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' MOTION TO STAY

NOTE FOR MOTION CALENDAR: October 21, 2022

INTRODUCTION

Plaintiffs respectfully submit this response in opposition to Intervenor-Defendants' ("Intervenors") 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, who *voluntarily* joined this case, assured this Court that they were not seeking to delay or disrupt the case schedule. Dkt. # 57 at 2. Yet now, e*ight months after* the Supreme Court took *Merrill* on the merits, two months after this Court adjusted the case schedule and set trial for May 1, 2023, Dkt. # 92, and months into discovery, Intervenors seek a stay that would delay this action, waste judicial resources, and harm Plaintiffs.

Further, the bases Intervenors cite to support their motion are meritless. Intervenors 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 is 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*, leaving to this Court the prerogative of overruling its own decisions.") (emphasis added). Moreover, Intervenors cannot show any hardship or inequity that would result from the case proceeding. To avoid undue delay and prejudice to Plaintiffs, preserve judicial resources, and ensure a proper resolution in this case, Intervenors' motion to stay should be denied.

BACKGROUND

On January 19, 2022, 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.

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

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] On June 24, 2022, Defendant State of Washington moved to continue the case schedule for 4 to 6 months. Dkt. # 79. Plaintiffs opposed Defendants' motion to continue, *see* Dkt. # 81. Intervenors did not state their position or file a brief with the Court. *See* Dkt. # 79. On August 14, 2022, the Court granted Defendant's motion to continue the case schedule, setting new discovery and briefing deadlines and scheduling the trial in the case to begin on May 1, 2023. On October 4, 2022, the oral argument in *Merrill* took place.[3] On October 5, 2022, Intervenors filed their motion to stay pending the outcome in *Merrill*. Dkt. # 97.

LEGAL STANDARD

The Ninth Circuit has an established framework for evaluating a request for a stay in a pending case. Under this framework, 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)). 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).

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[2] *Id*.
[3] *Id*.

ARGUMENT

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

Intervenors 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 election and allowing evidence needed to prove their case to go stale. In contrast, there is no concrete hardship to Intervenors arising from the continuation of discovery and litigation of this case. Indeed, the orderly course of justice weighs in favor of denying the stay.

A. Plaintiffs will suffer damage from 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, 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*. 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' stay, the

parties would not be able to resume *discovery* until as late as the end of June 2023, let alone dispositive briefing, pretrial briefing, trial, the necessary time for this Court to consider the evidence and issue a decision, a remedial phase, and any possible appeal. 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' motion to stay.

Further, the delay Intervenors seek may impair the quality of evidence gathered during discovery. In addition to Plaintiffs' results claim, Plaintiffs also have an intent claim under Section 2 of the federal Voting Rights Act. Dkt. # 1. During depositions already conducted in this case, less than a year after events in question, some deponents have struggled to recall key details, or even whether they have deleted relevant communications. *See, e.g.*, Ex. 1 (Dep. Excerpts) Campos Dep. at 20:17-20 (forgetting whether he deleted communications regarding 2021 redistricting); 62:13-19 (failing to recall timing and the content of his conversations with Commissioner Graves regarding LDs 14 and 15); McLean Dep. at 29:14-21 (not remembering specifics of an analysis conducted by Commission staffer regarding VRA); Davis Dep. at 79:25-80:6 (not recalling if Commissioners were consulted about the use of a particular partisan performance metric). Delaying discovery and trial will only exacerbate the effect of passing time on witnesses' recollection of the 2021 redistricting process, depriving Plaintiffs of a fair opportunity to gather key evidence to support their case.

B. Intervenors do not identify any concrete hardship that warrants a stay.

Defendants 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 bemoan the "grave risk" that Defendants would face in having to litigate this case in the event *Merrill* significantly changes the legal standard under Section 2 case and speculate about hardships that "all parties" "could" face. Dkt. # 97 at 10-12. This is not a serious assertion. 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 *eight months* to request a stay.[4] Defendant State of Washington's opposition to this motion underscores the absurdity of Intervenors' hardship claims. Dkt. # 97 at 1. 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.'").[5]

[4] The additional cases Intervenors cite, *Robinson v. Ardoin* and *Nairne v. Ardoin,* further demonstrate their delay in seeking a stay. The Supreme Court's stay in *Robinson v. Ardoin,* Nos. 22-cv-211 and 22-cv-214, came on June 28, 2022. *See Ardoin v. Robinson,* No. 22-30333, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a814.html. That date was well before briefing was complete on Defendant State of Washington's motion to continue, *see* Dkt. # 82 (noting the motion to continue for July 8, 2022) and more than three months before Intervenors filed their motion to stay on October 5, 2022. Intervenors also waited over 5 weeks after the *Nairne* stay to file their motion here. *See, e.g.*, Dkt. # 97 at 3 (citing *Nairne* decision date as August 30, 2022).

