The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

SUSAN SOTO PALMER et al.,

*Plaintiffs*,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, et al.,

*Defendants*,

and

JOSE TREVINO et al.,

*Intervenor-Defendants*.

Case No.: 3:22-cv-5035-RSL

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

NOTE ON MOTION CALENDAR: OCTOBER 21, 2022



## I. INTRODUCTION

Intervenor-Defendants ("Intervenors") respectfully submit this Reply to Plaintiffs' and Defendant State of Washington's Responses (Dkts. # 98, 99), and request that the Court grant Intervenors' Motion to Stay Proceedings (Dkt. # 97), pending resolution of *Merrill v. Milligan*, 142 S. Ct. 1358 (2022), by the Supreme Court of the United States.

When Intervenors joined this case, *Merrill* was indeed pending; but since that time, the Supreme Court has clearly signaled that Section 2 cases should be stayed until its decision in *Merrill* is announced. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Lower courts have observed this signal and, accordingly, stayed Section 2 cases pending resolution of *Merrill*. *See e.g.*, *Nairne*



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

*v. Ardoin*, No. 22-178-SDD-SDJ, 2022 U.S. Dist. LEXIS 155706, at *7 (M.D. La. Aug. 30, 2022) ("Nor can there be any serious debate that the Supreme Court has expressed that cases applying Section 2 are better held until *Merrill* is decided."). This case presents no exception as the factors considered in deciding motions to stay all favor granting a stay here. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (listing factors). Therefore, the Court should grant Intervenors' Motion to Stay Proceedings (Dkt. # 97).

## II. ARGUMENTS

### A. A Stay Pending *Merrill* Does Not Automatically Necessitate Delayed Resolution of This Case Beyond the Next Election.[1]

A stay pending *Merrill* does not automatically mean that this case's resolution will conflict with the 2024 election. Plaintiffs claim a stay "*could* delay resolution of this matter until after the 2024 elections." (Dkt. # 98 at 4) (emphasis added). But this claim is far more speculative than Intervenors' argument that the resolution of *Merrill* will greatly impact this proceeding. Plaintiffs' claim assumes that discovery and trial cannot be concluded in the year between the latest possible decision date in *Merrill* and the August 2024 Washington primary.[2] If Plaintiffs' concern is that *Purcell v. Gonzales*, 549 U.S. 1 (2006), will prevent any change in Washington's maps in the runup to the 2024 primaries, *see* (Dkt. # 98 at 5), then their issue is with Supreme Court precedent rather than the merits of Intervenors' Motion. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("[The Supreme] Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

Moreover, the *Merrill* decision will likely affect the outcome in this case far more than will a delay of a few months. *Merrill* will, at minimum, reevaluate the Court's existing Section 2



[1] Relatedly, Plaintiffs' argument that Intervenors waited too long to raise the issue of *Merrill* is unavailing. Intervenors waited until they had (1) a clear record from the Supreme Court of multiple stays indicating that the Court intends to reevaluate its Section 2 caselaw; *see* (Dkt. # 97 at 2–4), (2) a sister district court concluding the same, *Nairne*, 2022 U.S. Dist. LEXIS 155706, at *7, and (3) oral argument in *Merrill* that indicated the Court intends to announce a revised standard for litigating Section 2 claims.

[2] "In May and June" of 2023, the Supreme Court will sit "to announce orders and opinions" for this term. *The Court and Its Procedures*, Supreme Court of the United States (last visited Oct. 20, 2022) https://www.supremecourt.gov/about/procedures.aspx. Thus, at the latest, the Supreme Court will announce the *Merrill* decision in June of 2023. This provides the Court a full year before Washington's August 2024 primary election in which to decide this case.



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

precedents, if not alter them wholesale. *See Merrill*, 142 S. Ct. at 1358; *Nairne*, 2022 U.S. Dist. LEXIS 155706, at *7; *see also* (Dkt. # 97 at 7–8 (explaining how *Merrill* will "go to the heart of the elements of a Section 2 vote-dilution claim and are directly relevant to [the legal issues] presented here")).

