IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al. Plaintiffs, v. KYLE ARDOIN, in his official capacity as the Acting Secretary of State of Louisiana, Defendant	Case No. 18-625-SDD-EWD

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Defendant's request for certification of an interlocutory appeal marks the second time Defendant has sought a stay in this case and at least the sixth filing in which he has raised the question of jurisdiction of a three-judge court and laches with this Court—both of which are routine issues that are commonly raised in motions to dismiss and far from the exceptional circumstances permitting interlocutory appeals. Instead of demonstrating *any* of the three separate elements required to certify such an appeal, Defendant rehashes the same substantive arguments on both issues that this Court properly rejected in its May 9, 2019 Order and its May 31, 2019 Ruling. But "[d]isagreement by a party with a district court's judgment" is not a basis for certification of an interlocutory appeal. *United States v. Louisiana*, No. CV 11-470-JWD-RLB, 2016 WL 4522171, at *3 (M.D. La. Aug. 29, 2016). Not only is Defendant's argument legally insufficient, it exposes his Motion for what it really is: an attempt to further delay adjudication of Plaintiffs' claims.

Based on Defendant's persistent misrepresentations of the law and facts, the Court should be even more skeptical of his arguments and refuse to indulge his efforts to waste the Court's time

and prevent Plaintiffs from vindicating their voting rights. Because Defendant fails to carry his heavy burden to demonstrate that certification of an interlocutory appeal under 28 U.S.C. § 1292(b) is warranted for either the three-judge court issue under 28 U.S.C. § 2284 or the laches issue, Plaintiffs respectfully request that the Court deny Defendant's Motion.

I. BACKGROUND

Plaintiffs filed their Complaint in this action on June 13, 2018. On July 31, 2018, Defendant filed a motion to dismiss. ECF No. 16. Plaintiffs filed an Amended Complaint mooting certain arguments in Defendant's motion to dismiss, ECF No. 19, along with a Response in Opposition to the motion to address the remaining arguments raised therein, ECF Nos. 20–22, 25–27. On September 10, 2018, Defendant filed his Second Motion to Dismiss, reasserting the same arguments he raised (and Plaintiffs already addressed) in his initial motion. ECF No. 33. That motion was fully briefed on October 12, 2018. ECF Nos. 34, 35, 37, 39.

In response to Plaintiffs' discovery requests served in January 2019, Defendant sought a protective order and a stay of discovery while his Motion to Dismiss was pending, which Plaintiffs opposed. ECF Nos. 47, 48. On March 18, 2019, the Magistrate Judge stayed discovery "pending resolution of the Motion to Dismiss First Amended Complaint." ECF No. 57.

On May 9, 2019, the Court denied Defendant's Motion to Dismiss and referred the case to the Magistrate Judge for pretrial scheduling and discovery. ECF No. 68. The Court issued its written Ruling on Defendant's Motion to Dismiss three weeks later. ECF No. 72.

II. LEGAL STANDARD

A district court may certify an interlocutory appeal under 28 U.S.C. § 1292(b) only where the movant demonstrates that three separate elements have been met: (1) the challenged "order involves a controlling question of law," (2) "as to which there is substantial ground for difference

of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." § 1292(b); *United States v. Louisiana*, 2016 WL 4522171, at *2. This is a high bar. Indeed, this Circuit has "a firm [] policy against interlocutory or piecemeal appeals," *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 170–71 (5th Cir. 2009) (internal quotations omitted), and granting one under 28 U.S.C. § 1292(b) is allowed only "in 'exceptional cases,'" *United States v. Louisiana Generating LLC*, No. CIV.A. 09-100-JJB, 2012 WL 4588437, at *1 (M.D. La. Oct. 2, 2012) (citing *United States v. Garner*, 749 F.2d 281, 286 (5th Cir. 1985)). *In re Cent. Louisiana Grain Co-op., Inc.*, 489 B.R. 403, 411 (W.D. La. 2013) (interlocutory appeal requires "exceptional circumstances that justify departure from the basic policy of postponing appellate review until after entry of final judgment") (internal quotations omitted). Interlocutory appeals are thus disfavored, and statutes permitting them must be strictly construed. *Fannie Mae v. Hurst*, 613 F. App'x 314, 318 (5th Cir. 2015) (citing *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir.1997) (per curiam)); *Louisiana Generating*, 2012 WL 4588437, at *1 ("The Fifth Circuit strictly construes the requirements of Section 1292(b).").

III. ARGUMENT

A. Defendant Has Not Demonstrated That an Interlocutory Appeal is Warranted as to the Three-Judge Issue

Defendant fails to meet any of the three required elements for an interlocutory appeal on the three-judge court issue, and his request should be denied. As an initial matter, Defendant fails to demonstrate why this is a controlling question of law. The same arguments Defendant advances here could be made about *any* jurisdictional question that comes before a court, and such questions are commonplace; courts routinely decide their own jurisdiction, and certifying interlocutory appeals merely because a jurisdictional question is decided is untenable. This is precisely why courts regularly deny requests for certification of interlocutory appeals of jurisdictional rulings.

