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
No. 2:86-cv-4075

BRIEF OF MISSISSIPPI AND TEXAS AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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Federal institutional-reform injunctions are disfavored—particularly when they come in the form of consent decrees. Those injunctions inherently raise federalism concerns: after all, under such injunctions a federal court restructures, regulates, and oversees state and local government institutions. Those federalism concerns are magnified with consent decrees. Those decrees often regulate areas of core state responsibility, often are imposed without any admission or adjudication of liability, often are sweeping in scope, and often can have indefinite duration—binding successor officials who had nothing to do with those decrees. Recognizing the sensitive federalism concerns presented by institutional-reform consent decrees, the Supreme Court has directed courts to take a "flexible approach" to requests to dissolve those decrees—an approach that seeks to mitigate the many concerns in this area. *Horne v. Flores*, 557 U.S. 433, 450 (2009). Under that approach,

federal courts must "ensure that responsibility for discharging the State's obligations is returned promptly" to state officials "when the circumstances warrant." *Ibid.* (quotations omitted).

The panel majority departed from these principles in this case. The panel upheld the district court's refusal to dissolve Louisiana's 30+-year-old consent decree that regulates the State's power to draw a state-supreme-court district—even though Louisiana has performed every remedial action that the decree requires and has done so for decades. Rather than view the 30+-year-old consent decree with due respect for Louisiana's longstanding compliance and with the "flexibility" that federalism demands, the panel majority deemed the federalism concerns "exaggerated" and at every turn put a thumb on the scale to favor keeping the decades-old consent decree in place. The majority imposed on the decree a prospective-compliance requirement that entrenches harms to the State and indefinitely forces decades-old political choices upon it. The majority exacerbated those harms by imposing on the State heightened dissolution standards that defy settled redistricting principles.

The sound resolution of this case is important to amici curiae, the States of Mississippi and Texas.* The majority's decision departs from Supreme Court precedents on institutional-reform litigation and from

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important principles of federalism. This Court should grant rehearing en banc and reverse the district court's judgment.

ARGUMENT

The Divided Panel's Decision Cannot Be Reconciled With Important Principles Of Federalism.

A. Institutional-Reform Consent Decrees Present Significant Federalism Concerns.

Institutional-reform injunctions are "disfavored." *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018) (citing *Horne v. Flores*, 557 U.S. 433, 448 (2009)). It is not hard to see why: under such injunctions, a federal court restructures, regulates, and (often indefinitely) oversees state and local government institutions. These injunctions "'raise sensitive federalism concerns'" and "'involve[ ] areas of core state responsibility.'" *Ibid.* (quoting *Horne*, 557 U.S. at 448). Under our system of federalism, institutional-reform injunctions are suspect from the start.

Institutional-reform injunctions in the form of consent decrees raise even bigger federalism problems. They exacerbate the problems of other institutional-reform injunctions in several ways.

To start, consent decrees usually lack core hallmarks of judicial decision-making. Perhaps most centrally, they often do not involve an adjudication of liability. Institutional-reform consent decrees thus often

never require a court to "determine whether the plaintiff established his factual claims and legal theories" or to "find[ ] that a statutory or constitutional violation has occurred." Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. Pa. J. Const. L. 637, 647 (2014) (quotations omitted). Such consent decrees also involve no judicial "inquir[y] into the precise legal rights of the parties" and do not require federal judges to "reach and resolve the merits of the claims or controversy." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quotations omitted). Indeed, "[m]ost consent decrees reflect no judgment of any government official. A and B draft and approve the decree; court approval is a mere rubber stamp." *Allen v. Louisiana*, 14 F.4th 366, 375 n.* (5th Cir. 2021) (Oldham, J., concurring) (quotations omitted). This all means that, under an institutional-reform consent decree, there is a great risk an injunction will have massive consequences without a full resolution of a concrete legal issue.

