

No. 20-90042

---

IN THE  
**United States Court of Appeals**  
FOR THE FIFTH CIRCUIT

---

LOUISIANA STATE CONFERENCE OF  
THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, *et al.*,  
*Plaintiffs-Respondents,*

v.

STATE OF LOUISIANA, *et al.*,  
*Defendants-Petitioners,*

---

Appeal from the United States District Court  
for the Middle District of Louisiana, Case No. 19-479-JWD-SDJ

---

**ANSWER IN OPPOSITION TO DEFENDANTS-PETITIONERS'  
PETITION FOR INTERLOCUTORY APPEAL  
PURSUANT TO 28 U.S.C. § 1292(b)**

---

Jon Greenbaum  
jgreenbaum@lawyerscommittee.org  
Ezra D. Rosenberg  
erosenberg@lawyerscommittee.org  
**LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW**  
1500 K Street NW, Suite 900  
Washington, DC 20005

Jennifer Kies Mammen  
jennifer.mammen@bclplaw.com  
Alec W. Farr (*admission applied for*)  
awfarr@bclplaw.com  
Adam L. Shaw (*admission applied for*)  
adam.shaw@bclplaw.com  
**BRYAN CAVE LEIGHTON PAISNER LLP**  
1155 F Street NW, Suite 700  
Washington, DC 20004

*Counsel for Plaintiffs-Respondents*

---

**CERTIFICATE OF INTERESTED PERSONS**

**No. 20-90042**

---

LOUISIANA STATE CONFERENCE OF  
THE NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, *et al.*,

*Plaintiffs-Respondents,*

v.

STATE OF LOUISIANA, *et al.*,

*Defendants-Petitioners,*

---

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**A. Plaintiffs-Respondents**

1. Louisiana State Conference of the National Association for the Advancement of Colored People
2. Anthony Allen
3. Stephanie Anthony

The following is a list of all private practice lawyers and private law firms that are currently or formerly engaged in this litigation:

***Plaintiffs-Respondents:***

Arthur Ray Thomas  
Arthur Thomas & Associates  
3313 Government Street  
Baton Rouge, LA 70806  
225-802-4199 Fax: 225-334-7491  
artthomas51@gmail.com

Alec W. Farr  
Bryan Cave Leighton Paisner LLP  
1155 F Street, NW, Suite 700  
Washington, DC 20004  
202-508-6053 Fax: 202-220-7353  
awfarr@bclplaw.com

Jennifer Kies Mammen  
Bryan Cave Leighton Paisner LLP  
1155 F Street, NW, Suite 700  
Washington, DC 20004  
202-508-6044 Fax: 202-220-7344  
jennifer.mammen@bclplaw.com

Adam L. Shaw  
Bryan Cave Leighton Paisner LLP  
1155 F Street, NW, Suite 700  
Washington, DC 20004  
202-508-6078 Fax: 202-220-7378  
adam.shaw@bclplaw.com

Jason C. Semmes  
Bryan Cave Leighton Paisner LLP  
1155 F Street NW, Suite 700  
Washington, DC 20004  
202-508-6005 Fax: 202-220-7305  
jason.semmes@bclplaw.com

*(continued on next page)*

***Defendants-Petitioners:***

Jason B. Torchinsky  
Holtzman Vogel Josefiak  
Torchinsky, PLLC  
15405 John Marshall Hwy  
Haymarket, VA 20169  
540-341-8808  
jtorchinsky@hvjt.law

Phillip Michael Gordon  
Holtzman Vogel Josefiak  
Torchinsky PLLC  
15405 John Marshall Hwy  
Haymarket, VA 20169  
540-341-8808  
pgordon@hvjt.law

Celia R. Cangelosi  
Attorney at Law  
5551 Corporate Blvd. Suite 101  
Baton Rouge, LA 70808  
225-231-1453 Fax: 225-231-1456  
celiacan@bellsouth.net

Elizabeth Murrill  
Solicitor General of Louisiana  
Angelique Duhon Freel  
Jeffrey Wale  
Assistant Attorneys General  
Louisiana Department of Justice  
Civil Division  
P. O. BOX 94005  
Baton Rouge, Louisiana 70804  
Telephone: (225) 326-6017  
Facsimile: (225) 326-6098  
Email: MurrillE@ag.louisiana.gov  
freela@ag.louisiana.gov  
walej@ag.louisiana.gov

Meryl Macklin  
Bryan Cave Leighton Paisner LLP  
3 Embarcadero Center, 7th Floor  
San Francisco, CA 94111  
415-675-1981 Fax: 415-675-3434  
meryl.macklin@bclplaw.com

Ezra D. Rosenberg  
Lawyers' Committee for Civil Rights  
Under Law  
1500 K Street, NW, 9th Floor  
Washington, DC 20005  
202-662-8345 Fax: 202-783-0857  
erosenberg@lawyerscommittee.org

