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

**Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500**

**MOTION INFORMATION STATEMENT**

**Docket Number(s):** No. 19-576-cv

Caption [use short title]

NAACP v. Merrill

**Motion for:** Stay of proceedings in the district court pending appeal

Set forth below precise, complete statement of relief sought:

A stay of all proceedings in the district court until after this Court has resolved the Eleventh Amendment defense at issue in this appeal.

**MOVING PARTY:** Denise Merrill and Dannel Malloy **OPPOSING PARTY:** NAACP et al

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

**MOVING ATTORNEY:** AAG Michael K. Skold **OPPOSING ATTORNEY:** David N. Rosen

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Court- Judge/ Agency appealed from: District Court for the District of Connecticut, Honorable Judge Warren W. Eginton

**Please check appropriate boxes:**

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:**

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency: Friday, May 17, 2019

Appeal is based on Defendants claimed Eleventh Amendment immunity from suit, which includes immunity from discovery and pretrial litigation. District court has denied a stay pending appeal and directed the parties to attend discovery conference on 5/17/19. To preserve their immunity from suit, Defendants request a ruling on this motion before the discovery conference takes place.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

**Signature of Moving Attorney:**

/s/ Michael K. Skold **Date:** 5/13/19 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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

| | | |
|---|---|---|
| NAACP, ET AL., | : | No. 19-576-cv |
| *Plaintiff-Appellees*, | : | |
| | : | |
| v. | : | |
| | : | |
| DENISE MERRILL, ET AL., | : | |
| *Defendant-Appellant*. | : | MAY 13, 2019 |

**DEFENDANT-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL**

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Defendants hereby respectfully request that this Court issue an order staying all proceedings in the district court. The Court should grant the motion pursuant to the well-established dual jurisdiction rule, which divests the district court of jurisdiction until after this Court has resolved the Eleventh Amendment issue raised in this appeal.

**BACKGROUND**

This case is a constitutional challenge to Connecticut's legislative redistricting map under the one person, one vote principle of the Equal Protection Clause. *See generally* Complaint, Dist. Ct. Doc. 1 (attached hereto as Exhibit A). Plaintiffs' claim is based on their belief that the Constitution categorically forbids states from relying on facially neutral

total population numbers from the United States census to measure the population of their legislative districts, and that the Constitution instead requires states to modify the census numbers to count prisoners as residents of their "district of origin" instead of the district where they are incarcerated.

Defendants moved to dismiss on the ground that Plaintiffs' claim is insubstantial, and thus insufficient to invoke *Ex Parte Young*, because it is foreclosed by several Supreme Court precedents and a recent First Circuit decision that rejected the exact same claim, which claim the First Circuit expressly characterized as "implausible." *See generally* Dist. Ct. Doc. Nos. 14-1 and 24, discussing *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), *Burns v. Richardson*, 384 U.S. 73, 92 (1966), *Gaffney v. Cummings*, 412 U.S. 735, 749-51, 754 (1973), and *Davidson v. City of Cranston*, 837 F.3d 135, 141-44 (1st Cir. 2016). The district court denied that motion. In doing so, the district court did not attempt to address or engage Defendants' substantive arguments, and in fact, did not even cite or acknowledge most of the binding and persuasive precedents upon which Defendants relied. *See generally* Dist. Ct. Doc. No. 27.

Defendants timely appealed the district court's ruling pursuant to the collateral order doctrine, which permits Defendants to immediately "appeal a district court order denying a claim of Eleventh Amendment immunity" notwithstanding the lack of a final judgment. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). As set forth in Defendants' Appellant brief, which Defendants hereby incorporate by reference, *see* ECF Doc. No. 26, Defendants argue on appeal that they are entitled to Eleventh Amendment immunity because, even assuming that the facts pled in the Complaint are true, as a matter of law those facts do not allege a "substantial" federal claim that satisfies *Ex Parte Young*. *In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2d Cir. 2007); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 374 (2d Cir. 2005); *see Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014) (summary order).

At the same time that they filed this appeal, Defendants timely filed a motion for stay with the district court as required by Rule 8(a)(1). Dist. Ct. Doc. No. 29. That motion was based in part on the dual jurisdiction rule, which applies in cases where a defendant has appealed the district court's denial of an immunity-based defense like the

Eleventh Amendment pursuant to the collateral order doctrine. In such cases, the dual jurisdiction rule operates to deprive the district court of jurisdiction until after the appeal has been resolved unless the appeal is frivolous. *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).

The district court denied Defendants' motion to stay on May 8, 2019, and referred the case to a magistrate judge for scheduling on discovery. Dist. Ct. Doc. No. 41 (attached hereto as Exhibit B). In doing so, the district court summarily concluded—without explanation or analysis—that "defendants' appeal on the basis of the Eleventh Amendment is frivolous because plaintiffs have alleged a plausible claim of an on-going equal protection violation seeking prospective relief." Exh. C at 4. That of course simply restates the district court's conclusion on the motion to dismiss, and it begs the question that is the entire basis for this appeal; namely, whether the district court properly concluded that the facts pled in the Complaint allege a "substantial" or "plausible" federal claim for purposes of *Ex Parte Young*. *See In re Deposit Ins. Agency*, 482 F.3d at 621; *Shelton*, 578 F. App'x at 55.

Because the district court has denied relief, pursuant to Rule 8(a)(2), Defendants hereby request that this Court stay all proceedings in the district court until after the Court resolves this appeal. Such relief is necessary and appropriate to preserve Defendants' Eleventh Amendment immunity from suit, which will be forever lost if the case proceeds in the district court while this appeal is pending.

## ARGUMENT

### I. The Dual Jurisdiction Rule Requires The Court To Grant A Stay Unless The Appeal Is Frivolous

The Eleventh Amendment provides an immunity from both liability and suit. *Puerto Rico Aqueduct*, 506 U.S. at 145. The latter of those immunities entitles Defendants "not to have to answer for [their] conduct" at all, and necessarily includes a protection from having to incur the cost and burden of engaging in "such pretrial matters as discovery . . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985), citing *Harlow v. Fitzgerald,* 457 U.S. 800, 817 (1982). Indeed, "[t]he very object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State [and its officials] to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, 506 U.S. at 146; *see, e.g., Siegert v. Gilley,* 500 U.S. 226, 232 (1991).

Because an immunity from suit would be forever lost if a defendant is required to engage in pretrial litigation, when presented with an immunity-based defense like the Eleventh Amendment courts must stay discovery until after that immunity defense has been resolved. *See, e.g., Siegert,* 500 U.S. at 232-33; *Mitchell,* 472 U.S. at 525-26; *Harlow,* 457 U.S. at 818. And for those same reasons, the Supreme Court also has established the collateral order doctrine, which permits a defendant immediately to "appeal a district court order denying a claim of Eleventh Amendment immunity" notwithstanding the lack of a final judgment. *Puerto Rico Aqueduct*, 506 U.S. at 143-46.

