IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

ANTHONY ALLEN; STEPHANIE ANTHONY; LOUISIANA STATE CONFERENCE OF THE NAACP,

Plaintiffs-Appellees,

v.

STATE OF LOUISIANA; R. KYLE ARDOIN, SECRETARY OF STATE OF LOUISIANA IN HIS OFFICIAL CAPACITY,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NO. 19-479-JWD-SDJ

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CERTIFICATE OF INTERESTED PERSONS

No. 20-30734

ANTHONY ALLEN; STEPHANIE ANTHONY; LOUISIANA STATE CONFERENCE OF THE NAACP,

Plaintiffs-Appellees,

v.

THE STATE OF LOUISIANA, *et al.,*

Defendants-Appellants.

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.

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STATEMENT REGARDING ORAL ARGUMENT

Cases involving redistricting, the Voting Rights Act, and the competing jurisdiction of the various district courts are highly nuanced inquiries that go to the heart of concerns over federalism. Oral argument will materially assist the Court in its analysis of the issues presented on appeal. Oral argument will allow the Court to present, and counsel to respond to, any questions the Court may have in a timely and efficient manner. Therefore, pursuant to local rule 28.2.3 and Fed. R. App. P. 34(a), Appellants hereby request oral argument in this matter.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(b). *See also* Fed. R. App. P. 5(a)(3). After receiving permission from the District Court, ROA.571, Appellants timely petitioned this Court to permit this interlocutory appeal. The petition was granted on November 24, 2020. *Allen, et al. v. State of Louisiana, et al.*, No. 20-30734 (5th Cir. Nov. 24, 2020) *transferred from* No. 20-900428. The jurisdiction of the District Court is disputed by Appellants and is the reason for this interlocutory appeal. Plaintiffs below assert jurisdiction under 28 U.S.C. §§ 1331, 1342(a). The Court's jurisdiction on review, however, "is the certified *order*, not merely the questions in a vacuum . . . ." *Faulk v. Union Pac. R.R. Co.,* 576 Fed. Appx. 345, 348 (5th Cir. 2014) (emphasis in original) (citing *Castellanos-Contreras v. Decatur Hotels, LLC,* 622 F.3d 393, 398 (5th Cir. 2010) (*en banc*)); *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) (unanimous court).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does a consent decree issued by one district court that expressly retains jurisdiction to enforce and interpret the decree's terms deprive a sister district court of jurisdiction to modify or otherwise interfere with the decree?

2. Does a district court have the ability to modify the injunctions of a sister court?

STATEMENT OF THE CASE

I. THE HISTORY OF LITIGATION INVOLVING LOUISIANA'S STATE SUPREME COURT DISTRICTS.

Litigation over Louisiana's Supreme Court districts has a history which spans 33 years. Prior to the original *Chisom* litigation, Justices of the Louisiana Supreme Court were elected from six districts. *Chisom v. Jindal*, 890 F. Supp. 2d 696, 702 (E.D. La. 2012). Five of the six districts were single-member. *Id*. The First Supreme Court District was comprised of four parishes and elected two justices on an at-large basis, bringing the total number of justices to seven. *Id*.

In 1986, several plaintiffs brought suit alleging violations of the U.S. Constitution and Section 2 of the Voting Rights Act. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987); *see also Chisom v. Jindal*, 890 F. Supp. 2d at 702.[1] After a number of appeals to the Fifth Circuit, *see, e.g.*, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), and an appeal to the United States Supreme Court, *Chisom v. Roemer*, 501 U.S. 380 (1991), a Consent Decree was entered by the Eastern District of Louisiana on August 21, 1992 ("Consent Decree"). *See* 1992 Consent Decree ROA.239-249.

[1] A more expansive history of the litigation involving Louisiana's Supreme Court districts can be found in *Chisom v. Jindal*, 890 F. Supp. 2d 696 (E.D. La. 2012) and is summarized in Appellants' Pet. for Interlocutory Review, *Allen v. State of Louisiana*, No. 20-30734 (5th Cir. Nov. 24, 2020) *transferred from* No. 20-90042.

The 1992 Consent Decree mandated, *inter alia*, that there be a "Supreme Court district comprised solely of Orleans Parish, for the purpose of electing a Supreme Court justice from that district when and if a vacancy occurs in the present First Supreme Court District prior to January 1, 2000." ROA.241. The 1992 Consent Decree went on to affirm that legislation would be enacted in the 1998 legislative session to provide for reapportionment of the now seven Louisiana Supreme Court districts. ROA.244. The 1992 Consent Decree effectively "memorialized" La. Acts 1992, No. 512 of the Louisiana Legislature. *Chisom v. Jindal*, 890 F. Supp. 2d at 703-705 (quoting *Perschall v. State*, 697 So. 2d 240, 245-47 (La. 1997)). The Act created a district comprised of Orleans Parish that would take effect on January 1, 2000, or earlier if a vacancy occurred in the first district before January 2000. ROA.243-244.

