No. _____

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
CIVIL ACTION NO. 19-479-JWD-SDJ

PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Elizabeth Murrill (La. Bar Roll No. 20685)
Solicitor General of Louisiana
Angelique Duhon Freel (La. Bar Roll No. 28561)
Jeffrey Wale (La. Bar Roll No. 36070)
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

Jason Torchinsky (VSB 47481)
Counsel of Record
Phillip M. Gordon (VSB 95621)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
jtorchinsky@hvjt.law

Counsel for Defendant-Petitioner the State of Louisiana

Celia R. Cangelosi (Bar Roll No. 12140)
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

CERTIFICATE OF INTERESTED PERSONS

No. 20-_____

Louisiana State Conference of the National Association for the Advancement of Colored People, *et al.*,

Plaintiffs-Respondents,

v.

The 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.

Pursuant to the fourth sentence of Rule 28.2.1 Defendants-Petitioners are governmental parties and are not required to produce a certificate of interested persons or a corporate disclosure statement pursuant to Fed. R. App. P. 26.1(a) .

The following is a list of all private practice lawyers and private law firms that are currently 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
Email:Artthomas51@gmail.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
Email:Adam.Shaw@bryancave.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
Email:Awfarr@bclplaw.Com

Jason Semmes
Bryan Cave Leighton Paisner LLP
1155 F Street Nw, Suite 700
Washington, DC 20004

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

Brendan Downes
Lawyers' Committee for Civil Rights
Under Law
1500 K St, Nw. 9th Floor
Washington, DC 20005
202-662-8600

Defendants-Petitioners:

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

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

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

Ezra D. Rosenberg
Lawyers' Committee for Civil Rights
Under Law
1500 K Street, Nw Suite 900
Washington, DC 20005
202-662-8345 Fax: 202-783-0857
Email:Erosenberg@lawyerscommittee.org

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

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

/s/Jason Torchinsky
Jason Torchinsky
Holtzman Vogel Josefiak Torchinsky PLLC
15405 John Marshall Hwy.
Haymarket, VA 20169
(540) 341-8808

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE QUESTION 3

RELIEF SOUGHT 4

STATEMENT OF FACTS AND PROCEDURAL HISTORY 4

I. The Eastern District Consent Decrees. 4

II. The 2012 *Chisom v. Jindal* Eastern District Litigation. 6

III. The Middle District Litigation. 8

ARGUMENT 10

I. The District Court Properly Certified Its Order for Interlocutory Review. 11

A. The Order Involves Controlling Questions of Law to Which There Are Substantial Grounds for Difference of Opinion. 12

B. An Immediate Appeal Will Materially Advance the Ultimate Termination of the Litigation. 19

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF CONFERENCE 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

CASES

Castellanos-Contreras v. Decatur Hotels LLC, 622 F.3d 393 (5th Cir. 2010) .12, 13

Cazorla v. Koch Foods of Miss., LLC, 838 F.3d 540 (5th Cir. 2016) 19

Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) 5

Chisom v. Jindal, 890 F. Supp. 2d 696 (E.D. La. 2012).....*passim*

Chisom v. Roemer, 501 U.S. 380 (1991) 5

Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1985) 20

Gill v. Whitford, 138 S. Ct. 1916 (2018).....17

Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961).....12

Hastert v. Illinois State Bd. of Election Comm'rs, 28 F.3d 1430 (7th Cir. 1993) 17

Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987) 20

Jackson v. La. Dep't of Pub. Safety & Corr., No. CV 15-490-JJB-RLB, 2016 U.S. Dist. LEXIS 57956 (M.D. La. May 2, 2016) 11

June Med. Serv., LLC. v. Gee, 2018 U.S. Dist. LEXIS 82504 (M.D. La. May 11, 2018) 13, 19

League of Women Voters v. Commonwealth, 278 A.3d 737 (Pa. 2018) 17

Lee v. Va. State Bd. of Elections, 2015 U.S. Dist. LEXIS 171682 (E.D. Va. December 23, 2015).....17

