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

REPLY BRIEF OF THE STATE OF LOUISIANA AND THE SECRETARY OF STATE IN SUPPORT OF THEIR JOINT MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

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Pursuant to the Court's Order, Defendants file this Reply Brief in Support of Their Joint Motion for Certification of Interlocutory Appeal within fourteen (14) days of the filing of Plaintiffs' Response in opposition. ECF No. 53.

INTRODUCTION

The arguments for and against Defendants' Motion for Certification of Interlocutory Appeal (the "Motion") are well established from the other pleadings in this matter. In their Response Brief, Plaintiffs advanced no new or unique arguments as to why the Court should deny Defendants' Motion. Plaintiffs' entire opposition rests on a flawed understanding surrounding the *Chisolm* Consent Decree. For reasons unknown, Plaintiffs insist on litigating this matter in the Middle District rather than the Eastern District, which has continuing jurisdiction over disputes involving the seven Louisiana Supreme Court districts. The Court should grant Defendants' Motion and certify the interlocutory appeal for all the reasons discussed in the Motion and the other pleadings on this issue because this scenario is the exact scenario for which interlocutory

appeals were created, and: (1) this close call jurisdictional issue certainly involves a "controlling question of law" that would resolve this case in its entirety; and (2) courts cannot claim jurisdiction, nor can a party consent to jurisdiction, when there is no jurisdiction to claim or consent to. Further, in the event the Court grants Defendants' Motion and certifies the interlocutory appeal, a stay pending that interlocutory appeal would be warranted.

ARGUMENT

I. This Close Call Jurisdictional Issue Certainly Involves a "Controlling Question of Law" that Would Resolve This Case In Its Entirety.

Plaintiffs attempt to argue that because the Court denied Defendants' Motion to Dismiss, the jurisdictional issue has already been decided and therefore does not involve a "controlling issue of law," failing to meet the standard to certify the question for interlocutory appeal. *See* ECF No. 54 at 4-6. Here, if the Court lacks jurisdiction because the Eastern District maintains continuing jurisdiction due to the language of the Consent Decree, that is the end of the matter in this Court, and the matter will be dismissed or transferred. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869); *See* Fed. R. Civ. P. 12(b). In its Order denying Defendants' Motion to Dismiss due to the continuing jurisdiction of the Eastern District under the Consent Decree, the Court stated: "[t]he question of whether the relief Plaintiffs seek falls within the scope of the *Chisom* Consent Judgment is a close one." ECF No. 47 at 21. Jurisdiction in the Middle District is not the home run Plaintiffs argue.

Plaintiffs are of the mistaken belief that the Consent Decree only governs District 1[1] and that simply because they believe they can draw a second majority-minority district in Baton Rouge

[1] There has been some confusion among the parties and the Court regarding whether the First or the Seventh District is the current majority-minority district. Originally, the first district was the majority-minority district created by the 1992 Consent Decree. However, when the Decree was later amended, Orleans was split between the First and the Seventh Districts, and the Seventh District became the majority-minority district. *See* Amended Consent Decree. As such, assuming *arguendo* that Plaintiffs' flawed argument is true, a second majority-minority district would need to

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without touching the First District, the Middle District unquestionably has jurisdiction. *Id.* at 3.[2] This argument is flawed because the Consent Decree did not simply require the drawing of a single district, but unambiguously required the drawing of seven new districts—of which one would be a majority-minority district. The 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.***

Consent Decree at ¶ (C)(8) (emphasis added). *Any* matter that touches on *any* of the supreme court districts is covered under the Consent Decree. This is clearly evidenced by fact that the Eastern District firmly held that it maintained continuing jurisdiction under the consent decree, decades later, over a matter dealing with an issue only tangentially related to the consent decree—the seniority of judges from the seven Supreme Court districts. *See Chisom v. Jindal*, 890 F.Supp. 2d 696 (E.D. La. 2012). Therefore, if the issue of judge seniority implicates the Consent Decree, issues surrounding creating a new majority-minority district, which necessarily requires drawing new lines in multiple districts, most certainly does! *Id.*

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Plaintiffs attempt to argue that the requested question to be certified is not an "exceptional case". ECF No. 54 at 3 (citing M.D. case). While claiming that the matter is a simple, routine legal issue, they fail to cite to a single case that shares similar facts and legal situations. Plaintiffs failed to cite to a single analogous case because there is most likely not a single case which deals with:

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be drawn without touching the First or the Seventh Districts, as they both are covered under the Amended Consent Decree.

