No. 22-30320

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
Case No. 2:86-CV-4075
Presiding Judge Susie Morgan

EN BANC SUPPLEMENTAL BRIEF OF INTERVENOR PLAINTIFF-APPELLEE BERNETTE J. JOHNSON

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certified that the following listed persons and entities as described in the fourth sentence of 5th Circuit 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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Dated: March 29, 2024

STATEMENT REGARDING ORAL ARGUMENT

Intervenor Plaintiff-Appellee, Bernette J. Johnson, does not request oral argument as she believes the factual and legal issues are clear and more than adequately addressed in the parties' briefs. Nonetheless, she is happy to make her counsel available for oral argument should the Court deem it helpful or necessary.

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STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction over Plaintiffs' Section 2 claim under 28 U.S.C. § 1343(a), 28 U.S.C. § 1331 and 28 U.S.C. § 1357. The parties entered into a Consent Judgment that resolved Plaintiffs' Section 2 claim. Thereafter the State moved to dissolve the Consent Judgment, and the district court denied its motion. A three-judge panel of this Court affirmed the district court's decision. This Court granted the State's petition to rehear the case en banc. This Court has jurisdiction to hear the case under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES ON REHEARING

1. Did the district court abuse its discretion in ruling that the State failed to meet its burden of satisfying the first clause of Federal Rule of Civil Procedure 60(b)(5)—satisfaction, release, or discharge of the Consent Judgment?

2. Did the district court abuse its discretion in ruling that the State failed to meet its burden of satisfying the third clause of Federal Rule of Civil Procedure 60(b)(5)—prospective application of the Consent Judgment is no longer equitable?

3. Did the district court accurately determine that ensuring future compliance with Section 2 of the Voting Rights Act was contemplated by the parties when agreeing to the Consent Judgment?

INTRODUCTION

This case arises from decades of litigation related to violations of Section 2 of the Voting Rights Act by the State of Louisiana. The purpose of the Consent Judgment—which the parties entered in 1992 to resolve discriminatory judicial districting of the Louisiana Supreme Court by the State—was to ensure the State's compliance with Section 2 in future Louisiana Supreme Court elections and redistricting for the Louisiana Supreme Court Judicial Districts.

The State, after two unsuccessful attempts to dissolve the Consent Judgment, now seeks en banc review of the district court's decision. The State points to the successive election of three Justices in District 7, including the ascension of Justice Johnson to Chief Justice, as sufficient to demonstrate the satisfaction, discharge, or release from the Judgment. The State maintains that it need not furnish any evidence to secure dissolution of the Consent Judgment. But the burden is on the State to demonstrate that dissolution is warranted.

The State's separate argument that dissolution is warranted due to a changed circumstance—the malapportionment of Louisiana Supreme Court judicial districts—falls equally flat. Malapportionment is not a changed circumstance when its existence is nearly a century old nor when the remedy to the "changed circumstance" can be implemented without dissolution of the Consent Judgment which is otherwise unsatisfied.

For the reasons set forth below and in Chief Justice Johnson's previous brief and for all the reasons in the *Chisom* Plaintiffs' and DOJ's briefs, the district court correctly ruled that dissolution of the Consent Judgment was improper under Rule Procedure 60(b)(5). The district court's decision should be affirmed, or in the alternative, the case should be remanded for further evidentiary proceedings.

STATEMENT OF THE CASE

Chief Justice Johnson respectfully refers the Court to her prior briefing before the three-judge panel of this Court for a comprehensive review of the long history of this case, including the portions related to the initial conditions that spawned this litigation, the execution of the Consent Judgment in 1992, the enforcement of the Consent Judgment in the years following its execution, and the State's bad faith challenge to then-Justice Johnson's ascension to Chief Justice. Below, Chief Justice Johnson addresses the most recent proceedings in the case.

A. The State's Rule 60(b)(5) Motion and the District Court's Ruling.

On December 2, 2021, the State filed its dissolution motion in the Eastern District of Louisiana largely on two grounds: that a "final remedy" had been implemented with the appointment of Justice Johnson as Chief Justice and the

subsequent election of Justice Griffin to District 7 and that applying the injunction prospectively was no longer equitable because the districts were malapportioned.[1]

On May 24, 2022, the district court denied the State's motion for dissolution,[2] holding that the State had not met its burden of proving that dissolution of the Consent Judgment was appropriate under either the first of third clauses of Rule 60(b)(5)[3]. The district court applied the legal test in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), to determine whether under the first clause of Rule 60(b)(5) the State had demonstrated that it had complied with the Consent Judgment in good faith and the vestiges of past discrimination had been eliminated to the extent practicable. *Id.* at 248–50. The district court applied the standard in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), to evaluate whether under the third clause of Rule 60(b)(5) the State had produced evidence sufficient to show that a significant change in facts or law warranted dissolution of the judgment and that dissolution was suitably tailored to the changed circumstances. *Id.* at 383. Under these legal tests, the lower court held that the State was not entitled to dissolution of the Consent Judgment under either the first or the third clauses of Rule 60(b)(5).[4]

[1] ROA.1429.
[2] ROA.1934.
[3] ROA.1943–57.

