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November 8, 2024

VIA E-MAIL and POST
Carol L. Michel
Clerk of Court
U.S. District Court
Eastern District of Louisiana
500 Poydras St., Room C-151
New Orleans, LA 70130
Clerk@laed.uscourts.gov

Re: *United States v. City of New Orleans*, No. 2:12-cv-01924 (E.D. La.),
Comment on the proposed Sustainment Plan

Dear Ms. Michel:

The Court has invited the public to submit written comments (ECF No. 795) on the pending Motion for Approval of Sustainment Plan (ECF No. 793). The deadline for submitting those comments is November 8, 2024. *See* ECF No. 797. Accordingly, I write to comment on the legal interest the State of Louisiana has in this case.

The agreement that the parties have reached in the Sustainment Plan, and now ask the Court to adopt as its own order, does not get this case any closer to the objective that the Supreme Court and the Fifth Circuit have set: to restore local control. In fact, the Sustainment Plan moves this case backward, even further away from that objective. But there is no legal authority to do that. There is no ongoing violation of federal law, which means keeping the Consent Decree in place any longer unduly usurps the State's sovereign prerogative to enforce state law within its borders—authority that it delegated to the City in that area of the State. Meanwhile, the bureaucratized system that manages the Consent Decree marches on—sucking up State and City resources and enriching DC lawyers with taxpayer dollars.

It is time to restore local control. At a very, very minimum, the Court should start the two-year clock now without imposing any new injunctions beyond what the Consent Decree already requires.

I. THIS CONSENT DECREE HAS A LONG HISTORY.

In 2012, the U.S. Department of Justice (DOJ) sued the City of New Orleans and alleged that law enforcement officers of the New Orleans Police Department

(NOPD) maintained an unconstitutional "pattern or practice of conduct." Compl. ¶ 2, ECF No. 1. That *same day*, the City signed a contract with DOJ to remedy the allegations with a lengthy and detailed list of new NOPD policies. *See* ECF No. 2. The parties had agreed to "the nation's most expansive" institutional overhaul of a state or local government agency. NOPD Consent Decree, https://nola.gov/nopd/nopd-consent-decree/ (last visited Nov. 1, 2024). The agreement contained "a broad array of separate tasks and goals detailed in more than 490 paragraphs and 110 pages." *Id.*

The parties immediately asked the Court to adopt their contract as an order of the Court, called a consent decree. *See* ECF No. 2. The Court granted that request six months later, *see* ECF No. 159, and amended the Consent Decree earlier this year, *see* ECF No. 778. The Consent Decree provides that "the Court shall retain jurisdiction of this action for all purposes until such time as the City has achieved full and effective compliance with this Agreement and maintained such compliance for no less than two years." *Id.* ¶ 486. The parties call that two-year "no backsliding" requirement the "Sustainment Period." ECF No. 793-1 at 3.

In 2022, two years ago and about ten years after the Court first adopted the Consent Decree, the City moved to end the Consent Decree under Federal Rule of Civil Procedure 60(b)(5). *See* ECF No. 629. Rule 60(b)(5) allows a party to move to terminate "a final judgment" or "order" (like a consent decree) when the order "has been satisfied, released, or discharged" or when "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

The City believed then and believes now (and I agree) that it is legally entitled to end the Consent Decree, exit the Court's supervision, and regain full and independent control over NOPD—just as the State designed. I submitted an amicus brief on behalf of the State to support the City's Rule 60(b)(5) Motion. *See* Mot. for Leave to File an Amicus Brief, ECF No. 642; Proposed Amicus Brief, ECF No. 642-1. In that brief, I explained that the State has an independent interest in ending this Consent Decree because of the federalism problems that grow larger the longer the Consent Decree stays in place. *See* ECF No. 642-1. After all, the *State* delegated authority to the City/Parish of New Orleans[1] to enforce the *State's* laws in that area of the *State*. Thus the longer the federal court continues to superintend NOPD, the greater the harm to the structure contemplated under the State Constitution and statutes and the federal Constitution.

The Court rejected the brief. *See* ECF No. 645 at 5 (concluding "that participation by the A.G. as amicus curiae is not warranted"). The Court also has indicated it disagrees with the City's Rule 60(b)(5) Motion. What the Court should have done, then, is deny the City's Motion. But for over two years now, the Court has

[1] The City of New Orleans and the Parish of Orleans operate as a unified city-parish government.

refused to rule on the City's Rule 60(b)(5) Motion, and instead pressed the City to capitulate to entering *new* consent orders.

The Court's refusal to rule put the City in a stalemate, unable to regain control of NOPD as the law requires and unable to seek appellate review of the Court's inaction. In this way, the Court has insulated its actions from review by its superior courts—while the City continues bleeding *hundreds of thousands of dollars each month* in monitoring fees, attorney fees, and the expense of the Consent Decree itself.

After two years of costly court-imposed gridlock, the City finally gave in. The City's lawyers and DOJ lawyers reached a new agreement—the "Sustainment Plan"—and have asked the Court to approve it. *See* ECF No. 793.

In response, the Court has endeavored to determine what the public thinks of the Sustainment Plan. *See* ECF No. 795 at 2 ("The public is encouraged to submit written comments to the Court . . . ."). That is an unusual move, not least because the parties in this case (including the State as amicus) are the governments that bear responsibility for representing the public interest in litigation.

