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April 26, 2012

By ECF & Hand

The Honorable Reena Raggi
United States Court of Appeals
for the Second Circuit
225 Cadman Plaza East
Brooklyn, NY 11201

The Honorable Gerald E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

The Honorable Dora L. Irizarry
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Favors et al. v. Cuomo et al.*, No 11 Civ. 5632

Dear Judges Raggi, Lynch, and Irizarry:

This firm, together with Jeffrey M. Wice and Leonard M. Kohen, represents Defendant Senators John L. Sampson and Martin Malavé Dilan in the above-referenced matter. Pursuant to this Court's instruction during the status conference on April 20, 2012, we are filing simultaneously herewith the Declaration of Todd Breitbart dated April 25, 2012, which sets forth the evidence we have demonstrating why the Senate Majority did not make the requisite honest and good faith effort to construct districts as nearly of equal population as is practicable. Please note that one Exhibit to Mr. Breitbart's Declaration – Exhibit 4 – is a DVD of block equivalency files. It will be hand-delivered to your chambers (and to Judge Mann's) today and will be served on all counsel by e-mail.

As we explained during the April 20, 2012 status conference, at the appropriate time, Mr. Breitbart and other prospective Plaintiffs intend to seek to intervene in this action to allege that the enacted 63-seat Senate plan violates the one person, one vote rule. Additionally, Senators Sampson and Dilan intend to assert such a claim as a cross-claim against the Defendants in this case. We are aware that this Court has previously stated that it would entertain additional motions to intervene only reluctantly. We respectfully submit, however, that it would be premature for Mr. Breitbart or Senators Sampson or Dilan to assert claims that *the enacted Senate plan* is unlawful (as opposed to claims that *the impasse* is unlawful) while the preclearance proceedings are still underway. *See Branch v. Smith*, 538 U.S. 254, 283 (2003) (Kennedy, *J.*, concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts.") (quoting *Connor v. Waller*, 421 U.S. 656 (1975)); *see also*, *e.g.*, Hughley v. Adams, 667

F.2d 25, 26 (11th Cir. 1982) ("We also decline, for reasons of ripeness, to consider plaintiffs' remaining objections to the plan before it has received preclearance."). Mr. Breitbart is prepared to seek leave to intervene, and Senators Sampson and Dilan are prepared to seek leave to amend their Answer to assert cross-claims, promptly after the Department of Justice grants preclearance, if it does.[1]

We hope the Court agrees that we have acted in good faith and have made diligent efforts to comply with all of the Court's orders and instructions in this extraordinarily complex and fast-moving case. We further hope the Court agrees, based upon the facts set forth in Mr. Breitbart's accompanying Declaration, that allowing Mr. Breitbart (and others) and Senators Sampson and Dilan to present their claims as soon as they become ripe will assist this Court in resolving the important issues that will be before it if and when preclearance of the enacted Senate plan is granted.

We respectfully request that the Court provide us with guidance regarding how to proceed. Of course, our first choice would be for the Court to simply grant us leave to file a Complaint on behalf of Mr. Breitbart and other prospective Plaintiffs, and to grant us leave to amend Senators Sampson's and Dilan's Answer to assert cross-claims, promptly after preclearance is granted, assuming it is granted. If this Court would prefer us to file formal motion papers seeking such leave, we certainly will do so.

We thank the Court for its consideration of Mr. Breitbart's Declaration and the issues presented in this letter.

Respectfully submitted,

/s/

Eric Hecker (EH 0989)

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[1] It has never been a secret that Senators Sampson and Dilan believe the enacted Senate plan is unlawful. Some of the parties have previously suggested that Senators Sampson and Dilan should "realign" themselves as Plaintiffs in this case. But the "realignment" doctrine appears to apply only in the context of identifying the real plaintiffs and the real defendants for purposes of *diversity jurisdiction*. *See*, *e.g.*, *Correspondent Services Corp. v. First Equities Corp. of Florida*, 338 F.3d 119, 124 (2d Cir. 2003) (citing *Smith v. Sperling*, 354 U.S. 91, 96 (1957); *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 621 (2d Cir. 1993)). We are aware of no authority suggesting that a public official named as a defendant in a constitutional challenge to government action should, or even may, "realign" himself or herself as a plaintiff if he or she believes in good faith that the claims asserted against him or her have merit. We therefore respectfully submit that the appropriate course was and remains for Senators Sampson and Dilan to remain as Defendants with respect to claims alleging that the *impasse* is unlawful, and to assert cross-claims against the Defendants, once those claims become ripe for adjudication, alleging that *the enacted Senate plan* is unlawful.

cc: The Honorable Roanne L. Mann (by ECF)
All counsel (by ECF and, as to Ex. 4, e-mail)