COUCH WHITE
COUNSELORS AND ATTORNEYS AT LAW

Couch White, LLP
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222
(518) 426-4600

Kevin M. Lang
Partner

Direct Dial: (518) 320-3421
Telecopier: (518) 426-0376
email: klang@couchwhite.com

February 17, 2012

VIA ECF FILING AND OVERNIGHT COURIER

Hon. Gerard E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

Hon. Reena Raggi
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 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.*
Case No. 11-Civ.-5632 (DLI-GEL-RR)

Dear Judges Lynch, Raggi, and Irizarry:

Enclosed please find Defendant Brian M. Kolb's Memorandum of Law responding to the Court's Order to Show Cause as to whether a Special Master should be appointed to commence work on creating a new redistricting plan. For the reasons set forth therein, Defendant Kolb respectfully asserts that a Special Master should not be appointed at this time.

We thank the Court for its consideration of this response.

Respectfully submitted,

COUCH WHITE, LLP

Kevin M. Lang

Kevin M. Lang

KML/glm
Enclosure
cc: All Counsel (via ECF)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, *et al.*,

Plaintiffs,

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

DONNA KAYE DRAYTON, *et al.*,

Intervenor Plaintiffs,

Date of Service:
February 17, 2012

-v-

ANDREW M. CUOMO, as Governor of the State of New York, BRIAN M. KOLB, as Minority Leader of the Assembly of the State of New York, *et al.*,

Defendants.

MEMORANDUM OF LAW
OF DEFENDANT BRIAN M. KOLB, MINORITY LEADER
OF THE ASSEMBLY OF THE STATE OF NEW YORK
IN OPPOSITION TO THE APPOINTMENT OF A SPECIAL MASTER

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

February 17, 2012

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PRELIMINARY STATEMENT

The Three-Judge Court has directed the parties to show cause why it should not appoint a Special Master to begin the process of creating a new redistricting plan. Defendant Brian M. Kolb, the Minority Leader of the Assembly of the State of New York ("Defendant Kolb") respectfully submits that the appointment of a Special Master at this time is inappropriate and premature.

The appointment of a Special Master is one of the requests for relief sought by Plaintiffs in their Complaint (Complaint ¶¶ 117, 125, 133, 141, and request for relief ¶ 3). Thus, by the Order to Show Cause, the Court is essentially asking why Plaintiffs should not be given summary judgment on their Complaint. It is well established in our jurisprudence that a plaintiff is not entitled to relief if it does not present a valid basis for such relief. Here, Defendant Kolb and other Defendants have filed motions seeking the dismissal of the Complaint for lack of standing, justiciability, and ripeness. They have clearly demonstrated that there is no merit to arguments asserted in the Complaint, and that the Complaint is devoid of any legitimate factual basis for awarding them the relief they seek.

Defendants' motions, which are to be decided by Judge Irizarry, have not yet been adjudicated. Before any consideration is given to granting Plaintiffs relief under their Complaint, the Court must first address the threshold issue of whether there is a case or controversy before it. If the determination is made that there is a case or controversy, the Court should first allow Defendant Kolb, and the other Defendants, to join issue and respond to the merits of the Complaint (Defendant Kolb respectfully notes that no Defendant in this action has filed a responsive pleading; *see* Order of Court granting Motion for Extension of Time to Answer for Defendants Cuomo and Duffy, Dkt. 49; Order of Court granting Motion for extension of Time to Answer for Defendants Sampson and Dilan, Dkt. 50). Accordingly, the

issue of appointing a Special Master is not properly before the Court at this time, and the Court should refrain from granting relief under the Complaint until the motions to dismiss are decided.

Further, the case law on redistricting makes clear that the courts should intercede only at the last minute, and that they should not substitute their decisions for those of the state legislatures. Indeed, the United States Supreme Court reiterated this latter principle less than a month ago in *Perry v. Perez*, 565 U.S. ___, 132 S. Ct. 934 (2012). As explained herein and in a Declaration submitted concurrently by Defendant Robert Oaks ("Oaks Declaration" or "Oaks Decl."), the Assembly Minority's representative on the Task Force on Demographic Research and Reapportionment ("LATFOR"), substantial affirmative steps are being taken by LATFOR, with corollary actions expected to be taken in the near future by the New York State Legislature and Governor, to establish new Assembly, Senate, and Congressional districts and enact corresponding redistricting legislation into law. This process is expected to be completed in the coming weeks, well in time to complete all steps associated with the 2012 elections. These facts demonstrate that there is no impasse and no reason for the Court to intercede or appoint a Special Master at this time.

