**No. 22-30320**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

RONALD CHISOM; MARIE BOOKMAN; URBAN LEAGUE OF LOUISIANA,
*Plaintiffs-Appellees,*

UNITED STATES OF AMERICA; BERNETTE J. JOHNSON,
*Intervenor Plaintiffs-Appellees,*

v.

STATE OF LOUISIANA, EX REL., JEFF LANDRY, ATTORNEY GENERAL,
*Defendants-Appellants*

On Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans,
Civil Action No. 2:86-cv-4075,
Honorable Donna Sue Morgan, U.S. District Judge

# BRIEF OF REMEDIES SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' EN BANC SUPPLEMENTAL BRIEF

**(Amici Curiae *&* *Counsel for* Amici Curiae *Listed on Inside Cover*)**

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## CERTIFICATE OF INTERESTED PERSONS

**Case Number and Style**: No. 22-30320, *Chisom v. Louisiana ex rel. Landry*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Defendant-Appellant**: The State of Louisiana, ex rel. Jeff Landry, in his official capacity as Attorney General of Louisiana.

2. **Counsel for Defendant-Appellant**: Elizabeth Murrill of the Office of the Attorney General – Baton Rouge; Angelique Duhon Freel, Carey T. Jones, Lauryn Sudduth, and Jeffrey Michael Wale of the Department of Justice – Baton Rouge; and Shae McPhee of the Department of Justice – New Orleans.

3. **Plaintiffs-Appellees**: Ronald Chisom, Marie Bookman, and the Urban League of Louisiana. None of the Plaintiffs-Appellees are a publicly held corporation; no Plaintiff-Appellee has any parent corporation; and no publicly held corporation owns 10 percent or more of any Plaintiff-Appellee's stock.

4. **Counsel for Plaintiffs-Appellees**: Leah C. Aden and Alaizah Koorji of the NAACP Legal Defense and Education Fund, Inc.; Ronald L. Wilson; William P. Quigley of Loyola University School of Law; Michael de Leeuw, Amanda Giglio, Andrew D. Linz, and Joan Taylor of Cozen O'Connor.

5. **Intervenor Plaintiff-Appellee #1**: Justice Bernette J. Johnson.

6. **Counsel for Intervenor Plaintiff-Appellee #1**: Nora Ahmed and Megan Snider of the ACLU Foundation of Louisiana; Kelley E. Brilleaux and Connor W. Peth of Irwin Fritchie Urquhart & Moore L.L.C.; Jon Marshall Greenbaum of the Lawyers' Committee for Civil Rights Under Law; and James M. Williams of Chehardy, Sherman, Williams, Hayes.

7. **Intervenor Plaintiff-Appellee #2**: The United States of America.

**8. Counsel for Intervenor Plaintiff-Appellee #2**: Yael Bortnick and Erin Helene Flynn of the U.S. Department of Justice, Civil Rights Division, Appellate Division; Emily Brailey of the U.S. Department of Justice, Civil Rights Division, Criminal Section; and Peter M. Mansfield of the U.S. Attorney's Office for the Eastern District of Louisiana.

**9. *Amicus Curiae***: Professor Richard L. Hasen, Professor Douglas Laycock, Professor Doug Rendleman, and Professor Caprice L. Roberts.

**10. Counsel for *Amicus Curiae***: Stuart M. Sarnoff, David N. Kelley, Kevin A. Kraft, and Daniel Meteer of O'Melveny & Myers.

*/s/ Kevin A. Kraft*
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## INTEREST OF *AMICI CURIAE*[1]

Richard L. Hasen is a Professor of Law and Political Science at UCLA School of Law, and an expert in remedies and in election law. Professor Hasen is co-author (with Professor Douglas Laycock) of *Modern American Remedies* (5th ed. 2019) and author of *Examples & Explanations for Remedies* (4th ed. 2023). He was elected to The American Law Institute in 2009 and serves as co-reporter, with Professor Laycock, on the Institute's law reform project, *Restatement (Third) of Torts: Remedies*. Professor Hasen is also an internationally recognized expert in election law. He directs the Safeguarding Democracy Project that aims to preserve free and fair elections in the United States and is the author of many articles and books on elections and election law including, most recently, *A Real Right to Vote* (Princeton University Press 2024).

