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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES THOMAS, et al., *Plaintiffs*, vs. WES ALLEN, in his official capacity as Secretary of State of Alabama, et al., *Defendants*.	Case No.: 2:21-cv-1531-AMM

PLAINTIFFS' MOTION TO MODIFY STAY

Plaintiffs respectfully request that the Court modify its full stay of proceedings in this case, *see* ECF No. 61, to require the exchange of initial disclosures and allow the parties to conduct written discovery on Plaintiffs' racial gerrymandering claims only. A modified stay would be consistent with the *Milligan* panel's recent order modifying its prior stay to allow similar discovery prior to the Supreme Court's decision. *See* Scheduling Order, *Milligan v. Merrill*, No.: 2:21-cv-1530-AMM, ECF No. 157 (N.D. Ala. Jan. 10, 2023) (attached as Ex. A). Both cases involve the same Defendants and both have racial gerrymandering and Voting Rights Act ("VRA") claims concerning Alabama districts. Thus, modifying the stay in this limited manner will not unfairly prejudice Defendants. A modification will also allow the case to proceed more efficiently after the Supreme Court's decision. Defendants oppose this modification.

BACKGROUND

Plaintiffs filed this action on November 16, 2021, challenging 11 Alabama State Senate districts and 21 State House districts as unconstitutional racial gerrymanders under the Fourteenth Amendment. ECF No. 1. On February 11, 2022, Plaintiffs filed an Amended Complaint that maintained their racial gerrymandering claims and added a claim under Section 2 of the VRA challenging the State's failure to draw an additional State Senate seat in Montgomery where Black voters had an equal opportunity to elect a candidate of choice. ECF No. 54 ¶¶ 6–8, 143–221, 232–38. Plaintiffs filed a Second Amended Complaint on February 25, 2022, that corrected errors but made no substantive changes. ECF No. 57.

Milligan v. Merrill also involves both VRA and racial gerrymandering claims, but challenges Alabama's congressional districts. After the court there granted a preliminary injunction on the VRA claim, s*ee* Prelim. Injunction Mem. Op. & Order, *Milligan*, ECF No. 107, the Supreme Court granted a stay and noted probable jurisdiction. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). The question presented is whether "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."[1] The Court held argument on October 4, 2022. Its decision remains

[1] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1086.html.

pending.

After the Supreme Court accepted jurisdiction in *Merrill*,[2] the panels both here and in *Milligan* stayed all discovery pending the Supreme Court's decision. *See* ECF No. 61; Order, *Milligan*, ECF No. 148 (May 2, 2022). Plaintiffs requested and were granted a status conference in which they argued for discovery on their racial gerrymandering claims only while *Merrill* proceeded in the Supreme Court, *see* ECF Nos. 62, 63, but this Court did not lift any aspect of the stay at that time.

The *Milligan* panel held a status conference on November 16, 2022, after which the parties conferred as to whether limited discovery could occur prior to the Supreme Court's decision without any undue burden or prejudice to the parties, and the parties ultimately proposed a consent order which that court signed on January 10, 2023. *See* Scheduling Order, *Milligan*, ECF No. 157. That order required the exchange of initial disclosures, and allowed for "written discovery relating to the intentional racial discrimination and racial gerrymandering claims, not to exceed 35 interrogatories, 30 requests for production, and an unlimited number of requests for admission," and fact discovery on the process and timing of implementing a new congressional map for the 2024 elections, including up to three depositions. *Id.* at 2–3.

[2] Hereinafter, "*Merrill*" refers to the Supreme Court proceedings and "*Milligan*" refers to the district court proceedings in that case.

