UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	No. 3:18-cv-01094-WWE
Plaintiffs,	
v.	
DENISE MERRILL, SECRETARY OF THE STATE, and NED LAMONT, GOVERNOR,	March 8, 2019
Defendants.	

SUPPLEMENTAL REPORT OF PARTIES' RULE 26(f) PLANNING MEETING

Date Complaint Filed: June 28, 2018
Date Complaint Served: July 2, 2018
Date of Defendant's Appearance: July 16, 2018

Pursuant to Fed. R. Civ. P. 16(b), 26(f) and D. Conn. L. Civ. R. 16, on August 13, 2018 the parties conferred to develop a discovery plan, which they reported to the Court on August 25, 2018. ECF No. 13. On November 5, 2018, the Court stayed discovery pending disposition of Defendants' motion to dismiss. ECF No. 26. On February 15, 2019, the Court denied that motion to dismiss and directed the parties to submit an updated discovery and dispositive motions schedule on or before March 8, 2019. ECF No. 27. The parties now submit this supplemental 26(f) Planning Report pursuant to the Court's February 15, 2019 order.

I. Certification

Undersigned counsel, after consultation with their clients, certify that (a) they have discussed the nature and basis of the parties' claims and defenses and any possibilities for

achieving a prompt settlement or other resolution of the case; and (b) they have developed the following proposed case management plan. Counsel further certify that they have forwarded a copy of this report to their clients.

II. Jurisdiction

A. Subject Matter Jurisdiction

Plaintiffs contend that the Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357, and that this suit is authorized by 42 U.S.C. § 1983. Defendants dispute that this Court has subject matter jurisdiction, and contend that the Eleventh Amendment bars this case in its entirety. Defendants reserve the right to raise any other jurisdictional defenses that subsequent research and factual development may reveal.

B. Personal Jurisdiction

Personal jurisdiction is not contested.

III. Brief Description of Case

This case is a constitutional challenge to the legislative redistricting map that Connecticut adopted in 2011. Plaintiffs allege that the populations of the map's Senate and House districts are based on total population numbers from the United States census. Plaintiffs further allege that the census counts incarcerated persons as residents of the town where they are incarcerated instead of the town where they resided pre-incarceration. Plaintiffs claim that counting incarcerated persons in that manner violates the "one person, one vote" principle of the Equal Protection Clause. Plaintiffs seek a declaration that Connecticut's 2011 Redistricting Plan violates the Fourteenth Amendment to the U.S. Constitution and an injunction against the use of the 2011 Redistricting Plan in the 2020 elections.

A. Claims of Plaintiffs

Connecticut violates the "one person, one vote" requirement of the Fourteenth Amendment by engaging in unlawful "prison gerrymandering." Connecticut's state legislative redistricting plan, adopted in 2011 and scheduled for use in the 2020 elections, counts incarcerated persons in the districts in which they are incarcerated, rather than in the districts in which they permanently reside. This is in contradiction to Connecticut law, which states that "[n]o person shall be deemed to have lost his residence in any town by reason of his absence therefrom in any institution maintained by the state." Conn. Gen. Stat. § 9-14 (2018). As a result, the 2011 state legislative redistricting plan includes multiple malapportioned districts in which the actual number of constituents (exclusive of incarcerated persons) is more than ten percent smaller than the number of constituents in the largest district, contrary to the "one person, one vote" requirements of the Fourteenth Amendment. The "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mandates that each person's vote shall be equal to that of his or her fellow citizens.

Moreover, incarcerated people in Connecticut are disproportionately African-American and Latino and come from urban areas, but the State has concentrated many of its prisons in rural districts with predominantly white populations. Defendants' reliance on the incarcerated population in determining the geographic boundaries of House Districts 5, 37, 42, 52, 59, 61, 103, 106, and 108, and Senate District 7 under the 2011 Redistricting Plan impermissibly inflates the voting strength and political influence of the residents in these districts and dilutes the voting strength and political influence of Plaintiffs and other persons residing outside of these districts, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

B. Defenses and Claims of Defendants

The Eleventh Amendment bars this case in its entirety, and Plaintiffs' claims lack merit, because Plaintiffs have not and cannot demonstrate an ongoing violation of federal law. The Supreme Court has made clear that states properly may rely on total population numbers from the United States census when designing their legislative maps. There is no dispute that Connecticut's legislative map satisfies the one person, one vote principle when measured by the census data that the legislature actually (and properly) used. To the extent that Plaintiffs ask this Court to second guess the legislature's policy judgment to use objective census data, and to dictate Plaintiffs' own preferred population counting method instead, the Court has no authority to do so. A contrary conclusion would conflict with the deference to which the legislature is entitled when making the political judgment about whether and how to include particular groups within the population base, would conflict with decades of Supreme Court precedents, and would unjustifiably interfere with the historic and near-universal practice that the 50 states have adopted to count population for purposes of legislative redistricting.