See, e.g., *Singh v. Daimler-Benz*, AG, 800 F. Supp. 260, 261, 263 (E.D. Pa. 1992) (finding insufficient grounds to grant interlocutory appeal of jurisdictional question where plain language of statute supported the court's jurisdiction), *aff'd* 9 F.3d 303 (3d Cir. 1993); *TCL Commc'ns Tech. Holdings Ltd v. Telefonaktenbologet LM Ericsson*, No. SACV1400341JVSANX, 2014 WL 12588293, at *4 (C.D. Cal. Sept. 30, 2014) (denying certification of jurisdictional question for interlocutory appeal); *Keybank Nat'l Ass'n v. Perkins Rowe Assocs., LLC*, No. CV 09-497-JJB-SCR, 2010 WL 11549699, at *2 (M.D. La. Feb. 3, 2010) (same where defendant failed to demonstrate substantial difference of opinion over a controlling question of law).

The jurisdictional question at issue here is no different. Defendant has asked this Court to interpret a statute—28 U.S.C. § 2284—and determine whether that statute impacts its jurisdiction over this case. This Court has done so and found, consistent with the plain language of the statute, that § 2284 "applies only when the constitutionality of apportionment is being challenged" and that "[s]uch a challenge is not made in this case." ECF No. 72 at 6. And this Court is in good company; at least three other courts, *including a panel of the Fifth Circuit*, have evaluated this issue and concluded the same.[1] *Thomas v. Bryant*, 919 F.3d 298 (5th Cir. 2019); *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354–55 (N.D. Ala. 2019) ("A claim solely alleging a Section 2 violation falls outside a plain reading of § 2284. . . . The court sees no need to go beyond the text of Section 2 or § 2284 when their plain meanings are so clear."); *Thomas v. Bryant*, No. 3:18-CV-441-CWR-FKB, 2019 WL 454598, at *2 (S.D. Miss. Feb. 5, 2019).

As these decisions demonstrate, there is *no* ground for any difference of opinion, much less a substantial one. In fact, after 11 months and five briefs arguing this issue, Defendant has been

[1] *See also Dwight, et al. v. Kemp*, No. 1:18-cv-2869-RWS (N.D. Ga. Sept. 12, 2018), ECF Nos. 25, 26 (Georgia Secretary of State agreed that no three-judge panel is needed or permitted under § 2284 in a § 2 case challenging a congressional districting plan).

unable to identify a single case in which a standalone § 2 claim was referred to a three-judge panel. As the Fifth Circuit observed in *Thomas v. Bryant*, "[b]efore this year, it apparently had never dawned on a judge or party in a Section 2-only state redistricting case that a three-judge panel might be required. And that is because the most straightforward reading of the three-judge statute is that is applies only when 'constitutionality' of apportionment is being challenged." 919 F.3d at 305; *see also id.* at 304 ("[N]o reported case has ever used a three-judge panel for a case challenging district lines only under § 2 of the Voting Rights Act."); *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1357 (N.D. Ala. 2019) ("Neither the court nor Defendant could find any purely Section 2 cases heard by a three-judge panel.").[2] Accordingly, Defendant has failed to carry his burden to demonstrate that there is substantial ground for difference of opinion.

Nor do the authorities Defendant relies upon support his request for certification. Defendant continues to cling to *Page v. Bartels*, 258 F.3d 175 (3d Cir. 2001), as the basis for his three-judge-court argument. But as this Court recognized, *Page* "is distinguishable because it was 'an action involving both statutory Voting Rights Act and constitutional challenges to the apportionment of a statewide legislative body.'" ECF No. 72 at 3–4 (quoting *Page*, 248 F.3d at 194). Defendant's repeated refusal to acknowledge the actual ruling in *Page* underscores the baselessness of his argument.

The dissent in *Thomas*, moreover, provides no grounds for disagreement on this issue. *Thomas* involved a § 2 challenge to a statewide legislative plan (not a congressional plan). "The only question," as posed by the dissent, was "whether the 'constitutional' modifier in § 2284(a)

[2] By contrast, Plaintiffs have identified a host of statewide § 2 challenges that were heard before a single district judge. *See, e.g., Rural W. Tenn. African Am. Affairs Council*, 209 F. 3d at 838 (convening three-judge panel where plaintiffs raised constitutional and statutory claims and then disbanding the panel after plaintiffs filed a second amended complaint solely under § 2 of the Voting Rights Act); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 980 (D. S.D. 2004) (same after § 5 claim was decided by three-judge panel and only § 2 claim remained); *Old Person v. Brown*, 182 F. Supp. 2d 1002 (D. Mont. 2002) (§ 2 claim challenging statewide legislative districts heard by a single judge).

applies to the second phrase in the sentence" regarding the apportionment of statewide legislative bodies. 919 F.3d at 322 (Clement, J., dissenting in part); *see also id.* at 323 (recognizing "the plaintiff's undenied ability to select the claims he wishes to bring"). There was thus no dispute in *Thomas* that § 2 challenges to congressional plans are properly heard before a single district judge. At bottom, *all* of the available authority establishes that this Court has jurisdiction to hear this case.