Act 776 of 1997 was signed into law on July 10, 1997. *See Chisom v. Jindal*, 890 F. Supp. 2d at 705. Act 776 provided for the reapportionment of the seven Supreme Court districts as envisioned by the Consent Decree. *See id.* Specifically, Act 776 mandated seven single-member Supreme Court districts and assigned the formerly at-large justices to individual districts. *Id*. at 706. In 1999, "certain parties" moved that the original Consent Decree be modified to reflect the fact that the parties accepted Act 776 as an addendum to the 1992 Decree. *Id*. The request was

granted, and Act 776 was made part of the Consent Decree. *Id*; *see also* 2000 Consent Decree Modification, ROA.251-257.

Last decade, Justice Johnson (formerly Chief Justice)[2] of the Louisiana Supreme Court, as well as the *Chisom* plaintiffs, moved in the Eastern District of Louisiana for that court to "interpret" the terms of the 1992 Consent Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 701. At issue in *Chisom v. Jindal* was the proper method of calculating Justice Johnson's seniority for tenure purposes—and therefore to determine who would be the Chief Justice of the Louisiana Supreme Court—under the terms of the 1992 Consent Decree, as modified. *See id.* at 711. Several parties moved to dismiss the action under the theory that the Eastern District court no longer had jurisdiction under the Consent Decree. *Id.* at 708. That court flatly rejected the argument and asserted that it alone had "subject matter jurisdiction to interpret and enforce the decree's terms." *Id*. at 710-11. The District Court stated that only after an "affirmative ruling" by the Eastern District "that the Consent Judgment has been completely satisfied and thus has been vacated or terminated" does that court lose jurisdiction. *Id*. at 711. Subsequent to the 2012 litigation, Defendant is unaware of any further pertinent litigation over Louisiana's State Supreme Court districts other than the instant litigation.

[2] Justice Johnson's term expired on December 31, 2020, after serving on the court from October 31, 1994, until becoming Chief Justice on February 1, 2013.

II. THE CASE BELOW.

On July 23, 2019, two individual voters and the Louisiana State Conference of the NAACP filed a complaint in the Middle District of Louisiana alleging violations of Section 2 of the Voting Rights Act. *See NAACP, et al. v. State of Louisiana, et al.*, No. 19-cv-479 (M.D. La.) (ROA.27-28).[3] The Prayer for Relief seeks a declaration that "the current apportionment of Louisiana Supreme Court districts violates Section 2 of the Voting Rights Act" and an injunction that will prevent the State "from administering, implementing, or conducting any future elections for the Louisiana Supreme Court under the current method of election." ROA.28 at ¶¶ a-b. This requested relief specifically implicates the ongoing Consent Decree in the Eastern District. *Compare* ROA.28 at ¶¶ a-b *with* ROA.244 at ¶ C(8) ("[F]uture Supreme Court elections . . . shall take place in the newly reapportioned districts."). Nowhere on the face of the Complaint is there an allegation that relief is being sought exclusively for the Fifth Supreme Court District. *See generally* ROA.14-29. The District Court itself, in its order certifying the appeal, acknowledged that "[t]he net *effect* of the relief the *Chisom* plaintiffs sought is identical to the relief sought by the instant Plaintiffs: a redrawing of all *seven* districts by the Legislature to ensure compliance with the Voting Rights Act." ROA.570 (italics in original; underlining added for emphasis).

[3] Further citations to the record below will be exclusively to the Record on Appeal.

On October 4, 2019, the State of Louisiana filed a motion to dismiss Plaintiffs' claims because, *inter alia*, the Court lacked jurisdiction due to the continuing Consent Decree in the Eastern District of Louisiana.[4] Response, reply, and supplemental briefing followed suit. *See* ROA.288-310; ROA.311-331; ROA.332-335; ROA.336-341; ROA.342-352; ROA.366-373. On June 26, 2020, the District Court issued its Ruling and Order denying Defendants' Motions to Dismiss. ROA.377-449.

