The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

SUSAN SOTO PALMER, et. al.,

Plaintiffs,

v.

STEVEN HOBBS, et. al.,

Defendants,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

Intervenor-Defendants.

Case No.: 3:22-cv-05035-RSL

Judge: Robert S. Lasnik

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' RENEWED MOTION TO STAY

NOTE FOR MOTION CALENDAR: January 13, 2023

INTRODUCTION

Plaintiffs respectfully submit this response in opposition to Intervenor-Defendants' ("Intervenors") renewed motion to stay proceedings in this case pending the U.S. Supreme Court's disposition of *Merrill v. Milligan*. Almost two months after the U.S. Supreme Court took *Merrill* on the merits, Intervenors *voluntarily* joined this case, assuring this Court that they were not seeking to delay or disrupt the case schedule. Dkt. # 57 at 2. Since joining the case, they have continually sought to do just that. Eight months after the Supreme Court took *Merrill* on the merits, and two months after this Court set trial for May 1, 2023, Dkt. # 92, Intervenors sought a stay, Dkt. #97, which this Court rightly denied, Dkt. # 101. Now, as discovery comes to a close, Intervenors

once again seek a stay, Dkt. # 123. Little has changed since Intervenors' last motion to stay, and as before, granting a stay would delay this action, waste judicial resources, and harm Plaintiffs.

Further, the bases Intervenors cite to support their motion continue to lack merit. No further information has emerged about how the Supreme Court might resolve *Merrill* since this Court denied Intervenors' last motion to stay. Dkt. # 101. Intervenors continue to engage in ungrounded speculation about what the Supreme Court *might* do in the future and present an incomplete analysis of the relevant factors for considering a stay. But the law as it stands today remains settled: no controlling authority, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), has been overruled, and lower courts are bound by existing precedent. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 207 (1993) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [court] should *follow the case which directly controls*.") (emphasis added); *United States v. Hatter*, 532 U.S. 557, 567 (2001) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *see also Northshore Sheet Metal, Inc. v. Sheet Metal Workers Int'l Ass'n, Loc. 66*, No. 15-CV-1349 BJR, 2018 WL 4566049, at *11 (W.D. Wash. Sept. 24, 2018) (applying this principle). Despite attempting once again to delay these proceedings with this motion to stay, Intervenors still cannot show any concrete hardship or inequity that would result from the case proceeding. Rather, a stay would prejudice Plaintiffs and delay a proper resolution of this case, and Intervenors renewed motion to stay should be denied.

BACKGROUND

This case commenced on January 19, 2022, when Plaintiffs filed their complaint challenging the legislative redistricting plan drawn by the Washington Redistricting Commission and approved by the Legislature under Section 2 of the Voting Rights Act. Dkt. # 1. Plaintiffs allege that Legislative District 15 was drawn to create the façade of a Latino opportunity district

that in fact dilutes Latino voting power in violation of Section 2 of the federal Voting Rights Act ("VRA"). *Id*. at ¶¶ 34, 273-83. On February 7, 2022, the U.S. Supreme Court granted a stay of a preliminary injunction in *Merrill v. Milligan* and took the case on the merits.[1] Around two months later, on March 29, 2022, Intervenors filed a motion to intervene in this case, Dkt. # 57, which Plaintiffs opposed. Dkt. # 64. On May 6, 2022, the Court allowed Intervenors permissive intervention, but declined to grant intervention as of right because Intervenors lack any significant protectable interest in the suit. Dkt. # 68. The Court also ordered joinder of the State of Washington as a Defendant. Dkt. # 69.

On June 14, 2022, the U.S. Supreme Court scheduled the oral argument in *Merrill* for October 4, 2022.[2] In the months that followed, Defendant State of Washington moved to continue the case schedule for 4 to 6 months, which the Court granted, ultimately setting a new trial date to begin May 1, 2023. *See* Dkt. # 79; Dkt. # 81. Intervenors stated no position and filed no motions regarding the timing of the case during this period. Instead, Intervenors waited until October 5, 2022, the day after the *Merrill* oral arguments, to file a motion to stay this case pending the outcome in *Merrill*. Dkt. #97. Plaintiffs opposed that motion, Dkt. # 98, as did the State of Washington. Dkt. # 99. On October 26, 2022, this Court denied Intervenors' motion to stay. Dkt. # 101. On November 2, 2022, two of the Intervenor-Defendants, Alex Ybarra and Jose Trevino, purported to file a cross-claim, alleging legislative district 15 is a racial gerrymander. Plaintiffs opposed the request to add this cross-claim, and filed a motion to bifurcate and transfer, strike,

[1] *See Merrill v. Milligan,* No. 21-1086, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html

[2] *Id*.

and/or dismiss the cross-claim. Dkt. 105, 127. As discovery comes to a close, Intervenors have once again filed a motion to stay, which Plaintiffs and the State once again oppose. Dkt. # 123.

