UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, et al.,

Plaintiffs,

v.

ANDREW M. CUOMO, et al.,

Defendants.

11 Civ. 5632
(RR) (GEL) (DLI)
(RLM)

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PLAINTIFFS-INTERVENORS' DONNA KAYE DRAYTON ET AL. MEMORANDUM OF LAW IN OPPOSITION TO THE SENATE MAJORITY DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs-Intervenors Donna Kaye Drayton, Edwin Ellis, Aida Forrest, Gene A. Johnson, Joy Woolley, Sheila Wright, Melvin Boone, Grisselle Gonzalez, Dennis O. Jones, Regis Thompson Lawrence, Aubrey Phillips, by their undersigned counsel, respectfully submit this memorandum, along with the attached Declaration of Joan P. Gibbs, dated April 9, 2012, in opposition to the Senate Majority Defendants' – New York State Senators Dean G. Skelos and Michael Nozzolio, and LATFOR member Welquis R. Lopez - motion to dismiss their First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7.1 (a) (1).

In their memorandum, the Senate Majority Defendants offer essentially two arguments as to why this Court should dismiss Counts I, II, III and VIII of Plaintiffs-Intervenors' First Amended Complaint. First, the Senate Majority Defendants contend that Plaintiffs-Intervenors malapportionment claims are premature. Memorandum of Law In Support of Senate Majority Defendants' Motion to Dismiss [hereinafter "Senate Majority's Mem."] at pp. 9-17. Second, the Senate Majority Defendants contend that, even assuming *arguendo* that Plaintiffs-Intervenors' claims are ripe, Plaintiffs-Intervenors are not entitled to the relief they seek on their malapportionment causes of action because they fail to state claims upon which relief can be granted. Senate Majority's Mem. at pp. 17- 20.

As more fully explained within, the Court should reject both of these arguments and allow this action to proceed because Plaintiffs-Intervenors' malapportionment claims are ripe for adjudication, and state claims upon which relief can be granted.

STATEMENT OF FACTS

On March 14, 2012, the New York State Legislature enacted S. 6696-A.9525, an act providing for the decennial redistricting of New York State's State Senate and State Assembly districts. The following day, March 15, 2012, the Governor of New York, signed S.6696 – A.9525 into law as Chapter 16 of the Laws of 2012 ("Chapter 16"). Six days later, on March 21, 2012, the Senate and Assembly enacted S.6755-A.9584, amending Chapter 16 to make technical amendments and corrections to the provisions of law set forth in S.6696 –A.9525. On March 26, 2012 the Governor of New York signed S.6755-A.9584 as Chapter 20 of the Laws of 2012 ("Chapter 20").

New York is scheduled to hold primary elections for the New York State Senate and State Assembly on September 11, 2012. N.Y. Election Law Section 8-100(1) (a). State Senate and Assembly candidates may begin gathering petition signatures on June 5, 2012. N.Y. Election Law Section 6-134(4), and candidates must file notices of their candidacies and sufficient petition signatures no later than July 12, 2012. N.Y. Election Law Section 6-158(1).

Because three counties in New York are covered jurisdictions under Section 5 of the Voting Rights Act, New York's new State Senate and State Assembly districts must be precleared by the United States Department of Justice or the United States District Court for the District of Columbia before they can be implemented. 42 U.S.C. Section 1973 (c). See also, 28 C.F. R. Section 51.10. The Procedures for the Administration of Section 5 of the Voting Rights Act are set forth in Part 51, Section 28 of the Code of Federal Regulations. Pursuant to 28 C.F.R Section 51.9 (a), the United States Attorney has 60 days from the application for preclearance to render a decision. However, "[t]he 60 day period shall recommence upon the receipt in like manner of a resubmission, information provided in response to a written request

for additional information, or material, supplemental information or a related submission." 28 C.F.R 51.9 (b) (internal citations omitted). See also, 28 C.F.R Section 51.39.

Twelve days prior to the passage of Chapter 20, on March 14, 2012, the Senate submitted the Senate maps in Chapter 16, S.6696, to the Department of Justice for preclearance and, that same day, filed an action for a declaratory judgment in the United States District Court for the District of Columbia. New York v. United States, No. 1:12 Civ. 00413 (D.D.C.). The United States is scheduled to file its answer in New York v. United States on April 13, 2012. Senate Majority Mem. at p. 3. Upon information and belief, the Senate has neither informed the Department of Justice of the passage of Chapter 20, or S. 6755, nor amended its complaint in New York v. United States to include Chapter 20.

