

In The  
**Supreme Court of the United States**

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THEODORE DALLAS, *et al.*,

*Petitioners,*

v.

L.J., *et al.*,

*Respondents.*

—◆—

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

—◆—

**REPLY BRIEF FOR THE PETITIONERS**

—◆—

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
REPLY BRIEF FOR THE PETITIONER .....	1
I. This Case Squarely Presents the Purely Legal Question Whether Courts Must Ap- ply a “Flexible Approach” when Consider- ing a State’s Request for Relief from an Institutional-Reform Decree Based on an Intervening Change in Law.....	2
II. The Decision Below Conflicts with the Flexible Approach Taken by Other Courts in Ruling on Motions to Terminate Con- sent Decrees .....	7
III. The Question Whether the Statute Under- lying the Decree Provides a Private Right of Action Also Warrants Review by this Court.....	10
CONCLUSION.....	13

## TABLE OF AUTHORITIES

## Page

## CASES

<i>31 Foster Children v. Bush</i> , 329 F.3d 1255 (11th Cir. 2003).....	12
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997).....	3
<i>Blessing v. Freestone</i> , 529 U.S. 329 (1997) .....	1, 2, 8, 9
<i>Brown v. Tennessee Dep't of Finance &amp; Admin.</i> , 561 F.3d 542 (6th Cir. 2009) .....	8
<i>DeShaney v. Winnebago County Dep't of Soc. Servs.</i> , 489 U.S. 189 (1989).....	7, 9
<i>Evans v. City of Chicago</i> , 10 F.3d 474 (7th Cir. 1993) .....	6, 10
<i>Frew v. Hawkins</i> , 540 U.S. 431 (2004).....	9
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002) .....	1, 2, 8, 9
<i>Horne v. Flores</i> , ___ U.S. ___, 129 S. Ct. 2579 (2009).....	1, 2, 6, 8, 9
<i>John B. v. Goetz</i> , 626 F.3d 356 (6th Cir. 2010) .....	6, 8, 12, 13
<i>L.J. v. Massinga</i> , 699 F. Supp. 508 (D. Md. 1988) .....	5, 12
<i>Olivia Y. v. Barbour</i> , 351 F. Supp. 2d 543 (S.D. Miss. 2004) .....	12
<i>Suter v. Artist M.</i> , 503 U.S. 347 (1992).....	<i>passim</i>
<i>Sweeton v. Brown</i> , 27 F.3d 1162 (6th Cir. 1994).....	8
<i>United States v. Tennessee</i> , 615 F.3d 646 (6th Cir. 2010) .....	9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 671(a)(16).....5, 6, 11, 12

RULES

Fed. R. Civ. P. 60(b)(5) .....*passim*

MISCELLANEOUS

*Moore’s Federal Practice* (Matthew Bender 3d ed.) .....3

Wright, Miller & Cooper, *Federal Practice & Procedure* (2d ed. 2002).....4

## REPLY BRIEF FOR THE PETITIONER

The plaintiffs' brief in opposition effectively confirms why this Court's review is warranted. Some variation of the plaintiffs' stated reasons for denying the petition would likely apply to any decades-old federal-court consent decree and, if accepted, would equally insulate from review any refusal by lower courts to consider whether continued enforcement of the decree is appropriate.

In *Horne v. Flores*, this Court emphasized that "sensitive federalism concerns" require courts to apply a "flexible approach" in evaluating whether a long-running institutional-reform decree should be perpetuated in the face of a state's request for relief, under Rule 60(b)(5), when the request is based on changed factual circumstances. 129 S. Ct. at 2593-94. This case presents the parallel situation of a state moving for relief from a 23-year-old decree based on intervening changes in the governing law.

The plaintiffs insist that the courts below were right to disregard the teachings of *Horne* in their application of Rule 60(b)(5), and that the lower courts were therefore justified in also departing from the analysis that this Court has prescribed, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), *Blessing v. Freestone*, 529 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), for determining whether a federal Spending Clause statute creates a private right of action. The plaintiffs are simply wrong in asserting that the two purely legal issues presented in the

petition are “highly fact-dependent,” Brief in Opp. 2, and, despite their efforts, they cannot reconcile the court of appeals’ decidedly inflexible analysis of those issues with that of other lower courts. This case provides an ideal vehicle for resolving the division of authority in the lower courts on both issues presented in the petition, and those important questions merit this Court’s review.

