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

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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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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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?

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 judicial districting of the Louisiana Supreme Court—was to ensure the State's compliance with Section 2.

Prior to the Consent Judgment, not a single person who had ever served on the Louisiana Supreme Court was elected by a Black majority district. The Consent Judgment was implemented to resolve this issue as it related to the Black voting age population living in and around Orleans Parish. The Judgment has been in effect for thirty years, protecting the voting power of Black people in the Seventh Judicial District ("District 7") and ensuring that Louisiana remains compliant with federal law in its judicial district mapping.

There is no debate that the Consent Judgment prevents the Louisiana Legislature from violating Section 2. The State nevertheless seeks to dissolve it, claiming that the successive election of three justices by a Black-majority voting bloc is sufficient to show satisfaction, discharge, or release from the Judgment. The State contends that it need not wade into the complexity of vote dilution case law to secure dissolution of the Consent Judgment. But no facts or law support this contention. 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.

For these reasons and those set forth below, the district court correctly ruled that dissolution of the Consent Judgment was improper under both the first and third clauses of Federal Rule of Civil Procedure 60(b)(5). Its ruling should be affirmed. Alternatively, this Court should remand the case for further evidentiary proceedings.

STATEMENT OF THE CASE

The Chisom Plaintiffs Challenge the State's Compliance with Section 2 of the Voting Rights Act in 1986.

On September 19, 1986, the case that forms the basis of this appeal was filed by a group of voters in Orleans Parish—namely, Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry A. Dillon, III, and the Louisiana Voter Registration/Education Crusade (the "*Chisom* Plaintiffs").[1] These voters filed a class action suit against the State of Louisiana and its officials, alleging violations of Section 2 as it related to the method of electing Supreme Court justices.[2] Specifically, the *Chisom* Plaintiffs emphasized that the method in which the State elected justices in the New Orleans area—whereby two "at-large" justices were elected from a single district comprised of Orleans, Jefferson, Plaquemines, and St. Bernard Parishes—resulted in the impermissible dilution of minority voting

[1] ROA.1935.
[2] ROA.1935.

strength.[3] The 1986 lawsuit unequivocally sought to remedy explicit violations of Section 2.

The Parties Enter into a Consent Judgment, the Terms of Which Ensure Black Citizens in New Orleans Have an Opportunity to Elect a Supreme Court Justice of Their Choice.

After years of litigation—including an appeal to the United States Supreme Court, which ruled that Section 2 was applicable to the election of Louisiana Supreme Court justices—the parties agreed to enter into a Consent Judgment to resolve the *Chisom* Plaintiffs' claims. It was signed by Judge Charles Schwartz of the United States District Court for the Eastern District of Louisiana on August 21, 1992.[4] The Consent Judgment expressly and repeatedly provided that it was designed to ensure compliance with Section 2 of the Voting Rights Act. The Judgment stated:

> The Chisom plaintiffs and the United States claim that the multimember district system for electing justices of the Louisiana Supreme Court in the First Supreme Court District (first district) dilutes black voting strength in violation of Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. 1973 [Section 2], because black citizens have less opportunity than other members of the electorate to participate in the political process and elect justices of their choice.[5]

[3] ROA.1935.
[4] ROA.1547.
[5] ROA.1540.

While the Judgment additionally set forth the State's position that it did "not agree with this contention," it went on to articulate the State's 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."[6] This was merely the preamble.

The operative terms of the Consent Judgment were more express on the issue, setting forth in no uncertain terms what was being "ORDERED, ADJUDGED, & DECREED"—in particular that "[t]he 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."[7] Further, the Consent Judgment explained that the specific actions the State was being ordered to take were "[c]onsistent with . . . the remedial objectives of the Voting Rights Act[.]"[8]

The Consent Judgment explicitly created a new judicial seat. This eighth justice would be "assigned to serve on the Supreme Court,"[9] and would "share equally in the cases, duties, and powers of the Louisiana Supreme Court[,] . . . including but not limited to, those powers set forth by the Louisiana Constitution, the laws of Louisiana, and the Louisiana Rules of Court.[10] It was ordered that the

[6] ROA.1541.
[7] ROA.1542.
[8] ROA.1542.
[9] ROA.1543.
[10] ROA.1543.

justice assigned to this position "shall receive the same compensation, benefits, expenses, and emoluments of offices as now or hereafter are provided by law for a justice of the Louisiana Supreme Court."[11]

The Consent Judgment also set forth requirements for legislating "the reapportionment of the seven districts of the Louisiana Supreme Court in a manner that complies with the applicable federal voting law, taking into account the most recent census data available."[12] "The reapportionment will provide for a single-member district that is majority black in voting age population that includes Orleans Parish in its entirety. The reapportionment shall be effective on January 1, 2000, and ***future*** Supreme Court elections after the effective date shall take place in the newly apportioned districts."[13]

The final provision of the Consent Judgment underscored that the "Court shall retain jurisdiction over this case until the ***complete implementation*** of the final remedy has been accomplished."[14]

Act 512 Creates the Chisom Seat in 1992 and Act 776 Creates District 7, Which Becomes an Addendum to the Consent Judgment in 2000.

The new judicial seat created by the Consent Judgment became known as the "*Chisom* Seat."[15] It was officially enacted when Act 512 was passed by the Louisiana

[11] ROA.1543.
[12] ROA.1545.
[13] ROA.1545 (emphasis added).
[14] ROA.1547 (emphasis added).
[15] ROA.1726.

legislature and signed into law by Governor Edwin W. Edwards on June 22, 1992.[16] On January 1, 1993, Justice Revius Oliver Ortique, Jr. was sworn in as the first Louisiana Supreme Court Justice *elected* to the *Chisom* Seat.[17] Although Black justices had previously been appointed to serve on the Supreme Court in a *pro tempore* capacity, Justice Ortique was the first Black justice *elected* to sit on the Louisiana Supreme Court.[18]

Following Justice Ortique's retirement on June 14, 1994, Justice Bernette Joshua Johnson was elected to serve on the *Chisom* Seat, becoming the first Black woman elected to the Louisiana Supreme Court. She was sworn in on November 16, 1994.[19] In accordance with the terms of the Consent Judgment, she remained in the *Chisom* Seat until its dissolution in 2000.[20]

