UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al. Plaintiffs, v. ANDREW M. CUOMO, et al. Defendants.	)))))))))))))	Case: 1:11-cv-05632-DLI-RR-GEL **Date of Service**: April 2, 2012

MEMORANDUM OF LAW IN SUPPORT OF SENATE MAJORITY DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BACKGROUND 3

ARGUMENT 8

I. Plaintiffs' Malapportionment Claims Are Not Ripe 9

II. Even If Plaintiffs' Malapportionment Claims Are Ripe, They Should Be Dismissed Because They Are Not Entitled To The Relief That They Seek 17

CONCLUSION 20

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully submit this memorandum in support of their motion to dismiss Plaintiffs' First Amended Complaint in its entirety; Counts I, II, III, and VIII (to the extent Count VIII is seeking relief from allegedly malapportioned districts) of the Drayton Intervenors' First Amended Complaint; Counts I, II, and III of the Lee Intervenors' First Amended Complaint; and Counts I, II, and IV (to the extent Count IV is seeking relief from allegedly malapportioned districts) of the Ramos Intervenors' First Amended Complaint.[1]

PRELIMINARY STATEMENT

The Legislature has enacted a plan for State Senate and Assembly seats, and preclearance proceedings in the Department of Justice ("DOJ") are pending and scheduled to be resolved in advance of the June 5, 2012 petitioning period for State Senate candidacy. Yet, in their amended complaints, plaintiffs and the various intervenors (collectively "plaintiffs") seek this Court's prompt intervention to redraw the state legislative districts. They premise their attempt to displace this presumptively constitutional redistricting plan on multiple layers of speculation that the DOJ *might* object to the enacted plan; that, if that happens, the Legislature *might* not be able to address any such objections in time; and that a state court *might* find the Senate's plan unconstitutional.

[1] This partial motion to dismiss postpones the date for the Senate Majority Defendants to answer as to all claims. *See* Fed. R. Civ. P. 12(a)(4)(A); *see also Gortat v. Capala Bros., Inc.,* 257 F.R.D. 353, 366 (E.D.N.Y. 2009); *Alex. Brown & Sons, Inc. v. Marine Midland Banks, Inc*., No. 96 Civ. 2549, 1997 WL 97837, at *6-7 (S.D.N.Y. Mar. 6, 1997); *Ricciuti v. N.Y.C. Transit Auth.*, No. 90 Civ. 2823, 1991 WL 221110, at *2 (S.D.N.Y. Oct. 3, 1991). The Senate Majority Defendants also join the Assembly Majority Defendants' motion to dismiss the amended complaint of Intervenor Plaintiff Yitzchok Ullman (DE 270), which asserts claims only with respect to the 2012 Assembly plan.

These claims fail on jurisdictional grounds. In the first place, plaintiffs' claims are premature in light of the Court's limited potential role before the 2012 elections. The only potential—and as-yet unripe—role for the Court is to impose remedial districts for the three covered counties if preclearance does not come in time, and to do so in a way that reflects the enacted plan except to the extent particular districts fail to comply with Section 5. *See Perry v. Perez*, 132 S. Ct. 934, 942 (2012). In light of this limited potential role, there is time to act later, and insufficient risk of the plaintiffs being subject to the old malapportioned districts if the court does not act now, before the DOJ has completed the preclearance process. Intervening at this time would therefore be premature. *See Branch v. Smith*, 538 U.S. 254, 262 (2003) (holding that a district court may not impose a remedial plan unless the State plan "had not been precleared and *had no prospect of being precleared* in time for the . . . election." (emphasis added)). Indeed, it is well-established that a claim is not ripe for adjudication where, as here, it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (internal citation and quotation marks omitted). Because plaintiffs' claims are premised entirely on speculation about certain events that probably will not occur, these claims should be dismissed on ripeness grounds.

Alternatively, even if these claims *are* ripe, plaintiffs are not entitled to the relief that they seek. While they ask the Court to begin the process of redrawing the district lines, they fail to allege any facts that would satisfy their burden of showing that particular "aspects of the state plan . . . stand a reasonable probability of failing to gain § 5 preclearance." *Perez*, 132 S. Ct. at 942. In the absence of such a showing, this Court lacks the authority to alter the enacted state plan. *See id.* Therefore, this Court should dismiss the aforementioned claims.

