**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

NAACP, ET AL., *Plaintiffs*, v. DENISE MERRILL, ET AL., *Defendants*.	: : : : : : :	No. 3:18-cv-01094-WWE MARCH 19, 2019

**DEFENDANTS' REPLY BRIEF IN
FURTHER SUPPORT OF THEIR MOTION FOR STAY**

The dual jurisdiction rule divests this Court of jurisdiction during the pendency of Defendants' appeal unless this Court affirmatively certifies that the appeal is frivolous. In that regard, it is not sufficient for Plaintiffs to argue that Defendants' Eleventh Amendment defense "lacks merit." Pl. Opp. at 2. Rather, the frivolous standard is much higher, and it requires a finding by this Court that Defendants' immunity defense is not even arguable or colorable before the case can proceed.

Plaintiffs cannot meet that high standard. To the contrary, Defendants' argument that Plaintiffs' failed to adequately allege an ongoing violation of federal law for purposes of *Ex Parte Young* is based on a recent First Circuit decision that expressly rejected the exact same claim that Plaintiffs present, as well as decades of practice and Supreme Court precedents that both approve of Connecticut's redistricting approach and also refute Plaintiffs' claim. *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016); *see, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1123-24, 1132 (2016); *Burns v. Richardson*, 384 U.S. 73, 92 (1966). By contrast,

Plaintiffs' claim is based on an abstract and novel legal theory that no appellate court previously has adopted, and that finds scant support in the current caselaw. When considered in that context, Plaintiffs' claims are far closer to the boundary of being non-colorable than Defendants' Eleventh Amendment immunity defense.

In any event, the validity of the parties' respective Eleventh Amendment arguments is for the Second Circuit to decide at this stage of the proceedings. Because neither Defendants' appeal nor the Eleventh Amendment defense upon which it is based is frivolous, this Court lacks jurisdiction to proceed until after the Second Circuit has conclusively resolved Defendants' pending appeal.

I. The Dual Jurisdiction Rule Divests This Court Of Jurisdiction Unless This Court Affirmatively Certifies That Defendants' Appeal Is Frivolous

Contrary to Plaintiffs' assertion, a determination that Defendants' Eleventh Amendment defense "lacks merit" is not sufficient for this Court to proceed in the face of Defendants' pending appeal. Pl. Opp. at 2. Rather, it is well established that the dual jurisdiction rule—"which has been uniformly followed by courts in those circuits that have considered it"—operates to "divest[] the district court of jurisdiction to proceed" unless the district court affirmatively "certifies that the appeal is ***frivolous***." *City of New York v. Beretta U.S.A. Corp.*, 234 F.R.D. 46, 51 (E.D.N.Y. 2006) (emphasis added); *see also, e.g., Bradley v. Jusino*, No. 04 CIV. 8411, 2009 WL 1403891, at *1 (S.D.N.Y. May 18, 2009) (holding that district court lacks jurisdiction unless it "certifies Defendant's appeal as frivolous"). Plaintiffs do not cite a single case that applies a different or lesser standard.

In fact, the sole case that Plaintiffs cite for their "lacks merit" standard did not even apply that standard, and applied the frivolous standard instead. *See* Pl. Opp. at 2, citing *Beretta*, 234 F.R.D. at 51. In doing so, that court expressly stated that "the filing of an appeal under the collateral order doctrine . . . divests the district court of jurisdiction to proceed . . . unless the district court certifies that the appeal is frivolous." *Beretta*, 234 F.R.D. at 51. It also made clear that district courts assessing the dual jurisdiction rule cannot "step into the shoes of the Second Circuit Court of Appeals and decide whether the collateral order doctrine is a basis for the pending interlocutory appeal . . . ." *Id.* at 52. Rather, as long as the appeal is at least colorable, district courts lack jurisdiction to proceed. *Id.*

II. Defendants' Appeal Is Not Frivolous

The frivolous standard that applies under the dual jurisdiction rule is an extremely difficult standard to meet. Indeed, it is not satisfied even by "a finding that the correct resolution of an appeal seems obvious." *United States v. Davis*, 598 F.3d 10, 13–14 (2d Cir. 2010) (collecting cases). Rather, an appeal is frivolous only if it is based on such "inarguable legal conclusions" and "fanciful factual allegations" that the Court can certify that the appeal lacks ***any*** "arguable basis either in law or in fact." *Tafari v. Hues,* 473 F.3d 440, 442 (2d Cir.2007), citing *Neitzke v. Williams,* 490 U.S. 319, 325 (1989). This Court is bound to "exercise great care" in making such a determination, as a finding that the appeal is frivolous will deprive Defendants of the constitutional immunity from suit that they seek to vindicate on appeal. *Id.* at 441.

