THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CHISOM, ET AL	)	**CIVIL ACTION NO: 86-4075**
	)	
VERSUS	)	**SECTION: "E"**
	)	**JUDGE SUSIE MORGAN**
EDWARDS, ET AL	)	
	)	**MAG. NO. (1)**
	)	**MAG. SALLY SHUSHAN**
	)	
**********		**********

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTIONS [R. 137, 146 AND 159]

The State of Louisiana, by and though the Office of the Governor and Governor Bobby Jindal, submits this memorandum to oppose plaintiff-intervenor's (i) *Motion to Reopen Case, Motion for Joinder, and Motion for Contempt* [R. 137]; plaintiffs' (ii) *Motion to Reopen and Enforce Consent Decree, to Add Defendants, and to Stay Proceedings in the Louisiana Supreme Court* [R. 146]; and (iii) their joint *Motion to Stay* [R. 159]. Based upon the law set forth below, the relief plaintiffs and plaintiff-intervenor seek should be denied.

I. Introduction

The State of Louisiana, by and through the Office of the Governor and Governor Bobby Jindal, previously set forth the issue presented – an unprecedented Louisiana Constitutional dispute involving two Justices' competing claims to succeed Chief Justice Kimball as the Chief Justice of the Louisiana Supreme Court upon her January 31, 2013, retirement. *See* Motion to Dismiss and Memorandum in Support. The resolution of this dispute hinges on interpreting the Louisiana Constitution's language to determine who is the "judge oldest in point of service on the supreme court," – Justice Johnson or Justice Victory. LSA—Const. Art. V, § 6. To resolve the two conflicting claims, the Supreme Court issued an Order on June 13, 2012, exhibit "A."

The Louisiana Supreme Court did not predetermine or decide the validity of either Justice's claims to being "the judge oldest in point of service on the supreme court." Rather, the Supreme Court's Order gives the competing Justices an opportunity to be heard on an issue requiring the Supreme Court to interpret the Louisiana State Constitution. In response, plaintiffs and plaintiff-intervenor filed motions in this long-ago closed case. [R. 137, 146, and 159.] Following a meeting on July 19, 2012, this Court issued a Minute Entry and then a briefing schedule. [R. 154 and 166.] At this Court's Request, the Louisiana Supreme Court extended its briefing schedule. Exhibit "B." Thereafter, the Louisiana Supreme Court timely filed a Motion to Intervene and a Complaint in Intervention [R. 176], a motion this Court denied by Order dated August 6, 2012. [R. 187.] Thereafter, the State of Louisiana, through counsel appointed by the State, timely filed a Rule 12(b) Motion to Dismiss, challenging this Court's subject matter jurisdiction. The State subsequently additionally filed that Motion to Dismiss through the Governor, acting on behalf of the State of Louisiana.

This Court lacks subject matter jurisdiction over the present dispute, as the State of Louisiana separately briefed in its Rule 12(b) Motion to Dismiss. The State will not reargue that point here. Instead, *assuming* this Court has subject matter jurisdiction, this memorandum will show that this Court should deny plaintiffs and plaintiff-intervenor the relief they seek. First, under controlling law, abstention is warranted. Second, to grant the relief plaintiffs and plaintiff-intervenor seek would require this Court to violate the federal Anti-Injunction Act, 28 U.S.C. § 2283. Third, the Justices of the Louisiana Supreme Court of the State of Louisiana have judicial immunity.

II. Historical Background

The State of Louisiana set forth a detailed history of the *Chisom* case in its memorandum to support dismissal under F.R.Civ.P. 12(b). Only a brief summary is provided here.

A. The *Chisom* case

In 1986, plaintiffs Chisom, Bookman and Morial and others sued on behalf of all African-American persons registered to vote in Orleans Parish. They alleged the method of electing justices from the First Supreme Court District, composed of Orleans, Jefferson, St. Bernard, and Plaquemines Parishes, impermissibly diluted minority voting strength. Their lawsuit specifically sought to divide the First Supreme Court District into two districts, one for Orleans Parish (to create a "minority-majority" district) and the second for the other parishes. *See, e.g.,* Amended Complaint, ¶¶ V and VIII(3)(b), exhibit "C." The United States Supreme Court likewise articulated the relief plaintiffs sought:

> Petitioners seek a remedy that would divide the First District into two districts, one for Orleans Parish and the second for the other three parishes. If this remedy were adopted, the seven members of the Louisiana Supreme Court would each represent a separate single-member judicial district, and each of the two new districts would have approximately the same population. According to petitioners, the new Orleans Parish district would also have a majority black population and majority black voter registration.

Chisom v. Roemer, 501 U.S. 380, 385, 111 S.Ct. 2354, 2359 (1991).

Without admitting to any violation but to resolve the dispute, the Louisiana Legislature enacted several changes to Title 13 of the Revised Statutes. The Legislature reapportioned the existing six Supreme Court districts into seven, effective January 1, 2000. The Seventh District would consist of most of Orleans Parish and would be a "minority-majority" district. The person elected to this Seventh District would take office as a Supreme Court Justice following the 2000 election. LSA—R.S. 13:101.1.