Professor Douglas Laycock has studied and written about the law of remedies for nearly 50 years. He is the Robert E. Scott Distinguished Professor of Law Emeritus at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas. Professor Laycock was the sole author

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici Curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E), (b)(4); 5th Cir. R. 29.2. Professor Hasen, Professor Laycock, Professor Rendleman, and Professor Roberts appear in their individual capacity; institutional affiliations are listed for identification purposes only.

of the first four editions of *Modern American Remedies* (1985–2012) and the co-author with Professor Hasen of the fifth edition (2019). He is an emeritus member of the Council of the American Law Institute and former First Vice President of the Institute; he resigned from the Council and the vice presidency to become the co-reporter, with Professor Hasen, of the Institute's *Restatement (Third) of Torts: Remedies*.

Professor Doug Rendleman, a foremost remedies scholar, is the Robert E.R. Huntley Professor of Law, Emeritus, at Washington & Lee University. He is co-author of the casebook Doug Rendleman & Caprice L. Roberts, *Remedies: Cases and Materials* (West 9th ed. 2018). He also co-authored with Owen Fiss the casebook *Injunctions* (Foundation 1984), which is the authoritative work on the law of injunctions. Professor Rendleman's casebook, Doug Rendleman, *Complex Litigation: Injunctions, Structural Remedies, and Contempt* (Foundation 2010), is authoritative on structural injunctions. Professor Rendleman has published nineteen articles on injunctions and contempt. He also serves as Adviser to the American Law Institute's *Restatement (Third) of Torts: Remedies*. In 2021, Professor Rendleman received the Lifetime Scholarly Achievement Award from the AALS Remedies Section.

Professor Caprice L. Roberts is a leading remedies scholar and Associate Dean of Faculty Development & Research and the J.Y. Sanders Professor of Law at

Louisiana State University Paul M. Hebert Law Center, where she teaches constitutional law, federal courts, and remedies. She revitalized a leading treatise on the law of remedies, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* (West 3d ed. 2018), and has published numerous articles on equitable remedies. Professors Roberts serves as Adviser to the American Law Institute project *Restatement (Third) of Torts: Remedies*. She also co-authored the casebook Doug Rendleman & Caprice L. Roberts, *Remedies: Cases and Materials* (9th ed. 2018), as well as *Federal Courts: Context, Cases, and Problems* (Aspen 3d ed. 2020 & 4th ed. forthcoming 2024).

These remedies scholars submit this brief as interested parties in the proper and just application of remedies law to explain that relief from federal institutional reform consent decrees under Rule 60(b)(5) requires that the party seeking relief produce sufficient evidence to establish future compliance with the purpose of the decree.

Counsel for Plaintiffs-Appellees consented to the filing of this brief. Counsel for Defendants-Appellants did not object to its filing.

## INTRODUCTION

The district court did not abuse its discretion in refusing to terminate—but offering to consider modification of—the Consent Decree requiring the State of Louisiana (the "State") to continue to comply with Section 2 of the Voting Rights Act ("Section 2") in an Orleans Parish-based district elections for the Louisiana Supreme Court. By its plain language, the Consent Decree is intended to apply prospectively to "ensure" the State's continued compliance with Section 2 in the Orleans Parish-based district, ROA.98–99, until the State has made a sufficient evidentiary showing that relief from the terms of the Decree is warranted under Rule 60(b)(5).

As the State has failed to offer *any evidence* of future compliance with Section 2, and given recent judicial findings that it continues to violate Section 2 as to other elections, it has not met its burden, rendering its present motion to terminate the Consent Decree inadequate as a matter of law.

The Supreme Court has required that courts take federalism concerns seriously when a state asks to modify or terminate a consent decree imposed by a federal court. But invoking the term "federalism" does not allow the state to evade having to make its required evidentiary showing. In this case, the district court properly indicated it would consider modifying the Consent Decree in a flexible way in light of federalism principles if and when the State comes forward with actual

evidence justifying modification. That day, however, has not yet arrived.

## ARGUMENT

### I. Properly Interpreted, the Consent Decree "[E]nsures" That the State Will Prospectively Comply With Its Obligations Under Section 2 for Black Voters in Orleans Parish in Louisiana Supreme Court Elections.

#### A. The Plain Language of the Consent Decree Requires Prospective Compliance With Section 2 for Black Voters in Orleans Parish.

The State is obligated under the plain text of the Consent Decree to make certain that future Louisiana Supreme Court judicial elections for Black voters in Orleans Parish are non-dilutive, as required by Section 2. As this Court has recognized, "[c]onsent decrees are hybrid creatures, part contract and part judicial decree" that must be interpreted "according to general principles of contract law." *Allen v. Louisiana*, 14 F.4th 366, 371 (5th Cir. 2021) (citations omitted). "When a contract is expressed in unambiguous language, its terms will be given their plain meaning, and enforced as written." *Chisom v. Jindal*, 890 F. Supp. 2d 696, 712 (E.D. La. 2012) (citing *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 350 (5th Cir. 1998)).