LEGAL STANDARD

Under the framework for evaluating a request for a stay in a pending case, courts consider: (1) "the possible damage which may result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being required to go forward," and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962)); *see also* Dkt. #101 at 2 (applying this framework). The burden is on the movant, and "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

ARGUMENT

I. Intervenors still cannot meet their burden to establish that a stay should be granted.

Intervenors still have not met the "rare circumstances" necessary to justify a stay of this proceeding. 299 U.S. at 255. Staying discovery here would cause significant damage to Plaintiffs, potentially delaying a remedy until the 2026 (or even 2028) election. In contrast, there is no concrete hardship Intervenors face in continuing to litigate this case under the law as it exists. Moreover, consideration of what will serve the orderly course of justice weighs in favor of denying the stay.

A. Plaintiffs will be harmed by a stay.

A stay is inappropriate where there is "'even a fair possibility that the stay will work damage to some one else.'" *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 255). Here, the damage to Plaintiffs that will result from granting a stay is more than just a possibility and far outweighs any hardship to Intervenors.

First, "a stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Lockyer*, 393 F.3d at 1110 (citing *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979)). But halting all action in this case until after the Supreme Court announces a decision in *Merrill* could delay resolution of this matter until after the 2024 elections. This delay would mean that Latino voters in the Yakima Valley region would not obtain relief until the 2026 elections, *more than halfway through the decade*. Indeed, among Plaintiffs' requested relief is the renumbering of a Latino opportunity district to coincide with the presidential election cycle. If relief is foreclosed for 2024, that would delay relief until *2028*—near the end of the decade. Every election that continues under an illegal map is one that irreparably harms Plaintiffs, further compounding the harms Latino voters have long suffered in the Yakima Valley region. *See Garza v. Cty. Of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (finding that Latinos in Los Angeles County suffered an injury of vote dilution that "has been getting progressively worse, because each election has deprived Hispanics of more and more of the power accumulated through increased population"). If the Court grants Intervenors' renewed motion to stay, the parties may have to wait until as late as the end of June 2023 to proceed with this case, including dispositive motions, pre-trial deadlines, disclosures, motions practice, trial, a decision, and any remedy if Plaintiffs prevail,

making resolution in time for the next election in early 2024 more difficult. Moreover, both the State and the Secretary of State have expressed concerns regarding the impact any delay in this case may have on the timeline for litigation and implementation of any remedy in time for the next election cycle. *See, e.g.,* Dkt. 99 at 2, 112 at 2. To avoid the possibility of remedial maps coming too late and running up against the time limits of *Purcell v. Gonzales*, 549 U.S. 1 (2006), *see* Dkt. # 66 (order denying Plaintiffs' motion for preliminary injunction in election year on *Purcell* grounds given the deadline of March 28, 2022), Plaintiffs respectfully request that this Court deny Intervenors' renewed motion to stay.

Intervenors also contend that because discovery is complete, any delay could no longer impair the quality of evidence presented at trial. Not so. While depositions in this case are nearly complete, the risk of deterioration of evidence is not completely obviated, and a delay of trial will not result in *better* testimony by witnesses. In addition, a number of potential witnesses were not deposed at all, nor were all depositions of witnesses necessarily exhaustive. Delaying trial will only exacerbate the effect of passing time on witnesses' recollection of the 2021 redistricting process, depriving Plaintiffs—and the Court—of a fair opportunity to present the best evidence at trial. The damage that Plaintiffs would suffer as a result of this—and as a result of a compressed timeframe forcing discriminatory maps to persist for another election cycle—is severe and weighs strongly against granting a stay.

B. Hardship to Intervenors remains speculative not concrete.

Intervenors do not meet their burden to "make out a clear case of hardship or inequity." *Landis*, 299 U.S. 248 at 255. In contrast to the concrete harms Plaintiffs will suffer if this case is stayed, Intervenors identify at best only speculative harms if a stay is not granted. Intervenors express concern about the "risk" and the possible "uncomfortable scenario" of having to relitigate

this case under a potentially changed legal standard. Dkt. #123 at 6. But these worries are based on speculation about what the Supreme Court *might* do that *could* impact part of this case, and ignore Plaintiffs' claims that will be wholly unaffected by *any* outcome in *Merrill*.

