

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, HOWARD LEIB, LILLIE :  
H. GALAN, EDWARD A. MULRAINE, :  
WARREN SCHREIBER, and WEYMAN A. :  
CAREY, :

Plaintiffs, :

and, :

DONNA KAYE DRAYTON, EDWIN ELLIS, :  
AIDA FORREST, GENE A. JOHNSON, JOY :  
WOOLEY, SHEILA WRIGHT, LINDA LEE, :  
SHING CHOR CHUNG, JULIA YANG, JUNG :  
HO HUNG, JUAN RAMOS, NICK :  
CHAVARRIA, GRACIELA HEYMANN, :  
SANDRA MARTINEZ, EDWIN ROLDAN, :  
MANOLIN TIRADO, LINDA ROSE, :  
EVERET MILLS, ANTHONY HOFFMAN, :  
KIM THOMPSON-WEREKOH, CARLOTTA :  
BISHOP, CAROL RINZLER, GEORGE :  
STAMATIADES, JOSEPHINE RODRIGUEZ, :  
SCOTT AUSTER, and YITZCHOK ULLMAN :

Case No. 11-CV-5632  
(DLI)(RR)(GEL)

Intervenor-Plaintiffs, :

v. :

ANDREW M. CUOMO, as Governor of the :  
State of New York, ROBERT J. DUFFY, as :  
President of the Senate of the State of New :  
York, DEAN G. SKELOS, as Majority Leader :  
and President Pro Tempore of the Senate of the :  
State of New York, SHELDON SILVER, as :  
Speaker of the Assembly of the State of New :  
York, JOHN L. SAMPSON, as Minority Leader :  
of the Senate of the State of New York, BRIAN :  
M. KOLB, as Minority Leader of the Assembly :  
of the State of New York, the NEW YORK :  
STATE LEGISLATIVE TASK FORCE ON :  
DEMOGRAPHIC RESEARCH AND :  
REAPPORTIONMENT (“LATFOR”), JOHN J. :  
McENENY, as Member of LATFOR, ROBERT

**FIRST AMENDED COMPLAINT**

OAKS, as Member of LATFOR, ROMAN :  
HEDGES, as Member of LATFOR, MICHAEL :  
F. NOZZOLIO, as Member of LATFOR, :  
MARTIN MALAVÉ DILAN, as Member of :  
LATFOR, and WELQUIS R. LOPEZ, as :  
Member of LATFOR, :  
: :  
Defendants.

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Plaintiffs Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey, by their attorneys, Willkie Farr & Gallagher LLP, as directed by the Court by order dated March 21, 2012, for their First Amended Complaint herein, allege as follows:

**INTRODUCTION**

1. New York’s process of redistricting its State Senate, Assembly, and congressional districts over the past several decades has become an exercise in partisan self-dealing and incumbent protection. As a result of this process, many New Yorkers have long been denied any meaningful opportunity to select their own leaders.

2. New York citizens and public interest groups called upon the Legislature to enact a system of independent redistricting, whereby the individuals drawing district lines are free from political pressure and therefore have the ability to draw those lines based upon standardized criteria, such as population equality, contiguity of districts, fair representation of minority groups, respect for political subdivisions like counties and towns, compactness of districts, and preservation of communities of interest. Despite the fact that majorities of both houses of the Legislature promised to enact such a system of independent redistricting, no such system has been adopted.

3. Meanwhile, until recently, the redistricting process following the 2010 census had stalled and threatened to throw the state's 2012 elections into a quagmire absent court intervention.

4. The legislative stalemate was a direct result of legislative inaction on reform of the redistricting process. The Governor had promised to veto any redistricting plan that was not the result of an independent process, and no such independent process took place.

5. Accordingly, Plaintiffs asked this Court to avert this impending electoral disaster by appointing a Special Master to effectuate independent redistricting based upon fair criteria.

6. On February 28, 2012, this Court, in response to Plaintiffs' original Complaint, referred the task of creating new congressional districts to Magistrate Judge Roanne Mann, assisted by Professor Nathaniel Persily. On March 19, 2012, this Court adopted (with minimal changes) the congressional redistricting plan created by Magistrate Judge Mann, and ordered the implementation of these districts (the "Ordered Plan") for the 2012 congressional elections for the House of Representatives.

7. While the Court was crafting the Ordered Plan, the Legislature passed, and the Governor signed, redistricting plans for the State Assembly and Senate. Although these plans have been enacted by the State, they still have not been pre-cleared under the Voting Rights Act and thus neither elections nor pre-election activities such as candidate petitioning may take place using these districts. In addition, the Senate plan is the subject of a lawsuit in state court, entitled *Cohen, et al. v. Cuomo, et al.*, No. 12-102185 (Sup. Ct. N.Y. Cty), that could ultimately result in the enacted Senate plan being deemed unusable (the "State Court Suit").

