

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’
RENEWED MOTION TO STAY**

NOTE FOR MOTION
CALENDAR: January 13, 2023

INTRODUCTION

Plaintiffs respectfully submit this response in opposition to Intervenor-Defendants’ (“Intervenors”) renewed 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, Intervenor *voluntarily* joined this case, assuring this Court that they were not seeking to delay or disrupt the case schedule. Dkt. # 57 at 2. Since joining the case, they have continually sought to do just that. Eight months after the Supreme Court took *Merrill* on the merits, and two months after this Court set trial for May 1, 2023, Dkt. # 92, Intervenor sought a stay, Dkt. #97, which this Court rightly denied, Dkt. # 101. Now, as discovery comes to a close, Intervenor

1 once again seek a stay, Dkt. # 123. Little has changed since Intervenors' last motion to stay, and
2 as before, granting a stay would delay this action, waste judicial resources, and harm Plaintiffs.

3 Further, the bases Intervenors cite to support their motion continue to lack merit. No further
4 information has emerged about how the Supreme Court might resolve *Merrill* since this Court
5 denied Intervenors' last motion to stay. Dkt. # 101. Intervenors continue to engage in ungrounded
6 speculation about what the Supreme Court *might* do in the future and present an incomplete
7 analysis of the relevant factors for considering a stay. But the law as it stands today remains settled:
8 no controlling authority, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), has been overruled,
9 and lower courts are bound by existing precedent. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 207
10 (1993) (“[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons
11 rejected in some other line of decisions, the [court] should *follow the case which directly*
12 *controls.*”) (emphasis added); *United States v. Hatter*, 532 U.S. 557, 567 (2001) (“[I]t is this
13 Court’s prerogative alone to overrule one of its precedents.”); *see also Northshore Sheet Metal,*
14 *Inc. v. Sheet Metal Workers Int’l Ass’n, Loc. 66*, No. 15-CV-1349 BJR, 2018 WL 4566049, at *11
15 (W.D. Wash. Sept. 24, 2018) (applying this principle). Despite attempting once again to delay
16 these proceedings with this motion to stay, Intervenors still cannot show any concrete hardship or
17 inequity that would result from the case proceeding. Rather, a stay would prejudice Plaintiffs and
18 delay a proper resolution of this case, and Intervenors renewed motion to stay should be denied.
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22 **BACKGROUND**

23 This case commenced on January 19, 2022, when Plaintiffs filed their complaint
24 challenging the legislative redistricting plan drawn by the Washington Redistricting Commission
25 and approved by the Legislature under Section 2 of the Voting Rights Act. Dkt. # 1. Plaintiffs
26 allege that Legislative District 15 was drawn to create the façade of a Latino opportunity district

1 that in fact dilutes Latino voting power in violation of Section 2 of the federal Voting Rights Act
 2 (“VRA”). *Id.* at ¶¶ 34, 273-83. On February 7, 2022, the U.S. Supreme Court granted a stay of a
 3 preliminary injunction in *Merrill v. Milligan* and took the case on the merits.¹ Around two months
 4 later, on March 29, 2022, Intervenors filed a motion to intervene in this case, Dkt. # 57, which
 5 Plaintiffs opposed. Dkt. # 64. On May 6, 2022, the Court allowed Intervenors permissive
 6 intervention, but declined to grant intervention as of right because Intervenors lack any significant
 7 protectable interest in the suit. Dkt. # 68. The Court also ordered joinder of the State of Washington
 8 as a Defendant. Dkt. # 69.

10 On June 14, 2022, the U.S. Supreme Court scheduled the oral argument in *Merrill* for
 11 October 4, 2022.² In the months that followed, Defendant State of Washington moved to continue
 12 the case schedule for 4 to 6 months, which the Court granted, ultimately setting a new trial date to
 13 begin May 1, 2023. *See* Dkt. # 79; Dkt. # 81. Intervenors stated no position and filed no motions
 14 regarding the timing of the case during this period. Instead, Intervenors waited until October 5,
 15 2022, the day after the *Merrill* oral arguments, to file a motion to stay this case pending the
 16 outcome in *Merrill*. Dkt. #97. Plaintiffs opposed that motion, Dkt. # 98, as did the State of
 17 Washington. Dkt. # 99. On October 26, 2022, this Court denied Intervenors’ motion to stay. Dkt.
 18 # 101. On November 2, 2022, two of the Intervenor-Defendants, Alex Ybarra and Jose Trevino,
 19 purported to file a cross-claim, alleging legislative district 15 is a racial gerrymander. Plaintiffs
 20 opposed the request to add this cross-claim, and filed a motion to bifurcate and transfer, strike,
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24 ¹ *See* *Merrill v. Milligan*, No. 21-1086,
 25 <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html>

26 ² *Id.*

1 and/or dismiss the cross-claim. Dkt. 105, 127. As discovery comes to a close, Intervenors have
2 once again filed a motion to stay, which Plaintiffs and the State once again oppose. Dkt. # 123.

