UNITED STATES DISTRICT PANEL
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.,	:	
Plaintiffs,	:	Index No. 11-CV-5632 (DLI)(RR)(GEL)
v.	:	Date of Service: March 14, 2012
ANDREW M. CUOMO, et al.,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ADOPTION OF THE REPORT AND RECOMMENDATION

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When Plaintiffs commenced this action in November, their goals were two-fold. In the face of the Legislature's failure to re-draw New York's districts, Plaintiffs sought this Court's intervention in order to avoid the electoral chaos and delay that could put New York's congressional delegation, and their own ability to participate meaningfully in its selection, in jeopardy.[1] They also aimed for districts drawn in a fair way, using neutral principles, and in a manner that put the interests of voters ahead of the interests of incumbent politicians and political parties. The Recommended Plan satisfies both of these goals. If approved by this Court, it will go into effect in time for candidates and politically active citizens to begin gathering signatures on nominating petitions by March 20, thereby allowing the rest of the political calendar to play out normally leading up to the congressional primary on June 26, 2012. The Plaintiffs' second goal has been met through the Report and Recommendation's use of neutral redistricting principles, its "commitment to nonpartisanship," and its rejection of political lobbying and "reconciling political arguments" as outside the Court's role in this process. (Report and Recommendation ("R&R") at 2, 40.)

In taking up this "unwelcome obligation," the Court proceeded through an open, transparent process allowing for maximum participation from the parties and the public at large, given the time constraints. Magistrate Judge Mann created a fair and open process, and in doing so went well beyond the procedures of previous special masters by creating a website to solicit plan proposals, comments and objections from the public, inviting an extra round of comments, and entertaining comments from the public at the hearing until every person had spoken. As Magistrate Judge Mann explained, the Court had in fact

[1] Plaintiffs also remain concerned about the continued failure of the Legislature to enact State Assembly and Senate redistricting plans, and the impact of that failure on their ability to participate meaningfully in Assembly and Senate elections in 2012, although such redistricting is not at issue in this submission.

> opened its eyes and ears to the parties and public, and provided an opportunity for all interested individuals to have input into the redistricting process. In doing so, the Court aimed, as best as possible, to balance all competing interests.

(R&R at 40.) That the Court was able to do all this in two weeks, while the Legislature has been unable to agree upon a plan for a year, is a testament to the Court's hard work and focus.

In crafting the Recommended Plan, the Court rejected calls by multiple parties to consider the protection of incumbents. The Court correctly found that, while a *legislature* may properly protect incumbents while redistricting, no "state policy" in favor of incumbent protection existed to which *judicial* deference was owed, given the "constitutional[] infirm[ity]" of the Existing Plan. (R&R at 34-35 (citing *Perry v. Perez*, 132 S Ct. 934, 941 (2012)).)[2] The Court also found little rationale for considering incumbency, given the ability of candidates for Congress to run for any district as long as they are residents of the state. (*Id.* at 36-37.) Disregarding calls from some parties that "voters should not be 'put . . . in the position of having to' weigh whether their interests will be adequately protected by an outdistricted incumbent," the Court rightly decided to "trust[] that voters can rationally decide whether to support an incumbent whose home happens to be in an adjoining district." (*Id.* at 37 (first alteration in original).) Moreover, given the required removal of two districts, and the absence of any neutral principle upon which to decide which incumbents should or should not be paired, the Court noted that incumbent protection would require the Panel to follow a "tradition of political horse-trading" which, while viable for legislatures, would have been improper for a court. (*Id.* at 38).

In stepping into the vacuum created by legislative inaction, the Court proceeded through an open, transparent process allowing for maximum participation from the parties and the public

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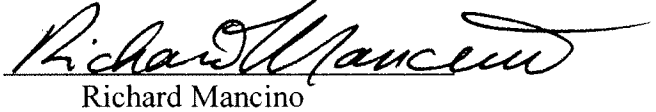
[2] For further discussion on this issue, see Plaintiffs' Memorandum of Law in Response to Parties' Proposed Congressional Districts, Dkt. No. 166, at pp. 2-7 (appended hereto).

at large. By focusing only on those neutral principles that flow directly from the United States and New York Constitutions and governing federal law, and by eschewing partisan concerns, the Court has created a plan driven by fairness to all New Yorkers. The Recommended Plan does what any neutral and independent plan should do: it creates a fair playing field for voters and candidates and, in the words of the Court, "let[s] the chips fall where they may." (Redistricting hearing Tr. 62:3-9, 68:20-22, Mar. 5, 2012.)

For these reasons, and those expressed in their prior submissions, Plaintiffs urge the Panel to adopt the Report and Recommendation in its entirety and order the Recommended Plan into effect.

Dated: New York, New York
March 14, 2012

WILLKIE FARR & GALLAGHER LLP

By: 

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