8. Although Senate and Assembly plans have been enacted, they are currently unusable and may remain so until after the June 5, 2012 start to the candidate petitioning period for these state legislative elections. It is not currently known whether or when the Senate and Assembly plans will receive final approval. Just as it did with respect to congressional redistricting, this Court must now prepare for the possibility that such final approval will not occur in a timely fashion and that the Court will need to adjust districts or create new districts before the candidate petitioning period begins. The 2012 state legislative elections, and the votes of millions of New Yorkers, remain at risk.

### **PARTIES**

9. Plaintiff Mark A. Favors is a registered voter in New York County in the State of New York, in what were, under the 2002 redistricting plan, the 71<sup>st</sup> Assembly District and the 30<sup>th</sup> Senatorial District (the “Existing” districts). Mr. Favors works as a registered public health nurse and in his spare time founded and serves as Executive Director of the Youth Civic Leadership Academy, which empowers low-income and minority youths as community leaders. Mr. Favors desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

10. Plaintiff Howard Leib is a registered voter in Tompkins County in the State of New York, in the Existing 125<sup>th</sup> Assembly District and 51<sup>st</sup> Senatorial District. Mr. Leib is an entertainment and intellectual property attorney and an educator. Mr. Leib spends considerable time working to protect the rights of voters from all parties, including election day poll monitoring. He is actively considering becoming a 2012 candidate for State Senate from the

Existing 51<sup>st</sup> Senatorial District, nicknamed the “Abraham Lincoln riding a vacuum cleaner” district for its odd gerrymandered shape. However, Mr. Leib lives near the far Western border of the current 51<sup>st</sup> Senatorial District, and he does not know whether he will still live in that District following the current redistricting process, nor does he know who will be the eligible voters in his District. In order to make the important decision about whether to run for office and to begin building political support and raising money, Mr. Leib needs to know where the final district lines lie as soon as possible. In addition, regardless of his own candidacy, Mr. Leib desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

11. Plaintiff Lillie H. Galan is a registered voter in Westchester County in the State of New York, in the Existing 93<sup>rd</sup> Assembly District and 35<sup>th</sup> Senatorial District. Ms. Galan is retired from the New York State Office of Children and Family Services, having worked for the State for 32 years. She serves as President of the Community Advisory Board of Rockland Community Mental Health Center, an adult mental health clinic, and has served on that Board since the mid-1990s. She also serves as a District Leader in the Third Ward in Yonkers. Ms. Galan desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in her district in the 2012 primary and general elections, and she is interested in volunteering for or contributing money to one or more of these candidates.

12. Plaintiff Edward A. Mulraine is a registered voter in Westchester County in the State of New York, in the Existing 87<sup>th</sup> Assembly District and 36<sup>th</sup> Senatorial District. Reverend Mulraine is a pastor at the Unity Baptist Tabernacle in Mt. Vernon and engages in a

number of local issues, particularly relating to anti-violence initiatives. Reverend Mulraine desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

13. Plaintiff Warren Schreiber is a registered voter in Queens County in the State of New York, in the Existing 26<sup>th</sup> Assembly District and 16<sup>th</sup> Senatorial District. Mr. Schreiber is retired from the Metropolitan Transit Authority in the State of New York and serves as President of the Bay Terrace Community Alliance, a neighborhood coalition in Queens. Mr. Schreiber desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

14. Plaintiff Weyman A. Carey is a registered voter in Kings County in the State of New York, in the Existing 58<sup>th</sup> Assembly District and 21<sup>st</sup> Senatorial District. Mr. Carey and his wife have lived in their East Flatbush, Brooklyn home since 1974. Together, Mr. and Mrs. Carey own and run Garden 54, an event facility adjacent to their home. Mr. Carey serves as District Leader of the Existing 58<sup>th</sup> Assembly District. He desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

15. Defendant Andrew M. Cuomo is the Governor of the State of New York. He is being sued in his official capacity.

16. Defendant Robert J. Duffy is the Lieutenant Governor and President of the Senate of the State of New York. He is being sued in his official capacity.

17. Defendant Dean G. Skelos is the Majority Leader and President *Pro Tempore* of the Senate of the State of New York. He is being sued in his official capacity.

18. Defendant Sheldon Silver is the Speaker of the Assembly of the State of New York. He is being sued in his official capacity.

19. Defendant John L. Sampson is the Minority Leader of the Senate of the State of New York. He is being sued in his official capacity.

