In the

United States Court of Appeals for the

Fifth Circuit

Case No. 22-30320

RONALD CHISOM; MARIE BOOKMAN; 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, NEW ORLEANS
CIVIL ACTION NO. 2:86-CV-4075, HONORABLE DONNA SUE MORGAN, U.S. DISTRICT JUDGE

OPPOSITION TO EN BANC REHEARING BY RONALD CHISOM, MARIE BOOKMAN, AND URBAN LEAGUE OF LOUISIANA, PLAINTIFFS-APPELLEES

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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COUNTER-STATEMENT OF THE ISSUES

Whether the Panel's decision — to affirm the District Court's conclusion that Louisiana's Attorney General failed to meet its evidentiary burden under Federal Rule of Civil Procedure 60(b) to vacate a Consent Decree on the basis of a threadbare record — was an appropriate application of this Court's jurisprudence.

COUNTER-STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

In 1986, Plaintiffs filed a class action complaint challenging the multimember district system for electing justices to the Louisiana Supreme Court. Plaintiffs claimed this system prevented Black voters in Orleans Parish from having an equal opportunity to elect their preferred candidates in violation of Section 2 of the Voting Rights Act ("Section 2"). That litigation culminated in a Consent Decree that represented the parties' collective desire to settle the issues raised by the complaint to resolve the litigation.

The Decree's "relief" was both interim and forward looking. To provide immediate relief, the Decree provided for the temporary addition of a Justice to the Louisiana Supreme Court — elected from Louisiana's Fourth Circuit Court of Appeals — to serve until a new Justice took office under a new plan for electing Supreme Court justices. ROA.99-101. To provide relief during future election cycles, the Decree called for the Louisiana legislature to enact legislation that: "provides for the reapportionment of the seven districts of the Louisiana Supreme

Court in a manner that complies with the applicable federal voting law, taking into account the most recent data available"; has "a single-member district that is majority black in voting age population that includes Orleans Parish in its entirety"; and would become effective on January 1, 2000. ROA.102. The Decree further provides that "*future* Supreme Court elections after the effective date shall take place in the newly [seven single-member] reapportioned districts," and called for "[t]he Court [to] retain jurisdiction over this case until *the complete implementation* of the final remedy has been accomplished." ROA.102; ROA.104 (emphasis added).

The legislation called for by the Decree — codified as Act No. 776, 1997 Reg. Sess. (La. 1997) ("Act 776") — was signed into law on July 10, 1997. On January 3, 2000, the parties amended the Decree to incorporate that legislation "as an addendum to the Consent Judgment." ROA.51. In doing so, the Decree explicitly incorporated the portions of Act 776 that allow Louisiana to redistrict the Supreme Court in future years, provided that Louisiana complies with the terms of the Decree, including applicable federal law, when it does so. *See* Act 776 § 101.1(e), ROA128. ("The legislature may redistrict the supreme court following the year in which the population of this state is reported to the president of the United States for each decennial federal census.").

Recently, a new set of plaintiffs brought another challenge to the districts charged with electing justices to the Louisiana Supreme Court under Section 2,

which resulted in a jurisdictional issue before this Court. *See Allen v. Louisiana*, 14 F.4th 366 (5th Cir. 2021). After resolving that question, the Court questioned in dicta whether the Decree's "final remedy ha[d] been implemented" in the preceding decade after Justice Bernette J. Johnson's assumed the role of Chief Justice. *Id.* at 374. But the Court emphasized that the State had never moved to have the Decree vacated, and therefore explained that it "need not decide" whether the Decree's "final remedy" had been implemented. *Id.*

The Attorney General moved to dissolve the Decree in the District Court below on December 2, 2021, attaching the *Allen* opinion as one of his eight supporting exhibits. The District Court denied the motion on May 24, 2022, concluding that the Attorney General had failed to carry his burden under either the first or third clauses of Federal Rule of Civil Procedure 60(b)(5). ROA.1957. The Attorney General appealed. ROA.1958.

The majority of a panel of this Court affirmed the District Court's decision. ECF 95-1 ("Panel Op."). In its Opinion, the Panel: determined that the District Court correctly read express language of the Decree to require future compliance with its terms; explicitly held that *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell* provides the appropriate test for evaluating a motion to dissolve an institutional reform decree under Rule 60(b)(5)'s first clause; and upheld the District Court's finding that the Attorney General had

not demonstrated changed circumstances that made continued enforcement of the Decree inequitable under the Rule's third clause.

