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 FOR RECONSIDERATION OF THE COURT'S DENIAL OF HIS MOTION TO DISMISS AMENDED COMPLAINT.

Pursuant to Federal Rule of Civil Procedure 60(b)(6), Defendant Secretary of State of Louisiana respectfully moves the Court to reconsider its May 9, 2019 Order, (ECF No. 68), denying Defendant's Motion to Dismiss Amended Complaint.[1]

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 (5th Cir. Sept. 3, 2019).[2] The Fifth Circuit clarified that the laches defense *is* applicable under the facts of this case and the Circuit Court also clarified that a Section 2 claim requires the creation of a "*working* majority of the voting age population." *See Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575, 26-27, 34-35 (5th Cir. 2019).

For the reasons detailed in the attached Memorandum of Law, the Secretary respectfully requests that the Court grant this Rule 60(b)(6) motion to Reconsider and dismiss Plaintiffs' Amended Complaint.

[1] Alternatively, Defendant requests that the Court reconsider its Order Denying Certification in light of this Motion to Reconsider.
[2] The opinion is also available at *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575 (5th Cir. 2019).

Dated: September 16, 2019

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 16th 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 Torchinsky
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UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

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DEFENDANT SECRETARY OF STATE'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR RECONSIDERATION.

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 (5th Cir. Sept. 3, 2019).[1] 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 promptly filed a 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. (ECF No. 100).

Pursuant to Federal Rule of Civil Procedure 60(b)(6), Defendant Secretary of State of Louisiana respectfully moves the Court to reconsider its May 9, 2019 Order, (ECF No. 68), and Ruling, (ECF No. 72), denying Defendant's Motion to Dismiss Amended Complaint. *Thomas v.*

[1] The opinion is also available at *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575 (5th Cir. 2019).

Bryant, 2019 U.S. App. LEXIS 26575 (5th Cir. 2019) represents controlling law that fundamentally impacts the Court's denial of Defendant's Motion to Dismiss.[2]

I. Standard of Review

Federal Rule of Civil Procedure 60(b) "provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment." *Saloman v. Wells Fargo Bank, N.A.,* 2010 Dist. LEXIS 73943, *6 (E.D. Tex. 2010). Rule 60(b)(6) permits a court to relieve a party from an order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "In particular, Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time . . . ." *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 863-64 (1988). A Court's order may be vacated in order to "accomplish justice" under "extraordinary circumstances." *See id.* While typically a change in decisional law will not be an extraordinary circumstance, the Court may find an extraordinary circumstance "where the subsequent court decision is closely related to the case in question." *Batts v. Tow-Motor Forklift Co.,* 66 F.3d 743, 748 n.6 (5th Cir. 1995). Further, a change in decisional law is more likely to be treated as an extraordinary circumstance when a judgement is not final. *See id*.

The factors that a court must analyze when considering a 60(b) motion are:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to do substantial justice; (4) whether the motion was made within a reasonable time; (5) whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether there are any intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack.

[2] Alternatively, Defendant requests that this motion be deemed a Motion to Reconsider the Court's September 12, 2019 Order Denying Defendant's Motion for Certification. ECF No. 100.

Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 356 (5th Cir. 1993) (quoting *Seven Elves v. Eskenazi*, 635 F.2d 396, 402 (5th Cir.1981)). As is evident, many of the factors are inapplicable to the review of pre-final judgement rulings. Of those that are applicable, the Secretary meets them all.

II. ARGUMENT

a. The Motion Is Timely

A Rule 60(b) motion must be made within a reasonable time. Fed. R. Civ. P. 60(c)(1); *see also Edward H. Bohlin Co*., 6 F.3d at 356.

