UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Plaintiffs*, v. DENISE MERRILL, SECRETARY OF STATE, and DANNEL P. MALLOY, GOVERNOR, *Defendants*.	No. 3:18-cv-01094-WWE October 4, 2018

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY

Plaintiffs bring this civil rights action to challenge Defendants' practice of "prison gerrymandering," namely their allocation of incarcerated persons where they are confined rather than at their pre-incarceration addresses for the purposes of drawing state electoral districts. This practice results in malapportioned districts that violate the Fourteenth Amendment. After Plaintiffs served the complaint and counsel for Defendants appeared, the parties conferred and submitted a Rule 26(f) report. Form 26(f) Report, ECF No. 13. Plaintiffs served their initial disclosures on Defendants and one set of Requests for Production, *see* Exhibit A, and Defendants filed the instant motion for a stay of discovery.

A stay of discovery pending a motion to dismiss is disfavored. *See, e.g.*, *Morien v. Munich Reinsurance Am., Inc.*, 270 F.R.D. 65, 67 (D. Conn. 2010) ("[T]he pendency of a dispositive motion is not, in itself, an automatic ground for a stay."). Because Defendants fail to show good

cause for a stay as required by Fed. R. Civ. P. 26(c), and because Defendants' arguments regarding sovereign and qualified immunity are meritless and have no relevance to this action—which seeks only prospective injunctive relief (not damages) against state officials for federal constitutional violations—the Court should deny the motion and allow discovery to commence.

I. Defendants have not shown good cause for a stay of discovery.

Defendants bear the burden of showing good cause for a stay. Fed. R. Civ. P. 26(c); *Lithgow v. Edelmann,* 247 F.R.D. 61, 62 (D. Conn. 2007). To determine whether Defendants have met that burden, courts consider (1) whether Defendants have made a strong showing that Plaintiffs' claim lacks merit; (2) the breadth of the discovery sought; and (3) the potential prejudice to Plaintiffs of a stay. *Morien,* 270 F.R.D. at 67; *Lithgow*, 247 F.R.D. at 62. Here, each factor counsels in favor of allowing discovery to proceed.

First, Defendants have failed to show that Plaintiffs' claim lacks merit. This is a high bar. *See Stanley Works Israel Ltd. v. 500 Grp., Inc.*, No. 3:17-CV-01765 (CSH), 2018 WL 1960112, at *3 (D. Conn. Apr. 26, 2018) (stay of discovery was not warranted where "both parties [had] raised arguments, founded in law."); *Levinson v. PSCC Servs., Inc.*, No. 3:09-CV-00269 (PCD), 2009 WL 10690157, at *2 (D. Conn. Sept. 16, 2009) (stay of discovery was not warranted where claims were not "frivolous or glaringly deficient").

Plaintiffs have alleged that Connecticut's legislative districting plan impermissibly inflates the voting strength of certain Connecticut House Districts, violating the "one person, one vote" requirement of the Fourteenth Amendment. *See* Compl. ¶¶ 98-99, ECF No. 1. At least one federal district court has accepted a constitutional challenge to prison gerrymandering. *See Calvin v.*

Jefferson Cty. Bd. of Comm'rs, 172 F. Supp. 3d 1292 (N.D. Fla. 2016)[1]. As set forth more fully in their opposition to Defendants' motion to dismiss, Plaintiffs' claim is not barred by the Eleventh Amendment, which permits suits for prospective injunctive relief against state officials acting in their official capacity for ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123 (1908). Moreover, the First Circuit's rejection of a different lawsuit, challenging prison gerrymandering in municipal rather than state districts, is hardly enough to render Plaintiffs' claims "so frivolous or glaringly deficient as to warrant a stay of discovery." *Levinson*, 2009 WL 10690157 at *2.

Second, as is evident from the Rule 26(f) Report filed by the parties, *see* Form 26(f) Report, ECF No. 13, and the first Request for Production served by Plaintiffs, *see* Exhibit A, the discovery sought by Plaintiffs is neither overbroad nor unduly burdensome, and will assist the Court in assessing the merits of Plaintiffs' claims. Whether a districting scheme violates the Constitutional promise of "one-person, one-vote" is a necessarily fact-bound inquiry, often requiring courts to examine population statistics and maps, aided by expert reports and testimony. *See Brown v. Thomson*, 462 U.S. 835 (1983) (establishing that a districting scheme with population disparities larger than ten percent is presumptively unconstitutional). Plaintiffs also seek to establish through discovery, inter alia, whether incarcerated people have a meaningful "representational nexus" with their current state legislators, *see Calvin*, 172 F. Supp. 3d at 1310-11 (N.D. Fla. 2016), and whether the state's malapportioned districts were drawn "based on legitimate considerations." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Because Plaintiffs' discovery requests go directly to each of these material questions, they are not overbroad.