Critically for purposes of this motion, the rule that defendants asserting an Eleventh Amendment defense cannot be subjected to pretrial litigation continues to apply during the pendency of an appeal under the collateral order doctrine. In such cases, courts in this Circuit and others "uniformly" have applied the dual jurisdiction rule, under which the filing of an appeal on immunity grounds "divests the district court of jurisdiction to proceed" until after the immunity defense has been resolved on appeal. *Bradley v. Jusino*, No. 04 CIV. 8411, 2009 WL 1403891, at *1 (S.D.N.Y. May 18, 2009) (quotation marks omitted); *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). The rule operates "immediately" upon the filing of the appeal. *In re S. African Apartheid Litig.*, No. 02 CIV. 4712 (SAS), 2009 WL 5183832, at *1 (S.D.N.Y. July 7, 2009).

The only way that a district court can proceed in the face of such an immunity-based appeal is if the appeal is frivolous. *E.g., Beretta U.S.A. Corp.*, 234 F.R.D. at 51. That is an extremely high standard. It is not satisfied by a finding that the immunity defense lacks merit, or 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 it 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). Courts are bound to "exercise great care" in making such a determination, as a finding that the appeal is frivolous irreversibly deprives the defendant in such cases of the constitutional immunity from suit that it seeks to vindicate on appeal. *Id.* at 441.

## II. This Appeal Is Not Frivolous

The First Circuit expressly and unanimously held in *Cranston* that the exact same claim that Plaintiffs present here is "implausible" and foreclosed by decades of binding Supreme Court precedents. 837 F.3d at 141-44. That is the very definition of an "insubstantial" federal claim that fails to satisfy *Ex Parte Young*. *In re Deposit Ins. Agency*, 482 F.3d at 621, 623; *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 133 (2d Cir. 2010). Regardless of whether this Court ultimately agrees with that argument, Defendants' appeal plainly is not frivolous in light of *Cranston* and the binding Supreme Court precedents on which that decision was based. Defendants are therefore entitled to have this Court review the district court's ruling on the motion to dismiss before being irreversibly deprived of their Eleventh Amendment immunity from suit in the district court. *Puerto Rico Aqueduct*, 506 U.S. at 146.

Specifically, as set forth in Defendants' Appellant brief, which Defendants request that the panel review before ruling on this motion, this Court expressly has held that a plaintiff must at the very least allege a "substantial" or "plausible" federal claim in order to invoke *Ex*

*Parte Young*, and that such claims "will not survive . . . scrutiny" under *Ex Parte Young* if they are "insubstantial." *In re Deposit Ins. Agency*, 482 F.3d at 621, 623; *Shelton*, 578 F. App'x at 55. A federal claim is "insubstantial" if it is "implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit." *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 133 (2d Cir. 2010).

Here, Defendants have argued that Plaintiffs' one person, one vote claim is insubstantial as a matter of law, and thus insufficient to satisfy *Ex Parte Young*, because it is implausible and foreclosed by several binding Supreme Court precedents. *See generally* ECF No. 26. That conclusion is compelled by: (1) *Evenwel*, 136 S. Ct. at 1124-31, in which the Supreme Court held that the approach Connecticut has followed is "plainly permissible" and consistent with the "theory of the Constitution" upon which one person, one vote is based; (2) *Burns*, 384 U.S. at 92 and *Gaffney*, 412 U.S. at 749-51, 754, in which the Supreme Court held that federal courts ***have no constitutional authority*** to even consider the question that Plaintiffs present, which is a political question that involves "fundamental choices about the nature of representation" with which federal courts have "no constitutionally

founded reason to interfere"; and (3) *Cranston*, 837 F.3d at 141-44, in which the First Circuit expressly held that the exact same prisoner-based claim that Plaintiffs present here is "implausible" in light of *Burns* and *Evenwel*, and that the approach Connecticut has followed "easily passes constitutional muster" under those precedents.

If those precedents are not enough to support a non-frivolous argument that Plaintiffs failed to allege a substantial federal claim for purposes of *Ex Parte Young*, then nothing is.

The district court's ruling denying Defendants' motion for stay does not support a different conclusion. The district court summarily stated in its ruling that Defendants' appeal is "frivolous" because "plaintiffs have alleged a plausible claim of an on-going equal protection violation seeking prospective relief." Exh. C at 4. That simply restates the district court's conclusion on the motion to dismiss, and it begs the question that is the entire basis for this appeal; namely, whether the district court properly concluded that Plaintiffs have alleged a "plausible" or "substantial" federal claim for purposes of *Ex Parte Young*. *In re Deposit Ins. Agency*, 482 F.3d at 621; *Shelton*, 578 F. App'x at 55. The mere fact that the district court disagrees with Defendants'

argument on that issue does not mean that Defendants' argument is frivolous. And Defendants' argument certainly is not frivolous in light of the principles established in *Burns*, *Evenwel* and *Cranston*, all of which the district court inexplicably chose to ignore in its rulings on both the motion to dismiss and the motion for stay.[1]

Nor is Defendants' appeal frivolous because "[t]he inquiry into whether jurisdiction exists under . . . *Ex Parte Young* and its progeny 'does not include an analysis of the merits of the claim.'" Exh. C at 4, quoting *Verizon Maryland, Inc. v. Pub. Ser. Comm'n of Maryland*, 535 U.S. 635, 645-46 (2002). Defendants concede that *Ex Parte Young* does not require courts to resolve the merits of an alleged federal claim that meets the basic requirement of being "substantial." *See In re Deposit Ins. Agency*, 482 F.3d at 621. Thus, in *Verizon* it was improper for the

[1] The district court's conclusory and unexplained statement that Defendants' appeal is "frivolous" is utterly confounding given its own refusal to acknowledge or consider these binding and persuasive precedents. Indeed, despite the fact that Defendants' entire argument depends on those cases, the district court ***has not even cited*** *Cranston* or *Burns* in any of its rulings in this case, much less attempted to address or distinguish those cases. And although the district court at least mentioned *Evenwel* in its ruling on the motion to dismiss, it did not engage in any meaningful analysis of that case or in any way attempt to address Defendants' arguments about it. *Compare* Dist. Ct. Doc. No. 27 at 11-12 *with* Dist. Ct. Doc. No. 14-1 and 24, and ECF No. 26.

lower courts to conclude, as part of the *Ex Parte Young* analysis, that the challenged conduct "probably" would not violate federal law at the end of the day based on their assessment about what the challenged FCC ruling required, whether that ruling remained in effect, and what jurisdiction's laws applied to the agreement. *Verizon*, 535 U.S. at 646 (emphasis omitted). Those were disputed questions about whether a substantial federal claim ultimately would succeed on the merits, and they went beyond the limited inquiry that *Ex Parte Young* permits.

Critically, however, in making the statement upon which the district court relied, the Supreme Court reiterated that a plaintiff still must at least "allege" an actual "violation" of federal law before invoking *Ex Parte Young*. *Id.* at 645; *see id.* at 646, quoting *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 296 (1997) ("An ***allegation*** of an ongoing violation of federal law" is required) (emphasis in original). This Court has made clear in cases since *Verizon* that this basic pleading standard requires a plaintiff to allege a federal claim that is at the very least substantial or plausible, and that federal courts can and must assess whether the complaint satisfies that basic pleading requirement before *Ex Parte Young* will apply.