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976) (internal quotations omitted). There can be no doubt that Defendant's motion is timely. Defendant's Motion to Dismiss Plaintiffs' Amended Complaint was denied by the Court on May 9, 2019, (ECF No. 68), and the ruling stating the Court's reasons was not handed down until May 31, 2019, (ECF No. 72). Defendant immediately moved for certification of interlocutory appeal. (ECF No. 71). It was not until September 3, 2019 that he Fifth Circuit determined the merits of *Thomas v. Bryant*, which is now controlling precedent in this Circuit. Defendant notified this Court that he planned to file this motion on either Friday September 13th or Monday September 16th. (ECF No. 99). This motion was filed on September 16, 2019, thirteen days after the Fifth Circuit handed down its opinion in *Thomas*. Thirteen days is certainly a reasonable time. *See Lairsey*, 542 F.2d at 932 (noting that controlling precedent issued several months after the applicable notice of appeal was still a reasonable time).

b. The Fifth Circuit's Ruling in *Thomas* Is an "Extraordinary Circumstance" Justifying Relief.[3]

The United States Court of Appeals for the Fifth Circuit in *Thomas v. Bryant*, 2019 U.S. App. LEXIS 26575 (5th Cir. 2019) determined several central questions that directly impact this Court's denial of the Motion to Dismiss. Specifically, the *Thomas* Court addressed the issues of laches and the requirements of a successful Section 2 claim.

i. Plaintiffs' Claims are Barred by Laches.

The Fifth Circuit's opinion in *Thomas* warrants reconsideration of the Motion to Dismiss on Defendant's laches defense. This Court denied Defendant's Motion to Dismiss in part because of the existence of certain Plaintiffs who moved to Louisiana only recently. *See* Ruling (ECF No. 72 at 12). The *Thomas* Court reaffirms the basic elements of laches, which is an inexcusable delay that causes prejudice. *Thomas*, 2019 U.S. App. LEXIS 26575 at *20-27. Under the first element, delay, the *Thomas* Court clarified that a state's statute of limitations serves "as a reference point" for a laches defense. *Id*. at *20. Mississippi has a three-year statute of limitations for civil claims. Therefore, the *Thomas* Court used 2015 as the date that Plaintiffs should have known of their claims. *Thomas*, 2019 U.S. App. LEXIS 26575 at *20-21. Most liberative prescriptions in Louisiana are one year in length. *See, e.g.*, Louisiana Civ. Code Art. 3492. The Original Complaint was filed at least one-year after the latest resident moved into the district.[4] Complaint (ECF No. 1 ¶¶ 15, 22). Using the analogue 1-year prescription for most civil claims in Louisiana "as a reference point" shows unreasonable delay under the *Thomas* Court's analysis.

[3] The Fifth Circuit determined that Section 2 claims, by themselves, are not constitutional claims. *Thomas*, 2019 U.S. App. LEXIS 26575 at *16-18. However, nothing in the Fifth Circuit's opinion addresses Defendant's argument that Plaintiffs actually pled constitutional harm.

[4] Plaintiffs Original Complaint is deficient in that it does not indicate the exact date Plaintiff Hart became a resident of Louisiana, only noting that it was "June 2017." Complaint (ECF No. 1 at ¶ 22).

On the issue of prejudice, the *Thomas* Court finds that prejudice exists in the electoral context when: (1) "a court orders redistricting shortly before the regular, decennial redistricting"; or (2) a ruling would "upset[] the results of an election already conducted." *Thomas*, 2019 U.S. App. LEXIS 26575 at *23. However, the *Thomas* Court did not frame these as being the only types of prejudice that are cognizable, but instead it identified those as the most common. In fact, the *Thomas* Court identified that the harms experienced in this case are in fact prejudicial.

