

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, et al.,	:	
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Plaintiffs,	:	Index No. 11-CV-5632
	:	(RLM)
	:	
v.	:	Date of Service: March 2, 2012
	:	
ANDREW M. CUOMO, et al.,	:	
	:	
Defendants.	:	
-----	X	

**MEMORANDUM OF LAW IN RESPONSE TO PARTIES’
PROPOSED CONGRESSIONAL REDISTRICTING PLANS**

WILLKIE FARR & GALLAGHER LLP

Richard Mancino
Daniel M. Burstein
Jeffrey A. Williams
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
rmancino@willkie.com
dburstein@willkie.com
jwilliams@willkie.com

Attorneys for Plaintiffs

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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 of law in response to the redistricting plans submitted to the Court on February 29, 2012.

PRELIMINARY STATEMENT

Plaintiffs filed this action to ensure that the redistricting process proceeded before this Court in an independent and timely manner to avoid the electoral chaos that would occur absent the Court's intervention. Plaintiffs now remain focused on the process at hand and do not intend to comment on the substance of the redistricting proposals submitted this week by the parties. Instead, Plaintiffs urge the Court to take into account only the proper, impartial criteria required by federal law and the New York State Constitution in crafting its redistricting plan.

Courts and Special Masters drawing redistricting plans are under great scrutiny and have every reason to demonstrate that their plans are independent and fair to New Yorkers. In an effort to demonstrate fairness, Special Masters in the past have endeavored to show that the plan is equally beneficial or detrimental to both major political parties and does as little harm to incumbents as possible. The means by which they have attempted to do this is by recognizing and taking into account the residences of incumbent legislators to protect those legislators from facing each other in elections. To be sure, engaging in incumbency protection is easy to do.

By contrast, non-political redistricting principles such as preservation of communities of interest or Voting Rights Act compliance are more difficult to identify and to define. Unlike protection of incumbents, however, it is those non-political redistricting principles that are enshrined in the New York State Constitution and in federal law. Those neutral redistricting principles are designed to empower communities to elect representatives that serve their common interests. Those are the criteria that are listed in the three-judge panel's

order of referral to this Court, and it is only those impartial criteria that this Court should consider.

The intense focus on protecting incumbents emerged in Court on February 27, 2012 and dominated this week's briefing by the parties. Due to the high-profile question of which members of Congress might lose their seats, the issue of incumbent protection threatens to overwhelm the critical impartial redistricting criteria if this Court entertains that consideration.

While political balancing sounds like a neutral redistricting principle, in practice it requires drawing lines around representatives' homes. This practice inevitably prioritizes incumbents and perceived fairness to political parties over fairness to voters. The State and Federal Constitutions empower voters to choose their representatives, and not the other way around. In this brief, Plaintiffs explain why the Court should not consider incumbency at all in creating its redistricting plans, and Plaintiffs set forth the reasons why the Court need not and should not rely upon the redistricting plans proposed by legislators.

ARGUMENT

I. Incumbent Protection Is Not New York State Policy and Deserves No Consideration By the Court in Preparing a Redistricting Plan.

The Supreme Court has made clear in the recently decided *Perry v. Perez* case that, when courts are forced to assume the "unwelcome obligation" of drawing district lines, they should defer to redistricting principles embodied in duly enacted state law. 132 S. Ct. 934, 940, 943 (2012) (district court erred in not giving deference to "the Legislature's enacted plan"); *see also Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (only an enacted plan passed by both houses of a legislature and signed by a governor should be considered a "clear expression[] of state policy" on redistricting). Such deference is appropriate due to courts' difficulty in "defining neutral legal principles in this area, for redistricting ordinarily involves criteria and

standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.” *Perry*, 132 S. Ct. at 941.

