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, NEW ORLEANS
CIVIL ACTION NO. 2:86-CV-4075
HONORABLE SUSIE MORGAN, U.S. DISTRICT JUDGE

EN BANC SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES RONALD CHISOM, MARIE BOOKMAN, AND URBAN LEAGUE OF LOUISIANA

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CERTIFICATE OF INTERESTED PERSONS

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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STATEMENT REGARDING ORAL ARGUMENT

Oral argument before the en banc Court is set for May 16, 2024.

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INTRODUCTION

Defendant-Appellant (the "Attorney General") has asked the District Court to dissolve an institutional reform consent decree that various sophisticated parties representing the State of Louisiana (the "State") negotiated and signed. To obtain the requested relief under Rule 60(b)(5), the Attorney General bore the burden of showing that the Consent Decree had either been "satisfied, released, or discharged" or that its continued enforcement is no longer equitable. Fed. R. Civ. P. 60(b)(5). But the Attorney General premised her[1] ask on a misreading of the State's obligations under the Consent Decree—obligations not designed to last in perpetuity—and on a scant evidentiary record. The District Court held that the Attorney General had not met her burden under either provision of Rule 60(b)(5) and denied the requested relief.

At present, this Court's review is limited to whether the District Court's decision amounts to an abuse of discretion. It did not. The District Court's decision was based on a proper reading of the plain terms of the Consent Decree, the evidentiary record (or lack thereof), and applicable authority governing Rule 60(b)(5) motions. The decision to deny the Attorney General's request for termination was not an abuse of discretion and should be affirmed by this Court.

[1] At the time the Motion to Dissolve the Consent Decree was filed, Jeff Landry served as Attorney General, and was later replaced by Elizabeth Murrill. For consistency, the Attorney General in this brief is referred to as "she" or "her."

STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant action pursuant to 28 U.S.C. § 1292(a)(1).

COUNTER-STATEMENT OF THE ISSUES ON REHEARING

Whether the District Court abused its discretion when it denied the Attorney General's motion to vacate an institutional reform consent decree pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure where she failed to meet her evidentiary burden to obtain such relief.

COUNTER-STATEMENT OF THE CASE

To avoid repetition, the Plaintiffs-Appellees ("Chisom Plaintiffs") incorporate by reference the statement of the case from their Opening Brief to the Panel.

STANDARD OF REVIEW

A district court's denial of a motion to vacate or modify a judgment under Rule 60(b)(5) is reviewed for abuse of discretion. *Anderson v. City of New Orleans*, 38 F.4th 472, 479 (5th Cir. 2022). Abuse of discretion review is "highly deferential." *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d 440, 446-47 (5th Cir. 2019). "It is not enough that granting the motion [to dissolve] may have been permissible; instead, denial of relief must have been *so unwarranted* as to constitute an abuse of discretion." *Moore v. Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 405 (5th Cir. 2017) (emphasis added). When conducting abuse of discretion review, the reviewing court defers to the district court's factual findings unless they are clearly erroneous.

Anderson, 38 F.4th at 479. Questions of law are reviewed de novo. *Moore*, 864 F.3d at 405.

Deference to a lower court's "exercise of . . . discretion is heightened" in cases involving "consent decrees directed at institutional reform" because of "the [trial] judge's many years of experience with [the] matter." *Cooper v. Noble*, 33 F.3d 540, 543 (5th Cir. 1994) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 394 (1992) (O'Connor, J., concurring) and *Hutto v. Finney*, 437 U.S. 678, 688 (1978)).

SUMMARY OF THE ARGUMENT

The District Court did not abuse its heightened discretion when it denied the Attorney General's motion to terminate the Consent Decree pursuant to Rule 60(b)(5). In support of her motion, the Attorney General proffered only eight (8) exhibits: a decision by this Court that does not bear on the instant case, election records of the three Louisiana Supreme Court justices elected as a result of the Consent Decree, and a generic presentation discussing redistricting. That meager evidentiary showing was not sufficient to justify termination under Rule 60(b)(5). The District Court based its decision on an accurate reading of the Consent Decree's plain terms and the evidentiary requirements (under any applicable legal standard) of Rule 60(b)(5). In finding that the Attorney General had failed to meet her burden to justify relief—particularly the most dramatic relief, dissolution—under Rule 60(b)(5), the District Court was well within its discretion and issued a careful, well-

reasoned decision. That decision should be affirmed, and none of the Attorney General's arguments compel a different result.

Perhaps recognizing that she cannot meet her heavy burden, the Attorney General now argues *for the very first time* that the District Court lacked the subject matter jurisdiction to deny the motion. But the Attorney General's argument—which suggests that the District Court somehow had the jurisdiction to grant the Attorney General's motion, but not to deny it—misconstrues the nature of federal court jurisdiction and rests on misinterpretations of precedent. It should be rejected.

The Attorney General's arguments regarding Rule 60(b)(5)'s third clause, which permits relief where continued enforcement of a judgment would be inequitable, ignore that the applicable question is whether the District Court *abused its discretion* in reaching its decision—not whether this Court would decide the motion differently. Moreover, the record supports that malapportionment, which has long existed in Louisiana Supreme Court districts, was anticipated by the parties. Indeed, the Consent Decree's terms permit the State to address such malapportionment. Thus, the District Court properly found that enforcement of the Consent Decree is not inequitable.

As for the Attorney General's arguments regarding Rule 60(b)(5)'s first clause, which permits relief where a movant shows that a judgment has been "satisfied, released, or discharged," the Attorney General overlooks critical,

forward-looking terms of the Consent Decree that the Attorney General made no effort to demonstrate were "satisfied." To effectuate the Consent Decree's purpose, which is Section 2 of the Voting Rights Act's compliance in the election of justices to the Louisiana Supreme Court for Black voters (primarily) in Orleans Parish, the State agreed to a number of remedial measures. One of those measures requires that that the New Orleans-based district (District 7) remain in place for *future* elections. That long-term remedy must remain in place until the State presents evidence of good faith compliance, and offers evidence that the vote dilution harm the Consent Decree was meant to address would not immediately recur upon termination. The District Court found that the Attorney General failed to meet this evidentiary showing under any Rule 60(b) legal standard. And, far from asserting that the Consent Decree is meant to last in perpetuity, Plaintiffs-Appellees ("Chisom Plaintiffs") have provided examples of evidence that would be sufficient for Rule 60(b) relief, which the Attorney General has failed to offer.

