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

MEMORANDUM OF LAW IN OPPOSITION TO SENATE MAJORITY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Plaintiffs Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey respectfully submit this memorandum in opposition to the motion to dismiss Plaintiffs' First Amended Complaint ("Amended Complaint" or "FAC") filed by Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis Lopez ("Movants").

PRELIMINARY STATEMENT

Movants once again make the very same ripeness arguments rejected by this Court in denying the prior motions to dismiss. What is more, Movants once again ignore the alarming yet undisputed reality of the situation: New York needs to have new state legislative districts in place before candidate petitioning begins, no such districts are currently in place, and further delay would leave this Court without sufficient time to impose a plan if it ultimately becomes necessary to do so. The Court must protect against the "disastrous scenario"[1] whereby Voting Rights Act pre-clearance is delayed or denied and there is insufficient time to fashion a remedy. This action is therefore ripe for the Court's involvement.

Plaintiffs have moreover stated a clear claim for relief, and indeed the Court has already taken steps to grant that relief. In their Amended Complaint, Plaintiffs ask the Court in the first instance to "begin drawing State Senate and Assembly plans using a timeline that would allow for the implementation of such districts well in advance of the June 5 start of petitioning if the Enacted Plans have not yet become legally operative." (FAC ¶ 84.) By its March 21, 2012 direction to Professor Persily to begin work on state legislative districts at a designated time, as well as by its April 3, 2012 scheduling order soliciting input from the parties as to how those districts should be drawn, the Court has already begun the process Plaintiffs request. Movants' contention that Plaintiffs are not entitled to the relief they seek thus flies in the face of the

[1] Court's Memorandum Opinion and Order on the Motions to Dismiss 11, March 8, 2012, ECF No. 219 ("MTD Decision").

Court's actions to date. The Court's actions themselves are supported by significant precedent in which courts create interim redistricting plans while the pre-clearance process is pending in order to prepare for the possibility that pre-clearance will not be timely granted.

Because this action clearly is ripe and the Plaintiffs' requested relief and the Court's actions thus far to grant that relief are proper, this latest motion to dismiss should be denied.

BACKGROUND

The Court is well acquainted with the brief but active history of this action. Plaintiffs filed their original Complaint on November 17, 2011, alleging among other things that New York's House of Representatives, State Senate, and State Assembly districts were malapportioned and had not been adjusted pursuant to the 2010 census, in violation of Plaintiffs' federal and state constitutional rights. Movants and several other Defendants moved to dismiss the original Complaint principally on the ground that the action was not ripe for review and there was still sufficient time remaining for the Legislature to complete a redistricting plan ahead of the 2012 elections. (MTD Decision 3, 7, 8.) This Court denied those motions by order dated February 21, 2012, and in its March 8, 2012 Decision the Court explained that Movants' ripeness arguments failed in light of the unconstitutionality of the existing districts, the lack of a new final redistricting plan, and the approaching start to the candidate petitioning period. (MTD Decision 10, 12-13.)

Finding this action to be ripe, the Court then proceeded to appoint Magistrate Judge Mann to prepare a congressional redistricting plan to be imposed in the event that Movants' prognostications about timely legislative action turned out to be wrong and that such a plan could not be approved through the legislative and pre-clearance processes in time for the start of the petitioning period. Ultimately, Movants' predictions proved to be wrong. No

congressional redistricting plan was enacted, and the Court—granting judgment to the Plaintiffs—imposed the plan prepared by Judge Mann (with minor changes) to be used for the 2012 congressional elections. (Order & Op., Mar. 19, 2012, ECF No. 242.)

Meanwhile, the Legislature passed redistricting plans for the State Senate and Assembly (the "Enacted Plans"), which the Governor signed on March 15, 2012. The Enacted Senate Plan was submitted to the United States Department of Justice for Voting Rights Act pre-clearance on March 16, 2012, and the Enacted Assembly Plan was submitted on March 28, 2012. (Letter from Senate Majority Defendants to Court (Mar. 21, 2012), ECF No. 250; Letter from Assembly Majority Defendants to Court (Mar. 29, 2012), ECF No. 259.) Under the Voting Rights Act, the Department of Justice has 60 days from the date of submission to reach a decision on pre-clearance. 42 U.S.C. § 1973c (2006). That time can be extended if the Department of Justice requests additional information. 28 C.F.R. §§ 51.37, 51.39 (2012); *Branch v. Smith*, 538 U.S. 254, 263 (2003). If the Department of Justice denies pre-clearance, then a revised plan must be adopted, and the pre-clearance process begins anew. *Flateau v. Anderson*, 537 F. Supp. 257, 261 n.10 (S.D.N.Y. 1982).

