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

OPPOSITION OF THE UNITED STATES TO APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

This case concerns the proper disposition of the State of Louisiana's motion to dissolve a Consent Judgment governing elections to the Louisiana Supreme Court. The panel majority correctly concluded that the district court did not abuse its discretion in holding that the State had failed to meet its evidentiary burdens under Rule 60(b)(5)'s first or third clause.

Dissolution of a consent decree is not warranted until the State achieves the objective of the judgment to which it has agreed. Federalism principles do not relieve the State of its evidentiary burdens. Nor does continued application of the Consent Judgment violate federalism principles by depriving the State of its authority over voting districts. The Consent Judgment allows the legislature to redraw supreme court districts; it simply requires that it not dilute the voting strength of Black voters in Orleans Parish.

The panel correctly applied Supreme Court and circuit precedent in affirming the fact-bound denial of the State's motion to dissolve. No good reason exists for en banc review.

STATEMENT

1. Plaintiffs sued the State, alleging that the method of electing members to the Louisiana Supreme Court violated Section 2 of the Voting Rights Act (VRA). *See* ROA.464, 1935. The United States intervened as a plaintiff. *See* ROA.1755.

After extensive litigation, the parties entered a Consent Judgment in 1992 to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2." ROA.1542.

The Consent Judgment required both an interim remedy and prospective relief. ROA.1542-1545. Specifically, it required the State to provide for the reapportionment of the seven districts (*i.e.*, seven seats) of the Louisiana Supreme Court and create a single-member district centered in Orleans Parish that is majority Black in voting age population. ROA.1542-1545. It also mandates that "future Supreme Court elections . . . shall take place in the newly reapportioned districts." ROA.1545. It provides, however, that "[t]he legislature may redistrict the supreme court" in the year following a decennial census.[1] *See* Courts and Judicial Procedure, State Supreme Court-Redistricting, 1997 La. Sess. Law Serv. Act 776 (H.B. 581); ROA.1551-1557 (adopting Act 776 as an addendum to the Consent Judgment). Finally, it provides that the court will "retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished." ROA.1547.

2. In 2019, different plaintiffs sued the State in the Middle District of Louisiana, seeking a second Black opportunity district among the seven seats. *See*

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

Allen v. Louisiana, 14 F.4th 366, 369 (5th Cir. 2021). The district court certified an interlocutory appeal to this Court to decide whether "the Eastern District [of Louisiana] has exclusive subject-matter jurisdiction over all matters involving Louisiana Supreme Court districts under the [*Chisom* decree]." *Ibid.* (alterations in original). This Court held that the Eastern District did not, explaining that the Consent Judgment "aimed to remedy alleged vote dilution in one supreme court district, not to reform the whole system." *Id.* at 374.

3. Following the *Allen* decision, and on the eve of a redistricting session, the State moved in this case under Federal Rule of Civil Procedure 60(b)(5) to dissolve the Consent Judgment. *See* ROA.1429-1435. After a hearing, the district court denied the State's motion because it found that the State had not met its burden under either Rule 60(b)(5)'s first or third prong. ROA.1934, 1943.

4. A divided panel affirmed. *Chisom v. Louisiana*, 85 F.4th 288 (5th Cir. 2023); *id.* at 307-316 (Engelhardt, J., dissenting). The panel majority first determined that the Consent Judgment's "final remedy" was to ensure the State's prospective compliance with Section 2 of the VRA, not simply to fulfill certain action items associated with that objective. *Id.* at 297-299.

In analyzing the first clause of Rule 60(b)(5)—whether "the judgment has been satisfied, released, or discharged"—the panel majority rejected the State's proffered "substantial compliance" standard. *Chisom*, 85 F.4th at 299-302.

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

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

ARGUMENT

En banc review is warranted only when the panel decision conflicts with a decision of the Supreme Court or this Court or where "the proceeding involves a question of exceptional importance," such as "an issue on which the panel decision

conflicts with the authoritative decisions of other" circuit courts. Fed. R. App. P. 35(a) and (b); *see* 5th Cir. R. 35.1 & I.O.P. 35. Neither circumstance exists here.