The Attorney General cannot overcome her insufficient evidentiary showing before the District Court on appeal, and the District Court was well within its discretion to deny the Attorney General's motion in light of the record before it. The District Court's decision was neither *clearly* erroneous nor *so* unwarranted as to constitute an abuse of discretion. It should therefore be affirmed.

ARGUMENT

A. The District Court Unquestionably Had Jurisdiction to Resolve the Attorney General's Motion.

In an attempt to manufacture a more favorable standard of review for herself, the Attorney General now argues for the first time that there was some jurisdictional defect to the District Court's order below. Appellant's En Banc Br. at 14-18. The Attorney General's position is self-refuting. According to the Attorney General, the District Court could permissibly *grant* her motion, but somehow lacked the jurisdiction to *deny* it. The Attorney General's argument misconstrues the nature of federal court jurisdiction, rests on flawed premises, and relies on a selective misreading of the caselaw. This Court should reject it.

Federal courts have subject matter jurisdiction over *disputes*, and that jurisdiction involves the power to resolve those disputes. A federal court's jurisdiction is not outcome-dependent: "[j]urisdiction is authority to decide the case *either way*." *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (emphasis added); 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3522 (3d ed. 2023) ("The jurisdiction of the federal courts is dependent on the subject matter of the action or the status of the parties to it; it is not dependent on the merits of the claim asserted.").

The District Court unquestionably had federal question jurisdiction over the claims underlying the suit against the State for violation of Section 2 of the Voting

Rights Act. *See* 28 U.S.C. § 1331. The State agreed to settle those claims in the Consent Decree, and further consented to the term providing that the "[District] Court shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished." ROA.104. And "[i]t is well settled . . . that a district court possesses ancillary jurisdiction 'to secure or preserve the fruits and advantages of a judgment or decree rendered' by that court." *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 868 (5th Cir. 1984) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934)). Here, that jurisdiction necessarily includes the authority to determine whether "the final remedy has been accomplished," as contemplated by the Consent Decree. The Attorney General disagrees with the District Court's conclusion. But that disagreement does nothing to divest the Court of jurisdiction.

The Attorney General makes two arguments in support of her contention that the District Court exceeded its jurisdiction, neither of which have merit. *First*, the Attorney General maintains that "remedial jurisdiction" can last only until the underlying violation that gave rise to the judgment is remedied, but because the Consent Decree contained no admission of liability, there was never a Section 2 violation to correct. Appellant's En Banc Br. at 14-16. This argument misunderstands both the nature of jurisdiction and the cases on which the Attorney General relies.

A court's jurisdiction is not tied to a finding of liability, which is rarely included in an agreement to settle litigation. Settlements routinely disclaim admission of liability, and the notion that there was no violation in the absence of such a disclaimer is specious. Indeed, if an underlying violation is necessary for jurisdiction, and the absence of an admission of liability means there was never a violation, then the District Court would have lost the jurisdiction to enforce any part of the Consent Decree the moment it was entered. But it is well settled law that a district court has jurisdiction to enforce a settlement agreement embodied in a consent decree that is then entered by the court. *See, e.g., Borel ex rel. A.L. v. Sch. Bd. Saint Martin Par.*, 44 F.4th 307, 312-13 (5th Cir. 2022) (noting that "a district court may also obtain remedial authority over litigation from a party's voluntary entrance into a consent decree" and finding that the district court had remedial jurisdiction because of the school board's "assumption of obligations under the superseding consent order [that] confer[ed] remedial jurisdiction on the district court to enforce those obligations").

Moreover, the Attorney General completely ignores that the State explicitly agreed to continued jurisdiction in this case. ROA.98; *see Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."); *see also id.* at 438 (describing consent decrees as "federal-court order[s]

that spring[] from a federal *dispute* and further[] the objectives of federal law," and not, as the Attorney General suggests here, an order that exclusively arises from an adjudicated violation of federal law) (emphasis added).

The cases on which the Attorney General relies are not to the contrary. In fact, the Attorney General does not identify a single case in which a court lacked remedial jurisdiction because of the absence of a finding or admission of liability. Instead, she cites cases where a district court overstepped in enforcing a consent decree by imposing new obligations that were never the subject of the original dispute.[2] In *Brumfield v. La. State. Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015), for example, the Court explained that the challenged order purporting to enforce a consent decree "[went] beyond correcting—and indeed ha[d] nothing to do with—the violation originally litigated" in that case. *See also M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 272 (5th Cir. 2018) (concluding that while "remedial action [was] appropriate," the challenged injunction went "well beyond what [wa]s necessary to

[2] The remaining cases the Attorney General cited in support of her jurisdictional argument either had nothing to do with jurisdiction, *see Horne v. Flores*, 557 U.S. 433, 469-70 (2009) (vacating district court order for an "inadequate Rule 60(b)(5) analysis"), or actually *upheld* the exercise of jurisdiction to enforce the judgment, s*ee Hawkins*, 540 U.S. at 437-40 (2004) (rejecting Eleventh Amendment challenge to order enforcing consent decree); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (upholding the lower court's remedy because it was "tailored to cure the condition that offend[ed] the Constitution" below and, thus, did not exceed appropriate limits) (citation and internal quotation marks omitted); *Borel*, 44 F.4th at 312-13 (approving the district court's exercise of remedial jurisdiction based on a consent decree that included such jurisdiction as an express term).

achieve constitutional compliance"). But these cases are inapposite as here, the remedial measures do not go beyond the harms the Consent Decree was meant to address. It is undisputed that Chisom Plaintiffs "originally litigated" a Section 2 claim and the remedial measures contained in this Consent Decree are tailored to the harms originally alleged. *See Allen v. Louisiana*, 14 F.4th 366, 372-73 (2021) (*rejecting* the argument that the *Chisom* Consent Decree governed more than District 7 and noting that the *Chisom* Consent Decree "was tailored to remedy [the animating] violation"). In contrast to *Brumfield* and *Abbott*, the District Court's May 2022 order imposed no new obligations; it merely declined to relieve the State of its existing, express obligations under the Consent Decree.