The Legislature also enacted LSA—R.S. 13:312.4 to create the "*Chisom* seat" – an additional judgeship for the Fourth Circuit Court of Appeal. The person elected to this "*Chisom* seat" would be assigned to sit *pro tempore* on the Supreme Court pursuant to LSA—Const. Art. V, §5(A). In 2000, plaintiff-intervenor ran unopposed for the Supreme Court seat §101.1

created. Five years and three years before, voters in the Second and Third Supreme Court Districts elected Justices Victory and Knoll, respectively, to seats on the Louisiana Supreme Court.

In the *Chisom* litigation, the then-presiding Judge, Charles Schwartz, Jr., entered a Consent Judgment on August 21, 1992 [R. 120] and closed the case. Certain parties, but not all, jointly moved later to amend the 1992 Consent Judgment because, contrary to the exact wording of the Consent Judgment: (1) the reapportionment of the Louisiana Supreme Court Districts took place in 1997, rather than in 1998; and (2) when reapportioning the Supreme Court districts, the Legislature split Orleans Parish between Supreme Court Districts One and the newly-created District Seven. This was not "in strict conformity with the Consent Judgment, but . . . me[t] the intent of all parties to this litigation for the final resolution of the matter." *See* Joint Motion to Amend Consent Judgment, ¶¶ 3 and 4, exhibit "D." The United States' October 17, 1997, letter, attached to the Joint Motion, also reflected the above-described purpose underlying the joint motion. Without reopening the case, Judge Schwartz entered an Order adding an addendum to the original Consent Judgment. [R. 135.]

With this abbreviated history, the State of Louisiana turns to the merits of its arguments. First, if this Court decides it has subject matter jurisdiction, this Court should nevertheless abstain from hearing this matter. Second, to enjoin the Louisiana Supreme Court and/or its Justices from deciding the Louisiana constitutional question pending before it would violate the federal Anti-Injunction Act, 28 U.S.C. § 2283, which Act constrains the All Writs Act, 28 U.S.C. § 1651(a). Third, not only are facts lacking to support sanctioning any Justice, the Justices of the Louisiana Supreme Court have judicial immunity.

III. This Court should abstain from hearing plaintiffs' and plaintiff-intervenor's actions

If the Court were to conclude it has subject matter jurisdiction over these recently-filed claims, this Court should nevertheless abstain to preserve "traditional principles of equity, comity, and federalism." *See, e.g., Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750 (1971); *Alleghany v. McCartney*, 896 F.2d 1138, 1142 (8th Cir. 1990). Federal court abstention is divided into several doctrines aimed at preserving those principles. *See Railroad Comm'n v. Pullman Co*., 312 U.S. 496, 61 S.Ct. 643 (1941)(abstention appropriate where a challenged state statute is susceptible of a construction by the state court that would modify or avoid a federal constitutional question); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976)(abstention appropriate to avoid duplicative litigation); *Burford v. Sun Oil Co*., 319 U.S. 315, 63 S.Ct. 1098 (1943)(abstention appropriate to avoid needless conflict in administration of state affairs); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (abstention appropriate to avoid intrusion on state enforcement of state law in state courts). In *O'Shea v. Littleton*, 414 U.S. 488, 499-500, 94 S.Ct. 669 (1974), the Court also espoused the doctrine of "equitable abstention" which cautions that a "court of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

"[T]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1, 11 n. 9, 107 S.Ct. 1519 (1987). Thus, this Court may apply or combine abstention doctrines as it sees fits.

A. *Younger* Abstention

The Supreme Court's *Younger* decision and its progeny direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Younger v. Harris*, 401 U.S. at 40-41, 91 S.Ct. 746 (1971); *Samuels v. Mackell*, 401 U.S. 66, 73, 91 S.Ct. 764 (1971)("where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.") The *Younger* doctrine "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate injury to the federal plaintiff." *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371 (1979). When federal courts disrupt a state court's opportunity to "intelligently mediate federal constitutional concerns and state interests" and interject themselves into such disputes, "they prevent the informed evolution of state policy by state tribunals." *Moore*, 442 U.S. at 429-30, 99 S.Ct. 2371.

The Supreme Court applies *Younger* to civil proceedings where important state interests are involved. *Id.*; *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975). "The seriousness of federal judicial interference with state civil functions has long been recognized by the Court. [It has] consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman*, 420 U.S. at 603, 95 S.Ct. 1200.

Absent "extraordinary circumstances," *Younger* abstention in favor of state judicial proceedings is required if the state proceedings: (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *See Bice v. Louisiana Public Defender Board*, 677 F.3d 712, 716 (5th Cir. 2012); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515 (1982); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092

(9th Cir.2008)(noting where these standards are met, a district court "may not exercise jurisdiction" and "there is no discretion in the district courts to do otherwise.") "Where *Younger* abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires *dismissal* of the federal action." *Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir.1988)(emphasis in original.) Here, all three circumstances are met and *Younger* abstention principles apply.

First, if this Court were to proceed as plaintiffs and plaintiff-intervenor request, this Court necessarily would interfere with an ongoing state judicial proceeding, that being Louisiana Supreme Court docket number 12-O-1342, *In re: Office of Chief Justice, Louisiana Supreme Court*.

