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. 3:18-cv-00625-SDD-EWD

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STAY

The Court should deny Defendant's Motion to Stay—the latest episode in his endless crusade to delay this case—pending the outcome of a rehearing *en banc* in *Thomas v. Bryant*, No. 19-60133, 2019 WL 4616927 (5th Cir. Sept. 23, 2019). Defendant fails to meet his burden to "make out a clear case of hardship or inequity in being required to go forward," because there is more than "a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Accordingly, his Motion should be denied.

Defendant rehashes for the *eighth* time his already-rejected laches argument, Mot. at 5 (admitting he "previously presented" this defense), and claims that a case involving a state legislative plan will somehow be "dispositive of this case," Mot. at 4. Putting aside Defendant's utter failure to meet the legal standard for a stay, a stay is otherwise inappropriate because the decision in *Thomas* is unlikely to demand any particular outcome here for at least three reasons. First, every court to have considered whether a standalone claim under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, must be referred to a three-judge panel has come out the same way as this Court did in its well-reasoned decision denying Defendant's Motion to Dismiss. The rehearing in *Thomas* is unlikely to reach a different conclusion, and even if it did, it would almost

certainly be limited to state legislative districts and would therefore have no bearing on this case. Second, any difference in outcome as to the laches issue in *Thomas* is also unlikely to undermine the Court's *fact-specific* decision as to the laches defense Defendant raised, and lost on, here. Finally, Defendant's vague and unsupported assertions about the mere possibility that the Fifth Circuit may issue a decision that relates to the merits of a factually and legally distinct Section 2 claim does not warrant a stay here. Based on Defendant's repeated misrepresentations of the law and facts and his relentless efforts to delay this case,[1] the Court should not entertain his efforts to waste the Court's limited time and resources and prevent Plaintiffs from vindicating their voting rights. Plaintiffs respectfully request that the Court deny Defendant's Motion.

I. BACKGROUND

On June 13, 2018, Plaintiffs—eleven African-American voters in Louisiana—filed a Complaint challenging Louisiana Revised Statute § 18:1276.1 ("2011 Congressional Plan"), because it dilutes African-American voting strength and denies African-American voters in Louisiana the equal opportunity to elect candidates of their choice for the U.S. House of Representatives in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See generally* ECF No. 1.

Seven weeks later, Defendant moved to dismiss the Complaint. 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

[1] Defendant's efforts to delay this case at every turn have become nonsensical. For example, Defendant's argues that potential for "voter confusion counsels in favor of a stay." Mot. at 7. Defendant seems to be arguing that delaying adjudication of this case, such that it would be decided *closer* to the November 2020 congressional election, would somehow result in less voter confusion than if the case were decided further in advance of the 2020 election. This argument is absurd and yet again exposes Defendant's true objective: running out the clock on this case so he can win by default. The Court should not allow such an injustice.

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. The Court appropriately denied Defendant's motion to dismiss in its May 9, 2019 Order, ECF No. 68, for the reasons set forth in its May 31, 2019 Ruling, ECF No. 72.

Defendant then moved for the extraordinary relief of certification of an interlocutory appeal, as well as a stay, ECF No. 71, which Plaintiffs opposed, ECF No. 73, and the Court denied on September 12, ECF No. 100. Just four days later, Defendant filed a Motion for Reconsideration of this Court's May 9, 2019 Order, ECF No. 101, relying solely on the Fifth Circuit's decision in *Thomas v. Bryant*, No. 19-60133, 2019 WL 4153107 (5th Cir. Sept. 3, 2019), which has since been vacated by the Fifth Circuit pending rehearing *en banc*. *See Thomas v. Bryant*, No. 19-60133, 2019 WL 4616927 (Sept. 23, 2019). Plaintiffs opposed Defendant's Motion to Reconsider on October 7, 2019, ECF No. 121. Defendant now moves for a stay of all proceedings—for the third time—pending the resolution of the *en banc* proceeding in *Thomas*.

II. LEGAL STANDARD

"'A stay is an intrusion into the ordinary processes of administration and judicial review' and a party is not entitled to a stay as a matter of right." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). While a district court has authority to issue a stay under its inherent power to control its docket, "such control is not unbounded." *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983). Indeed, "the Supreme Court has characterized the circumstances in which such a stay is appropriate as 'rare.'" *Miller Weisbrod, LLP v. Klein Frank, PC*, No. 3:13-CV- 2965-B, 2014 WL 2738231, at *2 (N.D. Tex. June 17, 2014) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). For a stay to be proper, the "suppliant for a stay must make out a clear case of hardship or inequity in being

required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255; *see also David v. Signal Intern., LLC*, 37 F. Supp. 3d 836, 840 (E.D. La. 2014) (denying a stay where "[t]he hardship and inconvenience that would result from a stay substantially outweighs any benefit").