Defendants reserve the right to raise any additional defenses, affirmative or otherwise, that discovery, subsequent pleading or additional research may reveal.

IV. Statement of Undisputed Facts

Counsel certify that they have made a good faith attempt to determine whether there are any material facts that are not in dispute. The following material facts are undisputed:

1. The Connecticut legislature, exercising authority granted by Article III of the state Constitution, appointed a Reapportionment Committee following the 2010 Census.

2. The Reapportionment Committee failed to meet its September 15, 2011 deadline to submit a redistricting plan. Pursuant to Article III of the Connecticut Constitution, Governor Malloy appointed a Reapportionment Commission on October 5, 2011.

3. On November 30, 2011, the Reapportionment Commission unanimously adopted a state legislative redistricting plan and submitted it to Defendant Merrill.

4. The state legislative redistricting plan became effective soon thereafter, upon publication by Defendant Merrill.

5. Incarcerated persons convicted of a felony are not eligible to vote in Connecticut elections.

6. The Connecticut State House of Representatives has 151 members, and the Connecticut State Senate has 36 members, each of whom is elected by an individual district.

V. Case Management Plan

A. Outstanding Order on Scheduling in Civil Cases

The parties request modification of the deadlines in the Standing Order on Scheduling in Civil Cases as set forth below.

Defendants request that the Court stay all proceedings in this case until after the Second Circuit Court of Appeals has resolved Defendants' appeal from this Court's denial of their motion to dismiss. Defendants have separately filed a motion for stay that details the legal grounds upon which a stay must (and should) be granted. *See* Doc. No. 29. Plaintiffs will oppose the motion for a stay.

B. Scheduling Conferences

If the Court determines that the case can proceed, the parties request a pretrial conference with the Court before entry of a scheduling order pursuant to Fed. R. Civ. P. 16(b). Plaintiffs prefer that the conference be conducted in person, and Defendants prefer that the conference be held via telephone.

C. Early Settlement Conference

The parties certify that they have considered the potential benefits of attempting to settle the case before undertaking significant discovery or motion practice. Counsel will continue to discuss settlement possibilities if and when they arise, but settlement is unlikely at this time. The parties do not request a referral for alternative dispute resolution pursuant to D. Conn. L. Civ. R. 16.

D. Joinder of Parties, Amendment of Pleadings, and Motions Addressed to the Pleadings

The parties currently do not believe that joinder of additional parties will be required.

E. Discovery

Defendants contend that this Court lacks jurisdiction to proceed with this case until after the Second Circuit has resolved Defendants' pending appeal, and that discovery therefore cannot proceed at this time. Specifically, Defendants have appealed this Court's denial of Defendants' Eleventh Amendment defense pursuant to the collateral order doctrine. Once such an immunity-based appeal has been filed, courts in this Circuit and others "uniformly" have held that the dual jurisdiction rule "divests the district court of jurisdiction to proceed" until after the appeal has been resolved. *Bradley v. Jusino*, No. 04 CIV. 8411, 2009 WL 1403891, at *1 (S.D.N.Y. May 18, 2009) (quotation marks omitted); *see, e.g., City of New*

York v. Beretta U.S.A. Corp., 234 F.R.D. 46, 51 (E.D.N.Y. 2006) (collecting cases). Defendants have separately filed a motion for stay that describes their arguments for a stay in more detail. *See* Doc. No. 29.

Plaintiffs contend that this Court should deny Defendants' motion to stay under the applicable test laid out in *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987) (enumerating the four factors to be considered in issuing a stay pending appeal), as they will set out in detail in their opposition to Defendants' motion to stay discovery. As this Court recently concluded, Defendants' Eleventh Amendment argument lacks merit and is precluded by *Ex parte Young*. *See Ex parte Young*, 209 U.S. 123 (1908); Ruling on Mot. to Dismiss, Doc. No. 27, at 7. With the 2020 elections looming, time is of the essence. A second stay of discovery nine months after Plaintiffs filed their complaint would substantially injure Plaintiffs' ability to secure timely relief and should be denied.

If the Court determines that the case will proceed, the parties propose the following regarding discovery:

1. The parties disagree about what discovery deadlines should apply in this case. If the Court intends to proceed with discovery, the parties request a scheduling conference with the Court prior to the entry of any scheduling order. To facilitate that conference, the parties have proposed the following deadlines for the Court to consider.

