IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NAACP, ET AL.,	:	No. 3:18-cv-01094-WWE
Plaintiffs,	:	
	:	
v.	:	
	:	
DENISE MERRILL, ET AL.,	:	
Defendants.	:	MARCH 7, 2019

DEFENDANTS' MOTION FOR STAY

Defendants hereby respectfully request that this Court issue an order staying all further proceedings in this case until after the Second Circuit Court of Appeals has resolved Defendants' appeal, which Defendants filed this same date. *See* Doc. No. 28. For the reasons set forth below and in Defendants first motion for stay—which this Court granted, *see* Doc. Nos. 15, 25 and 26—the Court ***must*** stay discovery because Defendants' appeal is based on their Eleventh Amendment immunity from suit, which provides a complete immunity from having to engage in pre-trial burdens like discovery and dispositive motion practice. Pursuant to the "dual jurisdiction" rule, this Court is divested of jurisdiction until after the Second Circuit conclusively resolves the Eleventh Amendment issue on appeal.

Further, even if the Court somehow concludes that it has discretion on this issue—which it does not—the Court nevertheless should grant a stay because the factors that courts consider in determining whether to stay a case pending appeal all favor Defendants.

BACKGROUND

Plaintiffs ask this Court to interfere with the State's legislative redistricting process, to declare Connecticut's legislative map unconstitutional, and to issue the extraordinary remedy of a mandatory injunction requiring the legislature to redraw the legislative map. Plaintiffs' claim is based on a novel theory that the Constitution categorically prohibits states from relying on facially neutral population numbers from the United States census to measure the population of their legislative districts, and that the constitution instead requires states to modify the census numbers to count prisoners as residents of their "district of origin" instead of the district where they are incarcerated.

Defendants moved to dismiss the case on the ground that Plaintiffs failed to adequately allege an ongoing violation of federal law, and their claim is therefore barred by the Eleventh Amendment. *See generally* Doc. Nos. 14-1 and 24. Because the Eleventh Amendment provides a complete immunity from suit, including an immunity from engaging in pre-trial burdens like discovery and motion practice, Defendants at the same time moved to stay discovery until after the Eleventh Amendment issue has been conclusively resolved. *See* Doc. Nos. 15 and 25.

Properly recognizing that discovery cannot proceed while the Eleventh Amendment defense remains outstanding, this Court granted the motion to stay while it considered the motion to dismiss. Doc. No. 26. The Court subsequently denied the motion to dismiss, and in doing so dissolved the stay and instructed the parties to proceed with discovery and dispositive motions. Doc. No. 27.

Given the nature of the issues in this case, the impermissible intrusion into the legislative redistricting process that the case represents, and the extraordinary nature of the relief that Plaintiffs seek, Defendants have elected to appeal this Court's denial of their motion to dismiss to the Second Circuit, and have filed their appeal this same date.[1] *See* Doc. No. 28. For the same reasons that a stay was required while this Court considered the Eleventh Amendment issue in Defendants' motion to dismiss, this Court must and should stay this case until after the Second Circuit has resolved the Eleventh Amendment issue on appeal.

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER THE "DUAL JURISDICTION" RULE, AND IT THEREFORE *MUST* STAY THE CASE UNTIL AFTER THE SECOND CIRCUIT HAS RESOLVED THE APPEAL

Defendants have appealed this Court's denial of their Eleventh Amendment defense to the Second Circuit pursuant to the collateral order doctrine. Doc. No. 28; *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-46 (1993). Like their motion to dismiss, Defendants' appeal seeks to vindicate their constitutional immunity from suit, which necessarily includes an immunity from having to engage in pre-trial burdens like discovery and dispositive motion practice. When such appeals are filed, courts in this Circuit and others "uniformly" have applied the "dual jurisdiction" rule, under which the filing of the interlocutory appeal on immunity grounds "divests the district court of jurisdiction to proceed"

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[1] The Court's denial of Defendants' Eleventh Amendment defense is immediately appealable under the collateral order doctrine. *E.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-47 (1993)

until after the immunity defense has been resolved on appeal.[2] *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). The rule operates "immediately upon the filing of a request for interlocutory review under the collateral order doctrine," and it specifically applies in appeals based on a claimed "Eleventh Amendment immunity" from suit. *In re S. African Apartheid Litig.*, No. 02 CIV. 4712 (SAS), 2009 WL 5183832, at *1 (S.D.N.Y. July 7, 2009).

The reasons for the dual jurisdiction rule are largely the same as the reasons why this Court was required to stay discovery pending its own resolution of the Eleventh Amendment issue in Defendants' motion to dismiss. Specifically, the Eleventh Amendment provides an immunity from both liability ***and*** from suit. *Puerto Rico Aqueduct*, 506 U.S. at 145. The latter immunity from suit entitles the State "not to have to answer for [its] conduct" at all. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). That necessarily includes a protection from having to incur the cost and burden of engaging in "such pretrial matters as discovery" and dispositive motion practice. *Id.* at 526, citing *Harlow v. Fitzgerald,* 457 U.S. 800, 817 (1982).