[2] It is widely known that the majority-minority district in New Orleans is substantially underpopulated. It is not clear that any Court could afford Plaintiffs' relief under the Voting Rights Act without addressing this substantial underpopulation issue.

(1) a continuing consent decree which touches on the same issues discussed in a case pending in a different district; (2) a court, many years later, confirming the continuing jurisdiction of the consent decree; (3) all while dealing with drawing new judicial district maps while a census is being conducted and redistricting is likely to take place soon thereafter. If the current matter is not an "exceptional case," Plaintiffs would be hard pressed to find one that is.

II. Courts Cannot Claim Jurisdiction, Nor Can a Party Consent to Jurisdiction, When There Is No Jurisdiction to Claim or Consent To.

Plaintiffs attempt to argue the because they have "stipulated"[3] that the Court need not modify the consent decree to grant their requested relief and because the Court has found it has jurisdiction that Defendants should "accept[]" jurisdiction, end "its delaying tactics," and try the case in the Middle District. ECF No. 54 at 5. Unfortunately for Plaintiffs, one cannot consent to jurisdiction when none exists. *See Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir. 1987); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985) (per curiam). Further, a party cannot "accept"[4] jurisdiction, where none exists to accept. Further, a court mistakenly finding it has jurisdiction on a "close" jurisdictional call does not create jurisdiction where none exists. The entire body of federal case law surrounding jurisdiction was formed by judges, whether district or appellate, being mistaken regarding their jurisdiction.

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III. The Matter Should Be Stayed Pending the Interlocutory Appeal.

Should the Court grant Defendants' Motion and certify the interlocutory appeal, the Court should also stay the matter pending the interlocutory appeal. If the Court finds the matter is proper

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[3] Plaintiffs are unable to *sua sponte* stipulate to facts and future acts outside the Complaint. As such, this supposed stipulation should be struck and not considered by the Court.

[4] Not to belabor the issue, but the entire point of the mythological reference to Scylla and Charybdis is pertinent because you cannot actually, as Plaintiffs contend, steer around it. ECF No. 54 at 3-4, n1. For an updated version of the same metaphor, we refer Plaintiffs to "being caught between a rock and a hard place" or a "catch-22." In any event, the point being made by the State is that an order from the Middle District which conflicts with the Eastern District Consent Decree would force the Defendants to follow one court's order at the expense of another court's order, which places the State in an untenable position that could only be resolved by an appellate court.

for a certified question, it is implied that a stay would be warranted until the jurisdictional status of the Court could be confirmed by the Fifth Circuit. All of the stay factors weigh in favor of having a court of certain competent jurisdiction preside over this matter, and for an appellate court to rule on the issue of jurisdiction of this Court at an early stage of the proceedings.[5]

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: August 21, 2020

Respectfully Submitted,

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[5] Plaintiffs' attempt to pass off *Johnson v. Ardoin* as a reason why they are likely to prevail in this matter is unfounded and falls short for multiple reasons. See ECF No 54 at 11. First, *Johnson v. Ardoin* does not address seven supreme court districts, but six congressional districts. Second, *Johnson v. Ardoin* did not deal with maps that were currently under continuing jurisdiction of a different court. As such, the primary reason Defendants contend Plaintiffs will not prevail in the Middle District, the continuing jurisdiction of the Eastern District under the Consent Decree, is not present in J*ohnson v. Ardoin*, therefore, it is easily distinguishable.

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 21st day of August 2020, the foregoing Reply 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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