Here, one of the obligations imposed on the State by the Consent Decree is to "ensure" that it complies with Section 2 in "the system for electing the Louisiana Supreme Court." ROA.99. Even if the State addressed all other provisions of the Consent Decree, the forward-looking, continued obligation of future compliance under Section B still would not be discharged absent a proper showing by the State

under Rule 60. *See Baton Rouge Oil & Chem. Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002) (requiring the Court to "honor the presumption that parties to a contract intend every clause to have some effect"); *Jindal*, 890 F. Supp. 2d at 712 (same).

Section C of the Consent Decree also lays out specific remedial measures that, by their plain language, must be implemented prospectively. ROA.99–102. In particular, the Consent Decree requires that "[t]here *shall be* a Supreme Court district comprised solely of Orleans Parish, *for the purpose of electing* a Supreme Court justice from that district." ROA.99 (emphasis added). This mandates that an Orleans Parish district not only be created, but also *prospectively exist* to ensure that future elections are held in that district, at least until Section 2 compliance is demonstrated. ROA.99. Notably, another provision explicitly provides that "future supreme Court elections after the effective date shall take place in the newly reapportioned districts." ROA.99–102.

This interpretation is confirmed by the Consent Decree's repeated purpose of ensuring prospective compliance with Section 2 in the Orleans Parish-based district. ROA.98–99. It is also consistent with this Court's prior reading of Section C in *Allen*, a case involving allegations of similar violations of Section 2 in another Louisiana Supreme Court district. 14 F.4th at 372. There, this Court read Section C to provide for the "creation of the Supreme Court district in Orleans Parish *and*

*the operation of its new justice*" as part of "converting the one at-large district into the present-day majority-black district." *Id*. (emphasis added). This Court implicitly acknowledged that, beyond the mere point-in-time creation of an Orleans Parish district, the Consent Decree requires that the district's integrity—i.e., the non-dilution of Black voting power—be protected in elections going forward. *Id*.; *see* ROA.99, ROA.102.

In a subsequent section, the Consent Decree provides for the district court's continued jurisdiction "until the complete implementation of the final remedy has been accomplished." ROA.104. The term "final remedy" captures the holistic completion of all relief contemplated by the Consent Decree. ROA.104. With its plain terms committing the State to continued conduct, the Consent Decree's "final remedy" is properly interpreted to include future compliance with Section 2 in the Orleans Parish-based district, thus requiring the Consent Decree to operate prospectively until modified by the district court upon an adequate evidentiary showing by the State. ROA.99, ROA.104; *Ruiz v. Lynaugh*, 811 F.2d 856, 860 (5th Cir. 1987); *Jindal*, 890 F. Supp. 2d at 710 ("So long as the final remedy under a consent decree has not been achieved, the court entering the decree retains subject matter jurisdiction to interpret and enforce the decree's terms.").

This reading of the Consent Decree is also consistent with Louisiana contract law. *See Allen*, 14 F.4th at 371 (interpreting the Consent Decree by "consult[ing]

the contract law of the relevant state, here Louisiana"). "Under Louisiana law, courts seek the parties' common intent starting with the contract's words, which control if they are clear and lead to no absurdities." *Id*. (citing La. Civ. Code arts. 2045, 2046). Then, the Consent Decree must "be construed as a whole" and "each provision in the contract must be interpreted in light of the other provisions." *Id.* (quoting *Baldwin v. Bd. of Sup'rs for Univ. of La. Sys.*, 2014-0827, p. 7 (La. 10/15/14), 156 So. 3d 33, 38 (citing La. Civ. Code art. 2050)).

The common intent of the parties is clear: the "consent judgment will ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act." ROA.98–99. Guided by this intent, the Consent Decree's requirements therefore are properly interpreted to require future compliance with Section 2 in the Orleans Parish-based district. ROA.98–104; *see Allen*, 14 F.4th at 372.

### B. Prospective Application of Consent Decrees Is Essential to Achieving Their Purpose of Addressing Violations of Federal Law.

Contrary to the Consent Decree's plain language and the parties' clear contractual intent, the State contends that the Consent Decree's "final remedy" should not be read to include future compliance with Section 2 in the Orleans Parish-based district; the State argues that the Consent Decree only requires compliance with specific tasks listed in Part C. En Banc Suppl. Br. for the State at 18, ECF No. 182. But this interpretation disregards the nature of institutional reform injunctions

like the Consent Decree, and the corresponding necessity to ensure that the prospective, final remedy is implemented.

