UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case: 1:11-cv-05632-DLI-RR-GEL
	)	
	)	**Date of Service**: April 17, 2012
ANDREW M. CUOMO, et al.	)	
	)	
	)	
Defendants.	)	
	)	

SENATE MAJORITY'S RESPONSE TO APRIL 13 SHOW CAUSE ORDER

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The Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully submit this memorandum in response to this Court's April 13, 2012 Order to show cause why they should not be directed to produce the documents requested by the Drayton Intervenors by April 19, 2012.

ARGUMENT

On Thursday, April 12—approximately four hours after the 5:00 p.m. deadline set by the Court had passed—the Drayton Intervenors filed a motion for preliminary injunction, declaratory judgment, and expedited discovery. (DE 306). In order to compensate for their own failure to develop the proper evidence in a timely way, the Drayton Intervenors seek immediate access to all documents referring to, among other things, the preparation and creation of the 2012 redistricting plans for the New York State Senate. (DE 306-2). In response to the Drayton Intervenors' submission, this Court ordered all defendants "to show cause why defendants should not be directed to produce the documents requested by the Drayton Intervenor Plaintiffs by April 19, 2012." 4/13/12 Order to Show Cause. This Court should deny the Drayton Intervenors' motion for expedited discovery.

As a threshold matter, the Court should not order discovery before it has determined whether it even has authority to continue to proceed with this matter and entertain plaintiffs' requests for preliminary injunctive relief. As the Senate Majority Defendants argue in their response to the submissions of April 12, this Court does not have the authority to consider drawing an interim map or make any preliminary determinations of the merits of plaintiffs' claims in connection with such an interim-line-drawing exercise. This panel was convened to adjudicate an impasse suit; the impasse has ended, and with it the panel's authority. Where, as here, the Legislature has enacted a plan and has submitted it for preclearance, a non-D.C. Court

is powerless to litigate the merits of any Section 5 claims. *See Perkins v. Matthews*, 400 U.S. 379, 384-855 (1971). That is because "Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General . . . the determination [of] whether a covered change does or does not [comply with Section 5]." *Id.* at 385.

The preclearance proceedings will also be resolved in a timely fashion. The DOJ has declared that it intends to make a determination on New York's application for Section 5 preclearance for the Senate Plan before the petitioning period begins on June 5, 2012. As the DOJ explained in its recent status report to the U.S. District Court for the District of Columbia: "The Attorney General has undertaken expedited review of this submission [and] [b]arring any unforeseen circumstances, the Attorney General anticipates making a determination on the New York Senate plan by April 27, 2012." 4/13/12 Status Report at 1. And the D.C. Court has issued an order "agree[ing] with the [State] that the resolution of [the Senate's preclearance complaint] must be expedited," and has directed the DOJ to answer the preclearance complaint on an expedited basis. 3/30/12 Order. Moreover, there is no reason to believe that the DOJ or the D.C. Court lacks sufficient time to resolve any Section 5 issues, when only three counties in New York are covered jurisdictions. See 28 C.F.R. pt. 51 app. Accordingly, because there is absolutely no reason to believe that the DOJ or the District Court will fail to do their job, this Court is powerless to entertain the Drayton Intervenors' application urging this Court to begin a process of drawing interim lines for the New York State Senate predicated on a contingency that these preclearance proceedings will not be completed in time.

Alternatively, even if this Court believes it has the authority to rule on the merits of plaintiffs' requests for preliminary equitable relief, the Drayton Intervenors are not entitled to the documents they have requested. The Drayton Intervenors have lodged five document requests

with this Court, requesting "[a]ll electronic and hardcopy documents, including all drafts, prepared by, edited by or reviewed by" LATFOR and/or any defendant that refer to the preparation and creation of the 2012 redistricting plans for the New York State Senate and Assembly, the 2012 Congressional Plan for New York, and the creation and location of new State Senate District 63. (DE 306-2). All of these requests run afoul of the well-established doctrine of legislative privilege.

State legislators and their legislative agents possess a broad privilege against discovery aimed at investigating the motives behind legislative activity. *See, e.g., Tenney v. Brandhove,* 341 U.S. 367, 372-75 (1951). Legislative privilege is firmly rooted in history and tradition, and is incorporated into federal law through Rule 501 of the Federal Rules of Evidence. *See, e.g., Tenney*, 341 U.S. at 372; *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403 (1979); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 6-7 (2d Cir. 1980); Fed. R. Evid. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). In civil cases, such as this one, the legislative privilege possessed by state legislators and their staff is co-extensive with the constitutionally rooted privilege that members of Congress enjoy pursuant to the Speech or Debate Clause. *See Sup. Ct. of Va.*, 446 U.S. at 733; U.S. Const. art. I, § 6, cl. 1.

