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May 3, 2012

BY ECF

The Honorable Reena Raggi
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

The Honorable Gerard E. Lynch
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

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

Re: *Favors v. Cuomo*, No. 1:11-cv-05632-DLI-RR-GEL (E.D.N.Y.)

Dear Judges Raggi, Lynch, and Irizarry:

We represent the Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez. Today, the Court of Appeals affirmed the judgment for Senator Skelos, Governor Cuomo, and the other respondents in *Cohen v. Cuomo*, Index No. 102185/12 (Sup. Ct. N.Y. Cty.). The Court of Appeals' decision is attached. The Court held, among other things, that "petitioners have not met their burden of demonstrating that the use of two constitutionally adequate means of determining the number of Senate seats, in the course of addressing two discrete historical contexts, is unconstitutional." *Cohen v. Cuomo*, No. 135, slip op. at 7 (N.Y. May 3, 2012).

In accordance with this Court's April 20, 2002 Order, the Senate Majority Defendants will address in tomorrow's submission the plaintiffs', and the Senate Minority Defendants', proffered evidence in support of plaintiffs' claim that the 2012 Senate Plan violates the equal population mandate of the Fourteenth Amendment to the U.S. Constitution. We note, however, that the Senate Minority Defendants represented to the Court at the most recent conference that the issues under plaintiffs' equal protection claim are "all inextricably bound with the Senate si[z]e issue," (4/20/2012 Tr. at 48), which has now been resolved.

Respectfully submitted,

/s/ Michael A. Carvin
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cc: All counsel of record (by e-mail)

No. 135

Daniel Marks Cohen, et al.,
Appellants,
v.
Governor Andrew M. Cuomo, et al.,
Respondents.

Eric J. Hecker, for appellants.
Michael A. Carvin, for respondent Skelos.
Elaine Reich, for respondent Silver.
New Roosevelt Foundation, Inc.; Common Cause New York, amici curiae.

PER CURIAM:

Petitioners commenced this special proceeding seeking a declaration that Chapter 16 of the Laws of 2012, insofar as it expands the size of the New York State Senate from 62 to 63 districts, is unconstitutional. Specifically, they argue that the Legislature's failure to apply a consistent method of

calculating the number of Senate seats due to population growth throughout the State is arbitrary and violates article III, § 4 of the New York State Constitution. We find that petitioners have failed to satisfy their heavy burden of establishing the unconstitutionality of this legislation and we therefore affirm.

This dispute arises out of the process of adjusting representation in the State Senate whereby the Legislature uses the historical, constitutionally prescribed "ratio" process to determine the required number of Senate seats. The Constitution of 1894 established a minimum of 50 State Senate districts and set forth a method of determining whether the number of seats is to be increased based on population shifts or increases as indicated by the census (see NY Const, art III, § 4). The initial step in this process is to divide the population of the State's citizens by 50, resulting in the applicable "ratio" figure (see NY Const, art III, § 4).[1] Any county that has at least three "full ratios," or six percent of the state's population, is then allocated a Senate seat for each full ratio (see NY Const, art III, § 4). If the number of seats so assigned

[1] "The ratio for appointing senators shall always be obtained by dividing the number of inhabitants . . . by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent" (NY Const, art III, § 4).

is greater than the number of seats assigned to that county in the Constitution of 1894, the increase is added to the original 50 Senate seats so that the "whole number of senators" is increased accordingly (see Matter of Schneider v Rockefeller, 31 NY2d 420, 431-432 [1972]).[2]

Difficulties are presented in determining the proper ratio for counties that were divided after 1894 (resulting in the creation of counties that did not then exist) and for counties that were combined in 1894 within a single Senate district. Article III, § 4 does not provide any specific guidance on how to address these situations. The Legislature has, in the past, employed two different methods. The populations of the counties at issue can be combined and then divided by the ratio figure to get a number that is then rounded down to the nearest full ratio ("combining before rounding down"). That figure is then compared to the number of Senate seats that were allotted to that district in 1894 for purposes of determining any increase. Another way is to divide the population of each county by the ratio figure, round the resulting number for each county down to the nearest

[2] As we have previously observed, this method is solely for the purpose of determining the size of the State Senate (see Schneider, 31 NY2d at 431 n 5). When the constitutional provision was enacted in 1894, it was also used to allocate Senate seats to counties, but since the advent of the "one person, one vote" rule (Reynolds v Sims, 377 US 533 [1964]), seats cannot be allocated on a county-by-county basis. Thus, the drawing of districts and apportioning of Senate seats is a process completely separate from determining the number of seats (see e.g. WMCA, Inc. v Lomenzo, 377 US 633 [1964]).

full ratio and then combine the full ratios to get the number of Senate seats ("rounding down before combining") for purposes of comparison to the number of seats allocated in 1894.

