19-576

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NAACP CONNECTICUT STATE CONFERENCE, JUSTIN FARMER, GERMANO KIMBRO, CONLEY MONK, JR., GARRY MONK, and DIONE ZACKERY,
Plaintiffs-Appellees,

v.

DENISE MERRILL AND DANNEL MALLOY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellee the National Association for the Advancement of Colored People (NAACP) states that it is a not-for-profit corporation organized under the laws of New York.[1] The NAACP has no parent corporation and no publicly traded company owns ten percent or more of its stock. Plaintiff-Appellee the NAACP Connecticut State Conference, the statewide organ of the NAACP in Connecticut, is a non-incorporated association with no outstanding stock.

[1] On March 6, 2019, the NAACP filed a notification of name change with the New York Department of State and is now registered as "NAACP Empowerment Programs, Inc."

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT... vi

STATEMENT OF THE ISSUE viii

INTRODUCTION.. 1

STATEMENT OF THE CASE... 3

The Proceedings Below... 6

SUMMARY OF ARGUMENT... 9

STANDARD OF REVIEW..11

ARGUMENT 12

THIS CASE FALLS SQUARELY WITHIN THE *EX PARTE YOUNG* EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY. 12

A. *Ex parte Young* Controls this Case.................................... 12

B. Defendants Fail to Show that Plaintiffs' Claims Are Frivolous or Insubstantial... 14

1. Plaintiffs' Claims Have a Substantial Basis in Law....... 17

2. The Cases Defendants Rely on Do Not Help Them 22

i. Evenwel.. 23

ii. Davidson 32

iii. Burns and its Progeny.. 33

CONCLUSION..38

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS..39

CERTIFICATION OF SERVICE..40

TABLE OF AUTHORITIES

Cases

Abbott v. Perez, 138 S. Ct. 2305 (2018).. 33

Baker v. Carr, 369 U.S. 186 (1962) 13, 14, 32

Brown v. Thomson, 462 U.S. 835 (1983) 13, 17, 20, 22

Burns v. Richardson, 384 U.S. 73 (1966) ....passim

Calvin v. Jefferson Cnty. Bd. of Comm'rs, 172 F. Supp. 3d 1292 (N.D. Fla. 2016).. 16, 27, 28

Connor v. Finch, 431 U.S. 407 (1977).. 17

CSX Transp., Inc. v. New York State Office of Real Prop. Servs., 306 F.3d 87 (2d Cir. 2002) 11

Davidson v. City of Cranston, 837 F.3d 135 (1st Cir. 2016) ..passim

Davidson v. City of Cranston, 188 F. Supp. 3d 146 (D.R.I. 2016) 16

Davidson v. City of Cranston, 42 F. Supp. 3d 325 (D.R.I. 2014) .. 16

Evenwel v. Abbott, 136 S. Ct. 1120 (2016).............................passim

Ex parte Young, 209 U.S. 123 (1908) ....passim

Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) 29

Franklin v. Massachusetts, 505 U.S. 788 (1992) 30

Frew v. Hawkins, 540 U.S. 431 (2004).. 12

Gaffney v. Cummings, 412 U.S. 735 (1973) 18, 37

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) 14

In re Dairy Mart Convenience Stores, Inc., 411 F.3d 367 (2d Cir. 2005) 13, 15

In re Deposit Ins. Agency, 482 F.3d 612 (2d Cir. 2007) ....passim

Kalson v. Paterson, 542 F.3d 281 (2d Cir. 2008) .... vi, vii, 8

Mahan v. Howell, 410 U.S 315 (1973) ....passim

Miller v. Johnson, 515 U.S. 900 (1995) 37

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) vi

Reynolds v. Sims, 377 U.S. 533 (1964) 17, 21, 28, 33

Rucho v. Common Cause, 139 S. Ct. 2484 (2019) 26, 36

S. New England Tel. Co. v. Glob. NAPs Inc., 624 F.3d 123 (2d Cir. 2010) 15

Shapiro v. McManus, 136 S. Ct. 450 (2015) 16

Stone v. Philbrook, 528 F.2d 1084 (2d Cir. 1975) vii

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 2, 9, 13, 14

Wesberry v. Sanders, 376 U.S. 1 (1964) 31

Statutes and Constitutional Provisions

28 U.S.C. § 2284 .... vi, 7, 8, 10

Conn. Const., art. 3, § 6(c) 3

Conn. Gen. Stat. § 9-14 .... 4, 7, 19, 27

Conn. Gen. Stat. § 9-14a 19

Conn. Gen. Stat. § 9-46 .... 4, 19

Conn. Gen. Stat. § 9-46a 19

N.Y. Correct. Law § 71(8)(a) 31

N.Y. Legis. Law § 83-m(13)(b) 31

Other Authorities

Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol'y Rev. 355 (2011) 29

Nat'l Research Council, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS (Daniel L. Cork & Paul R. Voss eds., 2006) 29

Proposed 2020 Census Residence Criteria and Residence Situations, 81 FR 42577-01 30

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under the collateral order doctrine, which permits immediate appeals of nonfinal orders denying a claim of Eleventh Amendment immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993).

