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

MICHAEL L. SHAKMAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Case No. 69-2145
DEMOCRATIC ORGANIZATION OF COOK	)	
COUNTY, *et al.*,	)	Judge Edmond E. Chang
	)	
Defendants.	)	

GOVERNOR'S REPLY IN SUPPORT OF HIS MOTION TO VACATE THE MAY 5, 1972 CONSENT DECREE AND CROSS-MOTION TO VACATE THE ORDERS APPOINTING THE SPECIAL MASTER

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The Plaintiffs' Combined Reply and Response and the Special Master's Response[1] demonstrate that, for several independent but interrelated reasons, it is time to end the 1972 decree and the Special Master's tenure. *First*, Plaintiffs and the Special Master do not because they cannot cite to any "ongoing violation of federal law," *Horne v. Flores*, 557 U.S. 433, 454 (2009), or any ongoing violation of the 1972 decree. Their submissions do not identify a single example of who violated federal law or the decree, whose rights were violated, when, and how.

Second, the fact that there have not been violations, let alone systemic violations, over the past six years demonstrates that the State has instituted a "durable remedy." That remedy is comprised of the Exempt List and Exempt Employment plan, monitoring and oversight from OEIG and HEM, and numerous other good faith improvements that the State indisputably has instituted over the past six years.

Third, the Plaintiffs' and Special Master's further demands – regarding a Comprehensive Employment Plan, an electronic hiring process, and more – are not based in federal law and seek to convert a narrow, prohibitory injunction into a massive, mandatory injunction. The history of this case and governing law involving institutional reform consent decrees foreclose this improper conversion and expansion.

Fourth, the Plaintiffs no longer have any concrete stake in this litigation. They do not and cannot explain how independent candidates and voters are impacted by further reforms to the State's employment processes, let alone that further relief from this Court will redress concrete injuries. There is no actual campaign or candidate at issue, only hypothetical ones. While Plaintiffs argue that the Court should continue the decree despite the lack of any case and

[1] The Plaintiffs' Combined Reply and Response, Dkt. 7104, is cited herein as "PLR"; the Special Master's Response, Dkt. 7083, is cited as "SMR." The memorandum from the Office of Executive Inspector General ("OEIG"), Dkt. 6936, is cited as "OEIGR."

controversy, that argument defies the foundations of a limited judiciary and federalism.

Fifth, the Special Master and the State have completed the duties prescribed under the Court's 2014 and 2017 Rule 53 orders. Plaintiffs' and the Special Master's argument that they are no longer focused on "current or past violations," but rather "*prospective* measures to prevent *future* violations," SMR at 1; PLR at 9, concedes the lack of the necessary connection between their further demands and "violations," and thus the lack of any remaining federal interest. When not rooted in "violations," further recommendations may be good ideas, but they are not requirements of federal law. Imposing changes on the State divorced from violations is not a permissible role of a Special Master under Rule 53, and it is not a permissible role of a federal court. Combined, these justifications leave no doubt that the State has met its burden under Rule 60(b) to exit federal court oversight of its employment practices.

I. There is no ongoing violation of federal law.

In order to resolve the State's Rule 60(b) motion, the Court "need[s] to ascertain whether ongoing enforcement of the original order [is] supported by an ongoing violation of federal law." *Horne*, 557 U.S. at 454; *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1206 (10th Cir. 2018) ("[T]he district court should have 'ascertain[ed] whether ongoing enforcement of the [decrees] was supported by an ongoing violation of federal law.'") (citing *Horne*). Nothing in Plaintiffs' filing, the Special Master's Response, or the factual record in this case allows the Court to determine that there is an ongoing violation of federal law, or that there has been a violation of federal law in the past six years. That fact should compel the outcome. *See People Who Care v. Rockford Bd. of Educ., Sch. Dist. 205*, 246 F.3d 1073, 1078 (7th Cir. 2001) (terminating decree where "[p]ressed at argument, the plaintiffs' able lawyer could not cite an instance in which the school board has violated any of the numerous provisions of the decree").

a. What is – and is not – a violation of federal law and a violation of the 1972 decree.

To determine whether there is an "ongoing violation" of federal law (or the 1972 decree), the Court must first assess what is, and is not, a "violation" with respect to Plaintiffs' rights in this case. As explained below, even when applying their all-encompassing definition that anything involving "patronage" is a "violation," Plaintiffs cannot point to any ongoing or even recent violation. But Plaintiffs' imprecise and overbroad definition of a "violation" is fundamentally wrong, as the case history and binding precedent demonstrate.

i. What is a violation of federal law?

The only conduct that amounts to a "violation" of federal law for the purposes of Plaintiffs' rights, and thus for the purposes of this case, is perpetuating "a system of coerced political work demanded of those already employed by the government as a condition of continued employment." *Shakman v. Democratic Org. of Cook Cnty.*, 829 F.2d 1387, 1398 (7th Cir. 1987) (*"Shakman II*"). As explained below, the case history makes this clear.

Plaintiffs filed this action in 1969, alleging that:

> [T]heir constitutional rights as a candidate, taxpayers and voters were violated by the defendants' practice of coercing "patronage" employees as a condition of keeping their jobs to contribute money to the various Democratic organizations and candidates; to do political and campaign work both during their regular working hours and on their own time for candidates endorsed by the organization and its affiliates; and to vote for party candidates. Plaintiffs asserted that these coercive practices directly result in the defeat of independent candidates and perpetuates the dominance of the Democratic party in Cook County by enabling the defendants to coercively muster a massive army of political workers who are essentially paid with public money and whose discipline is maintained by the constant threat of job loss. It is this tactic, plaintiffs alleged which dilutes the votes of those seeking to elect non-organization candidates and which creates insurmountable odds for independent candidates in view of the fact that such candidates cannot match either the funds or campaign man hours derived from patronage employees.

Shakman v. Democratic Org. of Cook Cnty., 356 F. Supp. 1241, 1243 (N.D. Ill. 1972). The district court initially dismissed Plaintiffs' complaint for lack of standing. *Shakman v.*

Democratic Org. of Cook Cnty., 310 F. Supp. 1398 (N.D. Ill. 1969). In 1970, the Seventh Circuit reversed, holding that because this alleged scheme of coerced political work and donations favored incumbent candidates to the detriment of their challengers, plaintiff candidates and voters were "seeking redress for injuries to their own interests" – the disadvantage of competing against a coerced political army – and had standing in that capacity. *Shakman v. Democratic Org. of Cook Cnty.*, 435 F.2d 267, 269 (7th Cir. 1970) ("*Shakman I*").

Shortly thereafter, in 1972, the district court considered motions to dismiss filed by defendants who had not entered into the consent order. 356 F. Supp. 1241, 1244. The court explained that its "task … [was] to interpret the perimeters of the Court of Appeals decision." *Id.* at 1244. In doing so, the Court held that the Seventh Circuit's decision in *Shakman I* "prohibits only political considerations *which [a]ffect voter and candidate rights.*" *Id.* at 1248.

At the time of the District Court's decision – prior to *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) – courts had held that public employment could "be conditioned on political considerations," and numerous defendants based their motions to dismiss on those cases. *Shakman*, 356 F. Supp. at 1245. As a result, the district court specifically addressed the distinction between cases brought by public employees alleging that their employment was conditioned on political affiliation and "our case … [alleging] a comprehensive system of coercion which [a]ffects the entire electoral system as regards voters and candidates." *Id.* at 1246. The Court held "those practices not directly affecting voter-candidate rights and which affect employee rights alone are not governed by the *Shakman [I]* opinion." *Id.* at 1247.[2]

[2] While the *Elrod*, *Branti*, and *Rutan* line of Supreme Court cases established that partisan employment actions violate public employees' First Amendment rights, such conduct has never been held to violate candidate or voter rights absent coerced political work.

Plaintiffs provide no authority holding that other "patronage" actions violate federal law with respect to candidates and voters.

The specific question of the legality of patronage "hiring" was reserved in the 1972 decree. *See* 1972 decree Section H(1)(b) ("Jurisdiction is retained … [t]o enable the parties to this Judgment to continue to litigate the following questions before this Court: … (b) Can political sponsorship or other political considerations be taken into account in hiring employees?"). After litigation, the district court held that defendants "infringed the plaintiffs' constitutional rights through their use of patronage hiring, firing, and promotion practices." *Shakman v. Democratic Org. of Cook Cnty.*, 481 F. Supp. 1315, 1349 (N.D. Ill. 1979). The Seventh Circuit, however, vacated and remanded, holding in 1987 that voters and candidates do not have standing to challenge governmental hiring policies. *Shakman II*, 829 F.2d at 1399.

ii. What is a violation of the 1972 decree?

There are three key limitations to the 1972 decree that Plaintiffs and the Special Master do not adequately acknowledge or address: (1) the decree cannot be enforced as to conduct that does not violate federal law; (2) the decree cannot cover "hiring"; and (3) the decree does not extend beyond the geographic bounds of the Northern District.

The decree cannot be enforced as to conduct that does not violate federal law.

Plaintiffs argue that the 1972 decree is not limited to prohibiting "[a] coerced political work scheme." PLR at 8. They are wrong: either the decree is so limited, or it exceeds appropriate limits. It is true that the 1972 decree enjoins the State from "conditioning, basing or knowingly prejudicing or 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." 1972 decree ¶ E(1). In the history of this case, the most straightforward interpretation of

this language is that it reinforces the prohibition in paragraph E(2) of "knowingly causing or permitting any employee to do partisan political work" by adding that no "term or aspect" of State employment may be conditioned on coerced work. *See Shakman,* 356 F. Supp. at 1248 (striking "that portion of the prayer for relief which seeks the enjoining of *all* and *any* political considerations in public employment" and adding that "Section E(1) of the consent order entered on May 5, 1972 is totally unnecessary").

But insofar as Plaintiffs read the 1972 decree to sweep more broadly, that interpretation runs afoul of the bedrock principle that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or … flow from such a violation." *Horne,* 557 U.S. at 550. "[T]he court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder." *Evans v. City of Chicago,* 10 F.3d 474, 479 (7th Cir. 1993); *see also Komyatti v. Bayh,* 96 F.3d 955, 961 (7th Cir. 1996) (A federal court may only "enforce the terms of a consent decree as long as they are tailored to rectify the federal constitutional violation."). Thus, even if the decree aimed to enjoin all post-employment actions based on political reasons, it can be enforced only as to conduct that violates federal law and affects candidates' and voters' federally-protected rights: coerced political work. *See Shakman,* 356 F. Supp. at 1248 ("[W]e agree that part E(1) of the consent decree is neither mandated by the Court of Appeals or any case-law."); *Evans*, 10 F.3d at 479 ("[The Seventh Circuit] has emphasized the district court's responsibility to identify the rule of federal law supporting a consent decree binding the political arms of government, and the corresponding obligation to permit new public officials to set their own policy within the limits established by federal law.").

The decree does not and cannot apply to State "hiring." Plaintiffs and the Special Master consistently ignore that the decree does not and cannot apply to hiring. Despite the clear case history discussed above, Plaintiffs now argue that "hiring" is not "hiring" when it involves existing State employees moving to different jobs. *See* PLR at 5. The Seventh Circuit, understanding the history of this case, did not draw any distinction between "hiring" when it involved existing employees as opposed to external candidates. *See generally Shakman II*, 829 F.2d at 1387. The district court decision reversed by *Shakman II* makes clear that "patronage hiring *and promotion* practices," 481 F. Supp. 1315, 1329 (emphasis added), were at issue when the Seventh Circuit held that plaintiffs have no standing to pursue such claims. Plaintiffs' argument that some "hiring" *is* within the scope of the 1972 decree also cannot be squared with the Seventh Circuit's decision in *Rutan v. Republican Party of Illinois*, 868 F.2d 943, *aff'd in part, rev'd in part*, 497 U.S. 62 (1990). *Rutan* held that voters have no standing to challenge whether the State "use[s] political considerations in hiring, rehiring from layoffs, transferring, and promoting state employees." *Id.* at 944, 958. The Seventh Circuit determined that "plaintiffs' standing argument is no different from that rejected in *[Shakman II]*," *id.* at 958 – thus rejecting any difference in treatment between hiring, rehiring, transferring, and promoting. This holding makes sense because Plaintiff candidates and voters are not impacted any differently by whether a job vacancy is filled by an external or an internal candidate. Plaintiffs do not even attempt to address the binding precedent from the *Rutan* decision.

The decree does not and cannot apply outside the Northern District of Illinois. The decree by its terms is limited geographically to "employment within the Northern District of Illinois." 1972 decree ¶ B. Plaintiffs cannot and do not dispute this, but instead argue that "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." PLR at 22. That argument is a non-sequitur. The geographic limitation of the decree plainly means that conduct occurring outside of the Northern District is not covered, and cannot constitute a violation of the 1972 decree. Plaintiffs previously acknowledged this limitation. *See* Dkt. 3744 at 10 (seeking appointment of a special master for "jobs under the jurisdiction of the Governor within the Northern District of Illinois").

b. Plaintiffs' and the Special Master's examples do not show ongoing violations.

