UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF NEW ORLEANS, Defendant.	CIVIL ACTION NO. 2:12-CV-01924-SM-DPC JUDGE SUSIE MORGAN MAGISTRATE JUDGE DONNA PHILLIPS CURRAULT

BRIEF OF *AMICI CURIAE* THE STATE OF LOUISIANA IN SUPPORT OF THE CITY OF NEW ORLEANS' MOTION TO TERMINATE THE CONSENT DECREE

Laura Cannizzaro Rodrigue
Blake Arcuri
Rodrigue & Arcuri
201 St. Charles Avenue
Suite 114-412
New Orleans, LA 70170

Jeff Landry
Attorney General
Elizabeth B. Murrill
Solicitor General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTEREST OF AMICUS CURIAE

The State of Louisiana writes supports the City of New Orleans' Motion to Terminate the Consent Decree. The State has its own sovereign interests in terminating the consent decree and writes to amplify the dangers to federalism of keeping the consent decree over the New Orleans Police Department in place. "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniform police force to aid in the accomplishment of that purpose." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

In cases like this one seeking institutional reform injunctions against state or local government in areas of core state responsibility, the Supreme Court and the Fifth Circuit have warned courts again and again to avoid keeping institutional reform consent decrees in place too long because they have the power to upset the proper balance between state and federal powers. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433 (2009); *In re Gee*, 941 F.3d 153 (5th Cir. 2019). This balance is what makes "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 45 (1971). "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government" in which their powers are "balance[d]." *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

If the sovereigns are to remain "dual" and their powers "balanced," *id.* at 457, the federal court, "anxious though it may be to vindicate and protect federal rights and federal interests, [must] always . . . do so in ways that will not unduly interfere

with the legitimate activities of the States," *Younger*, 401 U.S. at 44–45. Otherwise, the dual-sovereign system is reduced to a single sovereign, and "Our Federalism" ceases to exist. *Id.* at 45. It is time to curtail federal oversight over public safety and policing in New Orleans and return NOPD to the City's control so that the "pernicious" threats to federalism inherent in this case do not materialize. *See Allen v. Louisiana*, 14 F.4th 366, 375 (5th Cir. 2021) (Oldham, J., concurring).

SUMMARY OF THE ARGUMENT

Institutional reform consent decrees—like the one in this case—suffer from a host of sensitive federalism concerns. These decrees transfer control over areas of core state responsibility to federal courts. They replace the state or local government officials elected or appointed to administer those areas with a single federal judge who becomes the new administrator of that area for the duration of the consent decree. And they allow the original set of government officials to insulate their policy preferences from the democratic process and impose their preferences on future officials.

Federal Rule of Civil Procedure 60(b)(5) is the procedural mechanism for addressing these federalism concerns. Rule 60(b)(5) empowers courts to relieve a party from an institutional reform consent decree in two situations relevant here: (1) when the decree has been satisfied or (2) its prospective application is no longer equitable. The Supreme Court has paved the way for courts to resolve the federalism concerns of institutional reform consent decrees by making it easier for courts to

grant Rule 60(b)(5) motions and instructing courts to promptly return democratic control under that Rule.

Here, the City satisfies both. The Consent Decree presents all the federalism concerns recognized by the Supreme Court over an area "unquestionably at the core of the State's police power." *Kelley*, 425 U.S. at 247. Indeed, the Consent Decree is a major obstacle to state and local collaboration to address critical threats to the public. The Court should allay those concerns by granting the City's Motion to Terminate the Consent Decree for two reasons. First, NOPD has complied with the Consent Decree. Federal courts apply state contract principles to determine when a Consent Decree has been satisfied. Louisiana contract law applies a substantial compliance standard, not a strict compliance standard. Substantial compliance means more than 50%, much less than the Monitor's arbitrary and unrealistic 95% compliance standard.

The Consent Decree contains a compliance provision spelling out three steps NOPD must take to be found in compliance with the Consent Decree. NOPD must change its policies to match the Consent Decree's material requirements (done), train its officers on the new policies (done), and make sure its officers comply with the new policies (presumably a continuing obligation). Under Louisiana contract law, once NOPD substantially complies with those three things, the Consent Decree should be terminated under Rule 60(b)(5).