The scope of institutional-reform consent decrees compounds these federalism concerns. These decrees are broad by definition: they restrain and regulate an entire State or local institution. But it gets worse. Institutional-reform consent decrees often encompass broader relief than the complaint seeks or than the court could have ordered through an

adversarial trial. "[S]tate and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation ... [and] also more than what a court would have ordered absent the settlement." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389, 392 (1992); *see Derrickson v. City of Danville,* 845 F.2d 715, 717 (7th Cir. 1988) (recognizing that institutional-reform consent decrees may "tempt[ ]" government officials "to do by 'consent' what federal law does not require or state law permit"). The costs and stakes of institutional-reform litigation can be so staggering that defendant officials will just agree to relief that ends the case—even if that relief is broader than appropriate.

The duration of institutional-reform consent decrees raises yet another problem. Even when they are time-limited, such decrees often purport to indefinitely bind future officials to that broader relief. Such decrees—particularly when they "bind state and local officials to the policy preferences of their predecessors"—can "'improperly deprive future officials of their designated legislative and executive powers.'" *Horne*, 557 U.S. at 449, 451 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)). Inheriting "overbroad or outdated consent decrees" hinders the ability of state and local officials "to respond to the priorities and concerns of their constituents" and thus inhibits core principles of democracy. *Ibid.*

(quotations omitted); *accord* Mark Kelley, *Saving 60(B)(5): The Future of Institutional Reform Litigation*, 125 Yale L.J. 272, 303 (2015) ("Consent decrees involving government institutions pose a threat to democratic accountability: parties may negotiate public policy behind closed doors, and politicians may lock in future administrations, pander to private interests, and seek political cover."). And consent decrees are often not time-limited but instead "remain in place for extended periods." *Rufo*, 502 U.S. at 380; *accord* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 Vand. L. Rev. 167, 188 (2017) (noting that "countless [institutional-reform] injunctions issued in the past continue to influence the day-to-day operation of government institutions across a wide range of legal areas"). That just compounds the problems that consent decrees present. "To the extent that consent decrees insulate today's policy decisions from review and modification by tomorrow's political processes, they violate the democratic structure of government." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 297.

In short, as two veteran institutional-reform-decree litigators have explained, so-called "democracy by decree" "goes beyond the proper business of the courts; it often renders government less capable of responding to the legitimate desires of the public; and it makes

politicians less accountable to the public." Ross Sandler & David Schoenbrod, Democracy By Decree: What Happens When Courts Run Government 139 (2003).

Recognizing the "sensitive federalism concerns" presented by "institutional reform decrees," the Supreme Court has directed federal courts to take a "flexible approach to Rule 60(b)(5) motions addressing such decrees." *Horne*, 557 U.S. at 448, 450 (quotations omitted). That "flexible approach" should "ensure that responsibility for discharging the State's obligations is returned promptly" to state officials "when the circumstances warrant." *Id.* at 450 (quotations omitted) When "applying this flexible approach," courts "must remain attentive" to excessive "decrees" that "improperly deprive future officials of their designated legislative and executive powers." *Ibid.* (quotations omitted) And a "critical question" is whether the "objective" of the decree "has been achieved." *Ibid.* "If a durable remedy has been implemented, continued enforcement of [the decree] is not only unnecessary, but improper." *Ibid.* In sum, federalism imposes sharp limits on institutional-reform consent decrees—and courts must enforce those limits by dissolving such decrees as soon as appropriate.

B. The Panel Majority's Decision Fails To Account For The Significant Federalism Concerns Presented By The Institutional-Reform Consent Decree In This Case.

The principles set out above required the panel in this case to dissolve Louisiana's 30+-year-old institutional-reform consent decree. The panel's departure from those principles warrants rehearing en banc.

The consent decree here raises all the "sensitive federalism concerns" that come with institutional-reform consent decrees. *Horne*, 557 U.S. at 448. First, the decree restricts and regulates the State's power to draw a state supreme-court district. Op. 3-4. That implicates a State's "duty and responsibility" over districting: "the most vital of local functions." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quotations omitted). Second, the consent decree does not rest on an adjudication of liability. The district court never adjudicated on the merits the plaintiffs' claim under Section 2 of the Voting Rights Act (VRA). Op. 3. The State did not concede liability. Third, the decree binds those who had no part in making it: former state officeholders negotiated and executed the decree, leaving their successors to live with the long-term consequences. Op. 3. Fourth, the decree has been in place for decades—and, in the panel majority's view, will be in place indefinitely. As the majority viewed things, the decree indefinitely surrenders the State's redistricting

authority to federal courts until the State achieves "prospective compliance with Section 2 of the VRA." Op. 24.