Jon M. Greenbaum  
Lawyers' Committee for Civil Rights  
Under Law  
1500 K Street NW, 9th Floor  
Washington, DC 20005  
202-662-8315  
jgreenbaum@lawyerscommittee.org

Jennifer Nwachukwu  
Lawyers' Committee for Civil Rights  
Under Law  
1500 K St, NW, 9th Floor  
Washington, DC 20005  
202-662-8600  
jnwachukwu@lawyerscommittee.org

Brendan Downes (former counsel)  
Lawyers' Committee for Civil Rights  
Under Law  
1500 K St, NW, 9th Floor  
Washington, DC 20005  
202-662-8600

/s/Jennifer Kies Mammen  
Jennifer Kies Mammen  
jennifer.mammen@bclplaw.com

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
CERTIFICATE OF INTERESTED PERSONS .....	i
INTRODUCTION .....	1
RELIEF SOUGHT .....	2
STATEMENT OF THE CASE.....	3
A.    Procedural Background .....	3
B.    The <i>Chisom</i> Litigation .....	4
C.    The 2012 <i>Chisom</i> Litigation .....	6
ARGUMENT .....	8
A.    Defendants Have Not Demonstrated That the District Court’s Order Involves a “Controlling Question of Law” .....	10
B.    There is No Substantial Ground for Difference of Opinion Concerning the Scope of the <i>Chisom</i> Decree.....	14
C.    Certification of the Order for Interlocutory Appeal Will Lengthen Already Delayed Litigation .....	17
CONCLUSION .....	19
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT.....	21
CERTIFICATE OF SERVICE .....	22

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Batton v. Georgia Gulf</i> , 261 F. Supp. 2d 575 (M.D. La. 2003).....	11
<i>Caterpillar Inc. v. Lewis</i> , 519 U.S. 61 (1996).....	9
<i>Cedar Lodg Plantation, LLC v. CSHV Fairway View I, LLC</i> , No. CV 13-00129-BAJ-EWD, 2017 WL 3908918 (M.D. La. Sept. 6, 2017), <i>aff'd in part, vacated in part, remanded</i> , 753 F. App'x 191 (5th Cir. 2018) 2017 WL 3908918 .....	14
<i>Chisom v. Edwards</i> , 659 F. Supp. 183 (E.D. La. 1987).....	4
<i>Chisom v. Jindal</i> , 890 F. Supp. 2d 696 (E.D. La. 2012).....	5, 7, 13
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	<i>passim</i>
<i>Clark-Dietz &amp; Assocs.-Eng'rs, Inc. v. Basic Constr. Co.</i> , 702 F.2d 67 (5th Cir. 1983) .....	8, 9
<i>Fannie Mae v. Hurst</i> , 613 F. App'x 314 (5th Cir. 2015) .....	8
<i>Gruver v. La. ex rel Bd. of Supervisors</i> , CIVIL ACTION 18-772-SDD-EWD, 2019 WL 6245421 (M.D. La. Nov. 22, 2019).....	10, 13
<i>Martin v. Wilks</i> , 490 U.S. 755 (1989).....	1, 12
<i>S. U.S. Trade Ass'n v. Unidentified Parties</i> , No. 10-1669, 2011 WL 2790182 (E.D. La. July 14, 2011).....	14

*United States v. Bear Marine Servs.*,  
696 F.2d 1117 (5th Cir. 1983), 548 U.S. 53 (2006) .....9

*United States v. Garner*,  
749 F.2d 281 .....8

*United States v. La.*,  
CIV A. 11-470-JWD-RLB, 2016 WL 4522171 (M.D. La. Aug. 29,  
2016) .....10, 17

**Statutes**

28 U.S.C. § 1292(b) .....*passim*

1992 La. Acts No. 512, § 1 .....5

**Rules**

Fed. R. App. P. 32(f).....21

Federal Rule of Appellate Procedure 27(d)(2)(A).....21

Federal Rule of Appellate Procedure 32(a)(5).....21

Federal Rule of Appellate Procedure 32(a)(6).....21

Rule 28.2.1 .....i

## INTRODUCTION

Applying the legal framework outlined in *Martin v. Wilks*, 490 U.S. 755 (1989), a seminal case limiting the preclusive effect of consent decrees, the district court denied two motions to dismiss filed by Defendants-Petitioners the State of Louisiana and the Secretary of State of Louisiana (“Defendants”) on grounds “that the instant case falls outside the jurisdiction of the *Chisom* Consent Judgment.” (ECF No 47 at 22.)<sup>1</sup> While the district court suggested that the question was “a close one,” the rationale underlying its decision was anything but close. Indeed, the district court observed that “[i]t cannot be questioned that most of the preamble of the [*Chisom*] Consent Judgment and great majority of the order itself are devoted almost entirely to the creation of the Supreme Court district in Orleans Parish and the operation of its new justice.” (*Id.* at 21 (emphasis added).) Further, the district court held that even if the *Chisom* Consent Judgment applied to this case, Defendants’ “position rests on the faulty premise that Plaintiffs cannot collaterally challenge the *Chisom* Decree in a separate action,” a premise that “appears to be severely undermined by *Martin*.” (*Id.* at 22 (emphasis added).)

