UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, HOWARD LIEB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SHREIBER and WEYMAN A. CAREY, Plaintiffs, and DONNA KAYE DRAYTON, EDWARD 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 and MANOLIN TIRADO and YITZCHOK ULLMAN, Intervenor Plaintiffs, v. ANDREW M. CUOMO, as Governor of the State of New York, ERIC T. SCHNEIDERMAN, as Attorney General of the State of New York, ROBERT J. DUFFY, as President of the Senate of the State of New York, DEAN G. SKELOS, a 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 APPORTIONMENT ("LATFOR"), JOHN J. McENENY, as Member of LATFOR, ROBERT 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.	Case No. 1:11-CV-05632 (RR) (GEL) (DLI) (RLM) Date of Service: April 2, 2012

MEMORANDUM OF LAW IN SUPPORT OF ASSEMBLY MAJORITY DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT OF INTERVENOR PLAINTIFF YITZCHOK ULLMAN

Defendants Sheldon Silver, John McEneny and Roman Hedges respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint of Intervenor- Plaintiff Yitzchok Ullman ("Ullman") under Federal Rule of Civil Procedure 12(b)(6).

Following the 2010 decennial census, on March 15, 2012, the Governor of New York signed into law, as Chapter 16 of the Laws of 2012, the Assembly redistricting plan contained in S.6696-A.9525 ("2012 Assembly Plan").[1] While all validly enacted legislation carries with it a presumption of constitutionality, see Schulz v. State of N.Y., 84 N.Y.2d 231, 241, 619 N.Y.S.2d 343, 347 (1994) ("enactments of the Legislature – a coequal branch of government – enjoy a strong presumption of constitutionality"), redistricting enactments by a legislative body enjoy a particularly strong presumption of validity precisely because the Legislature, rather than the court, is given the unique role of effecting politically charged laws uniquely suited to their institutional strength. In re Fay, 291 N.Y. 198, 207 (1943) (A reapportionment plan "can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld"[internal quotation marks omitted]). Accord: Wolpoff v. Cuomo, 80 N.Y.2d 70, 78, 387 N.Y.S.2d 560, 563 (1992); Fund for Accurate & Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 671 (N.D.N.Y. 1992) ("[A] state's

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[1] Chapter 16 was subsequently amended by Chapter 20 of the Laws of 2012, signed by the Governor on March 26, 2012. The amendment does not impact the Assembly districts which include the town of Ramapo.

redistricting law is ordinarily accorded deference as a constitutionally compliant enactment . . .") (citing Clements v. Fashing, 457 U.S. 957, 962-63 [1982]).

Ullman complains that the 2012 Assembly Plan maintains the division of the Town of Ramapo into three Assembly districts which he alleges violates the Fourteenth Amendment of the United States Constitution, as well as Article III, § 5 of the New York State constitution. (Amended Complaint, ¶¶ 3, 31-38.) Insofar as the United States Constitution is concerned, the gravaman of Ullman's Amended Complaint is that the Assembly "boundaries have been impermissibly drawn based upon religious considerations" (Amended Complaint ¶ 37), namely, the separation of the "Chasidic Jewish villages of Kaser and New Square" into two Assembly districts (Amended Complaint ¶¶ 26, 32-34), and the Legislature's failure to maintain the Town of Ramapo within a single Assembly district. (Amended Complaint, Counts II and IV.) Ignoring the existence and presumed constitutionality of the 2012 Assembly Plan, Ullman further contends that the current Assembly districts violate the "one-person-one-vote" mandate of the Fourteenth Amendment. (Count I.) Lastly, Ullman asserts as a supplemental claim, the division of the Town of Ramapo as violative of Article III, § 5 of the New York State constitution. (Amended Complaint, Count III.) As is set forth below, as a matter of law, none of these complaints sets forth a cause of action upon which relief can be granted. Therefore, Ullman's Amended Complaint should be dismissed in its entirety.