Second, *beyond question*, the State of Louisiana has the paramount interest in regulating the subject matter of the claim – interpreting Louisiana Constitution Article V, § 6 – to determine who is entitled to be the next Chief Justice of the Louisiana Supreme Court.[1]

Third, plaintiff-intervenor will have every opportunity to advance any argument she has both as to her claimed right to become the Chief Justice upon Chief Justice Kimball's retirement and to make any challenge, constitutional or otherwise, to the procedure set forth in the June 13, 2012, Order, as amended. Because of this opportunity to be heard and participate fully in the state court proceeding, plaintiff-intervenor will not suffer "great and immediate injury," *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, and thus, in the absence of "great and immediate injury," this

[1] LSA—Const. Art. V, § 6, reads:

> The judge oldest in point of service on the supreme court shall be chief justice. He is the chief administrative officer of the judicial system of the state, subject to the rules adopted by the court.

Court should recognize the "strong policy against federal intervention in state judicial processes." As the United States Supreme Court noted in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739 (1970), proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts with relief from error, if any, "ultimately [in] this Court." *Id.*, at 287, 90 S.Ct. at 1743.

B. *Pullman* Abstention

Pullman abstention also applies. *Railroad Comm'n v. Pullman Co*., 312 U.S. 496, 61 S.Ct. 643 (1941). As the Supreme Court explained, the lesson of *Pullman* was that "federal courts should abstain from a decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984). "[F]or *Pullman* abstention to be appropriate it must involve (1) a federal constitutional challenge to state action and (2) an unclear issue of state law that, if resolved, would make it unnecessary for us to rule on the federal constitutional question." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Committee*, 283 F.3d 650, 653 (5th Cir.2002).

Underlying the Supreme Court's *Pullman* abstention doctrine is an emphasis on comity. Respect for the expertise of a state's judicial system in construing state statutes pervades the majority opinion. Justice Felix Frankfurter, writing for the *Pullman* Court, described the driving force behind the abstention doctrine as follows: "[F]ederal courts, exercising a wise discretion, restrain their authority because of a 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501, 61 S.Ct. at 645.

Pullman abstention is appropriate here. Plaintiffs and plaintiff-intervenor challenge the Louisiana Supreme Court's "official actions" on alleged federal constitutional grounds. They infer that the Supreme Court's June 13, 2012, Order violates federal law by undermining the Voting Rights Act. As a result, they claim, plaintiff-intervenor's federally protected rights are being violated. The first prong of *Pullman* is satisfied.

Second, the possible existence of a federal question is entirely contingent on an unresolved interpretation of Louisiana law – namely, interpreting Louisiana Constitution Art. V, § 6, to decide who is entitled to be the Chief Justice of the Louisiana Supreme Court. The question of state law here is at least – and perhaps even more than – "fairly subject" to the Louisiana Supreme Court's understanding of the State's Constitution. This goes to the heart of *Pullman* and its progeny. *Pullman* abstention "is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Bellotti v. Baird*, 428 U.S. 132, 147, 96 S.Ct. 2857 (1976).

Significantly, Judge Schwartz – who presided over the *Chisom* case until well after it was closed – abstained from deciding the constitutionality of Act 512 of 1992, which Act created the temporary Fourth Circuit Judge who would be assigned to the Louisiana Supreme Court and which Act was the foundation for the August 21, 1992, Consent Order. [R. 120]

In January 1995, Clement F. Perschall, Jr., filed a *Petition for Declaratory Judgment on the Constitutionality of Louisiana Acts 1992, No. 512* in the 19th Judicial District Court for the Parish of East Baton Rouge. Perschall contended Act 512 violated the Louisiana Constitution because, *inter alia*, it created an eighth seat on the Louisiana Supreme Court in contravention of the Constitution's providing for one Chief Justice and six Associate Justices. *See Perschall v.*

State of Louisiana, 1995 WL 396311, * 1 (E.D.La. July 5, 1995)(Schwartz, J.) After being removed to federal court, Perschall's complaint was allotted to Judge Schwartz because "it was materially related to the matter previously pending in this Court styled *Chisom, et al v. Edwards, et al*." *Perschall v. The State of Louisiana*, 1997 WL 767703, *2 (E.D.La. Dec. 10, 1997)(Schwartz, J.)

Judge Schwartz examined Perschall's complaint – challenging the constitutionality of the Act forming the basis of the *Chisom* Consent Judgment – and deferred to Louisiana state courts by abstaining under *Pullman*. Reasoned Judge Schwartz:

> As the state's supreme court is the ultimate authority and is not bound by the federal court's ruling on the state law issues, a ruling by the federal court in a case such as the present one would be nothing but a forecast.
>
> * * *
>
> A state court's determination that Act 512 violates Louisiana law would in all likelihood moot or substantially alter the plaintiff's single federal constitutional claim. Moreover, in light of the state courts' final authority to interpret doubtful state laws, a ruling by this Court as to the state law issues would constitute merely a tentative decision subject to prompt displacement by a state adjudication. On the other hand, submitting the plaintiff's novel state law claims to the expertise of a Louisiana court would respect the values of federalism highlighted in *Pullman* by avoiding premature constitutional adjudication, needless friction with state policies, and decision on unsettled questions of state law better resolved by state courts.