Second, the Attorney General maintains that a court's jurisdiction to enforce a consent judgment ends when "a party fully complies" with its terms. Appellant's En Banc Br. at 16. But that is precisely the inquiry that Rule 60(b) requires. *See* Fed. R. Civ. P. 60(b)(5) (permitting a court to relieve a party from a final judgment if, *inter alia*, "the judgment has been satisfied, released, or discharged"). And regardless of how the question is formulated—whether "the judgment has been satisfied," "the final remedy has been accomplished," or "a party [has] fully complie[d]"—it is for the District Court to make this determination, not the Attorney General. *See, e.g.*, *Anderson v. City of New Orleans*, 38 F.4th 472, 479 (5th Cir. 2022); *Moore v. Tangipahoa Par. Sch. Bd.*, 864 F.3d 401, 405 (5th Cir. 2017); *see*

also United States v. Ruiz, 536 U.S. 622, 628 (2002) ("A federal court always has jurisdiction to determine its own jurisdiction.").

Here, the Attorney General claimed that the terms of the Consent Decree had been satisfied, and moved under Rule 60(b)(5) to vacate it. The District Court's jurisdiction to make a ruling on that motion does not somehow cease to exist because the District Court did not rule in favor of the Attorney General. And for the reasons set forth below, the District Court did not abuse its discretion in determining that the Attorney General, who presented practically no evidence to support her motion, had not met her burden under the Rule.

B. The District Court Did Not Abuse Its Discretion in Finding That the Terms of the Consent Decree Expressly Require Future Compliance.

Contrary to the Attorney General's contentions, the District Court did not abuse its discretion by enforcing the clear, unambiguous terms of the Consent Decree that seek to ensure non-dilution of Black electoral opportunity in future Louisiana Supreme Court elections in a New Orleans-based district. As the Attorney General has acknowledged, a consent judgment (like the Consent Decree) is a "hybrid creature[], part contract and part judicial decree," Appellant's En Banc Br. at 22 (quoting *Allen*, 14 F.4th at 371), that "'embodies *an agreement* of the parties' . . . 'that the parties desire and expect will be reflected in, and be *enforceable as*, a judicial decree,'" *Hawkins*, 540 U.S. at 437 (quoting *Rufo v. Inmates of Suffolk Cnty.*

Jail, 502 U.S. 367, 378 (1992) (emphasis added)). And as this Court has repeatedly acknowledged, consent judgments are construed in accordance with "general principles of contract interpretation." *Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir. 2006); *see also Frew v. Janek (Frew I*) 780 F.3d 320, 327 (5th Cir. 2015) (stating that consent decrees "are construed according to general principles of contract law") (internal citations omitted).

It is well-settled that courts—including courts in Louisiana—must examine and honor the unambiguous language in a contract when interpreting its terms, as it is the best evidence of the parties' common intent. *See Sundown Energy, L.P. v. Haller*, 773 F.3d 606, 612 (5th Cir. 2014) ("The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and not assumed.") (citation and internal quotation marks omitted). Where the terms of the contract are clear, they control—even where those terms may not align with the parties' past or current intentions. La. Civ. Code Ann. art. 2046 (2024); *Sundown Energy, L.P.*, 773 F.3d at 612 ("[W]e may not ignore an unambiguous contractual provision simply because, in our view, it does not align with the parties' intent."). And courts interpreting a contract must examine each and *every* term "so that each is given the meaning suggested by the contract as a whole" and that no term is rendered meaningless. *Sundown Energy, L.P.*, 773 F.3d at 612; *Massie v. Inexco Oil Co.*, 798 F.2d 777, 779 (5th Cir. 1986) (in interpreting a lease agreement, stating that

Louisiana law requires "that we determine the intent of the parties as expressed in the lease without rendering any part of the instrument meaningless"); *cf.* La. Civ. Code Ann. art. 2049 (2024).

As the District Court correctly observed, the terms of the Consent Decree express the parties' collective intent to ensure non-dilution of Black electoral opportunity in a New Orleans-based district for the Louisiana Supreme Court, where necessary to comply with Section 2.[3] *See generally* ROA.1940-43. The Consent Decree's preamble reflects the parties' collective belief that "the relief contained in this consent judgment *will ensure* that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act" and the parties' collective intent to secure forward-looking relief through the Consent Decree. ROA.98 (emphasis added). Paragraph B then states that "The relief contained in this consent judgment *will 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).

Paragraph C then delineates specific, remedial measures that effectuate the Consent Decree's purpose. *Id.* The eighth remedial measure unequivocally calls for

[3] The sophisticated parties to the Consent Decree included the Attorney General, the Chisom Plaintiffs, the Department of Justice, the Governor of Louisiana, the Secretary of State of Louisiana, and the Chief and Associate Justices of the Louisiana Supreme Court. ROA.105-07.

a re-apportionment of the Louisiana Supreme Court districts that "provide[s] for a single-member district that is majority black in voting age population" based in Orleans Parish and specifies that "*future Supreme Court elections* . . . shall take place in the newly reapportioned districts." ROA.102 (emphasis added).