Plaintiffs acknowledge that there is some uncertainty concerning jurisdiction because their challenge to the constitutionality of the apportionment of a statewide legislative body subjects this case to the three-judge district court requirement of 28 U.S.C. § 2284. *See Kalson v. Paterson*, 542 F.3d 281, 286-287 (2d Cir. 2008) (constitutional challenge to state legislative districts must be referred to three-judge district court, even where, as here, no party has requested a referral). In § 2284 cases, a single judge "may conduct all proceedings except the trial" and any single-judge ruling before final judgment "may be reviewed by the full [three-judge district] court," 28 U.S.C. § 2284(b)(3), rather than by a court of appeals. However, this Court has nevertheless exercised jurisdiction over a single-judge ruling

in a § 2284 case where that ruling involves a question raised by this appeal: whether a plaintiff's allegations are "insubstantial." *See Kalson*, 542 F.3d at 288-290 (affirming single judge order dismissing constitutional challenge to state districts). *See also Stone v. Philbrook*, 528 F.2d 1084, 1089 (2d Cir. 1975) ("[T]he court of appeals has jurisdiction when a single judge has only taken action he could properly take.").

<u>**STATEMENT OF THE ISSUE**</u>

Was the District Court correct to conclude that Defendants are not entitled to sovereign immunity, since *Ex parte Young* applies to this constitutional challenge to Connecticut's legislative redistricting plan?

INTRODUCTION

Connecticut's legislative districting plan allocates incarcerated people to the electoral districts where the State confines them, not to the districts where State law says they permanently reside. The NAACP and other plaintiffs brought suit in federal court against Connecticut officials challenging the constitutionality of this practice, commonly known as "prison gerrymandering." The complaint, JA10-31, alleges that Connecticut's prison gerrymandering results in electoral districts with population deviations in excess of ten percent, the "safe harbor" long recognized by the Supreme Court. As a result, the complaint alleges, Connecticut denies equal representation to residents of the state in violation of the Fourteenth Amendment.

Defendants' interlocutory appeal claims Eleventh Amendment immunity in the teeth of *Ex parte Young*, 209 U.S. 123 (1908), and denial by the District Court (Warren W. Eginton, J.) of their Rule 12(b)(1) and 12(b)(6) motions, JA35-46. Defendants' sole argument is that Plaintiffs' constitutional claim is wrong—which is not enough for them to win at this stage, since

"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, 646 (2002). Defendants' only hope is to show that Plaintiffs' claims are "frivolous or insubstantial." *In re Deposit Ins. Agency,* 482 F.3d 612, 621 (2d Cir. 2007). But Plaintiffs sufficiently allege that Connecticut's allocation of incarcerated people to districts where they do not reside or receive political representation unconstitutionally distorts the state legislative map.

STATEMENT OF THE CASE

In June 2018, Plaintiffs—the NAACP, its Connecticut State Conference, and five individuals—brought suit against Connecticut Secretary of the State Denise Merrill and then-Governor Dannel Malloy in their official capacities seeking an injunction against using Connecticut's state legislative map for future elections because the state's practice of prison gerrymandering makes the map unconstitutional. JA10.

The state legislative map that Plaintiffs challenge was adopted by Defendants in 2011. JA23, ¶¶ 63-64. Governor Malloy appointed a Reapportionment Commission, which formulated and submitted a redistricting plan to Secretary of the State Merrill. *Id.*, ¶¶ 62-63. Soon thereafter, the plan became effective upon publication by Secretary Merrill. *Id.*, ¶ 64; *see also* Conn. Const., art. 3, § 6(c). The complaint makes the following allegations, which are assumed to be true for purposes of the Rule 12(b)(1) and 12(b)(6) motion:

The Reapportionment Commission chose to count incarcerated people in the towns where their prisons are located.

JA24, ¶ 67; JA29, ¶ 92. No federal or state law required it to do so. *Id.* On the contrary: Connecticut's electoral law provides that no person is deemed to have lost his or her residence in a town by reason of that person's "absence therefrom in any institution maintained by the state." Conn. Gen. Stat. § 9-14.

Although incarcerated people are counted in the districts where they are held in custody, they are not actually represented there. JA11, ¶¶ 4-5; JA28, ¶ 90. Incarcerated people typically have no contact with their prison district's elected representatives, who neither visit nor perform constituent services for them. *Id.* Most incarcerated people are stripped of the right to vote, but those who *are* eligible to vote can cast ballots only in the districts where they permanently reside, not in the districts where they are incarcerated. *See* Conn. Gen. Stat. §§ 9-46, 9-14. Incarcerated people are not only forcibly relocated to prison locations but also — and uniquely among types of transient residents — physically isolated by state command from the residents and towns where they are incarcerated. They cannot visit or patronize public or private establishments; they neither drive on the district's roads

nor send their children to the district's schools. JA11, ¶¶ 4-5. For these reasons, incarcerated people are not in any meaningful sense residents or constituents of the electoral districts where they are incarcerated. They are phantom constituents.

The result of this misalignment is a map that fails to satisfy the constitutional requirement that Connecticut's electoral districts be roughly equal in population. When incarcerated people are appropriately counted at what state law says is their home, rather than in their districts of incarceration, nine State House districts are severely underpopulated with at least 10% fewer people than the most populated House district. JA26, ¶ 74. Moreover, after properly allocating incarcerated people to their pre-incarceration districts, at least six districts, in the cities of New Haven, East Haven and Hamden, are overpopulated. JA14, ¶ 21.