20. Defendant Brian M. Kolb is the Minority Leader of the Assembly of the State of New York. He is being sued in his official capacity.

21. Defendant LATFOR is the New York State Legislative Task Force on Demographic Research and Reapportionment. LATFOR is charged by statute with researching the techniques and methodologies that the U.S. Census Bureau used in the decennial census and with providing a technical plan to meet the timeline for redistricting based on such census.

22. Defendants John J. McEneny, Robert Oaks, Roman Hedges, Michael F. Nozzolio, Martin Malavé Dilan, and Welquis R. Lopez are members of LATFOR. They are being sued in their official capacities.

### **JURISDICTION AND VENUE**

23. This Court has jurisdiction over Plaintiffs' federal constitutional claims pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1983.

24. This Court has jurisdiction over Plaintiffs' declaratory judgment claim pursuant to 28 U.S.C. § 2201.

25. This Court has supplemental jurisdiction over Plaintiffs' related state law claims pursuant to 28 U.S.C. § 1367.

26. Venue is appropriate in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

27. Since this is an action challenging the apportionment of congressional districts and statewide legislative bodies, this three-judge Court should remain convened pursuant to 28 U.S.C. § 2284.

### **FACTUAL ALLEGATIONS**

#### **I. Background**

##### **A. The Redistricting Process**

28. Article III, Sections 4 and 5 of the New York State Constitution provide that after each decennial census, the New York State Senate and Assembly districts must be readjusted or altered so that each district contains, to the extent possible, an equal number of inhabitants, in as compact a form as possible.

29. Similarly, the United States Constitution requires that federal congressional boundaries be re-drawn every ten years to reflect population shifts shown in the census.

30. The process of re-drawing these district lines is known as redistricting. In New York State, redistricting is the responsibility of the State Legislature.

31. In 1978, the Legislature created LATFOR, an advisory task force on demographic research and reapportionment. LATFOR is made up of six members: four legislators (two each from the Senate and Assembly) and two non-legislators. One of the non-legislators is appointed by the President *Pro Tempore* of the Senate, the other by the Assembly Speaker. The current members of LATFOR are Defendants Assemblyman John J. McEneny,

Assemblyman Robert Oaks, Senator Michael F. Nozzolio, Senator Martin Malavé Dilan, Dr. Roman Hedges, and Welquis R. Lopez.

32. According to its website, LATFOR's role is to "aid[] the Legislature by providing technical plans for meeting the requirements of legislative timetables for the reapportionment of Senate, Assembly and Congressional districts" and "analyze[] the Census Bureau population figures used in the redistricting plan." In plain English, LATFOR's primary role is to prepare the redistricting maps for the Legislature.

33. The redistricting plan must be approved by the Legislature and the Governor. In addition, three counties of New York City (Bronx, Kings, and New York) require that the United States Justice Department's Civil Rights Division or the United States District Court for the District of Columbia review and approve the plan for compliance with the Voting Rights Act.

**B. New York's History of Partisan Self-Interested Redistricting By the Legislature**

34. The current process for drawing district lines in New York State has been widely criticized as lacking independence from the Legislature, serving partisan interests, and protecting incumbent office-holders rather than the public interest.

35. Technological advances in redistricting technology now allow legislators the ability to hand-pick the voters who will elect them, rather than allowing voters to select the legislators. Sophisticated computer software and voter databases have transformed the redistricting process into a precise and highly manipulable science.

36. Over the last several decades, New York's legislators have effectively used their direct role in the redistricting process to protect existing incumbents and existing majorities in both houses. These efforts have ensured that, once elected, incumbents often face

uncompetitive elections and little chance of defeat. For instance, between 1982 and 2008 nearly 3,000 legislative general elections were held, resulting in a mere 39 cases in which an incumbent lost in the general election. In the decade between 2000 and 2010, the incumbent reelection rate averaged a staggering 96%. Even in 2010, an historically anti-incumbent year, 92% of incumbent state legislators won reelection.

37. LATFOR lacks independence in this process. Two-thirds of LATFOR members are sitting legislators who are literally drawing their own districts. Partisan concerns appear to be regularly taken into account when drawing district lines. For example, a July 20, 2001 memorandum to Defendant Senator Dean Skelos titled “Size of the Senate,” which discusses increasing the Senate from 61 to 63 members, is focused primarily on the political considerations of different scenarios. The memorandum, written by a legislative redistricting staff member, notes that an additional district in Long Island would be problematic for Republicans because it “almost certainly would not be a republican pickup.” The memorandum also states that a combined Queens-Long Island district would politically help certain senators. Another memorandum, dated December 18, 2001, entitled “The 135,” describes how a legislative staff member drew two districts at the time represented by Senators Saland and Leibell “a little bit ‘lite’” (*i.e.*, with lower population) in order to “maximize[] the Westchester portion attached to [the] Bronx” to make it more favorable for Senator Guy Velella’s district.

