UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK A. FAVORS et al.,

Plaintiffs,

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

v.

ANDREW M. CUOMO et al.,

Defendants.

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THE SENATE MINORITY'S SUPPLEMENTAL RESPONSE TO THE COURT'S APRIL 3 AND APRIL 4, 2012 ORDERS

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Attorneys for Defendants Senate Minority Leader Sampson and Senator Dilan

Pursuant to the Court's April 13, 2012 Order, Senate Minority Leader John L. Sampson and Senator Martin Malavé Dilan (collectively, the "Senate Minority") submit this supplemental brief to address the effect of the New York Supreme Court's decision to dismiss the Petition in *Cohen* on the issues the parties discussed in their submissions of Thursday, April 12, 2012.

Although the court in *Cohen* found it "disturbing" that the Legislature used different counting methodologies in different parts of the State for the first time in 2012, Justice Braun nonetheless concluded that it was "not for this court to declare the Legislature's act unconstitutional." Slip. Op. at 6-7.[1]

Attached for this Court's review is the letter that the *Cohen* Petitioners submitted yesterday to the New York Court of Appeals seeking an expedited schedule for briefing and arguing their direct appeal to that Court. For the reasons expressed in that letter, we expect the Court of Appeals to hear the *Cohen* Petitioners' appeal in short order, and to rule on the constitutionality of Chapter 16 prior to the beginning of the nominating petitioning period on June 5, 2012. In the meantime, for the reasons that follow, we respectfully suggest that this Court should continue the process of developing a contingency plan.

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[1] The court's criticism of the manner in which the Senate Majority arrived at its 63-seat plan is consistent with the public statement Governor Cuomo issued upon signing Chapter 16 into law. Signaling his doubts about the constitutionality of at least some aspects of Chapter 16, the Governor stated that "it is of critical importance that the courts are already engaged in the redistricting process and are expected to review not only challenges under the Voting Rights Act but also other state constitutional challenges to these district lines." The Governor explained that because a "veto is not necessary to trigger such a judicial review," it would be inappropriate to veto Chapter 16, even if it is "legally defective," because a veto would undo the "sorely needed" reforms to the redistricting process that the package of redistricting bills puts into place for the 2020 cycle. The Governor concluded that "[o]n balance," the "best course" was to sign the bill, thereby ensuring "permanent[] reform [of] the redistricting process" in the future, and to let the courts decided whether the results of the "flawed process" in 2012, including the Senate size increase, are lawful. *See* Chapter 16 of the Laws of 2012, Senate Bill Number 6736, Governor's Approval Memorandum.

We emphasize the significance of the difference between the procedural postures that were before the Supreme Court in *Perry v. Perez*, __ U.S. __, 132 S. Ct. 934 (2012), and *Branch v. Smith*, 538 U.S. 254 (2003). In *Perry*, because it was clear that the legislatively enacted plan would not be precleared in time for the upcoming election, the three-judge District Court *ordered into effect* an "interim plan" that affirmatively *displaced* the legislatively enacted plan. In *Branch*, by contrast, it was not clear, when the three-judge District Court first began developing its *contingency* plan, whether the legislatively enacted plan would be precleared in time for the upcoming election. For that reason, the contingency plan that the three-judge District Court developed in *Branch* was merely that – an insurance policy that would be used *only* in the event that the legislatively enacted plan was unavailable (and as it turned out, it was unavailable).

The case before this Court is like *Branch*, not *Perry*. The parties appear to agree that the New York Court of Appeals and the Department of Justice both likely will conclude their review of the lawfulness of Chapter 16 before the nominating petitioning period begins on June 5, 2012. This Court exercised its discretion to begin developing a contingency plan not because it is clear that the enacted plan will be unavailable. Rather, it did so because *if* the legislative plan is unavailable – either because the Court of Appeals strikes down Chapter 16 in *Cohen* or because preclearance is withheld – there will not be sufficient time to complete the intensive process of drawing new Senate districts from scratch, subjecting them to public comment, refining them, and putting them in place all before June 5, 2012 unless the Court adheres to its earlier decision to begin developing a contingency plan now.

That the Supreme Court rejected the *Cohen* Petition does not render it imprudent for this Court to continue that process. The Court of Appeals will review the constitutional question presented in *Cohen de novo*. Even if the Supreme Court had granted the Petition, there would be

no guarantee that the Court of Appeals would not reverse. But the possibility of such a reversal would not have rendered it imprudent for this Court to continue to take the steps necessary to ensure that there will not be a statewide one person, one vote violation in 2012. As the Supreme Court strongly suggested in its opinion, and as the Governor intimated in his approval memorandum, *see supra* n.1, the New York Court of Appeals, and only the New York Court of Appeals, is going to decide whether the Senate size increase is unlawful.

To be sure, in an ideal world, this Court would have the luxury of waiting to see what the Court of Appeals and the Department of Justice do before expending resources developing a contingency plan, and there is no question that this Court can and should consider the resources issue in exercising its discretion regarding how to proceed. At this point, however, it appears that this Court largely is delegating to Dr. Persily the task of considering a contingency plan. Although the state will be compelled to pay Dr. Persily's bill – and in the end, perhaps for naught – we respectfully submit that, in light of the Legislature's lengthy delay in enacting a redistricting plan, the relatively modest cost of having Dr. Persily continue to prepare for what otherwise could be a constitutional crisis is not a compelling basis for this Court to change course.

Dated: April 17, 2012
New York, New York

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