No. 22-30320

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RONALD CHISOM; MARIE BOOKMAN, ALSO KNOWN AS GOVERNOR; 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,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SUPPLEMENTAL EN BANC BRIEF OF THE UNITED STATES AS INTERVENOR-APPELLEE

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
YAEL BORTNICK
ANNA M. BALDWIN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATE CONSTITUTION AND STATUTES:

RULES:

MISCELLANEOUS: **PAGE**

INTRODUCTION

Following the 2020 federal decennial census, and with the intent to reapportion its judicial districts, the State of Louisiana moved to dissolve a Consent Judgment governing elections to the Louisiana Supreme Court. The State did so for the express purpose of revising the remedial district anchored in Orleans Parish that the State agreed to maintain when it stipulated to the Judgment. Following a hearing, the district court denied the State's motion because the State failed to meet its burden under Federal Rule of Civil Procedure 60(b)(5) to establish either that the Consent Judgment had been satisfied or that its continued application would be inequitable. The district court's holding was not an abuse of discretion.

To be entitled to relief from the Consent Judgment, the State must show either that it has achieved the Judgment's objective and implemented a durable remedy or that a modification is essential to achieving the Judgment's goals. In the State's own words, the goal of the Consent Judgment was to "ensure that Louisiana's citizens were selecting their Supreme Court Justices in a way that avoided diluting the voting power of minority communities." ROA.1446.[1] The

[1] "ROA.__" refers to the page numbers of the Record on Appeal. "Br. __" refers to page numbers in the State's opening brief. "Pet. __" refers to page numbers in the State's petition for rehearing en banc. "Supp. Br. __" refers to page numbers in the State's en banc supplemental brief.

only evidence the State offered to show it has accomplished that objective is that Black justices were elected in the district created as a result of this lawsuit. But at most this evidence demonstrates the effectiveness of the Consent Judgment, not that the State has implemented a durable remedy.

The State also objects to how long the Consent Judgment has been in effect. But the State waited three decades to move for relief, and then put forward only a threadbare motion. The State did not present the district court with either a proposed redistricting plan or other concrete evidence indicating that the State would satisfy its obligation under the Consent Judgment to guard against vote dilution in Orleans Parish. Not only did the State fail to present any evidence at the hearing on its motion, the State flatly refused to commit to maintaining a district that provides Black voters an opportunity to elect candidates of choice in Orleans Parish or to confirm whether one would be required under Section 2 of the Voting Rights Act should the court dissolve the Judgment.

In evaluating whether the district court abused its discretion, the unique context of this case matters. Louisiana supreme court justices serve ten-year terms. Thus, although the Consent Judgment has been in place for thirty years, there have been only three elections—all uncontested—in the Judgment's remedial district. Additionally, neither federal nor state law requires redistricting of judicial districts following the decennial census to correct for malapportionment. Here, the terms of

the Consent Judgment expressly allow for redistricting, yet the State has never chosen in the intervening decades to redraw its supreme court districts. The State's decision thus far to retain unaltered judicial districts and its further decision not to share any proposed map with the district court left the court without evidence that the systemic relief bargained for in the Consent Judgment will endure in the absence of the Judgment's express constraints.

The district court's order did not sentence the State to "life imprisonment" as the State asserts (Supp. Br. 3); it simply required the State to meet its burden. Nothing in the district court's order precludes the State from seeking to make an adequate showing on remand should it choose to file a new motion. Indeed, the district court and the panel majority each provided the State with a roadmap for how it could make such a showing.

Once the State has shown that the objects of the decree have been attained, modification or termination may be warranted. Until that time, however, the State must comply with the Consent Judgment. This Court should affirm the district court's order.

STATEMENT

A. The Initial Lawsuit And Resulting Consent Judgment

Ronald Chisom, along with several other plaintiffs, sued the State of Louisiana, alleging that the method of electing members to the Louisiana Supreme

Court violated Section 2 of the Voting Rights Act (VRA). *See* ROA.464, 1935. Specifically, plaintiffs alleged that the use of an at-large system to elect two justices from a multi-member district comprised of parishes in the New Orleans area diluted Black voting strength when the remaining five justices on the Louisiana Supreme Court were elected from single-member districts. *See Chisom v. Roemer*, 501 U.S. 380, 384-385 (1991). The United States intervened as a plaintiff. *See* ROA.1755.

After extensive litigation, including an appeal to the Supreme Court regarding Section 2's applicability to judicial elections, the parties entered a Consent Judgment in 1992 to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the [VRA]." *See* ROA.1542; *Chisom v. Roemer*, *supra*. The Consent Judgment required both an interim remedy (*i.e.*, creation of a temporary eighth seat known as the "*Chisom* seat") and prospective relief. ROA.1542-1545.

As to prospective relief, the Consent Judgment required the State to reapportion the seven districts (*i.e.*, seven seats) of the Louisiana Supreme Court into single-member districts. To remedy the alleged Section 2 violation, the State agreed to create a judicial district encompassing Orleans Parish that is majority Black in voting age population and provides Black voters an equal opportunity to participate in the political process and elect candidates of their choice. ROA.1542-

1545. The Judgment mandated that "future Supreme Court elections . . . shall take place in the newly reapportioned districts." ROA.1545. It further provided that "[t]he legislature may redistrict the supreme court" following each decennial federal census.[2] *See* Courts and Judicial Procedure, State Supreme Court-Redistricting, 1997 La. Sess. Law Serv. Act 776 (West) (H.B. 581); ROA.1551-1557 (adopting Act 776 as an addendum to the Consent Judgment). Finally, it provides that the court will "retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished." ROA.1547.

B. Litigation Related To Justice Johnson's Service On The Supreme Court

Bernette Johnson was elected to the *Chisom* seat in 1994, and she won election as an associate justice to the newly created seventh district in 2000. *See Allen v. Louisiana*, 14 F.4th 366, 370 (5th Cir. 2021) (recounting this history).

In 2012, a dispute arose about whether to include Justice Johnson's service in the *Chisom* seat in calculating her tenure for the purpose of determining who would be the next chief justice of the Louisiana Supreme Court. *Allen*, 14 F.4th at 370-371. Plaintiffs and Justice Johnson, who intervened in the case (*see* ROA.86-89), moved the district court to enforce the Consent Judgment by issuing a

[2] Nonetheless, the State has not redrawn its supreme court districts since entry of the Consent Judgment. *See* ROA.1954-1955.

declaratory judgment on the calculation of Justice Johnson's tenure. *See* ROA.53-85, 221-231; *Chisom v. Jindal*, 890 F. Supp. 2d 696, 708 (E.D. La. 2012). The State moved to dismiss, arguing, *inter alia*, that the court lacked jurisdiction over the dispute. ROA.553-572.

The district court granted the motions to enforce the Consent Judgment and denied the State's motion to dismiss. *Chisom*, 890 F. Supp. 2d at 728. It found that the Consent Judgment called for Justice Johnson's service in the *Chisom* seat to be credited to her for all purposes under Louisiana law and, therefore, the "final remedy" had not yet been implemented. *Id.* at 711. Justice Johnson served as chief justice until her retirement in 2020. *See Allen*, 14 F.4th at 374 & n.12.