Subsequently, on July 17, 2020, Defendants filed a joint motion in the Middle District Court to certify the jurisdictional question for interlocutory appeal to this Court as well as a stay pending appeal. ROA.476-489. An additional motion was filed in the Middle District to voluntarily transfer venue pursuant to either 28 U.S.C. § 1404(a) or the first-to-file rule. ROA.490-503. After briefing, the District Court granted the motion to certify interlocutory appeal and denied the motion to stay pending appeal. ROA.551-577. The District Court, as a separate order, denied Defendants' Motion to Transfer without prejudice "subject to refiling . . . after [this Court] renders a decision on the . . . interlocutory appeal . . . ." ROA.12.

In its order certifying the question, the District Court concluded that all three prongs of the interlocutory review standard were satisfied. ROA.565-571. This

[4] The Louisiana Secretary of State filed a separate motion to dismiss, respecting the ongoing Consent Decree, which incorporated and adopted by reference all of the State of Louisiana's arguments. *See* ROA.259.

Court subsequently granted Appellants' timely petition for interlocutory review and set briefing. ROA.579.

SUMMARY OF THE ARGUMENT

The Middle District Court acted without jurisdiction or legal authority in reviewing a case involving a consent decree that was approved and maintained by a different federal district court. The Middle District's order denying Defendants' motion to dismiss was in error for at least two reasons.

First, the Middle District acted without regard for the fact that the Consent Decree governing this case was approved by its sister court in the Eastern District of Louisiana, and that the decree is still maintained by that court to this day. When the Middle District denied Defendants' motions to dismiss in this case, *see* ROA.377, it exercised power that was not its to employ. It is essential for the continued functioning of the federal judiciary that courts show due respect for the jurisdiction of their sister courts, or risk blurring all lines of judicial authority. *See Mann Mfg. v. Hortex, Inc.*, 439 F.2d 403, 405 (5th Cir. 1971). This principle of comity is especially meaningful in cases such as this one, where the Consent Decree was the product of lengthy litigation and settlement negotiations that extended over the course of a decade and the original district court has never relinquished its jurisdiction over the matter. *See Chisom v. Jindal*, 890 F. Supp. 2d at 711.

While federal courts must jealously guard their own jurisdiction, they must also decline to encroach upon the jurisdiction of their sister courts. When a jurisdictional boundary line is crossed, an appellate court has two choices: either clearly reestablish the line or invite future trespasses. If this case is allowed to proceed in the Middle District, then there will be nothing preventing other federal courts from testing their own jurisdictional boundaries by issuing a variety of gratuitous opinions on cases and controversies in which sister courts have already asserted jurisidiction and issued orders.

Second, concerns over federalism should never be far from the minds of the federal judiciary when quintessential state functions are in dispute. *In re Gee*, 941 F.3d 153, 166 (5th Cir. 2019) (per curiam). Louisiana has a sovereign interest in not being subject to conflicting court orders, especially when those orders intrude upon sovereign state functions such as organizing and conducting elections.

The Middle District acted without regard for the fact that the instant case involves redistricting, and redistricting litigation is a unique endeavor that can impact the voting rights of every individual residing within a state.[5] A court cannot evaluate a redistricting case without considering the federalist principles embodied in the United States Constitution, which clearly allocates the primary authority for

[5] This is not to say, however, that every voter has standing to challenge a redistricting map. *Gill v. Whitford*, 138 S. Ct. 1916, 1929-31 (2018) (holding that allegations of statewide redistricting harm are insufficient for standing purposes).

reapportionment to state legislatures and then, only as a last resort, to the federal courts. *See Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978). Most importantly, all redistricting litigation involving statewide district maps must conclude with the selection of a single map that governs all future elections in the state and which thereby potentially impacts the rights of every voter of that state. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964); *Reynolds v. Sims*, 377 U.S. 533, 579-80 (1964). Changes to the boundaries of one district often require offsetting alterations to other districts. In a map composed of only seven districts covering an entire state, changing the boundaries of even a single district is a comprehensive process with statewide ramifications. If alterations to an existing map are required by a federal court, then liability must be determined and the state must have an opportunity to adjust the lines. The court can then review those lines or act if the state fails to comply with the court's order.

ARGUMENT

At bottom, this case is about the power of one district court to modify the injunctions of a sister court. The Middle District's order denying Defendants' motions to dismiss was in error for two reasons, the first of which implicates the horizontal relationship among the federal district courts themselves (jurisdiction), and the second of which concerns the vertical relationship between federal courts and state governments (federalism).