BACKGROUND

As the Court is aware, the Legislature enacted a redistricting plan for the State Senate and Assembly on March 14, 2012, and the Governor signed it into law the next day. *See* S.6696-A.9525. On March 16, the Senate plan was submitted to the DOJ for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and a preclearance complaint and a request for expedition was that same day filed in the U.S. District Court for the District of Columbia. (DE 258). The DOJ's answer is due April 13, 2012. *See* Order, *New York v. United States*, No. 1:12-cv-00413-RBW (D.D.C. Mar. 30, 2012). We understand that that preclearance submission for the Assembly plan has also been filed. (DE 259, 265).

The preclearance process for the Senate plan must be completed within sixty days, *see* 28 C.F.R. § 51.9(a), and is therefore scheduled to be completed before the petitioning period for Senate elections begins on June 5, 2012, *see* N.Y. Elec. Law § 6-134(4), and the primary election on September 11, 2012, *see* N.Y. Elec. Law § 8-100(a). The DOJ's review is limited: only three New York counties are covered by Section 5—Bronx, Kings (Brooklyn), and New York (Manhattan)—and therefore the DOJ will be reviewing only the Senate districts contained in these counties. *See* 28 C.F.R. pt. 51 app. During the last redistricting cycle, the DOJ took only twelve days to preclear New York's Senate and Assembly plans. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 357-58 (S.D.N.Y. 2004). And, in this cycle, the U.S. District Court for the District of Columbia has ordered the DOJ to respond to the Senate Majority's complaint by April 13, 2012. Moreover, even if the DOJ were to take the full sixty days in this cycle, *see* 28 C.F.R. § 51.9(a), that process will still be completed by May 15, 2012, three weeks before the currently scheduled start of the petitioning period.

Meanwhile, on March 15, 2012, a group of petitioners—including Senator Martin Milave Dilan, who is a defendant here—commenced a proceeding in the Supreme Court of the County of New York challenging the Senate plan under the New York Constitution. Pet., *Cohen v. Cuomo*, No. 12-102185 (Mar. 15, 2012). Their sole claim is that the Legislature violated Article III, section 4 of New York's Constitution by increasing the size of the New York Senate from 62 districts to 63. "[T]he parties stipulated to a briefing schedule that will culminate in full submission of the arguments and oral argument on April 6, 2012," Senate Minority Defs.' Mar. 16 Letter at 1 (DE 239), long before the petitioning period begins. The petitioners in that state court proceeding will have to overcome the "strong presumption of constitutionality [that] attaches to [a] redistricting plan." *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992). In particular, a New York court may "upset the balance struck by the Legislature and declare the plan unconstitutional only when it can be shown beyond a reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.*

On March 21, this Court held a status conference. The Court noted that the parties' malapportionment claims were premised on the Legislature failing to enact a redistricting plan for the State Senate and Assembly, and observed that those are alleged "facts that no longer exist." 3/21/12 Hr'g tr. 14 (Raggi, J.); *see also id.* at 53 ("Now, the facts have changed." (Lynch, J.)). Because this Court "d[id] not wish to guess at what the parties are pleading to the Court in light of some of the changed circumstances since the original complaint was filed," the Court ordered the parties "to file amended complaints by March 27." *Id.* at 65 (Raggi, J.); *see also* 3/21/12 Scheduling Order.

In response to the Court's order, the plaintiffs filed amended complaints alleging malapportionment claims. *See* Pls.' First Am. Compl. (DE 255); Drayton Intervenors First Am. Compl., Counts I-III, VIII (DE 254); Lee Intervenors First Am. Compl., Counts I-III (DE 256); Ramos Intervenors First Am. Compl., Counts I, II, IV (DE 257). They speculate that the DOJ *might* object to the enacted plan, but no party alleges any facts to show that there is a reasonable probability that the DOJ will object to any particular aspect of the enacted plan. To the contrary, plaintiffs acknowledge that "*[i]t is not currently known* whether or when the Senate and Assembly plans will receive final approval." *See, e.g.*, Pls.' First Am. Compl. ¶ 8 (emphasis added); *id.* ¶ 80 ("[I]t is entirely *possible* that the Department of Justice or D.C. Court could identify a violation near the end of the 60-day period . . . . (emphasis added)). In the same vein, the Ramos Intervenors make the conclusory assertion that "the Senate Leader's submission of the Senate Plan was incomplete, defective and therefore not a proper submission," Ramos Intervenors First Am. Compl. ¶ 32, yet they do not allege any particular omissions or defects. Further, no plaintiff alleges any specific facts indicating that the Legislature will be unable to cure any defects identified by the DOJ.