In 1997, three years into Justice Johnson's term, the Louisiana Legislature passed Act 776.[21] The Act, *inter alia*, formally and permanently created a new Louisiana Supreme Court district map. That map included a new Black-majority district: District 7, which went into effect on January 1, 1999.[22] Act 776 also assigned the justices currently on the Louisiana Supreme Court to districts outlined in the new map; it provided that the *Chisom* Seat would expire in 2000, at the election of a

[16] ROA.1935.
[17] ROA.1439.
[18] *Chisom v. Jindal*, 890 F. Supp. 2d 696, 704 n. 16 (E.D. La. Sept. 1, 2012).
[19] *See id.* at 707.
[20] ROA.1937.
[21] ROA.1726; *see also* Act No. 776, 1997 La. Acts 1265.
[22] ROA.1726; *see also* Act No. 776, 1997 La. Acts 1265.

justice from District 7.[23] The Act additionally provided that "[a]ny tenure on the supreme court gained by such judge while so assigned to the supreme court shall be credited to such judge."[24] Crucially, the Act underscored that 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."[25] The parties jointly moved to add Act 776 as an addendum to the Consent Judgment on December 27, 1999.[26] Judge Schwartz approved the addendum on January 3, 2000.[27]

The State Disputes the Terms of the Consent Judgment and Its Obligation to Fulfill Those Terms in 2012.

In October of 1997, Justice Johnson filed a motion to intervene in the instant matter to protect her rights moving forward.[28] On October 7, 2000, after running unopposed, Justice Johnson was elected to the Louisiana Supreme Court by voters of the newly established District 7.[29] Ten years later, she was reelected.[30]

On June 13, 2012, the Louisiana Supreme Court issued an order following the announcement that current Chief Justice Catherine Kimball would retire effective

[23] ROA.1936.
[24] ROA.1838.
[25] ROA.1838.
[26] ROA.45.
[27] ROA.51.
[28] ROA.24; *see also Chisom v. Jindal*, 890 F. Supp. 2d at 705.
[29] *See Chisom v. Jindal*,890 F. Supp. 2d at. 707.
[30] *Id.*

January 31, 2013.[31] The order stated that, "considering that the administration of justice requires a legal determination of who will assume the position of Chief Justice on February 1, 2013[,] . . . [a]ny sitting justice may file with the Clerk of Court, no later than July 31, 2012," on the issue.[32]

Subsequently, on July 5, 2012, Justice Johnson filed a second motion to intervene in the underlying suit.[33] Specifically, Justice Johnson moved to reopen the case, seeking to enjoin the Supreme Court from proceeding with its order and seeking a declaratory judgment pursuant to the terms of the Consent Judgment.[34] The *Chisom* Plaintiffs filed a pleading seeking the same relief on July 10, 2012.[35] On July 27, 2012, the United States filed a pleading in support of both Justice Johnson and the *Chisom* Plaintiffs.[36]

On August 13, 2012, the State moved to dismiss the motions filed by Justice Johnson and the *Chisom* Plaintiffs. The State argued that the court did not have jurisdiction over the matter; that the *Chisom* Plaintiffs did not have standing; and that the court should abstain and defer to the State.[37] The State also filed oppositions to the pleadings filed by Justice Johnson and the *Chisom* Plaintiffs.[38] The *Chisom*

[31] ROA.331-32.
[32] ROA.332.
[33] ROA.53; *see also Chisom v. Jindal*, 890 F. Supp. 2d at 708.
[34] ROA.62, 63.
[35] ROA.221.
[36] ROA.428.
[37] ROA.722*; see also Chisom v. Jindal*, 890 F. Supp. 2d at 708.
[38] ROA.744.

Plaintiffs, the United States, and Justice Johnson each filed oppositions to the State's motion to dismiss.[39]

On September 1, 2012, Judge Susie Morgan issued an order holding that the terms of the Consent Judgment called for Justice Johnson's tenure from November 16, 1994, until October 7, 2000, to be credited to her "for all purposes under Louisiana law."[40] In so holding, the Court specifically found that "[t]here has been no affirmative ruling by this Court that the Consent Judgment has been completely satisfied . . . . Because the Court finds that the 'final remedy' under the Consent Judgment has not yet been accomplished the Court has continuing jurisdiction and power to interpret the Consent Judgment . . . ."[41]

The State appealed the lower court's ruling to this Court.[42] But before this Court had an opportunity to rule, on October 16, 2012, the Louisiana Supreme Court issued a *per curiam* order holding that "upon Chief Justice Kimball's retirement in early 2013, Justice Johnson, through an unbroken chain of both appointed and elected service on this court, has the most seniority to become the next chief justice."[43] Chief Justice Johnson served in this role until her retirement on December

[39] ROA.1009, 1021, 1033.
[40] ROA.1113; *see also Chisom v. Jindal*, 890 F. Supp. 2d at 711.
[41] ROA. 1113.
[42] ROA.1165.
[43] *In re Off. of Chief Just., Louisiana Supreme Ct.,* 2012-1342 (La. 10/16/12).

31, 2020. On January 1, 2021, Justice Piper D. Griffin was sworn in as an Associate Justice in the District 7 seat.

Failing to Meet Its Burden Under Rule 60(b)(5), the State Asks for Dissolution of the Consent Judgment in the Instant Case.

In 2019, a three-member panel of this Court issued its decision in *Allen v. State*.[44] In *Allen*, plaintiffs alleged that Louisiana was in violation of the Voting Rights Act for failing to provide a majority Black Supreme Court district in the Baton Rouge area.[45] On a certified appeal from the United States District Court for the Middle District of Louisiana, the State asked the Fifth Circuit to determine whether jurisdiction over the suit lay in the Middle District (where the suit had been filed) or in the Eastern District (the court with jurisdiction over the Consent Judgment). In holding that jurisdiction over the Baton Rouge suit lay in the Middle District, this Court explained: "So, even assuming the Judgment still lives after all these years—something we are not asked to decide—it could not oust the district court's jurisdiction over this case. This being a certified appeal, we decide that and nothing more."[46]

After this Court issued its decision in *Allen*, the State filed a motion to dissolve the Consent Judgment, with an eight-page memorandum in support, in the United

[44] *Anthony Allen, et al. v. State of LA, et al.,* 14 F.4th 366 (5th Cir. 9/17/2021).
[45] *Id.*
[46] *Id.* at 368.