3 LEGAL STANDARD

4 Under the framework for evaluating a request for a stay in a pending case, courts consider:
5 (1) “the possible damage which may result from the granting of a stay,” (2) “the hardship or
6 inequity which a party may suffer in being required to go forward,” and (3) “the orderly course of
7 justice measured in terms of the simplifying or complicating of issues, proof, and questions of law
8 which could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th
9 Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962)); *see also* Dkt. #101 at 2
10 (applying this framework). The burden is on the movant, and “[o]nly in rare circumstances will a
11 litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law
12 that will define the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).
13

14 ARGUMENT

15 I. Intervenors still cannot meet their burden to establish that a stay should be 16 granted.

17 Intervenors still have not met the “rare circumstances” necessary to justify a stay of this
18 proceeding. 299 U.S. at 255. Staying discovery here would cause significant damage to Plaintiffs,
19 potentially delaying a remedy until the 2026 (or even 2028) election. In contrast, there is no
20 concrete hardship Intervenors face in continuing to litigate this case under the law as it exists.
21 Moreover, consideration of what will serve the orderly course of justice weighs in favor of denying
22 the stay.
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1 **A. Plaintiffs will be harmed by a stay.**

2 A stay is inappropriate where there is ““even a fair possibility that the stay will work
3 damage to some one else.”” *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059,
4 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 255). Here, the damage to Plaintiffs that will
5 result from granting a stay is more than just a possibility and far outweighs any hardship to
6 Intervenors.

7 First, “a stay should not be granted unless it appears likely the other proceedings will be
8 concluded within a reasonable time in relation to the urgency of the claims presented to the court.”
9 *Lockyer*, 393 F.3d at 1110 (citing *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864
10 (9th Cir. 1979)). But halting all action in this case until after the Supreme Court announces a
11 decision in *Merrill* could delay resolution of this matter until after the 2024 elections. This delay
12 would mean that Latino voters in the Yakima Valley region would not obtain relief until the 2026
13 elections, *more than halfway through the decade*. Indeed, among Plaintiffs’ requested relief is the
14 renumbering of a Latino opportunity district to coincide with the presidential election cycle. If
15 relief is foreclosed for 2024, that would delay relief until 2028—near the end of the decade. Every
16 election that continues under an illegal map is one that irreparably harms Plaintiffs, further
17 compounding the harms Latino voters have long suffered in the Yakima Valley region. *See Garza*
18 *v. Cty. Of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (finding that Latinos in Los Angeles
19 County suffered an injury of vote dilution that “has been getting progressively worse, because each
20 election has deprived Hispanics of more and more of the power accumulated through increased
21 population”). If the Court grants Intervenors’ renewed motion to stay, the parties may have to wait
22 until as late as the end of June 2023 to proceed with this case, including dispositive motions, pre-
23 trial deadlines, disclosures, motions practice, trial, a decision, and any remedy if Plaintiffs prevail,
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1 making resolution in time for the next election in early 2024 more difficult. Moreover, both the
2 State and the Secretary of State have expressed concerns regarding the impact any delay in this
3 case may have on the timeline for litigation and implementation of any remedy in time for the next
4 election cycle. *See, e.g.*, Dkt. 99 at 2, 112 at 2. To avoid the possibility of remedial maps coming
5 too late and running up against the time limits of *Purcell v. Gonzales*, 549 U.S. 1 (2006), *see* Dkt.
6 # 66 (order denying Plaintiffs’ motion for preliminary injunction in election year on *Purcell*
7 grounds given the deadline of March 28, 2022), Plaintiffs respectfully request that this Court deny
8 Intervenor’s renewed motion to stay.