C. The State's Motion To Dissolve The Consent Judgment

1. In 2019, different plaintiffs sued the State in the Middle District of Louisiana, seeking a second district that provides Black voters an equal opportunity to elect candidates of choice among the seven seats. *See Allen*, 14 F.4th at 369. The district court in that case certified an interlocutory appeal to this Court to decide whether "the Eastern District [of Louisiana] has exclusive subject-matter jurisdiction over all matters involving Louisiana Supreme Court districts under the [*Chisom* decree]." *Ibid.* (alterations in original).

The State argued that it was "clear from the text of the [Consent Judgment] itself" that it "constitutes a continuing injunction" and "mandates that all future

elections" for the seven Louisiana supreme court districts take place within the boundaries "contemplated by the [Consent Judgment]." *See* La. Br. at 14, *Allen v. Louisiana*, *supra* (No. 20-30734). This Court rejected that broad reading, explaining that the Consent Judgment "was tailored to remedy" the vote dilution in Orleans Parish and "had nothing to do with the other districts" or "how they are to be apportioned." *Allen*, 14 F.4th at 371-373. Because the Consent Judgment "aimed to remedy alleged vote dilution in one supreme court district, not to reform the whole system," this Court held that the Eastern District of Louisiana did not have exclusive jurisdiction over the supreme court districts. *Id.* at 374.

2. Following the *Allen* decision, and on the eve of a decennial redistricting session, the State moved in this case under Federal Rule of Civil Procedure 60(b)(5) to dissolve the Consent Judgment. *See* ROA.1429-1435. In support of its motion, the State submitted (1) this Court's decision in *Allen* (ROA.1450-1465); (2) a PowerPoint entitled "Redistricting In Louisiana" (ROA.1466-1539); (3) a copy of the Consent Judgment, as amended by the parties' joint motion to incorporate Act 776 into the judgment (ROA.1540-1557, 1573-1574); and (4) the official commissions of the justices who have served in the *Chisom* seat and the

seventh district, along with "Election Results Report[s]" (ROA.1558-1572, 1575-1583).[3]

After a hearing, the district court denied the State's motion. ROA.1934. To begin, the court turned to contract principles governing consent decrees and found that the purpose of the Consent Judgment is "to ensure compliance with Section 2 of the [VRA]" and to "correct[] and guard[] against the dilution of Black voting power in Orleans Parish." ROA.1940-1941. On top of certain specific remedies, the court found that the Consent Judgment's "unambiguous language contemplates future compliance." ROA.1942. With that purpose in mind, the court held that the State had not met its burden under Rule 60(b)(5) to show either that the Consent Judgment had been satisfied or that applying it was no longer equitable. ROA.1943.

3. A divided panel affirmed. *Chisom v. Louisiana*, 85 F.4th 288 (5th Cir. 2023); *id.* at 307-316 (Engelhardt, J., dissenting). The panel majority first determined that the Consent Judgment's "final remedy" was to ensure the State's

[3] Besides Justice Johnson, two other justices have been elected to either the *Chisom* seat or the new seventh district: Justice Revius O. Ortique, Jr., who served from 1992 to 1994 and was the first Black justice on the Louisiana Supreme Court, and Justice Piper D. Griffin, who was elected to a ten-year term in 2020 following Justice Johnson's retirement. *See* ROA.1432-1434.

prospective compliance with Section 2 of the VRA, not simply to fulfill specific action items associated with that objective. *Id.* at 297-299.

In analyzing the first clause of Rule 60(b)(5)—whether "the judgment has been satisfied, released, or discharged"—the panel majority rejected the State's proffered "substantial compliance" standard. *Chisom*, 85 F.4th at 299-302. Instead, like the district court, it applied the "*Dowell* standard"—which asks whether the State has complied with the Consent Judgment in good faith and whether the vestiges of past discrimination have been eliminated to the extent practicable—and held that the State had not met that standard. *Id.* at 299, 301-302 (citing *Board of Educ. of Okla. City Pub. Schs., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237, 250 (1991)). The panel majority also held that the district court did not abuse its discretion in determining that dissolution was inappropriate under Rule 60(b)(5)'s third clause, which asks whether applying the Judgment prospectively is no longer equitable. *Id.* at 305.

In a dissenting opinion, Judge Engelhardt disagreed with the majority's description of the "final remedy." *Chisom*, 85 F.4th at 310-311. He would have held that the district court's jurisdiction ended when the State completed the last of the Judgment's eight action items, *id.* at 311, and that the State satisfied Rule 60(b)(5)'s third clause by providing "concrete evidence" of malapportionment, *id.* at 314.

4. On the State's petition, this Court granted rehearing en banc and vacated the panel's opinion and judgment.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the State's motion to vacate the Consent Judgment. As relevant here, Rule 60(b)(5) permits a party to obtain relief from a judgment if either (1) "the judgment has been satisfied, released, or discharged," or (2) "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Under either prong, the State must show that it has achieved the goals of the Consent Judgment or that a modification is necessary for it to do so. The State has not met this burden.

First, the district court did not err in holding that the State has not satisfied the Consent Judgment. The State had the burden to demonstrate that it has achieved the Consent Judgment's objective—to not impermissibly dilute the voting strength of Black Louisianans in Orleans Parish. To meet its burden, the State offered only that Black justices have been elected in the district created by this lawsuit. But this evidence simply demonstrates the Consent Judgment is likely working by providing Black voters in Orleans Parish an opportunity to elect candidates of their choice, not that the State has implemented a durable remedy. The court did not abuse its discretion in denying the State's motion where the State sought to terminate the decree in anticipation of redistricting but refused to present

the court with either a proposed plan or other concrete evidence that any new plan would comport with Section 2 of the VRA. Indeed, despite the Supreme Court's contrary holding in this *very* case, the State continues to argue in *Allen* that Section 2 does not apply to judicial elections, further calling into question its commitment to retain the Judgment's remedial district.

Nor does the district court's reliance, in part, on a school desegregation case to determine whether the State had satisfied the Consent Judgment require reversal. This Court has recognized that the standard for termination in school desegregation cases may provide guidance in other contexts. But even if this Court were to disagree with the district court's consideration of a school desegregation case, the State does not dispute that it must establish that the Consent Judgment has achieved its purpose and that the State has implemented a durable remedy. The district court did not abuse its discretion in holding that the State failed to meet that burden.

Second, the court did not abuse its discretion in separately holding that the State did not show that applying the Consent Judgment was no longer equitable based on malapportionment. Even accepting malapportionment as a basis for relief where one-person, one-vote principles do not apply to judicial elections, the State would need to show that it could not address population differences while still complying with the Consent Judgment. The Judgment, however, explicitly allows

the legislature to redraw supreme court districts; it simply precludes the State from acting to eliminate the equal opportunity to participate in the political process and elect candidates of choice that the Judgment provides to Black voters in Orleans Parish. Yet the State has not redrawn the other six supreme court districts or proposed any modifications to the seventh district. Simply put, the State offered the district court no sound basis to grant relief from the Consent Judgment.

ARGUMENT

This Court should affirm the district court's denial of the State's motion to vacate the Consent Judgment.

A party may move for relief from a final judgment where either "the judgment has been satisfied, released, or discharged" or where "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). A party satisfies a consent decree when "the objective of the [challenged decree] . . . has been achieved." *Horne v. Flores*, 557 U.S. 433, 450 (2009). Consent decrees in institutional reform litigation, however, "often remain in place for extended periods of time," increasing the "likelihood of significant changes occurring during the life of the decree." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380 (1992) (*Rufo I*). Thus, a movant may also be entitled to relief even if they have not satisfied the original order if they can show "a significant change either in factual conditions or in law." *Id.* at 384. Modifying decrees in such circumstances "is often essential to achieving the goals of reform litigation." *Id.* at 381.

