UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.	)	
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	)	
Plaintiffs,	)	
	)	
v.	)	Case: 1:11-cv-05632-DLI-RR-GEL
	)	**Date of Service**: March 14, 2012
ANDREW M. CUOMO, et al.	)	
	)	
	)	
Defendants.	)	
	)	

SENATE MAJORITY DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to this Court's Order, the Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully object to the Magistrate Judge Roanne L. Mann's Report and Recommendation. The configuration of the Long Island congressional districts in the Magistrate Judge's Recommended Plan, along with districts 5, 8, 11, 19, 23, 25, and 27, needlessly violate traditional redistricting principles, including the principles specifically identified by this Court in its Order of Referral.

BACKGROUND

In late February, this Court referred the task of drafting a new congressional redistricting plan for the State of New York to Magistrate Judge Mann and appointed Dr. Nathaniel Persily as an expert to assist her. Order Of Referral To Magistrate Judge at 2-4 ¶¶ 1, 4 (DE 133). As the Court explained, "[t]he number of New York's members of the House of Representatives in Congress has been reduced from 29 to 27, based upon the results of the 2010 Census." *Id.* at 4-5. The Court ordered the Magistrate Judge to "adhere to, and, where possible, reconcile the following" redistricting principles:

a. The plan will divide the state into 27 congressional districts in accordance with the 2010 federal Census and applicable law.

b. Districts shall be substantially equal in population.

c. Districts shall be compact, contiguous, respect political subdivisions, and preserve communities of interest.

d. The plan shall comply with 42 U.S.C. §1973(b) and with all other applicable provisions of the Voting Rights Act.

Id. at 3 ¶ 2.

Moreover, the Court indicated that "[t]he magistrate judge may consider other factors and proposals submitted by the parties, which, in the magistrate judge's view, are reasonable and

comport with the Constitution and applicable federal and state law." *Id.* ¶ 3. The Court also instructed the Magistrate Judge to "consider any proposals, plans, and comments either already submitted or to be submitted by all parties and intervenors in this action." *Id.* at 4 ¶ 6; *see also* Magistrate's Order (DE 129) (ordering parties to "serve and file their proposed Congressional redistricting plans").

In response to these orders, the Senate Majority Defendants "propose[d] a Congressional redistricting plan that reflects the reduction in Congressional seats, while at the same time complies with the traditional redistricting principles and the Voting Rights Act requirements identified by this Court." Senate Majority Defs.' Submission (DE 144). In conjunction with this submission, and as authorized by this Court, the Senate Majority Defendants also filed a brief explaining why incumbency protection is an appropriate factor that the Magistrate Judge should consider in drawing a proposed congressional districting map. *See* Senate Majority Defs.' Letter (DE 145); *see also* Assembly Majority Defs.' Letter (DE 153).

The Senate Majority Defendants objected to Assembly Majority Defendants' proposed redistricting plan because it "raise[d] significant concerns under the Voting Rights Act, and violates existing districts, pairing incumbents unnecessarily, and undermining political fairness," Senate Majority Defs.' Resps. & Objections at 1 (DE 170), and opposed Common Cause's plan, which paired no fewer than eight incumbents, because it "violates the one-person, one-vote requirement, contravenes the Voting Rights Act, and disregards traditional redistricting principles in favor of irrelevant data," *id.* at 4.

On March 5, the Magistrate Judge filed a draft redistricting plan and ordered the parties to show cause why this plan should not be presented to this Court as the recommendation of the Magistrate Judge. *See* Order To Show Cause (DE 184). Senate Majority Defendants responded

(DE 192), arguing that the districts proposed for Long Island, along with proposed districts 5, 8, 11, 19, 23, and 27, violate traditional redistricting principles. The Magistrate Judge subsequently filed her Report and Recommendation (DE 223). This Recommended Plan does not implement any of the Senate Majority Defendants' proposed modifications. Senate Majority Defendants therefore file the following objections.

