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.

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No. 11 Civ. 5632 (RR) (GEL) (DLI)

THE SENATE MINORITY'S RESPONSE TO
THE SENATE MAJORITY'S MOTION TO DISMISS

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Senate Minority Leader John L. Sampson and Senator Martin Malave Dilan (collectively, the "Senate Minority") respectfully submit this response to the motion of Senate Majority Leader Dean G. Skelos, Senator Michael F. Nozzolio, and LATFOR member Welquis R. Lopez (collectively, the "Senate Majority") to dismiss portions of each of the Amended Complaints, and to dismiss the Favors Plaintiffs' First Amended Complaint in its entirety, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The Senate Majority's motion to dismiss rests on a fundamental mischaracterization of the Court's March 21, 2012 Order. The sensible procedure that the Court announced will not in any way "displace, "alter," "obstruct," or "impede" the "enacted state plan." Maj. Br. at 1, 2. Unless and until the enacted Senate plan is precleared by the Department of Justice, it has no legal force, and thus there is nothing to "displace, "alter," "obstruct," or "impede." *See* 42 U.S.C. § 1973C(a) (providing that covered changes shall not go into effect "unless and until" they are precleared). Rather, the Court exercised its discretion to begin the process of drawing a *contingency* plan – one that, by definition, will not "displace" the enacted Senate plan, but merely will be *available* to go into effect if the enacted Senate plan does *not* go into effect, thereby preventing a statewide one person, one vote violation. There is no question that this Court has jurisdiction and discretion to begin developing such a contingency plan. *See Branch v. Smith*, 538 U.S. 254 (2003).

The Court's decision to exercise its discretion in this matter was lawful and prudent. For a variety of reasons set forth in greater detail in the comments that the Senate Minority submitted to the Department of Justice, *see* Hecker Decl. Ex. A, and in the Petition and supporting papers in *Cohen v. Cuomo*, Index No. 102185/2012 (Sup. Ct. N.Y. Cnty.), *see* Dkt. Entry Nos. 288 &

289, there is a reasonable probability either that the Department of Justice will decline to preclear the enacted Senate plan or that the state courts will strike it down as unconstitutional, and there is no basis for the Senate Majority's confidence that there will be ample "time to act later" if either of these events occurs. Maj. Br. at 2. There is a reasonable probability that the Department of Justice will require the Senate Majority to resubmit its deficient preclearance application, which would restart the 60-day preclearance clock. 28 C.F.R. § 51.37(b); *Branch*, 538 U.S. at 263. Even if the Department of Justice reaches its decision by May 15, 2012, there is a reasonable probability that it will deny preclearance either on the basis that the Senate Majority did not meet its burden of proving (i) that the radical change in the Legislature's methodology for calculating the size of the Senate or (ii) that the significant regional malapportionment have no discriminatory purpose and will have no retrogressive effect on the ability of minority groups to elect the candidates of their choice. Notably, these are *statewide* issues that could not be remedied by making only minor revisions in the three covered counties. There similarly is a reasonable probability that the state courts will enjoin the addition of the 63rd Senate seat, and if that happens, it is virtually certain that any state court remedy could not be precleared by June 5, 2012.

Despite the judiciousness of and the case law supporting this Court's decision to begin the process of developing a contingency plan, the Senate Majority urges this Court to dismiss portions of the Intervenors' Amended Complaints and the entirety of the Favors Plaintiffs' Amended Complaint. The Senate Majority offers two bases for its motion: first, that Plaintiffs' malapportionment claims are not ripe; and second, that even if the malapportionment claims are ripe, this Court has no authority to take the steps necessary to ensure that there will be no statewide one person, one vote violation in 2012. The Senate Majority is wrong on both counts.

ARGUMENT

A. Plaintiffs' Malapportionment Claims Are Ripe

The Senate Majority's contention that Plaintiffs' malapportionment claims are not yet ripe rests on a serious mischaracterization of *Branch*.

In *Branch*, the Supreme Court unanimously affirmed the three-judge District Court's decision to begin developing a contingency plan, and ultimately to order that plan into effect, when it was not clear whether the Department of Justice would preclear a state court plan prior to the upcoming candidate qualification deadline. The facts in *Branch* are strikingly similar to those in this case. Just as this Court initially found it premature to begin addressing the state legislative impasse in February, the District Court in *Branch* initially "stay[ed] its hand" as well, choosing to give Mississippi more time to produce a compliant plan. 538 U.S. at 259. But the District Court decided that if it was "not clear" by January 7, 2002 that Mississippi would have a redistricting plan in place by March 1, 2002, then the District Court would develop, and if necessary implement, its own plan. *Id*.