This Court should affirm the district court's denial of the motion to dissolve the Consent Judgment because the State failed to meet its burden under either clause of Rule 60(b)(5). As the State before admitted, "the Consent Decree's goal was straightforward: [to] ensure that Louisiana's citizens were selecting their Supreme Court Justices in a way that avoided diluting the voting power of minority communities." ROA.1446. But rather than submitting evidence to demonstrate that it has achieved that objective or that a modification is essential to achieving the Consent Judgment's goals, the State flatly refused to commit to maintaining equal electoral opportunities for Black voters in Orleans Parish should the court dissolve the Judgment. *See* ROA.2024-2025. In fact, while seeking relief in this case, the State continues to argue in *Allen* that Section 2 does not apply to judicial elections, an argument the Supreme Court in *Chisom* rejected decades ago. *See* La. Mot. to Dismiss at 17-18, *Louisiana State Conf. of NAACP v. Louisiana*, No. 3:19-479 (Jan. 16, 2024); *Louisiana State Conf. of NAACP v. Louisiana*, 490 F. Supp. 3d 982, 1023 (M.D. La. 2020) (rejecting the State's argument under "*Chisom v. Roemer*'s direct holding"), *aff'd sub nom. Allen v. Louisiana*, 14 F.4th 366 (5th Cir. 2021); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). Based on the record before it, the district court did not abuse its discretion in denying the State's motion.

A. Standard of Review

This Court reviews a district court's denial of a Rule 60(b)(5) motion for abuse of discretion and reviews its underlying legal conclusions de novo. *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (*Frew I*). For the district court to have abused its discretion, "[i]t is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so *unwarranted* as to constitute an abuse of discretion." *Cooper v. Noble*, 33 F.3d 540, 544 (5th Cir.) (alteration in original) (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)), *supplemented*, 41 F.3d 212 (5th Cir. 1994). "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." *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011) (*LULAC*).

B. The State did not show that the Consent Judgment has been satisfied.

The district court appropriately rejected the State's primary argument that it has satisfied the Consent Judgment. A moving party may obtain relief from a judgment under Rule 60(b)(5) where it shows that "the objective of the [challenged decree] . . . has been achieved" and that it has implemented "a durable remedy." *Horne*, 557 U.S. at 450 (citing *Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (*Hawkins*)). But evidence from three uncontested elections is not "a sufficient

basis" to determine whether the Judgment had achieved its purpose of "alleviat[ing] the impermissible dilution of the votes of a protected class." *See LULAC*, 659 F.3d at 438-439 (vacating an order modifying a decree because it was based on evidence from only four elections). Given the "paucity of the record," the court did not abuse its discretion in denying the State's motion. *See id.* at 438.

1. The district court properly found that the purpose of the Consent Judgment is to correct and guard against the dilution of Black voting strength in Orleans Parish.

Consent decrees are construed according to principles of contract law. *Allen v. Louisiana*, 14 F.4th 366, 371 (5th Cir. 2021). To interpret a contract, a court must determine "the common intent of the parties," starting with the words of the contract so long as they are clear and lead to no absurdities. La. Civ. Code Ann. arts. 2045, 2046 (1985); *see also Allen*, 14 F.4th at 371. The court must construe the contract "as a whole" and interpret each provision "in light of the other provisions." *Allen*, 14 F.4th at 371 (quoting *Baldwin v. Board of Supervisors for Univ. of La. Sys.*, 156 So. 3d 33, 38 (La. 2014)).

Applying these principles, the district court properly found that the Consent Judgment, as a whole, "was specifically aimed at correcting and guarding against the dilution of Black voting power in Orleans Parish." ROA.1941; *see also Allen*, 14 F.4th at 374 (recognizing that the "*Chisom* decree aimed to remedy alleged vote dilution" in what is now District Seven). First, the Consent Judgment's stated

purpose is to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2." ROA.1542. Second, it mandates that "future Supreme Court elections . . . shall take place in the newly reapportioned districts." ROA.1545. And it provides the district court with jurisdiction "until the complete implementation of the final remedy has been accomplished." ROA.1547.

Contrary to the State's assertions (Supp. Br. 18), the district court did not err in holding that the Consent Judgment's terms require prospective compliance. Although the State now tries to quibble with the district court's interpretation of the Consent Judgment, the State admitted in its Petition For Rehearing En Banc that the Judgment includes an "agree[ment] to . . . maintain a majority-Black State Supreme Court district anchored in Orleans Parish." Pet. iii. Likewise, in its Rule 60(b)(5) motion, the State agreed that "the Consent Decree's goal was straightforward: [to] ensure that Louisiana's citizens were selecting their Supreme Court Justices in a way that avoided diluting the voting power of minority communities." ROA.1446; *see also* ROA.1814 (recognizing that the Consent Judgment was designed to ensure compliance with Section 2 of the VRA). The district court did not abuse its discretion in recognizing what the State once thought clear: the Consent Judgment's purpose is to correct and prospectively guard against minority vote dilution in Orleans Parish.

2. The State did not show that it has achieved the Consent Judgment's objective and implemented a durable remedy.

The State failed to meet its burden to demonstrate that it has satisfied the Consent Judgment. The State does not dispute that, to be entitled to relief, it must show both that the goal of the Consent Judgment "has been achieved" and that it has implemented a "durable" remedy. Supp. Br. 35 (quoting *Horne*, 557 U.S. at 450). The State has not met its burden.

a. To meet the Consent Judgment's overarching goal—to correct and prospectively guard against minority vote dilution in Orleans Parish—the State must not only establish a remedial district, it must also show that the remedy is "durable." While *Horne* leaves unanswered what it means to have a "durable remedy," lower courts have held that, at a minimum, 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*, No. 3:93-CV-65, 2015 WL 12979136, at *3 (E.D. Tex. Sept. 29, 2015) (alteration in original) (quoting *Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010)); *see also Inmates of Suffolk Cnty. Jail v. Rufo*, 12 F.3d 286, 292 (1st Cir. 1993) (*Rufo II*) (holding on remand from the Supreme Court that before vacating a consent decree, a district court must satisfy itself that "there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted").

Here, the State did not put forth sufficient evidence to give the district court confidence that it has implemented a durable remedy to protect against the alleged vote dilution at the heart of this lawsuit. The State did not present the court with either a proposed new plan or other concrete evidence indicating that any new plan would satisfy the State's obligation under the Consent Judgment to take no action resulting in impermissible vote dilution in Orleans Parish. Not only did the State fail to present any such evidence at the hearing on its Rule 60(b)(5) motion, the State also flatly refused to commit not to do so or to confirm whether a district that provides Black voters an equal opportunity to elect candidates of choice anchored in Orleans Parish would be required under Section 2 of the VRA should the court dissolve the Consent Judgment. *See* ROA.2024-2025. On this record, the district court reasonably found that the State had not shown that "there is little or no likelihood the original violation will not be repeated when the Consent Judgment is lifted." ROA.1948.

b. The State argues (Supp. Br. 8) that it satisfied the Consent Judgment by implementing the eight action items contained in Section C of the Consent Judgment. *See* ROA.1542-1545. Not so.