Defendants cannot show that they are entitled to interlocutory review of the district court’s order. First, this is not an “exceptional case” suitable for interlocutory appeal. There is no authority supporting Defendants’ assertion, Pet.

---

<sup>1</sup> Citations to the record below are to the ECF number.

at 13, that Plaintiffs were “required” to bring their claims in the Eastern District of Louisiana (“Eastern District”).

Second, there is no “substantial ground for difference of opinion” as to the scope and effect of the *Chisom* Decree. There is no authority supporting Defendants’ assertion, Pet. at 13, that “[r]edistricting and reapportionment are unique in jurisprudence” for purposes of the effect of a consent decree or that a ruling in favor of Plaintiffs will necessarily place Defendants “in the position of having to disobey one court to obey the other,” Pet. at 16. Defendants’ hyperbolic fear does not equate to a substantial ground for difference of opinion.

Finally, allowing an interlocutory appeal would result in piecemeal appeals – contrary to the intent of section 1292(b) and Fifth Circuit law. As both Defendants and the district court acknowledged, a ruling in favor of Defendants in this Court would result in, at most, dismissal without prejudice or transfer to the Eastern District. Pet. at 4. Thereafter, Plaintiffs’ Voting Rights Act claims, among other issues, will be subject to review in this Court. Judicial efficiency weighs against granting the Petition.

### **RELIEF SOUGHT**

Plaintiffs ask the court to deny the Petition. The Petition is based on a purely hypothetical and speculative premise that any ruling by the trial court will necessarily put the State in the position of having to obey “conflicting” orders from

two courts. As the district court found, this is a false premise, which Plaintiffs strongly dispute. (ECF No. 47 at 21.) But in the unlikely event that Defendants are correct, the proper time to appeal that issue will be after a trial and final judgment on the merits. Notwithstanding that the district court certified the case for interlocutory review, the issues do not present a “close” call. Even if they did, the case is not suitable for interlocutory review because a ruling from this Court at this stage of the litigation will not materially advance the litigation. It will protract the litigation, delay adjudication of Plaintiffs’ fundamental rights, and result in piecemeal appeals.

### **STATEMENT OF THE CASE**

#### **A. Procedural Background**

Plaintiffs-Respondents Louisiana State Conference of the National Association for the Advancement of Colored People (“NAACP”), Anthony Allen, and Stephanie Anthony (“Plaintiffs”) filed this action under Section 2 of the Voting Rights Act (“VRA”), 52 U.S.C. § 10301. Plaintiffs allege that Defendants are unlawfully diluting the votes of minority voters in and around Baton Rouge Parish – where the two individual Plaintiffs reside – in elections for Louisiana Supreme Court justices. Defendants filed two separate motions to dismiss, arguing that the action “should be dismissed for lack of jurisdiction because the *Chisom* Consent Decree issued by the Eastern District . . . controls.” (ECF No. 58 at 7.)

The district court denied both motions. (ECF No. 47.) Defendants then jointly moved the district court to certify the case for interlocutory review and stay proceedings in the district court (ECF No. 51), and to transfer the case to the Eastern District (ECF No. 52). The district court certified the case for interlocutory review but declined to stay proceedings (ECF No. 58) and denied the motion to transfer venue (ECF No. 59).

**B. The *Chisom* Litigation**

In *Chisom v. Roemer*, 501 U.S. 380 (1991), “minority plaintiffs challenged the original electoral process for the Louisiana Supreme Court, which had consisted of six judicial districts, five of which were single-member districts and one of which was multi-member, encompassed Orleans Parish, and elected two justices.” (ECF No. 47 at 4.) *Chisom* was a class action brought on behalf of “Ronald Chisom and four other black plaintiffs and the Louisiana Voter Registration Education Crusade . . . on behalf of all blacks registered to vote in Orleans Parish.” *Chisom v. Edwards*, 659 F. Supp. 183, 183 (E.D. La. 1987) (emphasis added). The *Chisom* plaintiffs did not seek to represent Louisiana citizens outside Orleans Parish.

*Chisom* focused exclusively on the then First District of the Louisiana Supreme Court. At the time of suit, the Louisiana Supreme Court members were elected from six districts. Five of the six districts elected one Justice each.

However, the First District, comprised of four parishes (Orleans, St. Bernard, Plaquemines, and Jefferson Parishes), elected two justices at-large. The *Chisom* plaintiffs argued that Louisiana's at-large system for the First District "impermissibly diluted the voting strength of the minority voters in Orleans Parish," *Chisom v. Jindal*, 890 F. Supp. 2d 696, 702 (E.D. La. 2012) (emphasis added), because no African American had ever been elected to either of the two at-large seats from the First District.

