UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHISOM, et al Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor BERNETTTE J. JOHNSON Plaintiff- Intervenor versus PIYUSH ("BOBBY") JINDAL, et al Defendants	∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞ ∞	CIVIL ACTION NO: 86-4075 SECTION: E MAGISTRATE: 1

PLAINTIFF INTERVENOR BERNETTE J. JOHNSON'S MEMORANDUM IN OPPOSITION TO STATE OF LOUISIANA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. PROC. 12(B)

MAY IT PLEASE THE COURT:

Pursuant to this Court's August 14, 2012 Order [R. Doc. 208], Plaintiff-Intervenor Bernette J. Johnson ("Justice Johnson") submits this Memorandum in Opposition to the State of Louisiana's August 13, 2012 Motion to Dismiss Pursuant to Fed. R. Civ. Proc. 12(B) [R. Doc. 197]. This memorandum incorporates the factual allegations and legal arguments set forth in the pleadings, declarations, and exhibits previously filed by Plaintiffs and Plaintiff-Intervenors in this action.

I. This Court Has Subject Matter Jurisdiction to Consider Plaintiffs' and Plaintiff-Intervenor's Motions and Grant Their Requested Relief.

In its Motion to Dismiss, the State's primary contention is that this Court lacks subject matter jurisdiction over Plaintiffs' and Plaintiff-Intervenors' motions. None of the State's supporting arguments withstand close scrutiny. Specifically, the State claims that Plaintiffs and Plaintiff-Intervenors have asked this Court to interpret the Louisiana Constitution and thereby interfere with the Louisiana Supreme Court's exclusive right to do so. It also asserts that the Consent Judgment has been fully implemented and is no longer operative; therefore, this Court's subject matter jurisdiction has expired.

The State's arguments fail because the determination of which justice will succeed Chief Justice Kimball as the "judge oldest in point of service" is dependent on whether Justice Johnson's six years as the Chisom judge count as years spent on the Louisiana Supreme Court. If they do, she has the longest tenure. If they do not, Justice Victory has the longest tenure. The question of whether those six years count is entirely a question of federal law. As the Louisiana Supreme Court held in Perschall v. State, the creation of the Chisom seat is unconstitutional as a matter of state law and only exists as a remedy set forth in the federal Consent Judgment. Moreover, the language of the Consent Judgment makes clear that the Chisom judge has the same rights and duties – including as to tenure – as the other justices. That language, as well as the language in the Consent Judgment specifically providing that this Court shall retain jurisdiction until the terms of the Consent Judgment are fully effectuated, demonstrates that this Court has subject matter jurisdiction.

A. The Consent Judgment, not State Law, Governs the Dispute Over How to Calculate Justice Johnson's Years of Service as a Chisom Judge

The parties all agree that under the Louisiana Constitution, the "*judge oldest point in service*" shall succeed Justice Kimball as Chief Justice. *See* "Memorandum in Support of F.R.

Civ. P. 12(B) Motion to Dismiss for Lack of Subject Matter Jurisdiction and/or to Dismiss Plaintiffs Chisom, Bookman and Morial's Motions Because They Lack Standing and/or to Dismiss on the Grounds of Lack of a Justiciable Claim" (hereinafter "Memo Supporting Motion to Dismiss") [R. 197-1 at 2]. Although the State does not explicitly acknowledge that the answer to this question completely turns on whether Justice Johnson's six years as the Chisom judge count toward her tenure, the State does not identify any other issue that is relevant to the answer.[1]

As the Louisiana Supreme Court recognized in its decision in Perschall, federal law, in the form of the Consent Judgment, and not state law, governs the issue before this Court. Perschall v. Louisiana, 697 So. 2d 240 (La. 1997). In Perschall, the Louisiana Supreme Court declared the state law creating the Chisom judge, Act No. 512, unconstitutional because it "*effectively impose[d] an eighth justice*" on the state supreme court and the Louisiana Constitution limits the Supreme Court to seven members. Id. at 259. In doing so, the Louisiana Supreme Court noted that the Chisom judge served "*in the full capacity of a judge – equal in responsibilities and benefits*." Id. The court did not eliminate the Chisom justice, as the plaintiff in Perschall requested, because of the federal Consent Judgment in this case. Id. at 260.

