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 AND REVERSAL

KEN PAXTON
Attorney General of Texas

LYNN FITCH
Attorney General of Mississippi
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

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

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statute

Rules

Other Authorities

INTRODUCTION, INTEREST OF AMICI CURIAE, AND SUMMARY OF ARGUMENT

A divided panel in this case prolonged a decades-old consent decree that robs Louisiana of core state authority: the power to redistrict a state-supreme-court district. That ruling was profoundly wrong. The en banc Court should order the decree dissolved.

This case involves an institutional-reform consent decree and redistricting—two areas that present heightened federalism concerns. Federal institutional-reform injunctions are disfavored—particularly when they are consent decrees. Federal injunctions that govern state and local governments undermine federalism. Consent decrees exacerbate that problem. Such decrees often regulate core state responsibilities, often are imposed without any admission or adjudication of liability, often have sweeping scope, often are agreed to by officials motivated to achieve policy goals they cannot otherwise implement, and often last indefinitely—binding successor officials who had nothing to do with the decrees. Recognizing the 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. *Horne v. Flores*, 557 U.S. 433, 450 (2009). That approach 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 cast these principles aside. It upheld the district court's refusal to dissolve Louisiana's 30+-year-old consent decree that regulates the State's redistricting power—even though Louisiana has performed every remedial action that the decree requires. Rather than view the stale 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 decree in place. The majority imagined a prospective-compliance requirement that entrenches harms and forces decades-old political choices upon the State. And the majority exacerbated those harms by imposing on the State heightened dissolution standards that defy settled principles governing redistricting and voting-rights disputes.

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 principles of federalism. The en banc Court should reverse the district court's judgment and dissolve the consent decree.

* The States may file this brief when granted leave by the Court.

ARGUMENT

Important Principles Of Federalism Require Dissolving Louisiana's Decades-old Consent Decree.

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 easy to see why. Under such injunctions, a federal court invokes equity power to restructure, regulate, and (often indefinitely) overtake the role of state and local officials in "'areas of core state responsibility.'" *Ibid.* (quoting *Horne*, 557 U.S. at 448). The Founding Generation worried that "equity power" would enable federal courts to subvert "'the legislative, executive, and judicial powers of the individual states.'" *Missouri v. Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (quoting Brutus No. 11, Jan. 31, 1788, in 2 The Complete Anti-Federalist 419-20). That is why the Constitution takes a "narrow[er]" view of "judicial equity power," limited to "certain types of cases"—not "a broad remedial power." *Id.* at 130 (discussing The Federalist No. 80 (A. Hamilton)). Despite this, courts have issued institutional-reform injunctions, "rais[ing] sensitive federalism concerns." *Horne*, 557 U.S. at 448.

Institutional-reform consent decrees deepen these concerns. To start, consent decrees generally lack the hallmarks of judicial decision-

making. They often do not involve an adjudication of liability. So they often do not require a court to examine the plaintiff's "factual claims and legal theories" or to conclude that a "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 decrees also involve no judicial "inquir[y]" into the parties' "legal rights" and do not require judges to decide "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); *accord* Owen M. Fiss, *Justice Chicago Style*, 1987 U. Chi. Legal F. 1, 17 (consent decrees are "an exercise of public power" without the legal "processes" that bestow "legitimacy and authority" on "that power"). Indeed, "[m]ost consent decrees reflect no judgment." *Allen v. Louisiana*, 14 F.4th 366, 375 n.* (5th Cir. 2021) (Oldham, J., concurring) (quotations omitted). The parties "draft and approve the decree; court approval is a mere rubber stamp." *Ibid.* There is a great risk that an institutional-reform consent decree 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. They restrain and regulate an entire state or local institution. Worse, institutional-reform consent