Accordingly, Plaintiffs' argument that a stay will "impair the quality of evidence," (Dkt. # 98 at 5), is unpersuasive as a litigation hold order can easily preserve relevant documents that can be used to refresh the memories of witnesses when discovery in this case is resumed. *See Knapke v. PeopleConnect Inc.*, No. C21-262 MJP, 2021 U.S. Dist. LEXIS 185960, at *9 (W.D. Wash. Sep. 28, 2021) ("[T]he Court is not convinced that there will be any loss of evidence given the litigation hold."); *see also Sealey v. Chase Bank U.S.A.*, No. 19-cv-07710-JST, 2020 U.S. Dist. LEXIS 183537, at *6 (N.D. Cal. Sep. 29, 2020) ("[T]he risk of harm to [the plaintiff] is small considering the likely length of the stay and the fact that [the defendant] is 'now aware of its obligations and should have already instituted a litigation hold to preserve documents that may be relevant to this litigation.'" (quoting *Canady v. Bridgecrest Acceptance Corp.*, CV-19-04738-PHX-DWL, 2020 WL 5249263, at *3–4 (D. Ariz. Sept. 3, 2020))). In fact, the *lack* of a stay will greatly impair the quality of the evidence as any change in law will likely necessitate different kinds of proof, which, in turn, will necessitate the potential wholesale duplication of discovery.



Assuming that the trial goes forward as presently ordered, on May 1, 2023, the trial would likely occur within weeks of the Supreme Court announcing its decision in *Merrill*. *See supra* n.2. Regardless of how the Court decides the present case, it is more likely than not that in the event the Supreme Court alters the current Section 2 legal landscape, much, if not all, of this case will need to be reconsidered with new evidence and new proof. Respectfully, the Court must therefore ask itself which decision enhances judicial economy, preserves resources—both public and private—and is in the public interest: (1) pausing the case for a few months while the Supreme Court decides *Merrill* and then moving forward with discovery and a trial applying the correct legal standard; or (2) moving forward under the present legal framework and issue a ruling only to have to relitigate the issue once *Merrill* is decided a few weeks later?



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

**B. The Question Presented in *Merrill* Does Have a Bearing on this Case.**

Allowing discovery to continue before the *Merrill* decision is a blind leap that the Supreme Court's Section 2 precedents will not meaningfully change. However, if the Court *does* alter the prevailing standard, even a little bit, then the parties' discovery and depositions will have been aimed at satisfying a legal standard that no longer exists. This would be a textbook case of waste of judicial and party resources. *See, e.g., Deutsche Bank Nat'l Trust v. SFR Invs. Pool 1, LLC*, 2017 U.S. Dist. LEXIS 56295, at *4–5 (D. Nev. Apr. 11, 2017). Moreover, Plaintiffs' ability to conduct discovery in 2023 will not be impaired if appropriate litigation holds are maintained. *See, e.g., Knapke*, 2021 U.S. Dist. LEXIS 185960, at *9.

Regardless of how the Supreme Court resolves *Merrill*, its decision will inform the outcome of this case. The question presented in *Merrill*, as adopted by the Supreme Court is "[w]hether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act [("VRA")], 52 U.S.C. §10301." 142 S. Ct. at 1358. Answering that question will necessarily require the Court to determine what Section 2 of the VRA requires of States—which is the very same question raised by the instant litigation. *See* (Dkt. # 97 at 7–8). Consequently, it is irrelevant that *Merrill* "is a different case brought by different parties based on different facts and under a different procedural posture." (Dkt. # 98 at 7). *See Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1997) (holding that a district court may enter a stay "pending resolution of independent proceedings" which "does not require that the issues in such proceeding [be] necessarily controlling of the action before the court").



Plaintiffs attempt to distinguish the instant case from *Merrill* is unpersuasive. They claim that this case is different because they "challeng[e] an existing bare-majority Latino district drawn by the State," (Dkt. # 98 at 7), but this neglects both the nature of the harm they assert and the remedy they seek. Initially, Plaintiffs claim a violation of Section 2 because they argue that the creation of a majority-Latino district is somehow a mechanism for depriving Latino voters of their right to elect the representatives of their choice. (Dkt. # 70 at 39–40). Vote dilution claims such as



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

Plaintiffs' are *directly* controlled by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny, which is directly at issue in *Merrill*.

That the underlying facts are different is irrelevant; Plaintiffs' claims are fundamentally the same ones advanced by the *Merrill* plaintiffs: that under existing maps, minority voters are not exercising their fair share of political power. *See Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 U.S. Dist. LEXIS 16996, at *3 (N.D. Ala. Jan. 24, 2022). Similarly, if Plaintiffs prevail in this lawsuit, they are requesting relief in the form of a reallocation of minority voters into an additional majority-minority district. The remedy requested in *Merrill* is nearly identical. *Id.*

**C. The Risks of Proceeding Are Greater than the Risks of Granting a Stay.**

Because of the inherent uncertainty surrounding the Supreme Court's decision in *Merrill*—a case that touches on the same issues of this case—Intervenors ask this Court to acknowledge said uncertainty and grant the requested stay. By contrast, Plaintiffs essentially ask the Court to gamble that nothing about the law will be changed by the *Merrill* decision. The latter is a large risk with *de minimis* benefits.