NOPD has achieved substantial compliance. To start, the Court already has found 15 of the Consent Decree's 17 sections to have been satisfied. While 88% percent

compliance *is* substantial *on its own*, the City demonstrated more than substantial compliance with one of the two remaining sections—Stops, Searches, and Arrests—bringing NOPD to 94% compliance, way above the level needed for substantial compliance. As for the other remaining section—Bias-Free Policing—the City is expected to achieve the nearly impossible task of proving a negative to be found in compliance. Relief should not be withheld on that basis alone because NOPD is already in substantial compliance with the Consent Decree as a whole. Indeed, it is unclear whether the City could ever be released from the Consent Decree if this is the sticking point because the standard to which the City is held is a constantly moving goal post.

Second, the Court should grant the City's Motion because prospective application of the Consent Decree is no longer equitable. The Consent Decrees' requirements for NOPD's Public Integrity Bureau are driving officers away, and crime is at an all-time high. Residents fear stopping at stop signs due to the dramatic increase in carjackings, and calls to the police for help go unanswered for hours. The NOPD police force is, at best, 65% of what it should be, according to city projections. And the cost of the required Monitor—now nearly *double* the original multimillion dollar price tag—is sucking up city funds that could be used to incentivize officers to stay or to attract new hires. The residents of New Orleans deserve to be safe and to have responsive police. The Consent Decree has morphed into an obstacle, rather than an aid, to reform. It should not be interfering with the City's and NOPD's ability to offer safety and protection to the citizens of and visitors to New Orleans. When

changed circumstances make a consent decree an "instrument of wrong" itself, it is no longer equitable to continue enforcing it.

ARGUMENT

I. CONSENT DECREES IN INSTITUTIONAL REFORM CASES ARE "PERNICIOUS" THREATS TO FEDERALISM.

Civil cases seeking injunctive relief usually follow a straightforward three-step process: the court (1) finds that the defendant is doing something unlawful, (2) commands the defendant to stop doing the unlawful thing, and then (3) dismisses the case. If needed, the parties can return to court to enforce the injunction through contempt proceedings or to seek relief from the injunction. But the court does not keep the case open to monitor the defendant's compliance with the injunction and withhold dismissing the case until compliance has been demonstrated for a certain length of time.

Institutional reform cases, like this one, that seek injunctive relief against state or local governmental entities are entirely different animals. These cases do not ask for a straightforward command to do or stop doing something. Instead, they seek to impose long-running, tentacled injunctions on state or local governmental entities—*the one here has more than 700 individual requirements*—and ask the federal court to keep the case open and supervise the governmental entity's compliance with the requirements. Of course, federal courts have the "responsibility[,] . . . when appropriate, [to] issu[e] permanent injunctions mandating institutional reform." *M. D. by Stukenberg v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018). But the Supreme Court and the Fifth Circuit have long instructed courts to be wary

of equity's potential for sliding the balance of state and federal power—"Our Federalism," *see Younger v. Harris*, 401 U.S. 37, 45 (1971)—too far to the federal side by handing over core areas of state sovereignty to federal courts.

From the very beginning of our federalist system, "[t]he Founders worried that the equity power would so empower federal courts that it would result in the entire subversion of the legislative, executive and judicial powers of the individual states." *In re Gee*, 941 F.3d 153, 167 (5th Cir. 2019) (cleaned up). In response to this concern, "'Hamilton sought to narrow the expansive Anti-Federalist reading of inherent judicial equity power' and 'described Article III "equity" as a jurisdiction over certain types of cases rather than as a broad remedial power.'" *Id.* (quoting *Missouri v. Jenkins*, 515 U.S. 70, 130, (1995) (Thomas, J., concurring)). Unfortunately, the Founders' worry that equity would swallow federalism is still with us, packaged in the modern form of institutional reform injunctions.

"[I]nstitutional reform injunctions are disfavored, as they 'often raise sensitive federalism concerns' and they 'commonly involve[] areas of core state responsibility.'" *Stukenberg*, 907 F.3d at 271 (quoting *Horne v. Flores*, 557 U.S. 433, 448 (2009)); *accord In re Gee*, 941 F.3d at 167 ("Courts are properly reluctant to grant such relief because of the federalism burdens it imposes."); *Frew v. Janek*, 820 F.3d 715, 721 (5th Cir. 2016) (*Frew II*) ("tak[ing] heed of the Supreme Court's admonition that the continued enforcement of the consent decree poses legitimate federalism concerns."). The Supreme Court "has even shaped substantive federal law around the assumption that it must avoid 'permanent judicial intervention in the conduct of governmental

operations to a degree inconsistent with sound principles of federalism and the separation of powers.'" *In re Gee*, 941 F.3d at 167–68 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)).