Even *if* the decree extended to cover all "patronage" actions impacting employees, and even *if* it extended to hiring, and even *if* it covered the entire State, there *still* is no evidence that the State has committed a single "violation" in the past six years, or is committing ongoing violations of the decree. Plaintiffs and the Special Master assert that ongoing violations exist, but even the faintest scrutiny demonstrates that not to be the case.

The Special Master contends in a footnote that "[t]he State's assertion that the Special Master has not identified 'a single patronage violation' during the course of her appointment is [not] accurate." SMR at 3, n.1. She then cites, without explanation, to Exhibit F, a May 2018 memorandum, which she characterizes as "discussing wide-spread violations." *Id*. But that is it. There is no explanation of the nature of the "wide-spread violations," who committed them, or whether they are ongoing now, more than two years later. (The Special Master has filed four subsequent IDOT reports and four subsequent Statewide reports that do not mention "wide-spread violations" relating to the dispute reflected in Exhibit F.)

A cursory review of Exhibit F reveals that it does not identify any violation of the 1972 decree or federal law. Rather, the Special Master described "significant and fundamental disagreements between the Special Master's office and the Governor's Office relating to what

role the Governor's Office should have in the selection and approval process for job protected positions." SMR Ex. F at 13. The Special Master argued that the State's position "leaves too much room for manipulation," *id.* – not that it violated federal law or the 1972 decree.[3]

In the context of the question of whether the State is currently violating federal law, the Special Master's vague references to "violations" she has uncovered,[4] without saying what they are, who committed them, and how they violated federal law or the consent decree, are inadequate. *See, e.g., Harmon v. Gordon*, 712 F.3d 1044, 1053 (7th Cir. 2013) ("We have often said that a party can waive an argument by presenting it only in an undeveloped footnote.").

Plaintiffs' amorphous assertions fare no better. They claim that, "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." PLR at 10. Plaintiffs' individual examples do not show any actual ongoing violation of federal law. Most of the examples involve "hiring" that occurred outside of the

[3] The only reference in the memorandum to even *potential* political discrimination relates to a complaint that the Special Master received in which the complainant alleged his salary increase was being blocked based on his party affiliation. SMR Ex. F at 7. But as the memorandum details, the Governor's Office explained that it declined to approve the increase because the candidate submitted false information on his application. SMR Ex. F at 7-10. Based on these disputed facts, the Special Master concludes this aspect of her memorandum by stating: "We are continuing to investigate the GO's involvement in the selection process for [the candidate] and will issue a separate memorandum when that investigation is complete." In her response to the Governor's Motion to Vacate, the Special Master does not cite to any document in which she concluded the investigation described in her memorandum.

[4] The Special Master implies that the State, through its Department of Central Management Services ("CMS"), has admitted to "Shakman non-compliance," SMR at 2, 66, by virtue of a bullet-point in an October 2019 memorandum providing a "High Level Overview on Test Track," the State's effort to improve its hiring by instituting an electronic process. SMR Ex. C. The bullet point is in a list of bullets in which CMS identifies "numerous problems with the current hiring process" including "Extended Hiring Cycle Time"; "Low quality candidates"; and "Aging Workforce – How do we attract new talent?" The context and substance of the October 2019 memorandum, as well as the sub-bullets ("Not electronic"; "Not standardized"; "Not easily auditable") belie any argument that the bullet point constitutes an admission of a violation of federal law.

Northern District. And even though these examples thus do not involve violations of federal law or the 1972 decree, the State has implemented the Special Master's remedial recommendations.

First, presumably leading with what they believe to be their best evidence of an "ongoing violation," Plaintiffs argue that the hiring *in 2016* of a *single candidate* for a position at IDOT involved "reported" political connections. PLR at 10. Plaintiffs do not assert or point to any evidence that the candidate was hired *because of* his "reported" political connections.[5] In addition, hiring is outside the scope of the decree, and the position in located in an IDOT District outside the geographic reach of the decree. Despite the fact that this example does not relate to the decree, the State has worked in good faith with the Special Master for six years to minimize any risk of favoritism in hiring for "technical" positions – ensuring instead that candidates are selected competitively and meet minimum criteria. IDOT "establish[ed] a narrow definition of 'technical' and determine[d] which positions meet that definition," SMR at 9, finalized and filed the "technical list," *id.* at 10, and "[f]inalized minimum required qualifications for technical position classifications that meet the technical definition," *id.*

Second, Plaintiffs point to 98 "complaints" involving conflicts of interest (mostly in the context of "hiring") referred to the Governor's Office since May 2017, and assert that "[t]he alleged conflicts include some related to political connections." PLR at 10. Plaintiffs and the Special Master are referring to the subset of complaints filed with the OEIG that the OEIG refers to State agencies – either for further investigation at the agency level (often with a response due to OEIG after the agency's investigation) or for awareness and internal follow up. The Governor's Office receives a copy of these referrals and provides the referrals and any agency

[5] Plaintiffs write that "[t]he Special Master raised the issue with the agency and the Governor's office in 2020." That is correct – July 23, 2020 –more than two years after the Special Master was provided the internal investigation report on June 18, 2018. *See* Exhibit 1 (email transmitting the underlying report to the Special Master).

responses to the Special Master for her review or, should she choose, further investigation. Complaints, which the Special Master received and chose not to investigate further, do not establish a "violation" of the decree or federal law. For context, the OEIG received 2,546 complaints in FY2019; it initiated 96 investigations, and completed 99 investigations, 27 of which resulted in findings of wrongdoing.[6]

In any event, the State has taken action in response to the Special Master's and HEM's "conflict of interest" recommendations. In 2019, the State implemented a conflict of interest disclosure form for employees involved in a hiring sequence. After all parties identified ways in which the process could be improved, the State revised the form further – taking the Special Master's comments – and provided additional training to personnel staff. *See* Exhibit 2 (revised Conflict of Interest disclosure); *see also* Dkt. 6222 at 9 ("IDOT has taken steps to ensure conflict of interest paperwork and any related follow up is documented and included in interview files.").

Third, Plaintiffs assert that "[i]ndividuals with political connections to former Chicago Alderman Richard Mell were hired into seasonal IDOT winter positions." PLR at 10. Again, this conduct was "hiring" and thus not covered by the decree, and again, Plaintiffs do not provide evidence that these individuals were hired *because of* their political connections. Moreover, Mell retired in 2013, and the Special Master reported on this issue in her initial report in March 2015. She has not indicated in any of her subsequent 16 reports that this alleged practice continues. To the contrary, the Special Master has documented many reforms that IDOT has made to its seasonal hiring programs and noted that those processes are working well.[7]

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[6] illinois.gov/oeig/publications/Documents/Fiscal%20Year%202019%20Annual%20Report.pdf at 4.

[7] *See* Dkt. 6458 at 9-10 (explaining that for "seasonal engineering technician and technician trainee hiring," "[i]n response to the Special Master's recommendations, IDOT revised its TT and ET programs for the summer of 2017;" "[s]ince that time, the Special Master's office continued to monitor the ET and TT hiring processes to ensure IDOT complies with the processes put in place;" "[i]n 2018, IDOT

Fourth, Plaintiffs argue that IDOT's use of emergency appointments "to hire politically connected individuals" is an ongoing violation. Once again, "hiring" is not part of the decree. This "evidence" comes from the Special Master's Fifth Report issued in April 2017, in which she presented the results of her "Staff Assistant" investigation, and the OEIG's 2014 Staff Assistant investigation report. Thus, Plaintiffs now cite as the "ongoing violation" the very same facts that – six years ago – initially led to the Special Master's appointment. And they do so without citing any evidence of current or ongoing violations regarding emergency appointments. None of the Special Master's reports or the Plaintiffs' or Special Master's Responses identify a single "politically connected individual" improperly hired through an emergency appointment during the past six years. And, as explained *infra* Section II.c., the Staff Assistant problem has been investigated and the circumstances identified as allowing that problem to occur have been fully addressed through reforms including the Exempt List and Exempt Employment Plan.

Fifth, and finally, Plaintiffs contend that – for a *single position* – minimum required qualifications were not applied correctly, leading a former hire with purported political connections to be selected for a position when it was later re-posted and filled competitively. PLR at 11. They point to no evidence that the candidate was rehired *for political reasons*. In addition, the position is located in Sangamon County and outside of the geographic reach of the decree, just as this is hiring, not covered by the decree. Setting aside this single disagreement regarding the application of Minimum Required Qualifications ("MRQs"), the Special Master

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conducted ET and TT hiring consistent with the Special Master's recommendations …;" "[t]his year IDOT reported that it took steps to further eliminate unnecessary obstacles to obtaining a broad pool of applications;" and "[r]egarding the 2019 TT program, this year's numbers suggest that IDOT is succeeding in reaching a more diverse applicant pool in some districts/bureaus."); Dkt. 6222 at 7 ("IDOT hires Snowbirds each winter season. The Special Master's office monitors the Snowbird hiring process to ensure IDOT continues to follow recommendations the Special Master issued in response to historical vulnerabilities in the Snowbird hiring process. … The Special Master acknowledges that the Snowbird hiring process this year went smoothly.").

has documented meaningful improvements with MRQs. *See* SMR at 17 ("As discussed in earlier reports, IDOT and HEM devoted a significant amount of work developing the MRQs and the results are a dramatic improvement over the previous process."). And, on September 18, the Special Master, at IDOT's invitation, conducted a workshop for personnel staff regarding "Refining and Applying Minimum Required Qualifications." *See* Exhibit 3.

This is the universe of "evidence" that the Plaintiffs and Special Master offer to identify the ongoing violation of federal law. There is no allegation or evidence of "a system of coerced political work demanded of those already employed by the government as a condition of continued employment." *Shakman II*, 829 F.2d at 1398. There is also no allegation or evidence of a systemic scheme whereby political affiliation is used to make employment decisions – or any sort of systemic violation that would allow intervention in the form of a systemwide consent decree. *Lewis v. Casey*, 518 U.S. 343, 392–93 (1996) ("Systemwide relief is never appropriate in the absence of a systemwide violation, and even then should be no broader and last no longer than necessary to remedy the discrete constitutional violation."). Plaintiffs effectively concede that they cannot present evidence of a systemic problem, instead arguing without any legal authority that "the cases cited by the Governor for the proposition that Plaintiffs must present evidence of systemic or state-wide violations have no application here." PLR at 39. And they acknowledge that "isolated problems and imperfections will not defeat what would otherwise constitute a durable remedy." PLR at 39. Incredibly, they assert that "[i]t is undisputed that there have been numerous past violations of this injunction continuing in recent years, and that patronage violations were systemic." PLR at 38. That is false. The fact that Plaintiffs are unable to support this sweeping statement with any citation whatsoever supports the opposite conclusion: that there is no ongoing or systemic violation.

c. The Special Master is expressly tasked with – and has been – investigating.

Perhaps recognizing the absence of evidence of violations, both Plaintiffs and the Special Master contend that the reason no one has uncovered ongoing violations is that no one is looking for them. The Special Master states and the Plaintiffs repeat that "[t]he Special Master, CMS Officials, HEM, and the Governor's Office" – "the group" – "prioritized fixing the current system over investigating violations." *See* SMR at 1; PLR at 9 (Plaintiffs add the "Court" to "the group"). No one provides details of this purported agreement. Contrary to these assertions, the State does not agree that a federal court or master can focus on *remedies* without knowing what *violation* is being remedied. *See People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 961 F.2d 1335, 1338 (7th Cir. 1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.") (citation omitted).

There is ample evidence in the record to question Plaintiffs' and the Special Master's assertion. The Special Master's 2014 Rule 53 Order expressly tasked her with "investigat[ing] the scope and reason for any violations of the 1972 Decree regarding [IDOT]" and "mak[ing] recommendations for how to remedy any *violations* of the 1972 Decree." Dkt. 4020 at 2 (emphasis added). In keeping with that order, the Special Master's website explains that the Court "appointed a Special Master to investigate and report on employment practices within the Illinois Department of Transportation ("IDOT")," that "[t]he Special Master is investigating whether IDOT's employment practices violate" *Shakman* or *Rutan*, and states "[i]f you have any information about IDOT employment practices, or examples of unfair politically motivated employment decisions, please contact the Special Master's office." *See* shakmanillinois.com.

As recently as January, the Special Master served a subpoena on the OEIG seeking, *inter alia*, any "complaints, allegations or information" regarding "political patronage" or "personnel

matters or employment practices, actions or decisions" at IDOT since 2016. 1/10/20 Special Master subpoena, Exhibit 4; *see also* 9/30/20 Special Master Ltr., Exhibit 5 (subpoenaing "HEM Advisories that reflect specific issues to investigate further"). And in February, the Special Master reported to the Court that she "has been investigating and collecting information for the past six years relating to the State's employment practices at IDOT, and for the past three years at other State agencies." Dkt. 6720 at 2. In July, Plaintiffs reported to the Court that "[t]he Special Master has been tasked with the role of investigating violations of the 1972 Decree," and that "[t]he Court and the Plaintiffs have relied on the Special Master as their eyes and ears to monitor and report on compliance matters." Dkt. 6954 at 3.