Martin v. Wilks, 490 U.S. 755 (1989).....16, 18

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 21

Mitchell v. Hood, 2014 U.S. Dist. LEXIS 61377 (E.D. La. May 2, 2014) 19

NAACP, et al. v. State of Louisiana, et al., No. 19-cv-479 (M.D. La.) 8

Perschall v. State, 697 So. 2d 240 (La. 1997) 5

Rico v. Flores, 481 F.3d 234 (5th Cir. 2007) 10, 11

Rucho v. Common Cause, 139 S. Ct. 2484 (2019) 17

Scott v. Ruston La. Hosp. Co., 2017 U.S. Dist. LEXIS 56138 (W.D. La. Apr. 12, 2017) 19

Stratton v. St. Louis S. R. Co., 282 U.S. 10 (1930) 18

Tesco v. Weatherford Int'l, Inc., 722 F. Supp. 2d 755 (S.D. Tex. 2010) 12

Tex. v. Dep't of Labor, 929 F.3d 205 (5th Cir. 2019) 16, 18

United States v. La. Generating LLC, 2012 U.S. Dist. LEXIS 142349 (M.D. La. Oct. 1, 2012) 12, 18

STATUTES AND RULES

28 U.S.C. § 1292(b) 2, 4, 11

28 U.S.C. § 1331 3

28 U.S.C. § 1342(a) 3

28 U.S.C. § 1404(a) 9

La. Act No. 512 (S.B. 1255) (1992) 5

La. Acts No. 776 (1997) 6

Fed. R. App. P. 5(a)(3) 2

Fed. R. Civ. P. 12(b) 21

INTRODUCTION

A State cannot obey two conflicting orders from two different courts. Yet that is the exact scenario that will occur should the Middle District Court grant Plaintiffs' relief. In 1992, the Eastern District of Louisiana issued a consent decree ("Consent Decree") that was agreed to by the State of Louisiana in an effort to end years of expensive litigation. That Consent Decree states, in no uncertain terms, that all "future Supreme Court elections after the effective date shall take place in the newly reapportioned districts." 1992 Consent Decree (attached as Ex. C). The Consent Decree provided that it would be in effect until the "complete implementation of the final remedy has been accomplished." Ex. C at ¶ K. The Louisiana Legislature proceeded to pass a law to "provide for the formal and permanent reapportionment of the State's Supreme Court Districts as called for by the terms of the Consent [Decree]." *Chisom v. Jindal*, 890 F. Supp. 2d 696, 705 (E.D. La. 2012). Then, in 2012, the Eastern District Court reaffirmed its jurisdiction over the terms of the Consent Decree until such time that it affirmatively states that the terms of the decree have been satisfied. *See id.* at 711.

It seems plain then that when a Consent Decree is so broad as to preempt all State action with respect to the State's Supreme Court Districts, and the issuing court affirms its exclusive jurisdiction, the only way forward is to seek relief from the court enforcing the Decree. The Middle District Court, however, disagreed.

While finding that the question as to its jurisdiction was "a close one" it nevertheless held, despite clear language to the contrary, that the purpose of the Consent Decree was to create a single majority-minority district in the Orleans area. Ex. B. at 21-23. This reading of the Consent Decree is in direct conflict with the plain language of the Decree itself.

While the District Court denied the motion to dismiss, upon joint motion by Defendants, it accepted that the question is sufficient to meet the standard for interlocutory review, namely that there is "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 . . . ." 28 U.S.C. § 1292(b); *see* Ex. A at 15-21. Therefore, this Court is now presented an opportunity to allow this interlocutory appeal to proceed and determine that the court below lacked jurisdiction over Plaintiffs' claims.

STATEMENT OF JURISDICTION

This Court has jurisdiction to permit an interlocutory appeal because on October 19, 2020, the district court determined that its order of June 26, 2020, which denied Defendants' motion to dismiss, "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S. C. § 1292(b); Fed. R. App. P. 5(a)(3); *see also* Ex. A at

15-21. The jurisdiction of the District Court is disputed by Defendants and is the reason for this interlocutory appeal. Plaintiffs below assert jurisdiction under 28 U.S.C. §§ 1331, 1342(a).

STATEMENT OF THE QUESTION

In 1992, and subsequently modified in 2000 ("2000 Consent Decree Amendment"), multiple executive officers on behalf of the State of Louisiana entered into a consent decree with several individual and organizational plaintiffs in the United States District Court for the Eastern District of Louisiana. *See* Ex. C; 2000 Consent Decree Modification (attached as Ex. D). The Consent Decree provided for, *inter alia*, the creation of a single majority-minority State Supreme Court judicial district in the Orleans area and the districting map for all seven State Supreme Court districts. Ex. C at ¶ C(8). The Consent Decree further provided for continuing jurisdiction "until the complete implementation of the final remedy has been accomplished." Ex. C at ¶ K. The Eastern District court reaffirmed its continuing jurisdiction as recently as 2012 when it decided an issue relating to the seniority of one of the justices whose district was created via the Consent Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 710-711 ("Because the Court finds that the 'final remedy' under the Consent Judgment has not yet been accomplished, the Court has continuing jurisdiction and power to interpret the Consent Judgment.").