Accordingly, by finding that the creation and existence of the Chisom judge was unconstitutional under Louisiana law, the Louisiana Supreme Court has divested itself of jurisdiction to decide whether the Chisom judge had the same benefit of office regarding tenure as the other justices. The Consent Judgment clearly specifies that the Chisom judge is entitled to the same benefits, including tenure, as the other justices. Section C.3. of the Consent Judgment

[1] The phrase "*judge oldest in point of service on the supreme court*" could conceivably mean the justice who has been a judge in Louisiana, including the lower courts, for the longest point in time. In practice, however, Louisiana only counts years a justice has spent on the Louisiana Supreme Court as reflected by the fact Justice Victory has been a Louisiana judge or justice for more years (since 1981) than Chief Justice Kimball (since 1982).

provides that the Chisom judge "s*hall receive the same compensation, benefits, expenses, and emoluments of offices as now or hereafter are provided by law for a justice of the Louisiana Supreme Court*," and Section C.4 provides that she "*shall participate fully and share equally in all other duties and powers of the Supreme Court, including, but not limited to, those powers set forth by the Louisiana Constitution, the laws of Louisiana, and the Louisiana Rules of Court*." The 2000 Amendment to the Consent Judgment further provides that "*[a]ny tenure on the supreme court gained by such judge while so assigned to the supreme court shall be credited to such judge*."

The State utterly fails to rebut the effect of the Louisiana Supreme Court's opinion in Perschall and the language of the Consent Judgment. The State only mentions the Louisiana Supreme Court's opinion in Perschall in four footnotes. Memo Supporting Motion to Dismiss at 1 n.1, 6 n.5, 8 n.7, and 13 n.8, and none of those footnotes includes a discussion of the issue identified above. Instead, the State attempts to draw significance from this Court's decision in 1995, Perschall v. State of Louisiana, 1995 WL 396311 (E.D. La. July 5, 1995), remanding the Perschall case to state court. [R. 197-1 at 7]. That decision has no significance to the present circumstances because the issue there was whether Act No. 512 was unconstitutional under the Louisiana Constitution, obviously a state law question, id. at * 6-7, whereas here there is no issue of state law.

The State does not even attempt to grapple with the specific provisions of the Consent Judgment that govern this dispute. The key provisions of the Consent Judgment cited above gave the Chisom judge the same benefits, emoluments of office, powers, and duties of the other justices. The tenure provisions adopted in the 2000 Amendment to the Consent Judgment did the same. The State makes a couple of arguments with respect to this tenure language. Its primary

argument is that the tenure provision should effectively be written out of the 2000 Consent Judgment because neither the parties' "Joint Motion to Amend Consent Judgment" nor the Department of Justice's letter preclearing Act No. 776 mention the tenure issue. [R. 197-1 at 11-14]. The State's secondary argument is that the tenure provision in Act No. 776 does not apply because it cannot be found anywhere in the Louisiana Revised Statutes and because the provision amended a statute, L.S.A. – R.S. 13:312.4, that the Louisiana Supreme Court found unconstitutional when it declared Act No. 512 unconstitutional in Perschall. [R. 197-1 at 13, n.8].

Both of these arguments are unavailing. The mere fact that the tenure provision is not mentioned in the Joint Motion, the Department of Justice letter, or the Louisiana Revised Statutes is of no significance. The 2000 Amendment to the Consent Judgment incorporates all of Act No. 776 into the Judgment, not part of Act No. 776. As the Supreme Court has held, "*[c]onsent decrees have elements of both contracts and judicial decrees*." Frew v. Hawkins, 540 U.S. 431, 437 (2004). as the Supreme Court has further instructed, United States v. Armour & Co., 402 U.S. 673, 682 (1971). Under basic principles of contract law, the language of the contract supersedes any extrinsic evidence where the terms of the contract are clear. See United States v. Armour & Co., 402 U.S. 673, 682 (1971)*("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it….and the instrument must be construed as it is written…*"). Here the terms of the Consent Judgment are clear regarding tenure. Moreover, the fact that Act No. 776 cannot be found in the Louisiana codes only supports Justice Johnson's position that the Consent Judgment, which includes Act No. 776, controls and not state law.[2] Thus, the Consent