Defendants' appeal does not even arguably meet the frivolous standard. Defendants have argued at length that Plaintiffs failed to adequately plead an ongoing violation of one person, one vote, and that the *Ex Parte Young* exception to the Eleventh Amendment therefore does not apply. *See* Doc. Nos. 14-1 and 24.[1] That argument is based on a recent First Circuit decision that expressly rejected the exact same claim that Plaintiffs present here, and that squarely held not only that Connecticut's approach to redistricting does not violate any principle of federal law, it is in fact the "norm" and "constitutional default." *Cranston*, 837 F.3d at 144. Defendants also relied on decades of Supreme Court precedents that not only have approved the redistricting approach that Connecticut has taken, but also have made clear that federal courts simply have no authority to interfere in the kind of political questions that Plaintiffs' claim presents. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1123-24, 1132 (2016); *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

Although this Court denied Defendants' motion to dismiss because it determined that Plaintiffs met the low threshold for pleading a "plausible" claim, nowhere in its decision did the Court suggest that Defendants' argument lacks merit or that it is unlikely to prevail if this case proceeds. And the Court certainly did not suggest that Defendants' argument is based on such "inarguable legal conclusions" or "fanciful factual allegations" that it could be deemed frivolous. *Tafari,* 473 F.3d at 442. Nor could the Court have made such a finding given the decades of binding and persuasive precedents that support Defendants' position.

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[1] Defendants hereby incorporate by reference the arguments made in their motion to dismiss and reply brief in support thereof. *See* Doc. Nos. 14-1 and 24.

Plaintiffs' sole argument to the contrary is their conclusory assertion that the Eleventh Amendment does not apply because *Ex Parte Young* permits claims seeking prospective relief against state officials for ongoing violations of federal law. Pl. Opp. at 1-2. As was the case when Plaintiffs made this same argument in the context of Defendants' first motion for stay, however, that just begs the question. To properly invoke *Ex Parte Young*, Plaintiffs cannot simply state the conclusion that they seek prospective relief for an ongoing violation of federal law, and then move on. Rather, they must ***adequately plead*** an actual claim under the federal law they claim has been violated. If they fail to do so, then by definition they have not alleged an ongoing violation of federal law, *Ex Parte Young* does not apply, and Defendants retain their Eleventh Amendment immunity from suit. *E.g., City of Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014) (although plaintiff asserted violation of federal law, *Ex Parte Young* not satisfied because plaintiff "fail[ed] to allege any plausible ongoing violation" of that federal law); *Cinotti v. Adelman*, 186 F. Supp. 3d 218, 223 (D. Conn. 2016) (same); *Leibovitz v. Barry*, No. 15-CV-1722 (KAM), 2016 WL 5107064, at *6 (E.D.N.Y. Sept. 20, 2016) (same); *Tiraco v. New York State Bd. of Elections*, 963 F. Supp. 2d 184, 193 n.8 (E.D.N.Y. 2013) (same).[2]

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[2] Plaintiffs' abstract and unexplained reliance on prior one person, one vote cases does not compel a different conclusion. *See* Pl. Opp. at 2, citing *Baker v. Carr*, 369 U.S. 186, 237 (1962), *Brown v. Thomson*, 462 U.S. 835 (1983), *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). In none of those cases did the state defendants argue that *Ex Parte Young* did not apply because the plaintiffs failed to adequately plead an ongoing violation of one person, one vote. Those cases are therefore irrelevant, and simply have nothing to do with the question at issue.

As discussed above, Defendants have presented far more than a colorable claim that Plaintiffs failed to adequately plead an ongoing violation of federal law, and that *Ex Parte Young* therefore does not apply. Plaintiffs may disagree with that position (as did this Court), and they are of course free to present their disagreement to the Second Circuit Court of Appeals in due course. Unless and until the Second Circuit conclusively resolves Defendants' Eleventh Amendment defense in Plaintiffs' favor, however, the dual jurisdiction rule divests this Court of jurisdiction to proceed.

CONCLUSION

The Court has no jurisdiction or discretion to proceed, and it must therefore stay the case until after the Second Circuit resolves Defendants' pending appeal.

Respectfully submitted,

DEFENDANTS DENISE MERRIL
AND DANNEL P. MALLOY

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 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.

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