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 Secretary of State of Louisiana,

Defendant.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant's Motion for Reconsideration marks at least the seventh filing in which he has raised the question of laches with the Court and is nothing more than the latest chapter in his never-ending quest to run down the clock on this case. Citing an inapplicable Federal Rule of Civil Procedure, Defendant argues that a now-vacated Fifth Circuit opinion warrants reconsideration of the Court's denial of Defendant's Motion to Dismiss. The Court should deny Defendant's Motion for Reconsideration because it is moot as it relies exclusively on a now-vacated Fifth Circuit opinion, *Thomas v. Bryant*, No. 19-60133, 2019 WL 4153107 (5th Cir. Sept. 3, 2019), and in any case, neither the now-vacated *Bryant* decision nor the Fifth Circuit's one-sentence vacatur supports reconsideration.[1] Based on Defendant's persistent misrepresentations of the law and facts, the

[1] Defendant asserts in a footnote that, in the alternative, the Court should construe his Motion as a Motion to Reconsider the Court's September 12, 2019, Order Denying Defendant's Motion for Certification of Interlocutory Appeal. *See* Mot. at 2 n.2 (citing ECF No. 100). Defendant provides no substantive argument whatsoever as to why *Bryant* impacts this Court's September 12 Order. Defendant does not even cite the September 12 Order anywhere else in his brief, and he fails to

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. 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.

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. 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

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articulate a single basis as to why this Court should reconsider that order. *See, e.g., U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 (11th Cir. 2007) (finding argument waived and holding that "we will not address this perfunctory and underdeveloped argument" where party "provided no legal authority to support their argument" nor any factual support); *Root Consulting, Inc. v. Insull*, No. 14-CV-4381, 2018 WL 1695369, at *6 (N.D. Ill. Apr. 6, 2018) (finding claim waived where party "offer[ed] no arguments, evidence, or legal authority relating to that contention").

on September 12, ECF No. 100. Just four days later, Defendant filed the instant 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).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 54(b) "[a]n interlocutory order . . . can be modified or rescinded by the Court." *Wagster v. Gautreaux*, No. CIV.A. 12-00011, 2014 WL 46638, at *1 (M.D. La. Jan. 6, 2014); *Hardey v. Newpark Res., Inc.*, No. CIV. A. 07-9025, 2008 WL 732715, at *1 (E.D. La. Mar. 18, 2008) (finding that Rule 54(b), not Rule 60, applied to a motion for reconsideration of a denial of a motion to dismiss).[2] Reconsideration "is not to be granted lightly" as it "is an extraordinary remedy that should be used sparingly." *Lightfoot v. Hartford Fire Ins. Co.*, No. CIV.A. 07-4833, 2012 WL 711842, at *3 (E.D. La. Mar. 5, 2012) (internal citations omitted). Such motions are "not the proper vehicle for rehashing evidence, legal theories, or arguments," and instead "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (internal citations omitted). "It is well settled that motions for reconsideration should not be used . . . to re-urge matters that have already been advanced by a party." *Id.* (internal citations omitted).

[2] Defendant claims to move "[p]ursuant to Federal Rule of Civil Procedure 60(b)(6)." Mot. at 1. However, as Defendant seems to recognize, *e.g.*, *id.* at 2, "[i]t is . . . well settled that Rule 60 applies only to *final* judgments." *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 874 (1st Cir. 1990) (emphasis added); *see also* Fed. R. Civ. P. 60(b), Advisory Committee's Note ("The addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule."). And as Defendant plainly understood when he sought "interlocutory" review of the Order, *see* ECF No. 71, the Order is not a final judgment, and therefore Rule 60(b) does not apply.

Within the Middle District of Louisiana, "three major grounds" have been recognized as justifying reconsideration: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Wagster v. Gautreaux*, 2014 WL 46638, at *2 (quoting *J.M.C. v. La. Bd. of Elementary and Secondary Educ.*, 584 F.Supp.2d 894, 896 (M.D. La. Oct. 20, 2008)).

III. ARGUMENT

A. Defendant's Motion for Reconsideration Should be Denied as Moot.

Defendant argues that the now-vacated *Thomas v. Bryant* decision presents an intervening change in controlling law and thus warrants reconsideration. Mot. at 2. As such, Defendant's Motion relies exclusively on a decision that has since been vacated pending a rehearing *en banc*.[3] *See Bryant*, 2019 WL 4616927; Mot. at 1–2 (citing *Bryant*, 2019 WL 4153107, as the singular basis for reconsideration). Because *Bryant* has been vacated, Defendant's motion for

[3] Despite alerting the Court to the Fifth Circuit's vacatur of the only decision Defendant relies on in his Motion, *see* ECF No. 107, and filing a subsequent Motion to Stay based on that vacatur, ECF No. 109, Defendant nonetheless has not withdrawn the instant Motion and instead wastes the parties' and the Court's resources with briefing and adjudicating this motion, even though he is well aware of this Court's extremely busy docket. *See Lightfoot v. Hartford Fire Ins. Co.*, 2012 WL 711842, at *3 ("When there exists no independent reason for reconsideration other than mere disagreement with a prior order, reconsideration is a waste of judicial time and resources and should not be granted.").