Taking their cue from Senator Dilan, plaintiffs also allege that the Legislature failed to seek preclearance of the change from 62 to 63 Senate districts. *See* Ramos Intervenors First Am. Compl. ¶ 33 ("This controversial Senate plan change was neither pre-cleared before its implementation nor presented for timely preclearance."); Pls.' First Am. Compl. ¶ 72-73 (alleging that "the Legislature used a different methodology to calculate the number of districts for the Enacted Plan" and that "[t]he Legislature has not yet sought pre-clearance for the change in methodology . . . . Its failure to do so may and likely will be subject to challenge as a violation of the Voting Rights Act"). But these parties do not allege that the Legislature enacted

a bill separate from the enacted plan that increased the Senate's size. The Legislature added an extra Senate seat as part of the same legislation that enacted the 2012 Senate plan. As noted, this legislation was signed into law on March 15, 2012, and promptly submitted for preclearance with the DOJ the very next day. Nor does any plaintiff claim that the preclearance submission somehow hid the fact that the enacted plan contains 63 Senate seats. And they do not claim that, pursuant to *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969), any party has or will file an action seeking to enjoin an unprecleared enactment for failure to seek preclearance pursuant to Section 5. In fact, the Legislature similarly increased the number of seats in the Senate in 2002, and the plan was precleared. *See Rodriguez*, 308 F. Supp. 2d at 358 ("On June 17, 2002, the Department of Justice precleared the Senate and Assembly Plans, including specifically the increase in Senate districts from 61 to 62."). Indeed, in every redistricting cycle, the Legislature must apply the formula from Article III, section 4 of the New York State Constitution to determine the size of the Senate.

Finally, the plaintiffs speculate that a state court might find the Senate plan unconstitutional. Pls.' First Am. Compl. ¶ 7 ("[T]he Senate plan is the subject of a lawsuit in state court . . . that *could* ultimately result in the enacted Senate plan being deemed unusable . . . ." (emphasis added)); *id.* ¶ 81 ("[T]he *possibility* exists that the state court could strike down the Enacted Senate Plan . . . ." (emphasis added)); Lee Intervenors First Am. Compl. ¶ 62 ("*If* . . . the *Cohen* suit results in the invalidation of the State Senate map, a strong likelihood exists that the redistricting plans will not be enacted or effective in timely manner by June 5, 2012 . . . ." (emphasis added)). But no party alleges any facts to show that the petitioners in that proceeding will be able to show, as they must to prevail, that the 2012 Senate plan violates the New York State Constitution beyond a reasonable doubt. And, in any event, as Judge Lynch has already

correctly observed: "[U]ntil some State, until the authoritative State judgment comes that tells us that there's something unconstitutional, that's the law, the plan that exists is the law of New York, vis-a-vis that, and we assume it's constitutional until told elsewise, until and unless told elsewise." 3/21/12 Hr'g tr. at 41.

Based on these wholly speculative allegations, the plaintiffs ask the Court to expend its resources to "take control" over drawing a state legislative districting plan even though the Legislature has already enacted such a plan, the Governor has signed it into law, and the DOJ is reviewing it. *See, e.g.*, Pls.' First Am. Compl. ¶ 91 ("[T]he Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria."); Drayton Intervenors First Am. Compl. ¶ 85 ("[T]he Court should take control of the redistricting process for state legislative districts and oversee the process of redrawing district lines pursuant to fair and legal criteria."); Lee Intervenors First Am. Compl. ¶ 75 ("[T]he Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria . . . ."); Ramos Intervenors First Am. Compl. ¶ 70 ("[T]he Court should maintain jurisdiction and manage the timely preparation of alternative and contingent redistricting plans using fair and legal criteria.").