**I. This Case Squarely Presents the Purely Legal Question Whether Courts Must Apply a “Flexible Approach” when Considering a State’s Request for Relief from an Institutional-Reform Decree Based on an Intervening Change in Law.**

1. The plaintiffs’ restatement of the first question presented in the petition is misleading, in two ways.

First, the plaintiffs confuse the *catalyst* that prompted the State’s Rule 60(b)(5) motion (“a statement in a footnote . . . in *Horne*”) with the changes in decisional law that were the *basis* for the motion. The statement in *Horne* clarified that a consent decree cannot be sustained on the basis of a statute that “does not provide a private right of action.” 129 S. Ct. at 2598 n.6. Under the analysis embodied in this Court’s decisions in *Gonzaga*, *Blessing*, and *Suter*, the provisions of the Adoption Act on which the plaintiffs based their claims in 1984 do not create privately-enforceable rights.

Second, the plaintiffs assert that “the State does not contend . . . that the decree is no longer necessary.” To the contrary, the State made its motion to terminate the decree precisely because the decree is unnecessary. More than that, the decree upsets the statutory scheme it purports to enforce: by placing in the hands of private litigants the power to direct the operations of a State program, the decree supplants the authority assigned by federal and State law to democratically-accountable State officials, to State courts, and to the federal Secretary of Health and Human Services. Thus, enforcement of an alternative decision-making regime through a consent decree is both contrary to applicable law and unnecessary.

2. Expanding on a theme they advanced below, the plaintiffs futilely attempt to excuse the court of appeals’ inflexible approach by attributing the outcome to an innocuous application of law-of-the-case doctrine. Brief in Opp. 27. First, rigid adherence to outdated precedents is fundamentally incompatible with a core purpose of Rule 60(b)(5) – namely, to allow consideration of intervening developments in the law, where “more recent cases have undermined the assumptions of” and the “criteria used to assess” the legal principles on which the decree rests.” *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997).

Moreover, the very nature of a Rule 60(b)(5) motion, which seeks to “relieve a party . . . from a final judgment,” *id.*, precludes reliance on law of the case, which applies “only until final judgment.” *Moore’s Federal Practice* § 134.20[2] (Matthew Bender 3d ed.);

*accord* 18B Wright, Miller & Cooper, *Federal Practice & Procedure* § 4478, at 637-42 (2d ed. 2002). After a final judgment, as here, the doctrine has no application, and a court's authority to grant relief in civil cases is instead "governed by the rules governing direct . . . attack – principally found in Civil Rule 60(b)," Wright, Miller & Cooper, *Federal Practice* § 4478; *accord Moore's Federal Practice* § 134.20[2]. Thus, the court of appeals erred by introducing a pre-judgment doctrine into its analysis of a post-judgment motion, an error compounded by the court's importation of an inflexible standard for evaluating the continuing vitality of antiquated precedents.

3. The plaintiffs' contention that this case involves "highly fact-specific circumstances," Brief in Opp. 14, amounts to nothing more than a truism: every case has facts. Any case that this Court might take to resolve the question presented here will exhibit the same feature, including a protracted history. (Every onerous consent decree, like every unhappy family according to Leo Tolstoy, is unhappy in its own way.) The plaintiffs' simplistic observation ignores the purely legal nature of the inquiry here: whether a State may obtain relief from an injunction that purports to enforce provisions of a statute where an intervening change in law establishes that no private right of action exists to enforce those statutory provisions.

In making their erroneous claim of a fact-bound issue, the plaintiffs describe facts they claim to be undisputed. Brief in Opp. 21. They are not undisputed,

but neither are they material. Many of those “facts” are outdated; many are drawn exclusively from the plaintiffs’ complaint and contempt petition, which is to say that they are *allegations*, not facts, which have never been adjudicated on the merits by any court.<sup>1</sup> More importantly, “facts” that the plaintiffs describe as violations of federal law are, in most cases, merely instances of claimed non-compliance with the terms of the decree, not with requirements imposed by the Adoption Act.<sup>2</sup> *To be clear, Maryland has an approved State plan, and its case plan and case-review system comply with the requirements of § 671(a)(16) of the Adoption Act.*

The salient facts here – namely the intrusive terms of the decree and the lack of any private right of action underpinning that decree – lamentably are *not* unique: although most lower courts have rejected the claims that the plaintiffs make here, *see* Petition at 29-30 & n.4, many states continue to labor under similar decrees, as the plaintiffs themselves point out, Brief in Opp. 28-29. Finally, the facts relied on

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<sup>1</sup> The defendants entered the 1988 consent decree “without any admission of liability by any defendant for any purpose.” *L.J. v. Massinga*, 699 F. Supp. 508, 518 (D. Md. 1988); the district court did not rule on the plaintiffs’ contempt petition, and it was withdrawn.

