and then by diverting those funds to the charter schools. A7; JA751. The DSA provides that the revenue generated by the DST is to go exclusively to the District to remedy the effects of historical segregation. Therefore, the State violated the DSA by enacting SB 287 and diverting revenue generated by the DST to charter schools.

A. Standard of Review.

The Court reviews *de novo* the District Court's interpretation of a settlement agreement. *Grant Cty. Sav. & Loan Ass'n v. Resol. Tr. Corp.*, 968 F.2d 722, 724 (8th Cir. 1992); *Gilbert*, 216 F.3d at 700. This standard applies to all issues in Plaintiffs' opening Brief.

B. Under the DSA, Revenue Generated by the DST Was to be Used Exclusively by the District to Remedy the Effects of Historical Segregation.

Under Missouri law, which governs the DSA, the general rules of contract construction apply when interpreting settlement agreements. *Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984); *Pierson v. Kirkpatrick*, 357 S.W.3d 293, 299 (Mo. Ct. App. 2012). The "cardinal rule" in the interpretation of a

contract "is to ascertain the intention of the parties and give effect to that intention." *Lawn Managers, Inc. v. Progressive Lawn Managers, Inc.*, 959 F.3d 903, 912 (8th Cir. 2020). When the contract is unambiguous, the intention of the parties is gathered from the four corners of the contract. *Id.* However, the "surrounding circumstances at the time of contracting and the positions and actions of the parties are relevant to the judicial interpretation of the contract." *Press Mach.*, 727 F.2d at 785; *Cavalier Homes of Ala., Inc. v. Sec. Pac. Hous. Services, Inc.*, 5 F. Supp. 2d 712, 716 (E.D. Mo. 1997); *see also Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, 306 S.W.3d 185, 191-92 (Mo. Ct. App. 2010) (evidence of the context and circumstances in which a settlement agreement was reached is admissible to aid to its interpretation).

Here, the parties to the DSA, including the State, intended for the revenue generated by the DST to go exclusively to the District to fund desegregation programs. This intent is reflected by the plain reading of the DSA and the Settlement Order, as well as by the position of the parties at the time of settlement, the language SB 781, and the campaign literature.

Under the 1983 agreement, the State agreed to increase annual funding to the District to pay for programs aimed at remedying the significant negative impacts of historical segregation. The DSA obligated the District to continue established intradistrict desegregation programs and provided two separate sources to fund those programs: (1) the revenue generated by DST approved by City voters; and (2) the

funding provided by the State as set out in SB 781. The parties agreed that an express condition to the City Board's decision to accept the DSA was that the sales tax and the resulting State aid would produce a minimum of $60 million in additional funding for the SLPS. JA165-166.

As reflected in the Settlement Order, the State promised long-term and continued funding to ensure that the District's obligations were fulfilled. The State agreed to the financial terms of the DSA, including providing the funds set forth in SB 781 and paying the revenue generated by the sales tax directly to, or assigned by the Transactional District, to the City Board. The parties understood and agreed that that City Board would receive a minimum of $60 million a year from State aid under SB 781 and the new sales tax.

Both the State and Intervenors admit, and the District Court recognizes, that charter schools were not parties to the underlying litigation or to the DSA. A4; JA748. Further, no charter school has been found to be a constitutional violator. *See Adams*, 620 F.2d at 1277. The DST was only intended to fund intradistrict desegregation remediation programs maintained by the District. Charter schools were not public schools as defined in SB 781 but were instead "independent, publicly supported schools." JA305 (Section 4.1). Not until 2005 did charter schools become labeled "public schools." Even with that change, charter schools are independent schools and not part of the District.

Furthermore, SB 781 did not permit charter schools to receive any portion of the revenue generated by the DST. This Court has already concluded in a prior appeal in this very case that "[w]hile ***Senate Bill 781 in 1998 had not required the District to pay any portion of its local tax revenue to the charter schools***, Senate Bill 287 in 2006 mandated that charter schools receive a per pupil percentage of local tax revenues received by the District." *Liddell*, 894 F.3d at 963-64 (emphasis added). The State argues extensively in its Brief that SB 781 required the District to share DST revenue with charter schools on a per pupil basis. But the State's cavalier attempt to challenge this Court's factual determination is barred by the law-of-the-case doctrine. *See Thompson v. C.I.R.*, 821 F.3d 1008, 1011 (8th Cir. 2016). In addition, the State admits the accuracy of the Court's factual summary in *Liddell,* 894 F.3d at 963-64, by incorporating it by reference in footnote 1 of its Brief. *See, e.g., Postscript Enters. v. City of Bridgeton*, 905 F.2d 23, 227-28 (8th Cir. 1990) (finding statements made by counsel in a brief to be binding judicial admissions). The State cannot now suggest that this factual summary is incorrect, particularly when, as here, it incorporated the factual summary whole cloth into its Brief. Further, the District Court's November 24, 2020 Order quoted the same factual summary and, in fact, relied on that summary in coming to its conclusion. In its Brief, the State attempts to parse certain prior factual determinations it wants to adopt, and those it does not. Instead, the State has conceded the factual determination was correct and this Court, now, should not disturb the summary.

Even if this factual determination was not the law of the case and even if the State had not expressly incorporated this Court's factual summary into its Brief, the State's argument naturally begs the question: if SB 781 required that DST revenue be shared with charter schools on a per pupil basis, then why was it necessary for the Missouri legislature to enact SB 287? The State asserts that the District was improperly withholding these funds from charter schools. If this was truly the case, then the charter schools could have easily sought a declaratory judgment or other relief from the courts. The legislative process—writing an entirely new bill, getting it passed by both houses of the Missouri General Assembly, and having it signed by the Governor—is a significantly more time-consuming and cumbersome process that simply petitioning the courts for relief.

The revenue generated by the DST was passed by the voters of St. Louis City specifically to fund desegregation programs maintained by the SLPS. Voters were informed that "the funds raised by this tax increase will go ONLY to the St. Louis Public Schools to fund the City's portion of the desegregation programs." JA660. This was the intention of the parties, as Dr. Danforth, the Settlement Coordinator, reviewed and approved the campaign literature. JA676.