As I explained in the amicus brief I filed two years ago, the State has an independent legal interest in ending this case. *See* ECF No. 641-1. That interest remains unchanged. Accordingly, I urge the Court for the reasons that follow to grant the City's still-pending Rule 60(b)(5) Motion (ECF No. 629). Alternatively, the Court should issue a ruling substantially narrowing the scope of its continued supervision, returning self-governance to the City to the maximum degree possible, eliminating all matters that exceed constitutional minimums from this case, and correspondingly deny the Motion to Approve the Sustainment Plan (ECF No. 793).

II. CONSENT DECREES IN INSTITUTIONAL-REFORM CASES INCREASINGLY HARM STATE SOVEREIGNTY THE LONGER THEY STAY IN PLACE.

Consent decrees are contracts between parties to a lawsuit to resolve the suit through agreement rather than litigation—much like a settlement agreement. For both consent decrees and settlement agreements, the parties can agree to more or less than what the court otherwise could order if the case went to trial. *See United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("Naturally, the agreement reached [in a consent decree] normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation."); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992) (explaining that "state 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").

What distinguishes a consent decree from a settlement agreement is that the court adopts the parties' contract as a court order. That means that each of the terms

of the contract becomes a court-ordered injunction that can be enforced as such. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) ("[E]very order of a court which commands or forbids is an injunction . . . ." (quoting Black's Law Dictionary 800 (8th ed. 2004)); *see also id.* ("defining 'injunction' as '[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury'" (alteration in original) (quoting Black's Law Dictionary 784 (6th ed. 1990))). But "while consent decrees have elements of judicial decrees, they are, at their core, contracts." *Chisom v. Louisiana ex rel. Landry*, 116 F.4th 309, 318 (5th Cir. 2024) (en banc).

As contracts, consent decrees are interpreted according to "'general principles of contract interpretation' as expressed in state law." *Id.* (quoting *Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir. 2006)). In *Chisom*, the Fifth Circuit, sitting en banc, applied "Louisiana contract law" to a consent decree between the State of Louisiana and DOJ (among others) to resolve a dispute over the State's Supreme Court voting district centering on New Orleans. *See id.* at 313, 318 & n.1. Under Louisiana law, "the appropriate standard in assessing the satisfaction of contractual terms is 'substantial compliance.'" *Id.* (citing *Dugue v. Levy*, 114 La. 21, 37 So. 995, 996 (1904)).

Likewise here, Louisiana's "substantial compliance" standard applies to this Consent Decree. The Consent Decree governs the State's general law enforcement power that it delegated to the City of New Orleans, which in turn established NOPD. The City's and NOPD's delegated law enforcement authority exists only in Louisiana. For these reasons, there is no other State's law but Louisiana's that could possibly govern this Consent Decree.

On the "decree" side, the Consent Decree is a court-ordered permanent injunction. But not all injunctions (whether housed in an adjudicated judgment or a consent decree) are created equal. An institutional-reform injunction is far more "pernicious[]" than a garden-variety injunction because it hands over the sovereign power of state and local government institutions to the federal judiciary, which may then dictate day-to-day operations on pain of contempt costs and monitoring fees like in this case. *Allen v. Louisiana*, 14 F.4th 366, 375 & n.* (5th Cir. 2021) (Oldham, J., concurring in the judgment) (collecting cases and scholarship).

In an ordinary case, the court does not keep the case open to monitor the agency's compliance with the injunction. The court does not condition dismissal of the litigation on the agency's ability to demonstrate a record of compliance with the injunction. Instead, the case is over, and the injunction stays. The plaintiffs can return to the district court to enforce the injunction through contempt proceedings. But ordinary injunctions generally do not require defendant agencies to take vaguely-defined affirmative actions into an indefinite future.

By contrast, institutional-reform injunctions arising from Consent Agreements often do. *See Horne v. Flores*, 557 U.S. 433, 448 (2009) ("[T]he dynamics of institutional reform litigation differ from those of other cases." (citing Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 317)). In particular, rather than seek an injunction to get rid of a particular law or regulation, they seek "court-ordered injunctions aimed at reforming the day-to-day operation of government institutions that are accused of committing systemic violations of law." Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 Vand. L. Rev. 167, 176, 182 (2017) (describing "institutional reform litigation [as] a radical departure from the traditional model of litigation"). By issuing such "institutional-reform injunctions," a federal judge essentially rewrites the policy handbook for the government institution, commands the institution to replace the old handbook with the new one, and dictates monitoring and reporting structures that the institution must create and pay for. Then the judge supervises the case to ensure all of that happens.

The upshot is judicial management of state and local institutions and the re-direction of hundreds of thousands of taxpayer dollars to maintain the court-created bureaucracy. Instead of the officials who were appointed or elected for that purpose, a district court effectively become the Chief of Police (like here), the warden of a State prison, the superintendent of a school district, or even the secretary of a State child-welfare agency. Judges in charge of supervising such cases often find no detail too minute for their oversight. *See, e.g.*, *M.D. by Stukenberg v. Abbott* (*Stukenberg I*), 907 F.3d 237, 271 (5th Cir. 2018) (more than 60 remedial orders in that case). Once a court has exercised that kind of power, it is often loath to give it up. *See, e.g.*, *Smith v. Sch. Bd. of Concordia Parish*, 906 F.3d 327, 331 (5th Cir. 2018) ("Since 1970, Concordia Parish has operated under a desegregation order entered by the Western District of Louisiana.").