States District Court for the Eastern District of Louisiana.[47] The State set forth two arguments. First, it posited that the final remedy under the Consent Judgment "has been implemented" pursuant to the first clause of 60(b)(5).[48] Second, it claimed that dissolution was proper under the third clause of Rule 60(b)(5) because the Supreme Court districts are "severely malapportioned."[49] Counsel for the *Chisom* Plaintiffs and Justice Johnson opposed the State's motion."[50]

On March 24, 2022, Judge Susie Morgan heard the State's motion.[51] During the hearing, Judge Morgan asked counsel for the State about the effect of the Consent Judgment on the continuing existence of District 7. She specifically asked whether dissolution of the Judgment "would mean that the State is free to *not* have a district in New Orleans where an African-American can be elected[.]"[52] She continued, asking whether the *Chisom* plaintiffs would have to "start from scratch" 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."[53]

Counsel for the State agreed that cracking District 7 was a legitimate possibility. He stated: "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

[47] ROA.1429.
[48] ROA.1429.
[49] ROA.1429.
[50] ROA.1721, 1752, 1755.
[51] ROA.1915.
[52] ROA.1948 (emphasis added).
[53] ROA.1948.

particular kind of district."[54] He underscored that "[t]he 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***."[55]

The district court issued its decision on May 24, 2022.[56] In a carefully considered and well-reasoned opinion, the court denied the State's motion. It held 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).[57] In particular, the court found that the State had not shown that the final remedy of the Consent Judgment had been implemented, nor had it shown that continued enforcement was no longer equitable based on changed circumstances.[58] The district court applied the *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), analysis to the State's arguments under the first clause of Rule 60(b)(5); it applied the *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), analysis to the State's arguments under the third clause of Rule 60(b)(5). Under these legal tests, the lower court held that the State was not entitled to dissolution of the Consent Judgement under Rule 60(b)(5).[59]

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[54] ROA.1949.
[55] ROA.1949 (emphasis added).
[56] ROA.1934.
[57] ROA.1943-57.
[58] ROA.1953.
[59] ROA 1957.

On May 25, 2022, the State filed a Notice of Appeal with the district court.[60]

SUMMARY OF THE ARGUMENT

The State of Louisiana's entire argument in support of its motion to dissolve the Consent Judgment is premised on a complete misreading of the Judgment's contents. Contrary to the State's repeated assertions, the Consent Judgment was wholly based on relief intended to remedy both past and future violations of Section 2 of the Voting Rights Act.

The Consent Judgment could not be more express on this issue. It articulated the State's 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."[61] In fact, this very phrase was "ORDERED, ADJUDGED & DECREED."[62] Importantly, this specific relief was deemed "[c]onsistent with . . . the remedial objectives of the Voting Rights Act[.]"[63] In this context, the Consent Judgment created a single-member majority-Black district in Orleans Parish. This district was to become effective on January 1, 2000, "and future Supreme Court elections after the effective date" were ordered to "take place in the newly reapportioned districts."[64]

[60] ROA.1958.
[61] ROA.1542.
[62] ROA.1542.
[63] ROA.1542.
[64] ROA.1545.

The first clause of Rule 60(b)(5) is not met simply because the State—reluctantly at times—has met its obligations to date. The State argues that the Consent Judgment should be dissolved because, in its view, the final remedy has been implemented. It has not. Because the purpose of the Consent Judgment was to prevent future violations of Section 2, the State needed to prove that the vestiges of past discrimination have been eliminated such that the likelihood of a future Section 2 violation is slim to none. To do so, the State would have needed to present proof in accordance with settled vote dilution case law—in particular, *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the attendant Senate factors. It did not. Instead, the State conceded that, in the event of dissolution, it was not bound to have a majority-Black district in Orleans Parish. The district court thus did not abuse its discretion in rejecting the State's contention that, under the first clause of Rule 60(b)(5), the successive election of three justices by a Black-majority voting bloc in Orleans Parish over a thirty-year period satisfies the final remedy of the Consent Judgment.

The State also argues that the Consent Judgment should be terminated under the third clause of Rule 60(b)(5) because the Judgment prevents the State from reapportioning malapportioned districts. This argument is undermined by two facts. For one, the Supreme Court districts have been malapportioned for nearly a century. As such, this contention does not satisfy the notion of a changed circumstance under either *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), or *Horne v.*

Flores, 557 U.S. 433, 447 (2009). Second, the Consent Judgment expressly contemplates redistricting within its framework. The parties previously amended the Consent Judgment to incorporate Act 776, which gives the Legislature the authority to reapportion the Supreme Court districts the year after census data is released.[65] By its own language, Act 776 applied to *all* Louisiana Supreme Court judicial districts, and its express incorporation into the Consent Judgment by joint motion on behalf of all parties demonstrates the parties' agreement that: redistricting could occur within the confines of the Consent Judgment going forward, provided that a Section 2 compliant district is drawn in the Orleans Parish area.

At this juncture, insufficient evidence has been marshalled to justify complete vitiation of the Consent Judgment, the purpose of which has been demonstrably unfulfilled. Nonetheless, as the district court found, nothing stops the State from coming back to court for approval of a proposed redistricting plan that addresses malapportionment, while at the same time continuing "to ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act."[66]

[65] ROA.1551.
[66] ROA.1542.