Institutional reform injunctions suffer from yet another set of federalism problems when they arise by party consent, which is very often the case. "Much has been written about the perniciousness of consent decrees," *Allen v. Louisiana*, 14 F.4th 366, 375 (5th Cir. 2021) (Oldham, J., concurring) (collecting cases and law review articles), because there is not much about a consent decree that resembles judicial decision-making. To name just a few of the problems, institutional reform consent decrees relieve the court from ever having to:

- "determine whether 'the plaintiff established his factual claims and legal theories,'" Michael T. Morley, *Consent or the Governed or Consent of the Government? The Problems with Consent Decrees in Government Defendant Cases*, 16 U. Pa. J. Const. L. 637, 647 (2014) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971));

- "find[] that a statutory or constitutional violation has occurred," *id.* (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992); *Armour & Co.*, 402 U.S. at 682–83);

- "inquire into the precise legal rights of the parties," *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)); or

- "reach and resolve the merits of the claims or controversy," *id.* (quoting *Metropolitan Housing Development Corp.*, 616 F.2d at 1014).

In short, "[m]ost consent decrees reflect no judgment of any government official. A and B draft and approve the decree; court approval is a mere rubber stamp." *Allen*, 14 F.4th at 375 n.* (quoting Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 133

(1987)); *see also La. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Louisiana*, No. 19-cv-479-JWD-SDJ, 2022 WL 2753069, at *5 (M.D. La. July 13, 2022) (deGravelles, J.) (explaining that the court adopted a consent order "without conducting a hearing, listening to testimony, or issuing formal findings of fact and conclusions of law").

Yet another federalism concern arises from the scope and duration of institutional reform consent decrees. They may encompass broader relief than the complaint seeks or than the court could have ordered through an adversarial trial. *See Rufo*, 502 U.S. at 392 ("[S]tate and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation . . . [and] also more than what a court would have ordered absent the settlement.").

And institutional reform consent decrees then bind future government officials to that broader relief: "Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby 'improperly deprive future officials of their designated legislative and executive powers.'" *Horne*, 557 U.S. at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)). Inheriting "overbroad or outdated consent decrees" makes it difficult for state and local officials "to respond to the priorities and concerns of their constituents" and thus inhibits democratic principles of republican government. *Id.* at 449; *accord* Mark Kelley, *Saving 60(B)(5): The Future of Institutional Reform Litigation*, 125 Yale L.J. 272, 303 (2015) ("Consent decrees involving government institutions pose a threat to democratic accountability:

parties may negotiate public policy behind closed doors, and politicians may lock in future administrations, pander to private interests, and seek political cover.").

Add to those concerns the fact that institutional reform consent decrees rarely make good on their promises to reduce litigation, save time and resources, quickly restore plaintiffs' rights and defendants' control, and efficiently end the case. *See, e.g.*, *Chisom v. Edwards*, No. 86-4075, 2022 WL 1768861 (E.D. La. May 24, 2022) (30-year-old case refusing to dissolve consent decree); *Thomas v. Sch. Bd. St. Martin Par.*, 544 F. Supp. 3d 651 (W.D. La. 2021) (60-year-old case refusing to dissolve consent decree). In practice, institutional reform consent decrees do not provide the same efficiency benefits that settlement agreements provide in private civil litigation. *See, e.g.*, *Horne*, 557 U.S. at 448 (noting "the dynamics of institutional reform litigation differ from those of other cases"). And "the longer an injunction or consent decree stays in place, the greater the risk that it will improperly interfere with a State's democratic processes." *Id.* at 453. The Attorney General of the United States recognized these federalism concerns and, in response, set narrow parameters for when and how USDOJ could agree to institutional reform consent decrees. *See* Ex. A, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities (Nov. 7, 2018).

For all of these reasons, individually and collectively, it is no wonder the Supreme Court has cautioned courts about the federalism dangers of institutional reform consent decrees and their potential to strike a blow at the very delicate

balance of Our Federalism where state and federal powers are supposed to be balanced.

