IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. SHAKMAN, *et al.*	)	
	)	No. 69 C 2145
Plaintiffs,	)	
	)	Hon. Edmond E. Chang
v.	)	District Judge
	)	
DEMOCRATIC ORGANIZATION OF COOK COUNTY, *et al.*,	)	Hon. Gabriel A. Fuentes
	)	Magistrate Judge
	)	
Defendants.	)	

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION TO CLARIFY SPECIAL MASTER'S RESPONSIBILITY AND RESPONSE TO GOVERNOR'S MOTION TO TERMINATE SPECIAL MASTER'S APPOINTMENT AND MOTION TO TERMINATE THE MAY 5, 1972 DECREE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Plaintiffs and the Governor share the objective of terminating the 1972 Decree.[1] Indeed, Plaintiffs have joined other defendants in motions to terminate federal oversight: the City of Chicago, Cook County, the Sheriff of Cook County, and the Forest Preserve District of Cook County. But Plaintiffs cannot yet join the Governor's request to do so. Unlike the other former defendants – each of whom had, among other things, fully implemented comprehensive employment plans and robust internal enforcement processes that court-appointed monitors had deemed adequate – the Governor has not yet completed those and other tasks necessary to meet his burden – and the burden is admittedly his – of showing that patronage practices have been eliminated and that a durable remedy is in place to prevent a recurrence of systemic patronage abuses. *See Horne v. Flores*, 557 U.S. 433, 450 (2009).

The question is not *whether* to terminate the Decree, but *when* and *how* to do so. The thorough report of the Special Master (Dkt. 7083, "SM Report") demonstrates that the Governor's request is premature. Progress has been made, but much work remains. Plaintiffs refer the Court to the SM Report, the principal conclusions of which will be summarized but not repeated below. The Governor argues that a durable remedy has been achieved because the State now has an "exempt list" and oversight of the State's employment practices by the Office of the Executive Inspector General ("OEIG") and its Hiring and Employment Monitoring Division ("HEM"). However, the Governor ignores that the State has not fully implemented the

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[1] This brief uses "Governor," the "Governor's Office," and the "State" interchangeably and to mean the Office of the Governor of Illinois and the entities and agencies under the Governor's jurisdiction. We refer to the Governor's Memorandum in Support of His Motion to Vacate the May 5, 1972 Consent Decree (Dkt. 6946) as "MV-Decree," his Cross-Motion to Vacate the Orders Appointing the Special Master (Dkt. 6947) as "MV-Master," and the Plaintiffs' Motion for Clarification Regarding, or, in the Alternative, to Expand the Scope of the Special Master's Responsibilities (Dkt. 6789) as "Plaintiffs' Motion to Clarify."

foundational element of an effective and durable remedy to prevent future patronage practices in State employment – the Comprehensive Employment Plan ("CEP") – including "crucial sections . . . that were designed to prevent future recurrent manipulation." (SM Rpt. at 47.) In fact, employees have not even been trained on the new CEP (Dkt. 6946 at 20 n.2, SM Rpt. at 45), and the Special Master catalogs other problems with the CEP implementation as well. (SM Rpt. at 45-53.)

The Governor conflates necessity with sufficiency in touting the approval of a narrower Exempt List and oversight by the OEIG and HEM. The long-overdue reforms to the Exempt List were one precondition to a durable remedy, but the existence of an Exempt List is not enough. It merely defines the universe of exempt positions for which political considerations may apply. As the Special Master notes, "[c]reation of the Exempt List and the Exempt Employment Plan is a significant achievement. But this alone will not prevent future abuses. If the State does not implement strong policies governing selection of candidates for non-exempt positions, then the Exempt List has limited value." (SM Rpt. at 65.) As the history of this case and the SM Report make clear, substantial problems remain and OEIG and HEM are not yet providing sufficient oversight and enforcement. (*Id.* at 56-62.)

The parties agree that the 1972 Decree should not terminate unless the Court is persuaded that past patronage practices have been eliminated and that a durable remedy is in place. As the Governor acknowledges, "a critical question in this Rule 60(b)(5) inquiry is whether the objective of [the original order] has been achieved. If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." (MV-Decree at 23 (quoting *Horne*, 557 U.S. at 450).) The corollary is that if a durable remedy has *not* been

implemented, continued enforcement of the Decree is necessary and proper. The durable remedy is not yet in place.

Whether a durable remedy is in place cannot be determined in a vacuum or rest on paper plans, sincere promises, or declarations of pure intent. Facts must be determined and plans must be implemented and tested before the Governor can avail himself of Rule 60(b)(5) to terminate the Decree. As the SM Report makes clear, more factual investigation is needed and the plans are not close to fully implemented. The State is not even at the beta test stage for the CEP and electronic hiring process.

The SM Report undermines the Governor's arguments that a durable remedy exists, and would support an immediate ruling denying the Governor's motion to vacate the 1972 Decree. But Plaintiffs suggest a more measured approach because, as noted, they seek sunset as well, albeit not prematurely. Plaintiffs believe that the best (and fastest) path to termination of the 1972 Decree is to permit the Special Master to complete her work under the Court's close supervision. The Governor can speed that process forward by working with her to complete the remaining tasks on a schedule to be set by the Court, with its close monitoring. It is more productive, and responsible, to focus on those tasks rather than litigation, as the parties had largely done until late last year when the Governor unexpectedly started taking a more adversarial stance.[2]

[2] Plaintiffs do not contest the Governor's right to file his Motion, only the apparent underlying conclusion that it makes more sense than continued collaboration. As Mag. Judge Schenkier observed in appointing the Special Master, "[m]y experience is that more progress is made in achieving what we are all interested in, and that is compliance with the decree. When the process is not an adversarial one, but instead is one that is shepherded through the efforts of a Court-appointed officer working through a well-defined mandate that is developed with the input of the parties." (Pls.' Mot. to Clarify, Ex. 7, Hearing Tr. 16:25-18:17, Oct. 22, 2014.)

The Special Master needs more time to monitor and evaluate, while the Governor needs more time to implement and test the remaining pieces of the remedial edifice. Accordingly, Plaintiffs suggest that the Governor's motions be entered and continued for six months while the Special Master continues to gather the facts necessary to advise the Court whether a durable remedy is in place (or, if not, what is left to accomplish), and for the Governor and the Special Master to continue to work diligently to complete the open tasks. At that point, Plaintiffs hope they will be in a position to join the sunset request, or, if not and if the Governor wants to press ahead with his termination request and obtain an immediate ruling, the Court will have the necessary factual record on which to base a ruling, either agreeing with the Governor or specifying those matters that need to be completed before termination is warranted.

As part of that process, the Court should confirm the Special Master's assignment as requested in Plaintiffs' Motion to Clarify (Dkt. 6789) as encompassing all agencies under the control of the Governor. The Court should direct her to evaluate and report, on a schedule set by the Court, on the Governor's progress and whether and when there is satisfactory resolution of the issues she has identified in her Report.

The jurisdictional arguments the Governor invokes provide no basis to abort the remedial process that has progressed since the 2014 appointment of the Special Master. As shown in Section I.C. below, and contrary to the Governor's arguments, no "changes in the law" warrant vacatur of the Decree. The process that Mag. Judge Schenkier and this Court have been shepherding is faithful to the federalism concerns the case law discusses. The *raison d'etre* of the process has been and remains creating a durable remedy for past constitutional violations in order to extricate the federal courts from oversight of the State's employment practices.

In determining whether the State has reached that point, it is important to note several points that the Governor has got wrong:

(i) The 1972 Decree is not limited, as the Governor suggests, to prohibiting forcing State employees to do precinct work. It covers much more: Any action "affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." (Dkt. 6946-1 at 4 ¶E(1).) Thus, it broadly applies to the many practices identified by the Special Master in which political reasons or factors can impact aspects of employment.

(ii) Nor does the 1972 Decree categorically exclude, as the Governor argues, hiring actions. A great deal – indeed most – State "hiring" is from the ranks of current State employees, as the Special Master explains. Thus, most State hiring practices and sequences affect existing State employees and are, therefore, subject to the 1972 Decree.