As evidence that the State had not complied with the "final remedy" in the Consent Judgment, the district court referred to the hearing it had held on March 24, 2022, during which the State responded in the negative when asked whether dissolution "would mean that the State is free to *not* have a district in New Orleans where an African-American can be elected[], and whether the *Chisom* plaintiffs would have to "start all over" if the State devised its own reapportionment plan "that splits Orleans Parish up into other districts so that there's no possibility for an African-American to be elected."[5] The State agreed that it was possible that after dissolution, District 7 might not remain a majority-Black district:

> I don't think if the legislature is going to truly reapportion the districts that they can be bound or committed to making any one parish any particular kind of district. . .. The reapportionment rules don't require that and don't mandate that. ***So if the legislature goes forward with reapportionment and this case is dissolved, then the result that Your Honor described is the result***.[6]

The State's response and its failure to furnish any evidence that demonstrated that it had complied with the Consent Judgment in good faith or that changed circumstances warranted dissolution resulted led the district court to conclude that dissolution was unwarranted.[7]

B. Decision of the Three-Judge Panel of the Fifth Circuit Affirming the District Court's Decision.

[5] ROA.1948 (emphasis added)
[6] ROA.1949 (emphasis added).
[7] ROA. 1957.

On May 25, 2022, the State appealed the district court's ruling.[8] On August 24, 2022, the State filed its merits brief before the Fifth Circuit, and a three-judge panel comprised of Judges Wiener, Stewart, and Engelhardt heard the State's appeal. On appeal, the State took the position that the district court erred in refusing to dissolve the Consent Judgment because, according to the State, it had fully complied with the terms of the Judgment while it was in effect.[9] The State went on, that by adhering to the terms of the Consent Judgment, it had achieved a "final remedy" through Justice Johnson's ascension to Chief Justice.[10] Plaintiffs and Chief Justice Johnson argued on appeal that the district court correctly found that the State had failed to present evidence sufficient to demonstrate that the final remedy of the Consent Judgment was implemented.[11]

Two judges on the three-judge panel affirmed the district court's denial. The Court held that "[t]he district court correctly determined that the Consent Judgment's final remedy is the State's *prospective compliance with Section 2 of the VRA*."[12] The Court noted that "several key clauses" in the Consent Judgment demonstrated that the parties had agreed to a final "final remedy" that was prospective, as the Judgment

[8] ROA.1958.
[9] R. Doc. 38 at 36–40.
[10] R. Doc. 38 at 45–46.
[11] R. Doc. 56 at 26–27, 31–49.
[12] R. Doc. 95-1 at 15 (emphasis added).

"repeatedly states that its goal is to 'ensure' that the Louisiana Supreme Court's election methods comply with the VRA."[13]

Next, the panel majority ruled, as a matter of law, that the district court did not err in applying the standard under *Dowell* and concluding that the State had not met *Dowell's* two-part test, [14] (1) the State has complied in 'good faith' with the Consent Judgment since its entry and the vestiges of past discrimination have been eliminated to the extent practicable. [15] The panel noted that the State failed to provide any "evidence, plans, or assurances of compliance with Section 2 of the VRA" if the Consent Judgment was dissolved; it went on, that the State's position was "the antithesis of *Dowell's* requirement."[16] Importantly, the panel reasoned that even if the State had complied with the Consent Judgment, the election of two Black Justices—Justice Johnson and Justice Griffin—from District 7 was not alone sufficient to show that the vestiges of past discrimination had been eliminated.[17] The panel thus held that the State failed to meet its burden to dissolve the Consent Judgment under the first clause of Rule 60(b)(5).[18]

Additionally, the panel reasoned that the district court did not err in ruling that the State had failed to meet the third clause of Rule 60(b)(5)—i.e., changed

[13] *Id.* at 14.
[14] *Id.* at 16–23.
[15] *Id.* at 24–25.
[16] *Id.* at 25.
[17] *Id.* at 26.
[18] *Id.* at 27.

circumstances, in this case, malapportionment, warranted a termination of the Judgment.[19] Under the two-prong *Rufo* test, the panel found that there was no evidence that a modification, as opposed to a complete termination, of the Consent Judgment could not serve as the appropriate remedy to address malapportionment.[20] This was because, according to the panel, the State had not shown that malapportionment was a new, changed circumstance or that continued enforcement of the Judgment was detrimental to the public interest.[21]

Lastly, the panel emphasized that the State's federalism concerns were "exaggerated," especially given the Court's opinion in *Allen v. Louisiana*, 14 F.4th 366, 368 (5th Cir. 2021), in which it "clarified the proper scope of the Consent Judgment" was to "remedy alleged vote dilution in one supreme court district, not to reform the whole system."[22] The panel further noted the lack of evidence that "the Consent Judgment significantly restrict[s] the Louisiana legislature's redistricting efforts" undercuts the State's federalism concerns.[23] On these grounds, the panel held that the district court did not abuse its discretion in finding that the State had not shown that dissolution was the proper course of action.[24]

[19] *Id.* at 30.
[20] *Id.* at 30–31.
[21] *Id.*
[22] *Id.* at 16, 33.
[23] *Id.* at 33.
[24] *Id.* at 35–36.

The State timely petitioned for rehearing *en banc* before the Fifth Circuit and this Court granted its petition.[25]

[25] *See* R. Doc. 163.

