UNITED STATES DISCTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHISOM, et al.,	∞	CIVIL ACTION NO.: 86-4075
Plaintiffs,	∞	
	∞	
UNITED STATES OF AMERICA,	∞	
Plaintiff-Intervenor,	∞	
	∞	
BERNETTE J. JOHNSON,	∞	SECTION E
Plaintiff-Intervenor,	∞	JUDGE SUSIE MORGAN
	∞	
Versus	∞	
	∞	
PIYUSH ("BOBBY") JINDAL, et al.,	∞	
Defendants	∞	MAGISTRATE SALLY SHUSHAN

BRIEF OF *AMICUS CURIAE*
THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
IN SUPPORT OF PLAINTIFFS AND PLAINTIFF-INTERVENORS
FOR THE INCLUSION OF JUSTICE BERNETTE J. JOHNSON'S
YEARS OF SERVICE AS THE *CHISOM* JUSTICE
IN THE CALCULATION OF HER SENIORITY
ON THE LOUISIANA SUPREME COURT

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., through undersigned counsel, certifies that it is a non-profit corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: August 13, 2012

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization established under New York laws to assist African Americans and other people of color in the full, fair and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.[2]

Orleans Parish voters originally filed this case to enforce Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which prohibits practices and procedures that have the effect of depriving minority voters of an equal opportunity to elect a candidate of their choice. As former co-counsel for the *Chisom* Plaintiffs, LDF has a significant interest in ensuring the proper, continued enforcement of the Consent Judgment, the remedy devised and approved by this Court to effectuate Section 2 of the Voting Rights Act.[3]

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[1] As described in the accompanying motion, LDF seeks leave to file this brief. The Federal Rules of Civil Procedure and the Local Rules for the Eastern District of Louisiana do not specify the requirements for filing such a motion. When LDF contacted the office of the Clerk of Court on August 6, 2012, it was instructed to follow Rule 29 of the Federal Rules of Appellate Procedure regarding *amicus* briefs. Therefore, this brief tracks the format required under that rule. *Amicus* files this brief in support of Plaintiffs and Plaintiff-Intervenors Justice Johnson and the United States. *See* Pls.' and Pl. Intervenor's Mot. to Reopen Case (Doc. 137); Pls.' Mot. to Reopen Case and Enforce Consent Decree (Doc. 146); Pls.' and Pl. Intervenor's Mot. to Stay (Doc. 159); *see also* U.S. Br. in Supp. of Mots. to Include *Chisom* Service (Doc. 183). *Amicus* also addresses certain assertions by the State, *see* State's Mot. to Dismiss (Doc. 188); State's Resp. to Mots. to Reopen Case and Mot. to Stay (Doc. 190); State's Resp. to U.S. Br. in Supp. of Mots. to Include *Chisom* Service (Doc. 191). *Amicus* responds to the State's assertions but is also cognizant of this Court's recent order directing Counsel for the State to show why these pleadings "should not be stricken from the record." *See* Rule to Show Cause (Doc. 194).

[2] LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts, including those involving the constitutionality of the provisions of the Voting Rights Act before the United States Supreme Court. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelby Cty., Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

[3] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The issue before this Court is straightforward: whether Justice Bernette Johnson, who has undeniably served the longest on the Louisiana Supreme Court [hereinafter "Supreme Court"] after Chief Justice Catherine Kimball,[4] should succeed the Chief Justice once she retires in January 2013. The Supreme Court has created a "proceeding"[5] to decide whether Justice Johnson's years of service as the assigned "*Chisom* Justice" should count for purposes of determining succession to the position of Chief Justice. In so doing, the Supreme Court has infringed this Court's continuing authority to interpret the Consent Judgment entered in this case, as amended ("Consent Judgment").[6] In fact, precisely because the Consent Judgment is controlling on the matter of Justice Johnson's tenure and vests this Court with jurisdiction to decide that question, any legal conclusions reached by the Supreme Court that are inconsistent with this Court's authoritative interpretation of the Consent Judgment would be invalid. *See* U.S. Const. art. VI. Thus, the Supreme Court's "proceeding" is both needless and improper.[7]

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[4] The State itself has acknowledged that Justice Johnson is the most senior in this regard. *See* State's Resp. to U.S. Br. in Supp. of Mots. to Include *Chisom* Service, Ex. A (Doc 191-1) (describing the Louisiana Supreme Court's decision to afford Justice Johnson the "customary administrative perquisites" of seniority).