Further, between 1999 and 2006, the District received all the revenue generated by the DST and did not pay any portion of that revenue to the charter schools. A35-36; JA340-341. This six-year practice makes certain that following the execution of the DSA and entry of the Settlement Order, the parties intended for

the District to receive the revenue generated by the DST. *See Rhoden Inv. Co. v. Sears, Roebuck and Co.*, 499 S.W.2d 375, 383 (Mo. 1973) ("It is well established that the interpretation placed on the contract by the parties prior to the time it became a matter of controversy is entitled to great, if not controlling, influence in ascertaining the intent and understanding of the parties and the courts will generally follow such practical interpretation."); *Stone v. Farm Bureau Town & Country Ins. Co. of Mo.*, 203 S.W.3d 736, 745 (Mo. Ct. App. 2006).

Therefore, the DSA, Settlement Order, and surrounding circumstances evidence the parties' intent for the revenue generated by the DST to go exclusively to the District to fund intradistrict desegregation programs.

C. The State Breached the DSA by Diverting DST Revenue to the Charter Schools Starting in 2006.

In 2006, the State breached the DSA by unilaterally changing the funding formula under the DSA to specifically require a portion of DST revenue be diverted to charter schools. The State unilaterally made this material change even though it previously agreed that this revenue should be remitted entirely to the District and voters were told that these funds would go only to the District to fund the its portion of the desegregation programs.

SB 287, which became effective on July 1, 2006, for the first time, began considering local tax revenues as part of the funding formula. "Local tax revenues" was not included in the previous version of the funding statute set out in Section 7.2(1) of SB 781 and codified as Mo. Rev. Stat. § 160.415 (1998), which was

incorporated into the DSA.[3] The State improperly interprets SB 287 by concluding that the revenue generated by the DST constitutes "local tax revenue" for purposes of the funding formula. Consequently, the State is improperly diverting revenue generated by the DST to charter schools.[4] Up to and including June 30, 2020, DESE has diverted $86,282.312 in revenue generated by the DST from the District to charter schools. JA680. This diversion of funding has affected the District's ability to fund the required remediation programs. The State agreed, in Section 22B of the DSA, that it would "not seek in any proceeding to limit or diminish the financial relief provided for under the agreement" (which is consistent with the apology from the Attorney General). JA195. The State also agreed, in Section 11.4 of the DSA, that any statutory changes to the State's funding formula or source of the funds having a "disproportionate adverse financial impact" on the District "shall be disregarded." JA168-169. These provisions act in harmony—the State will not seek to limit or diminish the funding on its own accord and will disregard statutory changes to funding that, as here, have a significant financial impact on the District. The State's actions violate these provisions.

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[3] SB 781, codified as Mo. Rev. Stat. § 160.415.2(1) (1998) stated that, "A school district having one or more resident pupils attending a charter school shall party to the charter school an annual amount equal to the product of the equalized, adjusted operating levy for school purposes for the pupils' district of residence." JA311 (Section 7.2(1)).

[4] St. Louis City is the only jurisdiction to pass a sales tax related to desegregation programs. The sole reasonable conclusion, then, is the State intended to shift some of the revenue generated from the DST from the District to charter schools in breach of the DSA.

D. This Court Has Previously Ruled that Similar Actions by the State Are a Violation of the Terms of a Settlement Agreement and Court Orders.

In 2008, this Court ruled against the State for taking similar action as in this matter. In *Jenkins*, the Kansas City, Missouri, School District ("KCMSD") was found to have unconstitutionally operated a segregated school district. *Jenkins v. Kansas City Mo. Sch. Dist.*, 516 F.3d 1074, 1077 (8th Cir. 2008). To address the vestiges of unconstitutional segregation, the court ordered remedial programs and capital improvements. *Id.* To help fund these programs, the court ordered KCMSD to issue capital improvement bonds and ordered an increase in the property tax levy to pay the bonds. *Id.* Charter schools were created in 1998 and per Mo. Rev. Stat. § 160.415.2(1), were funded by diverting federal, state, and local education funding away from the KCMSD on a per pupil basis. *Jenkins*, 516 F.3d at 1078-79. The Missouri legislature quickly realized that the KCMSD had financial obligations under the desegregation revenue bonds, so it amended the statute in 1999 so that the "per pupil amount paid by a school district to a charter school [was] reduced by the amount per pupil … needed … for repayment of leasehold revenue bonds obligated pursuant to a federal court desegregation action." *Id.* at 1079 (quotations omitted); Mo. Rev. Stat. § 160.415.2(5).

In 2006, the legislature repealed Mo. Rev. Stat. § 160.415.2(5) so that the KCMSD was no longer entitled to make reductions in its per pupil payments allocated to charter schools. *Jenkins*, 516 F.3d at 1079. In response, the plaintiffs

(school children and the American Federation of Teachers Local 691) sued to enforce the parties' agreement and the court orders. *Id.* at 1080. According to the plaintiffs, the State violated the agreement and court orders by enacting § 33.315 and SB 287, which required KCMSD to "use proceeds that are devoted to the repayment of the desegregation bonds to fund the charter schools." *Id.* at 1080 (quotations omitted). The district court granted the plaintiffs' motion, expressing its concern that the KCMSD would not be able to continue funding its ongoing operations and meeting its debt service obligation. *Id.*

This Court affirmed the district court's order. *Id.* at 1086. The Court found that the injunction was necessary to ensure the KCMSD's ability to repay court-ordered funding obligations, stating that "[i]mplicit in previous orders is a clear understanding that court-ordered remedies would be fully funded." *Id.* at 1083. In considering the court's previous orders, it found they "clearly indicate that [the court] only affirmed the District Court's order approving the Agreement after we were assured that sufficient funding would remain in place to enable the KCMSD to satisfy its desegregation obligations." *Id.* at 1084-85.