Although the Mississippi Legislature did not act, the Mississippi courts did. The Mississippi courts finalized a redistricting remedy on December 21, 2001, and Mississippi submitted the state court plan to the Department of Justice for preclearance on December 26, 2001. *Id*. at 259-60. Shortly before the 60-day review period was scheduled to end, the Department of Justice requested more information from Mississippi, which caused the 60-day clock to reset on February 20, 2001. *Id*. at 260.

Meanwhile, in January 2002 – several weeks *before* the Department of Justice restarted the 60-day clock – the District Court began developing its own remedial plan, reasoning that it was not clear whether the state court plan would be precleared before the March 1, 2002

candidate qualification deadline. *Id*. On February 19, 2002, the District Court ordered that if the state court plan was not "precleared before the close of business on Monday, February 25, 2002," then the District Court's plan would go into effect. *Id*. Because the state court plan was not precleared by this deadline, the District Court ordered its plan into effect. *Id*. at 260-61.

In an opinion by Justice Scalia, the Supreme Court unanimously affirmed. The Court expressly held that the Department of Justice has wide discretion to restart the 60-day preclearance clock when it determines that a jurisdiction's initial preclearance application is incomplete. *Id*. at 263-64. There was no suggestion in *Branch* that the District Court lacked jurisdiction to begin developing a contingency plan while the state court plan was before the Department of Justice, and the Supreme Court affirmed the process followed by the District Court in all respects.

The Senate Majority argues that the process affirmed in *Branch* violates the Article III case or controversy requirement unless the state plan has "*no prospect of being precleared*" prior to the deadline. Maj. Br. at 13 (emphasis in original). *Branch* held no such thing. To the contrary, the District Court in *Branch* began developing its contingency plan in January 2002, several weeks *before* the Justice Department restarted the 60-day clock. *Id*. at 260. At that time, the state court plan did not have "no prospect of being precleared" prior to the deadline. Rather, there merely was a reasonable possibility that preclearance would be denied. The District Court's decision to err on the side of caution proved to be very wise.

Here, the possibility that the Department of Justice may deny preclearance is hardly far fetched. As set forth in more detail in the Senate Minority's Section 5 comments (which are attached as Exhibit A to the accompanying Hecker Declaration), there are a number of serious issues with the Senate plan, including that the addition of the 63rd Senate seat and the statewide

malapportionment have a retrogressive effect on minority voting strength, and that the sharp drop in Hispanic citizen voting age population in at least one district in the covered counties makes it at best questionable whether that district remains an effective minority opportunity district. Because the first two of these issues are *statewide* issues – and the Senate size issue in *Cohen* obviously is as well – it simply is not true that "[t]he only potential role for the Court is to impose remedial districts for the three covered counties if preclearance does not come in time." Maj. Br. at 14.

Moreover, as in *Branch*, there are very significant procedural defects in the Senate Majority's preclearance application. The Senate Majority did not even arguably seek preclearance of its new methodology for calculating the Senate size, which is a radical departure from the methodology that the Legislature used in every prior redistricting, and which plainly is subject to preclearance. The Senate Majority suggests that its new methodology is not subject to preclearance, asserting that it was sufficient merely to submit, without retrogression analysis, a plan that contains 63 seats. Maj. Br. at 15. At a bare minimum, however, the Senate Majority must submit evidence sufficient to satisfy its burden of proving that the addition of another majority-white district did not have a discriminatory purpose and will not have a retrogressive effect. Nor did the Senate Majority provide the Department of Justice with any statistical evidence (such as racially polarized voting or electability analyses) demonstrating that the sharp drop in Hispanic citizen voting age population in proposed District 29 will not compromise the effectiveness of that district. Given these material omissions in the Senate Majority's application, there is at least a reasonable probability that the Department of Justice will exercise its discretion to request additional information from the Senate Majority, which would trigger a new 60-day review period. 28 C.F.R. § 51.37(b); *Branch*, 538 U.S. at 263.