[2] In addition, the State suggests that there is significance to the fact that the 2000 amendment to the Consent Judgment, which contains the specific language on tenure, does not include language retaining this Court's jurisdiction. [R. 197-1 at 11]. The 2000 Amendment did not require such language from this Court to retain its jurisdiction. The 2000 Amendment makes clear that it only amends the Consent Judgment by incorporating Act No.

Judgment, and not state law, decides the issue of Justice Johnson's tenure and under the terms of the Consent Judgment, Justice Johnson's years as the Chisom judge count towards her tenure.

B. Until Justice Johnson's Service as a Chisom Judge is Credited Towards her Tenure as a Louisiana Supreme Court Justice, the Full Remedy in this Case Has Not Been Completely Implemented

Section K of the Consent Judgment states that this Court "*shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished*." The State does not dispute that this language is sufficient to enable this Court to reopen the case prior to the complete implementation of the final remedy.

Instead, the State claims that complete implementation of the final remedy became accomplished in 2000 when the Chisom seat was extinguished in 2000 and Justice Johnson was elected as one of seven justices on the Louisiana Supreme Court. [R. 197-1 at 10]. The State reasons that the "*remedy sought*" by Plaintiffs in this case was to secure a new majority-minority judicial district based in Orleans Parish from which a Supreme Court justice would be elected, first as the Chisom judge and then as one of the seven justices. Because this occurred, the State believes that Plaintiffs' full remedy has been achieved and, as a result, the Court no longer retains jurisdiction under the terms of the Consent Judgment.

The full remedy in Chisom is more comprehensive. The State ignores a critical component of the remedy that is contained in the language of the Consent Judgment: that the Chisom judge receives the same benefits, emoluments, powers, and credit for tenure as the other justices. The Louisiana Supreme Court's June 1, 2012 Order, which raises whether Justice Johnson's years as a Chisom judge count toward her tenure, demonstrates that this component of the Consent Judgment has yet to be fully effectuated. As discussed above, by the terms of the

776. Accordingly, Act No. 776's terms became subject to the same retention of jurisdiction provisions that governed the Consent Judgment prior to the amendment.

Consent Judgment, Justice Johnson's service as a Chisom judge factors into any determination of seniority for purposes of determining the next Chief Justice, just as all years of service on the Supreme Court would count for any other Justice. Thus, the remedy in this case has not been fully accomplished until Justice Johnson's Chisom service is fully credited toward her tenure as a Louisiana Supreme Court Justice. Until such time, the terms of the Consent Judgment require that this Court retain subject matter jurisdiction.

The State's additional related arguments are similarly unpersuasive. The State believes it significant that the prayer for relief, [R. 197-1 at 4-5], summary description of the case and proposed remedy by the United States Supreme Court, [id. at 5-6], and this Court's 1994 summary description of the Consent Judgment in an Order denying a motion by plaintiff Bookman,[3] [id. at 10-11], focus on the component of the remedy that would create a majority-black, single-member district and do not mention any issue regarding the tenure and benefits of the Chisom judge. As discussed above, the remedy is defined by what is in the Consent Judgment, not how the remedy or proposed remedy is characterized in any other document.