[5] 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.

Moreover, the entire premise of Intervenors' stay motion is flawed. *Merrill* is a different case brought by different parties based on different facts and under a different procedural posture. *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. The other two cases cited by Intervenors, *Robinson v. Ardoin*, 2022 WL 2012389, at *5 (M.D. La. 2022), and *Nairne v. Ardoin,* 2022 WL 3756195, at *1 (M.D. La. Aug. 30, 2022), also concern the creation of an additional majority-minority district. This case, unlike *Merrill*, *Robinson*, and *Nairne*, 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.

Intervenors also argue that this case is "on all fours" with *Merrill* because *Merrill* contains an intent claim. Dkt. # 97 at 2. But 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. *See, e.g.*, *Milligan v. Merrill*, 582 F. Supp. 3d 924, 936-37 (N.D. Ala. Jan. 24, 2022). Neither *Robinson* nor *Nairne* raise intent claims at all. Thus, this case presents different factual and legal issues not implicated by *Merrill*, *Robinson*, *or Nairne*.[6]

Furthermore, there is no indication that any decision in *Merrill* will make any discovery the parties are undertaking irrelevant. In originally granting the stay in *Merrill*, Justice Kavanaugh pointedly noted that it "is wrong to claim that the Court's stay order makes any new law regarding the Voting Rights Act. The Stay order does not make or signal any change to voting rights law."

[6] The third case that Intervenors cite, *Caster v. Merrill*, was consolidated with *Merrill v. Milligan*. *See* U.S. Supreme Court, No. 21-1086 (Feb. 22, 2022), available at https://www.supremecourt.gov/docket/docketfiles/html/public/21-1086.html. Thus, *Caster* can hardly be used as a separate example.

Merrill v. Milligan, 142 S. Ct. 879, 879 (mem.) (2022) (Kavanaugh, J., concurring). Nor is the Court's action in staying a preliminary injunction granting *relief* in *Merrill* akin to Intervenors' request to stay *discovery* and all other proceedings in this matter. In the event the Supreme Court rules in *Merrill* in a manner that bears on some part of this case, —by no means a guarantee—this Court can always reopen discovery for limited purposes if necessary.[7] This is hardly the "clear case" that *Landis* requires a movant to demonstrate, especially where Plaintiffs will suffer significant harm.

To the extent that Intervenors' argument requires reading Supreme Court tea leaves based solely 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,

[7] Defendants cannot claim to have advanced information regarding how the Supreme Court will act following the *Merrill* oral argument. Nothing from the argument supports their assumption that *Merrill* will "prove dispositive" of this matter. Dkt. # 97 at 6. *See, e.g.*, *Oral Argument Transcript, Merrill v. Milligan, October 4, 2022* at 21:16-21 (Alito, J. noting some of the State of Alabama's arguments are "quite far-reaching"), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1086_f204.pdf.

the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." (citations omitted)).

Moreover, Intervenors conveniently omit several cases demonstrating that courts, including the U.S. Supreme Court, have repeatedly *denied* stay requests pending the *Merrill* decision. For example, in *LULAC v. Abbott*, a motion to stay pending the disposition in *Merrill* was denied by the district court and Fifth Circuit. *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.[8] Intervenors also fail 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*). There is good reason to follow these courts' lead, especially given the harms to Plaintiffs and the differences between this case and those cited by Intervenors.

C. The orderly course of justice is not served by staying this case.

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.

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

The parties have already started discovery in this case, scheduled numerous party and non-party depositions in the coming weeks and months, and retained expert witnesses working toward disclosing reports on November 2. The parties must develop a factual record, and, once again, there is no clear indication that *Merrill* will make any discovery the parties in this case take irrelevant. Rather, conducting discovery before a decision in *Merrill* is more likely to help the parties and the Court in determining whether and to what extent the ultimate decision affects this case. *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."). Allowing discovery to continue will ensure that the factual record is more complete by avoiding stale evidence.

Intervenors' appeals to judicial economy are meritless. As noted above, Intervenors waited over *eight months* to seek a stay. 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.

Finally, 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 is 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. That outcome would complicate the issues here and does not serve judicial economy or promote the orderly course of justice.

CONCLUSION

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

Dated: October 17, 2022

By: */s/ Edwardo Morfin*

Chad W. Dunn*
Sonni Waknin*
UCLA Voting Rights Project
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*
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegal.org
sleeper@campaignlegal.org
amulji@campaignlegal.org

*Admitted pro hac vice

Counsel for Plaintiffs

Edwardo Morfin
WSBA No. 47831
Morfin Law Firm, PLLC
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 17th day of October, 2022 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