IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Plaintiffs-Appellees*,	:	
v.	:	No. 19-576-cv
DENISE MERRILL, SECRETARY OF THE STATE, and DANNEL P. MALLOY, GOVERNOR, *Defendants-Appellants*.	:	May 13, 2019

PLAINTIFFS' RESPONSE TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

The District Court, Warren W. Eginton, J., concluded that Plaintiffs have stated a claim for relief that Connecticut's redistricting plan for the 2020 state elections may plausibly "compromise . . . fair and effective representation." JA 46. The Court accordingly denied Defendants' motion to dismiss so that the case could proceed to discovery and resolution before the 2020 elections.

Defendants, however, filed an interlocutory appeal from the order denying their motion to dismiss, premised on a radical and incorrect interpretation of the Eleventh Amendment that was rejected by Judge Eginton as inconsistent with a century of settled precedent. *Ex parte Young*, 209 U.S. 123 (1908). Now Defendants urgently ask this Court to enjoin a (probably brief) telephonic status conference with a Magistrate Judge on Friday and to stay all further proceedings. The District Court previously denied their request for a stay of discovery pending

appeal, finding that the appeal is "frivolous" and that a stay would be prejudicial. JA 51-52. The District Court was correct, and Defendants cannot make the extraordinary showing necessary to justify a stay pending interlocutory appeal. *See Nken v. Holder,* 556 U.S. 418 (2009); *Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (applying *Nken* and *Ex parte Young* to deny stay pending appeal in challenge to state vote-by-mail rules).

BACKGROUND

Plaintiffs challenge the constitutionality of Connecticut's redistricting plan and seek an injunction barring its future use by state officials. JA 30. In a nutshell, Plaintiffs' claim is that "prison gerrymandering," a practice that counts people who are incarcerated as residents of the prisons where they are confined rather than the communities they come from, distorts Connecticut's state legislative districts, warps the democratic process, and violates the Fourteenth Amendment where, as alleged here, it results in population deviations that violate the "one person, one vote" principle. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (deviations of 10% or more between district populations trigger scrutiny and subject the state to a higher burden of justification); JA 25-28 (alleging deviations of more than 10% in certain Connecticut state legislative districts).

Defendants moved to dismiss under Rule 12(b)(6), saying that the complaint failed to state a claim but not that the asserted claim was frivolous or insubstantial.

Conducting the limited inquiry appropriate to a Rule 12(b)(6) motion, Judge Eginton held that Plaintiffs "plausibly alleged [an] ongoing violation of federal law." JA 46. In denying Defendants' motion to dismiss, the District Court observed that "federal courts have jurisdiction to consider constitutional challenges to state legislative redistricting plans,"[1] JA 42, and distinguished the very Supreme Court cases that Defendants say it failed to address. JA 45-46 (discussing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) & *Gaffney v. Cummings*, 412 U.S. 735 (1973)).

As the District Court recognized, Defendants' objections were to the merits of the Plaintiffs' claims but did not go to the Eleventh Amendment defense. After all, "the 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); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("[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 this Court has held, "appellant's belief in the nonexistence of a federal law violation simply does not speak to

[1] Federal courts have of course heard challenges to states' legislative districting for decades. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (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).

'whether suit lies under *Ex parte Young*,'" *In re Deposit Ins. Agency*, 482 F.3d 612, 623 (2d Cir. 2007).

Defendants then appealed to this Court and moved for a stay pending appeal. Judge Eginton denied the stay, as he was required to do. Applying well-settled law from this Court and the Supreme Court, he correctly held that Defendants were impermissibly smuggling merits arguments into the straightforward *Ex parte Young* analysis. Instead, the Court found that *Ex parte Young* applies because Plaintiffs seek only prospective injunctive relief for ongoing violations of federal law and that, therefore, the appeal on Eleventh Amendment grounds was frivolous. *See* JA 51-52 (certifying appeal as frivolous because "[D]efendants' assertion that [P]laintiffs cannot establish an on-going constitutional violation . . . requires a decision on the merits."); *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Judge Eginton then referred the case to the Magistrate Judge to supervise discovery, beginning with a short teleconference this Friday. ECF No. 43.

ARGUMENT

The factors for entering a stay enjoining proceedings pending interlocutory appeal 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 fail even to address the factors, much less carry their burden.

A. Defendants Have No Likelihood of Success

Defendants' sovereign immunity argument is unlikely to prevail because it is precluded by *Young*. *See also Democratic Executive Committee v. Lee*, 915 F.3d at 1318 (denying stay pending appeal and explaining "[b]ecause the Secretary [of State] is the state's chief election officer with the authority to relieve the burden on Plaintiffs' right to vote, she was appropriately sued for prospective injunctive relief"). If there is to be any inquiry concerning Plaintiffs' allegations in the context of an *Ex parte Young* suit, it "is limited to whether the alleged violation is a substantial, and not frivolous, one; [the Court] need not reach the legal merits of the claim." *Deposit Ins. Agency v. Superintendent of Banks*, 482 F.3d 612, 623-24 (2d Cir. 2007); *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 374 (2d Cir. 2005). As the District Court twice held – *see* JA 41, 52 – Plaintiffs'

allegations of an ongoing violation of the Equal Protection Clause are far from frivolous or insubstantial.