Sixty days from March 28 is May 27, 2012. Petitioning to qualify for the ballot for Senate and Assembly elections begins June 5, 2012. New York has 150 Assembly districts and either 62, 63, or 64 Senate districts, depending upon which disputed interpretation of the New York State Constitution ultimately prevails. No redistricting plan may be implemented absent either Department of Justice pre-clearance or a federal court order, neither of which has occurred. 42 U.S.C. § 1973c; *Perry v. Perez*, 132 S. Ct. 934, 940 (2012); *Flateau*, 537 F. Supp. at 261 n.10 (S.D.N.Y. 1982).

At a conference on March 21, 2012, this Court agreed with Plaintiffs that the Court's intervention in state legislative redistricting may yet be necessary since the Enacted

Plans are not yet in effect and may not be in effect in time for the June 5 start to the candidate petitioning period. (Status Conf. Tr. 65-66, Mar. 21, 2012.) However, since the Court did not "wish to guess" at Plaintiffs' contentions now that this is no longer an impasse situation, the Court ordered Plaintiffs to file an amended complaint reflecting the current state of affairs. (Status Conf. Tr. 65.) Against this background, and as directed by the Court, on March 27, 2012, Plaintiffs filed their Amended Complaint.

ARGUMENT

When a complaint is challenged under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim, as Movants have once again done here, a court must accept the factual allegations made in the complaint as true, drawing reasonable inferences in favor of the plaintiff. *See Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003); *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). In deciding such motions, courts may rely upon matters of public record, including publicly filed court documents in other lawsuits, prior opinions and orders in other lawsuits, and the facts set forth in those opinions and orders. *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006); *Quitoriano v. Raff & Becker, LLP*, 675 F. Supp. 2d 444, 446 (S.D.N.Y. 2009); *Yalincak v. Barack Ferrazzano Kirschbaum Perlman & Nagelberg LLP*, No. 3:07CV00311(AVC), 2007 WL 2101033, at *1 n.2 (D. Conn. July 17, 2007).

I. This Action Is Ripe Given the Present Exigent Circumstances, as Recognized in the Court's Prior Decision Denying Nearly Identical Motions to Dismiss.

A. Plaintiffs Ask the Court to Address the Present Situation, Rather than What Might Happen in the Future.

In their Amended Complaint, Plaintiffs ask the Court (as they did in their original Complaint) to begin right away the process of preparing interim legislative districts. Plaintiffs thereby request that the Court respond to the current situation in which no final district lines are in effect for the 2012 elections, and in which the Court's failure to act now could result in the absence of any effective lines as of the start of the candidate petitioning period. (FAC ¶¶ 7-8, 65-84.) Movants, however, once again ask the Court (as they did in response to the original Complaint) to ignore this danger. Indeed, they would have the Court assume that the Enacted Plans will be finalized before the start of the candidate petitioning period (Mem. Of Law in Support of Senate Majority Defs.' Mot. To Dismiss 3, 11-12, 14, 18, Apr. 2, 2012, ECF No 286-1("Mov. Br.")), and that "there is time to act later." (*Id.* at 2.) This Court (as it did in response to Movants' last motion to dismiss) should reject Movants' rose-colored view of the current situation and instead should "'prepare for the possibility that this Court will be required to adopt an appropriate redistricting plan.'" (Order of Referral to Magistrate Judge 5, Feb. 28, 2012, ECF No. 133 (quoting *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002).)

