UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, HOWARD LIEB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SCHREIBER, and WEYMAN A. CAREY,

Plaintiffs,

-v-

ANDREW M. CUOMO, as Governor of the State of New York, ERIC T. SCHNEIDERMAN, as Attorney General of the State of New York, ROBERT DUFFY, as President of the Senate of New York, DEAN G. SKELOS, as Majority Leader and President Pro Tempore of the Senate of the State of New York, SHELDON SILVER, as Speaker of the Assembly of the State of New York, JOHN L. SAMPSON, as Minority Leader of the Senate of the State of New York, BRIAN M. KOLB, as Minority Leader of the Assembly of the State of New York, the NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT ("LATFOR"), JOHN J. McENENY, as Member of LATFOR,, ROBERT OAKES, as Member of LATFOR, ROMAN HEDGES, as Member of LATFOR, MICHAEL F. NOZZOLIO, as Member of LATFOR, MARTIN MALAVE DILAN, as Member of LATFOR, and WELQUIS R. LOPEZ, as Member of LATFOR,

Defendants.

Case: 1:11-cv-05632-DLI-RLM

ORAL ARGUMENT REQUESTED

Date of Service:
December 28, 2011

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANT BRIAN M. KOLB, MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK

Kevin M. Lang, Esq. (KL 6431)
COUCH WHITE, LLP
Counsel for Defendant Brian M. Kolb
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222
(518) 426-4600

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PRELIMINARY STATEMENT

In New York State, the process of establishing the boundaries of State Senate, State Assembly, and Congressional voting districts is the province of the Task Force on Demographic Research and Reapportionment ("LATFOR"). For more than 30 years, LATFOR has established districts that have comported with federal and state constitutional and legal requirements, and it has done so on a timely basis. By this lawsuit, six individuals seek to usurp the statutory authority and mandate of LATFOR and have the federal court inject itself into a matter that the United States Supreme Court has repeatedly recognized as the dominion of the States.

This lawsuit is improper as a matter of law. As discussed herein, Plaintiffs lack standing to bring this lawsuit and their claims are not justiciable because LATFOR has not concluded its reapportionment process. Plaintiffs have not suffered any actual harm, their claims are not ripe, and they do not form any basis upon which the Court may grant them any relief. For these reasons, Defendant Brian M. Kolb, the Minority Leader of the Assembly of the State of New York, respectfully requests that the Court dismiss this lawsuit in its entirety under Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and (6).

BACKGROUND

LATFOR is a bipartisan entity established by Chapter 45 of the Laws of 1978 of the State of New York to "engage in such research studies and other activities as its co-chairmen may deem necessary or appropriate in the preparation and formulation of a reapportionment plan for the next ensuing reapportionment of senate and assembly districts and congressional districts of the state and in the utilization of census and other demographic and statistical data

for policy analysis, program development and program evaluation purposes for the legislature." New York Legislative Law §83-m(3). LATFOR uses the results of the decennial censuses and other information it collects, and its analysis of that information, to develop fair and appropriate districts for the State Senate and Assembly and for New York's Congressional delegation. The districts it develops are subjected to extensive public scrutiny and then presented to the New York State Legislature for approval.

LATFOR's reapportionment process requires a balancing of multiple interests, including local municipal, economic, racial, and political concerns. Its mandate is, among other things, "to assist the legislature in the performance of its responsibilities" (New York Legislative Law §83-m(1)(c)), including developing a final reapportionment plan that protects the "one-person-one-vote" principle in accordance with the United States Constitution, New York Constitution, and federal and state law. In addition to public scrutiny and action by the Legislature, LATFOR's reapportionment plans must be approved by U.S. Justice Department's Civil Rights Division or the U.S. District Court for the District of Columbia because three counties (Bronx, Kings, and New York) are subject to Section 5 of the federal Voting Rights Act, 42 U.S.C. §1973c.

LATFOR's reapportionment plan is typically submitted to, and acted on by, the State Legislature between four and five months before the State's primary elections. The reapportionment plans in 1992, for example, were signed into law approximately four months before the primaries. In 2002, the reapportionment plans were adopted within a similar time frame. The primary elections in 2012 are statutorily set for September 2012, but they are likely to change due to an unrelated case pending in the Northern District of New

York.[1] The District Court in that case is considering moving the date to either June or August, 2012; the Court has indicated a preference in keeping the primary date as close to the current date in September as possible.

An August primary would provide LATFOR approximately four more months to finalize its reapportionment plan while still leaving an appropriate amount of pre-election activities including conducting candidate selection processes and undertaking campaigns for the candidates. Indeed, LATFOR is proceeding in a manner that will allow it to timely develop a reapportionment plan that fairly balances all competing interests, reflects the input of members of the public, embodies the constitutional principle of one-person one-vote, and comports with all federal and state legal requirements.