II. TO ADDRESS THESE PERNICIOUS THREATS TO FEDERALISM, THE SUPREME COURT MADE IT EASIER FOR COURTS TO DISSOLVE INSTITUTIONAL REFORM CONSENT DECREES UNDER RULE 60(B)(5).

Federal Rule of Civil Procedure 60(b)(5) allows courts to "relieve a party or its legal representative from a final judgment, order, or proceeding" under "three independent, alternative grounds for relief," *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (*Frew I*). Those grounds are: (1) "the judgment has been satisfied, released, or discharged," (2) "it is based on an earlier judgment that has been reversed or vacated," or (3) "applying it prospectively is no longer equitable." Fed. R. 60(b)(5).

Rule 60(b)(5) is the mechanism for preventing institutional reform consent decrees from bringing to pass the threats to federalism described above. "Rule 60(b)(5) serves a particularly important function in . . . 'institutional reform litigation'" because institutional reform consent decrees "often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment." *Horne*, 557 U.S. at 447–48. (quoting *Rufo*, 502 U.S. at 380). In the decades following *Brown v. Board of Education*, when courts have seen an "upsurge in institutional reform litigation," a district court's "ability" under Rule 60(b)(5) "to modify a decree in response to changed circumstances [has become] all the more

important." *Rufo*, 502 U.S. at 380 (discussing *Brown v. Board of Education*, 347 U.S. 483 (1954)).

In 1992, the Supreme Court in *Rufo* responded to that upsurge, and the increased threats to federalism that it brought with it, by adopting "a less stringent, more flexible standard" for Rule 60(b)(5) motions. *Id.* "[I]n recognition of the features of institutional reform decrees," *Rufo* "held that courts must take a 'flexible approach' to Rule 60(b)(5) motions addressing such decrees." *Horne*, 557 U.S. at 450 (discussing the holding in *Rufo*, 502 U.S., at 381). "A flexible approach allows courts to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." *Id.* (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

In 2009, these same "sensitive federalism concerns" prompted the Supreme Court in *Horne* to again make clear that the Rule 60(b)(5) inquiry tilts in favor of ending federal court supervision of institutional reform consent decrees. *Id.* at 448. *Horne*, like most Rule 60(b)(5) cases, involved Rule 60(b)(5)'s forward-looking third clause—whether prospective enforcement of the consent decree is equitable. *See Frew I*, 780 F.3d at 327 ("The vast majority of motions for modification and termination of consent decrees, especially those involving institutional reform, invoke Rule 60(b)(5)'s third clause."). There are "limited" cases interpreting Rule 60(b)(5)'s backward-looking first clause—whether the defendant has satisfied the consent decree. *Frew II*, 820 F.3d at 721. Regardless, *Rufo*'s "less stringent more flexible standard" applies to all of Rule 60(b)(5). 502 U.S. at 380–81 (explaining that flexibility is "often essential

to achieving the goals of reform litigation"); *accord League of United Latin Am. Citizens v. City of Boerne,* 659 F.3d 421, 437 (5th Cir. 2011) ("District courts must take a flexible approach to motions to modify consent decrees and to motions to modify or vacate institutional reform decrees [under Rule 60(b)].").

Moreover, each clause of Rule 60(b)(5) plays a critical role in preventing institutional reform consent decrees from placing areas of core state responsibility under federal control longer than absolutely necessary. *See Frew I*, 780 F.3d at 327 (explaining that "federalism concerns" apply to all clauses of Rule 60(b)(5) and "recogniz[ing] that Rule 60(b) is to be construed liberally to do substantial justice" (quoting *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir. 1980))). Rule 60(b)(5) "is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds." *Id.* (quoting *Johnson Waste Materials*, 611 F.2d at 600).