Prison gerrymandering artificially inflates the representational power of the predominantly white permanent residents of the rural electoral districts containing prisons. JA21,

¶ 49; JA28, ¶ 89.[2] At the same time it artificially deflates the representational strength of all other Connecticut residents, especially those in the state's urban and predominantly Black and Latino communities. In Connecticut, Latinos are almost four times more likely to be incarcerated than whites and African Americans are almost *ten times* more likely to be incarcerated than whites. JA18, ¶ 38. Prison gerrymandering thus compounds the political, economic, and social hardships that Black and Latino families endure when their fathers, sons, daughters, and mothers are sent to remote, rural prisons. JA11, ¶ 6; JA12, ¶ 11; JA21, ¶ 50.

The Proceedings Below

Plaintiffs brought this case on June 28, 2018. JA10. Defendants moved to dismiss the complaint before discovery or answering the complaint, JA32-JA34.

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[2] The concentration of incarcerated people in rural parts of the state is a product of Connecticut's history of prison construction. Nearly all of the state's prison-development projects were completed in the 1980s and 1990s, a time during which the prison population increased five-fold. JA19, ¶¶ 41-43. When building these facilities, the state chose to concentrate them in two areas: the Enfield-Suffield-Somers region along the northern border and Cheshire, in the central part of the state. JA20, ¶ 45.

The District Court denied the motion. JA35. The Court's February 2019 order explained that under *Ex parte Young,* "federal courts have jurisdiction to consider constitutional challenges to state legislative redistricting plans," JA42, and that it "ha[d] jurisdiction over the plausibly alleged ongoing violation of federal law." JA46. The Court observed that "[t]he instant case may be distinguishable from" the Supreme Court's ruling in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), since Connecticut's method of counting incarcerated people "plausibl[y] compromise[s] . . . fair and effective representation." JA45-46. The Court placed special emphasis on the fact that incarcerated people are not considered residents of their prison location under state law. JA46 (citing Conn. Gen. Stat. § 9-14).

Defendants then filed this interlocutory appeal, JA47, and simultaneously moved to stay proceedings in the District Court. *See* Dist. Ct. Dkt. No. 29. While the stay motion was pending, Plaintiffs advised the District Court that although no party had requested empaneling of a three-judge district court, this case is likely subject to the requirement of 28 U.S.C. § 2284(a) ("A district

court of three judges shall be convened . . . when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body”). Dist. Ct. Dkt. No. 39 (citing *Kalson v. Paterson*, 542 F.3d 281 (2d Cir. 2008) (three-judge district court must be empaneled even if not requested by party)).[3]

The District Court denied Defendants’ stay motion, holding that their appeal to this Court “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.” JA52 (emphasis added). Defendants renewed their request for a stay pending appeal before this Court, which granted the request on July 15, while ordering that the appeal be expedited. Dkt. 68. The Court then truncated the briefing schedule, Dkt. 72, and calendared argument for September 10, 2019. Dkt. 78-1.

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[3] Under the statute, a single judge “may conduct all proceedings except the trial.” 28 U.S.C. § 2284(b)(3). Judge Eginton was thus authorized to deny the motion to dismiss and request for a stay. The same statute, however, prohibits a single judge from “enter[ing] judgment on the merits.” *Id.* On remand, a three-judge district court must be convened even in the absence of a request by a party. *Kalson*, 542 F.3d at 286-287.

SUMMARY OF ARGUMENT

Defendants face an impossibly high bar on their interlocutory appeal. For more than a century, it has been settled law that the Eleventh Amendment does not bar suits, like this one, against state officials for prospective injunctive relief from alleged violations of the federal constitution. Challenges to state redistricting that meet these criteria have been allowed in federal courts for more than fifty years.

Defendants seek to avoid a textbook application of *Ex parte Young* by making merits arguments that are at this stage entirely inapposite. Sovereign immunity questions involve only a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md.*, 535 U.S. at 645 (internal citations omitted). An "appellant's belief in the nonexistence of a federal law violation simply does not speak to whether suit lies under *Ex parte Young*, because ordinarily an *allegation* of an ongoing violation of federal law is sufficient for purposes of the *Young* exception." *In re Deposit Ins. Agency,* 482

F.3d 612, 621 (2d Cir. 2007) (internal citations and quotations omitted). Defendants will have ample opportunities to rebut the substance of Plaintiffs' claims, but now is not the time.

Defendants' position that the Eleventh Amendment bars this suit requires them to show not only that the District Court was wrong to rule, twice, that the complaint adequately alleges an equal protection violation, but also that Plaintiffs' claims are "frivolous or insubstantial." *Deposit Ins.,* 482 F.3d at 621.[4]

Defendants cannot come close. The complaint alleges that several Connecticut House districts approach appropriate population size only by including incarcerated people who are forcibly relocated and then barred by Connecticut law from attaining residency in the district, who cannot vote in the district, who have virtually no access to elected representatives in the district, and who are prohibited by the state from forming community ties or using public services within the district. While imprisoned, their bodies are used by the state as ghost constituents to inflate the political power of residents in districts

[4] And as noted, only a three-judge district court, not a single judge, may "enter judgment on the merits." 28 U.S.C. § 2284(b)(3).

containing prisons and to debase the voting power and representation of all other Connecticut residents. These deviations exceed the ten percent "safe harbor" recognized by the Supreme Court. There is nothing frivolous or insubstantial in Plaintiffs' allegations that Connecticut is committing an ongoing violation of the equal representation command of the Fourteenth Amendment, which is why the District Court and other federal courts have uniformly allowed such claims to proceed.