Intervenors *voluntarily* inserted themselves into this litigation long *after* the Supreme Court granted certiorari in *Merrill*. Intervenors have been on notice of *Merrill* since the moment that they were granted entry into this suit but waited months to request a stay. Now, after attempting to add to this litigation with a new cross-claim and citing many of the same concerns that were rejected by this Court just over two months ago, they are attempting again to stay the case .[3] However, as before, if the *State Defendant* in this suit finds no hardship in proceeding on the current schedule, certainly the Intervenors, who *chose* to litigate this case, cannot either. *Lockyer*, 398 F.3d at 1112 ("[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity.'").[4]

Moreover, the entire premise of Intervenors' stay motion remains flawed. *Merrill* is a different case brought by different parties based on different facts and under a different procedural posture. Intervenors previously claimed that this case was "on all fours" with *Merrill* because *Merrill* contains an intent claim. Dkt. # 97 at 2. Here, they have softened their position somewhat,

[3] Intervenors' citations to *Robinson v. Ardoin* and *Nairne v. Ardoin,* in their previous motion to stay demonstrated Intervenors' delay in seeking a stay, as those cases were stayed by the Supreme Court weeks and months before Intervenors' first motion to stay. *See Ardoin v. Robinson,* No. 22-30333, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a814.html. These cases remain unhelpful to Intervenors as support for their renewed motion to stay.

[4] Further, courts in redistricting cases have held that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J. in chambers) (internal quotation marks omitted); *see also Cane v. Worcester Cty.,* 874 F. Supp. 695, 698 (D. Md. 1995); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996). The same logic applies here.

claiming instead that the legal questions presented in this case are "substantially similar" to those in *Merrill*. Dkt. # 123 at 2. But Intervenors' remain wrong in their claim that this case is so like *Merrill*. While some of the consolidated cases in *Merrill* did bring intent claims, the lower court did not decide those claims in its preliminary injunction order and are not under consideration by the Court in *Merrill*. *See, e.g.*, *Milligan v. Merrill*, 582 F. Supp. 3d 924, 936-37 (N.D. Ala. Jan. 24, 2022).

Further, *Merrill* addresses whether Section 2 of the VRA requires the creation of a second majority-Black congressional district in Alabama and primarily concerns the first prong of the *Gingles* results test. This case, unlike *Merrill*, does not seek to create an *additional* majority-minority district, but rather challenges an existing, bare-majority Latino district drawn by the State as a façade to deprive Latino voters of an equal opportunity to elect candidates of their choice. In addition, there is no real dispute in this case over whether it is possible to comply with first *Gingles* prong – the enacted version of legislative 15 itself does so, and the State's own expert witness Dr. John Alford admitted that both the enacted and Plaintiffs' demonstration plans satisfy *Gingles* prong one in his expert report and at his deposition.

Further, a number of courts, including the U.S. Supreme Court, have repeatedly *denied* stay requests pending the *Merrill* decision. *See, e.g.*, *LULAC v. Abbott*, No. 3:21-CV-00259-DCG-JES-JVB (W.D. Tex. April 22, 2022), ECF No. 246 (summary order denying motion to stay case pending *Merrill* before receipt of opposition briefing); *LULAC v. Abbott,* No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (" IT IS FURTHER ORDERED that Appellants' opposed alternative motion to stay depositions pending the Supreme Court's decision in U.S.S.C. No. 21-1086, *Merrill v. Milligan*, is DENIED."). The denial of the stay by the Fifth Circuit was then

affirmed by the Supreme Court.[5] Intervenors also failed to mention *United States v. Galveston County, Texas, et al.*, No. 3:22-CV-93 (S.D. Tex. May 24, 2022), ECF No. 28 (denying motion to stay proceedings pending *Merrill*). Just as Intervenors have here, Defendants in the Galveston case recently filed a renewed motion for a stay pending the outcome in *Merrill*. *See United States v. Galveston County, Texas, et al.*, No. 3:22-CV-93 (S.D. Tex. Sept. 30, 2022), ECF No. 77. As the United States pointed out in response to that filing, *Merrill* concerns only the analytical framework for evaluating an effects claim under Section 2, while the Galveston case includes an intent claim. *Id.*, ECF No. 80 at 6. The court in that case summarily denied the renewed motion to stay any claims in the case. *Id.*, ECF No. 85.

Moreover, to the extent that Intervenors' argument requires reading Supreme Court tea leaves based on one oral argument, it is far from certain that a wholesale jettisoning of Section 2 or a dramatic rewrite of *Gingles* will occur; all options, including no change to current binding caselaw, remain on the table. *Merrill* may well be resolved in a way that has no bearing on this case. But this is largely beside the point. "The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future." *Danielson v. Inslee*, 945 F.3d 1096, 1103 (9th Cir. 2019) (internal quotes omitted). Whatever the Supreme Court may announce regarding Section 2 when *Merrill* is decided, this case should proceed based on what the settled law is now. *See, e.g.*, *Agostini*, 521 U.S. at 207; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) ("[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.' In other words, the state courts and the other federal courts have a constitutional obligation to follow a

[5] *See Guillen v. LULAC,* 142 S. Ct. 2773 (2022), https://www.supremecourt.gov/orders/courtorders/053122zr_6537.pdf.

precedent of this Court unless and until it is overruled by this Court." (citations omitted)). The Court should not respond to "signals" that Intervenors attempt to glean from the U.S. Supreme Court, nor concoct a hardship for the parties where when does not exist. *See* Dkt. #123 at 6.