LATFOR is now in the deliberative stage of its process. LATFOR hosted public hearings across the state over the past six months to solicit comments and concerns from interested persons. Once it completes its deliberations and develops a reapportionment plan, LATFOR is expected to hold another round of public hearings. Only after that round of hearings will LATFOR finalize and send its reapportionment plan to the State Legislature for its consideration and approval. LATFOR has indicated that it expects its reapportionment plan to be in effect for the 2012 elections.[2]

On November 17, 2011, six individuals commenced this lawsuit based on speculation, conjecture, rumor, and innuendo. It is almost entirely devoid of facts and factual support for its claims. Many of the claims raised pertain to LATFOR's treatment of prisoners and its

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[1] United States of America v. State of New York, et al., Index No.: 1:10-cv-01214 (GLS) (RFT) (N.D.N.Y.).

[2] *See* http://www.latfor.state.ny.us/faqs/.

compliance with Part XX of Chapter 57 of the Laws of 2010 (commonly known as the "Prisoner Reallocation Law"). (*See, e.g.*, Complaint ¶¶9-13, 85-118, 143-149.) The Prisoner Reallocation Law requires LATFOR to count prisoners in the custody of the Department of Corrections in the districts in which they resided prior to their incarceration, rather than the locales in which they are incarcerated. Plaintiffs contend that although LATFOR has not completed its reapportionment plan, its plan (once finalized) might not properly allocate prisoners to their home districts. This, Plaintiffs' contend, would violate their federal and state constitutional rights because their voting districts are either too large or too small. To rectify these alleged violations, Plaintiffs ask the Court to disregard New York law, usurp the State's reapportionment process, bypass the State's right to determine its political boundaries, and displace the State Legislature's and Governor's reapportionment decision with its own perspective.

For the reasons set forth below, Plaintiffs' requests for relief are improper, invalid, and premature, and their Complaint should be dismissed. With respect to the claims regarding the Prisoner Reallocation Law, it is important to note that on December 1, 2011, LATFOR issued a meeting notice stating that it "will reconvene in the coming weeks at a date, location and time to be announced to finalize prisoner reallocation pursuant to Part XX of Chapter 57 of the Laws of 2010."[3] Subsequently, on December 22, 2011, LATFOR announced that an agreement was reached regarding the allocation of prisoners to their home

[3] *See* http://www.latfor.state.ny.us/hearings/20111201/.

counties.[4] This demonstrates that Plaintiffs' allegations regarding LATFOR's compliance with the Prisoner Reallocation Law are unfounded, premature, and potentially moot.

ARGUMENT

POINT I

THE COURT SHOULD NOT USURP THE STATE'S REAPPORTIONMENT PROCESS

Plaintiffs' lawsuit seeks Court intervention into political questions reserved to the State. LATFOR is charged with assisting the State Legislature in developing a reapportionment plan that protects the constitutional principle of "one-person one-vote" and is compliant with state and federal law. This Court should not act to derogate the State's right and authority to do so. *See, e.g.,* Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court [citations omitted].")

Furthermore, the constitutionality of the Prisoner Reallocation Law, upon which Plaintiffs' claims are premised, is being challenged in the New York State courts. Because the outcome of that challenge may render Plaintiffs' claims moot, this lawsuit is premature and not properly before the Court. Indeed, the Court should not entertain this matter until the State takes final action. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-817 (1976) (federal court abstention is appropriate "in cases presenting a

[4] *See* http://www.timesunion.com/local/article/Panel-shifts-inmate-count-in-New-York-2421310.php.

federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law").

A. Federal Court Interference At This Time Is Unnecessary And Inappropriate

The Supreme Court has enunciated on numerous occasions that reapportionment is primarily a matter for state legislative consideration and determination. *See* Miller v. Johnson, 515 U.S. 900, 915 (1995) (noting that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.... and so the States must have discretion to exercise the political judgment necessary to balance competing interests"); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 676 (1964); Connor v. Finch, 431 U.S. 407, 414 (1977).

In recognition of the state interests involved in redistricting, federal courts generally abstain from apportionment disputes unless absolutely necessary. Wise v. Lipscomb, 437 U.S. 535, 539 (1978) (holding that apportionment is a "legislative task which the federal courts should make every effort not to pre-empt"). No court should go out of its way to reach a constitutional question before it has to do so. Id. In Scott v. Germano, 381 U.S. 407 (1965), the Supreme Court held that the federal courts must not interfere with the redistricting process until the states have had a reasonable opportunity to redistrict on their own terms. Only if the states fail to complete the task, or fail to make timely progress, should the federal courts intervene. Id.