While the State does not agree that the Special Master has stopped investigating, it does agree with the logical conclusion of the Plaintiffs' and the Special Master's claim: at this point, they are issuing demands and recommendations that are not tethered to violations of federal law or the 1972 decree. Without that nexus, the Plaintiffs' demands and the Special Master's recommendations do not come within the ambit of this case: they are not required for there to be a durable remedy, but rather are free-floating changes to the State's employment practices that Plaintiffs and the Special Master believe would represent improvements.

d. Plaintiffs repeatedly have argued that a Special Master supplies the facts necessary to determine when the decree can end.

Plaintiffs sought a Special Master because they claimed that the State's compliance with the decree and federal law could not be assessed without one. They argued in 2014 that "[t]he role of the monitor is … to investigate, observe and report on whether government used improper political considerations in employment decisions." Dkt. 3869 at 3; *see also id.* at 12-13 ("Until a monitor is appointed with the ability to determine by first-hand investigation what is really happening in government employment, there is no way reliably to evaluate compliance with

existing Court orders."). Now, Plaintiffs argue that the State cannot exit the decree because its compliance has not been assessed by the Special Master. PLR at 9-10. Plaintiffs likewise claim that "the Governor has presented almost no evidence in support of his motions" and "has provided no declaration or deposition testimony." *Id.* at 9.

In support of its motions, the State has relied on the Special Master's reports. These are reports of the very evidence that Plaintiffs argue provides the basis to evaluate whether to terminate the decree. *See* Dkt. 6789 at 21-22 ("Experience in this case has shown that monitors provide the information … [that has] provided a basis … to end federal court oversight in government employment."); PLR at 37 ("The Special Master's observations … provide invaluable input to the parties and the Court – the 'up-to-date' facts *Horne* requires").

e. Plaintiffs' argument that the State may have a "durable remedy" in just six months suggests that it has one now.

While on one hand Plaintiffs argue that six years of the Special Master's activities have not yielded a record on which the Court can judge whether the decree should end, on the other they state that if she continues for just six more months, everyone *then* will have the required record. 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 work diligently to complete the open tasks." PLR at 4. "At that point, Plaintiffs hope they will be in a position to join the sunset request …." *Id.*

The Plaintiffs' position is not credible, and their request should be denied – but it is illustrative. *First*, Plaintiffs argue that there are defects of *constitutional* proportions in the State's "durable remedy" that *manifestly* prevent the State from exiting the decree now, yet they may "be in a position to join" the State's request in just six more months. That argument, of

course, indicates that the defects may not be so significant after all. *Second*, the fact that the Plaintiffs cannot identify "what is left to accomplish" and "those matters that need to be completed before termination is warranted" admits the problem. PLR at 4. *See People Who Care*, 246 F.3d at 1075 ("Nothing in the logic of … the plaintiffs' brief … suggests any natural terminus to the decree."). Plaintiffs argue that the State has not crossed the finish line, but also refuse to identify where the finish line is. Based on the existing record, developed over the past six years, pursuant to the very mechanism for developing a factual record that the Plaintiffs requested, the State is entitled to termination of the decree now.

II. The State has a durable remedy.

If a "durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Horne*, 557 U.S. at 450 (citation omitted). The Court must apply "a flexible standard that seeks to return control to state and local officials as soon as a violation of federal law has been remedied." *Id*. at 450-51.

a. The "durable remedy" inquiry requires first identifying the past violations of federal law at issue.

It is impossible to understand how the Plaintiffs and the Special Master can argue that the State does not have a durable remedy without being able to cite any ongoing, systemic violations of the 1972 decree or federal law. "[A]n inquiry into whether Defendants are currently in compliance with federal law is a necessary predicate to any inquiry into whether that compliance is more than merely fleeting. Unless the court properly focuses its inquiry on compliance with federal law, it cannot analyze whether any remedy adopted by the state will be effective to maintain such compliance." *Jackson*, 880 F.3d at 1207. Plaintiffs and the Special Master cannot show violations, let alone systemic violations, over the past six years, and they acknowledge, as they must, that the State has made significant improvements to its hiring and employment

practices during that time. *See* PLR at 40 ("The Governor has made important progress since 2014…"); SMR at 12 (noting that "IDOT and the State have adopted numerous reforms" and highlighting "the more significant accomplishments and progress toward these reforms"). Processes that have effectively prevented violations over the past six years – and that during that period have been significantly improved – have proved to be "durable."

b. The State has a "durable remedy" with respect to preventing coerced political work and donations – the initial violation that led to the 1972 decree.

"[A] decree cannot seek to eliminate a condition that does not violate federal law or flow from such a violation," and "must be limited to reasonable and necessary implementations of federal law." *Horne*, 557 U.S. at 450 (citation and quotation marks omitted). Thus, to properly conduct the "durable remedy" inquiry, the Court first must identify the initial violation of federal law at issue. This is where both Plaintiffs and the Special Master go astray. They cite changes that the State should make to its employment practices, but they do not identify any violation of federal law from which those demands flow – rendering the critiques and concerns irrelevant to the Rule 60(b) inquiry the Court is required to undertake.

The violation of federal law that originated the consent decree should not be the subject of any dispute. As the Seventh Circuit explained, that violation was that public employees were "required, as a condition of keeping their jobs, or in order to escape discipline, to contribute money to the county democratic organization, or its affiliates, or endorse candidates, and to do political work for such organizations and candidates. Some of such allegedly coerced work [was] done during regular working hours and some on the [employee's] own time. The defendants, it is alleged, coerce [employees] by this means to give votes, political support, campaign work, and money to candidates endorsed by the organization and its affiliates." *Shakman I*, 435 F.2d at 269.

Neither Plaintiffs nor the Special Master point to evidence that coerced political work

continues, or that more is needed to have a "durable remedy" that solves the initial Constitutional violation. The "durable remedy" has been implemented and is working. The Ethics Act codifies prohibitions against coerced political work, and creates a robust enforcement structure including an independent OEIG with authority to investigate based on complaints or on the IG's own motion, to compel all State employees to cooperate in her investigations, and to seek discipline for wrongdoers up to and including termination. 5 ILCS 430/5-15, 20-20, 20-70; OEIGR at 1-2, 18-19. And, this enforcement structure includes an independent Executive Ethics Commission, which can review OEIG reports and also appoint Special Executive Inspectors General to conduct additional investigation if needed. 5 ILCS 430/20-51; OEIGR at 19; *see Jackson*, 880 F.3d at 1203 ("a movant may establish its commitment to future compliance through the adoption of a durable remedy—such as a statute designed to cure the specific federal violation").

c. The "Staff Assistant" problem was not a violation of the 1972 decree – but regardless, the State has a durable remedy to prevent recurrence.

In 2014, Plaintiffs sought supplemental relief because of a problem at IDOT involving the use of the "Staff Assistant" position. As the Special Master described that problem: "IDOT improperly created or reclassified numerous 'Staff Assistant' or 'Executive Secretary' positions as *Rutan*-exempt … even though the work performed by those employees should be *Rutan*-covered." Dkt. 4128 at 5. She added that "the 'faux-exempt positions' were improperly filled with employees based on political consideration rather than qualifications." Dkt. 4128 at 5. In response, the Court appointed a Special Master to "investigate the scope and reason for any violations of the 1972 Decree regarding [IDOT]." Dkt. 4020 ¶ 3.

Plaintiffs allege that "[t]he Court already 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…." PLR at 17 n.6. The State is not aware of any

such finding, and Plaintiffs provide no citation for this assertion.[8] Plaintiffs may be referencing the 2014 hearing that led to the Special Master's appointment, but Judge Schenkier's findings in that hearing do not support Plaintiffs' current allegation. During that hearing, Judge Schenkier found that the Staff Assistant problem "raises the question of why IDOT used the nominally exempt staff position to hire many people and many who had political affiliation to perform non-exempt work." 10/22/14 Hr'g Tr. at 14:8-10. He concluded that the Court had "jurisdiction under the decree to determine the extent to which political considerations may have improperly affected the terms and conditions of existing employees. And if so, and if so, to determine what remedial measures may be in order." 10/22/14 Hr'g Tr. at 14:11-15.[9]

The State agrees that the Staff Assistant issue was a problem, but does not agree that it was a *Shakman* problem. That is because the conclusions reached by the Special Master are virtually the same as admissions made by defendants in this case that the Seventh Circuit evaluated and held were not actionable. The Special Master wrote:

> Our investigation concluded that the Governor's Office [under Governor Quinn] played a key role in the Staff Assistant abuse at IDOT. Most notably, the pressure exerted by the Governor's Office to onboard low-level politically connected candidates was the driving force behind the escalating number of Staff Assistants hired at IDOT. The Governor's Office pushed the politically connected candidates through the *Rutan*-exempt approval process with little to no regard for actual hiring need or whether the candidate was qualified to fulfill the stated duties of the job. Many of the sponsored candidates lacked qualifications to perform the duties described in the applicable position description, and performed *Rutan*-covered duties instead.

Dkt. 4988 at 5 ("Summary of Investigation Findings").

[8] "[V]iolations of injunctive orders must be proven by 'clear and convincing' evidence." *Shakman v. Democratic Org. of Cook Cnty.*, 533 F.2d 344, 351 (7th Cir. 1976) (citation omitted).

[9] In reaching this conclusion, Judge Schenkier explained that "the plaintiffs agree that the 1972 decree does not govern hiring practices, and they disclaim any attempt to seek a remedy for hiring violations." 10/22/14 Hr'g Tr. at 12:12-14. He determined that "post hiring practices regarding transfers, assignments, classifications and promotions" are "clearly within the scope of the decree" – a conclusion that the State disputes. *See supra* Section I.a.

Numerous Cook County *Shakman* defendants made near-identical admissions that were before the Seventh Circuit in *Shakman II*:

> Essentially, the defendants admitted that many departments and agencies in Cook County gave preference in hiring for many county jobs to those persons who had received political sponsorship from a Democratic Party official. Most of the jobs involved were not policy making positions and generally no public notice was given for those openings. The positions were normally classified as "temporary" despite the fact that many employees remained in them for years. The "temporary" status removed the job from the protection of the civil service statutes. The defendants also admitted that they believed that sponsorship was usually contingent on past political work or the expectation of political work in the future. The defendants also believed that a significant number of persons sponsored did some political work on behalf of candidates supported by the Democratic Party. Finally, the defendants admitted that they believed that this work helped elect candidates and that this perceived political advantage was one of the reasons that preference in hiring was given to those who had obtained sponsorship.

Shakman II, 829 F.2d at 1389–90. The district court had determined that because "[t]his political precinct work helps elect candidates supported by the various members of the Democratic County Central Committee, … the defendants' admissions also established that the patronage system created an actual significant advantage in elections." *Shakman II*, 829 F.2d at 1392. (The Special Master made no such finding here.) Despite that finding, the Seventh Circuit foreclosed Plaintiffs from pursuing relief based on this admitted and extensive patronage scheme. It held that plaintiff candidates and voters could not establish, "with the certainty required by the case-and-controversy requirement, that the injury they assert is 'fairly traceable' to the actions of the defendants that form the basis of their complaint." *Id.* at 1397.

Thus, the Seventh Circuit has already held that a functional equivalent of the Staff Assistant problem is not a *Shakman* problem. Accordingly, the State does not believe that the Staff Assistant problem can serve as the "violation" from which a remedy can flow. At most, the Staff Assistant problem shares a nexus with what the decree covers only with respect to the specific issues involving post-hiring transfer of existing employees and the subset of former Staff

Assistants involved. *See* 10/22/14 Hr'g Tr. at 12:15-14:15 (Judge Schenkier identifying conduct that he did not view as "hiring," including "at least 14 employees who were … at a later time transferred"; three employees whose "experience gained while in a nominally exempt position" possibly gave them a "leg up"; and "[a]t least 22 people who already held some position at IDOT [and] subsequently obtained a position as an exempt staff assistant," leading to the "possibility" that other employees were deprived of an opportunity to compete for those jobs).

Regardless of whether there was or was not a *Shakman* "violation" with respect to the Staff Assistants, and whether it is viewed as a broad problem involving hiring or a narrower problem involving post-hiring actions, the outcome is the same: after six years of Special Master oversight at IDOT and three years at the other agencies under the Governor, a durable remedy is in place such that it cannot reoccur. Plaintiffs themselves claimed that, for the Staff Assistant problem, the lack of an Exempt List was the key deficiency that needed to be remedied: that is why they focused on obtaining that specific relief – and not other relief – in 2016. *See* Dkt. 4676 at 4 ("The lack of a single comprehensive list of Exempt Positions and of an established procedure for revising the list of Exempt Positions permitted the Quinn administration to appoint approximately 300 individuals as purportedly exempt IDOT 'technical assistants' despite the fact that they did not warrant exempt status."); *see also* Dkt. 4798 at 2 ("The genesis of the Special Master Order was the pervasive misuse by IDOT of a position labeled as exempt – that of Staff Assistant – by hiring people into that position and then having them perform non-exempt work."). The State indisputably now has a comprehensive and definitive Exempt List and an Exempt Employment Plan. As the Special Master explained, "[h]aving a finite list ensures that improper political hiring is less likely to occur, because no department can simply create and fill an unlimited number of new positions, as was the case with the Staff Assistant positions at

IDOT." Dkt. 6306 at 2; *see* SMR at 14 ("The Exempt Employment Plan is a significant accomplishment that will help prevent further recurrences of *Shakman* violations.").