(iii) Neither the Plaintiffs (nor, we believe, the Special Master) seeks to take over or dictate the State's employment practices. That remains the responsibility of the Governor. The Plaintiffs' focus is on compliance with the requirements of the 1972 Decree and the constitutional principles underlying it. They want to finish the job, not prolong it. But they, and the classes they represent, are entitled to assurance that whatever plans and practices the State adopts will provide a durable remedy warranting termination of the Decree, and not be just one more of the many official State acknowledgments that patronage practices need to stop, unsupported by effective enforcement mechanisms and sanctions for non-compliance.

(iv) The Governor shoots at a strawman, arguing that Plaintiffs are demanding that the State comply with the equivalent of a Supplemental Relief Order ("SRO") like those several other defendants agreed to. The standards for substantial compliance in other SROs, and

Plaintiffs' proposed standard here, *see* Motion to Clarify at 4 n.3, are consistent with the case law that requires the State to have achieved "the objective" of the Decree and implemented a "durable remedy" in order to meet the standards of Rule 60(b)(5) for termination of the Decree.

(v) The Governor incorrectly conflates the alleged completion of the Special Master's initial assignments with the standards for termination of the Decree. There is, first, the incorrect premise to the argument – that the Special Master has completed her assignment. And, contrary to MV-Master at 1, the Court never suggested or implied that "[t]he orders appointing the Special Master contemplated that . . . the completion of her responsibilities would mark, the State's compliance with the 1972 decree." The Court never stated or implied that completion of the Special Master's itemized assignments meant termination of the Decree. Quite the opposite. The appointment order directed the Special Master to make recommendations of any further relief necessary to correct past violations and prevent recurrence, implying that further action by the State would be necessary.

LEGAL STANDARD

Rule 60(b)(5) provides that a party may obtain relief from a judgment or order if, among other things, "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]" Fed. R. Civ. P. 60(b)(5). Rule 60(b)(5) "may not be used to challenge the legal conclusions on which a prior judgment or order rests," *Horne*, 557 U.S. at 447, and may not provide relief to a party merely because "it is no longer convenient to live with the terms of a consent decree[,]" *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992). Accordingly, "a party seeking modification of a consent decree"—here, the Governor—"bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* The

"change in circumstances" may be "'a significant change either in factual conditions or in law' [that] renders continued enforcement 'detrimental to the public interest.'" *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 384). In "recognition of the features of institutional reform decrees," courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees so that "'responsibility for discharging the State's obligations is returned promptly to the State and its officials' *when the circumstances warrant*." *Id.* at 450 (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004)) (emphasis added).[3]

In addition to showing a "change in circumstances," a party seeking to terminate a consent decree based on the inequity of continued oversight must also establish that the "objective" of the decree has been achieved. *Horne*, 557 U.S. at 450 (A "*critical* question" in a Rule 60(b)(5) inquiry in which a party seeks to end a consent decree "is whether the objective of the [decree] has been achieved.") (emphasis added); *Frew*, 540 U.S. at 442 ("The federal court must exercise its equitable powers to ensure that *when the objects of the decree have been attained*, responsibility for discharging the State's obligations is returned promptly to the State and its officials.") (emphasis added); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249-50 (1991) ("The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."). "If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Horne*, 557 U.S. at 450. The converse is also true—if a durable remedy has not been

[3] Because the Governor has not met the standards set forth in *Horne*, Plaintiffs assume, without conceding, that *Horne* applies to a motion under Rule 60(b)(5) seeking modification of a consent decree, as opposed to a court-issued injunction. *See Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1198 (10th Cir. 2018) (discussing lower courts' conflicting conclusions regarding the force of *Horne* in the context of a Rule 60(b)(5) motion seeking modification of a consent decree).

implemented, continued enforcement of the order is not only necessary, but proper. Whether the objectives of a decree have been attained and a durable remedy has been implemented requires the Court to make "up-to-date factual findings." *Id.* at 469.

ARGUMENT

I. THE GOVERNOR HAS NOT MET THE REQUIREMENTS OF RULE 60(B)(5).

A. The Governor Has Not Established that the Objective of the Decree Has Been Achieved.[4]

The State claims that "the objective of the 1972 decree has been achieved" because "Plaintiffs do not allege that the State is perpetrating [a] coerced political work scheme" and the Ethics Act prohibits coerced political work by State employees. (Dkt. 6946 at 30.) The State's argument takes an unduly narrow view of the "objective" of the 1972 Decree and ignores that it is the *Governor's* burden to show compliance with federal law, which he has not done.

First, as discussed above, the 1972 Decree is not limited to prohibiting "[a] coerced political work scheme." Its scope is much broader: Any action "affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." (Dkt. 6946-1 at 4 ¶E(1).) Moreover, that the Ethics Act prohibits coerced political work does not mean that there is, in fact, no coerced political work, let alone that the State has achieved the Decree's broader

[4] Some courts have observed there is "tension" between *Horne* and *Rufo* "with respect to the appropriate course of action where a party seeking modification has brought itself into compliance with federal law but has not substantially complied with the specific terms of the consent decree or court order." *Jackson*, 880 F.3d at 1199; *but see Evans v. Fenty*, 701 F. Supp. 2d 126, 166-67 (D.D.C. 2010) (rejecting argument that there is tension between *Rufo* and *Horne* and holding that "a consent decree may appropriately go beyond the bare bones of what a court could order without the local government's consent"). Here, the Court need not resolve this "tension" because the State does not argue that the 1972 Decree or the 2014 and 2017 Orders exceed the minimum constitutional requirements.

objective of remedying and prohibiting unlawful political considerations in State employment practices.

Second, it is the *Governor's* burden to show that the State has achieved the objectives of the 1972 Decree and is in compliance with federal law. *See Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1206 n.9 (10th Cir. 2018) ("The burden of showing compliance with federal law is, of course, on the Defendants."). As discussed below, this requires up-to-date, factual findings. *See Horne*, 557 U.S. at 469. However, the Governor has presented almost no evidence in support of his motions and ignores a great deal of contrary evidence. The Governor has provided no declaration or deposition testimony. He instead points to the purported "absence of any evidence of violations of the 1972 consent decree" (Dkt. 6946 at 31), but the Special Master's Report convincingly rebuts the Governor's assertions that patronage abuses have not continued. She identifies a number of examples that indicate that the Governor has not yet eliminated illegal political influence in State employment practices, as did Plaintiffs in the Motion to Clarify at 15-19, to which the State has not replied.

Importantly, the Special Master has identified patronage abuses even though it was agreed early in her tenure that she would not focus on ferreting out violations, but "on *prospective* measures to prevent *future* violations – not investigations into current or past violations . . . The group [Governor, Plaintiffs, Special Master and Court] determined that limiting patronage abuses in the future required an entirely new employment system based on objective and auditable standards, appropriate checks and balances, and a comprehensive oversight component." (SM Rpt. at 1.) As she notes, the Governor is wrong to argue that the Special Master's job was to evaluate whether patronage abuses continue and that she found that they do not. Accordingly, the Governor's claim that there are no current examples of violations

of the prohibitions in the 1972 Decree (in addition to being factually incorrect) ignores that the Special Master was not tasked to search for them. Nevertheless, in the course of her work the Special Master identified many examples of continuing violations of the 1972 Decree, or cases in which violations are alleged but have not been fully investigated, including the following evidence of continuing political influence in employment decisions that violate the 1972 Decree.

(i) A candidate for a civil engineering position was selected despite the fact that [redacted]

(SM Rpt. at 38-40.)

(ii) Among complaints sent to the Governor's office and provided to the Special Master, 98 involved conflicts of interest after May of 2017. "The alleged conflicts include some related to political connections . . ." (SM Rpt. at 43-44.)

(iii) "[I]ndividuals with political connections to former Chicago Alderman Richard Mell were hired into seasonal IDOT winter positions." (SM Rpt. at 25.) (Because of the practice of repeat hiring of the same individuals for seasonal jobs, this issue involves 1972 Decree violations since existing employees are impacted.)

(iv) "IDOT . . . regularly used the emergency appointment process to quickly hire politically connected individuals into routine (non-emergency) positions, and then reappointed the same individuals into subsequent emergency hires, despite the prohibition against doing so. . . ." (SM Rpt. at 27-28.)

(v) The lack of enforcement of Minimum Required Qualifications ("MRQs") allowed a political hiring of an IDOT employee into a faux-exempt position, and his rehiring that was supposed to be competitive, but was not because MRQs were not applied. (SM Rpt. at 32.)

In short, the Governor has not carried his burden of showing that the vestiges of patronage have been eliminated.