The Assembly submitted both Chapter 16 and Chapter 20 to the Department of Justice on March 28, 2012. Two days later, on March 30, 2012, the Assembly filed a declaratory judgment action in the United States District Court for the District of Columbia, New York v. United States II, No. 1:12 Civ. 00500 (D.D.C.). Both the Senate and the Assembly requested that the Department of Justice expedite their requests for preclearance. See, 28 C.F.R. Section 51.34.

Meanwhile, on March 15, 2012, an action challenging the increase in the number of State Senate seats from 62 to 63 as violative of Article III, Section 4 of the New York Constitution was filed in the Supreme Court of the State of New York, County of New York. Cohen v Cuomo, No 12-102185 (N.Y. Sup. Ct. filed on March 15, 2012). Oral arguments on the parties' motions for summary judgment have been scheduled for April 9, 2012.

ARGUMENT

I

PLAINTIFFS-INTERVENORS' MALAPPORTIONMENT CLAIMS ARE RIPE FOR ADJUDICATION

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) challenges the court's subject matter jurisdiction. "Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim 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." Arar v. Ashcroft, 532 F. 3d 151, 168 (2d Cir. 2008). Plaintiffs-Intervenors "have the burden of proving by a preponderance of evidence" that subject matter jurisdiction exists. Morrison v. National Australia Bank, 547 F. 3d 167, 170 (2d Cir, 2008). However, the Court, in ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) "must take all facts alleged in the complaint as true and draw all reasonable inference in favor of" Plaintiffs-Intervenors. Id. Moreover, where, as is the case here, jurisdictional facts are disputed, the Court has the power and the obligation to consider matters outside the pleadings, such as affidavits, documents and testimony, matters of public record, including publicly filed court documents in other lawsuits, prior opinions and orders in other lawsuits, the facts set forth in those opinions and orders, in determining whether subject matter jurisdiction exists. See e.g., APWU v. Potter, 343 F. 3d 619, 627 (2d Cir. 2003); Filitech S.A. v. France Telecom S.A., 157 F, 3d 972, 932 (2d Cir. 1998); Komen v. American Telephone and Telegraph Co, 791 F. 2d 1006, 1011 (2d Cir. 1986); Quitoriano v. Raff & Becker, LLP, 675 F. Supp. 2d 444,446 (S.D.D.N.Y. 2009); Mangiagico v. Blumenthal, 471 F. 3d 391, 398 (2d Cir. 2006); Zappia Middle Construction Co. v. Emirate of Abu Dhabi, 215 F. 3d 247, 253 (2d Cir. 2000); Pant v. Empire Blue Cross Blue Shield, 152 F. 3d 67, 75 (2d Cir. 1998).

By their motion, the Senate Majority Defendants seek the dismissal of Plaintiffs-Intervenors malapportionment claims in their First Amended Complaint on the ground that these claims are not ripe for adjudication. "[R]ipeness is peculiarly a question of timing. Its basic rationale is to prevent courts, through premature adjudication, from entangling themselves in abstract disagreements." Thomas v. Union Carbine Agric. Prods. Co, 473 U.S. 568, 580 (1985) (internal quotation marks, brackets, and citations omitted.) "[T]he fitness of the issues for judicial decision" and "hardship to the parties of withholding court consideration" must inform any analysis of ripeness. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). See also, Simmonds v. I.N.S., 326 F. 3d 351, 359 (2d Cir. 2003).

In support of their motion, the Senate Majority defendants, in summary, contend that Plaintiffs-Intervenors' malapportionment claims are premature 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. Section 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 9, 2012, the state court proceeding challenging the constitutionality of a 63-seat plan is on track to be resolved promptly as well.

Senate's Majority's Mem. at 11-12. The Court should squarely reject each of the Senate Majority defendants' contentions here because, contrary to the Senate majority's contentions, Plaintiffs-Intervenors' malapportionment claims are "fit for judicial decision" because it is highly unlikely, if not inevitable, that New York will not have new state legislative maps by June 5, 2012 and Plaintiffs-Intervenors will suffer serious harm if the new state legislative maps are not in place by that date.