Similarly, the District Court in this case approved the DSA on the condition of continued funding (including State aid and all revenue generated by the DST) so that the District could continue to operate specific desegregation remediation programs. Like in *Jenkins*, the State changed SB 781 (Mo. Rev. Stat. § 160.415) so that it could claim that a portion of funding necessary for the programs (the revenue

generated by the DST) now goes to charter schools. *See* Mo. Rev. Stat. §§ 160.415.2(1); 160.415.5. This is in clear violation of the parties' DSA.

E. The District Court Improperly Expanded the Scope of the Desegregation Remedy.

The District Court erred in finding that a violation of the DSA only arises with charter schools' use (or non-use) of revenue generated by the DST. A7; JA751. As set forth above, neither the charter schools nor any other entity other than the District are entitled to any portion of the revenue generated by the DST. The parties to the DSA agreed and understood that the revenue generated by the DST was necessarily required to fund the intradistrict desegregation remediation programs mandated by the DSA. Therefore, the District Court's Order improperly expands the desegregation remedy, as set forth in the DSA, beyond constitutional violators.

The Supreme Court and this Court consistently have held: (1) only those remedies which are closely tailored to the nature and scope of the constitutional violation are permitted; and (2) a remedy may not be imposed that exceeds the scope of a proven constitutional violation by a constitutional violator. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007); *Missouri v. Jenkins*, 515 U.S. 70, 90 (1995); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Milliken v. Bradley* ("*Milliken II*"), 433 U.S. 267, 280-81 (1977); *Liddell*, 731 F.2d at 1305; *Liddell v. Special Sch. Dist.*, 149 F.3d 862, 868-69 (8th Cir. 1998).

This Court, in *Liddell v. State of Mo.*, 731 F.2d at 1298-99, affirmed the compensatory and remedial intradistrict desegregation programs in the 1983

settlement agreement as required by *Milliken II*. *Milliken II*, 433 U.S. at 280-81. The remedies (the desegregation remediation programs) were limited to the SLPS because that was where the constitutional violations occurred. The 1999 DSA continued these remediation programs within the District, and the District continues to maintain those necessary and required programs today.

Appellants concede that charter schools were not constitutional violators, and, in fact, did not exist when the District Court found a constitutional violation. *Adams*, 620 F.2d at 1277. Charter schools were not a party to the settlement agreements or court-ordered desegregation programs. Thus, until November 24, 2020, no court had included charter schools in the desegregation remedy. Even if including charter schools in the remedy would benefit St. Louis City students, that rationale does not permit the District Court to give charter schools access to funding that is necessary to fund intradistrict desegregation programs maintained by the District.

In *Missouri v. Jenkins*, 515 U.S. 70 (1995), the United States Supreme Court applied these established principles in accepting the State's argument that the district court exceeded its authority by providing for a school desegregation remedy that was *interdistrict* in nature when the constitutional violation was *intradistrict* within the KCMSD: "Here, the District Court has found, and the Court of Appeals has affirmed, that this case involved no interdistrict constitutional violation that would support relief. Thus, the proper response by the District Court should have been to eliminate to the extent practicable the vestiges of prior *de jure* segregation with the

KCMSD[.]" *Id.* at 90 (internal citations omitted). Similarly, here, the District Court improperly expanded the scope of the desegregation remedy at issue to include charter schools.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT CHARTER SCHOOL STUDENTS ARE ENTITLED TO THE SAME PER PUPIL FUNDING OF REVENUE GENERATED BY THE DST AS DISTRICT SCHOOL STUDENTS.

The District Court incorrectly found that charter school students should be entitled to the same per pupil funding formula as District school students because charter school students are public school students and the parties intended the funding to be based on a per pupil basis "for City public school students." A7; JA751. But under the DSA, the parties did not intend for charter school students to receive a portion of DST revenue as set forth in the DSA. Instead, as set forth above, the revenue generated by the DST was "unconditionally" assigned to the District exclusively to operate specific desegregation remediation programs as a remedy for decades of State-mandated public-school segregation. Charter schools were not parties to the litigation, the DSA, and do not have remediation obligations. In fact, charter schools were not even designated as public schools in 1999. The remedial obligations set forth in the DSA apply only to the District and the obligations do not transfer when a resident-District pupil attends another school, whether parochial,

independent private, or a charter school.[5] Thus, by redirecting revenue generated by the DST to charter schools, the State is violating the unambiguous terms of the DSA and the Settlement Order. This is further supported because under the clear and unambiguous terms of the DSA, suburban school districts that received District pupils as part of the voluntary interdistrict transfer plan did not and do not receive a "per pupil" portion of the revenue generated by the DST. Similarly, the funds have never followed District pupils attending private or parochial schools. There is nothing in the record to support the tenuous conclusion that the parties intended—at the time of contracting in 1996-1999—for a portion of the DST revenue be shared with newly-created charter schools.

The District Court relied on Section 11 of the DSA to support its conclusion. A5-7; JA749-751. However, the "per pupil language" in Section 11 of the DSA only applies to State aid—not revenue generated by the DST. Section 11 discusses the State's funding obligations to the District (which were provided on a "per pupil" basis). The revenue generated by the DST was a separate source of funding to be used to maintain the intradistrict desegregation remediation programs. Nothing in Section 11 of the DSA or Section 7.2(1) of SB 781 allows charter schools to receive a "per pupil" allocation of the revenue generated by the DST. As set forth above,

[5] However, as set forth in Plaintiffs' Responsive Arguments to Appellants' Briefs, if the Court agrees with the District Court that DST funding followed each child attending charter schools, then charter schools would not be entitled to receive such funding because there has been no finding that any charter school is using revenue generated by the DST for specific desegregation remediation programs.

SB 781 did not permit charter schools to receive a "per pupil" portion of revenue generated by the DST from 1999-2006. It was not until the State of Missouri enacted SB 287 that the State began diverting a per pupil portion of the revenue generated by the DST to charter schools.

Therefore, the DSA and Settlement Order approving the DSA make clear the parties did not intend for the revenue generated by the DST to be diverted to charter schools or any other school outside of the District on a "per pupil" basis. Instead, the revenue was to be paid to the District to fund the required intradistrict desegregation remediation programs set forth in the DSA.