The question is: Does the *Chisom* Consent Decree in the Eastern District of Louisiana deprive the Middle District of Louisiana of subject matter jurisdiction?

RELIEF SOUGHT

Petitioners ask this Court to grant interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), to address the question of the jurisdiction of one district court to adjudicate disputes over a districting plan for a state body implemented by and subject to the continuing Consent Decree of a different district court.[1] Upon granting the petition, Petitioners seek that this Court order the District Court to either dismiss without prejudice the underlying action for lack of jurisdiction or, alternatively, order that this case be transferred to the Eastern District of Louisiana.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Eastern District Consent Decrees.

The history of litigation over Louisiana's State Supreme Court districts spans nearly 35 years.[2] In 1986, several plaintiffs brought a class action claiming

[1] While the current dispute involves a consent decree that has been in effect since 1992, it is not hard to imagine that the upcoming 2021 reapportionment may implicate the exact issues raised in this Petition in other states. In fact, because every state in the Fifth Circuit has more than one federal district, the likelihood of competing court orders or consent decrees is higher in the Fifth Circuit than in other federal circuits.

[2] Due to the space constraints presented by the current procedural posture, what follows is a relatively abridged history of the litigation leading to this point. For a more fulsome recital of this and the related *Chisom* line of cases, Petitioners direct the Court's attention to the factual background in the District Court's Order

that "the multimember district system for electing justices of the Louisiana Supreme Court in the First Supreme Court District . . . dilutes black voting strength in violation of Section 2 of the Voting Rights Act . . . ." Ex. C at 1. After a series of appeals to both this Court, *see, e.g.*, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), and the Supreme Court, *Chisom v. Roemer*, 501 U.S. 380 (1991), the Consent Decree was entered into in 1992. *See* Ex. C.

The 1992 Consent Decree memorialized various changes to Louisiana law that would be enforced to implement the terms of the Decree.[3] *See* Ex. C; *see also* La. Act. 512 (S.B. 1255) (1992). The purpose of the Consent Decree was to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act." Ex. C at ¶ B. The Consent Decree further stated, *inter alia*, 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

---

Granting Certification of Interlocutory Review, Ex. A at 1-8, and the procedural history and factual background in *Chisom v. Jindal*, 890 F. Supp. 2d at 702-708.

[3] One of these changes was passed into law which provided, *inter alia*, for various changes in the method of electing the Louisiana Supreme Court and for the creation of a new position on the Court. *See* Ex. C at 2; *see also* La. Act No. 512 (S.B. 1255) (1992). This law was later found unconstitutional under the Louisiana Constitution by the Louisiana Supreme Court. *Perschall v. State*, 697 So. 2d 240, 243 (La. 1997). However, the Consent Decree remained in effect. *Id.* at 260.

> 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.***

Ex. C at ¶ C(8) (emphasis added); *see also* Ex. A at 18-19. Subsequently, in 1997 the Louisiana Legislature passed, and the Governor signed, La. Acts No. 776 (1997), which "provided for the formal and *permanent* reapportionment of the State's Supreme Court Districts . . . ." *Chisom v. Jindal*, 890 F. Supp. 2d at 705 (emphasis added). Act 776, however, was not in strict conformity with the 1992 Consent Decree because Orleans Parish was split between Districts 1 and 7. The parties, therefore, agreed that Act 776 effectuated the purpose of the 1992 Consent Decree and consented to the modification of that Decree. *See* Ex. D at ¶ 6. The Eastern District agreed and ordered the 2000 modification of the 1992 Decree on January 3, 2000. Ex. D at 7.

After the 2000 Consent Decree Modification, the State Supreme Court districts and the associated Consent Decrees remained undisturbed until 2012.

