

UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, *et al.*

Plaintiffs,

v.

KYLE ARDOIN, IN HIS OFFICIAL  
CAPACITY AS LOUISIANA SECRETARY  
OF STATE,

Defendant.

Case No.: 3:18-cv-00625-SDD-EWD

**DEFENDANT SECRETARY OF STATE'S MOTION TO STAY**

Pursuant to the Court's inherent power to manage the cases on its docket, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), Defendant Secretary of State of Louisiana respectfully moves the Court to stay all proceedings pending the resolution of the United States Court of Appeals for the Fifth Circuit's review in *Thomas v. Bryant*.

On September 23, 2019, the United States Court of Appeals for the Fifth Circuit ordered, on its own motion, vacating and rehearing *en banc* its decision in *Thomas v. Bryant*, No. 19-60133 (5th Cir. Sept. 3, 2019); *see also* (ECF No. 107-1). This decision directly calls into question this Court's denial of the Motion to Dismiss, (ECF No. 68), and the Motion for Certification, (ECF No. 100)—both of which are the subject of an outstanding Motion to Reconsider, (ECF No. 101). Defendant contacted Plaintiffs seeking their position on this motion. Defendant did not receive a response from Plaintiffs within the time requested.

For the reasons detailed in the attached Memorandum of Law, the Secretary respectfully requests that the Court grant this Motion to Stay this case pending the timely resolution of *Thomas*.

Dated: September 25, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that, on this 25th day of September 2019, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Jason B. Torchinsky  
Jason Torchinsky

*Counsel for the Defendant*

UNITED STATES DISTRICT COURT FOR THE  
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**DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO STAY**

The Court heavily relied upon a now vacated decision by the three-judge merits panel in *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575 (5<sup>th</sup> Cir. 2019) when denying Defendant's Motion for Certification. Given the current status of *Thomas*, this Court should stay all proceedings pending the resolution of the laches, three-judge panel, and Section 2 merits issues by an *en banc* United States Court of Appeals for the Fifth Circuit.

**BACKGROUND**

On May 31, 2019, the Court issued its ruling denying Defendant's Motion to Dismiss. (ECF No. 72). In so doing, the Court heavily relied upon the persuasive authority of a motions panel of the Fifth Circuit. Defendant, after the Court's order but before it published its ruling and reasons, sought to certify the three-judge panel and laches issues for interlocutory review. *See* (ECF No. 71). On September 3, 2019, the United States Court of Appeals for the Fifth Circuit handed down its decision in *Thomas v. Bryant*, No. 19-60133 (5<sup>th</sup> Cir. Sept. 3, 2019). Plaintiffs subsequently filed a Notice of Additional Authority purporting to provide "dispositive authority warranting the denial of Defendant's Motion for Certification of Interlocutory Appeal." *See* (ECF No. 98 at 1). Defendant Secretary of State of Louisiana filed a short response notifying the Court

that he intended to promptly file a Motion for Reconsideration. *See* (ECF No. 99). On September 12, 2019, the Court denied Defendant's Motion to Certify Order for Interlocutory Appeal and denied Defendant's Motion to Stay as moot. (ECF No. 100).

On September 16, 2019, Defendant filed a Motion for Reconsideration of the Court's denial of the Motion to Dismiss, or alternatively, a Motion for Reconsideration of the Court's denial of the Motion for Certification. (ECF No. 101). The Motion for Reconsideration remains pending. Then, on September 23, 2019, the United States Court of Appeals for the Fifth Circuit vacated and ordered *en banc* review of *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575, *vacated by Thomas v. Bryant*, No. 19-60133 (5th Cir. Sept. 23, 2019).

When deciding Defendant's Motion for Certification, the Court heavily relied upon the merits panel decision of the United States Court of Appeals for the Fifth Circuit in *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575 (5<sup>th</sup> Cir. 2019). Because the decision upon which the Court heavily relied has been vacated, the order denying Defendant's Motion for Certification should be reconsidered. As such, a stay is warranted to conserve party and judicial resources until such time as an *en banc* Fifth Circuit has time to hear and decide the nearly identical laches, three-judge court, and merits issues presented in *Thomas*.

