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

THE STATE'S EN BANC SUPPLEMENTAL BRIEF

RETRIEVED FROM DEMOCRACYDOCKET.COM

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
MORGAN BRUNGARD
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 94005
Baton Rouge, LA 70804
Telephone: (225) 999-6864
BrungardM@ag.louisiana.gov
Counsel for the State

CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, the State is a governmental party and need not furnish a certificate of interested persons.

/s/ Morgan Brungard
Morgan Brungard
Counsel for Defendant-Appellant
State of Louisiana

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

Statutes

RETRIEVED FROM DEMOCRACYDOCKET.COM

Other Authorities

Rules

Constitutional Provisions

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

Thirty years ago, the State of Louisiana—while expressly disclaiming any liability—settled a Voting Rights Act (VRA) lawsuit challenging a multi-member State Supreme Court voting district. The parties agreed the State would take eight concrete action items and, in return, Plaintiffs would dismiss all their claims with prejudice. The district court adopted that agreement in a Consent Judgment. Fast forward three decades: It is undisputed that the State fulfilled its end of the bargain by at least 2012 and has maintained that status quo ever since.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The State's complete compliance not only ended the use of multi-member districts, but also empowered Orleans Parish's Black voters to elect their candidate of choice for Supreme Court Justice—for the last three decades, and in effect for the next six years because Justice Piper Griffin will remain on the bench through at least 2030.

During and beyond the State's compliance, however, Louisiana's demographics changed. In particular, the Orleans Parish seat is now severely malapportioned—and has been for decades. For that reason, Louisiana's elected officials sought to fix the problem and asked the

district court overseeing the Consent Judgment to restore to the State the sovereign responsibility to draw its voting districts. Only then may the State ensure that Louisianans are served by Justices and districts that reflect bedrock principles of equality and democracy.

But the district court refused to free the State. It reasoned that the Consent Judgment was entered "to ensure compliance with Section 2 of the [VRA]" and that the State had not carried its burden of demonstrating "good faith" compliance with the VRA. ROA.1940–44. The district court acknowledged that "the State has complied with the terms of the Consent Judgment," but it insisted that the State must also "show[] there is little or no likelihood *the original violation* will not be repeated when the Consent Judgment is lifted"—"in other words," the State must show that "there will continue to be a Black opportunity district in Orleans Parish in the future." ROA.1948 (emphasis added). But *what* violation? Remember, the court never made a liability finding before entering the Consent Judgment, and the State expressly disclaimed liability. There was thus no "original violation," much less one that the State is now required to prove will never materialize at some unspecified time in the future.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The district court's action in this case is unprecedented, extraordinary, and wrong. It is life imprisonment by consent decree with no possibility of parole. And it directly abridges the State's sovereign responsibility for elections of its own Supreme Court. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))). By the district court's lights, that sovereign power will not be restored until the Attorney General—"the chief legal officer of the state," La. Const. art. IV § 8—somehow makes a judicially enforceable promise to maintain indefinitely "a Black opportunity district in Orleans Parish." ROA.1948. But that is just the Consent Judgment all over again. And by that logic, the Consent Judgment will never be satisfied. It is the Hotel California of consent decrees.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Eternal consent decrees are generally off limits under binding precedent and basic separation-of-powers principles. *See Allen v. Louisiana*, 14 F.4th 366, 373 (5th Cir. 2021); *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 387 (5th Cir. 2014)*; Guajardo v.*

Tex. Dep't of Crim. Just., 363 F.3d 392, 394 (5th Cir. 2004). For good reason: "[I]nstitutional reform injunctions often raise sensitive federalism concerns," especially where, as here, they "involve[] areas of core state responsibility," like redistricting. *Horne v. Flores*, 557 U.S. 433, 448 (2009). Federal courts thus have an affirmative obligation to "ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned *promptly* to the State and its officials." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (emphasis added). The district court heeded none of these teachings.

One final note: Under the district court's Order, the Plaintiffs and the U.S. Department of Justice will have effectively forced Louisiana into a backdoor, post-*Shelby County* Section 3 pre-clearance regime. *See* 52 U.S.C. § 10302(c).[1] And that has only emboldened the Department of Justice, which is running the same play in other similar cases. *See* United States' Notice of Suppl. Auth. at 3, *United States v. City of New Orleans*, No. 2:12-cv-01924 (E.D. La. Nov. 15, 2023), ECF No. 757 (Morgan, J.) (arguing "the City has not demonstrated that it is entitled to termination"

RETRIEVED FROM DEMOCRACYDOCKET.COM

[1] To be clear, no Section 3(c) relief was sought or ordered in the *Chisom* litigation.

because it has not met "the *Dowell* standards that [this case] held applied to termination of consent judgments in institutional reform cases").

This is not how the law, federalism, and our constitutional system work. And just as "federal judges are appointed for life, not for eternity," *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019), so too consent decrees cannot be immortal. The Court should reverse.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is tentatively set for the week of May 13, 2024, before the en banc Court.

STATEMENT OF JURISDICTION

Because the Plaintiffs filed their 1986 lawsuit under the VRA of 1965 (52 U.S.C. § 10301), the district court had jurisdiction under 28 U.S.C. § 1331. Roughly thirty years ago, the parties signed a settlement agreement that has been called a consent judgment that resolved the Plaintiffs' claims. *See* ROA.1935. The State of Louisiana moved the district court to dissolve it, *see* ROA.1429, ROA.1934, but the district court denied Louisiana's motion, *see* ROA.1957. An order denying a request to dissolve a consent judgment is immediately appealable under 28 U.S.C. § 1292(a)(1). *See Ruiz v. United States*, 243 F.3d 941, 945 (5th Cir. 2001).

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF THE ISSUES ON REHEARING

1. It is undisputed that neither the district court nor its Consent Judgment ever found a Section 2 violation, and it is likewise undisputed that the State has fully satisfied the Consent Judgment over the past three decades. Does the State's complete compliance with the consent judgment (a) eliminate the district court's continuing jurisdiction and/or (b) render the Consent Judgment "satisfied" under Rule 60(b)(5)?

