UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al., Plaintiffs, vs. ANDREW M. CUOMO, as Governor of the State of New York, et al., Defendants.	CV11-5632 (DLI)

MEMORANDUM OF LAW

INTRODUCTION

The following Memorandum of Law is submitted on behalf of Defendants Speaker of the Assembly, Sheldon Silver, Assemblyman John McEneny and Member of LATFOR Roman Hedges in support of the Assembly Plan for Congressional redistricting being submitted herewith. Among the factors which inform the Assembly's proposed new districts is a concern for the protection of incumbents. As demonstrated below, incumbency is a traditional redistricting criterion, taken into account both by legislatures and courts in fashioning redistricting plans. We respectfully urge the Court to consider protection of incumbents and the closely associated principle of preservation of cores of existing districts as important policy considerations to be reflected in the Court's redistricting plan. In this regard, we respectfully submit that the Court should not ignore the State's legitimate interest in protecting the seniority of its Congressional delegation.

There are two legal requirements and a number of traditional redistricting policy considerations that federal courts have recognized and utilized in fashioning court drawn plans.

U.S. Supreme Court Authority

As a matter of law, any redistricting plan must ensure voting equality by complying with the Constitutional mandate of "one person, one vote," (Reynolds v. Sims, 377 U.S. 533, 558, 84 S. Ct. 1362, 1380 [1964]), and must also safeguard the voting rights of minority groups, (White v. Regester, 412 U.S. 755, 93 S. Ct. 2332 [1973]), pursuant to the requirements of the Fourteenth and Fifteenth Amendments to the United States Constitution and of Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq.

In addition to the above stated legal requirements, the Supreme Court has also recognized as valid, albeit not legally required, a number of other additional traditional redistricting policy considerations such as:

> making districts compact, respecting municipal boundaries, preserving the cores of prior districts[1], and avoiding contests between incumbent Representatives.

Karcher v. Daggett, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663 (1983) (emphasis added).[2]

In White v. Weiser, 412 U.S. 783, 791, 93 S. Ct. 2348, 2350 (1973), the Supreme Court recognized as a legitimate redistricting goal a state policy aimed at maintaining existing relationships between incumbent representatives and their constituents, and preserving the seniority of the state's congressional delegation.

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1 Protecting the core of existing districts necessarily correlates with protection of incumbents.

2 Incumbency protection as a valid state policy to be taken into account in crafting a redistricting plan flows from the oft cited Supreme Court admonition that "[p]olitics and political considerations are inseparable from districting and apportionment." Gaffney v. Cummings, 412 U.S. 735, 753, 93 S. Ct. 2321, 2331 (1973). See also Miller v. Johnson, 515 U.S. 900, 914-916, 115 S. Ct. 2475, 2487-88 (1995) ("redistricting in most cases will implicate a political calculus" * * * and courts must accordingly "be sensitive to the complete interplay of forces that enter a legislature's redistricting calculus").

In Bush v. Vera, 517 U.S. 952, 964-65, 116 S. Ct. 1941, 1954 (1996), the Supreme Court flatly stated:

> [W]e have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal . . .
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> * * *
>
> [L]egitimate districting considerations, including incumbency, can be sustained.

(Emphasis added), citing Karcher v. Daggett, 462 U.S. at 740; White v. Weiser, 412 U.S. at 797; Burns v. Richardson, 384 U.S. 73, 89, n. 16, 86 S. Ct. 1286 (1966).

In Reno v. Bossier Parish School Board, 528 U.S. 320, 346, 120 S. Ct. 866, 881 (2000), the Supreme Court, in an opinion of four justices concurring in part and dissenting in part, recognized "incumbency protection" as a "customary districting concern." See generally Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381 (1991) (recognizing legitimacy of state's interest in "maintaining" an existing electoral system to preserve the "link" between an elected official and the official's base).

New York State Federal Court Authority

In Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681, 691 (E.D.N.Y. 1992) (three-judge court), the court acknowledged the criteria that may properly be considered include "maintenance of the cores of existing districts, communities of interest, and political fairness." (emphasis added).

In Diaz v. Silver, 978 F. Supp. 96, 104 (E.D.N.Y. 1996) (three-judge court), the court, after observing that "[i]ncumbency appears to have been the unacknowledged third-most-significant factor" in the state court referees' plan, found nothing improper in the Legislature's adoption of large portions of the referees' plan. The court noted the "legislators' . . . quite legitimate concerns about the ability of representatives to maintain relationships they had already

developed with their constituents," as well as "the powerful role that seniority plays in the functioning of Congress [which] makes incumbency an important and legitimate factor for a legislature to consider." Id. at 123.

The Diaz case involved a challenge to a newly-formed Hispanic district as being primarily race based in violation of Shaw v. Reno, 509 U.S. 630 (1993). Crediting incumbency as a valid redistricting criterion, the court found the district unconstitutional partially because of the absence of incumbency protection as a factor in the making of the district, leaving race as the primary motivating consideration.

The two decisions in Rodriguez v. Pataki, involving New York's redistricting in the wake of the 2000 census, further illuminate the importance of taking incumbency into account.

(a) The Rodriguez Court Drawn Congressional Plan

After the 2000 decennial census, the New York State Legislature initially failed to draw new congressional district lines for use in the 2002 election.

In Rodriguez v. Pataki, 207 F. Supp. 2d 123, 124 (S.D.N.Y. 2002) ("Rodriguez I"), a three-judge court[3] was empanelled for the purpose of drawing a court ordered redistricting plan for New York's Congressional delegation. The court appointed former U.S. District Judge Frederick B. Lacey as Special Master to prepare and recommend to the court a proposed congressional redistricting plan. Rodriguez I, 207 F. Supp. 2d at 124. On May 13, 2002, the Special Master filed his report with the court. On May 23, 2002, the court adopted the Special Master's Report in its entirety.