In an effort to circumvent these obligations, the Attorney General, citing Justice Engelhardt's dissent to this Court's majority panel opinion, argues that "the 'purpose' of the Consent Judgement, by definition cannot be its remedy" because a "'remedy' is the means by which a purpose is achieved." Appellant's En Banc Br. at 24-26 (citing Slip Op. at 43 (Englehardt, J., dissenting)). But the panel dissent and Attorney General incorrectly conflate the Consent Decree's purpose and forward-looking remedial measure. They are distinct.[4] The purpose of the Consent

[4] Nor, in any event, should a contract's "remedy" be divorced from its "purpose." The Attorney General cites to *Booth v. Churner* for this point, but the quoted language is not the Supreme Court's, but rather a citation to *a litigant's brief that the Court did not even adopt*. *See* Appellant's En Banc Br. at 24 (quoting *Booth v. Churner*, 532 U.S. 731, 737 (2001) (citing "Brief for Petitioner 15-16" for the proposition that the definition of a "remedy" is "the legal means to recover a right or to prevent or obtain redress for a wrong")). After citing the litigant's brief, the Supreme Court disposes of that argument, concluding that attempts to find an "isolated definition" for the term "remedy" were "ultimately inconclusive, for, depending on where one looks, 'remedy' can mean *either* specific relief obtainable at the end of a process seeking redress, or the process itself, the procedural avenue leading to some relief." 532 U.S. 731, 738 (2001) (emphasis added). The Court goes on to examine the context for the term "remedy" (as used in the statute at issue) and the statutory history to ascertain its meaning and application *to that case*. *Id.* at 738-39. Nothing in *Booth*—a case dealing with administrative exhaustion and statutory interpretation of the term "remedies"—suggests that contractual remedies

Decree—outlined in the preamble and reiterated in Paragraph B—is Section 2 compliance in the election of justices to the Louisiana Supreme Court for voters in Orleans Parish. ROA.98-99. While the Attorney General acknowledges the decree's "eight concrete and ascertainable steps" to achieve such purpose, *i.e.* the remedy, she then ignores that *one of those very steps* requires that the New Orleans-based district remain in place for future elections. *See* Appellant's En Banc. Br. at 8; ROA.102 ("future Supreme Court elections after the effective date shall take place in the newly reapportioned districts"). The State is bound by *all* of the terms of the Consent Decree—including that specific, durable remedy—unless and until it can make a sufficient showing under Rule 60 to terminate or modify its obligations. *See Baldwin v. Bd. of Supervisors for Univ. of La. Sys.*, 156 So. 3d 33, 38 (La. 2014) ("Furthermore, a contract is to be construed as a whole and each provision in the contract must be interpreted *in light of the other* provisions.") (emphasis added)).

Such future-oriented relief is common in contracts *and* consent judgments like the Consent Decree—indeed, it is part of what makes a consent judgment both a contract (agreed upon by the parties) *and* an injunction enforceable by the federal courts. Panel Majority Op. at 15 (citing *La. State Conf. of the NAACP*, 490 F. Supp.

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are somehow divorced from other contractual terms. And here, the purpose of the Consent Decree is significant and helpful to the State in making clear that adjustments to districts outside of District 7 would not undermine the purpose of the Consent Decree, which is focused on non-dilution in District 7 only. *See Allen*, 14 F.4th at 372-73.

3d 982, 990 (M.D. La. 2020) and *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (internal citations omitted)). If the relief laid out in the Consent Decree did not contain these terms and did not reach into the future (i.e., did not specifically apply to future elections), the Consent Decree would have no practical effect as it would leave the State with the power to effect the "eight action items," that do not contemplate long-term relief, and then undo them all instantly.

To be sure, the State *could* have negotiated additional terms to cabin the remedies laid out in the Consent Decree—for example, by providing for a certain number of election cycles that District 7 would remain in place, or by providing an end date to the Consent Decree's enforcement. But it did not do so, and instead agreed that that "[t]he Court *shall retain jurisdiction* over this case until the complete implementation of the final remedy has been accomplished." ROA.104 (emphasis added); *see Frew v. Hawkins*, 401 F. Supp. 2d 619, 635 (E.D. Tex. 2005), *aff'd sub nom. Frazar v. Ladd*, 457 F.3d 432, 432 (5th Cir. 2006) (enforcing full scope of consent decree and reasoning that "without reference to the naturally enhanced obligations of the Consent Decree, Plaintiffs would not receive the benefits for which they bargained; and Defendants would never be required to comply with the obligations which they undertook in exchange for saving the time, expense, and inevitable risk of litigation").

Holding the State to its contractual obligations and the Attorney General to Rule 60(b)'s evidentiary burden neither offends federalism nor undercuts Louisiana's sovereignty as a state. The State negotiated and agreed to the terms of the Consent Decree, and then implemented these terms through formal legislation. *See* ROA.97-113 (Consent Decree, Joint Motion to Amend Consent Decree); ROA.51 (Amendment to the Consent Decree reflecting incorporation of Louisiana Acts 1997, No. 776). It bears emphasis that this legislation—incorporated into the Consent Decree—maintained the State's ability to redistrict as needed, provided that District 7 remain a non-dilutive district. *See id.* The fact that the State has not redrawn the Louisiana Supreme Court maps in the intervening years is not evidence that the Consent Decree has stood in its way. Indeed, in recent legislative sessions the State has developed and voted on redistricting maps for the Louisiana Supreme Court that appear to respect District 7 and address the alleged malapportionment in the Attorney's General motion.[5]

Additionally, the nature of the "judgment" at issue—a consent judgment with terms (including, but not limited to, judicial oversight) negotiated and agreed upon by the State—distinguishes this case from *Horne v. Flores*, which implicated

[5] *See, e.g., Bill Search for the 2024 First Extraordinary Session*, La. State Legislature, https://legis.la.gov/legis/BillSearchList.aspx?srch=s (last visited Mar. 28, 2024) (enter "Supreme Court" under "Search by Summary"; then click "Search") (listing numerous supreme court maps recently introduced and considered by the legislature).

federalism concerns in connection with a declaratory judgment drafted by, issued by, and enforced by a federal court. 557 U.S. 433, 439 (2009). Unlike in *Horne*, the State *agreed* to enact systems to ensure that elections in a New Orleans-based district for the Louisiana Supreme Court complied with Section 2 and agreed to federal court oversight over those systems. ROA.97-104. The heightened federalism concerns in *Horne* based on the injunction in that case "[having] the effect of dictating state or local budget priorities" are not present here. *See Horne*, 557 U.S. at 448-52. Indeed, federalism concerns in the instant case are mitigated by the State's ability to reapportion judicial districts at will—as long as it maintains a non-dilutive district for Black voters based in Orleans Parish. ROA.102; *see* ROA.45-51 (motion to amend and amendment).