Because of such required deference, there is a critical difference between what a legislature may consider and what a court may consider in crafting redistricting plans. While a legislature may consider any redistricting criteria that are not prohibited by the federal or that state’s Constitution or by state and federal law, courts are charged with “honor[ing] state policies” while not “intrud[ing] upon state policy any more than necessary.” *White v. Weiser*, 412 U.S. 783, 795 (1973). Accordingly, this Court should only consider redistricting criteria that are clearly established as expressions of New York State policy.

A. New York Law Establishes Many Redistricting Guidelines, But Incumbency Is Not One of Them.

The redistricting guidelines set forth in the three-judge panel’s February 28, 2012 Order of Referral to Magistrate Judge have one thing in common: they are all firmly grounded in either federal or state law. Equal population between districts is required by Article I, Section 2 of the United States Constitution. Compliance with the Voting Rights Act is required by that long-standing federal statute. Compactness, contiguity, respect for political subdivisions, and preservation of communities of interest are all criteria set forth in Article III, sections 4 and 5 of the New York State Constitution.¹

A policy of protecting incumbent legislators, however, to ensure that they need not compete with one another for the votes of New York’s citizens, is not to be found anywhere in New York’s Constitution or in federal or New York State law.

¹ For further discussion on the constitutional nature of preservation of communities of interest, see Pls.’ Mem. of Law in Supp. of Appointment of a Special Master, Feb. 17, 2012, ECF No. 99.

To be sure, the Supreme Court has found that states *may* consider incumbency as a factor in drawing district lines. *White*, 412 U.S. at 791 (an enacted state plan with lines “drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness”); *Miller v. Johnson*, 515 U.S. 900, 906 (1995) (after equal population, contiguity, nondilution of minority voting strength and other legal requirements were met, a state-drawn plan could consider avoiding contests between incumbents). And if incumbency protection is already a matter of expressed state policy, a court drawing district lines may defer to that state policy. *White*, 412 U.S. at 795.

It is equally clear, however, that “avoiding contests between incumbents” is not an expressed policy of New York State. No party expressing support for incumbency protection this week points to any New York statute or constitutional provision indicating that protection of incumbents is State policy. No such statute or constitutional provision exists. Unlike in *White* or *Miller*, here there is no enacted State plan that would serve to express the will of the elected branches that protection of incumbents is a principle to be considered or to which any deference is owed.

Although Defendants Skelos, Nozzolio, and Lopez claim that the court in *Rodriguez v. Pataki* adopted “maintenance of the cores of existing districts” as a “well-established, traditional districting principle in New York” (Letter from Michael A. Carvin, counsel for Defs. Skelos, Nozzolio, and Lopez 1, Feb. 29, 2012, ECF No. 145), the court therein merely listed it as one of several “[a]dditional redistricting considerations” that legislatures may consider, separate from those required by the New York State Constitution. *Rodriguez v. Pataki*, No. 02 Civ. 618 (RMB), 2002 WL 1058054, at *4 (S.D.N.Y. May 24, 2002). Indeed, *Puerto Rican Legal Defense & Education Fund, Inc. v. Gantt*, quoted in *Rodriguez*, states that

“maintenance of the cores of existing districts” is one of several “permissive criteria,” the enumeration of which in the case law “is simply to guide legislatures as to the criteria they *may* properly consider in drawing a plan.” 796 F. Supp. 681, 691-92 (E.D.N.Y. 1992). The one-time justifications asserted by the State in a court filing to defend their legislatively-enacted redistricting plans in 2002 (*see* Defs. Silver, McEneny, Hedges Mem. in Supp. of Assembly Plan for Congressional Redistricting, Mar. 2, 2012, ECF No. 153) cannot be sufficient to establish State policy, particularly as compared with the criteria permanently enshrined in the State Constitution.

New York’s Special Master in *Flateau v. Anderson*, unlike any New York Special Master or court cited by Defendants, expressly considered whether issues of “political fairness” and “continuity of constituencies” are matters of New York State policy:

it appears to me that, while considerations of “political fairness” may well be appropriate in approving a legislative plan, they may not be appropriate for a court fashioning its own apportionment plans, absent an articulated and rational basis in the statutes or Constitution. These considerations are not included in the Court’s criteria and I have concluded that I should not use such a criterion as it may place the Court in the tenuous position of appearing to serve partisan political interests. For the same reason, while I recognize that some courts have made allowance for the protection of incumbents in drawing their plans, the plans I submit have not done so.

