UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, et. al.

Plaintiffs,

-against-

ANDREW M. CUOMO, et. al.

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SENATE MAJORITY LEADER SKELOS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff-Intervenors Juan Ramos, Nicholas Chavarria, Graciela Heymann, Sandra Martinez, Edwin Roldan, Manolin Tirado, Santiago Diaz, and Edwin Figueroa ("Ramos Plaintiff-Intervenors") respectfully submit this Memorandum in opposition to the Motion to Dismiss Ramos Plaintiff-Intervenors' First Amended Complaint filed by the Defendants New York State Senate Majority Leader Dean G. Skelos, and Members of LATFOR, Michael Nozollio and Welquis R. Lopez ("Senate Majority Defendants").

It is telling to note that the Senate Majority Defendants' Motion to Dismiss is not joined by Defendant Governor Andrew Cuomo – the official who is authorized to implement any redistricting legislation through the Executive Branch now that the Senate Redistricting Plan (S 6698) was signed into law in March of this year. Instead, Defendant Skelos who is only authorized by that state legislation as the "submitting authority who is responsible for obtaining preclearance of the revised senate districts" (Section 2-a(b)), and whose role in implementing S 6698 is now essentially over but for preclearance, is seeking to dismiss the claims of the Ramos Plaintiff-Intevenors. Regardless of the Senate Majority Defendants' legal status in this action going forward, as set forth below, their Motion to Dismiss should be denied.

The Senate Majority Defendants move to dismiss Counts I, II, and IV from Ramos Plaintiff-Intervenors' First Amended Complaint based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff-Intervenors have alleged satisfactorily sufficient facts and have raised causes of action in their pleadings that are ripe and prudential for this Court's adjudication.

Ramos Plaintiff-Intervenors and other plaintiffs request that this Court retain jurisdiction and to prepare to have state legislative maps drawn under a contingency protocol while the New York submission is pending Section 5 preclearance review. It is a guessing game as to whether there are remote or not too remote decisions to be made that would result in preclearance denial, approval, or requests to produce additional information by the U.S. Attorney General.

In addition, there is the legal disposition of the 63 seat formulae under state constitutional grounds that created the New York Senate Plan, currently in state court litigation, that has yet to be decided. It is most likely that subsequent appellate advocacy will cause lengthy delays that will surely keep the finality of the state's redistricted maps up in the air, and, such delays would further burden voters and candidates respecting the deadlines and processes set by the state's election laws and 2012 election calendar.

The Senate Majority Defendants contend that it is premature and unnecessary for this Court to be intruding into the state's business. They argue that the issues are not ripe. They further rely upon a dose of serendipity in speculating that the "[Justice Department's preclearance] process will still be completed by May 15, 2012, three weeks before the currently scheduled start of the petitioning period." Def. Motion to Dismiss ("MTD"), pp.3, 11.

FACTUAL BACKGROUND

The New York Senate enacted legislation to create two redistricting plans in S. 6698 – A. 9525 on March 14, 2012. The State Governor signed the legislation into law the day after. On March 26, 2012, the Governor signed into law the technical bill S. 6755- A.9584 as Chapter 20 of the Laws of 2012 that remediated errors and material omissions from the March 14, 2012 adopted legislation.

The political calendar for the petitioning of New York State Senate candidates begins on June 5, 2012 for those seeking to be qualified on the ballot for the September 11, 2012 primary election. See N.Y. Election Law 6-134(4) and 8-100(a).

Because New York, Bronx and Kings counties in downstate New York are "covered jurisdictions" under Section 5 of the Voting Rights Act, the legislation, which was the vehicle for the 2012 redistricting plan, can neither be implemented or made enforceable until the plan undergoes preclearance review by the Attorney General or by a federal District Court in the District of Columbia.

Ramos Plaintiff Intervenors have submitted their comment and objections to the U.S. Attorney General on April 5, 2012. See Exhibit attached to Declaration of Jackson Chin. In our comment letter we clearly make the case that the Senate Plan violates Section 5 of the Voting Rights Act. .

ARGUMENT

PLAINTIFF-INTERVENORS HAVE ADEQUATELY STATED A CLAIM FOR RELIEF

Plaintiff-Intervenors have presented a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P . 8(a)(2). A failure to do so may give rise to a Motion to Dismiss on the basis of "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

A motion to dismiss pursuant to Rule 12(b)(6) alleges that the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss under Rule 12(b)(6) is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).