Here, we are concerned with the Legislature's treatment of Queens and Nassau Counties on the one hand, and Richmond and Suffolk Counties on the other. In 1894, the territory that is currently Queens and Nassau was one county –- Queens. Richmond and Suffolk were each counties at that time, but were organized into a single Senate district. For purposes of the current redistricting process, the Legislature chose to use one method -- rounding down before combining -- to determine the full ratio for Queens and Nassau Counties. It chose to use the other method –- combining before rounding down –- to determine the full ratio for Richmond and Suffolk Counties. Based on 2010 census population statistics, consistent application of the rounding down before combining method would have resulted in 62 Senate districts, while consistent use of the combining before rounding down method would have resulted in 64 Senate districts. Petitioners argue that respondents manipulated the process for political purposes in order to reach a 63-seat Senate.

Supreme Court found that petitioners failed to meet their burden of establishing the unconstitutionality of the redistricting plan. Petitioners appealed directly to this Court as of right pursuant to CPLR 5601 (b)(2), and we now affirm.

Petitioners acknowledge that we have, in the past,

recognized each of the methods of calculation at issue. They maintain, however, that it violates article III, section 4 of the New York State Constitution to use different methods for different parts of the state in the same adjustment process.

In Schneider, we addressed the constitutionality of the procedure used by the Legislature to determine the number of senators that should be allotted. In that case, following the 1970 census, the Legislature combined the populations of Queens and Nassau Counties, divided by the ratio figure and then rounded down, resulting in an increase of eight senators (see 31 NY2d at 432). The petitioners had advocated for the rounding down before combining system, which would have resulted in only seven additional senators.

We found that the combining before rounding down "procedure followed by the Legislature [was] valid and [did] not transgress any constitutional provision" (Schneider, 31 NY2d at 432). We also observed that the other procedure –- rounding down before combining –- had been used in prior redistricting (see id.). Instead of deciding between these procedures, we held that "the Legislature must be accorded some flexibility in working out the opaque intricacies of the constitutional formula for readjusting the size of the Senate" (id.). We went on to say that, where a county had been divided subsequent to 1894, the process of combining before rounding down "more accurately reflects increases in the population of the territory of the

original county –- the very basis from which adjustments to the whole number of senators is made. This system is, therefore, consonant with the broad historical objectives underlying the provision for increasing the size of the Senate" (id., at 432-433).

It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality "and we will upset the balance struck by the Legislature and declare the [redistricting] plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld'" (Matter of Wolpoff v Cuomo, 80 NY2d 70, 78 [1992], quoting Matter of Fay, 291 NY 198, 207 [1943]).

The rationale proffered by respondents for their choice of methods is that they opted to treat Nassau County –- which did not exist in 1894 and which now has the population to warrant three full ratios –- as if it had been a county in existence in 1894. Therefore, the method of rounding down before combining was used for Nassau and Queens to determine the Senate seats attributable to each county. For Richmond and Suffolk Counties, which both existed in 1894 and were combined into a single district at that time, the Legislature continued its practice of using the method of combining before rounding down.

It is not our task to address the wisdom of the methods employed by the Legislature in accomplishing their constitutional mandate. Rather, here, we consider only whether the methods chosen amount to "a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein" (Matter of Sherrill v O'Brien, 188 NY 185, 198 [1907]). Despite petitioners' assertions, we cannot say that consistent application of one method of calculation is required, given the Constitution's silence on this issue and our recognition that the Legislature must be accorded a measure of discretion in these matters. Under these circumstances, petitioners have not met their burden of demonstrating that the use of two constitutionally adequate means of determining the number of Senate seats, in the course of addressing two discrete historical contexts, is unconstitutional.

Accordingly, the judgment of the Supreme Court should be affirmed, without costs.

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Judgment affirmed, without costs. Opinion Per Curiam. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided May 3, 2012