Here, Plaintiffs ask the Court to mount a hostile takeover of LATFOR's statutory responsibilities before LATFOR has had the opportunity to finish its work. Germano, and

the cases that followed it, recognize that reapportionment involves a delicate balancing of interests that federal courts should avoid, where possible. LATFOR is actively working to achieve the appropriate balance, and ensure that the reapportionment plan complies with the law – including the Prisoner Reallocation Law. For example, on December 22, 2011, LATFOR announced that the dispute over how to reallocate prisoners has been resolved through agreement. *See* n.4, *supra*. Contrary to Plaintiffs' accusations, the December 22nd announcement confirmed LATFOR's commitment to comply with the Prisoner Reallocation law. In addition, LATFOR has already conducted over a dozen public meetings and hearings to gather and understand the concerns and suggestions of the public.[5] As it has in the past, LATFOR intends to develop a reapportionment plan that reflects a fully and fairly deliberated process. Rather than participating in this process, Plaintiffs have instead commenced this premature litigation to force LATFOR into adopting a plan that furthers their own political objectives.

LATFOR's work should not be halted simply because Plaintiffs are unhappy with LATFOR's pace, or fearful its plan *might* not comport with the law. Plenty of time remains for LATFOR to finalize its reapportionment plan. Therefore, the Court should heed the admonitions of the Supreme Court and refrain from interfering in the State's reapportionment process at this juncture.

B. The Federal Court Should Abstain Pending The Outcome Of Related Litigation In State Court

On April 4, 2011, members of the New York State Senate, together with individual citizens, brought an action in New York State Supreme Court, Albany County, for a

[5] Transcripts of those meetings and hearings are available at http://www.latfor.state.ny.us/ hearings/.

judgment declaring the Prisoner Reallocation Law unconstitutional.[6] That complaint was dismissed by summary judgment on December 1, 2011. An appeal was timely filed, and the case remains pending. A successful appeal will result in a declaration that the Prisoner Reallocation Law is unconstitutional. If that happens, Plaintiffs' claims in this case will be moot.

Accordingly, the Court should stay its hand in this matter until the state courts render a final decision in that matter. Harrison v. N.A.A.C.P., 360 U.S. 167, 176-177 (1959) (federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them); *see also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-817 (1976) (federal court abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law").

POINT II

PLAINTIFFS LACK STANDING

A plaintiff in a federal court action must have standing to satisfy the "case or controversy" requirement under Article III of the Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). That is, federal courts are confined to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of the facts.'" Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990)

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[6] Senator Elizabeth O'C. Little et al. v. New York State Task Force on Demographic Research and Reapportionment et al., No. 2310-2011 (Albany County Sup. Ct.) (Devine, *J.*).

(*quoting* North Carolina v. Rice, 404 U.S. 244, 246 [1971]).

To establish standing, a plaintiff must demonstrate that he or she has suffered an "injury in fact." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). That injury must be "concrete and particularized" and "actual or imminent," and not hypothetical or "conjectural." Id. Speculative or "some day" intentions to engage in a harmed interest do not establish an injury in fact. Id. at 564; *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) ("whatever else the 'case or controversy' requirement embodie[s], its essence is a requirement of 'injury in fact' [citations omitted]."). Standing may also be granted if a plaintiff can demonstrate he is in imminent danger of suffering an injury the court is capable of preventing. Lujan, *supra*.

None of the Plaintiffs in this case have suffered any injury in fact. Plaintiffs Mark A. Favors, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey state that they "desire[] to communicate with the candidates" and/or are "interested in volunteering for or contributing money to one or more of these candidates." (Complaint ¶¶14, 16, 17, 18, and 19.) This is not an injury because they are not prevented from communicating with, donating to, or volunteering for, any candidates currently running for office. Their alleged injuries appear to be based upon "someday intentions." Lujan, *supra,* 504 U.S. at 560. That is, Plaintiffs claim that they are interested in donating/volunteering in the *future*. They do not allege that they *actively tried* to donate money, or volunteer time, and were injured because they were unable to do so. This distinction is fatal to their claims because no present, actual, or concrete injury exists under these facts.

Plaintiff Howard Lieb's alleged injury is slightly different than his co-plaintiffs, but it suffers the same fatal flaws. Mr. Lieb alleges that he is "actively considering becoming a

2012 candidate for State Senate... [and] needs to know where the district lines lie as soon as possible" so that he can "make the important decision about whether to run...." (Complaint ¶¶14, 16, 17, 18 and 19.) The problem with Mr. Lieb's "injury" is that it has not, and may not, ever come to fruition. His potential future candidacy is another "some day" intention that does not rise to an actual, present injury. The result might be different if Mr. Lieb had firmly decided to run for office, started his petition to get on the ballot, and was prevented from doing so because of redistricting flaws. That is not the case here. In fact, the primary probably will not occur until August 2012. This leaves Mr. Lieb plenty of time to run for office, *if* he should decide to do so in the future.