STANDARD OF REVIEW

The Report of the Magistrate Judge is reviewed *de novo*. *See* 28 U.S.C. § 6136(b)(1)(C); *Estate of Ellington v. Harbrew Imports Ltd.*, 812 F. Supp. 2d 186, 188 (E.D.N.Y. 2011); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 439 (N.D.N.Y. 2003).

ARGUMENT

The Recommended Plan needlessly violates New York's traditional redistricting principles.

Long Island. The recommended districts for Long Island fail to "respect[] the cores of current districts and the communities of interest that have formed around them." *Rodriguez v. Pataki*, No. 02-Civ. 618 (RMB), 2002 WL 1058054, at *6 (S.D.N.Y. May 24, 2002) (internal quotation marks omitted). Districts have traditionally run north to south across Long Island. But the Recommended Plan needlessly, and with no explanation from the Magistrate Judge, flips districts 2 and 3 to run east and west along Long Island's northern and southern shores. This change dramatically realigns the existing districts without any apparent basis in traditional redistricting principles. For example, whereas the Senate Majority Plan maintains 89.8% of the core of Rep. Israel's existing district and 82.9% of the core of Rep. King's existing district, *see*

DE 192 at 1, the Recommended Plan would preserve only 38.8% and 47.3%, respectively, of these districts, *see* DE 223-6 at 1.

Nonetheless, Professor Persily generally dismisses the Senate Majority Defendants' (and other parties') concerns about "respecting the cores of prior districts," insisting such claims are merely "pretextual arguments for protecting incumbents." Persily Aff. ¶ 157 (DE 223-1). As a threshold matter, incumbency protection *is* a traditional redistricting principle, as Professor Persily himself has previously recognized. The three-judge Court in the last round of redistricting litigation in New York held that preserving the cores of existing districts is an independent redistricting principle—not merely a pretext for incumbency protection. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 363 ("important state policies" include 'making districts compact, respecting municipal boundaries, *preserving the cores of prior districts, and avoiding contests between incumbent Representatives*'" (quoting *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983))). Indeed, even the Magistrate Judge acknowledged this. *See* Report & Recommendation at 32 n.18 (DE 223) ("While those two concepts may be related, this Court declines to equate them."). It was therefore inappropriate for the Magistrate Judge to disregard core preservation on this basis alone.

While preserving the cores of existing districts may help protect incumbents, it furthers other important redistricting goals as well, including preserving "communities of interest," *Rodriguez*, 2002 WL 1058054, at *6, "maintain[ing] the identity of the district[,] and usually preserv[ing] continuity of representation for voters and their representatives," Nathaniel Persily, *When Judges Carve Democracies: A Primer On Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1161 (2005) (*hereinafter* "Persily Primer"). By failing to preserve the cores of Long Island congressional districts 2 and 3, the Recommended Plan needlessly fractures

traditional communities of interest, destroys the identity of these districts, and disrupts continuity of representation for voters and their representatives. Moreover, keeping Smithtown wholly within district 1—rather than dividing it between districts 1 and 3 as the Recommended Plan does—is preferable and consistent with the traditional redistricting principle of respecting political subdivisions.

Therefore, even if this Court rejects incumbency protection as a legitimate redistricting criteria—and, as explained below, the Court should not—the Recommended Plan is inconsistent with other traditional redistricting principles in its treatment of districts 1, 2, and 3 on Long Island.

District 5. The Recommended Plan fails to "preserv[e] the cores of prior districts, and avoid[] contests between incumbent Representatives," *Rodriguez*, 308 F. Supp. 2d at 363 (quoting *Karcher*, 462 U.S. at 740), by needlessly pairing incumbents Rep. Meeks and Rep. Turner in district 5 and thereby creating an unnecessary open seat in neighboring district 6.