If, in *Merrill*, the Supreme Court *affirms* its existing Section 2 caselaw, then this case will proceed without being adversely affected. The Court will have a full year to finalize discovery, briefing, and trial before the next legislative election. *See supra* n. 2. Thus, while "all options, including no change to current binding caselaw, remain on the table" with regard to *Merrill*, (Dkt. # 98 at 8), accepting this fact does not necessitate rejection of Intervenors' Motion to Stay.

If, however, the Supreme Court *alters* the prevailing legal standard, and this case was allowed to proceed as currently scheduled, then the ramifications for this Court—and all the litigants—would be enormous. *See Deutsche Bank Nat'l Trust*, 2017 U.S. Dist. LEXIS 56295, at *5. In that hypothetical situation, discovery and briefing would have taken place under a legal standard that no longer exists. This litigation would be forced to start anew, duplicating efforts already expended and wasting the time and resources of the parties and the Court. Ultimately, Plaintiffs have no greater insight into how the Supreme Court will decide *Merrill* than Intervenors do, and the risks of guessing incorrectly are higher if a stay is denied than if it is granted. *See id.*



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

**D. The Interests of Judicial Economy Favor a Stay.**

Denying the requested stay is not a cost-neutral proposition. If *Merrill* is decided in any way that alters the prevailing legal standard, denying a stay would certainly require the duplication of effort and cost. Any preliminary expenses towards preparing for discovery are then sunk costs that will not be recovered if the parties plow forward in the face of uncertainty. However, if these proceedings are paused until *Merrill* is decided, then all parties—and this Court—can proceed confidently, knowing that they are applying the most up-to-date standard in Section 2 cases. Plaintiffs claim that the interests of judicial economy weigh against a stay because "[t]he parties have already started discovery in this case" by scheduling depositions and retaining expert witnesses. (Dkt. # 98 at 9–10). But depositions can be rescheduled, and experts can be retained until such time as their services are needed. At this point, a stay would require only minimal duplication of effort on the part of the parties. Consequently, the interest of judicial economy favors a stay. *See Naini v. King Cty. Pub. Hosp. Dist. No. 2.*, No. C19-0886-JCC, 2020 U.S. Dist. LEXIS 15015, at *7 (W.D. Wash. Jan. 29, 2020) ("[E]ven if a stay is not necessary to avoid hardship, a stay can be appropriate if it serves the interests of judicial economy.").



## III. CONCLUSION

The issues before the Supreme Court in *Merrill* will likely greatly impact this litigation. *See Merrill*, 142 S. Ct. at 881; *Ardoin*, 2022 WL 2312680, at *1. At the very least, the Supreme Court's disposition of that case will be informative to the parties' claims and defenses in the instant case. Consequently, the risk of wasting party and judicial resources is significant where, as here, some (if not all) of discovery, summary judgment, and trial may need to be relitigated in their entirety in light of new controlling law. Forcing the parties and the Court to complete discovery, file dispositive motions, and conduct all pre-trial procedures and a trial—when in all likelihood parties will have to start from the beginning—would directly undermine judicial economy, cause significant hardship, and prejudice to the parties.

For these reasons, the Court should stay this case pending the resolution of *Merrill*.



**Chalmers & Adams LLC**
1003 Main Street, Suite 5
Sumner, Washington 98390
PHONE: (206) 207-3920

DATED this 21st day of October, 2022.

Respectfully submitted,

*s/ Andrew R. Stokesbary*
Andrew R. Stokesbary, WSBA #46097
CHALMERS & ADAMS LLC
1003 Main Street, Suite 5
Sumner, WA 98390
T: (206) 207-3920
dstokesbary@chalmersadams.com

Jason B. Torchinsky (admitted pro hac vice)
Phillip M Gordon (admitted pro hac vice)
Dallin B. Holt (admitted pro hac vice)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLC
15405 John Marshall Hwy
Haymarket, VA 20169
T: (540) 341-8808
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
dholt@holtzmanvogel.com

*Counsel for Intervenor-Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 21st day of October, 2022.

Respectfully submitted,

*s/ Andrew R. Stokesbary*
Andrew R. Stokesbary, WSBA #46097

*Counsel for Intervenor-Defendants*