II. The 2012 *Chisom v. Jindal* Eastern District Litigation.

In 2012, a dispute between two Louisiana Supreme Court justices, respecting seniority rules for the position of Chief Justice on that court, resulted in additional litigation. *See generally Chisom v. Jindal*, 890 F. Supp. 2d 696. 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.

See id. at 728. Of specific import here is that the State Defendants argued that the Eastern District court lacked subject matter jurisdiction. *Id*. at 709. Specifically, the terms of the 1992 Consent Decree provided that the Eastern District court "shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished" and the State argued that "the complete implementation was accomplished on October 7, 2000[,] when Justice Johnson was elected to the Supreme Court from the Seventh [] District." *Id*. (quoting Ex. C). The Eastern District court disagreed.

Initially, the court held that despite plaintiffs' request to "reopen" the case, it had never actually been closed. *Id*. at 710. The court then went on to hold that "[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[,]" and only the court who entered the Consent Decree has "the power to determine whether it has been fully complied with and should be dissolved or vacated." *Id.* at 710-11. Therefore, because "[t]here has been no affirmative ruling by [the Eastern District] Court that the Consent [Decree] has been completely satisfied . . . the Court has continuing jurisdiction and power to interpret" its terms. *Id*. at 711. The court never affirmatively stated that the terms of the Consent Decree have been satisfied, and there have been no subsequent judgments by the Eastern District court that say otherwise.

III. The Middle District Litigation.

This brings us to the present litigation. 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.) (ECF No. 1 at ¶ 66-70).[4] 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 to enjoin the State "from administering, implementing, or conducting any future elections for the Louisiana Supreme Court under the current method of election." *Id*. at 15 ¶¶ a-b. 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 id.*

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.[5] Response, reply, and supplemental briefing followed suit. *See* (ECF Nos. 34-37, 40, and 44). On

[4] Citations to the record below that are not attached as exhibits hereto will be to the ECF number.

[5] The Louisiana Secretary of State filed a separate motion to dismiss that, respecting the ongoing Consent Decree, incorporated and adopted by reference all of the State of Louisiana's arguments. *See* ECF No. 28 at 3.

June 26, 2020, the District Court issued its Ruling and Order denying Defendants' Motions to Dismiss. Ex. B.

Subsequently, on July 17, 2020, Defendants filed joint motions to certify the question of the District Court's jurisdiction for interlocutory appeal and stay pending appeal, (ECF No. 51), and to voluntarily transfer venue pursuant to either 28 U.S.C. 1404(a) or the first-to-file rule, (ECF No. 52). After briefing, the District Court granted the motion to certify interlocutory appeal and denied the motion to stay pending appeal. Ex. A. 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 . . . ." (ECF No. 59).

In its order certifying the question, the District Court concluded that all three prongs of the interlocutory review standard were satisfied. First, the jurisdictional question at issue here presents "a controlling question of law" because it would "determine the future course of litigation." Ex. A at 16. Second, the District Court found that there are "substantial grounds for difference of opinion regarding the controlling question of law in the Court's Order." Ex. A at 17. The District Court recognized that the Consent Decree contains broad language indicating that the "relief sought" by the *Chisom* plaintiffs "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." Ex. A at 20. For the District Court there

was ample language about which "reasonable minds could differ" respecting the scope of the Consent Decree vis-à-vis Plaintiffs' claims. *See* Ex. A at 19, 20. Finally, the District Court held that immediate appeal "would materially advance the ultimate termination of the litigation in th[e Middle District] and expedite the transfer to the Eastern District if deemed appropriate." Ex. A. at 21. Therefore, if this Court concludes that the ongoing Consent Decree in the Eastern District of Louisiana deprives the Middle District of jurisdiction in this case, the parties could avoid proceeding to discovery, summary judgment, and possibly a full trial on the merits in a court that lacked jurisdiction from the case's inception.

ARGUMENT

The District Court erred in denying Petitioners' Motion to Dismiss for lack of jurisdiction. The clear language of the Consent Decree, as acknowledged in *Chisom v. Jindal*, supports the proposition that the Eastern District maintains exclusive authority regarding the reapportionment of Louisiana Supreme Court districts. *See* Ex. A; *Chisom v. Jindal*, 890 F. Supp. 2d at 705. As such, this Court, in deciding the unique jurisdictional question present here, would materially advance the ultimate termination of the litigation by deciding a controlling question of law upon which there is substantial ground for difference of opinion. See *Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007).