C. The orderly course of justice is served by allowing this case to proceed expeditiously.

Where a stay complicates issues, proof, or law, interests in the "orderly course of justice" weigh against a stay. *See Lockyer*, 398 F.3d at 1110. The "orderly course of justice" factor is synonymous with the interests of "judicial economy." *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). Here, the interests of judicial economy weigh in favor of denying the stay.

The parties have worked diligently to conduct discovery and are ready to proceed to the next phase of litigation in anticipation of a trial at the beginning of May 2023. Dispositive motions and trial are important next steps in fully developing the factual record in this case and, once again, there is no clear indication that *Merrill* will significantly impact these efforts, and this case should not be delayed on those grounds. *See Embree v. Ocwen Loan Servicing, LLC*, No. 2:17-CV-00156-JLQ, 2017 WL 5632666, at *3 (E.D. Wash. Nov. 22, 2017) ("The court will not engage in [] speculation. Regardless of the outcome of [another case], the parties will need to develop a factual record to show if, or how, that decision applies to the instant matter.").

Intervenors' appeals to judicial economy are meritless. As noted above, Intervenors waited over *eight months* to first seek a stay, and do so again now on the same flawed premises as before. The parties and the Court have already invested substantial judicial resources in developing the record in this case. Intervenors had months to file this motion and the opportunity to raise the issue when this Court was considering the State's continuance motion—yet they remained silent. This

Court has already scheduled case deadlines and a trial date twice, *see* Dkt. # 92, and Plaintiffs, and likely the Court, have other matters scheduled for trial in spring and summer of 2023.

"Appeals to the orderly administration of justice, without showing any hardship or inequity Defendants will face, fail to persuade the Court that a stay is warranted. This is especially true where contested issues implicate the public interest; in these circumstances, it is important for trial judges to develop the full record for review." *Karnoski v. Trump*, No. C17-01297MJP, 2017 WL 11434151, at *2 (W.D. Wash. Nov. 20, 2017). The contested issues in this case directly implicate a subject of deep importance to the public: fair elections. A stay in this case could delay a resolution until 2024, risking confusion and uncertainty about which maps would apply to elections in that year. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (discussing the application of the *Purcell* principle to avoid "judicially created confusion"). The precise application of the *Purcell* principle to redistricting cases remains unclear at best. *See Merrill*, 142 S. Ct. at 880; *id.* at 888 (Kagan, J., dissenting). Granting a stay in this case would allow Intervenors to delay the progress of this case to an entirely uncertain date at the expense of Plaintiffs' voting rights on the basis of a Supreme Court opinion that may not even affect this case. Instead, this Court should allow litigation to proceed in order to "develop a full record," which would best serve judicial economy and promote the orderly course of justice.

CONCLUSION

For the foregoing reasons, Intervenors' renewed motion to stay should be denied.

Dated: January 12, 2023

By: */s/ Edwardo Morfin*

Chad W. Dunn*
Sonni Waknin*
UCLA Voting Rights Project

Edwardo Morfin
WSBA No. 47831
Morfin Law Firm, PLLC

3250 Public Affairs Building
Los Angeles, CA 90095
Telephone: 310-400-6019
Chad@uclavrp.org
Sonni@uclavrp.org

Mark P. Gaber*
Simone Leeper*
Aseem Mulji*
Benjamin Phillips**
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
sleeper@campaignlegal.org
amulji@campaignlegal.org
bphillips@campaignlegal.org

*Admitted pro hac vice

** Pro hac vice application forthcoming

Counsel for Plaintiffs

2602 N. Proctor Street, Suite 205
Tacoma, WA 98407
Telephone: 509-380-9999

Annabelle E. Harless*
Campaign Legal Center
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

Thomas A. Saenz*
Ernest Herrera*
Leticia M. Saucedo*
Deylin Thrift-Viveros*
Mexican American Legal Defense and Educational Fund
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
Telephone: (213) 629-2512
tsaenz@maldef.org
eherrera@maldef.org
lsaucedo@maldef.org
dthrift-viveros@maldef.org

CERTIFICATE OF SERVICE

I certify that all counsel of record were served a copy of the foregoing this 12th day of January, 2023 via the Court's CM/ECF system.

/s/ Edwardo Morfin

Edwardo Morfin
WSBA No. 47831
Morfin Law Firm, PLLC
2602 N. Proctor Street, Suite 205
Tacoma, WA 98407
Telephone: 509-380-9999