The intervenors' complaints also allege entirely new causes of action, including claims that the enacted plan violates Section 2 of the Voting Rights Act, New York's Constitution, and the U.S. Constitution.[2]

[2] Plaintiffs did not address any request for leave to amend their complaints to assert such claims at the March 21, 2012 status conference. Rather, the Court and plaintiffs focused on plaintiffs' malapportionment claims and plaintiffs' related, and then-unpleaded, request that the Court promptly intervene to draw lines for the state legislative process notwithstanding that the 2012 Senate plan has been signed into law. *See, e.g.*, 3/21/12 Hr'g tr. at 6 (Hon. Raggi: "Is there any need for this action to go forward with respect to your remaining claims?" Mr. Mancino: "The short answer is yes . . . . Plaintiffs have three counts, Count One, Count Two and Count

ARGUMENT

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "Ripeness is a jurisdictional inquiry" because it is "a doctrine rooted in both Article III's case or controversy requirement and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005).

Likewise, a complaint must be dismissed if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). And "[a] pleading that states a claim for relief must

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(continued…)

Four, which allege Federal Constitutional violations based on the current, the 2002 State districting plan's violation of one person, one vote." Hon. Raggi: "But Defendants have no expectation of relying on those prior plans. Since this action was commenced, the State has enacted new plans."); *id.* at 49 (Hon. Raggi: "Tell me where we have it in a complaint before us."; Mr. Hecker: "It's the Plaintiffs' complaint alleging a statewide one person, one vote violation because there isn't a valid one person, one vote compliant plan in place in the 2002 election."; Hon. Raggi: "But even the minimums of notice pleading would require them to tell you that why it's deficient is because there's a 63-seat or 63 district plan."). The Court instructed plaintiffs to amend their complaints accordingly. *See id.* at 65 (Hon. Raggi: "[W]e do not wish to guess at what the parties are pleading to the Court in light of some of the changed circumstances since the original complaint was filed. All Plaintiffs are to file amended complaints by March 27th."); *see also* 3/21/12 Scheduling Order. In light of this procedural history, the Senate Majority Defendants reserve their right to object to plaintiffs' assertion of these new Section 2 and constitutional claims in their amended complaints, and will move to dismiss them on the pleadings if plaintiffs are ultimately permitted to assert such claims.

This motion responding to the complaint on an expedited basis is therefore addressed to plaintiffs' malapportionment claims, and shows that they are unripe and that the relief plaintiffs request is not warranted. In any event, there is no need for this Court to resolve the newly asserted Section 2 and constitutional claims before the election. Nor was that done in the last round of redistricting litigation in the Second Circuit. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), as in the present case, plaintiffs filed an impasse suit. *See id.* at 355. After the Senate plan was enacted in April 2002 but before it was precleared, the district court permitted plaintiffs to amend their complaint. *See id.* at 357. Plaintiffs then asserted entirely new claims, including claims under Section 2 of the Voting Rights Act, and the Court did not resolve these claims with a judgment in defendants' favor until almost two years later—long after the 2002 election. *See id.* at 358 (opinion dated March 15, 2004).

contain . . . a short and plain statement of the claim *showing* that the pleader is entitled to relief." *Id.* 8(a)(2) (emphasis added). Interpreting these Rules, the Supreme Court has explained that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Under this standard, "[a] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, plaintiffs must plead "factual content that allows the court to draw the reasonable inference that the [defendants are] liable for the misconduct alleged." *Id.* at 1940. These pleading standards are especially important in redistricting cases, where "the good faith of a state legislature must be presumed" and courts are cautioned to recognize "the intrusive potential of judicial intervention into the legislative realm." *Miller v. Johnson*, 515 U.S. 900, 915-17 (1995).

I. Plaintiffs' Malapportionment Claims Are Not Ripe

Plaintiffs' potential constitutional injury is voting in districts that are malapportioned because of the unequal population levels demonstrated by the 2010 Census. Of course, redistricting occurs every ten years to reflect the new census data. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 583–84 (1964); New York Const. art. III, §§ 4–5. Thus, plaintiffs' alleged injury will not occur unless and until the Legislature seeks to hold elections without equalizing population through a new redistricting plan based on the latest census. This injury is not ripe because the Legislature has already enacted a Senate redistricting plan, which is not alleged to be malapportioned, and preclearance proceedings for the plan are pending and scheduled to be resolved in advance of the June 5, 2012 petitioning period for State Senate candidacy.

Ripeness doctrine implicates the jurisdictional "case or controversy" requirement of Article III. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *Murphy*, 402 F.3d at 347. "Ripeness is peculiarly an issue of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citation and internal quotation marks omitted). A claim is not ripe for adjudication where it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas*, 473 U.S. at 580–81 (citation and internal quotation marks omitted); *see also Texas v. United States*, 523 U.S. 296, 300 (1998).