B. The Governor Has Not Established that the State Has Implemented a "Durable Remedy."[5]

The State has also not satisfied *Horne's* second requirement of showing that it has implemented a "durable remedy[.]" 557 U.S. at 450. "[A]t a minimum, a 'durable' remedy means a remedy that gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends." *Evans v. Fenty*, 701 F. Supp. 2d 126, 171-72 (D.D.C. 2010). Several of the desegregation cases "highlight the broad inquiry a district court must undertake when determining a party's commitment to abiding by federal law." *Jackson*, 880 F.3d at 1200. "[F]actors that a district court may consider include the party's commitment to compliance, the duration of the party's compliance with federal law, and whether or not the effects of the violation of federal law persist." *Id.*; *see also Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (holding that the district court may relinquish desegregation control in incremental stages, and stating that "one of the prerequisites to relinquishment of control in

[5] The State argues that it has implemented a durable remedy in a section titled "Significant changes in factual conditions compel termination of the decree." (Dkt. 6946 at 24.) Usually, modification of a consent decree based on changed factual circumstances may be warranted when (i) the changed circumstances "make compliance with the decree substantially more onerous," (ii) a "decree proves to be unworkable because of unforeseen obstacles," or (iii) "enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384. The State does not argue that any of these grounds for modifying the 1972 Decree exists here and focuses only on its purported achievement of the objectives of the 1972 Decree and implementation of a durable remedy.

whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution"); *id.* at 491 (listing relevant factors in determining whether partial withdrawal of federal desegregation oversight is appropriate as including whether the school district has demonstrated "its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance"); *Dowell*, 498 U.S. at 249-50 (stating that "[t]he district court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable").

The Governor rests his "durable remedy" argument on three shaky pillars: (i) an alleged absence of recent Decree violations; (ii) the adoption of an Exempt List and purported completion of the Special Master's assigned tasks; and (iii) the role of the OEIG and HEM. The SM Report explains in detail why these pillars are not enough to satisfy the Governor's burden. The absence of any one of the three defeats the Governor's argument. In fact, all three are wanting. Moreover, the Governor cannot demonstrate his "commitment" to remedying and preventing patronage practices in State employment without implementation of the CEP.

1. There have been violations and practices conducive to violations.

As discussed above, the Special Master has identified several examples that indicate patronage abuses have continued. Additionally, the Special Master has identified many instances in which practices were followed (or not followed) that create opportunities for political influence on employment decisions. The historical patronage culture of Illinois government, as evidenced over the course of this case, is relevant to whether a durable remedy has been achieved.

As the Special Master notes, the State fills vacancies through "methods that strongly favor current or former certified State employees or by finding other 'work arounds,' such as using personal services contracts, temporary hires, temporary assignments or other methods." (SM Rpt. at 19.) These "work arounds" lack sufficient procedures, rules and enforcement to generate a durable remedy for the patronage practices to which the 1972 Decree applies. Because so many job applicants – the vast majority – are current State jobholders, the 1972 Decree applies to hiring sequences involving them. The SM Report identifies these specific problem areas:

a. ***Temporary Assignments.*** "[T]emporary assignments result[] in unofficial/non-competitive promotions, increased pay, and unfair advantage over non-selected employees." (*Id.* at 20.) The practice is widespread. In 2018-19, the Department of Human Services had 3,263 temporary assignments. (*Id.* at 21.) For many employees, "temporary" equals "permanent." Some employees have been working in "temporary" positions for more than 10 years. (*Id.* at 23.) The CEP fails to address this systemic deficiency. (*Id*. at 24.) These practices violate the 1972 Decree, even though nominally related to hiring, because they give preferences to some State employees, many of whom were hired based on political considerations, at the expense of other State employees who are not given the opportunity to compete for the position. The State's practices provide an unfair advantage over non-selected State employees.

Historically, use of temporary assignments was a central device in the "classic" patronage employment system that generated this lawsuit. The practice was used by the City of Chicago to facilitate political employment actions by shielding favored employees from compliance with civil service rules. The practice is described in the original complaint at ¶25. To eliminate past vestiges of patronage violations and create a durable remedy to prevent future abuses, an open

and competitive process is necessary to fill positions. Repeated assignments as temporaries for political reasons violate the 1972 Decree with each reappointment, including those facilitated by prior hiring on a political basis, examples of which the Court recently addressed in the context of the IDOT Staff Assistant violations and the resulting John Doe procedures.

b. ***Temporary or Seasonal Hires.*** The SM notes that "individuals with political connections to former Chicago Alderman Richard Mell were hired into seasonal IDOT winter positions." (SM Rpt. at 25.) The Special Master adds that despite changes in IDOT procedures, "seasonal, temporary and emergency hire processes are not subject to uniform controls and adequate oversight sufficient to prevent future violations of the type" she describes. (*Id.* at 26.)

c. ***Emergency Appointments.*** The same concerns apply to emergency appointments, which are not addressed in the CEP. For example, "IDOT . . . regularly used the emergency appointment process to quickly hire politically connected individuals into routine (non-emergency) positions, and then reappointed the same individuals into subsequent emergency hires, despite the prohibition against doing so. . . . Inadequate measures have been taken to prevent a recurrence at IDOT, and we do not know if other agencies have similarly ignored CMS guidance." (SM Rpt. at 27-28.)

d. ***Personal Service Contracts***. The same concerns apply to the use of Personal Service Contracts ("PSCs"). PSCs "allow[] agencies to manipulate hiring sequences and avoid oversight by CMS." (SM Rpt. at 28.) In 2019, the State reported employing more than 1,700 contractual workers. (*Id.*) Hiring via PSCs is often repeated for the same individuals. (*Id.* at 29.) The CEP "does not include any *meaningful* enforcement or oversight mechanism." (*Id.* at 30.) Like temporary assignments and emergency hiring, the rehiring of PSC personnel falls

under the 1972 Decree as it involves renewal of non-exempt job assignments on a non-competitive basis subject to political manipulation.

e. ***MRQ Requirements.*** MRQ requirements and job descriptions are not applied accurately or completely. MRQs are also important to generate compliance with the 1972 Decree and eliminate vestiges of patronage, as the Special Master explains. Both shortcomings permitted the IDOT Staff Assistant job manipulation that violated the 1972 Decree. Despite the Special Master's recommendations that the State "update its job descriptions and include meaningful and objective minimum qualifications [and the] CEP requiring minimum requirements for all positions and accurate job descriptions . . . these requirements have not been fully implemented and/or followed." (SM Rpt. at 31.) The lack of enforcement of MRQs allowed political hiring of an IDOT employee into a faux-exempt position, and his rehiring that was supposed to be competitive, but was not because MRQs were not applied. (*Id.* at 32.)

f. ***Technical Positions.*** The State needs, but lacks, a complete list of technical positions in all State agencies, with appropriate MRQs, that should be (but is not) subject to CMS oversight. (SM Rpt. at 15-16.) Faux technical positions at IDOT were used for political employment actions in direct violation of the 1972 Decree, as OEIG and Mag. Judge Schenkier found, since eligible public employees were not considered for the jobs, which were awarded based on political sponsorship. The "John Doe process" – subsequently created by court order to prevent employees who previously obtained Staff Assistant positions based on political sponsorship from using the experience gained to obtain other State jobs – is insufficient to prevent continuing violations. (*Id.* at 17-18.) For example, a [redacted] (*Id.*)

This is relevant to obtaining complete relief for the violations of the 1972 Decree resulting from filling Staff Assistant jobs politically.

The foregoing examples are not to say that there is no proper role for temporary or emergency hiring or for treating technical positions or personal service contracts differently from most hiring. As the pandemic illustrates, flexibility is needed for exigent circumstances. But flexibility requires both guardrails and oversight, the absence of which has facilitated abuses. Rules and oversight are necessary to establish a durable remedy that can appropriately reduce the risks of future abuses.

2. Adopting an Exempt List is not enough.

The adoption of a proper Exempt List was necessary, but not sufficient, to generate a durable remedy. Defining and narrowing the universe of the exempt positions is one thing. Excluding political considerations from non-exempt hiring, promotion and other employment actions is quite another, as the Special Master stated. (*See* SM Rpt. at 65, quoted above at 2.)