For example, in *Shelton* the plaintiff alleged ongoing violations of Title VII. Although this Court acknowledged the statement in *Verizon*, it affirmed the dismissal on Eleventh Amendment grounds because the complaint failed to meet the "pleading requirements" for "alleg[ing a] plausible ongoing violation of federal law." 578 F. App'x at 55. That holding necessarily involved a substantive assessment of whether the complaint alleged a plausible violation of Title VII.

Similarly, in *In re Deposit Ins. Agency*, this Court held that *Ex Parte Young* requires courts to assess whether a plaintiff has alleged a "substantial" federal claim, and that a claim "will not survive . . . scrutiny" under *Ex Parte Young* if it is "insubstantial." *In re Deposit Ins. Agency*, 482 F.3d at 621, 623, citing *In re Dairy Mart*, 411 F.3d at 374. Although the Court did not elaborate on that standard, it has explained in other contexts that a claim is "insubstantial" when it is "implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit." *S. New England Tel. Co.*, 624 F.3d at 133. Although that is a relatively low standard, it too requires a substantive assessment of whether the complaint alleges a substantial or plausible claim that federal law actually has been violated.

That threshold inquiry is all that Defendants ask this Court to undertake in this appeal. Again, Defendants argue that Plaintiffs' claim is "insubstantial," and thus insufficient to invoke *Ex Parte Young*, because it is "implausible" and squarely "foreclosed" by *Burns*, *Evenwel* and the other Supreme Court precedents discussed in Defendants' brief. *In re Deposit Ins. Agency*, 482 F.3d at 621, 623; *S. New England Tel. Co.*, 624 F.3d at 133; *see generally* ECF No. 26. That conclusion is confirmed by *Cranston*, in which the First Circuit expressly held that that the exact same prisoner-based claim that Plaintiffs present here is "implausible" and foreclosed by the same Supreme Court precedents upon which Defendants rely in this appeal. 837 F.3d at 141-44.

Whether this Court ultimately agrees with Defendants' *Ex Parte Young* argument is a question for another day. For purposes of this motion, the Court simply must assess whether Defendants' appeal is frivolous. Because the First Circuit expressly held that the exact same claim that Plaintiffs present is implausible and foreclosed by binding Supreme Court precedents—which is the very definition of an "insubstantial" claim that fails to satisfy *Ex Parte Young*, *see In re Deposit Ins. Agency*, 482 F.3d at 621, 623; *S. New England Tel. Co.*, 624

F.3d at 133—Defendants' appeal clearly is not so "inarguable" and "fanciful" that it properly could be deemed frivolous. *Tafari,* 473 F.3d at 442. Defendants are therefore entitled to have this Court review their Eleventh Amendment argument before they can be forced to litigate Plaintiffs' insubstantial claim in the district court. *Puerto Rico Aqueduct*, 506 U.S. at 146.

## CONCLUSION

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
AND DANNEL P. MALLOY

WILLIAM TONG
ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 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*
Michael K. Skold
Assistant Attorney General

# EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | |
|---|---|
| NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NAACP CONNECTICUT STATE CONFERENCE, JUSTIN FARMER, GERMANO KIMBRO, CONLEY MONK, JR., GARRY MONK, and DIONE ZACKERY,<br><br>*Plaintiffs*,<br><br>v.<br><br>DENISE MERRILL, SECRETARY OF STATE, and DANNEL P. MALLOY, GOVERNOR,<br><br>*Defendants.* | Civil Action No. _____<br><br>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |

## INTRODUCTION

1. Connecticut's state legislative redistricting plan, adopted in 2011 and scheduled for use in the 2018 and 2020 elections, violates the "one person, one vote" requirement of the Fourteenth Amendment because the plan is based on unlawful prison gerrymandering.

2. "Prison gerrymandering" is the practice whereby Connecticut counts incarcerated people as residing in the state facility where they are imprisoned, rather than at their pre-incarceration address, for the purpose of drawing lines for state legislative districts.

3. Connecticut's prisoners are disproportionately African-American and Latino, and many maintain a permanent domicile in the state's urban centers. Nevertheless, many of these individuals are incarcerated in correctional facilities that the State has located primarily in rural, lightly populated, predominantly white parts of Connecticut.

4. Persons incarcerated in districts far from their home communities have no meaningful connection to the towns in which they are incarcerated. They are separated from their families and friends and have little contact with citizens residing immediately outside the walls of the prisons. Incarcerated persons cannot visit or patronize public or private establishments, such as parks, churches, businesses, or public transportation, in their surrounding communities.

5. Moreover, most Connecticut prisoners cannot vote under state law and have no contact with the representatives of the districts in which they are incarcerated. Local legislators do not visit prisoners incarcerated in their districts. Consequently, the districts' representatives do not, in practice, represent these incarcerated persons or perform legislative services for them.

6. Despite the welcome decline in the State's overall prison population, the disproportionate incarceration of African-American and Latino residents, and their confinement in distant, predominantly white districts, harms the communities they leave behind, as well. The voting power of these communities is diluted when incarcerated persons are removed from the apportionment base. Families bear severe emotional and financial hardships, neighborhoods experience economic and social instability, and entire communities lose their voice in state affairs when fathers, sons, daughters, and mothers are shipped to remote, rural prisons.

7. The Supreme Court has long recognized that variations of ten percent or more in the population of electoral districts raises constitutional concerns under the "one person, one vote" requirements of the Fourteenth Amendment.

8. Because Connecticut counts prisoners where they are incarcerated rather than where they permanently reside, the actual number of constituents (exclusive of prisoners) in as many as nine Connecticut House districts is more than ten percent smaller than the number of

constituents in the State's largest House district. The number of constituents in one Senate District is more than nine percent smaller than the largest Senate district.

9. Permanent residents of the prison-gerrymandered districts thus have more influence over local affairs and greater voting power than residents in other districts, particularly in the urban districts that many prisoners call home.

10. Defendants' prison gerrymandering violates the "one person, one vote" principle of the Fourteenth Amendment to the United States Constitution. It impermissibly inflates the voting strength of predominantly white voters residing in certain Connecticut House and Senate Districts, as compared to the voting strength of persons residing in all other House and Senate districts.

11. By counting prisoners in the districts where they are imprisoned instead of their pre-incarceration residences, prison gerrymandering dilutes the votes of residents in their home communities, who are disproportionally African-American and Latino, as compared to residents in other communities and districts.

12. Plaintiffs seek a declaration that Defendants' prison gerrymandering violates the Fourteenth Amendment to the U.S. Constitution and an injunction against the use of the 2011 Redistricting Plan in the 2020 elections.

## JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357. This suit is authorized by 42 U.S.C. § 1983.

14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Plaintiffs NAACP Connecticut State Conference, Justin Farmer, Germano Kimbro, Conley Monk, Jr., Garry Monk, and Dione Zackery and all Defendants reside in the District of Connecticut, the

facts that give rise to this suit occurred in the District of Connecticut, and no real property is involved in this dispute.

15. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

**PARTIES**

16. Plaintiff National Association for the Advancement of Colored People ("NAACP") is a non-profit, non-partisan corporation with over 300,000 members, including approximately 5,000 members residing in Connecticut, many of whom are registered to vote. Many NAACP members in Connecticut who are registered voters reside in state legislative districts that are overcrowded as a result of prison gerrymandering, as set forth below.