2 Did the district court err by replacing Louisiana contract principles with the standard for dissolving school desegregation decrees to determine whether the Consent Judgment had been "satisfied" under Rule 60(b)(5)?

3. In light of the current widespread malapportionment of Louisiana Supreme Court voting districts, is it "no longer equitable" under Rule 60(b)(5) to apply the Consent Judgment prospectively?

RETRIEVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF THE CASE[2]

To avoid repetition, the State incorporates by reference the statement of the case from its Opening Brief to the Panel.

SUMMARY OF THE ARGUMENT

The creation of voting districts is "primarily the duty and responsibility of the State," *Miller*, 515 U.S. at 915, but Louisiana has not been permitted to exercise its prerogative for more than thirty years. This is because the State settled a VRA lawsuit filed almost forty years ago. And when this Court invited the State to seek relief from this prohibition, *Allen*, 14 F. 4th at 374, the State promptly did so. The district court's Order denying that request was plainly wrong on the merits, and that error is underscored by the fact that the court lacked jurisdiction to do anything other than dissolve the Consent Judgment and dismiss the case.

RETRIEVED FROM DEMOCRACYDOCKET.COM

As to jurisdiction, the district court lacks jurisdiction to do anything except grant the State's motion and dismiss the case. A court can exercise

[2] The Court's January 29, 2024 Order granting the State's motion for rehearing en banc requested that the parties furnish their panel-stage merits briefs to the en banc Court for its consideration. Accordingly, this brief serves as a supplemental brief to avoid unnecessary repetition of facts and arguments.

continuing jurisdiction (1) to remedy the underlying violation of federal law and (2) to enforce the terms of a consent decree. But neither applies here. No VRA violation was ever established by party agreement or judicial finding, so there is no underlying violation to remedy. And there are no unfulfilled terms to enforce because the State undisputedly satisfied the terms of the Consent Judgment decades ago and has maintained the status quo ever since. The district court's Order doubling down on eternal consent-decree power is therefore void for lack of subject matter jurisdiction.

On the merits, first, Louisiana plainly "satisfied" the Consent Judgment's terms. Fed. R. Civ. P. 60(b)(5). That document set out eight concrete and ascertainable steps, and everyone—the State, the Plaintiffs, the Department of Justice, the district court, and the Panel Majority—agrees that *all eight* have been completed. That should have ended the district court's inquiry. Had the district court applied Louisiana contract law (which it ignored), the question should have been whether the State had substantially performed its obligations under the Consent Judgment. *Dugue v. Levy*, 37 So. 995, 996 (La. 1904). The obvious answer under the undisputed facts is yes. Substantial performance is not perfect

RETRIEVED FROM DEMOCRACYDOCKET.COM

performance, and yet the State went above and beyond to fully perform all eight action items and maintain that status quo for decades. That *complete* compliance constitutes *at least* "substantial compliance."

The district court rejected that straightforward conclusion, instead applying a test used nowhere except the school-desegregation context. In so doing, the court transformed Rule 60(b)(5) into an impossible mandate that the State prove a prospective negative—future and perpetual compliance with the Voting Rights Act. By morphing the Consent Judgment into a de facto preclearance regime, the district court transgressed binding caselaw and overrode the federalism and separation-of-powers principles that govern the delicate interplay between the State and the federal courts.

RETRIEVED FROM DEMOCRACYDOCKET.COM

What is more, the astounding malapportionment of Louisiana's Supreme Court voting districts independently renders the Consent Judgment "no longer equitable." Fed. R. Civ. P. 60(b)(5). Even though the *constitutional* one-person one-vote principle does not apply to judicial voting districts, the power of voters to select their judicial officers plainly matters (or else the Voting Rights Act would not apply to judicial elections). *See Chisom v. Roemer*, 501 U.S. 380, 385 (1991). This

malapportionment is profoundly unfair to a broad swath of the Louisiana electorate and harms the public interest, as both the district court and Panel Majority wrongly refused to acknowledge.

The district court's order should be reversed either for lack of subject matter jurisdiction or as an abuse of discretion under Rule 60(b)(5).

ARGUMENT

I. LOUISIANA SATISFIED THE TERMS OF THE CONSENT DECREE, LEAVING NOTHING WITHIN THE DISTRICT COURT'S CONTINUING JURISDICTION.

A. There is nothing magical about consent judgments that exempts them from traditional legal principles. Indeed, mistakenly treating them as unicorns is a dangerous enterprise. *See Allen*, 14 F.4th at 375 & n.* (Oldham, J., concurring) ("Much has been written about the perniciousness of consent decrees.") (collecting cases and law review articles). It is, of course, true that institutional reform consent judgments are a unique combination of contract and judicial judgment. *Smith v. Sch. Bd. of Concordia Par.*, 906 F.3d 327, 334 (5th Cir. 2018). But parties' agreement to a certain remedy in the hopes of saving time and money (and avoiding uncertainty) does not magically suspend the legal

RETRIEVED FROM DEMOCRACYDOCKET.COM

principles that generally govern contracts and judgments. *See Moore v. Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 407 (5th Cir. 2017) ("[C]onsent decrees are contractual in nature, so parties may fairly expect such orders to be enforced as both a contract and a judicial decree." (citing *Hawkins*, 540 U.S. at 437)).

On the contract side, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 521–22 (1986). It should be unsurprising, then, that a district court has jurisdiction to "enforce" the "obligations" parties assume in a consent judgment. *Borel ex rel. A.L. v. Sch. Bd. Saint Martin Par.*, 44 F.4th 307, 313 (5th Cir. 2022) (citing *Smith*, 906 F.3d at 334).