ARGUMENT

A. En Banc Review Is Reserved For Exceptional Situations Not Present Here.

As the Federal Rules of Appellate Procedure ("FRAP") and this Court's own Internal Operating Procedures ("IOPs") repeatedly emphasize, en banc review is an extremely rare step reserved for the most exceptional situations. The Panel Opinion challenged by the Attorney General falls well short of that threshold.

Under FRAP 35(a), en banc rehearing "is not favored" and will only be ordered if either (1) "en banc consideration is necessary to secure or maintain uniformity of the court's decisions," or (2) "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). The Court's IOPs further emphasize that such review is an "*extraordinary* procedure" reserved for panel opinions that "*directly* conflict[]" with existing precedent or for "*error[s]* of *exceptional* public importance." 5th Cir. R. 35 I.O.P. (emphasis added).

The Attorney General simply does not and cannot reach this high bar. Because the Panel Opinion is fully consistent with this Court's jurisprudence and that of the Supreme Court, the Attorney General is forced to manufacture a "direct conflict" with existing precedent. The Attorney General misconstrues narrow holdings and dicta from this Court to substitute a "substantial compliance" doctrine

rooted in state law for the well-settled federal law doctrines regularly applied in proceedings under Federal Rule of Civil Procedure ("Rule") 60(b)(5). Pet. Reh'g En Banc, ECF 106-1 at 7-9 ("Petition"). He further seeks to misrepresent a routine determination of an evidentiary burden under that Rule as an "exceptionally important case about federalism." Petition at iii. Neither argument holds water because nothing about the Panel's Opinion satisfies the strict standard for granting en banc review under FRAP 35. The Attorney General's submission illustrates why this Court labels petitions for en banc review "the most abused prerogative" of appellate advocates. 5th Cir. R. 35 I.O.P.

B. The Panel Did Not Create a Perpetual Compliance Mandate.

The Attorney General's primary argument rests on a faulty premise. In his attempt to frame the Panel Opinion as out of step with controlling precedent, the Attorney General argues that the Panel transformed the Consent Decree into a "perpetual injunction." Petition at iv. But the Opinion does no such thing. Both the Panel and Plaintiffs recognized that consent decrees are not designed to last in perpetuity. *See* Panel Op. at 33 (acknowledging that the Consent Decree was "not designed to last forever"); Chisom Pls.' Appellees Br., ECF 57 at 33; ROA.1737 & n.13. But although the Consent Decree is not designed to last forever, its plain language requires future compliance — that is, it expressly requires the State to conduct *future* elections using the existing Supreme Court District Seven. ROA.102.

The State agreed to that remedial term, which remains in place until it is no longer necessary to remedy Plaintiffs' rights under Section 2. And, to make such a showing, the State must meet its burden under Rule 60. Here, the District Court and Panel engaged only in the routine judicial exercise of interpreting and applying the terms of an agreement. And, as the District Court found, and as the Panel affirmed, the State made no meaningful effort to meet its evidentiary burden. ROA.1947-1953; ROA.1955-1956; Panel Op. at 24-27, 28-31.

The State, as a sophisticated party, entered into a Consent Decree that unambiguously contemplates future compliance. The Decree calls for certain immediate interim steps that have been accomplished — such as the development of the temporary *Chisom* seat and legislation implementing the current District Seven. But its explicit remedial terms also call for ongoing relief: to "*ensure* that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act." ROA.99 (emphasis added). The Decree further provides that it aims "to *ensure* black voters in the Parish of Orleans have an equal opportunity to participate in the political process and to elect candidates of their choice." ROA.103. As the District Court rightly noted — and the Panel rightly affirmed — the Decree's use of the "to ensure" language "carries with it the notion of guaranteeing a future result." ROA.1940-1942; Panel Op. at 15, 23. Further, the Consent Decree articulates a concrete, forward-looking remedy: that, after the reapportionment that

resulted in District Seven, "*future Supreme Court elections* after the effective date [of reapportionment] *shall take place* in the newly reapportioned districts." ROA.102 (emphasis added). The State "consent[ed] to entry of the . . . final and binding judgment" of the Decree; it thereafter also jointly moved with Plaintiffs to amend the Consent Decree to incorporate legislation that codified a seven-district map and established the majority-Black District Seven. *See* ROA 102; Act No. 776, 1997 La. Acts 1265, ROA.1265. That Joint Motion again expressly acknowledged that future elections shall take place in District Seven. ROA.46.