[1] The district court decision predates the Supreme Court opinion in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), on which Defendants rely in their memorandum in support of the motion to dismiss. As explained in Plaintiffs' opposition to Defendants' motion to dismiss, however, *Evenwel* does not control the outcome of this case. Pls.' Mem. Opp'n Defs.' Mot. Dismiss, Section III(D)(1).

Moreover, Defendants have failed to demonstrate that Plaintiffs' discovery requests would be unduly burdensome. Defendants provide no concrete information to support their conclusory statement that permitting discovery would be "costly and time consuming, and will substantially burden both Defendants and the Court." Defs.' Mot. Stay Disc. 7. Plaintiffs have proposed a reasonable discovery schedule addressing relevant topics, Form 26(f) Report, ECF No. 13, and have served their initial disclosures and a short request for production, *see* Exhibit A.

Absent information in the record to support a claim of undue burden, courts in this district have declined to stay similar requests during the pendency of a dispositive motion. *See, e.g.*, *Stanley Works Israel Ltd. v. 500 Grp., Inc.*, No. 3:17-CV-01765 (CSH), 2018 WL 1960112, at *3 (D. Conn. Apr. 26, 2018) (finding that Plaintiff's request for fewer than ten depositions and fewer than 25 interrogatories was not "unwieldy and expansive"); *Country Club of Fairfield, Inc. v. New Hampshire Ins. Co.*, No. 3:13-CV-00509 VLB, 2014 WL 3895923, at *7 (D. Conn. Aug. 8, 2014) (denying a motion to stay discovery where defendants failed to demonstrate discovery would be "time-consuming, burdensome or expensive"). Defendants have also failed to provide specific information to support their claim that it would be burdensome to produce the addresses and racial demographics of Connecticut inmates. Plaintiffs' requests for this information are focused on Connecticut's use of prison gerrymandering in the adoption of its 2011 Redistricting Plan. *See* Exhibit A; *see also* Form 26(f) Report, ECF No. 13. Given that Plaintiffs' requests are limited and narrowly tailored to establishing the merit of their claims, and that Defendants have failed to substantiate their claim of undue burden, this Court should not stay discovery.

On those two factors alone, Defendants have failed to carry their burden to show good cause for a stay. But Defendants are also incorrect that a stay of discovery would not be prejudicial to Plaintiffs. For each election cycle that Connecticut's unconstitutional legislative map is in

operation, the voting power of Plaintiffs is diluted while that of other Connecticut residents is inflated, presenting an ongoing violation of the Fourteenth Amendment's guarantee of equal protection. To ensure an orderly adjudication of Plaintiffs' claims sufficiently in advance of the 2020 elections—including completion of discovery, adjudication of summary judgment motions, trial if necessary, and appellate review if requested—it is important that discovery commence promptly. Moreover, that Defendants' unlawful conduct was ongoing for seven years before Plaintiffs filed suit does not demonstrate that a delay in adjudicating the dispute is of no consequence to Plaintiffs. *Ass'n Fe Y Allegria v. Republic of Ecuador*, No. 98 CIV. 8650 (BSJ), 1999 WL 147716, at *1 (S.D.N.Y. Mar. 16, 1999) (rejecting a motion to stay discovery and holding that plaintiffs having waited eleven years to file suit did not diminish the present prejudice of a discovery stay during pendency of motion to dismiss); *see also* Defs.' Mot. Stay Disc. 8.

Plaintiffs recognize that creating remedial districting schemes is a complicated process and have accordingly sought to balance the timing of discovery so as not to be overly burdensome to Defendants. Plaintiffs have not, for example, sought a preliminary injunction to remedy Connecticut's districting scheme in advance of the 2018 elections, which are imminent. A stay in discovery at this time, however, would unfairly delay Plaintiffs' efforts to establish the merit of their case. Because Defendants have failed to establish that discovery would be especially burdensome or that Plaintiffs' claims are meritless, discovery should proceed during the pendency of Defendants' motion to dismiss.