I. The panel majority's fact-bound interpretation of the Consent Judgment's remedy is supported by the record and does not conflict with decisions of the Supreme Court or this Court.

The State argues (Pet. 5-7) that the panel majority erred by interpreting the Consent Judgment's "final remedy" to require prospective compliance. Not so. The panel majority properly evaluated this fact-bound, record-specific question.

The Consent Judgment's terms require prospective compliance. First, its stated purpose is to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2." ROA.1542. Second, it mandates that "future Supreme Court elections . . . shall take place in the newly reapportioned districts." ROA.1545. And it provides the district court with jurisdiction "until the complete implementation of the final remedy has been accomplished." ROA.1547. Indeed, even now the State admits that the Consent Judgment includes an "agree[ment] to . . . maintain a majority-Black State Supreme Court district anchored in Orleans Parish." Pet. iii. The panel majority's affirmance that the Consent Judgment requires prospective compliance is thus well-supported. *See Chisom v. Louisiana*, 85 F.4th 288, 298-299 (5th Cir. 2023).

Nor did the panel majority convert the Consent Judgment "into one that admits to no feasible end to judicial control." *See* Pet. 6 (internal quotation marks

omitted). Certainly, "responsibility for discharging the State's obligations [should be] returned promptly to the State and its officials when the circumstances warrant." *Horne v. Flores*, 557 U.S. 433, 450 (2009) (citation and internal quotation marks omitted). But it would be premature to do so before the State has achieved the decree's objective and implemented a "durable remedy." *Ibid.* The panel majority correctly recognized that the State "fails to present any evidence whatsoever of the measures taken to ensure that the object of [the Consent Judgment] will be achieved (or continue to be achieved)." *Chisom*, 85 F.4th at 307.

The State identifies no error undermining the panel majority's conclusion that the State failed to meet its evidentiary burden. The State could have satisfied its burden by presenting "a roadmap that demonstrates continued compliance or a redistricting plan." *Chisom*, 85 F.4th at 302. But "the State provided no evidence, plans, or assurances of compliance with Section 2 of the VRA in the event that the Consent Judgment is terminated." *Ibid.* Indeed, during the district court hearing on the Rule 60(b)(5) motion, the State refused to commit to maintaining a Black opportunity district in Orleans Parish or to confirm whether one would be required under Section 2 should the court dissolve the Consent Judgment. *See* ROA.2024-2025. Given the "paucity of the record," the panel majority did not err in affirming

that the State had not met its burden to show dissolution is warranted.[2] *See League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 438 (5th Cir. 2011).

The State also errs in arguing (Pet. 7) that requiring prospective relief "runs afoul of binding precedent." While "consent decrees are not intended to operate in perpetuity," *Allen v. Louisiana*, 14 F.4th 366, 373 (5th Cir. 2021) (citation and internal quotation marks omitted), nothing prohibits a decree from ordering prospective relief, *see, e.g.*, *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (*Hawkins*) (holding that courts may order prospective injunctive relief against state officials). Indeed, under Rule 60(b)(5)'s third prong, a movant may only get relief from a final judgment where "applying it prospectively is no longer equitable"—language that counsels that prospective relief is appropriate until such a showing is made. Fed. R. Civ. P. 60(b)(5).

The State has identified no basis to disturb the well-supported, record-specific conclusion that the Consent Judgment requires prospective relief.

[2] Notably, nothing in the district court or the panel's record-specific conclusion precludes the State from seeking to make an adequate showing on remand should it choose to file a new motion. *See Chisom*, 85 F.4th at 302 (providing examples of evidence that could demonstrate future compliance).

II. Consistent with Supreme Court and circuit precedent, the panel majority correctly applied the first prong of Rule 60(b)(5).

The State argues (Pet. 7-11) that the panel majority's decision conflicts with *Allen*, 14 F.4th 366; *Frew v. Janek*, 780 F.3d 320 (5th Cir. 2015) (*Frew I*); and *Frew v. Janek*, 820 F.3d 715 (5th Cir. 2016) (*Frew II*). The State is incorrect. Those decisions do not preclude courts from drawing from federal precedent, *i.e.*, *Dowell*, *supra*, to determine the proper standard for applying a federal rule. Nor did the panel incorrectly apply *Dowell*.