The State also contends that "*crediting plaintiff-intervenor for time served while elected to the Court of Appeal for the Fourth Circuit, but serving on the Louisiana Supreme Court, toward the chief justice position – is beyond the scope of the Voting Rights Act*" [R. 197-1 at 14], and that "*[b]ecause the relief plaintiffs and plaintiff-intervenor seek does not remedy any alleged*

[3] The thrust of the State's argument about Plaintiff Bookman's 1994 effort to reopen Chisom is that, in denying Bookman's motion, this Court recognized that the aims of the Consent Judgment had already been achieved. This is not what happened, and is inapposite to the matter at hand. Plaintiff Bookman moved under Rule 60(b) to reopen Chisom because the first Chisom Justice, Justice Revius O. Ortique, Jr., would soon meet the then-mandated age of retirement (70) under the Louisiana constitution. She requested an order to permit Justice Ortique to remain in his position past his 70th birthday, arguing that the Chisom plaintiffs would be adversely affected by his retirement as there was no mechanism established to fill a vacancy in the Chisom seat. This Court declined to modify the Consent Judgment under Rule 60 because Justice Ortique's 70th birthday (and resulting retirement) was neither "*a significant change in circumstances*" nor "*an unforeseen condition*." This Court also held that the factors for injunctive relief were not satisfied, either. The only real message from this decision was that the Consent Judgment did not encompass Bookman's additional request, nor did it abrogate the constitutionally-mandated retirement age for Louisiana Supreme Court justices. These issues are irrelevant to the matter now before this Court as Justice Johnson is not seeking to modify the terms of the Consent Judgment or the Louisiana Constitution.

federal voting rights violation, this Court lacks jurisdiction." [R. 197-1 at 15]. The basis for this argument is that, according to the State, "*[t]he Voting Rights Act, 42 U.S.C. §1973, is concerned with ensuring an election practice does not deny or abridge the right to vote because of race. The Voting Rights Act is not concerned with the succession to the office of chief justice on a state supreme court according to the state's Constitution.*" [R. 197-1 at 9] (citations omitted).

In Frew, a case relied on by the State, the United States Supreme Court rejected a similar argument to that now made by the State. In Frew, the plaintiffs were children eligible for Medicaid services in Texas. They alleged that Texas had failed to provide required services and they sued state officials responsible for overseeing and implementing the program. After extensive negotiations, the parties entered a consent decree that the district court approved. Frew, 540 U.S. at 433-35. Though the federal statute the defendants were alleged to have violated was a "*brief and general mandate*," the consent decree was "*about 80 pages long*" and ordered a "*comprehensive plan for implementing the federal statute*." Two years later the plaintiffs filed a motion to enforce the consent decree on grounds that the state had not complied with it. The district court found that the defendants had violated the consent decree. The Fifth Circuit held that the district court lacked jurisdiction to enforce the consent decree because the plaintiffs had not established a violation of federal law. The Fifth Circuit found that the state had complied with the general mandate of the federal law even if it had not complied with the consent decree. Id. at 435-36. The Supreme Court reversed. In doing so, it rejected the state's argument that the decree overstepped its bounds by going beyond federal law. It found that there was nothing improper with the "*highly detailed*" nature of the decree, and that it required "*the state officials to take some steps that the statute does not specifically require*." Id. at 439. The court found that "[*t]he decree reflects a choice among various ways that a state could implement*

the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law." Id.

Similarly, enforcing the Consent Judgment in this case vindicates an agreement that Louisiana officials reached to comply with the Voting Rights Act. It does not matter whether the Voting Rights Act specifically provides that, as part of a remedy, the Chisom judge is entitled to the same rights and benefits, including tenure, as the other justices. The Consent Judgment reflects a choice by the parties that providing the Chisom judge with the same rights and benefits as the other justices was part of remedying the Voting Rights Act violation. The State contends that Justice Johnson has failed to demonstrate a new and ongoing violation of the Voting Rights Act. [R. 197-1 at 9,15]. As Frew makes clear, Justice Johnson does not need to do so – all she needs to show is that the State's actions violate the existing Consent Judgment.

In another related argument, the State further relies on Frew and another U.S. Supreme Court decision, Horne, to caution that federal decrees must not be excessive in their reach—either by attempting to remedy conditions that do not violate federal law or by overreaching into the province of legislative and executive officials. Horne v. Flores, 557 U.S. 433 (2009); [R. 197-1 at 7-10, 14-15]. Neither of these concerns is at issue in this action, and the State's cited authority does not show otherwise.