[5] By order on June 13, 2012, the Supreme Court initiated a "proceeding," set to begin on August 31, 2012, to resolve "contrary legal positions" about whether to credit Justice Johnson's accrued years of service as the *Chisom* Justice. Ex. 3, *In re Office of Chief Justice, La. Sup. Ct.*, No. 12-O-1342 (Order dated June 13, 2012), as amended by Ex. 4, *In re Office of Chief Justice, La. Sup. Ct.*, No. 12-O-1342 (Order dated July 20, 2012) (establishing a briefing schedule for "[a]ny sitting Justice interested in a legal determination of this matter").

[6] The Consent Judgment was entered on August 21, 1992. Ex. 1, Consent J., at 1. It was amended on January 3, 2000 "to reflect . . . that Louisiana Acts 1997, No. 776 be . . . added as an addendum." Ex. 2, Am. Consent J. & Order, at 7.

[7] There is a distinction between the matter of Justice Johnson's years of service as the *Chisom* Justice, which clearly falls within this Court's jurisdiction–and the ultimate question of who is the next-most senior Justice after Chief Justice Kimball. Once this Court resolves the former question, however, there would be no legal question left to adjudicate by the Supreme Court because this Court's determination in that regard is controlling. Further, because the Louisiana Constitution establishes that succession is automatic based upon seniority, La. Const. art. V, § 6 (providing that "[t]he judge oldest in point of service on the supreme court *shall* be chief justice") (emphasis added), it is unclear what function the Supreme Court's proceeding would serve. At most, any opinion that results from such "proceeding" would be "advisory," as the judgment of the Supreme Court would not be "conclusive". *See Perschall v. Louisiana*, 697 So. 2d 240, 252 n.17 (La. 1997) (citing *St. Charles Parish Sch. Bd. v. GAF Corp.*, 512 So. 2d 1165, 1171 (La. 1987)).

For its part, the State of Louisiana ("the State") asserts that this Court lacks subject matter jurisdiction; that the original plaintiffs Chisom, Bookman and Morial ("Original Plaintiffs") lack standing to litigate the dispute; and that the matter in dispute is in any event "premature" and not justiciable. State Mot. to Dismiss Br. (Doc. 188-1), at 2. Disregarding the key provisions of the Consent Judgment, the State further argues that the "object" of the Consent Judgment has been fully accomplished and that there is no "forward-looking" remedy left for this Court to enforce. State's Resp. to U.S. Br. in Supp. of Mots. to Include *Chisom* Service (Doc. 191), at 8-9. The Court should reject each of these arguments.

As set forth in more detail below, this Court has continuing jurisdiction to ensure that the terms and provisions of the Consent Judgment are fully implemented, including those that establish the *Chisom* Justice as an equal to her co-justices in every respect, including all "benefits," "duties and powers" as all other Justices on the Supreme Court. Moreover, as parties to this Consent Judgment and as the plaintiffs who filed the original action to vindicate the rights of minority voters who had previously been denied an equal opportunity to elect a candidate of their choice to the Supreme Court, resulting in a dilution of minority electoral power, the Original Plaintiffs have standing to pursue this action.

The *Chisom* seat, to which then-Judge Johnson was assigned in October 1994, was established as "relief" to "ensure that the system for electing the Louisiana Supreme Court is in compliance with Section 2 of the Voting Rights Act." Ex. 1, Consent J., ¶ B. Such relief could not be fully effectuated if the *Chisom* Justice were denied the benefits, duties and powers of her position and, in essence, was consigned to a second-class seat on the Supreme Court. It is axiomatic, therefore, that the Original Plaintiffs have sustained a cognizable injury by virtue of the Supreme Court's usurping this Court's dispositive authority to interpret, protect, and

effectuate the Consent Judgment as a means for determining whether to credit Justice Johnson's years of service as the *Chisom* Justice. If Justice Johnson is denied the benefit of the Consent Judgment's terms and provisions, so too are the Original Plaintiffs. *Cf. Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) (observing that "legislative leadership, influence, and power" can be hallmark of "minority group's opportunity to participate in the political process"), *superseded by statute on other grounds*. *See* 42 U.S.C. § 1973c(b)-(d).

