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.

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

It is this Court's discretion to stay this case pending the *Merrill* decision, and there are good grounds to do so. Or at the very least there is good cause to vacate the remaining scheduling order so that dispositive motions practice can proceed on the correct legal landscape. The Court and the parties will benefit from the hopeful clarification that *Merrill* should bring to the disputed issues in this case.

1. Other courts, including the Supreme Court, have stayed cases pending the *Merrill* decision.

Plaintiffs' response ignores that the Supreme Court of the United States did stay a similar case pending its decision in *Merrill*. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (mem) (2022) (No. 21-1596). The Supreme Court of the United States in *Robinson* agreed that a stay pending appeal was warranted, reversing the Fifth Circuit's affirmance of the Louisiana district court's denial of a motion to stay the injunction in that case. *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) *stayed by Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Then, in the separate case of *Nairne v. Ardoin*, the Louisiana district court followed that guidance and granted a renewed motion to stay the proceedings, even though those defendants waited to file their renewed motion to stay until the day the plaintiffs filed their expert reports. *Nairne v. Ardoin*, Case 3:22-cv-00178-SDD-SDJ, 2022 WL 3756195, at *1-2 (M.D. La. Aug. 30, 2022) ("Supreme Court has expressed that cases applying Section 2 are better held until *Merrill* is decided"). Plaintiffs' argument is incomplete that "a number of courts, including the United States Supreme Court, have repeatedly *denied* stay requests pending the *Merrill* decision." ECF No. 74, Resp. at 4. And the stay at issue in Plaintiffs' cited Fifth Circuit case of *LULAC v Abbott* involved an assertion of the legislative deliberative process and did not substantively address granting a stay the pending the *Merrill* decision, nor did the Supreme Court in affirming. *See LULAC Abbott v. United States*, No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022). This Court may properly follow the Supreme Court's guidance from *Ardoin v. Robinson*.

2. Defendants' motion is timely, and the decisions in Plaintiffs' cited precedent were discretionary and did not turn on the timing of the motion for stay.

Plaintiffs' arguments of timeliness regarding their cited district court cases are not on point. For example, in *LULAC v. Abbott*, the case had been pending since October 2021. *Complaint*, *LULAC v. Abbott*, No. 3:21-CV-00259-DCG-JES-JVB (W.D. Tex. Oct. 18, 2021), ECF No. 1.

The motion for stay in that case simply argued that *Merrill* would affect the applicable Section 2 test and was filed before the 2022 election. *See Motion to Stay Case*, *LULAC v. Abbott*, No. 3:21-CV-00259-DCG-JES-JVB (W.D. Tex. Apr. 20, 2022), ECF No. 241. Here, the 2022 election has already passed, so there will still be ample time after the *Merrill* decision to adjudicate this case before the 2024 election. In *Petteway v. Galveston Cnty.*, the court denied the defendants' *renewed* motion to stay. *Order Denying Motion to Stay*, *Petteway v. Galveston Cnty.*, 3:22-cv-00057 (S.D. Tex. Nov. 17, 2022), ECF No. 85. But that case involved more than just a single claim for violation of Section 2. *See U.S. Resp. Opp'n Defs.' Renewed Mot. Stay* at 6, *Petteway v. Galveston Cnty.*, 3:22-cv-00057 (S.D. Tex. Oct. 21, 2022), ECF No. 80. And in *Palmer v. Hobbs*, the case had been pending since January 2021. *See Compl.*, *Palmer v. Hobbs*, Case 3:22-cv-05035-RSL (W.D. Wash. Jan. 19, 2022), ECF No. 1. The movants in that case filed two motions for stay and the court denied the first without prejudice and allowed the movants to refile after the close of discovery. *Order Den. Intervenor-Defs.' and Cross-Pls.' Renewed Mot. Stay Proceedings*, *Palmer v. Hobbs*, Case 3:22-cv-05035-RSL (W.D. Wash. Jan. 20, 2023), ECF No. 138. The movants in that case filed their renewed motion just last month, on January 5, 2023. *Intervenor-Defs.' and Cross-Pls.' Renewed Mot. Stay Proceedings*, *Palmer v. Hobbs*, Case 3:22-cv-05035-RSL (W.D. Wash. Jan. 5, 2023), ECF No. 123.

None of those district courts' decisions to deny the motions in those case turned on the timing of the filing of the motion to stay. Rather, they were completely discretionary with the district court judge, just as the decision is completely in this Court's discretion in this case. Indeed, this Court has inherent power to control its docket and there are "no strict rules for the district court to apply" to determine whether to grant a stay. *Childress v. DeSilva Auto. Services, LLC*, No. 1:20-cv-00136-JB-JHR, 2020 WL 3572909, at *11 (D.N.M. July 1, 2020).