SUMMARY OF THE ARGUMENT

Chief Justice Johnson relies on her prior briefing before the three-judge panel and the briefs of the *Chisom* Plaintiffs and DOJ.[26] This supplemental brief addresses three arguments in the State's supplemental *en banc* brief: first, that Justice Johnson's ascension to Chief Justice was the final remedy contemplated under the Consent Judgment; second, that the State substantially complied with the Judgment; and third, that malapportionment is a changed circumstance that warrants dissolution of the Judgment. The State is incorrect on all three accounts.

The State misinterprets the Consent Judgment's "final remedy" in an effort to rewrite the terms of the Consent Judgment and free itself from conditions to which it agreed.[27] The final remedy under the Consent Judgment, as determined by both the District Court and the Panel, is continued and future compliance with Section 2 as applied to Black voters in District 7, encompassing Orleans Parish. Ascension of Justice Johnson to the Chief Justice position, a term that itself does not appear in the language of the Consent Judgment, is not the final remedy, as the State posits.

The State's argument that it complied with the Consent Judgment is unpersuasive considering the facts.[28] The State may have met one provision of the Judgment which includes time-limited remedies, however, it did not commit to

[26] *See* R. Doc. 56, R. Doc. 57.
[27] Suppl. Appellant Br. 14, 23 (R. Doc. 182).
[28] *Id.* at 10–13.

complying with any of the other provisions in the Judgment that expressly require prospective compliance with Section 2. The position the State espouses proves the opposite—that, according to the State, it need not ensure District 7 will remain a majority-Black district in the future and the district could very well be dissolved if the Legislature chose to do so.

The State's malapportionment theory is equally unavailing.[29] The Supreme Court districts have remained malapportioned for more than thirty years. Thus, malapportionment itself is not a new or a changed circumstance. Moreover, dissolution of the Consent Judgment is not tailored to any alleged changed circumstance. The Judgment contemplates future redistricting in compliance with Section 2, and so by its terms, the Judgment places no constraints on the State to reapportion its districts, so long as any redistricting that occurs is undertaken in a manner that complies with Section 2.

For all the reasons set forth below and in Chief Justice Johnson's previous brief before the merits panel and for the reasons set forth in the *Chisom* Plaintiffs' and DOJ's briefs, the district court's decision should be affirmed.

[29] *Id.* at 35–41.

STANDARD OF REVIEW

A district court's decision on a motion to vacate or modify a judgment under Rule 60 is reviewed for abuse of discretion, *Anderson v. City of New Orleans*, 38 F.4th 472, 479 (5th Cir. 2022), while any questions of law underlying the district court's ruling are reviewed de novo, *Frew v. Janek* (*Frew I*), 780 F.3d 320, 326 (5th Cir. 2015).[30] Any findings of fact are reviewed for clear error. *Id.*

Under the abuse of discretion standard, a Rule 60(b) motion is entitled to "heightened" or "substantial" deference. *Id.*; *Frazar v. Ladd*, 457 F. 3d 432, 435 (5th Cir. 2006); *Cooper v. Noble*, 33 F.3d 540, 543 (5th Cir. 1994). Rule 60(b) is not a means to an end of avoiding the consequences of settling a case; it is to be used only on narrow grounds and upon a showing of exceptional circumstances. *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792 (7th Cir. 1980); *Mayberry v. Maroney*, 529 F.2d 332, 335 (3rd Cir. 1976). The State bears the evidentiary burden of proving that dissolution under Rule 60(b)(5) is warranted. *U.S. v. City of New Orleans*, 947 F. Supp. 2d 601, 615 (E.D. La. 2013).

Ultimately, Rule 60 "balance[s] the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of all the facts." *Id.* (citing

[30] De novo review applies to the district court's application of *Dowell*. The district court did not err as a matter of law in applying *Dowell*, and that decision was affirmed by a panel majority of this Court reviewing the question de novo. In any event, Chief Justice Johnson does not address this issue and relies on the briefs of the *Chisom* Plaintiffs and DOJ.

Hesling v. CSX Transp., Inc., 396 F.3d 632, 638 (5th Cir. 2005)). "Granting relief under Rule 60 is 'an extraordinary remedy which should be used sparingly." *U.S. v. City of New Orleans*, 947 F. Supp. at 615 (citing *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004)).

ARGUMENT

I. JUSTICE JOHNSON'S ASCENSION TO CHIEF JUSTICE WAS NOT THE "FINAL REMEDY" CONTEMPLATED BY THE CONSENT JUDGEMENT.

The State asserts that Justice Johnson's ascension to the role of Chief Justice of the Louisiana Supreme Court demonstrates that the "final remedy" of the Consent Judgment has been fulfilled.[31] For one, the State seems to think that Chief Justice Johnson and Justice Jackson (presumably, it is referring to the first the Black woman to ever be appointed on the United States Supreme Court) are the same person because despite Chief Justice Johnson's distinguished service as Chief Justice of Louisiana's Supreme Court, the State bizarrely refers to her multiple times as "Justice Jackson."[32] This repeated error evinces a sloppiness when referring to Chief Justice Johnson that could unfortunately be construed as a lack of respect for her and her service to the highest court of this State. Worse, not only does the State repeatedly misname Chief Justice Johnson, but it also seeks to benefit from its own litigation losses and weaponize her service to evade future compliance with Section 2.