Finally, because the Supreme Court has already established a proceeding to resolve "contrary legal positions" among the Justices, which directly circumvents the authority of this Court, this action presents a justiciable controversy that is ripe for determination.[8] *Amicus Curiae* respectfully requests that this Court issue a declaratory judgment that Justice Johnson's years of service on the Supreme Court as the assigned "*Chisom* Justice" count for purposes of determining which Justice is the "oldest in point of service" after Chief Justice Kimball. *See* La. Const. art. V, § 6 (providing that "[t]he judge oldest in point of service on the supreme court shall be chief justice"). The plain language of Act 776 of the Louisiana Legislature, which was added by this Court as an addendum to the Consent Judgment on January 3, 2000, assists this Court in that inquiry. The terms of Act 776 clearly provide that "[a]ny tenure on the supreme court gained by [the *Chisom* Justice] while so assigned to the supreme court *shall be credited to such judge*." Ex. 5, Act 776, at Section 2(B) (emphasis added). In Justice Johnson's case, this tenure refers to the six years that she served as the *Chisom* Justice from 1994 to 2000.[9] Should it become necessary, *Amicus Curiae* respectfully requests that this Court enjoin any proceeding of

[8] Indeed, as described further below, *see infra* at 12 & n.20, even the creation of such a proceeding by its very nature injures Justice Johnson's reputation as a full-fledged Justice on the Supreme Court, which necessarily affects the Original Plaintiffs and the minority voters whose efforts led to the creation of the *Chisom* seat.

[9] Although this Court's authority under the Consent Judgment extends only to the calculation of her years of service as a *Chisom* Justice, her other years of service after the expiration of the *Chisom* seat naturally should also be included for purposes of calculating seniority.

the Supreme Court that infringes on this Court's jurisdiction and authority to interpret the Consent Judgment and to decide the question of Justice Johnson's tenure. Such an injunction is appropriate in order to protect and to effectuate the Consent Judgment.[10]

BACKGROUND[11]

On August 21, 1992, this Court entered a Consent Judgment to resolve claims filed by Orleans Parish voters, including Original Plaintiffs, under Section 2 of the Voting Rights Act against Louisiana's system of electing justices to the Supreme Court. Ex. 1, Consent J., ¶ B. Plaintiffs asserted that the "method of electing two Justices to the Louisiana Supreme Court at-large from the New Orleans area impermissibly dilute[d] minority voting strength'" in violation of Section 2. *Chisom v. Roemer*, 501 U.S. 380, 385 (1991); Ex. 6, Am. Compl., at 1. As a remedy, the litigation sought the implementation of a single-member, majority-minority Supreme Court district from the then-existing multi-member First District, which included Orleans Parish, Plaquemines, St. Bernard, and Jefferson Parishes. Ex. 6, Am. Compl., at 7.

Because this reapportionment could not be effectuated until there was a vacancy in the First District, however, Ex. 1, Consent J., ¶ C1, the Consent Judgment implemented an immediate, interim remedy by creating an additional court of appeal position "to be filled by election in 1992." *Perschall*, 697 So. 2d at 243 (La. 1997). By design, the judge elected to this position would come "from the first district of the Fourth Circuit, which is comprised of Orleans

[10] Because the proceeding before the Supreme Court was indisputably initiated long after the entry of the Consent Judgment that resolved the Orleans Parish voters' Section 2 claims, this Court has jurisdiction to decide this matter and neither needs to nor should abstain under federalism principles. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984) (abstention not required where state proceedings had not been initiated by "time proceedings of substance took place in federal district court."). Moreover, the Consent Judgment was intended to ensure "compliance with Section 2 of the Voting Rights Act," Ex. 1, Consent J., ¶ B, which was enacted to guarantee racial minorities basic federal rights against state encroachment. *See Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (federal injunction of state court proceeding is particularly appropriate to effectuate a federal civil rights statute). The instant controversy – involving the assertion of state power in an effort to frustrate and dilute a remedy designed to protect minority voters – offers a textbook justification for the assertion of federal authority.

[11] Since this matter has already been extensively briefed, *Amicus* sets forth only enough background to support its legal argument.