As the District Court noted, the legal question of whether a court-ordered redistricted State Supreme Court map, which is under the control of an ongoing Consent Decree, can be altered by a different district court is "a close one" where "reasonable minds could differ." Ex. A at 18-20; Ex. B at 21. Here, the question is particularly appropriate for interlocutory appeal because the question at hand involves unique issues surrounding redistricting, and redistricting is set to occur not only in Louisiana, but throughout this Circuit.

I. The District Court Properly Certified Its Order for Interlocutory Review.

The District Court correctly determined that the question of its jurisdiction in light of the continuing Consent Decree in the Eastern District satisfied the requirements of Section 1292(b). Ex. A at 15-21.

This Court may permit an order for interlocutory appeal under 28 U.S.C. § 1292(b) upon finding that "(1) a controlling question of law is involved, (2) there is substantial ground for difference of opinion about the question of law, and (3) immediate appeal will materially advance the ultimate termination of the litigation." *Rico*, 481 F.3d at 238; *Jackson v. La. Dep't of Pub. Safety & Corr.*, No. CV 15-490-JJB-RLB, 2016 U.S. Dist. LEXIS 57956, at *1 (M.D. La. May 2, 2016). The purpose of 28 U.S.C. § 1292 is to give the judiciary "considerable flexibility" in order to avoid the "disadvantages of . . . final judgment appeals."

Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 703 (5th Cir. 1961). "Under § 1292(b), it is the order, not the question, that is appealable." *Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393, 398 (5th Cir. 2010) (*en banc*) (citation omitted).

Interlocutory appeal is appropriate here because the Middle District Court's lack of jurisdiction presents substantial grounds for a difference of opinion regarding an unsettled yet controlling question of law that would materially advance the case.

A. The Order Involves Controlling Questions of Law to Which There Are Substantial Grounds for Difference of Opinion.

The District Court's disposition of the State's Motion to Dismiss rests on a controlling jurisdictional legal question that is potentially dispositive of the action in this Court. "Whether an issue of law is controlling usually 'hinges upon its potential to have some impact on the course of the litigation.'" *United States v. La. Generating LLC*, 2012 U.S. Dist. LEXIS 142349, at *5 (M.D. La. Oct. 1, 2012) (*quoting Tesco v. Weatherford Int'l, Inc.*, 722 F. Supp. 2d 755, 766 (S.D. Tex. 2010) ("[I]t is clear that a question of law is controlling if reversal of the order would terminate the action." (internal quotations omitted)).

As highlighted by the extensive discussion of the competing arguments in the District Court's Order certifying interlocutory appeal, there is, at the very least,

a substantial ground for difference of opinion as to the power of the District Court to even entertain a lawsuit that seeks to modify or overturn a sister court's Consent Decree. *See* Ex. A. A legal question presents "substantial ground for difference of opinion" when "reasonable jurists . . . debate" the issue. *Castellanos-Contreras*, 622 F.3d at 399. "A substantial ground for difference of opinion may exist if novel and difficult questions of first impression are presented." *June Med. Serv., LLC. v. Gee*, 2018 U.S. Dist. LEXIS 82504, at *3-4 (M.D. La. May 11, 2018) (internal quotations omitted). Redistricting and reapportionment are unique in jurisprudence because any specific body of government can have only *one* map setting its electoral boundaries at any single point in time.[6] At this stage the Court need not consider whether the Order is correct; it need only recognize that the law in this area is unsettled.

Petitioners maintain that Plaintiffs below were required to bring their claims in the Eastern District of Louisiana. Plaintiffs' failure to bring their claims (or alternatively seek to modify the Consent Decree) in the Eastern District necessitates either dismissal by the Middle District or, alternatively, transfer to the Eastern District of Louisiana. *See* (ECF No. 27-1 at 4-5). Plaintiffs' Complaint, on its face, seeks to enjoin all "future elections for the Louisiana Supreme Court under

[6] Unlike some statutes which do not require reenactment in a modified form if struck down by a court, a districting plan for a multi-district body *must* be replaced by another plan.

the current method of election" and a declaration that "the current apportionment of Louisiana Supreme Court districts violates Section 2 of the Voting Rights Act." *See* Compl. (ECF No. 1 at 15); Order (ECF No. 47 at 21). The current apportionment, however, was implemented by an order of a federal court and therefore cannot be a Section 2 violation. That aside, "Act 776 provided for the *formal and permanent* reapportionment of the State's Supreme Court Districts, as called for by the terms of the Consent Judgment." *Chisom v. Jindal*, 890 F. Supp. 2d at 705.