decrees often encompass broader relief than the law requires or than the court could order after a trial. "[F]ederal-court decrees exceed appropriate limits" when they target "a condition that does not violate the [law] or does not flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). Yet "public officials" at times "consent to" or fail to "vigorously oppos[e]" "decrees that go well beyond what is required by federal law." *Horne*, 557 U.S. at 448. And officials "may agree" to more than federal law "require[s]" or "what a court would have ordered" just to "avoid" burdensome "further litigation." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389, 392 (1992); *see Derrickson v. City of Danville, Illinois*, 845 F.2d 715, 717 (7th Cir. 1988) (consent decrees may "tempt[ ]" officials "to do by 'consent' what federal law does not require"). The costs and stakes of institutional-reform litigation can be so staggering that defendant officials will agree to terms that far exceed what the law demands.

Government officials may also use institutional-reform decrees to achieve otherwise unattainable policy aims. Decrees can "unbind" officials "from political constraints from coordinate branches of government or the people." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295, 315. This is improper. Government officials are not

supposed to advance "personal interests" by "consent[ing]" to "departures from the federal structure" designed to protect liberty. *New York v. United States*, 505 U.S. 144, 182 (1992). Yet it often happens. *See Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part) (officials commonly agree to unfavorable consent decrees "because of rifts within the bureaucracy or between the executive and legislative branches"). Courts accordingly must view decrees that surrender authority or arrogate powers of other officials (or entire branches of government) skeptically—to avoid undue infringements on governmental authority. *See Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1014 (7th Cir. 1984) (en banc) (declining to read a consent decree to undermine the Department of Justice's "constitutional obligation[s]" or endanger "public safety"). And courts must reject interpretations of decrees that suggest state officials agreed "to terms which would exceed their authority and supplant state law." *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997); *see Overton v. City of Austin*, 748 F.2d 941, 956 (5th Cir. 1984) (a "consent decree" that obligates officials to "act[ ]" beyond their "power and jurisdiction" under state law requires close scrutiny). When courts ignore those guardrails in interpreting and enforcing decrees they multiply the federalism harms that such decrees create.

The duration of institutional-reform consent decrees often exacerbates these problems still further. These decrees often indefinitely bind future officials to overbroad relief. Such decrees may purport to "bind state and local officials to the policy preferences of their predecessors" and "'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)); *see Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) (en banc) (Easterbrook, J., for a plurality) ("governments may form contracts" but "temporary officeholders may not contract away the basic powers of government to enact laws"). Inheriting "overbroad or outdated consent decrees" hinders state and local officials from "respond[ing]" to citizens' "priorities and concerns"—harming democracy. *Horne*, 557 U.S. at 449 (quotations omitted); *accord* Mark Kelley, *Saving 60(B)(5): The Future of Institutional Reform Litigation*, 125 Yale L.J. 272, 303 (2015) (consent decrees threaten "democratic accountability" because "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 often "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) ("countless" institutional-

reform "injunctions" still "influence the day-to-day operation of government institutions across a wide range of legal areas"). Consent decrees can thus long "insulate today's policy decisions from review and modification by tomorrow's political processes" and "violate the democratic structure of government." McConnell, 1987 U. Chi. Legal F. at 297; *Evans*, 10 F.3d at 478 ("[D]emocracy does not permit public officials to bind the polity forever.").

For all these reasons, so-called "democracy by decree" "goes beyond the proper business of the courts," "often renders government less capable of responding to the legitimate desires of the public," and leaves "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" calls for "promptly" returning "responsibility for discharging the State's obligations" 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 dissolve such decrees as soon as appropriate.

B. The Significant Federalism Concerns Present Here Require Dissolving Louisiana's Institutional-Reform Consent Decree.

The principles set out above require dissolving Louisiana's 30+-year-old institutional-reform consent decree. That decree raises all the "sensitive federalism concerns" that come with institutional-reform consent decrees. *Horne*, 557 U.S. at 448.