Appellees attempt to deflect attention from the inherent conflict their lawsuit raises with the existing consent decrees by minimizing the significance of their claims: They argue that they only implicate one district in the State and that the consequences of allowing the Middle District to create a new State Supreme Court district can somehow be cabined to the land mass comprising the Middle District.[6] This is faulty reasoning on multiple grounds. First, there is *no relief* that can be ordered by the Middle District that will *not infringe* upon the Eastern District's Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 711. Second, no jurisdictional dispute over a redistricting map is ever truly a purely local matter, and the consequences cannot be adequately contained when the case touches on core issues of federalism and separation of powers that will have wide-ranging impacts throughout the State.

The District Court, in its analysis, relied heavily on claim preclusion and collateral estoppel in reaching its determination that the ongoing Consent Decree in the Eastern District does not deny the Middle District jurisdiction. Preclusion,

[6] Plaintiffs attempted to amend their Complaint in their response to the State's motions to dismiss by "stipulating" that they are only seeking relief in the Fifth Supreme Court district. ROA.508; *see also* ROA.296-297. The District Court improperly credited this assertion. ROA.398. This is problematic for a number of reasons. First, a plaintiff cannot amend a complaint in a response to a motion to dismiss. *See, e.g.*, *O'Rourke v. Fairgrounds*, 2004 U.S. Dist. LEXIS 25620, at *8 n.22 (E.D. La. Dec. 21, 2004) ("[T]he Court must look to the face of the Complaint and Amended Complaint when considering a motion to dismiss.") (citing *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995)). Second, even assuming the underlying assertion is true, the face of the Consent Decree encompasses *all seven* supreme court districts, of which the fifth district is obviously one. ROA.244.

however, is a red herring. The issues here are jurisdiction and comity, not collateral estoppel.

The legal issues of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) are reviewed *de novo*. *Thompson v. Starkville*, 901 F.2d 456, 459 (5th Cir. 1990) ("[A]lthough the resolution of … legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief, as the issue involved is a legal one, [the Court] engage[s] in a *de novo* review." (internal quotations and alterations omitted)). This Court, with this opportunity on interlocutory review, should remedy the District Court's legal errors.

I. THE LOUISIANA MIDDLE DISTRICT COURT LACKS JURISDICTION TO MODIFY A SISTER COURT'S ORDERS.

A. The Scope of the 1992 Consent Decree, as Amended in 2000.

"The entry of a consent decree is more than a matter of agreement among litigants. It is a 'judicial act.'" *Ruiz v. Estelle*, 161 F.3d 814, 823 (5th Cir. 1998) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) ("*Clements*")). At base, a consent decree is a "judgment entered by consent of the parties" which exposes its "hybrid nature between judgment and contract." *Id.* at 822 (quoting and citing *Spacek v. Mar. Ass'n*, 134 F.3d 283, 284 (5th Cir. 1998) and *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland,* 478 U.S. 501, 519 (1986) ("*Firefighters*")). A "consent decree does not merely validate a compromise but,

by virtue of its injunctive provisions, reaches into the future and has continuing effect. . . . ." *Clements*, 999 F.2d at 846 (quoting *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*) (Rubin, J., concurring)).

"The scope of a consent decree must be discerned within its four corners" *Smith v. Sch. Bd. of Concordia Par.,* 906 F.3d 327, 336 (5th Cir. 2018) (quoting *Firefighters*, 467 U.S. at 574)). The four corners of the 1992 Consent Decree clearly delineate its reach. The 1992 Consent Decree states that

> Legislation will be enacted in the 1998 regular session of the Louisiana Legislature which provides for the reapportionment of the seven districts of the Louisiana Supreme Court in a manner that complies with the applicable federal voting law, taking into account the most recent census data available. The reapportionment will provide for a single-member district that is majority black in voting age population that includes Orleans Parish in its entirety. *The reapportionment shall be effective on January 1, 2000, and future Supreme Court elections after the effective date shall take place in the newly reapportioned districts*.

ROA.244 at ¶ C(8) (emphasis added). The Decree goes on to state that "[t]he [Eastern District] Court shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished." ROA.246 at ¶ (K). The signatories of the Consent Decree include the Louisiana Secretary of State, the Governor of Louisiana, and a representative of the Attorney General on his behalf. ROA.247-249. To avoid any confusion as to the continuing nature of the judgment, the Court stated that "[t]his consent judgment constitutes a final judgment of all claims raised in this action by the Chisom plaintiffs and the United States, *and is*

binding on all parties and their successors in office." ROA.245 at ¶ (H) (emphasis added).