III. THE COURT SHOULD GRANT THE CITY'S MOTION TO TERMINATE THE CONSENT DECREE.

The Court should grant the City's Motion to Terminate the Consent Decree for two reasons. First, NOPD has "satisfied" the Consent Decree. *See* Fed. R. Civ. P 60(b)(5). Second, "applying" the Consent Decree "prospectively is no longer equitable." *See id.*

A. NOPD Has Satisfied the Consent Decree.

"A critical question" in applying the *Horne* analysis "is whether the objective of the . . . declaratory judgment order . . . has been achieved." 557 U.S. at 450. "If a

durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Id.* (citing *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). In deciding whether to dissolve consent decrees, courts should be mindful of "the inherent limitation upon federal judicial authority" that prohibits courts from issuing remedies that do not "directly address and relate to" the violation of federal law the consent judgment meant to address. *Allen*, 14 F.4th at 373 (citations omitted). Courts should also ensure that "responsibility for discharging [state and local] obligations is returned promptly to [state and local] officials" when the circumstances warrant. *Horne*, 557 U.S. at 450.

These limitations on a court's equity power can even rise to the level of jurisdictional limitations. A federal court can lose Article III jurisdiction over a consent decree even if the court has not expressly relinquished control. *Allen*, 14 F.4th at 373 (rejecting as "wrong" and "baffling" the argument that a consent judgment is "binding upon [an institutional reform defendant] in perpetuity unless and until the Eastern District says otherwise" (cleaned up)). Institutional reform consent decrees "are not intended to operate in perpetuity" and cannot condemn state or local government to "judicial tutelage for the indefinite future." *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991). "Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of . . . the Fourteenth Amendment, require any such Draconian result." *Id.*

Courts apply state law principles of contract interpretation to determine if the objective of a consent decree has been achieved. Consent decrees are "hybrid

creatures, part contract and part judicial decree." *Allen*, 14 F.4th at 371 (quoting *Smith v. Sch. Bd. of Concordia Par.*, 906 F.3d 327, 334 (5th Cir. 2018)). A consent decree "embodies an agreement of the parties" and is "an agreement 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*, 502 U.S. at 378). Federal courts interpret consent decrees according to principles of contract law from the State in which the dispute arises. *Allen*, 14 F.4th at 371 (citing *Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996)).

The Fifth Circuit "recently clarified" that a defendant "can obtain relief under [Rule 60(b)(5)'s first clause] by demonstrating 'substantial compliance'" with a consent decree. *Frew II*, 820 F.3d at 721; *accord Frew v. Young*, No. 21-40028, 2022 WL 135126, at *3 (5th Cir. Jan. 13, 2022); *Dugue v. Levy*, 37 So. 995, 996 (1904) ("A substantial performance of the contract is all that [Louisiana] law requires." (internal quotation marks omitted)). A defendant seeking to terminate a consent decree bears the burden of showing substantial compliance. *Frew II*, 820 F.3d at 721; *accord Interstate Cont. Corp. v. City of Dallas*, 407 F.3d 708, 727 (5th Cir. 2005). But, of course, the Court "must take heed of the Supreme Court's admonition that the continued enforcement of the consent decree poses legitimate federalism concerns." *Frew II*, 820 F.3d at 721.

Substantial compliance is not perfect compliance. "Substantial compliance excuses deviations from a contract's provisions that do not severely impair the contractual provision's purpose." *Id.* (internal quotation marks omitted) (quoting

Frew I, 780 F.3d at 330). The Louisiana Supreme Court has indicated that the "legal" meaning of the word "substantial" in "substantial compliance . . . has the signification of the larger part," meaning more than 50%. *Riles v. Truitt Jones Const.*, 648 So. 2d 1296, 1300 (La. 1995); *see also Viator v. Gilbert*, 216 So. 2d 821, 822 (La. 1968) (holding that a person's "25 to 30 percent disability . . . incapacitate[s] him from the substantial performance of manual labor").

Louisiana courts use the terms "substantial compliance" with and "substantial performance" of a contract interchangeably. *Compare Henson v. Gonzalez*, 326 So. 2d 396, 399 (La. Ct. App. 1976) ("Where there is no *substantial compliance*, the contractor's sole recovery would be under quantum meruit." (emphasis added) (citing *Airco Refrigeration Service, Inc. v. Fink*, 134 So.2d 880 (1961))); *with Airco Refrigeration Serv., Inc*, 134 So. 2d at 882 ("For if the breached contract has not been *substantially performed*, the contractor . . . is limited to recovery on quantum meruit." (emphasis added)). "[S]ubstantial performance . . . is a question of fact" controlled by "factors to be considered": "the extent of the defect or non-performance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit to the defendant of the work performed." *Airco Refrigeration Serv.*, 134 So. 2d at 882.

