UNITED STATES 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.

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.

Case 1:22-cv-00095-JB-JFR

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE AND STAY CASE PENDING SUPREME COURT'S DECISION IN *MERRILL V. MILLIGAN*

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I. INTRODUCTION

Exactly one year ago today, on February 10, 2022, Plaintiffs brought the instant action challenging Defendants' adoption of a redistricting plan for the San Juan County Board of Commissioners because it dilutes the voting power of Navajo and other American Indian voters in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See* ECF 1. On February 7, 2022, three days before Plaintiffs filed their Complaint, the United States Supreme Court noted probable jurisdiction in *Merrill v. Milligan*, a Section 2 challenge to Alabama's congressional redistricting plan. (No. 21-1086). On February 22, 2022, the *Merrill* Court limited the question

presented to the single issue of "Whether the District Courts in these cases correctly found a violation of section 2…"

Nearly a year later, on January 27, 2023, Defendants filed their Motion to Vacate the Scheduling Order and Stay the Case pending the Supreme Court's decision in *Merrill*. *See* ECF 69. Defendants' untimely Motion comes on the eve of the close of discovery, following extensive written discovery and scheduled fact witness depositions. By the time Defendants' Motion is fully briefed and submitted to the Court, fact witness depositions will be nearly completed, with Plaintiffs' initial expert reports just days away from being disclosed. Nevertheless, based solely on their unsupported speculation of how they believe the Supreme Court may rule in *Merrill*, Defendants ask the Court to halt all proceedings after this case has been nearly fully developed. Defendants have not met their heavy burden of establishing that the extraordinary relief of a stay is warranted. Similar motions that were much more timely filed already have been denied by courts throughout the country. *See, e.g., LULAC v. Abbott*, No. 3:21-CV-00259-DCG-JES-JVB (W.D. Tex. April 22, 2022), ECF No. 246 (denying motion to stay redistricting case pending *Merrill*); *Palmer v. Hobbs*, No. C22-5035RSL (W.D. Wash. Jan. 20, 2023), ECF No. 138 (same); *Petteway v. Galveston Cnty.*, No. 3:22-cv-57 (S.D. Tex. Nov. 17, 2022), ECF No. 85 (same). As these decisions reflect, the proper course is for this Court to allow the case to proceed, and address any need for supplemental discovery if and when the *Merrill* decision so requires.

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Accordingly, Plaintiffs respectfully submit that Defendants' Motion be denied.

II. DEFENDANTS ARE NOT ENTITLED TO A STAY PENDING *MERRILL*'S RESOLUTION.

Defendants have not—and cannot—show they are entitled to a stay. "The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

In determining whether to grant a stay, "the Court generally hesitates to stay discovery unless both parties agree to the stay" and if a stay will prejudice the nonmoving party. *Childress v. DeSilva Automotive Servs., LLC*, 2020 WL 3572909, at *12 (D.N.M. July 1, 2020) (denying motion to stay pending resolution of Supreme Court case). Indeed, as this District has noted, "Courts of Appeals typically disfavor granting stays pending the Supreme Court's resolution of separate cases." *Id.* at *13.

A. A Stay Will Not Serve the Interests of Judicial Economy.

A stay pending the resolution of *Merrill* will not "simplify issues, proof, and questions of law" or serve the interests of judicial economy, contrary to what Defendants contend. Mot. at 3. *Merrill* has been pending in the Supreme Court since February 7, 2022—days before Plaintiffs even commenced this lawsuit, and almost a ***year*** before Defendants decided to bring the instant Motion. Even after the Supreme Court scheduled *Merrill* for oral argument on June 14, 2022, or after the oral argument took place on October 4, 2022, Defendants still failed to seek a stay. Defendants offer no explanation for their delay because it is evident that there is none.

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Moreover, the facts refute Defendants' contention that a stay will "simplify" this case because they maintain that only "some written discovery" has been accomplished. Mot. at 3-4. Quite the contrary is true. Since this case was filed, the parties have exchanged over 400 documents—amounting to over 6,500 pages of records. Declaration of Virginia Weeks in Support of Plaintiffs' Opposition at ¶ 2. The parties have scheduled a total of sixteen depositions, which will be nearly completed in mid-February 2023, before the Motion is fully briefed. *Id.* at ¶ 3. Plaintiffs will disclose their experts and expert reports to Defendants on February 27, 2023. ECF 70. Defendants' expert disclosures and reports are due one month later, on March 29, 2023. *Id.* Trial is scheduled to commence in a few months, on August 11, 2023. *Id.* Only now, close to the

end of the parties' discovery and a year after the Supreme Court agreed to take *Merrill*, do Defendants file their Motion. ECF 69. In short, Defendants seek a stay only to delay—*after* the parties have expended countless resources to litigate and conduct discovery.

B. *Merrill* does not establish the need for a stay.

The mere existence of a pending Voting Rights Act case in the Supreme Court does not justify a stay here. *See* Mot. at 3. Because cases raising constitutional challenges to statewide district maps can be appealed directly to the Supreme Court, *see* 28 U.S.C. §§ 1253, 2284(a), and because the Supreme Court has pendent jurisdiction to hear direct appeals from three-judge courts even when the district court rules on statutory grounds, *see Alexander v. Fioto*, 430 U.S. 634, 636 (1977), the Supreme Court routinely hears statewide Voting Rights Act challenges. The mere existence of a pending redistricting case in the Supreme Court cannot create grounds to pause all vote dilution litigation in the lower courts. Whatever uncertainties may persist in the doctrine's application, lower courts have applied the well-established *Gingles* test for over three decades, and have done so even as the Supreme Court has refined that test over time.

