IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

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| JAMILA JOHNSON, et al.<br><br>Plaintiffs,<br><br>v.<br><br>KYLE ARDOIN, in his official capacity as the Acting Secretary of State of Louisiana,<br><br>Defendant | Case No. 18-625-SDD-EWD |

**[PROPOSED] PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant's Response to Plaintiffs' Notice of Supplemental Authority, ECF No. 60 ("Response"), purports to challenge the recent holding in *Thomas, et al. v. Bryant, et al.*, No. 19-60133 (5th Cir. Mar. 22, 2019), that standalone claims brought under Section 2 of the Voting Rights Act are not subject to 28 U.S.C. § 2284's three-judge court requirement. But Defendant's challenge falls flat. Not only is *Thomas* based on well-settled principles of statutory interpretation and therefore persuasive authority in this case, but every member of the *Thomas* panel – including the dissenting judge – opined that there was no question that § 2284 does not apply to a standalone Section 2 challenge to a congressional apportionment plan. Such a statement from the Fifth Circuit should not be taken lightly, and it is proper for this Court to rely on that opinion.

While Defendant disregards the Fifth Circuit panel opinion, he extols the legally flawed district court opinion on laches in *Chestnut, et al. v. Merrill*, No. 2:18-CV-00907-KOB (N.D. Ala. Mar. 27, 2019), ECF No. 52. But the *Chestnut* court's laches analysis is not persuasive, as the court committed numerous legal errors, the circumstances of the plaintiffs in that case are materially

different from the plaintiffs here, and even if the Court agreed with Defendant's laches defense, this case would still proceed on declaratory relief. Accordingly, this Court should take notice of the Thomas decision and reject Defendant's laches argument.

## ARGUMENT

### I. *Thomas* is Persuasive Fifth Circuit Authority That No Three-Judge Court Should Be Empaneled

Defendant's argument that *Thomas* is not binding is of no moment. There is no question that *Thomas* is a persuasive statement from the Fifth Circuit that § 2284 does not contemplate empaneling a three-judge court for a standalone Section 2 challenge to a congressional apportionment plan. *See, e.g.*, *Bamaca-Cifuentes v. Attorney Gen. United States*, 870 F.3d 108, 111 (3d Cir. 2017) (finding decision of motions panel "persuasive"); *Myzer v. Bush*, 750 F. App'x 644, 647 (10th Cir. 2018) (following direction of motions panel decisions); *Lee v. Habib*, 424 F.2d 891, 895 (D.C. Cir. 1970) ("follow[ing] the lead of th[e] [motions] panel"). Indeed, even the dissent in *Thomas*, which Defendant paradoxically argues this Court *should* follow, did not dispute that "[t]he only question [in the statute] is whether the 'constitutional' modifier in § 2284(a) applies to the second phrase in the sentence [discussing statewide legislative districts]." *Thomas* dissent, slip op. at 38. Thus, there is no question that with respect to congressional apportionment cases, a three-judge court is only empaneled under § 2284 where a constitutional challenge is invoked. *See Thomas*, slip op. at 7 (noting that defendants "contend that 'constitutionality' modifies only challenges to apportionment of congressional districts, not challenges to apportionment of state legislatures"). As Plaintiffs have explained ad nauseum, in this case, Plaintiffs have not raised a constitutional challenge, nor can Defendant foist one upon them. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also* ECF No. 27 at 3-6; ECF No. 39 at 4-8; ECF No. 44 at 2, n.1. Accordingly, this Court should reject Defendant's invitation to be the first court ever to find that,

contrary to the plain language of § 2284, standalone Section 2 challenges should be heard by a three-judge court and deny Defendant's motion to dismiss on those grounds.

**II. Laches Does Not Bar Plaintiffs' Claim**

Defendant's argument that this Court should follow the Northern District of Alabama's recent decision in *Chestnut v. Merrill* and find that laches bars Plaintiffs' claim is similarly misplaced. *See* ECF No. 27 at 17-20; ECF No. 39 at 15-16.