As noted *supra* and in the language of the Consent Decree itself, *any* matter that modifies *any* of the seven Supreme Court districts is covered under the Consent Decree. This is clearly evidenced by fact that the Eastern District firmly held that it maintained continuing jurisdiction under the Consent Decree, decades later, over a matter dealing with an issue only tangentially related to the Consent Decree—the seniority of judges from the seven Supreme Court districts. *See Chisom v. Jindal*, 890 F.Supp. 2d 696. Therefore, if the issue of judicial seniority implicates the Consent Decree, issues surrounding creating an additional majority-minority district, which necessarily requires drawing new lines in multiple districts, most certainly does.

Plaintiffs' retort that they are actually only requesting relief in District 5 is both immaterial and improper for the District Court to have considered. First,

nothing on the face of Plaintiffs' Complaint states that Plaintiffs are seeking relief in District 5 alone. Second, it does not particularly matter where or what Plaintiffs are seeking as relief because it is clear from the plain language of the Consent Decree that it applies to each and every one of the seven Supreme Court districts. *See, e.g.*, Ex. C at ¶ (C)(8). Third, even if one were to read the Consent Decree as not covering all Supreme Court districts, the Decree's plain terms call for *one* majority-minority district. *Id*. Therefore, seeking a *second* majority-minority district somewhere in the state also contradicts the plain language of the Decree itself. Finally, "relief" for "only District 5" is not actually possible because changing District 5 necessarily requires the adjustment of one or more neighboring districts.[7] In order to add population sufficient to create a majority-minority district, some population must be added to, or removed from, the existing district, and that population must be added from somewhere or placed somewhere.[8] The District Court readily admits:[9]

[7] Changes to neighboring districts inevitably have downstream impacts on other districts.

[8] In addition, the currently existing population disparities in the existing districts create yet another layer of complication on top of any efforts to adjust the current map in light of the 2020 Census.

[9] There has been some confusion among the parties and the Court regarding whether the First or the Seventh District is the current majority-minority district. Originally, the first district was the majority-minority district created by the 1992 Consent Decree. However, when the Decree was later amended, Orleans was split

> [T]he Consent Judgment includes broader language that goes beyond simply a redrawing of District 5. Plaintiffs urge that the redrawing of District 5 can be done without affecting District 1, the only district governed by the Consent Decree. However, as already noted, the plain language of the Consent Decree is not limited to District 1. . . The redrawing of District 5 could require at least one other district to be redrawn. Because the Consent Decree includes language suggesting it applies to each and every one of the seven Supreme Court districts and the redrawing of District 5 could require an adjustment of one or more neighboring districts, the instant case may fall within the jurisdiction of the *Chisom* Consent Judgment.

Ex. A at 19-20. By denying the State's Motion to Dismiss, the District Court places the State in the position of having to disobey one court to obey the other. Should relief be granted to Plaintiffs in the Middle District, there is no possible way for the State to draw an additional majority-minority district without violating the Consent Decree that lies in the Eastern District of Louisiana.

Finally, the authorities in *Martin v. Wilks*, 490 U.S. 755 (1989) and *Tex. v. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019) are inapposite—or, at the very least, their applicability to this case is a question as to which there is substantial grounds for a difference of opinion. Petitioners' challenge to the District Court's jurisdiction (or relatedly the Plaintiffs' choice of forum) has nothing to do with a collateral attack theory. This is not a situation in which one court issued a permanent injunction and ended the case. The Eastern District Court specifically maintained continuing jurisdiction. *See, e.g.*, Ex. C at ¶ K; *Chisom v. Jindal*, 890 F.

---

between the First and the Seventh Districts, and the Seventh District became the majority-minority district. *See* Ex. D.

Supp. 2d at 710-11. The Defendants here are not suggesting that the Plaintiffs are precluded from challenging Louisiana's Supreme Court districts. The District Court where they chose to file, however, lacks the power to issue relief that directly conflicts with a sister court's ongoing Consent Decree over the exact same map.