In Horne, the state and state officials moved under Rule 60(b)(5) of the Federal Rules of Civil Procedure for relief from a consent decree implementing a federally-required English Language Learners program on grounds that circumstances surrounding its provision of funding to implement the decree had changed so substantially that the state should no longer be subject to the decree's terms. In Frew, the U.S. Supreme Court acknowledged the federalism concerns attendant federal court decrees, but pointed out that such concerns are balanced out by a party's

ability to use Rule 60(b)(5) to request release from the decree when circumstances have changed. Frew, 540 U.S. at 441. The Supreme Court was quite clear though that, if a state does not affirmatively request such relief and satisfy its burden of establishing a substantial change in facts or law, then a court must enforce a decree according to its terms. Horne, 557 U.S. at 447; Frew, 540 U.S. at 442. Here, the State has not objected to the substance or legal basis of the Consent Judgment, and the State has not indicated that it now wishes to be released from its obligations thereunder because the Consent Judgment overreached. It has not even attempted to meet these burdens, and Plaintiffs and Plaintiff-Intervenor are requesting that this Court enforce the clear terms of the Consent Judgment requiring Justice Johnson's years as a Chisom judge to be credited towards her tenure as a Louisiana Supreme Court Justice.

In support of this Court's subject matter jurisdiction, Plaintiffs and Justice Johnson have provided ample case law establishing a district court's authority to interpret and enforce its own consent judgments.[4] The State has not distinguished or discussed these cases in its Motion to Dismiss.[5] This authority is rooted in the All Writs Act, the inherent powers doctrine and Rule 65

[4] See Memo in Support of Motion to Reopen [R. 137-1 at 12-15], citing Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375 (1994); Waffenschmidt v. MacKay, 763 F.2d 711 (5th Cir. 1985); Trade Arbed, Inc. v. African Express MV, 941 F.Supp. 68 (E.D. La. 1996); Hospitality House, Inc. v. Stonebridge Health Center, Inc., 298 F.3d 424 (5th Cir. 2002); Ho v. Martin Marietta Corp., 845 F.2d 545 (5th Cir. 1988), and Memo in Support of Motion to Stay [R. 159-1 at 5-10, 19], citing United States v. New York Tel. Co., 434 U.S. 159 (1977); ITT v. Community Development Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978); United States v. Hall, 472 F.2d 261 (5th Cir. 1972); City Cab Co. of Orlando v. All City Yellow Cab, Inc., 581 F. Supp. 2d 1197 (M.D. Fla. 2008).

[5] The State suggests that Justice Johnson must move to reopen the case under Rule 60(b) of the Federal Rules of Civil Procedure and that she has failed to do so. [R. 197-1 at 2, n.2]. This Court need not invoke Fed. R. Civ. P. 60 to enforce the Consent Judgment against the State. See e.g. United States v. New York Tel. Co., 434 U.S. 159, 172 (1977) ("*This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . .*"); Ford Motor Co. v. Woods, 165 F. App'x 345, 346 (5th Cir. 2006) ("*[T]he district court had jurisdiction to issue an order enforcing its prior judgment.*"); United States v. City of Jackson, Mississippi, 318 F. Supp. 2d 395, 408 (S.D. Miss. 2002) aff'd sub nom. United States v. City of Jackson, Miss., 359 F.3d 727 (5th Cir. 2004) ("*Federal courts have the inherent power to enforce compliance with an injunction through civil contempt proceedings . . . .*"). However, reopening this case under Rule 60(b) would also be appropriate. Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381 (1994): (where there is an express retention of a district court's jurisdiction in the order dismissing a settled case, that court may later use its ancillary authority to reopen the case under Rule 60(b) and enforce the parties' agreement); See also, Memo in Support of Motion to Reopen at 13 [R. 137-1 at 13].