In practice, release from such institutional-reform injunctions can be virtually impossible. The path to freedom is supposed to be "substantial compliance," but in reality it requires establishing a lengthy record of near-perfect (if not perfect) compliance. That is what the City and NOPD have tried here. *See* ECF No. 629-1 at 2; ECF No. 629-24 (2022 Public Hearing Remarks from Lead Monitor: "After today, assuming the Court approves our recommendations, the NOPD will be left with [only] three [out of seventeen] areas of the [Consent Decree] not yet in full and effective compliance."). Given the comments of the Lead Monitor, the Court should grant the City's 60(b) motion because it has reached the goal of substantial compliance. At a minimum, however, those seventeen areas should be returned to local control in their entirety. But instead the Court has refused to rule on the City's Rule 60(b)(5) Motion *for two years*.

The Founders' worry that equity would swallow federalism regrettably has legs today. No doubt, federal courts have the "responsibility[,] . . . when appropriate, [to] issu[e] permanent injunctions mandating institutional reform." *Stukenberg I*, 907 F.3d at 271. But the Supreme Court and the Fifth Circuit have long instructed courts to be wary of the potential for sliding the balance of State and federal power too far. As to the *scope* of institutional-reform injunctions, the Supreme Court has reminded courts not to confuse best practices with constitutional minima:

- In 1974, the Court reminded lower courts that the scope of institutional-reform injunctions extends only to conditions that are caused by the violation. *See Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 745 (1974) (discussing the permissible scope of institutional reform injunctions).

- In 1977, the Court explained that courts "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267, 280–81 (1977).

- In 1979, the Court expressed concern that federal courts were "becom[ing] increasingly enmeshed in the minutiae of prison operations." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

- In 1981, the Court urged lower courts to limit their injunctions to constitutional requirements "rather than a court's idea of how best to operate a detention facility." *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (quoting *Bell*, 441 U.S. at 539)).

- In 1984, the Court emphasized "the very limited role that courts should play in the administration of detention facilities." *Block v. Rutherford*, 468 U.S. 576, 584 (1984).

Adding to these scope limitations, the Supreme Court also has limited the duration of institutional-reform injunctions:

- In 1992, concern for "the allocation of powers within our federal system" led the Court to decree that institutional-reform injunctions "are not intended to operate in perpetuity." *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991).

- In 2004, recognizing that institutional-reform injunctions "improperly deprive future officials of their designated legislative and executive powers," the Court required that, "when the objects of the decree have been attained, responsibility for discharging the State's obligations

[must be] returned promptly to the State and its officials." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441–42 (2004).

- In 2006, the Supreme Court "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)).

Together, these cases reflect a consistent effort by the Supreme Court to place federalism-protecting limits on the scope and duration of institutional-reform consent decrees. Properly respected, these limits offer courts sufficient room to remedy systemic violations of federal law, while ensuring that State sovereignty is not unduly abridged. This Court's failure to rule on the City's Rule 60(b) motion has effectively denied the City its requested relief but without the Court having to show its compliance with these directives. Instead, the City has been placed in between the proverbial "rock and a hard place" with the continued pressure to enter new orders "by consent."

III. CONSENT DECREES IN INSTITUTIONAL-REFORM CASES ARE SUPPOSED TO BE HARD TO GRANT AND EASY TO VACATE.

Because of the sovereignty-destroying danger presented by institutional-reform injunctions (whether by consent or otherwise), the Fifth Circuit rightly has established a presumption against granting them in the first place. After all, institutional-reform injunctions allow the federal government to do what it otherwise could not: "review and veto state [and local] enactments before they go into effect." *In re Gee*, 941 F.3d at 168 (quoting *Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013)). Congress, too, shares this concern. In the Prison Litigation Reform Act (PLRA), enacted in 1996, Congress placed firm limits on courts' abilities to grant institutional reform-injunctions as well as on the scope of these injunctions. In other words, the Supreme Court, the Fifth Circuit, and Congress are acutely aware of the federalism dangers presented by institutional-reform cases—and the law rightly tilts against the issuance (or at least toward the cabining) of institutional-reform injunctions in the first place.

Rule 60(b)(5) gives parties the ability to move to vacate consent decrees if (among other things), the party has "satisfied its obligations under the consent decree," *Chisom*, 116 F.4th at 313, or if "applying" the consent decree "prospectively is no longer equitable,'" *Horne*, 557 U.S. at 447 (quoting Fed. R. Civ. P. 60(b)(5)). The purpose of Rule 60(b)(5) is not "to challenge the legal conclusions on which a [consent decree] rests," but instead to "ask a court to modify or vacate a [consent decree]" due to subsequent changes. *Id.* (quoting *Rufo*, 502 U.S. at 384). In *Horne*, the Supreme Court established a presumption in favor of vacating institutional-reform injunctions under Rule 60(b)(5), exactly what the City requested two years ago.

The Supreme Court has emphasized that, "in recognition of the features of institutional reform decrees, . . . courts must take a 'flexible approach' to Rule 60(b)(5) motions addressing such decrees." *Horne*, 557 U.S. at 450 (quoting *Rufo*, 502 U.S. at 381). And that means "ensur[ing] that 'responsibility for discharging the State's obligations is returned *promptly* to [state and local] officials when the circumstances warrant." *Id.* (quoting *Frew*, 540 U.S. at 442 (emphasis added)). "[T]he rule reiterated time and again in [the Fifth Circuit] and the Supreme Court [is] that control of core legislative functions must be returned to [State and local governments] as soon as possible." *Chisom*, 116 F.4th at 319 (citing *Frew*, 540 U.S. at 441).