The following, therefore, is clear from the text of the Decree itself: (1) the Decree constitutes a permanent injunction dictating the perpetuation of the redistricting finalized by the Louisiana Legislature in 1997, as ordered by the Eastern District Court in 1992 and adopted by the Eastern District Court in 2000, *see* ROA.251-257; (2) the Decree mandates that *all future* elections shall take place in the districts contemplated by the Decree; and (3) the State of Louisiana and its executive officers are bound by judicial order to follow the terms of the Decree until "the complete implementation of the final remedy has been accomplished." *See* ROA.244-249. It seems plain then that the 1992 Consent Decree, which constitutes a continuing injunction with respect to the seven Louisiana Supreme Court districts, remains in effect and under the exclusive supervision of the Eastern District Court.

B. One District Court Cannot Modify the Orders of a Sister Court.

"[I]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected." *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995). As to consent decrees specifically, "'only the district court supervising implementation of the decree

would have subject matter jurisdiction to modify the decree[]' as they relate to the mechanisms for achieving the goals of the decree[]." *Thaggard v. Jackson*, 687 F.2d 66, 69 n.3 (5th Cir. 1982) (quoting *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980)). "It is well-settled that a federal court has inherent authority to enforce its own orders, including consent decrees agreed to by parties and approved by the Court." *Chisom v. Jindal*, 890 F. Supp. 2d at 710 (citing *United States v. Alcoa, Inc.,* 533 F.3d 278, 287 (5th Cir. 2008)). As the Eastern District court aptly put it, "[s]o long as the final remedy under a consent decree has not been achieved, the court entering the decree retains subject matter jurisdiction to interpret and enforce the decree's terms."[7] *Id.* (citing *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 856 (9th Cir. 2007)); *see also Mann Mfg.*, 439 F.2d at 407 ("It is well settled that the issuing court has continuing power to supervise and modify its injunctions in accordance with changed conditions…."). For the Eastern District court to lose jurisdiction over the Decree, it must issue an "affirmative ruling . . . that the Consent Judgment has been completely satisfied and thus has been vacated or terminated." *Chisom v. Jindal*, 890 F. Supp. 2d at 711. This is something the Eastern District court has not done.

[7] The State took the position in *Chisom v. Jindal* that the terms of the Decree had been satisfied, but the court disagreed. 890 F. Supp. 2d at 709-10. Therefore, Appellants assume herein, as they are left no other option, that the Eastern District Court was correct and that the 1992 Consent Decree is still in effect today.

Here, Plaintiffs are requesting that the Middle District court modify a continuing injunction of a sister court. *See* ROA.28; ROA.570. However, one district court does not have the power to dissolve or modify an injunction of a sister district court, *see Mann Mfg.*, 439 F.2d at 407, because "comity dictates that courts of coordinate jurisdiction not review, enjoin or otherwise interfere with one another's jurisdiction." *Brittingham v. Comm'r of Internal Revenue*, 451 F.2d 315, 318 (5th Cir. 1971).

The Middle District court, however, refused to dismiss (or, alternatively, transfer) this case to the Eastern District court. This is despite that fact that,

> [w]hen a court is confronted with an action that would involve it in a serious interference with or usurpation of this continuing power, considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.

Mann Mfg., 439 F.2d at 408 (internal alterations and quotations omitted); *see also Brittingham*, 451 F.2d at 318. The Middle District refused to dismiss or transfer this case despite the fact that it recognized that the "net *effect* of the relief the *Chisom* plaintiffs sought is identical to the relief sought by the instant Plaintiffs: a redrawing of all *seven* districts by the Legislature to ensure compliance with the Voting Rights Act." ROA.570.

Without this Court's intervention, the result of any adverse judgment of the Middle District Court against the State will result in a patently untenable situation.

The State will be placed in the absurd position of having to disregard one court's orders to comply with the other court's orders. Therefore, this Court should order the District Court to dismiss or, alternatively, transfer jurisdiction to the Eastern District of Louisiana.

II. REDISTRICTING LITIGATION IS DISTINGUISHABLE FROM OTHER FORMS OF CIVIL RIGHTS LITIGATION.

The District Court revealed a fundamental error by relying heavily on *Martin v. Wilks* in determining that the current Plaintiffs cannot be collaterally estopped from pursuing relief. ROA.394-396. In doing so, the District Court missed the forest for the trees, as the saying goes. This case is not about collateral estoppel or the alleged preclusive effects that the *Chisom* consent decree has on the instant Plaintiffs. Plaintiffs under these facts are not collaterally estopped from pursuing their claims writ large.[8] Instead, the issue is the ability of one district court to modify another district court's orders. *Supra* at § I. Most importantly, this case is about redistricting, and the unique federalism concerns implicated by the redistricting process raise a number of additional reasons why any reliance on *Martin* was misplaced.