The Attorney General cannot change the agreed-upon terms of the Consent Decree based on *ipse dixit*. Nor can she ask this Court to do so by ignoring the Consent Decree's terms or claiming that the District Court somehow erred (let alone abused its discretion) by enforcing them. That being said, neither the District Court nor the Chisom Plaintiffs maintain that the Consent Decree should remain in place in perpetuity. Rather, the District Court found—as the Chisom Plaintiffs have consistently argued—that the Consent Decree should remain in place until the Attorney General makes the appropriate showing under Rule 60(b). ROA.1938-

1957; *see* ROA.1737 n.13; Pls.-Appellees' Opening Br. at 33; Pls.-Appellees' Opp. to En Banc at 5, 8.

Nor is this burden impossible to meet. Contrary to the Attorney General's suggestion that the Consent Decree "will never be satisfied," Appellant's En Banc Br. at 3, the Attorney General could have presented an alternative remedial map, demonstrating her commitment to ensuring that future elections for the Louisiana Supreme Court in a New Orleans-based district are non-dilutive for Black voters, and/or data showing a lack of racially polarized voting in the New Orleans area. Both the District Court and Chisom Plaintiffs recognize that these are indicators of future compliance under Rule 60(b), but such evidence was wholly absent from the Attorney General's presentation. ROA.1949-50, 1952-53, 1955-57.

C. The District Court Did Not Abuse Its Heightened Discretion When It Denied the Attorney General's Motion to Dissolve the Decree.

The District Court did not abuse its discretion (indeed, it properly acted within its "heightened" discretion) when it denied the Attorney General's motion to dissolve the Decree under Rule 60(b)(5). *See Cooper v. Noble*, 33 F.3d 540, 543 (5th Cir. 1994). Rule 60(b)(5) provides a number of bases for seeking modification of, or relief from, a federal court's judgment—two of which the Attorney General invoked at the District Court. The Attorney General's primary argument in her motion below was that complying with the Decree "prospectively [would] no longer [be] equitable" under Rule 60(b)(5)'s third clause. Fed. R. Civ. P. 60(b)(5); *see also*

ROA.1446-48. The Attorney General also referenced the Rule's first clause, which permits relief if "the judgment has been satisfied, released, or discharged," though she did not premise her legal arguments on this clause—only mentioning it in passing in the background and standard of review sections of her motion. Fed. R. Civ. P. 60(b)(5); ROA.1443-46. Under both clauses, the Attorney General bears the burden of proof. *See Rufo*, 502 U.S. at 383.

The District Court did not abuse its discretion in finding that the Attorney General failed to meet her burden under either clause. The Attorney General presented a threadbare evidentiary record in support of her motion, consisting of only *eight* (8) exhibits: this Court's decision in *Allen*, the Decree (both in its original form and as amended), the election rolls of the three (3) justices who have held the seat instituted by the Decree, and a presentation entitled "Redistricting in Louisiana" dated September 17, 2021. ROA.1450-1583. In view of this scant showing, the District Court did not abuse its discretion in finding that that evidentiary record failed to demonstrate that continued enforcement would no longer be equitable (warranting relief under Rule 60(b)(5)'s third clause) or that the Consent Decree had been "satisfied" (warranting relief under Rule 60(b)(5)'s first clause).

1. The Attorney General Obscures the Proper Standard of Review.

The Attorney General obscures the standard of review applicable to this Court's en banc review. The question before this Court is not whether this Court (or

the Attorney General) would have made alternative factual findings. It is not even whether granting the motion to dissolve "may have been permissible." *Moore*, 864 F.3d at 405. The question before this Court is whether the District Court's findings were *clearly* erroneous and *so* unwarranted as to constitute an abuse of discretion. *Id.*

The Attorney General points to no law or evidence showing that "the district court's detailed decision" was an abuse of discretion. *Frazar*, 457 F.3d at 441 (finding no abuse of discretion); *Smith v. Sch. Bd. of Concordia Par*., 88 F.4th 588, 594 (5th Cir. 2023) (holding that Appellant had waived its argument that district court had abused its discretion when it "made zero mention of the applicable abuse-of-discretion standard of review, and summarized the district court's analysis in two short paragraphs—only to never discuss it again."). Indeed, the Attorney General's effort to distract from the issues before the en banc court is obvious from the start. In her Statement of the Issues, the Attorney General improperly asks this Court to answer questions of fact on en banc appeal. *See* Appellant's En Banc Br. at 6 ("STATEMENT OF THE ISSUES ON REHEARING . . . In light of the current widespread malapportionment of Louisiana Supreme Court voting districts, is it 'no longer equitable' under Rule 60(b)(5) to apply the Consent Judgment prospectively?"). But that is not this Court's role; and the proper inquiry is whether the District Court *abused its discretion* in making its determination regarding the

sufficiency of the Attorney General's evidentiary record. And, as stated below, the Attorney General has made no effort to show that the District Court clearly erred in its assessment of the limited evidence she presented.[6] In short, the Attorney General has "fail[ed] to articulate how the district court abused its discretion." *Frazar*, 457 F.3d at 440; *see Moore*, 864 F.3d at 405 ("It is not enough that granting the motion [to dissolve] may have been permissible; instead, denial of relief 'must have been *so unwarranted* as to constitute an abuse of discretion.'") (emphasis added) (quoting *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013).