Here, the City of New Orleans has met its burden of showing that NOPD has substantially complied with the Consent Decree. The Consent Decree requires NOPD to comply with the Consent Decree's "material requirement[s]" and defines compliance as three things: NOPD must "(a) incorporate[] the requirement into

policy; (b) train[] all relevant personnel as necessary to fulfill their responsibilities pursuant to the requirement; and (c) ensure[] that the requirement is being carried out in actual practice." Consent Decree ¶ 447, ECF No. 565. That "compliance" process is straightforward. NOPD must change its policies to match the Consent Decree's material requirements, train its officers on the new policies, and make sure its officers comply with the new policies. Once NOPD "substantially complies" with those three things, *see Frew II*, 820 F.3d at 721; *Dugue*, 37 So. at 996, the Consent Decree "has been satisfied" and the court should dissolve it, *see* Fed. R. 60(b)(5).

In the nearly ten years since this action commenced, NOPD has made tremendous strides, accomplishing what the Monitor called a "transformation" and complying with 15 out of the 17 categories, most for a period of more than two years. The Court expected to find NOPD in full compliance in early summer of 2022. In May, the City made compliance presentations to the Court on the two remaining sections—(1) Stops, Searches, and Arrests and (2) Bias-Free Policing—but no decision on those sections has been made, and the City remains unable to move into the required two year "sustained compliance" period.

The Court should find that NOPD has substantially complied with the Consent Decree's compliance process—15 out of 17 categories or 88% compliance should be substantial. *See Riles*, 648 So. 2d at 1300. Moreover, NOPD showed in May 2022 that it was in substantial compliance with the remaining sections. In the Stops, Searches, and Arrests category, NOPD has achieved near-perfect compliance:

- 99% of officers were reasonably courteous and professional when interacting with the subject or other civilians involved in the stop.

- 98% of Miranda warnings were given at the appropriate time if required.
- 100% of officers had reasonable suspicion or probable cause at the time of the stop.
- 100% of reports clearly articulated reasonable suspicion or probable cause.
- 99% of reports lacked boilerplate language as required.
- 99% of videos and reports were significantly consistent with each other.
- 99% of pat downs had sufficient justification.
- 99% of searches documented a valid legal basis.

Those statistics even meet the Monitor's unreasonably high and arbitrary 95% compliance standard, though the parties did not agree to that level of compliance, the court did not adopt that level of compliance, and the law does not require that level of compliance. *See Frew II*, 820 F.3d at 721; *Riles*, 648 So. 2d at 1300.

In the Bias-Free Policing category, the provisions set NOPD the near impossible task of proving a negative. The Monitor has acknowledged as much. *See* Comprehensive Reassessment of the Consent Decree Monitor Pursuant to Paragraph 456 of the NOPD Consent Decree at 37, ECF No. 574-1 (acknowledging "it is inherently difficult to prove a negative"). Even if the Court finds NOPD has not strictly complied with this category, strict compliance is not the correct standard. The law requires only substantial compliance, *see Janek*, 820 F.3d at 721; *Frew*, No. 2022 WL 135126, at *3; *Dugue*, 37 So. at 996. And 16 out of 17 categories or 94% compliance is more than substantial and should entitle the City and NOPD

to relief under Rule 60(b)(5). This is especially true in light of *Horne*'s lowered standard for granting Rule 60(b)(5) motions to dissolve institutional reform consent decrees to avoid federalism problems and the fact that police departments are "unquestionably at the core of the State's police power." *Kelley*, 425 U.S. at 247.

The intent of the Consent Decree was to end the federal constitutional violations identified in the USDOJ's 2011 investigation, not to permanently strip the City of control of the NOPD. Indeed, the Consent Decree cannot give the Court power to do that even if it wanted to. *See Dowell*, 498 U.S. at 249; *Horne*, 557 U.S. at 450. This Consent Decree has served its purpose, and NOPD should be returned to the City's control.

B. Applying the Consent Decree Prospectively Is No Longer Equitable.

Rule 60(b)(5) empowers courts to dissolve consent decrees if "a significant change either in factual condition or in law" renders prospective application of the consent decree "no longer equitable." *Horne*, 557 U.S. at 453 (quoting *Rufo*, 502 U.S. at 384). A court should be careful to avoid allowing "changed circumstances" to turn what the court "has been doing . . . into an instrument of wrong." *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (alternation in original) (internal quotation marks omitted) (quoting *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961)).

