

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS et al

Case No. 1:11-cv-5632-DLI-RLM

Plaintiffs,

v.

ANDREW M. CUOMO et al

Defendants.

AFFIDAVIT OF
SENATOR MARTIN MALAVE DILAN
IN OPPOSITION TO
MOTION TO DISMISS

----- X
STATE OF NEW YORK
COUNTY OF KINGS ss.

MARTIN MALAVE DILAN, being duly sworn, deposes and says that:

1. I am a Member of the New York State Senate, in my fifth term of office, representing the 17th Senatorial District in Kings County. I am one of the defendants in this action.
2. The plaintiffs, claiming to be politically engaged New York State residents, brought this “impassé” lawsuit seeking *inter alia* court supervision of the pending state redistricting process. The Complaint alleges that the plaintiffs are suing several of my co-defendants and me as members of the Legislative Advisory Task Force on Demographic Research and Reapportionment (LATFOR) in our official capacities.
3. I submit this affidavit in opposition to the pending motions to dismiss by Defendants Assembly Members Brian M. Kolb and Robert Oaks (“Movants”).
4. The Movants’ contention that the Legislature still has the time to enact redistricting is disproven by history and no longer is a reasonable assessment. Given new recent

events, combined with ongoing existing ones that are unique to this redistricting cycle, it has become even clearer that the Legislature has *already* approached an impasse over redistricting.

5. LATFOR has fallen far behind its schedule and is unlikely to be able to enact state and federal legislative redistricting. For example, LATFOR recently announced that it may curtail the second round of 14 hearings as initially planned last November down to only eight or nine which will conclude at the end of February.

6. Where LATFOR has fallen furthest behind is in formulating congressional redistricting plans. Under the current timeframe that its Co-Chairs, Senator Michael F. Nozzolio and Assembly Member John McEneny, have offered, LATFOR will not be able to propose a congressional redistricting plan with enough time to avoid disruptions to the 2012 election calendar. The LATFOR Co-Chairs have said that they will not proceed with congressional redistricting until after passing the Senate and Assembly redistricting plans, which also has been the protocol for LATFOR for at least the past three cycles. This was the work plan LATFOR adopted for itself during the last two redistricting cycles, when in the end it never recommended any congressional redistricting plan to the Legislature.

7. Also, in a surprise development, the Senate Majority unexpectedly announced on January 5, 2012 that it intends to add a 63rd Senate seat. Its injecting new controversy over a previously settled question at the eleventh hour threatens still further delay that I could not have anticipated when I submitted my previous affidavit.

A. After Its Sudden Reversal and Agreement to Implement Prisoner Reallocation, LATFOR Is Behind Even Its Own Late Schedule

8. I had previously submitted an affidavit to this Court (ECF doc no. 46, dated December 28, 2011, opposing prior motion to dismiss), in which I described a culture of divisiveness, an inability to agree, and partisanship among LATFOR. The Senate Majority

avoided implementing the newly enacted prisoner reallocation law that it deemed politically disadvantageous to its retention of the Senate Majority. Although LATFOR had a legal duty under the prisoner reallocation law to reallocate prisoners to their home addresses for purposes of drawing district lines, Defendant Senator Michael F. Nozzolio, who represents the Senate Majority on LATFOR, had opted to ignore the new law and “run the clock,” resulting in a near year-long delay.

9. Over the second half of 2011, LATFOR held numerous statewide hearings as part of the redistricting process but had refused to amend the census data, as required, to reflect the prisoner reallocation. LATFOR amended the census data only in the past month. This work seems not to have commenced until July, an unnecessary delay of half a year, and the Senate Majority seems not to have participated until November.

10. As a result, the public will finally have access to the properly amended data only for the upcoming second round of scheduled hearings. These hearings are now especially critical towards obtaining “preclearance” of a redistricting plan from the U.S. Department of Justice (or a special federal district court in Washington, D.C.) under the Voting Rights Act §5, which requires public participation in the process of devising redistricting maps and alternatives.

11. The LATFOR Co-Chairs originally planned, as of a November 18, 2011 meeting, to hold the same number of 14 hearings in the second round, to follow the announcement of their initial redistricting proposals, as there had been in the first round. *See* LATFOR website, <http://www.latfor.state.ny.us/hearings/docs/20111118mtgtrans.pdf> (visited January 16, 2012) (transcript of November 18, 2011 meeting) at pp. 16, 22-23.

12. However, it was not until January 10, 2012, when LATFOR finally convened a meeting to adopt a hearing schedule. By then, the LATFOR Co-Chairs announced that there may

be only eight to nine meetings starting in late January and continuing to the end of February , but still have not announced a specific schedule. No transcript is yet available but *see* LATFOR website, <http://latfor.state.ny.us/video/> (visited January 15, 2012) (January 10, 2012 meeting, 11:48 mark (Senator Nozzolio) and 31:46 mark (Assembly Member McEneny)).

13. The LATFOR Co-Chairs are late even by their own standards. This is significant given the record of inaction and delay by LATFOR particularly in implementing the prisoner reallocation component of its mandate.

14. The difference between its past conduct and the present however is that, now, there would be no additional margin of time for failing to comply with the law without delaying the election calendar. The precarious timing in the current cycle also brings to mind the history of the prior three redistricting cycles which each involved delays and disruptions to the election calendars (described in prior Memorandum of Law, ECF doc. no. 45, pp. 3-7). To avoid any such disruption in the election calendar in this cycle will require immediate cooperation by all participants, including the Senate Majority conference, which would be a drastic reversal from its past and current behavior as has been described above.