RETRIEVED FROM DEMOCRACYDOCKET.COM

On the judgment side, "the prospective provisions of the consent decree operate as an injunction." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983); *accord Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) ("[W]hen a decree commands or prohibits conduct, it is called an

injunction.").[3] So no surprise here—traditional limitations on injunctions apply to consent decrees. *Moore*, 864 F.3d at 407 ("As a judicial decree, such injunctions are 'subject to the rules generally applicable to other judgments and decrees[.]'" (quoting *Hawkins*, 540 U.S. at 441)).

These two generally applicable legal principles should keep institutional reform consent decrees within their appropriate bounds. But district courts often retain continuing jurisdiction—also referred to as "remedial jurisdiction," *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 307 & n.8 (5th Cir. 2015), or "continuing remedial jurisdiction," *Borel*, 44 F.4th at 313—to oversee the implementation of a remedy. And that is where consent decrees tend to go awry. An institutional reform consent decree under a court's continuing jurisdiction too often becomes a whole new case unto itself: a case within a case.

RETRIEVED FROM DEMOCRACYDOCKET.COM

[3] *See also Carson v. Am. Brands*, 450 U.S. 79, 84 & n.9 (1981) ("[T]he practical effect" of declining a "proposed consent decree" is to refuse an injunction.); *Thomas*, 756 F.3d at 384–85 & nn.6–8 (explaining that orders affecting consent decrees are orders affecting injunctions and so are immediately appealable under 28 U.S.C. § 1292(a)(1) (collecting cases)); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (per curiam) (Rubin, J., concurring in the per curiam, joined by Brown, J., Anderson, J., Randall, J., and Clark, J.) ("[B]y virtue of its injunctive provisions, [the consent decree] reaches into the future and has continuing effect.").

Contrast that situation with private settlement agreements. Private settlements generally dismiss all claims with prejudice, and parties come back to court only if someone breaches a material term of the agreement. Consent decrees, on the other hand, keep the case open, parties must stay in court until they substantially comply with the agreement, and "failure to comply with a term" of the agreement is "a failure to comply with a court order." *See* Charles K. Bloeser, Kokkonen v. Guardian Life: *Limiting the Power of Federal District Courts to Enforce Settlement Agreements in Dismissed Cases*, 30 Tulsa L.J. 671, 686 (1995) (contrasting private settlement agreements and consent judgments).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Its merits (or demerits) aside, however, continuing jurisdiction is not eternal jurisdiction. "Judicial oversight over state institutions must, at some point, draw to a close." *Johnson v. Heffron*, 88 F.3d 404, 407 (6th Cir. 1996) (citing *Bd. of Ed. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248–49 (1991); *see also Brumfield*, 806 F.3d at 302 n.8 ("At what point does the imposition of novel 'remedial orders' pursuant to increasingly antique . . . consent decrees, without predicate liability findings, become not merely unauthorized, but abusive of federal courts' power?"); *Allen*, 14 F.4th at 373–74 (deeming it "wrong and baffling" and

"weak sauce" to assume the "*Chisom* decree is still in force" and "binding upon Louisiana *in perpetuity* unless and until the Eastern District says otherwise" (internal citations omitted) (cleaned up)).

B. Under this Consent Judgment, the district court "retain[ed] jurisdiction over this case until the complete implementation of the final remedy has been accomplished." ROA.104. That is a classic example of how a court retains continuing jurisdiction. But there is nothing left within the scope of the district court's continuing jurisdiction. The district court's Order is therefore void for lack of subject matter jurisdiction.

First, a district court can continue to exercise remedial jurisdiction only until the original violation of federal law is remedied. *See Hawkins*, 540 U.S at 441 ("If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders" may "lead to federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law."); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation . . . ."); *Horne*, 557 U.S. at 450 (same); *M.D. v. Abbott*, 907 F.3d

RETRIEVED FROM DEMOCRACYDOCKET.COM

237, 271 (5th Cir. 2018) (same); *Borel*, 44 F.4th at 312 ("A district court has the continuing ability to order affirmative relief to cure violations flowing from the original [federal law] violation."); *Allen*, 14 F.4th at 373 ("[F]ederal-court decrees must directly address and relate to the [federal law] violation itself." (quoting *Dowell*, 498 U.S. at 247)); *Brumfield*, 806 F.3d at 298 (explaining that continuing jurisdiction extends to the "the correction of the [federal] infirmity").

Brumfield is a good example of that principle. Because the challenged order was "not correcting the constitutional infirmity," that order was "outside the scope of the district court's continuing jurisdiction" and "therefore void for lack of subject matter jurisdiction." *Id.* at 298, 300. "Without any predicate finding of a [federal] violation, the courts 'lack power' to implement orders concerning a state's . . . programs. Courts no more have power to invoke remedies against public bodies without liability judgments than they do to adjudicate controversies not fitting within under federal jurisdictional standards." *Id.* at 302.

Likewise here. There never was an underlying violation of federal law. *See* Consent Judgment, ROA.98 (showing no meeting of the minds on liability). And of course, the Consent Judgment precluded any judicial

RETRIEVED FROM DEMOCRACYDOCKET.COM

finding of liability. Consent Judgment, ROA.98 (making judgment "final and binding" and "dispositive of all issues raised in this case"); ROA.103 (dismissing plaintiffs' constitutional and statutory claims "with prejudice"). And so, there is no underlying Section 2 violation for the district court to "continue" to correct.

Second, a defendant's "assumption of obligations under [a] consent order confers remedial jurisdiction on the district court to enforce those obligations." *Borel*, 44 F.4th at 313 (citing *Smith*, 906 F.3d at 334). So what happens to a court's continuing jurisdiction when a party fully complies with the terms in a consent order? Because those obligations are injunctions, the answer is easy: No such jurisdiction exists.