III. ARGUMENT

A. Defendant Fails to Satisfy His Burden in Justifying a Stay

Because Defendant fails to "make out a clear case of hardship or inequity in being required to go forward," and because there is more than "a fair possibility that the stay for which he prays will work damage to someone else," *Landis*, 299 U.S. at 255, his Motion must be denied.

Notably, Defendant does not even attempt to satisfy his burden in demonstrating a stay is warranted. Indeed, his Motion fails to mention any hardship that would befall Defendant absent a stay or the impact of a stay on Plaintiffs. But a stay would undoubtedly "work damage" to Plaintiffs, Defendant, and the public. The parties and the public have an interest in resolving this case on its merits before another election under the 2011 Congressional Plan, which dilutes African-American voting strength and denies African-American voters in Louisiana the equal opportunity to elect candidates of their choice for the U.S. House of Representatives in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Defendant himself has an interest in not only the integrity but the fairness of Louisiana elections.[2] Those interests are not outweighed by Defendant's desire to avoid discovery during the pendency of the *en banc* rehearing in *Thomas*.

[2] *See* LA. CONST., Art. IV, § 7 (vesting Defendant with certain duties as "the chief election officer of the state); *see also* Louisiana Secretary of State R. Kyle Ardoin, *Department Overview: Duties*, https://www.sos.la.gov/OurOffice/DepartmentOverview/Pages/default.aspx (last visited Oct. 3, 2019) ("One of the most important charges of the Secretary of State's Office is to conduct the state's elections. Elections are the cornerstone of our democracy, and the integrity of the vote is of the utmost importance.").

In addition, a stay that threatens to deny by default Plaintiffs' request for injunctive relief before the 2020 elections "will work damage" not only to Plaintiffs but to all African Americans who are forced to cast ballots under an unlawful map that dilutes their voting power. *See Landis*, 299 U.S. at 255.

Rather than articulate—let alone attempt to satisfy—the applicable burden here, Defendant speculates that a Fifth Circuit decision in *Thomas* "*could be* dispositive of this litigation." Mot. at 8 (emphasis added). Defendant thus argues that all proceedings in this matter—specifically discovery, which he has tried to avoid or postpone numerous times before[3]—should be stayed until after *Thomas* is decided, which Defendant further speculates might occur "in April or May of 2020." *Id.* at 7.[4] But he fails to cite a *single* hardship he would endure if his Motion is denied, let alone one that outweighs the damage of a stay to Plaintiffs and their right to meaningfully participate in Louisiana's congressional elections.

If his Motion is denied, Defendant warns that "even more delay will ensue," *id.*, but he provides no basis for finding that proceeding with discovery here would cause any more delay than freezing the case for another seven months in anticipation of an *en banc* ruling that may or may not have any practical impact on this case. Beyond this argument's apparent flawed logic, it also does nothing to satisfy Defendant's burden of proving hardship absent a stay. *Landis*, 299 U.S. at 255; *David*, 37 F. Supp. 3d at 840. Accordingly, Defendant's Motion should be denied.

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[3] *See, e.g.*, Pls. Memo. in Support of Mot. to Compel, ECF No. 102-1 (noting, for example, Defendant's refusal to produce the voter file, despite that it is readily commercially available, on the basis that it "is not readily or inexpensively available if available at all"); ECF No. 47 (Defendant's motion for protective order and stay of discovery); ECF No. 71 (Defendant's motion to certify interlocutory appeal and seeking stay pending appeal).

[4] Even if Defendant's wild speculation were correct, the Fifth Circuit would have issued its opinion prior to when this Court would issue its decision, mitigating any risk of "conflicting rulings." Mot. at 7.

B. Even if Defendant Had Demonstrated the Elements Necessary for a Stay, the Fifth Circuit's Ruling is Unlikely to be "Determinative" of Issues in this Case

1. The Fifth Circuit is Unlikely to Decide the Jurisdictional Question Differently After its Rehearing En Banc in Thomas, and Even if it Did, it Would Not be Relevant to This Case

As Plaintiffs pointed out in opposition to another of Defendant's many dilatory tactics, "after 11 months and five briefs arguing [his three-judge panel] issue," Defendant "has been unable to identify a single case in which a standalone § 2 claim was referred to a three-judge panel." Pls. Opp'n. to Mot. to Certify Order for Interlocutory Appeal, ECF No. 73, at 4–5. Now, four months later, the same remains true. In contrast to the dearth of case law to support Defendant's position, all courts to have addressed the issue have ruled that standalone Section 2 claims should be heard by a single district judge. *See, e.g.*, *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); *Rural W. Tenn. African Am. Affairs Council, Inc. v. Sundquist*, 209 F.3d 835, 838 (6th Cir. 2000); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 498 (7th Cir. 1991); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); *Old Person v. Brown*, 182 F. Supp. 2d 1002 (D. Mont. 2002); *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 Section 2 case challenging a congressional districting plan). It is highly unlikely that the Fifth Circuit's decision to rehear *Thomas en banc* will be the first to find otherwise.

