IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

TERRY PETTEWAY, et al.	§	
	§	
	§	
Plaintiffs,	§	
v.	§	**Civil Action No. 3:22-CV-00057**
	§	
	§	
GALVESTON COUNTY, TEXAS, et al.	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION TO STAY

Pursuant to the Court's inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), Defendants Galveston County, Texas, and Mark Henry in his capacity as Galveston County Judge ("Defendants"), respectfully move the Court to stay all proceedings pending resolution of *Merrill v. Milligan*, No. 21-1086, 142 S. Ct. 1358 (Mar. 21, 2022) in the Supreme Court of the United States.

INTRODUCTION

Plaintiffs brought this action seeking declaratory and injunctive relief under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. *See* Am. Compl. ¶¶ 137-48, ECF No. 31. In their Amended Complaint, Plaintiffs allege that Galveston County's 2021 map of the Galveston County Commissioners Court "reduce[s] the ability of Black and Latino voters to elect their

candidates of choice by intentionally dismantling a majority-minority precinct and cracking Black and Latino voters across four precincts." *Id.* ¶ 4.

As there is a case pending before the Supreme Court that will inevitably impact this proceeding (and could very well be outcome determinative), Defendants now move to stay these proceedings pending resolution of *Merrill v. Milligan* at the Supreme Court of the United States.

ARGUMENT

The power to stay a case "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55. Courts have inherent power to stay proceedings while awaiting the outcome of another matter which may have a substantial or dispositive effect. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). A court is within its discretion to grant a stay when a related case with substantially similar issues is pending before another court. *See Greco v. NFL*, 116 F. Supp. 3d 744, 761 (N.D. Tex. 2015).[1]

"Whether to grant a stay pending resolution of another case is a fact-sensitive question." *Alford v. Moulder*, No. 3-16-cv-350-CWR-LRA, 2016 U.S. Dist. LEXIS

[1] It is worth noting that in 2020 the Eastern District of Louisiana issued a stay in a matter involving the Fair Housing Act that was only at the Petition for Certiorari stage with the U.S. Supreme Court, and not at the more advanced merits stage as is *Merrill*. *See Treece v. Perrier Condo. Owners Ass'n*, 2020 U.S. Dist. LEXIS 26515, at *49-50 (E.D. La. Feb. 14, 2020) (finding stay warranted where U.S. Supreme Court appeared *likely to grant certiorari* in different case and rule on dispositive issue).

143292, at *4 (S.D. Miss. Oct. 17, 2016) (citing *In re Beebe*, 56 F.3d 1384 (5th Cir. 1995)). Specifically, when considering whether to stay a matter pending resolution of a separate action, the Fifth Circuit has considered: (1) the potential hardship and prejudice to the moving party if a stay is denied; (2) the potential prejudice to the non-moving party if a stay is granted; and (3) other "difficulties inherent in the general situation, including potential judicial inefficiency . . . ." *See Wedgeworth v. Fireboard Corp.*, 706 F.2d 541, 545-46 (5th Cir. 1983), *aff'd in part and vacated in part on other grounds*, 706 F.2d at 548 (5th Cir. 1983); *see also Greco*, 116 F. Supp. 3d at 761 ("[I]n determining whether a stay is proper, courts consider the interests of the parties and potential conservation of judicial resources."); *Landis*, 299 U.S. at 254-55 (same).

I. A Stay Should be Granted Pending the Supreme Court's Determination in *Merrill v. Milligan*.

The Supreme Court's upcoming resolution of outstanding questions regarding Section 2 of the Voting Rights Act, specifically questions as to when majority-minority districts are required, will directly impact the present matter. Thus, there are several important reasons why Defendants' interests and the interests of judicial economy counsel in favor of granting a stay here.

The unique relief sought in the instant action is rare, and a case requesting this rare relief is currently pending before the United States Supreme Court in *Merrill v. Milligan*. This case closely parallels the recent Alabama trial court decisions where the Supreme Court issued a stay, and granted a *writ of certiorari* in one case and granted *certiorari*

*before judgmen*t in the other.[2] In those cases, the plaintiffs sought to create districts that were drawn first on the basis of race, claimed that proportional representation by race justified the proposed districts, and then adjusted the resulting maps to try to meet other state criteria.