Nor is it far fetched that the state courts will strike down the Senate plan under the New York Constitution. The Senate Majority declined to put on any case at all in *Cohen v. Cuomo*, offering no evidence whatsoever regarding why the Legislature decided to apply two different counting methodologies in different parts of the State for the first time ever in 2012. This stands in sharp contrast to every other previous Senate size case, because in every previous case, the State introduced into the record detailed legislative reports articulating why the Legislature did what it did. Rather than introducing evidence demonstrating why it did what it did this year, the Senate Majority's defense in *Cohen v. Cuomo* rests almost exclusively on its unsworn assertion that Method A and Method B regularly have been used simultaneously in the past. But as Petitioners' reply papers demonstrated, that is absolutely and demonstrably false. *See* Dkt. Entry No. 289. Indeed, this central claim is so patently false that the Senate Majority essentially abandoned it at oral argument last Friday.

Moreover, the Senate Majority's assertion that this Court should not begin drafting a contingency plan while *Cohen v. Cuomo* is pending cannot be squared with the arguments it made in state court. The Senate Majority successfully argued that the first state court action, *Cohen v. LATFOR*, Index No. 101026/2012 (Sup. Ct. N.Y. Cnty.), should be dismissed as unripe because there would be "nothing irregular in allowing the federal court to resolve [the] threshold question of state constitutional law" relating to the Senate size. Hecker Decl. Ex. B at 7-8 (internal quotation marks omitted); *see also id*. at 2 (arguing that this Court "can resolve that challenge along with the myriad other state-law issues it would face in drafting a redistricting plan" and that "[t]here is thus no reason to secure this [state] Court's advisory opinion in a non-justiciable suit for potential use in another suit [*i.e.*, *Favors v. Cuomo*] where Plaintiffs can—and will—present their claim if and when it ever becomes ripe"); *id*. at 7 (arguing that "any

proceedings in federal court provide Plaintiffs with more than 'an adequate remedy' to pursue their claim); *id*. (arguing that "Plaintiffs offer no explanation as to why [the] federal forum is inadequate, much less why this [state] Court should rush to issue an advisory opinion for Plaintiffs' potential use in [*Favors v. Cuomo*] where Plaintiffs' claim 'undoubtedly will' be presented if it ever becomes justiciable"); *id*. at 8 (arguing that "[f]ederal courts in redistricting cases routinely address issues of New York constitutional law"); *id*. (arguing that "[t]he federal court is fully equipped and prepared to address that issue"). The state court agreed with the Senate Majority, holding that this Court "already" has been "empaneled pursuant to 28 U.S.C. § 2284(b)" and "will undoubtedly endeavor" to "map New York State Senate . . . districts . . . in conformity with both State and Federal Constitutional mandates." Hecker Decl. Ex. C at 4 n.3. Having prevailed in arguing that this Court can and will remedy any violation of the New York Constitution, the Senate Majority is now estopped from claiming that the pendency of *Cohen v. Cuomo* poses any bar to this Court beginning to develop a contingency plan. *See DeRosa v. Nat'l Envelope Corp*., 595 F.3d 99, 103 (2d Cir. 2010) (judicial estoppel applies where (i) a party's position is "clearly inconsistent" with its earlier position; (ii) the party's former position has been adopted in some way by the court in the earlier proceeding; and (ii) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel).

Neither of the cases the Senate Majority cites – *Texas v. United States*, 523 U.S. 296 (1998), and *Little v. Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011) – supports the claim that this Court lacks Article III jurisdiction because neither of them involved any urgency at all. In *Texas v. United States*, a case concerning a law affecting Texas school districts, the Supreme Court specifically noted that its conclusion that the case was not ripe rested on its determination that there was no risk of immediate hardship to the parties in the absence of judicial intervention.

523 U.S. at 301. Similarly, *Little v. Strange* involved a change in state procedure regarding the disclosure and recusal obligations of state judges who have accepted campaign contributions from litigants appearing before them. 769 F. Supp. 2d at 1318. The plaintiff brought an *Allen* claim challenging the fact that the change had not been precleared under Section 5. The Court dismissed this claim as unripe because the plaintiff had not appeared before a judge to whom the statute would apply, and because the statute "had not been enforced, not even once, during its more than fifteen years of existence." *Id*. at 1318, 1331, 1334.