17. The NAACP works to enhance civic engagement among African American communities by increasing voter registration and through get-out-the-vote efforts. In its national get-out-the-vote effort in 2016, the NAACP targeted fifteen states, including Connecticut, which in 2012 had lower than expected African American voter turnout, with a campaign titled "Our Votes Matter." The NAACP relies on a fair and effective electoral process to help achieve its organizational missions of improving civic engagement, education, criminal justice, environmental justice, economic opportunity, and healthcare.

18. Members of the NAACP pay dues, elect the members of the NAACP Board of Directors, and are eligible, if elected, to serve on the NAACP Board of Directors. The NAACP's policies and procedures are established at an annual national convention by voting delegates representing each NAACP State Conference, Local Branch, and Youth Unit, elected by the members of those units.

19. In addition, the NAACP has had to divert organizational resources, including staff time, travel expenses, and other costs, to address unlawful prison gerrymandering in Connecticut.

20. The NAACP brings this action in its representative capacity on behalf of its members who are adversely affected by the unequal population of the legislative districts created by the 2011 Redistricting Plan, and in its organizational capacity.

21. Plaintiff Connecticut State Conference of the National Association for the Advancement of Colored People ("NAACP-CT") is a non-profit, non-partisan organization with nearly 5,000 members, all of whom reside or work in Connecticut, and many of whom are registered to vote. Many NAACP members in Connecticut who are registered voters reside in state legislative districts that are overcrowded as a result of prison gerrymandering, including members that reside in House Districts 88, 91, 94, 95, 96, and 97, among others.

22. NAACP-CT seeks to support the mission of the NAACP by organizing its members in Connecticut to advocate for political, educational, social and economic equality of rights. NAACP-CT devoted its April 2018 conference to criminal justice reform with the opportunity for attendees to meet candidates for Governor of Connecticut.

23. The members of NAACP-CT elect the Executive Committee of the NAACP-CT, and are eligible to serve on the Executive Committee if duly elected. The members of NAACP-CT elect voting delegates to represent NAACP-CT and the NAACP national convention.

24. In addition, the NAACP-CT has had to divert organizational resources to address unlawful prison gerrymandering in Connecticut.

25. NAACP-CT brings this action in its representative capacity on behalf of its members who are adversely affected by the unequal population of the legislative districts created

by the 2011 Redistricting Plan, and in its organizational capacity as well. NAACP-CT has members that reside in House Districts 88, 91, 94, 95, 96, and 97, among others.

26. Plaintiff Justin Farmer is a 23 year-old Jamaican-American resident of Hamden, Connecticut and a duly qualified elector eligible to vote in local, state, and federal elections. He has lived in Connecticut his entire life and currently resides at 231 Butler Street, Hamden, Connecticut. Mr. Farmer is a registered voter in Connecticut State House District 94 and regularly votes in state and local elections. Mr. Farmer is a student at Southern Connecticut State University in the Political Science Department, where he hopes to earn his B.A. in 2020. In 2017, he was elected to the Hamden Legislative Council, the town legislature, representing the Fifth District, which includes some of the poorest and wealthiest residents of Hamden. Mr. Farmer wears headphones to manage his Tourette's Syndrome, a movement disorder, which has contributed to law enforcement stopping Mr. Farmer more than thirty times on the street. Mr. Farmer has close family members who have been incarcerated. He is a member of the NAACP and NAACP-CT.

27. Plaintiff Germano Kimbro is a 58 year-old African-American resident of New Haven, Connecticut and a duly qualified elector eligible to vote in local, state, and federal elections. He has lived in Connecticut his entire life and currently resides at 126 Spring Street, New Haven, Connecticut. Mr. Kimbro is a registered voter in Connecticut State House District 95 and regularly votes in state and local elections. He also regularly participates in voter registration drives and volunteers for local, state and federal campaigns. Mr. Kimbro, a graduate of Springfield College, has worked for decades to reform the criminal justice system. As a young man, Mr. Kimbro was incarcerated, at which point he turned to education and service. Once he returned to the community, Mr. Kimbro dedicated himself to assisting people in overcoming the

stigma of criminal convictions and poverty. He has worked in a variety of human services positions and helped to launch the Pardon Me Program, through which he educated hundreds of Connecticut residents so that they could apply for pardons. He has worked for numerous state legislative reforms, including to establish the Connecticut Fatherhood Initiative (P.A. 99-193), to "Ban the Box" (P.A. No. 16-83), and to limit solitary confinement (P.A. 17-239). He is a member of Just Leadership USA and a lifelong member of the NAACP and NAACP-CT.

28. Plaintiff Conley Monk, Jr. is a 69 year-old African-American resident of Hamden, Connecticut and a duly qualified elector eligible to vote in local, state, and federal elections. He has lived in Connecticut for nearly his whole life, and currently resides at 2360 Shepard Ave in Hamden, Connecticut. Mr. Monk is a registered voter in Connecticut State House District 88, and regularly votes in state and local elections. Mr. Monk is also a Marine Corps combat veteran of the Vietnam War, the Director of the National Veteran's Council for Legal Redress, a Connecticut-based Veterans service organization, and participates in community development through his family organization, the Monk Council. Mr. Monk is a member of the NAACP and NAACP-CT.

29. Plaintiff Garry Monk is a 59 year-old African-American resident of New Haven, Connecticut and a duly qualified elector eligible to vote in local, state, and federal elections. He has resided in Connecticut for more than twenty years, and currently lives at 140 Fountain Terrace in New Haven, Connecticut. Mr. Monk is a registered voter in Connecticut State House District 92, and regularly votes in state and local elections. Mr. Monk is a veteran of the U.S. Air Force and serves as the Executive Director of the National Veteran's Council for Legal Redress, participates in community development through the Monk Council, and is an active member of the Thomas Chapel Church of Christ. Mr. Monk is a member of the NAACP and NAACP-CT.

30. Plaintiffs Conley and Garry Monk are brothers, and have a nephew who was incarcerated in Enfield Correctional Institution. This nephew was supported by the Monk family while incarcerated, and has recently returned to live in New Haven.

31. Plaintiff Dione Zackery is a 49 year-old African-American resident of New Haven, Connecticut and a duly qualified elector eligible to vote in local, state, and federal elections. She currently resides at 1435 Quinnipiac Ave. Unit 5, New Haven, Connecticut. Ms. Zackery is a registered voter in Connecticut State House District 97 and regularly votes in state and local elections. Ms. Zackery has been a registered voter since age eighteen, when she first registered to vote in Connecticut. She has multiple family members who have been incarcerated in Connecticut prisons, including several cousins who are currently incarcerated. Ms. Zackery's former partner, the father of her children, is formerly incarcerated. One cousin resided with Ms. Zackery before entering prison. He has now been released and is living on his own nearby. During the period of his incarceration, they wrote to each other and spoke on the phone. Ms. Zackery is a member of the NAACP and NAACP-CT.

32. Defendant Denise Merrill is a resident of Connecticut and is Connecticut's Secretary of State and Chair of the State Elections Board. She is sued in her official capacity. Secretary of State Merrill is the Constitutional officer of the State charged with publishing the legislative district map and conducting elections in Connecticut in a manner consistent with federal constitutional and statutory requirements.