Plaintiffs and Special Master approved the Exempt List and Exempt Employment Plan about 21 months ago, and have monitored how that process is working for over 500 exempt appointments. They do not proffer evidence that anything like the Staff Assistant problem is occurring today, or how anything like it could reoccur in light of the State's agreed-to reforms. Plaintiffs suggest that the State has more to do in terms of implementing "a procedure for monitoring or auditing Exempt appointments to ensure that the individuals are actually doing the job they were appointed to do." PLR at 17. But there is no evidence that this is a problem, and even the Special Master has not suggested that this is necessary. Her last report regarding Exempt employment included two paragraphs containing no further recommendations. Dkt. 6710 at 28. The Special Master has gained sufficient comfort with the Exempt process that she has yielded Exempt review to HEM, *see* Dkt. 6710 at 28 ("HEM reviews the appointment paperwork for each appointment. To avoid duplication of efforts, the Special Master's office has not played an active role in reviewing each appointment in recent months."). In sum, the State's remedy for the Staff Assistant problem is durable.

d. The State's additional reforms and improvements, including HEM, only enhance the durability of its remedy.

As explained above, the only two possible violations of federal law to remedy – the initial violation involving coerced political work and the Staff Assistant problem – have been thoroughly addressed. Indeed, the remedy that has been implemented exceeds by orders of magnitude what either of these past "violations" requires – and has been proven durable enough to prevent *any* violations of the 1972 decree or federal law, let alone *systemic* violations – during the past six years. Beyond the Exempt List, the Exempt Employment Plan, the John Doe

process, and the expanded oversight from HEM, the Special Master has detailed myriad improvements the State has made to its employment processes. *See* Dkt. 6946 at 32-34; SMR at 10-11 (completed 16 of the "more significant recommendations"); *id.* 12-18 (describing "significant progress," "numerous reforms," and "significant accomplishments and progress").

The State has established a six-year record of good faith compliance and improvement. While the Special Master and the Plaintiffs contend that the State was slow to implement some recommendations, they do not provide any persuasive reason to doubt the State's commitment to improving its employment processes and abiding by federal law. The Special Master's recent reports note that "several of the Special Master's long-standing recommendations to IDOT have been accomplished or are on track for completion," Dkt. 6900 at 1; *see also id.* at 22 (acknowledging "the real achievements and progress that IDOT has made since [the Special Master's] initial appointment"); that "[t]he Parties have engaged in a significant amount of work to improve the employment practices at the State of Illinois," Dkt. 6710 at 29; that the Parties "have worked collaboratively to accomplish significant progress," Dkt. 6565 at 1; and that "the work accomplished during this time period is notable," *id.* This real and meaningful progress demonstrates that the State meets the factors the Plaintiffs propose to assess the State's "durable remedy": "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." PLR at 11 (citing *Jackson*, 880 F.3d at 1200). "A movant may … establish its commitment to future compliance through a record of sustained good-faith efforts to remedy federal violations and, to the extent possible, eliminate the vestiges of the federal violation." *Jackson*, 880 F.3d at 1203.

The role of OEIG and HEM in reviewing State hiring and employment processes bolsters the State's commitment to sustained compliance. As OEIG described in its submission, it is "an

independent executive branch State agency with the largest inspector general oversight role." OEIGR at 1. "Under the Ethics Act, the OEIG is charged with investigating allegations of fraud, waste, abuse, misconduct, and violations of laws and rules including hiring improprieties." *Id.* at 2. "In 2015, the OEIG created a separate compliance division known as [HEM] to solely review State hiring and processes in order to ensure these are conducted according to competitive hiring rules and policies, and are free from political and other manipulation." *Id.*

The goal set out by Judge Schenkier is complete: "to encourage the fastest and most efficient transfer of knowledge and experience from the Special Master to HEM unit employees so they may carry more of the burden." Dkt. 4798 at 6. Indeed, the Special Master has yielded Exempt review to HEM, *see* Dkt. 6710 at 28, repeatedly and thoroughly relies on OEIG and HEM's work in her Response, and states that she "is not criticizing the compliance activities of HEM." SMR at 56. The Court has before it the OEIG's submission describing its work, OEIGR; the OEIG's founded investigative reports[10]; HEM's quarterly advisory reports[11]; and 67 Advisories and the complete underlying HEM files for four IDOT hiring reviews, Dkt. 7071. That showing demonstrates that OEIG and HEM capably serve an oversight and enforcement function sufficiently "durable" to deter and uncover violations of federal law.

III. The Plaintiffs' and Special Master's further demands are not based in federal law and seek to convert a narrow, prohibitory injunction into a massive, boundless mandatory injunction.

"[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or … flow from such a violation. If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law, it may improperly deprive future officials of their designated legislative and executive powers." *Horne,*

[10] https://www2.illinois.gov/oeig/investigations/Pages/PublishedOEIGCases.aspx
[11] https://www2.illinois.gov/oeig/HEM/Pages/HEM%20Reports.aspx

557 U.S. at 447; *see also Shakman v. City of Chicago*, 426 F.3d 925, 933 (7th Cir. 2005) ("*Shakman IV*"). As a consequence, "the court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder." *Evans*, 10 F.3d at 479 (7th Cir. 1993); *id.* at 482 (noting the importance of "preserving democratic governance, separating the judicial and political spheres, [and] respecting state autonomy in the absence of a federal rule"). A "substantial federal claim" exists "only if there is reason to believe that Illinois is violating its constitutional obligations (or would be doing so, but for the consent decree)." *David B. v. McDonald*, 156 F.3d 780, 782 (7th Cir. 1998); *see also Jackson*, 880 F.3d at 1201.

a. Plaintiffs' and the Special Master's demands are aimed at eliminating conditions that do not violate federal law and do not flow from any violation of federal law.

Plaintiffs and the Special Master are focused on eliminating numerous conditions within State employment policies and practices. Both want to eliminate the decentralized set of hiring policies by imposing a Comprehensive Employment Plan and the paper-based hiring process by requiring an electronic system. The Special Master argues that the State must eliminate or address numerous "conditions" which she characterizes as "systemic deficiencies": the "concept of 'reachability,'" SMR at 18; temporary and interim assignments, *id.* at 20; seasonal, temporary, and emergency hires, *id.* at 24; "personal services contracts," *id.* at 28; and other employment practices that "create opportunities for political manipulation," *id.* at 31.

The problem is that – even if the Court fully credits that these are systemic deficiencies in the State's employment processes (the State will explain below why they are not, and the steps already taken to address them) – these "conditions" plainly do not "violate [federal law] or … flow from such a violation." *Horne*, 557 U.S. at 447. They are, at most, potential weaknesses in

the State's hiring processes that *could, in the future, if a number of things go wrong,* lead to a violation of federal law. *See* PLR at 12 (listing "instances in which practices were followed (or not followed) that create opportunities for political influence on employment decisions"). There is no evidence that these "conditions" have led to violations of federal law in the past six years. *See John B. v. Emkes*, 710 F.3d 394, 413 (6th Cir. 2013) (vacating decree where "other than speculation as to what the future holds, the court saw no reason to believe that [defendant government] would fail to remain in compliance" with federal law, and where "[t]he record shows, instead, that [the government] has implemented a durable remedy for its past violations ….") (citation and internal quotation marks omitted).

Relatedly, and as argued more extensively below, none of these "systemic deficiencies" has anything to do with electoral interests of independent candidates and voters. *See United States v. Bd. of Educ. of City of Chicago,* 663 F. Supp. 2d 649, 662 (N.D. Ill. 2009) ("[E]vidence about conduct which has never been charged in the only operative complaint is a late and ill-fitting addition to any controversy between the parties. The original allegations of the complaint have long since disappeared for one reason or another. To bring an entirely different subject forward for resolution, lacking in specific allegations or precise violations, lacking in settled standards of conduct or practices by which to measure compliance, was ill-advised.").

The State addresses the Special Master's allegations of "systemic deficiencies" below:

"The concept of 'reachability,'" SMR at 18. It is instructive that the Special Master features "the concept of 'reachability'" – the State's ability to hire external candidates – as her first example of a "systemic deficiency that has not been addressed" in her list of "the most significant issues." SMR at 18. The example illustrates the problem. *First*, "reachability" by its definition relates to "hiring" and, thus, plainly is not covered by the decree. *Second*, it has

nothing to do with patronage or political discrimination, let alone a coerced work scheme; it is simply something about the State's employment practices that the Special Master views as a weakness. *Third*, as the Special Master indicates, the State's Collective Bargaining Agreements (CBAs) often impact the consideration of external candidates for a position because they may give union members the first priority in applying for a job. Nothing about these CBA provisions violates State or federal law.

Of course, the State seeks both to retain and grow its internal employees as well as to attract external candidates within the limits of its legal and contractual obligations. And it has completed many of the Special Master's recommendations to attract a broader, more diverse pool of candidates at meaningful entry points. *See* Dkt. 4631 at 10 ("The ET applicants came from a diverse group of colleges and universities across the country"); Dkt. 5069 at 4 ("IDOT improved [its hiring practices and procedures with respect to the summer TT and ET employees] considerably, including: … expanding advertising of the programs to obtain a wider and more diverse pool of candidates"); Dkt. 6458 at 10 ("Regarding the 2019 TT program, this year's numbers suggest IDOT is succeeding in reaching a more diverse applicant pool in some districts/bureaus."); Dkt. 6458 at 13 (IDOT completed the Special Master's recommendation to "[c]reate and present a plan to ensure a wider applicant pool for internship positions.").

The "use of temporary and interim assignments," SMR at 20. The Plaintiffs and the Special Master both attempt to rewrite history to suggest that the "use of temporary and interim assignments" is an issue that remains unsolved stemming from the misuse of the Staff Assistant position. That is wrong. The role of temporary and interim assignments in the Staff Assistant issue was that "candidates were placed into *Rutan*-exempt positions temporarily with the intention that they would later be hired into permanent positions." Dkt. 4988 at 3; *see also id.* at

34 ("Politically connected Staff Assistants Hired as "Emergency," or "Temporary" Employees to Perform Alleged "Exempt" Duties."). The creation of the Exempt List and the implementation of the Exempt Employment Plan prevent this problem from recurring "because no department can simply create and fill an unlimited number of new positions, as was the case with the Staff Assistant positions at IDOT." Dkt. 6306 at 2. In other words, the State no longer can create temporary or interim "faux-exempt" positions as a way to temporarily onboard politically-connected hires. Neither the Plaintiffs nor the Special Master assert otherwise.

The Plaintiffs and the Special Master now raise concerns about an entirely distinct issue. They argue that "[t]emporary assignments result[] in unofficial/non-competitive promotions, increased pay, and unfair advantage over non-selected employees." PLR at 13 (citing SMR at 20). That is unambiguously not the Staff Assistant problem. These "temporary assignments" or "job assignments" involve *covered* employees (i.e., those selected through a competitive process and with job protection). There is no evidence that they were hired improperly or that the temporary assignment or job assignment was done for a purpose other than meeting the agency's operational needs. Thus, this is another instance of Plaintiffs and the Special Master identifying a practice they do not like but is not related to past violations of the 1972 decree or federal law.

Perhaps recognizing the disconnect, Plaintiffs try yet another argument: that "[h]istorically, use of temporary assignments was a central device in the 'classic' patronage employment system that generated this lawsuit." PLR at 13. They say that "[t]he practice" is described in the original complaint at ¶ 25, without attaching or citing the original complaint or describing the "practice." PLR at 13-14. (The State is attaching the complaint as Exhibit 6.) Contrary to Plaintiffs' claim, the practice detailed in Paragraph 25 has nothing to do with the Staff Assistant problem or the "concerns" about temporary assignments giving covered

employees a leg up. Paragraph 25 describes how – prior to the protections of *Rutan* – patronage hires were given "temporary" jobs so they would never acquire civil service protection, and thus would continue to have to prove their fealty to their political sponsor at the risk of losing their "temporary" job: "Many of these employees … are hired on an even more precarious basis, namely, as so-called 'temporary' employees. Under this practice … the employee is hired as a 'temporary' employee, for from 60 to 180 days, at the end of which his employment must be 'renewed' by his or her employer if the employee is to retain the employment." Exhibit 6 ¶ 25.