38. These memoranda suggest that LATFOR and legislative redistricting staff members take partisan outcomes and the best interests of incumbents into serious consideration when producing district maps.

39. Although the partisan legislative redistricting process currently has the force of state law, in the event of a breakdown in the process including a failure to obtain timely

final approval of any enacted plan, it is the responsibility of a Court to supervise the redistricting process. Depending on the deficiency in the legislative redistricting plan (or lack of plan), the Court may not need to adhere to any elements of this partisan, self-interested redistricting process when carrying out this responsibility. Indeed, under certain circumstances including when the number of total districts changes, the Court in its supervision of this process is free to adopt the principles of fair redistricting in the interest of justice.

**C. Features of Fair Redistricting**

40. Independent redistricting proposals vary in their details, but they share the critical common theme that the line-drawers are disinterested individuals and are not the politicians whose chances of reelection often depend upon the results of the redistricting process.

41. The process of fair redistricting, whether independent or not, tends to be guided by certain criteria such as the ones that follow.

42. Population equality is a hallmark of fair redistricting proposals. The United States Supreme Court has held that a state's House of Representatives districts must be as equal to one another as practicable but that state legislative districts under certain circumstances may vary as much as ten percent between the most and least populous districts. Independent redistricting proposals typically reduce the maximum deviation, frequently to two percent.

43. Contiguity refers to the principle that no district should be separated from itself entirely by another district, *i.e.*, that each district shall consist of contiguous territory. Contiguity is required by the New York State Constitution.

44. Fair representation of minority groups refers to the principle that racial and linguistic minority groups should have an equal opportunity with other citizens to participate in the political process and to elect representatives of their choice. This principle is espoused in the federal Voting Rights Act.

45. Respect for political subdivisions refers to complex requirements in the New York State Constitution that essentially provide that wherever possible, districts should not cross over county lines and towns should not be divided into multiple districts.

46. Compactness refers to the principle that any two locations within a district should be as geographically close to each other as possible. Compactness is required by the New York State Constitution.

47. Preservation of communities of interest refers to the principle that communities that have shared interests including geographic, social, economic, and other interests should be united in districts where possible.

48. A redistricting process that applies the principles of population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest serves the interests of justice.

**D. New York's Legislators Committed to Independent Redistricting But Did Not Enact It**

49. In 2010, a coalition called New York Uprising asked candidates for the New York Legislature to sign a pledge to enact legislation to create an independent, non-partisan redistricting process that prioritizes specific criteria including population equality, competitiveness of elections, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest. The pledge calls for a redistricting process that expressly prohibits drawing districts favoring any political party, incumbent, or candidate for office.

50. One hundred thirty-eight current members of the New York Legislature signed this pledge, comprising a majority in each chamber. The vast support for this pledge by

candidates for office who are now legislators demonstrates significant political support for independent redistricting.

51. Despite the fact that majorities of both houses of the Legislature committed to independent redistricting, the legislative process to enact such independent redistricting broke down, and no independent redistricting process was ever established.

**E. The Accelerated Timeline Required in 2012 For Congressional Elections**

52. The federal Military and Overseas Voter Empowerment Act (the “MOVE Act”) requires states to provide military and overseas voters a minimum amount of time to apply for, receive, and return absentee ballots for federal elections. New York’s usual September congressional primary date leaves too little time between the primary and general elections to comply with the MOVE Act. As a result, beginning in 2012, New York can no longer hold its congressional primary elections in September. On November 16, 2011, the United States Department of Defense denied a request by the State of New York to keep its 2012 congressional primary date in September.

53. On January 27, 2012, Judge Gary L. Sharpe of the United States District Court for the Northern District of New York issued an order setting New York’s congressional primary election for June 26, 2012. Subsequently, Judge Sharpe set the period for collecting nominating petitions for congressional candidates to begin March 20, 2012.

54. The primary election for State Senate and Assembly seats remains scheduled for September 11, 2012. Under New York State Election Law, the period for collecting nominating petitions for Senate and Assembly candidates begins June 5, 2012.

55. In advance of the nominating and petitioning period, prospective legislative candidates must determine whether they will run for office. In order to make this

important decision, such individuals need to know in which district they reside and the contours of that district.

56. In practice, prospective candidates for public office begin building support and raising and spending money long before the nominating and petitioning period begins. For example, Defendant Skelos's campaign committee began making expenditures for the 2010 election at least as early as June 1, 2009 (fourteen months before the primary), and Defendant Silver's campaign committee began making 2010 election expenditures at least as far back as December 2, 2009 (nine months prior to the primary). For potential candidates to lay this campaign groundwork efficiently, and indeed to even make a decision to run, they need to know where their districts lie.