Unlike other remedial measures, institutional reform injunctions are not "one and done." They must be applied prospectively to implement institutional reforms for as long as necessary to address ongoing violations of federal law and safeguard against future violations. *Horne v. Flores*, 557 U.S. 433, 450 (2009) (seeking implementation of a "durable remedy" to address violation of federal law); *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (requiring that the school district demonstrate "its good-faith commitment" to upholding "the whole of the court's decree" and avoiding future violations of federal law); *Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cnty., Okl. v. Dowell*, 498 U.S. 237, 248–50 (1991) (requiring prospective compliance of school desegregation decrees for a "reasonable period of time" sufficient to eliminate the "vestiges of past discrimination…to the extent practicable" and establish that "it was unlikely that the school board would return to its former ways."); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983) (imposing a "continuing duty" to address school segregation beyond the mere implementation of a constitutionally acceptable plan).

Broadly applied, the State's reading of the Consent Decree would undermine the utility of such institutional reforms in upholding compliance with federal law. For instance, in *Rufo v. Inmates of Suffolk Cnty. Jail* ("*Rufo I*"), the Supreme Court

considered a request to modify a consent decree requiring construction of a new jail with improved conditions. 502 U.S. 367, 367, 374–75 (1992). The Court presumed the decree to inherently provided for the prospective operation of the jail; indeed, any interpretation that limited the relief to only the initial creation of the jail would allow the recurrence of the same constitutionally deficient conditions that led to the decree in the first place. *See id*. at 374–75. Here, the State's position that a non-dilutive Orleans Parish district need not be prospectively maintained would undermine the institutional reform the Consent Decree was meant to achieve, and risk return to the very same harms—Section 2 vote dilution in Orleans Parish—that the Decree was intended to redress. ROA.98–99.

The panel dissent incorrectly characterizes the State's compliance with Section 2 as a "purpose" fundamentally separate from any potential "remedy" under the Consent Decree. *Chisom v. Louisiana ex rel. Landry* ("*Chisom II*"), 85 F.4th 288, 311 (5th Cir. 2023) (Engelhardt, J., dissenting), *reh'g granted and opinion vacated*, No. 22-30320, 2024 WL 323496 (5th Cir. Jan. 29, 2024). Respectfully, the dissent incorrectly reads the Consent Decree's obligation to ensure Section 2 compliance in Orleans Parish as merely hortatory and not a State requirement.

A comparison to a jail reform consent decree as in *Rufo* is instructive. Imagine a decree that requires a county to take some specific steps to remediate unconstitutional conditions for inmates in a jail (for example, taking certain actions

to immediately alleviate overcrowding) as well as a more general requirement to end the unconstitutional treatment of inmates in violation of the Eighth Amendment. A district court that retains jurisdiction under such a decree may order future relief toward meeting the general requirement to remove the unconstitutional conditions, and the county's obligations do not end once it initially has taken the specific steps required by the decree.

Indeed, the *Dowell* Court in the school desegregation context held that relief from a consent decree could only be granted if the purposes of the litigation underlying the decree "had been fully achieved." 498 U.S. at 247; *see also Freeman*, 503 U.S. at 491 (requiring that the school district demonstrate "its good-faith commitment" to upholding "the whole of the court's decree"). This Court too requires that proposed modifications to or terminations of consent decrees be consistent with the decree's intended purpose of remedying underlying violations of federal law. *Frazar v. Ladd*, 457 F.3d 432, 440 (5th Cir. 2006) (reading *Freeman* to require proof of "full and satisfactory compliance with the decree"); *Police Ass'n of New Orleans ex rel. Cannatella v. City of New Orleans*, 100 F.3d 1159, 1168 (5th Cir. 1996); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1367 (5th Cir. 1995).[2] The

[2] Other circuits do the same. *See*, *e.g.*, *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir. 2011); *United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993); *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir. 1991).

Supreme Court did not undermine this requirement in *Horne v. Flores*. Rather, it said that if defendants in that case demonstrated that they were entitled to relief from the injunction at issue, "it will be because they have shown that the Nogales School District is doing exactly what this statute requires." *Horne*, 557 U.S. at 472. Here, Louisiana has not come close to demonstrating that it "is doing exactly what" Section 2 requires in Orleans Parish. *Id*.