Under the "flexible approach" to institutional-reform decrees and given the "sensitive federalism concerns" that the Supreme Court has recognized, *Horne*, 557 U.S. at 448, 450, the consent decree here should be dissolved. Louisiana has performed every remedial action that the consent decree requires. The decree required the State to reapportion its supreme-court districts and take seven other concrete steps to alter the composition of its supreme court. ROA.99-102. Over the past 30+ years the State has performed each of those steps. Indeed, there is "no actual dispute that the State" has fulfilled "*all* eight remedies" required by the decree. Diss. 45 (emphasis in original); *see* Diss. 45 n.10, 11 (noting that the panel majority, the district court, and the parties have not "identifie[d]" any "undone or lacking" "remedial action item" in the consent decree). The decree's "objective" has thus "been achieved," and the district court was required to restore to Louisiana its redistricting authority "promptly." *Horne*, 557 U.S. at 450 (quotations omitted); *see Frew v. Janek*, 780 F.3d 320, 323, 327 (5th Cir. 2015) ("the Supreme Court's unambiguous instructions" require lower courts to apply a "flexible standard" under Rule 60(b)(5) and to "promptly" restore state

officials' authority when a consent decree's objectives "have been obtained").

The panel majority reached the opposite conclusion by casting the federalism concerns here as "exaggerated" (Op. 33), failing to apply the "flexible approach" to dissolving institutional-reform consent decrees, and at each in turn instead assessing the circumstances under an unstated rigid presumption in favor of keeping the decades-old consent decree in place. *See*, *e.g.*, Op. 12-16 (reading Louisiana contract principles to defeat the State's proffered "substantial compliance" standard); Op. 15-16 (viewing decree's "final remedy" as "prospective compliance with Section 2 of the VRA"); Op. 27-31 (downplaying State's interest in redistricting its malapportioned supreme-court districts). Judge Engelhardt's dissent (Diss. 37-53) and Louisiana's petition (Pet. 5-14) amply rebut the flaws in the majority's conclusions. At least two components of the majority's approach are a particular affront to federalism and warrant further emphasis.

First, the majority read the decree to require not just compliance with the decree itself but also "prospective compliance with Section 2 of the VRA." Op. 15; *see* Op. 12-16. But that view impermissibly contemplates perpetual "federal-court oversight" of a vital state authority without "an ongoing violation of federal law." *Hawkins*, 540

U.S. at 441; *see Horne*, 557 U.S. at 447-48. And that view entrenches harms to the State's present-day officials and citizens by forcing decades-old political choices upon them in the present—and for the indefinite future. *See Horne*, 557 U.S. at 449 ("Where state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials.") (citation and internal quotation marks omitted); *Hawkins*, 540 U.S. at 442 (States "depend[ ] upon successor" officials to "bring new insights and solutions" to state problems). Federalism requires reading the consent decree to avoid those harms.

Second, the majority imposed on the State heightened dissolution standards that do not apply here. The majority adopted the plaintiffs' preferred "*Dowell* standard"—drawn from the *sui generis* school-desegregation context—which "asks 'whether the [State] had complied in good faith with the ... decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.'" Op. 17 (quoting *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 250 (1991)) (alterations in original); *see* Op. 16-27. The majority then heightened that standard's good-faith requirement to encompass an examination of "both past

compliance *and* future prospects," placing the burden on the State to "satisf[y]" the court that "there is relatively little or no likelihood that the original ... violation will promptly be repeated when the decree is lifted." Op. 24 (quotation marks omitted; alterations in original).