POINT I

THE ASSEMBLY DISTRICTS ARE NOT MALAPPORTIONED

The 2012 Assembly Plan redistricts New York's 150 Assembly districts in accordance with the 2010 decennial census as adjusted pursuant to Part XX of Chapter 57 of the Laws of 2010 (requiring the reassignment of State prisoners to their residence of record prior to

incarceration and the subtraction of federal prisoners from the State total). The ideal Assembly district comprises 129,187 persons, as the Amended Complaint acknowledges. (Amended Complaint, ¶ 22.) The deviation in the 2012 Assembly Plan from an ideal Assembly district ranges from -4% to +4%; the deviations for the new Ramapo districts, 96, 97 and 98, are each 2.72%. Ullman concedes that a deviation "with a 5% +/- margin [is] . . . acceptable. . . ." (Amended Complaint, ¶ 22.) Voinovich v. Quilter, 507 U.S. 146, 160-62 (1993); Brown v. Thompson, 462 U.S. 835, 842 (1983); Rodriguez v. Pataki, 308 F. Supp. 2d 346, 363-67 (S.D.N.Y.) (3-judge court), aff'd, 543 U.S. 997 (2004).

The Town of Ramapo (Rockland County) is not a covered jurisdiction subject to "preclearance" under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. See 28 C.F.R. pt. 51, app. Since nothing further is legally required to implement the new 2012 Assembly district lines with respect to Ramapo, and those lines concededly are within an "acceptable deviation," Count I of the Amended Complaint necessarily fails.

POINT II

THERE IS NO RIGHT TO COMMUNITY RECOGNITION IN THE REDISTRICTING PROCESS

It is settled law that there is no right to community recognition in the redistricting process. Mirrione v. Anderson, 717 F.2d 743, 745 (2d Cir. 1983), cert. denied, 465 U.S. 1036 (1984) ("in the absence of invidious discrimination, voters of a city, town, or geographic or ethnic community are not entitled to be grouped together in a single election unit."); United Jewish Org. of Williamsburgh, Inc. v. Wilson, 510 F.2d 512 (2d Cir. 1974), aff'd on other grounds sub nom., United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1997) ("U.J.O. v. Wilson"); Bay Ridge Community Council, Inc. v. Carey, 103 A.D.2d 280, 479 N.Y.S.2d 746 (2d Dep't 1984) (per curiam), aff'd, 66 N.Y.2d 657, 495 N.Y.S.2d 972 (1989).

Mirrione, supra, involved a vote dilution challenge under the Fourteenth and Fifteenth Amendments and the Voting Rights Act to the fragmentation of the community of Rosedale into four Assembly districts. Id. at 744-45. Specifically, the challenger "asserted the right to have his vote and those of other Rosedale voters counted as a bloc in a single assembly district." Id. at 745. Judge Newman, writing for a unanimous panel, squarely rejected the notion that a community, be it geographic, ethnic, or religious, is entitled to be kept whole in a single legislative district. The Court held:

> We conclude that neither federal statutes nor the Constitution assures any voter that the portion of the community in which he lives will not be separated from the rest of his community and joined with neighboring areas in the formation of an election district.

Id. at 744.

* * *

> [W]e have found no case that would make the observance of town lines or boundaries of unofficial communities a mandatory consideration under either the Voting Rights Act or the Constitution.

Id. at 746.

In reaching its conclusion, the Second Circuit invoked its earlier determination in U.J.O. v. Wilson, supra, 510 F.2d 512, a case it characterized as "closely analogous" to Mirrione. Id. at 745. In U.J.O. v. Wilson, the Court:

> . . . refused to prohibit the New York Legislature, as part of the 1974 reapportionment, from bisecting the Hasidic community of Brooklyn, New York. While recognizing that the political strength of the community would be diluted as a result of the redistricting plan, [the] Court held that members of a community have "no claim to being left together in one district at least absent a showing of discrimination on grounds of race or color. . . ."