57. In addition, politically active citizens typically begin the process of determining which candidates to support and endorse well in advance of the state primary. For example, prior to the 2010 primary election, the Community Free Democrats, a Democratic club on the Upper West Side of Manhattan, held a candidate forum with candidates for the United States House of Representatives and the New York State Assembly on April 22, five months before the September primary election. Similarly, on March 4, 2010 (six months in advance of the primary), the Westchester and Dutchess County Republican Committees convened a meeting to interview candidates for the Republican nomination for the 99<sup>th</sup> Assembly district. Citizen engagement with elections begins well before the election is held, and a delay in redistricting will leave voters and political parties unable to meaningfully engage in the political process.

**F. This Court Was Forced To Take Over Congressional Redistricting Due To The Failure Of The Legislature To Enact A Congressional Redistricting Plan As Required By Law**

58. Article I, Section 2 of the United States Constitution requires that members of the United States House of Representatives be apportioned among the states according to population, with the apportionment to be made every ten years.

59. Following the 2000 census, New York was apportioned 29 seats in the United States House of Representatives. However, New York lost two congressional seats following the 2010 census and is now entitled to only 27 seats in the House of Representatives.

60. Continued adherence to New York's Existing House of Representatives districts would have given New York two more seats than it is entitled to fill, which was in violation of the United States Constitution and Federal law.

61. In addition, the population disparity between New York's most and least populous Existing House of Representatives districts was 17.9%, which was in violation of the United States Constitution and Federal law.

62. Faced with the fact that, under the June 26 primary date, candidate petitioning had to begin on March 20, and the Legislature had not passed a congressional redistricting plan that would remedy these constitutional failures, on February 21, 2012 this Court referred to the Honorable Roanne L. Mann, United States Magistrate Judge, the task of crafting a congressional redistricting plan.

63. Magistrate Judge Mann, with the assistance of Professor Nathaniel Persily, created such a plan and, after opportunity for comment and objections by the parties and the public, presented it to this Court for approval on March 12, 2012.

64. After a hearing on Magistrate Judge Mann's proposed plan, this Court ordered its adoption and implementation (with minor changes) by New York State on March 19,

2012. Congressional candidates are currently collecting signatures on nominating petitions pursuant to the Ordered Plan.

**II. Because New York Still Has No Legally Operative State Legislative Redistricting Plan, This Court Must Prepare for the Possibility That It Will Need to Impose Its Own Plan**

**A. A Legally Operative Redistricting Plan Is Necessary Because Use of Existing Districts Leads to Population Inequality in Violation of the United States and New York Constitutions**

65. In 2010, a federal census was conducted. The results of that census were released to the Legislature and to the public on March 24, 2011.

66. Under Article III, Sections 4 and 5 of the New York State Constitution, the New York Legislature is obligated to re-draw New York's State Senate and Assembly districts after each national census.

67. The 2010 census revealed significant population disparities among State Senate and Assembly districts that would make adherence to the current existing lines illegal.

68. For example, the results of the 2010 census show that the population disparity between New York's most and least populous Existing State Senate districts is 25.4%, in violation of State and Federal law. Similarly, the population disparity between New York's most and least populous Existing Assembly districts is 31%, also in violation of State and Federal law.

69. Accordingly, it would violate the United States and New York State Constitutions, and State and Federal law, to conduct the 2012 elections under the Existing Assembly and Senate Districts.

**B. The Recently Enacted State Assembly And Senate Districts Are Not Yet Legally Operative And Are Subject To Legal Challenge**

70. The New York Legislature has re-drawn the Senate and Assembly district lines following the 2010 census. Both houses passed the plans (collectively the “Enacted Plans”), and they were signed into law by the Governor. However, before they can be used to conduct elections, the Enacted Plans must be pre-cleared by the United States Department of Justice or by the United States District Court for the District of Columbia (the “D.C. Court”). The Department of Justice may take up to 60 days from the date of submission of the Enacted Plans to render a decision, and the process in the D.C. Court can take even more time because it is not constrained by a 60-day window.

71. The Enacted Senate Plan was submitted to the Department of Justice on March 16, 2012. Upon information and belief, as of March 27, 2012, the Enacted Assembly Plan had not yet been submitted either to the Department of Justice or to the D.C. Court.

72. In addition, the Enacted Senate Plan contains 63 Senate districts, a change from the Existing Plan, which uses 62 districts. Upon information and belief, the Legislature used a different methodology to calculate the number of districts for the Enacted Plan than was used in the Existing Plan, constituting a change in “standard, practice or procedure with respect to voting” that requires pre-clearance under Section 5 of the Voting Rights Act of 1965.