The concern articulated by the State and the panel dissent—that the Consent Decree's forward-looking relief would create "eternal power"—is misguided. En Banc Suppl. Br. for the State at 18, ECF No. 182; *see Chisom II*, 85 F.4th at 313 (Engelhardt, J., dissenting). Requiring future compliance does not displace the well-settled principle that consent decrees "are not intended to operate in perpetuity." *Guajardo v. Texas Dep't of Crim. Just.*, 363 F.3d 392 (5th Cir. 2004) (quoting *Dowell*, 498 U.S. at 248). Indeed, neither the district nor Plaintiffs-Appellees have argued to the contrary. *See Chisom I*, 342 F.R.D. at 6 (recognizing that Rule 60(b) provides a potential avenue for relief from consent decrees); En Banc Suppl. Br. for Plaintiffs-Appellees at 18, ECF No. 205 (same).

As discussed in detail below, district courts retain authority to modify or terminate the Consent Decree under Rule 60(b)(5). *See*, *e.g.*, *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 436 (5th Cir. 2011); *United States v. Lawrence Cnty. Sch. Dist.*, 799 F.2d 1031, 1046 (5th Cir. 1986) ("The

federal courts have always affirmed their equitable power to modify any final decree that has prospective application."). Upon a sufficient evidentiary showing by the State, the specific relief provided in the Consent Decree can be modified or terminated in favor of an alternate approach upholding its "basic purpose" of ensuring compliance with Section 2 in future Louisiana Supreme Court elections. *Alberti*, 46 F.3d at 1367; *see Freeman*, 503 U.S. at 491; *Dowell*, 498 U.S. at 247; *Cannatella*, 100 F.3d at 1168. In short, the Consent Decree does not hold "eternal power"—modification and termination are available remedies—but the State must first satisfy the proper evidentiary burden to acquire them. *See Horne*, 557 U.S. at 450.

## II. Termination of the Consent Decree Would Be Inappropriate Because the State Has Not Met Its Burden of Establishing Future Compliance with Section 2 In Orleans Parish.

The district court correctly concluded that termination of the Consent Decree was inappropriate because the State presented absolutely no evidence of a plan to prospectively comply with its obligations under Section 2, and there remains a real risk that the State would violate Section 2 in Orleans Parish without the Decree.

### A. Relief From a Consent Decree Under Rule 60(b)(5) Requires That the Moving Party Present Evidence of a "Durable Remedy" For Future Compliance with the Purpose of the Decree.

"Consent decrees are subject to Federal Rule of Civil Procedure 60(b)." *City of Boerne*, 659 F.3d at 437 (citing *Rufo I*, 502 U.S. at 378). Rule 60(b)(5) permits a

party to seek modification or termination of a consent decree if, among other things, "the judgment has been satisfied, released, or discharged" or "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5); *see Horne*, 557 U.S. at 447. "The burden is on the moving party to prove that modification is warranted, regardless of whether the party seeks to lessen its own responsibilities under the decree, impose a new and more effective remedy, or vacate the order entirely." *City of Boerne*, 659 F.3d at 438 (citing *Rufo I*, 502 U.S. at 384); *see Horne*, 557 U.S. at 447 ("The party seeking relief bears the burden of establishing that changed circumstances warrant relief…").

The Supreme Court has long acknowledged that "Rule 60(b)(5) serves a particularly important function in what we have termed 'institutional reform litigation.'" *Horne*, 557 U.S. at 447 (quoting *Rufo I*, 502 U.S. at 380). First, as institutional reform injunctions typically implement prospective policies, courts must be able to accommodate changed circumstances over a substantial period of time. *Id*.; *see*, *e.g.*, *Cannatella*, 100 F.3d at 1168 ("It is settled that, to the extent a decree is drafted to deal with events in the future, the court must remain continually willing to modify the order to ensure that it accomplishes its intended result." (citing *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968))).

"Second, institutional reform injunctions often raise sensitive federalism concerns" by displacing local authority to remedy violations of federal law in "areas

of core state responsibility." *Horne*, 557 U.S. at 447. The Supreme Court requires that courts take such federalism concerns seriously because 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*, 557 U.S. at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)); *see Rufo I*, 502 U.S. at 392; *Dowell*, 498 U.S. at 248.