Plaintiffs do not claim that this practice is occurring at the State. Plaintiffs also completely ignore that current State employees in temporary assignments have job protections. Thus, even if Plaintiffs had evidence of political affiliation playing a role in these assignments – and they do not – current State employees cannot be subject to the political pressure described in paragraph 25 of the complaint. In addition, this type of long-lasting "temporary" job was a component of the conduct that the Seventh Circuit determined was not actionable. *See Shakman II*, 829 F.2d at 1389-90 ("The positions were normally classified as 'temporary' despite the fact that many employees remained in them for years. The 'temporary' status removed the job from the protection of the civil service statutes.").[12]

In any event, the State has taken significant strides towards bringing additional process and order to its use of temporary and interim assignments. In July 2018, the Special Master reported that "at [her] recommendation, IDOT … posted some positions that were formerly TAs. Those positions were permanently filled through the *Rutan*-covered process. By doing so, IDOT decreased the overall number of TAs." Dkt. 5920 at 8-9. By June 2020, "[a]t the Special

[12] Plaintiffs also argue that temporary assignments "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." PLR at 13. There is zero evidence that "many" State employees were hired "based on political considerations." This is another of Plaintiffs' sweeping, unsubstantiated claims.

Master's recommendation, IDOT significantly decreased the number of official temporary assignments over the years and took steps to limit the duration of temporary assignments." Dkt. 6900 at 18. All "official" IDOT temporary assignments – those that involve a pay increase – are reported each month to the Special Master; there generally are fewer than 10.[13]

The Special Master now has raised concerns about what she terms "unofficial" temporary assignments – assignments that do not involve a pay increase. In response to the Special Master's concerns, "IDOT recently created a new process and form for documenting 'unofficial' temporary assignments/job assignments and has provided training on the form." SMR at 24. Among other things, the new process is clear that candidates who apply for jobs at IDOT will not be credited for their temporary assignment experience unless it is properly documented. *See* Temporary Assignment Memo and Form, Exhibit 7. This policy is tailored to address the Special Master's concern that unofficial temporary assignments potentially could afford employees an advantage if they ultimately apply to fill the position on a permanent basis.

"Lack of oversight for seasonal, temporary, and emergency hires," SMR at 24. Hiring of seasonal, temporary, and emergency hires is "hiring" – and not covered by the decree. Regardless, the problem with the Staff Assistant misuse of "seasonal, temporary, and emergency hires" was entirely different than the problem that the Special Master now identifies. As she notes, "[m]any of the Staff Assistants improperly hired into faux-exempt positions were hired through an unregulated 'emergency' 'temporary' or 'seasonal' hires process, often for political

[13] The Special Master reported, based on a spreadsheet generated from a payroll report in late 2019, that the Department of Human Services had more than 3,000 temporary assignments in 2018 and 2019. SMR at 21. That payroll report provided a very rough data set – for instance, it (1) lists the same employees multiple times; (2) in some rows, it contains no employee name at all; and (3) it listed a large number of temporary assignments that lasted for a matter of a single day or a handful of days. The State now has provided the Special Master with better data, showing 175 current employees (at an agency of over 13,000) who have been in a temporary or interim assignment for 60 days or longer – mostly due to pending filling of vacancies.

reasons." SMR at 24 (emphasis added). That problem has been addressed by the Exempt List, which ensures that "no department can simply create and fill an unlimited number of new positions, as was the case with the Staff Assistant positions at IDOT." Dkt. 6306 at 2.

Now, the Special Master has different "concerns" that have nothing to do with the decree or the Staff Assistant problem. She argues that "IDOT's seasonal programs result in hiring IDOT relatives/former employees," SMR at 25 – but makes no claim about political influence. She then repeats the fallacy that the OEIG identified "*Rutan* violations in hiring seasonal state fair workers" in a report made public in 2018 – and that investigated conduct between 2007 and 2015. *Id.* at 26. As the State previously explained, that is false. The 2018 OEIG report did not find instances of patronage hiring or political discrimination. Dkt. 6947 at 21. The report itself "specifically notes that 'the OEIG did not uncover evidence that the hires were made based on political connections,' but rather that the failure to adhere to the State's *Rutan* hiring process meant that there existed the potential that improper hiring could occur." *Id.* In any event, the State earlier this year provided the OEIG and the Special Master with a memorandum from the Department of Agriculture detailing improvements it committed to making to the hiring processes for the 2020 State Fairs (both of which occur outside the Northern District). Exhibit 8. Because this year's State Fairs were canceled, the new process will be utilized in 2021.[14]

Hiring through "personal services contracts," SMR at 28. Hiring through personal services contracts ("PSCs") is "hiring" – and thus outside the scope of the decree. Moreover, there is no evidence that PSCs have been used for political manipulation. In contrast, PSCs are valuable tools for State government, with benefits for taxpayers. During the Covid-19 pandemic, several epidemiologists – who the State does not need and cannot afford for long-term, post-

[14] Despite her current critiques, the Special Master has noted that the State has made significant improvements to its seasonal hiring programs. *See supra* note 7.

pandemic employment but are critical now – were hired using PSCs. Similarly, the State has used PSCs *in this case* to make concerted progress. Nonetheless, the State has committed to provide training on PSCs during the CEP training. The Court instructed – and the State will ensure – that the "tone and content of the training must promote close attention to adhering to the policy by supervisors." Dkt. 7084.

Other employment practices that "create opportunities for political manipulation," SMR at 31. The Special Master lastly argues that "[o]ther components of the State's current employment practices create opportunities for political manipulation." SMR at 31. She lists "[i]nconsistent application of minimum qualifications and inaccurate position descriptions," the "bypass process" outlined in the union CBAs, "lack of uniform and consistent scoring and screening," "canceled sequences," and "lack of consistent disclosure and vetting of conflicts of interest" as examples. *Id.* at 31-42. These are all components of the State's "hiring" system – and thus not covered by the decree. Regardless, the Special Master's own framing says all that needs to be said: these aspects of the State's employment system could, potentially, be used for political manipulation. But there is no *evidence* that they have been used for political manipulation, let alone on a systemic basis, let alone in a way the Governor endorsed.

Nonetheless, as with the other concerns that the Special Master has raised, the State has taken these seriously. For example, the Special Master has documented significant improvements regarding IDOT's use of minimum qualifications. *See* SMR at 17 ("As discussed in earlier reports, IDOT and HEM devoted a significant amount of work developing the MRQs and the results are a dramatic improvement over the previous process."). In June 2020, the Special Master urged IDOT to "[c]ontinue to improve its hiring processes to address the other issues addressed [in her Eleventh IDOT Report], particularly with respect to refining minimum

qualifications and the uniform application of those qualifications." Dkt. 6900 at 22. In response, IDOT invited the Special Master to conduct a workshop for IDOT personnel staff. The Special Master conducted this workshop regarding "Refining and Applying Minimum Required Qualifications" on September 18. *See* Exhibit 3. Similarly, in coordination with the Special Master, the State in 2019 implemented a conflict of interest disclosure form for employees involved in a hiring sequence; it updated that form this summer, making the Special Master's recommended revisions. *See* Exhibit 2 (revised Conflict of Interest disclosure); *see also* Dkt. 6222 at 9 ("IDOT has taken steps to ensure conflict of interest paperwork and any related follow up is documented and included in interview files.").

As long as the State's employment system is administered by human beings, there will be the possibility that some employees could attempt to manipulate the system to some end. That potential cannot sustain a federal court's involvement. *See Plotkin v. Ryan,* 239 F.3d 882, 885 (7th Cir. 2001) (rejecting plaintiffs' argument that "[t]here is a substantial likelihood that without remedial steps being taken that such or similar [coerced partisan political work] unlawful conduct will continue" because "[t]hese allegations are purely speculative."); *Salazar by Salazar v. D.C.,* 896 F.3d 489, 500-01 (D.C. Cir. 2018) (further relief is not appropriate "just because [the Court] had 'no assurance' that already-solved problems 'w[ould] not arise again.'"); *id.* at 500 ("[A] local government cannot be subjected to ongoing classwide structural relief simply because a problem has not been 100% eradicated."); *id.* ("Expansive, classwide structural relief that judicially superintends local government operations cannot issue based on a factual predicate consisting only of one-off errors that have, at best, a marginal connection to the only remaining executory portions of the Consent Decree.").

At the end of the day, these recommended employment practices simply are not

constitutional mandates. The State has "maximum leeway" within the constitutional boundaries. *See Evans*, 10 F.3d at 479 ("[C]ourts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance. … [The Seventh Circuit] has emphasized … [the] obligation to permit new public officials to set their own policy within the limits established by federal law."). Despite room for improvement, the State's employment system exceeds what federal law requires and what is required to be relieved from court oversight.

b. Plaintiffs' and the Special Master's demands are not part of the 1972 decree, and would constitute a new, massive, unending mandatory injunction.

Just as they do not derive from federal law, the requirements Plaintiffs and the Special Master seek to impose are not found in the 1972 decree and are not essential to a durable remedy. There is no "Comprehensive Employment Plan" or "Electronic Hiring Process" mentioned in the narrow, prohibitory terms of the consent decree that the State entered forty-eight years ago. Indeed, there is no mandatory obligation on the part of the State; its obligations are entirely prohibitory. "Writing new injunctive obligations … into Consent Decree provisions that never addressed those matters … would turn the power to modify a consent decree into an injunctive blank check. 'Who would sign a consent decree if district courts had free-ranging interpretive or enforcement authority untethered from the decree's negotiated terms?'" *Salazar*, 896 F.3d at 500 (citation omitted).

Plaintiffs argue that they are <u>not</u> asking for a mandatory injunction by requiring things like a Comprehensive Employment Plan and an Electronic Hiring Process. They argue that they "have not asked the Court to compel the State to enter into a CEP," PLR at 36 – only that the State must remain under the decree unless and until it adopts one and the Special Master has conducted a "searching review of the CEP and its implementation." *Id.* at 23. But requiring a

CEP and Electronic Hiring Plan as a mandatory injunction, versus requiring them in order to exit a decree, is a distinction without a difference.[15] Under Plaintiffs' theory, this narrow prohibitory decree is accompanied by an implicit set of boundless, undefined mandatory requirements. This position finds no support in case law (Plaintiffs provide none) and is contradicted by fundamental principles governing decrees. *See United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it."); *Salazar*, 896 F.3d at 498 (adding new injunctive requirements "would deny the enjoined party the contractual bargain it struck in agreeing to the consent decree at the time of its entry, and would destroy the predictability and stability that final judgments are meant to provide").

Plaintiffs' position also is entirely contradicted by the history of this case, which they conspicuously omit. When the consent decrees in this case imposed a mandatory requirement, that requirement was expressly stated. For instance, numerous other decrees in this case affirmatively require that the defendant develop a plan for future compliance. *See* 1983 Consent Judgment, Exhibit 9 ¶ F (Section entitled "Plan of Compliance," requiring "a Plan of Compliance to implement this Judgment"); 1991 Consent Judgment, Dkt. 6486-2 ¶ F (same); 1995 Consent Judgment, Exhibit 10 ¶ F (same). Likewise, the Supplemental Relief Orders (SROs) binding other defendants imposed extensive and defined additional, often mandatory, obligations. *See* Dkt. 531 (Cook County); Dkt. 601 (City of Chicago). These SROs also affirmatively required the equivalent of a Comprehensive Employment Plan. *See* Dkt. 601 at 13

[15] Plaintiffs suggest that no Defendant has exited this case without these reforms. PLR at 1 ("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 …."). That is not the case. In 2010, Plaintiffs moved to dismiss 84 defendants with no showing of cause whatsoever. Dkt. 1747.

("The City will create a New Plan that will replace the current Detailed Hiring Provisions."); Dkt. 531 at 10 ("After … at least six (6) months monitoring experience of County employment practices, the Parties shall negotiate, in good faith, a new hiring plan.").

The SROs were agreed as a settlement of pending contempt motions and presented to the Court as settlements pursuant to Rule 23; they obtained judicial approval as such. *See* Dkt. 601; Dkt. 531. Critically, the SROs added classes *comprised of past, current, and future employees* to the classes of candidates and voters – thus alleviating the "case or controversy" problem and expanding significantly the scope of the case, the federal interests at issue, and the breadth of an appropriate remedy. *See, e.g.*, Dkt 601. at 39; Dkt. 531 at 5. Other active *Shakman* cases include this employee class that unequivocally does not exist for the State. Dkt. 3007 at 5 (Assessor); Dkt. 6382 at 2 (Clerk of Court); Dkt. 1831 at 5 (Recorder); *see also* Dkt. 6829 at 8-17 (finding that IVI-IPO can assert the interests of its employee member as to the County Clerk).

Yet Plaintiffs seek to impose on the State the extensive and onerous mandatory requirements of the SROs without the State's agreement, without an employee class, and without any of the factual circumstances that led to entry of the SROs. Plaintiffs now argue, in effect, that the SROs never were necessary, because "[t]he standards for substantial compliance in other SROs … 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" for termination. PLR at 5-6. That position is meritless. Plaintiffs argued that their 2014 evidence against the State "establishe[d] the need for supplemental relief with respect to the 1972 Order similar to the supplemental relief orders entered by the Court in the last several years with respect to" a number of other defendants, Dkt. 3744 at 9, but the Court did not enter such an order. Under Plaintiffs' theory, all of their past requests that were denied now form the contours

of what Rule 60(b) required all along. Their position finds no support in case law, and turns on its head the case history and the tailored relief entered by Judge Schenkier.

c. A Comprehensive Employment Plan, an Electronic Hiring Process, and adopting the Special Master's recommendations are not required by federal law or the 1972 decree.