Importantly, the Supreme Court has decided that "the public interest" weighs in favor of federalism: "[T]he public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381 (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

And in *Horne*, the Supreme Court extended *Rufo*'s "'flexible approach' to [all types of] Rule 60(b)(5) motions addressing such decrees," both motions to *modify* (like in *Rufo*) and motions to *vacate* (like in *Horne*). 557 U.S. at 450 (quoting *Rufo*, 502 U.S., at 381). That flexibility, *Horne* said, was necessary to preserve our federalist system: "A flexible approach . . . ensure[s] that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials.'" *Id.* (quoting *Frew*, 540 U.S. at 442).

Thus, although the Supreme Court did not put an end to institutional-reform litigation altogether, *Horne* makes clear that courts must favor vacating institutional-reform injunctions under Rule 60(b)(5).

Even in the context here—a motion to approve a new consent agreement—this Court is bound by these *same* precepts. They provide a foundational legal framework for the entire case.

IV. THE FIFTH CIRCUIT HAS DIRECTED THIS COURT AND OTHERS TO END INSTITUTIONAL-REFORM CONSENT DECREES.

State and local governments in Louisiana have endured—and continue to battle—a range of injunctions administered by federal courts that refuse to relinquish their power over sovereign State functions. This phenomenon is an affront to our federalism and the State itself. *See, e.g.*, *id.*, at 448 (explaining institutional-reform cases like this "raise sensitive federalism concerns" because they "involve[] areas of core state responsibility").

Chisom is a prime example. In the consent judgment, the State disclaimed any liability but, to settle the suit and dismiss the claims, agreed to pass legislation creating a majority-Black voting district around New Orleans. *See* Mot. Dissolve Consent Decree, Ex. C at 2, 7, *Chisom v. Edwards*, No. 2:86-cv-04075 (E.D. La. Dec. 2, 2021), ECF No. 257-4. For decades, everyone agreed the State had satisfied each of its obligations under the agreement. But in 2022, after the State filed a Rule 60(b)(5) motion to vacate the judgment), this Court denied that motion and required the State to show the impossible: *future* compliance with the consent judgment. *Chisom v. Louisiana ex rel. Landry*, 85 F.4th 288, 298 (5th Cir. 2023).

Three months ago, the full Fifth Circuit "reverse[d]" this Court's denial of the State's Rule 60(b)(5) motion and "render[ed] judgment in favor of the State" recognizing that the State had fulfilled its promises and satisfied its obligations. The Fifth Circuit clarified that the standard in these cases is doubly "flexible" in favor of vacating consent decrees. *Id.* at n.3.

The Fifth Circuit also installed itself "as a check on district courts to ensure that the above principles are followed." *Id.* at 317. As the Court explained, "Supreme Court precedent instructs not only that heightened deference to the district court is unwarranted in cases like [these] but, if anything, that deference should be lessened relative to an ordinary case." *Id.* To that end, the Court reminded this District Court (and others) that "the Supreme Court requires that [courts] refrain from applying 'a Rule 60(b)(5) standard that [is] too strict.'" *Id.* at 317 (quoting *Horne*, 557 U.S. at 452).

Chisom was not the last reminder. In a long-running institutional reform case involving Texas' foster care system, the Fifth Circuit has scaled back the district court's injunctions again and again and again. *See Stukenberg I*, 907 F.3d 237; *M.D. ex rel. Stukenberg v. Abbott* (*Stukenberg II*), 929 F.3d 272 (5th Cir. 2019); *M.D. ex rel. Stukenberg v. Abbott* (*Stukenberg III*), 977 F.3d 479 (5th Cir. 2020). On remand from the last appeal, Texas filed a Rule 60(b)(5) motion arguing it had substantially complied with certain remedial orders. *See M. D. by Stukenberg v. Abbott* (*Stukenberg IV),* ___ F.4th ____, No. 24-40248, 2024 WL 4471977, at *15 (5th Cir. Oct. 11, 2024). Instead, that district court left the Rule 60(b)(5) motion "pending" (much like here) and held Texas in contempt for failing to fully comply with its orders. *Id.* When Texas appealed, the Motions Panel (Elrod, Haynes, Douglas, JJ.) administratively stayed both the contempt order and the district court proceedings. *See M. D. ex rel Stukenberg v. Abbott*, No. 24-40248, 2024 WL 1651273, at *1 (5th Cir. Apr. 17, 2024). The Merits Panel (Jones, Clement, Wilson, JJ.) later replaced those administrative stays with full stays. *See M. D. ex rel Stukenberg v. Abbott*, No. 24-40248, 2024 WL 2309123, at *6 (5th Cir. May 20, 2024).

Last month, the Fifth Circuit reversed the contempt order and *directed that the case be reassigned to another district judge*. *Stukenberg IV*, 2024 WL 4471977, at *17. The Fifth Circuit took that opportunity (again) to issue three reminders:

(1) "[A]s a general rule of law federal judges are not allowed to become permanent de facto superintendents of major state [and local] agencies." *Id.* at *16 (citing *Horne*, 557 U.S. at 453; *United States v. Mississippi*, 82 F.4th 387, 400 (5th Cir. 2023)).

(2) It is never "appropriate," "under the federalist structure," "for federal court intervention to thwart [state and local governments'] self-management, where [they are] taking strides to eliminate the abuses that led to the original decree." *Id.* (citing *Horne*, 557 U.S. at 448).