First, the decree governs 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 decree does not rest on an adjudication of liability. The district court never adjudicated the merits of plaintiffs' claim under Section 2 of the Voting Rights Act. Op. 3. And the State never conceded liability. Third, the decree required action that exceeded the parties' authority under

state law. The defendant executive- and judicial-branch officials agreed to bind legislative-branch officials to reapportion electoral districts. Op. 3-4. Fourth, the decree binds those who had no part in making it: former officeholders negotiated and executed the decree, leaving their successors to live with the long-term consequences. Op. 3. Fifth, the decree has been in place for decades—and, on the panel majority's view, could be in place for decades more. That view of the decree surrenders the State's redistricting authority unless it 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 decree here should be dissolved. Louisiana has done all the decree required. The decree required the State to reapportion its supreme-court districts and take seven other steps. ROA.99-102. Over the past 30+ years the State has performed 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 nn.10, 11 (nobody has "identifie[d]" any "undone or lacking" "remedial action item" in the decree). The decree's "objective" has thus "been achieved," and the district court was required to restore Louisiana's 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 courts to apply a "flexible standard" under Rule 60(b)(5) and to "promptly" restore state officials' authority when a decree's objectives have been obtained).

The panel majority reached the opposite conclusion by deeming the federalism concerns here "exaggerated" (Op. 33), failing to apply the "flexible approach" to dissolving institutional-reform consent decrees, and instead creating a rigid presumption to keep the decades-old 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). Two aspects of the majority's approach are a particular affront to federalism.

First, the panel majority read the decree to require compliance with its terms *and* "prospective compliance with Section 2 of the VRA." Op. 15; *see* Op. 12-16. That view undermines federalism.

To start, the panel majority's prospective-compliance requirement contemplates perpetual "federal-court oversight" of a vital state authority without "an ongoing violation of federal law." *Frew v. Hawkins*,

540 U.S. 431, 441 (2004); *see Horne*, 557 U.S. at 447-48. But the district court never adjudicated plaintiffs' Section 2 claim and the State never conceded liability. Op. 3. Nobody contends that the current supreme-court district that the decree imposes (or its other completed "remedies") conflicts with Section 2. Diss. 45 & nn.10, 11. No "ongoing" violation of law justifies reading the decree to indefinitely suspend the State's redistricting powers.

The panel majority's view also infringes on the State's "sovereign interests and accountability" by reading the decree too broadly. *Hawkins*, 540 U.S. at 441; *see Horne*, 557 U.S. at 450. At plaintiffs' behest (Op. 14), the majority cobbled together "key clauses" of the decree to discern a prospective-compliance restriction on the State's redistricting authority. Op. 14-15. That fragmented approach ignores "principles of federalism" and fails to give the State "maximum leeway for democratic governance." *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (Easterbrook, J., for a plurality); *see Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1011-14 (7th Cir. 1984) (en banc) (rejecting a piecemeal reading of a consent decree that might obstruct the federal government's sovereign authority and endanger the public). The majority should instead have read the decree fairly—to "ensure" a "prompt[ ]"

restoration of the State's redistricting "responsibility." *Horne*, 557 U.S. at 450 (quotations omitted).

Notably, the panel majority's approach—which the Department of Justice and its allies insisted upon—contradicts DOJ's own oft-taken position when interpreting federal agencies' consent-decree obligations. DOJ has long recognized that federal courts should honor the United States' sovereign authority by narrowly reading consent decrees to which the United States is subject. *See*, *e.g.*, Final Reply Brief of Appellants United States of America, et al., *National Ass'n of Realtors v. United States of America*, No. 23-5065, 2023 WL 5333636, at *18-19 (9th Cir. Aug. 18, 2023) (relying on *Evans* and *Alliance to End Repression* and contending that federal courts should avoid "overbroad readings of agreements with private parties that would impinge upon sovereign rights"); Defendants-Appellants' Opening Brief, *Flores v. Barr*, No. 19-56326, 2019 WL 7494614, at *16-21 (9th Cir. Dec. 20, 2019); Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 23 Op. O.L.C. 126, 146, 1999 WL 1262049, at *17 (1999). Yet here, where another sovereign's authority is at stake, the Department of Justice has shunned that approach.