2. <u>Plaintiffs' pending discovery requests</u>: Plaintiffs submitted discovery requests upon Defendants on September 10, 2018. The parties agreed that Defendants were not required to respond to those requests during the pendency of Defendants' initial motion for stay, and that if the Court denied the stay

Defendants would be required to respond within 30 days of that denial. The Court did not deny the motion and instead granted it. Doc. No. 26. Although this Court dissolved the stay when it denied Defendants' motion to dismiss, Defendants have now renewed their motion for stay in light of their pending appeal to the Second Circuit.

3. If the courts determine that discovery in this case should now proceed despite Defendants' appeal and renewed motion for stay, Defendants request that the Court set a deadline for Defendants to respond to Plaintiffs' discovery requests by 30 days from any denial of Defendants' pending motion to stay by this Court or 30 days from any denial of a subsequent motion for stay filed with the Second Circuit Court of appeals pursuant to Rule 8(a)(2) of the Federal Rules of Appellate Procedure, whichever is later. Plaintiffs request that the Court set a deadline for Defendants to respond to Plaintiffs' discovery requests of March 17 because this Court's Order of February 15 dissolved the stay, and Plaintiffs therefore believe that Defendants' responses are due on March 17, 2019.

4. Plaintiffs anticipate that discovery will be needed on subjects including:

   - Pre-incarceration addresses, anticipated incarceration length, and racial demographics of people incarcerated in Connecticut;
   - Post-incarceration addresses, incarceration length, and other voting-related data of persons formerly incarcerated in Connecticut no longer incarcerated;
   - Phone records of incarcerated persons in Connecticut showing destination cities and towns of phone calls;

- Information regarding precinct boundaries to be used in the next redistricting cycle;
- Information from election registrars regarding voting registration of and voting registration attempts by incarcerated persons;
- Guidance provided to the Reapportionment Committee or Reapportionment Commission for 2011 redistricting;
- Data, documents, and other resources used by the Reapportionment Committee or Reapportionment Commission for 2011 redistricting;
- Current information on any incumbent representatives who are no longer running for office and any known information on candidates who intend to run for office in the corresponding districts;
- History, if any, of State Representatives and State Senators engaging in representational activities on behalf of incarcerated persons in their district, including but not limited to personal or staff visits or correspondence with incarcerated persons, provision of constituent services to incarcerated prisons, and other such activities (if any);
- History, if any, of State Representatives and State Senators engaging in representational activities on behalf of persons who resided in the elected official's district before incarceration, yet are, or were, incarcerated in a different district; including but not limited to personal or staff visits or correspondence with incarcerated persons, provision of constituent services to incarcerated prisons, and other such activities (if any).

5. If the Court determines that discovery is appropriate, Defendants anticipate that they will require discovery regarding any and all topics related to Plaintiffs' claim that they do not have representational or electoral equality. Defendants reserve the right to seek discovery on any other topics that subsequent research or factual development may reveal.
6. If the Court determines that the case can proceed, Plaintiffs propose the following discovery scheduling deadlines:
   a. All discovery, including depositions of expert witnesses pursuant to Fed R. Civ. P. 26(b)(4), will be commenced immediately and completed by **October 1, 2019.**
   b. The parties anticipate that the plaintiffs will require a total of no more than fifteen depositions of fact witnesses and that the defendants will require a total of no more than ten depositions of fact witnesses. Depositions of fact witnesses will commence by **June 1, 2019** and be completed by **October 1, 2019**.
   c. Parties will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed. R. Civ. P. 26(a)(2) on any issues on which they bear the burden of proof by **July 1, 2019**. Depositions of any such experts will be completed by **August 1, 2019**.
   d. Parties will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed. R. Civ. P. 26(a)(2) on any issues on which they do not bear the burden of proof by **September 1, 2019**. Depositions of such experts will be completed by **October 1, 2019**.

7. If the Court determines that discovery is appropriate at this time, Defendants propose the following discovery scheduling deadlines:

    a. All discovery, including depositions of expert witnesses pursuant to Fed R. Civ. P. 26(b)(4), will be commenced immediately and completed by **December 15, 2019.**

    b. The parties anticipate that the plaintiffs will require a total of no more than fifteen depositions of fact witnesses and that the defendants will require a total of no more than ten depositions of fact witnesses. Depositions of fact witnesses may commence immediately and will be completed by **October 1, 2019**.

    c. Parties will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed. R. Civ. P. 26(a)(2) on any issues on which they bear the burden of proof by **July 15, 2019**. Depositions of any such experts will be completed by **September 15, 2019**.

    d. Parties will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to Fed. R. Civ. P. 26(a)(2) on any issues on which they do not bear the burden of proof by **October 15, 2019**. Depositions of such experts will be completed by **December 15, 2019**.