STANDARD OF REVIEW

Whether state officials are immune from suit under the Eleventh Amendment is a legal determination that this Court reviews *de novo. See CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 94 (2d Cir. 2002). When an appellate court "reviews the legal merits of a claim for purposes of *Ex parte Young,* it reviews only whether a violation of federal law is *alleged*; appellate review of allegations is necessarily deferential, and only frivolous and insubstantial claims will not survive its scrutiny." *Deposit Ins.*, 482 F.3d at 623.

ARGUMENT

THIS CASE FALLS SQUARELY WITHIN THE *EX PARTE YOUNG* EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY.

A. *Ex parte Young* Controls this Case

The Eleventh Amendment allows suits for prospective injunctive relief against state officials acting in their official capacity for ongoing violations of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *see also Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("To ensure the enforcement of federal law . . . the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.").

Plaintiffs have brought such a suit. They have sued Connecticut's Governor and Secretary of the State in their official capacities. JA17, ¶¶ 32-33. They allege an ongoing violation of the federal constitution in that Defendants' continued use of a malapportioned legislative map violates the equal representation commands of the Fourteenth Amendment. *See* JA28, ¶ 91. This violation remains ongoing so long as the unconstitutional map remains the basis for Connecticut elections. *See* Dist. Ct. Dkt. No.

21 at 25-26. And Plaintiffs have requested only prospective relief: a declaratory judgment and an injunction requiring Defendants to adopt a new districting map for future elections. JA30.[5]

The *Ex parte Young* exception has allowed federal courts to hear similar constitutional challenges to state legislative maps for over fifty years. *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). It has done so even in cases where the plaintiffs' claims did not have obvious precedential support and were eventually rejected on the merits. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (suit against Texas Governor and Secretary of State challenging the allocation of legislative districts based on total population); *cf. Verizon Md.*, 535 U.S. at 646 (claims should be allowed under *Ex parte Young* even when the challenged state

[5] *Ex parte Young* will not apply in two circumstances, neither of which is present here: the existence of "a comprehensive remedial scheme [devised by Congress] that prevents the federal courts from fashioning an appropriate equitable remedy," and the presence of "certain sovereignty interests . . . [such as] when the administration and ownership of state land is threatened," *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005).

action is "probably *not* inconsistent with federal law after all.").[6] The District Court acknowledged these settled principles in ruling that the *Ex parte Young* exception applies here. JA36, JA41; JA51-52.

B. Defendants Fail to Show that Plaintiffs' Claims Are Frivolous or Insubstantial

Defendants cannot dispute that that Plaintiffs seek prospective injunctive relief against an ongoing alleged constitutional violation by state officials. Instead, they dispute the merits of Plaintiffs' claims, *see* Appellants Brief ("App. Br.") at 14-43, even though the Supreme Court and this Court have repeatedly held that the merits of a plaintiff's allegation are irrelevant to the sovereign immunity analysis. *See Verizon Md.*, 535 U.S. at 646 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("An allegation of an ongoing violation of federal law where the

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[6] Indeed, in *Baker*, the Supreme Court reversed its prior holdings that the constitutionality of unevenly populated legislative districts was a nonjusticiable political question, 369 U.S. at 209, 237.

requested relief is prospective is ordinarily sufficient to invoke" the *Ex parte Young* exception); *In re Deposit Ins. Agency,* 482 F.3d 612, 623 (2d Cir. 2007) (An "appellant's belief in the nonexistence of a federal law violation simply does not speak to whether suit lies under *Ex parte Young*.") (internal citations and quotation marks omitted). Most of Defendants' attack on the merits of the claims is thus simply inapposite.

Defendants' only hope is to show that Plaintiffs' claims are "frivolous or insubstantial," *Deposit Ins.*, 482 F.3d at 621. But "[a] federal claim is not 'insubstantial' merely because it might ultimately be unsuccessful on its merits." *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 133 (2d Cir. 2010); *cf. In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 374 (2d Cir. 2005) (cursory review sufficient to determine that claims survived immunity challenge because they were "neither insubstantial nor frivolous"). The Supreme Court has emphasized that the requirement that a claim be "substantial" for purposes of invoking federal jurisdiction is a "low bar," and that "constitutional insubstantiality" has been equated to "such concepts as

'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (citations omitted).

