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By ECF and Hand Delivery

The Honorable Reena Raggi
United States Court of Appeals
for the Second Circuit
225 Cadman Plaza East
Brooklyn, NY 11201

The Honorable Gerald E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

The Honorable Dora L. Irizarry
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Favors et al. v. Cuomo et al.*, No 11 Civ. 5632

Dear Judges Raggi, Lynch, and Irizarry:

This firm, together with Jeffrey M. Wice and Leonard M. Kohen, represents Defendant Senators John L. Sampson and Martin Milavé Dilan in the above-referenced matter. We write to update the Court regarding the state legislative redistricting process and to urge the Court to begin the process of developing a lawful state legislative redistricting plan.

Late last night, the Legislature passed two bills, S. 6696 and A. 9525, which adopt redistricting plans for the New York State Senate and Assembly. Our understanding from Mr. Chill is that the Governor signed these bills this morning. But this case nonetheless is not moot, and it still is necessary for this Court to develop a state redistricting contingency plan, for two reasons.

First, the Legislature's plan is subject to preclearance by the Department of Justice pursuant to section 5 of the Voting Rights Act, a process that can take up to 60 days. Second, as described in more detail below, the Legislature's addition of a 63rd Senate seat violates Article III, Section 4 of the New York Constitution and will be challenged in state court. If the Legislature's 63-seat plan is blocked either by the Department of Justice or by a state court, then the federal Constitution will require this Court to develop and implement a lawful Senate plan because it is

undisputed that the current districts (which were drawn in 2002) do not comply with the federal one person, one vote rule.

Ideally, this Court would conserve its limited resources by waiting to see whether the Legislature's plan is (a) precleared by the Department of Justice and (b) approved by the state courts before it undertakes the complex and time-consuming task of drawing a lawful Senate redistricting plan. After all, if both of these things happen—but *only* if both of these things happen—then this Court will not have to do anything further.[1] But if either one of these things does not happen, then it will be this Court's responsibility to ensure that a plan that complies with federal law is developed, subjected to public comment, and implemented in advance of the petitioning period, which begins on June 5, 2012. As this Court has observed, that process already should have begun. *See* Mar. 8, 2012 Order at 13 (observing that "a court should have as its goal the imposition of a plan no later than one month before candidates may begin qualifying for the primary ballot," which "means that the court should begin drawing its plan about three months before the beginning of ballot qualification in order to build in time for possible hearings and adjustments to the plan") (quoting Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1147 (2005)).

In January, a group of plaintiffs (represented by this law firm) filed suit against the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") seeking a declaratory judgment on the threshold question of whether Article III, Section 4 of the New York Constitution permits the addition of a 63rd Senate district in 2012. *See Cohen v. LATFOR*, Index No. 12-101026 (N.Y. County). The plaintiffs in that case alleged that LATFOR (under the direction of and with the approval of Majority Leader Skelos and Speaker Silver) manipulated the mathematical formula prescribed in the Constitution – by using two different counting methodologies in different parts of the State in the same reapportionment, including the very methodology that the Legislature expressly repudiated in 2002 as constitutionally improper – in an effort to justify adding the additional district that the Senate Republicans believe would best position them to maintain their slim majority.

The defendants in *Cohen* moved to dismiss on ripeness grounds, and the trial court granted their motion on March 9, 2012, holding that plaintiffs' claims will not be ripe until a plan is enacted and signed into law. That apparently happened this morning, and we therefore will recommence the *Cohen* plaintiffs' state court

[1] Notably, the Governor has *not* taken the position that adding a 63rd Senate district would be lawful. Rather, the Governor has carefully asserted that adding a 63rd district is "problematic," that it is now "too late for an independent process," and that because of the calendar, the issue must be "decided by the courts." Thomas Kaplan, *Albany Redrawing Political Map With Old Lines of Thought*, N.Y. Times, March 13, 2012, at A1.

challenge right away and seek summary judgment as soon as possible. But the plaintiffs may not be able to obtain an immediate preliminary injunction because the Legislature's plan will not take effect until it is precleared. And state law precludes a plaintiff from moving for summary judgment until the defendants have answered. *See* CPLR 3212(a). It therefore appears likely that the state trial court will not adjudicate the constitutionality of the plaintiffs' claims for weeks, to say nothing about the timeline for seemingly inevitable appellate review. By the time there is clarity from the state courts and the Department of Justice regarding the lawfulness of the Legislature's plan, it is very likely that there will not be enough time to develop and implement a lawful plan prior to the June 5, 2012 deadline—unless the Court begins the process of developing a contingency plan now.

For all of these reasons, we respectfully urge the Court to refer this matter to Magistrate Judge Mann and to set a schedule for developing a state redistricting contingency plan. In order to do so, Judge Mann first must address the threshold question of whether to develop a 62- or 63-seat Senate plan. We recognize that this is the very same issue that we will be litigating in state court. But as we have explained, it is this Court—not the state judiciary—that is primarily responsible for enforcing the federal Constitution, including the requirement that substantially equipopulous districts be implemented before June 5, 2012. And nobody can assure this Court that the state courts will rule on the constitutionality of the 63rd district before it is too late for this Court to enforce the Equal Protection Clause.

We acknowledge that this is a highly unusual procedural posture. We are aware of no case in which any federal court has ever been asked to address a threshold state constitutional question regarding the size of the legislative body to be redistricted, let alone where the question is as controversial and troubling as the one presented here. But the June 5, 2012 deadline is looming, and these extraordinary circumstances are entirely of the legislative leadership's making. For all of the above reasons, we respectfully submit that this Court cannot afford to sit by idly in the hope that a different court might resolve this issue in time to avoid a statewide Equal Protection Clause violation.

We look forward to addressing these weighty issues at the hearing later today or at any other time that the Court deems appropriate.

Respectfully submitted,

/s/

Eric Hecker (EH 0989)

cc: The Honorable Roanne L. Mann (by ECF and hand)
All counsel (by ECF and email)