Plaintiffs seek to fix what is not broken, utilizing the federal courts to prematurely usurp the statutory authority and mandate of LATFOR and interfere with the well-recognized constitutional right of New York's elected officials to establish the State's voting districts. For these reasons, Defendant Kolb respectfully submits that the Court should not take action with respect to the appointment of a Special Master at this time.

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 utilizes and analyzes the results of the decennial censuses and other information to develop fair and appropriate districts for the State Assembly and Senate and for New York's Congressional delegation. The districts that LATFOR develops are subjected to extensive public scrutiny and are then presented to the New York State Legislature and Governor 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 the Civil Rights Division of the United States Department of Justice 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 Voting Rights Act, 42 U.S.C. §1973c.

LATFOR's prior reapportionment plans were adopted in time to adequately complete all steps of the election process, and other than conjecture and speculation, there are no facts before the Court that would demonstrate a different outcome here. In 1992, for example, reapportionment plans were signed into law approximately four months before the primaries.

See Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681 (1992). In 2002, the reapportionment plans were adopted within a similar time frame. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004). Currently, the primary elections in 2012 are statutorily set for September 2012, but the Congressional primary date has been preliminarily moved to June 2012 by the February 9, 2012 Order of United States District Court Judge Gary L. Sharpe of the United States District Court for the Northern District of New York ("Sharpe Order"). *United States v. State of New York*, No. 10-v-01214, Dkt. No. 64 (Feb. 9, 2012). It must be noted that the Sharpe Order does not strictly apply to or refer to state legislative primary deadlines and expressly states that New York may select a different primary date or a different modified election calendar so long as all of the dates are compliant with the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). *Id.* at 5-6.

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. As described in the Oaks Declaration, LATFOR has hosted numerous public hearings across the State to solicit comments and concerns from interested persons,[1] has released amended population data in compliance with New York's Prisoner Allocation Law, and has released proposed district maps for the Assembly and Senate, along with supporting data. (Oaks Decl., ¶¶ 3-5) It is the understanding and belief of Defendant Kolb that the release of maps delineating the Congressional districts is imminent.[2] LATFOR's

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[1] While the Oaks Declaration focuses on LATFOR's recent activities, LATFOR began conducting public hearings on reapportionment on July 19, 2011 in Syracuse.

[2] Defendant Dean Skelos, Majority Leader of the New York State Senate, recently publicly discussed the Legislature's plans to pass the redistricting legislation by March 1, 2012. *See* "NY redistricting likely headed to federal 'master'", North Country Public Radio, February

plan, once finalized, will be sent to the New York State Legislature for its consideration and approval. LATFOR has indicated that it fully expects its reapportionment plan to be in effect for the 2012 election.

On November 17, 2011, six individuals commenced this lawsuit based on speculation, conjecture, rumor, and innuendo. The suit is almost entirely devoid of facts and concrete factual support for its claims. Many of the allegations and claims pertain to LATFOR's treatment of prisoners and its 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). Shortly after the filing of the pending motions to dismiss, LATFOR issued amended population data in compliance with the Prisoner Reallocation Law. (Oaks Decl., ¶ 3)

As a result of LATFOR's actions, Plaintiffs withdrew two of the six counts in their Complaint. (Notice of Voluntary Dismissal by Plaintiffs, Dkt. No. 66; Order Granting Dismissal of Counts V and VI of the Complaint, Dkt. No. 67) These actions demonstrate the lack of ripeness and justiciability of the Complaint, as argued in Defendants' motions to dismiss. Moreover, there remains an open question as to whether Plaintiffs have standing to bring their lawsuit.

16, 2012, http://www.northcountrypublicradio.org/news/story/19323/20120216/ny-redistricting-likely-headed-to-federal-master (Skelos quoted that he "hope[s] to pass the bill on March 1st.").

ARGUMENT

APPOINTMENT OF A SPECIAL MASTER IS NOT APPROPRIATE AT THIS TIME

POINT I

THRESHOLD ISSUES MUST FIRST BE DECIDED

As noted above, Defendant Kolb and other Defendants have moved to dismiss the Complaint for lack of standing, justiciability and ripeness, and such motions remain undecided. (*See* Motion to Dismiss by Defendant Kolb, dated December 28, 2011, Dkt. No. 41; Motion to Dismiss by Defendants Hedges, Lopez, McEneny, Nozzolio, Silver, and Skelos, dated December 22, 2011, Dkt. No. 22; Motion to Dismiss by Defendant Oaks dated December 28, 2011, Dkt. No. 42.) Given the pendency of these motions, issue has not been joined by any of the Defendants in this action because none have filed responsive pleadings.

