UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, ET AL. DOCKET 3:18-cv-00625-SDD-EWD

VERSUS

KYLE ARDOIN, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE

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DEFENDANT SECRETARY OF STATE'S RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

There are three primary reasons why this Court should pay little heed to the decision of the motions panel decision appended to Plaintiffs' Notice of Supplemental Authority. (*See* ECF No. 59). First, "a motions panel decision is not binding precedent." *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988). And, in any event, there are significant reasons to believe that the decision of the panel is flawed. Second, the facts underlying the panel's decision are inapposite. Finally, the United States District Court for the Northern District of Alabama released an informative opinion on March 27, 2019. *See Chestnut v. Merrill*, No. 18-cv-907 (N.D. Ala. March 27, 2019) (ECF No. 52). In this opinion—in a nearly identical suit with similar facts—the court found that the equitable doctrine of laches barred plaintiffs' claims for injunctive relief. Therefore, Plaintiffs' additional authority does little to alter the posture of the case at bar while the decision of the Alabama District Court is, in fact, informative.

I. There are Significant Reasons to Doubt the Applicability of the Motions Panel's Decision.

At the outset, it is well settled in the Fifth Circuit that "[a] motions panel decision is not binding precedent." *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988); *see also Cimino v. Raymark Indus*., 151 F.3d 297, 311 n.26 (5th Cir. 1998); *In re Deepwater Horizon*, 723 Fed. Appx. 247, 249 (5th Cir. 2018) (*per curiam*). In fact, merits panels are "especially vigilant where, as here, the issue is one of jurisdiction." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997). Outside of not being binding precedent, Judge Clement's dissenting opinion gives significant reasons to doubt the opinion of the motions panel will survive merits review at either the Fifth Circuit or the Supreme Court. *See Thomas v. Bryant*, No. 19-60133, 45 (5th Cir. March 22, 2019) (Clement, J. dissenting).

The dissent from the denial of stay identifies many significant errors in the majority's opinion.[1] Especially noteworthy is the discussion of laches.[2] In the dissent's view, the plaintiffs' delay in filing suit from 2012 to 2018 prejudiced the defendants. *Id*. at 37. The pertinent question for the dissent is not the individual

[1] The dissent closes with the extraordinary step of effectively apologizing to defendants. *Thomas v. Bryant*, No. 19-60133, 45 (5th Cir. March 22, 2019) (Clement, J. dissenting) ("I am afraid defendants have simply had the poor luck of drawing a majority-minority panel."). The dissent goes on to "*encourage* the State to move for an expedited appellate process before this court . . . for this court to undo its own mistake." *Id*. (emphasis added).

[2] As discussed in Section II, the discussion of 28 U.S.C. § 2284(a) is truly inapposite because Plaintiffs have, in fact, plead a constitutional challenge—regardless of how much they attempt to disguise that fact.

plaintiffs' knowledge but that "all the plaintiffs are challenging district lines which were implemented seven years ago. It is *that* unnecessary delay, common to all plaintiffs, which should bar the suit." *Id*. at 37-38 n.3 (emphasis added).

II. The Three-Judge Panel Discussion in *Thomas v. Bryant* is Inapposite.

The discussion of the motions panel in *Thomas* respecting the applicability of the three-judge statute is inapposite to the arguments raised in the Secretary's Motion to Dismiss for two fundamental reasons. First, the Secretary maintains, with good reasons, that the Plaintiffs actually *did* allege constitutional harm. (*See* ECF No. 33-1 at 2-4). Second, the primary question in *Thomas* was one of statutory construction to state legislative districts.

The Amended Complaint pleads impermissible racial motivation and discrimination, which is the essence of a racial gerrymandering claim under *Shaw* and its progeny. *See Shaw v. Reno*, 509 U.S. 630 (1993); *see also* (ECF No. 33-1 at 2-3). There was no such discussion in *Thomas*. Second, the motions panel was asking the fundamentally wrong questions regarding the nature of the Voting Rights Act claims in the first instance, instead focusing their study on the meaning of "the" in the statute as opposed to its nature and purpose.[3] The underlying challenge in *Thomas* was to state legislative and not congressional districts.

[3] This is seen most clearly in the panels insistence that 28 U.S.C. § 2284(a) *is not jurisdictional*, when it most certainly is. *See, e.g., LULAC of Texas v. Texas*, 318 F. App'x 261, 264 (5th Cir. 2009) (*per curiam*).

Therefore, anything the merits panel says on the topic of congressional districts is dicta and of little applicability to the case at bar.

III. A Recent Decision in the Northern District of Alabama Further Bolsters Defendant's Laches Argument.

As was noted in the Secretary's Motion to Dismiss, on the same day this case was filed, counsel for Plaintiffs filed two other nearly identical cases on the same day. (*See* ECF No. 33-1 at 4 n.1). On March 27, 2019 the United States District Court for Northern District of Alabama issued an opinion in which it found that plaintiffs' claims for injunctive relief are barred on the basis of laches.[4] *See Chestnut v. Merrill*, No. 18-cv-907, 8-15 (N.D. Ala. March 27, 2019) (memo. op.) (attached as Appendix A).

First, the court found that the delay was not excusable, even for the plaintiffs who did not reside in Alabama until 2016. *Id*. at 11. Here, just like in Alabama, Plaintiffs provide no justification for their delay outside their attempt to introduce "new residents and voters," which is the exact argument that failed in *Chestnut*. *Compare id*. at 11 *with* (ECF No. 34-1 at 16). Second, the court found "that to force the state . . . to redistrict twice in two years—once based on nine-year-old

[4] The Alabama court's discussion of the existence of a remedy is inapposite as the court's decision failed to focus on the issue of properly pleading *compactness* which is a necessary element of a Section 2 claim. *See Thornburg v. Gingles*, 478 U.S. 30, 49 (1986) ("First, the minority group must be able to demonstrate that it is sufficiently large *and geographically compact* to constitute a majority in a single-member district." (emphasis added)).

census data—would result in prejudice." *Id*. at 14. In so finding, the court cited, just as the Secretary has, *Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) in support of its arguments. The reasoning of the Alabama District Court tracks very much with the arguments made by the Secretary in his Motion to Dismiss and the outcome should largely be the same.[5]

CONCLUSION

For the reasons stated herein, as well as those reasons stated the Secretary's Motion to Dismiss, this case should be dismissed.

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[5] However, unlike the *Chestnut* court, there is no reason to distinguish between *injunctive relief* and *declaratory relief* as prejudice here extends further than redistricting twice in two years and instead also flows from the evidentiary harms noted in the Secretary's Motion to Dismiss. (*See* ECF No. 35-2 at 9).

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 29th day of March, 2019, the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system which gives notice of filing to all counsel of record. Counsel of record not registered in the CM/ECF system were served via other means.

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