The State's completion of enumerated action items does not relieve it of its overarching obligation to implement a durable remedy that protects against impermissible vote dilution in Orleans Parish. In similar circumstances this Court

held that a district court did not abuse its discretion in declining to vacate an injunction even though the defendant had "promulgat[ed] new regulations that literally comply with the conditions set out in the injunction." *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1078 (5th Cir. 1973). This Court explained that the "original injunction dealt not only with the promulgation of regulations, but also with their enforcement." *Ibid.* This Court found that the injunction had not been satisfied where the defendant failed to show that the new rules would be constitutionally applied in the future if the court vacated the injunction. *Ibid.*

Similarly, even though the district court here found that the State "has complied with the terms of the Consent Judgment by enacting Act 512 to create the temporary *Chisom* seat and Act 776 to create the current District Seven," the Judgment also requires the State to not impermissibly dilute the voting strength of Black Louisianans in Orleans Parish. ROA.1948. The State, however, failed to show that any new plan would do so. Rather, after taking no action on the judicial districts for decades, it sought wholesale dissolution of the Consent Judgment on the eve of a redistricting cycle for the express purpose of revising the remedial district that the action items established. ROA.1437. Because the State had never sought to redraw the judicial districts under the terms of the Consent Judgment, the court lacked a factual basis to conclude that the State would continue to meet the Consent Judgment's goals if the court vacated the Judgment. *See* ROA.1948. In

fact, the State refused to say whether it agreed that any map would even be subject to Section 2 of the VRA, let alone comply with the statute or provide equal electoral opportunities to Black voters.

Other courts have routinely rejected motions for relief from consent decrees in similar situations. For example, in *Building & Construction Trades Council of Philadelphia & Vicinity v. NLRB*, the Third Circuit held that it could not "assume" lawful compliance with a consent decree that prohibited certain forms of boycotting where the plaintiff—an association of labor unions—had admitted that the unions had not engaged in any picketing for most of the last six years. 64 F.3d 880, 890 (3d Cir. 1995). The Court found there was, therefore, "no background upon which any findings could be made that would show that [the plaintiff] has in fact learned how to picket without treading on the prohibitions . . . contained both in the law and the various negotiated consent decrees." *Ibid.*

Likewise, in *Allen v. Alabama State Board of Education*, the board entered a consent decree that required that any future teacher certification examinations avoid a discriminatory impact. 164 F.3d 1347, 1349 (11th Cir. 1999), *vacated by joint mot. of the parties*, 216 F.3d 1263 (11th Cir. 2000).[4] But rather than

[4] Although *Allen* was vacated after the parties' settlement and is no longer binding precedent, *see* 216 F.3d 1263 (11th Cir. 2000), its approach is still useful as persuasive authority. *See, e.g.*, *Jackson v. Georgia Dep't of Transp.*, 16 F.3d 1573, 1578 n.7 (11th Cir. 1994).

formulate a new, nondiscriminatory test after the decree was entered, the board suspended teacher certification examinations altogether until a decade later, when the Alabama legislature directed the board to select a new test. *Id.* at 1349-1350. The board then moved to vacate the consent decree, arguing that it had fully complied and that "if it wants to now reinstitute testing, it should not be forced to fashion tests consistent with the provisions of the consent decree." *Id.* at 1351.

The Eleventh Circuit affirmed the district court's denial of the board's motion as premature. *Allen*, 164 F.3d at 1351. Because "future testing requirements went to the heart of the consent decree," the Eleventh Circuit explained, it was proper for the district court to require the board to submit either the new test it planned to use or other evidence to show it had made a "good-faith effort" to comply with the consent decree's provisions. *Id.* at 1351-1352.

The State's motion to vacate the Consent Judgment is likewise premature. Although the Judgment expressly allows the State to redistrict, the State chose for decades to leave in place the agreed-upon boundaries. The State now seeks to dissolve the Consent Judgment to redistrict without providing the court with a new map or any other indication of its plans. Thus, like the plaintiffs in *Building & Construction Trades Council* and the board of education in *Allen v. Alabama State Board of Education*, the State has not yet shown that when faced with an opportunity to effectuate the purpose of the Consent Judgment, it will guard

against impermissible vote dilution in Orleans Parish. As a result, the district court did not abuse its discretion in finding that the State did not demonstrate that it had implemented a durable remedy.

3. The district court did not err in looking to federal precedent to interpret a federal rule.

The State attacks the district court's reliance on *Board of Education of Oklahoma City Public Schools v. Dowell*, *supra*, a school desegregation case, as erroneous, but that argument also does not counsel reversal. In analyzing whether the State had satisfied the Consent Judgment, the district court considered *Dowell*'s two-part test for whether to "dissolv[e] a . . . decree." ROA.1943 (alterations in original) (quoting *Dowell*, 498 U.S. at 248). Specifically, the district court considered (1) whether "the State has complied with the Consent Judgment in good faith" (ROA.1947), and (2) whether "the vestiges of past discrimination have been eliminated to the extent practicable"—*i.e.*, "whether the purpose of the [C]onsent [Judgment] has been fulfilled" (ROA.1950 (citation and internal quotation marks omitted)).

The district court did not abuse its discretion in considering this standard to determine whether the State had met its burden under Rule 60(b)(5) to dissolve the Consent Judgment. *See* ROA.1943-1953. Even if this Court disagrees, however, it should nevertheless affirm the court's denial of the State's motion to dissolve the Consent Judgment because the State has not met its burden under any standard.

a. The district court's reliance on *Dowell* is not reversible error. Because the first clause of Rule 60(b)(5) is "almost never applied to consent decrees," this Court has previously "deem[ed] it reasonable to consider Defendants' [Rule 60(b)(5)] motion with reference to" other federal precedent. *Frew I*, 780 F.3d at 327. Following this directive, the district court drew from appropriate Supreme Court precedent—*Dowell*—for guidance. ROA.1943 & n.50. As the district court explained, this Court has "indirectly approved" of applying *Dowell* to motions to dissolve consent decrees. ROA.1945-1947 (citing *LULAC*, 659 F.3d at 437-440; *Frew I*, 780 F.3d at 323, 327).

The district court's invocation of *Dowell* also comports with precedent from at least six other circuits. *See, e.g.*, *Alexander v. Britt*, 89 F.3d 194, 197 (4th Cir. 1996) (finding that *Dowell* and *Rufo* "are but variations on a single theme" in analyzing Rule 60(b) motion to terminate a consent decree addressing Medicaid and related programs); *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801 (7th Cir. 2001) (holding that *Dowell*'s principles "apply with equal force to police-reform decrees"); *McDonald v. Carnahan*, 109 F.3d 1319, 1321 (8th Cir. 1997) (applying *Dowell* to analyze whether to dissolve a consent decree regulating aspects of life on death row); *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1200-1201 (10th Cir. 2018) (applying the "broad inquiry" in *Dowell* to evaluate whether a movant implemented a durable remedy to address constitutional

violations regarding the institutionalization of persons with developmental disabilities); *Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020) (citing *Dowell* for the standard for whether the purpose of a consent decree relating to the rights of homeless persons has been "fully achieved"); *NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C. Cir. 2000) (reading *Dowell* and *Rufo* together to analyze whether to vacate a consent decree pertaining to employer's compliance with labor laws).

b. The State claims (Supp. Br. 29) that the *Dowell* standard "has no place in this litigation." Instead, Louisiana argues (Supp. Br. 22-23) that this Court's precedent requires the district court to draw from state contract law, rather than federal precedent, to determine the proper standard for applying Federal Rule of Civil Procedure 60(b)(5). But while this Court has held that courts should "consult the contract law of the relevant state" to interpret consent decrees, *Allen*, 14 F.4th at 371, it has never held that a court cannot draw from federal precedent to determine the proper standard for applying federal rules governing requests to terminate or modify court-ordered relief, *cf. Frew I*, 780 F.3d at 327.