ARGUMENT

When "there is even a fair possibility" that a stay sought or supported by a party "will work damage" to another party, the proponent "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). Because of the often-harsh effect of a stay, a court must continue to "weigh competing interests and maintain an even balance." *Id.*

Specifically, when "a district court exercises its discretion to stay a case pending the resolution of related proceedings in another forum, the district court must limit properly the scope of the stay." *Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000); *see also Landis*, 299 U.S. at 257 (a stay should be "designed so that its force will be spent within reasonable limits"). This requires considering "both the scope of the stay (including its potential duration) and the reasons cited by the . . . court for the stay." *Id.* at 1264. This remains true when the court issues a stay but where "circumstances have changed such that the court's reasons for imposing the stay no longer exist or are inappropriate," making it proper for the court to "lift the stay *sua sponte* or upon motion." *Marsh v. Johnson*, 263 F. Supp. 2d 49, 52 (D.D.C. 2003). By logical extension and practice, the court may also modify its stay upon motion rather than entirely lift it. *Cf. Sec. & Exch. Comm'n v. Hvizdzak Cap. Mgmt., LLC*, No. CV 1:20-154, 2021 WL 3549332, at *4 n.5 (W.D. Pa. Aug. 11, 2021) (referring to the parties' ability to "move to lift,

modify, or extend" a stay "based upon a change of circumstances or other good cause"); *Broussard v. First Tower Loan, LLC*, No. CV 15-1161, 2016 WL 879995, at *8 (E.D. La. Mar. 8, 2016) (modifying a discretionary stay); *Nigro v. Blumberg*, 373 F. Supp. 1206, 1214 (E.D. Pa. 1974) (referring to the plaintiff's "continuing right to petition for modification" of a stay).

The Defendants' agreement and the panel's allowance in *Milligan* to allow written discovery on racial gerrymandering claims while *Merrill* is pending presents the type of changed circumstances that support this Court changing "the scope of the stay." *Ortega Trujillo*, 221 F.3d at 1264. Both cases present VRA and racial gerrymandering claims and involve the same defendants sued in their official capacities. The *Merrill* decision will have equal or lesser effect on the racial gerrymandering claims in this case than in *Milligan* itself. Defendants can no longer fairly claim prejudice in proceeding with a limited scope of written discovery.

Other cases bear this out as well. Since the Court's stay order in *Merrill*, a series of consolidated redistricting cases in Georgia and Texas that also involve both Section 2 and racial gerrymandering challenges to congressional and state legislative maps have proceeded with full discovery. *See* Stip. & Order re: Discovery, *Ga. State Conf. of NAACP v. Georgia*, Case No. 21-cv-5338, ECF No. 87 (N.D. Ga. Sep. 16, 2022); Scheduling Order, *LULAC v. Abbott*, Case No. 3:21-cv-00259-DCG-JES-JVB, ECF No. 96 (W.D. Tex. Dec. 17, 2021); Order Modifying Scheduling Order,

LULAC v. Abbott, Case No. 3:21-cv-00259-DCG-JES-JVB, ECF No. 325 (W.D. Tex. June 9, 2022). Similarly, a case challenging several South Carolina congressional districts as racial gerrymanders proceeded to trial and judgment. *See S.C. State Conf. of NAACP v. Alexander*, No. 321CV03302MGLTJHRMG, 2023 WL 118775 (D.S.C. Jan. 6, 2023).

Plaintiffs demonstrated in their prior motion and at argument during the May 20, 2022 status conference that they face hardship from a stay in the case. *See Marti v. Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641, 651 (11th Cir. 2022) ("When evaluating stays, courts must also consider 'the danger of denying justice by delay.'") (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964)). Because a racial gerrymandering claim focuses in part on the series of events that led to the adoption of challenged maps, the memory of witnesses growing more stale with time may harm the ability to discover relevant information about the construction of those maps. And with every passing month, it will become more difficult to seek relief in a timeframe that will be conducive to seeking special elections under amended maps, should Plaintiffs prevail in whole or in part.

Plaintiffs now seek *only* written discovery on facts which will not change regardless of the ruling in *Merrill* and only on claims the Supreme Court is not considering in *Merrill*. In other words, the limited discovery sought at this time, such as details involving factors that were considered in drawing the districts, discussions

that were had, and why lines were drawn the way they were, will have to be conducted regardless of the ruling in *Merrill.* And Plaintiffs are not seeking depositions, so there is no risk of duplicative discovery by allowing the limited written discovery sought to proceed at this time. That limited scope is even more cabined than what Defendants have already agreed to in *Milligan*, the very case pending before the Supreme Court. These changed circumstances demonstrate that Defendants will not face unfair prejudice in proceeding with limited written discovery following a modified stay order.