"To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility 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*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009).

Plaintiff-Intervenors' First Amended Complaint has adequately presented facts that are plausible on their face and "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

Plaintiff-Intervenors have alleged that the Senate Plan, as adopted, has designed legislative districts which are over-populated and under-populated by region throughout the state. The Senate Plan is malapportioned in that it violates the one-person one-vote fundamental principle. Plaintiff-Intervenors' constitutional claims are based on the State's malapportionment of New York's Senate Plan and the specifically identified districts which are adversely affected wherein Latinos and other racial and language minority voters reside. Ramos Interv. Cmplt ¶¶ 40-44, ¶¶ 48-51. The Amended Complaint's claims concisely describe a discriminatory design permeated

with malapportioned districts and population deviation rates in violation of the U.S. Constitution and the Voting Rights Act.

Plaintiff-Intervenors' malapportionment claims have precisely alleged that the "State Plan violates the 'one-person one-vote' requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by failing to redraw districts using a consistent, non-arbitrary and non-discriminatory manner and by favoring one part of New York State at the expense of another region." Ramos Interv Cmplt 69.

Moreover, "The Senate Plan that was drawn and enacted by the Senate Majority presents serious violations under the US Constitution... Moreover, population deviations are employed to the disadvantage of Latino and other minority voters in the downstate region." Ramos Interv Cmplt ¶49. "[T]the creation of a new 63rd district placed upstate result in voter dilution of Latino voting strength and operates as a discriminatory denial of equal opportunity in electoral participation in this state." Ramos Interv Cmplt ¶ 50, and the Senate Plan's malapportionment scheme has not been justified by a good faith effort, legitimate state interests or neutral redistricting rationale..." Ramos Interv Cmplt ¶ 51.

Therefore, this Court must deny the motion to dismiss as Plaintiff-Intervenors' Counts One, Two and Four have alleged sufficient facts to plead violations of the U.S. Constitution's Fourteenth amendment's equal protection clause, due process clause, and the Declaratory Judgment Act. These allegations put Defendants on fair notice of the claims of these counts and the grounds upon which they rest.

PLAINTIFF-INTERVENORS HAVE STANDING TO BRING ALL THE INSTANT CLAIMS

Plaintiff-Intervenors reside in mostly overpopulated districts that have been redrawn by the New York Senate and adopted by the State Legislature. Plaintiff-Intervenors Chavarria, Diaz and Figueroa reside in Bronx County where Senate districts 29, 32, 33 and 34 were overpopulated and drawn by the Senate with deviations of 3.47% above the mean.

The Senate Plan intentionally deprives the voters of New York, Kings, Bronx, Queens, Richmond, Nassau and Suffolk counties of their fair proportionate share of voting power by its pattern of malapportionment, discriminatory overpopulated districts in New York City and Long

Island, and by the placement of the new 63rd district upstate. Ramos Plaintiff-Intervenors are harmed in their political and voting rights as this new district dilutes their voting rights.

As in *Baker v Carr*, Ramos Plaintiff-Intervenors are voters who have standing in a suit alleging that, as a result of the state's Senate Plan, there is disproportionate representation among drawn districts disfavoring the districts in which Plaintiff-Intervenors reside and because "they are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes"' 369 US 186, 206-08 (1962); see also *Arrington v. Elections Board,* 173 F.Supp 2d 86, 862 (E.D. Wisc.)(held plaintiffs had met their "relatively modest burden" of establishing standing in voting rights cases by alleging that their voting rights would be diluted in elections)

Plaintiff-Intervenors' complaint similarly alleges the same injury that the districts in which plaintiffs reside lack population equality would be diluting their voting power in violation of their constitutional rights. They have a direct interest in maintaining the effectiveness of their votes in the New York State Legislature and thus satisfy the injury-in-fact requirement of Article III standing.

Our claims are not premised on either the inability of the State of New York to have its plan precleared on time or on the State Plan's possible failings under Section 5 of the Voting Rights Act, as misunderstood by the Deft. MTD at pp. 1-2, 14, 20. These claims are grounded in the principles derived from the US Constitution's equal protection jurisprudence.