Moreover, as this Court has observed, it would be "a doubtful proposition at best" to consider claims "frivolous or insubstantial" when "after thorough and careful briefing on the issue, [multiple] federal judges arrived at opposite conclusions." *Deposit Ins.*, 482 F.3d at 621. Here, each federal district court that has considered "one-person, one-vote" challenges to prison gerrymandering has allowed the plaintiffs to proceed past the pleadings stage.[7]

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[7] In addition to the District Court, *see* JA46; JA52, two other Federal District Courts have found plausible similar arguments that prison gerrymandering violates the Fourteenth Amendment. *See Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) (awarding summary judgment to plaintiffs in challenge to school-board districting because the inclusion of prisoners in one district diluted representational and voting strength of voters of other districts); *Davidson v. City of Cranston, R.I.*, 42 F. Supp. 3d 325 (D.R.I. 2014) (denying motion to dismiss challenge to a municipal districting scheme that counted inmates as residents of the city ward containing a prison); *Davidson v. City of Cranston*, 188 F. Supp. 3d 146 (D.R.I. 2016), *rev'd* 837 F.3d 135 (1st Cir. 2016) (awarding summary judgment to plaintiffs in same case). The First Circuit's reversal in *Davidson* does not change that three federal courts have found "one-person, one-vote" challenges to prison gerrymandering substantial enough to proceed to the merits.

In any event, Plaintiffs have plausibly alleged a case of unconstitutional districting that is supported, not undercut, by Supreme Court precedent. Although Plaintiffs need not, at this stage, prove that their claims are ultimately correct, a review of the significant legal bases for their claims demonstrates that they are neither frivolous nor insubstantial.

1. Plaintiffs' Claims Have a Substantial Basis in Law

Legislative maps must satisfy "the fundamental principle of representative government in this country," which is "equal representation for equal numbers of people." *Evenwel*, 136 S. Ct. at 1131 (quoting *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964)). That rule obliges states to draw legislative districts of equal population, or at least "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. Under this guarantee, deviations of ten percent or more between the populations of the largest and smallest electoral districts trigger close judicial scrutiny and subject the state to a high burden of justification. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977).

Although a state normally satisfies its representational equality obligations by drawing districts to contain equal numbers of inhabitants, *Evenwel*, 136 S. Ct. 1120, relying on raw Census data to determine *where* people reside is not necessarily sufficient. For example, in *Mahan v. Howell*, 410 U.S 315 (1973), the Supreme Court affirmed a district court's order invalidating a legislative district on the ground that only half the U.S. Navy personnel allocated to the district were *bona fide* constituents there. *Id.* at 330-31. Virginia had defended its legislative map on the ground that the State's redistricting was based on Census data, but the Supreme Court found that justification inadequate. *Id.* at 331-332. Including temporarily stationed military personnel as part of the total population in those districts resulted in "significant population disparities" in violation of the principle of "one person, one vote." *Id.* at 332. As Judge Eginton observed here, *see* JA44-45, the Supreme Court has noted that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge" other important factors necessary to support "fair and effective representation." *Gaffney v. Cummings*,

412 U.S. 735, 749 (1973). A state is constitutionally obligated to modify Census data when failing to do so would compromise equal representation. *Id.*

Connecticut's prison-gerrymandered legislative map, which allocates incarcerated people as phantom constituents in electoral districts where they are not represented by the district's legislators, offends the requirement of "equal representation for equal numbers of people," *Evenwel*, 136 S. Ct. at 1131. Several Connecticut House districts approach the appropriate population size only by including incarcerated people who are legally barred from attaining residency in the district, *see* Conn. Gen. Stat. §§ 9-14, 9-14a; who cannot vote in the district, *see* Conn. Gen. Stat. §§ 9-46, 9-46a; who have virtually no access to elected representatives in the district, *see* JA28, ¶ 90; and who are barred by the government from forming community ties or using public services within the district, *see* JA11, ¶¶ 4-5.

Because incarcerated people are not meaningfully represented in their districts of incarceration, every legislator from a prison district has significantly fewer *bona fide*

constituents than other legislators, giving those constituents increased voting power and access to their elected representatives. JA26, ¶¶ 76-78. In turn, everyone else in Connecticut receives a smaller share of political representation than the permanent residents of prison districts. *See, e.g.*, JA26, ¶76 (for every 85 *bona fide* residents of House District 59, which encompasses three prisons, there are over 100 residents of House District 97 in New Haven). This misalignment causes precisely the "debasement of voting power and diminution of access to elected representatives" that the Fourteenth Amendment forbids. *Evenwel*, 136 S. Ct. at 1131 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). Residents of Connecticut's urban, predominantly Black and Latino communities, from which disproportionate numbers of people are incarcerated, are especially deprived of voting power and access to elected representatives. JA25-26, ¶¶ 71-78.

Connecticut's legislative districts deviate from representational equality to a significant enough extent that defendants must justify these deviations under law. *See Brown*, 462 U.S. at 842-43. After properly counting incarcerated people in

the communities state law defines as home, rather than where they are temporarily and involuntarily located by the State, there are substantial and unjustified deviations between the sizes of Connecticut's legislative districts, in violation of the Fourteenth Amendment's equal population mandate. JA11-12, ¶ 8.