Article III and common sense say courts cannot order "defendants to do something they have already done." *Mann v. Ohio Dep't of Rehab. & Corr.*, 814 F. App'x 134, 135 (6th Cir. 2020); *Woodyard v. Ala. Dep't of Corr.*, 606 F. App'x 572, 573 (11th Cir. 2015) (same). If a defendant's "incomplete offer of judgment—that is, one that does not offer to meet the plaintiff's full demand for relief—does not render the plaintiff's claims moot," *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 607 (5th Cir. 2014) (collecting cases), then the opposite also must be true. That is,

RETRIEVED FROM DEMOCRACYDOCKET.COM

when the defendant gives the plaintiff "the full relief requested," the plaintiff no longer has a "personal stake in the outcome of the action," the court is no longer "capable of granting effectual relief outside the terms of the offer," and there is no "live controversy" for the court to resolve. *Id.*

Here, it is undisputed that the State gave Plaintiffs the full agreed-upon relief (even though they disagreed on liability). Consent Judgment, ROA.98 ("Accordingly, the parties to this litigation desire to effect a settlement of the issues raised by the complaint and subsequent proceedings without the necessity of further litigation, and therefore consent to entry of the following final and binding judgment as dispositive of all issues raised in this case . . . ."). The State then maintained its consent-judgment "obligations" for more than thirty years. *Borel*, 44 F.4th at 313. At this point, there is quite literally nothing for the district court to "enforce." *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

In sum, the district court's Order is beyond the scope of the district court's continuing jurisdiction because the court can neither remedy a non-existent violation nor enforce already-satisfied obligations. That Order "is therefore void for lack of subject matter jurisdiction," should be

"reversed," and the consent judgment "dissolved." *Brumfield*, 806 F.3d at 291.

II. THE DISTRICT'S CLAIM TO ETERNAL POWER FLOUTS PRECEDENT, FEDERALISM, AND THE SEPARATION OF POWERS.

Beyond the district court's misreading of Consent Judgment's terms (discussed *infra*), by construing its "final remedy" as "the State's *prospective* compliance with Section 2," Slip. Op. at 15 (emphasis added), it ensured that there is "no feasible end to judicial control," *id.* at *18 (Englehardt, J., dissenting). Unless and until the State can show that it has anticipated and "remed[ied] some undefined future imaginary breach," *id.*, the district court has pronounced that the consent decree will never dissolve. And because there is no reasonable likelihood that either Plaintiffs or the Department of Justice will *ever* agree that the chance of a future Section 2 violation is zero, "this disagreement will prevent the Consent Judgment" (as misconstrued by the district court) "from ever being satisfied." *Id.*

Without question, though, "[i]nstitutional consent decrees are 'not intended to operate in perpetuity.'" *Guajardo*, 363 F.3d at 394 (quoting *Dowell*, 498 U.S. at 248). The Supreme Court has said so. *See Horne*, 557 U.S. at 448–50. This Court has said so. *See Guajardo*, 363 F.3d at 394.

RETRIEVED FROM DEMOCRACYDOCKET.COM

And both have reached this commonsense conclusion because perpetual consent decrees "bind state and local officials to the policy preferences of their predecessors" and hinder "their designated legislative and executive powers." *Horne*, 557 U.S. at 449 (quoting *Hawkins*, 540 U.S. at 441). Given the inherent "sensitive federalism concerns," institutional consent decrees remain "disfavored," particularly where, as here, they "involve[] areas of core state responsibility." *Stukenberg*, 907 F.3d at 271 (quoting *Horne*, 557 U.S. at 448).

For this reason, the district court was obligated to "ensure that when the objects of the decree ha[d] been attained, responsibility for discharging the State's obligations [was] returned *promptly* to the State and its officials." *Hawkins*, 540 U.S. at 442 (emphasis added). Indeed, "to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant," federal "courts *must* take a 'flexible approach' to Rule 60(b)(5) motions addressing such decrees." *Horne*, 557 U.S. at 450 (emphasis added) (first quoting *Hawkins*, 540 U.S., at 442, then quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 381 (1992)).

RETRIEVED FROM DEMOCRACYDOCKET.COM

But these admonitions fell on deaf ears here. Instead of "promptly" returning control to the State over its own Supreme Court voting districts, *Hawkins*, 540 U.S., at 442, the district court used *Horne*'s "flexible approach" to run in the opposite direction, ratcheting up the State's burden. The district court's approach has extended *indefinitely* (and for all intents and purposes, *permanently*) its control over a fundamental sovereign prerogative of the State. And it did so on nothing more than (a) an impossible-to-prove negative that appears nowhere in Rule 60(b) or cases interpreting Rule 60(b) and (b) rank speculation that the State might someday violate Section 2 with respect to the Orleans Parish district if the Consent Judgment were dissolved—a violation never established by party agreement or judicial finding.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Rationalizing that approach, the district court said this Court has not "otherwise announce[d] the applicable factors courts should consider." ROA.1946. Nonsense. The Supreme Court has made clear that "this flexible approach" flexes in favor of terminating consent judgments to protect federalism even where a state defendant has not attained perfect compliance. *Horne*, 557 U.S. at 450. For example, *Horne* reminded courts not only to avoid letting "'federal-court decrees exceed appropriate

limits" by trying to "eliminat[e] a condition that does not violate [federal law] or does not flow from such a violation,'" but also to affirmatively *limit*[]" decrees "to reasonable and necessary implementations of federal law." *Id.* (emphasis added) (first quoting *Milliken*, 433 U.S. at 282, then quoting *Hawkins*, 540 U.S. at 441). Limiting a consent decree implies something less than perfect compliance.

The Panel Majority, however, blessed that extreme approach, citing "flexibility" as a reason why the district court was justified in "requir[ing] *more* of the parties to show that dissolution is warranted because of its extensive experience with the decree." Slip Op. 3 (citing *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 437–40 (5th Cir. 2011); *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1203 (10th Cir. 2018)). A chalkboard tally of the number of years—or decades in this case—that a district court has supervised state officials is no justification for abdicating this Court's de novo duty to make sure courts properly apply the law. After all, everyone agrees on the facts here. *See Bass v. Stryker Corp.*, 669 F.3d 501, 507 (5th Cir. 2012) ("We have held that where underlying facts are not disputed, the significance of those facts becomes a question of law [reviewed de novo]."). And the longer a

RETRIEVED FROM DEMOCRACYDOCKET.COM

consent decree stays in place, the more—not less—the Court should question whether it has lasted too long. *Dowell*, 498 U.S. at 237; *Guajardo*, 363 F.3d at 394; *Allen*, 14 F.4th at 373.