RESPONSIVE ARGUMENTS TO APPELLANTS' OPENING BRIEFS

I. TO THE EXTENT REVENUE GENERATED BY THE DST WAS INTENDED TO FOLLOW STUDENTS INTO THEIR RESPECTIVE CHARTER SCHOOLS, THE DISTRICT COURT DID NOT ERR IN RESTRICTING CHARTER SCHOOLS' USE OF THE REVENUE GENERATED BY THE DST TO DESEGREGATION REMEDIATION PROGRAMS AND, IF NOT USED FOR SUCH PROGRAMS, ORDERING THAT SUCH REVENUE MUST BE PAID 100 PERCENT TO THE DISTRICT.

A. Standard of Review.

The Court reviews *de novo* the District Court's interpretation of a settlement agreement. *Gilbert*, 216 F.3d at 700.

B. The Revenue Generated by the DST Was Intended to Fund Desegregation Remediation Programs.

Appellants contend that charter schools are not required to maintain the desegregation remediation programs set out in the DSA. However, as the District

Court determined, Appellants cannot claim charter schools are entitled to DST revenue, yet ignore the parties' agreement and acknowledgment that the revenue would be used for remediation programs. A7-8; JA751-752 ("It is curious and interesting the State argues thaprovisions [sic] of the Settlement Agreement, with regard to its per pupil argument, should not be taken out of context, while it chooses to ignore other equally significant terms of the Agreement. As a result of a legislative strike on the legislative roulette wheel the Charter schools are not providing remedial constructs to racial segregation as contemplated and required by the settlement agreement.").

The District Court correctly found that the parties unambiguously set out their intent and the purpose of the DSA, which was to implement desegregation remediation programs. A8-9; JA752-753. The DST passed by the St. Louis City voters was specifically earmarked for funding desegregation programs. Indeed, voters were told that the funds raised by the tax would go only to the SLPS to fund these desegregation programs. JA660. Therefore, if the Court properly concluded charter schools could be entitled to a portion of the revenue generated by the DST

on a per pupil basis, they only would be entitled to that portion if they were operating desegregation remediation programs.[6]

C. Requiring Charter Schools Use the Funds for their Intended Purpose Does Not Contravene Principles of Contract Law or the DSA.

Because charter schools are not operating desegregation remediation programs, Intervenors argue that by requiring charter schools to abide by the desegregation obligations in the DSA, the court improperly contravened principles of contract law because the charter schools were not a party to it. Plaintiffs agree that charter schools were not a party to the DSA, which is one of the primary reasons they are not entitled to any revenue generated by the DST. In addition, the District Court did not mandate or require charter schools to maintain any desegregation programs set forth in the DSA. Instead, the District Court only found that if the charter schools are to receive any of the revenue generated by the DST, those funds must only be used to maintain these programs. Consistent with that holding, then, if charter schools are not operating any desegregation remediation programs, then the revenue generated by the DST must be paid to the District.

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[6] Intervenors improperly cite to an article authored by the Honorable Mike Wolff in support of their claim that charter schools are entitled to a windfall – a portion of the revenue generated by the DST without the restrictions. (Intervenors' Brief at 8). The Court should disregard this evidence because it was not in the District Court's record. *Am. Civ. Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1095 (8th Cir. 2011) ("Generally, we cannot consider evidence that was not contained in the record below when the district court rendered its decision."); *Garden v. Cent. Neb. Hous. Corp.*, 719 F.3d 899, 906 n.3 (8th Cir. 2013); *Allen v. U.S. Air Force*, 603 F.3d 423, 434 (8th Cir. 2010).

D. To the Extent Revenue Generated by the DST was Intended to Follow the Students, the District Court's Order Properly Concluded that Such Funds May Only be Used to Operate Desegregation Remediation Programs.

Intervenors claim that the District Court's Order imposes spending restrictions that are not in the DSA. As explained above, the revenue generated by the DST was passed by the voters specifically to provide funding to the District so it could meet its obligations under the DSA. JA654-676. As recognized in the Settlement Order, this additional source of funding was a prerequisite to the parties' agreement to the terms in the DSA. The District, in compliance with the DSA, has been using the funds to run the required remediation programs.

E. The District Court Did Not Impose an Obligation on Charter Schools that Exceeds Those Imposed on the District.

Appellants argue that charter schools cannot be obligated to run remediation programs because the City Board's obligation to run the programs expired after 10 years. This argument fails for at least two reasons. First, the District Court did not mandate charter schools to operate any remediation programs. Instead, it only stated that because the revenue generated by the DST was intended to be used for operation of desegregation remediation programs, charter schools could only receive the funding if they operated those programs. Also, Appellants' contention that the remediation obligations only run for 10 years is incorrect. The DSA required the

City Board to operate desegregation remediation programs for ***at least*** 10 years.[7] The parties contemplated the programs would continue to be run beyond the 10-year period because the DSA and Settlement Order reiterate the need for ***long-term*** funding to continue key aspects of the plan. Under the DSA, the parties recognized the "need for continuing remedial efforts to ensure that the enjoyment of full equality of opportunity by plaintiff school children is not impaired by the effects of past segregation." JA155. And in the Settlement Order, the District Court found that SB 781 was enacted to provide "long-term funding on on-going programs to implement school desegregation," and the Attorney General guaranteed that the "continued funding provided for by the state legislature in SB 781" demonstrated that his apology was not an empty one. JA329, 321. To date, as expressly permitted by the DSA, the District is still running various desegregation remediation programs, including the facilitation of the inter-district transfer programs.

F. The Conditional Requirement of the Funding Does Not Require the State to Violate the Law and DSA.

The State complains that the conditional use restriction on the revenue generated by the DST would require it to violate State law and the DSA. As discussed *supra/infra*, the DSA contemplated the funds only be used for desegregation remediation programs.[8] Also, the State has not (and cannot) point to

[7] Intervenors mislead the Court by stating that the programs were for "at most ten years." (*See* Intervenors' Br. at 10.)