Given these concerns, "[d]istrict courts must take a flexible approach to motions to modify consent decrees and to motions to modify or vacate institutional reform decrees." *City of Boerne*, 659 F.3d at 437 (citing *Rufo I*, 502 U.S. at 379–81); *see Horne*, 557 U.S. at 450; *Frew*, 540 U.S. at 442. A "critical question" that the moving party must answer under this approach is whether the underlying violation of federal law has been remedied and the initial order's objective of ensuring future compliance has been achieved. *Horne*, 557 U.S. at 450 (citing *Frew*, 540 U.S. at 442); *see Dowell*, 498 U.S. at 247; *United Shoe Mach. Corp.*, 391 U.S. at 248; *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). In the Fifth Circuit, the State must establish a "durable remedy" to terminate a consent decree. *Horne*, 557 U.S. at 450; *Anderson v. City of New Orleans*, 38 F.4th 472, 479 (5th Cir. 2022). "A durable remedy is one that 'gives the [c]ourt confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends.'" *Frew v. Janek*, 2015 WL 13357954, at *3 (E.D. Tex. Jan. 20, 2015) (quoting

*Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010)), *aff'd in part*, *vacated in part*, *and remanded on other grounds*, 820 F.3d 715 (5th Cir. 2016); *see* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 Vand. L. Rev. 167, 208 (2017) (finding that the *Horne* Court's "reference to a remedy that is 'durable' suggests that lower courts should not terminate institutional reform injunctions the moment the defendant has managed to cease its unlawful behavior.").[3]

### B. The State Has Not Proffered Any Evidence of Future Compliance with Section 2 In Orleans Parish to Support Terminating the Consent Decree.

The district court correctly concluded that the State has not met its burden of showing that termination of the Consent Decree is warranted under Rule 60(b)(5). *Chisom v. Edwards* ("*Chisom I*"), 342 F.R.D. 1, 15 (E.D. La. 2022), *aff'd sub nom. Chisom II*, 85 F.4th *reh'g granted and opinion vacated*, No. 22-30320, 2024 WL 323496 (5th Cir. Jan. 29, 2024). At the very least, the district court did not abuse its

[3] The Supreme Court in *Dowell* additionally required a court to conclude "that it was unlikely that the school board would return to its former ways" before finding that the purpose of the consent decree was "fully achieved" and relief could be granted. 498 U.S. at 247. Shortly thereafter, the First Circuit on remand in *Rufo* found that *Dowell* required a "district court, before terminating the decree entirely, to be satisfied that there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted." *Inmates of Suffolk Cnty. Jail v. Rufo* ("*Rufo II*"), 12 F.3d 286, 292 (1st Cir. 1993) (citing *Dowell*, 498 U.S. at 247).

discretion in rejecting termination of the Consent Decree. *See Anderson*, 38 F.4th at 479; *Moore v. Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 405 (5th Cir. 2017) ("A district court does not abuse its discretion by making a decision after the parties present little or no evidence of a particular fact."); *Jindal*, 890 F. Supp. 2d at 711 ("Exactly how a court should enforce and protect its orders is an issue largely left to the discretion of the court entering the order, so long as that discretion is exercised reasonably.").

Even under the flexible standard governing Rule 60(b)(5), termination of a consent decree is unwarranted where, like here, the moving party fails to produce any evidence assuring the Court of its future compliance with the federal law underlying the consent decree. *Dowell*, 498 U.S. at 247; *Rufo II*, 12 F.3d at 292. Without any such evidence, termination is impermissible under Rule 60(b)(5) as a matter of remedies law. *Dowell*, 498 U.S. at 247; *Rufo II*, 12 F.3d at 292. Here, the State "has not shown there is little or no likelihood the original violation will not be repeated when the Consent Judgment is lifted, in other words the Attorney General has not shown there will continue to be a Black opportunity district in Orleans Parish in the future." *Chisom I*, 342 F.R.D. at 12; *see Chisom II*, 85 F.4th at 302–03 ("the State provided no evidence, plans, or assurances of compliance with Section 2 of the VRA in the event that the Consent Judgment is terminated."). Indeed, at oral argument before the district court, the State disavowed any intent to maintain any

one parish as its own district or any particular district in New Orleans that would allow Black voters to elect a candidate of choice to the State Supreme Court. *Chisom I*, 342 F.R.D. at 12 ("If you dissolve an injunction, that injunction is no longer binding on whoever the defendants may have been....I don't think if the legislature is going to truly reapportion the districts that they can be bound or committed to making any one parish any particular kind of district." (quoting R. Doc. 315 at 10–11)).

The panel dissent incorrectly faults Plaintiffs-Appellees for not supplying evidence of likely future bad faith by the State in adhering to Section 2. *Chisom II*, 85 F.4th at 314 (Engelhardt, J., dissenting). But not only does this disregard the State's disclaimer of any intent to maintain the Orleans Parish district, *Chisom I*, 342 F.R.D. at 12, it also inappropriately seeks to shift the burden to Plaintiffs-Appellees, when it is clearly the State's burden to establish "that it was unlikely that the [State] would return to its former ways," *Dowell*, 498 U.S. at 247; *see Horne*, 557 U.S. at 450; *Rufo I*, 502 U.S. at 384; *Anderson*, 38 F.4th at 479; *City of Boerne*, 659 F.3d at 438.