[31] Suppl. Appellant Br. 25–26 (R. Doc. 182).
[32] *Id.* at 25.

A. Chief Justice Johnson Was the Second Ever African American Justice to Serve on the Louisiana's Supreme Court.

Chief Justice Johnson provides this Court with context around her service to demonstrate the importance of the Consent Judgment and its continued enforcement. Chief Justice Johnson was only the second Black person ever elected to Louisiana's Supreme Court in *over 200 years* of the state's existence. Out of all 117 Louisiana Supreme Court Justices who have served the state, only three have been Black. Significantly, all three of these Justices took their seats after the execution of the Consent Judgment, although the Judgment itself was not responsible for Justice Johnson's ascension to Chief.

Chief Justice Johnson's own tenure was marred by the State actively seeking to disqualify portions of her service as a Justice. In 2012, the State actively sought to diminish her seniority, by discrediting the time she served in the Chisom seat to prevent her from becoming Chief Justice.[33] Chief Justice Johnson's very presence in this litigation is therefore a testament to the State's active attempts to undermine the Consent Judgment, underscoring its importance.

Not only was Chief Justice Johnson the second Black Justice to ever serve on Louisiana's Supreme Court, but she was also the *only* Black member of the Court throughout her tenure, despite the fact Black Americans make up approximately

[33] ROA.722.

33% of Louisiana's total population. During her service, Chief Justice Johnson found she was frequently the only person to voice concerns on state laws that had discriminatory racial impacts. For example, in *State v. Bryant*, 2020-00077 (La. 7/31/20), 300 So. 3d 392, 393, the Louisiana Supreme Court adjudicated the appropriateness of a 23-year prison sentence given to a Black man for stealing hedge clippers. The court affirmed the sentence even though the defendant's prior criminal history was limited to non-violent crime. *Id.* Justice Johnson wrote the sole dissent against the harsh sentence. *Id.* She called it "excessive and disproportionate," and noted the significant costs, over $500,000, of the sentence. *Id.* Chief Justice Johnson's dissent emphasized a core theme: that putting more Black bodies behind bars for longer periods of time than their non-Black peers without any remedy in sight, and this as recently as 2020, undoubtedly affects Black voters ability participate in the political process.

Even before she assumed the role of Chief, as an Associate Justice, she continued to issue lone dissents in cases where the State was actively discriminating against its Black citizens. In *State v. Juniors*, 2003-2425 (La. 6/29/05), 915 So. 2d 291, 341–43, and *State v. Snyder*, 942 So .2d 484 (La. 9/6/2006), she was the only one to call the State into question for improperly using preemptory strikes on Black jurors in criminal matters involving Black defendants. In *Juniors*, then-Justice Johnson noted that the State had struck a Black juror for the juror's opposition to the

death penalty but did not strike white jurors who expressed the same sentiment. 915 So. 2d at 343. In *Snyder*, Justice Johnson again criticized the State on its use of peremptory strikes that resulted in an all-white jury deciding whether a Black defendant should face the death penalty. 942 So. 2d at 505–09.

In *Louisiana Department of Justice v. Edwards*, which was decided when she was Chief, she used her pen again to dissent against racially discriminatory conduct. 2017-2020, (La. 3/23/18), 239 So. 3d 824. This time, she dissented against the State Supreme Court's refusal to take up a writ that would have decided whether a lower court erred in finding unlawful the enactment of an anti-discrimination policy prohibiting state agencies, in part, from engaging in racially discriminatory practices. *Id.* at 1–3. She pointed out that the policy at issue was like others previously in place and, as such, would have granted the writ. *Id.* at 3.

B. Justice Johnson's Ascension to Chief Justice Was Unrelated to the Consent Judgment.

A decade ago, the State attempted to discredit and discount then-Justice Johnson's service on the Louisiana Supreme Court to prevent her from taking the Chief Justice position.[34] Incredibly, the State now seeks to benefit from a consequence it sought to prevent.[35] Justice Johnson's ascension to the Chief Justice,

[34] *Id.*
[35] Suppl. Appellant Br. 25–26 (R. Doc. 182).

however, was wholly unrelated to the Consent Judgment and was the product of the Louisiana Supreme Court's own interpretation of its own rules.

After the retirement of Chief Justice Catherine Kimball, Justice Johnson was the senior most member of the Supreme Court. In seeking to protect her seniority and ensure that she would rightfully ascend to Chief Justice, Justice Johnson moved to intervene in this suit for a determination of whether her service on the *Chisom* seat would be credited towards her seniority.[36] Despite the State's opposition and appeal to the Fifth Circuit, the Louisiana Supreme Court issued a *per curiam* opinion, prior to the resolution of the State's federal appeal, which concluded that Justice Johnson's "unbroken chain of both appointed and elected service" on the Louisiana Supreme Court bench entitled her to become the next Chief Justice and mooted the State's appeal before this Court. *See In re Off. Of Chief Just., LSC,* 2012-1342 (La. 10/16/12), 101 So. 3d 9, 21.

The Louisiana Constitution provided the determinative basis for Justice Johnson's ascent to Chief Justice and the Consent Judgment was "irrelevant for purposes of this matter." *Id.* The Consent Judgment had no bearing on the order of seniority and ascension because the question of who would occupy the Chief Justice position was a state law issue, involving "a Louisiana constitutional law issue which, in our system of justice, this court and no other is qualified to answer." *Id.* at 11.