[8] Contrary to the State's assertion, Intervenors are not running the desegregation remediation programs as required by the DSA.

anything in the statutes that would prevent it from complying with the District Court's Order by withholding the revenue generated by the DST if charter schools are not maintaining desegregation programs. As this Court has already concluded, SB 781 did not allow charter schools to receive any portion of the revenue generated by the DST. *See Liddell*, 894 F.3d at 963-64. The State cannot now use SB 287, enacted several years after the execution and approval of the DSA, to excuse its breach. *See Carroll v. Oak Hall Assocs., L.P.*, 898 S.W.2d 603, 607 (Mo. Ct. App. 1995) ("Parties are deemed to enter into their contracts in contemplation of the law as it exists at the time, and it is sometimes said that the existing law is part of the contract as if it were written therein."); *see also Jenkins*, 516 F.3d at 1083-86 (enjoining the State from enacting legislation that would reallocate local tax levies to fund charter schools in a way that would violate the terms of a court approved desegregation settlement).

Furthermore, the DSA expressly provides that "any statutory or administrative changes" to the funding formula or any source of State funding that have a disproportionate adverse financial impact on the District "shall be disregarded." In other words, the State agreed and understood that it would disregard any statute such as SB 287 that had a significant financial impact on the District. Diverting more than $80 million in DTS revenue away from the District certainly qualifies as a disproportionate adverse financial impact.

G. This Court and United States Supreme Court Precedent Do Not Prevent the Conditional Use of the Revenue Generated by the DST.

Appellants claim these "novel obligations" contradict Supreme Court guidance on desegregation remedies. The United States Supreme Court and this Court have consistently held desegregation remedies cannot be imposed to exceed the scope of a proven constitutional violation by a constitutional violator. *See Parents Involved*, 551 U.S. at 721; *Missouri v. Jenkins*, 515 U.S. at 90; *Freeman*, 503 U.S. at 494; *Milliken II*, 433 U.S. at 280-81; *Liddell*, 731 F.2d at 1305; *Liddell*, 149 F.3d at 868-69. However, this precedent makes clear the charter schools are not entitled to any revenue generated by the DST, because the DST was part of the remedy imposed on the City Board for acquiescing to decades of State-mandated public school segregation. However, even if the Court finds the remedy permissible, then the use restriction would also be permissible because the District Court did not mandate charter schools to run the programs—it merely interpreted the DSA regarding the use of the revenue generated by the DST.

H. The District Court Did Not Err in Fashioning Relief that it Deemed Consistent with the Terms of the DSA.

The State also argues that the use restriction is improper because it imposes relief that no party requested. In Plaintiffs' Motion to Enforce, they requested that the District Court enforce the DSA and Settlement Order and "for such other and further relief as the Court deems just and proper under the circumstances." JA79. The District Court had broad discretion to fashion an order in specific performance

that it deemed appropriate after considering the facts and the law. *See Ag Spectrum Co. v. Elder*, 181 F. Supp. 3d 615, 618 (S.D. Iowa 2016) (citing Fed. R. Civ. P. 54(c)) (empowering federal trial courts to grant any relief to which the evidence shows a party is entitled, even if the party failed to request an appropriate remedy in the pleadings). The State's authority on this point is inapposite. The State relies upon cases that concern whether an appellate court will consider arguments for the first time on appeal. *See Johnson Tr. of Operating Eng'rs Loc. #49 Health & Welfare Fund v. Charps Welding & Fabricating, Inc.*, 950 F.3d 510, 525 n.2 (8th Cir. 2020) (noting the general rule that an appellate court will not consider an argument for the first time on appeal); *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) (ruling that the court will not consider arguments asserted in a reply brief that were not asserted in the opening brief).

I. The District Court's Order Does Not Violate Principles of Federalism.

The State argues the District Court's Order violates principles of federalism by intruding into state educational policy. As an initial matter, the State did not raise this argument in its opposition papers to Plaintiffs' Motion to Enforce. Generally, this Court will not consider arguments raised for the first time on appeal. *See Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 847 F.3d 594, 598 (8th Cir. 2017); *Cole v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008). As a result, the Court should disregard this argument.

If, though, this Court does choose to consider this argument, the District Court's Order does not violate principles of federalism. This dispute arose because the State of Missouri and St. Louis City School District operated unconstitutionally segregated schools for more than a century. The District Court had a significant interest in remediating the violation. The instant issue is whether the State is breaching the DSA or violating the Settlement Order. Federal courts have consistently and squarely held that they have authority to interpret and enforce settlement agreements incorporated into previous court orders. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994); *Miener v. Mo. Dept. of Mental Health*, 62 F.3d 1126, 1127 (8th Cir. 1995).

Furthermore, the State, like any other party, is bound by the terms of its settlements, and may not enact laws to abrogate those contractual obligations. Otherwise, the State could effectively avoid any contractual duty by simply enacting self-serving legislation afterwards.

J. The District Court's Order is Consistent with Public Policy Considerations.

Appellants argue the District Court's Order disregards charter schools' role in desegregation efforts. This argument ignores that charter schools were not a part of the desegregation remediation programs contained in the DSA or part of any agreed-upon desegregation remedy. First, charter schools were never mentioned in any decision by this Court or District Court before these settlement agreement enforcement proceedings. Second, the DSA makes no mention of charter schools.

Third, the DSA only discusses SB 781 as it relates to the State funding provisions which were conditioned on final court approval of the DSA. In fact, the SB 781 provision creating charter schools became effective in 1998—before District Court approval of the DSA and before the State funding formula provisions being triggered. Consequently, even if the DSA were not finally approved by the Court, charter schools would have been authorized, which makes clear that charter schools were not a part of the agreed upon remedy. Fourth, the Settlement Order approving the DSA specifies the desegregation remediation programs required by the DSA and, again, makes no mention of charter schools.