Even if it did, *Thomas* involves *state* legislative districts, not congressional districts. Defendant's argument is premised on the baseless assumption that the Fifth Circuit will reach

beyond the issue before it and issue a blanket rule as to all types of redistricting claims. But such advisory opinions are not permitted. *Mitchell Energy Corp. v. Fed. Power Comm'n*, 533 F.2d 258, 262 (5th Cir. 1976) ("We are not allowed the luxury of advisory opinions."); *Schannette v. Doxey*, No. 2:12-CV-01416, 2013 WL 4516041, at *5 (W.D. La. Aug. 22, 2013) ("[A] court may not issue advisory opinions."); *see also* ECF No. 100 at 6 (recognizing that "apportionment of statewide legislative bodies" is "not before this Court because this matter challenges congressional apportionment"). And if the Fifth Circuit did issue such an extraordinary decision, all signs indicate that it would find that a three-judge court is *not* required in Section 2 cases challenging congressional districts. *See, e.g.*, *Thomas v. Bryant*, 919 F.3d 298, 304 (5th Cir. 2019) (noting that defendant agrees that in the text of § 2284 "'constitutionality' modifies" "challenges to apportionment of congressional districts," such that a three-judge court is required for congressional challenges only when a constitutional claim is asserted); *id.* at 322 (Clement, E. dissenting) (dissenting judge did not dispute "[t]he only question is whether the 'constitutional' modifier in § 2284(a) applies to the second phrase in the sentence [discussing statewide legislative districts]"). Accordingly, Defendant's Motion should be denied.

2. *Even if the Decision in Thomas Comes Out Differently on the Laches Issue, that Fact-Specific Analysis Would Not be Dispositive Here*

Defendant claims "a stay should issue to determine the applicability of laches to a Section 2 claim." Mot. at 6. But even if the Fifth Circuit determines that laches is generally applicable to Section 2 claims, it would not alter the fact-specific basis on which this Court evaluated and rejected Defendant's laches defense. *See* ECF No. 72 at 10–13.

Laches is a fact-intensive evaluation that is specific to the unique circumstances of each individual case. *See City of San Antonio v. Time Warner Cable Texas, LLC*, No. SA-17-CV-01232-OLG, 2018 WL 6588564, at *3 (W.D. Tex. Apr. 9, 2018) ("[t]he application of the laches defense

is a fact-specific inquiry"). "To successfully establish a laches defense, the defendant must prove "(1) a delay asserting a right or claim; (2) that the delay was inexcusable; [and] (3) that undue prejudice resulted from the delay." *Retractable Techs., Inc. v. Becton Dickinson & Co*., 842 F.3d 883, 899–900 (5th Cir. 2016) (alteration in original) (quoting *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998)); *see also City of El Paso v. El Paso Entm't, Inc.*, 382 F. App'x 361, 366 (5th Cir. 2010) (holding the party asserting a laches defense must prove it). A court's inquiry is necessarily fact-specific as to all three elements of the defense.

In denying Defendant's Motion to Dismiss, this Court recognized this and rightly 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; *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."). This Court's well-reasoned decision was based on the unique facts of this case, and therefore even if the Fifth Circuit found that laches barred the claims in *Thomas*, that decision would be based on the specific facts of that case and would not be dispositive in this distinct factual context. Accordingly, Defendant's Motion should be denied.

3. *Defendant's Vague and Unsupported Statements Regarding the "Merits of Section 2 Claims" Do Not Counsel in Favor of a Stay*

Defendant seems to be arguing for the novel rule that any time a case on appeal involves a claim brought under the law at issue in another case, the latter should be stayed. Mot. at 6. Without explaining how any specific merits issue in *Thomas* relates to this case, beyond the fact that *Thomas* involves Section 2, Defendant broadly claims that "any clarity on the merits of any claim or defense" in *Thomas* will impact his defense. *Id*. But such a standard would be untenable and unworkable and would upend this Circuit's presumption *against* stays. *See supra* at 3. Unsurprisingly, Defendant cites no legal authority in support of his position. In fact, the Supreme

Court has directed just the opposite: "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 255.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion to Stay be denied.

Dated: October 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, the foregoing Opposition to Defendant's Motion to Stay was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
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