3. The *Merrill* decision will directly apply to the critical issue in this case regarding the first *Gingles* factor.

This Court has noted that "stays are more likely when the Supreme Court's decision could negate or invalidate all of the plaintiff's case or remove the court's subject-matter jurisdiction." *Childress v. DeSilva Auto. Services, LLC*, 2020 WL 3572909, at *14 (D.N.M. July 1, 2020) (citations omitted). Here, the *Merrill* decision is likely to directly impact or invalidate the first *Gingles* factor that is critically disputed and the basis of Plaintiffs' sole Section 2 claim—the same claim at issue in *Merrill*. Namely, in this case Plaintiffs cannot argue that Defendants failed to draw 2 majority-minority districts in proportion to the minority's share of the total county population.

Quite simply, currently Native Americans as a minority group already compose "a numerical, working majority of the voting-age population" in 2 commission districts in San Juan County. *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 1242 (2009). "[T]he majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Id.* at 18–19. "The law cannot insist that a state legislature, when redistricting, determine precisely what percent minority population [the VRA] demands." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). "If the voting group of [a minority] have the numbers necessary to win and members of the group are allowed equal access to the polls, it cannot be rationally maintained that the vote is diluted." *Smith v. Brunswick Cnty., Va., Bd. of Sup'rs*, 984 F.2d 1393, 1401 (4th Cir. 1993). Moreover, there is no violation of § 2 where, "in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters'

respective shares in the voting-age population." *Johnson v. De Grandy*, 512 U.S. 997, 1000, 114 S. Ct. 2647, 2651 (1994).

In this case, Native Americans in San Juan County have a majority of voting age population in 2 out of 5 commission districts, in proportion to their approximately 40% share of the overall population in San Juan County. The San Juan County Board of Commissioners adopted a map with a majority Native American district of 82.67% in District 1—deferring to the Native American Commissioner for that district and the community of interest she wanted to protect—and with a second majority Native American district of 52.32% in District 2. Based on San Juan County's history of having 2 Native American commissioners from those districts with similar (or lower Native American population in District 2), the commission reasonably expected that providing a Native American majority district of approximately 52.32% would provide Native Americans in District 2 the opportunity to elect their candidate of choice. This satisfies *Gingles*, *Bartlett* and *DeGandy*. As *Bartlett* directs, Defendants had no obligation under § 2 "to give minority voters the most potential, or the best potential, to elect a candidate" or to maximize minority voting strength. *Bartlett*, 556 U.S. at 15-16.

The *Merrill* appellants directly challenge what is required of governments to comply with the VRA, specifically the first *Gingles* factor, and the Supreme Court has acknowledged the confusion around what the factors require. *Merrill v. Milligan*, 142 S. Ct. 879, 882–83 (2022) (Roberts, J. dissent) (collecting cases). The *Merrill* appellants argue that Section 2 cannot require drawing maps on the basis of race without running afoul of Equal Protection. *Brief for Appellants* at 37-42, *Merrill v. Milligan*, Nos. 21-1086, 21-1087 (Apr. 25, 2022). *See also, e.g.*, *Navajo Nation v. San Juan County*, 929 F.3d 1270, 1289–90 (10th Cir. 2019) (drawing districts solely on the basis of race to achieve strict proportionality can violate equal protection). Critically, the *Merrill*

appellants challenge how Plaintiffs can satisfy the first *Gingles* factor, which requires that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). At issue in *Merrill* is whether proportionality is required, and what is a narrowly tailored remedy in accord with Equal Protection.

The *Merrill* decision should answer whether Section 2 requires counties to draw racially segregated boundaries that create equally distributed minority populations to maximize the political chances of each majority-minority district. The *Merrill* decision must clarify the first *Gingles* factor and what is required, which will change the legal landscape of this case.

4. Defendants will suffer greater prejudice at this point in the litigation if it is not stayed.

Plaintiffs' argument that there has already been substantial discovery completed is similarly misplaced. Defendants provided Plaintiffs the opportunity to avoid moving forward with deposition discovery and incurring attorney fees on issues that may be moot when Defendants circulated the instant motion before starting the deposition schedule. And now that those depositions are complete, there is no prejudice to staying the remainder of the case for a matter of months until the *Merrill* decision comes down. At the very least, there is good cause to vacate the remainder of the scheduling order (that the parties have had to extend 3 times already anyway) and vacate the trial date to allow the parties to conserve additional expenses and fees by not engaging in motions practice on a legal standard that may also become moot. At this point in the litigation, it is Defendants who will suffer the greater prejudice if the case is not stayed or the remaining scheduling order not vacated since they will be forced to file dispositive motions and complete briefing before the *Merrill* decision quite likely changes the landscape for at least the first *Gingles* factor.

WHEREFORE, 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 February 24, 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.