(*Flateau* Special Master Robert P. Patterson, Jr. Report, 12-13.)²

Plaintiffs urge this Court to follow Judge Patterson’s guidance and to exclude considering incumbency in preparing its redistricting plans.

B. Considering Incumbency Would Put the Court in the Uncomfortable Position of Deciding Which of New York’s Representatives Lose Their Jobs.

Separate redistricting plans by the State Senate and Assembly Majorities illustrate the absence of a clear expression of State policy favoring incumbent protection. The Republican

² The Report of Robert P. Patterson, Jr., Special Master, *Flateau v. Anderson*, No. 82 Civ. 0876 (S.D.N.Y. 1982), was previously filed in this case and is available at ECF No. 100, Ex. H.

Senate Majority submitted one plan that would reportedly pit Democratic incumbents Gary Ackerman and Carolyn McCarthy against one another, thus eliminating a Democratic incumbent. (Thomas Kaplan, *Update on New York Redistricting*, N.Y. Times, Mar. 2, 2012, at A22.) The Democratic Assembly Majority submitted a different plan that would carve up the district currently represented by Republican Bob Turner, thus eliminating a Republican incumbent. (*Id.*) To the extent any policy can be gleaned from these plans, it is protection of incumbents *in one's own party*.

If this Court were to consider incumbency as a factor in its redistricting plan, it would be forced to wade into a political morass and actively decide which incumbents should lose their districts. How can the Court make such a decision? Some Defendants suggest that the most senior members of New York's Congressional delegation are the most valuable to the State. Mem. in Supp. of Assembly Plan for Congressional Redistricting, 1, Mar. 2, 2012, ECF No. 153. But if the Court were inclined to accept that logic, it might decide instead that only those members of Congress from the majority party "bring home the bacon" for New Yorkers and are therefore deserving of protection. Clearly these are politically charged determinations that the Court is in no position to make. As it is, the Court's redistricting task is "an exposed and sensitive one that must be accomplished circumspectly." *Connor v. Finch*, 431 U.S. 407, 415 (1977). That task would only be complicated by making such loaded decisions that risk bearing the "taint of arbitrariness and discrimination." *Id.* (quotations omitted). The Court would be well served to avoid imposing such a burden upon itself. Instead, the Court's process should be "a fastidiously neutral and objective one, free of all political considerations." *White*, 412 U.S. at 799 (Marshall, J., concurring in part).

C. If the Court Does Consider Incumbency, That Factor Should Be Subordinated to All Other Considerations.

To the extent that the Court does want to take incumbent protection into account in preparing a redistricting plan, it should subordinate that consideration to neutral redistricting principles, as other courts have done in the past. In *Johnson v. Miller*, the court found that because the incumbent protection factor is “inherently more political than factors such as communities of interest and compactness, we subordinated it to the other considerations.” 922 F. Supp. 1556, 1565 (S.D. Ga. 1995). Similarly, in *Colleton County Council v. McConnell*, the court found that incumbent protection can only be considered “[p]rovided it does not conflict with other nonpolitical considerations such as communities of interest and compactness.” 201 F. Supp. 2d 618, 647 (D.S.C. 2002). If the Court must consider incumbent protection, it should follow the lead of these other courts and weigh such factor only as a last resort.

D. Any Considerations of Incumbent Protection Should Be Limited to Congressional Redistricting.

Certain Defendants requesting that the Court consider protection of incumbents as a redistricting criterion rely on the argument that the State benefits from having more senior members in Congress. Letter from Skelos et al., 2, ECF No. 145; Explanation of Assembly Majority Proposed Congressional Dists., 1, Mar. 2, 2012, ECF No. 154. In the event that this Court decides to consider incumbency in its congressional redistricting plan, Plaintiffs urge that such consideration be limited to congressional redistricting only. While having seniority in the House of Representatives may confer some benefit on the State as a whole,³ seniority in the State Senate or Assembly only benefits one district within the State at the expense of another.

