UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

LOUISIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al*., Plaintiffs, v. STATE OF LOUISIANA, *et al*., Defendants.	Case No. 3:19-cv-00479-JWD-SDJ

MEMORANDUM IN SUPPORT OF THE STATE OF LOUISIANA'S AND THE SECRETARY OF STATE'S JOINT MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

On June 26, 2020, this Court issued a Ruling and Order Denying Defendant's Motion to Dismiss ("Order"). (ECF No. 47). The Court's Order denied, *inter alia*, Defendant's request for dismissal for lack of jurisdiction based on the existence of the *Chisom* consent decree. The Court's denial of the Motion to Dismiss puts the State in untenable position of potentially two conflicting rulings from two sister courts governing the same reapportionment map that are in effect at the same time. Cases involving electoral districts are unique—and significantly different from the issues presented in *Martin*—because there can only be *one* electoral district map. The Court's ruling paves the way for a situation in which the State may be compelled by this Court's order to violate the Court order of another Court.[1] This significant legal issue going to the jurisdiction of this Court and ought to be determined by the Fifth Circuit before this case proceeds. Therefore,

[1] As noted in prior briefing, it is the view of both the State of Louisiana and the Secretary of State that the Consent Order entered by the Eastern District of Louisiana governs the State Supreme Court districts for the entire State—and therefore encompasses the boundaries of every district inside and outside the geographic boundaries of the Eastern District of Louisiana. Any order from this Court ordering any alteration of any boundary of any district would put these Defendants in a quandary about which map to follow for upcoming elections.

the State of Louisiana and Secretary file this motion to certify interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

BACKGROUND

A referral to the United States Court of Appeals for the Fifth Circuit is appropriate here. As acknowledged by the parties and the Court, litigation pertaining to Louisiana's State Supreme Court districts has a lengthy and complex history.

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

The 1992 Consent Decree mandated, *inter alia*, that:

> 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.***

1992 Consent Decree (ECF No. 27-3 at ¶ (C)(8)) (emphasis added). The 1992 Consent Decree effectively "memorialized" La. Acts 1992, No. 512 of the Louisiana Legislature. *Chisom v. Jindal*, 890 F. Supp. 2d at 703-705 (quoting *Perschall v. State*, 697 So. 2d 240, 245-47 (La. 1997)). The Act created a district comprised of Orleans Parish that would take effect on January 1, 2000, or earlier if a vacancy occurred in the first district before January 2000. *Id*.

[2] A more complete history of the litigation involving Louisiana's Supreme Court districts can be found in *Chisom v. Jindal*, 890 F. Supp. 2d 696 (E.D. La. 2012).

Subsequently, Act 776 of 1997 was signed into law on July 10, 1997. Act 776 provided for the reapportionment of the Supreme Court districts as envisioned by the Consent Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 705; *see also* 1992 Consent Decree (ECF No. 27-3 at ¶ (C)(8)). Specifically, Act 776 created seven single member Supreme Court districts covering the geographic territory of the entire state and assigned the justices to individual districts. *Id*. at 706. In 1999, "certain parties" filed to amend the original Consent Decree to reflect the fact that the parties accepted Act 776 as an addendum to the 1992 Decree. *Id*. The request was granted, and Act 776 was made part of the Consent Decree. *Id*; *see also* 2000 Consent Decree Modification (ECF No. 27-4).

Litigation subsequently followed in the Eastern District respecting the application of the seniority rules for Chief Justice of the Louisiana Supreme Court as it related to the judicial districts created pursuant to the Consent Decree. *Chisom v. Jindal*, 890 F. Supp. 2d at 701. Of substantial import to the case at bar was the Eastern District's ruling which asserted that only the Eastern District of Louisiana had "subject matter jurisdiction to interpret and enforce the decree's terms." *Id*. at 710-11. That Court held that only an "affirmative ruling" by the Eastern District "that the Consent Judgment has been completely satisfied and thus has been vacated and terminated" does that court lose jurisdiction. *Id*. at 711.

On July 23, 2019, a set of Plaintiffs brought suit in this Court requesting alleging violations of, *inter alia*, the Voting Rights Act and requests that "the Court '[d]eclare that the current apportionment of Louisiana Supreme Court districts violates Section 2 of the Voting Rights Act." *See* Order (ECF No. 47 at 14). The State moved to dismiss Plaintiffs' Complaint because the current apportionment of the State's seven Supreme Court districts covering the entirety of the State is currently under a continuing Consent Decree in the United States District Court for the