2. The District Court Did Not Abuse Its Discretion in Finding that the Attorney General Failed to Meet Her Evidentiary Burden under *Rufo*.

The Attorney General has failed to demonstrate that the District Court's denial of her application under Rule 60(b)(5)'s third prong was "so unwarranted" as to constitute an abuse of its discretion. *Anderson*, 38 F.4th at 479; *see also Moore,* 864 F.3d at 405 ("It is not enough that granting the motion [to dissolve] may have been permissible; instead, denial of relief 'must have been *so unwarranted* as to constitute an abuse of discretion.'") (emphasis added) (quoting *Diaz v. Stephens*, 731 F.3d at 374). Critically, "[a] district court does not abuse its discretion by making a decision

[6] For example, the Attorney General seems to concede that malapportionment has long been present in the Louisiana Supreme Court districts and that the District Court's findings regarding the history of malapportionment were correct. *See* Appellant's Opening Br. at 44 ("Perhaps the district court is correct that previous officials have not shown much concern for malapportionment in the past.").

after the parties present little or no evidence of a particular fact." *Moore*, 864 F.3d at 408. The Attorney General—having presented "little to no evidence" to the District Court—simply cannot show that the "denial of relief [was] so unwarranted" as to warrant reversal. *Id.* at 405 (citation omitted).

Under the *Rufo* standard,[7] the movant must: (1) "establish[] that a significant change in facts or law warrants revision of the decree"; and (2) demonstrate that "the proposed modification is suitably tailored to the changed circumstances." 502 U.S. at 383. To meet this burden, the movant "must show that the change in circumstance is 'significant,' and not merely that 'it is no longer convenient to live with [the decree's] terms.'" *LULAC v. City of Boerne*, 659 F.3d 421, 437 (5th Cir. 2011) (quoting *Rufo*, 502 U.S. at 383) (second alteration in original). And the movant must make this showing by producing record evidence. *Id*. at 438 (citing *Rufo*, 502 U.S. at 384).

Below, the Attorney General argued that the Consent Decree should be terminated because "severe malapportionment" made ongoing compliance with the Decree's terms "both difficult to justify and detrimental to the public interest."

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[7] The Chisom Plaintiffs included a complete explanation of why the *Rufo* test was the proper standard to apply in its brief to the panel. Pls.-Appellees' Opening Br. at 19-23. The Attorney General does not dispute that the *Rufo* two-prong test was the appropriate standard in evaluating whether the Attorney General had met her significant burden of justifying the termination of the Decree. Appellant's Opening Br. at 45-46.

ROA.1444; ROA.1446. But of the few exhibits the Attorney General attached to support her motion to terminate, it appears only one mentioned this issue: a generic presentation entitled "Redistricting in Louisiana" dated September 17, 2021. ROA.1450-1583; *compare United States v. S. Fla. Water Mgmt. Dist*., No. 88-1886-CIV, 2010 WL 6268442, at *38 (S.D. Fla. Aug. 30, 2010) (Florida agencies bound by environmental regulation consent decree alleged a changed circumstance by developing a significant evidentiary record with data and expert analysis).

The District Court did not clearly err in finding that this failed to support the Attorney General's claim that "severe malapportionment" in the Louisiana Supreme Court districts constituted a "significant change" warranting termination of the Decree. Indeed, courts have routinely denied a motion to modify or terminate under *Rufo* where the parties anticipated the alleged changed circumstances. *See Rufo*, 502 U.S. at 385 ("Ordinarily . . . modification should not be granted where a party relies upon events that were actually anticipated at the time [the ordered was entered]"); *see also United States v. City of New Orleans*, 731 F.3d 434 (5th Cir. 2013) (declining to grant relief from police misconduct consent decree based on purportedly new costs of implementing another consent decree where the City had been on notice of such costs and thus could not claim a changed circumstance under *Rufo*); *White v. Nat'l Football League*, 585 F.3d 1129 (8th Cir. 2009) (declining to

modify antitrust consent decree where alleged changed circumstances occurred contemporaneously with the execution of the decree or were otherwise anticipated).

It is beyond dispute that both parties to the Consent Decree were aware of then-existing malapportionment in the districts that elect the Louisiana Supreme Court. *See* ROA.51, ROA.102. Indeed, courts have acknowledged that such malapportionment dates back to 1921. *See, e.g., Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972); *Chisom v. Roemer*, No. Civ. A. 86-4057, 1989 WL 106485 (E.D. La. Sept. 19, 1989). The parties further anticipated that malapportionment could shift and agreed to preserve the State's ability to redraw the districts. *See* ROA.51; ROA.102. And it is notable that, as explained by the District Court, the Louisiana Supreme Court districts "have been malapportioned since 2000, and today they are actually less malapportioned than they were after the 2010 census." ROA.1954.

The District Court did not abuse its discretion in finding that the evidentiary record before it failed to demonstrate that enforcement of the Consent Decree would be detrimental to the public interest. Even taking the allegations of malapportionment as true, the District Court correctly noted that it nevertheless did not warrant dissolution of the Decree as: (1) that there is no legal obligation to ensure that the Louisiana Supreme Court districts be equally apportioned; (2) that the State could reapportion the other six (6) Louisiana Supreme Court districts based on the Decree's terms, as amended; and (3) that, per the Consent Decree's terms, the

State could reapportion all seven (7) of the Louisiana Supreme Court districts, as long as the proposed reapportionment either complied with the Decree or conformed with an agreed-upon modification to the Decree's terms.[8]

To counter this, the Attorney General now argues (for the first time) that the District Court and the Panel Majority "concluded that the extraordinary malapportionment at issue here is entirely consistent with the public interest and of no particular concern." Appellant's En Banc Br. at 36. Not so. The District Court did not determine that "malapportionment . . . is entirely consistent with the public interest," but rather that the Attorney General failed to meet her evidentiary burden under *Rufo* that the malapportionment represented a "significant change" (in light of the longstanding history of malapportionment) or a detriment to the "public interest" caused by the Decree (in light of the State's continuing ability to address whatever malapportionment may exist in all of the districts).