The violations of the 1972 Decree involving the Staff Assistants illustrate why a process for adding positions to the Exempt List is not enough to prevent lapses into unlawful patronage practices. The Staff Assistant position went through the review process and was found by the State to meet the *Branti* standard. Because there was no oversight once a position was added to the list of *Rutan* positions and there were inadequate policies and enforcement for hiring, transfers, and promotions into non-exempt positions, IDOT was able to hire/transfer/promote politically connected people into the *Rutan* exempt Staff Assistant position and then immediately assign them to a non-Exempt position.

During the March 30, 2015 in-chambers conference, the State admitted that the problem of using purportedly Exempt positions to place individuals into non-exempt positions either directly or through transfers without going through a competitive process was not limited to

IDOT; it was statewide. (*See* Exhibit 1, Agenda for In-Chambers Conference with Judge Schenkier (Mar. 30, 2016).)[6]

The Exempt Position Hiring Process does not include any provision for what happens after a position is filled. The Governor has not presented any evidence that it has developed, much less implemented, a procedure for monitoring or auditing Exempt appointments to ensure that the individuals are actually doing the job they were appointed to do.

3. OEIG and HEM's efforts thus far have not resulted in changes.

Oversight and enforcement are not yet robust. Meaningful enforcement is necessary to a durable remedy, as the Governor implicitly acknowledges. Perfect paper procedures mean little if violations in practice are not identified and remedied. The SM Report documents that the State still lacks consistent enforcement procedures to enforce patronage-related employment rules. The many examples provided in the SM Report include these:

(i) The Department of Agriculture disobeyed CMS instructions requiring that all hiring for seasonal State Fair Workers follow *Rutan* hiring rules for competitive selection. (SM Rpt. at 26.)

(ii) "OEIG recommended that CMS follow up to determine whether these [specified] agencies were adhering to *Rutan* protocols with respect to PSCs, the Special

[6] Because the Governor was cooperating with the Special Master, Plaintiffs, and the Court to develop policies and procedures for both IDOT and the State as a whole that would remedy past violations and prevent reoccurrence, there was no need for the Court to direct the Special Master or allow Plaintiffs to engage in extensive discovery or investigations of the prior violations. The Court already had found that appointing individuals into purportedly Exempt positions to do non-exempt work or transferring the individuals to non-Exempt positions violated the 1972 Decree and the Governor admitted those problems were statewide, so the parties agreed to focus on the remedy rather than spend the time and resources uncovering and litigating the full extent of the violations.

Master's office has not received information related to any follow up by CMS or any other agency." (SM Rpt. at 29.)

(iii) The CEP "does not include any *meaningful* enforcement or oversight mechanism." (SM Rpt. at 30.)

(iv) With respect to MRQs, IDOT has ignored HEM's and the Special Master's requests to deal with those candidates who were improperly screened out of supposedly competitive hiring processes. (SM Rpt. at 34.)

(v) "Numerous other HEM Advisories have identified problems with the accuracy of position description duties and/or application of MRQs. Through August 2020, at least 24 HEM Advisories have touched on issues involving accuracy of position descriptions and/or application of MRQs." (SM Rpt. at 35.)

(vi) The CEP requires agencies that start a hiring sequence and then cancel it to "submit a justification to CMS for review and approval." At least five HEM advisories involve agencies that unilaterally cancelled hiring sequences without CMS review or approval. (SM Rpt. at 40-42.) The Special Master concluded that "failed sequences continue to occur without prior CMS notice or approval and provide significant opportunity for manipulation of the hiring process to favor a preferred candidate." Because so many State hiring sequences involve applications by current State employees, the process is subject to the 1972 Decree. Steps to prevent manipulations, like those noted above, are an important part of a durable remedy.

(vii) "[A]pproximately 25 HEM Advisories relate to the improper documentation and/or vetting of conflicts of interest." (SM Rpt. at 42.) "Accurate disclosure and vetting of conflicts of interest is an essential component of the State's

employment plan to prevent future manipulation. To date, there is a lack of consistent and uniform practice for disclosing and vetting conflicts." (*Id*. at 43.)

The Special Master's findings rebut the State's reliance on HEM and CMS to monitor compliance and enforce the new employment rules. HEM's and CMS's process and practice are not yet adequate to provide effective monitoring and enforcement for several reasons:

(i) "HEM's authority is limited – it is not authorized to review allegations of Political Discrimination and Political Contacts." "CMS is required to report such allegations to OEIG, which has discretion whether to investigate the matter." (SM Rpt. at 55.)

(ii) "In many instances, HEM noted that the scoring and/or screening documentation did not allow for adequate monitoring and review but did not challenge the agencies' selection." (SM Rpt. at 37.) It is not enough to identify problems. If uncorrected, they can lead to abuse.

(iii) As noted above, agencies repeatedly disregard HEM Advisories on a large number of important requirements (conflict review, application of MRQ, inviting sufficient applicants for each sequence, and proper scoring by interviewers). There appears to be no sanction for disregarding HEM.

(iv) "To date, CMS is not conducting all of its assigned compliance activities under the CEP (e.g., reviews and audits of personnel policies and practices necessary for ensuring compliance with CEP.)" (SM Rpt. at 55.)

(v) Although required by the CEP filed on November 25, 2019, "[t]o date, CMS has not issued or posted any compliance reports." (SM Rpt. at 56.)

(vi) "[T]he current compliance framework does not always allow for transparent reporting in HEM Advisories." (SM Rpt. at 57.) The Special Master refers, for example, to [redacted] (*Id.*)

(vii) HEM's reports do not identify issues that it investigated but decided to refer to OEIG, because HEM is not permitted to make the disclosure. As an example, the Special Master noted that a HEM's report [redacted] (SM Rpt. at 58.) As a result, "[i]ssues relating to hiring-related deficiencies or violations that reveal misconduct will not be timely flagged by HEM." (*Id.*)

(vii) "OEIG's position prevents HEM from timely disclosing information it discovers in a compliance review if the information relates to an ongoing OEIG investigation . . ." (SM Rpt. at 59.)

(viii) Similar problems undercut the value of internal agency investigations. "[I]t appears that findings made by an agency's investigative body are not publicly reported." (SM Rpt. at 60.)

Again, these conclusions from the SM Report do not eliminate HEM and OEIG as valuable enforcement sources post-sunset. But they illustrate that the two agencies and the procedures they apply are not there yet. And they establish that some State agencies give lip service to reform, while simply ignoring repeated HEM recommendations. That is a very important conclusion against the relevant history, which the SM Report documents, of many past

recommendations by State agencies and commissions on the importance of ending patronage practices – followed by lack of effective enforcement.

4. Implementation of the CEP is necessary.

A critical obstacle to implementation of a "durable remedy" is the failure to implement a completed, fully-developed CEP followed by a record that the CEP is functioning well enough to help prevent future political discrimination. The Governor admits that the CEP has not been fully implemented, (Dkt. 6946 at 20 n.2), a truth confirmed in spades at the September 14, 2020 status conference and the SM Report.[7] The Governor, therefore, argues that the CEP is irrelevant to the Rule 60(b)(5) analysis. He is wrong.

The Governor's argument that an employment plan is not identified in the 1972 Decree misses the point. The Governor also misstates the terms of the new CEP and of this Court's prior holdings. (Dkt. 6947 at 23.) As this Court found when it appointed the Special Master, hiring, promotions, and transfers are interrelated. (Dkt. 6947-1 at 12-14.) The Special Master has reported that the State mostly hires from within, and does not have a separate promotion policy. Implementing a proper process for filling positions affects current State employees at least as much as prospective hires from outside. Thus, the State's plans regarding "hiring" fall squarely within the terms of the 1972 Decree because vacancies are open to, and often filled with, current employees.

The fact that the 1972 Decree does not mention developing an employment plan confuses the injunction order with the requirements for the Court to terminate it. The issue is whether a durable remedy is in place. It is not enough for the State to promise not to let politics infect

[7] *See, e.g.*, Exhibit 2, Sept. 14, 2020 Hearing Tr: 32:2-34:10 (discussing timeline for implementing new parts of the CEP following upcoming trainings and that CEP section regarding PSCs "has not been rolled out comprehensively" and "won't be part of the training sessions that are starting on September 22nd").

employment decisions. The State makes employment decisions all the time. The controlling legal issue is whether a structure is in place to minimize the risks of reinfection. The Governor has adopted, but not yet implemented, the CEP to provide such a structure. (SM Rpt. at 1-2, 44-45 ("It was in *response* to actual or potential violations that *the State proposed a CEP as a remedy*." (italics added).) The Governor *chose* to create and has begun the process of implementing the CEP as the means to prevent patronage practices and overhaul a system that was otherwise antiquated and dysfunctional (and whose dysfunction contributed to the flourishing of illegal patronage). (*Id.* at 1-2, 44-45.) As the Special Master observed:

> Most of the deficiencies described in Section VI have been acknowledged by CMS, HEM and IDOT. As recently as October 2019, CMS listed a series of significant "easily identified numerous problems with the current hiring process." [Internal citation omitted.] In order to remedy those problems, the State proposed, and the parties agreed that a Comprehensive Employment Plan was necessary. Since at least early 2018, the parties have been discussing a statewide CEP, including at each Court status hearing since that time.