Eastern District of Louisiana. The Court subsequently ordered additional briefing on the impact of *Martin v. Wilks*, 490 U.S. 755 (1989). (ECF No. 39). The State subsequently filed additional briefing clarifying that the jurisdictional arguments made by the State do not preclude jurisdiction writ large by any federal court, but instead limit Plaintiffs to seeking relief in the Eastern District so long as that Court retains jurisdiction over all seven Supreme Court districts in the entire state. (ECF No. 40-2 at 1-2). The Court issued its Ruling and Order denying the State's Motion to Dismiss holding that while the "question . . . is a close one" the Plaintiffs both fall outside of the terms of the Consent Decree and are not, in any event, precluded in any way from bringing their suit in the Middle District. (ECF No. 47 at 22-23).[3]

ARGUMENT

The Court's assertion of jurisdiction over the same map controlled by the continuing jurisdiction of the Eastern District should be certified for interlocutory appeal.[4] This Court may certify an order for interlocutory appeal under 28 U.S.C. § 1292(b) upon finding that "(1) a controlling question of law is involved, (2) there is substantial ground for difference of opinion about the question of law, and (3) immediate appeal will materially advance the ultimate termination of the litigation." *Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007); *Jackson v. La. Dep't of Pub. Safety & Corr.*, No. CV 15-490-JJB-RLB, 2016 WL 6136592, at *1 (M.D. La. May

[3] The Court framed the issues presented in the Motion to Dismiss as a mere choice of forum dispute. *See* (ECF No. 47 at 14). This is emphatically not the case. The State has no preference for any specific forum other than the desire not to be placed between the Scylla of the Eastern District and the Charybdis of the Middle District. The Court never addressed the only consequence of its ruling that matters: If the Court eventually order's some relief for the Plaintiffs, the State will *necessarily* have to violate the terms of the Consent Decree in the Eastern District to implement *any* remedy. That is a situation the State cannot abide because a state cannot implement two conflicting maps by two different federal courts in the exact same geography.

[4] This motion is timely having been filed only 21 days after the Court's Order. *See Cazorla v. Koch Foods of Miss., LLC*, 2015 U.S. Dist. LEXIS 84924, *8 (S.D. Miss. Jun. 30, 2015) ("While the statute provides a time limit for filing § 1292(b) motions in the appeals court, 'there is no statutory deadline for the filing of the petition in the district court'; the petition need only be filed in a 'reasonable time.'" (quoting *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000) (Posner, C.J.)); *see also Aparicio v. Swan Lake*, 643 F.2d 1109, 1112 (5th Cir. 1981).

2, 2016). The purpose of 28 U.S.C. § 1294 is to give the judiciary "considerable flexibility" in order to avoid the "disadvantages of . . . final judgment appeals." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 (5th Cir. 1961). "Under § 1292(b), it is the order, not the question, that is appealable." *Castellanos-Contreras v. Decatur Hotels LLC,* 622 F.3d 393, 398 (5th Cir. 2010) (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

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

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

As highlighted by the extensive briefing at the motion to dismiss stage, there is, at the very least, a substantial ground for difference of opinion as to the power of this Court to even entertain a lawsuit that seeks to modify or overturn a sister court's consent decree. "A substantial ground for difference of opinion may exist 'if novel and difficult questions of first impression are presented.'" *June Med. Servs., LLC. v. Gee*, 2018 U.S. Dist. LEXIS 82504, *3-4 (M.D. La. May 11, 2018) (quoting *Mitchell v. Hood*, 2014 U.S. Dist. LEXIS 61377 (E.D. La. May 2, 2014)); *see also La. Generating LLC*, 2012 U.S. Dist. LEXIS 142349, *5 ("[A] genuine doubt as to the correct applicable legal standard relied on in the order" is a substantial ground). Redistricting and reapportionment are unique in jurisprudence as any specific body of government can only have *one* map setting forth its electoral boundaries at any single point in time. At this stage the Court

need not consider whether the Order is correct, it need only recognize that the law in this area is unsettled.

The State maintains that Plaintiffs were required to bring their claims in the Eastern District of Louisiana. Plaintiffs' failure to bring their claims (or alternatively seek to modify the Consent Decree) necessitates either dismissal or, alternatively, transfer to the Eastern District of Louisiana. *See* (ECF No. 27-1 at 4-5). Plaintiffs' Complaint, on its face, seeks to enjoin all "future elections for the Louisiana Supreme Court under the current method of election" and a declaration that "the current apportionment of Louisiana Supreme Court districts violates Section 2 of the Voting Rights Act." *See* Compl. (ECF No. 1 at 15); Order (ECF No. 47 at 21). The current apportionment however, was implemented by an order of a federal court and therefore cannot be a Section 2 violation.