ARGUMENT

I. The Standard of Review at Issue Is Abuse of Discretion.

A district court's ruling on a Rule 60(b) motion is entitled to "heightened" and "substantial" deference when the judgment at issue falls within the scope of an institutional reform consent judgment. *Frew v. Janek*, 780 F. 3d 320, 326 (5th Cir. 2015); *Frazar v. Ladd*, 457 F. 3d 432, 435 (5th Cir. 2006); *Cooper v. Noble*, 33 F. 3d 540, 543 (5th Cir. 1994). Thus, a lower court's decision to grant or deny relief pursuant to Rule 60(b) is reviewed under an "abuse of discretion" standard. *Id.* This standard is met only when *no* reasonable person could agree with the district court. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978); *First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990); *Bertrand v. Sullivan*, 976 F.2d 977, 979 (5th Cir. 1992), *overruled on other grounds*, *see Breaux v. U.S. Dept. of Health and Human Services*, 20 F.3d 1324, 1325 (5th Cir. 1994). In short, if reasonable minds could differ as to the district court's action, no abuse of discretion has been shown. *Id.*

Under the first clause of Rule 60(b)(5), a court does not abuse its discretion in refusing to modify a consent judgment where the party seeking relief has not adequately demonstrated that the judgment has been satisfied. *See e.g. Frazar,* 457 at 438 (holding that district court did not abuse its discretion in denying termination of a consent judgment when state failed to show any evidence of satisfying the

purpose of the judgment beyond minimum compliance with federal law); *Frew*, 780 F. 3d at 330-32 (applying satisfaction of judgment standard); *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 579 F. 3d 1268, 1272-74 (11th Cir. 2009).

Under the third clause of Rule 60(b)(5), a district court does not abuse its discretion in refusing to modify a consent judgment where the party seeking relief does not demonstrate that a significant change in circumstances warrants the requested relief. *See, e.g.*, *Frazar,* 457 F. 3d at 441 (holding that district court did not abuse its discretion in denying termination of a consent judgment when the state failed to provide evidence of significant changed factual or legal circumstances); *Cooper*, 33 F. 3d at 544 (holding same); *Horne v. Flores*, 557 U.S. 433, 447 (2009).

II. The District Court Did Not Abuse Its Discretion in Ruling that the State Failed to Meet Its Burdens of Proof Under Rule 60(b)(5).

The district court correctly ruled that the State failed to meet its burden of proof under both the first and third clauses of Rule 60(b)(5). In a Rule 60(b)(5) motion, the party seeking relief from a judgment bears the burden of showing why the judgment should be vacated. *U.S. v. City of New Orleans*, 947 F.Supp. 2d 601, 615 (E.D. La. 2013). 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), *cert. denied*, 405 U.S. 921 (1972); *Mayberry v. Maroney*, 529 F.2d 332, 335 (3rd Cir. 1976).

The Rule "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." *U.S. v. City of New Orleans*, 947 F.Supp. 2d 601, 615 (E.D. La. 2013) (citing *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. 2d 601, 615 (E.D. La. 2013) (citing *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

To prove release, discharge, or satisfaction of a judgment under the first clause of Rule 60(b)(5), a party must show that the judgment does not provide for any continuing obligations. *Frew*, 780 F.3d at 330. To satisfy the second clause of Rule 60(b)(5), the party seeking dissolution of the judgment must show that "a significant change either in factual conditions or in law renders continued enforcement detrimental to the public interest." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (internal quotations omitted)). As explained below, the State has not met its burden of proof under either clause of Rule 60(b)(5). The district court accordingly did not abuse its discretion in denying the State's motion to dissolve the Consent Judgment.

A. The State Failed to Meet the Burden of Proof Required to Dissolve the Consent Judgment Under the First Clause of Rule 60(b)(5).

The first clause of Rule 60(b)(5) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding" when "the judgment has been satisfied, released, or discharged[.]" Fed. R. Civ. P. 65. This clause is rarely invoked in the context of institutional reform judgments, like the Consent Judgment in this case. *See Frew*, 780 F. 3d at 327 ("[T]he first clause of Rule 60(b)(5) is raised far less often—typically when there is a dispute over the amount of the judgment—and is almost never applied to consent decrees."). Institutional reform judgments are a type of federal court judgment that aims to cure illegal state institutional practices. *See e.g.*, *id.; Frazar*, 457 F. 3d at 438-39. They often result in orders that remain in force for long periods of time. *Horne*, 557 U.S. at 447-48. The practice of diluting voting power of majority-minority voting districts falls within the scope of institutional reform. *See e.g., Allen*, 14 F.4th at 373. The Consent Judgment here is an institutional reform judgment because it was entered as a result of extensive litigation arising from the State's intentional cracking of the Black vote across Supreme Court judicial districts.[67]

The district court analyzed the State's dissolution request under the first clause of Rule 60(b)(5) pursuant to *Board of Education of Oklahoma City Public Schools,*

[67] *See* Statement of the Case, *supra* at 3-6.

Independent School District No. 89 v. Dowell, 498 U.S 237 (1991). In *Dowell*, the United States Supreme Court used a two-prong legal test to assess whether the terms of a consent judgment had been satisfied: (1) whether the judgment had been complied with in good faith, and (2) whether the vestiges of past discrimination had been eliminated to the extent practicable. 498 U.S. at 248-50. Under the *Dowell* analysis, the district court correctly held that the State failed to meet its burden of establishing compliance with the first clause of Rule 60(b)(5).

The lower court's analysis hinged on three core findings, specifically that:

- The purpose of the Consent Judgment was to ensure future compliance with Section 2 of the Voting Rights Act;[68]
- The State failed to demonstrate good faith compliance with the Consent Judgment because it had failed to prove that there was little chance the original violation would be repeated;[69] and
- The State failed to demonstrate that the vestiges of past discrimination have been eliminated to the extent practicable considering the Consent Judgment's purpose and the lack of evidence provided by the State that there are no present-day Section 2 issues.[70]

The State attacks the district court's opinion by relying primarily on three erroneous contentions. First, the State posits that Section 2 never was, or at least is no longer, at issue in the Consent Judgment. Second, the State contends that, because this is so, thirty years is long enough for Black voters in Orleans to participate in

[68] ROA.1940.
[69] ROA.1950.
[70] ROA.1950.

electing a Supreme Court justice of their choice. Third, the State argues that the district court's application of *Dowell*, 498 U.S. 237 (1991), was improper. All three arguments founder.

1. The Consent Judgment Sought to Bring Louisiana into Compliance with Section 2 of the Voting Rights Act and to Ensure Future Compliance with the Act.