The Supreme Court's decision in *Texas v. United States* is instructive. There, the State of Texas sought a declaratory judgment that a statutory procedure authorizing the State Commissioner of Education to appoint a master for an underperforming school district was not subject to the Voting Rights Act's preclearance requirement. *See Texas*, 523 U.S. at 298–99. The Supreme Court held that the suit was not ripe because the alleged harm was "contingent on a number of factors" such as the existence of an underperforming school district, the failure of other statutory remedies, and the Commissioner's decision to invoke the appointment remedy. *Id.* at 300. The Supreme Court therefore held that Texas's claim was "too speculative" to warrant immediate judicial resolution. *Id.* at 301; *see also Little v. Strange*, 769 F. Supp. 2d 1314, 1334 (M.D. Ala. 2011) (dismissing as unripe Voting Rights Act challenge to Alabama's statute regulating disclosure of judicial campaign contributions).

The danger of premature adjudication is also particularly acute in the redistricting context. Such premature action not only improperly enmeshes a court in speculative lawsuits, which is prohibited by Article III, it also impermissibly usurps the constitutionally assigned

prerogatives of state legislatures. As the Supreme Court has held, "the Constitution leaves with the States the primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (noting that Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt") (collecting cases); *Rodriguez*, 308 F. Supp. 2d at 352 ("New York's . . . redistricting laws are well within the purview and political prerogative of the State Legislature."). Accordingly, in the redistricting process, "[a]bsent evidence that [a state] will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34; *see also id*. at 33 ("In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.").

Applying these principles, plaintiffs' malapportionment claims are not ripe because they rest on speculation that the DOJ might not preclear the 2012 Senate plan in time for the petitioning period and that the New York State Supreme Court might rule that the petitioners showed beyond a reasonable doubt that the 2012 Senate plan violates the New York State Constitution by adding an extra Senate seat pursuant to Article III, section 4. Of course, these speculated events may never come to pass, so it would be premature for this Court to entangle itself now in the resolution of plaintiffs' malapportionment claims. Indeed, even if the DOJ were to take the full sixty days to complete its review, *see* 28 C.F.R. § 51.9(a), that process will be completed by May 15, 2012, three weeks before the currently scheduled start of the petitioning process. And, with oral argument scheduled for April 6, 2012, the state court proceeding

challenging the constitutionality of a 63-seat Senate plan is on track to be resolved promptly as well.

A court-ordered plan is thus not only unnecessary in light of the legislatively enacted plans, but would be wholly improper, and inconsistent with the scope of the Court's power under Article III, because it would be predicated on unripe, speculative claims. Plaintiffs nonetheless offer three sets of allegations in an attempt to avoid the straightforward conclusion that their suit is not ripe, none of which withstand even minimal scrutiny.

First, they speculate that the DOJ might object to the enacted plan and that the Legislature might not have enough time to remedy the objection. *See, e.g.*, Pls.' First Am. Compl. ¶ 8 ("*It is not currently known* whether or when the Senate and Assembly plans will receive final approval." (emphasis added)); *id.* ¶ 80 ("[I]t is entirely *possible* that the Department of Justice or D.C. Court could identify a violation near the end of the 60-day period . . . . (emphasis added)); Lee Intervenors First Am. Compl. ¶ 62 ("*If* the districts are denied preclearance . . . a strong likelihood exists that the redistricting plans will not be enacted or effective in timely manner by June 5, 2012 . . . ." (emphasis added)). But that is only speculation, and, indeed, plaintiffs fail even to plead any specific facts to show that the DOJ is likely to object to any particular aspect of the enacted plan.[3] Plaintiffs' request that the Court intervene based on events that probably will not occur is precisely the type of reliance on "contingent and future events that may not occur as anticipated, or indeed may not occur at all" that renders the parties impasse claims unripe. *Thomas*, 473 U.S. at 580-81; *Texas*, 523 U.S. at

[3] For example, the Ramos Intervenors line up adjectives that "the Senate Leader's submission of the Senate Plan was incomplete, defective and therefore not a proper submission," Ramos Intervenors First Am. Compl. ¶ 32, without alleging, as they must to withstand a motion to dismiss, any particular omissions or defects. *See Iqbal*, 129 S. Ct. at 1949 ("A pleading that offers labels and conclusions . . . will not do." (internal quotation marks omitted)).