The Panel did no more than identify this ongoing obligation arising out of the plain terms of the Consent Decree, and enforce it. Panel Op. at 14-15, 24-25, 34-35 & n.93. The Panel did not impose more on the State than it agreed to. *Id*. at 35 ("Our job is to enforce the Consent Judgment as written, not as the State wishes it had been written.").

The Attorney General also echoes Judge Englehardt's suggestion in dissent that the Panel's majority conflated the Consent Decree's purpose with its remedial requirements, and consequently substituted concrete obligations for an unbounded injunction to comply with Section 2. Petition at 5-6. But this argument ignores that the Consent Decree includes both a forward-looking purpose <u>and</u> a concrete remedial term in Section C — the section which Judge Englehart recognized as setting forth specific obligations — that requires future compliance. Panel Op. at

42, 44-45 (Engelhardt, J. dissenting). As noted above, in the specific actions identified in Section C, Paragraph 8, the Consent Decree mandates that "*future* Supreme Court elections . . . *shall* take place in the newly reapportioned [District Seven]." ROA.102. (emphasis added). This language is express, concrete, and mandatory.

The Panel's recognition of the plain language of the Consent Decree that requires future compliance does not, however, mean that the Decree is meant to last in perpetuity, as the Panel majority expressly recognized. Panel Op. at 32-33. Rather, the Panel simply held the Attorney General to his burden under Rule 60(b)(5) to demonstrate either that the State's obligations had been "satisfied, released, or discharged" under the Rule's first clause, or that changed circumstances existed that made prospective application of the Decree inequitable under the third clause. *See Frew v. Janek*, 820 F.3d 715, 726 (5th Cir. 2016) (the party seeking the dissolution of the judgment order bears "the burden [of] establish[ing] that they have satisfied their obligations under Rule 60"); *League of United Latin Am. Citizens v. Boerne*, 659 F.3d 421, 438 (5th Cir. 2011).

The Attorney General failed to make any meaningful effort to satisfy his burden, relying instead on the "hint" he perceived from the Court's opinion in *Allen* to do his heavy lifting. Petition at 4. He presented a paltry and unpersuasive record in support of his motion to dissolve the Decree. This record consisted of only eight

exhibits: a copy of this Court's decision in *Allen v. State of Louisiana*, the Decree (both in its original and as-amended forms), the election rolls of the three justices who have held the seat established by the Decree, a preclearance letter from the U.S. Department of Justice, and a Powerpoint presentation entitled "Redistricting in Louisiana" dated September 17, 2021. ROA.1450-1583. As the Panel pointed out, this "evidence focuses only on *past* compliance with the Consent Judgment," concerning other provisions of the Decree, but not the provision at issue here, i.e., the State's obligation to continue holding elections with District Seven. Panel Op. at 24. The record the Attorney General mustered does nothing to demonstrate that this specific term has been "satisfied, released or discharged" under Rule 60(b)(5)'s first clause, because it does not address the ongoing necessity to ensure Section 2 compliance by conducting *future* elections with District Seven in place. The Attorney General likewise offered no evidence that continued operation of the Decree is no longer "equitable" under clause three of the Rule.

The Attorney General argues that the Panel has imposed on him the insuperable task of "proving a prospective negative." Petition at 6. It did no such thing. The Attorney General is not obligated to demonstrate that future voting rights violations would be impossible; but he must present evidence to meet his burden under either clause of Rule 60(b)(5). In fact, the Panel acknowledged the ways in which the Attorney General could satisfy his burden to show that the prospective

relief requirement had been "satisfied." The Panel explained that "examples of future compliance may include a roadmap that demonstrates continued compliance or a redistricting plan." Panel Op. at 24-25 The Attorney General could have also proposed a redistricting plan that addressed his purported concerns with malapportionment while maintaining an opportunity-to-elect district in Orleans Parish; pointed to state legislative action to durably protect the voting rights of Black voters in Orleans Parish; or introduced evidence that an opportunity-to-elect district is no longer necessary — i.e., that the factors causing voting dilution under Section 2 have abated. *See* NOA.1948-1949; NOA.1956-1957.

Because the Attorney General offered no such evidence under either clause of Rule 60(b)(5), the District Court and Panel rightly found that he had not met that burden and accordingly denied his motion. That result did not improperly transform the Consent Decree into a perpetual injunction; it only confirmed the inadequacy of the Attorney General's showing to vacate it.