[36] ROA.53.

Moreover, the Louisiana Supreme Court held that it was "emphatically and singularly the ultimate authority on issues related to the Louisiana Constitution, particularly on an issue related to the administration and composition of [the Louisiana Supreme Court]." *Id.* at 13. Because the issue was decided by way of state law, the Consent Judgment played no part in determining Justice Johnson's seniority and as a result, her right to become Chief Justice. Thus, Justice Johnson's ascension could have been the final remedy contemplated by the Consent Judgment.

Furthermore, the Consent Judgment did not include any terms which could be interpreted to mean that Justice Johnson becoming Chief Justice in District 7 was the "final remedy" to be implemented by the State. Under the Consent Judgment, there was no requirement that the Justice serving in District 7 would ever become Chief Justice.[37] Furthermore, when the parties in the *Chisom* litigation entered into the Judgment, they did not contemplate that the Justice hailing from District 7 might ascend to Chief Justice, which was later decided by way of the state Constitution.

The State conveniently weaponizes Chief Justice Johnson's service as the Chief to dissolve the Consent Judgment in its entirety. The State not only claims that then-Justice Johnson's ascension was somehow the final remedy of the Consent Judgment, but that her ascension to Chief is evidence of the State's good faith compliance with the Judgment, an outcome it actively worked to undermine

[37] ROA.1540–47.

throughout the 2012 litigation.[38] This Court should not allow the State to "benefit" from the fortuitous circumstance that Chief Justice Johnson happened to become Chief Justice, especially when the State took an adverse position to that outcome at the time the issue was litigated.

II. THE STATE HAS NOT SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE CONSENT JUDGMENT.

As an initial matter, Chief Justice Johnson relies wholly on the briefs of the *Chisom* Plaintiffs and DOJ as to the application of the *Dowell* standard to determine whether dissolution of the Consent Judgment is warranted under the first clause of Rule 60(b)(5)— i.e., "the judgment has been satisfied, released or discharged." The State argues that state contract law applies in this instance.[39] And under that standard, the State need demonstrate only that it substantially complied with the terms of the Consent Judgment.[40] By all accounts, the Consent Judgment is not a state law contract. Rather, it is an institutional reform judgment that aims to remedy the vestiges of past discrimination.[41] Chief Justice Johnson does not address that argument. Nevertheless, even under the substantial compliance standard, the State fails to demonstrate that the Judgment should be dissolved.

[38] Suppl. Appellant Br. 15–16 (R. Doc.182).
[39] *Id.* at 12–13.
[40] *Id.* at 13.
[41] ROA.1940–43.

A. The "Final Remedy" Is Assurance that the State Will Maintain a Section 2 Compliant Electoral System for Electing State Supreme Court Justices.

Even assuming that the substantial compliance standard under contract law applies here,[42] which it does not, the State has not met it. Under the State's proposed standard, a party to a contract must show that it has completed "substantial performance" of the contract. *Dugue v. Levy*, 15-057, (La. 1904) 37 So. 995, 996. The party seeking dissolution of the contract, however, bears the burden of showing substantial performance of the contract's terms. *Frew v. Janek* (*Frew II*), 820 F.3d 715, 721 (5th Cir. 2016). Courts in this circuit excuse deviations from a contract's provisions that do not severely impair the contractual provision's purpose. *Id.* The contract law of the state in which the contract was agreed is the law that governs the interpretation of, and thus the satisfaction of, the contract. *Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc.*, 88 F.3d 347, 352 (5th Cir. 1996). The "primary concern of a court in construing a written contract is to ascertain the true intentions of the parties as expressed in the instrument." *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006). Thus, courts must use the unambiguous language of the written instrument and enforce the "objective intent" as evidenced by that language. *Id.* "Courts should examine and consider the entire writing in an effort to harmonize and

[42] Chief Justice Johnson notes that the State relies *heavily* on outdated contract case law from construction-related cases and from cases applying Texas state law to support its theory of "substantial performance." Neither of those standards should be determinative in the context of a Consent Judgment to remedy a violation of a federal civil rights statute, Section 2 of the VRA.

give effect to all the provisions of the contract so that none will be rendered meaningless." *Id.* at 408. When a contract resolves a lawsuit, the contract extends to "those matters the parties intended to settle." *Trahan v. Coca Cola Bottling Co. United, Inc.*, 2004-0100, p. 15 (La. 3/2/05); 894 So.2d 1096, 1107, (citing La. Civ. Code art. 3073). Moreover, Louisiana's Civil Code, Article 3076 provides: "A compromise settles only those differences that the parties intended to settle, *including the necessary consequences of what they express*." La. Civ. Code. Art. 3076 (emphasis added).

Setting aside whether the State's proposed standard of "substantial performance" should apply at all, the question here is whether, by implementing the eight action items contained in Provision C of the Consent Judgment, the State substantially complied with the Consent Judgment to warrant dissolution. Even under the State's ridiculously lenient standard, the State did not substantially comply. The Consent Judgment is not limited to Provision C and includes Provisions A through K, which the State conveniently ignores.[43] Provision C itself is time-limited by its language, as it refers to the creation of District 7 and the process by which a vacancy may be filled.[44] The remaining Provisions of the Judgment undermine the State's substantial compliance theory.