As a result of these parallels, the issues currently under consideration by the Supreme Court in *Merrill v. Milligan*, No. 21-1086 (U.S., Feb. 7, 2022) and *Merrill v. Caster*, No. 21-1087 (U.S., Feb. 7, 2022), are likely to substantially affect or be fully dispositive of the issues presented in this case. The judicial inefficiency (and hardship to Defendants) that could result from a liability finding from this court pre-dating the Supreme Court's soon expected pronouncement in *Merrill* puts the Defendants at grave risk that this Court could find liability under a legal theory that may no longer be applicable law. In addition, should this case proceed, the litigants could be placed in a position to entirely relitigate this case following the disposition of *Merrill.* These concerns demonstrate the clear risk of wasted time and resources for both this Court and the Parties if these proceedings are not stayed.

Accordingly, this Court should stay proceedings pending resolution of *Merrill*.

A. The Possibility of Prejudice to Defendants Weighs in Favor of Granting a Stay.

1. <u>The Issues in *Merrill* Will Likely be Dispositive of this Case.</u>

[2] Merrill is actually two cases. *Merrill, et al. v. Milligan, et al.*, No. 21-1086 (2022); *Merrill, et al. v. Caster, et al.*, No. 21-1087 (consolidated with *Milligan*). In *Caster*, the Supreme Court granted a rarely granted certiorari before judgment and took the case before the Eleventh Circuit could rule, and in *Milligan* the court noted probable jurisdiction and placed the case on the appellate docket from the three-judge district court panel. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022).

In determining whether a stay is proper, courts must weigh, *inter alia*, the similarity of issues and consequent likelihood that the related case will impact the case at bar, *see Greco*, 116 F. Supp. 3d at 761, the balance of the equities, *see Alford*, 2016 U.S. Dist. LEXIS 143292, at *5, and the "interests of judicial economy," *Labouliere v. Our Lady of the Lake Found.*, No. 16-00785-JJB-EWD, 2017 U.S. Dist. LEXIS 160853, at *25 (M.D. La. Sept. 29, 2017). Accordingly, courts frequently stay proceedings pending the outcome of a separate case pending before the Supreme Court of the United States where the Supreme Court's decision may substantially affect or prove to be dispositive of the matter. *See, e.g.*, *Kamal v. J. Crew Grp., Inc.*, No. 15-0190 (WJM), 2015 U.S. Dist. LEXIS 172578, at *4 (D.N.J. Dec. 29, 2015) (staying action pending Supreme Court's decision in a separate related action, and citing decisions of nine federal district courts staying similar cases); *see also Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, No. 15 C 5182, 2016 U.S. Dist. LEXIS 581, at *8 (N.D. Ill. Jan. 5, 2016) (same).

The issues under active consideration by the Supreme Court in *Merrill* align with those raised by the instant case. The question presented in *Merrill* 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, 52 U.S.C. §10301." 142 S. Ct. 1358 (2022). Specifically, *Merrill* arises from a dispute over Alabama's newly drawn congressional districts, where a three-judge district court concluded that Alabama's congressional districting plan likely violates section 2 of the Voting Rights Act, and thus entered an injunction ordering that Alabama's congressional districts be completely

redrawn. *See* 142 S. Ct. at 879 (Kavanaugh, J., concurring) (describing procedural background).

Similarly, Plaintiffs here challenge Galveston County's new County Commissioners plan because it is allegedly "violative of Section 2 of the VRA"[3] and likewise seek declaratory and injunctive relief. ECF No. 31 ¶ 5. There is little daylight between the dispositive issues under consideration in *Merrill* and those before this Court. The near total overlap of issues between the two cases translates to a high likelihood that *Merrill* will directly impact the instant case, which then implicates concerns of judicial economy and conservation of resources because of the risk that this Court's proceedings would have to be prepared under new standards in light of the Supreme Court's signal that it may reconsider binding precedent. *See Greco*, 116 F. Supp. 3d at 761.

The Supreme Court in *Merrill*—through opinions issued in the course of granting the stay in Alabama by Chief Justice Roberts and Justices Kavanaugh and Kagan—has made clear that it will be revisiting and clarifying Section 2 vote dilution claims. *Merrill*, 142 S. Ct. at 881 ("[T]he Court's case law" with respect to "whether a second majority-minority congressional district . . . is required by the Voting Rights Act and not prohibited by the Equal Protection Clause . . . is notoriously unclear and confusing.") (Kavanaugh, J. concurring with Alito, J.); *id*. at 882-83 ("*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote

[3] Defendants note that in addition to bringing a Section 2 claim, Plaintiffs also brought claims under the Fourteenth and Fifteenth Amendments. However, as will be discussed *infra*, this fact is of no importance to the Court's stay consideration.