Even if this Court were to look to Louisiana law, as the State proposes, to determine whether the State has satisfied the Consent Judgment, it does not follow that substantial compliance would be the correct standard. To be sure, Louisiana recognizes the concept of substantial performance. But it is not transferrable to

Rule 60(b)(5) motions. For starters, under state law "[a] contract *may not be dissolved*" when there has been substantial performance. La. Civ. Code Ann. art. 2014 (1985) (emphasis added). Moreover, while the doctrine of substantial performance applies to contracts between two parties, when a contract is undertaken to benefit a third person—here, for example, by ensuring equal electoral opportunities for Black voters in Orleans Parish—the parties "are bound to remain together until the completion of their undertaking." *Pratt v. McCoy*, 54 So. 1012, 1031 (La. 1911).

Nor does this Court's precedent dictate a "substantial compliance" standard. *Cf.* Supp. Br. 23 (citing *Frew v. Janek*, 820 F.3d 715, 721 (5th Cir. 2016) (*Frew II*)). In *Frew*, the parties entered a consent decree to make improvements to Texas's implementation of Medicaid's Early and Periodic Screening, Diagnosis, and Treatment program (the Program). *See Frew II*, 820 F.3d at 717. The parties later agreed to "eleven particularized orders for enforcing specific portions of the consent decree," the completion of which would provide a basis for terminating the corresponding part of the decree. *Id.* at 718 (internal quotation marks omitted). *Frew I* concerned whether the defendants had complied with one of those orders. 780 F.3d at 323.

Interpreting the consent decree at issue, this Court held that "substantial compliance" was a requirement of the parties' bargained-for relief. *See Frew I*,

780 F.3d at 327-330 (discussing "Consent Decree Interpretation"). The order and decree required the State to "implement an initiative to effectively inform pharmacists about [the Program]," conduct an "evaluation of pharmacists' knowledge" of the Program, "provide intensive, targeted educational efforts," and "train staff." *Id.* at 324-325. Rather than "guarantee[ing] specific outcomes," this Court held that the order and decree were "aimed at *supporting* [Program] recipients . . . by *addressing* concerns, *enhancing* access, and *fostering* use of services." *Id.* at 328. This Court concluded that the parties had intended that substantial compliance with the decree's "specific, highly detailed action plans" would achieve the decree's purpose. *Ibid.*

This Court recognized, however, that if the decree had contained different terms—such as guaranteeing effective compliance or including a termination provision referencing satisfaction of the decree's overall purpose—substantial compliance would not apply. *Frew I*, 780 F.3d at 330. Thus, rather than adopt a substantial compliance standard for termination, this Court held only that "the district court did not err in interpreting [the order at issue] to mandate specific actions only, the performance of which would automatically satisfy the parties' intent in concluding these agreements."[5] *Ibid.*

[5] At issue in *Frew II* was a motion to terminate another of the eleven orders. Applying *Frew I*, this Court reiterated that the defendants could show that

Accordingly, the consent decree at issue in *Frew* is easily distinguishable from the one here. First, unlike the decree in *Frew*, the Consent Judgment's goal is "to ensure compliance with Section 2 of the [VRA]." ROA.1542. Second, the Consent Judgment included a termination provision expressly mandating that the court retain jurisdiction "until the *complete* implementation of the final remedy has been accomplished." ROA.1547 (emphasis added). Thus, *Frew*'s holding is inapposite. *Cf. Frew I*, 780 F.3d at 330 (holding that if the decree had included provisions like those contained here, "[p]laintiffs might legitimately complain about the district court's approach").

c. The State also incorrectly argues (Supp. Br. 29) that even if this Court applies the *Dowell* test, the district court "badly mangled *Dowell*" by looking to "both past compliance and future prospects." Yet *Dowell* itself requires courts to examine the likelihood that the defendant "would return to its former ways" in considering whether the "purposes of the [decree] ha[ve] been fully achieved." *Dowell*, 498 U.S. at 247; *see also id.* at 261 (Marshall, J., dissenting) (recognizing that the majority's standard "focus[es] heavily on present and future compliance"). The Supreme Court reiterated in *Freeman v. Pitts* that one of the purposes of *Dowell*'s showing of "[a] history of good-faith compliance" is to "enable[] the

---

termination as to that particular order and its corresponding decree provisions was warranted "by demonstrating 'substantial compliance.'" *Frew II*, 820 F.3d at 721.

district court to accept the [defendant's] representation" regarding future compliance. 503 U.S. 467, 498-499 (1992). Thus, in analyzing *Dowell*'s good-faith prong, the district court correctly examined the State's "past compliance *and* future prospects." *See Chisom v. Louisiana*, 85 F.4th 288, 302 (5th Cir. 2023) (citation and internal quotation marks omitted).

Precedent from other circuits further supports the district court's analysis. For instance, on remand from the Supreme Court in *Rufo II*, the First Circuit held that before vacating a consent decree, a district court must determine that "there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted." 12 F.3d at 292 (citing *Dowell*, 498 U.S. at 247). The court recognized that this inquiry left "many questions unanswered" but stated that, at a minimum, it would require the defendant to show "that it is unlikely that the original violations will soon be resumed if the decree were discontinued." *Id.* at 292-293; *see also Johnson v. Heffron*, 88 F.3d 404, 406 (6th Cir. 1996) (affirming a court's consideration of both past compliance and "future prospects" in examining a Rule 60(b)(5) motion). The district court did not err by likewise evaluating "future prospects" here.

Nor did the district court embark on a "baseless expansion of *Dowell*" by examining whether "the purpose of the consent order has been fulfilled." *Cf.* Supp. Br. 31-32 (quoting ROA.1950). First, the court's interpretation comports with

Dowell and does not broaden its holding. *See Dowell*, 498 U.S. at 247 (holding that an injunction may be modified or dissolved where the defendant shows that "the purposes of the desegregation litigation had been fully achieved"); *id.* at 256 (Marshall, J., dissenting) (agreeing with the majority that the correct standard "is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved"). This Court and others have agreed with the district court's reading of *Dowell*. *See, e.g.*, *Frazar v. Ladd*, 457 F.3d 432, 440 (5th Cir. 2006) (interpreting *Dowell*'s standard as requiring proof of "full and satisfactory compliance with the decree" (citation and internal quotation marks omitted)); *Alexander*, 89 F.3d at 200 (interpreting *Dowell* to require a showing that "the purpose of the decree has been satisfied"); *United States v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993) (same).

d. Even if the district court erred by relying on *Dowell* or when interpreting the decision, the State would nevertheless need to show that it has fulfilled the purpose of the Consent Judgment to obtain relief. *See, e.g.*, *McDonald*, 109 F.3d at 1322 (holding that a court could properly vacate a decree once it has "accomplished its purpose"); *Johnson*, 88 F.3d at 406 (similar). Indeed, the State itself recognizes that to prove satisfaction, it needs to show that it has fulfilled "the object and purpose of the consent judgment." Br. 33; *see also* Supp. Br. 35. Even under the State's preferred substantial compliance standard, the extent to which

"the contractual provision's purpose" has been achieved is relevant to deciding whether the State has satisfied the Judgment. *See* Supp. Br. 23 (quoting *Frew II*, 820 F.3d at 721).