That prospective-compliance regime compounds the federalism concerns already inherent in this dispute. It conflicts with established principles that govern lawmaking and that have particular importance in redistricting. The majority's prospective "good faith" requirement in effect bars current (and future) state legislators from revising the boundaries of an election district unless the State proves that lawmakers *will* do that in good faith. Federal courts must presume that lawmakers have acted in "good faith" when they draw new electoral districts. *Abbott*, 138 S. Ct. at 2324; *see Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("[T]he sensitive nature of redistricting" and "the presumption of good faith that must be accorded legislative enactments" requires federal courts to "exercise extraordinary caution" in redistricting cases.). That presumption endures, even when federal courts have found that "past discrimination" infected prior redistricting. *Abbott*, 138 S. Ct. at 2324. And, in any challenge to a new redistricting enactment, the "burden of proof" to overcome the "presumption of legislative good faith" always

rests on the law's challengers. *Ibid.* The panel majority's heightened standard defies those rules.

CONCLUSION

This Court should grant rehearing en banc and reverse the district court's judgment.

Respectfully submitted,

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Dated: November 15, 2023

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: November 15, 2023

s/ Justin L. Matheny
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Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the content and form requirements of Fed. R. App. P. 29(a)(4), 29(b)(4), and 32(a) and Fifth Circuit Rule 29.2, and comports with the word-limitation requirements of Fed. R. App. P. 29(b)(4), because the brief, excluding the parts of the document exempted by Fed. R. App. P. 32, contains 2,509 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which appear in Century Schoolbook 12-point font.

Dated: November 15, 2023

s/ Justin L. Matheny
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In short, as two veteran institutional-reform-decree litigators have explained, so-called "democracy by decree" "goes beyond the proper business of the courts; it often renders government less capable of responding to the legitimate desires of the public; and it makes

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B. The Panel Majority's Decision Fails To Account For The Significant Federalism Concerns Presented By The Institutional-Reform Consent Decree In This Case.

The principles set out above required the panel in this case to dissolve Louisiana's 30+-year-old institutional-reform consent decree. The panel's departure from those principles warrants rehearing en banc.

The consent decree here raises all the "sensitive federalism concerns" that come with institutional-reform consent decrees. *Horne*, 557 U.S. at 448. First, the decree restricts and regulates the State's power to draw a state supreme-court district. Op. 3-4. That implicates a State's "duty and responsibility" over districting: "the most vital of local functions." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quotations omitted). Second, the consent decree does not rest on an adjudication of liability. The district court never adjudicated on the merits the plaintiffs' claim under Section 2 of the Voting Rights Act (VRA). Op. 3. The State did not concede liability. Third, the decree binds those who had no part in making it: former state officeholders negotiated and executed the decree, leaving their successors to live with the long-term consequences. Op. 3. Fourth, the decree has been in place for decades—and, in the panel majority's view, will be in place indefinitely. As the majority viewed things, the decree indefinitely surrenders the State's redistricting

authority to federal courts until the State achieves "prospective compliance with Section 2 of the VRA." Op. 24.

Under the "flexible approach" to institutional-reform decrees and given the "sensitive federalism concerns" that the Supreme Court has recognized, *Horne*, 557 U.S. at 448, 450, the consent decree here should be dissolved. Louisiana has performed every remedial action that the consent decree requires. The decree required the State to reapportion its supreme-court districts and take seven other concrete steps to alter the composition of its supreme court. ROA.99-102. Over the past 30+ years the State has performed each of those steps. Indeed, there is "no actual dispute that the State" has fulfilled "*all* eight remedies" required by the decree. Diss. 45 (emphasis in original); *see* Diss. 45 n.10, 11 (noting that the panel majority, the district court, and the parties have not "identifie[d]" any "undone or lacking" "remedial action item" in the consent decree). The decree's "objective" has thus "been achieved," and the district court was required to restore to Louisiana its redistricting authority "promptly." *Horne*, 557 U.S. at 450 (quotations omitted); *see Frew v. Janek*, 780 F.3d 320, 323, 327 (5th Cir. 2015) ("the Supreme Court's unambiguous instructions" require lower courts to apply a "flexible standard" under Rule 60(b)(5) and to "promptly" restore state

officials' authority when a consent decree's objectives "have been obtained").