(3) "[F]ederal judges [are not] even suited, by training or temperament, to manage institutions, personnel, or the provision of vital state [and local] services, even if counselled by monitors." *Id.*

* * *

Chisom and *Stuckenberg* stand at the end of a string of recent Fifth Circuit decisions that put the brakes on institutional-reform cases.[2] Those opinions put an exclamation point on the Fifth Circuit's efforts to restore the proper balance between State sovereignty—which includes the right to set up state and local government as States see fit under their general police powers—and federal courts' "use of equity power." *In re Gee*, 941 F.3d at 167 (quoting *Jenkins*, 515 U.S. at 131 (Thomas, J., concurring)). This Court's bottom-line obligation is to "flexibl[y]" apply Rule 60(b)(5) so that it can "promptly return[]" responsibility to state and local governments "precisely because [of] federalism." *Horne*, 557 U.S. at 452 (quoting *Frew*, 540 U.S. at 442). And it is supposed to do that "as soon as possible." *Chisom*, 116 F.4th at 319.

Flexibility inherently means that state and local governments deserve play in the joints, as they, in good faith, seek to satisfy the terms of an institutional-reform consent decree. By definition, therefore, it does not require perfect compliance, or even near-perfect compliance. The City cleared that flexible standard two years ago.

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[2] *See, e.g.*, Order, *Parker v. Hooper*, No. 23-30825 (5th Cir. Dec. 6, 2023) (Stewart, Graves, Oldham, JJ.), ECF No. 44-2 (granting an administrative stay of the Remedial Order); Order, *Parker v. Hooper*, No. 23-30825 (5th Cir. Mar. 6, 2024) (Jones, Haynes, Douglas, JJ.), ECF No. 156-2 (granting a full stay of the Remedial Order "pending further order of [that] court" just two days after oral argument); Order, *Charles v. LeBlanc*, No. 24-30484, 2024 WL 3842581 at *2 (5th Cir. Aug. 16, 2024) (directing that the district court rule "on the Plaintiffs' pending cross-motion . . . within 30 days of the date of this order"; allowing the State to "renew[]" its "stay motion" or "seek[] mandamus or other appropriate relief in the event that the district court effectuates its Remedial Order without first ruling on Plaintiffs' pending cross-motion"; and making clear that the same "panel" would hear "[a]ny subsequent stay motion or mandamus petition").

Promptly inherently means that state and local governments deserve to recover their sovereign rights immediately—but immediately upon what? When there is no longer a current and ongoing violation of the federal right at issue that warrants prospective relief. That is the limit the Supreme Court and the Fifth Circuit have set: "Once the alleged constitutional deficiency has been remedied, it is the courts' duty to bring federal control over the issue to its proper end." *Chisom*, 116 F.4th at 316; *accord Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("[J]udicial powers may be exercised only on the basis of a constitutional violation."); *Frew*, 540 U.S. at 441 (warning against "federal-court oversight of state programs for long periods of time even absent an ongoing violation of federal law").

V. THIS COURT IS EVADING THAT DIRECTIVE BY UNLAWFULLY REFUSING TO RULE ON THE CITY'S RULE 60(B)(5) MOTION AND, IN THE MEANTIME, FUNNELING HUNDREDS OF THOUSANDS OF CITY DOLLARS TO DC LAWYERS.

The directives of the Supreme Court and Fifth Circuit are clear and apply with special force here. Federal-court supervision of NOPD infringes on the State's sovereign prerogative to enforce its own laws and decide the structure of its law enforcement system. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976) ("The principles of federalism which play such an important party in governing the relationship between federal courts and state governments" apply "where injunctive relief is sought" against officials of "an agency of state or *local government* such as [a city police department]." (emphasis added); *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) ("In exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" (quoting *Stefanelli v. Minard,* 342 U.S. 117, 120 (1951))).

Continuing to infringe on the State's sovereign prerogative to enforce its own laws is no longer warranted because there is no ongoing violation of the underlying federal rights or the Consent Decree. To the contrary, DOJ agrees that "NOPD and the City have achieved compliance sufficient to enter the [two-year] Sustainment Period set forth in Consent Decree Paragraph 491." ECF No. 793 at 1. DOJ is so impressed with the "progress" the City and NOPD have made with their *voluntary* efforts *that DOJ wants the Court to adopt those efforts as court-imposed injunctions*, ECF No. 793-1 at 6. That is clearly an improper request under the above-discussed limits of this Court's authority.

Post-*Chisom*, there is no question that the legal obligation of the Court is to *end* the Consent Decree: "[T]he starting point for courts in consent-decree cases is an understanding that the decree has an end, and it is the courts' duty to ensure that control is returned to the State when that end is reached." *Chisom*, 116 F.4th at 316. Yet for *over two years*, the Court has left the City's Rule 60(b)(5) Motion languishing on a shelf. That refusal and the substantial amount of money imposed upon city

taxpayers in the meantime has coerced the City into negotiating a new agreement with new obligations, effectively "consenting" to a new source of authority for continuing to supervise the City and NOPD. *See Borel ex rel AL v. Sch. Bd. Saint Martin Par.*, 44 F.4th 307, 313 (5th Cir. 2022) (holding that a party's "assumption of obligations under [a new] consent order confers remedial jurisdiction on the district court to enforce those obligations").

The Court's decision to ignore the City's Rule 60(b)(5) Motion is as unlawful as it is extraordinary. "[W]here a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue [extraordinary relief] 'in order that [it] may exercise the jurisdiction of review given by law.'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662–63 (1978) (quoting *Ins. Co. v. Comstock*, 83 U.S. 258 (1873)); *accord Madden v. Myers*, 102 F.3d 74, 79 (3d Cir. 1996) ("[A]n appellate court may issue a writ of mandamus on the ground that undue delay is tantamount to a failure to exercise jurisdiction.").