The scenarios requiring the Court's adoption of a redistricting plan before the June 5 start to the candidate petitioning period are neither remote nor difficult to envision. The Department of Justice currently has until late May to review the Enacted Plans for compliance with the Voting Rights Act. (FAC ¶ 77.) It may deny pre-clearance without leaving sufficient time for the State to enact a new plan and obtain pre-clearance. (*Id*. ¶ 80.) Or the Department of Justice may ask for more information, thus giving itself until after the June 5 deadline to reach a decision. (*Id*. ¶ 79; *see also* Scheduling Order 1, Apr. 3, 2012, ECF. No. 287.)

This Court is acutely aware that creating redistricting plans or even making changes to existing redistricting plans is a time-consuming activity that should not be done at the last minute. (Status Conf. Tr. 31 (Judge Raggi: "moving people from one district almost invariably triggers a ripple effect. So, while I would like to be optimistic, I am not convinced it would be a small matter [to resolve issues in only the three Voting Rights Act counties].").) The ideal schedule is for a court to begin drawing plans three months before the petitioning period "in order to build in time for possible hearings and adjustments to the plan," and then to impose the plan "no later than one month before candidates may begin qualifying for the primary ballot." (MTD Decision at 13, quoting Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1147 (2005) at 1147.) At fewer than two months before June 5, the present circumstances have already made inroads on that conservative time frame. The passage of time is not an ally to the parties or the Court in this context. *See Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982) ("If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured."); *see also* Status Conf. Tr. 11 (Judge Lynch: "we know what it is like now to do a plan one month before the petition date, and I think it's fair to say that there's not much stomach for going through that again").

The procedural history recited by the Supreme Court in *Branch v. Smith*, 538 U.S. 254 (2003), illustrates the need for Court intervention now just in case the pre-clearance process does not proceed smoothly. There, the State of Mississippi submitted its redistricting plan to the Department of Justice 65 days before the candidate qualification deadline. *See id.* at 260. Near the expiration of the 60-day pre-clearance period, the Department of Justice requested more information, thus restarting the 60-day clock and apparently rendering it impossible for the plan

to gain pre-clearance in advance of the qualification deadline. *Id.* Fortunately, by the time the Department of Justice extended the pre-clearance clock, a three-judge district court had already promulgated its own plan to be used absent the timely pre-clearance of the state plan. *Id.* The district court started to draft its own plan nearly two months before the qualification deadline, it provisionally adopted the plan nearly one month before the deadline, and when pre-clearance was not granted, it ordered its plan into effect three days before the deadline. *Id.* The Supreme Court affirmed the district court's actions. *Id.* at 261-65.

The Enacted Assembly Plan was submitted for pre-clearance 69 days before the petitioning period begins, putting this lawsuit on a similarly tight timeline as the one in *Branch*. And as was *Branch*, this action is undoubtedly ripe. *See Montano v. Suffolk Cnty. Legislature*, 263 F. Supp. 2d 644, 648 (E.D.N.Y. 2003) (concluding that constitutional challenge "is ripe under the very realistic and practical problems facing all the parties and the public—that they must now begin preparing for the primary election"). Plaintiffs are clearly within their rights to urge the Court to begin preparing a provisional plan as soon as possible.

B. Movants' Ripeness Argument Has Already Been Considered and Rejected in This Case.

Movants identify the constitutional injury alleged in Plaintiffs' Amended Complaint—more or less accurately—as living in districts that are malapportioned because of the unequal population levels demonstrated by the 2010 Census. (Mov. Br. at 9.) On this premise, Movants argue that "[t]his injury is not ripe because the Legislature has already enacted a Senate redistricting plan, which is not alleged to be malapportioned, and pre-clearance proceedings for the plan are pending and scheduled to be resolved in advance of the June 5, 2012 petitioning period for State Senate candidacy." (Mov. Br. at 9.)

This argument is virtually indistinguishable from the one the Court rejected in its decision denying Movants' and others' prior motions to dismiss. Plaintiffs' injury as identified by Movants is the same as alleged by Plaintiffs in their original Complaint. (Original Compl. ¶¶ 120, 122.) The argument previously advanced by Defendants Kolb and Oaks but now advanced by Movants is the same: "that this action is not ripe until LATFOR releases its plans, the Legislature and the Governor enact the plans into law and the plan passes the preclearance process." (MTD Decision at 10-11.)