Furthermore, election districts are themselves a unique area of the law not readily susceptible to what would otherwise be well-hewn judicial reasoning. For example, when applied in the redistricting context, otherwise well-established case law surrounding standing and jurisdiction creates unique arguments and legal outcomes. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of the federal courts); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (holding that plaintiffs' alleged injuries associated with partisan gerrymandering were insufficient to confer standing). Cases that involve legal questions surrounding redistricting, such as the present case, certainly create unique and difficult legal questions. *See Lee v. Va. State Bd. of Elections*, 2015 U.S. Dist. LEXIS 171682 (E.D. Va. December 23, 2015); *Hastert v. Illinois State Bd. of Election Comm'rs*, 28 F.3d 1430, 1444 (7th Cir. 1993); *see also League of Women Voters v. Commonwealth*, 278 A.3d 737, 831-32 (Pa. 2018) (Saylor, C.J., dissenting).

Election districts are unique in other ways as well. For example, in redistricting litigation, the rights of others not before the court are always impacted. In most instances, just a few voters—or organizations—seek remedies through the courts that both contravene the State's legislative process and impact the rights of all voters. Another substantial difference between redistricting matters and other areas of law is that there *must be one map* in place to hold an election—it is not optional or discretionary. Unlike the regulatory context where some regulations are discretionary or not otherwise specifically required to be in place, a single map must be selected and utilized for every election of the same office (with the exception of at-large elections). Therefore, this unique area of law is unlike the situation presented in *Martin* or *Tex. v. Dep't of Labor*.

Irrespective of the parties' positions, it is certain that allowing this case to proceed when the District Court may not have jurisdiction has the "potential to have some impact on the course of the litigation." *See La. Generating LLC*, 2012 U.S. Dist. LEXIS 142349 at *5. The impact goes to the Court's jurisdiction. *See Stratton v. St. Louis S. R. Co.,* 282 U.S. 10, 16 (1930). If the District Court lacks the power to modify a sister court's Consent Decree, then any litigation in the District Court is a waste of judicial and party resources.

B. An Immediate Appeal Will Materially Advance the Ultimate Termination of the Litigation.

Resolution of the jurisdictional question will materially advance the litigation. "There is no requirement that permitting an interlocutory appeal be certain to materially advance the termination of the litigation; rather, 28 U.S.C. § 1292(b) only requires that permitting such an appeal *may* materially advance the ultimate termination of the litigation." *Scott v. Ruston La. Hosp. Co.*, 2017 U.S. Dist. LEXIS 56138, at *15 (W.D. La. Apr. 12, 2017) (internal quotation omitted) (emphasis in original). Avoiding post-trial appeals on a topic is sufficient to satisfy the "materially advance the ultimate termination" threshold. *See Cazorla v. Koch Foods of Miss., LLC,* 838 F.3d 540, 548 (5th Cir. 2016). Furthermore, "a key consideration of whether the appeal may advance the ultimate termination of the litigation is if the appeal has the potential to speed up the litigation." *June Med. Serv., LLC*, 2018 U.S. Dist. LEXIS 82504 at *4.

If Plaintiffs are victorious and the Middle District Court orders an additional majority-minority district, then this Court subsequently reverses on appeal on jurisdictional grounds, there will have been an extraordinary waste of party and judicial resources that could have been prevented by an interlocutory appeal. As noted, interlocutory review of the Order may make any further action in the District Court either futile or unnecessary. *See Mitchell v. Hood*, 2014 U.S. Dist. LEXIS 61377, at *18 (E.D. La. May 2, 2014) (avoiding costly burden of litigation

by potential dismissal materially advances the litigation). As the District Court aptly noted:

> While resolution of this issue would not terminate the action or determine the outcome of the litigation, it would determine the future course of litigation. If the Fifth Circuit reverses this Court's denial of the *Defendants' Motion to Dismiss*, then the result would be termination of the action in *this* Court. Plaintiffs recognize that while reversal on interlocutory appeal would not terminate this case on the merits, it would require the case be transferred to the Eastern District.
>
> []
>
> Plaintiffs mistakenly argue that the controlling question of law determination must result in the termination of the action. But, as explained above, this is not the question. Rather, a transfer of venue would have a significant impact on subsequent proceedings, and that is sufficient.

Ex. A at 16 (internal citation omitted).

