UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*, *Plaintiffs*,	:	
v.	:	Civil Action No. 3:18-cv-01094 (WWE)
DENISE MERRILL, SECRETARY OF THE STATE, and DANNEL P. MALLOY, GOVERNOR, *Defendants.*	:	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR STAY

Defendants have filed an interlocutory appeal on Eleventh Amendment grounds, *see* Doc. 28, and now seek to prevent this Court from overseeing targeted discovery necessary to adjudicate Plaintiffs' claims. Because Defendants' appeal is foreclosed by *Ex parte Young*, 209 U.S. 123, 160 (1908), the time before the 2020 state legislative elections is short, and in any case Defendants have not shown why they would be burdened by discovery, this Court should retain jurisdiction and allow discovery to proceed.

I. *EX PARTE YOUNG* REQUIRES THIS COURT TO RETAIN JURISDICTION

Defendants' Eleventh Amendment appeal fails if *Young* applies. It does—and Defendants do not say otherwise. In fact, they do not mention the case in their motion although it is the controlling law. To restate the rule, *see* Doc. 27 at 7 (Court's ruling), Doc. 20 at 6-7 (plaintiffs' brief), *Young* "created an exception to [Eleventh Amendment immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State." *Green v. Mansour*, 474 U.S. 64, 68 (1985). "*Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Id.* That is this case: Plaintiffs challenge the

Connecticut redistricting plan's constitutionality and seek an injunction barring its use by state officials in 2020. Doc. 1 at 21.

That is all that need be said, unless simply invoking the Eleventh Amendment is enough to divest this Court of jurisdiction. But it isn't: "an automatic divestiture rule is not applied" whenever parties invoke immunity by interlocutory appeal. *City of New York v. Beretta U.S.A. Corp.*, 234 F.R.D. 46, 51 (E.D.N.Y. 2006) (Weinstein, J.). As Judge Weinstein explained, such a rule would "significantly delay and disrupt the course of the litigation, imperiling both the rights of the plaintiff and the interest in judicial economy generally served by application of the final judgment rule." *Id.* Instead, the dual jurisdiction rule requires district courts to examine the arguments for an interlocutory appeal, and to retain jurisdiction and deny a stay if they lack merit. *Id. See also Palmer v. Goss*, No. 02 CIV. 5804 (HB), 2003 WL 22519454, at *1 (S.D.N.Y. Nov. 5, 2003) (Baer, J.) (denying motion for stay because Defendants' claim that qualified immunity issue turned on a question of law rather than fact had "no merit").

Defendants' appeal on immunity grounds is without merit. Federal courts have heard similar challenges to states' legislative districting for decades. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 237 (1962) (suit against Tennessee Secretary of State); *Brown v. Thomson*, 462 U.S. 835 (1983) (suit against Wyoming Governor and Secretary of State); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (suit against Texas Governor and Secretary of State). As this Court observed in its Feb. 15 order, "federal courts have jurisdiction to consider constitutional challenges to state legislative redistricting plans." Doc. 27 at 8.

Defendants' position that Connecticut's redistricting plan is lawful changes nothing under *Young*. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S.

635, 645-46 (2002) (citing its statement in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997), that "[a]n *allegation* of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.") (emphasis added)). As the Second Circuit has held, "appellant's belief in the nonexistence of a federal law violation simply does not speak to 'whether suit lies under *Ex parte Young*,'" *In re Deposit Ins. Agency*, 482 F.3d 612, 623 (2d Cir. 2007). Defendants' reliance on *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016) is therefore entirely misplaced at this point, though Defendants may if they choose raise it in a proper appeal.