Beyond the State's failure to meet its evidentiary burden, there is nothing to assuage Plaintiffs-Appellees' concern about the State's unwillingness to

prospectively comply with Section 2 should the Consent Decree be terminated.[4] "Whether authorities are likely to return to former ways once the decree is dissolved may be assessed by considering '[t]he defendants' past record of compliance and their present attitudes toward the reforms mandated by the decree.'" *Rufo II*, 12 F.3d at 292 (quoting Lloyd C. Anderson, *Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation*, 42 U. Miami L. Rev. 401, 411 (1987)).

Notwithstanding the State's past compliance with the short-term remedial measures required by the Consent Decree, emphasized by the panel dissent, termination requires an evidentiary showing that the decree is no longer necessary to enforce federal law. *Rufo II*, 12 F.3d at 292–93; *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071 (5th Cir. 1973). Historical compliance is but one factor in assessing the likelihood of future compliance. *Chisom II*, 85 F.4th at 313–14; *see Freeman*, 503 U.S. at 491; *Dowell*, 498 U.S. at 247; *Peery v. City of Miami*, 977 F.3d 1061, 1076 (11th Cir. 2020); *Rufo II*, 12 F.3d at 292–93. Despite "literally comply[ing] with the conditions set out in the injunction," the State, like the moving party in *Sullivan*, "failed to show that continuation of the [] injunction [was]

[4] Even if the Court were to apply a presumption of good faith in the State's drawing of electoral districts, *see Abbott v. Perez*, 585 U.S. 579, 581 (2018), the state's failure to even *offer* evidence indicating it will no longer violate federal law overcomes that presumption.

unnecessary to insure that the [District's] rules w[ould] not be unconstitutionally applied to students in the future." *Sullivan*, 475 F.2d at 1078; *cf*. *Peery*, 977 F.3d at 1076.

Moreover, the State's overall record of past compliance with most of the Consent Decree's short-term remedial measures does not inspire confidence in its likelihood of future compliance. Just two months ago, the State was found to have violated Section 2 in drawing electoral maps for the Louisiana State House and Senate. *Nairne v. Ardoin*, 2024 WL 492688, at *1 (M.D. La. 2024). Last November, this Court found that Louisiana's congressional map enacted following the 2020 census was discriminatory and likely violated Section 2. *Robinson v. Ardoin*, 86 F.4th 574, 583 (5th Cir. 2023). The State also faces ongoing litigation, initially filed in 2019, alleging a similar violation of Section 2 for diluting African American votes in Louisiana Supreme Court judicial elections in a different part of the state. *See La. State Conf. of the NAACP v. Louisiana*, 490 F. Supp. 3d 982, 990 (M.D. La. 2020), *aff'd sub nom. Allen*, 14 F.4th 366.

The State's present attitude toward compliance with Section 2 in Orleans Parish fares no better. As noted, the State openly disclaimed to the district court any intent to maintain the Orleans Parish district to comply with Section 2. *Chisom I*, 342 F.R.D. at 12. The State also recently unsuccessfully argued in another case that Section 2 does not apply to judicial election districts at all, despite the Supreme

Court's clear holding to the contrary. *Id*. (citing *La. State Conf. of the NAACP*, 490 F. Supp. 3d at 1019–22 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991))).

The State's requested "[d]issolution based on mere compliance with the minimum requirements of federal law is, additionally, inequitable, because it would permit perpetual re-litigation of the merits of Plaintiffs' claims." *Frazar*, 457 F.3d at 438 (quoting *Frew v. Hawkins*, 401 F. Supp. 2d 619, 636 (E.D. Tex. 2005), *aff'd sub nom. Frazar*, 457 F.3d). Indeed, the State's suggestion that Plaintiffs-Appellees could always just initiate new litigation to redress subsequent violations of Section 2 should they occur would render the Consent Decree meaningless. En Banc Suppl. Br. for the State at 18, ECF No. 182. "In choosing to voluntarily enter into the Consent Decree, Defendants waived the opportunity to litigate the merits of the claims in Plaintiffs' [Complaint] in exchange for negotiating the terms of the Consent Decree and avoiding the time, expense, and inevitable risk of litigation." *Frazar*, 457 F.3d at 438 (quoting *Frew*, 401 F. Supp. 2d at 636); *see* ROA.98 (explaining in the introduction to the Consent Decree that the State "only enter[ed] into this compromise agreement to resolve extensive and costly litigation" and avoid "the necessity of further litigation").