(*Id.* at 44-45.)[8]

The State's decision to adopt and implement the CEP as a remedy to illegal patronage and a long-overdue improvement to governance makes all the sense in the world because the State cannot effectively (and lawfully) operate with fragmented employment processes. Likewise, the geographic restriction in the 1972 Decree to the Northern District of Illinois is irrelevant because the State (properly) has never proposed to have a different employment plan downstate from that in the Northern District. Having chosen "[s]ince at least early 2018," (SM Rpt. at 45), to go down the statewide-CEP path to attempt to meet the legal requirements to

[8] The Parties first discussed the need for a CEP for IDOT with the Court during the October 19, 2016 status hearing in chambers. As a result of subsequent discussions, at the February 5, 2018 chambers status hearing, the Governor agreed to implement a CEP for all agencies under his jurisdiction. (*See* Exhibit 3, Mar. 15, 2018 email from S. Kerley.)

sunset, it is not credible for the State now to declare that the CEP is merely an irrelevant appendage to the durability of its remedy.

It is impossible to assess the durability of the remedy without a searching review of the CEP and its implementation. The Governor fills all vacancies using the CEP. It expressly covers more than external applicants: "[t]his CEP applies to current State employees as well as all applicants and candidates for State positions." (Dkt. 6612-1, § I.) When a position becomes vacant, internal and external applicants can apply or bid for the position. If an internal candidate gets the position (or is denied it), the process is covered by the 1972 Decree. As noted above, internal hiring has predominated over external hiring.

The Special Master described several important respects in which the CEP is incomplete and inadequate. Worse, those provisions that are in effect "are not regularly followed, as explained in the numerous HEM Advisories issued to date." (SM Rpt. at 45.) In implementing new policies, "success requires more than simply issuing a policy." It requires training, and testing, followed by appropriate amendments and retesting. It also requires "a robust enforcement mechanism" and there must be "consequences for failing to adhere to the policies." (SM Rpt. at 45-46.) The Special Master finds the State has not completed these steps. She cites many examples, including the following:

(i) The failure to use the new electronic hiring process [the "test track"] other than for "only a small percentage of sequences." (SM Rpt. at 47.)

(ii) The failure to implement "crucial sections of the CEP that were designed to prevent future recurrent manipulation." (*Id.* at 47-48 (itemizing the sections).)

(iii) Although since November 2019, HEM has been monitoring employment actions and issuing Advisories that "identify issues of concern and direct agencies to

existing CMS guidance," the "agencies often continue to make the same errors in later sequences that HEM reviews. This suggests that agencies need specific training on the CEP." (*Id.* at 48.) This may also suggest that the agencies are simply disregarding the CEP because there is no sanction for noncompliance. Specific examples are listed at SM Report 49-51.

The submission from the OEIG also highlights problems from the lack of implementation and training on the CEP. (Dkt. 6936.) In 2018 and 2019 HEM monitored a total of 31 hiring sequences. The OEIG reported wide-spread confusion about the application of minimum qualifications during the applications screening process. (*See, e.g.*, *id.*, Exhibit 1, at 2, 4, 5, 7.) HEM noted issues with the use of temporary assignments. (*Id.* at 6.) OEIG and HEM also noted problems with how candidates were scored by interviewers. (*Id.* at 8.)

Last, but not least, the Governor chose to file the proposed CEP despite disagreements with the Special Master and Plaintiffs regarding certain of its terms. Plaintiffs have the following objections to the CEP, with which they believe the Special Master concurs. These problems, if not addressed, weaken the durability of the proposed remedy:

- The CEP does not address the by-pass provision in the CBA. Under the CBA, the State can "bypass" an employee with more seniority if a less senior candidate has "superior skill and ability to perform the work required in the position classification." (SM Rpt. at 35 (quoting AFSMCE Contract Art. XVIII, §2(b)).) The CBA does not include any process or standard for determining when a candidate has "superior skill and ability." The Special Master and Plaintiffs had proposed requiring the State to follow the CEP when exercising the by-pass right – posting, screen applicants against the minimum and preferred qualifications, interview. That would allow for monitoring and auditing the

decision to exercise management discretion under the by-pass provision. (Dkt. 6612-1, § V.D.)

- The CEP does not require advance notice to HEM or the CMS Compliance Officer of interview panel meetings to discuss candidates. HEM and CMS cannot monitor without notice.
- HEM Advisories found multiple instances of interview panels waiting to score candidates until discussion with other panelists to reach consensus scoring in violation of the CEP. (*Id.* § V.H.) Requiring independent scoring by each interviewer as opposed to waiting until all interviews are completed to be told how to score candidates is an essential check on manipulation of scores for politically connected candidates.
- Temporary and Interim Assignments should be limited to 90 days. (*Id.*, § VIII.)
- There is no procedure for hiring Seasonal Workers. The CEP says only that positions "shall be posted and competitively selected." (*Id.*, § VIII.C.) (Plaintiffs had proposed adding "using the procedures in Section V or VI.")
- Section XI (Compliance investigations and advisories) of the CEP does not provide any enforcement mechanism to require agencies to comply with its terms. (*See* SM Rpt. at 27.) OEIG is charged with ensuring compliance, but accountability is lacking. OEIG can refer matters back to the agency to do the investigation. There is no requirement that OEIG or HEM track or monitor to make sure any such agency investigation is conducted; nor is the agency required to report back to OEIG, unless OEIG specifically asks for a response. Similarly, the CEP does not require the agency to respond to HEM Advisory recommendations unless HEM specifically asks for a response. By not requiring written responses from the agencies, the agencies are effectively told that it is acceptable to

ignore HEM.

As the SM Report and the OEIG submission exhibits show, no one is held accountable for violations of the CEP, no one is disciplined, no one has to undergo additional training, and violations recur. The Special Master's description of the Department of Agriculture provides a telling example:

- In 2013, CMS specifically instructed the Department of Agriculture to hire State Fair workers following the *Rutan* procedures. Agriculture ignored these instructions for years. No one was held accountable. (SM Rpt. at 26.)

- In 2015, OEIG found that Agriculture repeatedly violated hiring procedures and hired individuals through PSCs without following a competitive process. No one was held accountable. (SM Rpt. at 28-30.)

- In 2019, OEIG found, once again, that Agriculture continued to ignore the policies governing the use of PSCs by filling positions outside of any competitive process, even after repeated warnings from OEIG. No one was held accountable. (SM Rpt. at 30.)

- In 2020, the CEP required agencies, including Agriculture, to submit quarterly reports on the use of PSCs to allow CMS and OEIG HEM to monitor. Agriculture did not submit the reports for the first two quarters of 2020. No one was held accountable.

To summarize, the "up-to-date" facts regarding the CEP establish that the Governor cannot meet his burden of showing that the State has implemented a durable remedy. The CEP has not been fully implemented; personnel are untrained; there is inadequate oversight or compliance; violations carry no consequences; and the CEP itself requires additional safeguards.

C. No "Changes in the Law" Warrant Vacatur of the Decree.

The Governor has also failed to establish that "changes in the law" of standing "compel termination" of the 1972 Decree. (Dkt. 6946 at 35.) The Supreme Court has made clear that

changes in the law do not "automatically open[] the door for relitigation of the merits of every affected consent decree[.]" *Rufo*, 502 U.S. at 389. To so hold "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Id.* Instead, changes in the law warrant modification of a consent decree if "one or more of the obligations placed upon the parties has become impermissible under federal law" or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388; *see also United States v. Krilich*, 303 F.3d 784, 790 (7th Cir. 2002). Additionally, "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo*, 502 U.S. at 390. The Governor does not contend that any of these grounds exists: that prohibiting patronage practices in State employment "has become impermissible" or that the law has changed to make such practices "legal." Nor does the Governor argue that its agreement to the Decree was based "on a misunderstanding of the governing law."