II. The Eleventh Amendment does not immunize state officials from federal constitutional claims seeking only prospective injunctive relief.

Defendants' assertion that the Eleventh Amendment justifies a stay of discovery is wrong on two counts. Defs.' Mot. Stay Disc. 1. First, as discussed at greater length in Plaintiffs' Opposition to Defendant's Motion to Dismiss, Plaintiffs seek solely prospective injunctive relief and thus Eleventh Amendment immunity is unjustified. Pls.' Mem. Opp'n Defs.' Mot. Dismiss, Section IV(A); *see Ex parte Young*, 209 U.S. 123 (1908); s*ee also Frew v. Hawkins,* 540 U.S. 431, 437 (2004) ("To ensure the enforcement of federal law . . . the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."). Plaintiffs request only prospective injunctive relief for an ongoing constitutional violation, and make no claim for money damages. As discussed in Plaintiffs' Opposition, the *Ex parte Young* exception accordingly applies.

Further, Defendants cannot overcome *Ex parte Young*, and they mistakenly rely on *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and other qualified immunity cases. *See* Defs.' Mot. Stay Disc. 4.[2] Qualified immunity protects officials sued for damages, not in suits for prospective relief. *Harlow*, 457 U.S. at 818 ("[G]overnment officials . . . are shielded from liability *for civil damages* insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." (emphasis added)). Defendants do not cite any case holding that the Eleventh Amendment bars a suit for prospective injunctive relief—which is unsurprising, because it has been settled since *Ex parte Young* that no such bar exists.

---

[2] Defendants additionally cite to *Siegert v. Gilley*, 500 U.S. 226 (1991), *see* Defs.' Mot. Stay Disc. 4-5, a decision, like *Harlow,* that concerns qualified immunity in a suit for damages and never mentions the Eleventh Amendment. *See also Molina v. Christensen*, No. CIV.A.00-2585-CM, 2002 WL 69723 (D. Kan. Jan. 4, 2002) (citing the reasoning of *Siegert*); *NRP Holdings, LLC v. City of Buffalo*, No. 11-CV-472S(F), 2016 WL 6694247 (W.D.N.Y. Nov. 15, 2016) (citing the reasoning of *Harlow*).

Defendants also rely on case law regarding the sovereign immunity of a *state*, see Defs.' Mot. Stay Disc. 4 (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)), but this precedent is of no help either. Plaintiffs have not sued the State of Connecticut; they have brought claims for injunctive relief against state officials. Even *Puerto Rico Aqueduct and Sewer Authority* makes this point clear. *See* 506 U.S. at 146 ("The doctrine of *Ex parte Young* . . . ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law . . . . *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits . . . [those] against officials and not the States or their agencies . . . ."). Thus, the Eleventh Amendment plays no role in preventing discovery in this case.

III. Conclusion

For the foregoing reasons, Plaintiffs respectfully request this Court deny Defendants' Motion to Stay Discovery.

Respectfully submitted,

/s/ Michael J. Wishnie
Morton "Doni" Bloomfield, Law Student Intern*
Alaa Chaker, Law Student Intern*
Ashley Hall, Law Student Intern*
Keturah James, Law Student Intern*
Adeel Mohammadi, Law Student Intern*
Alden Pinkham, Law Student Intern*
Hope Metcalf (ct27184)
Michael J. Wishnie (ct27221)
Rule of Law Clinic
Yale Law School**
127 Wall Street
New Haven, CT 06520

Bradford M. Berry***
National Association for the
Advancement of Colored People, Inc.
Office of the General Counsel
4805 Mount Hope Drive
Baltimore, MD 21215
Tel: (410) 580-5797
Email: Bberry@naacpnet.org

David N. Rosen (ct00196)
Alexander T. Taubes (ct30100)
David Rosen & Associates, P.C.

* Motion for law student appearances forthcoming.
** This memorandum does not purport to state the views of Yale Law School, if any.
*** Motion for *pro hac vice* forthcoming.

Tel: (203) 436-4780
Email: Michael.Wishnie@ylsclinics.org

400 Orange Street
New Haven, CT 06511
Tel: (203) 787-3513
Email: Drosen@davidrosenlaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Michael J. Wishnie
Michael J. Wishnie, No. ct27221
Rule of Law Clinic
Yale Law School