Moreover, allowing written discovery on the racial gerrymandering claims to proceed will promote a more efficient resolution of the case. By identifying the relevant players in the redistricting process and beginning to refine the issues, the parties will be able to proceed with depositions on a timelier basis after the *Merrill* ruling. This discovery will also help the parties propose the proper timeline and schedule to resolve the case by revealing the extent to which non-party discovery is necessary. The decision in *Merrill* will not alter any of these basic underlying facts. But having them in hand before the *Merrill* decision will allow the parties to proceed with more efficiency after it.

CONCLUSION

Plaintiffs respectfully request that the Court modify its stay to allow the parties to exchange initial disclosures and begin written discovery only—including requests

for production and admission, interrogatories, and subpoenas for documents to non-parties—on the racial gerrymandering claims only, consistent with *Milligan*.

DATED this 16th day of February 2023.

Respectfully submitted,

/s/ LaTisha Gotell Faulks
LaTisha Gotell Faulks (ASB-1279-I63J)
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
tgfaulks@aclualabama.org

/s/ Deuel Ross
Deuel Ross*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Leah Aden*
Stuart Naifeh*
Kathryn Sadasivan (ASB-517-E48T)
Brittany Carter*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
laden@naacpldf.org snaifeh@naacpldf.org
ksadasivan@naacpldf.org

David Dunn*
HOGAN LOVELLS LLP
390 Madison Avenue

/s/ Davin M. Rosborough
Davin M. Rosborough*
Julie A. Ebenstein*
Dayton Campbell-Harris*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
drosborough@aclu.org
jebenstein@aclu.org
dcampbell-harris@aclu.org

/s/ *Sidney Jackson*
Sidney Jackson (ASB-1462-K40W)
Nicki Lawsen (ASB-2602-C00K)
WIGGINS, CHILDS, PANTAZIS, FISHER, & GOLDFARB
301 19th Street
North Birmingham, AL 35203
(205) 314-0500
sjackson@wigginschilds.com
nlawsen@wigginschilds.com

/s/ Jack Genberg
Jack Genberg*
SOUTHERN POVERTY LAW CENTER
PO Box 1287
Decatur, GA 30031
(404) 521-6700
jack.genberg@splcenter.org

New York, NY 10017
(212) 918-3000
david.dunn@hoganlovells.com
Blayne R. Thompson*
HOGAN LOVELLS US LLP
609 Main St., Suite 4200
Houston, TX 77002
(713) 632-1400
blayne.thompson@hoganlovells.com

Jessica L. Ellsworth*
Shelita M. Stewart*
HOGAN LOVELLS LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com
shelita.stewart@hoganlovells.com

Michael Turrill*
Harmony R. Gbe*
HOGAN LOVELLS US LLP
1999 Avenue of the Stars
Suite 1400
Los Angeles, CA 90067
(310) 785-4600
michael.turrill@hoganlovells.com
harmony.gbe@hoganlovells.com

Attorneys for Plaintiffs

Anthony Ashton*
Anna-Kathryn Barnes*
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5777
aashton@naacpnet.org
abarnes@naacpnet.org

Attorneys for Plaintiff Alabama State Conference of the NAACP

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which provides electronic notice of filing to all counsel of record.

This the 16th day of February, 2023.

/s/ Davin Rosborough

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*, **Plaintiffs,** **v.** **JOHN H. MERRILL, *in his official capacity as Alabama Secretary of State, et al.*,** **Defendants.**	)	**Case No.: 2:21-cv-1291-AMM** **THREE-JUDGE COURT**

EVAN MILLIGAN, *et al.*, **Plaintiffs,** **v.** **JOHN H. MERRILL, *in his official capacity as Secretary of State of Alabama, et al.*,** **Defendants.**	)	**Case No.: 2:21-cv-1530-AMM** **THREE-JUDGE COURT**

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

BY THE COURT:

SCHEDULING ORDER

These cases are before the Court on the parties' joint proposal of a scheduling order. *Singleton*, Doc. 123; *Milligan*, Doc. 156. Based on their agreements and joint proposal, the parties are ordered to proceed as follows:

1. The parties agree to meet and confer in good faith within three (3) days of the Supreme Court's decision in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087, to discuss an appropriate schedule if a trial is required on the merits of one or more of the claims at issue in this case. This Court will hold a status conference and rule on a scheduling order (including any revisions to this Scheduling Order) within seven (7) days of a submission from the parties following any Supreme Court decision.