More significantly, all parties to this appeal (including the charter school parents) agree that charter schools were not a party to the DSA and have not been found to be constitutional violators. There is simply nothing in the record to support the position that the parties intended in the DSA to share a portion of the revenue generated by the DST with charter schools. Contrary to Appellants' arguments, diverting the revenue generated by the DST to charter schools is a violation of the terms of the DSA and the Settlement Order. The diversion of this revenue deprives the District of the necessary funding to continue to operate required desegregation programs. This outcome clearly does not advance efforts to continue remediating historical and unconstitutional segregation in the SLPS as intended and required pursuant to the DSA.

K. The District Court Correctly Found that Charter Schools are Receiving Revenue Generated by the DST.

Intervenors also argue that the funding they receive from revenue generated by the DST is just State aid. This is not an accurate representation. First, if charter schools were not "local education agencies," the District would be required to pay charter schools the revenue generated by the DST directly. JA349 (Mo. Rev. Stat. § 160.415.2(1) (requiring school districts to pay directly to charter schools a per pupil amount of state aid ***plus local tax revenues***)). Second, the State cannot avoid its obligations by playing a shell game with the revenue generated by the DST. Under Mo. Rev. Stat. § 160.415.4, the State reduces its aid to the District based upon the amount of revenue generated by the DST the District received (revenue the parties agreed would provide funding to remediate unconstitutional segregation), and then it gives that same portion of revenue to the charter schools. The effect under both §§ 160.415.2(1) and 160.415.4 is identical—the District's funding is reduced, and it is not receiving the all the revenue from the voter-approved DST, funding that is necessary to maintain court-ordered desegregation programs. The money, instead, is diverted to charter schools, even though they have no such obligations to maintain programs intended on remediating historical segregation. In *Jenkins*, this Court rejected a similar argument raised by the State. 516 F.3d at 1085. That disingenuous argument should likewise be rejected in this appeal.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' EQUITABLE DEFENSES.

A. Standard of Review.

This Court reviews the District Court's denial of an equitable defense for an abuse of discretion. *Lawn Managers*, 959 F.3d at 911; *Riegelsberger v. Air Evac EMS, Inc.*, 970 F.3d 1061, 1063 (8th Cir. 2020). Despite correctly identifying this standard, the State improperly invites this Court to conduct *de novo* review, arguing that the District Court did not engage in its own weighing of equitable factors. But the cases cited by the State do not support this sweeping proposition. *See Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992) (involving the denial of a motion to intervene); *Yutterman v. Sternberg*, 86 F.2d 321, 324 (8th Cir. 1936) (involving witness credibility in a breach of contract claim). The District Court necessarily considered and rejected these affirmative defenses when granting the remedy of specific performance. Therefore, the abuse of discretion standard applies to all of Appellants' affirmative defenses.

B. The District Court Properly Exercised its Discretion in Granting Specific Performance.

Under Missouri law, "the trial court is afforded much discretion in deciding whether to award the equitable remedy of specific performance." *McBee v. Gustaaff Vandecnocke Revocable Trust*, 986 S.W.2d 170, 173 (Mo. 1999); *Ste. Genevieve Cnty. Levee Dist. #2 v. Luhr Bros, Inc.*, 288 S.W.3d 779, 783 (Mo. Ct. App. 2009) ("Because specific performance is an equitable remedy, we will afford the trial court

great discretion in ruling on the motion."). Here, the District Court properly exercised its judicial discretion in granting specific performance based on the facts and circumstances of this case.

Under Missouri law, a party may bring a suit in equity for specific performance to enforce a settlement agreement. *Compass Bank v. Eager Rd. Associates*, LLC, 922 F. Supp. 2d 818, 824 (E.D. Mo. 2013); *Landmark Infrastructure Holding Co. v. R.E.D. Inv., LLC*, 933 F.3d 906, 912 (8th Cir. 2019) (stating that "a suit for damages for breach of contract, no less than a suit for specific performance, is a suit to enforce a contract; in each, a court gives legal force to the parties' agreements against a party in breach").

The State argues that a variety of equitable factors militates against granting specific performance. The State contends, for example, that specific performance would adversely affect the rights of charter schools and their constituents and cause them to suffer undue hardship. But the State ignores the fact that charter schools never had a right to the proceeds from the DST in the first place. The DSA, Settlement Order, and SB 781 did not provide for the revenue generated by the DST to go to charter schools. In fact, charter schools did not receive this revenue before the passage of SB 287. Furthermore, Plaintiffs do not contend the State can fund charter schools under the current formula. Plaintiffs, instead, argue that charter schools should not be funded with the revenue generated by the DST that is required to entirely be paid to the District. The State can (and likely should) continue funding

charter schools, but not with money that should rightfully be allocated to the District. Charter schools do not have court-ordered desegregation obligations, and, therefore, their receipt of this funding is already a windfall. Putting an end to this windfall can hardly be characterized as inequitable or unjust. The State's arguments of future funding concerns on behalf of charter schools do not and cannot change the State's funding obligations under the DSA and the Settlement Order approving the DSA. These concerns (to the extent they are valid) do not outweigh the necessity of operating programs intended to remediate unconstitutional segregation and benefit the students of the District. The real party damaged by the State's ongoing breach of diverting millions of dollars in funds is Plaintiffs, who have a constitutional right to attend a school district that is not segregated. The District is still required to maintain court-ordered desegregation programs, and, without some relief, must do so without the agreed-upon funding.

The State also contends that specific performance would be detrimental to the public interest. Remarkably, the State takes the position that the public welfare would be harmed by enforcing of the terms of the DSA, a contract implemented to end the scourge of invidious racial segregation in the public schools. The public interest clearly weighs in favor of upholding terms of the DSA. *See H&R Block Tax Servs. LLC v. LUU Le Dang*, No. 19-00895-CV, 2019 WL 7593900, at *5 (W.D. Mo. Nov. 25, 2019) ("It is well-settled that enforcing valid contracts and preserving contractual relationships serve the public interest."); *Schott v. Beussink*, 950 S.W.2d

621, 625 (Mo. Ct. App. 1997) (recognizing the public interest in protecting the freedom of persons to contract and in enforcing contractual rights and obligations). Diverting the DST funding would be detrimental to the public interest because it would frustrate the District's ability to continue the necessary desegregation programs that benefit public school children.