Following *Chisom*, the Louisiana legislature enacted Act 512 in 1992, which created a temporary eighth Supreme Court seat for the sub-district of Orleans. *Id.*; see 1992 La. Acts No. 512, § 1. An August 21, 1992 federal consent decree memorializing Act 512 stipulated that (a) the State would split the multi-member district into two single-member districts upon expiration of the temporary seat, and (b) one of those districts would consist of most of Orleans Parish and a portion of neighboring Jefferson Parish, making it majority African-American. *Id.*

The Louisiana legislature subsequently enacted Act 776 in 1997, providing for the reapportionment of the Supreme Court districts as envisioned by the Consent Decree by creating seven single member districts. *Id.* (citing *Chisom v. Jindal*, 890 F. Supp. 2d at 705-06). On January 3, 2000, the *Chisom* parties filed a joint motion to amend the Consent Judgment. The parties asserted that because Orleans Parish was split between District 1 and District 7, Act 776 was "not in

strict conformity with the Consent Judgment” but the Act still “[met] *the intent of all parties to this litigation for final resolution of the matter.*” Pet. at 6. (See ECF 47 at 11 (emphasis added).) “The Eastern District agreed and ordered the 2000 modification of the 1992 Decree on January 3, 2000.” Pet. at 6.

As a result of the *Chisom* litigation, the process for electing justices to the Louisiana Supreme Court from the First District was changed from at-large to election from two single member districts, one of which was majority-minority. There was never an allegation in *Chisom* that the African American vote outside that district was diluted, nor did the *Chisom* Decree purport to impose obligations elsewhere in Louisiana.<sup>2</sup> After 2000, *Chisom*, and the Consent Decree, laid dormant for over a decade.<sup>3</sup>

### **C. The 2012 *Chisom* Litigation**

In 2012, the Eastern District revisited *Chisom* for the limited purpose of determining the seniority of two Louisiana Supreme Court Justices because under

---

<sup>2</sup> Plaintiffs here are not challenging the elimination of an at-large system in the Orleans Parish area; nor are they are challenging the creation of a majority-minority single member district in the Orleans Parish. And *Chisom* did not concern itself in any way with the only judicial district at issue in this case: that surrounding Baton Rouge. In contrast, Plaintiffs here contend that an additional majority-minority Louisiana Supreme Court district can be drawn without impacting the single member district in Orleans Parish created by the *Chisom* Decree.

<sup>3</sup> Appellants assert that “[t]he history of litigation over Louisiana’s State Supreme Court districts spans nearly 35 years.” Pet. at 4. Not really. *Chisom* wound its way to the U.S. Supreme Court and back over the course of several years from 1989 to 1992. It briefly came to life in 2000 when the Consent Decree was modified and again in 2012 when the Eastern District revisited *Chisom* for the limited purpose of calculating the tenure of Louisiana Supreme Court Justice Johnson.

the Louisiana Constitution the chief justice is the senior justice. In *Chisom v. Jindal*, the Eastern District “held that the seat created by the *Chisom* litigation—the *Chisom* seat—was entitled to the same accrual of tenure as any other Supreme Court seat.” Pet. at 6. (*See generally* 890 F. Supp. 2d 696). Since the issue presented in *Chisom v. Jindal* concerned the very seat created by the prior litigation, it was not surprising that the Eastern District held “that it had jurisdiction over the matter” (ECF No. 47 at 11) and “continuing jurisdiction and power to interpret” the terms of the *Chisom* Decree with regard to the *Chisom* seat. Pet. at 7. The Eastern District did *not* hold, nor does it follow, that the remedy put into place by the *Chisom* Decree was less-than-final or that no other court could ever exercise jurisdiction over a case involving the election of Louisiana Supreme Court justices.

Indeed, the State of Louisiana itself recognized this when it *objected* to the continuing jurisdiction of the Eastern District in the 2012 *Chisom* Litigation. 890 F. Supp. 2d at 708. Defendants’ position in this matter – that the Eastern District has perpetual jurisdiction over any case involving the voting rights of Louisiana residents concerning Supreme Court elections (even if they are located in a different district), the apportionment of districts, and the election of Louisiana Supreme Court justices – is a reversal of its prior position on the issue and finds no support at law.

## ARGUMENT

28 U.S.C. § 1292(b) provides as follows:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). When such an order is issued, section 1292(b) further provides: “The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order[.]” *Id.* “Interlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed.” *Fannie Mae v. Hurst*, 613 F. App’x 314, 318 (5th Cir. 2015) (quoting *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997)). “The purpose ... is to provide for an interlocutory appeal in those exceptional cases” in which the statutory criteria are met. *United States v. Garner*, 749 F.2d 281, 286, *opinion supplemented*, 752 F.2d 116 (5th Cir. 1985). “An interlocutory appeal assuredly does not lie simply to determine the correctness of a” lower court’s judgment. *Clark-Dietz & Assocs.-Eng’rs, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 68 (5th Cir. 1983).