Here, changed circumstances have turned the Consent Decree into just that. At a time when violent in New Orleans is spiking and data shows "New Orleans could

lead the nation for the highest murder rate per capita,"[1] NOPD is struggling to fill its ranks. In June, the City employed only 989 officers of the 1,500 it says are necessary to patrol the City.[2] That number is expected to drop to 898 by the end of the year.[3] According to the nearly 275 NOPD personnel members who responded to a Morale Retention Survey in February, overly punitive discipline, restrictive policing policies, and overreach by the Police Integrity Bureau are the leading factors driving people to leave NOPD.[4] Police groups have echoed those same concerns.[5] These are consequences of the Consent Decree outliving its usefulness and now having dangerous results.

The Consent Decree further hamstrings the City's efforts to hire enough officers by sucking up funds that could be used to increase officer salaries or other monetary incentives. The City has spent *$14.4* million on the Monitor, nearly *double* the amount that the parties envisioned at the outset. While the Consent Decree lags on, the City is struggling to find additional funds to provide increased salaries and incentives to retain a rapidly decreasing police force. After almost a decade of federal control, dollars that will continue to be absorbed by the Monitor should be appropriately returned to the City. *See Horne*, 557 U.S. at 448 ("Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local

[1] Fox 8 Live, https://www.fox8live.com/2022/07/06/new-orleans-could-have-nations-highest-murder-rate-per-capita-according-data-analyst/.
[2] WDSU News, https://www.wdsu.com/article/new-orleans-officer-shortage/40209377.
[3] *Id.*
[4] Fox 8 Live, https://www.fox8live.com/2022/03/18/nopd-internal-retention-survey-shows-lack-support-stress-flawed-disciplinary-process-contributing-manpower-shortage/ September 1, 2022. (Survey Results Attached).
[5] Fox 8 Live, https://www.fox8live.com/2022/08/05/mayor-cantrell-push-end-nopd-consent-decree-some-say-it-will-take-more-stop-attrition/ accessed September 1, 2022.

budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.").

NOPD's valiant efforts to achieve compliance with the Consent Decrees' requirements for its Public Integrity Bureau are driving officers away like no other identified issue. And the Consent Decree is taking money that NOPD could use to incentive officers to stay and to attract new officers. The Public Integrity Division was tasked with fixing the underlying problem and instead has itself become the underlying problem. The conditions that existed at the time the Consent Decree was confected have changed, recruiting for law enforcement is challenging, and violence in New Orleans is at an all-time high. But NOPD is effectively unable to respond to these current needs and conditions. NOPD needs to be able to restructure its disciplinary system into one which holds officers accountable in a more fair and even-handed manner so that the City can protect its residents and address the spiking crime rates. NOPD's officer shortage and accompanying crime rate are textbook manifestations of changed circumstances that have turned the Consent Decree into the "instrument of wrong" that *Agositini* counseled courts to avoid by granting Rule 60(b)(5) motions. *See* 521 U.S. at 215.

Despite all of these well-documented problems, the Court recently delayed deciding the City's Motion to Terminate the Consent Decree another *eight months* and reopened discovery. *See* Scheduling Order, ECF No. 641. New facts are not needed to decide the City's Motion. The record is already crystal clear that the

Consent Decree should be terminated. More discovery means more unjustified federal interference, and unnecessarily dragging out court deadlines only entrenches the federalism concerns and dangers of violent crime that people in New Orleans face every day. The Court should return NOPD to the City's control now.

CONCLUSION

The Court should grant the City's Motion to Terminate the Consent Decree to avoid bringing to pass the pernicious threats to federalism that *Horne* instructs courts to avoid under Rule 60(b)(5).

Respectfully submitted,

/s/ *Elizabeth B. Murrill*

Jeff Landry
Attorney General
Elizabeth B. Murrill
Solicitor General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. 3rd St.
Baton Rouge, LA 70802
(225) 326-6766
MurrillE@ag.louisiana.gov

Counsel for Amicus Curiae

Laura Cannizzaro Rodrigue
Blake Arcuri
Rodrigue & Arcuri
201 St. Charles Avenue
Suite 114-412
New Orleans, LA 70170