<sup>2</sup> The plaintiffs’ contention that three decades of federal-court oversight failed to produce substantial improvements until the advent of the current Governor’s administration, Brief in Opp. 10; Pet. App. 73, hardly makes a compelling case for continued federal-court supervision.

by the plaintiffs are irrelevant to the purely legal questions presented here. *Cf. John B. v. Goetz*, 626 F.3d 356, 363 (6th Cir. 2010) (criticizing district court for addressing issues of compliance with decree in deciding motion to vacate decree that was made based on the absence of privately-enforceable rights under the Adoption Act, including § 671(a)(16)).

4. The plaintiffs also assert that the lower courts' rulings can be sustained on grounds unrelated to the court of appeals' adherence to the outdated analysis in its 1987 ruling. Neither court below relied on either of the alternative grounds suggested by the plaintiffs, and neither ground would justify the continuation of the decree, as a matter of law.

First, the plaintiffs exacerbate the problem of inflexibility by asserting that the State's motion for relief under Rule 60(b)(5) could have been denied on the ground that it was not made sooner. Brief in Opp. 18-19. Their ill-considered argument suggests that the longer a decree remains in place, the more insulated it becomes from developments in the law. A corollary of this premise is that each succeeding generation of officeholders becomes increasingly bound by the assent (and policy preferences) of their distant predecessors. This is utterly inconsistent with this Court's recognition of the risks created by long-running institutional-reform decrees – namely, that “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.” *Horne*, 129 S. Ct. at 2597; *see also Evans v. City of Chicago*, 10 F.3d 474, 478 (7th

Cir. 1993) (en banc) (“[D]emocracy does not permit public officials to bind the polity forever.”).

The plaintiffs’ second asserted independent ground for denying the State’s Rule 60(b)(5) likewise lacks merit. They claim that the decree – notwithstanding its systemic focus – is supported by their substantive due process claims, even if it is unsupported by a right of action under the Adoption Act. Brief in Opp. 27-29. The terms of the decree are manifestly ill-suited to addressing the types of conscience-shocking government conduct that might be redressable through an action to address violations of due process rights. *Cf. DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989). In any event, because neither court below accepted this fallback justification for the decree, it poses no impediment to review of the question actually decided below.

## **II. The Decision Below Conflicts with the Flexible Approach Taken by Other Courts in Ruling on Motions to Terminate Consent Decrees.**

The plaintiffs attempt to minimize the conflict between the rulings below and the decisions of other courts that have properly vacated injunctions when changes in law establish that prospective application of the injunction is inequitable. Brief in Opp. 24-26. Their claim that the Sixth and Seventh Circuits apply the same approach in evaluating a state’s motion to

vacate a decree based on changes in law rests on two fallacies.

1. First, the plaintiffs stress that neither court has “addressed *Horne* footnote 6,” which is true, but beside the point. As explained above, the State’s argument that no private right of action underlies the decree rests not on *Horne*, but on *Gonzaga*, *Blessing*, and *Suter*, which articulated the analysis that courts are required to perform in determining whether a Spending Clause statute provides a private right of action. Second, just because a court describes its approach as “flexible” does not make the label accurate. The actual approach taken by the Sixth and Seventh Circuits deserves that label, and their approach differs demonstrably from the Fourth Circuit’s: those courts have granted relief on the precise grounds urged by the State and rejected by the Fourth Circuit here.

2. The Sixth Circuit has correctly concluded that prospective application of an injunction is inequitable when “[t]he foundation upon which the claim for injunctive relief was built has crumbled.” *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994). It has applied this principle in a case involving the Adoption Act, by vacating a portion of a decree, due to “intervening decisions” establishing that the claims made under that statute were not actionable. *John B.*, 626 F.3d at 357; see also *Brown v. Tennessee Dep’t of Finance & Admin.*, 561 F.3d 542, 546 (6th Cir. 2009).

The plaintiffs point to *United States v. Tennessee*, 615 F.3d 646 (6th Cir. 2010), in an effort to show that the Sixth Circuit’s approach mirrors the rigid approach of the Fourth Circuit in applying the standard for relief under Rule 60(b)(5), but the case does not support their position. Unlike the decision below, the Sixth Circuit denied Rule 60(b)(5) relief in that case because there had been no significant changes in law after entry of the judgment. Tennessee principally relied on this Court’s decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201 (1989), which *predated* the judgment the State had moved to set aside. Here, by contrast, the changes in the law on which Maryland principally relies resulted from this Court’s clarification of the appropriate implied-rights-of-action analysis that pertains to claims ostensibly brought to enforce provisions of Spending Clause statutes. That distinct strain of jurisprudence is articulated in three cases that were decided *after* entry of the 1988 judgment: *Suter* (1991), *Blessing* (1997), and *Gonzaga* (2002).