Id. at 745, quoting 510 F.2d at 521.

Similarly, in Wells v. Rockefeller, 281 F. Supp. 821 (S.D.N.Y. 1968), rev'd on other grounds, 394 U.S. 542 (1969), a three-judge District Court unanimously rejected the claim that the geographic community of Bay Ridge and the Jewish community of Crown Heights were

unconstitutionally divided by a redistricting plan. The Court there noted, "[t]he Legislature can not be expected to satisfy . . . the district preferences of all of our citizens." Id., 281 F. Supp. at 825.

Likewise, in Bay Ridge Community Council, Inc. v. Carey, supra, the Court flatly rejected a claim that the redistricting plan following the 1980 census violated the Fourteenth Amendment of the United States Constitution because it impaired the voting power of the voters of the community of Bay Ridge. Although the redistricting plan there splintered the Bay Ridge community into four separate districts (Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 454 N.Y.S.2d 186, 188 [Sup. Ct. Kings Co. 1982]), the court found no cognizable vote dilution claim. Bay Ridge Community Council, supra at 284, 479 N.Y.S.2d at 748-49.

Lastly, this Court, in its Opinion and Order of March 19, 2012 (ECF No. 242) also concluded that Brooklyn's Jewish communities had no legal right not to be "split[ ] among too many separate . . . districts. . . ." Id. at 30, 35. Indeed, if they had such protection, this Court may have been constrained to draw a Congressional district as requested by the various Jewish objectors. But it did not. Religious groups are not protected under the Voting Rights Act, which extends only to race and language minorities. Nor, as has been demonstrated above, do religious communities enjoy protected status under the Fourteenth Amendment.

Among the concerns this Court noted was its inability to identify with precision which individuals constitute the Jewish community given the "divergences" among them. Id. at 33. This concern also is true of Ullman's demand that Chasidic Jewish communities be unified in a single Ramapo district. Chasidic sects are divergent as well. In fact, each Chasidic sect answers to a different Chasidic spiritual leader whose opinions are not necessarily congruent. Chasidim, thus, do not ipso facto constitute a community of interest (even assuming communities of interest were legally protected, which they are not). Nor, as this Court observed,

does the census identify population by religion, much less segregate them into Chasidic and non Chasidic subsets. See id.

In declining to consolidate the Jewish population within a single Congressional district, this Court sounded a note consonant with the Mirrione Court's concerns regarding the "practical considerations militat[ing] against prohibiting the Legislature from subdividing identifiable communities in the districting process." Mirrione, supra, at 746. The Mirrione Court cautioned:

> . . . if plaintiff's contentions were accepted, federal courts would have to determine, without judicially manageable standards, which identifiable communities merit Constitutional protection, and to assess how the goal of community integrity, even when the community is a governmental subdivision, is to be balanced against competing concerns such as compactness, contiguity, and minority voting power. Overseeing such matters would inevitably embroil courts in the most contentious areas of political dispute.

Id. at 746.

Because stand alone community-of-interest claims in redistricting are not legally cognizable, Counts II and IV, Ullman's Fourteenth Amendment and related claims, should be dismissed for failure to state a cause of action as a matter of law.[2]

POINT III

THE NEW YORK STATE CONSTITUTIONAL PROHIBITION AGAINST SPLITTING TOWNS IS NOT ABSOLUTE

Relying on the provision in Article III, § 5 of the New York State constitution prohibiting the division of towns, Ullman argues that the 2012 Assembly Plan is ipso facto

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[2] Wright v. City of Albany, 306 F. Supp. 2d 1228 (M.D. Ga. 2003), cited by Ullman (Ullman Memo of Law, p. 10) is inapposite. Unlike here, in Wright the Court was required to fashion a redistricting plan because there was no legislatively enacted plan. Further, Wright revolves about the Voting Rights Act, a law that has no application to Ramapo.