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[3] The Court consisted of the then Chief Judge of the Court of Appeals for the Second Circuit, Hon. John M. Walker, Jr., as well as U.S. District Judges for the Southern District of New York, Hon. Richard M. Berman and Hon. John G. Koeltl.

In said May 13, 2002 Report, at p. 19, the Special Master acknowledged incumbency as a factor when he specifically rejected proposed plans that paired incumbents.

The Court, when it adopted the referee's plan "in its entirety," inter alia, noted with approval, the plan's "respect[ ] for 'the cores of current districts and the communities of interest that have formed around them,'" which resulted in the separation of two incumbents in Manhattan (Congresspersons Nadler and Maloney) so they would not have to run against each other. Opinion and Order Adopting Special Master's Congressional Redistricting Plan dated May 23, 2002 at p. 10, p. 11, fn. 12.[4]

(b) Challenge in the Rodriguez Case to Congressional, State, Senate and Assembly Lines Legislatively Enacted

The Rodriguez plaintiffs, who included black, Hispanic and white New York voters, asserted a further claim against Governor Pataki and other state officials (before the same three-judge federal court) seeking to overturn the congressional and legislative lines adopted by the Legislature following Rodriguez I.[5] After a lengthy trial, the court, on March 15, 2004 handed down a 211 page decision dismissing all claims against the legislatively enacted Congressional, Senate and Assembly district lines. Rodriguez v. Pataki, 308 F. Supp. 2d346 (S.D.N.Y. 2004) (three-judge court) ("Rodriguez II").

One of the grounds constituting the basis for the challenge in Rodriguez II was the claim of partisan gerrymandering which the court rejected noting that "preserving the cores of

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4 Following the issuance of the Court's plan, the Legislature passed its own congressional redistricting plan thereby legally supplanting the court's plan.

5 Unlike the Congressional Plan, Senate and Assembly lines had separately been adopted by the Legislature and precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act. After the Congressional Court Plan was ordered, the Legislature passed its own congressional redistricting plan which was also precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act.

prior districts," and "avoiding contest between incumbent Representatives" are "important state policies" in redistricting. Id., 308 F. Supp.2d at 363.

Another ground on which the Rodriguez II challenge rested was the population deviation among the legislative districts. At to that claim, the Rodriguez court:

> denied the defendants' initial motion to dismiss . . . the Complaint, . . . to give the plaintiffs an opportunity to meet their burden to show that the minimal deviation results solely from an unconstitutional or irrational state purpose rather than from other state policies recognized by the Supreme Court to be appropriate reasons for deviations. Such policies, announced in Karcher include 'making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives.' Karcher, 462 U.S. at 740.

Id., 308 F. Supp.2d at 366 (emphasis added). In its finding that the population deviation in the plan at issue was justified by, inter alia, the need for incumbency protection, the court held:

> The plan promotes the traditional principles of maintaining the core of districts and limiting incumbent pairing.

Id., 308 F. Supp.2d at 370 (emphasis added)

Finally, the Rodriguez II court specifically endorsed that part of the Senate plan drawn to "avoid[ ] . . . [a] partisan reconfiguration against [incumbent] Senator Velella." Id., 308 F. Supp.2d at 459.

Lower Federal Court Authority from States Other than New York

In South Carolina State Conf. of Branches of NAACP v. Riley, 533 F. Supp. 1178, 1180-1181 (D.S.C.), aff'd, 459 U.S. 1025, 103 S. Ct. 433 (1982) (three-judge court), the court stated the following as regards the plan it drew:

> Any new plan should alter the old only insofar as necessary to obtain an acceptable result. Incumbents know their constituents in the old districts, and many of those constituents will know their congressman as "my congressman." Many of the constituents would have been served by the

> congressman in ways calculated to obtain and enhance loyal support. Such voters ought not to be deprived of the opportunity to vote for a candidate that has served them well in the past and to enjoy his continued representation of them. Supporters and opponents, alike, have a basis for judging him.

In Arizonans for Fair Representation v. Symington, 828 F. Supp. 684 (D. Ariz. 1992) (three-judge court), aff'd, 507 U.S. 981, 113 S. Ct. 1573 (1993), the court found:

> The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.

Id., 828 F. Supp. at 688 (citation omitted; emphasis added).

In Prosser v. Elections Board, 793 F. Supp. 859, 871 (W.D. Wis. 1992) (three-judge court), the court drawn plan lacked incumbent pairings thereby creating the least "perturbation in the political balance of the state."

In Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) (three-judge court) the court, in articulating the traditional redistricting principles that guided the court-drawn plan, stated that "[m]aintaining the residences of the incumbents" so as to "protect the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust," was a "worthy" redistricting consideration. Id. at 647, citing Bush v. Vera, supra and Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995).

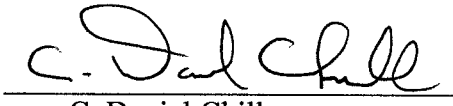
In Smith v. Clark, 189 F. Supp. 2d 529, 541, 545 (S.D. Miss. 2002) (three-judge court) the court included "protection of incumbent residences" as a factor to be considered in drawing of court-ordered plan because "maintenance of incumbents provides the electorate with some continuity." In discussing its plan, the court acknowledged its design to "protect[ ] incumbents." Id., 189 F. Supp. 2d at 545.

CONCLUSION

Based on all of the foregoing authority, it is respectfully submitted that this court should give considerable weight to incumbency protection as a traditional redistricting factor in a court drawn plan.

Dated: New York, New York
February 29, 2012

GRAUBARD MILLER

By: 

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