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By Hand Delivery

Andrew Klein, Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Cohen et al. v. Cuomo et al.*,
Index No. 12-102185 (New York County)

Dear Mr. Klein:

This firm represents the Petitioners in the above-referenced special proceeding, which alleges, pursuant to Unconsolidated Laws § 4221, that Chapter 16 of the Laws of 2012 violates Article III, Section 4 of the New York Constitution by increasing the size of the New York Senate from 62 seats to 63. On Friday afternoon, the Supreme Court issued a final order denying the Petition. That final order is immediately appealable to this Court pursuant to CPLR 5601(b)(2) and Article VI, Section 3(b)(2) of the Constitution. Moreover, because this appeal involves a challenge to an "apportionment by the legislature," Article III, Section 5 of the Constitution requires this Court to "give precedence" to this appeal "over all other causes and proceedings." For these reasons, and because of the extraordinary exigencies detailed below, we respectfully urge the Court to accept jurisdiction over this appeal without further inquiry and to set an expedited schedule for briefing and argument.

As set forth in detail in the Petition, Article III, Section 4 prescribes what is supposed to be an objective mathematical formula for determining the size of the Senate. Petitioners allege that the Senate Majority manipulated that formula by using two different counting methodologies in different parts of the State, for the first time in history, in order to create an additional district in the upstate region. In doing so, the Senate Majority radically departed from this Court's prior Senate size cases, *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972), *In re Fay*, 291 N.Y. 198 (1943), and *In re Dowling*, 219 N.Y. 44 (1916). Although the Supreme Court found it "disturbing" that the Legislature used different counting methodologies in different parts of the State for the first time in 2012, the court nonetheless concluded that it was "not for this court to declare the Legislature's act unconstitutional." Slip. Op. at 6-7.

CPLR 5601(b)(2) provides that an appeal may be taken to this Court as of right directly from a judgment of "a court of record of original instance" provided (i) that the judgment "finally determines" the action or proceeding and (ii) that "the only question involved on the

appeal is the validity of a statutory provision of the state . . . under the constitution of the state." Each of those elements plainly is met here. The Supreme Court's Decision, Order, and Judgment dated April 13, 2012 finally denied the Petition, and the only question in this appeal is whether Chapter 16 of the Laws of 2012 violates Article III, Section 4 of the Constitution. Because these elements are met, Article VI, Section 3(b)(2) of the Constitution directs that "the constitutional question" presented herein "shall be considered and determined" by this Court. *See* Sherrill v. O'Brien, 188 N.Y. 185, 197 (1907) (holding that "the courts can review legislative action in reapportioning the state and that on an appeal to this court jurisdiction should be entertained"); Arthur Karger, Powers of the New York Court of Appeals (3d. ed. 1997), §7:5 (explaining that this Court should accept an appeal as of right under CPLR 5601(b)(2) unless the constitutional claim is "so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance").

The Framers of the Constitution recognized that special proceedings challenging the constitutionality of legislative apportionments present extraordinary exigencies. Accordingly, Article III, Section 5 expressly provides that a court hearing a challenge to a legislative apportionment "shall give precedence thereto over all other causes and proceedings." Indeed, Article III, Section 5 goes so far as to require that if this Court is "not in session" when an appeal in such a case is taken, "it shall convene promptly for the disposition of the same."

This Court most recently heard an appeal under this provision in *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992). In that case, the reapportionment plan was signed into law on May 4, 1992; the Supreme Court issued its determination on June 12, 1992; and this Court issued its opinion resolving the appeal on June 30, 1992 – less than two months after the reapportionment was enacted, and less than 18 days after the appeal to this Court was taken.

Pursuant to New York Election Law §§ 4-110, 6-134(4), 6-136(2)(h), and 6-158(1), the nominating petitioning period for the 2012 Senate election begins on June 5, 2012. New York Board of Elections Co-Chair Douglas Kellner submitted an affidavit in this proceeding explaining that candidates cannot begin to collect nominating petition signatures until the district lines have been finalized, and the County Boards of Elections need at least one week prior to the beginning of the petitioning period to update their voter registration management systems and to publish the new party enrollment figures (which determine the number of signatures candidates must obtain to qualify for the primary ballot) and the new rosters of eligible voters (upon which candidates rely in collecting the required signatures). Accordingly, it is undisputed that the new Senate districts must be in place by late May at the very latest.

Moreover, if Petitioners prevail in this appeal, then any remedy ordered by this Court or by the Supreme Court on remand would have to be precleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a process that takes up to 60 days.

The 2010 Census data was released in March 2011, but the Legislature's redistricting task force did not announce until January 2012 that a 63rd district would be added. Because this lengthy delay created the extraordinary exigencies presented herein, Petitioners initially filed a declaratory judgment action on January 31, 2012, shortly after the addition of a 63rd district was

announced, seeking a declaration that the proposed increase is unconstitutional. *See Cohen v. LATFOR*, Index No. 12-101026 (New York County). The Defendants in that action, who were represented by the same attorneys who represent the Respondents in this proceeding, successfully moved to dismiss that first case as unripe. In doing so, the Defendants argued that the Senate size issue would not become justiciable until a redistricting plan was signed into law (which did not happen until March 15, 2012), insisting that there would be ample time thereafter for this Court to resolve the merits of this issue well in advance of the beginning of the nominating petitioning period. Citing *Wolpoff*, the Defendants assured the Supreme Court that this Court would accept a direct appeal and resolve the constitutionality of the addition of the 63rd seat "less than two months" after its enactment.

For all of these reasons, we respectfully request that the Court accept jurisdiction over this appeal without further inquiry and order an expedited briefing schedule.

Enclosed herewith for the Court's review are (i) the Petition; (ii) Appellants' Notice of Appeal, together with the Supreme Court's Decision, Order, and Judgment dated April 13, 2012; (iii) Appellants' Preliminary Appeal Statement; (iv) a copy of the notice sent to the Attorney General pursuant to section 500.9(b) of the Rules of the Court of Appeals; and (v) the Affidavit of New York Board of Elections Co-Chair Douglas Kellner dated February 21, 2012, which is part of the record in this proceeding.

Thank you for your consideration of the issues presented herein. We regret any inconvenience that these extraordinary exigencies may impose on the Court.

Respectfully submitted,

Eric Hecker

cc: All counsel (by hand delivery and e-mail)