No. 20-30734

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

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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-Appellant 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-Appellant Kyle Ardoin the Secretary of State of Louisiana

CERTIFICATE OF INTERESTED PERSONS

No. 20-30734

Allen, *et al.,*

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.

Pursuant to the fourth sentence of Rule 28.2.1, Defendants-Appellants 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-Appellees*:**	***Defendants-Appellants:***
Arthur Ray Thomas Arthur Thomas & Associates	Jason B. Torchinsky Holtzman Vogel Josefiak

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

Ezra D. Rosenberg
Lawyers' Committee for Civil Rights
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

Elizabeth Murrill
Solicitor General of Louisiana
Louisiana Department of Justice
Civil Division P. O. BOX 94005
Baton Rouge, Louisiana 70804
225-326-6017 Fax: 225-326-6098
Email: MurrillE@ag.louisiana.gov

Angelique Duhon Freel
Assistant Attorney General
Louisiana Department of Justice
Civil Division P. O. BOX 94005
Baton Rouge, Louisiana 70804
225-326-6017 Fax: 225-326-6098
freela@ag.louisiana.gov

Jeffrey Wale
Assistant Attorney General

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

Louisiana Department of Justice
Civil Division P. O. BOX 94005
Baton Rouge, Louisiana 70804
225-326-6017 Fax: 225-326-6098
walej@ag.louisiana.gov

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

For all Plaintiffs-Appellees bluster, this case is actually quite simple. The District Court below lacked subject matter jurisdiction because of the current *Chisom* Consent Decree, and nothing Appellees argue—or the District Court mistakenly found—alters that fact.

The die was cast on this litigation when the Eastern District of Louisiana approved the 1992 Consent Decree that required the reapportionment of the seven districts of the Louisiana Supreme Court, modified that Decree in 2000, and restated its jurisdiction with respect to the subject matter of that Decree in 2012. *Chisom v. Jindal*, 890 F. Supp. 2d 696 (E.D. La. 2012). Because the United States District Court for the Eastern District of Louisiana is currently enforcing the Consent Decree, as it has done for the past 27 years, the State is still bound by the terms of the decree. Therefore, there was nothing left for the District Court below to do but to respect the continuing jurisdiction of the Eastern District and dismiss the matter for lack of jurisdiction. As such, this Court should reverse the District Court and find that jurisdiction surrounding matters requesting *any* boundary alterations of Louisiana Supreme Court districts lie with the Eastern District, and not the Middle District.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION DUE TO THE CURRENTLY ENFORCED *CHISOM* CONSENT DECREE.

A. The Consent Decree Continues to Govern Each and Every Louisiana Supreme Court District.

The terms of the Consent Decree are simple and clear. Despite this, the District Court incorrectly found that Plaintiffs-Appellees' requested "relief can easily be accomplished" without affecting the Decree. ROA.398. Even a perfunctory reading of the Consent Decree easily contradicts this assessment. The District Court is of the mistaken belief that, because Plaintiffs-Appellees stipulated[1] that District 5 can be redrawn without redrawing District 1,[2] this somehow steers clear of the Decree. *See* ROA.398. However, the Decree provides that *all* of the Supreme Court districts be redrawn and governed by its terms.[3] *See* ROA.244 at ¶ C(8).

[1] 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.296-97. The District Court improperly credited this assertion. ROA.398. For further discussion *see* Defs.' Br. at 11 n.6.

[2] 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 between the First and the Seventh Districts, and the Seventh District became the majority-minority district. *See* ROA.251-59. As such, assuming *arguendo* that Plaintiffs' flawed argument is true, a second majority-minority district would need to be drawn without touching the First or the Seventh Districts, as they are both covered under the Amended Consent Decree.

[3] Even assuming Plaintiffs' irrelevant stipulation and the District Court's mistaken belief are correct, a new district cannot be drawn out of thin air—residents of any new district will come from already-existing districts whose boundaries will then, in turn, need to be adjusted. Statewide redistricting is a balancing act where there is give and take from all districts in the State.

The relevant sections of the Decree, which state that *all* of Louisiana's State Supreme Court districts are implicated in the Decree, are as follows:

> Legislation will be enacted . . . *which provides for the reapportionment of the seven districts of the Louisiana Supreme Court* in a manner that complies with . . . 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. . . . *[F]uture Supreme Court elections after the effective date shall take place in the newly reapportioned districts*.