10 Intervenor also contend that because discovery is complete, any delay could no longer
11 impair the quality of evidence presented at trial. Not so. While depositions in this case are nearly
12 complete, the risk of deterioration of evidence is not completely obviated, and a delay of trial will
13 not result in *better* testimony by witnesses. In addition, a number of potential witnesses were not
14 deposed at all, nor were all depositions of witnesses necessarily exhaustive. Delaying trial will
15 only exacerbate the effect of passing time on witnesses’ recollection of the 2021 redistricting
16 process, depriving Plaintiffs—and the Court—of a fair opportunity to present the best evidence at
17 trial. The damage that Plaintiffs would suffer as a result of this—and as a result of a compressed
18 timeframe forcing discriminatory maps to persist for another election cycle—is severe and weighs
19 strongly against granting a stay.

21 **B. Hardship to Intervenor remains speculative not concrete.**

22 Intervenor do not meet their burden to “make out a clear case of hardship or inequity.”
23 *Landis*, 299 U.S. 248 at 255. In contrast to the concrete harms Plaintiffs will suffer if this case is
24 stayed, Intervenor identify at best only speculative harms if a stay is not granted. Intervenor
25 express concern about the “risk” and the possible “uncomfortable scenario” of having to relitigate
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1 this case under a potentially changed legal standard. Dkt. #123 at 6. But these worries are based
2 on speculation about what the Supreme Court *might* do that *could* impact part of this case, and
3 ignore Plaintiffs’ claims that will be wholly unaffected by *any* outcome in *Merrill*.

4 Intervenor *voluntarily* inserted themselves into this litigation long *after* the Supreme Court
5 granted certiorari in *Merrill*. Intervenor has been on notice of *Merrill* since the moment that they
6 were granted entry into this suit but waited months to request a stay. Now, after attempting to add
7 to this litigation with a new cross-claim and citing many of the same concerns that were rejected
8 by this Court just over two months ago, they are attempting again to stay the case.³ However, as
9 before, if the *State Defendant* in this suit finds no hardship in proceeding on the current schedule,
10 certainly the Intervenor, who *chose* to litigate this case, cannot either. *Lockyer*, 398 F.3d at 1112
11 (“[B]eing required to defend a suit, without more, does not constitute a ‘clear case of hardship or
12 inequity.’”).⁴

13
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15 Moreover, the entire premise of Intervenor’s stay motion remains flawed. *Merrill* is a
16 different case brought by different parties based on different facts and under a different procedural
17 posture. Intervenor previously claimed that this case was “on all fours” with *Merrill* because
18 *Merrill* contains an intent claim. Dkt. # 97 at 2. Here, they have softened their position somewhat,
19

20 ³ Intervenor’s citations to *Robinson v. Ardoin* and *Nairne v. Ardoin*, in their previous motion to
21 stay demonstrated Intervenor’s delay in seeking a stay, as those cases were stayed by the Supreme
22 Court weeks and months before Intervenor’s first motion to stay. *See Ardoin v. Robinson*, No. 22-
23 30333,

[https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a814.ht
24 ml](https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a814.html). These cases remain unhelpful to Intervenor as support for their renewed motion to stay.

25 ⁴ Further, courts in redistricting cases have held that “mere injuries, however substantial, in terms
26 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.

1 claiming instead that the legal questions presented in this case are “substantially similar” to those
2 in *Merrill*. Dkt. # 123 at 2. But Intervenors’ remain wrong in their claim that this case is so like
3 *Merrill*. While some of the consolidated cases in *Merrill* did bring intent claims, the lower court
4 did not decide those claims in its preliminary injunction order and are not under consideration by
5 the Court in *Merrill*. See, e.g., *Milligan v. Merrill*, 582 F. Supp. 3d 924, 936-37 (N.D. Ala. Jan.
6 24, 2022).

7
8 Further, *Merrill* addresses whether Section 2 of the VRA requires the creation of a second
9 majority-Black congressional district in Alabama and primarily concerns the first prong of the
10 *Gingles* results test. This case, unlike *Merrill*, does not seek to create an *additional* majority-
11 minority district, but rather challenges an existing, bare-majority Latino district drawn by the State
12 as a façade to deprive Latino voters of an equal opportunity to elect candidates of their choice. In
13 addition, there is no real dispute in this case over whether it is possible to comply with first *Gingles*
14 prong – the enacted version of legislative 15 itself does so, and the State’s own expert witness Dr.
15 John Alford admitted that both the enacted and Plaintiffs’ demonstration plans satisfy *Gingles*
16 prong one in his expert report and at his deposition.
17