Finally, the State argues Plaintiffs' delay should preclude the relief Plaintiffs sought from the District Court. But as explained below, Plaintiffs did not unreasonably delay in moving to enforce their rights under the DSA. They filed their Motion within the purported limitations period. Therefore, the District Court did not abuse its discretion in granting specific performance.

C. The District Court Did Not Abuse its Discretion in Denying the Defenses of Equitable Estoppel, Acquiescence or Laches.

The District Court did not abuse its discretion in rejecting Appellants' affirmative defenses of equitable estoppel, acquiescence, and laches.

Equitable estoppel arises from the unfairness of allowing a party to belatedly assert rights if it knew of those rights but took no steps to enforce them until the other party has, in good faith, been disadvantaged by the changed condition. *Comens v. SSM St. Charles Clinic Med. Grp., Inc.*, 258 S.W.3d 491, 496 (Mo. Ct. App. 2008). "Whether the doctrine applies depends on the facts and circumstances of each particular case." *Id.* "Nevertheless, equitable estoppel is not favored under the law and it will not be invoked lightly." *Id.* For the doctrine of equitable estoppel to apply, there must be a representation made by the party estopped and relied upon by

another who changes his position to his detriment. *Id.* at 496-97. "In other words, the representation made by the party estopped must be inconsistent with the claim afterwards asserted and sued upon, and the party must be relied upon that representation and been injured thereby." *Id.* at 497.

Here, the State has not pointed to any admission, statement or act inconsistent with Plaintiffs' claim for specific performance. Plaintiffs have made no inconsistent representation to the State regarding the breach of the DSA. To the contrary, in 2008 and 2016, the District notified the Attorney General's Office and DESE about the breach. JA366-368; JA370-374. The State could not, and did not, rely on any representation from the SLPS or Plaintiffs in changing any position. In fact, the State relied on no statements when it unilaterally enacted a statute that is the genesis of this dispute and the breach of the DSA and the Settlement Order. It disregarded the 2008 notification. It disregarded the 2016 notification. And since the filing of Plaintiffs' Motion to Enforce, the State has steadfastly refused to alter or change the funding requirements to avoid breaching the DSA and violating the Settlement Order. Instead, it only attempted to justify this wrongful diversion of revenue from the District to charter schools.

The doctrine of waiver by acquiescence similarly does not apply. "Application of the doctrine has been restricted to cases wherein circumstances over and beyond a mere express or implied agreement to accept reduced payments or a delay in demanding full payment exists." *Grommet v. Grommet*, 714 S.W.2d 747,

751 (Mo. Ct. App. 1986). Here, Plaintiffs never agreed to accept the State's funding changes or accept less DST revenue, and the State did not change its position in any way because of any alleged acquiescence by Plaintiffs.

The doctrine of laches also does not bar this action. "The doctrine of laches is the equitable counterpart of the statute of limitations." *See Kan. City Area Transp. Auth. v. Donovan*, 601 S.W.3d 262, 275 (Mo. Ct. App. 2020). This doctrine does not apply because the purported statute of limitations had not run at the time of filing of Plaintiffs' Motion to Enforce. The Missouri Supreme Court has held that "as a general rule the doctrine of laches will not bar a suit before expiration of the period set forth in the applicable statute of limitations in the absence of special facts demanding extraordinary relief." *State ex rel. Gen. Elec. Co. v. Gaertner*, 666 S.W.2d 764, 767 (Mo. 1984). "This follows from the basic principle that equity follows the law, and where the rights of a party are clearly defined by statute, legal principles, and precedents, those determinations may not be unsettled or ignored in equity." *Lane v. Non-Teacher Sch. Emple. Ret. Sys. of Mo.*, 174 S.W.3d 626, 640 (Mo. Ct. App. 2005) (citation omitted). Because Plaintiffs could justifiably rely on Missouri's 10-year statute of limitations, this right should not be trampled or overridden by a court in equity.

Federal courts applying Missouri law have likewise rejected the application of laches in the absence of the running of the applicable limitations period. In *CitiMortgage, Inc. v. Reunion Mortg., Inc.*, No. 4:10-CV-1632, 2012 WL 5471165

(E.D. Mo. Nov. 9, 2012), for example, the district court held that the defendant was not entitled to the laches defense because "the statute of limitations has not expired, and [the defendant] has not identified any facts that would justify the 'extraordinary' relief of allowing a laches defense." *Id.* at *11. And in *CitiMortgage, Inc. v. Mason Dixon Funding, Inc.*, No. 4:09-CV-1997, 2012 WL 13055580, at *21 (E.D. Mo. Oct. 30, 2012), the district court held that "the second defense, laches, is also without merit" because "Missouri has a ten-year statute of limitations for breach of contract actions." *Id.*.

The United States Supreme Court has similarly held that laches cannot be invoked to bar legal relief on federal claims in the face of a statute of limitations enacted by Congress. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 960-61 (2017) ("Therefore, applying laches within a limitations period specified by Congress would give judges a 'legislation-overriging' role that is beyond the Judiciary's power ... Applying laches within the limitations period would also clash with the purpose for which the defense developed in the equity courts … Laches is a gap filling doctrine, and where there is a statute of limitations, there is no gap to fill.").

Even if the doctrine to somehow apply, the District court correctly rejected this defense. Mere delay does not constitute laches. Rather, the delay must be unreasonable, unexplained and must be shown to have caused damage and prejudice. *Trokey v. R.D.P. Dev. Grp., LLC*, 401 S.W.3d 516, 531 (Mo. Ct. App. 2013). Laches

"is not a favored defense, and equity does not encourage its invocation to defeat justice, but only to prevent injustice." *Ward v. Hudgens*, 22 S.W.3d 260, 264 (Mo. Ct. App. 2000). As stated above, Plaintiffs brought their Motion to Enforce timely and after becoming apprised of all the facts. Further, any alleged delay did not prejudice charter schools. Charter schools did not receive DST funds before the enactment of SB 287. The fact that they have since been receiving additional funding from the revenue generated by the DST, with no limitation on its spending, has provided them with an unjust windfall.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING INTERVENOR'S *RES JUDICATA* DEFENSE.