The district's court's error was profound. It committed fundamental separation-of-powers missteps (both vertical and horizontal) that drove a cascade of errors that infected the rest of its Order. And the Panel Majority was wrong to endorse it. Standing alone, these federalism and separation-of-powers principles strongly counsel in favor of reversal.

RETRIEVED FROM DEMOCRACYDOCKET.COM

III. LOUISIANA HAS SATISFIED THE TERMS OF THE CONSENT JUDGMENT, MANDATING DISSOLUTION UNDER RULE 60(B)(5).

A. Because consent decrees are "hybrid creatures, part contract and part judicial decree," *Smith*, 906 F.3d at 334, the district court should have applied Louisiana contract law to decide whether the judgment had been satisfied for purposes of Rule 60(b)(5), *Allen*, 14 F.4th at 371 ("We consult the contract law of the relevant state, here Louisiana."). Under Louisiana law, courts seek the parties' common intent starting with the contract's words, which control so long as they are clear and lead to no absurdities. *See* La. Civ. Code arts. 2045, 2046. "Furthermore, a contract is to be construed as a whole and each provision in the contract must be interpreted in light of the other provisions." *Baldwin v. Bd. of Supervisors*

for Univ. of La. Sys., 156 So. 3d 33, 38 (La. 2014) (citing La. Civ. Code art. 2050).

To determine whether a contract has been satisfied, the Louisiana Supreme Court has long held that "substantial performance of the contract is all that [Louisiana] law requires." *Dugue*, 37 So. at 996; *accord Lucille Ladies' Ready-To-Wear v. Glens Falls Ins. Co.*, 168 La. 696, 697, 699 (La. 1929) (applying substantial compliance to insurance contract). This test "excuses deviations from a contract's provisions that do not severely impair the contractual provision's purpose." *Frew v. Janek (Frew II)*, 820 F.3d 715, 721 (5th Cir. 2016).

Applying the substantial-compliance test here plainly shows that the Consent Judgment "has been satisfied, released, or discharged." Fed. R. Civ. P. 60(b)(5). In the words of the Consent Judgment, "[t]he Court shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished"—and, by implication, no later. ROA.104. The undisputed factual history set forth in the majority opinion and the plain language of the consent decree are clear: The "final remedy" is the implementation of the eight action items contained in Section C of the Consent Judgment. *See* ROA.99–102.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Logic compels this conclusion. The Consent Judgment provides that "[t]he relief" (the final remedy) "contained in this consent judgment" (eight actions items) "will ensure" (cause) "the system for electing the Louisiana Supreme Court [to be] in compliance with Section 2." ROA.98. As written, then, the "relief contained in this consent judgment" is the eight action items, which, in turn, are the final remedy, which is necessarily something *other than* guaranteeing perpetual "compliance with Section 2." The final remedy is the cause, Section 2 compliance is the effect, and since the time of Aristotle, the notion that one thing cannot be both its own cause and effect has been universally recognized.

Judge Englehardt correctly emphasized this point. He observed that "the 'purpose' of the Consent Judgment, by definition, cannot be its remedy," because a "'remedy' is the means by which a purpose is achieved." Slip Op. 43 (Englehardt, J., dissenting). In other words, "[a] remedy cannot be an end." *Id.*

More specifically, "[b]oth the legal definition of a remedy—that is, 'the legal means to recover a right or to prevent or obtain redress for a wrong,' *Booth v. Churner*, 532 U.S. 731, 737 (2001) (citation omitted)—and the plain English definition of a remedy—that is, 'something that

RETRIEVED FROM DEMOCRACYDOCKET.COM

corrects or counteracts'—demonstrate this plain principle." *Id.* It follows then, that "as a matter of clear, incontrovertible language, the 'final remedy' of the Consent Judgment cannot be 'the State's continued compliance with Section 2 of the VRA.'" *Id.* Instead, it must "be a course of action, a means of redress, or a corrective for the harm (*i.e.*, existing non-compliance with the VRA at the time the Consent Judgment was entered into) that it seeks to remediate." *Id.*

The course of action to which Judge Englehardt was referring is satisfaction of the eight action items contained in Section C of the consent decree. No one—not the Plaintiffs, the Department of Justice, the district court, or the Panel Majority—disputes that the State has completed *all eight*. *See* ROA.1948 (district court acknowledging 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 last possible dispute over those eight items was whether Justice Jackson would receive credit for her service while serving in the *Chisom* seat (which would in turn elevate her to the role of Chief Justice). That issue was resolved in 2012, and Chief Justice Jackson served the State with distinction for years and years from that

RETRIEVED FROM DEMOCRACYDOCKET.COM

seat.[4] In other words, since "Justice Johnson became Chief Justice and has now retired, . . . one might think the decree's final remedy has been implemented." *Allen*, 14 F.4th at 374. And that person would be right. Under Louisiana contract law, the consent decree "has been satisfied." Fed. R. Civ. P. 60(b)(5).

B. But the district court ignored Louisiana and its "substantial compliance" standard, opting instead for a non-Rule-60(b)(5) test used for dissolving desegregation orders—even though this obviously is not a desegregation case. *See Dowell*, 498 U.S. 237. This foundational legal error incorrectly stacked the deck against the State and is yet another reason why the district court's order should not stand.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The "more demanding *Dowell* standard, [] 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." Slip Op. 16. That standard is irreconcilable with this Court's application of Louisiana contract law in *Allen* to interpret *this*

[4] Indeed, as the NAACP itself explained during that litigation: "the Consent Judgment remains in effect and enforceable by this Court, until such time as Justice Johnson's service on the Supreme Court has ended." ROA.842. Even though Plaintiff NAACP's final condition was fulfilled more than a decade ago, however, the Consent Judgment persists.