33. Defendant Dannel P. Malloy is the Governor of Connecticut. He is sued in his official capacity. Governor Malloy is the Constitutional officer of the State charged with appointing Reapportionment Commissions for the purposes of adopting state assembly and senatorial districting plans.

## FACTUAL ALLEGATIONS

### A. *Mass Incarceration and Prison Construction in Connecticut*

34. In recent decades, the United States' incarceration rate has surged. Since the 1970s, the United States penal population exploded from approximately 300,000 to more than 2 million. The United States imprisons more people, per capita, than any other nation.

35. Persons with a felony conviction are more likely to become homeless and lose custody of their children, and less likely to find employment and complete their educations.

36. African Americans and Latinos experience an especially high rate of imprisonment and tend to live in racially and economically segregated neighborhoods. As a result, the social and political effects of imprisonment are focused in their communities.

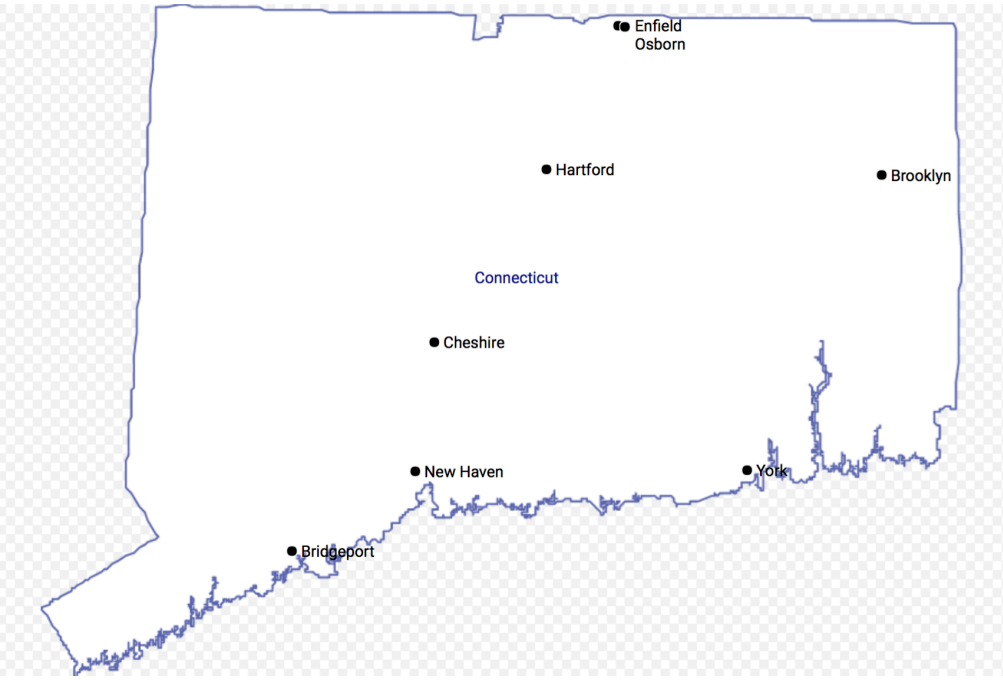
37. Connecticut is no exception. The state has the fifth-highest rate of incarceration of African American men in the country. Whites outnumber African Americans and Latinos by an almost 3-to-1 ratio in the state's general population, but there are twice as many African Americans and Latinos as whites in Connecticut prisons.

38. African Americans in Connecticut are almost ten times more likely to be incarcerated than whites, and Latinos are almost four times more likely to be incarcerated than whites.

39. The problem of prison gerrymandering is particularly severe in Connecticut because of the State's concentration of prisoners at facilities that are significant distances from their home communities.

40. Before 1980, Connecticut maintained correctional facilities at eight sites dispersed across the state, as illustrated in Figure 1.

Prisons in Connecticut Before 1980




41. The prison population in Connecticut increased from 3,828 in 1980 to 18,416 in 2010. This increase coincided with a surge of prison construction and expansion projects in the 1980s and 1990s.

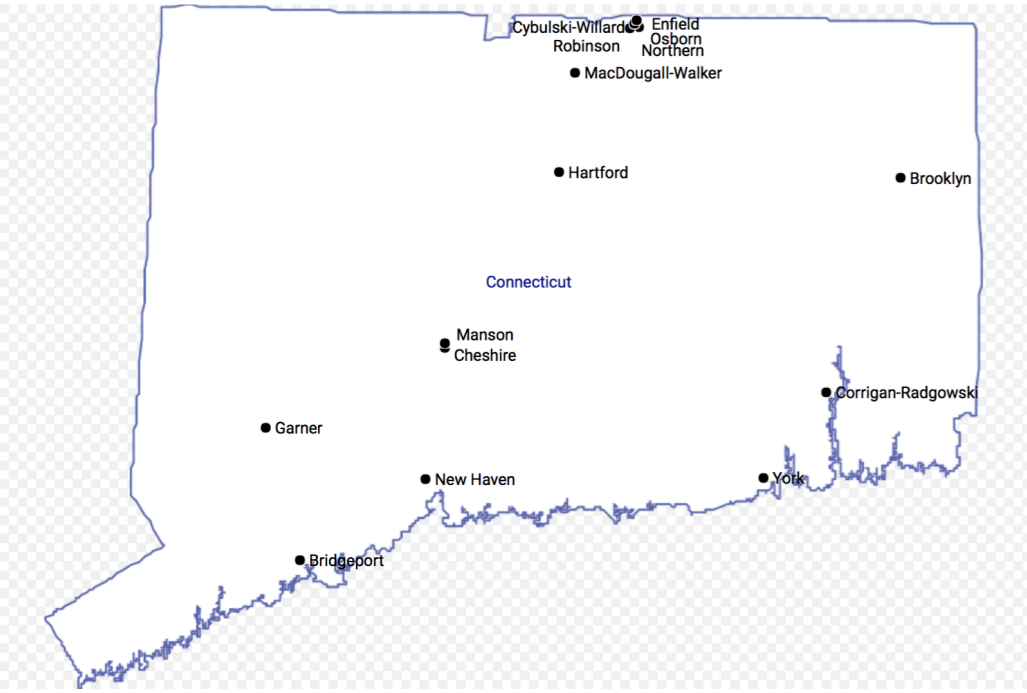
42. Of the twenty-one prison expansion projects Connecticut undertook between 1842 and 2003, fifteen – nearly all – were completed between 1988 and 1998. During this decade, the State expanded seven facilities: Manson Youth Institution, York Correctional Institution, Brooklyn Correctional Institution, Hartford Correctional Center, New Haven Correctional Center, Cheshire Correctional Institution, and MacDougall-Walker Correctional Institution.

43. As Connecticut incarcerated more of its residents over the past three decades, the State concentrated prisons in a few discrete geographic areas whose economies became dependent on these correctional facilities.

44. Out of ten prison expansion projects finished between 1990 and 1997, the State completed half within three adjacent cities—Enfield, Somers and Suffield—along the northern border of central Connecticut, a region that already had three existing prisons.