of the Federal Rules of Civil Procedure, all of which also empower this Court to use its enforcement powers to reach non-parties.[6] In a recent decision involving analogous facts, The Northeast Ohio Coalition for the Homeless v. Husted, 2012 U.S. Dist. LEXIS 66111 (N.D. Ohio May 12, 2012), a federal district court invoked the All Writs Act to enjoin a state court action that threatened to undermine a consent decree in a 42 U.S.C. § 1983 action. In reaching its decision, the court rejected several arguments similar to those made by the State in this case, including arguments related to subject matter jurisdiction, the All Writs Act, ripeness and the Anti-Injunction Act.[7]

In Northeast Ohio, plaintiffs sued Ohio state officials regarding various election procedures including procedures related to voter identification and provisional ballots. After several years of litigation, the parties reached a settlement resulting in a consent decree. The consent decree required the Secretary of State to institute a number of procedures through directives. Subsequent to the entry of the consent decree, the Ohio Senate President Thomas E. Niehaus and Ohio House of Representatives Speaker Pro Tempore Louis W. Blessing ("Relators"), on behalf of the State of Ohio, filed an action in Ohio Supreme Court seeking to

[6] The one case the State cites in support of its All Writs Act argument does not help the State. [R. 197-1 at 15]. On facts that are readily distinguishable from those in the instant case, the United States Supreme Court in U.S. v. Denedo held that the U.S Navy-Marine Corps Court of Criminal Appeals had jurisdiction over a Naval member's writ of coram nobis petition seeking review of charges he faced for violating the Uniform Code of Military Justice based on ineffective assistance of counsel. This Court is not faced with a request for such extreme relief and no party contends that there was an error in the Consent Judgment that must be corrected in the interests of justice. To the extent Denedo informs the instant action, it supports Plaintiff-Intervenor's and DOJ's positions that, where a federal court has subject matter jurisdiction over an action, the All Writs Act authorizes it to issue relief that is "*necessary or appropriate in aid of*" its jurisdiction. 28 U.S.C. § 1651(a).

[7] The Relators also contended that the Anti-Injunction Act prevented the court from enjoining the state case. The court found that all three exceptions to the Anti-Injunction Act applied. "*First, Plaintiffs' action was brought under an Act of Congress, 42 U.S.C. § 1983's provisions for civil relief from violations of constitutionally and federally protected civil rights*." Northeast Ohio, 2012 U.S. Dist. LEXIS 66111 at * 4-7. Second, the district court found that the 'necessary in aid of its jurisdiction' exception applied to a district court's continuing authority to enforce a settlement agreement where the court expressly retains jurisdiction over the agreement in such judgment, which had been done in that case. Third, the court found that an injunction was necessary to protect the Court's judgments. An order enjoining a collateral attack on the Consent Decree, a final judgment from this Court which is still in effect, is one made under the third exception. Plaintiff-Intervenor addresses the State's Anti-Injunction Act arguments in more detail in its companion reply memoranda.

compel the Secretary of State to rescind directives issued pursuant to the consent decree in the federal case. Northeast Ohio, 2012 U.S. Dist. LEXIS 66111 at * 4-7.

The plaintiffs in the federal case moved for an injunction to stop the state action. The Relators made three arguments in opposition: *"(1) Relators are not a party to this lawsuit, and therefore, this Court lacks jurisdiction to enjoin them from pursuing their state law claims; (2) there is and has been no violation of this Court's orders as to make Plaintiffs' claim ripe; and (3) principles of federalism provide that the Ohio Supreme Court is the final authority on issues of state law.*" Id. at 9. The district court rejected each argument.

With respect to the issue of jurisdiction, the district court found it had jurisdiction to enjoin the Realtors for two reasons. First, they found that the Relators were part of the State of Ohio and the State of Ohio was a party. Second, the court found that even if the Relators were not a party the court had the authority under the All Writs Act to enjoin nonparties from acting. Id. at * 10-19. Northeast Ohio further confirms this Court's authority, pursuant to the All Writs Act, to enforce the Consent Judgment against the original parties thereto, as well as the Louisiana Supreme Court and its members because the State of Louisiana is now a party to this action.