Plaintiff-Intervenors have interposed constitutional and statutory claims which are separate and distinct from the pending Section 5 preclearance review. Their legal questions are based on sufficiently well-pled factual allegations, which are accepted as true, and should defeat Defendants' motion to dismiss these claims.

Defendant blithely assures this Court that "even if the the DOJ were to take the full sixty days in this [preclearance] cycle, that process will still be completed by May 15, 2012, three weeks before the currently scheduled start of the petitioning period." MTD pp. 3, 11. "[T]he 2012 Senate plan is on track to be precleared before the petitioning period is scheduled to begin on June 5, 2012." at 14.

Plaintiff-Intervenors allegation that "the Senate Leader's submission [ ] was incomplete, defective and therefore not a proper submission" Cmplt at 32 was not a use of mere "labels and

conclusions", MTD p. 12 fn. 3, but had additional allegations, Ramos Interv. Cmplt at ¶ ¶ 30, 32 and 33, that, a) the entire New York submission to the Attorney General was indeed incomplete, e.g., it was missing the counterpart legislation of State Assembly files and maps, and, b) the Senate district plan effecting a last-minute foundational change from 62 seats to 63 seats would have also ordinarily required timely presentment to the Justice Department for Section 5 preclearance review, was not properly submitted.

Via the submission of the Defendant Senate Majority leader and the submission's Table of Contents existed a representation that the entire legislation was enclosed. In fact, the State's Assembly plan was left out intentionally. The submission was incomplete as it awaited the preparation and enactment of a later statutory bill owing to material omissions and technical errors in the redistricting plan. On March 26, 2012, the Governor signed into law the technical bill S. 6755-A.9584 as Chapter 20 of the Laws of 2012. We contend that the Department of Justice preclearance "clock" of 60 days would not have begun until the full legislation under Chapter 20 was submitted.

The effect of an incomplete or defective submission delayed the 60 day preclearance period. The time for review does not even factor in the possibility of the Attorney General making requests for additional information and documents from the submitting authority.

The Ramos Plaintiff-Intervenors know, as do surely the Defendants, that any notion of "apparent luxury of time is [ ] illusory." The State's legislative maps should be made legally ready "as soon as possible so that potential candidates and their supporters can responsibly plan their activities, and some argue that a court must be ready to handle a "worst case scenario." *Marylanders For Fair Representation, Inc. v. Schaefer,* 795 F. Supp. 747, 749 (E.D. Md 1992).

Plaintiffs cannot be faulted for warning this Court of the prospects of an oncoming train-wreck based on the above mentioned circumstances. Plaintiffs' Cassandra-like role in forecasting the prior Congressional redistricting conundrum in *Favors v. Cuomo* is being reprised. Fortunately, the Court had previously monitored and acted in shepherding a timely resolution in less than a month. There is a continuing need for a credible sentry to monitor and to intervene with contingency plans on the State Senate plan.

This Court noted the compactness in time and its Herculean efforts were exerted in successfully drafting a Congressional map with 27 districts. Its own appointed expert, Dr. Nathaniel Persily, has observed that " a court should have as its goal the imposition of a plan no later than one

month before candidates may begin qualifying for the primary election [i.e., Tuesday, May 8, 2012], and that "means that the court should begin drawing its plan about three months before the beginning of ballot qualification in order to build in time for possible hearings and adjustments to the plan." *Favors v. Cuomo*, at *25, citing Persily, When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans, 73 Geo. Wash. L. Rev., 1131, 1147 (2005).

As if this Court needed any reminding, which it does not, events that add further delay would give this Court far less time to handle the two legislative maps determined to be constitutionally and/ or statutorily wanting, and, in need of remedies from this Court. Defendants' gross estimate that 3 weeks, at worst, could still be sufficient time available for remediation of state maps before the petitioning period commences, is far too unreliable and is irresponsible for a practical approach in this matter.

Defendant Senate majority is totally mistaken when it states that "the court's limited potential role before the 2012 elections.... is to impose remedial districts for the three covered counties if preclearance does not come in time.". MTD, p.14.