invalid because the Town of Ramapo is not wholly contained in a single Assembly district. However, the New York State constitutional prohibition against splitting towns is not absolute. Schneider v. Rockefeller, 68 Misc. 2d 869, 328 N.Y.S.2d 996 (Sup. Ct. Albany Co.), aff'd, 38 A.D.2d 495, 331 N.Y.S.2d 270 (3d Dep't), aff'd, 31 N.Y.2d 420, 340 N.Y.S.2d 889 (1972). Schneider also involved a claim of unlawful division of the Town of Ramapo in the State's Assembly redistricting plan. 68 Misc. 2d at 874, 328 N.Y.S.2d at 1001. Nevertheless, the Court recognized that a redistricting plan can break town lines where other Constitutional mandates require that the Legislature do so and accordingly upheld the division of the Town of Ramapo for such reasons. Id.[3]

Article III, § 5 of the New York State constitution recites a number of criteria to which the Legislature should adhere when drawing Assembly districts. Among these criteria, in addition to the admonition to keep towns whole, is a requirement that districts be "of convenient and contiguous territory in as compact a form as possible. . . ." (emphasis added). Since "convenient . . . territory" is used as a separate phrase it cannot be merely a synonym for compactness and or contiguity, or any of the other factors identified in the constitution, but must have an independent meaning. The trial court in Schneider acknowledged the argument that the "convenient . . . territory" element of Article III, § 5 includes, among other things, "habitual associations, prior traditions and prior lines." 68 Misc. 2d at 875, 328 N.Y.S.2d at 1002 (emphasis added). See Richardson v. Stark, 284 A.D. 344, 346, 132 N.Y.S.2d 249, 251 (2d Dep't), aff'd, 307 N.Y. 269 (1954) ("Relevant and material factors [under Art. III, § 5 of the New York constitution] include pre-existing lines. . . ."). Article III, § 5 of the New York State

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[3] Ullman's invocation of Tishman v. Sprague, 293 N.Y. 42 (1944) (Ullman Memo of Law, p. 10) is unavailing, since it was decided prior to Reynolds v. Sims, 377 U.S. 533 (1964) and Schneider v. Rockefeller, supra, and any absolutist proposition therein vis-a-vis the inviability of town lines is no longer good law.

constitution does not rank the State redistricting factors recited therein, leaving to the Legislature, as the uniquely suited institution, the task of weighing and adjusting the various factors as it crafts new district lines. Wolpoff v. Cuomo, supra, 80 N.Y.2d at 79, 587 N.Y.S.2d at 564 ("Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determination of the Legislature . . . . We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own."); Matter of Smith, 148 N.Y. 187 (1896).[4]

Based on the holding in Schneider upholding the division of the Town of Ramapo, for forty years since 1972, and through three prior Assembly redistricting enactments, the Town of Ramapo has been split among Assembly districts so as to maintain the core of existing districts and to respect prior district lines. The 2012 Assembly Plan does so as well. Since the State constitution places the "convenience" factor of "habitual associations, prior traditions and prior lines" on a par with maintaining town lines, it is the Legislative prerogative to determine which takes precedence in any given situation, which it did when it continued a 40-year-old tradition of splitting Ramapo for the purpose of "convenience." A federal court should not disturb the State Legislature's exercise of its discretion in balancing the myriad competing factors in redistricting.

Accordingly, Court III of Ullman's Amended Complaint (State constitutional challenge) fails as a matter of law and should be dismissed as well.

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[4] Indeed, the Concurrent Resolution of the Senate and Assembly proposing amendments to the constitutional provisions concerning redistricting specifically eliminates the provision of Article III, § 5 prohibiting the division of towns while retaining the mandate of dividing Assembly districts into "convenient . . . territory" manifesting the Legislature's intent that convenience of territory is paramount to maintaining town lines. See A. 9526.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Amended Complaint of Intervenor Plaintiff Ullman should be dismissed.

Dated: New York, New York
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