Contrary to the Senate Majority Defendants' claims, redistricting cases are ripe for adjudication not when there has been a "final failure to reapportion" but rather when such failure appears to be inevitable if the court does not direct apportionment. See e.g., Flateau v. Anderson, 537 F. Supp. 257, 262 (S.D.N.Y. 1982). As the Court of Appeals has stated, "that the liability may be contingent does not necessarily defeat jurisdiction of a declaratory judgment action. Rather, courts should focus on the practical likelihood that the contingencies will occur." E.R. Squibb & Sons, Inc. v. Lloyd's & Co., 241 F. 3d 154, 177 (2d Cir. 2001).

In their memorandum, the Senate Majority Defendants claim that the Department of Justice will preclear the New York State Senate plan "by May 15, 2012." Senate Majority Mem. at p. 12. True, the Senate Majority submitted its request for preclearance of S. 6696 to the Department of Justice on March 14, 2012 and, in so doing, requested that it be expedited. Senate Majority Mem. at p. 3. However, seven days later, on March 21, 2012, the Senate and Assembly passed S. 6755-A.9584, amending Chapter 16 to make technical amendments and corrections to the provisions of law set forth in S. 6696-A.9525. Five days later, on March 26, 2012, the Governor of New York signed S. 6755-A.9584 as Chapter 20 of the laws of 2012. Upon information and belief, the Senate Majority has neither informed the Department of Justice of the enactment of Chapter 20 nor amended its complaint in New York v. United States, to include Chapter 20 as it is obligated to do. See 28 C.F. R. Section 51.21.

Moreover, the Senate Majority's initial submission was incomplete. In particular, the Senate Majority did not seek preclearance of the methodology or formula used in calculating the new Senate seat, which differed from the formula employed during the last redistricting cycle The Senate Majority also did not seek preclearance of the increase in the size of the Senate from 62 to 63 seats. See e.g., Presley v. Etowah County Commission, 502 U.S. 491, 503 (1992)

(Section 5 applies to any "increase" in the "number of officials for whom the electorate may vote"). See also, 28 C.F. R. Sections 51.12 and 51.13. Incomplete state submissions do not start the 60-day clock; rather the clock begins to run from the date that any additional requested information is received. See, 28 C.F. R. Section 51. 9(b); 28 C.F. R. Section 51.39.

Here, it also highly likely that the Department of Justice will seek additional or supplemental information because of the Comment Letters urging the Attorney General to Justice to object to the S.6696. S.6696 is widely opposed by minority elected officials in New York State and civil rights advocates. See Exhibits A attached to Declaration of Joan P. Gibbs, dated Apri1 9, 2012. [hereinafter "Declaration of Joan P. Gibbs]. And see e.g., Lee Intervenors' First Amended Complaint at paragraphs 94-115 (DE 256). During the vote on S. 6696-A.9584 in the Senate all of the members of the New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus ["Caucus"] walked out in protest and did not return for the vote. In the Assembly, six members of the Caucus voted against S. 6696-A.9584.

The Senate's Majority's action for a declaratory judgment, New York v. United States, also may not be resolved prior to June 5, 2012. Even assuming *arguendo* that the United States files its answer on April 13, 2012 when it is currently scheduled to do so, that Court still may not reach a decision in advance of the petition schedule. North Carolina's and South Carolina's efforts to secure preclearance of their 20ll redistricting plans are instructive here. As is the case here, both North Carolina and South Carolina simultaneously sought administrative preclearance of their decennial congressional and state legislative plans and commenced declaratory judgment actions in the United States District Court for the District of Columbia. In both cases, the Department of Justice sought additional information and the courts, upon information and belief,

awaited the submission of such information before proceeding. See, Exhibits B, C and D attached to the Declaration of Joan P. Gibbs. [1]

Furthermore, it is sheer speculation that the "state court proceeding challenging the constitutionality of a 63-seat Senate plan is on track to be resolved promptly as well." Senate Majority Mem. at p. 12. The Senate Majority Defendants do not know and have no way of knowing when the State Court in Cohen v. Cuomo will issue its decision on the parties' motions for summary judgments and what that decision will be. The only thing that is certain about Cohen v. Cuomo is that the losing party will appeal, a process that very likely will extend those proceedings beyond June 5, 2012. The Senate Majority Defendants' memorandum is strangely silent as to these issues.

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[1] On September 2, 2011, the state of North Carolina submitted its congressional and state legislative plans for preclearance to the Department, and, simultaneously, filed a declaratory judgment action in the United States District Court for the District of Columbia. See North Carolina v. Holder, 1:11-cv-01592 (D.D.C.). Sixty days later, on November 1, 2011, the Department of Justice precleared North Carolina's 2011 redistricting plan; thereafter the declaratory judgment was dismissed. Exhibit B attached the Declaration of Joan P. Gibbs.