A. The panel did not err in looking to federal precedent to interpret a federal rule.

Consistent with *Allen*, *Frew I*, and *Frew II*, the panel properly looked to Louisiana law to interpret the Consent Judgment. *See Chisom*, 85 F.4th at 297-298. That is all those cases require. *See Allen*, 14 F.4th at 371 (directing courts to "consult the contract law of the relevant state" to interpret consent decrees); *Frew I*, 780 F.3d at 328 n.28 (same); *Frew II*, 820 F.3d at 720, 724 (same). They do not preclude courts from consulting federal precedent to apply a federal rule.

Indeed, in *Frew I*, this Court did just that after it recognized that the first clause of Rule 60(b)(5) is "almost never applied to consent decrees." 780 F.3d at 327. Finding little precedent interpreting the first clause, this Court "deem[ed] it reasonable to consider Defendants' [Rule 60(b)(5)] motion with reference to the Supreme Court's unambiguous instructions in [*Hawkins*]," which "reiterated the

'flexible standard' for modification of institutional-reform consent decrees." *See id.* at 323, 327.

Likewise, the panel here, recognizing that case law interpreting the first prong of Rule 60(b)(5) "is lacking," drew from appropriate Supreme Court precedent—*Dowell*. *Chisom*, 85 F.4th at 301 (citing *Frew I*, 780 F.3d at 327). The panel explained that this Court has "implicitly approved" of application of the *Dowell* standard to motions to dissolve consent decrees. *Ibid.* (citing *Boerne*, 659 F.3d at 437-440; *Frew I*, 780 F.3d at 323, 327).

In addition to complying with this circuit's precedent, the panel's invocation of *Dowell* also comports with precedent from at least six other circuits. *See, e.g.*, *Alexander v. Britt*, 89 F.3d 194, 197 (4th Cir. 1996); *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801 (7th Cir. 2001); *McDonald v. Carnahan*, 109 F.3d 1319, 1321 (8th Cir. 1997); *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1200 (10th Cir. 2018); *Peery v. City of Miami*, 977 F.3d 1061, 1075 (11th Cir. 2020); *NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C. Cir. 2000).

B. *Frew* does not mandate a "substantial compliance" standard.

The panel majority's use of the *Dowell* standard to examine the first prong of Rule 60(b)(5), rather than the State's proffered substantial compliance standard, does not "conflict[] with this Court's decision[]" in *Frew*. *Cf.* Pet. 7. This Court held in *Frew I* that "substantial compliance" was a requirement of the parties'

bargained-for relief in that case, not of Rule 60(b)(5). *See* 780 F.3d at 327-330 (discussing "Consent Decree Interpretation").

1. There, the parties entered a consent decree to make improvements to Texas's implementation of Medicaid's Early and Periodic Screening, Diagnosis, and Treatment program (the Program). *Frew II*, 820 F.3d at 717. The parties later agreed to "eleven particularized orders for enforcing specific portions of the consent decree." *Id.* at 718 (internal quotation marks omitted). The parties intended compliance with each of these eleven orders would provide a basis for terminating the corresponding part of the decree. *Ibid.*

At issue in *Frew I* was whether the defendants had complied with one of those orders. 780 F.3d at 323. The order and decree required the State to "implement an initiative to effectively inform pharmacists about [the Program]," conduct an "evaluation of pharmacists' knowledge" of the Program, "provide intensive, targeted educational efforts," and "train staff." *Id.* at 324-325. Rather than "guarantee[ing] specific outcomes," this Court held that the order and decree were "aimed at *supporting* [Program] recipients . . . by *addressing* concerns, *enhancing* access, and *fostering* use of services." *Id.* at 328. Thus, this Court concluded that the parties had intended that substantial compliance with the decree's "specific, highly detailed action plans" would achieve the decree's purpose. *Ibid.*

