**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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| NAACP, ET AL., *Plaintiff-Appellees*, | : | No. 19-576-cv |
| v. | : | |
| DENISE MERRILL, ET AL., *Defendant-Appellants.* | : | MAY 15, 2019 |

**DEFENDANT-APPELLANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY PENDING APPEAL**

Defendants argued below and in their brief to this Court that Plaintiffs' claim is implausible and foreclosed by decades of binding Supreme Court precedents, and that it therefore fails to allege an ongoing violation of federal law for purposes of *Ex Parte Young*. *See generally* Dist. Ct. Doc. Nos. 14-1 and 24; ECF No. 26. This Court's only task in reviewing this motion is to assess whether that argument is frivolous. If it is not, then Defendants are entitled to have this Court review their Eleventh Amendment defense before being subjected to the burdens of litigation in the district court, and the dual jurisdiction rule requires this Court to grant a stay until after the appeal has been resolved. *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).

This appeal is not frivolous. To the contrary, the First Circuit recently held that the exact same claim that Plaintiffs present here is "implausible" and foreclosed by *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), *Burns v. Richardson*, 384 U.S. 73, 92 (1966) and other binding Supreme Court precedents. *Davidson v. City of Cranston*, 837 F.3d 135, 141-44 (1st Cir. 2016). That is the very definition of an "insubstantial" federal claim that fails to satisfy *Ex Parte Young*. *See, e.g., In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2d Cir. 2007); *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 133 (2d Cir. 2010). In light of *Cranston*, Defendants' argument by definition is not so "inarguable" and "fanciful" that it properly could be deemed frivolous. *Tafari v. Hues,* 473 F.3d 440, 442 (2d Cir. 2007).

Remarkably, Plaintiffs do not even mention *Cranston* in their opposition memorandum. Nor do they mention the dual jurisdiction rule, which courts in this Circuit and others "uniformly" have applied in immunity-based appeals brought under the collateral order doctrine. *Beretta U.S.A. Corp.*, 234 F.R.D. at 51 (collecting cases). That rule is based on the well-established principle that state defendants cannot be required to conduct discovery and other pretrial litigation while a

colorable Eleventh Amendment defense remains outstanding, including on appeal. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-45 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985); *Harlow v. Fitzgerald,* 457 U.S. 800, 817 (1982). Plaintiffs cite no legal authority to the contrary.

Instead, Plaintiffs assert—without explanation or analysis—that this motion for stay is governed by the four factor test set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See* Pl. Opp. at 4-5. While that test may apply in ordinary appeals, it does not apply in immunity-based like this. Indeed, *Nken* did not involve an Eleventh Amendment or other immunity defense, was not brought under the collateral order doctrine, did not discuss the immunity principles established in cases like *Puerto Rico Aqueduct*, *Mitchell* and *Harlow*, and contained no discussion about whether the dual jurisdiction rule should apply in such appeals. *Nken* therefore has no bearing on the issues raised in this motion.

Nor does Plaintiffs' extensive discussion of *Evenwel*, *Burns* and *Gaffney*. Pl. Opp. at 5-7. Again, this Court does not have to decide which of the parties' competing arguments about those cases is correct at this stage of the appeal. Rather, the dual jurisdiction rule simply

requires this Court to determine whether Defendants' Eleventh Amendment defense is frivolous. *Beretta*, 234 F.R.D. at 51. Defendants' argument clearly is not frivolous in light of *Cranston*, which Plaintiffs simply ignore when discussing those cases.

Finally, the Court should reject Plaintiffs' suggestion that Defendants' somehow waived their argument that Plaintiffs' claim is "insubstantial" for purposes of *Ex Parte Young* because they argued below that the Complaint fails to state a claim under Rule 12(b)(6). Pl. Opp. at 2-3, 7-8. Contrary to Plaintiffs' assertion, Defendants' motion to dismiss was based on both Rule 12(b)(6) and Rule 12(b)(1). Dist. Ct. Doc. No. 14 at 1. With regard to the Rule 12(b)(1) aspect of their motion, Defendants repeatedly argued that Plaintiffs failed to adequately allege an ongoing violation of federal law ***for purposes of Ex Parte Young***, and cited the same cases that establish the standard for resolving that issue that they now cite on appeal. *See, e.g.*, Dist. Ct. Doc. No. 25 at 2-3, citing *In re Deposit Ins. Agency*, 482 F.3d 612 (2d Cir. 2007) and *City of Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014). Further, the substantive basis for Defendants' Eleventh Amendment argument below was the exact same as it is on appeal; namely, that

Plaintiffs' claim is implausible and foreclosed by *Evenwel*, *Burns* and other binding Supreme Court precedents. *Compare* Dist. Ct. Doc. Nos. 14-1 and 24 with ECF No. 26. *See generally* ECF No. 26.

## CONCLUSION

For the reasons discussed above, in Defendants' opening memorandum on this motion, and in Defendants' Appellant brief, the Court should stay all proceedings in the district court until after it has resolved the Eleventh Amendment issue in this appeal.

Respectfully submitted,

DEFENDANTS DENISE MERRILL
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 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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