Courts have long recognized that "[r]edistricting litigation is not ordinary civil rights litigation." *See, e.g.*, *Balderas v. Texas*, 2002 U.S. Dist. LEXIS 25471,

[8] Appellants, by this language, do not waive any defenses other than to say that collateral estoppel is not implicated here because Plaintiffs *can* attempt to pursue their claims by way of seeking to modify the Consent Decree in the Eastern District Court.

at *9 (E.D. Tex.). The difference stems from an interplay between principles of separation of powers and federalism which is both inherent in and unique to redistricting cases. Core federalism principles are apparent in the bifurcated nature of the redistricting power itself. A state's redistricting authority over federal electoral districts is a direct grant of power from the U.S. Constitution. U.S. Const. art. I, § 4, cl. 1 (the "Elections Clause"). In addition, the power to apportion and redistrict state and local districts is a plenary power that belongs to the states. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 407 (5th Cir. 2020) (noting that a state's constitutional authority over congressional redistricting "is matched by state control over the election process for state offices" (citation omitted)); *see also c.f.* La. Const. art. III, § 6(A). Therefore, every time that a federal court becomes involved in a state's redistricting process, federalism concerns permeate the proceedings. *See, e.g.*, *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1357 (N.D. Ga. 2014) ("Judicial redistricting is not ideal. So where legislative action can remedy an unconstitutional or unlawful election plan, redistricting should be left to elected officials.").

Beyond the unique federalism concerns that permeate all redistricting litigation, there exist several additional aspects of redistricting litigation that further distinguish it from run-of-the-mill civil rights litigation. The first, and likely most important, legal and practical distinction is that all redistricting litigation

must conclude with the selection of *one* map that will govern all future elections for the contested entity until the next decennial redistricting cycle.[9] In the absence of a single decisive map, the electoral process in the jurisdiction would be "completely frustrated" and no election for any district-level office could be held. *Wise*, 437 U.S. at 542. Therefore, in redistricting litigation, the rights of *every person in a jurisdiction* can be affected. This is simply not the case in more typical forms of civil rights litigation, where only the rights of the instant plaintiffs are at issue and the effects of a decision are necessarily limited to the parties involved.

Second, redistricting is an area where the federal courts, outside of very limited and special circumstances, have no authority to draw redistricting maps in the first instance.[10] *See Wise*, 437 U.S. at 539 ("The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."). The courts are required to "offer governing bodies the first pass at devising a remedy," and it is only in the

[9] In most disputes over the constitutionality of statutes or regulations, federal courts can generally enjoin most statutes or regulations without the necessity of issuing injunctions to replace those statutes or regulations. That is almost never true in redistricting—there must be a replacement map governing the subject jurisdiction if the existing map violates federal law or the U.S. Constitution. The only exception to the requirement that a map exist is the remote possibility of certain at-large elections for Congress under 2 U.S.C. § 2. *See Branch v. Smith*, 538 U.S. 254, 270-71 (2003) (unanimous op.).

[10] The primary exception here is the so-called "deadlock" suit where the state is unable to redistrict in a constitutionally compliant manner after the decennial census but before the next scheduled election. *See, e.g.*, *S.C. State Conference of Branches of NAACP v. Riley*, 533 F. Supp. 1178, 1179 (D.S.C. 1982). The court's hand is forced in such instances because, once again, there *must* be a single map for each districted body and that map *must* meet the requirements of one person, one vote. *See, e.g.*, *Wesberry*, 376 U.S. at 14 (applying to federal congressional districts); *Reynolds*, 377 U.S. at 579-80 (applying to state legislative districts).

rare instance that a state legislature fails to produce an acceptable plan that the court is authorized to "fashion a remedial plan." *See United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009); *Williams v. City of Texarkana*, 32 F.3d 1265, 1268 (8th Cir. 1994). On the contrary, in most other forms of litigation, a district court has the general authority to review all facts and law and then come to a determination concerning the rights of the parties before it, without waiting for any other arm of the state government to go first.

Third, redistricting is distinguishable from other forms of civil rights litigation on the basis that the rights of every individual in a given jurisdiction are affected by redistricting in some way.[11] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which … we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. The right to vote—and therefore, all other rights—is inherently affected by redistricting. Whenever a state legislature reapportions a district map by drawing new district lines, many individuals residing in the state have an interest in the outcome—whether from equal population claims, vote dilution claims, or racial gerrymandering claims. Redistricting therefore differs measurably from other forms of civil rights litigation such as § 1983 actions in which an individual brings suit to vindicate some

[11] To reiterate, Appellants are not suggesting that every citizen in every jurisdiction always has standing to bring a challenge to any redistricting plan. *See Gill*, 138 S. Ct. at 1929-31.

personal right. *See, e.g.*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 660 (1978) (female employees of government agency sued over discriminatory employment practices). There is no way to contain the effects of a court-ordered redistricting, which is why judicial intervention in the process is only permitted as a last resort.