300. Thus, such unfounded speculation about what the DOJ might do in the future affords no basis to interfere with the enacted plan now.

Counsel for the Senate Minority Defendants, who have not asserted a claim in this action but are defendants in it, nonetheless insists that *Branch v. Smith*, 539 U.S. 254 (2003), authorizes this Court to intervene, even when it is "speculative" whether an enacted plan will be precleared. *See* 3/21/12 Hr.'g tr. at 34 ("*Branch* . . . is a case in which . . . just like this case, was in the process of being pre-cleared, but had not yet been pre-cleared and the District Court stepped in in advance, *even though it was entirely speculative* whether the Attorney General would or would not pre-clear, and for exactly the reasons we're urging, namely, there's not going to be enough time to start later if the Attorney General does deny pre-clearance or the *Cohen* issue which I'll get to." (emphasis added)).

But that case does not erase the case or controversy requirement in the redistricting context, as the Senate Minority Defendants would have it. To the contrary, *Branch* holds that a district court may not impose a remedial plan unless the State plan "had not been precleared and *had no prospect of being precleared* in time for the . . . election." 538 U.S. at 265 (emphasis added). That is simply not this case. In fact, the Court in *Branch* suggested that a district court cannot even begin the process of drafting a remedial plan until there are "*serious doubts* whether the [State's plan] will be precleared prior to the . . . candidate qualification deadline," *id.* at 260 (emphasis added and internal quotation marks omitted), which no plaintiff has undertaken to plead let alone prove. As the Court in *Branch* explained in applying familiar principles of legislative deference, the State must be given an "adequate opportunity to develop a redistricting plan," *id.* at 262, and "'[a]bsent evidence that the[] state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal

litigation to be used to impede it,'" *id.* (quoting *Growe*, 538 U.S. at 34). Such evidence is wholly lacking here, where the 2012 Senate plan is on track to be precleared before the petitioning period is scheduled to begin on June 5, 2012.

Moreover, Plaintiffs' claims are premature in light of the Court's limited potential role before the 2012 elections. The only potential role for the Court is to impose remedial districts for the three covered counties if preclearance does not come in time. *See Perez*, 132 S. Ct. at 942. When drawing interim relief, a court must defer to the plan enacted by the Legislature because it "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Id.* at 941. In particular, the Court may only modify the districts the DOJ objected to, or modify the particular districts "that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* at 942. Additionally, under *Perez* and *Upham* this Court would not be *required or permitted* to modify the enacted plan "to achieve de minimis population variations" in districts that are unaffected by a Section 5 objection. *Id.* at 943. That is because, while "court-drawn maps are held to a higher standard of acceptable population variation than legislatively enacted maps," "those 'stricter standard[s]' are not triggered where a district court incorporates unchallenged portions of a State's map into an interim map." *Id* at 943 n.2 (quoting *Upham*, 456 U.S. at 42–43).

Second, plaintiffs assert the Senate Minority Defendants' notion that the Legislature failed to seek preclearance of the change from 62 to 63 seats, and that this failure might render the Senate plan invalid. *See* Ramos Intervenors First Am. Compl. ¶ 33 ("This controversial Senate plan change was neither pre-cleared before its implementation nor presented for timely preclearance"); Pls.' First Am. Compl. ¶ 72-73 (alleging that "the Legislature used a different methodology to calculate the number of districts for the Enacted Plan" and that "[t]he Legislature

has not yet sought pre-clearance for the change in methodology . . . . Its failure to do so may and likely will be subject to challenge as a violation of the Voting Rights Act").

But, as the Senate Minority Defendants and plaintiffs well know, the 63-seat plan was enacted by the Legislature as part of the 2012 Senate plan and signed into law by the Governor on March 13, 2012. It was not accomplished through separate legislation on an earlier date. Moreover, Article III, section 4 of New York's Constitution guides the determination of the size of the Senate, and the Legislature applied this provision—as it does in every redistricting cycle—when it enacted a Senate redistricting plan with 63 seats.[4] This was no "change."