Parish." Ex. 1, Consent J., ¶ C2. The Consent Judgment provided that this duly elected judge would be assigned immediately to the Supreme Court as its eighth member, pursuant to the Supreme Court's constitutional assignment power. *Id.* at ¶¶ C4-C5. *See* La. Const. art. V, § 5(A). The *Chisom* seat would only last until a justice could be elected from the reapportioned single-member district that was based in Orleans Parish, which in fact occurred in 2000.

Significantly, the Consent Judgment provides that the judge who was assigned to the Supreme Court as the *Chisom* Justice "shall 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 "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." Ex. 1, Consent J., ¶¶ C3-C4. The Consent Judgment further states that this Court "*shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished*." *Id.* at ¶ K (emphasis added). In short, the Consent Judgment expressly provides that the *Chisom* Justice—here, Justice Bernette Johnson—shall be equal in every respect to her colleagues on the Supreme Court and gives this Court continuing authority to effectuate that remedy.

In 1992, after the Consent Judgment became effective, Revius Ortique, Jr. won election to the First District (Orleans Parish) of the Fourth Circuit Court of Appeal, and was immediately assigned to the *Chisom* seat, making him the first African American on the Supreme Court.[12] Ex. 7, Johnson Decl., ¶ 4. Justice Ortique served as the *Chisom* Justice until his retirement in 1994, when Justice Johnson won the election to fill the vacant Fourth Circuit Court of Appeal seat in

[12] Justice Ortique's portrait was installed at the Supreme Court five years ago and still hangs there, side by side with the portraits of all former Supreme Court Justices, dating back to the early 1800s. The Supreme Court's effort to deny Justice Johnson the benefits and status of her office is not just an injustice her, but also to Justice Ortique, the Original Plaintiffs and the minority voters who helped to create the *Chisom* seat in order to rectify the dilution of minority electoral strength in Orleans Parish.

October, 1994, becoming the second *Chisom* Justice on the Supreme Court. *Id.* at ¶¶ 4, 5. Justice Johnson held the *Chisom* seat for six years until 2000, when the terms of the other two justices of the First District expired. *Id.* at ¶ 5. She was then elected to the now-reapportioned single First District seat in Orleans Parish and won again in 2010, without opposition. *Id.* According to the Consent Judgment, the *Chisom* seat ceased to exist following Johnson's election in 2000.[13] Ex. 1, Consent J., ¶5 (providing that "[t]he additional judicial position for the Fourth Circuit Court of Appeal . . . shall expire automatically on the date that a justice takes office subsequent to being elected in any election called from a Supreme Court district composed [solely] of Orleans Parish in accordance with . . . [the] Consent Judgment.").

In June 1992, two months before the Consent Judgment was approved and entered, the Louisiana Legislature passed and the Governor signed Act No. 512 (S.B. 1255) (1992) ("Act 512"). Act 512 was the product of the settlement negotiations between the parties involved in the *Chisom* litigation and provided for much of the same relief as was provided in the Consent Judgment. Indeed, the Consent Judgment "memorializes" Act 512 and states that it is "Consistent with Louisiana Act No. 512 (1992)." *Id.* at ¶ C.

Four years later, a resident and registered voter of Orleans Parish brought suit to have Act 512 declared unconstitutional because it created eight seats on the Louisiana Supreme Court, rather than seven as provided under the state constitution. *Perschall*, 697 So. 2d at 259. While the Supreme Court in *Perschall* struck down Act 512 as unconstitutional, it concluded that the ruling would preserve the status quo:

> We realize that Act 512 does not exist in a vacuum. The State argues, and we agree, the Act and the *Chisom* Consent Judgment are separate and independent methods by which the negotiated remedy was implemented. Although the Act falls by this judgment, *we recognize the status quo remains intact under the Chisom Consent Judgment. Consequently, this court as it is currently composed shall*

[13] Once the *Chisom* seat expired, the number of Justices on the Supreme Court reverted to seven, from eight.

> *continue to function as a de jure court with its actions valid and effectual*. We emphasize that the court-approved settlement in *Chisom*, which is under the jurisdiction of the United States District Court for the Eastern District of Louisiana, is not affected by this judgment.