It should also be noted that the 2012 elections will not be held under the old districting plan developed in 2002. Thus, there is no reason to believe that an injury will be caused by an improper reliance on population data gathered in the 2000 census. LATFOR is working on a new redistricting plan based on the 2010 census. A new suit, filed after LATFOR finalizes a plan (or fails to act in time to allow a valid election next year) could present a real controversy. Conversely, the instant suit must be dismissed because Plaintiffs have not suffered any injury.

POINT III

PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

Plaintiffs' fourth, fifth, and sixth causes of action allege violations of the New York State Constitution, Prisoner Reallocation Law, and federal Voting Rights Act, respectively. The question presented by each of these claims is whether LATFOR's reapportionment plan will comply with the Prisoner Reallocation Law. That question is impossible to determine at

this juncture, however, because, as noted above, LATFOR's reapportionment plan is still being developed and has not been finalized. Moreover, recent developments since Plaintiffs filed their complaint demonstrate that LATFOR is making strides towards complying with the Prisoner Reallocation law. Specifically, the *Albany Times Union* reported on December 22, 2011 that LATFOR reached an agreement regarding how to allocate prisoners in accordance with the Prisoner Reallocation law, and could have redistricting maps for the Legislature's approval in early 2012. *See* n.4, *supra*. Thus, there is no "case or controversy" for the Court to decide and these claims should therefore be dismissed for lack of subject matter jurisdiction under F.R.C.P 12(b)(1).

To be justiciable under Article III of the United States Constitution, a claim must be ripe for judicial review. Thomas v. City of New York, 143 F.3d 31, 34 (2d Cir. 1998). The ripeness doctrine "prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967). A case is not ripe when it "'involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.'" AMSAT Cable Ltd. v. Cablevision of CT Ltd. Partnership, 6 F.3d 867, 872 (2d Cir. 1993) (*quoting* 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3532.2, at 141 [2d ed. 1984]). "When resolution of an issue turns on whether 'there are nebulous future events so contingent in nature that there is no certainty they will ever occur,' the case is not ripe for adjudication." In re Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1146 (2d Cir. 1993).

A. Plaintiffs' Claims Cannot Be Adjudicated Until LATFOR's Reapportionment Plan is Finalized

The Prisoner Reallocation Law requires prisoners to be apportioned for districting purposes to the census blocs corresponding to their residences prior to being incarcerated. New York Legislative Law §83-m(13)(b). Plaintiffs allege that as a part of this reapportionment process, LATFOR must compile and release population data regarding the home addresses of prisoners. (*See* Complaint ¶¶ 85-91.) Plaintiffs claim that LATFOR has not yet performed this duty, and is therefore not in compliance with the law. (Complaint ¶¶ 85-91, 143-49.) Plaintiffs also claim that LATFOR's plan will ultimately not correctly reapportion prisoners' residency with the Prisoner Reallocation Law. (Complaint ¶¶ 102-05, 143-49.)

These claims are not ripe for review because there is no final reapportionment plan for New York, and no final decisions have been made regarding the manner in which prisoners will be treated for reapportionment purposes. Indeed, as noted above, LATFOR recently issued a notice stating its intent to address this very issue in the near future. In the absence of any final action, the Court has no ability to review and evaluate the legality and appropriateness of the final reapportionment plan or its compliance with the Prisoner Reallocation Law, the Voting Rights Act, or the federal and state constitutions. Although Plaintiffs are fearful that LATFOR's plan *might* ultimately fall short, those fears do not constitute a case or controversy for this Court to decide.

Support for this argument can be found in decisions issued by the Second Circuit Court of Appeals on another reapportionment case in New York. There, the Second Circuit held that reapportionment plans that have not been finalized are not ripe for judicial review.

Compare Longway v. Jefferson County Bd. of Supervisors, 995 F.2d 12 (2d Cir. 1993) ("Longway I ") and Longway v. Jefferson County Bd. of Supervisors, 24 F.3d 397 (2d Cir. 1994) ("Longway II").

Both of the Longway cases involved a challenge to a Jefferson County legislative reapportionment plan. Plaintiffs alleged in both cases that the reapportionment plan was unconstitutional because it included a very broad population calculus (referred to as the "total population census figure") which improperly included transient residents such as prisoners, military personnel, and group home occupants. Longway I, *supra,* 995 F.2d at 14.

Unlike the case at bar, the reapportionment plan in Longway I was deemed ripe for review because it had been finalized. Id. Although the plan had not yet been adopted by the voters, it was clear that the plan would be relied upon in the redistricting. The final plan was subject to review because it was based upon the total census figure to which the plaintiffs objected.

In contrast, in Longway II no reapportionment plan had been finalized. Therefore, the Second Circuit held that the plaintiffs' challenge to the unfinished plan was premature. Longway II, *supra*, 24 F.3d at 400. Importantly, the Second Circuit noted that it was still "possible that the defendants will propose and adopt a reapportionment plan that does not use the total census population figure." Id. at 400-01.

