LATINOJustice PRLDEF

May 4, 2012

Hon. Judge Reena Raggi
United States Court of Appeals, Second Circuit
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Hon. Judge Gerald E. Lynch
United States Court of Appeals, Second Circuit
40 Foley Square
New York, NY 10013

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

Re: *Favors v. Cuomo*, 1:11-cv-05632- -RR-GEL- DLI

Dear Hon. Judges Raggi, Lynch and Irizarry:

Ramos Intervenors submit this letter in response to Defendants submission, ECF. Doc. 338.

The discriminatory effect and the constitutional harm to Plaintiff Intervenors have been demonstrated by the Defendants' scheme to design a 63-seat Senate Plan. This plan is permeated by severely malapportioned districts found throughout the state. A purposeful decision involved the creation of a new majority-white district upstate while depriving a seat from minority populations in New York City and downstate that had fueled the vast proportion of the state's population growth in the past decade.

Defendants allegation that "plaintiffs cannot establish injury…[as they] have failed to cite to *any* alternative 63-seat plan that would add the 63rd seat downstate…and create an additional majority-black or majority-Hispanic district" ECF Doc. 338 at 19 is inaccurate. Their misimpression must be corrected yet again. Plaintiff Intervenors have already demonstrated that alternative Senate Plans with the additional majority-minority seat were possible to draw in Bronx County. ECF Doc 305, 327-1, and, 337.

One such plan by Common Cause New York had been timely provided to LATFOR in advance of the passage of New York's Chapter 16 legislation.

This Court is being asked by Defendants to presume that redistricting is motivated by politics and all actions thus animate this plan are legitimate. ECF 338 at 20. Plaintiff Intervenors contend that even such a broad truism and presumption does not preclude an inquiry into impermissible, discriminatory or irrational factors that infected the redistricting process. The promotion of unconstitutional or irrational state policies and considerations as related to malapportioned / non-equipopulous senate districts, individually and in the overall design, are the issues of fact to our inquiry.

Assessing a jurisdiction's motivation in drawing district lines is a complex endeavor "requiring the trial court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)*; see also *Miller v. Johnson, 519 U.S. 900, 914(1995); Hunt v. Cromartie, 526 U.S. 541, 546 (1999).*

The Supreme Court has discussed the possible evidentiary factors that may be involved in proving "invidious discriminatory purpose." It noted that "the specific sequence of events leading up to the challenged decision may also shed light on the decision maker's purposes". *Arlington Heights* at 266-67. The Court further held:

> The legislative or administrative history may be highly relevant, especially where There are contemporary statements by members of the decision making body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently would be barred by privilege.

Arlington Heights at 268 citing *Tenney v. Bradhove*, 341 U.S. 367 (1951); *United States v. Nixon*, 418 U.S. 683, 705 (1974).

As for the issue of accessing information and documents from the individuals who are most knowledgeable and who made decisions in crafting the challenged 2012 Senate Plan, Plaintiff Intervenors cannot meet their burden, if Defendants' position to absolutely preclude discovery is affirmed. Legislative privilege is a qualified, not absolute, privilege, especially in redistricting matters.[1] "Notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions." *Rodriguez v. Pataki*, 280 F. Supp.2d 89, 95-96 (S.D.N.Y. 2003). This qualified privilege yields when claimants are seeking "to vindicate important federal interests." Id at 96. Moreover, the Rodriguez court stated: " [a]lthough this suit is not brought on behalf of the United States, there can be no question that it raises charges about the fairness and impartiality of some of the central institutions of our state government. This, too, suggests that the qualified legislative or deliberative process privilege should be accorded only *limited deference*." Id at 102. (emphasis supplied).

[1] Some courts find no privilege at all in cases involving Voting Rights Act concerns. *Marylanders* for *Fair Representation v. Schaefer*, 144 F.R.D. 292, 304-5 (M. Md. 1992)(two of the three panel judges finding no qualified privilege in redistricting case); *United States v. Irwin*, 127 F.R.D. 169, 173-4 (C.D. Cal. 1989).

In closing, Ramos Intervenors substantially join and support the analysis submitted by the Drayton Intervenors, ECF Doc 352. We, too, note that in the period following the U.S. Supreme Court's precedential decisions which articulated a new constitutional framework of "one-person one-vote" based on the 14th Amendment's equal protection clause, the counting of "whole persons" in New York State became the fundamental denominator in accordance with the 1970 amendment to New York's Constitution. Counting a whole person has been the consistent standard since then and was the choice made by the New York State legislature for redistricting and apportionment. *Burns v. Richardson,* 384 U.S. 73 (1966). The holding in *WMCA Inc. v. Lomenzo* (1964) oft-cited by Defendants, e.g., ECF Doc. 338 at 18, is thus superceded and inapplicable.

Respectfully submitted,

_____/s/_____
Jackson Chin

Juan Cartagena
Jose L. Perez
Jackson Chin

Counsel for Plaintiffs-Intervenors Juan Ramos, Nicolas Chavarria, Edwin Roldan, Sandra Martinez, Manolin Tirado, Graciela Heymann, Santiago Diaz and Edwin Figueroa.

Cc: All counsel by ECF