In addition, Frew illustrates a federal district court's proper exercise of subject matter jurisdiction to enforce its own judgments. Reversing the Fifth Circuit, the U.S. Supreme Court unanimously decided on certiorari, that the Eleventh Amendment did not bar a district court from enforcing a consent decree against non-compliant state officers two years after its entry. Plaintiffs in the underlying litigation involving implementation of Texas' Medicaid program returned to the district court seeking enforcement of the consent decree's terms and the Court determined, "*Federal courts are not reduced to approving consent decrees and hoping for*

compliance. Once entered, a consent decree may be enforced." Frew, 540 U.S. at 440. The Court recognized that this principle applies to cases involving remedies for violations of prior orders, as well. Id.

The State also appears to challenge the characterization of the six Louisiana Supreme Court Justices as parties in privity under Rule 65(d) of the Federal Rules of Civil Procedure. [R. 197-1 at 8, n.7]. In doing so, the State only demonstrates its confusion about the significance of its role in Chisom. Rule 65(d) is clear that a district court's orders and injunctions bind parties to the underlying action and the parties' "*officers, agents, servants, employees, and attorneys*." Fed. R. Civ. P. 65(d)(2)(A), (B). Persons in "active concert or participation" with these two groups may also be bound. Fed. R. Civ. P. 65(d)(2)(C). The State does not contend that the cases cited in support for treating the six individual justices as parties in privity are inapplicable and it has not put forth any contradictory authority. The State's reference to Rule 65(d)'s privity prong in a footnote erroneously focuses on the intervention in Chisom by former Justices Calogero and Marcus. [R. 197-1 at 8, n.7]. However, Plaintiff-Intevenor asserts that the six *current* Louisiana Supreme Court Justices may be bound by the Consent Judgment as parties in privity. Finally, to the extent the State is a defendant to the Chisom litigation, the privity inquiry under Rule 65(d) is unnecessary. As a party, this Court can enforce the terms of the Consent Judgment against the State, which includes the six justices of the Louisiana Supreme Court and the Louisiana Supreme Court.

II. There is a Ripe, Justiciable Question for This Court to Decide

The State argues that Plaintiffs' and Justice Johnson's pending motions are not ripe for review by this Court. [R. 197-1 at 17-18]. It contends that the "*mechanism*" established by the Louisiana Supreme Court to identify the next Chief Justice has not yet resulted in the

determination that Justice Johnson should not be the next Chief. According to the State, Justice Johnson may not suffer any harm.

The standards for ripeness are not as constrained as the State contends. The Fifth Circuit has set forth the standard for ripeness as follows:

> *A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."* Monk v. Huston, *340 F.3d 279, 282 (5th Cir. 2003) (quoting* New Orleans Pub. Serv., Inc. v. Council of New Orleans, *833 F.2d 583, 586 (5th Cir. 1987)). The Supreme Court has expounded that "[t]he key considerations [for ripeness] are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."* Id. *(citing* Abbott Labs., 387 U.S. at 149*) (internal quotation omitted). "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required."* Id. *Yet, "even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness."* Cent. & Sw. Servs. v. E.P.A., 220 F.3d 683, 690 (5th Cir. 2000).

Roark & Hardee LP v. City of Austin, 522 F.3d 533, 545 (5th Cir. 2008).

There is nothing abstract and hypothetical here. The Louisiana Supreme Court has set forth a process to determine for itself whether Justice Johnson's six years as a Chisom judge count toward her tenure on that court. The Louisiana Supreme Court understands, however, that that is a question of federal law. This Court has all of the factual information it needs to decide the underlying issue. Justice Johnson would suffer a hardship if this Court waited for the Louisiana Supreme Court's process to play out. She would either have to participate in a judicial proceeding that is illegitimate or not participate and suffer the consequences. Other federal courts have found a threat to institute state court litigation on a related matter was "*clearly a definitive position that threatens a concrete injury*." Lauderbaugh v. Hopewell Township, 319 F.3d 568, 574-75 (3d Cir. 2003). In this case, there is more than just a threat of a state court proceeding but an actual state proceeding in which briefing is due in just two weeks, by August