Plaintiffs' retort that they are actually only requesting relief in District 5 is both immaterial and improper for the Court to have considered. First, nothing in Plaintiffs' Complaint affirmatively states that Plaintiffs are seeking relief in District 5 and nowhere else. *See generally* (ECF No. 1). Second, it does not particularly matter where Plaintiffs are seeking relief because it is clear from the plain language of the Consent Decree that the Decree applies to each and every one of the seven Supreme Court districts. *See, e.g.,* (ECF No. 27-3 at ¶ (C)(8)). Third, even if one were to read the Consent Decree as not covering all Supreme Court districts, the Decree's plain terms call for *one* majority-minority district. *Id*. Therefore, seeking a *second* majority-minority district somewhere in the state also goes against the plain language of the Decree itself. Finally, "relief" for "only District 5" is not actually possible because changing District 5 necessarily requires the adjustment of one or more neighboring districts. In order to add population sufficient to create a majority-minority district, some population must be added to, or removed from, the existing

district, and that population must be added from somewhere or placed somewhere. In addition, as previously noted, the currently existing substantial total population disparities in the existing districts creates yet another layer of complication on top of any efforts to adjust the current map.

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

Finally, the authority in *Martin v. Wilks*, 490 U.S. 755 (1989) and *Tex. v. Dep't of Labor*, 929 F.3d 205 (5th Cir. 2019) are inapposite—or, at the very least, their applicability to this case is a question to which there is substantial grounds for a difference of opinion. The State's challenge to the Court's jurisdiction (or relatedly the Plaintiffs' choice of forum) has nothing to do with a collateral attack theory. This is not a situation in which one court issued a permanent injunction and ended the case. The Eastern District Court specifically maintained continuing jurisdiction. *See, e.g, Chisom v. Jindal*, 890 F. Supp. 2d at 710-11; (ECF No. 27-3 at ¶ K). The Defendants here are not suggesting that the Plaintiffs are precluded from seeking to challenge the Supreme Court districts. This Court, however, lacks the power to issue relief that directly conflicts with a sister court's ongoing consent decree over the exact same map. Furthermore, election districts are unique in that, when successful on either final judgment or on consent decree, the rights of others not before the court are always impacted. In most instances, just a few voters—or related organizations—have remedies implemented through the courts that both contravene the State's legislative process and impact the rights of all voters, not just those before the court. In addition, the other substantial difference between redistricting matters and other areas of law is that there *must* be a map in place to hold an election – it is not optional or discretionary. Unlike the regulatory

context where some regulations are discretionary or not otherwise specifically required to be in place, some map must be selected and utilized for every election (with the exception of at-large elections). Therefore, this unique area of law is unlike the situation presented in *Martin* and *Tex. v. Dep't of Labor*.

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

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

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

If Plaintiffs are victorious and this Court orders an additional majority-minority district, then the Fifth Circuit reverses on appeal on jurisdictional grounds there will have been an

extraordinary waste of party and judicial resources that can be prevented by this timely request for interlocutory appeal. As noted, interlocutory review of the Order may make any further action in this Court either futile or unnecessary. *See Mitchell v. Hood*, 2014 U.S. Dist. LEXIS 61377, *18 (E.D. La. May 2, 2014) (avoiding costly and burden of litigation by potential dismissal martially advances the litigation). Therefore, resolution of this Court's jurisdiction will materially advance the ultimate termination of this litigation, and the movants represent to this Court that they would move to seek expedited review of this matter before the Court of Appeals if this motion were granted.

III. The Court Should Stay this Case Pending Appeal.

Section 1292(b) allows a stay of proceedings if the "district judge . . . shall order." *See* 28 U.S.C. § 1292(b). The stay factors considered in § 1292(b) appeals are the same as in any other stay pending appeal. *See Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil*, 2015 U.S. Dist. LEXIS 22980, *11-12 (S.D. Tex. Feb. 26, 2015). The stay factors are as follows: (1) whether the applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably injured; (3) whether the plaintiffs will be substantially injured; and (4) the public interest. *Id*. at *11. All factors support a stay in this case.

Given the jurisdictional and dispositive nature of the questions to be presented on interlocutory appeal, this case should be stayed pending the outcome of that appeal. It is in the interest of all parties to settle this jurisdictional dispute now to avoid lengthy and expensive litigation that has every possibility of being relitigated when dismissal or transfer is ordered. The parties and the public interest will be furthered by the correct application of the law in this matter. Should the Fifth Circuit find that this Court lacks jurisdiction to modify a sister court's existing consent decree, then any actions by this Court would have been in vain. Such an outcome would

result in significant confusion under the best of circumstances. A stay is therefore appropriate to conserve judicial and party resources in the event any of the issues raised in the Motion to Dismiss are reversed.

CONCLUSION

Therefore, for the aforementioned reasons, this Court should certify interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Dated: July 17, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 17th day of July 2020, the foregoing Motion for Interlocutory Appeal was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

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