The cases that the State cites do not hold otherwise. *Cf.* Supp. Br. 32 (citing *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984); *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971)). The *Armour & Co.* case stands for the unremarkable proposition that the "scope of a consent decree must be discerned within its four corners." 402 U.S at 682. Applying that rule, *Firefighters Local* held that the district court exceeded its powers by entering a new injunction that surpassed the express terms of the consent decree it professed to enforce. 467 U.S. at 573-575. In contrast, the court's order here did not require any new relief. Rather, the court looked within the four corners of the Consent Judgment, determined that the purpose of the Judgment was to remedy and prospectively guard against minority vote dilution in Orleans Parish, and held that the State had not met its burden to show that it has accomplished that purpose.

In sum, the district court did not abuse its discretion in relying on *Dowell*. But even if this Court disagrees, it should nonetheless affirm. Regardless of whether this Court applies the *Dowell* standard, substantial compliance, or a different test, the State does not dispute that, to secure relief, it must show that the "objective" of the Judgment "has been achieved" and that it has instituted "a

durable remedy." *See Horne*, 557 U.S. at 450 (citing *Hawkins*, 540 U.S. at 442); *see also* Br. 27; Supp. Br. 35. The district court did not abuse its discretion in holding that the State failed to meet its burden.

4. The district court's denial of the State's motion does not extend the Consent Judgment indefinitely.

The State incorrectly claims (Supp. Br. 18) that the district court's denial of its Rule 60(b)(5) motion prevents the Consent Judgment from ever being satisfied. The State asserts that the denial amounts to "life imprisonment" (Supp. Br. 3), yet the State has always held the keys in this case. Although the State argues (Supp. Br. 25-26) that it satisfied the Consent Judgment as early as 2012, it did not seek relief until 2021.[6] *See Allen*, 14 F.4th at 374 (noting that the State had "never asked the Eastern District to vacate the decree"). Even then, it submitted only a threadbare motion that pointed to the fact that Black justices were elected in the district created because of this lawsuit. *See* ROA.1952; *Chisom*, 85 F.4th at 302 (now-vacated majority opinion recognizing that "the State provided no evidence,

[6] In fact, only after it decided to pursue redistricting did the State ever argue that it had satisfied the Consent Judgment. *Compare* Opening Br. of Defs.-Appellants at 14, *Allen v. Louisiana*, *supra* (No. 20-30734) (arguing to this Court in 2021, after Justice Johnson had retired and Justice Griffin had begun a ten-year term, that the Consent Judgment "constitutes a continuing injunction" and created obligations that "remain[] in effect"), *with* ROA.1429-1430 (seeking dissolution of the Consent Judgment to redraw the supreme court districts).

plans, or assurances of compliance with Section 2 of the VRA in the event that the Consent Judgment is terminated").

Indeed, rather than proffering relevant evidence, the State took the position at the motion hearing that dissolution of the Consent Judgment permitted it to eliminate the Orleans-based opportunity district if it so desired. *See* ROA.2024-2025. The district court found the State's position particularly troubling in light of its concurrent arguments in *Allen* that Section 2 should not apply to judicial elections, despite the Supreme Court's contrary holding in this *very* case. *See* ROA.1949; *Louisiana State Conf. of NAACP*, 490 F. Supp. 3d at 1023 (rejecting the State's argument under "*Chisom v. Roemer*'s direct holding"); *Chisom*, 501 U.S. at 404 (holding that Section 2 of the VRA applies to such elections). The State cannot seriously fault the district court for not "promptly" dissolving the Consent Judgment when the State failed to support its motion, refused to commit to equal electoral opportunities for Black voters in Orleans Parish, and would not say whether a district anchored in Orleans Parish that provides Black voters such an opportunity would be required to comply with Section 2 of the VRA. *Compare* Supp. Br. 19-20, *with* ROA.1949 (denying relief "at this time").

The State also ignores the unique context of this case. Admittedly, the Consent Judgment has been in place for "[r]oughly thirty years." Supp. Br. 5. But because Louisiana supreme court justices sit for ten-year terms, *see* La. Const. Art.

V, § 3, there have been only three elections in District Seven, all uncontested, since entry of the Consent Judgment. *See* ROA.1563, 1565, 1577. Moreover, because the one-person, one-vote requirement does not apply to judicial elections and because the State never sought to redraw the judicial districts despite its ability to do so under the express terms of the Judgment, as amended in 1997, this case is unlike those in which the State necessarily revisits district boundaries every ten years.

Even in more traditional redistricting cases, the State does not always prevail. In *LULAC*, this Court vacated a district court's order modifying a consent decree where the movants alleged only that one minority candidate for city council ran in two contested and two uncontested elections over a thirteen-year period. 659 F.3d at 438-440. This Court found that "[t]his information did not provide the district court with a sufficient basis" to determine whether the decree had achieved its purpose of "alleviat[ing] the impermissible dilution of the votes of a protected class." *Id.* at 438-439. Here, even though the Consent Judgment has been in place for longer, there have been even fewer elections from which to glean whether electoral opportunities are equal. The district court appropriately declined to assume the State's compliance from the mere passage of time.

Nor can the State blame the district court or any other party for its decision not to redraw its supreme court districts following earlier decennial census results.

Cf. Supp. Br. 7 (claiming that "Louisiana has not been permitted to exercise its prerogative for more than thirty years"). As this Court has recognized, the Consent Judgment explicitly allows the State legislature to redraw its supreme court districts; it simply requires that the State not impermissibly dilute the voting strength of Black Louisianans in Orleans Parish. *Allen*, 14 F.4th at 373 (rejecting the argument that the Consent Judgment froze the seven supreme court districts as they were redrawn by Act 776); *see also* ROA.1551-1557 (adopting Act 776 as an addendum to the Consent Judgment); ROA.1957 (recognizing that "the State is free to reapportion the remaining six supreme court districts on its own, and to propose a modification of District Seven's boundaries"). Certainly, nothing in federal or state law requires the State to take such action. *See Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). But the State's decades-long contentment with the current map, combined with its ambivalent statements both in this litigation (*see* ROA.2024-2025) and in *Allen* (*see* ROA.1949 & n.77) regarding future Section 2 compliance, left the court without evidence that the parties' bargained-for relief will endure post-dissolution.

Of course, nothing in the district court's order precludes the State from seeking to make an adequate showing on remand upon filing another motion. The district court itself suggested that the State could present "a formal plan" that demonstrates its continued compliance. *See* ROA.1948. Likewise, the panel

majority recognized that the State could satisfy its burden by presenting either "a roadmap that demonstrates continued compliance or a redistricting plan." *Chisom*, 85 F.4th at 302. The United States has also repeatedly agreed that the State can establish that the "final remedy" has been achieved if it shows that a new plan "meets the decree's fundamental requirement of ensuring compliance with Section 2 of the [VRA]." *See, e.g.*, ROA.1763. Notably, none of these options requires the State to show that "the chance of a future Section 2 violation is zero." *Cf.* Supp. Br. 18. Rather, the State must simply show that, consistent with the Consent Judgment, it will not take immediate action to impermissibly dilute the voting strength of Black Louisianans in Orleans Parish upon the Judgment's dissolution.[7]

5. The State's other arguments, including its new assertion that the district court lacks jurisdiction, fail.

The State's remaining arguments likewise fail because they rest on the same mistaken premise that the State has satisfied the Consent Judgment.

a. The State argues (Supp. Br. 16) that the district court no longer has jurisdiction because it has fully complied with the terms of the Consent Judgment. But as the State itself represented as recently as 2021, the Consent Judgment

[7] The United States understands that the legislature is currently considering redrawing the supreme court districts. As the United States has indicated since the State first filed its motion, the State's enactment of a redistricting plan that fulfills the goals of the Consent Judgment would address its concerns as to whether the State has satisfied the Judgment.

created "continuing" obligations that "remain[] in effect." *See* Opening Br. of Defs.-Appellants at 14, *Allen v. Louisiana*, *supra* (No. 20-30734). Nor has the State contested the district court's jurisdiction until now.