The Attorney General's secondary arguments also fail. The Attorney General argues: (1) that the decrease in malapportionment cited by the District Court was "infinitesimal," (2) that the District Court improperly regards this malapportionment

[8] The Attorney General acknowledges the Chisom Plaintiffs' and the Department of Justice's "well-intentioned" willingness to work with the State to draw a new map that addresses the claimed malapportionment and preserve the opportunity-to-elect New Orleans-based district established by the Decree. Appellant's Opening Br. at 41-42. Thus, the Consent Decree does not stand (nor has it ever stood) in the way of the State performing its "sovereign function in accordance with Louisiana law." *Id*. at 42.

as "judicially irrelevant" because the racial disparities "are the 'right' kind of racial disparities," and (3) that the malapportionment created by the Consent Decree is being wielded as a prophylactic measure against speculative Section 2 violations, for which there is "no evidence." Appellant's En Banc Br. at 37-41. These arguments improperly aim to shift the burden to the Chisom Plaintiffs to show a less "infinitesimal" improvement in malapportionment, or that the State was likely to commit a Section 2 violation. But the Chisom Plaintiffs do not carry the burden here, nor do they need to respond to the Attorney General suggestion that there are "right kinds" of racial disparities—an unsupported argument that is completely divorced from Rule 60(b) and the standard of review here. This Court should ignore the Attorney General's distractions.

As the District Court recognized, if the Attorney General is truly concerned about malapportionment, she could easily meet her evidentiary burden under Rule 60(b) to modify the Consent Decree by submitting a new Supreme Court map that cured malapportionment, but preserved District 7 as an opportunity-to-elect district for Black voters in the New Orleans area. ROA.1956. That is what the State did in 1999, and Plaintiffs agreed to modify the Consent Decree as a result. ROA.45-51; ROA.125-29. The Attorney General simply failed to do so.

Accordingly, the District Court's finding that the Attorney General did not satisfy the evidentiary burden necessary to warrant the dissolution of the Decree under Rule 60(b)'s third clause should be affirmed.

D. The Attorney General Failed to Show, Under Any Standard, That the Consent Decree Was "Satisfied" Under Rule 60(b)(5).

The first clause of Rule 60(b)(5) permits relief from a judgment where the party seeking relief shows that the judgment in question has been "satisfied, released, or discharged." Fed. R. Civ. P. 60(b)(5). As this Court has recognized, there is little case law on this clause of Rule 60(b)(5), as it is rarely invoked and "almost never applied to consent decrees." *Frew v. Janek (Frew I)*, 780 F.3d 320, 327 (5th Cir. 2015). While the parties disagree over the correct standard to apply, Pls.-Appellees' Opening Br. at 23-25, the Attorney General has failed to meet her burden under any conceivable standard to show that the Consent Decree has been "satisfied, released, or discharged."[9]

[9] As stated previously, this Court can reserve judgment on whether *Dowell* provides the proper framework for deciding whether an institutional reform decree has been "satisfied" under the first clause of Rule 60(b)(5), as the outcome is the same regardless of the standard applied and as the Fifth Circuit may affirm on any ground supported by the record. Pls.-Appellees' Opening Br. at 25; *see also Gilbert v. Donahoe*, 751 F.3d 303, 311 (5th Cir. 2014) ("Under our precedent, we may 'affirm on any ground supported by the record, including one not reached by the district court.'" (quoting *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012)).

First, the District Court did not err in applying the standard promulgated in *Board of Education of Oklahoma City Public Schools Independent School District No. 89 v. Dowell*, 498 U.S. 237 (1991) in analyzing the Attorney General claim under the first clause of Rule 60(b)(5). Other courts have done exactly that, and have done so outside of the context of school desegregation.[10] *See, e.g.*, *Johnson v. Heffron*, 88 F.3d 404, 407 (6th Cir. 1996) (referencing *Dowell* in assessing termination of consent decree addressing jail overcrowding); *J.G. v. Bd. of Educ. of Rochester City Sch. Dist*., 193 F. Supp. 2d 693, 699-700, 707 (W.D.N.Y. 2002) (applying *Dowell* in assessing termination of consent decree addressing school district's education of special needs students). This application makes sense. The U.S. Supreme Court did not limit *Dowell* to school desegregation cases; it presented an alternative standard for terminating consent judgments aimed at remedying institutional discrimination (as opposed to the unlawful restraint of trade). *Dowell*, 498 U.S. at 246-48 (distinguishing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). Certainly, the question of terminating the Consent Decree—aimed at addressing the dilution of Black electoral opportunity in violation of Section 2 of the Voting Rights Act—

[10] Neither the Attorney General's citations to a slew of Fifth Circuit cases applying the *Dowell* standard to school desegregation decrees, *see* Appellant's En Banc Br. at 27 n.5, nor her reliance on a stray quotation from *Frew v. Janek (Frew I)*, 780 F.3d 320, 329-30 (5th Cir. 2015), move this needle. Contrary to the Attorney General's suggestion, *Frew I* does not reference *Dowell* at all, let alone opine on whether its "persuasiveness is limited" to the school desegregation context. Appellant's En Banc Br. at 28 (quoting *Frew I*, 780 F.3d at 329-30).

better fits the *Dowell* context than the *Swift* context, making the *Dowell* standard the reasonable one to use.

