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May 4, 2012

VIA ECF & OVERNIGHT COURIER

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

Hon. 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

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

Re: Favors, *et al.* v. Cuomo, *et al.*
1:11-cv-05632-DLI-RLM

Dear Judges Raggi, Lynch, and Irizarry:

At the April 20, 2012 conference before the Three-Judge Court, the Court provided the Defendants an opportunity to respond to the evidentiary submissions offered by the Intervenor-Plaintiffs and Senate Minority Defendants. The Court also indicated that it is presently focusing on the disputes over the Senate redistricting plan. We respectfully submit the following comments on those submissions on behalf of Defendants Brian M. Kolb, Robert Oaks, Sheldon Silver, John J. McEneny, and Roman Hedges ("Assembly Defendants").

Initially, we note that the information provided by Intervenor-Plaintiff Ullmnan does not pertain to the Senate redistricting dispute. Defendants Silver, McEneny, and Hedges have made a separate filing responding to that submission, while Defendants Kolb and Oaks reserve comment on it.

With respect to the submissions by the other Intervenor-Plaintiffs and Senate Minority Defendants, the Assembly Defendants submit that the burden of responding is on the Senate Majority Defendants as the developers of the Senate redistricting plan. As declared by Debra A.

Levine-Schellace, the Co-Executive Director of the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), "[t]he 2012 Senate Plan was developed exclusively within the Senate majority redistricting office of LATFOR." Declaration of Debra A. Levine-Schellace, dated April 27, 2012, ¶ 7; submitted as Docket No. 336-1.

However, because some of the arguments raised by the Intervenor-Plaintiffs and Senate Minority Defendants could apply to the disputes with the Assembly redistricting plan, the Assembly Defendants offer a general observation regarding the evidentiary submissions. The declarations and documentation offered by the Intervenor-Plaintiffs claim, among other things, that the Senate redistricting plan is legally infirm because there are multiple other ways in which the districts could be drawn.

For example, Intervenor-Plaintiffs' witness Andrew Beveridge declared that his alternative "better adheres" to constitutional and traditional redistricting principles. Declaration of Andrew A. Beveridge, dated April 26, 2012, ¶ 15; submitted as Docket Nos. 331 and 340-2. Intervenor-Plaintiffs' and Senate Minority Defendants' witness Todd Breitbart similarly declared that his alternative "better adheres" to constitutional and traditional redistricting principles. Declaration of Todd Breitbart, dated April 26, 2012, ¶ 3; submitted as Docket Nos. 327 and 340-1. Both gentlemen also claim that the Senate Majority did not engage in an "honest and good faith effort" in developing the adopted Senate redistricting plan. *See, e.g.*, Beveridge Decl. at ¶ 91, Breitbart Decl. at ¶ 88.

Intervenor-Plaintiffs, the Senate Minority Defendants, and their witnesses make a substantial and unjustified leap from claiming that there alternative redistricting plans are superior to the adopted Senate plan to their assertion that the Senate did not act in good faith. The former does not prove the latter, and none of the proponents of this assertion have offered any direct connection between the former and the latter other than their say-so. Indeed, the mere fact that multiple redistricting plans could be drawn that all comply with applicable constitutional and legal requirements does not mean that the Senate's failure to adopt the Intervenor-Plaintiffs', or their witnesses', alternative recommendations constitutes an act of bad faith.

More importantly, the issue before the Court is not whether there exists a better redistricting plan, the issue is whether the adopted plan passes constitutional and legal muster. *Cf. Matter of Schneide*r *v. Rockefeller*, 31 N.Y.2d 420, 427 (1972) ("While petitioners urge several alternate plans which they claim approach mathematical exactness and minimize or eliminate violations of county lines, we would emphasize that it is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions."). The Assembly Defendants respectfully submit that the evidentiary

submissions offered by the Intervenor-Plaintiffs are not sufficient to overcome the presumption of constitutionality accorded to the Senate redistricting plan.

Further, none of the evidentiary submissions support Intervenor-Plaintiffs' attempt to pierce the legislative privilege applicable to the development of the adopted redistricting plan. None of their witnesses state that they need such information to complete their analyses, or that their analyses are lacking because of the absence of such information. Indeed, the requests for discovery constitute nothing more than a last-ditch attempt to engage in a fishing expedition in the hope of finding some basis to establish a viable challenge to the adopted, and pre-cleared, Senate redistricting plan.

For the foregoing reasons, the Assembly Defendants respectfully submit that the Intervenor-Plaintiffs have not made out a *prima facie* showing sufficient to support their request for discovery or to allow this case to proceed.

Respectfully submitted,

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