Intervenors' reliance on the doctrine of *res judicata* is entirely misplaced. *Res judicata*, or claim preclusion, "precludes relitigation of a claim formerly made." *A.G. ex. rel. Hubbard v. Midwest Bus Sales, Inc.*, 823 F.3d 448, 453 (8th Cir. 2016) (quoting *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. 2002)). Under Missouri law, this doctrine applies when (1) a prior judgment was rendered by a court of competent jurisdiction; (2) the decision was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Midwest Bus Sales*, 823 F.3d at 453. Claim preclusion does not apply if the "things adjudicated" in the two suits are different. *Chesterfield Vill.*, 64 S.W.3d at 318.

Intervenors cite *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477 (Mo. 2009) and three orders entered by the District Court on unrelated consent motions in 2011,

2013, and 2015. The litigation in *Comm. for Educ. Equal* did not even involve Plaintiffs, and therefore, *res judicata* on its face does not apply. *Headley v. Bacon*, 828 F.2d 1272, 1275 (8th Cir. 1987) (noting that *res judicata* does not bar claims against parties who were not involved in the first action). The three prior rulings by the District Court also do not bar this action because there were not "claims" adjudicated on the merits that resulted in any "final judgment." To the contrary, the matters relate to Court approval of three separate agreements made between the parties related to the Section 10 Funds established in the DSA. Consent agreements reflecting modifications to the DSA do not constitute "claims" that were adjudicated for *res judicata* purposes. Additionally, none of the prior matters relates to the same cause of action at issue in this appeal—whether the State has breached the DSA by diverting revenue generated by the DST to charter schools under SB 287. Further, the orders are not "final judgments," and in each other, the District Court specifically retained jurisdiction to enforce the provisions. *See Illig v. Union Elec. Co.*, 334 F. Supp. 2d 1151, 1155 (E.D. Mo. 2004) (declaring that as long as the case was still pending, its prior rulings were interlocutory and not the end of the case for *res judicata* purposes).

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING INTERVENORS' STATUTE OF LIMITATIONS DEFENSE.

Plaintiffs timely moved to enforce the DSA within the applicable statute of limitations. Under Missouri law, statutes of limitation apply to the commencement

of "civil actions," not necessarily the filing of motions, as is the case here. See Mo. Rev. Stat. §§ 516.100-145. But putting this aide, a claim for specific performance to enforce a settlement agreement is generally subject to the 10-year statute of limitations set forth in Mo. Rev. Stat. § 516.110. *Millington v. Masters*, 96 S.W.3d 822, 829 (Mo. Ct. App. 2002). That statute provides for up to 10 years to bring an action upon any writing for the payment of money or property. *See Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. 1997) ("Taken at its plain meaning, section 516.110(1), the ten-year statute of limitations applies to every breach of contract action in which the plaintiff seeks a judgment from the defendant for payment of money the defendant agreed to pay in a written contract."); *see also Harris v. Mortg. Professionals*, 781 F.3d 946, 949 (8th Cir. 2015).

Under Missouri law, the statute of limitations begins to run when the action accrues. An action accrues, and the statute of limitations starts to run, not when the wrong is done or the technical breach occurs, but when the damage resulting therefrom is sustained and capable of ascertainment. *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 577 (Mo. 2006); Mo. Rev. Stat.§ 516.100. "An action for specific performance is triggered by the failure to do the thing contracted for at the time and in the manner contracted." *Millington*, 96 S.W.3d at 829; *see also K-O Enterprises, Inc. v. O'Brien*, 166 S.W.3d 122, 127 (Mo. Ct. App. 2005) (stating that it is well-settled that the right to sue for specific performance "is

triggered by the failure of a party to do that which is contracted for, in accordance with the procedure established by the contract").

Here, the State breached the DSA when it started diverting DST revenue to charter schools sometime after SB 287 became effective on July 30, 2006. Once the District became aware of this reduction in funding, it notified the Attorney General and DESE on December 8, 2008 that the State was improperly withholding DST revenue from the District and therefore breaching the DSA. JA362-368 Plaintiffs timely moved to enforce the DSA on April 12, 2016 – within the applicable 10-year statute of limitations.

Moreover, even if the five-year limitations period were applicable, as Intervenors suggest, the Intervenors ignore the fact that the State's monthly reduction of revenue generated by the DST constitutes a continuing breach of contract that triggers a new limitations period each month that revenue generated by the DST is improperly diverted. *See Davis v. Laclede Gas Co.*, 603 S.W.2d 554, 556 (Mo. 1980); *Forrest T. Jones & Co. v. Variable Annuity Life Ins. Co.*, 447 F. Supp. 2d 1035, 1048 (W.D. Mo. 2006).

CONCLUSION

This Court should reverse the District Court's November 24, 2020 Order finding that: (1) the State did not violate the DSA in reducing the amount of revenue generated by the DST to the District to go to charter schools; and (2) charter school students are entitled to the same per pupil funding of revenue generated by the DST

as District school students. This Court should remand with instructions that all DST revenue be remitted to the SLPS to fund desegregation programs and that the State is prohibited from withholding any State aid to the District.

If this Court affirms the District Court's Order in its entirety, Plaintiffs request this Court remand the case to the District Court for a finding that charter schools are not running all desegregation programs as required by the DSA and therefore are not entitled to any portion of the revenue generated by the DST.

Dated: June 21, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7) and (f) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing Brief (exclusive of the cover page, statement regarding oral argument, corporate disclosure statement, table of contents and authorities, signature block, and certificates of compliance and service) contains 13,781 words as determined by the word count feature in Microsoft Word. Pursuant to Local Rule 28A(h), I also certify that electronic versions of the Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF's system. These versions have been scanned for viruses and are virus-free.

/s/ Christopher A. Pickett

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2021, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served accordingly.

/s/ Christopher A. Pickett