LATFOR's reapportionment plan has not been finalized; it is a work-in-progress with as-yet unknown conclusions and recommendations. Id. Only after LATFOR has completed the reapportionment process and has submitted its final plan to the State Legislature, and after the reapportionment plan has been enacted into law by action of the State Legislature and Governor would it become ripe for judicial review. Id. at 401 (noting that "there being

no pending proposal utilizing the total population figure, resolution of that state law issue would constitute a mere advisory opinion"). This case is unlike Longway I because it is "still possible" that LATFOR "will propose and adopt a reapportionment plan" that complies with federal and state constitutional and legal requirements. Id.

With respect to LATFOR's compliance with Prisoner Reallocation Law, Plaintiffs' allegations regarding timing of the release of amended prisoner population data are unavailing and inapposite. (Complaint ¶¶ 89-90.) The Prisoner Reallocation Law does not impose a deadline for releasing the amended prisoner population data. Moreover, Plaintiffs concede that LATFOR recently published reports indicating that it was in the "process of releasing the amended population data" and had directed its staff to "make a recommendation on how to proceed" (Complaint ¶¶90-91.) These facts, in combination with LATFOR's December 22, 2011 announcement that LATFOR would, in fact, reassign prisoners' residence to their home districts, rather than the districts in which they are incarcerated, demonstrate that LATFOR is clearly moving forward to comply with the Prisoner Reallocation law. *See* n.4, *supra*.

In fact, the *Albany Times Union* quoted Assembly Jack McEneny (a democratic member of LATFOR) as stating "As we speak, this is going through the computerized system and changing the count for every block and every town that has prisoners assigned to it." *See* n.4, *supra*. The *Albany Times Union* further reported that a draft set of maps for the state Legislature and U.S. House of Representatives seats could be available early next year, and another round of public hearings will be scheduled. Id. These undisputed facts prove that LATFOR is moving forward with a bona fide redistricting plan that complies with the

law. The Court should allow LATFOR to continue its work. There is no present harm to redress.

Plaintiffs' allegations that LATFOR does not have time to finalize a legitimate reapportionment plan are similarly premature. There are approximately six to eight months before the primary elections will be held. That means LATFOR has between two and four months to finalize its reapportionment plan and submit it to the State Legislature. While Plaintiffs speculate that LATFOR cannot complete its tasks in this time frame, that speculation has no basis in fact. Just the opposite, the facts demonstrate that the last two times LATFOR was required to develop comprehensive reapportionment plans, it completed its efforts approximately four months before the date of the primaries. Further, it is incontrovertible that those reapportionment plans satisfied all constitutional and legal requirements in that they withstood judicial challenges. Matter of Wolpoff v. Cuomo, 80 N.Y.2d 70 (1992); Rodriguez v. Pataki, 308 F.Supp.2d 346 (S.D.N.Y. 2004), *aff'd* 543 U.S. 997 (2004).

It is also important to note that there have been substantial technological advances over the past ten years in data collection, data processing, communications, and cartography. These advances have dramatically increased the speed at which district lines can be drawn and evaluated. In fact, there are now tools freely available on the internet that allow interested persons to develop their own reapportionment maps and proposals. Thus, activities that took weeks and months historically can now be accomplished in a matter of hours to days. In all circumstances, there is still sufficient time for LATFOR to compete its tasks and for a reapportionment plan for New York State to be finalized and adopted. Accordingly, there is no imminent risk of injury that requires Court intervention at this time.

B. Plaintiffs' Claim Under The New York Constitution Cannot Be Adjudicated Until LATFOR's Plan Is Finalized

The ripeness doctrine also requires dismissal of Plaintiffs' claim that there have been violations of Article III, Sections 4 and 5 of the New York State Constitution. Those sections require that district lines be drawn to protect the "one-person one-vote" principle. Petition of Orans, 45 Misc.2d 616 (Sup. Ct. N.Y. County 1965) *aff'd* 15 N.Y.2d 339 (1965). The districts must reflect, among other things, population equality, contiguity, convenience, and as compact form as practicable. *See* NYS CONST. ART. III, §4. There is no way for the Court to review whether the State's reapportionment plan will comport with these requirements until the plan is finalized and adopted. Therefore, for the same reasons set forth above, Plaintiffs' fourth claim is unripe, does not amount to a case or controversy requiring adjudication by the Court at this time, and should be dismissed.

C. Plaintiffs' Voting Rights Act Claim Can Not Be Adjudicated Until LATFOR's Plan Is Finalized

Plaintiffs allege the Prisoner Reallocation Law was transformed into a federal law when it was precleared by the Department of Justice[7] and now has the "force of federal law." (Complaint ¶100.) Plaintiffs conclude that any failure to comply with the Prisoner Reallocation Law, without further preclearance, will therefore be a violation of the Federal Voting Rights Act. (Complaint ¶100.)