Id. at 260 (emphasis added). The Supreme Court acknowledged the continued operation of the Consent Judgment.[14] The *Perschall* Court noted that the Justice who occupied the *Chisom* seat was to "serve in the *full capacity* of a justice during the period assigned." *Id*. at 259 (emphasis added). [15]

Following *Perschall*, the Louisiana Legislature enacted Act 776, to take effect on January 1, 1999. Ex. 5, Act 776, Section 4. Act 776 redistricted the six Supreme Court districts into seven single member districts and, consistent with the Consent Judgment, provided in Section 2(B) that "[a]ny tenure on the supreme court gained by [the *Chisom* Justice] while so assigned to the supreme court *shall be credited to such judge*".[16] *Id.* at Section 2(B) (emphasis added). Act 776 was "added as an addendum to the Consent Judgment" effective January 3, 2000. Ex. 2, Am. Consent J. & Order at 1, 7. By virtue of its incorporation into the Consent Judgment, its terms now control this action.

ARGUMENT

The Consent Judgment, which has not been vacated by this Court, establishes the *Chisom* Justice as an equal among her peers in every respect, entitling her to the "same compensation, benefits, expenses, and emoluments of offices" as provided to any other justice on the Supreme Court. The Consent Judgment further provides that she "shall participate fully and share equally

[14] Of course, the Supreme Court would not have had the authority to vacate a federal order or unilaterally to terminate or modify its obligations under that order. *See* U.S. Const. art. VI.

[15] The Supreme Court has recognized Justice Johnson's seniority in other ways. After Chief Justice Kimball suffered a debilitating stroke in January 2010, Justice Johnson assumed the position of Acting Chief Justice based on her acknowledged tenure as the "second most senior justice". *See* Ex. 8, La. S. Res. 174, at 3.

[16] Act 776 also provided, in Section 2(A), that the *Chisom* Justice "shall continue to receive the same compensation and benefits [as the other Supreme Court Justices] until the [*Chisom*] judgeship expires." Ex. 5, Act 776, Section 2(A).

in all . . . duties and powers, including, but not limited to, those powers set forth by the Louisiana Constitution, the laws of Louisiana, and the Louisiana Rules of Court." Ex. 1, Consent J., ¶¶ C3-C4. The plain language of the Consent Judgment demonstrates Justice Johnson's equality to all other justices in every regard, including in the accrual of tenure in accordance with her years of service on the Supreme Court.

A. The Remedy Provided for in the Consent Judgment Has Yet to Be Fully Effectuated and, Therefore, This Court Has Continuing Jurisdiction in This Matter

Two of the three remedies required by the Consent Judgment—namely, the interim *Chisom* seat, and the creation by reapportionment of the single-member, majority-Black Supreme Court district based in Orleans Parish—were effectuated by the end of the year 2000. However, the third substantive requirement of the Consent Judgment—the full realization by Justice Johnson of each benefit, duty, and power that would attend a justice of her tenure, including, most notably her ascension to the position of Chief Justice – has yet to be effectuated. Thus, the Consent Judgment remains in effect and enforceable by this Court, until such time as Justice Johnson's service on the Supreme Court has ended. Until that time, the remedy negotiated by the parties and approved by this Court is not fully realized and, therefore, incomplete. Her service should factor into any determination of seniority for purposes of determining the next Chief Justice, just as it would for any other Justice on the Supreme Court.

Moreover, the Consent Judgment confers continuing jurisdiction on this Court to ensure that Justice Johnson is treated no differently than her peers. *Id.* at ¶ K (providing that this Court "shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished."). The provisions of the Consent Judgment that establish Justice Johnson as an equal among her counterparts have not yet been fully realized, and are, in fact, the subject of

continuing attacks and efforts to prevent their realization.[17] *Cf. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 249 (1991) (past compliance with terms of a decree is relevant to decision whether to modify or dissolve it).