When prisoners are counted at their permanent residence, nine House Districts are revealed to be at least ten percent less populous than the largest House District. JA26, ¶ 74. Deviations that large can occasionally be acceptable when they are "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 577, 579. But whether Connecticut's deviations are "based on legitimate considerations" can be resolved only after Defendants identify the considerations

they rely on and Plaintiffs have had the opportunity to test the justifications and supporting evidence, if any, in discovery.[8]

2. The Cases Defendants Rely on Do Not Help Them

Defendants characterize the above arguments as "insubstantial," App. Br. at 12, but the legal authorities they cite do not support that proposition. Defendants rely on *Evenwel*, but as Judge Eginton recognized, JA45-46, that case is distinguishable both on the facts and on the question it sought to answer. Defendants also point to the First Circuit's decision in *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016), but a single out-of-circuit case, which like *Evenwel* answers a different question than

[8] Defendants are wrong that "discriminatory intent indisputably is a necessary element of every one person, one vote claim." App. Br. at 12. That interpretation is contrary to the Supreme Court's holding in *Mahan,* 410 U.S. at 315, which invalidated a district malapportioned due to the assignment of Navy personnel to the address where they were home-ported, although there was no showing of intentional discrimination. The injury is an insufficiently justified disparity in representation, irrespective of the legislature's motives. When a map results in "significant disparities" between districts that exceed the 10% threshold, as Plaintiffs allege here, the burden is on the state to justify those disparities. *Brown*, 462 U.S. at 842-43 (apportionment plans resulting in population disparities above 10% create a prima facie case of discrimination to be justified by the state). Defendants have not tried to do so; they have only said they do not need to.

the one presented here, cannot be enough to render a case in this Circuit "frivolous" or "insubstantial." Finally, Defendants suggest that *Burns v. Richardson*, 384 U.S. 73 (1966) means that courts may not review the legislature's choice to allocate prisoners to the electoral districts where they are incarcerated. App. Br. at 20-26. But for more than fifty years, the Supreme Court has held that challenges to state action yielding legislative malapportionment are justiciable.

Plaintiffs address these cases in turn.

i. Evenwel

Defendants argue that after *Evenwel*, "a state's compliance with one person, one vote should be measured 'solely by the number of inhabitants' in each district." App. Br. at 14 (quoting *Evenwel*, 136 S. Ct. at 1129). In Defendants' telling, *see* App. Br. at 10, *Evenwel* now provides states *carte blanche* to draw districts composed of equal raw population totals, without regard to whether individuals are misallocated in a way that undermines the "equitable and effective representation" that *Evenwel* demands. 136 S. Ct. at 1132.

But *Evenwel* answered an altogether different question from the one presented here. *Evenwel* concerned *whether* certain non-voting classes of residents could be counted in Texas' apportionment baseline, rather than *where* in the state such residents must be counted. Plaintiffs do not challenge Connecticut's decision as to *whether* to include incarcerated people in the population baseline, which is the only issue on which *Evenwel* is relevant. Instead, Plaintiffs challenge *where* Connecticut counts them. Nowhere does *Evenwel* say that states may blindly follow what the decennial Census count reports as to *where* someone resides. And *Evenwel* certainly does not give permission for a state to skew representation by legal fiat, moving some populations for redistricting purposes from the location the state otherwise recognizes as their legal residence.

The relevant Supreme Court case regarding *where* to count people for state redistricting purposes is not *Evenwel* but *Mahan v. Howell*, which invalidated a Virginia state districting plan that relied on unmodified census data to assign Navy personnel based on their home-port address rather than their permanent

residence. 410 U.S. at 330-32. Reading *Evenwel* in light of *Mahan* leads to the conclusion that states are not free to define the location of its inhabitants in a manner that diminishes meaningful equal representation for its residents.

Moreover, as the District Court correctly observed, the underlying logic of *Evenwel* cuts squarely against counting incarcerated people where they are imprisoned but not in fact represented. *See* JA45-46 ("The instant case may be distinguishable from *Evenwel* . . . [since it] implicates the plausible compromise of fair and effective representation."). An important reason the *Evenwel* Court approved Texas's districting plan was that "representatives serve all residents, not just those eligible or registered to vote." *Evenwel*, 136 S. Ct. at 1132. Groups of residents categorically denied the franchise, like minors and non-citizens, nonetheless "have an important stake in many policy debates" and in "receiving constituent services." *Id.* Accordingly, the Constitution does not require electoral districts to contain equal numbers of eligible voters, but rather for "each representative [to] be accountable to (approximately) the same

number of constituents." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

But the discussion of "nonvoters" in *Evenwel* is simply inapplicable to incarcerated people, who for reasons that go beyond their disenfranchisement cannot fairly be considered "constituents" of the districts in which they are incarcerated. As the complaint alleges, unlike the free nonvoting groups *Evenwel* describes, incarcerated people are not meaningfully represented by their prison district legislators. JA11, ¶¶ 4-5; JA28, ¶ 90. Incarcerated people cannot interact with their prison district's representatives, who do not visit or communicate with them. *Id.* Incarcerated people do not receive constituent services, cannot use local municipal or state services or send their children to local schools, and do not have an "important stake" in local political outcomes in towns like Enfield and Suffield. JA11, ¶¶ 4-5. They are forcibly separated from and enjoy no meaningful connection to the communities where they are incarcerated. JA11, ¶¶ 4-5; JA28, ¶ 90. By contrast, incarcerated individuals *do* have a stake in local policy debates in their home districts, where state law still deems

them residents. JA46 (citing Conn. Gen. Stat. § 9-14). Defendants' choice to count incarcerated people in districts where they are not effectively represented thus undermines the "equitable and effective representation" that *Evenwel* demands. 136 S. Ct. at 1132.