Perschall v. State of Louisiana, 1995 WL 396311, *2 (E.D.La. July 5, 1995)(Schwartz, J.)

Judge Schwartz noted the importance of the question of the constitutionality of Act 512 to the *Chisom* Consent Judgment but nevertheless recognized abstaining was proper:

> By abstaining from deciding the state constitutional issues, the Court does not undermine the substantial federal interest in determining the constitutionality of Act 512. Such an interest clearly exists since the validity of the Consent Judgment entered by this Court in the *Chisom* case rests on a determination of the viability of the aforesaid act under the Louisiana Constitution. However, since any judgment of this Court in that respect would constitute merely a prediction, the net result would be to delay final resolution of the state law constitutional issues.

Id. Ultimately, the Louisiana Supreme Court held the Act unconstitutional in *Perschall v. State of Louisiana*, 96-0322 (La. 7/1/97); 697 So.2d at 260.

Pullman abstention, as Judge Schwartz recognized when Perschall challenged the constitutionality of the very Act underpinning the Consent Judgment, is equally, if not more, appropriate now.

C. Equitable Abstention

Finally, principles of equity, comity, and federalism preclude equitable intervention when a federal court is asked to enjoin a state court proceeding. *O'Shea v. Littleton*, 414 U.S. at 499-500, 94 S.Ct. 669. The doctrine of equitable abstention provides that a "court of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id*. at 499, 94 S.Ct. 669.[2]

The equitable abstention doctrine sustains "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *O'Shea*, 414 U.S. at 500, 94 S.Ct. 669. If the requested equitable relief requires intrusive follow-up into state court proceedings, it constitutes "a form of monitoring the operation of state court functions that is antipathetic to established principles of comity." *Id*. These "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local priorities." *Horne v. Flores*, 557 U.S. 433, 129 S.Ct. 2579, 2593 (2009). "When the relief sought would require restructuring of state governmental institutions, federal courts will intervene only upon finding a *clear* constitutional violation, and even then only to the extent necessary to remedy that violation." *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992)(emphasis added.) *See also Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974), *cert. denied*, 423 U.S. 841, 96

[2] Plaintiffs and plaintiff-intervenor seek equitable relief – an injunction from this Court directed to the Louisiana Supreme Court – pursuant to 28 U.S.C. § 1651(a).

S.Ct. 73 (1975)(where the Court applied equitable abstention to bar federal court intrusion into state affairs.)

The principles of equitable abstention apply here. Plaintiffs' and plaintiff-intervenor's challenges to the Louisiana Supreme Court's official actions and its interpretation of Louisiana's Constitution necessarily would require this Court to intrude upon the Louisiana Supreme Court's administration of its own affairs. Such a request violates the fundamental principles of comity. *See O'Shea*, 414 U.S. at 501, 94 S.Ct. 669 ("monitoring state judicial officers impermissibly intrudes in state court functions that is antipathetic to established principles of comity"); *see also Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts*, 488 F.2d 1241, 1244-46 (1st Cir. 1973). Further, plaintiff-intervenor has an adequate remedy at law and will not suffer irreparable injury. The Louisiana Supreme Court's June 13, 2012, Order, as amended, affords plaintiff-intervenor the opportunity to present her claim to becoming the next Chief Justice of the Louisiana Supreme Court upon Chief Justice Kimball's retirement. Federal court interference in this process, however, would actually *prevent* and interfere with the right of Justice Victory to present *his* competing claim as a matter of state constitutional law.

In sum, abstention is appropriate. Plaintiffs' and plaintiff-intervenor's claims and the relief requested strike at the very heart of federalism and the institutional competence of Louisiana's judiciary to adjudicate state matters. To reopen this matter and grant plaintiffs and plaintiff-intervenor the relief they seek would require this Court to set constitutional parameters regarding the function of Louisiana's highest court. Generally speaking, the Louisiana Supreme Court is the final expositor of Louisiana law and its judicial functions. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308 (1976)("We are, of course, bound to accept the interpretation of [the State's] law by the highest court of the State"); *Stringer*

v. Black, 503 U.S. 222, 234, 112 S.Ct. 1130 (1992)(noting that the state supreme court is the final authority on the meaning of state law); *Perschall v. State of Louisiana*, 1995 WL 396311, * 2 (E.D.La. July 5, 1995) (E.D.La. July 5, 1995)(Schwartz, J.)("As the state's supreme court is the ultimate authority and is not bound by the federal court's ruling on the state law issues, a ruling by the federal court in a case such as the present one would be nothing but a forecast," *citing Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499-500, 61 S.Ct. 643 (1941)).

For the above reasons, this Court should abstain from proceeding further.

IV. Plaintiffs' and plaintiff-intervenor's requested relief would violate 28 U.S.C. §2283

Plaintiffs and plaintiff-intervenor ask this Court to enjoin the Louisiana Supreme Court from acting. *See* Plaintiff-Intervenor Motion [R. 137], p. 11, ¶ 5; Plaintiffs' Motion to Reopen and Enforce Consent Decree [R. 146], ¶¶ D, F and H. But the federal Anti-Injunction Act, 28 U.S.C. §2283, bars this Court from enjoining the Louisiana Supreme Court from proceeding and deciding the Louisiana constitutional question presented in *In Re: Office of Chief Justice, Louisiana Supreme Court,* docket no. 12-O-1342.