Similarly, on or about August 9, 2011, South Carolina filed an action in the United States District Court for the District of Columbia for a declaratory judgment that their new state legislative seats complied with Section 5 of the Voting Rights Act, Harrell v. United States, No. 1:11-cv-01454 (D.D.C). The same day, South Carolina sought administrative preclearance from the Justice Department. Exhibit C attached to the Declaration of Joan P. Gibbs. On October 11, 2011, sixty-three later, the Department of Justice precleared South Carolina's new state legislative plans. Id.

Subsequently, on August 30, 2011, South Carolina filed an action the United States Court for the District of Columbia for a declaration that its new Congressional districts compiled with Section 5 of the Voting Rights Act. See Harrell v. United States, 1:111-cv-01566 (D.D.C.). The next day, August 31, 2011, South Carolina submitted the plans to the Justice Department for preclearance. Exhibit D attached to the Declaration of Joan P. Gibbs. Seventy-nine days later, on October 28, 2011, the Justice Department precleared South Carolina's congressional plan; thereafter the declaratory judgment action was dismissed. Id.

The two cases relied on by the Senate Majority to support their arguments here, Texas v. United States, 523 U.S. 296 (1998) and Little v. Strange, 796 F. Supp. 1314 (M.D. Ala, 2011), are easily distinguishable from the case at bar. In Texas v. United States, Texas appealed from a judgment of the United States District Court for the District of Columbia, denying a declaratory judgment that Section 5 applied to the implementation of certain provisions of the Texas Education Code, permitting it to sanction local districts that failed to meet mandated educational achievements. Texas v. United States, supra, 523 U.S. at 300. The Supreme Court affirmed the district court's judgment on the grounds that the claim was not ripe for adjudication because of the numerous contingencies that would have to occur before the problem Texas sought to resolve would arise.

Justice Scalia, writing for a unanimous Court, explained:

> Whether Texas will appoint a master or management team under [Sections] 39.131(a)(7) and (8) is contingent on a number of factors. First, a school district must fall below the state standards. Then, pursuant to state policy, the Commissioner must try first "the imposition of sanctions which do not include the appointment of a master of management team" He may, for example, "order the preparation of a student achievement plan. . ., submission of the plan to the Commission for approval, and implementation of the plan."...or "appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent...It is only these less intrusive options fail that the Commissioner may appoint a master or management team",... and even then, only "to the extent the Commissioner determines necessary,"...Texas has not pointed to any particular school district in which implication of [Sections] 39.131(a)(7) or (8) is currently foreseen or even likely. Indeed, Texas hopes that there will be no need to appoint a master or management team for any district. Under these circumstances, where "we have no idea whether or when such a sanction will be ordered", the issue is not fit for adjudication.

Texas v. United States, 523 U.S. at 300. (citing Toilet Goods Assn., Inc. v. Gardner 387 U.S. 158, 163 (1967); Renne v. Geary, 501 U.S. 312, 321-322 (1991) (internal citations omitted).

Further, Justice Scalia went on to state:

> Texas asks us to hold that under no circumstances can the imposition of these sanctions constitute a change affecting voting. We do not have sufficient confidence in our powers

> of imagination to affirm such a negative. The operation of the statute is better grasped when viewed in light of a particular application. Here, as is often true "determination of the scope of ...of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function". In the present case, the remoteness and abstraction are increased by the fact that Chapter 39 has yet to be interpreted by the Texas courts. Thus, "proposing consideration of the question presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe" the provisions.

Texas v. United States, 523 U.S. at 301. (citations omitted). Accordingly, the Court found "it too speculative whether the problem Texas presents will ever need solving: we find the legal issues Texas presents not fit for our consideration, and the hardship to Texas of biding time unsubstantial. " Id.