The Fifth Circuit has granted extraordinary relief when district courts fail to rule on motions within as little as seven months. *See In re United States ex rel. Drummond*, 886 F.3d 448, 450 (5th Cir. 2018) (per curiam) ("[W]rit of mandamus was appropriate to address district court's seven month delay in entering judgment." (discussing *In re Hood*, 135 Fed. Appx. 709, 711 (5th Cir. 2005))). Here, two-plus years is more than "ample time to consider" the City's "pending" Rule 60(b)(5) Motion.

The Court's unlawful refusal to rule on the City's Motion has massive financial consequences for the City and NOPD. The Court-imposed Monitor filled that role with not just one *but a whole group of Washington DC lawyers* charging Washington DC rates. The monitoring team bills the City a whopping "$115,000 per month (on average)." Notice of Full and Effective Compliance with the Consent Decree 3 (Nov. 30, 2020).[3] *Today, that monthly average, multiplied by the Consent Decree's 12-year lifespan, has climbed to an estimated* ***$16.5 million in taxpayer dollars***. In the last twenty-seven months since the City's Rule 60(b)(5) Motion has been pending (August 2022 to now), the *monitoring fees exceed $3 million dollars*. And that is only for the Monitor. Under that kind of financial extortion, the City's current request can only be viewed as *capitulation* rather than consensual.

Now add in the costs of the Consent Decree "reforms." When the Court adopted the Consent Decree in 2012, the reforms it required were estimated to cost the City "$11 million a year." Charles Maldonado, *Paying for the Consent Decree*, Gambit, Aug. 13, 2012 (updated Nov. 20, 2019).[4] Today, that estimate (multiplied by the twelve

[3]https://bloximages.newyork1.vip.townnews.com/nola.com/content/tncms/assets/v3/editorial/a/4b/a4bb3818-40a4-11eb-8d39-fb0b472ad9a9/5fdbbcd6bafd9.pdf.pdf

[4]https://www.nola.com/gambit/news/paying-for-the-consent-decree/article_f243a99b-bfaa-5ebc-ab67-abffef42f956.html.

years the Consent Decree has been in place), has ballooned to *$132 million*. That fact alone should be grounds for substantial revisions to the decree.

Over the last decade, the monitoring fees and reform costs together are estimated to have cost the City a jaw-dropping *$150 million dollars*, which does not include the City's attorney fees for this case.

Those millions of dollars are the very funds NOPD needs to keep the City safe. The Consent Decree, far from improving public safety, has crippled NOPD's ability to recruit and retain officers, which in turn has sent the City's crime rate soaring. As Mayor Cantrell put it in 2022 when the City filed its Rule 60(b)(5) Motion: "The consent decree handcuffs our officers by making their jobs harder, pestering them with punitive punishment and burying them with paperwork that is an overburden." WDSU News (updated Aug 4, 2022 at 9:48 PM).[5] The "main" step that would "make conditions better on the job," said the Mayor, was *"ending the federal consent decree." Id.* New Orleans would be safer and the NOPD improved if the City could have invested those $150 million (plus attorney fees) into maintaining the existing police force and recruiting top talent. Instead, the State had to send in the Louisiana State Police to provide additional police support in the City to get crime under control.

The long running institutionalizing of the Consent Decree has given birth to an *entire court-run industry* unto itself—from the DC monitoring team, to the army of lawyers litigating this case, to the many new positions and internal committees NOPD has had to create just to manage the Consent Decree—all on the City's dime.

That system is so bureaucratized that now the monitoring team is monetizing their involvement in this case for their own benefit. Two members of the monitoring team "co-founded" a private company, recruited NOPD's former chief and deputy chief, and solicited contracts with other police departments "to bring lessons learned in the process of reforming the NOPD to communities nationwide." Missy Wilkinson, *Federal Monitor Overseeing NOPD Consent Decree Slammed by Colleague at Public Hearing*, The Advocate, Oct. 29, 2024.[6] This year, their company successfully sold their services to Minneapolis to be the independent evaluator of its new police reforms. *Id.*

This bureaucratized system provides zero value to New Orleans or Louisiana as a whole. It funnels millions of taxpayer dollars into private pockets while leaving the public exposed to exploding crime rates and ignoring the City's attempts to end this situation through litigation. Because NOPD's "outdated records system" could not "tell the feds how much crime the city had in 2021," "[v]ictim-serving organizations" that determine their share of federal funding based on the City's crime

[5] https://www.wdsu.com/article/new-orleans-nopd-policy-change/40808733

[6] https://www.nola.com/news/crime_police/zero-integrity-federal-monitor-overseeing-nopd-consent-decree-slammed-by-colleague-at-public-hearing/article_ba9b8b92-9636-11ef-af69-9f80a8888aed.html.

rate, "will lose out on nearly $1 million [in federal funds] this year and next year." Ben Myers, *New Orleans crime victims are losing funding. Here's why*, The Advocate, Oct. 29, 2024.[7] Had the Court decided the City's Rule 60(b)(5) Motion in due course, the City would have had a path to stopping the million-dollar monitoring fees and could have used that money for things like updating its records system. Surely Louisianans living and working in New Orleans would be better served by keeping money for a safer City and improved victim services at home and out of DC lawyers' pockets.