dilution claim.") (Roberts, C.J., dissenting); *id*. at 889 (observing that the Court majority believes "that the law needs to change") (Kagan, J., dissenting). As the Supreme Court has given this Court every reason to believe that the law governing Section 2 claims is about to change with respect to redistricting cases, this Court should use its inherent power to stay these proceedings. *See Wedgeworth*, 706 F.2d at 545-46, *aff'd in part and vacated in part on other grounds*, 706 F.2d at 548. Staying a case while a controlling appeal is pending is "at least a good" reason, "if not an excellent one." *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.,* 559 F.3d 1191, 1198 (11th Cir. 2009) (a stay is appropriate when "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case" is forthcoming); *see* Minute Order Granting Mot. to Stay, *Johnson et al. v. Ardoin*, No. 3:18-cv-625 (M.D. La. Oct. 17, 2019), ECF No. 133 ("The Court has considered the Defendant's Motion and the Plaintiffs opposition and finds that a Stay pending en banc consideration of the Voting Rights Act issue by the Court of Appeal in *Thomas v Bryant* is warranted in the interest of judicial economy and to avoid attendant litigation expenses to the parties pending resolution of the largely unsettled legal issue. The Court is mindful that the delay attendant to this stay will impede the injunctive proceedings which the Plaintiffs had hoped to push to conclusion in advance of the Fall 2020 elections. However, considering the posture of the case and the Court's crowded docket, the likelihood of resolution before the Fall of 2020 is remote and therefore the hardship of delay is outweighed by the interests served in granting a stay pending en banc decision in *Thomas v Bryant*.").

Should this case proceed, the hardship to Defendants will be immense as it will be potentially compelled to defend itself against Plaintiffs' claims now under the current—soon to be outmoded—Section 2 regime and *again* under any new regime the Supreme Court announces. It is simply incontestable that Section 2 claims are fact and resource intensive inquiries. *NAACP v. Fordice*, 252 F.3d 361, 367 (5th Cir. 2001) ("Before making its totality of the circumstances analysis, the district court correctly recognized that it was required to effect a flexible, fact-intensive inquiry predicated on an intensely local appraisal of the design and impact of the contested electoral mechanisms, a searching practical evaluation of the past and present reality and a functional view of political life." (internal citations and quotations omitted) (cleaned up)).

Furthermore, it is expected that the Supreme Court will decide *Merrill* before the end of the 2022-2023 term, meaning that a decision will probably be released by March 2023, but no later than June of 2023 in any event.[4] A decision in even June 2023 is *well in advance* of the pertinent County Commission election in 2024 where the voters of Precinct 3 will elect their next commissioner. Currently, there is no pending motion for expedited relief or for a preliminary injunction. As such, even if the Court grants this Motion, the Court will have sufficient time to hear this matter in the normal course prior to the 2024

[4] The Supreme Court has recently been deciding redistricting cases approximately four months after oral argument. *See, e.g.*, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (argued Feb. 27, 2013, decided June 25, 2013); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (argued Nov. 12, 2014, decided Mar. 25, 2015); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (argued Dec. 5, 2016, decided March 1, 2017); *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (argued Dec. 5, 2016, decided May 22, 2017); *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (argued Apr. 24, 2018, decided June 25, 2018).

Precinct 3 elections. As such, the weight of possible prejudice in the event of the denial of this request is high for Defendants, whereas any potential prejudice against Plaintiffs in the event of a stay, aside from a brief delay in a decision of this matter, is nonexistent as the Court will have more than sufficient time to decide this matter following *Merrill* and before the 2024 Precinct 3 elections.[5]

2. Despite Plaintiffs Also Bringing Fourteenth and Fifteenth Amendment Claims, the Court Should Still Stay the Entire Matter, Not Just the Section 2 Claim.

As noted earlier, in addition to Plaintiffs' Section 2 claim, they also bring claims under the Fourteenth and Fifteenth Amendments. *See* ECF No. 31, ¶¶ 137-48. Despite, this, given the substantial overlap in legal theories and factual backgrounds of the three claims, the Court should issue a global stay for all three claims.