A. Plaintiffs' and plaintiff-intervenor's reliance upon the All Writs Act, 28 U.S.C. §1651(a) is misplaced

Starting at page 4 of their brief, plaintiffs and plaintiff-intervenor argue this Court may enjoin the Louisiana Supreme Court pursuant to the powers vested in this Court by the All Writs Act, 28 U.S.C. § 1651(a). Plaintiffs and plaintiff-intervenor are mistaken.

Although the All Writs Act, 28 U.S.C. § 1651, permits a federal court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the All Writs Act "is limited by the Anti-Injunction Act, which prevents a federal court from enjoining the 'proceedings in a state court except as expressly authorized by Congress or where necessary in aid of its jurisdiction, or to protect and effectuate its

judgments.'" 28 U.S.C. § 2283. *See, e.g., Newby v. Enron Corporation*, 338 F.3d 467, 473-74 (5th Cir. 2003)('[u]nder the All Writs Act, federal courts 'may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. [*Citation omitted.*] This broad grant of authority is then limited by the Anti-Injunction Act, which bars a federal court from enjoining a state court unless that action is 'expressly authorized by Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments"); *Estate of Brennan v. Church of Scientology*, 645 F.3d 1267, 1273 (2011)("The Anti-Injunction Act, however, 'serves as a check on the broad authority recognized by the All Writs Act,' and 'prohibits federal courts from utilizing that authority to stay proceedings in state court unless the requirements of three narrow exceptions are met,'") *quoting Burr & Forman v. Blair*, 470 F.3d 1019, 1026 (11th Cir. 2006); *Lorillard Tobacco Co. v. Chester, Wilcox & Saxbe*, 589 F.3d 835, 843-44 (6th Cir. 2009); *Sandpiper Village Condominium Association, Inc. v. Louisiana-Pacific Corporation*, 428 F.3d 831, 841 (9th Cir. 2005), *cert. denied,* 548 U.S. 905, 126 S.Ct. 2970 (2006); *Retirement Systems of Ala. V. J.P. Morgan Chase & Co.*, 386 F.3d 419, 425 (2nd Cir. 2004)("[t]he All Writs Act, 28 U.S.C. §1651(a), provides federal courts with the power to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' *This grant of authority is limited by the Anti–Injunction Act, 28 U.S.C. §2283, which bars a federal court from enjoining a proceeding in state court unless that action is "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments*")(*italics added*); *Prometheus Development Co. v. Everest Properties II, LLC*, * 2, fn 1, 2006 WL 1699574 (N.D.Cal. June 16, 2006)(Alsup, J.)("PDC and Diller argue that jurisdiction here is conferred by the All Writs Act, 28 U.S.C. § 1651. The jurisdictional grant under the All Writs Act, however, is limited by the Anti-

Injunction Act"); *Industrial Tower and Wireless, LLC v. Town of Epping*, 2010 WL 4026127, * 3 (D.New Hampshire Oct. 14, 2010)(LaPlante, J.)(same); *Del Rio v. CreditAnswers*, 2010 WL 1337700, * 1 (S.D. Cal. April 1, 2010)(same).[3]

Because the Anti-Injunction Act, 28 U.S.C. § 2283, circumscribes the equitable powers of the All Writs Act, this Court must look to the exceptions under the Anti-Injunction Act to determine whether this Court has the power to enjoin the Louisiana Supreme Court. The two exceptions to the Anti-Injunction Act on which plaintiffs and plaintiff-intervenor rely do not apply so as to authorize this Court to enjoin the Louisiana Supreme Court.

B. The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining the Louisiana Supreme Court

Starting at page 10 of their memorandum [R. 159-1], plaintiffs and plaintiff-intervenor suggest this Court "may be inclined to consider the 'Anti-Injunction Act, 28 U.S.C. § 2283.'" Indeed, this Court should consider the Anti-Injunction Act because it limits the All Writs Act, 28 U.S.C. § 1651, as discussed above, and bars this Court from granting the relief plaintiffs and plaintiff-intervenor seek. First enacted in 1793, the Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

The United States Supreme Court recognizes the Anti-Injunction Act "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts." *Chick Kam Choo v. Exxon Corp*., 486 U.S. 140, 146, 108 S.Ct. 1684 (1988). And the Act's core message is one of respect for state courts. *Smith v. Bayer*

[3] Like plaintiffs and plaintiff-intervenor, the United States too overlooks the limitation the federal Anti-Injunction Act, 28 U.S.C. § 2283, imposes on the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.,* United States Mem. [R. 183, p. 6.]

Corp., ___ U.S. ___, 131 S.Ct. 2368, 2375 (2011); *Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1137 (5th Cir.1973)(§2283 was enacted "to avoid unseemly conflict between state and federal courts.") The Act broadly commands that state courts "shall remain free from interference by federal courts." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 282, 90 S.Ct. 1739 (1970). That edict is subject to only "three specifically defined exceptions" and is "an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of three specifically defined exceptions." *Id.*, 398 U.S. at 285-86, 90 S.Ct. at 1742. Those exceptions, although designed for important purposes, "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S., at 146, 108 S.Ct. 1684; *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1739 (1970); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 514, 75 S.Ct. 452, 454-55 (1955). Indeed, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." *Id.*, at 297, 90 S.Ct. 1739; *Smith v. Bayer Corp*, 131 S.Ct. at 2375.