In Little v. Strange, a campaign contributor sought a declaration that Section 5 of the Voting Rights Act required preclearance of a never-enforced Alabama law, which required recusal of state court judges receiving substantial campaign contributions from a litigant or other described individual. A three judge court granted the defendants' motion on the grounds that the plaintiff lacked standing and the action was not ripe. In so doing, the Court explained:

> We conclude that Plaintiff has not shown that an injury in fact necessary to achieve Article III standing in this [Section] 5 suit brought to obtain injunctive relief against enforcement of the Alabama Act... pending preclearance, and to obtain a declaratory judgment that the Alabama Act requires preclearance. The Alabama Act has lain dormant since its enactment more than fifteen years ago, and Plaintiff fails to demonstrate any concrete or actual injury or credible threat of enforcement. On this record, Plaintiff's fear of enforcement is wholly speculative. For substantially the same reason, Plaintiff's [Section] 5 lawsuit is not ripe.

Little v. Strange, 796 F. Supp. at 1335.

In short, neither Texas v. United States nor Little v. Strange involved redistricting. In addition, here, unlike in Texas v. United States, only one of two contingencies need to occur for the Court's intervention to become inevitable: the Senate plan is not precleared is not precleared by June 5, 2012 or there is no final decision in Cohen v. Cuomo by June 5, 2012. Little v.

Strange is also of little assistance to the Senate Majority Defendants because there, unlike here, the plaintiff's claims were "wholly speculative" because the fifteen year old statute at issue therein had never been enforced.

In conclusion, New York State must have new state legislative districts and these districts must be in place on or before June 5, 2012, fifty-seven (57) days from today, when the circulation of nominating petitions for state legislative offices is scheduled to begin. The new state legislative lines must be precleared by either the Department of Justice or the United State District Court for the District of Columbia. See e.g., Perry v. Perez, 132 S. Ct. 934, 940 (2012) ("This Court has been emphatic that a new election map cannot be used to conduct an election until it has been precleared") (citing Clark v. Roemer 500 U.S. 646, 652 (1991). In light of the unlikelihood that the Senate Majority Defendants will obtain preclearance of the new State Senate redistricting plan from either the Department of Justice or the United States District Court for the District of Columbia prior to June 5, 2012 *and* that there will be a final decision in Cohen v. Cuomo by that date, this Court should deny the Senate Majority Defendants' motion to dismiss and hold that Plaintiffs-Intervenors' malapportionment claims are ripe for adjudication and allow this action to proceed.

ARGUMENT

II

PLAINTIFFS-INTERVENORS MALAPPORTIONMENT CAUSES OF ACTION STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

The Senate Majority Defendants additionally seek the dismissal of Plaintiffs- Intervenors' malapportionment causes of action for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b) (6). In reviewing a 12(b) (6) motion, a court must also accept all factual allegations in the complaint as true and from those allegations draw all reasonable inferences in the plaintiff's favor. See e.g., Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 986-87 (2010); Fulton v. Goord, 591 F. 3d 37, 43 (2d Cir. 2009). "[T]he Court is limited to reviewing the four corners of the complaint, any documents attached to that pleading or incorporated in it by reference, any documents that are 'integral' to the plaintiff's allegations even if not explicitly incorporated by reference, and facts of which the court may take judicial notice." Carvel v. Scarpino, 2010 U.S. Dist. LEXIS 133642, at *18 (S.D.N.Y. Dec. 16, 2010). See also, Chambers v. Time Warner, Inc., 282 F. 3d 147, 152-153 (2d Cir. 2002).

Pursuant to Fed.R. Civ. P 8 (a)(2), a complaint must contain "a short and plain statement showing that the pleader is entitled to relief." A complaint will survive a Rule 12 (b) (6) motion if it sets forth "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 530 U.S. 544, 570 (2007). A complaint satisfies this plausibility standard "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant acted unlawfully." Id. (quoting Twombly, 550 U.S. at 566).

Counts I, II, III of Plaintiffs-Intervernors First Complaint clearly satisfies the requirements of Fed. R. Civ. P. 8(a). In their Complaint, Plaintiffs-Intervenors allege that they are Black voters who reside in existing State Senate and/or State Assembly districts that must be redrawn as a result of the 2010 Census. See Plaintiffs-Intervenors' First Amended Complaint at paragraphs 11- 18, 29-38, 81- 97. These allegations sufficiently state a claim for a declaratory judgment declaring that New York's existing State Senate and Assembly districts violate the Fourteenth Amendment and Article III, Sections 4 and 5 of the New York State Constitution.

The Senate Majority Defendants do not seriously contest the sufficiency of Plaintiffs-Intervenors' malapportionment allegations. Rather, the Senate Majority Defendants' primary contention is that because the "legislature has enacted a districting plan for the state legislative districts and that plan is now undergoing preclearance by the DOJ," this "**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.**" Senate Majority Mem. at p. 17, 20. (emphasis supplied). In so arguing, the Senate Majority seriously misreads Perry v. Perez, 132 S. Ct. 934 (2012).