C. The Panel Opinion is Fully Consistent with Existing Precedent.

The Panel Opinion was consistent with the jurisprudence of this Court and the Supreme Court. The Attorney General sought to vacate the Consent Decree under clauses one and three of Rule 60(b)(5). The Panel therefore appropriately examined and applied existing case law in analyzing the sufficiency of his motion under each of those clauses. The Panel was consistent with this Court's jurisprudence both in

its application of the *Board of Education of Oklahoma City Public Schools v. Dowell* ("*Dowell*") standard to clause one (thereby rejecting the Attorney General's "substantial compliance" standard), and in its application of the test set forth in *Rufo v. Inmates of Suffolk County Jail*[1] to clause three. Consequently, nothing about the Panel's legal holdings merit rehearing.

At the outset, despite the Attorney General's protestations concerning the Panel's use of the *Dowell* standard, Petition at 7-11, there is little dispute that the choice of standard would not alter the outcome of this case. Notably, Judge Englehardt, in his dissent, did not suggest that the choice of competing standards was outcome determinative. Panel Op. at 40-41. Whether evaluated under *Dowell* or "substantial compliance," there is no question that, as discussed above, the plain terms of the Consent Decree explicitly call for future elections to be conducted using District Seven. Under either *Dowell*'s good faith or the substantial compliance standard, the Attorney General must present *some* evidence that this provision to which the State agreed is no longer necessary to remedy the violations that gave rise to the Decree. And the District Court did not abuse its discretion, as the Panel

[1] As the Panel Opinion noted, the State "acknowledge[d] that the U.S. Supreme Court's two-part test in *Rufo* applies," Panel Op. at 27, and the State does not appear to challenge the application of that test in its en banc petition. *See generally* Petition.

affirmed, in finding the Attorney General's meager record insufficient to make that demonstration.

In any event, the notion that the Panel made some error warranting en banc review by applying *Dowell* rather than a "substantial compliance" standard found in Louisiana construction law is plainly wrong. *State contract law* cannot provide the substantive legal standard for a *federal rule of procedure*. Consent decrees are part contracts, and therefore courts look to the contract doctrines of the relevant state to interpret their terms. *See Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir. 2006). But, once those terms are determined, the question is whether a party seeking to vacate a consent decree has sufficiently "satisfied, released, or discharged" those terms under Rule 60(b)(5). And that is a question of federal procedural law, not state law. *See Camacho v. Tex. Workforce Comm'n*, 445 F.3d 407, 409 (5th Cir. 2006) ("[F]ederal law, rather than state law, invariably governs procedural matters in federal courts"); *c.f. Jackson v. FIE Corp.*, 302 F.3d 515, 522-23 (5th Cir. 2002) (holding that a conflicting Louisiana statute "must yield" to the federal standard on a Rule 60(b) motion to vacate a default judgment in federal court).

Moreover, as the Panel properly recognized based on the reasoning of *Dowell* itself and persuasive authority from other circuits, *Dowell* is the appropriate standard under Rule 60(b)(5). Panel Op. at 21-22. As this Court has previously noted, clause one is "almost never applied to consent decrees," and there are consequently few

decisions considering its application in contexts like this one. *Frew v. Janek*, 780 F.3d 320, 327 (5th Cir. 2015). The question of what standard to apply to determine when an institutional reform decree, like the Consent Decree, is "satisfied, released, or discharged" under Rule 60(b)(5) was squarely presented in this case, and the Panel resolved it by looking to the considerations set forth in *Dowell*. The application of *Dowell* under these circumstances was reasonable, appropriate, and consistent with what this Court had said in *Boerne* and *Frew*, and what the Supreme Court said in *Rufo*. Panel Op. at 17-18. Furthermore, the application of this standard makes sense in the instant case, which involves systemic racial discrimination and a Decree that seeks institutional reform of that system. Certainly, it makes more sense than a contract doctrine rooted in Louisiana construction law. *See Transier v. Barnes Bldg., LLC*, 14-1256 (La. App. 3 Cir. 6/10/15), 166 So. 3d 1249, 1260 (citing La. Civ. Code Ann. art. 2769 (2022)).

By the same token, the Panel's rejection of the Attorney General's "substantial compliance" doctrine was perfectly consistent with existing law. Panel Op. at 19-23. The Attorney General's erroneous notion that there is some robust doctrine of "substantial compliance" in this Circuit is based on a misreading of the Court's decision in *Frew*, which interpreted a *Texas* consent decree in light of the Texas contract doctrine of substantial compliance. *See Frew*, 780 F.3d at 330 ("In determining that a party to a contract has fulfilled its contractual obligations, *Texas*

law allows substantial compliance.") (emphasis added). This Court never purported to pronounce the standard by which Rule 60(b)(5) motions must be assessed in every case, much less in cases involving institutional reform decrees, which require courts to deploy "a flexible approach." *Boerne*, 659 F.3d at 437-38.