For its part, the State makes several arguments, each of which should be rejected by this Court. First, the State's assertion that the "object" of the Consent Judgment has been fully accomplished and that there is no "forward-looking" remedy left for this Court to enforce, *see* State's Resp. to U.S. Br. in Supp. of Mots. to Include *Chisom* Service (Doc. 191), at 8-9, is meritless. Second, the State's reliance on an earlier decision by Judge Schwartz to deny a motion by one of the Original Plaintiffs to "reopen" the case is misplaced.[18] Third, the State further errs in its assertion that the Consent Judgment, which was amended in 2000 through the incorporation of Act 776, "did *not* include language retaining jurisdiction." State Mot. to Dismiss Br. (Doc. 188-1), at 11. In fact, the 2000 Amendment did not alter the language in the original Consent Judgment that explicitly conferred continuing jurisdiction on this Court to enforce its terms. Ex. 1, Consent J., ¶ K ("The Court shall retain jurisdiction over this case until the complete implementation of the final remedy has been accomplished."). Fourth, the State incorrectly maintains that the issue of the tenure accorded to the *Chisom* Justices was never raised or decided. State Mot. to Dismiss Br. (Doc. 188-1), at 13. This assertion, too, is false, as

[17] *See* n. 20 *infra*.

[18] In that action, Plaintiff Bookman sought to enjoin a provision of the Louisiana State Constitution that at the time imposed a mandatory retirement on Justices who had reached the age of 70. This provision required Justice Ortique, the first *Chisom* Justice, to retire. *Chisom v. Roemer*, No. CIV. A. 86–4075, 1994 WL 261806, * 1 (E.D. La. June 9, 1994). Judge Schwartz's decision to deny the motion is instructive, but for precisely the opposite reason urged by the State. Relying on the very same provisions cited here, Judge Schwartz emphasized that the *Chisom* Justice was to be treated no differently than any other Justice. *See id.* at * 5 (observing "[t]hat all of the provisions of Louisiana law . . . pertinent to judgeships [] would apply to the *Chisom* seat is evident from the language in paragraphs C.3 – C.4 of the consent decree . . . ."). The significance of Judge Schwartz's decision was only that Justice Ortique would be subject to the same mandatory retirement provision as every other Justice. The instant controversy is entirely different as the State seeks to treat Justice Johnson as subordinate to her peers, rather than as an equal.

is plain from the inclusion of Act 776 as an addendum to the Consent Judgment. Ex. 5, Act 776, Section 2(B); Ex. 2, Am. Consent J. & Order, at 7.

Finally, the State also argues that the Docket in this case indicates that it has been "closed." State Mot. to Dismiss Br. (Doc. 188-1), at 1, 2 , 7, 10, 14, 16. But even if this case has been *administratively closed*, that would not *vacate* the Consent Judgment and, thereby, terminate the continuing obligations of the original defendants and those acting in concert with them to confer equal benefits, duties and powers on Justice Johnson. As the United States Supreme Court explained in *Board of Education of Oklahoma City Public Schools*, such injunctive judgments vindicating federal rights cannot be vacated absent a sufficient factual showing that their requirements have been fully realized and that the original violation and its effects have been eliminated to the greatest extent possible. 498 U.S. at 249-50. To vacate a Consent Judgment, an order would have to contain specific recitations clearly and explicitly dismissing the case and vacating the judgment, including its injunctive requirements. *Id*. at 246 (concluding that beneficiaries of consent decree in school desegregation case are entitled to a "rather precise statement" of the basis for terminating or dissolving a decree); *cf. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (observing that where the state has not established a sufficient basis to modify a decree, such "decree should be enforced according to its terms"). This Court has not yet made such findings or issued such an order.

B. The Original Plaintiffs, as Parties to the Consent Judgment, and for Whose Benefit the *Chisom* Seat Was Created, Have Standing to Seek to Enforce the Terms of the Consent Judgment

This Court should conclude that the Original Plaintiffs—Chisom, Bookman, and Morial—have standing as parties to and beneficiaries of the Consent Judgment. The Consent Judgment explicitly sought to implement a remedy that complied with Section 2 of the Voting

Rights Act by providing "black voters in the Parish of Orleans [with] an equal opportunity to participate in the political process and to elect candidates of their choice." Ex. 1, Consent J., ¶ E. Denying Justice Johnson, and the voters in the majority-Black Orleans Parish who elected her, the "duties and powers" associated with her seniority would violate the Consent Judgment, undermine the Voting Rights Act, and relegate Justice Johnson to second-class status.