31, 2012. Indeed, when there is a possibility that a state court proceeding would undermine a consent decree, federal courts have acted before the state court actually did anything to jeopardize the federal judgment. Here, again, Northeast Ohio, 2012 U.S. Dist. LEXIS 66111, discussed *infra* in Section I(b), is instructive. In rejecting the defendants' ripeness argument, the district court stated that the plaintiffs did not have to wait until a state court decision had been rendered to seek to enforce the consent decree. The court cited two Sixth Circuit cases supporting that finding. Id. at * 19-20. (citing *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe,* 589 F.3d 835 (6th Cir. 2009) and *City of Detroit,* 329 F.3d 515, 523-24 (6th Cir. 2003)(en banc)). See also United States v. New York, 972 F.2d 464, 468-469 (2d Cir. 1992) (Second Circuit affirmed district court's removal, pursuant to the All Writs Act, of a state action where the state court decision could have jeopardized the federal consent decree); In re VMS Securities Litigation v. Prudential Securities, Inc., 103 F.3d 1317, 1321 (7th Cir. 1996) (Seventh Circuit affirmed order of two federal district courts to enjoin state court proceeding of a related matter "*to guard the integrity of its prior rulings over which it had expressly retained jurisdiction*"); Nowling v. Aero Services Int'l, Inc., 734 F. Supp. 733, 737-39 (E.D. La. 1990) (district court refused to remand claim originally brought in state court and removed to federal court "*to avoid the real possibility of orders issuing from a state court that would be inconsistent with its own*.") These cases make clear that Justice Johnson does not have wait to lose in the Louisiana Supreme Court before vindicating her rights under the Consent Judgment.

Finally, there are indications that Justice Johnson will not receive a fair hearing before the Louisiana Supreme Court. Chief Justice Kimball, who signed the June 13 Order, has already indicated how she will vote. When she met with Justices Johnson and Victory, she suggested options where Justice Victory and Justice Knoll would assume the Chief Justice position before

Justice Johnson but not vice versa. She also told Justice Johnson that she considered Justice Johnson a Court of Appeals judge during her years as a Chisom judge. Moreover, it is disingenuous for the Louisiana Supreme Court to even review this issue. In Perschall, it held that the creation of the Chisom seat violated the Louisiana Constitution because the Chisom judge served "*in the full capacity of a judge – equal in responsibilities and benefits*," yet now it has reopened that exact same question to determine whether Justice Johnson served in the full capacity of a justice, equal in benefits as a Chisom judge. Furthermore, even the nature of Mr. Tully's representation invites questions as he appeared at least at one point to be representing both the justices who were recused because they have an interest in becoming Chief Justice before Justice Johnson and those justices who would decide the matter if left to the Louisiana Supreme Court. For all of these reasons, this matter is ripe for decision by this Court and the circumstances of this matter require this Court's intervention to protect the integrity of the Consent Judgment. United States v. Hall, 472 F.2d 261, 266 (5th Cir. 1972)(upholding enforcement of school desegregation order and declaring "*In such cases, as in voting rights cases, courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment*.").

For the reasons stated above, Plaintiff-Intervenor Bernette J. Johnson respectfully requests that this Court deny the State of Louisiana's motion to dismiss under Federal Rule of Civil Procedure 12(b), and grant the relief by requested by Plaintiff-Intervenor in the "Motions to (1) Reopen Case, (2) to Join as Defendants Justice Kimball, Victory, Knoll, Weimer, Guidry, and Clark of the Louisiana Supreme Court, (3) for Contempt against Justices Kimball, Weimer, Guidry and Clark" [R. Doc. 137] and the "Motion to Stay Proceedings" [R. Doc. 159].

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all parties via facsimile transmission, electronic mail, hand delivery, or by placing same in the U.S. Mail, postage prepaid and properly addressed on this 15th day of August, 2012.

s/James M. Williams
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