Because the Opinion was consistent, and did not directly conflict, with any decisions of this Court or the Supreme Court, en banc rehearing is unwarranted. Accordingly, the Attorney General's Petition should be denied.

D. There is No Significant Federalism Concern, Much Less an Exceptionally Important One.

The Attorney General's final argument — that this case presents an exceptionally important question of federalism — is likewise meritless. The Attorney General fails to explain exactly *how* the Consent Decree violates the principles of federalism. *See generally* Petition. The absence of a plausible explanation from the Attorney General reveals that the Consent Decree does not, in fact, hamstring state functions to reapportion and/or redraw the boundary lines of any of the seven districts of the Louisiana Supreme Courts. To the contrary, the terms of the districting statute incorporated into the revised Decree explicitly permit the Louisiana Legislature to redraw Supreme Court judicial districts at any point, as long as — pursuant to the terms of the Consent Decree and the Joint Motion providing for the conduct of "future Supreme Court elections" approved by the District Court — the majority-Black District Seven remains intact. *See* ROA.128.

Despite the Attorney General's arguments otherwise, the State retains its sovereign prerogative to draw its judicial districts, so long as it does so in a way that ensures the opportunity for Black voters in Orleans Parish to elect their candidate of choice where necessary. The Attorney General presented no evidence to the contrary.

Pursuant to FRAP 35 and this Court's precedent, "[a] proceeding may involve a question of exceptional importance if 'it involves an issue on which [a] panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.'" *Wright v. Hollingsworth*, 201 F.3d 663, 666 (5th Cir. 2000), *rev'd on reh'g on other grounds*, 260 F.3d 357 (5th Cir. 2001) (citing F.R. App. P. 35(b)(1)(B)). This Court has also found that a question of exceptional importance exists when it must determine the "proper interpretation and application" of recent Supreme Court precedent. *See United States v. Tharpe*, 536 F.2d 1098, 1099–1100 (5th Cir. 1976), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). But when a "case merely involve[s] application of established rules to the particular facts of these cases" it is not "worthy of en banc dissertation." *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1169 n. 38 (5th Cir. 1987), *cert. granted, judgment vacated by Pan Am. World Airways, Inc,. v. Lopez,* 490 U.S. 1032 (1989).

The Attorney General cannot demonstrate that this case involves more than an application of established rules to a particular set of facts. In applying its Rule

60(b)(5) analysis, the Panel rightly concluded that the Louisiana Legislature was not "hamstrung by the Consent Judgment in redistricting matters." Panel Op. at 31. Since the Decree's enactment, therefore, the State has been free to redraw its other six judicial districts without any form of federal supervision or interference. Yet it has not. Indeed, if the State were interested in redrawing all the districts, including District Seven, the Consent Decree would not present a significant obstacle. The State could have sought to modify or amend the Decree, just as it did in the 2000 amendment that incorporated Act 776. It need only have demonstrated either that the redrawn District Seven would have ensured the opportunity for Black voters in Orleans Parish to elect a candidate of choice, or that such a district was no longer necessary.

The record reveals no obstacle to the State's exercise of its sovereignty. The Attorney General produced no reports, official statements, or expert testimony indicating that Louisiana State Legislature's disinterest in redistricting was attributable to the Consent Decree. And he continues to offer this Court nothing more than his *ipse dixit* that the Consent Decree represents some grave offense to the principle of federalism.

The Attorney General consequently fails to establish that the Consent Decree violates the principles of federalism, much less that it presents an exceptionally important question worthy of en banc review. Because neither the Decree nor the

Panel Opinion presents such a question, the Petition for en banc rehearing should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny en banc rehearing.

Dated: November 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2023, a true and correct copy of the foregoing Opposition to En Banc Rehearing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Upon acceptance by the Court of the electronically filed document, 20 paper copies will be filed with the Court within the time provided in the Court's rules via Federal Express.

Dated: November 30, 2023

By: */s/ Leah C. Aden*
Leah C. Aden

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and in accordance with Fifth Cir. R. 35.5, this document contains 3,893 words.

2. This document 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 this document has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.

Dated: November 30, 2023

By: *<u>/s/ Leah C. Aden</u>*
Leah C. Aden