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

2. The panel majority correctly concluded that the "State's reliance on [*Frew*] for the application of the substantial compliance standard is misplaced." *Chisom*, 85 F.4th at 301. First, unlike the decree in *Frew*, the Consent Judgment's "goal is to 'ensure' that the Louisiana Supreme Court's election methods comply with the VRA." *Id.* at 298. And the Consent Judgment included a termination provision expressly mandating that the court retain jurisdiction "until the complete implementation of the final remedy has been accomplished." *Ibid.* Thus, *Frew*'s holding is inapposite. *Cf. Frew I*, 780 F.3d at 330 (holding that if the decree had

[3] At issue in *Frew II* was a motion to terminate another of the eleven orders. Applying *Frew I*, this Court simply reiterated that the defendants could show termination of the decree was warranted there "by demonstrating 'substantial compliance'" with the order at issue. *Frew II*, 820 F.3d at 721.

included provisions like those contained here, "[p]laintiffs might legitimately complain about the district court's approach").

Second, as the panel noted, the *Frew* decisions relied on Texas law, not Louisiana law. *Chisom*, 85 F.4th at 301-302. While Louisiana law does recognize the concept of substantial performance, it is not transferrable to Rule 60(b)(5) motions. *See ibid.* For starters, Louisiana law mandates that "[a] contract *may not be dissolved*" when there has been substantial performance. La. Civ. Code Ann. art. 2014 (1985) (emphasis added). Moreover, while the doctrine of substantial performance applies to contracts solely between two private parties, when a contract is undertaken to benefit a third person—like here—the parties "are bound to remain together until the completion of their undertaking." *Pratt v. McCoy*, 128 La. 570, 620-621 (1911). Thus, even applying Louisiana law, substantial compliance is not the appropriate standard.

C. The panel majority properly applied *Dowell*.

Finally, the panel majority did not "revolutionize[]" *Dowell* by examining the State's prospects of future compliance. *Cf.* Pet. 11. *Dowell* itself requires courts to examine the likelihood that the defendant "would return to its former ways" in considering whether the "purposes of the [decree] ha[ve] been fully achieved." *Dowell*, 498 U.S. at 247; *see also id.* at 261 (Marshall, J., dissenting) (recognizing that the majority's standard "focus[es] heavily on present and future

compliance"). The Supreme Court reiterated in *Freeman v. Pitts* that one of the purposes of *Dowell*'s required showing of "[a] history of good-faith compliance" is to "enable[] the district court to accept the [defendant's] representation that" there will be no "intentional discrimination *in the future*." 503 U.S. 467, 498-499 (1992) (citation omitted; emphasis added). Thus, in analyzing *Dowell*'s good-faith prong, the panel correctly examined the State's "past compliance *and* future prospects." *See Chisom*, 85 F.4th at 302 (citation and internal quotation marks omitted).

The State asserts (Pet. 11) that "[n]one of the cases cited by the majority supports adding [a future compliance] requirement." The State is wrong. On remand from the Supreme Court in *Inmates of Suffolk County Jail v. Rufo*, the First Circuit held that before vacating a consent decree, a district court must first satisfy itself that "there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted." 12 F.3d 286, 292 (1st Cir. 1993) (citing *Dowell*, 498 U.S. at 247). The court recognized that its holding left "many questions unanswered." *Id.* at 292-293. But even under the "most favorable" possible standard for decree termination that it could imagine, the court explained that the defendant would need to show "that it is unlikely that the original violations will soon be resumed if the decree were discontinued." *Id.* at 293; *see also Johnson v. Heffron*, 88 F.3d 404, 406 (6th Cir. 1996) (affirming a

court's consideration of both past compliance and "future prospects" in examining a Rule 60(b)(5) motion).[4] These precedents support the panel's holding.

III. The petition for rehearing does not raise any questions of exceptional importance.

Contrary to the State's assertions (Pet. 12-14), federalism concerns do not demand a different result. As the panel majority recognized, "federalism interests . . . do not relieve the State of its evidentiary burdens." *Chisom*, 85 F.4th at 307; *see also Hawkins*, 540 U.S. at 442 (explaining that "principles of federalism" do not require a court grant relief from a consent decree until "the objects of the decree have been obtained"); *Horne*, 557 U.S. at 450 (similar).