VI. THE COURT SHOULD GRANT THE CITY'S PENDING RULE 60(B)(5) MOTION AND DECLINE THE SUSTAINMENT PLAN.

The City *right now* is legally entitled to end the Consent Decree because it has substantially complied. Remember, the Lead Monitor told the Court in 2022 that NOPD had fully satisfied 14 out of the Consent Decree's 17 categories, which at the very least should have substantially narrowed the City's focus. Since then, the City and NOPD have maintained that level of compliance for the two-plus years that the City's Rule 60(b)(5) Motion has been pending. That is evidenced by the parties' agreement that the City is legally entitled to start the two-year countdown toward terminating the Consent Decree. *See* ECF No. 793 at 1. *There should be no need to restart the clock.*

The Court's refusal to decide the City's Rule 60(b)(5) Motion has left the City with few paths forward. But the new agreement solves nothing and piles on *new obligations* on top of the overbloated Consent Decree, *see* ECF No. 793-1. The City, however, has already sustained the requisite level of compliance for the requisite amount of time in the two years that its Rule 60(b)(5) Motion has been pending. There is no legal basis upon which new obligations should be assumed by or imposed upon the City.

The Sustainment Plan piles on so many new obligations that it needs a two-page spreadsheet to track the City's and NOPD's "Sustainment Plan Deadlines," ECF No. 793-1 at 27–28, *and another two-page spreadsheet for the "Audit Schedule*," *id.* at 20–21. The City, of course, will have to foot the bill for all of that. More than money, however, the City has conceded that the Court's approval of the Sustainment Plan "will render the City's [Rule 60(b)(5)] Motion moot." ECF No. 794 at 3.

This agreement achieves nothing for the City. In exchange for voluntarily giving up its Rule 60(b)(5) Motion and taking on new obligations and expenses, I expected that the City would have negotiated the Sustainment Plan to say that the City has reached "full and effective" compliance with the Consent Decree and that maintaining that status quo for two years would automatically terminate the Consent Decree. The

[7] https://www.nola.com/news/politics/new-orleans-nonprofits-federal-grants-crime-victims/article_4fd4eb3a-92e6-11ef-a2e9-cf0e31ec2e38.html.

Sustainment Plan instead leaves the Consent Decree's provisions for termination in place. ECF No. 793-1 at 17 ("Nothing in this Plan modifies the Termination provisions (Paragraphs 491 and 492) of the Consent Decree."). The Sustainment Plan expressly leaves "the authority of the Court," "the authority of DOJ as set forth in the Consent Decree and applicable law," and "the authority of the Monitor as set forth in the Consent Decree" to their fullest reach. *Id.* And by its own terms, the sole "purpose" of the Sustainment Plan "is to present the City and the NOPD the opportunity to demonstrate that they have the systems in place to monitor their own compliance and to take meaningful corrective actions where such monitoring identifies areas in need of improvement." *Id.* at 5.

The City has agreed to onerous new measures and expenses in exchange for something it has been legally entitled to for the past two years. Sadly, two years from now, the City will be in the exact same position that it was in 2022 when it filed its Rule 60(b)(5) Motion and that it is in now. If it wants to terminate the Consent Decree at that time, it will have to again follow the termination procedures in Paragraphs 491 and 492 of the Consent Decree just like it did in 2022. Paragraph 491 allows the parties "to jointly ask the Court to terminate" the Consent Decree—which is a Rule 60(b)(5) request whether joint or solo—four years "after" the first effective date (January 2013), "provided that the City and NOPD have been in full and effective compliance with [the Consent Decree] for two years." ECF No. 778 ¶ 491. In the event the parties "disagree whether the City has been in full and effective compliance for two years," Paragraph 492 allows "either party" to "seek to terminate" the Consent Decree *six years* after the first effective date. *Id.* ¶ 492. There is no end in sight, and the costs are just increasing.

Whether jointly with DOJ under Paragraph 491 or solo under Paragraph 492, the City in two years will have to file and litigate a Rule 60(b)(5) Motion, and the Court will have full discretion to decide that motion as it does any other motion. *See* ECF No. 793-1 at 4. In the meantime, the City will have paid hundreds of thousands (perhaps millions) of dollars in additional expenses and will have extended the Court's supervision for at least another two to six years.

The Court should not do that for many, many reasons.

For one, the Court lacks jurisdiction to make the Sustainment Plan and its new requirements an order of the Court because there is no legal injury—no ongoing violation of federal law or of the Consent Decree. That is because a court has continuing jurisdiction in institutional-reform case to do two (and only two) things: (1) "continue to issue relief to cure" the underlying "constitutional violation" only so long as it "exist[s]" and (2) "enforce" "obligations" assumed in a "consent order." *Borel*, 44 F.4th at 313.

Here, the Consent Decree itself took care of the original allegations of an unconstitutional "pattern or practice of conduct by [NOPD] law enforcement officers"—the very reason "[t]he United States br[ought] this action," Compl. ¶ 2, ECF No. 1—by requiring NOPD to replace its old policies with new curative policies that its officers have to follow. As for violations of the Consent Decree, the exact opposite is true. ECF No. 793 at 1 ("The Parties agree that NOPD and the City have achieved compliance sufficient to enter the Sustainment Period set forth in Consent Decree Paragraph 491."). There may be some outstanding "specific elements of the Consent Decree," EFC No. 793 at 1, but they do not warrant new injunctions aimed at satisfying an entirely different purpose, *see* ECF No. 793-1 at 5 ("The purpose of the Sustainment Period is to present the City and the NOPD the opportunity to demonstrate that they have the systems in place to monitor their own compliance and to take meaningful corrective actions where such monitoring identifies areas in need of improvement."). There is, thus, no Article III injury that could justify granting additional injunctive relief (whether by consent or otherwise).

