**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**WESTERN DIVISION**

**THE CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,** **PLAINTIFFS,**

**v.** **Case No. 4:19-cv-00402-JM**

**STATE OF ARKANSAS, *et al.*,** **DEFENDANTS.**

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY DISCOVERY**

Plaintiffs chose to sue the State of Arkansas and its agencies, all of which enjoy sovereign immunity from private parties' lawsuits. *See Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751-53 (2002). Because Congress did not in Section 2 of the Voting Rights Act abrogate the States' sovereign immunity, that "immunity pose[s] a bar to federal jurisdiction" over Plaintiffs' claims. *Alden v. Maine*, 527 U.S. 706, 730 (1999); *see Seminole Tribe of Fla. Florida*, 517 U.S. 44, 59 (1996). Defendants have detailed this jurisdictional bar in briefs supporting their motion to dismiss. (*See* DE 22 at 3-7; DE 30 at 2-6.) And they have explained to Plaintiffs why Arkansas's sovereign immunity prohibits proceeding with discovery. (*See* Rule 26(f) Rep., DE 31 at 2, 4-5.) Yet Plaintiffs have insisted on plowing ahead. For example, they served on the State of Arkansas itself requests for production that would require it to search the files of *every state employee*. The State's sovereign immunity does not allow such requests. So Defendants respectfully ask this Court to stay all discovery while it considers their motion to dismiss the amended complaint.

"Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Maritime Comm'n*, 535 U.S. at 766. Therefore, it is well established that discovery should not proceed until sovereign immunity is resolved. *See Jackson v. Riebold*, 815 F.3d 1114, 1117-18, 1121-22 (8th Cir. 2016)

(affirming stay and denial of discovery pending motion for summary judgment based on sovereign immunity, among other arguments); *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that until a "[qualified] immunity question is resolved, discovery should not be allowed"). As the Seventh Circuit put it, sovereign immunity gives States "a 'right not to be sued' as well as a right to win on the merits." *Goshtasby v. Bd. of Trs. of Univ. of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997). Therefore, it held that in the face of a "colorable claim" of sovereign immunity, "the district court must stay proceedings." *Id.* Given that Plaintiffs do not dispute that neither the Supreme Court nor the Eighth Circuit has held that the Voting Rights Act abrogates the States' sovereign immunity, Defendants' claim here is, at the very least, "colorable." (*See* Reply in Supp. of Mot. to Dismiss, DE 30 at 2.)

Absent a discovery stay, Plaintiffs will subject Arkansas and its agencies to extraordinarily burdensome discovery requests, and their sovereign immunity would be "effectively lost." *Van Wyhe v. Resich*, 581 F.3d 639, 648 (8th Cir. 2009) (quoting *Pearson v. Callahan*, 555 U.S. 223 (2009)). Indeed, Plaintiffs have already served discovery requests on each Defendant, including the State of Arkansas itself. (*See* Plfs.' First RFP to State of Arkansas, attached as Ex. A.) Among other broad topics, those requests seek "all communication[s]" between "all agents, advisors, employees, representatives, attorneys," etc., of the State of Arkansas related to "Arkansas Court of Appeals judges and Arkansas Supreme Court justices." (Ex. A at 2, 10-11.) In other words, while this Court considers Arkansas's sovereign-immunity defense, Plaintiffs expect the State to collect documents from *every state employee* that relate in any way to a member of either the Arkansas Court of Appeals or Supreme Court. Wholly apart from the obvious overbreadth of Plaintiffs' requests, being compelled to respond to any subset of them before a ruling on the sovereign-immunity defense would effectively strip the State of that immunity.

In the Rule 26(f) report, Plaintiffs unpersuasively tried to justify subjecting Arkansas to discovery before a sovereign-immunity ruling. (*See* DE 31 at 2-3.) But they ignored the precedent from the Supreme Court and the courts of appeals stating that discovery stays like the one Defendants request are appropriate—perhaps even mandatory. For the proposition that sovereign immunity is somehow less entitled to a discovery stay than qualified immunity, they rely on a single district-court decision. *See Guggenberger v. Minnesota*, Civil No. 15-3439 (D. Minn. Jan. 12, 2016), ECF#47 at 4. First off, Minnesota in that case apparently cited only decisions holding discovery should be stayed pending resolution of qualified immunity, leaving the court unaware that the rule in sovereign-immunity cases is equally well-settled. *See id.* And the Seventh Circuit has expressly rejected the idea that sovereign immunity does not justify a discovery stay because of differences between it and qualified immunity. *See Goshtasby*, 123 F.3d at 428-29. In fact, the D.C. and Tenth Circuits have gone so far as to suggest that a writ of mandamus should issue where a discovery order even potentially implicates sovereign immunity. *See In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998); *Univ. of Tex. at Austin v. Vratil*, 96 F.3d 1337, 1339-41 & n.1 (10th Cir. 1996) (granting on sovereign-immunity grounds a writ of prohibition, a "drastic and extraordinary remedy" similar to mandamus, where state colleges and universities were compelled to respond to interrogatories—even though the Tenth Circuit did "not . . . decide whether these or other state colleges and universities [we]re, in fact, entitled to Eleventh Amendment immunity").

Alternatively, Plaintiffs argued that this Court should allow discovery to proceed in piecemeal fashion as to the individual defendants—the Governor, the Secretary of State, and the Attorney General. (DE 31 at 3.) The Court should reject that request. Courts regularly stay discovery against all defendants when only some defendants raise immunity, so as to conserve the

court's and parties' resources. *See, e.g.*, *Sundquist v. Nebraska*, No. 8:14-CV-220, 2015 WL 611815, at *2-3 (D. Neb. Oct. 16, 2015) (staying discovery as to all defendants pending decision on some defendants' claim of qualified immunity); *Britton v. Thompson*, No. 7:08-CV-5008, 2009 WL 2355389, at *1 (D. Neb. July 29, 2009) (staying discovery as to all defendants pending decision on a single defendant's qualified-immunity defense); *cf. Stanley v. Finnegan*, No. 6:17-CV-06008-PKH (W.D. Ark. July 18, 2017), ECF #37 (staying discovery as to all defendants pending a single defendant's qualified-immunity appeal); *Gard v. Dooley*, No. 4:14-CV-04023-LLP, 2015 WL 632097, at *3 (D.S.D. Feb. 13, 2015) (staying all discovery as to all claims, where defendants raised qualified immunity only as to some, where the claims "substantially overlap[ped] factually").

In addition to avoiding a piecemeal, two-stage discovery process, a stay of discovery as to all Defendants would protect Arkansas's sovereign immunity. Even if discovery were only allowed to proceed against the individual defendants, Arkansas and its agencies—including the Board of Apportionment, of which all individual defendants are members—would be required to monitor any discovery that took place pending a sovereign-immunity ruling. Such involvement, even as third parties, would undermine Arkansas's immunity from suit. Given these concerns, this Court should stay all discovery pending its sovereign-immunity ruling.

## CONCLUSION

For these reasons, the Court should grant Defendants' motion to stay discovery.

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Respectfully submitted,

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