18 Further, a number of courts, including the U.S. Supreme Court, have repeatedly *denied*
19 stay requests pending the *Merrill* decision. See, e.g., *LULAC v. Abbott*, No. 3:21-CV-00259-DCG-
20 JES-JVB (W.D. Tex. April 22, 2022), ECF No. 246 (summary order denying motion to stay case
21 pending *Merrill* before receipt of opposition briefing); *LULAC v. Abbott*, No. 22-50407, 2022 WL
22 2713263, at *2 (5th Cir. May 20, 2022) (“ IT IS FURTHER ORDERED that Appellants’ opposed
23 alternative motion to stay depositions pending the Supreme Court’s decision in U.S.S.C. No. 21-
24 1086, *Merrill v. Milligan*, is DENIED.”). The denial of the stay by the Fifth Circuit was then
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26

1 affirmed by the Supreme Court.⁵ Intervenor also failed to mention *United States v. Galveston*
 2 *County, Texas, et al.*, No. 3:22-CV-93 (S.D. Tex. May 24, 2022), ECF No. 28 (denying motion to
 3 stay proceedings pending *Merrill*). Just as Intervenor have here, Defendants in the Galveston case
 4 recently filed a renewed motion for a stay pending the outcome in *Merrill*. See *United States v.*
 5 *Galveston County, Texas, et al.*, No. 3:22-CV-93 (S.D. Tex. Sept. 30, 2022), ECF No. 77. As the
 6 United States pointed out in response to that filing, *Merrill* concerns only the analytical framework
 7 for evaluating an effects claim under Section 2, while the Galveston case includes an intent claim.
 8 *Id.*, ECF No. 80 at 6. The court in that case summarily denied the renewed motion to stay any
 9 claims in the case. *Id.*, ECF No. 85.

11 Moreover, to the extent that Intervenor’s argument requires reading Supreme Court tea
 12 leaves based on one oral argument, it is far from certain that a wholesale jettisoning of Section 2
 13 or a dramatic rewrite of *Gingles* will occur; all options, including no change to current binding
 14 caselaw, remain on the table. *Merrill* may well be resolved in a way that has no bearing on this
 15 case. But this is largely beside the point. “The Rule of Law requires that parties abide by, and be
 16 able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be
 17 in the future.” *Danielson v. Inslee*, 945 F.3d 1096, 1103 (9th Cir. 2019) (internal quotes omitted).
 18 Whatever the Supreme Court may announce regarding Section 2 when *Merrill* is decided, this case
 19 should proceed based on what the settled law is now. See, e.g., *Agostini*, 521 U.S. at 207; *Ramos*
 20 *v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) (“[V]ertical
 21 *stare decisis* is absolute, as it must be in a hierarchical system with ‘one supreme Court.’ In other
 22 words, the state courts and the other federal courts have a constitutional obligation to follow a
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25 _____
 26 ⁵ See *Guillen v. LULAC*, 142 S. Ct. 2773 (2022),
https://www.supremecourt.gov/orders/courtorders/053122zr_6537.pdf.

1 precedent of this Court unless and until it is overruled by this Court.” (citations omitted)). The
2 Court should not respond to “signals” that Intervenors attempt to glean from the U.S. Supreme
3 Court, nor concoct a hardship for the parties where when does not exist. *See* Dkt. #123 at 6.

4 **C. The orderly course of justice is served by allowing this case to proceed**
5 **expeditiously.**

6 Where a stay complicates issues, proof, or law, interests in the “orderly course of justice”
7 weigh against a stay. *See Lockyer*, 398 F.3d at 1110. The “orderly course of justice” factor is
8 synonymous with the interests of “judicial economy.” *Naini v. King Cty. Pub. Hosp. Dist. No. 2.*,
9 No. C19-0886-JCC, 2020 U.S. Dist. LEXIS 15015, at *7 (W.D. Wash. Jan. 29, 2020). Here, the
10 interests of judicial economy weigh in favor of denying the stay.

11
12 The parties have worked diligently to conduct discovery and are ready to proceed to the
13 next phase of litigation in anticipation of a trial at the beginning of May 2023. Dispositive motions
14 and trial are important next steps in fully developing the factual record in this case and, once again,
15 there is no clear indication that *Merrill* will significantly impact these efforts, and this case should
16 not be delayed on those grounds. *See Embree v. Ocwen Loan Servicing, LLC*, No. 2:17-CV-00156-
17 JLQ, 2017 WL 5632666, at *3 (E.D. Wash. Nov. 22, 2017) (“The court will not engage in []
18 speculation. Regardless of the outcome of [another case], the parties will need to develop a factual
19 record to show if, or how, that decision applies to the instant matter.”).