ROA.244 at ¶ C(8) (emphasis added). This language calls "for the reapportionment of the *seven districts*"—note that this refers to multiple districts—and that elections take place in those "newly reapportioned *districts*"—clearly referring to the seven districts mentioned earlier in the paragraph. ROA.244 at ¶ C(8) (emphasis added). This is not a complicated case of statutory construction—the language is clear: create seven new districts and then hold elections using those, and only those, new districts.

The Consent Decree goes on to state that "[t]his judgment is a restructuring of the Supreme Court of Louisiana by federal court order . . . ." ROA.244 at ¶ F. By its own terms, the Consent Decree covers every Supreme Court District, along with internal operations of the State's Supreme Court including the selection of the Chief Justice, and binds the State to the terms of the Consent Decree for as long as the Decree is in effect. *See e.g.,* ROA.244 at ¶¶ F, H; *Chisom v. Jindal*, 890 F. Supp. 2d at 705-706 ("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.") ("Districts" plural in the original). As recently as 2012, the Eastern District addressed the extent of its jurisdiction under the Decree—hardly a time in the distant past.[4] *Chisom v. Jindal*, 890 F. Supp. 2d at 711.

In 2012, in the matter of *Chisom v. Jindal*, the Eastern District of Louisiana affirmed its continuing jurisdiction until such time as it divests itself of that jurisdiction. *Id.* The District Court itself, in its order certifying this appeal, acknowledged that "[t]he net *effect* of the relief the *Chisom* plaintiffs sought is identical to the relief sought by the instant Plaintiffs-Appellees: a redrawing of all *seven* districts by the Legislature to ensure compliance with the Voting Rights Act." ROA.570 (italics in original; emphasis added in underline). Because the Eastern District has yet to divest itself of jurisdiction under the Consent Decree, and the Consent Decree continues to bind the parties to the *Chisom* litigation, including the State of Louisiana, the Eastern District has exclusive jurisdiction over the modification of *any* State Supreme Court District.

What is the State of Louisiana to do if the Middle District Court grants Plaintiffs-Appellees' requested relief and orders new Supreme Court districts to be

[4] Plaintiffs-Appellees repeatedly lament the age of the Decree, as if the age of the Decree has some bearing on its enforceability. It is important to note that the last time the Louisiana Supreme Court districts were reapportioned was in 2000—the same time the Consent Decree was amended to account for that reapportionment. *See* ROA.251-59. How does a court continually reassert its jurisdiction when the jurisdiction surrounds a practice (redistricting) that occurs so infrequently? The Eastern District has asserted its jurisdiction over issues associated with State Supreme Court districts more frequently than redistricting has occurred since the implementation of the Consent Decree in 1992. *See* ROA.251-59; *Chisom v. Jindal*, 890 F. Supp. 2d 696.

drawn? Under the terms of the Consent Decree, the State must first seek permission in the Eastern District before altering the Supreme Court district boundaries. What if the Eastern District denies the State's modification request? What if the *Chisom* plaintiffs (parties to the Consent Decree) object to the new maps and want to be involved in the process? What if an additional group of plaintiffs file a third Voting Rights Act suit in the Western District of Louisiana requesting a different boundary realignment scheme? How does the State hold elections with any degree of consistency and confidence when court-ordered boundaries can simply be attacked and revised in a sister court? How does the State of Louisiana obey the commands of conflicting sister federal courts simultaneously?

B. Plaintiffs-Appellees' and District Court's Discussion Surrounding "Collateral Attacks" to Consent Decrees Is a Red Herring.