45. Connecticut's correctional facilities are now even more concentrated in two areas: the Enfield-Suffield-Somers region along the northern border and Cheshire, in the central part of the state. The distribution of correctional facilities as of the 2010 census is set forth in Figure 2.

Prisons in Connecticut in 2010



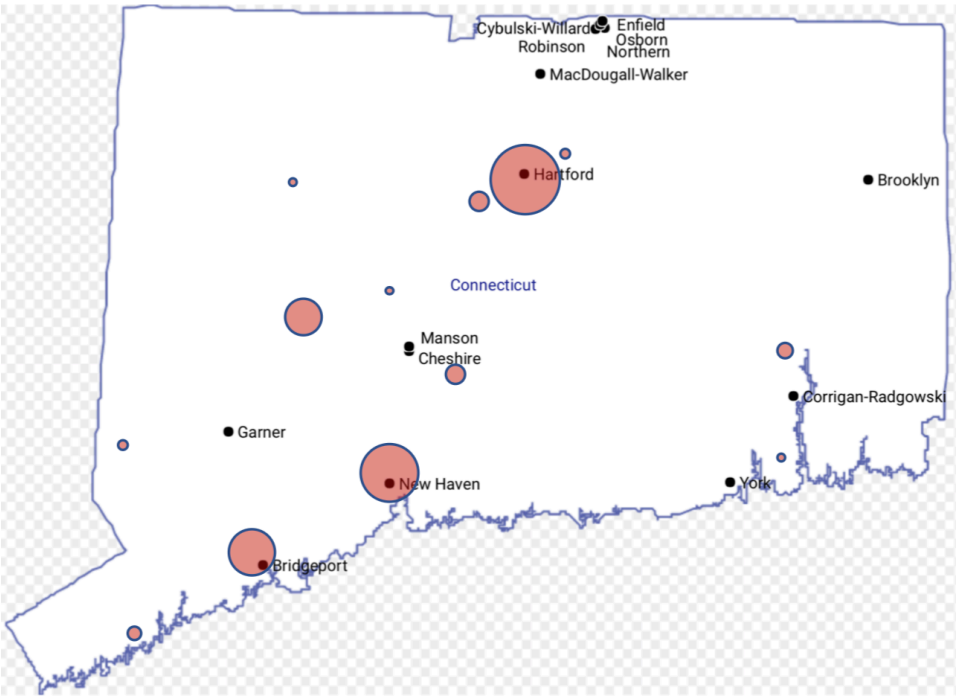

46. The overall prison population has declined during the tenure of Defendant Governor Malloy, but the residual population in the Department of Correction's fourteen currently operating prisons remains concentrated in lightly-populated or rural areas.

47. A large and disproportionate number of Connecticut prisoners are African American or Latino persons who maintained a permanent address, pre-incarceration, in one of

the State's three urban centers of Hartford, Bridgeport, and New Haven and their immediate suburbs.

48. The pre-incarceration addresses of Connecticut's prisoners are illustrated in Figure 3. The sizes of the colored circles correspond to the percentage of Connecticut's prisoners who resided in that particular geographic area immediately prior to incarceration.

Where Incarcerated Residents Lived Prior to Incarceration

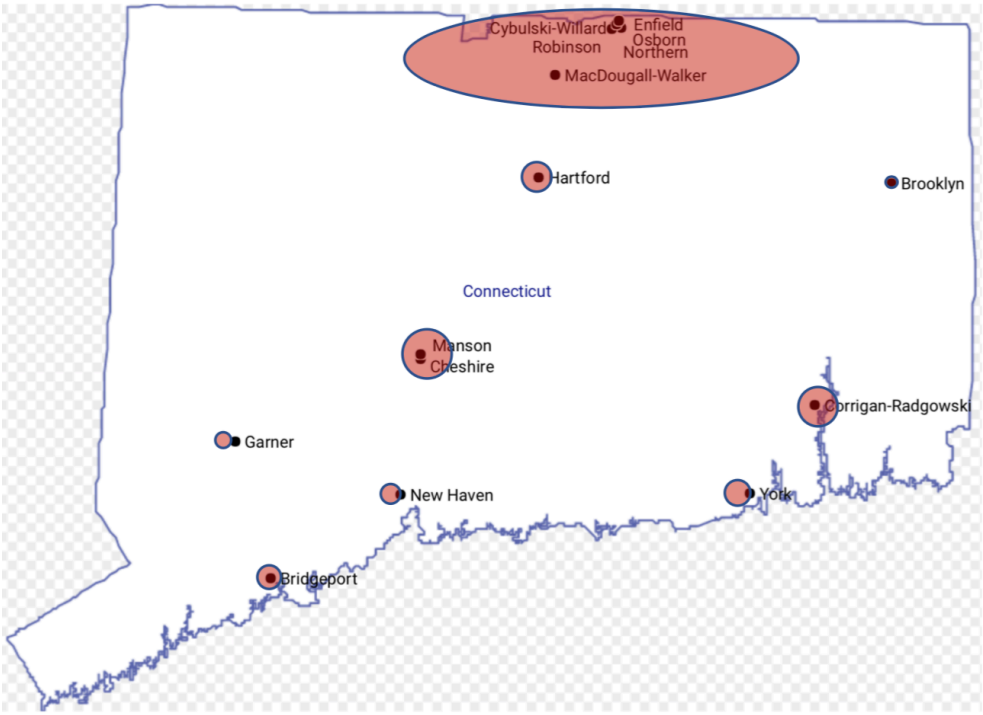



49. Connecticut relocates nearly all of its prisoners to a correctional facility in a rural, predominantly white, lightly-populated area, especially in the Enfield-Somers-Suffield area along the northern border. The State maintains a second concentration of prisoners in the Cheshire area.

50. The siting of prisons in locations far from the urban centers where most prisoners maintained a permanent domicile, combined with a lack of public transportation, creates further hardship for incarcerated people and their families.

51. The location of prisoners by population as of the 2010 census is illustrated in Figure 4. The sizes of the colored shapes correspond to the percentage of incarcerated people who are housed in a prison located in that particular geographic area.

Where Prisoners are Incarcerated




***Prison and District Populations***

52. Hartford Correctional Institution (Hartford) is located in House District 5.

53. York Correctional Institution (East Lyme) is located in House District 37.

54. Corrigan-Radgowski Correctional Center (Montville) is located in House District 42.

55. Osborn Correctional Institution (Osborn) and Northern Correctional Institution (Northern) are located in House District 52.

56. Robinson Correctional Institution (Robinson) and Willard-Cybulski Correctional Institution (Willard-Cybulski) are located in House District 59. Enfield Correctional Institution

(Enfield), which was operational during the 2010 Census and 2011 redistricting plan, and which continued operating until January 23, 2018, is also located in House District 59.

57. MacDougall Walker Correctional Institution (MacDougall-Walker) is located in House District 61.

58. Manson Youth Correctional Institution (Manson) and Cheshire Correctional Institution (Cheshire) are located in House District 103.

59. Garner Correctional Institution (Newtown) is located in House District 106.

60. MacDougall-Walker, Robinson, Enfield, Willard-Cybulski, Osborn, and Northern are all located in Senate District 7.

**B.** ***State Legislative Redistricting in Connecticut***

61. The Connecticut legislature, exercising authority granted by Article III of the state Constitution, appointed a Reapportionment Committee following the 2010 Census.