20
21 Intervenors’ appeals to judicial economy are meritless. As noted above, Intervenors waited
22 over *eight months* to first seek a stay, and do so again now on the same flawed premises as before.
23 The parties and the Court have already invested substantial judicial resources in developing the
24 record in this case. Intervenors had months to file this motion and the opportunity to raise the issue
25 when this Court was considering the State’s continuance motion—yet they remained silent. This
26

1 Court has already scheduled case deadlines and a trial date twice, *see* Dkt. # 92, and Plaintiffs, and
 2 likely the Court, have other matters scheduled for trial in spring and summer of 2023.

3 “Appeals to the orderly administration of justice, without showing any hardship or inequity
 4 Defendants will face, fail to persuade the Court that a stay is warranted. This is especially true
 5 where contested issues implicate the public interest; in these circumstances, it is important for trial
 6 judges to develop the full record for review.” *Karnoski v. Trump*, No. C17-01297MJP, 2017 WL
 7 11434151, at *2 (W.D. Wash. Nov. 20, 2017). The contested issues in this case directly implicate
 8 a subject of deep importance to the public: fair elections. A stay in this case could delay a resolution
 9 until 2024, risking confusion and uncertainty about which maps would apply to elections in that
 10 year. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020)
 11 (discussing the application of the *Purcell* principle to avoid “judicially created confusion”). The
 12 precise application of the *Purcell* principle to redistricting cases remains unclear at best. *See*
 13 *Merrill*, 142 S. Ct. at 880; *id.* at 888 (Kagan, J., dissenting). Granting a stay in this case would
 14 allow Intervenors to delay the progress of this case to an entirely uncertain date at the expense of
 15 Plaintiffs’ voting rights on the basis of a Supreme Court opinion that may not even affect this case.
 16 Instead, this Court should allow litigation to proceed in order to “develop a full record,” which
 17 would best serve judicial economy and promote the orderly course of justice.
 18
 19

20 CONCLUSION

21 For the foregoing reasons, Intervenors’ renewed motion to stay should be denied.

22 Dated: January 12, 2023

23
 24 Chad W. Dunn*
 25 Sonni Waknin*
 26 UCLA Voting Rights Project

By: /s/ Edwardo Morfin

Edwardo Morfin
 WSBA No. 47831
 Morfin Law Firm, PLLC

1 3250 Public Affairs Building
Los Angeles, CA 90095
2 Telephone: 310-400-6019
3 Chad@uclavrp.org
Sonni@uclavrp.org

4 Mark P. Gaber*
5 Simone Leeper*
Aseem Mulji*
6 Benjamin Phillips**
7 Campaign Legal Center
1101 14th St. NW, Ste. 400
8 Washington, DC 20005
mgaber@campaignlegal.org
9 sleeper@campaignlegal.org
amulji@campaignlegal.org
10 bphillips@campaignlegal.org

11 *Admitted pro hac vice

12 ** Pro hac vice application forthcoming

13 *Counsel for Plaintiffs*
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16
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20
21
22
23
24
25
26

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 12th day of January, 2023 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

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The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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Judge: Robert S. Lasnik

**[PROPOSED] ORDER
DENYING INTERVENOR-
DEFENDANTS' RENEWED
MOTION TO STAY**

This matter came before the Court on Intervenor-Defendants' Renewed Motion to Stay. The Court has reviewed and considered all briefing and any supporting papers presented to the Court, as well as any hearing in this matter.

Based on the foregoing, it is hereby ORDERED that Intervenor-Defendants' Renewed Motion to Stay is DENIED.

IT IS SO ORDERED.

DATED this ____ day of _____, 2023.

/s/ _____
The Honorable Robert S. Lasnik
U.S. District Judge

By: /s/ Edwardo Morfin

1
2
3 Chad W. Dunn*
4 Sonni Waknin*
5 UCLA Voting Rights Project
6 3250 Public Affairs Building
7 Los Angeles, CA 90095
8 Telephone: 310-400-6019
9 Chad@uclavrp.org
10 Sonni@uclavrp.org

11 Mark P. Gaber*
12 Simone Leeper*
13 Aseem Mulji*
14 Benjamin Phillips**
15 Campaign Legal Center
16 1101 14th St. NW, Ste. 400
17 Washington, DC 20005
18 mgaber@campaignlegal.org
19 sleeper@campaignlegal.org
20 amulji@campaignlegal.org
21 bphillips@campaignlegal.org

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

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Counsel for Plaintiffs

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/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

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