In regards to the District Court's jurisdiction, Plaintiffs attempt to argue that they have "stipulated"[10] that the District Court need not modify the Consent Decree to grant their requested relief. ECF No. 54 at 5. Unfortunately for Plaintiffs, one cannot consent to jurisdiction when none exists. *See Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir. 1987); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985) (per curiam). Further, a party cannot "accept" jurisdiction, where none exists to accept. A court mistakenly finding it has jurisdiction on a "close" jurisdictional call does not create jurisdiction where none exists. The entire body of federal case law surrounding jurisdiction was formed by judges, whether

[10] Plaintiffs are unable to amend a Complaint by way of averments in a response to a motion to dismiss. As such, this supposed stipulation should not be considered by any court.

district or appellate, who were mistaken regarding their jurisdiction. Here, if the District Court lacks jurisdiction because the Eastern District maintains continuing jurisdiction due to the language of the Consent Decree, that is the end of the matter in the Middle District. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869); *See* Fed. R. Civ. P. 12(b).

Therefore, as a court cannot hear a case without jurisdictional authority, this Court's resolution of the question surrounding the District Court's jurisdiction will materially advance the ultimate termination of this litigation.

CONCLUSION

For these reasons, this Court should grant Petitioners permission to appeal from the District Court's Order denying Petitioners' Motion to Dismiss.

JEFF LANDRY
ATTORNEY GENERAL

Elizabeth Murrill (La. Bar Roll No. 20685)
Solicitor General of Louisiana
Angelique Duhon Freel (La. Bar Roll No. 28561)
Jeffrey Wale (La. Bar Roll No. 36070)
Assistant Attorneys General
Louisiana Department of Justice
Civil Division
P. O. BOX 94005
Baton Rouge, Louisiana 70804-9005
Telephone: (225) 326-6017
Facsimile: (225) 326-6098
Email: MurrillE@ag.louisiana.gov
freela@ag.louisiana.gov
walej@ag.louisiana.gov

Counsel for Defendant-Petitioner the State of Louisiana

/s/ Jason Torchinsky
Jason Torchinsky (VSB 47481)
Counsel of Record
Phillip M. Gordon (VSB 95621)
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jtorchinsky@hvjt.law
pgordon@hvjt.law

SECRETARY OF STATE
KYLE ARDOIN

/s/ Celia R. Cangelosi
Celia R. Cangelosi (Bar Roll No. 12140)
5551 Corporate Blvd. Suite 101
Baton Rouge, LA 70808
Phone: 225-231-1453
Fax: 225-231-1456
Email: celiacan@bellsouth.net

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

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 5,189 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.

Dated: October 29, 2020

/s/Jason Torchinsky

Jason Torchinsky
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jtorchinsky@hvjt.law

CERTIFICATE OF CONFERENCE

I hereby certify that, pursuant to Fifth Circuit Rule 27.4, counsel for Defendants-Petitioners conferred with opposing counsel for Plaintiffs-Respondent concerning this Petition. Undersigned counsel was advised that opposing counsel opposes this Petition.

Dated: October 29, 2020

/s/Jason Torchinsky

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

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, an electronic copy of the foregoing Petition was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service was accomplished to the following parties via first-class mail and email:

Arthur Ray Thomas
LEAD ATTORNEY;ATTORNEY TO BE NOTICED
Arthur Thomas & Associates
3313 Government Street
Baton Rouge, LA 70806
225-802-4199 Fax: 225-334-7491 Email:Artthomas51@gmail.Com

Adam L Shaw
PRO HAC VICE;ATTORNEY TO BE NOTICED
Bryan Cave Leighton Paisner LLP
1155 F Street, Nw Suite 700
Washington, DC 20004
202-508-6078 Fax: 202-220-7378
Email:Adam.Shaw@bryancave.Com

Alec W Farr
PRO HAC VICE;ATTORNEY TO BE NOTICED
Bryan Cave Leighton Paisner LLP
1155 F Street, Nw Suite 700
Washington, DC 20004
202-508-6053 Fax: 202-220-7353
Email:Awfarr@bclplaw.Com

Jason Semmes
PRO HAC VICE
Bryan Cave Leighton Paisner LLP
1155 F Street Nw, Suite 700
Washington, DC 20004

Meryl Macklin
PRO HAC VICE;ATTORNEY TO BE NOTICED
Bryan Cave Leighton Paisner LLP
3 Embarcadero Center 7th Floor 94111
San Francisco, CA 94111
415-675-1981 Fax: 415-675-3434
Email:Meryl.Macklin@bryancave.Com

/s/Jason Torchinsky

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