Plaintiffs-Appellees resort to a textbook example of the straw man fallacy when discussing collateral attacks to consent decrees.[5] For example, in the second question presented, Plaintiffs-Appellees exaggerate one of the questions on appeal when they ask, "Can a court's decree in one case deprive non-parties of their right to vindicate their rights in a separate action, in a different court, involving relief that does not conflict with the first court's order?" Pls.' Br. at 1. This question portrays

[5] In addition to exaggerating Defendants-Appellants' actual position, it is also telling that Appellees' argument is flawed because one of their primary sources for legal support is the District Court's Order that is being challenged in this Court. *See e.g.,* Pls.' Br. at 12-13.

the issue in such a general manner—completely ignoring the specific and unique reasons for which this interlocutory appeal was allowed—that Plaintiffs-Appellees spend a large portion of their brief arguing against a general contention that is not before this Court. *See e.g.,* ROA.394-99 (District Court also spent over six pages in the challenged Opinion responding to a collateral attack theory that was never argued by Defendants-Appellants). Defendants-Appellants desire to put to rest any potential confusion or perception that they are arguing that Plaintiffs-Appellees are absolutely precluded from pursuing their claims via a collateral, or some other, estoppel theory. Defendants-Appellants have not argued that Plaintiffs-Appellees' claims are barred writ large by an estoppel theory. Instead, Defendants-

Appellants simply assert that Plaintiffs-Appellees are precluded from seeking relief outside of the Eastern District due to the ongoing Consent Decree of the Eastern District. The Eastern District's Decree essentially preempts the field when it comes to Louisiana Supreme Court boundary realignment.

Further, it is important to note that the holding in *Martin v. Wilks*, the case on which Plaintiffs-Appellees and the District Court primarily rely, is distinguishable from the facts of this case.[6] In *Martin*, the defendants argued that the plaintiffs, a group of white firefighters, were "*precluded* from challenging employment

[6] Likewise, *Texas v. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019) is inapposite as the Defendants-Appellants' position is not that Plaintiffs-Appellees' claims are precluded in any federal court.

decisions taken pursuant to the decrees, even though these firefighters had not been parties to the proceedings in which the decrees were entered." *Martin v. Wilks*, 490 U.S. 755, 758-59 (1989) (emphasis added). The Supreme Court held that "a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id*. at 759. Defendants-Appellants do not challenge that ruling in the present matter. Here, Plaintiffs-Appellees are not denied any legal rights by requiring them to seek relief in the Eastern District as opposed to this District. Defendants-Appellants' jurisdictional argument is not based on an estoppel theory—rather it is based on judicial comity and the fact that courts issuing orders have the ability to determine the validity of those orders while they are still being enforced, without worry that they will be adjusted by a sister court. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995). *Martin* is not even at issue in this case.

Unlike the plaintiffs in *Martin* who were suing to vindicate their *own* civil rights, the relief that was issued pursuant to the Consent Decree (i.e. the redrawing of all seven State Supreme Court districts) directly implicates *everyone's* civil rights—parties and nonparties alike—as they all reside within the State. Districted electoral maps always impact every resident to some degree, regardless of whether they are parties to the suit or otherwise opt-in to the remedy.

Assuming *arguendo* that *Martin* does apply, redistricting litigation likely falls under the exception articulated in *Martin* as it is a "representative" or "class" suit

that involves "a special remedial scheme [that] expressly foreclose[es] successive litigation by nonlitigants." *Martin*, 490 U.S. at 762 n.2. To hold otherwise would lead to multiple election maps, issued from competing courts, attempting to govern elections for a single statewide body. Notwithstanding that position being untenable, absent this Court reversing the District Court, it is a position where Defendants-Appellants could possibly find themselves in the months to come. There can only be one map governing the State Supreme Court Districts in a particular election—and that map is currently under the continuing jurisdiction of the Eastern District and cannot be altered by a sister court.

CONCLUSION

For the aforementioned reasons, as well as the reasons stated in Defendants-Appellants' Opening Brief, Defendants-Appellants respectfully request that this Court REVERSE the District Court's Opinion.

Respectfully Submitted this 5th day of March 2021,

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

/s/ Jason Torchinsky
Jason Torchinsky (VSB 47481)
Phillip M. Gordon (VSB 95621)
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
15405 John Marshall Hwy
Haymarket, VA 20169
Phone: (540) 341-8808

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 the State of Louisiana

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 Kyle Ardoin the Secretary of State of Louisiana

Fax: (540) 341-8809
Email: jtorchinsky@hvjt.law
pgordon@hvjt.law

CERTIFICATE OF SERVICE

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

March 5, 2021.

/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 COMPLIANCE

Undersigned counsel certifies that this Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because, excluding the parts of the Reply Brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 2,059 words.

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

Dated: March 5, 2021

/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