Last, the panel majority's prospective-compliance requirement entrenches harms to the State's present-day officials and citizens by

forcing decades-old political choices upon them now—and for the indefinite future. "[O]verbroad or outdated consent decrees" hinder state officials from "respond[ing]" to "priorities and concerns of their constituents" and "fulfill[ing] their duties as democratically-elected officials." *Horne*, 557 U.S. at 449 (quotations omitted). And States "depend[ ] upon successor" officials to "bring new insights and solutions" to state problems. *Hawkins*, 540 U.S. at 442. Federalism requires reading the consent decree to avoid those harms. The panel majority did the opposite—its view threatens to usurp the State's authority forever.

Second, the panel majority wrongly imposed on the State heightened dissolution standards. The majority adopted plaintiffs' preferred "*Dowell* standard," which looks to whether the State has complied with the decree "'in good faith'" 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)); *see* Op. 16-27. The majority then heightened that standard to require proof of "both past compliance *and* future prospects" and obligated 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 (quotations omitted; alterations in original).

That heightened prospective-compliance regime compounds the federalism concerns that this dispute presents. None of the authorities (Op. 21-22) that the majority relied on applied *Dowell*'s standard—or anything like the majority's heightened *Dowell* standard—to redistricting. That is unsurprising. No court should apply such a standard to a redistricting decree.

The panel majority's new prospective good-faith requirement undermines established principles that govern lawmaking and that have particular importance in redistricting. It bars current (and future) legislators from revising an election district unless the State *proves* that lawmakers will do that in good faith. Yet federal courts must presume that lawmakers act in "good faith" when drawing new districts. *Abbott*, 138 S. Ct. at 2324; *see Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("the presumption of good faith" requires "extraordinary caution" in redistricting cases.). That presumption endures even when "past discrimination" infected prior redistricting. *Abbott*, 138 S. Ct. at 2324. And, in any redistricting case, the "burden of proof" to overcome the "presumption of legislative good faith" always rests on the challengers. *Ibid.* The panel majority's heightened standard defies those rules.

The majority's prospective good-faith requirement also undercuts settled remedial principles for redistricting and voting-rights disputes.

Redistricting electoral districts is "a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). When courts determine that "an existing apportionment scheme" violates federal law, they should "whenever practicable" give the State a "reasonable opportunity" to "adopt a substitute measure" over a court-imposed plan. *Id.* at 540; *see Veasey v. Abbott*, 830 F.3d 216, 269 (5th Cir. 2016) (en banc) ("[W]hen feasible, our practice has been to offer governing bodies the first pass at devising remedies for Voting Rights Act violations.") (quotations omitted). And the challengers who oppose the State's solution must "establish" that it has "constitutional or statutory flaws." *Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991).

Imposing a prospective good-faith feature casts all this aside. It preempts the State's future redistricting efforts by indefinitely locking in place the current supreme-court district. And it requires the State to disprove that any new map violates federal law. That overbroad remedy would be dubious even after an adjudicated Section 2 violation. There was never such a ruling here, and the State denied any Section 2 violation. Op. 3. Decades later, the panel majority was wrong to invent and impose a consent-decree requirement that strips the State of

redistricting authority—a harsher penalty than what could be imposed after a full trial in nearly any other voting-rights case.

CONCLUSION

This Court should reverse the district court's judgment and dissolve Louisiana's decades-old consent decree.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

LYNN FITCH
Attorney General of Mississippi

s/ Justin L. Matheny
SCOTT G. STEWART
Solicitor General
JUSTIN L. MATHENY
ANTHONY M. SHULTS
Deputy Solicitors General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Telephone: (601) 359-3680
E-mail: justin.matheny@ago.ms.gov
Counsel for Amici Curiae

Dated: March 6, 2024

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: March 6, 2024

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32, it contains 3,358 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 its footnote, which appears in Century Schoolbook 12-point font.

Dated: March 6, 2024

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Amici Curiae