73. The Legislature has not yet sought pre-clearance for the change in methodology with the Department of Justice or the D.C. Court. Its failure to do so may and likely will be subject to challenge as a violation of the Voting Rights Act.

74. Neither candidate petitioning nor any other election process, including the elections themselves, may take place using the Enacted Plans until they are pre-cleared or until

60 days have run from the date of their submission to the Department of Justice which period may be extended by the Department of Justice.

75. The Enacted Plan also faces a legal challenge in the State Court Suit alleging that it improperly contains 63, rather than 62, Senate districts. The Plaintiffs in the suit contend that the Legislature's use of two different and inconsistent methodologies in calculating the number of Senate districts for the Enacted Plan violated the New York State Constitution.

**C. Because The Enacted Plans May Not Be Operative In Time To Conduct Petitioning, The Court's Continued Involvement Is Necessary**

76. The start of the period for which candidates for State Assembly and Senate may collect signatures on nominating petitions is June 5, 2012, slightly more than two months from the date of the filing of this First Amended Complaint.

77. Because of the Legislature's excessive delay in creating the Enacted Plans, they were submitted for pre-clearance so late that the 60-day period for the pre-clearance process will run until late May, just before the June 5, 2012 start of petitioning.

78. If the Department of Justice or D.C. Court finds that either the Senate or Assembly Enacted Plan violates the Voting Rights Act, including with respect to the number of Senate districts in the State, the violation would have to be remedied before such plan could be used for any election activity, including candidate petitioning.

79. Moreover, the Department of Justice may request more information in order to make its decision, which could extend its time beyond the initial 60-day period.

80. Because of the late submission, it is entirely possible that the Department of Justice or D.C. Court could identify a violation near the end of the 60-day period, in late May 2012, which would leave a very limited amount of time for the Legislature and Governor to remedy the violation, submit revised plans to the Department of Justice or D.C. Court for further

review, and receive pre-clearance before June 5. Despite the assurances made by Counsel to the Senate Majority Defendants at the March 21, 2012 hearing before this Court that the Legislature would be able rapidly to pass a bill to remedy any such issue, it is not clear from the Legislature's record thus far in the redistricting process that the Legislature could accomplish such a revision with the necessary alacrity to avoid irreversible prejudice to Plaintiffs and other New York voters and candidates should the petitioning period begin without a legally operative plan in place.

81. The State Court Suit could also result in an order invalidating the Enacted 63-seat Senate plan. It is likely that such an order would be appealed, and it is not presently possible to determine how long it would take to achieve a final determination of whether the Enacted Senate Plan is legal. Because of the uncertain timing of a decision on the State Court Suit, the possibility exists that the state court could strike down the Enacted Senate Plan, and a new 62-district plan would not yet be in place by the June 5 start of petitioning.

82. Because of the extremely limited time available to this Court to create a congressional plan, congressional districts were only in place for one day before petitioning began on March 20. Although this was unavoidable with congressional districts, it is, for the reasons discussed in paragraphs 55-57, *supra*, prejudicial to voters and candidates, including Plaintiffs, to lack knowledge of district lines in the period preceding the start of petitioning.

83. Both the parties and this Court have acknowledged the "herculean task" undertaken by Magistrate Judge Mann, Professor Persily and this Court in drawing the Ordered Plan in two weeks. The Ordered Plan only required the drawing of 27 districts, whereas the combined State and Assembly maps involve 212 or 213 districts, depending on the ultimate number of Senate districts. Accordingly, for this Court to draw State Senate and Assembly

plans, while utilizing the admirably transparent processes for public objection and comment employed in creating the Ordered Plan, would likely take significantly longer than two weeks.

84. Thus, because New York's Existing Assembly and Senate districts are unusable due to their violation of the United States and New York State Constitutions and State and Federal law, and because the Enacted Plans are not yet legally operative and may not be legally operative in time for the start of petitioning on June 5, 2012, this Court's involvement remains necessary. In order to avoid the prejudice to Plaintiffs and other New York voters and candidates of not having districts in place before the start of the petitioning period, this Court should begin drawing State and Assembly plans using a timeline that would allow for the implementation of such districts well in advance of the June 5 start of petitioning if the Enacted Plans have not yet become legally operative.

#### **COUNT I**

**(Violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution; Pursuant to 42 U.S.C. § 1983)<sup>1</sup>**

85. The allegations contained above are repeated and re-alleged as if fully set forth herein.

86. New York's districts were last adjusted in 2002, following the 2000 census. Now that the 2010 census has been completed, the New York Legislature's 2002 redistricting is out of date and may not be used for subsequent state legislative elections.