The State's argument that the Consent Judgment is not meant to "remedy potential Section 2 violations beyond the terms of the consent judgment" fails to pass muster.[71] In its briefing, the State fails to substantively grapple with any of the underlying conditions that led to the entry of the Consent Judgment, let alone satisfy its burden of proving that the terms of the Consent Judgment have been satisfied. The State points to the election of three justices—out of 126 total justices that have served on the Louisiana Supreme Court over the course of 209 years—by a Black-majority voting bloc as evidence of substantial compliance with the Consent Judgment's terms.[72] According to the State, because ensuring future compliance with Section 2 does not fall within the ambit of the Consent Judgment's enumerated terms, dissolution is appropriate.[73] But the State cannot reframe the articulated purpose of the Consent Judgment—ensuring that Louisiana Supreme Court elections both at the time and in the "future" are "consistent" with the Voting Rights Act—by

[71] Appellant's Br., at 44.
[72] *Id.* at pp. 18, 34-35.
[73] *Id.* at 29-36.

now claiming the Consent Judgment's purpose is best understood as the State seeking to avoid "pour[ing] resources into defending the legality of the multi-member district."[74]

The underlying conditions that led to entry of the Consent Judgment are not simply erased because certain enumerated items in the Judgment are satisfied. In the same way that a doctor who removes a cancerous tumor cannot proclaim a patient cancer free in the absence of a long-term treatment plan, so too the State cannot proclaim that the election of three justices by a Black-majority bloc over a thirty-year period resolves the underlying Section 2 violations that led to entry of the Consent Judgment.

Thus, the district court was correct when, as the Statement of the Case makes clear, it found that "[t]he Consent Judgment was specifically aimed at correcting and guarding against the dilution of Black voting power in Orleans Parish."[75] The 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."[76] Reasoning that the Consent Judgment's language "frequently uses the word 'ensure[,]'" the court accurately concluded that the phrase "to ensure"

[74] Appellant's Br., at 5, 16.
[75] ROA.1941.
[76] ROA.1942.

within the Consent Judgment "carries with it the notion of guaranteeing a future result."[77]

The purpose of the Consent Judgment was and continues to be: ensuring that the State adheres to Section 2 of the Voting Rights Act such that Black voters in Orleans Parish have an opportunity to meaningly participate in the political process—and accordingly elect a justice of their choice to the Louisiana Supreme Court. This was true at the time the parties entered into the Consent Judgment and it remains true today. The State's attempt to alter the Consent Judgment's terms at this stage is nothing more than a faulty escape hatch. The bottom line is, the State cannot sidestep its burden of showing proof that a Section 2 violation is no longer present under settled vote dilution case law.

(a) The State Fails to Show Any Changes in the *Chisom* Plaintiffs' Ability to Meet the *Gingles* Preconditions.

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 is that

[77] ROA.1942.

three Black justices have been elected to the Louisiana Supreme Court since entry of the Consent Judgment.[78] This was insufficient to overcome the *Gingles* preconditions, particularly considering *Chisom* Plaintiff-Appellees' 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."[79]

The limited evidence in this case demonstrates that all three *Gingles* preconditions are satisfied. First, Black voters in Orleans Parish remain a sufficiently large and geographically compact group to constitute a majority-minority district.[80] Second, based on Plaintiffs' own (not the State's) "preliminary analysis" of the evidence, it is likely 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.[81] Third, *Chisom* Plaintiff-Appellees pointed to findings of other Courts, even in recent years, that found "patterns of [racially polarized voting] throughout Louisiana."[82] For example:

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[78] ROA.1952.
[79] ROA.1734.
[80] ROA.1734 at n.11 (citing *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1124 (E.D. La. 1986).
[81] ROA.1734.
[82] 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, the Department of Justice (the "DOJ") sued the City of West Monroe under Section 2 of the Voting Rights Act over its at-large alderman elections. *United States v. City of West Monroe*, 2021 WL 2141902, No. 21-cv-0988 (W.D. La. Apr. 14, 2021). The 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.*

- In *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020), this Court affirmed a district court that found racially polarized voting present in local Louisiana judicial elections.

- In *La. State Conference of NAACP v. Louisiana*, 490 F. Supp. 3d 982, 1019 (M.D. La.), *motion to certify appeal granted sub nom. Louisiana State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Louisiana*, 495 F. Supp. 3d 400 (M.D. La. 2020), and *aff'd sub nom. Allen v. Louisiana*, 14 F.4th 366 (5th Cir. 2021), the Middle District of Louisiana found sufficient preliminary evidence of racially polarized voting statewide.

- In *Allen v. Louisiana*, 14 F.4th 366 (5th Cir. 2021), currently pending in the Middle District of Louisiana, the plaintiffs allege that Louisiana illegally dilutes the votes of Black Louisianians in Louisiana Supreme Court District 5.

The existence of the *Gingles* preconditions in Louisiana is further evidenced by recent Section 2 voting rights litigation seeking to (i) establish an ability to elect judges in Jefferson Parish, the parish bordering Orleans to the west,[83] and (ii) block the redistricting of the St. Bernard Parish School Board, the parish bordering Orleans Parish to the east, which would effectively deny Black voters an opportunity to elect candidates of their choice.[84] At the lower court, *Chisom* Plaintiff-Appellees also pointed to research demonstrating the existence of racially polarized voting in each of the four parishes that border Orleans (Jefferson, Plaquemines, St. Bernard, and St. Tammany parishes).[85]

[83] ROA.1735.
[84] ROA.1735.
[85] ROA.1734. As explained in Plaintiff-Appellees' Opposition in the District Court, the evidence of the racially polarized voting in the parishes surrounding Orleans Parish was not before the Court because the State failed to create a record of evidence for the lower court to review. *Id.*

In the end, the State did not present any evidence refuting patterns of racially polarized voting endemic to the State, let alone the other *Gingles* preconditions. Against this backdrop, the lower court did not abuse its discretion in finding that the State failed to meet its burden of showing satisfaction, release, or discharge of the Consent Judgment.

(b) The State Fails to Show Any Changes in the Totality of the Circumstances that Led to the Enactment of the Consent Judgment.