B. Failure by LATFOR to Propose Congressional Redistricting Requires Court Intervention

15. LATFOR also still has not developed any schedule for congressional redistricting. This poses a prohibitive time crunch *even at the present time*. There is no debate that the 2010 census results require the loss of two congressional districts in New York. However, LATFOR has not released map proposals for congressional redistricting, despite being exclusively tasked by the Legislature with recommending congressional district lines in addition to state legislative districts.

16. The new congressional maps are not expected to be issued together with the state legislative redistricting maps before hearings begin later this month or by early February, but instead still after that time. The LATFOR Co-Chairs, Senator Nozzolio and Assembly Member McEneny, have both commented during hearings suggesting that LATFOR will not proceed with congressional redistricting until after passing the Senate and Assembly redistricting plans.¹

17. In each of the past two decades, the Legislature only *completed* congressional redistricting under pressure from the courts. This same path in the present cycle appears unavoidable now to finalize congressional districting.

18. At an August 4 hearing, Co-Chair McEneny gave his anticipated schedule: issuing proposed Senate and Assembly redistricting plans by October or November 2011 and then twelve public hearings. LATFOR is far behind the schedule that Co-Chair McEneny projected five months ago for legislative redistricting.

19. As it is now January, LATFOR has fallen behind even its Co-Chairs' timing. This timing, for the earliest scenario, will put the Legislature at an impasse in formulating the congressional redistricting. The LATFOR Co-Chairs have already said that the next round of hearings will last until the end of February, and that they will not proceed with congressional redistricting until after passing the Senate and Assembly redistricting plans. A LATFOR report in March places the Legislature in the position of not having any time to propose a congressional plan, convene any subsequent hearings, make modifications, schedule LATFOR approval followed by senate and assembly votes, submit to the Governor, and obtain approval from either

¹ See, e.g., Transcript of LATFOR Public Hearing on Congressional and State Legislative Redistricting, Albany, August 4, 2011, available on LATFOR website, <http://www.latfor.state.ny.us/hearings/docs/20110804hrgrtrans.pdf> (visited January 17, 2012), 7:21-24; Video of January 10, 2012 Hearing, available on LATFOR website, <http://latfor.state.ny.us/video/> (visited January 15, 2012), 12:32 (LATFOR will follow same process as in 2002 and 1992) Note that LATFOR produced only Senate and Assembly plans before holding its second round of hearings in 1992 and 2002.

the U.S. Department of Justice or special federal district court in Washington, D.C.

20. In both in 1992 and 2002, LATFOR made no congressional redistricting plan proposals to the Legislature.

21. In each of the past three decades the Legislature's action on congressional redistricting plans was so late, even under pressure from the courts, that the political calendar had to be revised to push back the start of petition circulation (this was done twice in 1982, after the first delay did not prove to be sufficient). The history in particular as to congressional redistricting, rather than providing the reassurance offered in the Movants' memoranda that judicial intervention will prove unnecessary, suggests that it is a question of when, not whether.

C. The Senate Republicans Move to Add a 63rd Senate District Shows Continued Partisanship and Discord that Will Prevent Agreement on Plan

22. On January 5, the Senate Majority attorney Michael Carvin issued an opinion letter asserting that the Senate Majority must expand the Senate by one seat. *See* LATFOR website, <http://www.latfor.state.ny.us/faqs/docs/2012senatesize.pdf> (visited January 15, 2012) (under "Frequently Asked Questions;" "What other requirements must the legislature follow?") As I understand, this position is untenable as a legal proposition, as will be briefly explained.² But *how* and *when* the Senate Majority delivered its announcement that it was adding a 63rd district says more about the Senate Majority's partisan agenda and disregard for transparency than the announcement itself: It posted its opinion letter on the inconspicuous "frequently asked questions" ("FAQs") section of the LATFOR website late on a Friday afternoon. *See id.*

² As I understand, the position for 63 districts is untenable because it depends upon an inconsistent application of the constitutional rule. A *consistent* application of the constitutional doctrine would yield 62 districts when applied to the 2010 census data. The Senate Majority thus applies one tabulation procedure to one pair of counties (Queens and Nassau) and a different tabulation procedure to a second pair of counties (Richmond and Suffolk). The reason that any such tabulation is needed is that Suffolk and Richmond comprised one senate district while Nassau and The Bronx were parts of other counties in 1894 when the formula in the State Constitution was developed to determine the size of the Senate, pursuant to the NYS Constitution, Article III, § 4.

23. Injecting new controversy at the eleventh hour again typifies the legislative leaders' inability to agree and their intractable partisan approach.

24. To avoid disruption in the election calendar in this cycle will require immediate cooperation and nonpartisanship by all participants, including the Senate Majority conference, which would be a major reversal from its past and current behavior as has been described above.

25. The prohibitively compressed timeline and intractable partisanship are impediments to a legislatively agreed upon redistricting plan and further indicative of an impasse, which thus should result in permitting this action to proceed.

Respectfully submitted,


SENATOR MARTIN MALAVE DILAN

Sworn to before me
This 17th of January, 2012


NOTARY PUBLIC

ALEJANDRA N. PAULINO
Notary Public, State of New York
No. 02PA6145014
Qualified in Albany County
Commission Expires April 24, 2014