62. The Reapportionment Committee failed to meet its September 15, 2011 deadline to submit a redistricting plan. Pursuant to Article III of the Connecticut Constitution, Governor Malloy appointed a Reapportionment Commission on October 5, 2011.

63. On November 30, 2011, the Reapportionment Commission unanimously adopted a state legislative redistricting plan and submitted it to Defendant Merrill.

64. The state legislative redistricting plan became effective soon thereafter upon publication by Defendant Merrill. See Conn. Const., Art. 3 § 6(c) ("Upon receiving such plan [from the Reapportionment Commission] the secretary [of state] shall publish the same forthwith, and, upon publication, such plan of districting shall have the full force of law.").

65. According to the Connecticut Department of Corrections, and as counted in the 2010 Census, each prison described in paragraphs 52 through 60 held the following number of incarcerated people in March 2010:

| Facility | Prisoners |
|---|---|
| Hartford | 1,095 |
| York | 2,014 |
| Corrigan-Radgowski | 1,511 |
| Osborn | 1,980 |
| Northern | 356 |
| Robinson | 1,486 |
| Enfield | 724 |
| Willard-Cybulski | 1,164 |
| MacDougall-Walker | 2,137 |
| Manson | 608 |
| Cheshire | 1,494 |
| Garner | 608 |

66. The Connecticut Legislature commissioned a report from the Office of Legislative Research in 2010 that indicated the majority of people incarcerated in these prisons were not residents of the districts in which they were incarcerated.

67. No Connecticut state law requires counting prisoners where they are incarcerated. Counting prisoners where they are incarcerated is a *choice* made by the Reapportionment Commission appointed by Governor Malloy and reflected in the plan published by Defendant Merrill.

68. The Connecticut Legislature has considered legislation mandating that prisoners be counted at their pre-incarceration addresses for reapportionment purposes in its 2011, 2013, 2015, and 2016 legislative sessions. Lawmakers failed to enact legislation in each instance, leaving the 2011 Redistricting Plan unchanged.

69. A significant number of the people incarcerated in Connecticut's fourteen operational prison facilities are ineligible to vote because they have been convicted of a felony. CONN. GEN. STAT. § 9-46 ("persons with a felony conviction [are] not eligible to vote in Connecticut elections").

70. Connecticut statutes treat the few incarcerated people who *are* eligible to vote as residents of their pre-incarceration domiciles and prohibit these voters from claiming residence for voting purposes in the district in which they are incarcerated. CONN. GEN. STAT. §§ 9-14, 9-14a.

71. When combined with the practice of prison gerrymandering, the geographic concentration of prison facilities results in the dilution of the votes of residents in urban voting districts that are overpopulated as compared to districts that contain prison facilities.

72. Because they reside in such overpopulated districts, Plaintiffs Justin Farmer, Germano Kimbro, Conley Monk, Jr., Garry Monk, and Dione Zackery (hereafter "individual Plaintiffs") and members of Plaintiffs NAACP and NAACP- CT (hereafter collectively "the NAACP") have substantially less voting power than residents of at least five State House Districts, and as many as nine House Districts. These include Districts 5, 37, 42, 52, 59, 61, 103, 106, and 108, and Senate District 7 (hereinafter "gerrymandered districts").

73. Data locating prisoners at their exact pre-incarceration addresses is not publicly available. Home district of origin may be approximated, however, using public records detailing the home towns and cities of prisoners at the time of their admission.

74. When district population size is calculated using these prisoner reallocation estimates, nine State House districts (Districts 5, 37, 42, 52, 59, 61, 103, 106, and 108) have more than ten percent fewer people than the most populated House district (District 97).

75. Even when prisoners are removed from the apportionment base rather than counted in their approximate pre-incarceration districts, five House districts (Districts 5, 52, 59, 61, and 103) are more than ten percent smaller than the largest House District (District 88).

76. For every 85 residents in District 59 (which encompasses Robinson, Enfield, and Willard-Cybulski Correctional Institutes), there are over 100 residents in District 97 (located in New Haven). The vote of a District 97 resident thus counts for less than 85% of the vote of a District 59 resident. Similar imbalances occur in the other gerrymandered districts.

77. Because their individual votes count for less, individual Plaintiffs, NAACP members, and their fellow residents must invest greater energy to elect representatives of their choice. Plaintiffs in District 97 have over 15% more doors to knock on, voters to call, and mailings to send if they wish to have an equal influence over the political process as residents of District 59. Because of this increased need for resources, their campaign donations go less far.

78. Because their district is overpopulated in this manner, the influence of individual Plaintiffs' and NAACP members over their representatives is also diluted. For example, District 97 Representative Al Paolillo has 3,751 more constituents than District 59 Representative Carol Hall. Thus, to serve his full body of constituents, Rep. Paolillo must fully listen and respond to 15% more people despite working with the same level of funding, staff, and hours in the day.

79. The Connecticut State House of Representatives has 151 members, and the Connecticut State Senate has 36 members, each of whom is elected by an individual district.

80. The 151 individual House districts each elect one member to the State House of Representatives, and the 36 individual Senate districts each elect one member to the State Senate.

81. The "ideal" district size is defined by the total state population divided by the number of districts.

82. According to Connecticut State's published data after the 2011 redistricting, the ideal House district size is 23,670 residents.

83. The gerrymandered districts, however, have substantially fewer residents than the ideal population, and are thus more than ten percent smaller than the largest state district, District 97.

84. For instance, as of November 2011, District 59 contained only 21,001 residents when prisoners are counted in their home districts. When compared with District 97, which would have a population of approximately 24,752 residents when prisoners are counted in their home districts, the actual number of constituents in District 59 was 15.84% smaller.

85. The following table sets forth the populations and deviation from District 97, the largest district, of other House Districts, including and excluding prisoners:

| **District** | **Population (prisoners counted where incarcerated)** | **Population (prisoners counted in approximate home districts)** | **Deviation from the largest district** |
|---|---|---|---|
| **5** | 23,000 | 22,139 | 11.04% |
| **37** | 23,310 | 21,333 | 14.44% |
| **42** | 23,663 | 22,218 | 10.70% |
| **52** | 23,531 | 21,250 | 14.79% |

| | | | |
|---|---|---|---|
| **59** | 24,314 | 21,001 | 15.84% |
| **61** | 23,448 | 21,330 | 14.45% |
| **103** | 23,005 | 21,543 | 13.56% |
| **106** | 22,971 | 22,382 | 10.01% |
| **108** | 23,531 | 22,234 | 10.64% |

86. The ideal Senate district size is 99,280 residents. Senate District 7 contained 102,622 residents as of 2011.

87. Senate District 7 contained 94,692 residents when incarcerated persons are counted in their home districts. There are 9.53% fewer residents in Senate District 7 than in District 26, the largest Senate district.

88. The most recent census data, based on the 2011-2015 American Community Survey (ACS) five-year estimates, demonstrates that the above discrepancies have worsened based on population changes since district lines were drawn.