As this Court has explained:

The foundation of the principle codified by 28 U.S.C. § 1291 (1976), which permits appeals of only “final decisions,” is the avoidance of piecemeal litigation. The policy that cases are ordinarily to be

reviewed only once, and then comprehensively, conserves judicial energy and eliminates the delays, harassment, and costs that would be occasioned by a succession of separate interlocutory appeals.

The Judicial Code, however, authorizes appeals from interlocutory orders in exceptional cases such as those in which the potential shortening of litigation warrants such an extraordinary procedure.

*United States v. Bear Marine Servs.*, 696 F.2d 1117, 1119 (5th Cir. 1983) (emphasis added), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). “Routine resort to § 1292(b) requests would hardly comport with Congress’ design to reserve interlocutory review for ‘exceptional’ cases while generally retaining for the federal courts a firm final judgment rule.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996). *See also Clark-Dietz*, 702 F.2d at 69 (“The basic rule of appellate jurisdiction restricts review to final judgments, avoiding the delay and extra effort of piecemeal appeals.”).

The district court’s order is not appropriate for interlocutory review. Here, as below, the State’s argument rests on the false premise that it will inevitably be called upon to “obey two conflicting orders from two different courts.” Pet. at 1. But, as the district court acknowledged, the *Chisom* Decree created Supreme Court District 1, while this case is specifically geared to “the redrawing of Supreme Court District 5 in Baton Rouge.” The relief Plaintiffs seek – the creation of a second majority-minority district in and around Baton Rouge Parish – can be

granted without disturbing District 1, thus avoiding any conflict between sister courts. (ECF No. 47 at 22.) Thus, the Petition should be denied.

**A. Defendants Have Not Demonstrated That the District Court’s Order Involves a “Controlling Question of Law”**

“[A]n issue is not considered a controlling question of law if ‘resolution on appeal would have little or no effect on subsequent proceedings.’” *United States v. La.*, CIV A. 11-470-JWD-RLB, 2016 WL 4522171, at \*3 (M.D. La. Aug. 29, 2016) (quoting *United States v. La. Generating LLC*, 09-100, 2012 WL 4588437, at \*1 (M.D. La. Oct. 2, 2012)). “Multiple circuits have specified that a controlling question of law must refer to a ‘pure question of law’—one that the ‘court of appeals could decide quickly and cleanly without having to study the record.’” *Gruver v. La. ex rel Bd. of Supervisors*, CIVIL ACTION 18-772-SDD-EWD, 2019 WL 6245421, at \*3 (M.D. La. Nov. 22, 2019) (alteration in original) (quoting *Williams v. Taylor*, CIV. A. 15-321, 2015 WL 4755162, at \*3 (E.D. La. Aug. 11, 2015)).

The interlocutory appeal sought by Defendants will have little or no effect on the subsequent proceedings on the merits. The thrust of Defendants’ argument in their motions to dismiss was that an Eastern District consent decree issued twenty years ago – in a different case dealing with different issues concerning a different judicial district – deprives the Middle District of jurisdiction. Defendants complain that “[w]hile finding that the question as to its jurisdiction was ‘a close

one’ it nevertheless held . . . that the purpose of the Consent Decree was to create a single majority-minority district in the Orleans area,” Pet. at 2, and this case concerns the Baton Rouge area. (See ECF No. 47 at 22 (“[A] fair reading of the *Complaint* as a whole demonstrates that these Plaintiffs—from East Baton Rouge Parish, and thus outside the *Chisom* class—are in fact seeking relief by the redrawing of Supreme Court District 5 in Baton Rouge.”).) But “[n]ot just any close question should be certified for interlocutory appeal. The law is filled with close cases. Judicial economy counsels against sending every such close call to the courts of appeals, for district courts are quite capable of making those calls.” *Batton v. Georgia Gulf*, 261 F. Supp. 2d 575, 585 (M.D. La. 2003).