There is no federal law requirement that the State implement a CEP.[16] In 2014, Plaintiffs sought "[d]evelopment with input from the Special Master, of a hiring, promotion, reassignment and employment plan for non-exempt positions." Dkt. 3744 at 10. They were not awarded this relief. And courts have rejected the necessity of this type of plan to exit institutional reform litigation. *See Bd. of Educ. of City of Chicago*, 663 F. Supp. 2d at 655 ("The Seventh Circuit has rejected the … proposition that a good-faith determination … requires the presentation of a detailed plan for future district operations, notwithstanding a determination of good faith compliance with decree provisions and the elimination of vestiges of discrimination to the extent practicable. *See People Who Care*, 246 F.3d at 1078."). In contrast, Plaintiffs *were* awarded, in 2016, an Exempt List and "procedures for correcting and revising the Exempt List," Dkt. 4798 at 6 – which are embodied in the approved Exempt Employment Plan. Dkt. 6180.

Still, in the process of working with the Special Master and in consultation with the Plaintiffs, the State developed and filed the CEP, which included and expanded on the Exempt Employment Plan, in November 2019. Dkt. 6612. This was good faith cooperation, not a judicial admission. The State never acknowledged or indicated that having a CEP is required by the 1972 decree or the Constitution.

Like the CEP, the State also is committed to modernizing its hiring processes by implementing an electronic hiring system. After multiple years of work on this significant

[16] Plaintiffs acknowledge that the State "would not be in contempt" for failing to implement a CEP or "if an agency of State government failed to follow procedures the CEP sets forth." PLR at 36.

change to its processes, the State expects to dramatically increase the number of hiring sequences that are conducted electronically in 2021, and to eventually conduct all hiring electronically. The State agrees with the Special Master that electronic hiring is a "vast improvement." Dkt. 6710 at 21. But it defies logic to argue that federal law or the 1972 decree require an electronic process.

Beyond items like a CEP and an electronic hiring plan, Plaintiffs and the Special Master would impose as mandatory injunctive requirements each of her 33 *current* "more significant recommendations." SMR at 9-12. As explained above, federal law does not require that the State adopt countless systemic "recommendations" in order to exit a decree with narrow, prohibitory requirements.

d. Changes to the OEIG and HEM's processes are not required by federal law or the 1972 decree.

In order to call into question the State's durable remedy, both the Plaintiffs and the Special Master take aim at OEIG and HEM. But the critiques do not allege that OEIG and HEM are missing evidence of patronage practices or in any way question "the integrity, competency, or rigor of their monitoring of the State's hiring and employment," Dkt. 6946 at 27. Instead, the Plaintiffs and Special Master challenge aspects of the State's enforcement structure that are common to inspectors general ("IGs"), including the IGs for the City and County, both of which were relieved from the 1972 decree. Their concerns about the OEIG and HEM are baseless and, even if they were founded, do not establish that OEIG and HEM are lacking in a way that undercuts them as a meaningful component of the State's durable remedy.

The oversight of the OEIG and HEM is as "durable" as what the City and County inspectors general provide. Plaintiffs' and the Special Master's demands for changes to the process followed by the OEIG and HEM also are inconsistent with the history of this case. For both the City and the County, supplemental relief orders required an independent inspector

general and dictated their role. *See* Dkt. 601 at 23-25 (detailing "[t]iming of IGO Investigation," what the IG will do with "Sustained Cases" and "Non-Sustained Cases," and the IG's obligation to file "quarterly reports" with the Court); Dkt. 531 at 19-23 (detailing "Timing of IGO Investigation," "IGO Report" requirements, and "Quarterly Report" requirements). Despite the fact that the State has no such supplemental relief order, and no affirmative *Shakman* requirements relating to its Inspector General or, more generally, to oversight, the Plaintiffs and the Special Master now seek to impose demands regarding "transparency and reporting." These demands go far beyond what the City and the County have implemented, or what a durable remedy requires. For example, the County Compliance Administrator reported the following in recommending that the County exit the decree:

> [T]he County's first Independent Inspector General … has built an office staffed with capable and diligent investigators and has established credibility with Cook County actors. Employees and job candidates with concerns know where to find the OIIG, and they appear to trust that their complaints will be thoughtfully pursued and that they do not risk their jobs by airing concerns. …. [The Compliance Administrator] has found the OIIG investigations to be thorough, practical and well-reported. The reports clearly state recommendations for remedial measures, and the OIIG regularly follows through on securing the County's responses to recommendations and verification that remedial measures promised are carried out.

Dkt. 5987 at 11-12. Neither the City nor the County have monitoring and oversight structures or reporting that surpass what the OEIG and HEM do for the State. *Compare* City 2Q Report[17] (pages 34 to 42 discuss hiring and employment) and County Semi-Annual Report[18] *with* HEM 3Q Report.[19] If anything is required in this case to have a "durable remedy" with respect to the

[17] https://igchicago.org/wp-content/uploads/2020/07/OIG-Second-Quarter-2020-Report.pdf
[18] https://opendocs.cookcountyil.gov/human-resources/compliance/semi-annual/Compliance_Officers_Semi-Annual_Report_September_2020.pdf
[19] illinois.gov/oeig/HEM/Documents/HEM%20Report%20-%20Third%20Quarter%202020.pdf

functions of the OEIG and HEM,[20] it is: an independent office with separate appropriations, staffed with capable and diligent investigators, analysts, and attorneys, who do thorough, quality work, and have an ability to report on their work and founded instances of misconduct they identify. That was good enough for the Plaintiffs with respect to the County two years ago, and good enough for the Plaintiffs and the Special Master with respect to the City six years ago.

When the Special Master recommended a "substantial compliance" finding for the City, she described the processes that are the same as those used by the State OEIG. She explained that "[t]he City's agreement to house the Hiring Oversight function within the Office of the Inspector General" – and not within the City itself – "[was] key to the Monitor's opinion that the City" was ready to exit the decree. Dkt. 3780 at 12. Because the Inspector General "has the ability to report any future violations, should they occur, to the public," the Special Master was satisfied that the City had met its obligations. *Id.* at 12-13. She likewise praised the structure at the City IG that the State OEIG shares: "OIG Hiring Oversight can now publicly report on its reviews and audits of hiring data and monitoring of hiring processes. In addition, if the OIG conducts an investigation into hiring violations that are sustained, that office can [publicly] report its results, its recommendations and the City's response." Dkt. 3780 at 11 (emphasis added). She added that "[t]his reporting procedure will continue to be a check on the City's

[20] Plaintiffs argue that "[m]eaningful enforcement is necessary to a durable remedy, as the Governor implicitly acknowledges." PLR at 17. The State does not in fact acknowledge that an oversight and enforcement structure is necessary. To the contrary, cases relieving government defendants from institutional reform decrees routinely do so without "an oversight and enforcement structure." For example, myriad school desegregation cases ended without an "inspector general" or equivalent office continuing to investigate and publicly report on school districts' continued desegregation compliance. *See generally People Who Care*, 246 F.3d 1073; *Bd. of Educ. of City of Chicago*, 663 F. Supp. 2d 649. Indeed, Plaintiffs do not cite a single case supporting the notion that "oversight and enforcement" is necessary once compliance with federal law is achieved. However, in this case, the robust oversight and enforcement by OEIG and HEM provide significant reason – on top of the State's additional components of its durable remedy – that federal court oversight no longer is necessary.

employment practices after Court oversight is lifted." *Id.* The same is true for the State.

The "reporting and transparency" concerns are not founded. The Special Master now takes issue with "the processes or status of implementation that limit HEM's … activities." SMR at 57. She lays out four principal "concerns regarding compliance reporting and transparency": (1) transparency concerns relating to HEM Advisories; (2) limitations on HEM's reviews and reporting; (3) lack of information and transparency with respect to agency investigations; and (4) inability to follow up on complaints referred to agencies with no response required. *Id.* at 57-62. Plaintiffs cite these same concerns to assert that "OEIG and HEM are not yet providing sufficient oversight and enforcement." PLR at 2 (citing SMR at 56-62).

The first of the Special Master's concerns stems from the fact that HEM does not disclose in its publicly-available Advisories when it has referred possible misconduct to the OEIG for investigation and an investigation is ongoing. SMR at 57-60. The Special Master cites one Advisory in which HEM summarizes its review of an IDOT hiring sequence and states that it did not identify additional issues regarding the final candidate's selection. Because HEM referred information it learned in this hiring review to the OEIG for investigation, the Special Master finds that HEM's failure to publicly reveal that fact demonstrates a "flaw in the transparency of reporting [that] needs to be addressed." SMR at 58. In her second concern, the Special Master takes issue with what she describes as "the OEIG's position" that when HEM refers potential misconduct for OEIG investigation, HEM cannot disclose the referred facts and the existence of the ongoing investigation. SMR at 58. In the Special Master's view, the "restrictions on HEM's ability" to disclose information that is part of an ongoing OEIG investigation "frustrate the goals of timely discovery, remediation and transparent reporting." SMR at 60.

As an initial matter, both of these complaints reduce to a disagreement with the State

Ethics Act, which dictates that "all investigatory files and reports of the Office of an Executive Inspector General, other than monthly reports required under Section 20-85, are confidential, are exempt from disclosure under the Freedom of Information Act, and shall not be divulged to any person or agency, except as necessary" under certain limited exceptions. 5 ILCS 430/20-95(d) (emphasis added). What the Special Master describes as OEIG's policy, SMR at 57, is State law.

Both the Special Master and the Plaintiffs ignore the very sound policy behind the law that requires keeping ongoing investigations confidential. Treating ongoing investigations as confidential is critical to ensuring their effectiveness (in addition to balancing the privacy interests of employees who have not been found to have engaged in wrongdoing). In fact, the SROs Plaintiffs negotiated with the City and the County insisted on this confidential treatment.[21]

The fact that HEM refers potential misconduct it spots for a confidential OEIG investigation – in which all State employees are mandated to cooperate – promotes, rather than frustrates, the goals of discovery, remediation and transparency. While it necessarily takes longer to produce an investigation report than a HEM Advisory, the disclosure of any wrongdoing is, if anything, delayed, not prevented. And any argument that referring potential misconduct for an OEIG investigation "frustrates" remediation is baseless. A founded OEIG report can address issues well beyond a single hiring sequence and result in discipline including termination, regardless of whether an employee has finished the probation period.

For her third and fourth concerns regarding the State's compliance reporting and transparency, the Special Master notes that when agencies conduct internal personnel

[21] *See* Dkt. 601 at 23 (complaints to "the IGO shall otherwise remain confidential and shall not be disclosed to anyone outside the IGO except as provided for in the IGO Ordinance") (emphasis added); *id.* at 24 ("The City's Executive branch, its departments and their employees and agents … shall fully cooperate with the IGO's investigation of the complaint, by, among other things, providing the IGO with access to all requested documents and records in a manner that will preserve the confidentiality of the IGO investigation.") (emphasis added); Dkt. 531 at 23-24 (similar provisions for Cook County).

investigations, they do not publicize the results. SMR at 60-62. This boils down to a general complaint that the public is not made aware of every disciplinary investigation in State government. Despite receiving all of the complaints that the OEIG refers back to agencies, the Special Master does not point to any example of potential misconduct that is slipping by unnoticed because State agencies, like most governments, do not publicize employee discipline. Neither the Plaintiffs nor the Special Master identify aspects of the City or County processes that publicly report all allegations of wrongdoing and the internal investigations that follow.

OEIG and HEM oversight has led to significant improvements and reforms. In addition to relying on the Special Master's concerns described above, Plaintiffs also argue that "OEIG and HEM's efforts thus far have not resulted in changes" – not because OEIG and HEM missed violations of the 1972 decree or federal law, but because the State's internal employment policies sometimes are not followed to the letter – *as evidenced by OEIG and HEM identifying those deviances*. PLR at 17-19. The Plaintiffs broadly assert that agencies ignore HEM's recommendations and, as a result, HEM's efforts are "not yet adequate to provide effective monitoring."[22] *Id.* at 19-20. The OEIG's memorandum contradicts the Plaintiffs' conclusions. The OEIG describes numerous ways in which its "oversight has led to significant improvements in State hiring." OEIGR at 3, 23. The OEIG notes, among other examples of improvements, (1)

[22] The sweeping claim that State agencies ignore HEM's recommendations is false. For instance, agencies have re-posted positions and started the hiring sequence anew when HEM identified inconsistencies sufficient to warrant that action. The Department of Veterans' Affairs re-posted the Director of Nursing position after HEM Advisory 20-HEM-0043; the Department of Healthcare & Family Services similarly re-interviewed candidates at HEM's request after HEM Advisory 19-HEM-0079. The Department of Public Health modified minimum required qualifications for its Oral Health Division Chief after that action was recommended by HEM Advisory 20-HEM-0065. And the fact that HEM has issued Advisories on the same topic to numerous agencies, and sometimes repeated Advisories to the same agency, does not demonstrate that the agencies are "ignoring" HEM. Rather, that demonstrates HEM's consistent monitoring. Different personnel – even within a single agency – may be responsible for distinct hiring sequences.

changes to the exempt hiring process based on HEM's identification of issues, *id.* at 8-9; (2) acceptance by the Governor's Office of HEM's recommendations regarding exempt hiring, *id.* at 10; (3) the development of a new process for monitoring term appointments based on the work of HEM and CMS, *id.* at 12; (4) changes made by agencies in response to HEM advisories, *id.* at 13; and (5) changes to the scoring process based on HEM recommendations, *id.* at 15.