As presented in their appeal, Defendants misstate or ignore the District Court's analyses. Defendants say that the District Court did not distinguish their principal authority, the Supreme Court's decision in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 (2016). But in fact, Judge Eginton stated plainly that "[t]he instant case may be distinguishable from *Evenwel*," JA 45. As Judge Eginton explained, the challenge to Texas's redistricting plan in *Evenwel* would have "undermine[d] 'equitable and fair representation.'" JA 45-47 (quoting *Evenwel*, 136 S. Ct. at 1132). But this case shows the reverse: that Connecticut's *existing* redistricting plan may "plausibl[y] compromise . . . fair and effective representation." JA 46. Judge Eginton found it significant that Connecticut counts prisoners for redistricting purposes in the districts where they are incarcerated, when "incarcerated individuals are not even considered residents of their prison location" under state law. *Id.* (citing Conn. Gen. Stat. § 9-14).

Simply put, the District Court correctly distinguished *Evenwel* because it concerned *whether* to count certain non-voters in state redistricting, with plaintiff Texas voters contending non-voters should be excluded entirely from Texas's redistricting, 136 S. Ct. at 1125; this case, by contrast, concerns not whether but *where* to count certain persons.

Defendants claim that in "*Burns*[*v. Richardson,* 384 U.S. 73 (1966)] and *Gaffney* . . . the Supreme Court held that federal courts *have no constitutional authority* to even consider the question that Plaintiffs present," Mot. at 9 (emphasis in original). Not so. As the District Court noted in its ruling denying Defendants' motion to dismiss, *Gaffney* actually said the opposite. It held that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge . . . other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment . . . ." JA 45; G*affney*, 412 U.S. at 749. The District Court's analysis of *Gaffney* was correct.

Burns, for its part, did not address the question this case presents at all. In that case, the Supreme Court held, following an evidentiary hearing in the District Court, that using only registered voters to apportion districts was permissible when the results were not substantially different from those using total population. *Burns*, 384 U.S. at 93. That case has no relevance where, as here, it is alleged that the method of counting total population results in substantial disparities that violate the one person, one vote requirement, JA 25-28, and this Court is being asked to dismiss the claim on a Rule 12(b)(6) motion.

Additionally, Defendants failed to make their present argument in the District Court that Plaintiffs' claim is "insubstantial." Defendants filed six briefs in

the District Court seeking dismissal or a stay of all proceedings, and never argued that Plaintiffs' claim was "insubstantial" under *Ex parte Young*. ECF Nos. 14-1 (motion to dismiss), 15 (motion to stay), 24 (reply), 25 (reply), 29 (renewed motion to stay), and 33 (reply). Defendants argued only that Plaintiffs' claim failed on the merits, which, as explained above, "simply does not speak to whether suit lies under *Ex parte Young*." *In re Deposit Ins. Agency*, 482 F.3d at 623; *see* JA 41, 52 (denying motion to dismiss and renewed motion for stay on these grounds). Because "it is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal," *Askins v. Doe No. 1*, 727 F.3d 248, 252 (2d Cir. 2013), Defendants' new arguments should be disregarded.

Defendants complain that the District Court's opinion was "conclusory" and "utterly confounding" because the court did not discuss certain precedents at length. Mot. at 11 n.1. But the District Court did what it was supposed to do. As Defendants concede, the court was not permitted to resolve the merits in determining whether *Ex parte Young* applies. *See* Mot. at 11. 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 judicial review." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

B. Defendants Show No Injury from Moving Forward

Defendants make no attempt to show irreparable injury from moving this litigation forward toward trial, much less that a phone call on Friday would be burdensome. As the phone call Friday will likely show, the burden of discovery in this case will be modest. This failure 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.").

C. Plaintiffs Would Be Irreparably Injured by a Stay

In fact, a stay of discovery would inflict substantial injury on *Plaintiffs*, preventing them from obtaining relief even if they are right. The District Court found that a stay would prejudice Plaintiffs. JA 51. It was right: although the 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.

ECF No. 20 at 4-5. That statement carries even more weight today, with the 2020 elections looming. Indeed, Plaintiffs will need relief well before November 2020, because the machinery of the election goes into action well 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.

D. The Public Interest Favors Denying a Stay

The public interest favors the speedy resolution of disputes—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. Allowing this case to proceed will allow the District Court to

determine as soon as possible whether Connecticut's legislative map is unconstitutional—a matter of great concern to all citizens.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to stay.

Respectfully submitted,

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