In short, this appeal is "frivolous" under the dual jurisdiction rule and no stay should be entered. *Beretta, supra*, 234 F.R.D. at 51; *Goss, supra*, 2003 WL 22519454 at *1. Defendants provide no case support for Eleventh Amendment immunity in a *Young* case: their immunity cases are damages lawsuits, *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 513 (1985), *Siegert v. Gilley*, 500 U.S. 226, 227 (1991), *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-46 (1993), *Bradley v. Jusino*, No. 04 CIV. 8411, 2009 WL 1403891, at *1 (S.D.N.Y. May 18, 2009) (Sweet, J.), *NRP Holdings, LLC v. City of Buffalo*, No. 11-CV-472S(F), 2016 WL 6694247, at *1 (W.D.N.Y. Nov. 15, 2016) (Foschio, M.J.), or denied the requested stay in full, *In re S. African Apartheid Litig.*, No. 02 CIV. 4712 (SAS), 2009 WL 5183832, at *1 (S.D.N.Y. July 7, 2009) (Scheindlin, J.) or in part, *Beretta, supra*, 234 F.R.D. at 53.[1]

[1] There is one apparent exception to this statement, but it is only apparent. Defendants successfully sought a stay on Eleventh Amendment immunity grounds where plaintiffs sought prospective injunctive relief in *Molina v. Christensen*, No. CIV.A.00-2585-CM, 2002 WL 69723 at *1 (D. Kan. Jan. 4, 2002). In a later ruling the court held that the Eleventh Amendment appeal *was* likely frivolous, but reserved judgment, because it was possible defendants would owe plaintiff damages later in the litigation. *Molina v. Christensen*, No. CIV.A. 00-2585-CM, 2002 WL 1461976, at *3 (D. Kan. Jun. 26, 2002) ("[P]laintiff claims that defendants must show that

II. DEFENDANTS HAVE NOT SHOWN GOOD CAUSE FOR A STAY

Not only is a stay pending appeal improper as a matter of law, it is unwarranted even if it were a matter of discretion because all the relevant factors that courts consider in determining whether to grant a stay pending appeal favor Plaintiffs. Those factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. " *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation omitted).

The burden is on Defendants. When there exists a "fair possibility" that a stay would damage another party, the movant must "make out a clear case of hardship or inequity in being required to go forward." *Kelly v. Honeywell Int'l, Inc.*, No. 3:16-CV-00543 (VLB), 2017 WL 4856867, at *2 (D. Conn. Aug. 23, 2017) (Bryant, J.) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Defendants have not met this high burden.

First, as discussed above, Defendants are unlikely to prevail in the Court of Appeals on sovereign immunity grounds because their argument is precluded by *Young*. Defendants' single argument in support of their "substantial possibility" of success on appeal is to point to the First Circuit's ruling in *Davidson, supra*. But *Davidson*, which involved no sovereign immunity questions, is entirely inapposite to Defendants' Eleventh Amendment appeal.[2] Defendants have thus failed to show "a substantial indication of probable success," and a stay of discovery at this juncture would be an unjustified "intrusion into the ordinary processes of administration and

---

the state is obligated to pay any damage award entered against them in order to implicate Eleventh Amendment immunity. The court agrees . . . ."). Plaintiffs here do not seek damages.

[2] Additionally, as Plaintiffs noted in opposing Defendants' motion to dismiss, *Davidson* is distinguishable and not binding on the Second Circuit or this Court. *See* Doc. 21 at 21-24.

judicial review." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

Second, a stay of discovery would inflict a substantial injury on Plaintiffs. Although Plaintiffs' complaint was filed more than eight months ago, discovery has yet to begin, and any further delay risks preventing Plaintiffs from obtaining relief altogether. As Plaintiffs noted last year in their Memorandum in Opposition to Defendants' Motion to Stay Discovery:

> 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.

Doc. 20 at 4-5. That statement carries even more weight today, with the 2020 elections looming. Indeed, Plaintiffs will need relief before November 2020, because the machinery of the election goes into action in advance of the vote. The Secretary of the State may begin issuing nominating petition forms for offices to be contested at the regular election as soon as January 2, 2020. *See* Conn. Gen. Stat. § 9-453b (2018). Further delay could prevent the adoption of a constitutional map in time for the 2020 elections, condemning Plaintiffs to two additional years with unconstitutionally diminished representational strength.