This harm to Justice Johnson as the *Chisom* Justice harms the Original Plaintiffs as well. If Justice Johnson is denied the powers and duties associated with her accumulated tenure on the Supreme Court, the Original Plaintiffs' voting rights are also denied, because the benefits of her tenure naturally inure to the benefit of those whose efforts led to the creation of the *Chisom* seat. Justice Johnson's second-class treatment is their second-class treatment and violates the Consent Judgment as a "final and binding judgment…dispositive" of all federal claims raised by the original plaintiffs in the *Chisom* litigation.[19] Ex. 1, Consent J., at 2. As the beneficiaries of this Consent Judgment, both the Original Plaintiffs and Justice Johnson herself have standing to ensure that its terms are fully effectuated.

C. The Matter of Justice Johnson's Tenure Is Ripe for Determination by This Court.

The Supreme Court's creation of a proceeding purportedly to resolve "contrary legal positions" on whether to credit Justice Johnson's years of service as a *Chisom* Justice contravenes this Court's authority to decide this question under the Consent Judgment and is, therefore, improper. The mere announcement by the Supreme Court constituted a breach of the Consent Judgment, making this Court's determination of Justice Johnson's tenure ripe.[20]

[19] Because the Consent Judgment was approved by this Court to effectuate the remedial objectives of the Voting Rights Act, Ex. 1, Consent J., at ¶ B, *see Roemer*, 501 U.S. at 403-04, it clearly does not exceed the "appropriate limits" of a federal judicial power, as the State suggests, State Mot. to Dismiss Br. (Doc. 188-1) at 8-9.

[20] Even were this Court to conclude that the Supreme Court's Orders establishing such proceeding did not breach the Consent Judgment, it is an anticipatory breach that threatens Justice Johnson with imminent harm to her stature as a

Whether to count the *Chisom* Justice's service on the Supreme Court for tenure purposes is not a matter of state law that falls within the jurisdiction of the Supreme Court. Rather, it is a federal question that is for this Court to decide based upon its interpretation of its own federal order. *See* U.S. Const. art. VI. State law, which bears on succession to the position of Chief Justice, only becomes operative after this Court has decided how to count Justice Johnson's years of service on the Supreme Court under the Consent Judgment.[21] Therefore, the State's assertion that its authority controls here, State's Resp. to Mots. to Reopen Case and Mot. to Stay (Doc. 190), at 9, is erroneous. Moreover, such a proceeding infringes on this Court's jurisdiction insofar as it purports to resolve a matter that depends on the construction of the Consent Judgment.

CONCLUSION

By every measure, Justice Johnson is entitled to have her tenure as a *Chisom* Justice counted for purposes of determining seniority. For the aforementioned reasons, this matter is ripe for a determination by this Court. The Original Plaintiffs and Justice Johnson have standing to pursue it; and this Court has the authority to issue a declaratory judgment that Justice Johnson began to accrue seniority upon her assignment to the Supreme Court in October 1994.

Justice and to her professional reputation among her constituents. *See Foretich v. U.S.*, 351 F.3d 1198, 1210 (D.C. Cir. 2003) (reputational injury is sufficient to confer Article III standing). This harm is concrete, particularized, and causally related to the proceeding itself and would be redressed were this Court to conclude that Justice Johnson stands as an equal in every respect among her peers. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Despite the State's protestations to the contrary, State Mot. to Dismiss Br. (Doc. 188-1), at 3, there are indications that members of the Supreme Court have already predetermined whether to credit Justice Johnson's years of service as the *Chisom* Justice. For example, Chief Justice Kimball herself proposed that Justice Johnson's colleague, Justice Victory, assume the Chief Justice position following her retirement—despite Justice Victory having been elected to the Supreme Court in January of 1995, months after Johnson's assignment—and that Justice Johnson wait until the year 2017 to become Chief Justice. Ex. 7, Johnson Decl., ¶ 18; *see id.* at ¶ 7.

[21] However, because state law dictates that succession is *automatic* based on the seniority of the Justices, there is nothing for the Supreme Court to determine under a "proceeding" or otherwise. *See* La. Const. art V, § 6 (providing that "[t]he judge oldest in point of service on the supreme court *shall* be chief justice) (emphasis added)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 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 counsel of record who are registered participants of the Court's CM/ECF system. I further certify that I mailed the foregoing document by first-class mail to counsel of record who are not CM/ECF participants as indicated in the notice of electronic filing.

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