#### **I. A Stay Should be Granted Pending the Outcome of *Thomas v. Bryant*.**

The power to stay a case "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Courts have inherent power to stay proceedings while awaiting the outcome of another matter which may have a substantial or dispositive effect. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). A court is within its discretion to grant a stay when a related case with substantially similar issues is pending before

the court of appeals. *See Greco v. NFL*, 116 F. Supp. 3d 744, 761 (N.D. Tex. 2015). “Whether to grant a stay pending resolution of another case is a fact-intensive question.” *Alford v. Moulder*, 2016 U.S. Dist. LEXIS 143293, \*4 (S.D. Miss. October 17, 2016) (citing *In re Beebe*, 1995 U.S. App. LEXIS 41303, (5th Cir. 1995)). “[I]n determining whether a stay is proper, courts consider the interests of the parties and potential conservation of judicial resources.” *Greco*, 116 F. Supp. 3d at 761; *see also Landis*, 299 U.S. at 254-55. Among the interests the courts consider are the likelihood that the related case will impact the case at bar, *see Greco*, 116 F. Supp. 3d at 761, and a balancing of the equities, *see Alford*, 2016 U.S. Dist. LEXIS 143293, \*6.

#### **A. The Interests of the Parties Weigh in Favor of Granting a Stay.**

There are many and varied reasons why Defendant’s interests must counsel in favor of granting a stay. *First*, the fact and the manner in which the Fifth Circuit issued a *vacatur* and ordered *en banc* rehearing *sue sponte* counsels in favor of a stay. *Second*, the issues in *Thomas v. Bryant* are likely to be dispositive over many, if not most, issues presented in this case. *Third*, Plaintiffs’ years-long delay in filing suit counsels in favor of stay. *Fourth*, a stay is proper to eliminate voter confusion resulting from potentially multifarious and contradictory rulings of this Court and the Fifth Circuit.

##### **a. The *Sue Sponte* Nature of the Fifth Circuit’s Action Counsels in Favor of Granting a Stay.**

On September 23, 2019, the United States Court of Appeals for the Fifth Circuit took the highly unusual step of *sue sponte* ordering rehearing *en banc* thereby *vacating* the *Thomas* panel’s opinion. *See Robinson v. Louisiana*, 791 F.3d 614, 615 (5<sup>th</sup> Cir. 2015) (Smith, J. dissenting from a denial of rehearing *en banc*). The *Thomas* defendants-appellants did not move for rehearing *en banc*; the court did it on its own motion. In the normal course, “the court should not devote its considerable *en banc* resources to a case in which the losing party declines to press its case beyond

an unsuccessful result from the panel.” *Id.* Therefore, it is obvious that a majority of judges sitting *en banc* “evidently view the panel majority as having committed error so serious that the rare invocation of the entire court is needed.” *Id.*

b. The Issues in *Thomas* Will be Dispositive of this Case.

The now vacated *Thomas* opinion addressed several questions of law that are potentially dispositive of this litigation. The issues addressed in the now vacated opinion are: (1) application of the three-judge panel statute to claims brought exclusively under Section 2; (2) laches; and (3) the race consciousness of any court ordered remedy. *See Thomas*, 2019 U.S. App. LEXIS 26575. As the Plaintiffs rightly noted in their Notice of Supplemental Authority, (ECF No. 98), the issues in the now vacated *Thomas* opinion are largely dispositive of the issues in this case. *See* (ECF No. 98). It now appears that an *en banc* Fifth Circuit will be making determinations that are largely dispositive of this case, but now in Defendant’s favor.

i. *Three-Judge Panel*

The Court relied heavily upon the merits panel decision in *Thomas v. Bryant* when denying Defendant’s Motion for Certification. In fact, the Court referenced either the *Thomas* motion or the *Thomas* merits panel decisions eighteen times in a ten-page ruling. *See generally* (ECF No. 100). This is understandable because, at the time of that ruling, “the Fifth Circuit ha[d] ‘spoken on the point.’” (ECF No. 100 at 6). However, a mere eleven days later the Fifth Circuit has spoken once again, this time vacating the decision so heavily relied upon by this Court.