The Court distinguishes the laches finding in *Chestnut v. Merrill*, 377 F. Supp. 3d 1308 (N.D. Ala. 2019), and in so doing shows prejudice here. *Thomas*, 2019 U.S. App. LEXIS 26575 at *26-27. The Court distinguishes *Chestnut* by first noting that "the delay and prejudice in that case were great." *Id.* at *27. *Chestnut* is almost indistinguishable from the case at bar. *Chestnut* is a case also involving the challenging of congressional districts under only Section 2 of the voting rights act. *Chestnut*, 377 F. Supp. 3d at 1311. Similar to the Plaintiffs here, there is a *Chestnut* plaintiff that moved to Alabama in 2016 (partially, no doubt, to avoid a laches defense). *Id*. at 1315. As it pertains to plaintiffs' delay, the *Chestnut* court found that a new resident of Alabama does not excuse plaintiffs delay in filing suit. *Id*. at 1315-16. The Fifth Circuit seemingly credited that determination. *See Thomas*, 2019 U.S. App. LEXIS 26575 at *27. Therefore, newly arrived Louisiana resident plaintiffs are insufficient to defeat a laches claim.

With respect to prejudice, the *Chestnut* plaintiffs requested that the court to redraw four of seven districts after three elections had taken place. *Id.* at *27-28 By contrast the *Thomas* plaintiffs only requested redrawing one district out of fifty-two state senate districts where no election took place in the contested district until 2015. *Id.* Here, Plaintiffs are challenging two districts of seven after four elections had already been conducted under the 2011 plan.[5] Under the *Thomas* Court's

[5] The mere fact that Plaintiffs are asking to redraw "only" two districts is illusory as redrawing congressional districts necessarily impacts additional nearby districts due to the one-person one-vote rule. *See, e.g., Ala. Legis.*

analysis of *Chestnut*, Plaintiffs delay has prejudiced the Defendant. Therefore, the Court should dismiss Plaintiffs' claims based on the equitable doctrine of laches.

ii. Plaintiffs' Failed to Plead that two *Working* Majority-Minority Districts Could be Drawn.

The *Thomas* Court also clarified an additional area of law which has a direct and substantial impact on Plaintiffs' claims. The district in question in Thomas was already a, barely, majority-minority district. *Id.* at *32 Because of this fact, the defendant argued that since the district was already a majority-minority district, no relief was necessary. *Id.* at *32. The Fifth Circuit disagreed. *Id.* The Court affirmed that it has "rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Id.* at *33.

The Court then turned to analyzing *Bartlet v. Strickland*, 556 U.S. 1 (2009). *Bartlet* clarified the meaning of the first *Gingles* precondition—that a minority population be sufficiently large and geographically compact to form a majority in a single member district—in the context of a claim for a crossover district. *Id*. at 3. The Fifth Circuit refused to adopt the inverse of the *Bartlet* rule and find that a majority-minority population *per se* forecloses a Section 2 claim. *Thomas*, 2019 U.S. App. LEXIS 26575 at *34-36. The Circuit Court then goes on to find that the *Bartlet* decision actually helps plaintiffs since *Bartlet* requires a "working majority of the voting-age population." Id. at *35 (emphasis in original). A "working majority" is one in which there are sufficient minority votes to effectively elect a candidate of choice in the chosen district.

Plaintiffs here have not sufficiently plead that there can exist two "working" majority-minority districts in Louisiana. Plaintiffs Amended Complaint merely alleges that "two majority-minority" congressional districts can be drawn, *see, e.g.,* (ECF No. 1 at ¶ 11, and p. 28 ¶ C), and

Black Caucus v. Alabama, 135 S. Ct. 1257, 1270 (2015); *Thomas*, 2019 U.S. App. LEXIS 26575 at *28; *Thomas*, 2019 U.S. App. LEXIS 26575 at *89 (Willett, J. dissenting).

that such a district would "remedy" the existing Section 2 violation, *see, e.g.,* (ECF No. 1 at ¶¶ 19-22). However, these naked assertions are insufficient under *Iqbal*, *Twombly*, and their progeny. *See, e.g., Bell Atl. Corp. v.* Twombly, 550 U.S. 544, 555 (2007).

CONCLUSION

Therefore, for the aforementioned reasons, the Court should reconsider and Dismiss Plaintiffs' Amended Complaint. Furthermore, the Court should, in the alternative, reconsider its Order Denying Defendant's Motion for Interlocutory Appeal.

Dated: September 16, 2019

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 16th 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.

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