In response, Defendants turn to a slippery slope argument. They warn that a holding that incarcerated people are not *bona fide* constituents of their prison districts would invite the federal courts to make "subjective and fact intensive judgments about what types and levels of political interest are sufficient to make somebody an 'actual' constituent of a district." App. Br. at 31. Incarcerated people in Connecticut, however, are in a class of their own. They are involuntarily held far from their legal homes, disenfranchised, and physically isolated by government command. This combination makes them different from "every other kind of temporary resident." App. Br. at 35. Accordingly, a judicial ruling correcting Connecticut's misallocation of incarcerated people away from their home districts would be properly limited. *See Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1324 (N.D.

Fla. 2016) ("I am convinced that the slope ahead is not so slippery [because of] the fact that we are dealing with prisoners. Prisoners are not like minors, or resident aliens, or children—they are separated from the rest of society and mostly unable to participate in civic life.").[9]

Also unlike *Evenwel*, the question of how to treat incarcerated people in redistricting is not answered by "constitutional history," 136 S. Ct. at 1127-30, and Connecticut's answer is not a "settled practice" followed by "all States," 136 S. Ct. at 1132-34. The Census Bureau's choice to count incarcerated

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[9] The court in *Calvin* found unconstitutional a county-level prison gerrymandering scheme, and noted in passing that the result might have been different if the challenge were to state legislative districts. 172 F. Supp. 3d at 1324. However, prison gerrymandering at the state level more fundamentally offends the Supreme Court's equal representation jurisprudence. Those cases served to remedy state failures to reapportion their legislatures to account for rapid population growth in urban areas, which unfairly gave rural constituents inflated power. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated."). Plaintiffs likewise allege that Defendants' state-level prison gerrymandering causes an artificial shift in political representation from the State's cities to its rural areas. JA19-21, ¶¶ 41-49.

people where they physically reside is not a uniform historical practice. The current practice of counting incarcerated people at their physical location for the Census began in 1910. In the 1900 Census, the first to mention counting incarcerated people, the examiners' instructions said

> [M]any prisoners are incarcerated in a state or county of which they are not permanent residents. In every case, therefore, enter the name of the county and state in which the prisoner is known, or claims, to reside. . . . [I]f they have some other permanent place of residence, write it in the margin of the [population] schedule on the left-hand side of the page.

Nat'l Research Council, ONCE, ONLY ONCE, AND IN THE RIGHT PLACE: RESIDENCE RULES IN THE DECENNIAL CENSUS 84-85 (Daniel L. Cork & Paul R. Voss eds., 2006). *See also* Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol'y Rev. 355, 371-372 (2011).

Today, the Census Bureau acknowledges that its choice to count incarcerated people at their prison locations is based on administrative – not legal – considerations. *See, e.g.*, *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 895 (D. Md. 2011) ("According to the Census Bureau, prisoners are counted where they are

incarcerated for pragmatic and administrative reasons, not legal ones."). And the Bureau provides states with the necessary data to reallocate incarcerated people when drawing legislative districts.[10] As the Supreme Court has recognized, the term "usual residence," as used in the Census, "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place," and it had a broad meaning at the time of the Founding. *Franklin v. Massachusetts*, 505 U.S. 788, 804-805 (1992) (affirming the Secretary of Commerce's judgment that overseas federal workers should be allocated to the states for enumeration).[11]

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[10] The Census Bureau has recognized that "some states have decided . . . to 'move' their prisoner population back to the prisoners' pre-incarceration addresses for redistricting," and now "offer[s] a product . . . to assist them in their goals of reallocating their own prisoner population counts," removing any practical barriers states may face in ending prison gerrymandering. Proposed 2020 Census Residence Criteria and Residence Situations, 81 FR 42577-01.

[11] Relying on enduring ties rather than mere physical presence for overseas federal workers, the Supreme Court explained, "[did] not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promote[d] equality." *Id.* at 806.

Moreover, states and localities, including governments within the Second Circuit, differ in how they treat individuals who are incarcerated in their decennial redistricting processes. *See, e.g.*, N.Y. Correct. Law § 71(8)(a); N.Y. Legis. Law § 83-m(13)(b) (ending prison gerrymandering in New York State). These changes have been brought about, in part, because the rapid growth of prison populations and the accompanying prison construction boom have in some states artificially shifted political power from urban to rural areas and thus made this issue more relevant.

It is possible that before the age of mass incarceration Connecticut's choice to rely on prisoners' mere physical presence had no meaningful impact on the representational equality of the state's residents. Plaintiffs adequately allege that today, however, the continued use of prison gerrymandering results in unevenly populated districts with disparities that are intolerable violations of representational equality. Accordingly, this Court has jurisdiction to determine whether this practice is unconstitutional. *See Evenwel*, 136 S. Ct. at 1123-24; *Wesberry v. Sanders*, 376 U.S.

1, 6 (1964) (rejecting argument that reapportionment is committed exclusively to legislative discretion when doing so would "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction"); *Baker*, 369 U.S. at 191-92.

ii. Davidson

The First Circuit's decision in *Davidson v. Cranston*, 837 F.3d 135 (1st Cir. 2016) is similarly inapposite. For this interlocutory appeal, it is enough to say that *Davidson* is a single out-of-circuit case; it is not binding and can hardly foreclose Plaintiffs' claims or render them "frivolous" or "insubstantial" for the purposes of the sovereign immunity inquiry. It is also readily distinguishable. As with *Evenwel*, *Davidson* concerned *whether,* not *where,* inmates should be counted in the City of Cranston's apportionment base. *Davidson*, 837 F.3d at 146 ("The Constitution does not require Cranston to *exclude* the ACI inmates from its apportionment process.") (emphasis added). But Plaintiffs request no such remedy in this case, asking only that incarcerated people

be properly allocated to the electoral districts where Connecticut law already deems them genuine residents.

Davidson was also a case about municipal prison gerrymandering, whereas here Connecticut is counting incarcerated people as ghost constituents of state legislative districts. As a controversy about local municipal districts, *Davidson* did not involve one of the Supreme Court's chief concerns in its "one person, one vote" cases: protecting urban and suburban residents from the inflated political influence of rural residents, a concern that arises specifically in statewide cases. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. at 567 n.43 (noting that statewide "legislative apportionment controversies are generally viewed as involving urban-rural conflicts," and that generally there is an "underrepresentation of urban and suburban areas.").

iii. Burns and its Progeny

Defendants argue that their choice to allocate incarcerated people to their prison districts was a decision "exclusively for the legislature to make." App. Br. at 20 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). They particularly rely on *Burns v.*

Richardson, 384 U.S. 73 (1966), to argue that the decision whether to count transient residents in a state's apportionment base is one of those "fundamental choices about the nature of representation" that are reserved to the "political and legislative process," and with which courts have "no constitutionally founded reason to interfere." *Id.* at 92; App. Br. at 2-3.

Defendants' reliance on *Burns* is misplaced in this context. *Burns* itself demonstrated the propriety of judicial intervention: not only did the Supreme Court hear the question, it approved the state's apportionment "only because on [that] record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Burns*, 384 U.S. at 93.

Defendants' reliance on *Burns* is misplaced for an even more basic reason: like *Evenwel* and *Davidson* above, and unlike the instant case, *Burns* is a case about *whether* to count persons, not

where to count them.[12] The question in this case is not whether a state may include or exclude people from the apportionment base, but whether a state may artificially inflate the representation of some parts of a state at the expense of others.

And on that question, the Supreme Court has not hesitated to intervene when a state's districting scheme undermines equal representation, as it did seven years after *Burns* in *Mahan*, 410 U.S. at 315. *Burns* itself held that a state's districting decisions would be subject to judicial scrutiny when they "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns*, 384 U.S. at 88. Here, Plaintiffs have alleged in detail how prison gerrymandering operates to reduce the representational strength of Connecticut's urban, predominantly Black and Latino communities. JA18, ¶¶ 36-38; JA 20-21, ¶ 47.

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[12] *Burns* involved a Hawaii state legislative redistricting plan that used a baseline of registered voters instead of total population. The State chose that approach because of the large and transient population of nonresident military personnel on Oahu. The Court held that Hawaii's plan was justified because "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94.

More generally, the Supreme Court has never held that equal representation challenges under the Fourteenth Amendment are non-justiciable political questions. Indeed, this past term the Court reaffirmed in *Rucho v. Common Cause* that "one-person, one-vote" challenges are justiciable even while holding that partisan gerrymandering cases are not. In "one-person, one-vote" cases, the Court observed, "our cases have held that there is a role for the courts" to vindicate the principle that "each representative must be accountable to (approximately) the same number of constituents." *Rucho*, 139 S. Ct. at 2495–96, 2501.

Finally, none of the cases cited by Defendants for the proposition that the legislature is owed deference helps them *now*, when the only question is whether Plaintiffs' allegations are sufficiently non-frivolous to invoke *Ex parte Young*. In those cases, courts have evaluated a state's redistricting choices based on an evidentiary record, not just a complaint. *See Perez*, 138 S. Ct. at 2305 (holding after a trial that legislature acted in good faith when it adopted Constitutional court-ordered plan in order to end litigation and stabilize districts prior to election); *Miller v.*

Johnson, 515 U.S. 900 (1995) (upholding after a trial the lower court decision that legislature's redistricting plan was an illegitimate racial gerrymander); *Gaffney*, 412 U.S. at 735 (upholding after an evidentiary hearing a plan with 7.84% maximum deviation and which kept political boundaries intact over a proposed plan which achieved lower deviation by splitting towns across districts); *Burns*, 384 U.S. at 73 (holding after an evidentiary hearing that a state may use only registered voters in apportionment base when the resulting distribution of legislators was not substantially different from using total population in the apportionment base). None of these cases limits or invalidates the applicability of *Ex parte Young* to Plaintiffs' allegations that Connecticut's prison gerrymandering scheme violates the Fourteenth Amendment.

CONCLUSION

This Court should affirm the District Court's order.

By: */s/ Alexander T. Taubes* */s/ Benjamin D. Alter*

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*** Motion for admission *pro hac vice* forthcoming.

** This filing does not purport to state the views, if any, of Yale Law School.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 7,857 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

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CERTIFICATION OF SERVICE

I hereby certify that on this 12th day of August, 2019, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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