This robust protection is premised on the bedrock principle that "the exercise of legislative discretion should not be inhibited by judicial interference." *Bogan*, 523 U.S. at 52; *see Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (holding that, in order to serve the purpose of preventing deterrents to the uninhibited discharge of legislative duties, legislative

immunity covers "all aspects of the legislative process"). Accordingly, the privilege protects against compulsory evidentiary process, including requests for documents, *see MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (holding that "[d]iscovery procedures can prove just as intrusive" as defending oneself against suit), including compelled document production like that requested by the Drayton Intervenors. *See Brown & Williamson Tobacco Co. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995) ("A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen."). And the same privilege enjoyed by legislators extends to their "aides and assistants," who are "treated as one" with the legislators they serve. *Gravel v. United States*, 408 U.S. 606, 616 (1972) (internal quotation marks omitted); *see Rini v. Zwirn*, 886 F. Supp. 270, 284 (E.D.N.Y. 1995) ("The official immunity available to legislators is extended to legislative aides . . . . This 'legislative aide' immunity has been extended to both state and local government officials.").

The Drayton Intervenors nowhere address legislative privilege in their requests or their motion, but their attempt at accessing voluminous documents pertaining to the 2012 redistricting process runs headlong into the established protections afforded to the Senate Majority Defendants, and to the LATFOR staff as their aides. This alone is a showing of cause why the Senate Majority Defendants should not be compelled to produce all of the documents requested by the Drayton Intervenors. Moreover, before the Senate Majority Defendants produce any documents, they will of course have to conduct a privilege review. That process will take far longer than the two days the Court suggested in its order to show cause.[1]

[1] The Drayton Intervenors' requests are also objectionable in other respects. For example, Local Rule 26.3 defines "concerning" to mean "relating to, referring to, describing, evidencing or constituting." But the Drayton Intervenors define "concerning" much more broadly, to mean "having any relationship or connection to, concerning, being connected to,

Finally, the Drayton Intervenors have failed to make a showing of their need for the documents they have requested. Under Rule 26(d)(1), "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)," except under special circumstances not applicable here or on order of the court. Neither the Drayton Intervenors nor any other plaintiff has made any effort to initiate the Rule 26(f) conference. And the Drayton Intervenors have not made a showing of good cause why they should be entitled to bypass the normal discovery procedures of Rule 26 and obtain an order of expedited discovery now. *See Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007) (adopting "standard of 'reasonableness' and 'good cause'" when considering requests for expedited discovery). All the Drayton Intervenors offer in support of their request is the conclusory statement that this discovery is necessary in order for them to prepare for the hearing on their motion for a preliminary injunction. (DE 306).

But, even apart from any discovery that the Drayton Intervenors are seeking from the Senate Majority Defendants, their motion for a preliminary injunction is inadequate on its face—as the Drayton Intervenors admit. In an attorney declaration submitted by the Drayton Intervenors, they acknowledge that the two experts they have offered in support of their motion "have been unable to fully complete their analysis's [sic] of" *nearly all* of the requisite elements on their claims under Section 2 of the Voting Rights Act of 1965. (DE 306-2). The Drayton Intervenors' Memorandum in Support of their motion for preliminary injunction is even more candid. It concedes that the Drayton Intervenors "are unable to fully present all the evidence

(continued…)

commenting on, responding to, containing, evidencing, showing[,] memorializing, describing, analyzing, reflecting, pertaining to, comprising, constituting, *or otherwise establishing any reasonable, logical, or causal connection*." (emphasis added).

necessary to succeed on either their Fourteenth Amendment or their claims under Section 2 of the Voting Rights Act." (DE 307 at 3 n.1). But they go on to say that "[n]otwithstanding this, however, the Court should grant [the] motion for a preliminary injunction." (*Id.*).

This Court should not overlook the Drayton Intervenors' fatal shortcomings in their own preparation and grant their expedited request for discovery from the Senate Majority Defendants. No discovery will resolve the Drayton Intervenors' failure to complete their expert analyses in support of their motion for preliminary equitable relief. Regardless of whether the Senate Majority Defendants produce any documents in response to the Drayton Intervenors' requests, the Drayton Intervenors' motion must necessarily fail on the merits. Moreover, the Drayton Intervenors allowed more than two weeks to pass between filing their amended complaint and moving for expedited discovery. The Drayton Intervenors should have submitted their document request much earlier, particularly in light of the legislative privilege issues raised by the request—of which they are well aware—and the substantial effort that will be involved in collecting and reviewing all of the documents implicated in it. The Senate Majority Defendants should not be burdened to respond to the Drayton Intervenors' request and conduct a massive privilege review on a drastically foreshortened schedule in light of the comparatively leisurely pace at which the Drayton Intervenors proceeded in propounding and serving this request.

CONCLUSION

This Court should deny the Drayton Intervenors' request for expedited discovery.

Dated: April 17, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of April, 2012, a true and correct copy of the foregoing was served on the following counsel of record through the Court's CM/ECF system:

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