Setting aside the substantive merits of Plaintiffs' argument, the claim must be dismissed because it anticipatorily *assumes* that LATFOR will not comply with the Prisoner Reallocation Law. As explained in detail above, LATFOR's reapportionment process is

[7] The Voting Rights Act requires preclearance for any redistricting plan that would affect "covered jurisdictions" at risk for discriminatory gerrymandering. There are three "covered jurisdictions" in New York State: Kings County, Bronx County, and New York County.

ongoing, and there is sufficient time for compliant reapportionment to occur (provided the law is not overturned). The Supreme Court has been very clear in stating that "[a]bsent evidence that [the] state branches will fail timely to perform [their] duty [to enact redistricting legislation], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." Growe v. Emison, 507 U.S. 25, 34 (1993). Inasmuch as the State still has two to four months to finalize and adopt a comprehensive reapportionment plan, it is premature and inappropriate for the Court to intervene in this State matter.

Moreover, because there is no final, adopted reapportionment plan in place, there is no legitimate case or controversy before the Court regarding the State's compliance with the Voting Rights Act, or any other law. Indeed, once a reapportionment plan is finalized and adopted, there may be no dispute whatsoever regarding its compliance with the Voting Rights Act. For all of the foregoing reasons, Plaintiffs' sixth claim is unripe and should be dismissed under F.R.C.P. 12(b)(1) for lack of subject matter jurisdiction.

D. Plaintiffs' Claim Under Article I, Section 2 of the Federal Constitution is Similarly Premature

Article I, Section 2 of the United States Constitution provides for the apportionment of Congressional Representatives across the States. Plaintiffs' third claim alleges that "without proper redistricting, New York's representation in the United States House of Representatives is at risk." (Complaint ¶ 129.)

As with the other claims discussed above, there is simply no way to determine whether the State's reapportionment plan will violate the mandates of Article I, Section 2 until the plan is finalized and adopted. The States have the "primary responsibility" for

apportionment, and the Court should not intervene to prevent a speculative harm that will likely not occur. Growe, *supra*, 507 U.S. at 34. Drafting and implementing reapportionment plans in New York have always rested with the State Legislature and Governor, with the assistance of LATFOR since 1978. *See* U.S. Const. Art. I, § 2; New York Const. Art. III, § 1, 4, 5. "[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." White v. Weiser, 412 U.S. 783, 794–95 (1973) (*quoting* Reynolds, *supra,* 377 U.S. at 586).

Plaintiffs' claim rests on the speculative assumption that no timely redistricting will occur and ignores the ongoing reapportionment process presently being conducted by LATFOR. New York must be given the opportunity in the first instance to reapportion the State's voting districts on its own and according to its own legislative direction. The Court should not grant any credence to Plaintiffs' baseless speculations or determine that they are adequate to frame a valid case or controversy. Until the State finalizes and adopts a reapportionment plan, or its time for doing so has expired, the Court should not interfere or substitute itself for the State's duly elected legislative and gubernatorial officials. Growe, *supra*; Poe v. Ullman, 367 U.S. 497 (1961). Accordingly, Plaintiffs' third claim is unripe and should be dismissed under FRCP 12(b)(1) for lack of subject matter jurisdiction.

E. Plaintiffs' Equal Protection and Due Process Claims are Premature

Plaintiffs' claims under the Equal Protection and Due Process claims of the United States Constitution are not ripe for review, for the same reasons discussed above. The heart of Plaintiffs' Equal Protection claim is that LATFOR's redistricting plan *might* violate the "one-man-one-vote" principle. Plaintiffs' Due Process claim argues that their voting power

has been diminished. Neither of these claims can be determined under the facts that presently exist. LATFOR has yet to submit a final redistricting plan, and until that time, there is no way for the Court to review its constitutionality.

In sum, the facts of this case need to mature and develop in the form of a final redistricting plan before any of Plaintiffs' claims become ripe for review.

POINT IV

PLAINTIFFS' COMPLAINT FAILS TO STATE AN EQUAL PROTECTION CLAIM

The Equal Protection Clause of the Fourteenth Amendment guarantees "[the] right to be free from invidious discrimination in statutory classifications and other governmental activity." Bernheim v. Litt, 79 F.3d 318, 323 (2d Cir. 1996) (*quoting* Harris v. McRae, 448 U.S. 297, 322 [1980]). In other words, "[t]he Equal Protection Clause requires that the government treat all similarly situated people alike." Harlen Assocs. v. Inc. Village of Mineola, 273 F.3d 494, 499 (2d Cir. 2001).

In the context of political/election-related matters, such as this lawsuit, the Supreme Court has held that the Equal Protection Clause guarantees the principle of "one-person one-vote." *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 13-14 (2009). In cases involving the reapportionment of voting districts, the Supreme Court held that the "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as practicable." Reynolds v. Sims, 377 U.S. 533, 577 (1964). There, the Court recognized that is impossible to arrange districts "so that each one has an identical number of residents, or citizens, or voters." Id. Therefore, in Gaffney v. Cummings, 412 U.S. 735, 745 (1973), the Court determined that

"minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."