At the same time, the Recommended Plan fails to respect communities of interest by dividing among a total of no fewer than four districts (districts 5, 8, 9, and 10) traditional Russian and Jewish neighborhoods in Brooklyn, and traditional communities of interest in Far Rockaway Peninsula, Howard Beach, and Ozone Park, which also include substantial Jewish populations. These are communities that were previously unified and should remain unified in what is currently district 5. In this respect, too, the Recommended Plan fails to respect political subdivisions by needlessly having district 5 cross into Nassau County.

These violations of traditional redistricting principles are completely unnecessary, as the Senate Majority Plan demonstrates. The Senate Majority Plan would not require this incumbent pairing in district 5 and respects communities of interest and political subdivisions, all while

avoiding retrogression in surrounding Section 5 districts and ensuring that minorities continue to have an equal opportunity to elect representatives of their choice. *See* Senate Majority Plan Submission at 3-4 (DE 144).

Nonetheless, the Magistrate Judge suggests that the incumbency pairing in district 5 does not violate traditional districting principles because incumbency protection is not a proper factor for courts to consider in court-drawn plans. *See* Report & Recommendation at 32-38. In support of this conclusion, the Magistrate Judge primarily claims that "the creation of a redistricting plan that ignored incumbency would [1] enhance both the reality and appearance of judicial impartiality, and [2] would be entirely consistent with governing caselaw." *Id.* at 33. Both claims are without merit.

First, avoiding incumbency pairings actually *enhances* the reality and appearance of judicial impartiality. As Professor Persily has observed, by "protecting all incumbents equally," a court "avoid[s] charges that its plan is biased against one party." Persily Primer at 1136-37 (citing *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992)). This is especially true since pairing incumbents is a well-recognized political gerrymandering tool.[1] Ignoring incumbency protection and needlessly pairing incumbents as a result thus does not place a Court above the "political thicket," as the Magistrate Judge reasoned, but enmeshes the Court in that thicket. *See* Report & Recommendation at 37 (DE 223).[2] Indeed, and not surprisingly in light of

[1] *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004) (overturning plan where "Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible"), *summ. aff'd*, 524 U.S. 947 (2004); *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 402 (W.D. Va. 1991) (discussing plan that paired Republican incumbents); S. Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 552 (Nov. 2004) ("Contemporary partisan gerrymandering" may involve "redrawing the lines to place the residences of two incumbents in the same district.").

[2] While the Recommended Plan includes four incumbent pairings, the Senate Majority Plan includes only one incumbent pairing—this is the bare minimum, in light of Rep. Hinchey's announced retirement and the State's loss of two Congressional seats. *See* Senate Majority Defs.' Submission at 1. Moreover, the Senate Majority Defendants' proposal to collapse the existing Queens-Nassau Congressional district reflects demographic changes,

the Magistrate Judge's proposal to pair Rep. Turner against Rep. Meeks, Rep. Turner announced yesterday that he will not run for reelection as a Representative but is now planning to run for the U.S. Senate instead; if this gratuitous pairing is undone, Rep. Turner's choice might be reversed.

Second, ignoring incumbency is contrary to governing case law. As the Magistrate Judge acknowledges, "'whenever adherence to state policy does not detract from the requirements of the Federal Constitution, . . . a district court should . . . honor state policies in the context of congressional reapportionment.'" Report & Recommendation at 21 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). In New York, "'avoiding contests between incumbent Representatives'" *is* an "important state polic[y]." *See Rodriguez*, 308 F. Supp. 2d at 363 (quoting *Karcher*, 462 U.S. at 732-33). Incumbency is "an important and legitimate factor for a legislature to consider" due to "the powerful role that seniority plays in the functioning of Congress." *Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997). Also, legislators have "quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with constituents." *Id.*

Contrary to the Magistrate Judge's determination to ignore incumbency protection altogether, the Supreme Court and other courts across the country have similarly recognized incumbency protection as a traditional redistricting principle on par with other traditional principles that were specified in this Court's Order of Referral such as compactness and preserving political boundaries. *See Karcher*, 462 U.S. at 740 ("[M]aking districts compact, respecting municipal boundaries, preserving the cores of prior districts, *and avoiding contests between incumbent Representatives*. . . . are all legitimate objectives" (emphasis added)); *see*