The district court rejected Defendants’ argument that the *Chisom* Decree deprived it of jurisdiction for multiple reasons. (ECF No. 47, at 22). But even if Defendants’ position had any merit – which it does not – the best outcome Defendants could hope for would be to have the case transferred to the Eastern District or dismissed without prejudice. Either of these eventual outcomes would be a waste of time and resources, especially in light of the fact that the case has now been pending in the district court (and is still proceeding there) for over a year and a half. Neither result would terminate the case on the merits, nor have a “significant impact on subsequent proceedings” as the district court suggested in certifying the case for interlocutory appeal. ECF No. 58, at 16. Defendants do not

attempt to explain what effect would result from having the case tried in the Eastern District, because there is no reason to believe that a transfer or re-filing in that court would make any difference whatsoever on the course of the litigation. The apparent effects of such an outcome would be to deny Plaintiffs not only their *choice* of forum but also the most *appropriate* forum – and further delay resolution of the case on the merits.<sup>4</sup> In any event, the overarching fact is that there is no injunction arising out of the *Chisom* Decree that would preclude the Middle District’s “jurisdiction” over this case. There is no basis to conclude that Plaintiffs here were parties or in privity with the parties in *Chisom*. See *Martin*, 490 U.S. at 759. In this light, Defendants’ argument that the Middle District lacks jurisdiction is best viewed as a request to transfer venue, which Defendants altogether fail to justify (and which the district court did not certify for interlocutory review).

Nevertheless, in order to alleviate Defendants’ purported concern about the potential for “conflicting” district court orders, Plaintiffs have offered to stipulate that the trial court need not modify the *Chisom* Decree, which established Supreme

---

<sup>4</sup> Moreover, Petitioners’ argument that it would be “an extraordinary waste of party and judicial resources” to litigate this case through to the merits if this Court later finds that the Eastern District should have heard the case also rests on a false premise that the parties here would then have to restart the case from zero. If, as it suggests, the State has no preference for either court and wants a speedy resolution of this matter, it could drop any appeal to the Fifth Circuit on this issue and could, in any event, stipulate that the factual record developed in the Middle District will be used to resolve the case in the Eastern District if future proceedings there are required.

Court District 1, as part of any remedy Plaintiffs may obtain.<sup>5</sup> Defendants raise the specter of a jurisdictional problem that does not exist, either legally or practically.<sup>6</sup> Furthermore, because Defendants insist that the history of *Chisom* and Supreme Court District 1 bears upon this case (which it does not), this is not a case that the “court of appeals could decide quickly and cleanly without having to study the record.” *Gruver*, 2019 WL 6245421, at \*3 (citations omitted). While the district court suggests that the scope and effect of the *Chisom* Decree “involves a threshold question of law” (ECF No. 58 at 17), it remains true that this Court would, on interlocutory review, have to thoroughly “study the record” in *Chisom* before reaching even the “threshold” question the district court identifies. Indeed, the scope and effect of the *Chisom* Decree is deeply intertwined with the facts of *Chisom v. Jindal* and the 2000 modification of the Decree, in which the parties agreed that Act 776 “[met] the intent of all parties to this [*Chisom*] litigation *for final resolution of the matter.*” (ECF No. 47 at 11 (first modification in original).) None of these questions is suitable for interlocutory review.

---

<sup>5</sup> Plaintiffs make much of Plaintiffs’ offer to stipulate, arguing that Plaintiffs “are unable to amend a Complaint by way of averments in a response to a motion to dismiss,” Pet. at 20 n.10, and that “a party cannot ‘accept’ jurisdiction, where none exists to accept,” Pet. at 20. This misses the point. Plaintiffs do not seek to amend the Complaint. They merely offered to make such a stipulation, subject to Defendants’ consent (exactly as they did in *Chisom*).

<sup>6</sup> Again, if the trial court grants the relief Plaintiffs seek by redrawing District 5 and leaving District 1 undisturbed, the *Chisom* plaintiff class would not have standing to challenge that order. The State can avoid any abstract conflict by accepting jurisdiction and venue in the Middle District.

**B. There is No Substantial Ground for Difference of Opinion Concerning the Scope of the *Chisom* Decree**

Defendants also fail to meet their burden of showing that there is substantial ground for difference of opinion as required for section 1292(b) certification. “The threshold for establishing [a] ‘substantial ground for difference of opinion’” for interlocutory certification “is a high one.” *S. U.S. Trade Ass’n v. Unidentified Parties*, No. 10-1669, 2011 WL 2790182, at \*2-4 (E.D. La. July 14, 2011) (denying motion to certify interlocutory appeal in part Defendant “failed to demonstrate” a “substantial grounds for a difference of opinion.”) (citations omitted). “The mere fact that settled law might be applied differently is insufficient to show that there is a substantial ground for difference of opinion.” *Id.* “Disagreement with the district court’s ruling is insufficient to establish a substantial ground for a difference of opinion.” *Cedar Lodg Plantation, LLC v. CSHV Fairway View I, LLC*, No. CV 13-00129-BAJ-EWD, 2017 WL 3908918, at \*11 (M.D. La. Sept. 6, 2017), *aff’d in part, vacated in part, remanded*, 753 F. App’x 191 (5th Cir. 2018) 2017 WL 3908918 (citing *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 724 (N. D. Tex. 2006)).