Consistent with *Rufo*, the Seventh Circuit in this very case has rejected attempts to relitigate the standing issue anew as grounds for not enforcing a consent decree, and held that the argument must be evaluated under the equitable standard of Rule 60(b)(5). *See O'Sullivan v. City of Chicago*, 396 F.3d 843 (7th Cir. 2005) ("*Shakman III*"). In *Shakman III*, the City made an analogous argument to that the Governor advances now – that, due to changes in the law, the plaintiffs, two police officers seeking to enforce the 1983 consent decree against the City, lacked standing. *Id.* at 851. The district court granted the City's motion, but the Seventh Circuit reversed. After reviewing the history of this litigation, the Seventh Circuit stated:

> After a case has become final by exhaustion of all appellate remedies, only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge.

Id. at 859 (quoting *In re Factor VIII*, 159 F.3d 1016, 1019 (7th Cir. 1998)). *See also Shakman v. City of Chicago*, 426 F.3d 925, 936 (7th Cir. 2005) ("*Shakman IV*") (same).

The Seventh Circuit stated that if the City were to file a Rule 60 motion to terminate the Decrees, "the focus of the district court shall be not on the law of standing as a jurisdictional concept but on the equitable standards embodied in Rule 60(b)(5)." *Shakman III*, 396 F.3d at 868. The Seventh Circuit reiterated this standard in *Shakman IV*, holding that the defendant "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Shakman IV*, 426 F.3d at 936 (quoting *O'Sullivan*, 396 F.3d at 861).

The Governor acknowledges this law of the case—in a footnote—and claims that he is not arguing that Plaintiffs lacked standing when the Decree was entered. (Dkt. 6946 at 36 n.3.) Nor could he. The Seventh Circuit has held that Mr. Shakman, Mr. Lurie, and the voter and candidate classes that they represent have standing to pursue claims of unlawful patronage practices affecting the rights of governmental employees. *Shakman v. Democratic Org. of Cook Cty.*, 435 F.2d 267, 270 (7th Cir. 1970) ("*Shakman I*"). The decision in *Shakman I* has never been overturned and remains the law of the case.[9] The Court (Mag. Judge Schenkier) recently rejected the Clerk of Cook County's challenge to Plaintiffs' standing, holding that "the standing

[9] In *Shakman v. Democratic Org. of Cook Cty.*, 829 F.2d 1387 (7th Cir. 1987) ("*Shakman II*"), the Seventh Circuit held that the voter class lacked standing to challenge patronage *hiring* claims. The Seventh Circuit made clear, however, that: "Our holding does *not* address the substantially different question of whether the plaintiffs would have standing to attack the constitutionality of the coerced political work demanded of those already employed by the government as a condition of continued employment." *Id.* at 1398.

of voters and candidates to pursue claims under the 1972 Consent Decree [is] well-settled." *Shakman v. Clerk of Cook Cty.*, 69 C 2145, 2020 WL 1904094, at *9 (N.D. Ill. Apr. 17, 2020).

Moreover, the Governor's argument that "significant changes in the law of ***voter*** standing" compel termination of the Decree, (Dkt. 6946 at 35-39 (emphasis added)), ignores the fact that the original Plaintiff class of ***candidates*** has standing to enforce the 1972 Decree. That class alleged that the patronage system put independent candidates and their supporters at an illegal and unconstitutional disadvantage because patronage employees and applicants were forced to support the dominant political parties by donating to campaign funds and performing campaign work. The patronage system also harmed independent candidates, like Mr. Shakman, by forcing them to expend significant funds (in excess of $10,000) to counter these tactics. (*See, e.g.*, Dkt. 376-1, Second Am. Compl. ¶¶19-39.) In *Shakman I*, the Seventh Circuit held that these claims were justiciable, and that Mr. Shakman had standing to bring them. 435 F.2d at 270. *Shakman II* does not suggest that independent candidates lack standing to challenge governmental actions that provide a competitive advantage to the major political parties, and decisions after *Shakman II* hold that a candidate whose competitor obtains an advantage through a government practice or regulation has standing to challenge that practice or regulation. *See, e.g., Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 63-66 (D.D.C. 2000).[10]

While disclaiming any attempt to challenge Plaintiffs' standing directly, the Governor argues, selectively quoting from *Shakman III*, 396 F.3d at 859, that "due to 'significant changes

[10] Because *Shakman I* remains controlling and the Governor concedes that Plaintiffs had standing when the 1972 Decree was entered, Plaintiffs have limited their discussion of why Mr. Shakman, Mr. Lurie, and the classes they represent had and continue to have standing to enforce the 1972 Decree. However, Plaintiffs request the right to supplement this response should the Court determine *Shakman I* is not controlling and considers the issue of Plaintiffs' standing anew.

in the law of voter standing since the entry of' the consent decree, at this juncture, the decree is 'fashioned in litigation in which one of the litigants [does] not have a sufficient concrete stake in the outcome' such that its provisions 'are not worthy of continued enforcement by a federal court.'" (Dkt. 6946 at 36 n.3.) This argument erroneously assumes, contrary to *Shakman I*, that the Plaintiffs do not have a "sufficient concrete stake in the outcome." Moreover, the complete quotation shows that *Shakman III* did not hold that a consent decree is unenforceable under Rule 60(b)(5) if it was entered into by a plaintiff whose standing is later called into question:

> Even given the vitality of *Swift* and its progeny, a decree fashioned in litigation in which one of the litigants did not have a sufficient concrete stake in the outcome *might* contain provisions that are not worthy of continued enforcement by a federal court. If the City "establishes reason to modify the decree, the court should make the necessary changes; *where it has not done so, however, the decree shall be enforced according to its terms*."

Shakman III, 396 F.3d at 868 (quoting *Frew*, 540 U.S. at 442) (emphasis added). Accordingly, even if there were grounds to revisit Plaintiffs' standing (there are not) and even if the Court were to decide that they did not have standing, under Rule 60(b)(5) that is not sufficient to warrant termination of the Decree.

As noted above, Mag. Judge Schenkier recently applied the holding of *Shakman III* in denying the argument of the Clerk of Cook County seeking to vacate the 1972 Decree as against the Clerk of Cook County's office based on an argument that the Plaintiffs lacked standing:

> There has been no change in law that would make [it] inequitable to enforce the 1972 Consent Decree. The 1972 Consent Decree was entered in the shadow of *Shakman I*, which held that voters and candidates had standing to pursue the claims that applicant's and employee's rights were violated by the use of political consideration in employment decisions concerning non-exempt employees. *Shakman II* did not change that precedent as it applied to existing employees. Similarly, *Rutan* [*v. Republican Party of Ill.*, 476 U.S. 62 (1990)] also did not address the standing of voters or candidates to assert such claims. Consistent with the Seventh Circuit's law of the case, our inquiry into standing "shall be not on the law of standing as a jurisdictional concept but on the equitable standards embodied in Rule 60(b)(5)." *Shakman III*, 396 F.3d at 868. In any event, neither

> *Shakman II* nor *Rutan* effected any change in the law making it unjust to continue to enforce the 1972 Consent Decree.

2020 WL 1904094, at *18 (N.D. Ill. Apr. 17, 2020).

That conclusion applies here. The Governor fails to show any change in the law that makes it "unjust to continue to enforce the 1972 Decree." *Id.* The "holding of *Shakman I*—that voters and candidates have standing to challenge unlawful political discrimination against employees—remains controlling here." *Id.* at *8. Second, even if there were changes in the law that cast doubt on Plaintiffs' standing, the Governor has failed to establish that it would be inequitable to enforce the Decree in light of those changes. Notably, the Governor does not cite a single case in which a court vacated a long-standing consent decree on the basis that the original plaintiffs did not have standing to pursue the claims. In fact, almost all of the cases cited by the Governor were decided on a motion to dismiss at the outset of the case, where an entirely different standard applies.[11] The two cases that were not decided on a motion to dismiss held that the plaintiffs *did* have standing to pursue their claims.[12] In short, the Governor has not established that any changes in the law make it inequitable to enforce the 1972 Decree and warrant its vacatur.