2. **Initial Disclosures:** Regardless of the timing of the Supreme Court's decision, the parties shall exchange Initial Disclosures as required by Fed. R. Civ. P. 26 by **January 30, 2023**. The parties will supplement this information as needed by **one week** after the Supreme Court rules and thereafter as required by Rule 26. Neither side need disclose expert witnesses as part of any of these initial disclosures.

3. **Commencement of Discovery:** Beginning on **January 9, 2023**, the parties may engage in (1) fact discovery on the process of implementing a new congressional map and the feasibility of doing so under certain time constraints related to the 2024 election, not to exceed 3 depositions, 15 interrogatories, 15 requests for production, and an unlimited number of requests for admission, collectively among all Plaintiff groups, and (2) written discovery relating to the intentional racial discrimination and racial gerrymandering claims, not to exceed 35 interrogatories, 30 requests for production, and an unlimited number of requests for

admission, collectively among the *Milligan* and *Singleton* Plaintiff groups who have brought those claims, provided that nothing in this Scheduling Order forecloses or limits the parties' ability to seek discovery on any claims in this matter following the Supreme Court's ruling, except that written discovery on the intentional racial discrimination and racial gerrymandering claims shall continue to be governed by the limitations herein.

4. **Electronically Stored Information:** To the extent it exists, the parties will produce relevant, non-privileged electronically stored information in TIFF[1] format or in a format that is otherwise mutually agreeable to the parties. Data for production may be delivered via email to the extent practicable, via USB flash storage media, or other means mutually agreeable. The parties agree to the entry of an order regarding claims of privilege or of protection with respect to the inadvertent production of any privileged material that will allow the producing party to claw back such inadvertently produced document(s) and will further require that such party produce a privilege log as to any such document.

[1] The parties agree to produce the following information for electronically stored information to the extent reasonably practicable, except hard copy documents scanned and produced electronically: starting bates, ending bates, starting bates of family, ending bates of family, bates range of family, starting bates of parent, starting bates of each attachment, file name of each attachment, custodians, document type, file author, file last author, file created date, file created time, file last modified date, file last modified time, file last printed date, file last printed time, file last accessed date, file last accessed time, file company, file title, file names, file extension, file paths, file size, page count, character count, SHA1 hash, MD5 hash, deduplication hash, email sending (From), To recipients, cc recipients, bcc recipients, email sent date, email sent time, email received date, email received time, email subject, email message ID, email in-reply-to ID, path to native file, path to text file, volume, normalized time zone.

5. For purposes of this litigation, the parties need not preserve, produce, or create a privilege log for, any document that was (i) created by, and exchanged solely among, counsel and/or counsel's staff, or (ii) that was created in the prosecution or defense of this litigation and exchanged solely among counsel and/or counsel's staff on the one hand and parties on the other.

6. Regardless of the timing of the Supreme Court's decision, the Court and the Parties will make every possible effort to ensure that this case will be trial-ready by the week of **July 31, 2023**. Trial shall be scheduled at the earliest possible date during that week or after available to the Court. **Estimated trial time: 10 days**.

7. The parties agree to confer in advance of this Court's February 8, 2023 status conference to map out potential schedules for expert disclosures, dispositive motions, and other pretrial deadlines depending on when the Supreme Court issues a decision. In all events, the parties agree to work in good faith toward resolution of Plaintiffs' claims in time for a trial the week of July 31, 2023 and any relief to be effectuated for the 2024 congressional elections.

DONE and **ORDERED** this 10th day of January, 2023.

Stanley Marcus

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE