UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, et al.,

Plaintiffs, :

Index No. 11-CV-5632 (DLI)(RLM)

v. :

ANDREW M. CUOMO, et al., :

Defendants. :

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MEMORANDUM OF LAW IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO DISMISS OR STAY

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Plaintiffs Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey respectfully submit this memorandum in opposition to the motion to dismiss Plaintiffs' Complaint or stay this action filed by Defendants Dean G. Skelos, Sheldon Silver, John J. McEneny, Roman Hedges, Michael F. Nozzolio, and Welquis Lopez ("Movants").

PRELIMINARY STATEMENT

In their motion to dismiss, Movants tellingly ignore the unprecedented uncertainty facing New York's electoral and redistricting processes in 2012, which render this action especially timely. New York's 2012 primary election will not take place at its usual time in September. Rather, it will almost certainly take place in June or August 2012, as several of these very Movants have acknowledged and even encouraged. At the same time, the inevitability of a stalemate in the political redistricting process is far clearer this redistricting cycle than it has been in any other cycle in recent history. Governor Cuomo has repeatedly promised that he will veto any redistricting plan that is the product of a process initiated by the New York State Legislative Task Force on Demographic Research and Redistricting ("LATFOR"), while the only redistricting process underway is that very LATFOR process that the Governor has denounced. There is no reason to believe that the Governor will not keep his promise, and there is no indication that any independent process that would receive the Governor's blessing will occur in a timely fashion. Thus, New York is facing an uncertain but certainly upcoming primary date, along with a clearly defined impasse that has no foreseeable resolution. The timing is just right for this case, and the Court's prompt intervention is needed.

In the face of these well-pleaded allegations—which on this motion the Court must accept as true—Movants try to invent a rule suggesting that redistricting lawsuits become ripe only when there are four months to go before a primary election. But such a "rule" is

contrary to authority providing that such actions are ripe as far as nineteen months in advance of a primary election. Courts seldom dismiss redistricting suits as unripe but instead maintain jurisdiction over such suits, monitor the Legislature's progress on redistricting, and initiate the process of court-supervised redistricting when the failure of the political process to draw those lines in a timely fashion appears inevitable, but in any event before the constitutional violation has already occurred.

Not only is this action ripe for filing, but it is also time for the Court promptly to begin the process of drawing district lines in advance of a possible June 2012 primary election, which certain of these Movants have urged to be New York's primary date. The political calendar for a June 2012 primary begins in March 2012, and it would be imprudent to rush the inevitable process of court-supervised redistricting any more than is necessary. Courts are rightfully reluctant to engage directly in the redistricting process except in those situations in which the proper conduct of elections is at stake. This is one of those situations.

FACTUAL BACKGROUND

A. Unprecedented Circumstances Surround the Current Action.

This action arises at a time of historical unpredictability in New York's political process. Federal law requires that New York's 2012 primary election be moved from September to an earlier date that has not yet been set, but which could be in June—three months earlier than past primaries. The Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2318 (the "MOVE Act"), "requires states to provide military and overseas voters a minimum amount of time to apply for, receive, and return absentee ballots." (Compl. ¶ 77.) "New York's usual September primary date leaves too little time between the primary and general elections to comply with the MOVE Act." (*Id.*)

In *United States v. New York*, No. 1:10-CV-1214 (GLS), a case pending before Judge Sharpe in the United States District Court for the Northern District of New York, the United States Department of Justice has taken the position that compliance with the MOVE Act requires New York's primary to be held in August 2012 at the latest. (*See* Burstein Decl. Ex. A (Proposed Order 5, *United States v. New York*, No. 1:10-CV-1214 (GLS) (N.D.N.Y. Dec. 19, 2011), ECF No. 53-1.) ("New York shall conduct its 2012 non-presidential federal primary election . . . at least 80 days before the November 6, 2012 federal general election.").) A request by New York State for a waiver from complying with the MOVE Act—which would have allowed New York to keep its primary election in September—was denied last month. (Burstein Decl. Ex. B (Letter from U.S. Department of Defense to N.Y. State Board of Elections, *United States v. New York*, No. 1:10-CV-1214 (GLS) (N.D.N.Y. Nov. 16, 2011), ECF No. 39-1).)

Although Movants claim in their brief that "New York's legislative primaries are scheduled for September 2012—nearly ten months after the filing of Plaintiffs' Complaint" (Mov. Br. 7), several of the Movants themselves have not only acknowledged that the date will be moved, but have actively insisted on earlier dates. Movant Skelos has asked for the primary election to be held in August 2012 (*see* Burstein Decl. Ex. C (Motion by the N.Y. State Senate to Intervene 12 n.4, *United States v. New York*, No. 1:10-CV-1214 (GLS) (N.D.N.Y. Oct. 11, 2011), ECF No. 23)), while Movant Silver has requested a primary date in June 2012. (Burstein Decl. Ex. D (Letter from Speaker Silver to Judge Sharpe 1, *United States v. New York*, No. 1:10-CV-1214 (GLS) (N.D.N.Y. Dec. 19, 2011), ECF No. 54-1.)) There is no question that New York's 2012 primary election will be held before September 2012.

In addition, the sitting Governor, whose approval is required to pass a redistricting plan (absent a highly unlikely veto override), has taken the unequivocal step of promising to veto any redistricting plan passed under the current, non-independent redistricting process. On

February 17, 2011, Governor Andrew Cuomo's office released a statement acknowledging that "Governor Cuomo has pledged that if an agreement on permanent reform of the redistricting process is not reached, he will veto the redistricting plans passed by the Legislature if those plans have been developed under the existing process and prioritize partisan and incumbent interests over the voters' interests." (Compl. ¶ 71.) On July 6, 2011, Governor Cuomo reiterated his pledge, stating, "I will veto a plan that is not independent or a plan that's partisan . . . That's what I've said all along. That's what the people of the state of New York overwhelmingly support." (Compl. ¶ 72.) He further clarified that LATFOR is unable to produce non-partisan district lines. (*Id.*) And on September 30, 2011, when asked whether he would veto the redistricting boundaries being drafted by LATFOR, Governor Cuomo responded "yes," and added that he:

> believe[s] the process is not independent, and I don't see how a non-independent process can come up with an independent product. I therefore would veto a bill that was not an independent product. It would then go to the courts. Period. And that's what I have said, and that's what I'm sticking by.

(Compl. ¶ 73.)

B. Despite Nine Months Having Passed Since Release of the 2010 Census Data, the Redistricting Process Is Still in Its Infancy.

The results of the 2010 federal census were released to the New York Legislature and to the general public nine months ago, on March 24, 2011. (Compl. ¶ 59.) Since March, the only progress that New York has made in its redistricting process has been that LATFOR has held its first round of public hearings. (Compl. ¶ 96.) LATFOR has not released preliminary district maps nor held hearings to solicit comments on its preliminary maps nor adopted final maps nor transmitted those maps to the Legislature for its consideration. (*See* Compl. ¶¶ 94-97.) For its part, the Legislature has not taken up consideration of any proposed redistricting plans nor

made any public statements that would suggest any impending resolution of the stalemate caused by the Governor's promise to veto any LATFOR-passed plans.

C. Because of the Advanced Primary Date, Other Political Deadlines Required by the New York Political Calendar Are Also Advanced, and New Districts Must Be in Place Before Those New Deadlines.

Movant Silver has asked Judge Sharpe in the Northern District of New York to move New York's primary election to the fourth Tuesday in June—June 26, 2012. (Burstein Decl. Ex. D at 1.) Moving the date of the primary would accordingly require moving up the dates of a number of events which, under New York election law, are pegged to the date of the primary in what is called the Political Calendar. For a June 26 primary election, the Political Calendar starts on March 6, 2012, which is the last day for State and County party chairs to file statements of party positions for the primary elections. N.Y. Elec. Law § 2-120(1) (McKinney 2011) (112 days before the primary). The next date on the Political Calendar would be March 20, 2012, the first day for candidates to collect signatures for their designating petitions. N.Y. Election Law § 6-134(4) (McKinney 2011) (98 days before primary). Subsequent deadlines pepper the Political Calendar in the months leading up to the primary election. *E.g.*, N.Y. Elec. Law §§ 4-110, 5-210(3), 6-120(3), 6-158(1), 6-158(2) (McKinney 2011).

Advancing the primary date and Political Calendar would also advance preparatory *political* activities such as candidate fundraising and expenditures and citizen engagement with candidates through interviews, meetings, and forums. (Compl. ¶¶ 81, 82.) In the 2010 election cycle, candidates began expenditures as early as fourteen months before the primary. (Compl. ¶ 81.) Similarly, citizens and political parties began holding forums and interviews with candidates five to six months in advance of the 2010 primary election. (Compl. ¶ 82.)

Finally, New York laws affecting voting rights, including redistricting laws, require "preclearance" under the Voting Rights Act of 1965. (Compl. ¶ 99.) The Voting Rights Act gives the United States Department of Justice 60 days from an application for preclearance to reach a decision, and it often uses the entire 60-day period. (Compl. ¶ 101.) Thus, in order for New York to pass a final redistricting plan in time for that plan to be precleared before the March 2012 start of the Political Calendar for a June 2012 primary election, the Legislature and Governor would likely have to pass final redistricting legislation no later than January 2012.

D. **Past Rounds of Redistricting in New York Have Required Court Intervention.**

Movants' recitation regarding New York's prior redistricting cycles is missing significant facts demonstrating that the Legislature acted in previous years only under significant pressure from courts.

While Movants are correct that the Legislature in 1992 passed a redistricting plan for State Senate and Assembly districts six months before the primary election (Mov. Br. at 2), they fail to mention that the Legislature did not adopt a congressional redistricting plan at that time. In fact, the Legislature did not adopt a congressional redistricting plan until ***after*** lawsuits were filed in both state and federal court, ***after*** the state court appointed three referees and the federal court appointed a Special Master to draft two separate congressional redistricting plans, ***after*** the state court referees and the federal court Special Master completed their different plans, ***after*** the state court adopted the referees' plan and the federal court was preparing to adopt the special master's plan, and ***after*** the beginning of the candidate petitioning process had to be postponed due to legislative inaction and the need for preclearance under the Voting Rights Act. *Diaz v. Silver*, 978 F. Supp. 96, 99 (E.D.N.Y. 1997); *Puerto Rican Legal Def. & Educ.Fund, Inc. ("PRLDEF") v. Gantt*, 796 F. Supp. 681, 684-86 (E.D.N.Y. 1992). The plan ultimately adopted

by the Legislature was the one created by the state court referees, apparently under threat that the federal court would impose the Special Master's plan. *Diaz*, 978 F. Supp. at 99; *PRLDEF*, 796 F. Supp. at 685-86. The federal court subsequently adopted the Special Master's plan anyway as a contingency in case the plan passed by the Legislature and signed by the Governor did not obtain preclearance. *PRLDEF*, 796 F. Supp. at 684.

Similarly, in 2002, the Legislature did not adopt a congressional redistricting plan until ***after*** lawsuits were filed in both state and federal court, ***after*** the state court appointed a referee and the federal court appointed a Special Master to draft two separate congressional redistricting plans, ***after*** the state court referee and the federal court Special Master completed their different plans, ***after*** the federal court adopted the Special Master's plan, and apparently ***after*** the beginning of the candidate petitioning process had to be postponed due to legislative inaction and the need for preclearance under the Voting Rights Act. *Rodriguez v. Pataki ("Rodriguez II")*, 308 F. Supp. 2d 346, 355-58 (S.D.N.Y. 2004) (three-judge court); *Allen v. Pataki*, Index No. 101712/02 (Burstein Decl. Ex. E (Order Appointing Special Referee, *Allen v. Pataki*, No. 101712/02 (N.Y. Sup. Ct. May 10, 2002)); Burstein Decl. Ex. F. (Plan & Report of the Referee, *Allen v. Pataki*, Index No. 101712/02 (N.Y. Sup. Ct. May 20, 2002))); N.Y. Election Law § 6-134(4) (McKinney 2011). The timing of the Legislature's ultimate passage of a congressional redistricting plan shortly after the federal court's adoption of the Special Master's plan suggests that this passage occurred only in the face of pressure from the court. *See Rodriguez II*, 308 F. Supp. 2d at 357-58.

These facts demonstrate that in past redistricting cycles, courts have taken notice of legislative inaction and drawn their own redistricting plans when necessary to avoid harm to voters, candidates, and the electoral process, even when legislators still appear to be working toward a resolution on redistricting. This Court should likewise intervene promptly in light of

the urgency of the current redistricting cycle and the inevitability of a political impasse on redistricting.

ARGUMENT

When a complaint is challenged under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, as Movants have done here, a court must accept the factual allegations made in the complaint as true, drawing reasonable inferences in favor of the plaintiff. *See Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003); *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992); *Heidsieck & Co. Monopole S.A. v. Piper-Heidsieck*, No. 98-7741 (LAP), 2001 WL 263029, at *3 (S.D.N.Y. Mar.15, 2001). In deciding motions to dismiss, courts may rely upon matters of public record, including publicly filed court documents in other lawsuits, prior opinions and orders in other lawsuits, and the facts set forth in those opinions and orders. *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998); *Decker v. Nagel Rice LLC*, No. 09 Civ. 9878, 2010 WL 2346608, at *1 n.2 (S.D.N.Y. May 28, 2010); *Quitoriano v. Raff & Becker, LLP*, 675 F. Supp. 2d 444, 446 (S.D.N.Y. 2009); *Yalincak v. Barack Ferrazzano Kirschbaum Perlman & Nagelberg LLP*, No. 3:07CV00311(AVC), 2007 WL 2101033, at *1 (D. Conn. July 17, 2007).

I. Redistricting Actions Are Timely When Brought as Long as Nineteen Months Before a Primary Election and Are Rarely Dismissed.

Movants argue in their brief that there is a window "four months" in advance of the primary, outside of which actions seeking judicial intervention in redistricting are unripe as a matter of law. (Mov. Br. at 7.) Movants arrive at this proposition not by citing any authority to this effect, but instead by cherry-picking cases and by focusing on the date upon which the final

redistricting plan was adopted (as opposed to when the action that brought about such plan was filed). In doing so, Movants ignore multiple lawsuits brought well outside their limited window that were found to be justiciable, and moreover assume away the time between when an action is filed and when a final plan is ultimately enacted, by the court or otherwise.

Redistricting cases are ripe for adjudication not when there has been a "final failure to reapportion to date," as Movants contend, but rather when such failure appears inevitable if the court does not direct reapportionment. *Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982). The purpose of the court's intervention even before the constitutional violation occurs is that failure by the court to act at that time would leave no time to take corrective action before the elections. *Id.* When determining whether a redistricting challenge is ripe, a court should consider "the very realistic and practical problems facing all the parties and the public—that they must now begin preparing for the primary election." *Montano v. Suffolk Cnty. Legislature*, 263 F. Supp. 2d 644, 648 (E.D.N.Y. 2003) (citing *New York v. United States*, 505 U.S. 144, 175 (1992) for the proposition that "a statute is ripe for challenge when litigants must begin preparing to comply with it").

A. Courts Have Routinely Found Redistricting Lawsuits to Be Justiciable Outside of the Movants' Four-Month Window.

Consistent with the above principles, courts have maintained jurisdiction over actions filed many months in advance of a primary election. During New York's last redistricting cycle in 2002, for example, plaintiffs filed suit on January 25, 2002, eight months in advance of the September 2002 primary election. *Rodriguez v. Pataki ("Rodriguez II")*, 308 F. Supp. 2d 346, 355 (S.D.N.Y. 2004) (three-judge court). During the previous cycle, actions were filed in both federal and state courts on March 26, 1992, six months in advance of the 1992 primary election. *Puerto Rican Legal Def. & Educ. Fund, Inc. ("PRLDEF") v. Gantt*, 796 F.

Supp. 681, 684 (E.D.N.Y. 1992). During the 1982 redistricting cycle, a complaint was filed on February 10, 1982, seven months before the primary election. *Flateau v. Anderson*, 537 F. Supp. 257, 259 (S.D.N.Y. 1982). Each of these lawsuits proceeded for further adjudication; none was dismissed for lack of ripeness, lack of jurisdiction, or for any other reason.[1] *E.g.*, *Flateau*, 537 F. Supp. at 260 (retaining jurisdiction); *see also Miss. State Conf. of NAACP v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, at *4, *9 (S.D. Miss. May 16, 2011) (three-judge court) (retaining jurisdiction over suit filed one year before 2012 primary election); *Montano*, 263 F. Supp. 2d at 645 (suit filed six months before primary election); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 624-27 (D.S.C. 2002) (three-judge court) (suit filed nine months before primary election).

In *Arrington v. Elections Board*, plaintiffs filed their challenge on February 1, 2001, more than nineteen months before the September 2002 Wisconsin primary election. 173 F. Supp. 2d 856, 858 (E.D. Wisc. 2001) (three-judge court). Ruling later in the year 2001 but still more than nine months before the primary election, the court found the case to be ripe. *Id.* at 866-67. In reaching this conclusion, the court examined the question of when a litigant would need to begin to comply with a redistricting law:

> The Supreme Court has stated that a challenge to a statute becomes ripe when litigants need to start preparing to comply with it. *See New York v. United States*, 505 U.S. 144, 175 (1992). Thus, the present lawsuit would be ripe when citizens need to start preparing for the primary elections. Such elections will be held in the fall of 2002. But who is to say when a citizen (especially a potential candidate) must start preparing for them? If a candidate were to come forward today and declare that he or she is preparing to run for Congress but is stymied by the uncertainty of the congressional districts, would the court find the candidate's complaint challenging the current apportionment plan ripe? If not, why not? **Setting arbitrary deadlines (or reaching any other sort of arbitrary decision) is to be avoided.**

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[1] Although ripeness was not addressed in each of these decisions, courts "have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006).

Id. at 865 (emphasis added) (footnote omitted). Thus, the court in *Arrington* disclaimed any firm rule as to when a redistricting action may become ripe, instead finding that a case or controversy existed because Wisconsin's decade-old districts lacked population equality and were therefore unconstitutional, because "plaintiffs' fear of injury" by having their votes diluted was "realistic," and because the court could redress the situation by declaring the apportionment plan unconstitutional and entering injunctive relief. *Id.* at 866. Movants' reliance on *Arrington* in support of their made-up four-months-before-the-primary justiciability rule (Mov. Br. 7-8) is therefore inexplicable.

B. Courts Must Consider Both the Time Required to Adjudicate a Lawsuit, as Well as Dates in the Political Calendar Before the Primary Date, When Determining Ripeness.

In these and many other redistricting cases, plaintiffs filed suit before the courts' intervention became especially urgent, apparently in recognition that these cases take time to adjudicate. In each case, the court initiated the court-supervised redistricting process at a time that it deemed appropriate, or in some cases somewhat later than is ideal, after giving the legislature what each such court deemed to be "an adequate opportunity" to complete the process itself. *Upham v. Seamon*, 456 U.S. 37, 41 (1982) (quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973)). For example, in *Rodriguez v. Pataki ("Rodriguez I")*, the court appointed a Special Master to draw district lines on April 26, 2002, three months after the case was filed and five months before the primary election. 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002) (order appointing Special Master). Finding that "the 'eleventh hour' is upon us, if indeed it has not already passed," the court asked the Special Master to complete his work in only two weeks. *Id.* In *Montano*, on May 14, 2003, two months after the case was filed and five months before the primary election, the court gave the Suffolk County Legislature one day to adopt a redistricting

plan before it would appoint a Special Master. 263 F. Supp. 2d at 645. Only in the face of that threat did the legislature adopt a plan. *Id.* at 646. In *Flateau*, on April 2, 1982, two months after the case was filed and five months before the primary election, the court imposed upon the State Legislature a two-week deadline to pass a redistricting plan before the court would intervene and create its own plan. 537 F. Supp. at 262, 266 ("If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured."); *see also Colleton Cnty. Council*, 201 F. Supp. 2d at 625 (court appointed "technical advisor" to draw lines seven months before primary election).

Nor is the primary date the only relevant deadline for courts to consider when assessing the time needed to implement a redistricting plan. In deciding when to intervene, courts have also considered other dates in the political calendar, such as deadlines for declaring candidacy and the beginning of the candidate petitioning period. For example, in *PRLDEF*, the Court noted that it was "acutely aware of the pressing need for having a redistricting plan in place as soon as possible, preferably by June 9, 1992, which is the earliest date established by the New York Election Law for obtaining signatures on designating petitions." 796 F. Supp. at 685. Likewise, in *Smith v. Clark*, , the court announced that it would draft and implement its own plan upon the state's failure to redistrict by two months before the state-law deadline for qualification of candidates. 189 F. Supp. 2d 503, 504-05 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254, 262 (2003); *see also Montano*, 263 F. Supp. 2d at 645 (referencing first day for candidates to gather petitions for primary election).

What these cases demonstrate is that there is no formulaic time frame in which courts deem redistricting suits to be ripe, notwithstanding Movants' attempt to arbitrarily set this time frame at four months before the primary election. (Mov. Br. 5, 7.) Each of Movants' cases

in support of that faulty proposition was first filed outside of their purported four-month time frame, and none involved a finding that the case was unripe or that the court lacked jurisdiction over the case. The one redistricting situation cited by Movants in which the court did dismiss did not arise in the context of an impasse (as is alleged here) and is distinguishable on that basis. In *Carter v. Virginia State Board of Elections*, No. 3:11-cv-7, 2011 WL 665408 (W.D. Va. Feb. 15, 2011), the court dismissed because the lawsuit was filed only two weeks after census data was released, when the Virginia Legislature could not have had adequate opportunity to consider the data. When the same suit was refiled just a few months later, the court dismissed again because the legislature had by that time already passed a redistricting plan. *Carter v. Va. Bd. of Elections*, No. 3:11-cv-00030, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011). Compared with the nine months that New York has had to pass a plan and the Governor's promise to veto any plan currently under consideration, the *Carter* decisions are inapplicable.

Accordingly, it would be improper for the Court to dismiss this case. Rather, the Court should retain jurisdiction and proceed promptly to the appointment of a Special Master and the process of Court-supervised redistricting.

II. The Strong Possibility of a June 2012 Primary Election Necessitates the Court's Immediate Intervention.

A. The Motion to Dismiss Must Be Decided Based on the Facts Alleged in the Complaint, Which State, Echoing Movants' Admissions, That the Primary Election Will Be Held in June or August.

Movants base their motion entirely on the false premise that New York's 2012 primary election will occur in September 2012 (Mov. Br. 1, 3, 7, 9, 11) and decline to mention the possibility of any other primary date until the final paragraph of their brief. (*Id.* at 10.) But in light of the contrary allegation in the Complaint stating that New York's primary election will not occur in September 2012 (Compl. ¶ 77), Movants' assertion is legally meaningless.

Moreover, Movants well know that federal law requires New York to move its primary election to a date no later than August 18, 2012 (*see* Burstein Decl. Ex. A, at 5), and Movant Silver himself has asked the United States District Court for the Northern District of New York to schedule the primary election for June 26, 2012. (Burstein Decl. Ex. D, at1.) The bipartisan Election Commissioners' Association of the State of New York has joined Movant Silver in this request for a June 26, 2012 primary election, citing the administrative difficulty that would be posed by a primary election later in the summer (*see* Burstein Decl. Ex. G (Letter from N.Y. Election Commissioners' Association to U.S. Department of Justice and N.Y. Attorney General's Office 1, *United States v. New York*, No. 1:10-CV-1214 (GLS) (N.D.N.Y. Dec. 19, 2011), ECF No. 54-3)), such as the August primary date proposed by Movant Skelos (*see* Burstein Decl. Ex. C, at 12, n. 4). At public LATFOR hearings, Movants Nozzolio and McEneny have similarly acknowledged that the primary election will not be held as usual in September 2012. (*E.g.*, Burstein Decl. Ex. H, Transcript of LATFOR Public Meeting 4-5, 25 (Nov. 18, 2011) *available at* http://www.latfor.state.ny.us/hearings/docs/20111118mtgtrans.pdf.)

Although Movants are certainly correct that "[a]bsent evidence that [a state] will fail timely to perform [its redistricting] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it," *Growe v. Emison*, 507 U.S. 25, 34 (1993), the "evidence" Movants seek may be found in the allegations of the Complaint, which must be taken as true for purposes of this motion. *See Lunney*, 319 F.3d at 554. The Complaint establishes that the primary election will be held before September 2012 and may be held as early as June 2012. (Compl. ¶¶ 77, 78.) The Complaint further establishes that the Legislature and the Governor are at an impasse in the redistricting process for which no resolution is foreseeable. (Compl. ¶¶ 69-76.) *See Flateau*, 537 F. Supp. at 262 (recognizing public positions taken by legislative leaders and stating that "[w]hile there has been no final

failure to reapportion to date, the inevitability of such failure if this court does not direct reapportionment has persuaded us that the matter is ripe for adjudication."). In any event, the Court's appointment of a Special Master to draw district lines in case of (or in anticipation of) the Legislature's failure to enact its own plan serves neither to "affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34. Rather, the Court's intervention would supplement any legislative efforts and, if past history is any guide, the Court may thereby even facilitate the legislative process. (*See* Factual Background, *infra*, at D.)

Movants have offered the Court no reason to ignore the reality, or to disregard Plaintiffs' well-pleaded factual allegations that the court must accept as true, that the primary election will definitely happen earlier than September 2012 and that the political process is at an impasse. Nor does any such reason exist. Rather than embrace the fiction offered by Movants, the Court must acknowledge that the primary election is almost certain to occur in June or August 2012, as stated in the Complaint (¶ 78) and confirmed by Movants' and others' filings in the Northern District of New York (*see* Exs. D & C), and that the legislative process will not result in an enacted redistricting plan. (Compl. ¶¶ 74-76.) *See Flateau*, 537 F. Supp. at 262 (recognizing public positions taken by legislative leaders when considering ripeness).

B. Enacting a Redistricting Plan Before the Earliest Possible Deadline in the Political Calendar Is Necessary to Avoid Prejudice to Plaintiffs.

Given that a June 26, 2012 primary election is the earliest primary date under active consideration by legislative leaders and election officials, as discussed above, that makes it the "worst case scenario" that the Court must consider to schedule further proceedings, *Marylanders for Fair Representation, Inc. v. Schaefer*, 795 F. Supp. 747, 749 n.5 (D. Md. 1992), in order to avoid a situation in which "it would be too late for any timely remedy to be

structured." *Flateau*, 537 F. Supp. at 262. Proceeding based on that primary election date and the dates on the Political Calendar in advance of that primary election will enable the Court to ensure that those political events proceed on time.

For a primary election on June 26, 2012, the political calendar starts on March 6, 2012, which is the last day for State and County party chairs to file statements of party positions to be filed in the primary elections. N.Y. Elec. Law § 2-120(1) (112 days before the primary). Perhaps more importantly, the first day for candidates to collect signatures for their designating petitions would be March 20, 2012. N.Y. Elec. Law § 6-134(4) (98 days before primary); *see PRLDEF*, 796 F. Supp. at 685 (recognizing the beginning of the petitioning period as the "preferred" date for having a redistricting plan in place). As discussed above, obtaining preclearance pursuant to the Voting Rights Act in time for this March 2012 start of the political calendar would likely require New York to pass a final redistricting plan by January 2012 at the latest. The Court, however, can adopt a plan without preclearance, *Connor v. Johnson*, 402 U.S. 690, 691 (1971), and thus should consider March 2012 to be the final deadline to have a complete redistricting plan in place.

On the other hand, if the Court were to proceed under Movants' "four-month" rule and assumption of an August or September primary, Plaintiffs' case would not be ripe until at least April 2012. Such a result would be exceedingly prejudicial for Plaintiffs should Movant Silver succeed in advocating for a June primary election. In such event, the March 2012 statutory petitioning period could have begun before the Court even initiates the steps to determine in which districts Plaintiffs reside. It is the avoidance of such a scenario for which Plaintiffs filed their case in November 2011, eight months after the census results were released to the Legislature, seven months before a June primary, and well within the time frame in which

courts have exercised jurisdiction in the past. *E.g.*, *Rodriguez II*, 308 F. Supp. 2d at 355 (filed eight months before primary election).

Having a final redistricting plan in place at the earliest possible date—ideally even before the final March 2012 deadline discussed above—is necessary and appropriate to avoid the harm to Plaintiffs (and other voters and candidates) that would be caused by a last-minute completion of the redistricting process. Specifically, Plaintiff Leib is a potential candidate who would be prejudiced by delayed redistricting because he does not know where his district lies or who his potential voters are. (Compl. ¶¶ 15, 80-81.) He is unable to decide whether to run and to begin raising money and political support (both of which are crucial for successful petitioning) until redistricting is completed. (*Id.*) *See Arrington*, 173 F. Supp. 2d at 865 (suggesting that candidate's claim would be ripe if he asserted that he was considering running for office but was stymied by the uncertainty of districts). Meanwhile, other Plaintiffs may not know who their local candidates are until redistricting is completed, and therefore are prejudiced by an inability to engage in political activities in support of or in opposition to those candidates. (Compl. ¶¶ 14-19, 82.) The mere fact that similarly-situated Plaintiffs in prior cases have suffered similar prejudice, as observed by Movants (Mov. Br. 9-10), in no way prevents this Court from taking steps to alleviate that prejudice. *See Montano*, 263 F. Supp. 2d at 648 (finding a challenge ripe "under the very realistic and practical problems facing all the parties and the public—that they must now begin preparing for the primary election"); *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 546 (2d Cir. 2007) (in evaluating ripeness, courts consider "the hardship to the parties of withholding court consideration"); *Able v. United States*, 88 F.3d 1280, 1290 (2d Cir. 1996) (same).

These redistricting cases take time between filing and the appointment of a Special Master and the ultimate adoption of a redistricting plan, as illustrated repeatedly in the

cases. *See, e.g.*, *Rodriguez v. Pataki*, No. 1:02-CV-00618 (S.D.N.Y.) (Complaint, Jan. 25, 2002 [Dkt. 1]; special master appointed Apr. 26, 2002 [Dkt. 27]; redistricting plan adopted May 24, 2002 [Dkt. 71]); *PRLDEF v. Gantt*, No. 1:92-cv-01521 (E.D.N.Y.) (Complaint, Mar. 31, 1992 [Dkt. 1]; special master appointed May 12, 1992 [Dkt. 79]; redistricting plan adopted June 11, 1992 [Dkt. 132]). Here, Plaintiffs filed their Complaint on November 17, 2011, but assuming this motion to dismiss is denied, Movants may not even be required to answer until mid-January 2012 at the earliest. The next month, February 2012, is within the four-month window of a June 2012 primary within which even Movants concede "corrective action" is taken by courts. (Mov. Br. 5.) Resolution of motions for intervention, the establishment of a three-judge panel, the selection of a Special Master, the drawing of plans, and the consideration and finalization of those plans are all steps that take time as well.

Moreover, redistricting is an important process that should not be rushed, and therefore prompt intervention by the Court is necessary to avoid repeating past last-minute redistricting efforts. *See, e.g.*, *Rodriguez I*, 207 F. Supp. 2d at 125 (finding that "the 'eleventh hour' is upon us, if indeed it has not already passed" and giving the Special Master only two weeks to create a plan); *Montano*, 263 F. Supp. 2d at 645 (giving the legislature only one day to pass a redistricting plan). The "extraordinary direction" of courts postponing certain deadlines on the political calendar must be avoided whenever possible. *See Montano*, 263 F. Supp. 2d at 648; *Smith*, 189 F. Supp. 2d at 511 ("changing the dates of the election schedule would be deleterious to the rights of the voters, the candidates and the political parties, and accordingly we are determined to avoid such a change of dates").

For these reasons, the time has arrived for the Court's active intervention in the line-drawing process in advance of a June 2012 primary. In the event the primary election is subsequently scheduled for a date later than June 2012, this action still should not be dismissed.

Rather, under that circumstance the Court should retain jurisdiction over the case and intervene at such time as it deems appropriate. *See Miss. State Conf. of NAACP*, 2011 WL 1870222, at *9, n.6 (citing *Branch v. Smith*, 538 U.S. 254, 262 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993)).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Movants' motion to dismiss or stay this case.

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