To assess whether there is a present potential for a Section 2 violation in the absence of the Consent Judgment, the State should have—but did not—provide evidence as to the "totality of the circumstances," the key element necessary to determine Section 2 liability. *Gingles*, 478 U.S. at 36-37. The totality of the circumstances is typically assessed by referencing the Senate factors set forth in the Senate report accompanying the 1982 amendment to the Voting Rights Act of 1965. S. Rep. No. 97-417, at 28-29 (1982). There are typically nine Senate factors to consider. *Gingles*, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). For the sake of illustration (because in the end it is the State's burden to argue that the Senate Factors weigh in favor of dissolution), Justice Johnson will discuss five Senate factors: one that deals with recent findings concerning historical

discrimination in Louisiana's voting process, and four that played an integral role in the opinions she issued as a Louisiana Supreme Court justice.[86]

Senate Factor 1. This factor addresses historical discrimination in voting processes. It considers "the history of official voting-related discrimination in the state or political subdivision." *Gingles*, 478 U.S. at 37. In *Robinson et al. v. Ardoin*, 2022 WL 2012389 (M.D. La. 2022), a case pending in the Middle District of Louisiana that is stayed and is currently on appeal to the United States Supreme Court, the district court found a robust history of discrimination in Louisiana's voting processes. *Id.* at *53.

The court found that there had been no Black state-wide elected officials in Louisiana since the Reconstruction period; that despite being approximately one-third Black, Louisiana's legislature was only approximately 23% Black; and that less than 25% of the mayors in Louisiana are Black. *Id.* The district court noted that Louisiana has an indisputably long history of racial discrimination. *Id.* at *54-55. "From 1965 to 1999, the U.S. Attorney General issued 66 objection letters to more than 200 voting changes, and from 1990 until the end of preclearance in 2013, an additional 79 objection letters were issued." *Id.* at *53. The *Robinson* court

[86] The other Senate factors are: (2) racially polarized voting; (3) the extent to which a political subdivision or state has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that enhance opportunity for discrimination; (4) denial of minority members from candidate slating processes; and (9) whether the policies underlying the state's use of voting qualifications, prerequisites to voting, or standards, practices, or procedures are tenuous. S. Rep. No. 97-417, at 28-29 (1982).

specifically cited reports finding that there were fewer polling locations in heavily Black populated areas in Louisiana. *Id.* It concluded that there is "no sincere dispute" related to "Louisiana's long and ongoing history of voting-related discrimination" against Black Louisianians. *Id.* at *55.

Senate Factors 5 and 8. These factors relate to Black Louisianians' ability to partake in and influence the political process. Senate factor 5 considers the "extent to which members of the minority group in the state or political subdivision bear the effects of discrimination (education, employment, health) which hinder their ability to participate in the political process." *Gingles*, 478 U.S. at 37. Relatedly, Senate factor 8 considers "whether there is a significant lack of responsiveness on the part of elected officials to the particular needs of members of the minority group." *Id*. Taken together, these factors consider the extent to which the State responds to discrimination and its effects.

The legal opinions authored by Justice Johnson discussed below run the gamut, from challenging disproportionate prison sentences handed to Black people, to the juries that decide the fate of Black people in criminal cases, to the critical importance that anti-discrimination laws play in society. All told, Justice Johnson's opinions underscore how imperative it is for Black voters to have representation on the Louisiana Supreme Court.

By way of a most recent example, in *State v. Bryant*, the Louisiana Supreme Court adjudicated the appropriateness of a 23-year prison sentence given to a Black man for stealing hedge clippers.[87] The court affirmed the sentence despite the fact that the defendant's prior criminal history was limited to non-violent crime.[88] Justice Johnson wrote the sole dissent against this objectively unreasonable and harsh sentence.[89] She called it "excessive and disproportionate," further noting the significant costs the sentence would have on the state, over $500,000.[90] 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 pollical process.

Justice Johnson's opinions in *State v. Juniors*[91] and *State v. Snyder*[92] underscore these very same inequities. In both cases, she issued dissenting opinions calling out the State for improperly using preemptory strikes against Black jurors in criminal matters involving Black defendants. In *Juniors*, Justice Johnson noted that the State struck a Black juror due to her mild hesitancy to impose the death penalty, but did not strike white jurors who apparently expressed the same sentiment.[93] In *Snyder*, Justice Johnson again criticized the State on its use of peremptory strikes

[87] 2020-00077 (La. 7/31/20), 300 So. 3d 392, 393.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] 915 So. 2d 291 (La. 6/29/2005).
[92] 942 So .2d 484 (La. 9/6/2006).
[93] 915 So. 2d at 341-43.

that resulted in an all-white jury deciding whether a Black defendant should face the death penalty.[94] She emphasized how the prosecution referenced the O.J. Simpson trial, despite assurances that it would not, and connected this about-face to the prosecution's intentional and discriminatory purpose of inflaming an all-white jury's emotions.[95] These opinions show the State's ethos of discriminating against Black people ensnared in the criminal legal system and how Justice Johnson was oft the *lone* voice representing a Black-majority voting bloc.

In *Louisiana Department of Justice v. Edwards*, Justice Johnson used her pen again to dissent against racially discriminatory conduct.[96] This time, she argued 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.[97] She pointed out that the policy at issue was like others previously in place and, as such, argued for the granting of the writ. Even outside of criminal legal context, Justice Johnson represented the constituency that elected her in arguing against judicial attempts to impede policies that seek to prohibit racial discrimination.

[94] 942 So. 2d 484 at 505-09.
[95] *Id.* at 505.
[96] 239 So. 3d 824 (La. 3/23/18).
[97] *Id.* at 1-3.

Throughout Justice Johnson's tenure on the Louisiana Supreme Court, hers was the *only* voice adequately representing the interests of Black voters in District 7—in fact, of Black Louisianians across the State. She issued dissent after dissent squarely addressing the continued discrimination of Black Louisianians by multiple arms of the State. Her judicial decisions make clear how little the totality of the circumstances have changed since the Consent Decree's inception, and how vital it is for Black voters to continue to have a voice on the Louisiana Supreme Court.

Senate Factors 6 and 7. These factors relate to the way Black Louisianians are portrayed by politicians in the media and their ability overcome these negative stereotypes and hold elected office. Senate factor 6 considers "whether political campaigns use overt or subtle racial appeals," while Senate factor 7 considers the "extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 97-417, at 28-29 (1982).