8. The parties agree that discovery will not be conducted in phases.

9. The parties agree that they will not request permission to serve more than 25 interrogatories.

10. Plaintiffs intend to call one or more expert witnesses at trial. Defendants may call expert witnesses at trial.

11. Undersigned counsel (after consultation with their respective clients) concerning computer-based and other electronic information management systems, including historical, archival, back-up and legacy files, in order to understand how information is stored and how it may be retrieved) have discussed the disclosure and preservation of electronically stored information ("ESI"), including, but not limited to, the form in which such data shall be produced, search terms and/or other techniques to be used in connection with the retrieval and production of such information, the location and format of ESI, appropriate steps to preserve ESI, and the allocation of costs of assembling and producing such information. The parties agree to the following procedures for the preservation, disclosure and management of ESI:

The parties will preserve all ESI and accept disclosure of ESI in the form(s) in which the information is ordinarily and customarily maintained in the usual course of business or, if not reasonably usable in that form, as searchable PDF documents. Electronic mail should include attachments to the email and indicate to whom the email was addressed and whether it was a reply. Upon request and if reasonably available, a party shall make diligent efforts to produce any electronically-stored spreadsheet or database in its native format (*e.g.* Microsoft Excel) rather than in PDF format. All electronically stored documents created by a word processing program are to be produced in the native format, if reasonably available, rather than in PDF format. To the extent any ESI is preserved only in printed form, such information may be produced in PDF format. ESI may be produced on CD-ROM. The parties will undertake to search their electronically stored records for responsive documents and information by utilizing

search terms and procedures known by the disclosing party to be reasonably calculated to locate responsive documents and information.

12. Undersigned counsel (after consultation with their clients) have also discussed the location(s), volume, organization, and costs of retrieval of information stored in paper or other non-electronic forms. The parties agree to the following procedures for the preservation, disclosure and management of such information:

The parties will preserve all information stored in paper or other non-electronic forms and accept disclosure of this information via courier or certified mail delivery. The parties will undertake to search their paper and non-electronic records for responsive documents and information by utilizing procedures known by the disclosing party to be reasonably calculated to locate responsive documents and information.

13. Undersigned counsel have discussed discovery procedures that minimize the risk of waiver of privilege or work-product protection, including procedures for asserting privilege claims after production. The parties agree to the following procedures for asserting claims of privilege after production:

If any information that is clearly marked as being attorney-client privileged or subject to work-product protection is disclosed, or if information that obviously comprises privileged attorney-client communications or attorney work product is disclosed, the party to whom it is disclosed will notify opposing counsel and the disclosing party will have thirty days to assert the privilege and seek the return of the information. The party to whom the information is disclosed agrees not to review the information after recognizing that a privilege or work-production protection applies and further agrees to not duplicate that information or further disclose it.

F. Dispositive Motions

Plaintiffs propose that dispositive motions will be filed on or before **December 1, 2019**.

Defendants propose that dispositive motions will be filed on or before **January 31, 2020**.

G. Joint Trial Memorandum

The joint trial memorandum required by the Standing Order on Trial Memoranda in Civil Cases will be filed within thirty days after the entry on the ruling of the last dispositive motion. If dispositive motions are not filed, the joint trial memorandum required by the Standing Motion on Trial Memoranda in Civil Cases will be filed ninety days after the completion of all discovery.

H. Initial Disclosures

Initial disclosures were served by Plaintiffs on September 10, 2018. Plaintiffs propose that Defendants be required to serve their initial disclosures by March 17.

Pursuant to Federal Rule of Civil Procedure 26(a)(1)(C), Defendants hereby object to any submission of initial disclosures at this time. As set forth in Defendants' motion for stay, Defendants have appealed to the Second Circuit Court of Appeals, and no further proceedings in this case can occur until after the Second Circuit resolves that appeal. *See* Doc. No. 29. Pursuant to Rule 26(a)(1)(C), if the courts determine the case should proceed notwithstanding Defendants' pending appeal and motion for stay, Defendants further request that any order regarding the submission of initial disclosures in this case afford Defendants until 14 days after any denial of Defendants' pending motion to stay by this Court or until 14 days after any denial of a subsequent motion for stay filed with the Second Circuit Court of appeals pursuant to Rule

8(a)(2) of the Federal Rules of Appellate Procedure, whichever is later, within which to submit their initial disclosures.

VI. Trial Readiness

The case will be ready for trial within thirty days of the parties' submission of the Joint Trial Memorandum.

As officers of the Court, undersigned counsel agree to cooperate with each other and the Court to promote the just, speedy and inexpensive determination of this action.

Respectfully submitted this 8th of March, 2019.

By /s/ Michael J. Wishnie
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[*] Motion for law student appearance forthcoming.

[**] This filing does not purport to state the views of Yale Law School, if any.

[***] Motion for *pro hac vice* forthcoming.

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