3. The Seventh Circuit has likewise vacated decrees when changes in the law established that the underlying claims are not supported by a private right of action, and has done so in several cases. *See* Petition at 25. That court’s articulation of the justification for this approach echoes the observations made by this Court in *Horne* and *Frew v. Hawkins*, 540 U.S. 431, 442 (2004). Courts “must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced” and courts are

“bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance.” *Evans*, 10 F.3d at 479.

By obstinately adhering to a 1987 decision that employed an analysis that is inconsistent with the analysis prescribed by subsequently-developed case law, the court of appeals gave short shrift to the principles of federalism and democratic accountability that should have guided its analysis here, and that have guided the Sixth and Seventh Circuits’ analysis in analogous circumstances.

### **III. The Question Whether the Statute Underlying the Decree Provides a Private Right of Action Also Warrants Review by this Court.**

As they have done with the first question presented in the petition, the plaintiffs confront the second question by restating, and misstating, it. The question does not concern law-of-the-case doctrine. As explained above, that doctrine has no application in post-judgment proceedings under Rule 60(b)(5), and the court of appeals’ invocation of the doctrine as a justification for its refusal to give effect to current decisional law was clear error.

It is only by erecting this law-of-the-case strawman that the plaintiffs can (a) argue that this case does not “properly present[]” the actual question raised in the petition, Brief in Opp. 27, and (b) deny

the existence of a division of authority on that question, *id.* at 29-33.

1. The actual question presented is whether the sole provision of the Adoption Act that the plaintiffs now lean on, § 671(a)(16), provides a private right of action that would support continued enforcement of a wide-ranging injunction that governs substantial aspects of Maryland's foster care system. The question is squarely presented, because the State's claim to Rule 60(b)(5) relief was premised on its contention that this provision does not create privately-enforceable rights. Though the court of appeals' rationale for rejecting the State's contention is obscured by a mistaken reliance on law of the case, *Pet. App.* 32, the practical effect of the court's decision is the same: a denial of a motion that was expressly founded on the absence of a right of action under the Adoption Act. The practical effect is also the same as the district court's insistence that prospective application of the decree is equitable "even if these particular plaintiffs don't have a private right of action." *Pet. App.* 82-83.

2. Rather than refute the State's demonstration of a division of authority in the lower courts on the question presented, the plaintiffs amplify that demonstration and emphasize the depth of the split. They endorse the reasoning of the minority of courts that have found a private right of action under the Adoption Act, *Brief in Opp.* 29, and they do not attempt to deny that many more courts have reached the opposite conclusion, *Petition* at 29-30.

The plaintiffs attempt to downplay the significance of two leading cases, from the Sixth and Eleventh Circuits, but they offer no valid basis for distinguishing them.

The plaintiffs assert that § 671(a)(16) was not at issue in *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003). Brief in Opp. 31-32. They are wrong. See 329 F.3d at 1270-73. Other courts in the Eleventh Circuit have understood the analysis in *31 Foster Children* to compel the conclusion that § 671(a)(16) does not supply a private right of action to enforce definitional provisions of the Adoption Act, a conclusion that is contrary to the plaintiffs' position in this case and that contradicts the Fourth Circuit's belief that its 1987 decision in *L.J. v. Massinga* retains vitality under this Court's modern precedents. See, e.g., *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 561-62 & n.16 (S.D. Miss. 2004) ("rationale for the court's conclusion in *31 Foster Children* applies fully to . . . claims . . . based on . . . § 671(a)(16)"); see also *id.* at 559 (identifying "split of authority" between *L.J. v. Massinga* and cases decided since *Suter*).

The plaintiffs' attempt to reconcile the Fourth Circuit's decision with the Sixth Circuit's ruling in *John B.* also lacks merit. Though they claim the latter court was "uncertain whether the decree at issue was based on [the Adoption Act] at all," Brief in Opp. 32, the plaintiffs in *John B.* asserted that the decree's provisions were supported by the statute, and the court expressly instructed the district court to vacate any provisions that were based on the

Adoption Act. *See* 626 F.3d at 363. On remand, the district court implemented the appellate mandate and vacated the affected provisions.

The plaintiffs' assertion, accepted by some courts and rejected by most, that Congress "overturned" this Court's holding in *Suter*, Brief in Opp. 19, serves to demonstrate the existence of a further cleavage in lower-court decisions that warrants resolution by this Court.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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