As discussed at length in the Motion for Certification, it is certain that the failure to request and empanel a three-judge court is a controlling question that has the “potential to have some impact on the course of the litigation.” *See United States v. La. Generating LLC*, 2012 U.S. Dist. LEXIS 142349 at \*5; *see also* (ECF No. 71-1). The impact, in this instance, goes directly to the

Court’s jurisdiction. *See Stratton v. St. Louis S. R. Co.*, 282 U.S. 10, 16 (1930); *see also* LULAC v. Texas, 318 Fed. Appx. 261, 264 (2009) (per curiam) (“We agree with our sister circuits that the term ‘shall’ in § 2284 is mandatory and jurisdictional.”). If the Fifth Circuit now determines that a three-judge court must be impaneled, then a single judge lacks the power to issue judgment. *See Stratton*, 282 U.S. at 16; *see also* *Igartua v. Obama*, 842 F.3d 149, 152 (1st Cir. 2016); *see also* *Armour v. Ohio*, 925 F.2d 987, 989 (6th Cir. 1991). A recent decision by the United States Court of Appeals for the Second Circuit confirms the jurisdictional nature of 28 U.S.C. § 2284 by finding that a single-judge district court lacked jurisdiction to deny a motion to dismiss. *See NAACP v. Merrill*, 2019 U.S. App. LEXIS 28797, \*14-17 (2<sup>nd</sup> Cir. Sept. 24, 2019) As the applicability of § 2284 is jurisdictional and foundational to the Court’s authority to rule in the first instance, it only makes sense for the Court to order a stay and await further guidance from the Circuit Court.

*ii. Laches*

Laches is yet another issue that is now before the *en banc* Thomas court and was previously presented in both Defendant’s Motion to Dismiss, (ECF No. 33), and Motion for Certification, (ECF No. 71). Laches operates as a time bar, in much the same way as a liberative prescription. *See Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) (“Even without a specific statutory bar to call into play, courts will impose a parallel bar—under the rubric of laches—in cases in which the plaintiff has failed to act in a reasonably prudent manner to protect and enforce rights, and when a perceived injustice to the defendant exists.”); *see also* Louisiana Civ. Code Art. 3492 (defining a one-year liberative prescription for most civil claims). The original Thomas merits panel generally agreed, in dicta, that Laches ought to apply *Chestnut v. Merrill*, 356 F. Supp. 3d 1351 (N.D. Ala. 2019); *see also* Thomas, 2019 U.S. App. LEXIS 26575 at \*26-27. Interestingly,



the dissent also agreed that the reasoning in *Chestnut* bars the *Thomas* plaintiffs' claims.<sup>1</sup> A stay should issue to determine the applicability of laches to Section 2 claims.

*iii. Merits*

Finally, several important issues on the merits of Section 2 claims, and the availability of a specific remedy are likely to be reviewed by the *en banc* panel. The dissent in the *Thomas* merits panel highlights the issues that are squarely before the Court when Judge Willett noted that "I believe the majority opinion oversteps (our judicial power in election cases), overlooks (the VRA's opportunity-not-outcomes emphasis on racial neutrality), and overrides (the State of Mississippi's broad sovereign power to regulate its elections within the bounds of the law)." *Thomas*, 2019 U.S. App. LEXIS 26575 at 101 (Willett, J. dissenting). A stay is appropriate because any clarity on the merits of any claim or defense will have a direct impact on Defendant's trial and discovery strategies.

c. Plaintiffs' Improper Delay in Filing Suit Counsels in Favor of a Stay.

Under the best of circumstances, Voting Rights Act litigation is a drawn-out, fact-intensive affair. *See, e.g., Terrebonne Parish Branch NAACP v. Jindal*, No. 3:14-cv-69 (M.D. La.) (*filed* Feb. 3, 2014, *final judgment* Aug. 15, 2019) (appeal pending before the United States Court of Appeals for the Fifth Circuit at No. 19-30665); *see also Nipper v. Smith*, 39 F.3d 1494, 1498 (11<sup>th</sup> Cir. 1994) ("Voting rights cases are inherently fact-intensive, particularly . . . section 2 vote dilution claims . . ."). However, instead of bringing this case years ago, Plaintiffs waited until the