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<sup>1</sup> In the Original Complaint, Plaintiffs' allegations in Count I referred to New York's congressional districts as well as State Senate and Assembly districts. In its order dated March 19, 2012, this Court granted Plaintiffs' requested relief with regard to the congressional districts. In the interest of clarity Plaintiffs have removed the allegations with regard to the congressional districts for which relief has already been granted.

87. New York's current legislative districts lack population equality, in violation of the "one person one vote" requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

88. Certain Plaintiffs live in overpopulated districts, and therefore their voting power is diluted in violation of the Equal Protection Clause.

89. New York needs new State Senate and Assembly districts before the June 5, 2012 start of the petitioning period for the 2012 elections to those bodies.

90. Because the Enacted Plans require pre-clearance by the Department of Justice or the D.C. Court, and such pre-clearance may not be granted prior to June 5, 2012, the ability to complete New York's 2012 elections in a timely and legal fashion is at significant risk.

91. To remedy these Equal Protection violations in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

92. The Court should maintain the referral to Magistrate Judge Mann, and the retention of Professor Persily, to prepare a redistricting plan so that, in the event that the Enacted Plans do not become legally operative in time for the June 5, 2012 start of petitioning, the rights of Plaintiffs and other New York voters and candidates are not infringed upon by the absence of districts in conformity with the requirements of the Equal Protection Clause.

93. In the interest of justice, the work of Magistrate Judge Mann and Professor Persily should be performed entirely independent of partisan interests and concerns, and any order directing Magistrate Judge Mann and Professor Persily to begin work on a redistricting plan should require that any resulting redistricting plan be independent of partisan interests. The Court should direct Magistrate Judge Mann and Professor Persily to prioritize redistricting

criteria by first ensuring any resulting plan's compliance with the United States Constitution and then by considering population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

94. Upon presentation of an appropriate independent redistricting plan prepared by Magistrate Judge Mann and Professor Persily, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

**COUNT II**  
**(Violation of the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution; Pursuant to 42 U.S.C. § 1983)<sup>2</sup>**

95. The allegations contained above are repeated and re-alleged as if fully set forth herein.

96. As a result of New York's failure to obtain timely final approval of its Enacted Plan, certain Plaintiffs live in overpopulated Existing Districts, resulting in a dilution of their voting power.

97. The diminishment of Plaintiffs' voting power constitutes a deprivation of Plaintiffs' rights without due process of law. The State of New York has deprived these Plaintiffs of their full rights to vote in state legislative races by allowing malapportionment of those districts and improperly denying Plaintiffs a fair and full weight in their votes.

98. To remedy these Due Process violations in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

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<sup>2</sup> In the Original Complaint, Plaintiffs' allegations in Count II referred to New York's congressional districts as well as State Senate and Assembly districts. In its order dated March 19, 2012, this Court granted Plaintiffs' requested relief with regard to the congressional districts. In the interest of clarity Plaintiffs have removed the allegations with regard to the congressional districts for which relief has already been granted.

99. The Court should maintain the referral to Magistrate Judge Mann, and the retention of Professor Persily, to prepare a redistricting plan so that, in the event that the Enacted Plans do not become legally operative in time for the June 5, 2012 start of petitioning, the voting rights of Plaintiffs and other New York voters and candidates are not infringed upon by the absence of equally populated districts.

100. In the interest of justice, the work of Magistrate Judge Mann and Professor Persily should be performed entirely independent of partisan interests and concerns, and any order directing Magistrate Judge Mann and Professor Persily to begin work on a redistricting plan should require that any resulting redistricting plan be independent of partisan interests. The Court should direct Magistrate Judge Mann and Professor Persily to prioritize redistricting criteria by first ensuring any resulting plan's compliance with the United States Constitution and then by considering population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

101. Upon presentation of an appropriate independent redistricting plan prepared by Magistrate Judge Mann and Professor Persily, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

### **COUNT III**

**(Violation of Article I, Section 2 of the U.S. Constitution; Pursuant to 42 U.S.C. § 1983)**

102. In the Original Complaint, Count III alleged that New York's Existing congressional districts were too numerous by two seats, in violation of Article I, Section 2 of the United States Constitution, and that Plaintiffs, who each live in one of the Existing Districts, risked losing their votes if elections were conducted under the improper Existing Districts. Plaintiffs requested that this Court take control of redistricting and draw, and order into effect, congressional districts in compliance with the United States Constitution, and which were drawn

using the redistricting criteria of population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

103. By its order dated February 28, 2012, this Court referred to Magistrate Judge Mann the task of creating a congressional redistricting plan with the proper number of districts pursuant to the requirements of the United States Constitution, and utilizing Plaintiffs' requested redistricting criteria. By its order dated March 19, 2012, this Court declared the Existing Districts to be in violation of the United States Constitution, and ordered (with slight adjustments) the implementation of Magistrate Judge Mann's proposed plan. These orders granted Plaintiffs' requested relief on Count III.