## III. The State Can Address Its Concerns With the Consent Decree by Presenting Grounds for Modification or Termination to the District Court.

While the State's current request for termination of the Consent Decree is inadequate, its denial does not leave the State without recourse to seek relief from what it terms the inequitable enforcement of the Consent Decree. An alternative—and more appropriate—way for the State to address its concerns would be to come forward with a compelling evidentiary case that modification or termination of the Consent Decree is warranted.

Among other things, the State must show that a "durable remedy" of future compliance with Section 2 in Orleans Parish can be accomplished through means other than the Consent Decree as it is currently formulated. *Horne*, 557 U.S. at 450; *Anderson*, 38 F.4th at 479. "The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make the necessary changes;" otherwise, "the decree should be enforced according to its terms." *Frew*, 540 U.S. at 442. District courts are amenable to modifying consent decrees using a "flexible approach" to ensure the just, yet restrained, application of federal authority given the federalism concerns inherent in such reforms. *Horne*, 557 U.S. at 450; *Rufo I*, 502 U.S. at 381; *City of Boerne*, 659 F.3d at 437; *see Frew*, 540 U.S. at 442. Case in point: the district court below dutifully "indicated an openness to amending the

Consent Judgment to include a new redistricting plan that addresses compliance and assuages the State's concerns." *Chisom II*, 85 F.4th at 302–03.

In considering a request for modification of a consent decree under Rule 60(b)(5), the "district court must [] examine the evidence on the record and consider whether the moving party met its burden." *City of Boerne*, 659 F.3d at 440 (remanding "to develop a sufficient record in order to decide whether…modification of the consent decree is appropriate."). After the Supreme Court in *Dowell* required evidence of likely future compliance before terminating a consent decree, 498 U.S. at 247, the Tenth Circuit on remand elaborated that "[m]ere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the [defendant's] good faith." *Dowell by Dowell v. Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Dist. No. 89, Oklahoma City, Okl.*, 8 F.3d 1501, 1512–13 (10th Cir. 1993) (quotation omitted). The district court would properly consider, among other things, redistricting proposals, testimony, and other evidence indicating whether the State is likely to comply with Section 2 in Louisiana Supreme Court judicial elections going forward. *Horne*, 557 U.S. at 447 (citing *Rufo I*, 502 U.S. at 383); *Dowell*, 498 U.S. at 247; *Rufo II*, 12 F.3d at 292. For example, as the district court here suggested, evidence of future compliance that may support modification could include "a roadmap that demonstrates continued compliance or

a redistricting plan." *Chisom II*, 85 F.4th at 302–03; *see*, *e.g.*, *NAACP v. City of Thomasville*, 401 F. Supp. 2d 489, 493 (M.D.N.C. 2005) (terminating a consent decree after the state presented a new election plan).[5]

Despite the district court's "indicated [] openness to amending the Consent Judgment," the State did not produce any evidence to meet its burden that modification is warranted. *Chisom II*, 85 F.4th at 302; *see Chisom I*, 342 F.R.D. at 15–17. Offering no evidence of future intentions to uphold the requirements of the Consent Decree is insufficient as a matter of law to terminate the Consent Decree. *See Horne*, 557 U.S. at 447 (citing *Rufo I*, 502 U.S. at 383); *Frew*, 540 U.S. at 432; *Dowell*, 498 U.S. at 247; *Rufo II*, 12 F.3d at 292.

Given the serious federalism concerns inherent in granting a consent decree, the State can always seek relief from future enforcement of the Consent Decree by presenting an evidentiary case that includes reasonable assurances of future compliance with Section 2. *See Horne*, 557 U.S. at 447 (citing *Rufo I*, 502 U.S. at 383); *Frew*, 540 U.S. at 432; *Dowell*, 498 U.S. at 247; *Rufo II*, 12 F.3d at 292.

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[5] As another example, the Eleventh Circuit in *Peery* affirmed termination of a consent decree concerning the treatment of homeless people because the City demonstrated that it had, prospectively, "a strong system in place to address homelessness," including "formal police policies" and established a "Homeless Trust, which receive[d] $60 million in tax revenue each year." 977 F.3d at 1076.

## CONCLUSION

For all the above reasons, and in Plaintiffs-Appellees' appellate briefs, the Court should affirm the district court's order denying Defendants' motion to terminate the Consent Decree.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of April, 2024, a true and correct copy of the foregoing was filed electronically using the CM/ECF system, which served counsel for the parties.

*/s/ Kevin A. Kraft*
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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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