Consent Judgment. *See* 14 F.4th at 371. And that error alone warrants reversal.

On top of that, *Dowell* did not interpret or apply Rule 60(b) at all. This is because *Dowell* was a school desegregation case, and Rule 60(b) is not typically used to dissolve desegregation decrees.[5] In fact, this Court has observed that, "[o]wing to school desegregation's unique legal history, the consent decree modification standards articulated in" cases like *Dowell* "may be of limited applicability" outside of the desegregation context. *Frew v. Janek (Frew I)*, 780 F.3d 320, 329 n.37 (5th Cir. 2015) (noting this Court has "cited" cases like *Dowell* "almost exclusively in . . . school desegregation cases"). And if there were any doubt, the Court has emphasized that school desegregation cases "present *unique*

RETRIEVED FROM DEMOCRACYDOCKET.COM

[5] *See Dowell*, 498 U.S. at 241 ("Motion to Close Case"); *Freeman v. Pitts*, 503 U.S. 467, 473 (1992) ("motion for final dismissal of the litigation"); *Missouri v. Jenkins*, 515 U.S. 70, 80 (1995) (seeking "partial unitary status"); *Borel*, 44 F.4th at 311 (reviewing "denial of [the board's] motion for unitary status"); *Moore*, 921 F.3d at 546 (reviewing "grant [of] 'provisional' unitary status"); *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 598, 601 (5th Cir. 2015) (stating "the [School] District moved for unitary status" and reviewing "order denying unitary status"); *Anderson v. Sch. Bd. of Madison Cnty.*, 517 F.3d 292, 294 (5th Cir. 2008) (reviewing "motion for full unitary status"); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 715–16 (2007) (explaining desegregation decree was dissolved "after finding" of "unitary status").

issues in consent decree jurisprudence" such that their "*persuasiveness is limited*" beyond that context. *Id.* at 329–30 (emphasis added). But the district court plowed through these critical admonitions and applied *Dowell* in this non-school-desegregation case anyway.

More fundamentally, Rule 60(b)(5) authorizes relief from "judgments that lack legal effect." *Kemp v. United States*, 596 U.S. 528, 537 (2022). But that is miles away from the purpose of *Dowell*. Under *Dowell*, "[d]issolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes . . . 'the time required to *remedy the effects of past intentional discrimination*.'" 498 U.S. at 248 (emphasis added) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)). A "it stopped working" judgment is quite the opposite of a "it's worked for long enough" judgment.

A test specifically designed to remedy present effects of past intentional separation of public school children by race has no place in the Rule 60(b)(5) analysis. And it especially should not be used to chain Louisiana's Supreme Court for more than thirty years based on the

RETRIEVED FROM DEMOCRACYDOCKET.COM

State's decision to end costly litigation *without admitting* Section 2 liability. The *Dowell* standard thus has no place in this litigation.

C. Worse still, both the district court and Panel Majority badly mangled *Dowell* by holding that "the [*Dowell*] good faith inquiry looks to both past compliance and future prospects." ROA.1947; *accord* Slip Op. 24 (explaining *Dowell* considers "both past compliance and 'future prospects'" and requires a showing of "'relatively little or no likelihood' of repeat violation once the Consent Order is terminated"). *Dowell* held no such thing.

Dowell asks: (1) "whether the Board ha[s] complied in good faith with the desegregation decree since it was entered" and (2) "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 498 U.S. at 249–50. The Supreme Court and this Court have a long track record of applying that two-step inquiry. *See Freeman*, 503 U.S. at 492 (quoting the two-step *Dowell* inquiry); *Missouri v. Jenkins*, 515 U.S. 70, 88–89 (1995) ("The ultimate inquiry is [the two-step *Dowell* inquiry.]"); *Borel*, 44 F.4th at 314; *Moore*, 921 F.3d at 549–50; *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 601 (5th Cir. 2015); *Anderson*, 517 F.3d at 297.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Against the weight of that precedent, the district court and Panel Majority relied on out-of-circuit opinions to add more requirements to *Dowell*. None of those cases, however, actually makes prospective compliance a part of *Dowell*.

To start, neither *Johnson*, 88 F.3d 404, nor *Inmates of Suffolk Cnty. Jail v. Rufo* (*Rufo II*), 12 F.3d 286 (1st Cir. 1993), makes prospective compliance a part of *Dowell*. *Johnson* does not apply the two-step *Dowell* inquiry, citing *Dowell* only once for the proposition that "[j]udicial oversight over state institutions must, at some point, draw to a close." *Johnson*, 88 F.3d at 407. *Johnson* cites *Rufo II*, not *Dowell*, for its "future prospects" language. *Id.* at 406 (citing *Rufo II*, F.3d at 292).

Rufo II's prospective compliance requirement is dicta. The First Circuit "neither adopt[ed] nor reject[ed]" the view that "the Commissioner would *arguably* be entitled to termination" if he could show "that it is unlikely that the original violations will soon be resumed if the decree were discontinued." 12 F.3d at 293 (emphasis added); *see also McDonald v. Carnahan*; 109 F.3d 1319, 1321 (8th Cir. 1997) (labeling as "dicta" *Rufo II*'s "unlikely to be repeated" requirement).

RETRIEVED FROM DEMOCRACYDOCKET.COM

The other cases suffer from similar problems.[6] And the one case that actually applied a prospective requirement standard—*Allen v. Alabama State Board of Education*—was vacated the next year. 164 F.3d 1347, 1350 (11th Cir. 1999) (citing *Rufo II*, 12 F.3d at 292), *vacated*, 216 F.3d 1263 (11th Cir. 2000).

Unfortunately, the district court's baseless expansion of *Dowell* did not end with prospective compliance. The district court also said *Dowell*

RETRIEVED FROM DEMOCRACYDOCKET.COM

[6] *Youngblood v. Dalzell* does not involve Rule 60(b) and does not apply the two-step *Dowell* inquiry. 925 F.2d 954, 956 (6th Cir. 1991) (reviewing "the trial judge's sua sponte dismissal"). *Youngblood* held only that, "[s]imilarly [to *Dowell*]," the district court "should consider whether to terminate its jurisdiction over the case in light of the specific terms of the consent decree." *Id.* at 960.