In summary, this Court certainly is not *required* to craft a contingency plan now, but it plainly has the *discretion* to do so. Only this Court can decide, based upon its docket and its view of the complexities of the task at hand, when is the appropriate time to begin drawing a contingency plan. The Senate Majority's argument that Article III prohibits the considered plan that this Court devised and that the Supreme Court approved in *Branch* is unsupported and contrary to common sense.

B. The Senate Majority's Other Arguments Have No Merit

The Senate Majority offers two additional reasons why this Court supposedly is prohibited from doing anything until either the Department of Justice declines to preclear or the state courts strike down the enacted Senate plan. Neither argument has merit.

First, the Senate Majority observes that if the state courts strike down its unprecedented and irrational use of Method A and Method B in the same redistricting, then it is possible that both a 62-seat plan (which would result from the consistent use of Method B) and a 64-seat plan (which would result from the consistent use of Method A) could satisfy the New York Constitution. Sen. Maj. Br. at 19. But it does not follow that it is "impossible for this Court to know what sort of remedial plan it should be drafting." *Id*.

In *Schneider v. Rockefeller*, the New York Court of Appeals held that when the Legislature acts in "good faith" and does not "play[] fast and loose" with constitutional requirements, it has discretion either to use Method A consistently or to use Method B consistency. 31 N.Y.2d 420, 429, 430, 432-33 (1972). So does this Court. In exercising its discretion, the Court should consider both (i) that Method A is "consonant with the broad historical objectives underlying the provision for increasing the size of the Senate," *id*. at 433, and (ii) that the Legislature used Method B most recently in 2002. The fact that Method A and Method B are both available hardly compels the conclusion that the Court should do nothing at all. Given the dubious validity of the enacted Senate plan, a new plan must be crafted to avoid a statewide one person, one vote violation. The Legislature's failure to calculate the Senate size in a lawful manner, which requires this Court to consider how the Legislature would have exercised its discretion had it not been led astray, is the fault of nobody but the Senate Majority.

Second, the Senate Majority boldly asserts that if the state courts strike down the enacted Senate plan in *Cohen*, then the Supremacy Clause will require this Court to implement the Legislature's 63-seat plan *even though it violates New York Constitution*. Maj. Br. at 19-20. According to the Senate Majority, the "state-law requirement" – that is, the New York Constitutional requirement that the Senate size be determined in good faith based upon an objective mathematical formula – "will be preempted under the Supremacy Clause, and this election will have to go forward under the precleared, federally-compliant 63-seat plan." *Id*. at 19. This argument, which would enable the Senate Majority to get away with its mischief in the face of a state court ruling that it violated the New York Constitution, is frivolous.

The Supremacy Clause "invalidates state laws that interfere with, or are contrary to, federal law," *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13

(1985) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, *C.J.*)) (internal quotation marks omitted), but only where there is an "*unavoidable conflict*" between federal and state law, *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (emphasis added). Here there is no conflict at all between New York and federal law, let alone one that is "unavoidable." There is no federal law that requires the New York Senate to have 63 districts, nor is there a federal law that requires federal courts to defer to state plans that have been found unconstitutional by state courts. Because there is no federal-state conflict at all, much less an "unavoidable" one, there simply is no Supremacy Clause issue.

The only case the Senate Majority cites in support of its strained Supremacy Clause argument is *Perez v. Perry*, 132 S. Ct. 934 (2012), which nowhere mentions the Supremacy Clause, but which the Senate Majority quotes for the proposition that "[t]he 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." *Id*. at 940. The Senate Majority conveniently fails to quote *the very next sentence* of the Court's opinion, which recognizes that if an "intervening event . . . renders the current plan unusable," then it obviously cannot be used. *Id*. *Perez* observed that the most common "intervening event" that renders a plan "unusable" is a "census" demonstrating that the current plan violates the one person, one vote rule. *Id*. Without question, a state court ruling finding the existing plan unconstitutional an enjoining its enforcement similarly would render it "unusable." The fact that the Senate Majority would rely on *Perez* for the proposition that the Supremacy Clause *requires* this Court to implement a plan that the state courts have *enjoined* as violating the New York

Constitution, and its decision not to cite the sentence in *Perez* that squarely refutes that extraordinary claim, are troubling.

CONCLUSION

For the foregoing reasons, the Court should deny the Senate Majority's motion to dismiss.

Dated: April 9, 2012
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