A. *Martin v. Wilks* Is Distinguishable from Redistricting Cases.

All three of the distinctions outlined above illuminate why the District Court's reliance upon *Martin v. Wilks* in denying Defendants' motions to dismiss was improper. In *Martin*, a group of white firefighters attempted to collaterally attack an existing consent decree that required increased minority hiring by the City of Birmingham, Alabama, arguing that the decree was resulting in reverse discrimination against white employees. 490 U.S. 755, 759-61 (1989). The Supreme Court held that the white firefighters' lawsuit was not an "impermissible collateral attack" on the decree because they "were neither parties nor privies to the consent decree[]." *Id.* at 761 (quoting *In re Birmingham Reverse Discrimination Emp't Litig.*, 833 F.2d 1492, 1498 (11th Cir. 1987)). This was true because the *Martin* respondents were suing to vindicate their *own* civil rights in an action that had no effect on the rights of other individuals in the State of Alabama; however, that is not the case here. If Appellees were to win the relief they seek, the Louisiana Supreme Court map would have to be redrawn in a way that may impact the rights of voters statewide and that will clearly violate the plain terms of the

ongoing Consent Decree in the Eastern District, to which the State *is* still bound. ROA.570. Furthermore, the *Martin* respondents brought their collateral attack in the *same federal district court* in which the consent decree was entered, so the case is totally inapposite for the issue presented here, where Appellees failed to do that very thing. *See Martin* at 759-60; *see also supra* § I(B).

The Supreme Court announced a general rule in *Martin* that a party "is not bound by a judgment *in personam* in [] litigation in which he is not designated as a party or to which he has not been made a party by service of process." 490 U.S. at 761. The court also made clear that there were exceptions to that general rule. *Id*. at 762 n.2. Redistricting is meaningfully distinct from other forms of civil rights litigation such that the general rule is inapplicable.

It is true that, in most cases, a final judgment in a lawsuit resolves issues among the parties thereto but "does not conclude the rights of strangers to those proceedings." *Id*. at 762. However, the Supreme Court has also acknowledged that there exists a small subset of unique cases in which the general rule is unworkable for various reasons. *See id.* at 762 n.2. One scenario in which the general rule does not apply is in "class" actions [12] or "representative" suits, and another is when "a

[12] The *Chisom* plaintiffs brought suit as a class action representing "all black persons registered to vote in Orleans Parish . . .". *Perschall*, 697 So. 2d at 244. The relief afforded, however, was not limited to Orleans Parish. ROA.251-257. District 1 is split between Orleans, Jefferson, Washington, St. Tammany, St. Helena, and Tangipahoa Parishes. District 7, the current majority-minority district, is split between Orleans and Jefferson Parishes. *See* La. Supreme Court,

special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," so long as "the scheme is otherwise consistent with due process." *Id.* Although the Court did not expressly mention redistricting cases among the exceptions it listed in *Martin*, it is clear that the same principle applies and that a redistricting plan is certainly a "special remedial scheme" within the sense the *Martin* Court intended.

The Supreme Court's default preference for joinder over notice, while ordinarily sensible, *see id.* at 765, is impractical in redistricting cases because every American citizen of voting age in the state, or relevant geography, would have to be joined as a plaintiff in order to preclude future litigation.[13] According to a 2016 Census Bureau estimate, Louisiana has a citizen voting-age population of 3,454,978[14]—the idea that all of those people must be joined in order to litigate their rights in a redistricting process is absurd. Moreover, a state's authority to conduct redistricting without joinder of or notice to every citizen in the state is clearly consistent with due process because the state's authority to redistrict is laid

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Louisiana Supreme Court Districts Effective January 1, 1999, https://www.lasc.org/about_the_court/LA_Supreme_Court_map.pdf.

[13] Observing this issue on a smaller scale, it cannot be the fact that every voting age resident of any specific Supreme Court district must be joined in this litigation for there to be some finality to the proceedings.

[14] *See* U.S. Census Bureau, *Citizen Voting-Age Population: Louisiana*, (Nov. 15, 2016), available at: https://www.census.gov/library/visualizations/2016/comm/citizen_voting_age_population/cb16-tps18_louisiana.html.

out in both the federal and state constitutions as well as state statute. *See, e.g.*, U.S. Const. art. I, § 4, cl. 1; *c.f.* La. Const. art. III, § 6(A); La. Rev. Stat. § 13:101.