Nor did the District Court (or the Panel Majority, for that matter) misapply *Dowell* by examining evidence of future compliance with the Consent Decree as part of that analysis. *Dowell* calls for courts to address, among other things, "whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." ROA.1947 (quoting *Dowell*, 498 U.S. at 249-50). And courts applying *Dowell* in assessing the termination of consent decrees have properly examined whether "'the goals of the consent decree have been achieved'" and "not only what defendants had done up to the present, but also future prospects" in applying that standard. *See, e.g.*, *Johnson*, 88 F.3d at 406 (quoting *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991)); *see also Inmates of Suffolk Cnty. Jail v. Rufo (Rufo II)*, 12 F.3d 286, 292 (1st Cir. 1993) (finding that "implicit in [the *Dowell* requirements] is the need for the district court, before terminating the decree entirely, to be satisfied that there is relatively little or no likelihood that the original constitutional violation will promptly be repeated when the decree is lifted") (citation omitted); *J.G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 193 F. Supp. 2d 693, 699 (W.D.N.Y. 2002) (applying *Dowell* which requires the court, on a termination motion, to assess

whether "it is unlikely that the party would revert to non-compliance" absent the decree").[11]

Even if reviewing "future prospects" were not necessary to apply *Dowell* generally (it is), it is necessary here in light of the forward-looking terms of the Consent Decree. The District Court rightfully found that the Consent Decree ensures that the reapportioned districts—and, more specifically, the establishment of District 7, an electoral opportunity district—will govern *future* elections for the Louisiana Supreme Court to ensure compliance with Section 2. ROA.1947-53. To assess whether these terms have been "satisfied, released, or discharged," it was necessary for the District Court to examine whether the State took actions to preserve the ability of Black voters in Orleans Parish to elect a candidate of choice to the Louisiana Supreme Court, so long as necessary. *Id.*

Absent that examination, key terms of the Consent Decree would have gone ignored by the District Court, which would not only misapply *Dowell*, but also fundamental tenets of contract interpretation that govern the interpretation and enforcement of consent judgments. *See Sullivan v. Hous. Indep. Sch. Dist*., 475 F.2d

[11] Again, the Attorney General's representation that the "future prospects" language in *Rufo II* is *dicta* misstates the opinion. *Rufo II* definitively infuses the need to make *some* showing that the original constitutional violation will not be repeated, even where it declines to provide specifics on that showing (as doing so was unnecessary given the paucity of the movant's showing). *Rufo II*, 12 F.3d at 292-94.

1071, 1078 (5th Cir. 1973) (denying Rule 60 motion to vacate injunction because "injunction dealt not only with the promulgation of regulation, but also with their enforcement" and school district had failed to show that the regulations it implemented pursuant to the injunction would be constitutionally applied).

Second, even if the proper standard for assessing compliance with the first prong of Rule 60(b)(5) is "substantial compliance," the Attorney General failed to meet that threshold showing. None of the Attorney General's *eight* (8) exhibits demonstrate the State's intention to ensure that future elections for the Louisiana Supreme Court would include an electoral opportunity district for Black voters in the New Orleans area, or that such a district was no longer necessary in that area to address vote dilution. *See* Pls.-Appellees' Opening Br. at 26-30; *compare Peery v. City of Miami*, 977 F.3d 1061, 1076 (11th Cir. 2020) (applying the substantial compliance standard and granting termination of consent decree that required the city to protect the rights of unhoused individuals where the City implemented a wide array of remedial procedures, provided "ample evidence" that those procedures were being followed, and supported a finding "that compliance will continue after the termination of the decree"); *N.L.R.B. v. Carpenters 46 N. Cal. Cntys. Conf. Bd.*, No. 86-7110, 1991 WL 680341 (9th Cir. Aug. 31, 1999) (granting motion to dissolve consent decree governing union conduct not just due to "the 'mere passage of time,'" but pursuant to a showing of good faith compliance and the absence of any evidence

"suggesting that violations are likely to recur in the absence of the decree") (quoting *S.E.C. v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996)).

In fact, the Attorney General has already made clear that the State does *not* intend to ensure that the New Orleans-based opportunity district remains intact if the Consent Decree is lifted; it intends to utilize its blank slate as it sees fit. *See* 3/26/2023 Oral Argument Tr. at 9:21-11-8; *United States v. Michigan*, Nos. 94-2391, 95-1258, 1995 WL 469430, at *16 (6th Cir. Aug. 7, 1995) (rejecting the state's motion to modify prison reform consent decree where "defendants have not exhibited the commendable history of cooperation and good faith"); *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of Dep't of Developmental Servs*., 215 N.E.3d 1119 (Mass. 2023) (denying Department of Developmental Services' motion to terminate consent decree concerning the use of physical aversive interventions on group home residents where it failed to provide "robust evidence" that the violation had not been recurring or "establish an ongoing record of good faith [] conduct").

The Attorney General neither showed good faith compliance, nor provided the robust evidence required to assure the District Court that the harms the Consent Decree was designed to address would not immediately recur upon its termination. Repeating that harm—i.e. dissolving the New Orleans-based electoral district—which the Attorney General stated in open court that it would be open to doing, would not only "severely impair" the purpose behind the eight action items created

by the Consent Decree—it would undo it. *See* 3/26/2023 Oral Argument Tr. at 9:21-11-8; *Frew v. Janek (Frew II)*, 820 F.3d 715, 721 (5th Cir. 2016) (substantial compliance not satisfied where deviations from performance of term(s) "severely impair the contractual provision's purpose") (quoting *Frew I*, 780 F.3d at 330). Thus, even under the Attorney General's preferred substantial compliance framework, she has failed to show termination is warranted on this record.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's opinion in its entirety.

Dated: March 29, 2024

Respectfully submitted,

s/ Leah C. Aden

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, a true and correct copy of the foregoing En Banc Supplemental Brief 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, 22 paper copies will be filed with the Court within the time provided in the Court's rules via Federal Express.

Dated: March 29, 2024

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

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and in accordance with 5th Cir. R. 32.2, this document contains 8,431 words.

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Dated: March 29, 2024

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