This 63 Senate-seat plan was also submitted to the DOJ for preclearance as part of the 2012 Senate plan, as none of the parties dispute. And plaintiffs do not allege, nor could they, that the preclearance submission somehow hid the fact that the enacted plan contains 63 seats. Indeed, plaintiffs do not even allege that an *Allen*[5] suit is pending, or identify a party that will likely bring an *Allen* suit challenging this alleged failure to comply with Section 5. In fact, the Legislature similarly increased the number of seats in the Senate in 2002, yet the DOJ had no problem preclearing the plan without a formally separate submission of the size of the Senate change. *See Rodriguez*, 308 F. Supp. 2d at 358 ("[T]he Department of Justice precleared the

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[4] Indeed, Article III, section 4 also provides guidance to the Legislature on other aspects of redistricting. *See, e.g.*, N.Y. New York Const. art. III, § 4 ("Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable . . . ."). It would be equally absurd for plaintiffs to argue that changes in compactness should be precleared separately from the overall enacted plan.

[5] *Allen*, 393 U.S. 554-57.

Senate and Assembly Plans, including specifically the increase in Senate districts from 61 to 62.").[6]

Third, plaintiffs speculate that a state court might find the Senate plan unconstitutional, and that the State might not have sufficient time to correct this defect. *See, e.g.*, Pls.' First Am. Compl. ¶ 7 ("[T]he Senate plan is the subject of a lawsuit in state court . . . that could ultimately result in the enacted Senate plan being deemed unusable . . . ." (emphasis added)); *id.* ¶ 81 ("[T]he possibility exists that the state court could strike down the Enacted Senate Plan . . . ." (emphasis added)); Lee Intervenors First Am. Compl. ¶ 62 ("*If* . . . the *Cohen* suit results in the invalidation of the State Senate map, a strong likelihood exists that the redistricting plans will not be enacted or effective in timely manner by June 5, 2012 . . . ." (emphasis added)).

Not only is this allegation based on speculation as to future events, but no plaintiff even attempts to allege facts to show it is likely that the New York State Supreme Court will rule that the 2012 Senate plan violates the New York State Constitution. And, as noted, plaintiffs' sheer, unsupported assumption that this might happen contravenes the well-established presumption of constitutionality that attaches to the Legislature's enacted plan. *See Schulz v. State*, 84 N.Y.2d 231, 241 (1994) ("[E]nactments of the Legislature—a coequal branch of government—enjoy a strong presumption of constitutionality."); *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)).

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[6] Because Article III, section 4 guides the determination of the size of the Senate, it is an integral part of *every* Senate redistricting, regardless of whether the result is that the size is different from last time.

Because "a state's redistricting law is ordinarily accorded deference as a constitutionally compliant enactment," *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 671 (N.D.N.Y. 1992) (citing *Clements v. Fashing*, 457 U.S. 957, 962-63 (1982)), it would be improper for this Court to presume that, or even to entertain whether, the recently enacted state Senate apportionment is invalid as a matter of New York Constitutional law and to begin drafting a remedial plan based on this assumption. That is especially so where, as here, the New York State Supreme Court already has this issue before it. *See generally* 3/21/12 Hr'g tr. at 41 ("[U]ntil some State, until the authoritative State judgment comes that tells us that there's something unconstitutional, that's the law, the plan that exists is the law of New York, vis-a-vis that, and we assume it's constitutional until told elsewise . . . .").

For all these reasons, plaintiffs' malapportionment claims should be dismissed on the ground that they are not ripe and therefore fail to satisfy the Article III "case or controversy" requirement.

II. Even If Plaintiffs' Malapportionment Claims Are Ripe, They Should Be Dismissed Because They Are Not Entitled To The Relief That They Seek

Alternatively, even assuming that plaintiffs' malapportionment claims were ripe, plaintiffs have failed to plead facts establishing that they are entitled to the relief that they seek: having the court step in and draw its own redistricting map for state legislative districts.

This is no longer an impasse suit. Unlike with the congressional map, the Legislature has enacted a districting plan for the state legislative districts and that plan is now undergoing preclearance review by the DOJ. Plaintiffs' malapportionment claims are predicated on the notion that this enacted state districting plan may not be precleared or may be declared unconstitutional by a state court and that this Court should therefore step in and draw an interim map—not that there is not a duly enacted, properly apportioned plan in light of the 2010 Census.