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For that reason, a number of courts, including the United States 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."); *see also Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (affirming Fifth Circuit's denial of the stay); *Palmer v. Hobbs*, No. C22-5035RSL (W.D. Wash. Jan. 20, 2023), ECF No. 138 (denying motion to stay redistricting case pending

Merrill's resolution); *Petteway v. Galveston Cnty.*, No. 3:22-cv-57 (S.D. Tex. Nov. 17, 2022), ECF No. 85 (same).

Federal courts likewise have been moving ahead to conduct litigation and to decide Section 2 cases under the standards first enunciated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), even after the Supreme Court took the *Merrill* case and granted a stay in February 2022. *See, e.g., Rose v. Raffensperger*, 1:20-cv-02921-SDG, 2022 WL 3135915 (N.D. Ga. Aug. 5, 2022), *stayed*, No. 22-12593, 2022 WL 3572823 (11th Cir. Aug. 12, 2022), *stay vacated*, No. 22A136, 2022 WL 3568483 (U.S. Aug. 19, 2022) (method of election for Georgia Public Service Commission); *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, 587 F. Supp. 3d 1222 (N.D. Ga. 2022) (Georgia's congressional redistricting); *Bowman v. Chambers*, 586 F. Supp. 3d 926, 936-37 (E.D. Mo. 2022) (St. Louis City Council redistricting); *Baltimore Cnty. Branch of Nat'l Ass'n for the Advancement of Colored People v. Baltimore Cnty., Md.*, No. 21-cv-03232-LKG, 2022 WL 657562 (D. Md. Feb. 22, 2022), *order modified*, 2022 WL 888419 (D. Md. Mar. 25, 2022) (Baltimore County redistricting).

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A stay would not benefit the Court or the Plaintiffs. Nor would it further the administration of justice. It would merely reward Defendants for their inexcusable delay. To the extent Defendants' 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. Justice Kavanaugh cautioned lower courts from reading too much into the Supreme Court's treatment of *Merrill* before its decision, emphasizing that "The stay order does not make or signal any change to voting rights law." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (mem.) (2022) (Kavanaugh, J., concurring). As is true in any case that the Supreme Court decided, all options, including no change to current binding caselaw, remain on the table. Though Defendants speculate

that the "legal framework … will likely change" under *Merrill*, Mot. at 4, *Merrill* may well be resolved in a way that has no bearing on this case. Defendants do not explain how any conceivable resolution of *Merrill* could affect fact discovery. And, even if the decision affected expert opinions, that can be easily accommodated without an *ex ante* delay of trial is this case.

C. Defendants have not met their heavy burden in seeking a stay.

"[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,* 299 U.S. at 255; *see also Danielson v. Inslee,* 945 F.3d 1096, 1103 (9th Cir. 2019) ("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." (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 v. Felton,* 521 U.S. 203, 207 (1997) ("lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"); *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 precedent of this Court unless and until it is overruled by this Court." (citations omitted)).

In any event, a decision in *Merrill* will not likely render current the current – and nearly completed – discovery process irrelevant or unnecessary. If the decision *Merrill* ultimately effects some aspect of this case, the Court can always open limited discovery for these very limited purposes. Such a modification, especially considering the entirely speculative nature of what havoc

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Merrill will wreak, presents significantly less hardship than forcing months long discovery delay when the painstaking, time-consuming and costly process is over halfway complete.

D. A Stay Will Prejudice Plaintiffs.

Critically, staying the case now will delay this litigation by at least another six months, thereby likely interfering with upcoming filing deadlines for the next San Juan County Commissioner which are scheduled for March 12, 2024. *See* Election Handbook of the State of New Mexico, §1-8-26(B) (2021 ed.) ("Declarations of candidacy for any other office to be nominated in the primary election shall be filed with the proper filing officer on the second Tuesday of March of each even-numbered year between the hours of 9:00 a.m. and 5:00 p.m."), *available at* https://www.sos.state.nm.us/wp-content/uploads/2021/10/NM-Election-Handbook-SOS.pdf. Delaying this litigation—and therefore trial—even just six months could deprive would Plaintiffs relief for the 2024 election cycle and perpetuate Defendants' Section 2 violation.

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Moreover, staying the case now will cause a delay that will undermine Plaintiffs' witness testimony at subsequent depositions or trial. While discovery in this case, including depositions, is nearly complete, the longer trial is delayed, the greater increase there is in the risk of deterioration of testimony. 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 is severe and weighs strongly against granting a stay.

The wiser course of action is for this Court to allow the case to proceed in accordance with the present schedule, and deal with any ramifications of *Merrill* (or, indeed, of any intervening precedent) if and when necessary.

III. DEFENDANTS' MOTION TO VACATE AND STAY SHOULD BE DENIED.

For the reasons set forth above, Plaintiffs respectfully request that Defendants' Motion (ECF 69) be DENIED.

Dated: February 10, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2023, I filed the foregoing via the CM/ECF electronic filing system, causing a copy of the same to be served on all counsel of record.

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