As explained above, Plaintiffs' critiques of OEIG and HEM's processes are not well-founded, but even if they were, they in no way undermine the very clear evidence that OEIG and HEM are actively monitoring for both potential violations of federal law and to improve the State's employment practices. That is more than sufficient for OEIG and HEM to serve as a meaningful component of the State's durable remedy.

IV. There is no case or controversy.

The Supreme Court has instructed that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). It has long held that federal courts may exercise their authority "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341.

The Seventh Circuit twice has signaled doubt whether candidate and voter interests were sufficient to sustain a case or controversy here. The Court explained in *O'Sullivan v. City of Chicago*, 396 F.3d 843, 868 (7th Cir. 2005) ("*Shakman III*") that "[a]s *Shakman II* makes clear, we have serious concerns whether the plaintiffs as voters bring to the litigation the sort of

concrete adverseness to fulfill the mandate of *Lujan*," adding that "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." It then emphasized in *Shakman IV*, "the need to avoid, when possible, interference in the decision-making process of local governmental leaders by extending, unnecessarily, the life of a consent decree whose objectives have been achieved or have become unjust, illegal, or unattainable." 426 F.3d at 933 (citing cases).

a. Plaintiffs identify no way in which they are impacted, let alone injured, by the State's employment policies and practices.

Plaintiffs barely dispute that there remains no case or controversy in the current posture of the case and provide no answer to the question of how this case, at this point, in any way impacts independent candidates or voters.[23] They identify no election or candidate at issue, no independent candidate competing against the Governor who is disadvantaged, and no voter supporting such a candidate. Plaintiffs are utterly unaffected by whether the State has a Comprehensive Employment Plan and an electronic hiring system, and whether the State religiously adheres to its internal employment policies. They do not even try to state a theory of how they are affected, let alone posit facts showing tangible injury that can be redressed.

[23] Plaintiffs attempt to suggest that the State "ignore[d] the fact that the original Plaintiff class of ***candidates*** has standing to enforce the 1972 Decree." PLR at 29. That is a distortion of the State's argument, which clearly targeted both candidate and voter standing. *See, e.g.*, Dkt. 6946 at 35 ("The State is aware of no case law outside of the *Shakman* case suggesting that voters – or a candidate from an election held 50+ years ago – have a federal interest sufficiently concrete to constitute a case-and-controversy such to exert extended oversight of a public body's statewide employment practices."). And the Seventh Circuit has not distinguished between the standing of candidates and voters in this case. *See Shakman II*, 829 F.2d at 1399 ("[T]he plaintiffs do not have standing to assert the claim they bring to this court …"); *id.* at 1388 ("The appellees are independent candidates, independent voters, and taxpayers who allege that the appellants' policy of using political 'sponsorship' as a factor in determining who receives a Cook County government job, creates a substantial electoral advantage for the incumbent political office holder and, in doing so, violates the appellees' constitutional rights.").

b. Plaintiffs have standing – if at all – to challenge the "coerced political work" practice that they concede is no longer occurring and is unrelated to their current demands.

Plaintiffs retreat to their original basis for standing: that candidates and voters were harmed "because patronage employees and applicants were forced to support the dominant political parties by donating to campaign funds and performing campaign work," and that they then had to "expend significant funds … to counter these tactics." PLR at 29. As the State previously argued, "if there remains a case-and-controversy in this litigation, it is solely with respect to the narrow and specific facts of the coerced political work scheme that formed the basis of Plaintiffs' Complaint and allowed them to assert injury 50 years ago." Dkt. 6946 at 38.

The glaring problem is that Plaintiffs do not contend that this scheme of coerced political work and coerced political donations continues. Plaintiffs suggest that independent candidates may not "lack standing to challenge governmental actions that provide a competitive advantage to the major political parties," and that "a candidate whose competitor obtains an advantage through a government practice or regulation has standing to challenge that practice or regulation." PLR at 29. But Plaintiffs do not argue – let alone demonstrate – that the State's employment practices "provide a competitive advantage" to the Governor in any way.

Plaintiffs want to target practices that – in their view – have the common thread of relating to "the patronage system." PLR at 29. This they cannot do. Their "law of the case" argument applies – if at all – only to the specific theory of coerced political work and donations. *See Shakman*, 356 F. Supp. at 1248 (holding that the patronage "spoils system" "in no way [a]ffects the rights claimed … in this case"). Plaintiffs' claims unrelated to "coerced political work and donations" schemes must be evaluated under *Shakman II* or require first impression evaluation at this juncture under current law. In this regard, it is critical to note the Supreme

Court's admonition that "standing is not dispensed in gross." *DaimlerChrysler*, 547 U.S. at 353 (citing *Lewis*, 518 U.S. at 358 n.6). "[T]he actual-injury requirement would hardly serve the purpose ... of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." *Id.* (citing *Lewis*, 518 U.S. at 357). Plaintiffs do not cite a single case suggesting that candidates and voters have standing to challenge the State's employment practices – or even so-called "patronage" practices – *other than* with respect to coerced political work. The chasm between Plaintiffs' original theory and their current demands cannot be bridged: there is no overlap between the reason they initially were deemed to have standing and the reason they now seek to continue this case.

c. The Court's analysis under Rule 60(b) must be guided by the current law of standing, and the current law of the case.

The Seventh Circuit stated in this case that "the district court's Rule 60(b) analysis *must* account for the significant changes in the law of voter standing …." *Shakman IV*, 426 F.3d at 936 (emphasis added). It instructed that "the district court should be guided by the *current law of standing* to determine whether the class of voters has the necessary interest in this litigation to vigorously litigate and present the matter of political patronage to the court in the manner *best suited* for judicial resolution, or whether that task is best left to individuals *directly impacted* by hiring decisions made by the City." *Id.* (emphasis added). The Seventh Circuit's formulation strongly suggests the answer. The *current law of standing* – and the *current law of the case* with *Shakman II* – call into question whether it remains equitable to allow Plaintiffs to prosecute even the "coerced political work and donations" scheme at issue in *Shakman I*, while foreclosing the notion that this case can cover more. As with *Shakman II*:

> [I]t is important to note that the hiring practice at issue here is significantly different from the sort of activity that usually forms the basis of a challenge to an electoral system. Indeed, this case is not really a challenge to the mechanics of an electoral system at all. We are not asked to evaluate any aspect of the electoral process—the procedure to get on the ballot or to obtain a place on the ballot. There is no claim that any candidate was deprived of the opportunity to run for office, to appear on the ballot, or to be given any particular place on the ballot. Nor is there any claim that a voter was deprived of the opportunity to vote for a particular candidate. Rather, the gravamen of the appellees' complaint is that the announced hiring practice of the appellants provided a decided advantage in communicating with the electorate and in effectively marshalling community support for the appellants' political cause.

829 F.2d at 1395-96. Even in recent cases that *do involve* the actual electoral system – in ways far more direct than the "butterfly flaps its wings" theory of injury and redressability here – Courts routinely determine that candidates and voters lack a sufficiently concrete stake.[24]

Plaintiffs' two cases supposedly supporting their ongoing standing – *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990), and *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d

[24] *See Democratic Party of Wisconsin v. Vos*, No. 19-3138, 2020 WL 4012806, at *4 (7th Cir. July 16, 2020) ("The immediate harm the Party has suffered is psychological: it asserts that it will have a harder time organizing voters and fielding candidates because of concerns that Democrats who win elections will have less power in office than they expect. The Party also expects an added financial burden insofar as it must spend more money to generate enthusiasm among the populace. But mobilizing voters who are discouraged or apathetic, but not actually impeded in their ability to achieve desired electoral outcomes, is 'baseline work' for a political party; it is an 'ordinary program cost[ ],' not an 'injury in fact.'") (citation omitted); *Lux v. Judd*, 651 F.3d 396, 400 (4th Cir. 2011) (coplaintiffs' "abstract, generalized interest" in seeing his name on the ballot cannot "meet the requirement that an injury be concrete and particularized"); *Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618, 621 (D.C. Cir. 1998) ("The individual appellants say their support for rival candidates was rendered less effective because the Clinton campaign had greater funds with which to sway voters. That conclusion rests on a series of hypothetical occurrences, none of which appellants can demonstrate came to pass."); *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 127–28 (6th Cir. 1995) ("Miyazawa has merely asserted a general complaint that an unidentified candidate that she may want to vote for may not be eligible to run for that office. She has demonstrated no close relationship to, or any personal stake in, the claim made. No one is guaranteed the right to vote for a specific individual. Miyazawa has suffered no harm, nor will she suffer any greater harm than that of any other voter in the City of Cincinnati, that would provide her standing herein.") (internal citation omitted); *Drake v. Obama*, 664 F.3d 774, 784 (9th Cir. 2011) ("Once the 2008 election was over and the President sworn in, Keyes, Drake, and Lightfoot were no longer 'candidates' for the 2008 general election. Moreover, they have not alleged any interest in running against President Obama in the future. Therefore, none of the plaintiffs could claim that they would be injured by the 'potential loss of an election.'").

58, 63-66 (D.D.C. 2000) – are in no way analogous.[25] *Fulani* involved inclusion and exclusion of candidates on a ballot. 917 F.2d at 1030 ("On account of the decision by the Indiana officials to allow the two major political parties on the ballot, New Alliance faced increased competition which no doubt required additional campaigning and outlays of funds. … We believe that New Alliance's injury is fairly traceable to the action of the Indiana officials who allowed the Democrats and Republicans on the ballot."). *Buchanan* involved inclusion and exclusion of candidates in a debate. 112 F. Supp. 2d at 65. ("When a debate sponsor uses subjective criteria for choosing the participants, the candidates are the ones who suffer a 'concrete and particularized' injury that would imminently deprive them of a fair opportunity to compete on equal footing with their rivals."). That is "the sort of activity that usually forms the basis of a challenge to an electoral system." *Shakman II*, 829 F.2d at 1395-96. Unlike the theoretical impact here, Plaintiffs' cases involve a direct line between Defendants' conduct and plaintiff's injury. The current law of standing thus is clear: Plaintiffs do not present this case in "the manner best suited for judicial resolution"; to the contrary, "that task is best left to individuals directly impacted by hiring decisions made by" the State. *Shakman IV*, 426 F.3d at 936.

d. The Court should not continue this case without a live case or controversy.

Plaintiffs argue that "even if there were changes in the law that cast doubt on Plaintiffs'

[25] Plaintiffs also rely on Judge Schenkier's recent decision with respect to the Clerk of Cook County. PLR at 30-31. The State believes Judge Schenkier's reasoning and conclusion are wrong, as demonstrated by the excerpt that Plaintiffs quote. The decision stems from the mistaken view that *Shakman I* "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 …." *Shakman v. Clerk of Cook Cnty*., 2020 WL 1904094, at *18 (N.D. Ill. Apr. 17, 2020) (emphasis added). To the contrary, *Shakman I* did not empower voters and candidates to "pursue the claims" that other people's rights were violated; it held that they could "seek[] redress for *injuries to their own interests* and the interests of others similarly situated." 435 F.2d at 269 (emphasis added). Plaintiffs understood the weakness of their candidate and voter standing arguments in the County Clerk dispute and focused heavily on arguing that Plaintiff IVI-IPO, an "independent organization with members who are job applicants and job holders," had standing to represent employees who are actually affected by government employment policies. *See* Dkt. 6669 at 6-10.

standing" (which there are), the State "has failed to establish that it would be inequitable to enforce the decree in light of those changes." PLR at 31; *compare Evans*, 10 F.3d at 480 ("[C]ontinued enforcement of a consent decree regulating the operation of a governmental body depend[s] on the existence of a substantial claim under federal law. Unless there is such a claim, the consent decree is no more than a contract …. Prospective enforcement therefore is 'inequitable' within the meaning of Rule 60(b)(5)."") (internal citation omitted). Plaintiffs argue that, even though they may be wholly unaffected by what happens in this litigation, the State should continue to be subject to the scrutiny of the federal court because this case is old.

Plaintiffs' argument offends the very foundations of the judiciary and its limited role. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) ("For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character."); *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 477 (7th Cir. 2013) ("A case becomes moot, and the federal courts lose subject matter jurisdiction, when a justiciable controversy ceases to exist between the parties."). It is hornbook law that "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986); *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't,* 924 F.3d 375, 396–97 (7th Cir. 2019) ("The district court cannot 'suspend the application of Article III' and the parties cannot 'stipulate to the enlargement of federal jurisdiction' by means of a consent decree. Even when the parties resolve the plaintiff's claims by agreement, therefore, the district court must consider whether it has jurisdiction to award the relief requested.") (citation omitted).

