IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, a federally recognized Indian Tribe; NAVAJO NATION HUMAN RIGHTS COMMISSION; LORENZO BATES; JONNYE KAIBAH BEGAY; GLORIA ANN DENNISON; TRACY DEE RAYMOND; and BESSIE YAZZIE WERITO,

Plaintiffs,

v. **Case 1:22-cv-00095-JB-JSR**

SAN JUAN COUNTY, NEW MEXICO; SAN JUAN COUNTY BOARD OF COMMISSIONERS; JOHN BECKSTEAD, in his official capacity as Chairman; TERRI FORTNER, in her official capacity as Commissioner; STEVE LANIER, in his official capacity as Commissioner; MICHAEL SULLIVAN, in his official capacity as Commissioner; GLOJEAN TODACHEENE, in her official capacity as Commissioner; and TANYA SHELBY, in her official capacity as COUNTY CLERK,

Defendants.

DEFENDANTS' MOTION TO VACATE SCHEDULING ORDER AND STAY CASE PENDING SUPREME COURT'S DECISION IN *MERRILL v. MILLIGAN*

Defendants respectfully request the Court to vacate the current trial date and scheduling order and to stay this matter pending the Supreme Court of the United States' forthcoming opinion in *Merrill v Milligan*[1] that will squarely address the legal framework for proving a violation of Section 2 of the Voting Rights Act, which is the only claim Plaintiffs' bring in this case. Here,

[1] *Merrill v. Milligan*, 142 S. Ct. 1105 (2022) ("The question presented in this case is: Whether the District Courts in this case correctly found a violation of section 2 of the Voting Rights Act, 52 U.S.C. § 10301."). Docket available at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html.

both judicial economy and the parties' interests support vacating the current scheduling order and granting a stay until 30 days after the Supreme Court issues its opinion in *Merrill*.[2]

I. ARGUMENT

"[T]he power to stay proceedings 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 v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "A district court may exercise its inherent power to control its docket by entering a stay of a federal proceeding in favor of another proceeding even if the parties and issues in the two proceedings are not identical. This rule applies 'whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.'" *Capitol Specialty Ins. Corp. v. Sw. Clubs, Inc.*, No. 1:12-cv-01299 MCA/LAM, 2015 WL 11117308, at *2 (D.N.M. Mar. 31, 2015) (quoting *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)). The court properly stays an action pending a decision in a separate case where the decision in the separate case may resolve many questions of fact and law, or in all likelihood will at least simplify them all. *Landis*, 299 U.S. at 256. "In deciding whether to enter a stay under the Court's inherent power to control its docket, the Court considers two factors: (1) the parties' competing interests; and (2) judicial economy." *Capitol Specialty*, 2015 WL 11117308, at *3. The Tenth Circuit reviews a district court's ruling on a motion for stay for abuse of discretion. *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983).

[2] Pursuant to D.N.M.LR-Civ. 7.1(a), on January 27, 2023, Defendants provided a copy of this Motion to Plaintiffs to determine whether they oppose or concur in the requested relief. Plaintiffs oppose.

a. Judicial economy supports staying this case.

In this case, just as in *Capitol Specialty*, judicial economy is the factor that sets the context for the Court's analysis of the parties' competing interests and any resulting hardship to Plaintiffs. *See Capitol Specialty*, 2015 WL 11117308, at *3. The Court measures judicial economy in terms of simplifying or complicating issues, proof, and questions of law that result from granting a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Here, staying this case pending the Supreme Court decision in *Merrill* will simplify issues, proof, and questions of law. Critically, a decision in *Merrill* is likely to clarify or altogether change the legal framework for this case. The *Merrill* appellants challenge what constitutes a violation of Section 2 of the Voting Rights Act and how to apply the *Gingles* preconditions. The *Merrill* appellants directly challenge that the VRA creates an affirmative obligation to redistrict on account of race. They argue that Section 2 must require proving discriminatory intent to be consonant with Equal Protection, despite language in *Gingles* that disclaims intent as an element of Section 2.[3] They further argue that an illustrative map drawn on account of race cannot satisfy the first *Gingles* precondition. Indeed, the *Merrill* briefing directly challenges that Section 2 can constitutionally require racial gerrymandering in place of race-neutral redistricting. In this case, Plaintiffs have only brought a single cause of action for a violation of Section 2 of the Voting Rights Act, alleging that all three *Gingles* preconditions are satisfied. Plaintiffs provided an illustrative map that strictly racially gerrymandered the San Juan County Commissioner Districts such that Districts 1 and 2 had almost exactly the same percentage of Native American voters. If the Supreme Court agrees with the *Merrill* appellants, Plaintiffs in this case will not satisfy the first *Gingles* precondition.

[3] *Thornburg v. Gingles*, 478 U.S. 30, 43-44, 106 S. Ct. 2752, 2762–63 (1986) ("[A] court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors'" and without requiring "proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.").

Moreover, there is no reason to fully develop the facts in this case, disclose expert opinions and file dispositive motions under a legal framework that will likely change before this Court hears the motions or has a trial. Currently, this case is set for trial August 11, 2023. But the Supreme Court heard oral argument on *Merrill* on October 4, 2022, and will issue an opinion by the end of its current term in June 2023. As a consequence, the stay Defendants request will not delay this case at all, since there will be grounds to vacate the scheduling order and the trial date as soon as the Supreme Court issues an opinion in *Merrill*, and a stay until then will only last a matter of months. Further, any change in the applicable legal test for proving a violation of Section 2 will likely entitle the parties to reopen discovery and continue depositions to develop the new material facts. And even if the *Merrill* decision were ultimately released after the trial date, it would still apply to any appeal and potentially require a new trial anyway.

b. The Parties' interests align in not incurring unnecessary costs and fees, which also supports staying this case.

Generally, "where a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity because the relief would severely affect the rights of others." *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983). But here, the judicial economy of staying this case pending the *Merrill* decision also supports the parties' aligned interest in not incurring wasteful attorney fees on work that may need to be duplicated or may become moot. Indeed, the Parties have not yet conducted any depositions and have not disclosed any expert witnesses. There has only been some written discovery to date, and no dispositive motions have been filed. Staying the case now confers the benefit of saving the Parties from conducting the majority of discovery blindly without view of the imminent *Merrill* decision. This is critically important in a case where the Court may award attorney fees to the prevailing party. *See* 52 U.S.C. § 10310(e).

Moreover, there is no prejudice suffered to Plaintiffs in delaying this matter, since there was already an election on the challenged districts while this case was pending in November 2022. There will not be another election in San Juan County until 2024, and there will be sufficient time to resume and conclude litigation in this case well before the next election even if the stay remains until August 2023. Indeed, Plaintiffs' interest in litigating this case in time for any future election does not conflict with Defendants' interest in conserving resources and avoiding litigation issues that may potentially be moot. Moreover, Plaintiffs should not have an interest in rapidly proceeding in this case only to have to re-litigate in six months as a result of new law.

II. CONCLUSION

Staying this case just makes sense and will only benefit the Parties by allowing the Supreme Court to provide binding guidance in *Merrill* that will dictate the issues, relevant facts, expert opinions and legal framework in this case. Plaintiffs respectfully request the Court enter an order:

A. Vacating the current scheduling order and trial date;

B. Staying all proceedings until 30 days after the Supreme Court issues its opinion in *Merrill*; and

C. Such other relief the Court deems necessary.

Respectfully Submitted:

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I HEREBY CERTIFY that on January 27, 2023, the foregoing was filed electronically through the CM/ECF system, which caused all parties and counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Brian Griesmeyer
Brian Griesmeyer, Esq.