89. As a result of the current districting plan, residents of the prison gerrymandered districts possess artificially inflated voting and representational power compared to those in other districts, whereas the people incarcerated in the gerrymandered districts have effectively no representation.

90. For instance, upon information and belief, State Senator John Kissel (S-7) has not visited incarcerated people in any of the five prisons located in his district over his past two terms.

91. The effect is that Connecticut's 2011 Redistricting Plan reflects neither electoral equality nor representational equality.

92. It would have been possible for the Reapportionment Committee or Reapportionment Commission to adjust district boundaries so as to prevent creating nine malapportioned House districts containing prisons, thus safeguarding the principle of one person, one vote, but they did not do so. This remedy would require minor alterations to approximately 30 additional contiguous districts, and can be accomplished without introducing incumbent conflicts.

93. Prison gerrymandering also deprives the state of Connecticut of at least one minority opportunity district. The same districting plan which would restore "one person one vote" also has the effect of raising the Citizen Voting Age Population in House District 14 from 20.2% under the current plan to nearly 45%, thus enhancing the potential for the Connecticut legislature to more accurately reflect the choices of Connecticut's voting population.

94. Plaintiffs are suffering irreparable harm as a result of Defendants' actions, and that harm will continue unless defendants' current practice of counting prison populations for the purpose of apportionment is declared unlawful and enjoined.

95. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief.

## FIRST CAUSE OF ACTION

**(Violation of 42 U.S.C. § 1983 and Equal Protection)**

96. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

97. Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

98. The "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment mandates that each person's vote shall be equal to that of his or her fellow citizens.

99. Defendants' reliance on the incarcerated population in determining the geographic boundaries of House Districts 5, 37, 42, 52, 59, 61, 103, 106, and 108, and Senate District 7 under the 2011 Redistricting Plan inflates the voting strength and political influence of the residents in these districts and dilutes the voting strength and political influence of Plaintiffs and other persons residing outside of these districts, in violation of the Equal Protection requirements of Section 1 of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask this Court to:

1) Exercise jurisdiction over Plaintiffs' claims;

2) Declare that the use of prison gerrymandering in the 2011 Redistricting Plan adopted by Connecticut violates the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;

3) Enjoin Defendants and their agents, employees, and representatives from conducting elections for the Connecticut House of Representatives and Senate under the 2011 Redistricting Plan in the 2020 electoral cycle;

4) In the event Defendants fail or are unable to implement a redistricting plan that comports with the Constitution and laws of the United States, enforce a court-ordered redistricting plan;

5) Award Plaintiffs the expenses, costs, fees, and other disbursements associated with the filing and maintenance of this action, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988;

6) Exercise continuing jurisdiction over this action during the enforcement of its judgment; and

7) Award any other and further relief this Court deems proper and just.

Dated this 28th day of June 2018.

Respectfully submitted,

/s/ Michael J. Wishnie

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*Counsel for Plaintiffs*

* Motion for law student appearance forthcoming
** Motion for admission *pro hac vice* forthcoming

# EXHIBIT B

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP"), NAACP CONNECTICUT STATE CONFERENCE, JUSTIN FARMER, GERMANO KIMBRO, CONLEY MONK, GARRY MONK, DIONE ZACKERY,**
**Plaintiffs,**

**v.** **3:18cv1094 (WWE)**

**DENISE MERRILL, Secretary of State, et al.,**
**Defendants**

**RULING ON MOTION TO STAY**

In this action, plaintiffs NAACP, NAACP Connecticut State Conference, Justin Farmer, Germano Kimbro, Conley Monk, Garry Monk and Dione Zackery bring a constitutional challenge to the legislative Redistricting Plan that Connecticut adopted in 2011; plaintiffs assert this action against the Connecticut Secretary of State and Governor. Plaintiffs seek a declaration that that the Redistricting Plan violates the Fourteenth Amendment to the United States Constitution and seek an injunction against its use in the 2020 elections. Specifically, plaintiffs allege that the legislative Redistricting Plan's "unlawful prison gerrymandering" violates the principle

of "one person, one vote" encompassed by the Fourteenth Amendment.

This Court denied a defense motion to dismiss for lack of jurisdiction and failure to state a claim. Defendants had argued that the action was barred by the Eleventh Amendment due to a failure to allege an on-going violation of federal law. However, this Court held that the complaint stated a plausible on-going violation of the Equal Protection clause. The Court noted: "The instant case implicates the plausible compromise of fair and effective representation due to the Redistricting Plan's reliance upon total population census data when, by state law, incarcerated individuals are not even considered residents of their prison location." The Court concluded that review of the merits of the action was appropriate for summary judgment.

Defendants have filed an interlocutory appeal of this ruling pursuant to the collateral order doctrine. They have requested that the Court stay the action pursuant to the dual jurisdiction rule providing that an interlocutory appeal on immunity grounds "divests the district court of jurisdiction to proceed….unless the district court certifies that the appeal is frivolous." City of New York v. Beretta U.S.A. Corp., 234 F.R.D. 4651 (E.D.N.Y. 2006). Plaintiffs assert that a stay is inappropriate on legal

grounds, and that it is prejudicial in light of the fact that the asserted equal protection violation concerns the 2020 state legislative election. Defendants' appeal may not be resolved quickly, which could hinder plaintiffs' ability to litigate this claim. Plaintiffs seek to proceed with discovery. The Court agrees that a stay should be not granted in this case.

Plaintiffs assert an equal protection challenge to the defendants' redistricting plan, which presents a plausible constitutional challenge. Baker v. Carr, 369 U.S. 186, 237 (1962) (allegations of denial of equal protection present justiciable cause of action). Additionally, the Eleventh Amendment does not bar federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." Green v. Mansour, 474 U.S. 64, 68 (1985); Ex Parte Young, 209 U.S. 123, 160 (1908). The inquiry into whether jurisdiction exists under the exception articulated by Ex Parte Young and its progeny "does not include an analysis of the merits of the claim." Verizon Maryland, Inc. v. Pub. Ser. Comm'n of Maryland, 535 U.S. 635, 645-46 (2002).

Here, defendants' assert that its redistricting practice is authorized on basis of Evenwel v. Abbott, 136 S. Ct. 1120 (2016), which held that a

redistricting map "presumptively complies with the one-person, one- vote rule" if the "maximum population deviation between the largest and the small district is less than 10%" when measured by a facially neutral population baseline. However, defendants' assertion that plaintiffs cannot establish an on-going constitutional violation under this standard requires a decision on the merits. Accordingly, for purposes of considering whether a stay should issue under the dual jurisdiction rule, the Court finds that defendants' appeal on the basis of the Eleventh Amendment is frivolous because plaintiffs have alleged a plausible claim of an on-going equal protection violation seeking prospective relief. Additionally, the Court finds that denial of the stay is appropriate due to consideration of the importance of timely completion of discovery in this case, the likelihood of delay due to the appeal, and importance of the equal protection issues raised by this appeal. See Niken v. Holder, 556 U.S. 418, 434 (2009). The Court will refer this case to Magistrate Judge Spector for a discovery and scheduling conference. The motion to stay is DENIED.

Dated this 8th day of May 2019 at Bridgeport, Connecticut.

/s/Warren W. Eginton
Warren W. Eginton
Senior U.S. District Judge