Justice Johnson's tenure on the Louisiana Supreme Court, including the challenges she faced after her election, speak to how the totality of the circumstances that prompted the entry of the Consent Judgment has not changed. Indeed, twenty years after the Consent Judgment's entry, the State argued that Justice Johnson's time in the *Chisom* Seat did not count toward her seniority. This campaign against the *Chisom* Seat—elected by a Black-majority voting bloc—was, at a minimum, a

subtle racial appeal that sought to hamper Justice Johnson's entitlement to the "same . . . benefits . . . provided by law for a justice of the Louisiana Supreme Court."[98]

The State provided woefully deficient proof relevant to demonstrating that the totality of the circumstances has changed since the Consent Judgment's entry. This point is only exacerbated by the State's concession in open court that, if the Consent Judgment is dissolved, it will be free to eliminate the only majority-Black Louisiana Supreme Court judicial district. The sad reality is: the totality of the circumstances that necessitated the creation of the Louisiana Supreme Court seat that Justice Ortique and Justice Johnson held, and that Justice Griffin now holds, has not changed since the Consent Judgment's inception. The State has marshalled no evidence to the contrary. 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.

2. The State Is Wrong in Claiming That the Consent Judgment Has Been Satisfied Simply Due to the Passage of Time.

The State contends that the briefing of the NAACP Legal Defense and Educational Fund ("LDF") in 2012 resolves the matter of whether the Consent Judgment has been satisfied. Twisting the words of the LDF, the State claims without evidence of any kind that the Consent Judgment ended with Justice

[98] ROA.1543.

Johnson's tenure on the court. Apparently, for the State, thirty years is a long time (too much time, in fact) for Black voters to partake in the voting franchise. In essence, the State argues that electing three justices out of 126 to the Louisiana Supreme Court over the course of its 209-year history is sufficient to remedy past and present discrimination in voting suffered by Black people in Orleans Parish.

But Section 2 does not have a shelf life. The State's argument premised on the passage of time fails because it relies on the specious contention that the Consent Judgment does not require consideration of Section 2 compliance going forward—when it most assuredly does. Again, until the State proves that Black voters cannot satisfy the *Gingles* preconditions and the attendant Senate factors, its slapdash attempt to point to the election of three Supreme Court justices elected by a Black majority cannot succeed in substantiating its request to dissolve the Consent Judgment.

3. The Consent Judgment Is an Institutional Reform Judgment Subject to *Rufo* and *Horne*, Thereby Implicating a Necessary Analysis of the *Gingles* Preconditions and the Senate Factors.

The State's attempt to fault the district court for relying on *Dowell*, 498 U.S. 237—to show that the Consent Judgment has been satisfied, released, or discharged—crumbles in the face of the State's inability to show that it meets the requirements laid out in *Rufo*, 502 U.S. 367.[99] The district court correctly held that

[99] Appellant's Br., at 36-40.

the State failed to show that it complied with the Consent Judgment in good faith and that the vestiges of past discrimination have been eliminated, the two elements necessary to satisfy *Dowell*.[100] While that analysis is correct and should be affirmed by this Court, the lower court would have reached the same outcome had it applied *Rufo*. *Id.* at 383. For *Rufo* to apply, the Consent Judgment at issue must be an institutional reform judgment. It is.

While *Rufo* strictly addressed the third clause of Rule 60 (b)(5)—*i.e.*, the equities involved in "prospective[]" application of a consent judgment—its analysis appears to equally apply to the first clause, at least where the party seeking dissolution takes issue with the prospective nature of a consent judgment's terms. Under *Rufo*, the party seeking to disturb the judgment must both (1) establish that a significant change in facts or law warrants revision of the judgment; and (2) demonstrate that the proposed modification is suitably tailored to the changed circumstances. *Id.* at 383. As recognized by Justice Alito in *Horne v. Flores*, 557 U.S. 443 (2009), the passage of time may "warrant reexamination of the original judgment" only when there are "*changes in the nature of the underlying problem*, changes in governing law or its interpretation by the courts, and new policy insights." *Id.* at 448 (emphasis added). Reexamination is not warranted when no such changes are presented or substantiated.

[100] ROA.1950.

Nevertheless, the State relies heavily on *Horne*. But *Horne* is readily distinguishable. There, the United States Supreme Court was considering a consent judgment that arose out of litigation brought by English language learning students in Arizona against their school district. *Id.* at 438. The Court addressed the third clause of Rule 60(b)(5) and Arizona's argument that prospective application of the consent decree was no longer equitable. *Id.* at 439. 454. The Court reasoned that the lower court had not properly applied *Rufo* because it too narrowly focused on the specific action items mandated by the judgment, rather than language stating that "appropriate action" needed to be taken to ensure compliance with the law. *Id.* at 450, 452. To assess whether "appropriate action" had been taken, the Court considered whether changed factual or legal circumstances warranted modification of the original order. *Id.* at 454-57. The Court noted that, because the district court did not apply *Rufo*'s flexible standard, it had abused its discretion. *Id.* at 456. The Court remanded the case back to the lower court to consider four factual and legal changes that needed to be considered under *Rufo*, including enactment of a new law. *Id.* at 459.

To be clear, *Horne* specifically reversed the lower court for focusing on enumerated items in a consent judgment in the absence of considering whether broader "appropriate action" had been taken to remedy the underlying issue that prompted the judgment. Here, the district court followed the dictates of *Horne* in

considering the broader purpose of the Consent Judgment, in particular ensuring compliance with Section 2 of the Voting Rights Act. *Horne* clarified that *Rufo*'s standard is a flexible one meant to encompass the underlying conditions that led to entry of the consent judgment at issue. *Rufo*'s standard is not so narrow that it strictly focuses on "action items," as the State argues.[101] Quite the opposite, *Horne* underscores looking at the broader picture in assessing whether a significant change in facts or law warrants a suitably tailored revision of the judgment. Here, the facts and law at issue go to the heart of settled Section 2 vote dilution case law, with which the State chooses not to contend.