In matters such as this, where multiple causes of action have been brought, a stay of all claims can be warranted even when the outcome of independent proceedings will only directly bear on one of them. *See Willis v. City of Hattiesburg*, No. 2:14-cv-89-KS-MTP, 2015 U.S. Dist. LEXIS 194021, at *14 (S.D. Miss. Jan. 30, 2015). In cases where all claims brought by a plaintiff "arise from the same event" and "are intertwined and based on

[5] While not controlling here, Defendants note out of an abundance of candor with the Court that two federal district courts, one in Louisiana and the other in Texas, recently denied motions to stay Section 2 redistricting cases pending *Merrill*. *See Robinson v. Ardoin*, No. 22-211-SDD-SDJ, 2022 U.S. Dist. LEXIS 80615 (M.D. La. May 4, 2022); *see* Minute Order Denying Mot. to Stay, *LULAC, et al. v. Abbott, et al.*, No. 3:21-cv-259 (W.D. Tex. Apr. 22, 2022), ECF No. 246. However, both these cases involved pending motions for preliminary injunction and the litigation processes were already well under way. Here, the matter is in the initial stages with no pending motions for preliminary or expedited relief. Further, if stayed pending *Merrill*, this matter could be easily recommenced and decided well in advance of any deadlines involving the 2024 election involving Precinct 3—which is the only election at play here.

substantially the same factual allegations," the interests of judicial economy generally warrant the grant of a global stay. *Id*. Staying all claims until each can be fully litigated "prevent[s] the risk of essentially duplicative proceedings" and ensures that the court operates with complete information when it adjudicates the claims. *Id.* (citation omitted). For example, in *Merrill*, despite the existence of Section 2 claims *and* Fourteenth Amendment Claims, the U.S. Supreme Court still stayed the *entire* matter. *See* Compl. ¶¶ 190-210, *Milligan et al. v. Merrill et al.*, No 2:21-cv-1530, ECF No. 1 (listing three causes of action under the Fourteenth Amendment *and* Section 2 of the Voting Rights Act).

The fact that the inclusion of *both* Section 2 *and* Fourteenth Amendment claims was a non-issue when the Supreme Court issued a stay in *Merrill* is likely due to the substantial overlap in law and facts surrounding the two different claims, even if not exact. When comparing Section 2 with the Fourteenth and Fifteenth Amendments, the Supreme Court has held that the underlying language of Section 2 of the Voting Rights Act and the Fifteenth Amendment are essentially identical. *See City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). The Fifteenth Amendment provides, "[t]he *right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude*." U.S. Const. amend. XV, § 1 (emphasis added). Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color*, or in contravention of the guarantees set forth in section 4(f)(2) of this title, as

provided in subsection (b).” 52 U.S.C. § 10301(a) (emphasis added). Subsection (b) was added in 1982 in order to add the totality of the circumstances test. “Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. . . . The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings.” *City of Mobile*, 446 U.S. at 61.

It is well accepted by the courts that the Voting Rights Act is simply Congress enforcing provisions of the Fourteenth and Fifteenth Amendments. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“We have also concluded that . . . measures protecting voting rights are within Congress’ power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States.”); *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1293 (11th Cir. 2018) (“The Voting Rights Act, which is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment, was enacted pursuant to an identical enforcement provision, U.S. Const. amend. XV, § 2, which the Supreme Court has referred to [in *City of Boerne*] as a parallel power to enforce the provisions of the Fifteenth Amendment.”) (internal quotations and citations omitted)); U.S. Const. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). As such, the language and supporting law surrounding the purposes and effect of the Voting Rights Act leads inexorably to the conclusion that, for purposes of this Motion, Plaintiffs’ three claims should be treated as nearly identical claims “aris[ing] from the same

event" [*i.e.*, the creation and passage of the challenged map] and "are intertwined and based on substantially the same factual allegations." *Willis*, 2015 U.S. Dist. LEXIS 194021, at *14. Therefore, Plaintiffs' claims *in their entirety* should be stayed pending *Merrill*. *Id.*

B. Conservation of Judicial Resources Counsels in Favor of a Stay.

The issues before the Supreme Court in *Merrill* could be dispositive of this litigation. *See Merrill*, 142 S. Ct. at 881. 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. It can hardly be understated that the risk of wasting party and judicial resources is great when some, if not all, of discovery, summary judgment, and trial may need to be relitigated in their entirety. Forcing the parties and the Court to undertake an endeavor which will in all likelihood prove fruitless is an extraordinary waste of time and resources. For this reason alone, this Court should stay this case pending resolution of *Merrill*.

CONCLUSION

For the aforementioned reasons, the Court should stay proceedings pending resolution of *Merrill v. Milligan* before the United States Supreme Court.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on May 16, 2022, I conferred with counsel for Plaintiff regarding the filing of this Motion. Plaintiff's counsel, Valencia Richardson, has indicated that Plaintiffs do not consent to the relief requested herein.

/s/ Dallin B. Holt
Dallin B. Holt

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record on May 16, 2022, through the CM/ECF system.

/s/ Dallin B. Holt
Dallin B. Holt