Jeff D. v. Otter, 643 F.3d 278, 283 (9th Cir. 2011) was found by this Court to be "inapposite" to non-desegregation cases, and this Court expressly declined to apply it outside of the desegregation context because it "rested on two school desegregation cases." *Frew I*, 780 F.3d at 329.

Alexander v. Britt did not require prospective compliance under *Dowell* and anyway is dicta. 89 F.3d 194, 200 (4th Cir. 1996) (suggesting "the *Dowell* standard may well be inapplicable to consent decrees" but declining to "definitively resolve the question" because "even if the *Dowell* standard applied to the 1992 consent order, the administrators did not and could not satisfy that standard").

McDonald applies the traditional two-step *Dowell* inquiry that "consider[s] *past* compliance with court orders and defendant's good faith." 109 F.3d at 1321 (emphasis added) (citing *Dowell*, 498 U.S. at 249).

"examines whether 'the purpose of the consent order has been fulfilled.'" ROA.1950 (quoting *Alexander v. Britt*, 89 F.3d 194, 202 (4th Cir. 1996)). Wrong.

For one, that is not what *Alexander* said. *Alexander* merely (and logically) reasoned that "meet[ing] the *Dowell* standard" by showing that "the 'vestiges' of past unlawful behavior have been eliminated 'to the extent practicable'" would satisfy "the purpose of the decree." 89 F.3d at 200.

For another, the Supreme Court flatly rejected adding terms to consent decrees to "carr[y] out the purposes of the decree." *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984) (calling that approach "unconvincing"); *see United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971) ("[A] decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.")

Adding brand new requirements to *Dowell* now—more than thirty years after it was decided—changes the law midstream for the dozens of school boards that have invested decades toward satisfying *Dowell*,

RETRIEVED FROM DEMOCRACYDOCKET.COM

exiting their desegregation cases, and regaining control over their school districts. *Dowell* is already a very difficult standard to meet. *See Freeman*, 503 U.S. at 505 (Scalia, J., concurring) ("[O]nce state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, effectively irrebuttable (because the school district cannot prove the negative), that any current racial imbalance is the product of that violation, at least if the imbalance has continuously existed . . . ."). Making *Dowell* even more onerous at this very-late stage of the game will wreak havoc for the State's school boards and keep the many open desegregation cases—and there are dozens in Louisiana alone[7]—in the federal courts for many more decades to come.

RETRIEVED FROM DEMOCRACYDOCKET.COM

At bottom, the district court's error (and the Panel Majority's perpetuation of it) rips *Dowell* from its desegregation context and then augments it in a manner that makes the State's predicament even more intractable. From that mistake, the rest followed. Reversal is thus warranted.

---

[7] *See Parish Desegregation Matrix*, Tulane University (last updated Aug. 8, 2010), https://africanamericanhighschoolsinlouisianabefore1970.files.wordpress.com/2018/04/parish-desegregation-status-summary.pdf (showing forty school districts still under desegregation order as of 2010)

D. One final error warrants mention. The Panel Majority allowed the district court to swap the agreement the parties actually made for the one the court wished they had made. And it did so at both the liability and remedy levels. As for liability, the State expressly disclaimed any liability decades ago when it entered into the Consent Judgment, but the district court required the State to show "there is little or no likelihood the *original violation* will not be repeated when the Consent Judgment is lifted." ROA.1948 (emphasis added). As for remedy, the parties agreed to a remedy of eight action items that are undisputedly now fulfilled, but the district court required the State to show "there will continue to be a Black opportunity district in Orleans Parish in the future." ROA.1948.

The district court's approach amounted to rewriting the parties' agreement, and it is wrong on many levels. A court must interpret a consent decree "within its four corners." *Armour & Co.*, 402 U.S. at 682. Courts "cannot add to or subtract from the consent decree or interpret it according to what the court thinks is the purpose of the agreement." *In re Deepwater Horizon*, 732 F.3d 326, 348 (5th Cir. 2013) (Dennis, J., concurring in part and dissenting in part) (citing *Armour & Co.*, 402 U.S. 673 "and its progeny"). Because the State, "by the decree, waived [its]

RETRIEVED FROM DEMOCRACYDOCKET.COM

right to litigate the issues raised, a right guaranteed to [it] by the Due Process Clause, the conditions upon which [it] has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff[s] established [their] factual claims and legal theories in litigation." *Armour & Co.*, 402 U.S. at 682.

To recap, back in 1992, the State, the Plaintiffs, and the Department of Justice agreed to the steps set out in Section C of the Consent Judgment. Because those steps have indisputably been completed, the objective indeed "has been achieved." *Horne*, 557 U.S. at 450. That remedy has been in place for decades and is clearly "durable." *Id.* No one suggests the State is going to return to a multi-member district system, and there is no evidence of that. Accordingly, the district court should have granted the State's motion to dissolve the Consent Judgment.

RETRIEVED FROM DEMOCRACYDOCKET.COM

IV. THE SEVERE MALAPPORTIONMENT PERPETUATED BY THE CONSENT JUDGMENT INDEPENDENTLY WARRANTS RELIEF UNDER RULE 60(B)(5).

Finally, the district court and Panel Majority gravely erred in discounting the massive malapportionment that the Consent Judgment

mandates and perpetuates. Rule 60(b)(5) authorizes a court to "relieve a party or its legal representative from a final judgment" when "applying it prospectively is no longer equitable."

The Panel Majority rejected as "unavailing" the State's concern that the malapportionment was "detrimental to the public interest." Slip. Op. 31. The district court similarly rejected the State's argument that the population deviations were "detrimental to the public interest," reasoning that the "State [wa]s under no pressing obligation to reapportion the supreme court districts." ROA.1955. In so reasoning, both the district court and Panel Majority remarkably concluded that the extraordinary malapportionment at issue here is entirely consistent with the public interest and of no particular concern. They were wrong.