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<sup>1</sup> It is vital to note that a newly resident plaintiff was not enough to defeat a laches claim in *Chestnut*. *See Chestnut*, 377 F. Supp. 3d at 1315-16. It is also important to note that Defendant's Motion for Reconsideration argues that Dismissal or Certification is appropriate for the newly resident plaintiff issue. *See* (ECF No. 101-1 at 5). While the Court denied Certification on the laches issue because its reasons were different than those argued by Defendant at the time, (ECF No. 100), that is only true because Defendant felt compelled to move for Certification *before* the Court issued its stated reasons. *Compare* Order Denying Motion to Dismiss (ECF No. 68) (May 9, 2019) (noting that "reasons" were to be assigned) *with* Motion for Certification (ECF No. 71) (May, 20, 2019) *and* Ruling (ECF No. 72) (assigning reasons for the order denying motion to dismiss).

eve of the fourth election—out of five total elections under the current congressional apportionment plan—to bring their cause of action. (ECF No. 1) (*filed* June 13, 2018). They cannot now complain that their “ability to obtain injunctive relief in this case could soon be foreclosed,” (ECF No. 103), when it is a result of their own actions. In fact, the dilatory nature of Plaintiffs’ claims in the Section 2 context is an issue that is directly before the *en banc Thomas* court. Plaintiffs’ dilatory actions should not prevent Defendant from knowing what the law actually is before having to defend itself. Therefore, a stay is appropriate here.

d. The Increased Possibility of Voter Confusion Counsels in Favor of Stay.

“A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). “Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell*, 549 U.S. at 4-5. “As an election draws closer th[e] risk” of voter confusion increases. *Id.* at 5. Injunctions close in time to elections are disfavored in federal court. *Id.* at 4-6.

Even under Plaintiffs’ newly proposed schedule, *see* (ECF No. 103-1), they are unlikely to obtain injunctive relief, *see* (ECF No. 108). The Fifth Circuit has set oral argument in *Thomas* for January 2020. (ECF No. 107-1 at 1). A decision is therefore likely around the time that Plaintiffs have requested trial, in April or May of 2020. Should the Fifth Circuit decide any dispositive issue differently than this Court, then even more delay will ensue. The problem of conflicting rulings is a real possibility here because the Fifth Circuit is likely to issue an opinion that has a direct and immediate impact on this case. Further, it is the Fifth Circuit itself that has counseled against schedules that would directly interfere with ongoing elections. *See Veasey v. Abbott*, 830 F.3d 216, 243 (5<sup>th</sup> Cir. July 20, 2016).

### **B. The Conservation of Judicial Resources Counsels in Favor of a Stay.**

The issues before the *en banc Thomas* court could be dispositive of this litigation. At the very least, the issues before the *en banc Thomas* court will be informative to the parties' claims and defenses. It can hardly be understated that the risk of wasting party and judicial resources is great when some, if not all, of discovery, summary judgement, and trial may need to be relitigated in their entirety. Forcing the parties and the Court—which is already burdened with an extraordinarily busy docket, *see* Order Affirming Denial of Motion to Expedite (ECF No. 95); *see also* Order Denying Motion to Expedite (ECF No. 90)—to undertake an endeavor which will in all likelihood prove fruitless is an extraordinary waste of time and resources.

### **CONCLUSION**

For the aforementioned reasons, the Court should stay proceedings pending resolution of *Thomas v. Bryant* before the *en banc* United States Court of Appeals for the Fifth Circuit.

Dated: September 25, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that, on this 25th day of September 2019, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Jason B. Torchinsky  
Jason Torchinsky

*Counsel for the Defendant Kyle Ardoin, the*  
*Secretary of State of Louisiana*

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**[PROPOSED] ORDER GRANTING MOTION TO STAY**

Before the Court is Defendant's Motion to Stay Case Pending *En Banc* Review of the Fifth Circuit's Decision in *Thomas v. Bryant*. After considering the motion, the Court is of the opinion it should be GRANTED.

IT IS THEREFORE ORDERED that Defendant's Motion for Stay is GRANTED. All actions are stayed pending the United States Court of Appeals for the Fifth Circuit's opinion in *Thomas v. Bryant*.

DATE: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE  
Shelly D. Dick

**CERTIFICATE OF SERVICE**

I do hereby certify that, on this 25th day of May 2019, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Jason B. Torchinsky  
Jason Torchinsky

*Counsel for the Defendant*