Defendant's argument fails to acknowledge that a court can draw maps to remedy Section 5 violations as well as address claims brought under the U.S. Constitution and Section 2 of the Voting Rights Act. In the latter situation, this court while giving deference to policy choices made by the state must nevertheless "take care not to incorporate into the interim plan any legal defects in the state plan." *Perry v. Perez*, 132 S. Ct. 934, 942 (2012)("In the absence of any legal flaw in this respect in the State's plan, the District court had no basis to modify that plan. Footnote 2: This Court has stated that court-drawn maps are held to a higher standard of acceptable population variation than legislatively enacted maps... But this Court has also explained that "stricter standard[s]" are not triggered where a district court incorporates unchallenged portions of a State's map into an interim map. *Upham v. Seamon,* 456 U.S. 37, 42-43. (1982)."

The U.S. Supreme Court recognized that "faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying" a state plan - even one that was itself unenforceable- "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Perry v. Perez*, at 941, citing *Abrams v. Johnson*, 521 U. S. 74, 79 (1997).

In contrast to the facts in *Perry v Perez* where the district court was only called upon to remedy potential Section 5 violations, in the instant case, Ramos Plaintiff-Intervenors were asking this court to remedy violations of the U.S. Constitution's one- person one-vote mandate and Section 2 of the Voting Rights Act. The *Perry* Supreme Court's instruction to the district court was limited to instances where there was "*no claim that the population variances in those districts were unlawful.*" Id. (*emphasis provided*)

In the unlikely situation this Court agrees with Defendants' sweeping position that it has no power to achieve "de minimis population variances" in one-person one-vote contexts, this Court would also be agreeing that it has no power to remedy equal protection violations.

Notwithstanding the outcome of the Section 5 preclearance process by the U.S. Justice Department, this Court has full authority to review the Plaintiff-Intervenors' constitutional and Voting Rights Act claims which have been well-pled owing to the discriminatory and illegitimate dilutive effects of the Senate Plan's malapportionment scheme.

PLAINTIFF-INTERVENORS CLAIMS ARE RIPE FOR ADJUDICATION

"Ripeness is a jurisdictional inquiry." *Favors v Cuomo,* 2012 U.S. Dist. Lexis 31538 *14, citing *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005), and "peculiarly a question of timing....[where] the fitness of the issues for judicial decision and the hardship to he parties of withholding court consideration must inform any analysis of ripeness." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-1 (1985).

The constitutional claim of malapportionment may arise not only where the legislature has failed to timely redraw district maps subsequent to a decennial census, but also where the redistricting of maps fail to adhere to the one-person one-vote principles under the equal protection clause of the 14th Amendment. *Reynold v. Sims*, 377 U.S. 533, 583 (1964)(striking as unconstitutional a state legislative map where the Alabama legislature had failed to redistricting in six decades); *Karcher v. Daggett*, 462 U.S. 725, 727 (1983)(striking down a state reapportionment plan after the 1980 Census that did not comply with one-person one-vote principles).

Defendants cite *Texas v. United States* as "instructive" for this Court because there the Supreme Court had held that the suit was not ripe and that the harm was "too speculative" to appoint a special master. Motion To Dismiss, p.10. The State of Texas had sought preclearance of a

change to its educational system which might, after a long series of unlikely events occurring, affect voting practices. The alleged harm was "contingent on a number of factors" occurring. However, in the Texas case, no upcoming or imminent situation existed in which the voting change would have, in fact, affected voting procedures. Therefore, the Court found no hardship in reviewing the change until conditions made it necessary to do so. Id at 301.

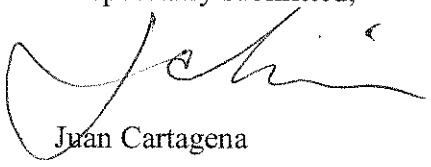
The New York redistricting legislation is so different, in comparison. The foreseeable event that needs to occur before the State's implemenation of their malapportioned redistricting plan is for the U.S. Department of Justice or the D.C. federal court to adjudicate Section 5 preclearance.

CONCLUSION

For the above-stated reasons, Ramos Plaintiff Intervenors respectfully ask that this Court deny the Senate Majority Defendants' motion to dismiss.

Dated: New York, New York
April 9, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jackson CHIN, certify that on this 9th day of April 2012, a true and correct copy of Plaintiff-Intervenors Memorandum of Law In Opposition to the Defendant Senate Majority Leader's Motion to Dismiss and a Declaration of Jackson Chin, dated this same day, was delivered to the Plaintiffs, Plaintiff-Intervenors, and Defendants via the ECF electronic filing system of the Eastern District of New York.