[43] ROA. 1540–47.
[44] ROA. 1542–45.

Provision B includes *prospective* language, that the Consent Judgment "will ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act."[45] That language, as interpreted by the district court and affirmed by the majority of the three-judge panel, thus calls for *both* present and future compliance with Section 2.[46] Indeed, the plain language of the Judgment uses the future tense, "will" to fashion prospective relief, namely through the creation of a single-member majority-Black district in Orleans Parish that was to become effective on January 1, 2000, and from which "future Supreme Court elections after the effective date" were ordered to "take place in the newly reapportioned districts."[47]

The State cannot escape that the Consent Judgment includes language that goes to the State's commitment to maintain District 7 as a majority-Black district in the future. Considering the "underlying goals" of the Consent Judgment, the district court emphasized that, by its terms, the Consent Judgment was forward looking, requiring the State to ensure that "Black voters in Orleans Parish have an equal opportunity to participate in the political process, both at the time the Consent Judgment was entered and in the future."[48] The State argues that its work is done

[45] ROA.1542.
[46] R. Doc. 95-1 at14–16; ROA.1940–43.
[47] ROA.1542
[48] ROA.1947.

because it complied with Provision C. But to accept the State's argument would be the equivalent of rewriting the Consent Judgment to omit all the other Provisions including one of the most important Provisions, Provision B, which requires the State to continue to maintain District 7 as a majority-Black District. *See Frazar*, 457 at 439 (5th Cir. 2006) ("to interpret the sole object of the [consent judgment] to ensure compliance with something less than that which is stated in the [consent judgment] itself would be akin to rewriting the [consent judgment]"). The State's future compliance with the Consent Judgment is a necessary consequence of what it agreed to when the Consent Judgment was entered.

The State's reliance on *Frew I* is unavailing for a number of reasons. In *Frew I*, the parties had "already agreed that substantial compliance" with the terms of the decree "would achieve their common goal." 780 F.3d at 328. This Court noted that the plaintiffs in the case had incorporated additional items that were not in the decree to begin with. *Id.* at 238–39. To that end, the Court found that if the decree "had explicitly guaranteed pharmacists' compliance, provided an objective standard for assessing the effectiveness of Defendants' actions, or set termination conditions referencing satisfaction of the Decree's overall purpose, Plaintiffs might legitimately complain about the district court's approach." *Id.* at 330.

The Consent Judgment here could not be more different from the decree that was at issue in *Frew I*. By its terms, the Consent Judgment here requires prospective

compliance, and the State has failed to commit to such prospective compliance. While the State may have satisfied the specific "action items" in Provision C, the State has not provided any assurance that it will comply with Section B, by ensuring that District 7 complies with Section 2 of the VRA. Notably, during the district court hearing on its motion for dissolution, counsel for the State did not inspire confidence that the State would commit to preserving District 7 as a majority-Black district. Indeed, when asked that very question by the district court, the Louisiana Attorney General failed to answer in the affirmative. The Attorney General openly admitted that there would be *nothing* preventing the State from committing another Section 2 violation should the Consent Judgment be dissolved.[49] Thus, in the absence of any assurance to the contrary, the district court properly concluded that the State had not demonstrated that it had complied with the underlying goals of the Consent Judgment which was to preserve a majority-Black district in the Orleans Parish area. In addition, that Provision C of the Judgment is not the "final remedy" is further underscored by the fact that Provision K, providing that "the Court shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished," makes no mention of Provision C.

The State further argues that because there was never a finding of a Section 2 violation, there is no ongoing Section 2 violation that the district court can "continue

[49] ROA.1949.

to correct."[50] That position is misleading. Provision E of the Consent Judgment provides that the Plaintiffs are the prevailing parties and that the Judgment itself obliges the State to ensure that its remedy complies with Section 2: "Defendants agree that, in order to comply with the Voting Rights Act, and in order 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, the *Chisom* plaintiffs and the United States are to be considered the prevailing parties in this litigation."[51] In agreeing that Plaintiffs were the prevailing party here, the State acquiesced to facts proffered by Plaintiffs relating to "the official history of racial discrimination in Louisiana's 1st Sup. Ct. District" and "the continuing effects of past discrimination on the Plaintiffs."[52]

Considering the various provisions of the Consent Judgment and the necessary consequences of what the State and the *Chisom* Plaintiffs and DOJ agreed to, the State's position that it substantially complied with the Consent Judgment is unpersuasive. The State may have complied with Provision C, one provision, but that is insufficient to warrant full dissolution.

[50] Suppl. Appellant Br. 26 (R. Doc. 182).
[51] ROA.1546.
[52] ROA.878.

B. The State Has Not Satisfied Its Burden of Proving that It Substantially Complied with the Consent Judgment Because It Fails to Show that Plaintiffs Can No Longer Sustain a Section 2 Violation.

To demonstrate that the State substantially complied with the Judgment, the State must prove that the underlying conditions that led to the creation of the Consent Judgment are eliminated. *Board of Education of Oklahoma City Public Schools, Independent School District No. 89 v. Dowell*, 498 U.S. 237, 250 (1991). Contrary to the State's position, the underlying conditions that led to entry of the Consent Judgment are not simply erased because the State argues that it satisfied the enumerated items, i.e., Provision C, in the Consent Judgment.