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[2] The only way a court can proceed in such cases is if the appeal is frivolous. *Bradley*, 2009 WL 1403891 at *1. Defendants' Eleventh Amendment argument plainly is not frivolous, and this Court did not even arguably suggest otherwise when it denied the motion to dismiss. Indeed, the Court could not have made such a finding given the First Circuit's decision in *Davidson v. City of Cranston*, 837 F.3d 135, 144 (1st Cir. 2016), which expressly rejected the exact same claim that Plaintiffs present here.

Because that immunity would be forever lost if the State could be required to engage in pre-trial discovery and dispositive motion practice, defendants asserting such a defense are "entitled to have questions of immunity resolved before being required to engage in discovery and other pretrial proceedings." *Molina v. Christensen*, No. CIV.A.00-2585-CM, 2002 WL 69723 at *1 (D. Kan. Jan. 4, 2002); *see, e.g., Siegert,* 500 U.S. at 232-33; *Mitchell,* 472 U.S. at 525-26; *Harlow v. Fitzgerald,* 457 U.S. at 818; *NRP Holdings, LLC v. City of Buffalo*, No. 11-CV-472S(F), 2016 WL 6694247 at *1 (W.D.N.Y. Nov. 15, 2016). That rationale applies regardless of whether the immunity defense is being pressed in the district court or on appeal: Either way, Defendants' immunity from suit will be forever lost if it is required to litigate, and it makes no difference whether the district court or the Second Circuit is the court that ultimately resolves the Eleventh Amendment issue.

For all of these reasons, the Court ***must*** stay discovery until after the Second Circuit conclusively resolves the Eleventh Amendment issue on appeal.

II. DEFENDANTS ALSO HAVE SHOWN GOOD CAUSE FOR A STAY OF DISCOVERY

Even if the Court concludes that it is not required to stay discovery under the dual jurisdiction rule, it nevertheless should exercise its discretion to stay the case.

In this Circuit, courts generally consider four factors in determining whether to stay proceedings in the district court pending appeal: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public

interests that may be affected. *Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993). All four of these factors weigh in Defendants' favor.

First, for all of the reasons discussed above, Defendants unquestionably will suffer an irreparable injury if they are required to litigate this case in the face of a colorable immunity defense under the Eleventh Amendment. Indeed, it is precisely because of that irreparable injury that Defendants are entitled to appeal this Court's denial of their Eleventh Amendment defense under the collateral order doctrine. *Puerto Rico Aqueduct*, 506 U.S. at 143-46.

Second, Plaintiffs will not suffer any injury—much less a substantial injury—if this Court stays the case pending appeal. Indeed, despite the fact that the mass incarceration and prison construction projects that are the basis for Plaintiffs' claims occurred during the 1980s and 1990s, and despite the fact that the challenged map was designed in 2011, Plaintiffs waited until 2018—***fully seven years*** after the latest conduct that they complain of—to belatedly bring this constitutional challenge. If Plaintiffs were not prejudiced by that lengthy delay, they will not be prejudiced by waiting an additional short period of time for the Second Circuit to resolve the Eleventh Amendment on appeal.

To the extent that Plaintiffs are concerned that a stay will increase the risk of this litigation encroaching on the 2020 elections, they brought that upon themselves by waiting seven years after the map was designed to bring this case. And in any event, Plaintiffs can avoid that concern by asking the Second Circuit to expedite the appeal if they wish.

Third, although this Court has denied Defendants' motion to dismiss, for all of the reasons discussed in their motion, Defendants have at the very least demonstrated "a substantial possibility, [even if] less than a likelihood, of success on appeal." *Hirschfeld*, 984 F.2d at 39. Indeed, in *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016), the First Circuit expressly rejected an ***identical*** claim to that which Plaintiffs raise here. Although this Court did not address or distinguish that highly persuasive authority in its decision, *Cranston* and the other cases upon which Defendants relied certainly are enough to meet the "substantial possibility" standard that is required for a stay pending appeal.

Fourth, the public interest supports a stay. The Supreme Court expressly has noted that the Eleventh Amendment is a sufficient basis for appealing under the collateral order doctrine precisely because of the "substantial public interest" and "particular value of a high order" that would be irreparably harmed by allowing the litigation to proceed. *Will v. Hallock*, 546 U.S. 345, 352-53 (2006). And while it certainly is true that there also is an important public interest in ensuring that Connecticut's legislative map complies with the Constitution, if appropriate that interest can be vindicated after the Second Circuit has resolved the appeal. The equally important interest in protecting Defendants' constitutional immunity from suit in federal court cannot be. Again, that is precisely why Defendants are entitled to appeal this Court's decision under the collateral order doctrine.

CONCLUSION

The Court must (and should) stay the case until after the Second Circuit resolves Defendants' appeal.

Respectfully submitted,

DEFENDANTS DENISE MERRIL
AND DANNEL P. MALLOY

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2019, 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 system.

/s/ Michael K. Skold
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