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[11] *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (affirming dismissal); *Rutan v. Republican Party of Ill.*, 868 F.2d 943, 958 (7th Cir. 1989), *aff'd in part, rev'd in part*, 497 U.S. 62 (1990) ("Because the injury asserted in the complaint is not fairly traceable to the challenged action, the district court properly dismissed plaintiffs' claims as voters for lack of standing."); *Plotkin v. Ryan*, 239 F.3d 882, 883-84 (7th Cir. 2001) (affirming dismissal); *Winpisinger v. Watson*, 628 F.2d 133, 142 (D.C. Cir. 1980) ("We affirm the order of the district court dismissing the action.").

[12] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) ("We therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members in this case[.]"); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 (1979) ("We conclude that the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III.").

II. THE SPECIAL MASTER HAS NOT COMPLETED HER ASSIGNMENTS.

The Governor rests his termination arguments in part on the contention that the Special Master has completed her itemized tasks and that such completion alone supports termination. Neither premise withstands scrutiny.

First, even limited to IDOT alone, it is clear that the Special Master has not completed the tasks listed in the November 18, 2014 Order appointing her, (Dkt. 4020). Although she has "recommend[ed] measures that may be necessary or appropriate to prevent any recurrence" of violations of 1972 Decree, (*id.* ¶3(ii)), it is clear from her Report and her prior reports that this is a dynamic process, and she has continued to make recommendations as events have unfolded. The SM Report makes abundantly clear that she is not nearly done "assess[ing] the implementation of those efforts to ensure that they are effective" and "mak[ing] recommendations for how to remedy any violations of the 1972 Decree." (*Id.* ¶3(iii), (v).) As shown above with regard to the CEP and other items, "implementation" by IDOT and the other agencies is not yet complete, let alone functioning long enough for her to "assess" the results.

The Governor also erroneously argues that the Special Master's authority under the May 1, 2017 Order expanding her jurisdiction, (Dkt. 5004), ended when the statewide exempt list was approved. The Governor ignores language from Mag. Judge Schenkier's opinion that led to the expansion order:

> [T]he Special Master has been instrumental in identifying and beginning remediation of a number of problems with consent decree compliance at IDOT. [Citation omitted.] *We are confident these problems would not have been uncovered without the work of the Special Master. We are equally confident that the process of identifying and correcting any similar issues at the other agencies will be best completed under the guidance of the Special Master.* She has developed detailed knowledge about the way that exempt and non-exempt hiring and job-classification has been undertaken in Illinois, as well as on-the-ground understanding of what types of problems may exist with respect to compliance with the 1972 decree across the State.

(Dkt. 4798 at 4-5 (emphasis added).) While the Opinion and the subsequent Order (Dkt. 5004) focused on the development and finalization of the statewide Exempt List, it is clear from the Opinion that the Court sought to benefit from the Special Master's observations and expertise "about the way that exempt and non-exempt hiring and job-classification has been undertaken in Illinois." The processes governing non-exempt hiring are the flip side of the coin of whether the Exempt List is being implemented properly. If political considerations are corrupting the non-exempt hiring process, then the State is effectively treating such positions as exempt – and the Exempt List is not being followed. This, of course, overlaps with the development and implementation of the CEP, which, as discussed above, the Governor had agreed to develop with the input and oversight of the Special Master in February 2018. The parties' conduct until late 2019 treated the Special Master's authority as including such statewide activity. The Court should clarify that the 2017 expansion order contemplated monitoring such activity, or, if not, expand the Special Master's authority to complete the tasks she embarked upon with the consent and cooperation of the parties.

Second, the Governor misreads the Court's language regarding the Special Master's appointment to argue, incorrectly, that the Court equated completion of her itemized tasks with the criteria for termination of the Decree. Termination of the 1972 Decree was obviously not before the Court then, and the orders were not a mechanical checklist for decree termination. The Governor asserts that "[t]he orders appointing the Special Master contemplated that she would facilitate, and the completion of her responsibilities would mark, the State's compliance with the 1972 decree." (Dkt. 6947 at 1.) But the materials cited in support say no such thing. They identify particular compliance issues, but nowhere state that completion of such issues would result in automatic termination. And the 2014 transcript the Governor cites ignores the

preceding paragraph, in which Mag. Judge Schenkier stated that "compliance with the decree is best served by having a transparent process in which an agent of the Court is involved in further investigating the scope and reason for what occurred, recommending the measures that may be necessary to prevent any recurrence and then in assessing the implementation of those efforts to ensure that they are effective." (Dkt. 6947-1 at 16:25-17:6.) As discussed above, such tasks remain incomplete.

Likewise, contrary to the Governor's arguments, Plaintiffs are not seeking to relitigate relief the Court failed to grant. The Court denied Plaintiffs' request to conduct discovery into the Governor's employment practices without prejudice, in part because much of the information sought by Plaintiffs overlapped with the inquiry and monitoring that the Special Master would be doing. (Dkt. 6947-1 at 19.) The Governor's attempt (Dkt. 6946 at 21-22; Dkt. 6947 at 5-6) to equate the Court's decision to not allow discovery "at this time" with a ruling on the merits or an implication regarding decree termination simply misstates the record.

III. ALLOWING THE SPECIAL MASTER TO MONITOR IMPLEMENTATION OF THE CEP STATEWIDE IS NECESSARY AND APPROPRIATE TO REACH SUBSTANTIAL COMPLIANCE AND FOR THE COURT TO MAKE THE FACTUAL FINDINGS REGARDING THE STATE'S MOTION.

There is a well-documented history in this case of special masters assisting other defendants to come into substantial compliance with the various decrees, and thereby to allow the Court to make the necessary factual findings to support dismissing those defendants. (*See* Dkt. 6789 at 6-7.) When the 2005 Sorich indictments exposed the fraudulent manipulation of employment processes in Chicago, and similar abuses were identified elsewhere, Judge Andersen began the practice of appointing special masters to observe and report on the employment practices of governmental bodies subject to the prior decrees, including the 1972

Decree. Prior to that action, compliance was essentially on the honor system – and it failed. Accountability through transparency monitored by special masters has proved far more effective.

Importantly, Judge Andersen's decision to appoint special masters and give them authority to monitor and report has proven to be the means for defendants to *exit* federal oversight, not prolong it. The cliché holds true here: sunshine is the best disinfectant. As Mag. Judge Schenkier found when he appointed the Special Master in 2014, the Court does not have the "horsepower" to develop the factual record necessary to decide a Rule 60(b)(5) motion to terminate the 1972 Decree with regard to State employment practices involving many thousands of employees and dozens of State agencies. (Dkt. 6947-1 at 17.) He correctly concluded, based on his and Judge Andersen's experiences with the appointment of special masters for other defendants in this case, that the most efficient and effective way to assemble and present the necessary evidence is through a special master:

> My experience is that more progress is made in achieving what we are all interested in, and this is compliance with the decree. When the process is not an adversarial one, but instead is one that is shepherded through the efforts of a Court-appointed officer working through a well-defined mandate that is developed with the input of the parties.

(*Id.* at 18.)

The Governor effectively ignores this history. Instead, he misstates the relief Plaintiffs seek and the scope of the Special Master's authority.

Plaintiffs are not asking the Court to authorize the Special Master to "go beyond superintending compliance" with the 1972 Decree. (Dkt. 6947 at 23.) The current order appointing the Special Master limits her authority to observing and reporting, and Plaintiffs have not sought to change those duties. (Dkt. 4020 at 2.) The Special Master does not have the type of

"quasi-inquisitorial, quasi-prosecutorial role" found to be problematic in *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003).[13]

Nor are Plaintiffs asking the Court to "convert the narrow prohibitory injunction of the 1972 decree into a massive mandatory injunction to adopt employment practices and a 'Comprehensive Employment Plan' – and then to have the Special Master monitor all aspects of the Comprehensive Employment Plan." (Dkt. 6946 at 32. *See also* Dkt. 6947 at 19, 24.) The Governor's argument is a straw man that again conflates several distinct concepts.