*First*, laches does not apply to this case because Plaintiffs seek prospective relief. *See Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 1005, n.32 (5th Cir. 1981) ("laches may not be used as a shield for future, independent violations of the law"); *see also Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1321 (11th Cir. 2008) ("[L]aches . . . bar[s] only . . . retrospective damages, not to prospective relief."); *see also* ECF No. 27 at 17-20; ECF No. 39 at 15-16. Indeed, numerous courts have declined to apply laches in voting rights cases, like this one, where plaintiffs seek prospective relief to address "ongoing" injury precisely because each new election presents a new harm. *Garza v. Cty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990); *Smith v. Clinton*, 687 F. Supp. 1310, 1312-13 (E.D. Ark. 1988) (action not barred by laches because "the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held"); *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991) (action not barred by laches despite only one election remaining before redistricting and nine years passing since most recent census). Most recently, the Southern District of Ohio ruled that laches did not bar a partisan gerrymandering claim against a congressional map drawn in 2011 and challenged in 2018, specifically because "plaintiffs [were] not seeking a remedy for any harm that they alleged occurred prior to the filing of their lawsuit, but [sought] prospective relief only." *Ohio A. Philip Randolph Institute v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018). *Chestnut*

failed to address, let alone acknowledge the fact that elections are an ongoing violation, *see, e.g.*, *Chestnut*, slip op. at 8-9, or that the plaintiffs there, like the Plaintiffs here, seek entirely prospective relief to prevent the dilution of African Americans' votes in future elections, *see* Am. Compl. ¶ 97. This Court should not commit the same error.

*Second*, even if laches could apply, Defendant Ardoin and the defendants in *Chestnut* failed to carry their burden to demonstrate undue prejudice. To be sure, while Defendant Ardoin insinuates that he is prejudiced by the possibility of "redistrict[ing] twice in two years," Response at 4, prejudice for purposes of a laches defense is not available where, as here, "prejudice would arise essentially from a decision on the merits." *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985) (rejecting laches defense); *Jeffers*, 730 F.Supp at 203 (rejecting laches defense in Section 2 dilution action because "the expense, trouble, and disruption [of redistricting] are not a consequence of plaintiffs' delay in filing" and "would have occurred whenever the suit was filed"). Instead, Defendant must show that inexcusable delay causes "disadvantage in asserting and establishing his claimed right or defense," *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 101 (5th Cir. 1978), which Defendant does not, and cannot, argue here. What Defendant Ardoin and the *Chestnut* court describe as "prejudice" is simply the consequence of an adverse ruling on the merits, and it is plainly insufficient to demonstrate laches. *See Pac for Middle Am. v. State Bd. of Elections*, No. 95 C 827, 1995 WL 571887, at *5 (N.D. Ill. Sept. 22, 1995) (rejecting laches defense and holding that "defendants[']contention that all of the congressional districts may need to be redrawn is not a prejudicial consequence of the plaintiffs' delay" but rather "the natural and inevitable result of a decision in plaintiffs' favor"). In fact, courts allow redistricting challenges to proceed even when multiple redistrictings may occur, when redistricting would occur close to a

census year, or when few elections remain before already-scheduled redistricting.[1] The *Chestnut* finding of prejudice, therefore, is erroneous.[2]

*Third*, even if this Court were to find the *Chestnut* decision persuasive, this case is factually distinguishable from *Chestnut* because Defendant has not demonstrated, and cannot demonstrate, that Plaintiffs delayed at all, let alone unreasonably, as multiple Plaintiffs were not registered voters or residents of the districts at issue until after the 2016 election. *See* ECF No. 27 at 19, n.18; ECF No. 39 at 16. For example, Plaintiff Johnson moved to Louisiana in April 2017, and was not eligible to vote for congress until the November 2018 election. ECF No. 19 ¶ 15. Likewise, Plaintiff Hart was not registered to vote in CD 6 until October 2017. *Id.* ¶ 22. This suit was filed on June 13, 2018. Moreover, Plaintiffs Rogers and Smith only registered to vote in CDs 5 and 6 shortly before the 2016 election, *id.* ¶¶ 19, 21; both brought suit before the next congressional election. Thus, it can hardly be said that they delayed on their claims, and their individual right to sue cannot be subsumed by the alleged delay of others. *See Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F. Supp. 2d 575, 579 n.2 (S.D.W.Va. 2000) (political candidate's delay in asserting First Amendment challenge did not apply to registered-voter co-plaintiffs). In the *Chestnut* case, by contrast, the plaintiff who had moved to Alabama most recently moved there in 2016. *Chestnut*,