The State is correct that once compliance has been achieved, "responsibility for discharging the State's obligations [should be] returned promptly to the State." Pet. 13 (quoting *Horne*, 557 U.S. at 450). But the State errs because it has not shown compliance. *See ibid.* The panel majority's affirmance that the State failed to show compliance is a fact-bound, record-specific conclusion; it is not a question of exceptional importance.

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[4] The State also cites (Pet. 11 n.3) several other cases, which it claims the panel majority incorrectly said support a "future prospects" requirement. The opinion, however, only cited to *Rufo* and *Johnson* on this issue. *See Chisom*, 85 F.4th at 302. In any event, the State also errs in describing these other cases as contrary to the panel majority's opinion.

The State also incorrectly suggests (Pet. 12-13) that because it never stipulated to a violation of federal law, the district court lacks remedial authority. The State is wrong. The Supreme Court foreclosed the State's argument in *Hawkins*. 540 U.S. at 438 (rejecting argument that a federal court "should not enforce a consent decree . . . unless the court first identifies, at the enforcement stage, a violation of federal law"). The Court explained that courts can enforce a consent decree even absent a violation of federal law because the decree represents "a remedy the state officials themselves had accepted." *Id.* at 439.

This Court has also repeatedly rejected similar arguments. In *Smith v. School Board of Concordia Parish*, this Court rejected the defendant's argument that the district court lacked remedial authority to enforce an interdistrict remedy despite never having found an interdistrict violation. 906 F.3d 327, 334 (5th Cir. 2018). Rather, this Court explained that the court's "remedial authority derives from the consent decree itself." *Ibid.*; *see also Borel v. School Bd. Saint Martin Par.*, 44 F.4th 307, 312 (5th Cir. 2022) (holding that, besides curing ongoing violations, a district court "may also obtain remedial authority over litigation from a party's voluntary entrance into a consent decree"). Similarly, in *Frazar v. Ladd*, this Court held that compliance with federal law alone is not an adequate ground to dissolve a consent decree where the defendant had not otherwise met its burden on a Rule 60(b)(5) motion. 457 F.3d 432, 440-441 (5th Cir. 2006).

Finally, the panel did not "refus[e] to abide by *Horne*'s principles." Pet. 14. *Horne* only requires granting relief under Rule 60(b)(5) "as soon as a violation of federal law has been remedied" if the movant can also show that "a durable remedy has been implemented." 557 U.S. at 450-451.

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

The Supreme Court reversed. *Horne*, 557 U.S. at 472. The Court found that the district court's opinion effectively "was an inquiry into whether the original order had been satisfied." *Id.* at 454. But while the EEOA requires states to take appropriate action, the Court recognized that it leaves states with "a substantial

amount of latitude in choosing how this obligation is met." *Ibid.* (citation and internal quotation marks omitted). Thus, even if Arizona had not satisfied the particulars of the decree, Arizona could still show that prospective enforcement would be inequitable because it had employed other tools to achieve the EEOA's statutory objective. *Ibid.* The Court remanded the case for the district court to consider whether factual and legal changes—including adoption of structural and management reforms—warranted relief from the judgment. *Id.* at 460.

Unlike *Horne*, where Arizona had enacted new legislation, the State has not provided any "evidence, plans, or assurances of compliance with Section 2 of the VRA in the event that the Consent Judgment is terminated." *Chisom*, 85 F.4th at 302. Nor has the State identified a durable remedy apart from the Consent Judgment that demonstrates that it will not dilute the voting strength of Black voters in Orleans Parish on the first occasion in which the State has sought to redraw supreme court districts since agreeing to the Judgment. *See ibid.* The panel's fact-bound affirmance that "the State has failed to meet its evidentiary burdens," *see id.* at 307, both was correct and does not raise a question of exceptional importance.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 30, 2023, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit Federal Rules of Appellate Procedure 35(e) because it contains 3895 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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