In Brown v. Thomson, 462 U.S. 835 (1983), the Supreme Court developed a benchmark for determining whether a particular reapportionment plan violates the one person, one vote principle. The Court stated that "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." Id. at 842-43. In addition to deviation standards, the Court has "expressly rejected the argument that the possibility of drafting a better plan alone is sufficient to establish a violation of the one person, one vote principle." Daly v. Hunt, 93 F.3d 1212, 1221 (4th Cir. 1996) (*citing* Gaffney, 412 U.S. at 740–41).

To state a claim under the Equal Protection Clause, Plaintiffs were required to sufficiently allege two essential elements: (1) they were treated differently than others similarly situated; and (2) this differential treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 321–22 (E.D.N.Y. 2002) (*citing* Diesel v. Town of Lewisboro, 232 F.3d 92, 103 [2d Cir. 2000]).

However, Plaintiffs' Complaint does not allege that LATFOR's process is tainted with discriminatory intent, or that Plaintiffs have been treated differently than any other voters in their respective communities. Moreover, as discussed above, LATFOR has not

completed its work, and there is no final reapportionment plan for New York. Therefore, there is nothing before the Court that would support any finding that the State has violated the one-person one-vote principle espoused by the Equal Protection Clause. Indeed, the Court has nothing before it to compare to the benchmark established by Brown v. Thomson.

Rather, Plaintiffs' state as the bases to their Equal Protection claim that the current districts lack population equality (Complaint ¶108), that LATFOR *may not* correctly apply a state law that is undergoing judicial review and may be nullified (Complaint ¶¶110-112), that the State's reapportionment process has not been concluded (Complaint ¶114), and that the Court should usurp the State's long-recognized right to develop its own reapportionment plan (Complaint ¶¶117-118). None of these allegations form a legally cognizable basis for an Equal Protection claim.

As to the first allegation, there is no dispute that there must be reapportionment of the voting districts in New York given the results of the 2010 census. This requirement has been recognized by the State Legislature, the Governor, LATFOR, and the public at large, and it is because of this change in circumstances that LATFOR is right now engaged in the process of developing new districts. Moreover, because the existing districts cannot and will not be used for purposes of the 2012 elections, that they may lack population equity is a red herring and certainly no basis to grant Plaintiffs the relief they are seeking.

As to the second and third allegations, as discussed above, it is premature for the Court to rule on the reapportionment process because that process is not yet complete. A review of the long line of cases addressing the Equal Protection Clause in the context of reapportionment disputes demonstrates that the role of the Courts is to evaluate the propriety of final reapportionment plans, not works in progress. *See, e.g.*, Bartlett v. Strickland, *supra*

(reviewing a final North Carolina reapportionment plan that split one county into two districts); Shaw v. Reno, 509 U.S. 630 (1993) (reviewing a final North Carolina reapportionment plan for being discriminatory to minorities); Avery v. Midland County, 390 U.S. 474 (1968) (reviewing the disproportionate population distribution of a final reapportionment plan for Midland County, Texas).

Further, Plaintiffs have not alleged any facts or circumstances that would indicate any intention by LATFOR to draw districts with disparate population levels or that would violate the one-person one-vote principle. Rather, Plaintiffs allege that prisoners housed in upstate correctional facilities might be counted as residents of the communities in which they are physically located rather than the communities in which they resided prior to their incarceration. While those allegations may pertain to their fifth and sixth claims, they do not form the basis of an Equal Protection claim.

That is, counting prisoners in the county of their present residence rather than the county of their former residence would not result in an Equal Protection violation, provided that the voting districts across the State have equal or near-equal population densities, nor would such treatment automatically result in malapportioned districts. Prior to the passage of the Prisoner Reallocation Law, prisoners were routinely considered residents of the place in which they were incarcerated, and the districts that ensued from such treatment were never found to violate the Equal Protection principle of one-person one-vote (in each of the past two times that voting districts in New York were reapportioned, the Courts rejected challenges to the final reapportionment plans). Matter of Wolpoff v. Cuomo, *supra;* Rodriguez v. Pataki, *supra*; *see also* Kaplan v. County of Sullivan, 74 F.3d 398 (2d Cir.

1996) (Equal Protection claim could not be supported where plaintiff and prisoners resided in same district).

Finally, as to the fourth basis alleged by Plaintiffs, for the reasons discussed in Point I, *supra*, the Court should refrain from injecting itself into the ongoing state process and substituting itself for the duly enacted reapportionment process that has been in effect, and functioning properly, in New York for over 30 years.

For all of the foregoing reasons, Plaintiffs have failed to satisfy the requirements for stating an Equal Protection claim. Because Plaintiffs have failed to establish any legal basis upon which relief may be granted, Plaintiffs' first claim should be dismissed pursuant to F.R.C.P. 12(b)(6).