(continued…)

avoids retrogression in covered counties, and respects the cores of existing districts and communities of interest. *See id.* at 1-2.

also Abrams v. Johnson, 521 U.S. 74, 98 (1997) (quoting *Karcher*); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) (finding incumbent protection to be a traditional state interest in South Carolina); *Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995) (finding that the protection of incumbents was a legitimate consideration); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688-89 (D. Ariz. 1992) (three-judge court) (same)

The Court should therefore defer to—and not wholly ignore—the important state policy of incumbency protection when drawing district lines, as courts in this circuit have done in previous rounds of redistricting litigation. For example, the court-appointed referees made incumbency protection the "third-most-significant factor" in drawing the plan at issue in *Diaz*, 978 F. Supp. at 104. Indeed, in *Diaz* the court held that that the configuration of a congressional district constituted a *Shaw* violation in part because this traditional redistricting principle had been improperly subordinated to racial considerations. *See id.* at 123 ("Nevertheless, while incumbency explains, in major part, the final boundaries of various districts, without the factor of race, the 12th CD, as a majority-Latino district, would never have been created. . . . [T]he race-based maximization policy of DOJ led to the creation of a seventh majority-minority district and, consequently, eliminated the possibility of protecting still another incumbent."). And the *Rodriguez* court listed the avoidance of incumbency pairings as one of several traditional redistricting principle, along with maintaining equal population among the districts, without singling incumbency protection out as a criterion for only the Legislature to use. *See Rodriguez*, 308 F. Supp. 2d at 352 ("[T]raditional districting principles include[e]: maintaining equality of population, preserving the 'cores' of existing districts, *preventing contests between incumbents*,

and complying with the requirements of the Voting Rights Act." (emphasis added)); *see also* Senate Majority Defs.' Letter (DE 145); Assembly Majority Defs.' Letter (DE 153).

Courts in other states have similarly deferred to the policy of incumbent protection when drawing district lines. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 84 (1997) (noting the district court's use of this factor); *Colleton Cnty.*, 201 F. Supp. 2d at 647; *Johnson*, 922 F. Supp. at 1565; *Arizonans for Fair Representation*, 828 F. Supp. at 688-89; *see generally Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (upholding plan drawn by three-member bipartisan board after legislative impasse; "politics and political considerations are inseparable from districting and apportionment."). The Magistrate Judge should not have ignored this principle entirely. More specifically, the Recommended Plan violates well-established redistricting principles by needlessly pairing incumbents in district 5.

If, as appears to be the case, traditional principles were violated in an effort to increase the black voting age population (BVAP) in recommended district 5, such an increase was unnecessary under the Voting Rights Act. A plaintiff alleging a Section 2 vote dilution claim must make three threshold showings: "(1) The minority group must be "sufficiently large and *geographically compact to constitute a majority*," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)) (emphasis added). *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009).

Thus, Section 2 does not require the creation of a majority-minority district where the minority group is not *geographically compact*. *See LULAC v. Perry*, 548 U.S. 399, 433 (2006); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). When analyzing Section 2 compactness, the "inquiry should take into account traditional districting principles such as maintaining

communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433 (quoting *Abrams*, 521 U.S. at 92) (quotation marks and citations omitted). For example, in *Abrams* the Supreme Court held that the district court "acted well within its discretion" in declining to draw an additional majority-black Congressional district in Georgia, where the proposed district would have "split[] Bibb County-a county never before split in apportionment plans." 521 U.S. at 89.

Similarly here, recommended district 5 is not compact and it disrupts communities of interest and traditional boundaries by crossing into Nassau County. Moreover, the creation of such a district is particularly unnecessary since the existing district demonstrates that blacks can elect candidates of choice in a district that has less than 50% BVAP. *See Bartlett*, 556 U.S. at 16 ("It is difficult to see how the [*Gingles*] majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate.").