Thus, the district court correctly found that "[t]he Consent Judgment was specifically aimed at correcting and guarding against the dilution of Black voting power in Orleans Parish."[53] The district court further determined that, while the Consent Judgment provided for "certain specific remedies—e.g., the creation of the temporary *Chisom* seat and the creation of the current District Seven—its unambiguous language contemplates future compliance."[54] Reasoning that the Consent Judgment's language "frequently uses the word 'ensure[,]'" the district court accurately concluded that the phrase "to ensure" within the Consent Judgment "carries with it the notion of guaranteeing a future result."[55]

[53] ROA.1941.
[54] ROA.1942.
[55] *Id.*

To seek dissolution in earnest, the State must prove that Plaintiffs can no longer establish a Section 2 violation under the *Thornburg v. Gingles*, 478 U.S. 30 (1986), preconditions: (1) compactness of Louisiana's Black population in Orleans; (2) cohesive voting among this group; and (3) the existence of racially polarized voting in Orleans. *Id.* at 50–51. The State did not even try to meet its burden. The district court correctly observed that the only "evidence" the State presented was that three Black justices, including Chief Justice Johnson, have been elected to the Louisiana Supreme Court since entry of the Consent Judgment.[56] This was insufficient to overcome the *Gingles* preconditions, particularly considering the *Chisom* Plaintiffs' showing that "there is significant evidence that the *Gingles* factors would still be present and a Section 2 violation would persist in the absence of the Consent Judgment."[57]

As explained in depth in Chief Justice Johnson's original briefing to this Court, Plaintiffs demonstrated the existence of the three *Gingles* preconditions. First, Black voters in Orleans Parish remain a sufficiently large and geographically compact group to constitute a majority-minority district.[58] Second, based on Plaintiffs' own (not the State's) "preliminary analysis" of the evidence, it is likely

[56] ROA.1952.
[57] ROA.1734.
[58] *Id.* at n.11 (citing *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1124 (E.D. La. 1986)).

that Black voters in Orleans Parish are politically cohesive—i.e., they vote similarly and white-majority voters sufficiently vote as a bloc, thus enabling them to defeat Black voters' preferred candidates.[59] Third, the *Chisom* Plaintiffs pointed to findings of other courts, even in recent years, that found "patterns of [racially polarized voting] throughout Louisiana."[60] The State failed to furnish evidence to the contrary.

In conjunction with the *Gingles* preconditions, the State should have shown a change in the totality of the circumstances that led to the enactment of the Consent Judgment but did not. The totality of the circumstances is generally assessed through the evaluation of the nine Senate factors set forth in the 1982 Senate report issued alongside the 1982 amendment to the VRA. Chief Justice Johnson's prior briefing addresses the Senate factors by demonstrating the existence of an official history of discrimination in the political subdivision at issue (Senate Factor 1); Black Louisianians' ability to partake in and influence the political process (Senate Factors 5 and 8); and the use of racial appeals, namely through negative stereotypes used

[59] ROA.1734.

[60] ROA.1733–34; *see also Major v. Treen*, 574 F. Supp. 325, 337 (E.D. La. 1983) (holding that there was racial polarization in Orleans Parish). Most recently, in 2021, DOJ sued the City of West Monroe under Section 2 over its at-large alderman elections. *U.S. v. City of West Monroe*, No. 21-cv-0988, 2021 WL 2141902, (W.D. La. Apr. 14, 2021). DOJ contended there was racially polarized voting sufficient to satisfy *Gingles* because "[i]n contests between Black candidates and White candidates for West Monroe Board of Alderman and other parish, state, and federal positions, White voters cast their ballots sufficiently as a bloc to defeat the minority's preferred candidate." *Id.* at *3. The court agreed and entered a consent judgment between the parties. *Id.*

against Black Louisianians by politicians in the media and their ability overcome these stereotypes and hold elected office (Senate Factors 6 and 7).[61]

Chief Justice Johnson's tenure on the Louisiana Supreme Court, including the challenges she faced after her election, speaks to how the totality of the circumstances that prompted the entry of the Consent Judgment have not changed. Twenty years after the Consent Judgment's entry, the State argued that her service as the Justice from the *Chisom* Seat did not count toward her seniority. The State's campaign against the *Chisom* Seat—in particular, a candidate elected to this seat by a Black-majority voting bloc—was, at a minimum, a subtle racial appeal (Senate Factor 6) that sought to hamper then-Justice Johnson's entitlement to the "same . . . benefits . . . provided by law for a justice of the Louisiana Supreme Court."[62]

The State did not provide any evidence that the totality of the circumstances has changed. This point is only exacerbated by the State's concession before the district court that, if the Consent Judgment is dissolved, the legislature will be free to eliminate the only majority-Black Louisiana Supreme Court judicial district. The district court thus did not err in concluding that the State failed to show that it had satisfied, released, or discharged the Consent Judgment.

[61] *See* R. Doc. 56 at pp. 38-44.
[62] ROA.1543.