Defendants’ arguments on this factor continue to rehash their motions to dismiss and show nothing more than their disagreement with the district court’s order. Defendants’ claim that there is a substantial ground for difference of opinion as to whether the Middle District is empowered to “issue relief that

directly conflicts with a sister court’s ongoing Consent Decree over the exact same map.” Pet. at 17. The district court rejected this contention and its supporting propositions. Defendants assert, for example, that voting rights jurisprudence is unique in that “any specific [elected] body of government can only have *one* map setting its electoral boundaries at any single point in time.” Pet. at 13. But this ignores that the central aim of *Chisom* was “to ensure black voters *in the Parish of Orleans* have an equal opportunity to participate in the political process and to elect candidates of their choice[.]” (ECF No. 47 at 10, quoting *Chisom* Decree (emphasis added).)

Moreover, Defendants’ assertion that the Eastern District forever claimed jurisdiction over a “map” runs counter to the plain language of the *Chisom* Decree and defies common sense. That the State ultimately adopted a new, statewide scheme for the election of Supreme Court justices to draw the new District 1 does not mean that the Eastern District intended to assert or in fact did retain jurisdiction over all future cases concerning different Supreme Court districts. This is why the State consented to an order modifying the *Chisom* Decree in 2000 and agreed “to accept Louisiana Acts 1997, No. 776 as *compliance with the mandates* of said consent judgment.” (*See* Ex. D. to Pet., Order.) (*See* also ECF No. 47 at 11 (recognizing that Louisiana Acts 1997, No. 776 “[met] the intent of all parties to this litigation [*Chisom*] for final resolution of the matter.” (first modification in

original).) Thus, it is absurd for the State to contend now – twenty years later – that the Eastern District intended to retain jurisdiction over “the map” even after that court and the *Chisom* parties acknowledged that Louisiana Acts 1997, No. 776 fulfilled the “mandates” of the Decree. Nor does it follow that the Middle District cannot decide whether the State unlawfully dilutes the votes of African American citizens who live in a wholly separate part of the State that was not at issue in *Chisom*.

In denying Defendants’ motions to dismiss, the district court stated: “Contrary to Defendants’ arguments, this relief [the redrawing of Supreme Court District 5 in Baton Rouge] can easily be accomplished without redrawing District 1 in Orleans Parish.” (ECF No. 47, at 22.) Indeed, Plaintiffs maintain, and will later show, that there is at least one way to redraw Supreme Court District 5 without affecting Orleans Parish and Supreme Court District 1. Therefore, Defendants’ belief that any order from the Middle District resulting in any alteration of any boundary of any district in creating a new majority-minority district in and around Baton Rouge will “place[ ] the State in the position of having to disobey one court to obey the other,” Pet. at 16, is unfounded. So long as District 1 is not affected, the mandates of the *Chisom* order will not be implicated. There will not be even a hypothetical conflict with the *Chisom* Decree, much less a real conflict.

Defendants' failure to carry their burden on this factor is also a sufficient and independent basis for denying the Petition.

**C. Certification of the Order for Interlocutory Appeal Will Lengthen Already Delayed Litigation**

Certifying the Order for interlocutory appeal would severely delay the adjudication of Plaintiffs' fundamental rights. Defendants do not—and cannot—argue that Plaintiffs are not entitled to have their claims heard. A trial on the merits will occur but has not yet been scheduled, even eighteen months after the Complaint was filed, because the first many months of this case have been spent refuting Defendants' hypothetical fears that any ruling on the merits by the Middle District will intrude upon the *Chisom* Decree.

Interlocutory review will also result in piecemeal appeals – contrary to the intent of 1292(b) and governing Fifth Circuit law. Defendants argue that “[i]f the [Middle] District Court lacks the power to modify a sister’s court’s Consent Decree, then any litigation in the District Court is a waste of judicial and party resources.” Pet. at 18. The State attempted a similar argument in *United States v. Louisiana*, 2016 WL 4522171, at \*4, a case concerning the State’s alleged failure to meet its obligation under the National Voter Registration Act. There, the State argued that an interlocutory appeal of this Court’s denial (in part) of the State’s motion for summary judgment would materially advance the litigation because it “would constitute a waste of time and resources if the case proceeded to trial . . .

and it proved out after appeal that only a portion of the transactions [at issue in the case] should have been tried.” *Id.* (citation omitted). The court rejected this argument.

Defendant’s logic is circular and misguided; *every* erroneous ruling by a district court has potential to harm litigants affected by the judgment, just as every erroneous ruling will likely lead to additional expense of judicial resources to reach a just resolution. However, this does not render every erroneous ruling subject to interlocutory appeal. Moreover, Defendant’s argument under this prong is premised on the underlying assumption that this Court’s ruling is erroneous. However, this premise is undermined by the fact that, as discussed above, there is no difference of opinion on this issue . . . , and the few rulings rendered on the subject are consistent with this Court’s. Defendant has offered no persuasive arguments to convince this Court the Fifth Circuit would disagree with its previous Order.