Plaintiffs and plaintiff-intervenor contend the injunction they ask this Court to issue – to "stay all proceedings planned and contemplated by the Louisiana Supreme Court in furtherance of its June 13, 2012 Order in *In Re: Office of Chief Justice, Louisiana Supreme Court,* docket no. 12-O-1342 until such time as this Court has ruled on [their] motions" – fall within two of the narrow exceptions to the Anti-Injunction Act. Those two exceptions are (1) the "necessary in aid of its jurisdiction" exception; and (2) the "relitigation" exception. Neither exception applies, however, and as interpreted by the Supreme Court the Anti-Injunction Act precludes this Court from enjoining the Louisiana Supreme Court from proceeding.

1. The "necessary in aid of its jurisdiction" exception

The "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act authorizes injunctive relief "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295, 90 S.Ct. 1739 (1970), This exception "arose from the settled rule that if an action is *in rem*, the court first obtaining jurisdiction over the res may proceed without interference from actions in other courts involving the same *res*." *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1982). Although the second exception has since been expanded to include some *in personam* actions, it remains that an injunction is justified only where a parallel state action "threatens to 'render the exercise of the federal court's jurisdiction nugatory.'" *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 806 (9th Cir. 2002)(*quoting Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir.1996)). Indeed, the general rule is still that "[w]here a suit is strictly in *personam* . . . there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined[,] . . . because [the subsequent action] neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with the law." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 232, 43 S.Ct. 79 (1922); *see also Donovan v. City of Dallas,* 377 U.S. 408, 412, 84 S.Ct. 1579 (1964).

Fifth Circuit decisions hold the "necessary in aid of its jurisdiction" exception is "interpreted narrowly," finding a threat to the Court's jurisdiction "only where a state proceeding threatens to dispose of property that forms the basis for federal *in rem* jurisdiction, *see, e.g., Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1140 (5th Cir.1973), or where the state

proceeding threatens the continuing superintendence by a federal court, such as in a school desegregation case. Courts in this Circuit issue injunctions under the "necessary in aid of its jurisdiction" only in exceptional circumstances, when necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case. *Corely v. Entergy Corporation*, 297 F. Supp. 2d 915, 918 (E.D. Tex. 2003). In no event, said the Fifth Circuit, "may the 'aid of jurisdiction' exception be invoked merely because of the prospect that a concurrent state proceeding might result in a judgment inconsistent with the federal court's decision.'" *State of Texas v. United States*, 837 F.3d 184, 186 fn 4 (5th Cir. 1988)(*citing Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295-96, 90 S.Ct. 1739, 1747-48 (1970). Section 2283 mandates a significant reluctance to enjoin state courts. *T. Smith & Son, Inc. v. Williams,* 275 F.2d 397, 405-06 (5th Cir. 1960); *Corely v. Entergy Corporation*, 297 F.Supp.2d at 918.

This is neither an *in rem* action nor a case where this Court continuously supervises a school desegregation plan. To the contrary, Judge Schwartz *closed* this case on August 22, 1992, and it remains closed. Plaintiffs sought a remedy to "divide the First District into two districts, one for Orleans Parish and the second for the other three parishes [whereby] the seven members of the Louisiana Supreme Court would each be elected from a separate single-member judicial district, [. . .] each of the two new districts would have approximately the same population [and] the new Orleans Parish District would also have a majority black population and majority black voter registration." *See Chisom v. Roemer*, 501 U.S. at 385, 111 S.Ct. at 2359. Creating the Seventh Supreme Court District in 1999 and electing plaintiff-intervenor to the new Seventh Supreme Court District seat in 2000 accomplished the sought-for remedy. Simply put, this Court

is not engaged in any ongoing supervising of the voting relative to Louisiana Supreme Court elections and there is no voting rights question at issue here.

Thus, the only available avenue for plaintiffs and plaintiff-intervenor is to convince this Court that it can enjoin the Louisiana Supreme Court from deciding the question of Louisiana constitutional law currently pending in the Louisiana Supreme Court, namely: "for purposes of determining the Chief Justice of the Louisiana Supreme Court as of February 1, 2013, which Justice is the 'judge oldest in point of service on the supreme court' under Article V, Section 6 of the Louisiana Constitution of 1974?" *See* Order, exh. "A." The question thus-presented to and before the Louisiana Supreme Court was *never* presented to, briefed, or decided by this Court. Controlling United States Supreme Court precedent forecloses plaintiffs' and plaintiff-intervenor's resort to the "relitigation" exception to the Anti-Injunction Act.

2. The "relitigation" exception

Binding United States Supreme Court precedent demonstrates the "relitigation" exception to the Anti-Injunction Act does not apply here either.