Perry v. Perez, involved efforts to redraw Texas's electoral districts in light of 2010 Census. As the Supreme Court noted: "The 2010 census showed an enormous increase in Texas's population, with over four million new residents. That growth required Texas to redraw its electoral districts for the United States Congress, the State Senate, and the State House of Representatives, in order to comply with the Constitution's one-vote rule." Perry v. Perez 123 S. Ct . at 939. Texas redrew its electoral districts and then filed an action for declaratory judgment in the United States District Court for the District of Columbia for preclearance. Id at 940. The Court denied Texas's motion for summary judgment and scheduled the case for trial. Id.

Meanwhile, a suit was brought in the District Court for the Western District of Texas, challenging Texas's new maps under the United States Constitution and the Voting Rights Act. Perry v. Perez, 132 S. Ct. at 940. A three judge panel was convened, which held argument and a trial with respect to the plaintiffs' claims but withheld decision pending resolution of the preclearance process in the D.C. court. Id. However, as it became increasingly unlikely that Texas' newly enacted plans would be precleared in time for the 2012 primaries, that Court, after receiving proposals and holding extensive hearings, issued interim plans. Id. Texas asked the three judge court to stay the interim plans, pending an appeal, on the ground that the interim maps "were unnecessarily inconsistent with the State's enacted plans." Id. The Supreme Court granted a stay and noted probable jurisdiction. Id.

In its brief, Texas stated the question before the Supreme Court as follows: "whether, while preclearance remains pending, another district court may order the use of judicially drawn 'interim' electoral maps that give no deference to the State's duly-enacted maps, are not premised on any actual or likely violation of law, and are based on nothing more than the court's own notion of sound public policy and 'the collective public good.'" Brief for Appellants, Perry v. Perez, Nos. 11-713, 11-714, 11-715 (S.Ct filed December 21, 2011) at p.2.

The Supreme Court unanimously vacated the opinion below, noting that the extent to which the San Antonio federal court deferred to unobjectionable portions of Texas's enacted plan was unclear. Perry v. Perez, 132 S. Ct. at 944. The Court remanded for the trial court to defer to Texas's enacted plan, except as to those portions where there is a "likelihood of success" on a challenge under the Constitution or Section 2 of the Voting Rights Act, and except those portions where there is a "reasonable probability" that an aspect of the plan will cause it to be denied preclearance. On remand, the trial court was instructed that it should also defer to minor

population deviations in Texas's enacted plan where those districts are otherwise unproblematic, and should further defer to Texas's wishes in splitting precincts (which may now change), regardless of the exigencies of the impending election. Perry v. Perez, 132 S. Ct. at 943-944.

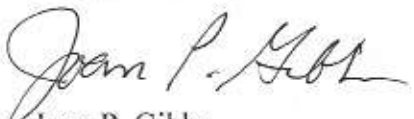
In short, the Court in Perry v. Perez, did not hold, as the Senate Majority Defendants apparently believe, that malapportionment claims such as those presented by Plaintiffs-Intervenors here, are barred once the State has enacted a redistricting plan. If that were true, the Court would have remanded the case with instructions to dismiss, rather than remanding "for further proceedings consistent with this opinion." Id. at 944. Accordingly, this Court should deny the Senate Majority Defendants' motion to dismiss. This Court can and should examine the new New York State Senate redistricting plan and draw a new plan consistent with the Supreme Court's guidelines in Perry thereby enabling New York's election process to occur on schedule with maps that adhere to the voter protection mandates of the United States Constitution and the Voting Rights Act.

CONCLUSION

For the foregoing reasons, Plaintiffs-Intervenors respectfully request that this Court deny the Senate Majority Defendants' motion to dismiss this case.

Dated: Brooklyn, New York
April 9, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JOAN P.GIBBS, hereby certify that on this 9TH day of April 2012 true and correct copies of Plaintiffs-Intervenors Memorandum of Law In Opposition to the Senate Majority Defendant's Motion to Dismiss and Declaration of Joan P. Gibbs, dated April 9, 2012 was delivered to the Plaintiffs, Plaintiffs-Intervenors and Defendants via the United States District Court for the Eastern District Of New York, ECF system.

/s/ Joan Gibbs_____