As a threshold matter, plaintiffs failed to make the required showing that the enacted plan "ha[s] no prospect of being precleared in time." *Branch*, 538 U.S. at 265; *see also Perez*, 132 S. Ct. at 940 (noting that district court stepped in to draw interim maps because "[a]s Texas' 2012 primaries approached, it became increasingly likely that the State's newly enacted plans would not receive preclearance in time for the 2012 elections"). Nor can they, because unlike in *Branch* and *Perez* the 2012 Senate plan is currently on track for the DOJ to reach its decision before the candidate petitioning period for State Senate office begins on June 5, 2012.

Moreover, even if plaintiffs could establish that preclearance will not be obtained before the petitioning period for state legislative office, they have not shown that there is any basis for this Court to step in and draw an interim map. As the Supreme Court has recently made clear, a court drawing an interim map must defer to the plan enacted by the Legislature because it "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Perez*, 132 S. Ct. at 941. In particular, the Court may only modify a specific part of a plan when this particular "aspect[] of the state plan . . . stand[s] a reasonable probability of failing to gain § 5 preclearance." *Id.* at 942. This "reasonable probability standard [reflects the need to] balance[] the unique preclearance scheme with the State's sovereignty and a district court's need for policy guidance in constructing an interim map." *Id.* For example in *Perez*, the Court held that the district court "had no basis to modify" district lines in North and East Texas because the plaintiffs there had not made a preliminary-injunction-like showing that there a reasonable probability that these particular districts would be denied Section 5 preclearance. *See id.* at 943. Similarly here, this Court "ha[s] no basis to modify" any district lines until plaintiffs prove a reasonable probability that the 2012 Senate plan will be denied preclearance. *Id.* at 941.

Yet the plaintiffs here do not even attempt to *allege* facts that would satisfy this standard, let alone submit proof. No plaintiff sets out any allegations to show that any particular districts in the three covered counties are retrogressive. And the Ramos Intervenors' conclusory allegation that "the Senate Leader's submission of the Senate Plan was incomplete, defective and therefore not a proper submission," Ramos Intervenors First Am. Compl. ¶ 32, fails to satisfy their burden under *Perez* because they do not allege any specific omissions or defects—let alone explain why the there is a reasonable probability that the DOJ will deny preclearance on the basis of these unstated defects. *See Iqbal*, 129 S. Ct. at 1949 ("A pleading that offers labels and conclusions . . . will not do." (internal quotation marks omitted)).

Similarly, plaintiffs' claims should be dismissed because plaintiffs do not plead sufficient facts to determine whether, even assuming a 63-seat plan is unconstitutional, the proper remedy is to draw a 62-seat plan, a 64-seat plan, or a plan containing some other number of seats. Rather, plaintiffs claim only that a 63-seat plan is unconstitutional. Even assuming that this Court could properly credit this claim before it has been adjudicated in New York Supreme Court (and this Court may not), in the absence of a showing of how many seats, in plaintiffs' view, the Senate plan should apportion, it would be impossible for this Court to know what sort of remedial plan it should begin drafting. Further still, should the state court ultimately find that the Senate plan is unconstitutional, this determination will not trigger a need for this Court's intervention. It would then be up to the Legislature and the state court to implement this state-law requirement in a way that complies with federal law. If they cannot do this in time for the current election because they cannot get the remedial plan precleared, then the state-law requirement will be preempted under the Supremacy Clause, and this election will have to go forward under the precleared, federally-compliant 63-seat plan. *See Perez*, 132 S. Ct. 940 ("The failure of a State's newly

enacted plan to gain preclearance prior to an upcoming election does not, by itself, require a court to take up the state legislature's task. That is because, in most circumstances, the State's last enacted plan simply remains in effect until the new plan receives preclearance.").

In sum, the Court does not have the authority to modify the 2012 Senate plan in any way as part of a process for drawing an interim map. On this separate ground, plaintiffs' malapportionment claims should be dismissed.

CONCLUSION

Because plaintiffs' malapportionment claims are contingent on certain events that probably will not occur—and that no plaintiff has shown is likely to occur—these claims should be dismissed on ripeness grounds. Alternatively, even assuming that the Court may exercise the judicial power over these unripe claims, plaintiffs are not entitled to the relief they seek on their malapportionment claims.

The Court should, therefore, dismiss plaintiffs' malapportionment claims.

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Respectfully submitted,

/s/Michael A. Carvin

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of April, 2012, a true and correct copy of the foregoing was served on the following counsel of record through the Court's CM/ECF system:

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