If anything, the need for ongoing jurisdiction is even more apparent where the State seeks dissolution for the express purpose of redrawing the remedial district the Consent Judgment established. That is, the State does not simply want the court to mark the Judgment satisfied; it wants the Judgment dissolved so that it has carte blanche to redistrict, without giving any assurance that it will not undo the ongoing relief required by the decree. The question, therefore, is not whether the district court has jurisdiction to "enforce already-satisfied obligations," Supp. Br. 17, but whether the court has jurisdiction to ensure that the State does not dismantle the remedy to which it agreed.

The answer to the latter question is yes. *See Rufo II*, 12 F.3d at 292 (requiring the district court to ensure as a condition to termination "that there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted"). Because the State has not redrawn the districts since it adopted seven single-member districts, there is no evidence that the parties' bargained-for relief will persist without the Judgment's express constraints. The district court has continuing jurisdiction until the State can prove that it has implemented a durable remedy. *Cf. Borel v. School Bd. Saint*

Martin Par., 44 F.4th 307, 310-311 (5th Cir. 2022) (holding that the district court properly retained remedial jurisdiction over a desegregation case that had been pending for more than five decades).

b. The State also incorrectly suggests (Supp. Br. 14-16) that because it never stipulated to a violation of federal law, the district court lacks remedial authority. The Supreme Court, however, foreclosed the State's argument in *Hawkins*. 540 U.S. at 438 (rejecting argument that a federal court "should not enforce a consent decree . . . unless the court first identifies, at the enforcement stage, a violation of federal law"). The Court explained that courts can enforce a consent decree even absent a violation of federal law because the decree represents "a remedy the state officials themselves had accepted." *Id.* at 439. Accordingly, a federal court should not return "responsibility for discharging the State's obligations" to state officials until "the objects of the decree have been obtained." *Id.* at 442.

Nor is the fact that the State "expressly disclaimed liability" in the Consent Judgment determinative of whether the district court has continuing remedial authority. *Cf.* Supp. Br. 2. In *Frazar*, this Court rejected a similar argument because holding otherwise "would permit perpetual re-litigation of the merits of Plaintiffs' claims." 457 F.3d at 438 (citation omitted). Such a rule potentially would allow the "party filing the Rule 60(b) motion" to "eliminate consent decree

obligations, even if there is no attempted compliance with [the decree's] legally enforceable terms." *Ibid.* Thus, this Court held that compliance with federal law does not alone suffice to dissolve a consent decree where a defendant has not otherwise met its burden under Rule 60(b)(5). *Id.* at 440-441; *see also Hawkins*, 540 U.S. at 442 (holding that the decree "should be enforced according to its terms" until the State "establishes reason to modify the decree").

The State's reliance (Supp. Br. 15) on *Brumfield v. Louisiana State Board of Education*, 806 F.3d 289 (5th Cir. 2015), also does not help its argument. In that case, the district court had entered a consent decree aimed at preventing future state aid to discriminatory private schools. *See id.* at 298. Decades later, the court entered an order for further relief addressing a new program that provided vouchers to students attending public schools. *Id.* at 292-293. A group of parents intervened and moved under Federal Rule of Civil Procedure 60(b)(4) to vacate that order as void for lack of jurisdiction. *Id.* at 295. The district court denied the motion to vacate, and the intervenors appealed. *Id.* at 296.

This Court held that the order was "void for lack of subject matter jurisdiction" because the court's original order had "retained continuing jurisdiction for the remedial purpose" of preventing "future state aid to discriminatory private schools." *Brumfield*, 806 F.3d at 298. The new order, in contrast, did not further that remedial purpose. *Ibid.* Rather, it concerned a

voucher program for public school students as to which "no federal constitutional violation ha[d] been alleged, litigated or adjudicated." *Id.* at 302.

This case in no way resembles *Brumfield*. The district court did not enter a new order outside the scope of the Consent Judgment; it simply held that the State failed to meet its burden on its Rule 60(b)(5) motion to show that it has achieved the Consent Judgment's remedial purpose—a determination that is largely within the sound discretion of the district court. *See* ROA.1950-1952.

c. Finally, the State argues (Supp. Br. 19-21) that the district court erred in failing to apply a "flexible approach" to the first clause of Rule 60(b)(5), which allows for relief where a judgment has been satisfied. As this Court has explained, however, "the flexible standard for modifying consent decrees" is "associated with the *third* clause of Rule 60(b)(5)," which allows for relief from a final judgment where "applying it prospectively is no longer equitable." *Frew I*, 780 F.3d at 329-330; Fed. R. Civ. P. 60(b)(5). Even where such decrees have not been satisfied, "a flexible approach" in implementing and modifying decrees "is often essential to achieving the goals of reform litigation" because of the "likelihood of significant changes occurring during the life of the decree." *Rufo I*, 502 U.S. at 380-381.

The same rationale does not hold true for Rule 60(b)(5)'s first clause. *See Frew I*, 780 F.3d at 329-330 (finding that a case resting on the flexible standard for modification had limited persuasiveness for analyzing whether a consent decree

had been satisfied). Certainly, "responsibility for discharging the State's obligations [should be] returned promptly to the State and its officials when the circumstances warrant." *Horne*, 557 U.S. at 450 (citation and internal quotation marks omitted). But it would be incorrect under the first clause of Rule 60(b)(5) to read contractual provisions flexibly and relieve a party of obligations it can meet under current circumstances. In such a scenario, a court should not deem a consent decree satisfied or a durable remedy implemented. *Ibid.*

Horne is illustrative. There, a group of English-Language-Learner students sued, alleging that Arizona was violating the Equal Educational Opportunities Act of 1997 (EEOA), which requires states to take "appropriate action to overcome language barriers." 557 U.S. at 438-439 (citation omitted). The district court entered declaratory judgment for the plaintiffs requiring Arizona to ensure adequate funding for such programs. *Id.* at 441. Arizona later passed legislation to increase funding and to institute several programming and structural changes. *Id.* at 442. It then moved for relief under the third prong of Rule 60(b)(5), arguing that continued enforcement of the judgment was inequitable because Arizona was "fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances." *Id.* at 439. The district court denied the motion, and the Ninth Circuit affirmed. *Id.* at 443-444.

The Supreme Court reversed. *Horne*, 557 U.S. at 472. The Court found that the district court's opinion effectively "was an inquiry into whether the original order had been satisfied." *Id.* at 454. But while the EEOA requires States to take appropriate action, the Court recognized that it leaves States with "a substantial amount of latitude in choosing how this obligation is met." *Ibid.* (citation and internal quotation marks omitted). Thus, even if Arizona had not satisfied the particulars of the decree, Arizona could still show that prospective enforcement would be inequitable because it had employed other tools to achieve the EEOA's statutory objective. *Ibid.* The Court remanded the case for the district court to consider whether factual and legal changes—including adoption of structural and management reforms—warranted relief from the judgment. *Id.* at 460.