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[1] *See, e.g., Shuford v. Ala. State Bd. of Educ.*, 920 F. Supp. 1233, 1239-40 (M.D. Ala. 1996) (rejecting laches defense, finding no "reason why it would be more difficult to litigate a § 5 claim" at the time plaintiffs filed suit "than it would have been if the claim had been raised at the time the [change in election practice or procedure occurred]"); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (case resulted in multiple redistrictings within a two-year span); *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991) (action not barred by laches despite only one election remaining before redistricting and nine years since most recent census); *Agre, et al. v. Wolf, et al.*, Case No. 2:17-cv-04392-MMB, ECF No. 83 (E.D. Penn. Nov. 16, 2017) (action not barred by laches where plaintiffs challenged 2011 map in 2017 "because the Plaintiffs have alleged a continuing violation").

[2] Indeed, the error underlying the *Chestnut* court's prejudice determination is even more glaring in its finding that redrawing the maps under 2010 census data would be prejudicial to the State. In finding this, the court failed to acknowledge not only that courts do this all the time, *see, e.g., Jeffers*, 730 F. Supp. at 203, but that every election proceeding under the 2011 Congressional Plan, including the upcoming 2020 election, proceeds under "old" census data. Thus, it is of no consequence that nine-year old census data would be used to redraw the map for the 2020 election, as that is precisely the data that the election would proceed under anyway. Allowing Plaintiffs to proceed with their suit, however, ensures that that election will be legal and fully compliant with the Voting Rights Act.

slip op. at 10.

More fundamentally, however, as discussed above, the injury inflicted from Louisiana's unconstitutional map is ongoing, and even the Plaintiffs who were registered in Louisiana during or soon after the 2010 redistricting are harmed anew with each election. *See supra* at 3-4. Thus, finding that laches bars Plaintiffs' claim when there is still an opportunity to remedy a harm that will occur as soon as November 2020 is not appropriate.

*Lastly*, the *Chestnut* court also erred because laches is an intensely factual inquiry, and it was premature to decide that issue on the pleadings, just as it is premature here.[3] Further, even if the Court were to follow the *Chestnut* decision, contrary to Defendant's argument this case would not be dismissed. Rather, as in *Chestnut*, Plaintiffs' claims for declaratory relief would remain and this case would continue. *Chestnut*, slip op. at 15.

**CONCLUSION**

Accordingly, the Court should take notice of *Thomas v. Bryant* and find that 28 U.S.C. § 2284 does not apply to standalone Section 2 claims. Likewise, for the reasons set out above and in Plaintiffs' previous briefing on the issue, *see* ECF No. 27 at 17-20, ECF No. 39 at 15-16, laches does not bar Plaintiffs' claims.

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[3] Because "laches is a *fact-intensive affirmative defense*, some courts consider it an 'unsuitable basis for dismissal at the pleading stage.'" *Spiral Direct, Inc. v. Basic Sports Apparel, Inc.*, 151 F. Supp. 3d 1268, 1280 (M.D. Fla. 2015) (emphasis added) (citation omitted); *see also Retractable Tech., Inc. v Betcon Dickinson & Co.*, 842 F.3d 883, 898 (5th Cir. 2016) (noting that the determinations underlying a laches defense "are findings of fact"); *Thomas*, slip op. at 21 (same); *Maxwell v. Foster*, No. Civ.A.98-1378, 1999 WL 33507675, at *3 (W.D. La. Nov. 24, 1999) (laches determination made on motion for summary judgment following discovery). Thus, it is *only* where a "complaint on its face shows that . . . laches bars relief" that it may properly be dismissed under Rule 12(b)(6). *Spiral Direct, Inc. v. Basic Sports Apparel, Inc.*, 151 F. Supp. at 1280 (citations omitted).

Dated: April 8, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 8, 2019, the foregoing Reply In Support of Plaintiffs' Notice of Supplemental Authority was filed electronically with the Clerk of Court using the CM/ECF system.

*s/ Jennifer Wise Moroux*
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