The facts of this case are much closer to those of *Mann Manufacturing v. Hortex, Inc.* than they are to the situation in *Martin*. In *Mann*, the Western District of Texas issued a temporary injunction in an action involving two similar patents where the initial action for declaratory judgment had been filed in the Southern District of New York. 439 F.2d at 405-06. Because the original district court had previously issued an injunction to prevent the parties from litigating similar issues in Texas federal courts, this Court reversed the Western District's grant of a temporary injunction as "a serious interference with or usurpation of" the power of the original court to supervise its earlier injunction. *Id.* at 408. Consent decrees like the one at issue here are just another form of injunction, *see Fla. Ass'n for Retarded Citizens v. Bush*, 246 F.3d 1296, 1298 (11th Cir. 2001); *Clements*, 999 F.2d at 845, and *Mann* provides evidence that permitting one district court to interfere with another district court's maintenance of an existing injunction offends both "comity and sound judicial administration." 439 F.2d at 405. The same principle applies with even greater force in redistricting matters which have constitutional and statewide ramifications.

This litigation is a redistricting matter. Here, the Consent Decree by its very terms applies to the statewide map of Louisiana's Supreme Court districts, *see*

ROA.244, and the legislation that implemented the Consent Decree governs that map on a "permanent" basis until such time as the Eastern District of Louisiana determines that "the complete implementation of the final remedy has been accomplished." ROA.246. The Eastern District has not yet made that determination, so the Consent Decree remains in effect. *Chisom v. Jindal*, 890 F. Supp. 2d at 696. Therefore, the Middle District should have granted Appellants' motion to dismiss or, alternatively, transferred venue over this action to the Eastern District.

B. The Unique Federalism Concerns Implicated Here Should Have Dictated the Middle District Not Assert Jurisdiction.

"The Supreme Court has long 'recognized that States are not normal litigants.'" *In re Gee*, 941 F.3d at 166 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007)). Louisiana is not a run-of-the-mill litigant; in fact, it is a "residuary sovereign[] and joint participant[] in the governance of the Nation," *id.* at 166-67 (quoting *Alden v. Maine*, 527 U.S. 706, 748 (1999)), which is why "[j]udicial review of *any* state law implicates obvious federalism concerns." *Id.* (emphasis added) (citing *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985)). These federalism concerns are significantly heightened when litigants seek to use the federal courts' equitable powers to maintain injunctive oversight of a state's sovereign functions. *See id.* ("The Founders worried 'that the equity power would' so empower federal courts that it 'would result in . . . the entire subversion of the

legislative, executive and judicial powers of the individual states." (quoting *Missouri v. Jenkins*, 515 U.S. 70, 128-29 (1995) (Thomas, J., concurring)).

Federal court jurisdiction is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *See Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Louisiana, in an effort to avoid further litigation over supreme court districts, entered into a Consent Decree that, in the Eastern District Court's judgment, is binding upon the State in perpetuity unless and until it says otherwise. *Chisom v. Jindal*, 890 F. Supp. 2d at 711. And yet another federal district court is now poised to subject Louisiana to a conflicting court order—and any court order respecting the composition of Louisiana's Supreme Court districts *is* a conflicting order. *See id.*; *see also* ROA.239-249. On its face, this is an untenable situation for the State.

Exposing Louisiana to conflicting judicial decrees further infringes upon the rights of the State by subjecting its interests in avoiding federal interference with a purely state electoral system. The ramifications of the Middle District's refusal to dismiss this case are wide-ranging. For example, if Appellees can convince one court to modify a sister court's decree, there is no incentive for this State or any other State to enter into a decree in any redistricting matter ever. The federal judiciary cannot have it both ways. Either there is an ongoing consent decree that

binds the State and requires future litigants to pursue their relief through modification of that decree, or there is not. Unless the Eastern District's jurisdiction over its own consent decree is preserved here, then this "small" issue will arise again and again in other jurisdictions until the molehill has metastasized into a mountain.

CONCLUSION

For the aforementioned reasons, this Court should reverse the District Court's denial of the motion to dismiss for want of jurisdiction or, alternatively, transfer venue to the Eastern District of Louisiana.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been filed with the Clerk using the Court's CM/ECF system which will provide notice to all counsel of record.

January 13, 2021.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 5(c)(1) because, excluding the parts of the Petition exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 6,618 words.

Undersigned counsel certifies that this Petition 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 this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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