Unlike *Horne*, where Arizona had enacted new legislation, the State has not provided any "evidence, plans, or assurances of compliance with Section 2 of the VRA in the event that the Consent Judgment is terminated." *Chisom*, 85 F.4th at 302. Nor has the State identified a durable remedy apart from the Consent Judgment that demonstrates that Black electoral opportunities in Orleans Parish will not be diluted upon termination of the Judgment. *See ibid.* This Court should affirm the district court's holding that the State failed to meet its evidentiary burdens under the first clause of Rule 60(b)(5).

C. The State did not show that continued enforcement of the Consent Judgment is no longer equitable.

The State separately argues (Supp. Br. 35-41) that it is entitled to relief from the Consent Judgment under the third clause of Rule 60(b)(5) because applying the Judgment prospectively is no longer equitable. *See* Fed. R. Civ. P. 60(b)(5). A court has discretion to modify a judgment when "significant changes in factual conditions make a consent judgment unworkable, make compliance substantially more onerous, or make enforcement detrimental to the public interest." *Cooper*, 33 F.3d at 544 (citing *Rufo I*, 502 U.S. at 384). "Once a moving party meets this standard, a district court must consider 'whether the proposed modification is suitably tailored to the changed circumstance.'" *Frazar*, 457 F.3d at 436 (quoting *Rufo I*, 502 U.S. at 383). Here too, the district court acted well within its discretion in denying the State's motion.

1. The State has not met its burden to show a significant change in factual conditions warranting termination of the Consent Judgment. In its supplemental brief, the State points to a single factual change in support of dissolution: "extraordinary malapportionment," a condition to which the State has acquiesced for decades. Supp. Br. 35-36. To meet its burden under *Rufo*, the State must show that this change "affect[s] compliance with, or the workability or enforcement of, the final judgment." *Cooper*, 33 F.3d at 544.

Under the facts here, the State cannot show that it is barred from addressing malapportionment while still complying with the Consent Judgment. The Judgment expressly provides that the "legislature may redistrict the supreme court" following a federal decennial census. *See* Courts and Judicial Procedure, State Supreme Court-Redistricting, 1997 La. Sess. Law Serv. Act 776 (West) (H.B. 581); ROA.1551-1557 (adopting Act 776 as an addendum to the Consent Judgment). The Judgment simply prevents the State from diluting the voting strength of Black voters in Orleans Parish when doing so.[8] *See* ROA.1957 (recognizing that "the State is free to reapportion the remaining six supreme court districts on its own, and to propose a modification of District Seven's boundaries"); *Allen*, 14 F.4th at 373 (rejecting the argument that the Judgment froze the seven districts as redrawn by Act 776).

Moreover, the Consent Judgment has not prevented the Louisiana legislature from redrawing the supreme court districts in each redistricting cycle since entry of the Consent Judgment. For instance, during the 2011 redistricting session, the legislature considered redrawing the supreme court districts, but legislators failed to agree on a new map. *See* ROA.1760-1761. Similarly, in both the 2021

[8] The State's suggestion (Supp. Br. 41) that the Consent Judgment results in "deep federal intrusion into a core aspect of State sovereignty" likewise fails because the State has always retained the ability to redistrict.

redistricting session and in two special legislative sessions this year, the Louisiana legislature again expressed interest in trying to enact a new map, but legislators could not reach consensus. *See* Greg LaRose, *Louisiana Supreme Court justices want their districts redrawn*, La. Illuminator (Dec. 29, 2023, 5:00 a.m.), https://perma.cc/DP5P-GB55 (noting that four proposals to redraw the Louisiana supreme court districts were introduced during the 2022 redistricting session but none was brought up for a floor vote).[9] In fact, the only time the State has redrawn its supreme court districts in the last 100 years was in 1997, and only then because the Consent Judgment entered in this case required the State to do so. *See* ROA.1954-1955. The State has not shown that it is the Consent Judgment, rather than politics, that has kept the legislature from correcting any population differences across districts. *See* ROA.1954-1955.

2. In any event, it was not an abuse of discretion for the district court to deny the State relief from the Consent Judgment. "Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed

[9] *See also* Greg LaRose, *New districts for Louisiana Supreme Court justices die without a Senate vote*, La. Illuminator (Jan. 24, 2024, 5:56 p.m.), https://perma.cc/M4WR-WAYW (discussing first special legislative session); Tyler Bridges, *Louisiana Supreme Court redistricting is dead for now. Here's why and what happens next.*, The Advocate (Feb. 27, 2024), https://perma.cc/R3H3-2GFB (discussing second special legislative session).

modification is suitably tailored to the changed circumstance." *Rufo I*, 502 U.S. at 391. A proposed modification must be "tailored to resolve the problems created by the change in circumstances" and "do no more." *Ibid.* Termination of a consent decree, unlike modification, is proper only when "the objects of the decree have been attained." *Frazar*, 457 F.3d at 437 (quoting *Hawkins*, 540 U.S. at 442); *see also United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (holding that a consent decree "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved"); *City of Miami*, 2 F.3d at 1508 (holding that termination of a consent decree is only appropriate after the decree's basic purpose has been achieved).

The State has not met its burden to show that either modification or termination is appropriate. As discussed above, *see* pp. 17-22, *supra*, the State has not shown that the purpose of the decree has been achieved. Thus, termination of the Judgment in its entirety would be premature. And while modification to address population differences among judicial districts may be appropriate, the State must first propose a specific modification. *See LULAC*, 659 F.3d at 436 (suggesting that where a consent decree establishes single-member districts and updated census data later becomes available, modification may be appropriate where "the parties agree[] on adjustments to the districts based on the new data"). The State's Rule 60(b) motion did not propose any modification. *See* ROA.1435.

On remand, the State could meet its burden by showing that a proposed plan addressing population differences across districts would comply with the State's obligation under the Consent Judgment to guard against impermissible vote dilution in Orleans Parish. Alternatively, the State could show that a change in circumstances (*i.e.*, demographic changes) makes that obligation unworkable.

District courts have reasonably sought such evidence in similar circumstances. In *NAACP v. City of Thomasville*, for example, the defendants moved for relief from an agreed-upon remedy *after* the city adopted a new method of election for the city council. 401 F. Supp. 2d 489, 492-493 (M.D.N.C. 2005). The defendants put forth an extensive record, including voter registration data, election return results, demographic data, and an expert analysis of racially polarized voting. *See id.* at 493-495. The court concluded that the proposed method of election likely would not dilute minority voting strength and granted the motion to terminate the consent judgment. *Id.* at 503-504; *see also Smith v. Hosemann*, No. 3:01-CV-855, 2022 WL 2168960, at *1-4 (S.D. Miss. May 23, 2022) (moving to vacate a court-ordered redistricting plan *after* the State passed a new plan that satisfied all federal constitutional and statutory requirements). Here, however, the State has presented no such evidence.

Because the State has not shown, at this point, that continued enforcement of the Consent Judgment would be inequitable, this Court should affirm the district court's separate denial of the State's Rule 60(b)(5) motion on this ground.

CONCLUSION

For these reasons, this Court should affirm the district court's order denying the State's motion to vacate the Consent Judgment.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Yael Bortnick
ERIN H. FLYNN
YAEL BORTNICK
ANNA M. BALDWIN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

CERTIFICATE OF SERVICE

On March 29, 2024, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,161 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 5th Cir. Rule 32.2. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: March 29, 2024