In his Motion to Stay, ECF No. 109-1 at 2, Defendant states without explanation that the vacatur supports reconsideration of the Court's denial of Defendant's Motion to Certify Interlocutory Appeal, ECF No. 100. Plaintiffs intend to file a complete and timely response to Defendant's Motion to Stay but note here that Defendant's argument is baseless. This assertion appears to be based on Defendant's unsupported assumption that the *en banc* Fifth Circuit Court will reverse *Bryant* and find that (1) laches barred plaintiffs' claim, even though vacatur may have nothing to do with laches and even though it would remain a factual issue if the Fifth Circuit did reverse on laches, and (2) non-constitutional VRA challenges to congressional districting plans must be before a three-judge court under 28 U.S.C. § 2284, even though *Bryant* involves *state* legislative districts and the *Bryant* dissent and all other judges to consider the issue agree that non-constitutional challenges to congressional districts must be heard before a single district judge. The Fifth Circuit's vacatur of *Bryant* does not support Defendant's assumption.

reconsideration is effectively based on no intervening event whatsoever. Thus, the Court should dismiss Defendant's Motion as moot rather than reaching the merits. *See, e.g., Gauman v. Safeco Ins. Co. of Am.*, No. CV 04-2082-PCT-EHC, 2005 WL 8160916, at *3 (D. Ariz. Sept. 14, 2005) (noting that "[b]ecause an opinion has been vacated and the case is set for rehearing *en banc*, the court cannot rely on its holding").

B. Even if Defendant's Motion Were Not Moot, the Since-Vacated *Bryant* Decision Does Not Otherwise Support Reconsideration.

1. Defendant Misstates the Bryant Court's Laches Holding.

Defendant's argument as to laches misstates the *Bryant* decision. As Defendant admits, the Fifth Circuit simply "reaffirm[ed] the basic elements of laches," Mot. at 4, and reiterated in *Bryant* the laches standard: "[t]o 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." *Bryant*, 2019 WL 4153107 at *7 (quoting *Retractable Techs., Inc. v. Becton Dickinson & Co*., 842 F.3d 883, 899–900 (5th Cir. 2016) (alteration in original)); *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). *Bryant* also confirmed that "resolving a laches defense is a fact-specific inquiry." *Bryant*, 2019 WL 4153107 at *8. This was the law before *Bryant*, remained the law under *Bryant*, and is still the law now that *Bryant* has been vacated.

The Fifth Circuit acknowledged in *Bryant* that a state's general statute of limitations for civil claims is a useful "reference point" in determining whether a claim under Section 2 of the Voting Rights Act ("VRA") is barred by laches. *Id.* at *8. However, the *Bryant* Court did not suggest, as Defendant argues, that use of such a "reference point" obviates the longstanding legal standard in evaluating a laches defense or that any claim made beyond that "reference point" is automatically the product of "inexcusable delay." *Compare* Mot. at 4 (purporting that any delay

beyond the "reference point" is "unreasonable") *with Bryant*, 2019 WL 4153107 at *7–8 (reiterating the longstanding laches test and suggesting that the "reference point" of a state's statute of limitations relates to the baseline question of whether a claim was delayed). As the VRA does not contain a statute of limitations, the *Bryant* Court merely suggested that a state's "analogous" general civil statute of limitations might present a reference point in conducting a laches analysis. In other words, while there may be a basis to allege that claims made beyond the reference point are *delayed*, the reference point is not determinative of the remaining essential elements of the laches test—that is, whether the delay was unreasonable, and, if so, whether the unreasonable delay unduly prejudiced the state.

Defendant misses this point, arguing that because "[m]ost liberative prescriptions in Louisiana are one year in length," any claim under Section 2 of the VRA not filed within one year is automatically the product of "unreasonable delay" and therefore barred by laches. *See* Mot. at 4. This argument is baseless. Again, *Bryant* merely noted that a VRA claim made outside of an analogous statute of limitations, when used as a "reference point," is arguably delayed; Defendant wrongly interprets this to mean that any such delay is also *de facto* inexcusable and unduly prejudicial to the State. If this were the case, the laches inquiry would be entirely determined by reference to an analogous statute of limitations, effectively importing a statute of limitations, from state law no less, into the VRA. Not only did the Fifth Circuit opinion in *Bryant* impose no such blanket rule, it specifically acknowledged "that no circuit court has disturbed a district court's denial of a laches defense in any case where the suit was filed more than eight months before the election," *Bryant*, 2019 WL 4153107 at *9, as is the case here. Defendant notably makes no mention of that portion of the *Bryant* opinion. Further, in arguing in favor of a blanket rule, Defendant ignores *Bryant*'s reiteration that laches remains a fact-intensive analysis, entirely

dependent on the unique circumstances of each individual case. *Id.* at *8. This Court's Order on Defendant's motion to dismiss was based on this longstanding legal standard, ECF No. 72 at 10–13, and *Bryant* identifies no basis to revisit that ruling.