³ This argument is debatable. Researchers at Harvard Business School have determined that companies experienced lower sales and retrenched by cutting payroll, R&D, and in-district spending in the years that followed the ascension of their district’s member of congress to a committee chairmanship. See Lauren Cohen et al., *Do Powerful Politicians Cause Corporate Downsizing?*, J. of Pol. Econ. (forthcoming 2012), available at <http://www.people.hbs.edu/cmalley/pdffiles/envaloy.pdf>.

Accordingly, protection of incumbency for members of the State Senate or Assembly would be an arbitrary consideration and should not be carried over to any further redistricting plans drawn by this Court. *See Finch*, 431 U.S. at 415 (redistricting plans should be drafted “in a manner free from any taint of arbitrariness or discrimination”) (quotations omitted).

II. The Court Should Not Rely on Redistricting Plans Proposed by Legislators.

A. To Avoid Triggering the Preclearance Requirement, the Court Should Not Entertain Suggested Plans from the Political Branches.

Although redistricting plans approved by a federal court are typically not subject to the Voting Rights Act’s preclearance requirement, *Connor v. Johnson*, 402 U.S. 690, 691 (1971), there is one significant exception to this rule. When a proposed redistricting plan “reflect[s] the policy choices of the elected representatives of the people, . . . the preclearance requirement of the Voting Rights Act is applicable.” *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). In other words, if the plan ultimately approved by the Court was derived entirely from plans submitted by State legislators, it will have to be precleared.

Professor Persily cautioned that this unusual rule gives a court the “somewhat perverse incentive to avoid entertaining suggestions from the political branches. The more influence that the jurisdiction’s elected officials or their proxies have over the court’s plan, the closer the court comes to adopting a plan that could be held up for sixty days by the Department of Justice.” Nathaniel Persily, *When Judges Carve Democracies*, 73 *Geo. Wash. L. Rev.* 1131, 1150 (2005).

As the Court is aware, time is of the essence here, and there is insufficient time in advance of the candidate petitioning period for the Department of Justice to review the Court’s work. Thus, Plaintiffs urge the Court to heed Professor Persily’s warning and avoid any significant reliance on redistricting plans submitted by sitting legislators.

B. The Court Owes No Deference to Legislator-Proposed Redistricting Plans.

The Court should not hesitate to avoid reliance on legislator-submitted redistricting plans because, as mere unenacted proposals by legislators, those plans are entitled to no more deference than a plan submitted by any member of the public.

In *Perry v. Perez*, the Supreme Court instructed that where a redistricting plan has been “recently enacted” by a state through the political process, the district court drawing its own interim districts should “take guidance” from the state plan and even use the state plan as “a starting point.” *Perry*, 132 S. Ct. at 941. “Enactment” of a redistricting plan, of course, requires passage by both chambers of the State Legislature and signature by the Governor (or override of the Governor’s veto). N.Y. Const. art. IV, § 7. Such enactment has not occurred here, and therefore the Court need not pay any particular tribute to plans submitted by legislators. *See Perry*, 132 S. Ct. at 943 (acknowledging that without a recently enacted plan to use as a guide, a court may be required to design a plan “based on its own notion of the public good”).

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court not to consider incumbency as a factor in its redistricting plans and not to rely upon redistricting plans submitted by the Defendant legislators.

Dated: New York, New York
March 2, 2012

WILLKIE FARR & GALLAGHER LLP

By: /s Richard Mancino
Richard Mancino
(A Member of the Firm)

Daniel M. Burstein
Jeffrey A. Williams
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
rmancino@willkie.com
dburstein@willkie.com
jwilliams@willkie.com

Attorneys for Plaintiffs