C. MALAPPORTIONMENT DOES NOT JUSTIFY DISSOLUTION OF THE CONSENT JUDGMENT.

The State argues that the alleged malapportionment in the Louisiana Supreme Court districts mandates the dissolution of the Consent Judgment under Rule 60(b)(5) because it renders the Judgment as no longer equitable.[63] But the district court correctly held that under *Horne v. Flores*, 557 U.S. 433 (2009) (citing *Rufo v.* 502 U.S. at 384 (1992), the alleged malapportionment was not a significant changed circumstance that made compliance with the Consent Judgment more onerous or detrimental to the public interest.[64] Even if malapportionment could be deemed a significant change, the district court correctly ruled that the State had nonetheless failed to show how dissolution of the Consent Judgment was suitably tailored to address the changed circumstance.[65] The district court's conclusion should prevail here.

First, malapportionment in Louisiana's Supreme Court judicial districts is not new. The census data shows that the current judicial districts are less malapportioned than they were in 2010.[66] In fact, the districts have been malapportioned since at least 2000—nearly two thirds of the Consent Judgment's lifespan.[67] Moreover, they

[63] Suppl. Appellant Br. 35–41 (R. Doc. 182).
[64] ROA.1953–57.
[65] ROA.1956–57.
[66] ROA.1954.
[67] *Id.*

were malapportioned for 76 years before the enactment of the Consent Judgment.[68] All to say, it is exceedingly disingenuous for the State to suggest that, even though it did not care about malapportionment for 100 some odd years, because Louisiana officials have decided to care now, a change in circumstance under *Rufo* exists.[69]

Second, even if the State had met its burden of showing a change in circumstances, dissolution of the Consent Judgment is not a "suitably tailored" solution. *See Rufo*, 502 U.S. at 391. As the district court correctly noted, "termination is far beyond what would be necessary to address malapportionment in the Louisiana Supreme Court districts."[70] After all, the Consent Judgment *explicitly contemplates future districting.* The Consent Judgment incorporates Act 776, which provides: "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."[71] Thus, by the very terms of the Consent Judgment, the State is free to reapportion the districts, so long as in doing so it complies with the Consent Judgment and federal law.

The State's invocation of federalism concerns is equally unavailing. To that end, the State takes aim at the prospective goals of the Consent Judgment, arguing

[68] ROA.1954–55.
[69] Suppl. Appellant Br. 35–41 (R. Doc. 182).
[70] ROA.1957.
[71] ROA.1956.

that *any* prospective goal underlying the Consent Judgment means "life imprisonment" for the State and makes the Judgment the "Hotel California of consent decrees."[72] But the State fails to recognize that the simple escape from its perceived "life imprisonment" is committing to prospective compliance with federal law. The nature of Consent Judgments like this one—which, like school desegregation decrees or any other decree that aims to eliminate discrimination—is a focus on eliminating the past and continuing vestiges of discrimination; elimination of that discrimination is the parole the State seeks. That the State simply does not agree with the nature of such decrees is not a sufficient reason to dissolve the Consent Judgment.

In furtherance of its position, the State relies on *Horne*[73] in which the Court considered the continuing application of an injunction against a school district's English-language learner policies. 557 U.S. at 434. But *Horne* did not address whether a consent decree or judgment that includes *prospective* goals as part of its terms is inherently inappropriate as the State suggests. *Horne* simply recognized that injunctions in institutional reform cases "often remain in force for many years," and to that end, provided a test for determining whether keeping the injunction in force prospectively was no longer equitable, e.g., "changed circumstances… warrant

[72] Suppl. Appellant Br. 3 (R. Doc. 182).
[73] Suppl. Appellant Br. 18–20 (R. Doc. 182).

reexamination of the original judgment." *Id.* at 448. Here, however, the State has not satisfied its burden of pointing to any changed circumstances that warrant wholly returning redistricting power over District 7 to the State. If anything, the record is rife with evidence showing that, if said power is returned to the State, it will immediately violate Section 2, a circumstance that can only then be resolved through additional, renewed litigation.

Moreover, the State has not lost *any* of its power to redistrict Louisiana's Supreme Court districts. The sole constraint on the State is that it can only redistrict according to federal law, as it is otherwise required to do anyway. As the district court emphasized, the State is free to reapportion all six of the other judicial districts.[74] It is even free to reapportion District 7 through a request to the district court for modification of the Consent Judgment—so long as District 7 remains a majority-minority district that complies with Section 2 of the Voting Rights Act.[75]

Lastly, should this Court find that the district court erred as to whether there was a changed circumstance, the appropriate remedy is not termination of the Consent Judgment, but rather a modification of its terms to address malapportionment. Indeed, the parties to this litigation have modified the Consent

[74] ROA.1956.
[75] *Id.*

Judgment in the past to address changed circumstances.[76] There is no reason to believe that they cannot do so again.

CONCLUSION

For the reasons set forth in this brief and in Chief Justice Johnson's initial brief as well as in the briefs of the *Chisom* Plaintiffs and DOJ, this Court should affirm the district court's ruling.

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Respectfully submitted,

s/ Nora Ahmed

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[76] ROA.45.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 7,498 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point type for text and 12 point type for footnotes.

/s/ *Nora Ahmed*
Nora Ahmed

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I electronically filed the En Banc Supplemental Brief of Intervenor Plaintiff-Appellee Bernette J. Johnson with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, I certify that any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1, and the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

s/ *Nora Ahmed*
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