Districts 8 and 11. Traditionally, Marlboro Housing Development and Coney Island have been in the same Congressional district. The Magistrate Judge's Recommended Plan, however, places Marlboro in district 11, and Coney Island in district 8. Moreover, the Recommended Plan splits Midwood between districts. To preserve the cores of existing districts and preserve communities of interest, Marlboro should be placed in district 8, and in exchange, all of Midwood should be located in District 11—as in the Senate Majority Defendants' proposed plan.

District 19. The Recommended Plan fails to respect the core of district 19 and the communities of interest that have formed around it. Notably, the Recommended Plan omits communities in the Hudson Valley that were traditionally part of this district, including the counties of Warren, Washington, and Saratoga. As a result, the Recommended Plan preserves

only 44.1% of Rep. Gibson's prior district, *see* DE 223-6 at 5, as compared to the Senate Majority Plan, which preserved 78.3% of this district, *see* DE 192 at 2.

Districts 23, 25, and 27. The Recommended Plan fails to respect political subdivisions by splitting several towns in Wyoming and Livingston Counties. Consistent with traditional redistricting principles, these districts should be redrawn so that Wyoming and Livingston are drawn entirely into District 27, while population from Erie County is drawn into District 23.

The Recommended Plan also fails to respect political subdivisions by splitting the town of Hamlin so that 9,043 of its residents are in district 27, while only two people are in district 25. As a result of this split, the local government will need to expend resources on ballots and voting machines for a separate election district containing only two people. This problem could be avoided by placing all of the Census blocs south of Route 104 and west of Redman Road in district 27, and placing the rest of Clarkson in district 25. Then the town of Hamlin could be placed entirely within district 25 without violating the equal population requirement.

CONCLUSION

The Senate Majority Defendants respectfully request that the Court adopt these modifications to the Recommended Plan so that the final plan comports with, and does not unnecessarily deviate from, traditional redistricting principles.

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Respectfully submitted,

/s/Michael A. Carvin

Michael A. Carvin (MC 9266)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
202/879-3939

Todd R. Geremia (TG 4454)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
212/326-3939

David Lewis (DL 0037)
LEWIS & FIORE
225 Broadway, Suite 3300
New York, NY 10007
212/285-2290

Attorneys For Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of March, 2012, a true and correct copy of the foregoing was served on the following counsel of record through the Court's CM/ECF system:

Richard Mancino
Daniel Max Burstein
Jeffrey Alan Williams
WILLKIE FARR & GALLAGHER
787 Seventh Avenue
New York, NY 10019

Attorneys for Plaintiffs

Joshua Pepper
Assistant Attorney General
120 Broadway, 24th Floor
New York, NY 10271

Attorney for Defendants Andrew M. Cuomo, Eric T. Schneiderman, and Robert J. Duffy

Leonard M. Kohen
67 E. 11th Street #703
New York, NY 10003

Attorney for Defendants John L. Sampson and Martin Malave Dilan

Jonathan Sinnreich
SINNREICH KOSAKOFF & MESSINA LLP
267 Carleton Avenue, Suite 301
Central Islip, NY 11722

Attorney for Defendant Robert Oaks

Harold D. Gordon
Couch White, LLP
540 Broadway
Albany, NY 12201

Attorney for Defendant Brian M. Kolb

Joan P. Gibbs
Center for Law and Social Justice
1150 Carroll Street
Brooklyn, NY 11225

Attorney for Intervenors Drayton, Ellis, Forrest, Johnson, Woolley, and Wright

James D. Herschlein
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022

Attorney for Intervenors Lee, Chung, Hong, and Lang

Jackson Chin
LatinoJustice PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013

Attorney for Intervenors Ramos, Chavarria, Heymann, Martinez, Roldan, and Tirado

Jeffrey Dean Vanacore
Perkins Coie LLP
30 Rockefeller Center, 25th Floor
New York, NY 10112

Attorney for Rose Proposed Intervenors

/s/ Michael A. Carvin