The Seventh Circuit is clear that the absence of a federal claim or subject matter jurisdiction should end the case – even when it involves an old decree. *See David B.*, 156 F.3d at

781 ("Now almost 20 years old, this case has reached the end of the line."); *id.* at 783 (explaining that "[b]ack in 1979, the three defendants were appropriate to the theory of the case," but noting that the plaintiffs' theory, "if it had ever supplied a federal claim substantial enough to impose on the state a long-term obligation … does so no longer," including because it "cannot support relief against the defendants in this case"); *see also Perkins v. City of Chicago Heights*, 47 F.3d 212, 218 (7th Cir. 1995) ("we refuse to 'prolong the injury caused by [the] consent decree arrived at through an unfair process by failing to invalidate it sooner rather than later' …. As a federal court, we "must preserve the appropriate relation between state and national power …").

Contrary to Plaintiffs' argument that ancient decrees should not be questioned, scrutiny is *especially* important when the decree was agreed to in another era by officials whose democratic mandates have long since passed. *Horne*, 557 U.S. at 453 ("[T]he longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes."); *Evans*, 10 F.3d at 478 ("'Chicago' did not reach a settlement with the plaintiffs. … Negotiations were conducted on Chicago's behalf by its corporation counsel, who we may suppose acted with the approval of Harold Washington, then Chicago's mayor … Although the decree purports to last for all time—and the district court's decision refusing to vacate the decree even after *Evans II* reflects a belief that the commitments *ought* to run perpetually—democracy does not permit public officials to bind the polity forever.").

V. The Special Master's role should be ended.

As set forth above, the 1972 decree should be terminated. Likewise, the Special Master's role should end. The State argued in its Cross Motion, Dkt. 6974, that the Special Master has completed her assigned tasks, and that Plaintiffs have not offered any basis – let alone a showing of "some exceptional condition," *Williams v. Lane*, 851 F.2d 867, 884 (7th Cir. 1988) – to

expand her duties. Plaintiffs barely grapple with these arguments, and they refuse to identify the portions of the Special Master's Rule 53 orders that, in their view, are fulfilled or unfulfilled.

a. There is no factual or legal basis to expand the Special Master's authority.

Plaintiffs do not discuss Rule 53 or cite a single case applying Rule 53, nor do they challenge the State's legal authority holding that "the appointment of a special master is the exception and not the rule and … there must be a showing that some exceptional condition requires such an appointment." *Id.* at 884. Nor do they point to any "exceptional condition" that requires expanding the Special Master's duties. To the contrary, their argument remains that "if the State wants to exit the decree through a Rule 60(b) motion, it must submit to either expansive discovery conducted by the Plaintiffs or expansive discovery conducted by the Special Master." Dkt. 6947 at 15. Plaintiffs do not dispute this characterization – which would mean that a Special Master's appointment would be altogether *unexceptional* – one ought to be appointed at the outset of *every* consent decree as an inevitable precursor to the eventual Rule 60(b) motion.

Against a backdrop where there is no ongoing violation of the decree, and where Plaintiffs long ago lost any injury to redress, the notion that the Court should order *additional relief* in the form of expanding the Special Master's jurisdiction *after six years* finds no support in fact or law. The argument also turns on its head the history of this case and the specific relief that Judge Schenkier ordered. Plaintiffs would have the Court find that – even though the Court in 2014 and 2016 listed specific tasks for the Special Master to complete (to the exclusion of other requested relief) – it was always intended that, if the State ever sought to exit the decree, the Special Master's scope would cover the entirety of the State's hiring and employment processes. This argument is meritless. Now that the Special Master has completed her work, her tenure should end.

b. The Orders appointing the Special Master should be vacated.

The Special Master has completed the responsibilities set forth in the Rule 53 orders. There should be no dispute that she completed the four assigned tasks for non-IDOT agencies, which all related to exempt positions. *See* Dkt. 4798 at 6-7; Dkt. 5004.[26] Plaintiffs do not argue that these tasks are unfulfilled. Rather, they argue that, even though Plaintiffs specifically sought relief in the form of these four tasks, Dkt. 4676 at 1-2, and Judge Schenkier specifically identified these four tasks, Dkt. 4798 at 6-7; Dkt. 5004, these four tasks never represented the scope of the Special Master's duties. *See* PLR at 33. That is not how Rule 53 works. Rule 53 requires that the Order appointing a special master precisely specify the master's duties. Fed. R. Civ. P. 53(b)(2). The commentary to Rule 53 underscores that "Rule 53(b)(2) requires precise designation of the master's duties and authority." In her most recent Sixth Report for non-IDOT agencies, the Special Master spends a mere two paragraphs devoted to the only topic within the scope of her charge, the Exempt Employment Plan, in a section entitled "Update on Other Matters." Dkt. 6710 at 28. The Special Master's duties for non-IDOT agencies are complete.

With respect to the 2014 IDOT Order, there is more ambiguity in some of the tasks identified, but if properly understood as "very targeted functions," 10/22/14 Hr'g Tr. 17:7-11, relating to investigating misuse of the "staff assistant" position, the Special Master has

[26] The non-IDOT duties are complete:
(1) Review all positions under the jurisdiction of the Governor designated as "exempt." Complete. The State has an agreed-upon Exempt List. Dkt. 6180.
(2) Develop a single and comprehensive list of all "exempt" positions – an "Exempt List." Complete. The State has an agreed-upon Exempt List. Dkt. 6180.
(3) Develop procedures for revision of the Exempt List. Complete. These procedures are agreed to and explained in the State's Exempt Employment Plan. Dkt. 6158.
(4) Investigate whether certain positions designated as "exempt" qualify under applicable law. Complete. The State has an agreed-upon Exempt List. Dkt. 6180.

completed the tasks assigned. *See* Dkt. 4020.[27] In her periodic reports, the Special Master has identified specific "recommendations" for what the State should work to accomplish. The State has devoted significant resources and effort to accomplish those tasks as they were identified. In August 2019 and June 2020, for example, the Special Master recommended a total of 13 tasks for IDOT, including tasks as far afield as "[c]reate and present a plan to ensure a wider applicant pool for internship positions." Dkt. 6458 at 13; Dkt. 6900 at 22. Still, in good faith, over the course of the past twenty-one months, IDOT effectively completed in real time every "recommendation" presented by the Special Master.[28]

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[27] The IDOT duties are complete:

(1) "Investigate the scope and reason for any violation of the 1972 Decree regarding the Illinois Department of Transportation ("IDOT")." Complete. The Special Master completed her investigation in an 89-page report filed on April 24, 2017. Dkt. 4988; *see also* Dkt. 5069 at 1 ("[T]he Special Master and her staff completed the investigation into the Governor's Office's involvement in the misuse of the Staff Assistant position at IDOT ….").
(2) Recommend measures that may be necessary or appropriate to prevent any recurrence. Complete. The Special Master has recommended measures to prevent recurrence of the Staff Assistant problem and has not identified any way in which that problem, as described in her 4/24/17 report, can recur.
(3) Assess the implementation of those efforts to ensure that they are effective. Complete. The Special Master has assessed the implementation of the measures necessary to prevent the recurrence of the Staff Assistant problem, namely, the Exempt List and the Exempt Employment Plan.
(4) Address whether positions in IDOT labeled as exempt were properly exempt under applicable legal principles. Complete. The State has an agreed-upon Exempt List, which includes IDOT positions. Dkt. 6180.
(5) Make recommendations for how to remedy any violations of the 1972 Decree. Complete. Without identifying "violations" of the 1972 Decree, the Special Master's recommendations are no longer tied to remedying specific violations.

[28] *From August 2019*:

(1) Finalize technical list and file with the Court by September 15, 2019. Completed – filed at Dkt. 6633; *see* SMR at 10 (recommendation 10).
(2) Present all new 4d(3) titles to CSC for determination no later than the September 2019 CSC meeting. Completed; *see* SMR at 10 (recommendation 6).
(3) Present MRQs for all technical classes by September 15, 2019. Completed – SMR at 10 (recommendation 11).
(4) Finalize MRQs for each technical class by November 1, 2019. Completed – SMR at 10 (recommendation 11).
(5) Work with CMS to determine what provisions specific to technical hiring are necessary to be included in the Statewide CEP by December 1, 2019. Completed – SMR at 10 (recommendation 12).

Now, the Special Master has identified "recommendations" that pre-date this administration and that have not merited subsequent inclusion in her contemporaneous to-do lists. The Special Master also makes clear that "the process is far from complete" (SMR at 3) and that she "will continue to make recommendations on an ongoing basis and in future reports to the Court." Dkt. 6900 at 22. As explained above, the requirements of federal law and the narrow prohibitions of the decree cannot sustain the weight of more mandatory obligations couched as "recommendations." Like the decree itself, the Special Master's responsibilities "exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or … flow from such a violation." *Horne*, 557 U.S. at 447; *see also People Who Care*, 961 F.2d at 1338. The nine Rule 53 duties are complete. Plaintiffs and the Special Master acknowledge that her efforts are no longer focused on "current or past violations," but rather

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(6) Create and present a plan to ensure a wider applicant pool for internship positions by January 1, 2020. Completed – sent to Special Master on November 26, 2019.
(7) Convert currently designated *Rutan*-exempt positions not included on the Exempt List to *Rutan*-covered by January 1, 2020. Completed – SMR at 10 (recommendation 15).
(8) Create a detailed plan with target dates for conversion of titles that will no longer be technical to the Personnel Code by January 1, 2020. Completed – sent to Special Master on December 23, 2019.

From June 2020:
(1) Convert currently designated *Rutan*-exempt positions not included on the Exempt List to *Rutan*-covered by August 31, 2020. Completed – SMR at 10 (recommendation 15).
(2) Convert titles that will no longer be technical to the Personnel Code by October 31, 2020. Completed – conversion remains in process but the goal of conversion (CMS compliance oversight) has been achieved. IDOT and CMS memorialized this agreement on August 11, 2020.
(3) Adopt the Special Master's recommendations regarding temporary assignments. Completed (though the Special Master would contend that not *all* of her recommendations were adopted) – IDOT instituted a new form and procedure for job assignments and conducted training on September 8 and 10 on the new form and procedure. *See* Exhibit 7.
(4) Continue to improve its hiring processes to address the other issues addressed herein, particularly with respect to refining minimum qualifications and the uniform application of those qualifications. Completed – IDOT invited the Special Master to conduct a workshop on minimum qualifications with IDOT personnel, which occurred on September 18. *See* Exhibit 3.
(5) Work with the Special Master's office to create and implement additional training for IDOT personnel. Completed – IDOT invited the Special Master to conduct a workshop on minimum qualifications with IDOT personnel, which occurred on September 18. *See* Exhibit 3.

"*prospective* measures to prevent *future* violations." SMR at 1; PLR at 9. That is not "superintending compliance with the … decree," *Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003); it is recommending changes divorced from any federal interest. *See United States v. Bd. of Sch. Comm'rs of City of Indianapolis*, 128 F.3d 507, 512 (7th Cir. 1997) ("[G]reat knowledge is a temptation as well as a resource: a temptation to blur the separation of powers, to shift the balance between the federal courts and state and local government too far toward the courts, and to disregard procedural niceties, all in fulfillment of a confident sense of mission.").

VI. Conclusion

An institutional reform decree's "end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a … system that is operating in compliance with the Constitution.'" *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995). The Seventh Circuit has admonished Courts, parties, and Special Masters "to bend every effort to winding up" such litigation, and to guard against "looming interminability" and "indefinite continuation of the decree." *People Who Care*, 246 F.3d at 1074, 1077. In this case, the Seventh Circuit emphasized "the need to avoid, when possible, interference in the decision-making process of local governmental leaders by extending, unnecessarily, the life of a consent decree whose objectives have been achieved …." *Shakman IV*, 426 F.3d at 933 (citing cases).

After 48 years under the decree, this case has left behind any remaining federal interest and any case or controversy. After six years of work by the Special Master, she and the State have completed their assigned tasks. The State is operating in compliance with federal law, has instituted a durable remedy, and thus has achieved the objectives of the 1972 decree. Vacating the decree at this juncture is not only appropriate, it is required by the federalism concerns that must guide the Court's analysis.

October 19, 2020

Respectfully Submitted,

KWAME RAOUL
Illinois Attorney General

JB Pritzker, in his official capacity
as the Governor of the State of Illinois

By: /s/ *Brent D. Stratton*

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that, on October 19, 2020, he caused to be filed through the Court's CM/ECF system a copy of Governor's Reply in Support of His Motion to Vacate the May 5, 1972 Consent Decree and Cross-Motion to Vacate the Orders Appointing the Special Master. Parties of record may obtain a copy of this filing through the Court's CM/ECF system.

/s/ Brent D. Stratton

Brent D. Stratton