Ultimately, Defendant advocates for an impossible standard whereby every time a party is displeased with a jurisdictional ruling, an interlocutory appeal would be warranted. *See* Mot. at 7 (claiming that "avoiding post-trial appeals on a topic is sufficient" justification to certify for an interlocutory appeal). But that justification falls far short of the "exceptional circumstances" that must exist to certify an order for interlocutory appeal. *Louisiana Grain Co-op.*, 489 B.R. at 411. Defendant thus fails to demonstrate that this Court should certify the three-judge court issue for interlocutory appeal.

B. Defendant Has Not Demonstrated That an Interlocutory Appeal is Warranted as to the Laches Issue

Defendant likewise fails to meet any of the three elements required to certify an interlocutory appeal on the laches issue, and his request should be denied. First, the Court's Order regarding laches does not rest on a controlling legal question. To be controlling, an issue must be one where "reversal of the [] order would (1) terminate the action or (2) materially affect the outcome of litigation." *Louisiana Grain Co-op.*, 489 B.R. at 411. Here, a reversal on laches grounds would not result in either outcome because "the Court did not address the laches issue on the facts [and] a decision in Defendant['s] favor would result in a remand to determine the merits of the laches defense and would not dispose of the litigation." *Bond v. Marriott Int'l, Inc.*, 971 F. Supp. 2d 480, 495 (D. Md. 2013), *aff'd in part, vacated in part, rev'd in par*t, 637 F. App'x 726 (4th Cir. 2016) (reversed in part on other grounds); *see* ECF No. 72 at 12. This Court held that

"[a]t this stage in the proceeding, Defendant has not carried its burden of proving that Plaintiffs brought this action with undue delay." ECF No. 72 at 11–12; *see also id.* at 12 ("At this stage, the record is not sufficiently developed to enable the Court to determine whether there is an inexcusable delay."); *Tennyson v. Babcock & Wilcox Co.*, No. EV 78-188-C, 1979 WL 2023, at *4 (S.D. Ind. June 22, 1979) (denying certification of interlocutory appeal after denying defendant's laches defense on a motion to dismiss because "the issues of delay and prejudice are questions of fact and are thus not subject to appellate review until decided by the Court"). Motions to certify laches issues for interlocutory appeal are thus routinely denied.[3] *See, e.g., Mellon Nat. Leasing Corp. v. Rosa*, No. 84-2761-B(CM), 1985 WL 9433, at *1 (S.D. Cal. Apr. 2, 1985); *Tennyson*, 1979 WL 2023, at *4; *Bond*, 971 F. Supp. 2d at 495. For these same reasons, Defendant fails to satisfy §1292(b)'s third element: an interlocutory appeal would not advance the ultimate termination of the litigation. *See David v. Signal Int'l, LLC*, 37 F. Supp. 3d 836, 839 (E.D. La. 2014) (noting that "[r]egardless of the Fifth Circuit's ruling, the [case] would then have to be returned to the Court [] resulting in an additional lengthy delay").[4]

Additionally, Defendant's arguments regarding his unsuccessful laches defense fail to demonstrate that there is "a substantial ground for difference of opinion." It is well-established that laches does not apply to claims for prospective relief. *See Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005, n.32 (5th Cir. 1981) ("laches may not be used as a shield for future, independent violations of the law"); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533

[3] "Because laches is a *fact-intensive affirmative defense*, some courts consider it an unsuitable basis for dismissal at the pleading stage." *Spiral Direct, Inc. v. Basic Sports Apparel, Inc.*, 151 F. Supp. 3d 1268, 1280 (M.D. Fla. 2015) (emphasis added) (internal citation omitted).

[4] Defendant claims that if the Fifth Circuit rules in his favor on the laches issue, this case would be dismissed, but that argument contravenes caselaw even in the isolated case where a court found laches could apply to a comparable § 2 claim. In *Chestnut v. Merrill*, 2019 WL 1376480, at *7, the court held that laches did not bar plaintiffs' claim for declaratory relief and refused to dismiss the case.