**COUNT IV**  
**(Violation of the New York Constitution)**

104. The allegations contained above are repeated and re-alleged as if fully set forth herein.

105. New York's Existing State Senate and Assembly districts lack population equality, in violation of the population equality requirements of Article III, sections 4 and 5 of the New York State Constitution.

106. Certain plaintiffs live in overpopulated Existing Districts. If those districts are not replaced with new, legally operative districts, their votes would be diluted in violation of the New York State Constitution.

107. New York needs new State Senate and Assembly districts before the June 5, 2012 start of the petitioning petition period for the 2012 elections to those bodies.

108. Because the Enacted Plans require pre-clearance by the Department of Justice or the D.C. Court, and such pre-clearance may not be granted prior to June 5, 2012, the ability to complete New York's 2012 elections in a timely and legal fashion is at significant risk.

109. To remedy these violations of the New York State Constitution in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

110. The Court should maintain the referral to Magistrate Judge Mann, and the retention of Professor Persily, to prepare a redistricting plan so that, in the event that the Enacted Plans do not become legally operative in time for the June 5, 2012 start of petitioning, the voting rights of Plaintiffs and other New York voters and candidates are not infringed upon by the absence of equally populated districts.

111. In the interest of justice, the work of Magistrate Judge Mann and Professor Persily should be performed entirely independent of partisan interests and concerns, and any order directing Magistrate Judge Mann and Professor Persily to begin work on a redistricting plan should require that any resulting redistricting plan be independent of partisan interests. The Court should direct Magistrate Judge Mann and Professor Persily to prioritize redistricting criteria by first ensuring any resulting plan's compliance with the United States Constitution and then by considering population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

112. Upon presentation of an appropriate independent redistricting plan prepared by Magistrate Judge Mann and Professor Persily, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

**COUNT V**  
**(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)**

113. The allegations contained above are repeated and re-alleged as if fully set forth herein.

114. For the reasons set forth in this Complaint, Defendants, through their inaction in the redistricting process, have deprived Plaintiffs, and all citizens of the State of New York similarly situated in malapportioned districts, of the constitutional right to vote by denying them equal protection and due process under the law in violation of the United States Constitution.

115. Plaintiffs are entitled to a declaratory judgment by the Court determining that Plaintiffs' constitutional rights have been violated, in order for Plaintiffs to obtain such further relief as may be necessary to vindicate those rights.

## RELIEF SOUGHT

WHEREFORE, Plaintiffs respectfully request the following relief:

1. An order or judgment declaring New York's Existing State Senate and Assembly districts, last adjusted in 2002, to be invalid for failing to comply with the United States Constitution, the New York State Constitution, and State and Federal law;<sup>3</sup>
2. An order or judgment declaring that Plaintiffs' constitutional rights have been violated by Defendants' inaction in the redistricting process;
3. An order or judgment declaring that the Enacted Plans may not be used to effectuate the 2012 election until they have been pre-cleared by the Department of Justice or the D.C. Court;
4. An order appointing Magistrate Judge Mann to serve as independent Special Master to propose new State Senate and Assembly district lines in conformity with the 2010 census, the United States and New York State constitutions, applicable State and Federal law, and the following principles: population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest; and with such lines to be in place in advance of the June 5, 2012 start of petitioning;
5. An order requiring LATFOR and its members and staff to cooperate with the Magistrate Judge Mann for all purposes;
6. An order or judgment re-drawing district lines in conformity with Magistrate Judge Mann's proposal, assuming her satisfactory completion of an independent redistricting proposal;

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<sup>3</sup> In the March 19, 2012 Opinion and Order, the Court granted Plaintiffs' request for a judgment declaring that the Existing House of Representatives districts were invalid for failing to comply with the United States Constitution. The March 19, 2012 Opinion and Order, as well as the judgment in their favor in respect of the Existing House of Representatives, are expressly incorporated herein by reference.

7. An order requiring Defendants to pay to Plaintiffs reasonable attorney's fees and expenses, expert fees, costs, and other expenses incurred in prosecuting this action, pursuant to 42 USC § 1973l(e) and 42 U.S.C. § 1988; and

8. Granting such other relief as the Court may deem just and proper.

Dated: New York, New York  
March 27, 2012

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