The fact that DOJ agrees the City has reached "sufficient" compliance to start the two-year countdown to termination, *id.*, presents a different jurisdictional problem: mootness. There is no "live" controversy for the Court to decide. *Chisom*, 116 F.4th at 315; *Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990) ("An action is moot where (1) the controversy is no longer live or (2) the parties lack a personal stake in its outcome."); *accord U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."). The two-year clock started by operation of law (with or without the Court's approval), which is yet another reason the Court lacks jurisdiction to expand the Consent Decree by adopting the Sustainment Plan's new remedies.

For another, by asking the Court to *add new* requirements to those of the existing Consent Decree, the parties are asking to modify the institutional-reform injunction. The "label[]" the parties chose for their motion is "immaterial; a motion's substance, and not its form, controls." *Charles v. LeBlanc*, No. 24-30484, 2024 WL 3842581, at *1 (5th Cir. Aug. 16, 2024) (quoting *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 251 (5th Cir. 2004)). That request to expand the institutional-reform injunction is itself a Rule 60(b)(5) request. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008) ("A Rule 60(b)(5) motion is the appropriate vehicle for modifying a permanent injunction that has prospective effect, regardless of whether the modification expands restrictions or eliminates restrictions in the injunction."). And along with it come that Rule's federalism-protecting presumptions in favor of restoring State and local control in these types of cases.

Even if all these legal obstacles are somehow overcome, the Sustainment Plan is riddled with subjective, undefined metrics that are wholly up to subjective interpretation. Just a few of the many examples:

- The City and NOPD are "to take *meaningful* corrective actions where [their self-monitoring system] identifies areas *in need of improvement*." ECF No. 793-1 at 5 (emphasis added). Because the Sustainment Plan does not define the term "meaningful," the Court gets to decide if the actions were meaningful enough according to its subjective view.

- In addition to requiring corrective action, the Sustainment Plan imposes *new* "remedial measures" in areas like use-of-force investigations, stops and searches, and gender-bias policing (particularly in cases involving domestic violence and sexual assault). *Id.* at 9–15. NOPD must "continue to *diligently* pursue" both "the corrective actions" and the new "remedial measures." *Id.* at 9. As before, "*diligently pursue*" is subjective and undefined, so the Court gets to decide how hard NOPD must work for its pursuit of these new measures to qualify as "diligent."

- The City and NOPD must "maintain a *meaningful* Serious Discipline Review Board ("SDRB")" and "include a *clear* policy, *practical and detailed* Standard Operating Procedures, a *consistent* meeting schedule, and *periodic* reviews by the NOPD Professional Standards and Accountability Bureau ("PSAB")." *Id.* at 6. Once gain, these italicized terms are subjective, undefined, and therefore up to the Court's subjective interpretation.

- "NOPD agrees to continue using *trustworthy* data as a *meaningful* management tool." *Id.* at 6. As before, the failure to define the italicized, subjective terms leaves it to the Court to decide whether the data is trustworthy and meaningful enough.

- An offer's "violation of law, policy, or the Consent Decree" will not terminate "the Sustainment Period provided" that (among other conditions) the violation "is not indicative of *a pattern of violative behavior*" and "NOPD is *maintaining transparency* with the Monitor and DOJ regarding the violation, the discipline, and the remedial action." *Id.* at 17. The parties could have included objective measures. Instead, the Court gets to fill in those blanks. It is also unclear what "maintaining transparency" requires. The State has laws addressing public records and public meetings that apply to these public officials.

> What obligations beyond those are being imposed here? Must NOPD report every officer's failure to follow any NOPD "policy," no matter how small or technical (*i.e.*, "wash your hands after using the bathroom and before returning to duty")? How soon after a violation must NOPD report before it is deemed a failure to maintain transparency? What happens if the officer's violation of policy is a failure to self-report? Is NOPD on the hook for a transparency failure and therefore subject to termination?

It would have been infinitely better if the Sustainment Plan had objective measures. Objective measures would go a long way to helping the Court, the parties, and the public determine compliance.

Yet another flaw in the Sustainment Plan is that it fails to explain what happens at the end of the two years if the City and NOPD have successfully complied with the Sustainment Plan. The Plan clearly explains that the Court can pause or exit the Sustainment Period (to be restarted at a later date). *See id.* at 17. But the Plan includes *no provisions in the opposite direction*—no sunset provision for example—*while at the same time making clear that the Plan has zero effect on the Consent Decree*. *See* id. at 4 ("[T]his Plan does not expand the existing terms of the Consent Decree."); *id.* at 17 ("Nothing in this Plan modifies the Termination provisions (Paragraphs 491 and 492) of the Consent Decree.").

CONCLUSION

For all of these reasons, I urge the Court to grant the City's Rule 60(b)(5) Motion or at least deny it so that the City can appeal and deny the Motion to Approve the Sustainment Plan. There is no ongoing violation of federal law, which means keeping the Consent Decree in place any longer unduly usurps the State's sovereign prerogative to enforce state law within its borders—authority that it delegated to the City in that area of the State. Meanwhile, the bureaucratized system that manages the Consent Decree marches on—sucking up State and City resources and enriching DC lawyers with taxpayer dollars. It is time to restore local control. At a very, very minimum, the Court should start the two-year clock now without imposing any new injunctions beyond what the Consent Decree already requires.

Sincerely,

Liz Murrill
Louisiana Attorney General