2. *Defendant Contorts the Facts to Fit his Flawed Laches Arguments.*

Defendant claims "[t]he Original Complaint was filed *at least* one-year after the latest resident moved into the district." Mot. at 4. But in so doing, he improperly assumes that Plaintiff Hart, who Plaintiffs allege moved into the challenged district in "June 2017," ECF No. 19 ¶ 22, moved to Louisiana within the first 12 days of June 2017, as the Complaint was filed on June 13, 2018. That factual assumption lacks a basis and at the very least is improper on a motion to dismiss, the denial of which Defendant now asks the Court to reconsider.

But even if Defendant's argument stood on solid factual ground, the legal standard for a laches defense requires Defendant to prove that any one- or two-week delay on behalf of Ms. Hart is "inexcusable," and that it "undu[ly] prejudice[d]" the State. *See Retractable Techs.*, 842 F.3d at 899-900. This Court rightly found that Defendant failed to meet his burden in establishing that any delay was inexcusable as of his Motion to Dismiss, ECF No. 72 at 12 ("At this stage, the record is not sufficiently developed to enable the Court to determine whether there is an inexcusable delay."), and Defendant makes no showing as to how a *putative* delay of two weeks or less is inexcusable now.

3. *Plaintiffs Satisfied Their Pleading Requirements Under Section 2.*

Finally, contrary to Defendant's contention, Judge Willett's dissent in the since-vacated *Bryant* decision does not support reconsideration here. Defendant claims that "[t]he *Thomas* Court . . . clarified" what Defendant characterizes as "[t]he Fifth Circuit['s] disagree[ment]" with binding

Supreme Court precedent. *See* Mot. at 6; *see also Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). Not so.

Putting aside the fact that a dissent (even one that has not been vacated) has no precedential value, Defendant misrepresents that the *Bryant* dissent demands a Section 2 claim must be dismissed under Federal Rule of Civil Procedure 12(b)(6) *unless* a plaintiff pleads that an illustrative majority-minority district would be a "*working* majority-minority" district. Mot. at 6. Judge Willett imposed no such heightened pleading standard—*Bryant* was before the Fifth Circuit not upon a motion to dismiss but after a full trial on the merits. *See generally Bryant*, 2019 WL 4153107.

Contrary to Defendant's claims, Judge Willett made an entirely different point in his dissent: where plaintiffs challenge an existing majority-minority district under Section 2, an open question of law remains as to what those plaintiffs must prove to prevail on their claim, since the legal requirement that plaintiffs demonstrate they can constitute a numerical majority in a single-member district is inapplicable in such an instance. *See id.* at *34. Here, unlike in *Bryant*, Plaintiffs do not contend that the State's existing majority-minority district is not a working majority-minority district. Thus—even *if* (a) *Bryant* had not since been vacated, (b) the dissent in that case had any precedential value, and (c) the dissent stood for what Defendant claims—*Bryant* would still be wholly inapposite.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion for Reconsideration be dismissed or denied.

Dated: October 7, 2019 Respectfully submitted,

s/Darrel J. Papillion
Darrel J. Papillion (Bar Roll No. 23243)
Renee C. Crasto (Bar Roll No. 31657)
Jennifer Wise Moroux (Bar Roll No. 31368)
WALTERS, PAPILLION,
THOMAS, CULLENS, LLC
12345 Perkins Road, Building One
Baton Rouge, LA 70810
Phone: (225) 236-3636
Fax: (225) 236-3650
Email: Papillion@lawbr.net
Email: crasto@lawbr.net
Email: jmoroux@lawbr.net

Marc Erik Elias (admitted pro hac vice)
Bruce V. Spiva (admitted pro hac vice)
Amanda R. Callais (admitted pro hac vice)
Lalitha D. Madduri (admitted pro hac vice)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: BSpiva@perkinscoie.com
Email: ACallais@perkinscoie.com
Email: LMadduri@perkinscoie.com

Abha Khanna (admitted pro hac vice)
Perkins Coie LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: AKhanna@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, the foregoing Opposition to Defendant's Motion for Reconsideration was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
Jennifer Wise Moroux