The panel majority reached the opposite conclusion by casting the federalism concerns here as "exaggerated" (Op. 33), failing to apply the "flexible approach" to dissolving institutional-reform consent decrees, and at each in turn instead assessing the circumstances under an unstated rigid presumption in favor of keeping the decades-old consent decree in place. *See*, *e.g.*, Op. 12-16 (reading Louisiana contract principles to defeat the State's proffered "substantial compliance" standard); Op. 15-16 (viewing decree's "final remedy" as "prospective compliance with Section 2 of the VRA"); Op. 27-31 (downplaying State's interest in redistricting its malapportioned supreme-court districts). Judge Engelhardt's dissent (Diss. 37-53) and Louisiana's petition (Pet. 5-14) amply rebut the flaws in the majority's conclusions. At least two components of the majority's approach are a particular affront to federalism and warrant further emphasis.

First, the majority read the decree to require not just compliance with the decree itself but also "prospective compliance with Section 2 of the VRA." Op. 15; *see* Op. 12-16. But that view impermissibly contemplates perpetual "federal-court oversight" of a vital state authority without "an ongoing violation of federal law." *Hawkins*, 540

U.S. at 441; *see Horne*, 557 U.S. at 447-48. And that view entrenches harms to the State's present-day officials and citizens by forcing decades-old political choices upon them in the present—and for the indefinite future. *See Horne*, 557 U.S. at 449 ("Where state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents, they are constrained in their ability to fulfill their duties as democratically-elected officials.") (citation and internal quotation marks omitted); *Hawkins*, 540 U.S. at 442 (States "depend[ ] upon successor" officials to "bring new insights and solutions" to state problems). Federalism requires reading the consent decree to avoid those harms.

Second, the majority imposed on the State heightened dissolution standards that do not apply here. The majority adopted the plaintiffs' preferred "*Dowell* standard"—drawn from the *sui generis* school-desegregation context—which "asks 'whether the [State] had complied in good faith with the ... decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.'" Op. 17 (quoting *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 250 (1991)) (alterations in original); *see* Op. 16-27. The majority then heightened that standard's good-faith requirement to encompass an examination of "both past

compliance *and* future prospects," placing the burden on the State to "satisf[y]" the court that "there is relatively little or no likelihood that the original ... violation will promptly be repeated when the decree is lifted." Op. 24 (quotation marks omitted; alterations in original).

That prospective-compliance regime compounds the federalism concerns already inherent in this dispute. It conflicts with established principles that govern lawmaking and that have particular importance in redistricting. The majority's prospective "good faith" requirement in effect bars current (and future) state legislators from revising the boundaries of an election district unless the State proves that lawmakers *will* do that in good faith. Federal courts must presume that lawmakers have acted in "good faith" when they draw new electoral districts. *Abbott*, 138 S. Ct. at 2324; *see Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("[T]he sensitive nature of redistricting" and "the presumption of good faith that must be accorded legislative enactments" requires federal courts to "exercise extraordinary caution" in redistricting cases.). That presumption endures, even when federal courts have found that "past discrimination" infected prior redistricting. *Abbott*, 138 S. Ct. at 2324. And, in any challenge to a new redistricting enactment, the "burden of proof" to overcome the "presumption of legislative good faith" always

rests on the law's challengers. *Ibid.* The panel majority's heightened standard defies those rules.

CONCLUSION

This Court should grant rehearing en banc and reverse the district court's judgment.

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Dated: November 15, 2023

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: November 15, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the content and form requirements of Fed. R. App. P. 29(a)(4), 29(b)(4), and 32(a) and Fifth Circuit Rule 29.2, and comports with the word-limitation requirements of Fed. R. App. P. 29(b)(4), because the brief, excluding the parts of the document exempted by Fed. R. App. P. 32, contains 2,509 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, which appear in Century Schoolbook 12-point font.

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