RETRIEVED FROM DEMOCRACYDOCKET.COM

A. The Constitution's proportionality mandate, of course, does not directly apply to judicial officers. *Wells v. Edwards*, 409 U.S. 1095 (1973). But the entire premise undergirding the VRA's application to judicial elections is that "elected judges" should be considered "representatives" just like "prosecutors, sheriffs, state attorneys general, and state treasurers." *Chisom*, 501 U.S. at 399.

Because judges are "representatives" for purposes of the VRA, malapportionment strikes at the heart of the democratic function that elected judges must perform—*i.e.*, "represent" their constituents in a manner consistent with bedrock democratic principles, including the one-person, one-vote mandate. For that reason, the Supreme Court has expressly rejected the premise that "judicial elections are entirely immune from vote dilution claims." *Id.* at 402–03; *see also Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 859 n.3 (5th Cir. 2004) (explaining that this Court was "at a loss as to what *other* standard" than the "one-person, one-vote requirement" of *Gingles* would apply to "judicial districts").

Malapportionment is—quite literally—vote dilution. It renders the votes of citizens in overpopulated districts less powerful than those of voters in underpopulated districts. And there is no world in which malapportionment of any stripe is in the public interest.

B. The malapportionment at issue here is decidedly not in the public interest. Indeed, although the Supreme Court has tolerated *minor* deviations in populations between districts, the malapportionment at issue here is leaps and bounds beyond what one-person-one-vote principles permit.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Courts measure maximum deviations "between the largest and smallest district" by population in the statewide map. *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016). "Maximum deviations above 10% are presumptively impermissible." *Id.* "A plan with larger disparities in population . . . creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

The maximum population deviation here is much, much worse than the presumptively unconstitutional 10 percent. It was "approximately 54.4% after the 2020 census," ROA.1954—more than *five times* the presumptively unconstitutional benchmark. Indeed, this severe malapportionment—which is undeniably race-based as a race-based remedy with an explicitly race-based purpose—is likely itself a violation of Section 2 of the VRA, not least because some votes are worth only 64.8 percent of those in another district (1/1.544). Because the VRA applies to elected judges, *Chisom*, 501 U.S. at 399–402—which is the *only* reason that the Consent Judgment exists at all—this raced-based vote dilution is wholly inconsistent with the public interest as defined by Congress in the VRA. *See, e.g.*, *United States v. Oakland Cannabis Buyers' Co-op.*,

RETRIEVED FROM DEMOCRACYDOCKET.COM

532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" (citation omitted)).

C. The panel majority attempted to discount this severe malapportionment by reasoning that it was "not a new problem," that the *Chisom* district "had grown less malapportioned over time," and that "the remaining election districts have remained consistently malapportioned since the 2010 census." Slip Op. 10. None of this holds water.

As an initial matter, the "improvement" in malapportionment since 2010 that the Panel cited is infinitesimal: It was "approximately 54.5% after the 2010 census, and approximately 54.4% after the 2020 census." ROA.1954. That 0.1% "improvement" is hardly a basis for discounting the State's malapportionment concerns as insignificant. At that rate of improvement (and absolutely no regression), the malapportionment could be expected to end around *the 7460 Census*. That is hardly enough to justify indefinite federal usurpation of the State's core sovereign power.

More fundamentally, severe malapportionment—even if it is not a "new" problem—is *never* in the public interest under bedrock

RETRIEVED FROM DEMOCRACYDOCKET.COM

constitutional and democratic principles. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments *can mean only one thing—one person, one vote*." *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (citation omitted) (emphasis added). This singular imperative cannot be ignored by judicial indifference simply because the disparities have festered for too long.

In that respect, malapportionment ages more like unrefrigerated fish than a fine wine. So says the Supreme Court: Even though malapportioned state legislative districts in Tennessee and Alabama had existed since 1901, their lengthy tenure did not save them from judicial scrutiny and invalidation more than half a century later. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) (holding that a constitutional challenge to maps apportioned in 1901 was justiciable); *Reynolds*, 377 U.S. at 583 (invalidating Alabama's 1901 legislative maps sixty-three years later). Just so here.

Malapportionment likewise does not suddenly become judicially irrelevant when the resulting racial disparities are the "right" kind of racial disparities in the Department of Justice's (or any court's) view.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Indeed, there is no reason to believe that the Civil Rights Division would be so sanguine about this enormous malapportionment-induced vote dilution if the shoe were on the other foot.

The Consent Judgment's price—severe malapportionment and deep federal intrusion into a core aspect of State sovereignty—is, at most, justifiable now only as a prophylactic against possible future Section 2 violations. But that is speculation in the extreme. There is no evidence that the State is likely to violate Section 2 if the Consent Judgment is dissolved—and any purported violation could be rapidly challenged under Section 2 in any event. Nor is any Section 2 violation even possible until 2030 when the term of Justice Griffin—who represents the *Chisom* district—expires. And so the drastic price of severe malapportionment and intrusion on State sovereignty is all for nothing. Put otherwise, the Consent Judgment "is no longer equitable," and the district court gravely erred in holding otherwise. Fed. R. Civ. P. 60(b)(5).

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

For any of these reasons, the Court should reverse the district court's denial of relief under Rule 60(b) and dissolve the Consent Judgment.

Very respectfully submitted,

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
/s/ Morgan Brungard
MORGAN BRUNGARD
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 94005
Baton Rouge, LA 70804
Telephone: (225) 999-6864
BrungardM@ag.louisiana.gov
Counsel for the State

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I certify that on February 28, 2024, I filed the foregoing brief with the Court's CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record.

/s/ Morgan Brungard
MORGAN BRUNGARD

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **8,272** words, exclusive of parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Century Schoolbook, 14-point font.

RETRIEVED FROM DEMOCRACYDOCKET.COM

/s/ Morgan Brungard
MORGAN BRUNGARD

February 28, 2024