*Id.*

The result should be the same here. As the *United States v. Louisiana* court held, any error by a court could lead to the additional expense of judicial resources and could “harm” litigants. It does not follow, however, that every ruling by a district court should be certified for interlocutory appeal under § 1292(b). Quite the opposite, Defendants persistent efforts to muddy the waters by interweaving this case with *Chisom* strongly suggests that Defendants simply disagree with the Court’s decision and will go to extreme lengths to avoid reaching the merits of this case. The Court should see through this veneer and deny the Petition.

Furthermore, transferring or re-filing the case in the Eastern District would actually result in a waste of judicial (and party) time and resources. The case has

been pending for a year and a half. The parties have spent any hours developing strategies, submitting briefs, and preparing for the discovery phase in the trial court. Shifting the case to the Eastern District at this stage – for no good reason other than Defendants’ unfounded fear of the potential for “conflicting” orders – runs the risk lengthening the course of the litigation with no upside.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court reject Defendants’ Petition.

Dated: November 17, 2020

Respectfully submitted,

Of Counsel:

Meryl Macklin  
meryl.macklin@bclplaw.com  
**BRYAN CAVE LEIGHTON PAISNER LLP**  
Three Embarcadero Center, 7th Floor  
San Francisco, CA 94111  
(415) 675-3400  
(415) 675-3434 Facsimile

Jason C. Semmes  
jason.semmes@bclplaw.com  
**BRYAN CAVE LEIGHTON PAISNER LLP**  
1155 F Street NW, Suite 700  
Washington, DC 20004  
(202) 508-6000  
(202) 508-6200 Facsimile

Jennifer N. Nwachukwu  
jnwachukwu@lawyerscommittee.org  
**LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW**  
1500 K Street NW, Suite 900  
Washington, DC 20005  
(202) 662-8600

Arthur R. Thomas  
**ATTORNEY AT LAW**  
3313 Government Street  
Baton Rouge, LA 70806  
(225) 334-7490  
(225) 334-7491 Facsimile

/s/ Jennifer Kies Mammen

By: Jennifer Kies Mammen  
jennifer.mammen@bclplaw.com  
Alec W. Farr (*admission applied for*)  
awfarr@bclplaw.com  
Adam L. Shaw (*admission applied for*)  
adam.shaw@bclplaw.com  
**BRYAN CAVE LEIGHTON PAISNER LLP**  
1155 F Street NW, Suite 700  
Washington, DC 20004  
(202) 508-6000  
(202) 508-6200 Facsimile

Jon Greenbaum, Esq.  
jgreenbaum@lawyerscommittee.org  
Ezra D. Rosenberg, Esq.  
erosenberg@lawyerscommittee.org  
**LAWYERS' COMMITTEE FOR CIVIL  
RIGHTS UNDER LAW**  
1500 K Street NW, Suite 900  
Washington, DC 20005  
(202) 662-8600

*Counsel for Plaintiffs-Respondents  
Louisiana State Conference of the  
National Association for the  
Advancement of Colored People,  
Anthony Allen, and Stephanie Anthony*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

1. This Answer in Opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2, it contains 5,190 words.

2. This Answer in Opposition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, with 14 point for text and 12 point for footnotes.

/s/ Jennifer Kies Mammen  
Jennifer Kies Mammen

**CERTIFICATE OF SERVICE**

I, Jennifer Mammen, certify that on this 17th day of November, 2020, a true and correct copy of the foregoing Plaintiffs-Respondents' Answer in Opposition to Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) has been served on all parties through the Court's electronic filing system and forwarded by electronic to the following:

Jason Torchinsky  
*Counsel of Record*  
Phillip M. Gordon  
HOLTZMAN VOGEL JOSEFIK TORCHINSKY PLLC  
15405 John Marshall Hwy  
Haymarket, VA 20169  
Phone: (540) 341-8808  
Fax: (540) 341-8809  
jtorchinsky@hvjt.law

Elizabeth Murrill  
Solicitor General of Louisiana  
Angelique Duhon Freel  
Jeffrey Wale  
Assistant Attorneys General  
Louisiana Department of Justice  
Civil Division  
P. O. BOX 94005  
Baton Rouge, LA 70804-9005  
Telephone: (225) 326-6017  
Facsimile: (225) 326-6098  
MurrillE@ag.louisiana.gov

*Counsel for Defendant-Petitioner the State of Louisiana*

*(continued on next page)*

Celia R. Cangelosi  
5551 Corporate Blvd. Suite 101  
Baton Rouge, LA 70808  
Phone: (225) 231-1453  
Fax: (225) 231-1456  
celiacan@bellsouth.net

*Counsel for Defendant-Petitioner  
Kyle Ardoin the Secretary of State  
of Louisiana*

/s/ Jennifer Kies Mammen  
Jennifer Kies Mammen