F.3d 1287, 1321 (11th Cir. 2008) ("[L]aches . . . bar[s] only . . . retrospective damages, not [] prospective relief."); *see also* ECF No. 27 at 17–20; ECF No. 34 at 15–16; ECF No. 61-1 at 3–6. Likewise, numerous courts have found laches does not apply in voting rights cases, like this one, where Plaintiffs seek prospective relief to address "ongoing" injury precisely because each new election presents a new harm. *Garza v. Cty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990); *see, e.g.*, *Smith v. Clinton*, 687 F. Supp. 1310, 1312–13 (E.D. Ark. 1988) (action not barred by laches because "the injury alleged by the plaintiffs is continuing, suffered anew each time [an] election is held"); *Luna v. Cty. of Kern*, 291 F. Supp. 3d 1088, 1144 (E.D. Cal. 2018) (action not barred by laches "because plaintiffs have demonstrated an ongoing violation of § 2 of the Voting Rights Act"); *Miller v. Bd. of Comm'rs of Miller Cty.*, 45 F. Supp. 2d 1369, 1373 (M.D. Ga. 1998). Courts in two recent partisan gerrymandering cases reaffirmed this principle. *See League of Women Voters of Michigan v. Benson*, No. 2:17-CV-14148, 2019 WL 1856625, at *25 (E.D. Mich. Apr. 25, 2019) (action not barred because laches does not apply to voting rights claims seeking declaratory and injunctive relief); *Ohio A. Philip Randolph Institute v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018) (action not barred by laches because plaintiffs were seeking prospective relief, not "a remedy for any harm that they alleged occurred prior to the filing of their lawsuit"). As this Court noted, "when relief sought is prospective, any 'prejudice' suffered by Defendant would have occurred regardless of the time of filing suit." ECF No. 72 at 11.

Defendant's citation to a handful of out-of-circuit cases applying laches to voting rights claims—often in highly distinguishable circumstances, *see, e.g.*, *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990) (applying laches where plaintiffs filed suit *after* the last election under the challenged plan took place and where "court-ordered reapportionment . . . would be completely gratuitous[]")—does not establish substantial ground for disagreement. *See, e.g.*, *Dorato v. Smith*,

163 F. Supp. 3d 837, 880 (D.N.M. 2015) ("Substantial ground for difference of opinion does not exist merely because courts have disagreed on an issue.").

Ultimately, even if laches did apply to plaintiffs' claim for prospective relief, it is a highly fact-intensive issue committed to the discretion of the district court and therefore an inappropriate basis for interlocutory review. *See, e.g.*, *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 898 (5th Cir. 2016) (on appeal laches is reviewed only for an abuse of discretion and "the district court's findings of delay, inexcusability, and prejudice are findings of fact that can be overturned only if they are clearly erroneous, or if in view of the entire record the finding is illogical or implausible") (internal citations omitted). Defendant thus fails to demonstrate that this Court should certify the laches issue for interlocutory appeal.

IV. A STAY IS UNWARRANTED

Defendant fails to establish *any* of the factors considered in issuing a stay: (1) he does not even state, let alone argue, that he is likely to succeed on appeal, perhaps recognizing that the law is clear (see discussion *supra*); (2) he points to no irreparable harm that would befall him if this case is not stayed; (3) Plaintiffs would be substantially injured by a stay, and (4) the public interest weighs in favor of the case continuing unimpeded. *Monumental Task Comm., Inc v. Foxx*, No. CV 15-6905, 2016 WL 430450, at *1 (E.D. La. Feb. 4, 2016). Defendant thus fails to carry his "heavy burden" to demonstrate a "genuine necessity" for a discretionary stay. *Signal Int'l*, 37 F. Supp. 3d at 840 (citing *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6 (5th Cir.1985)).

Most importantly here, Defendant fails to consider, and certainly does not dispute, that Plaintiffs would be substantially injured by a stay. If a stay were to issue, Plaintiffs' ability to obtain relief in this case could soon be foreclosed. Plaintiffs brought this action nearly a year ago to ensure the voting power of African Americans in Louisiana is no longer diluted under

Louisiana's congressional district map in violation of § 2 of the Voting Rights Act. With each passing day, the 2020 election approaches, and a stay would pose a threat to Plaintiffs' ability to obtain timely relief and vindicate their right to vote. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Likewise, the public's interest in this action and enforcement of the Voting Rights Act is "paramount." *Bishop v. Lomenzo*, 350 F. Supp. 576, 581 (E.D.N.Y. 1972); *see Kennedy v. Riley*, No. 2:05CV1100-MHT, 2007 WL 1461746, at *2 (M.D. Ala. May 17, 2007) (noting public's significant interest in enforcement of the Voting Rights Act, which "is intended to protect the right to vote [which] is a fundamental political right") (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Because of the important issues this case presents, it should continue to move forward so a new, lawful map can be in place in time for the 2020 election.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendant's Motion for Certification of Interlocutory Appeal and deny his request for a stay.

Dated: June 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, the foregoing Reply In Support of Plaintiffs' Notice of Supplemental Authority was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
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