The Court determined that this very argument "fails" due to the possibility that this process will not be complete until it is too late to avoid a constitutional violation: "The court must not wait to intervene until after such a disastrous scenario comes to pass." (MTD Decision at 10-11.) That the Court in its prior decision was discussing congressional redistricting does not distinguish the logic inherent in its reasoning – the Court must not wait to act until after it is too late to remedy an impending constitutional injury, even if that injury is not certain to occur. The Court's prior decision on this very issue governs disposition of Movants' motion to dismiss. *See In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991); *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) ("where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again"). Thus, though there are many good reasons discussed above for rejecting this motion to dismiss, the Court need look no further than its own prior decision to do so.

II. Plaintiffs Seek Relief That Not Only Is Cognizable But Is Already Being Implemented by the Court.

Through their Amended Complaint, Plaintiffs ask this Court to avert electoral chaos and constitutional injury by imposing interim redistricting plans in case the Enacted Plans do not obtain final approval in a timely manner. (FAC ¶¶ 92, 99, 110.) To impose interim

redistricting plans before the June 5 start to the candidate petitioning period, as discussed above, the Court must begin working on those plans now. The Court has now established a framework by which the parties should advise the Court how (if at all) they believe the Court's interim plan should differ from the Enacted Plans. (Scheduling Order 2, ECF No. 287.) Despite Movants' insistence that an interim plan by the Court is not terribly cumbersome and involves only three counties (Mov. Br. at 3, 14), it is the process outlined by the Court—and not this motion to dismiss—that will resolve the question of how many different districts the Court will need to re-draw in order to complete its interim plan.[2] Then, even if the Court determines that the Enacted Plans are constitutional and compliant with the Voting Rights Act, it will still have the responsibility to order those plans into effect absent timely pre-clearance, thus avoiding uncertainty and turmoil in the electoral process. In doing so, the Court would be granting the final relief Plaintiffs request.

Plaintiffs' requested relief, and the Court's actions toward granting that relief here, are well supported. For example, in *Branch*, as discussed above, the three-judge district court began preparing a redistricting plan shortly after the State's application for pre-clearance and two months before the candidate qualification deadline, ordered that plan to be used absent timely pre-clearance one month before the deadline, and then formally ordered the plan into effect when pre-clearance was not granted in time three days before the deadline. 538 U.S. at 260. The Supreme Court affirmed the district court's actions. *Id.* at 261-65. Similarly, in *Puerto Rican Legal Defense & Education Fund v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992), one month before the candidate petitioning period was scheduled to begin, the three-judge district court ordered its already-drawn plan to be used absent timely pre-clearance of the enacted plan,

[2] Movants' contention that an interim plan requires the Court to review only three counties is contradicted by Movants' own acknowledgement in their brief that the full statewide 63-seat Senate plan is subject to pre-clearance. (Mov. Br. at 5-6, 15.)

and it set a deadline of the day before petitioning as the time in which the Court's plan would be ordered into effect. *Id.* at 686 ("Subject to further order of this court, if the plan adopted by the state legislature, or some duly approved modification thereof is not in place, *i.e.*, both adopted as law in the State of New York and precleared, by 5:00 pm on July 8, 1992, then the Special Master's plan shall operate as the plan for congressional districts for the State of New York for the 1992 elections.").

Contrary to Movants' contention (Mov. Br. at 13, 18), Plaintiffs are not asking the Court to *impose* its plan at this time, but rather to begin preparing a plan now, then to approve the plan on a provisional basis pending timely pre-clearance, and ultimately to order the plan into effect to avert disaster if pre-clearance is not obtained. As this proposed course of action is entirely consistent with existing law, and is something that the Court has already set in motion, the Court should reject Movants' arguments in their entirety.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Movants' motion to dismiss the First Amended Complaint.[3]

[3] In the unlikely event that the Court grants Movants' motion to dismiss, Plaintiffs request that, before doing so, the Court enter final judgment pursuant to Federal Rule of Civil Procedure 54(b) with regard to Count III of Plaintiffs' Original and Amended Complaints, in accordance with the Court's March 19, 2012 Opinion and Order [Dkt. 242].

Dated: New York, New York
April 9, 2012

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