First, Plaintiffs are not seeking a new injunction. Plaintiffs have not asked the Court to compel the State to enter into a CEP – that was the Governor's plan. Nor would the State be in contempt for failing to do so, or if an agency of State government failed to follow procedures the CEP sets forth. Rather, the issue is whether to *vacate* the injunction, not whether to broaden its terms. As discussed above, the State chose to develop and implement a CEP – with agreement and support of the Court, Special Master, and Plaintiffs – as the *means* by which the Governor would meet his burden of showing he has implemented durable procedures to prevent future violations of the *existing* injunction, the prohibitory terms of which are indisputably no different than the constitutional requirements of *Rutan* and *Branti*. That is why *Salazar by Salazar v. D.C.*, 896 F.3d 489 (D.C. Cir. 2018), (Dkt. 6946 at 32), is irrelevant. In *Salazar*, the *plaintiff* moved under Rule 60(b)(5) to expand an injunction, the district court acknowledged that it was "imposing '<u>additional</u> injunctive relief, based on the <u>new</u> factual circumstances,'" *id.* at 498 (citation omitted), and even "provided relief for Subclasses of Plaintiffs and corresponding sections of the Consent Decree that had already been vacated or terminated," *id.* at 499. In

[13] The Governor's reliance on *Cobell* is also misplaced because *Cobell* did not involve appointing a special master to monitor a consent decree. *Cobell*, 334 F.3d at 1143 ("Nor could the Monitor have been limited to enforcing a decree, for there was no decree to enforce ….").

contrast, Plaintiffs here seek no new injunction, and it is the *defendant* moving to vacate based on an assertion that a durable remedy is in place.

Second, the appointment of a special master to monitor compliance with a consent decree is procedural, not injunctive. *See Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) ("the appointment of the monitor was not itself an injunction"); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 540 (7th Cir. 1997) ("orders allowing the special master to discover and be discovered … are merely procedural orders"); *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987) ("we hold that the order of reference is not appealable as a modification of the preliminary injunction"). The Special Master's observations and recommendations provide invaluable input to the parties and the Court – the "up-to-date" facts *Horne* requires – to allow the Court to determine with the vestiges of political discrimination have been eliminated and a durable remedy is in place to prevent a recurrence.

For the two reasons just discussed, the Governor's argument based on the difference between mandatory and prohibitory injunctions is both irrelevant and a distraction. (Dkt. 6946 at 20, 32; Dkt. 6947 at 24.) The cases the Governor cites have no bearing here because none concerned the standards for vacating an injunction, whether mandatory or prohibitory, under Rule 60(b)(5) and the *Rufo-Horne* cases. For example, *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011), (Dkt. 6946 at 32), concerned whether to impose a mandatory injunction on an insurer to reinspect houses for hail damage. Vacating a consent decree was not at issue. No new injunction is sought here. Similarly, *Plotkin v. Ryan*, 239 F.3d 882, 885 (7th Cir. 2001), (Dkt. 6947 at 18-19), involved voter standing at the outset of a case, not post-judgment questions as to whether a durable remedy exists to support vacating a consent decree.

The 1972 Decree enjoins the Governor from, *inter alia*, "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to . . . a governmental employee, upon or because of any political reason or factor." (Dkt. 6946-1 at 4 ¶E(1).) It is undisputed that there have been numerous past violations of this injunction continuing in recent years, and that patronage violations were systemic. The issue before the Court is not whether the language of the 1972 Decree is mandatory or prohibitory, or even whether violations today are systemic, but whether the injunction should be dissolved. That, in turn, returns us to the Governor's Rule 60(b)(5) burden, which is to establish, based on an "up-to-date" factual record, *Horne*, 557 U.S. at 469,[14] that the objective of the Decree has been achieved and a durable remedy is in place to prevent future violations. The observations and reporting of the Special Master are the only currently available means to providing such an "up-to-date" record, and are far more searching and complete than the alternative of authorizing Plaintiffs to conduct discovery.

Nor are the Plaintiffs asking the Court to order the Governor to implement Plaintiffs' preferred employment policies or demanding perfection or "unattainable" goals in implementing policies. The Governor has filed the CEP as part of his proposed durable remedy to support

[14] The Governor misstates the holding and subsequent history of *Horne* in an effort to dodge the requirement for the Court to hear evidence before deciding a Rule 60(b)(5) motion. (Dkt. 6947 at 15-16.) In *Horne*, the Supreme Court reversed the lower court's decisions because the lower court had *not* conducted a factual analysis. 557 U.S. at 469-70. The Supreme Court vacated the lower court's order denying a Rule 60(b)(5) motion and remanded the case so that the lower courts could hear evidence and make the factual findings necessary to rule on the Rule 60(b)(5) motion. On remand, the district court conducted a three-week evidentiary hearing and made extensive findings of fact. *Flores v. Arizona*, No. 92-CV-596-TUC-RCC, 2013 WL 10207656, at *1 (D. Ariz. Mar. 29, 2013). The defendants presented detailed evidence that the policies and procedures they had adopted to cure the prior violations had been implemented. *Id.* *See also Inmates of Suffolk Cty. Jail v. Rufo*, 148 F.R.D. 14, 16 (D. Mass. 1993) (on remand from the Supreme Court, the district court allowed several months of discovery, briefing, and a hearing with evidence presented by affidavit and live witnesses).

vacating the 1972 Decree. Plaintiffs have recognized in the case of each defendant that previously obtained substantial compliance that the standard is "substantial," not "total" or "perfect." Decree termination is a pragmatic, not utopian exercise. That is why each of the SROs provided that "technical violations or isolated incidents of noncompliance shall not be a basis for a finding that the [defendant] is not in substantial compliance." *See, e.g.*, Dkt. 531 at 11 (Cook County SRO). While there is no SRO here, the principle is the same, that isolated problems and imperfections will not defeat what would otherwise constitute a durable remedy. To determine when that point is reached, Plaintiffs are simply asking the Court to authorize the Special Master to monitor implementation of the CEP (whether in its current form or as modified by the Governor after discussions with the Special Master and Plaintiffs) and related policies, and report to the Court and the parties.

For this same reason, the cases cited by the Governor for the proposition that Plaintiffs must present evidence of systemic or state-wide violations have no application here. (Dkt. 6946 at 33-34; Dkt. 6947 at 19.) Plaintiffs have sued a single defendant, the Governor's Office; the CEP applies to all agencies under the jurisdiction of the Governor's Office. As noted, the Governor has voluntarily and properly pursued a statewide CEP since at least early 2018. It is his burden to show that it is fully effective and supports termination. The Special Master's report explains in detail that he has not carried that burden.

Allowing the Special Master to monitor the implementation of the CEP and related policies is the most efficient and effective way to bring the Governor into compliance with the 1972 Decree so that the Decree can sunset. The Governor points to the passage of time since the Special Master was first appointed, but the reality is that much remains to be accomplished and she was not responsible for the delay. It took the Governor, not the Special Master or the

Plaintiffs, more than four years to develop the process for determining which positions would be included on the Exempt List. (Dkt. 6158.) Finalizing the Exempt List took another six months. (Dkt. 6384.) The proposed CEP first discussed in October 2016 was not filed until November 25, 2019, without obtaining agreement from the Special Master and the Plaintiffs or approval from the Court. The Governor still has not provided training or implemented the CEP. (Dkt. 6612.)

The Governor has made important progress since 2014 in laying the necessary foundations for a durable remedy. Working with the Special Master, OEIG created HEM, modeled on the steps the City of Chicago's Inspector General took to achieve compliance by separating the investigative function of the OEIG from the compliance and auditing role now performed by HEM. The Governor has adopted a CEP and will begin training this month so that the CEP can be implemented. The responsibility of CMS, which is the Governor's primary human resources agency, has been expanded to bring more oversight and consistency to employment policies and practices. The last stage to achieve compliance is to implement those programs to ensure that the policies are "in fact applied in the observance rather than the breach." (Dkt. 6829 at 41 (appointing special master for the Cook County Clerk).)

CONCLUSION

For the foregoing reasons, the Court should (i) grant Plaintiffs' Motion for Clarification and either (ii) enter and continue for six months or (iii) deny the Governor's Motion to Vacate and Cross-Motion to Vacate.

Dated: September 25, 2020

Respectfully submitted,

/s/Brian I. Hays
One of Plaintiffs' Attorneys

Michael L. Shakman
Edward W. Feldman
Mary Eileen C. Wells
Miller Shakman Levine & Feldman LLP
180 N. LaSalle Street
Chicago, IL 60601
312-263-3700

Brian I. Hays
Ernesto Palomo
Irina Dashevsky
Locke Lord LLP
111 S. Wacker Drive
Chicago, IL 60606
312-443-1800

Certificate of Service

I, Brian I. Hays, an attorney, state that on September 25, 2020, I caused a true and correct copy of the foregoing to be served via e-filing upon all parties of record.

/s/Brian I. Hays