The "relitigation" exception authorizes an injunction to prevent state litigation of a claim or issue "that previously was presented to and decided by the federal court." *Smith v. Bayer Corp.,* 131 S.Ct. at 2375; *Chick Kam Choo*, 486 U.S. at 147, 108 S.Ct. 1684. But in applying the "relitigation" exception, the Supreme Court has "taken special care to keep it 'strict and narrow.'" *Smith v. Bayer Corp.,* 131 S.Ct. at 2375, *quoting Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. 1684. After all, said the Supreme Court in *Smith v. Bayer Corp*.,

> . . . a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment.' [Citation omitted.] Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the second court (here, the one in West Virginia). So issuing an injunction under the relitigation exception is resorting to heavy artillery.[5] For that reason, every benefit of the doubt goes toward the state court, *see Atlantic Coast Line*, 398 U.S.,

> at 287, 297, 90 S.Ct. 1739; an injunction can issue only if preclusion is clear beyond peradventure.

Id., 131 S.Ct. at 2375-76.[4]

In *Chick Kam Choo*, 486 U.S. at 147-148, 108 S.Ct. at 1690, the Supreme Court observed the proper scope of the relitigation exception "is perhaps best illustrated by *Atlantic Coast Line*," and the Court summarized *Atlantic Coast Line* as follows:

> That case arose out of a union's decision to picket a railroad. The railroad immediately sought an injunction from a Federal District Court to prevent the picketing. The court refused to enjoin the union, issuing an order in 1967 that concluded, in part, that the unions were 'free to engage in self-help.' The railroad then went to state court, where an injunction was granted. Two years later this Court held that the Railway Labor Act, 45 U.S.C. §151 *et seq*., prohibited state court injunctions such as the one the railroad had obtained. This decision prompted the union to move in state court to dissolve the injunction, but the state court declined to do so. Rather than appeal, however, the union returned to federal court and obtained an injunction against the enforcement of the state court injunction. *The District Court read its 1967 order as deciding not just that federal law did not authorize an injunction, but that federal law pre-empted the State from interfering with the union's right of self-help by issuing an injunction. Accordingly, the court concluded that an injunction was necessary to protect that judgment*.
>
> The Court of Appeals affirmed, but this Court reversed, holding that the federal court injunction was improper even assuming that the state court's refusal to dissolve its injunction was erroneous. *After carefully reviewing the arguments actually presented to the District Court in the original 1967 litigation and the precise language of the District Court's order, we rejected the District Court's later conclusion that its 1967 order had addressed the propriety of an injunction issued by a state court*:
>
> > Based solely on the state of the record when the [1967] order was entered, *we are inclined to believe that the District Court did not determine whether federal law precluded an injunction based on state law. Not only was that point never argued to the court, but*

[4] In the above quoted text, footnote 5, following "resorting to heavy artillery," reads: "[t]hat is especially so because an injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment. As we have noted before, 'the state appellate courts and ultimately this Court' can review and reverse such a ruling," *citing Atlantic Coast Line*, 398 U.S. 281, 287, 90 S.Ct. 1739.

> *there is no language in the order that necessarily implies any decision on that question.*

Chick Kam Choo, 486 U.S. at 147-148, 108 S.Ct. at 1690 (*internal citations and quotation marks omitted*)(*emphasis added.*)

The Supreme Court in *Chick Kam Choo* went on to explain:

> [A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court. Moreover, *Atlantic Coast Line* illustrates that this prerequisite is strict and narrow. *The Court assessed the precise state of the record and what the earlier federal order actually said; it did not permit the District Court to render a post hoc judgment as to what the order was intended to say.*

Chick Kam Choo, 486 U.S. at 147-148, 108 S.Ct. at 1690 (*underscoring original; italic added.*)

This Court, then presided over by Judge Schwartz, never considered, let alone decided the issue presently before the Louisiana Supreme Court. Instead, in the December 27, 1999, Joint Motion to Amend Consent Judgment, movers expressed the sole purpose to amend the Consent Judgment and that purpose had nothing to do with the current dispute:

1.

> On August 21, 1992, the parties to this matter effectuated a settlement of the issues raised by the complaint and consented to the entry of a Consent Judgment in Civil Action No. 86-4075, *Chisom, et al v. Edwards, et al.* (Exhibit A).

2.

> Paragraph (C)(8) of the Consent Judgment reads:
>
> > 8. 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 . . . . 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 . . . .

3.

> Amendment of LSA—Const. Art. III, § 2 (1974), providing for regular sessions convening in even-number years to be restricted to the consideration of legislation which provides for fiscal matters, forced the legislature to reapportion the Louisiana Supreme Court in 1997, rather than in 1998.
>
> 4.
>
> Louisiana Acts 1997, No. 776 amends R.S. 13.101, 101.1 and 312.4(D), to redistrict the Supreme Court. (Exhibit B). Section 4 provides for the act to become effective on January 1, 1999. Orleans Parish was split between District 1 and District 7 in Act 776 (1997), which is not in strict conformity with the Consent Judgment, but which meets the intent of all parties to this litigation for final resolution of the matter.
>
> * * *
>
> 6.
>
> All parties to this matter agree to modify the Consent Judgment so that it reflects the intent of the parties to accept Act 776 (1997) as an addendum to the Consent Judgment, and present an Order for the court's approval.
>
> * * *

See Joint Motion to Amend Consent Judgment, exhibit "D."