Defendants make too much of the fact that Plaintiffs brought suit seven years after Connecticut's allegedly unconstitutional map was adopted, *see* Doc. 29 at 6. That Defendants' unlawful conduct was ongoing before Plaintiffs filed suit does not mean that delaying discovery would not harm Plaintiffs. *See 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) (Jones, J.) (rejecting a motion to stay discovery and holding that plaintiffs having waited eleven years to file suit did not diminish the

prejudice of a discovery stay). Plaintiffs seek not to remedy past harms but to avoid suffering unconstitutionally diminished representation for the two years following the 2020 elections, should Connecticut's unconstitutional map remain in effect.

Third, allowing discovery to proceed would not cause Defendants to suffer an "irreparable injury." Defendants' claim of irreparable injury stems entirely from their claim of immunity from suit, which—as discussed above—is frivolous. Beyond this, Defendants make no attempt to show that the narrow and targeted discovery Plaintiffs seek would even be burdensome. This alone is sufficient to defeat their claim of irreparable injury. *See Barcia v. Sitkin*, No. 79-civ-5831(RLC), 2004 WL 691390, at *2 (S.D.N.Y. Mar. 31, 2004) (Carter, J.) (finding no "irreparable injury" where movants "[did] not offer any evidence of the financial, administrative, or personnel burden" they would suffer absent a stay). *See also McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) (per curiam) ("Litigation costs, standing alone, do not rise to the level of irreparable injury … [since] [m]ere injury, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Plaintiffs' requests for factual discovery described in the parties' revised Rule 26(f) report, Doc. 31, are narrow and focused on allowing the Court to determine the extent to which Connecticut prisoners are bona fide residents of the legislative districts in which they are incarcerated, the degree to which prison gerrymandering distorts the state's electoral districts and dilutes the votes of Plaintiffs, and the ease with which any constitutional violation found by the Court could be remedied with modest adjustments to the existing map.

Finally, it is in the public interest that discovery proceeds. The public interest favors the quick resolution of disputes, *see, e.g.*, Fed. R. Civ. P. 1 ("These rules . . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and

inexpensive determination of every action and proceeding."); *Kelly*, *supra*, 2017 WL 4856867 at *3. Speedy resolution is all the more important in a case such as this one, which raises questions regarding electoral fairness, racial equality, and democratic government that must be answered before the 2020 elections. *See Daniels v. City of New York*, 138 F. Supp. 2d 562, 565 (S.D.N.Y. 2001) (Scheindlin, J.) (finding the public interest favored "the most expeditious resolution" of litigation over "a controversial matter of serious public concern," in that case racial profiling). Proceeding with discovery now will allow this court to determine as soon as possible whether Connecticut's legislative map is unconstitutional—a matter of great concern to all residents of the state.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court retain jurisdiction and allow discovery to proceed pending Defendants' appeal to the Second Circuit.

Respectfully submitted,

By /s/ Michael J. Wishnie
Doni Bloomfield, Law Student Intern
Alaa Chaker, Law Student Intern
Ayoub Ouederni, Law Student Intern*
Ashley Hall, Law Student Intern
Keturah James, Law Student Intern
Hope Metcalf (ct27184)
Michael J. Wishnie (ct27221)
Rule of Law Clinic
Yale Law School**
127 Wall Street
New Haven, CT 06520
Tel: (203) 436-4780
Email: Michael.Wishnie@yale.edu

David N. Rosen (ct00196)
Alexander T. Taubes (ct30100)
David Rosen & Associates, P.C.
400 Orange Street
New Haven, CT 06511
Tel: (203) 787-3513
Email: drosen@davidrosenlaw.com

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

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

Benjamin D. Alter[***]
National Association for the Advancement of Colored People, Inc.
50 Broadway, 31st Floor
New York, NY 10004
Tel: (212) 626-6412
Email: balter@naacpnet.org