Sidestepping facts that underscore why the Consent Judgment was originally entered does nothing to demonstrate that those conditions no longer exist in Louisiana. The State cannot, and does not, argue that any of the *Gingles* preconditions have been eliminated and, as such, are the source of any substantial change underlying the issues that gave rise to the Consent Judgment. Nor does the State bother to show any change in the totality of the circumstances that would militate in favor of modifying, let alone dissolving, the Consent Judgment. By contrast, as explained in Parts II.A.1.(a)-(b) *supra*, the *Chisom* Plaintiffs and Justice Johnson have marshalled evidence that shows the exact opposite.

[101] Appellant's Br., at 38-39.

Because the State has failed to carry its burden in demonstrating why the Consent Judgment should be dissolved, it cannot succeed in arguing for its dissolution under the first clause of Rule 60(b)(5). The district court got it right and its judgment should be affirmed.

B. The State Failed to Meet the Burden of Proof Required to Dissolve the Consent Judgment Under the Third Clause of Rule 60(b)(5).

The third clause of Rule 60(b)(5) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding . . ." when ". . . applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The State argues that its purported thirty-year compliance with the Consent Judgment and the current malapportionment of Louisiana Supreme Court districts justifies dissolution. The public interest, it decries, is at issue. But the public's interest demands that the Consent Judgment remain in place when the underlying issues that necessitated its creation remain unchanged. The State next proclaims that federalism makes a thirty-year Consent Judgment tantamount to never-ending oversight. According to the State, it should have the right to redistrict the Louisiana Supreme Court and dilute the Black vote if it so chooses. But federalism is not a work-around that allows state entities to avoid the dictates of federal law and the terms of a consent judgment. Invoking federalism without more is certainly not enough to satisfy *Rufo*. 502 U.S. 367.

The district court correctly held that, under *Rufo*, *id.* at 367, the alleged malapportionment was not a significant changed circumstance that made compliance with the Consent Judgment more onerous or detrimental to the public interest. Even if malapportionment could be deemed a significant change (and it could not), the court ruled that the State had nonetheless failed to show how dissolution of the Consent Judgment was suitably tailored to address the changed circumstance. The district court's *Rufo* analysis should prevail here.

1. Malapportionment Is Not a Changed Circumstance That Renders the Consent Judgment More Onerous or Adverse to the Public Interest.

The State argues that "thirty years of compliance, widespread malapportionment, and Louisiana officials' concern for correcting malapportionment" indicate a significant change that warrants dissolution of the Consent Judgment.[102] Not so. Malapportionment is not new. The census data shows that the current judicial districts are *less* malapportioned than they were in 2010.[103] In fact, the districts have been malapportioned since at least 2000—nearly two thirds of the Consent Judgment's lifespan.[104] Moreover, they were malapportioned for 76 years before the enactment of the Consent Judgment.[105] All to say, it is exceedingly disingenuous for the State to suggest that, even though it did not care about

[102] Appellant's Br., at 45.
[103] ROA.1954.
[104] ROA.1954.
[105] ROA.1954-55.

malapportionment for 100 some odd years, because Louisiana officials have decided to care now, a change in circumstance under *Rufo*, 502 U.S. 367, exists. Convenience and pretext are neither exceptions to the third clause of Rule 60(b)(5) nor *Rufo*, 502 U.S. 367.

Furthermore, the case law is clear that judicial districts do not need to be equally apportioned. In *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd* 409 U.S. 1095 (1973), the Middle District of Louisiana held that the "one man, one vote" principle does not apply to the judicial branch—specifically, to districting governing the elections of justices to the Supreme Court of Louisiana. *Id.* at 454. While population equality is a consideration, it is only one of many considerations in the context of judicial redistricting. *See Clark v. Roemer*, 777 F. Supp. 445, 453 (M.D. La. 1990). There is no question this is good law, as a bill that would have required equal apportionment of judicial districts was defeated in the Louisiana Legislature. S. 163, 47th Leg., 2021 Reg. Sess. (La. 2021); H.R. Journal, 47th Leg., 2021 Reg. Sess., at 1401-02 (La. June 7, 2021) (recording the vote defeating the Bill).

Taking these facts and the law into consideration, the district court did not abuse its discretion in holding that the State's malapportionment argument did not establish that application of the Consent Judgment prospectively was no longer equitable.

2. Dissolution of the Consent Judgment Is Not Suitably Tailored to Any Alleged Changed Circumstance.

Even if the State had met its burden (and it did not) of proving that its unilateral decision to deign to care about malapportionment was sufficient to qualify as a changed circumstance, dissolution of the Consent Judgment is not a "suitably tailored" solution. *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."[106] 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."[107] 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 Judgment and federal law.

The State's invocation of federalism concerns is unavailing. While institutional reform judgments can implicate federalism concerns, returning the issues at bar in a consent judgment to a state should only occur when circumstances warrant. *Horne*, 557 U.S. 433 at 450-52. Here, the State has not satisfied its burden of pointing to any circumstances that warrant wholly returning redistricting power

[106] ROA.1957.
[107] ROA.1956.

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 litigation.

The fact is, 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.[108] 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.[109] As this Court held in *Allen*, the *Chisom* Consent Judgment does not govern the borders of any of the other six Supreme Court districts.[110] Hence, the State has free reign to redistrict the remaining six districts as it sees fit. The Consent Judgment is not the federal government holding a thumb on the scale of state power. It is the federal government ensuring that Louisiana *remains* in compliance with Section 2, consistent with the terms of an agreement the State reached and the district court entered as a judgment.

[108] ROA.1956.
[109] ROA.1956.
[110] ROA.1956.

Lastly, should it be found that the district court ruled in error as to whether there was a changed circumstance, the appropriate remedy is not termination of the Consent Judgment. Modification would be a more suitably tailored remedy to address malapportionment. Indeed, the parties to this litigation have modified the Consent Judgment in the past to address changed circumstances.[111] There is no reason why they cannot do so again. Indeed, Appellees have shown they are more than willing to work with the State in remedying its newfound concern over malapportionment.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the district court. Alternatively, this Court should remand the case for further evidentiary proceedings.

[111] ROA.45.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system and notice of this filing will be sent via e-mail to all CM/ECF participants.

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(G) AND 5TH CIR. R. 32.3

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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 9,809 words excluding parts of the brief 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 the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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