Nowhere in their Joint Motion was any "tenure" issue raised, let alone briefed, for Judge Schwartz to decide. Nor did the United States Attorney General's October 17, 1997, approval letter, attached to the joint motion and copied to Judge Schwartz, mention anything about "tenure." *See* October 17, 1997, U.S. Department of Justice letter, exhibit "E."[5] Rather, the *only* issue presented to Judge Schwartz involved amending the 1992 Consent Judgment to reflect: (1) the legislature had not reapportioned the seven districts exactly as the Consent Judgment

[5] The second paragraph of the United States Government's October 17, 1997, letter, exhibit "E," stated:

> Your submission does not request review for, nor does Act No. 776 make, any changes with regard to the continued existence of the thirteenth judicial position for the Fourth Circuit Court of Appeal or the assignment of that position to the Louisiana Supreme Court. You confirmed this in an October 16, 1997 telephone conversation with Timothy Mellett, an attorney in the Voting Section.

required, *i.e.* – Act 776 split Orleans Parish between District 1 and District 7, rather than including all of Orleans Parish within one district; but (2) this reapportionment "me[t] the intent of all parties to this litigation for final resolution of the matter." *See* Joint Motion, ¶ 4. Acts 1997, No. 776, attached to the Order as an "addendum" showed by precincts how Louisiana would be divided into seven supreme court election districts. In sum, merely because "tenure" language appeared in Acts 1997, No. 776, does not mean Judge Schwartz considered or decided the Louisiana constitutional issue presently before the Louisiana Supreme Court. Judge Schwartz clearly *did not* adjudicate that issue when he entered the January 3, 2000, Order.[6]

Notwithstanding the suggestions by plaintiffs, plaintiff-intervenor and the United States, neither the original Consent Judgment nor the January 3, 2000, Order addressed, let alone, decided the issue this dispute presents – "which Justice is the 'judge oldest in point of service on the supreme court' under Article V, Section 6 of the Louisiana Constitution of 1974" – and thus entitled to becoming the next Chief Justice of the Louisiana Supreme Court. *See* Order, exhibit "A."

Under the binding precedent set forth above, and pursuant to the unassailable facts, to enjoin the Louisiana Supreme Court or its Justices from interpreting the Louisiana Constitution to decide the question before it would violate the federal Anti-Injunction Act, 28 U.S.C. § 2283.

[6] The "tenure" reference in Act 776 is not part of La. R.S. 13:101, 101.1 or 312.4 nor is it included in any other Louisiana statute. The "tenure" reference was made to the judgeship created by La. R.S. 13:312.4, a statute the Louisiana Supreme Court held unconstitutional three years before the Consent Judgment was amended. Further, § 4 of Act 776 specifically said "[t]his Act shall become effective on January 1, 1999, and shall not affect any election held prior to that date. . . ."

V. The Justices of the Louisiana Supreme Court have judicial immunity for their acts as Justices of the Louisiana Supreme Court

There are no facts *whatsoever* to support *any* sanction against any of the Justices of the Louisiana Supreme Court. Neither the Louisiana Supreme Court nor its current Justices (except plaintiff-intervenor) was a party to this closed case. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local Number 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 531, 106 S.Ct. 3063 (1986).

Regardless, the Justices have judicial immunity for their acts as Justices of the Louisiana Supreme Court. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286 (1991)(*per curiam*)(The doctrine of absolute judicial immunity protects judges from suit for any action taken within the judge's jurisdiction and in his or her judicial capacity.) The doctrine of absolute judicial immunity is as old as medieval times and the English courts. *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 543 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 106 S.Ct. 496 (1985); *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183 (1980); *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 100 S.Ct. 1967 (1980); *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978); *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967); *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L.Ed. 646 (U.S. 1872)("[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.")

CONCLUSION

This Court should decline the invitation to reopen this case or to dispense the remedies plaintiffs and plaintiff-intervenor seek. The current dispute requires interpreting Louisiana's

Constitution to determine who should become the next Chief Justice of the Louisiana Supreme Court upon the retirement of Chief Justice Kimball, a question currently and uniquely posed to the Louisiana Supreme Court. No issue under the Voting Rights Act is present and federal jurisdiction is lacking. Additionally, or alternatively, even if this Court had jurisdiction, it should abstain from deciding the issue as a matter of federal-state comity. Nor is there a basis in law or in fact to hold any of the Justices of the Louisiana Supreme Court in contempt. Even if there were such a basis, the Justices are protected by judicial immunity. Finally, to enjoin the functioning of the Louisiana Supreme Court would violate the Federal Anti-Injunction Act, 28 U.S.C. § 2283, and would represent an unprecedented interference with the highest court of the State of Louisiana.

Wherefore, the State of Louisiana, through its Governor Bobby Jindal, prays this Court to deny the motions to reopen, deny the motions to add defendants, deny the motions to hold any Justices in contempt, and deny any request for a stay or injunctive relief directed to the Louisiana Supreme Court and its Justices.

Respectfully submitted:

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CERTIFICATE

I hereby certify that on the 13th day of August 2012, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all participating counsel of record. I also certify that I have mailed the foregoing by United States Postal Services, First Class, to all non-CM/ECF participants.

s/Kevin R. Tully
KEVIN R. TULLY