POINT V

PLAINTIFFS' COMPLAINT FAILS TO STATE A DUE PROCESS CLAIM

Due process requires notice and an opportunity to be heard. The Supreme Court has held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961). The Court has also held that "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In the Complaint, Plaintiffs' second claim is that their voting power has been diminished without due process of law. (Complaint ¶122.) This bare allegation is disproven

by the actions of LATFOR and refuted by Plaintiffs' own allegations in the Complaint.

As noted above, due process is a flexible doctrine, and the process employed should be commensurate, and appropriate, to the government function involved. Here, that function is the reapportionment of the State into voting districts of roughly equal population density (and with due consideration to other factors discussed above). There can be no question that LATFOR has provided, and will continue to provide, the process that is appropriate to carrying out this function. It has provided notice of its activities and multiple opportunities for Plaintiffs and all other interested persons to participate in the reapportionment process. That is all the process to which Plaintiffs are entitled.

In fact, Plaintiffs fully concede that LATFOR has provided, and continues to provide, due process. Plaintiffs acknowledge that: (1) LATFOR has conducted public hearings (Complaint ¶76); (2) LATFOR's process involves several steps, including at least two rounds of public hearings (Complaint ¶94); and (3) LATFOR has already held one round of public hearings (Complaint ¶96). Further, the totality of allegations in the Complaint demonstrate that Plaintiffs have received adequate notice of LATFOR's activities and actions inasmuch as they claim to know what LATFOR is doing and they bring this lawsuit to oppose the activities and actions taken thus far.

Plaintiffs also concede that their voting power has not yet been diminished in that they are bringing this lawsuit to preemptively prevent such an outcome. They acknowledge that LATFOR has not made any final decisions (Complaint ¶¶3, 8, 9 and 97), and that the State Legislature has not taken any final or binding action (Complaint ¶¶63 and 68). Indeed, they fully recognize that the reapportionment process is still underway. (Complaint ¶¶76, 83, and 94.)

Because Plaintiffs have received ample notice of LATFOR's actions and have been given the opportunity to provide input into the reapportionment process, and because there has been no final decision by LATFOR or the State Legislature that has impacted Plaintiffs' voting power in any way, Plaintiffs have failed to state a claim upon which any relief may be granted. Accordingly, Plaintiffs' second claim should be dismissed pursuant to F.R.C.P. 12(b)(6).

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed in its entirety.

COUCH WHITE, LLP

Dated: December 28, 2011
Albany, New York

/s/ Kevin M. Lang
Kevin M. Lang, Esq. (KL6431)
Counsel for Defendant Brian M. Kolb
540 Broadway
P.O. Box 22222
Albany, New York 12201
(518) 426-4600

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of December, 2011, a true and correct copy of the foregoing was served on the following counsel of record through the Court's CM/ECF system:

Richard Mancino, Esq.
Daniel Max Burstein, Esq.
Jeffrey Alan Williams, Esq.
WILLKIE FARR & GALLAGHER LLP
Counsel for Plaintiffs
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

Joan P. Gibbs, Esq.
CENTER FOR LAW AND SOCIAL JUSTICE
Counsel for Intervenor Plaintiff Donna Kaye Drayton
1150 Carroll Street
Brooklyn, New York 11225
(718)804-8833

Joshua Benjamin Pepper, Esq.
Stephen Kerwin, Esq.
OFFICE OF THE ATTORNEY GENERAL
Counsel for Defendants Andrew M. Cuomo, Eric T. Schneiderman, and Robert J. Duffy
120 Broadway
24th Floor
New York, New York 10271
(212) 416-8567

Michael A. Carvin, Esq.
JONES DAY
Counsel for Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939

Todd R. Geremia, Esq.
JONES DAY
Counsel for Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez
222 East 41st Street
New York, New York 10017-6702
(212) 326-3939

David L. Lewis, Esq.
LEWIS & FIORE
Counsel for Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

Leonard M. Kohen, Esq.
Counsel for Defendants John J. Sampson and Martin Malave Dilan
67 East 11th Street # 703
New York, New York 10003
(212) 254-8371

C. Daniel Chill, Esq.
GRAUBARD MILLER
Counsel for Defendants Sheldon Silver, John J. McEneny, and Roman Hedges
The Chrysler Building
405 Lexington Avenue
19th Floor
New York, New York 10174
(212) 818-8800

Timothy F. Hill, Esq.
Jonathan Halsby Sinnreich, Esq.
SINNREICH KOSAKOFF & MESSINA, LLP
Counsel for Defendant Robert Oaks
267 Carleton Avenue
Suite 301
Central Islip, New York 11722-4501
(631) 650-1200

/s/ Kevin M. Lang
Kevin M. Lang, Esq. (KL6431)

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