Until the Court determines whether there is an actual case or controversy before it, and the jurisdiction of the Court validly exists, it would be wholly inappropriate for the Court to proceed with consideration of the merits of Plaintiffs' Complaint. While Defendant Kolb appreciates the Court's concern about the issues raised by Plaintiffs, the Court should not treat the speculative worst-case scenario propounded by Plaintiffs as fact, nor should the Court assign any material weight to Plaintiffs' factually unsupported allegations. Indeed, the absence of a legitimate factual foundation or legal basis for the Complaint is demonstrated by Plaintiffs' voluntary dismissal of two counts of their Complaint.

The Order to Show Cause directed the parties to demonstrate "why the three-judge court, at this time, should not appoint a Special Master to begin the process of creating a new redistricting plan" (Order to Show Cause, issued February 15, 2012). The relief sought by

Plaintiffs included "an order appointing an independent Special Master to propose new State Senate, Assembly and House of Representatives district lines in conformity with the 2010 census, applicable state and federal law..." (Complaint, request for relief ¶ 3). Thus, the Order to Show Cause is asking Defendants to demonstrate why Plaintiffs should not be granted summary judgment on this issue. While the Court must accept as true the factual allegations in a complaint when addressing a motion for summary judgment, it is black letter law that the Court cannot accept as true and rely solely on the allegations in a complaint as the basis for granting summary judgment. *See, e.g., August v. Offices Unlimited, Inc.*, 981 F.2d 576, 580 (1st Cir. 1992) ("Mere allegations, or conjecture unsupported in the record, are insufficient to raise a genuine issue of material fact"). Particularly here, where none of the Defendants have answered the Complaint, the Court should not grant summary judgment to Plaintiffs based solely on the allegations in their Complaint.

For the foregoing reasons, the issue of whether Plaintiffs are entitled to the relief stated in their Complaint is not properly before the Court and should not be addressed at this time.

POINT II

THE APPOINTMENT OF A SPECIAL MASTER IS PREMATURE

The Supreme Court has held that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions..." *Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475 (1995). It is well settled and "abundantly clear that legislative reapportionment is a matter primarily for a state's legislative body, and that a federal court may interfere only when that body fails timely to validly reapportion, after having had an adequate opportunity to do so." *The Fund for Accurate and Informed Representation, Inc. v. Weprin*, 796

F. Supp. 662, 666 (N.D.N.Y. 1992); see also *Scott v. Germano*, 381 U.S. 407 (1965) (holding 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, and intervention should only occur if the states fail to complete the task, or fail to make timely progress). This is because reapportionment is a function that is "primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court" *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (citations omitted).

A. The State Has Not Failed To Timely Reapportion

The "District Court's Request to Chief Judge of the Second Circuit Court of Appeals for the Appointment of a Three-Judge Panel Pursuant to 28 U.S.C. §2284(b)" ("Designation Order") states that Defendants' pending motions to dismiss simply rely on the history of past redistricting legislation and "point to no affirmative steps being taken by the New York State Legislature at this time or that will be taken in the near future to pass redistricting legislation." (Designation Order at 5.) While at the time the motions were prepared and submitted, they pointed to only some affirmative steps that had been taken (*e.g.*, public hearings to solicit public input on the development of the new district maps), there have been substantial developments since that time, and it is inappropriate for the Court to ignore those steps in deciding whether to proceed with the appointment of a Special Master.

In New York, the statutory process for establishing the boundaries of State Assembly, State Senate, and Congressional voting districts has been the province of LATFOR for more than three decades. The process enacted by the New York State Legislature, as explained in the Oaks Declaration (Oaks Decl., ¶¶ 2-6) and noted recently by Senator Skelos (*see*

footnote 1, *supra*), is proceeding in an expeditious manner calculated to complete the redistricting process in time to satisfy all procedural steps associated with the 2012 elections.

Specifically, discernible and concrete progress has been made in that LATFOR has released amended population data in compliance with the Prisoner Reallocation Law, a primary focus of the Complaint. (Oaks Decl., ¶ 3) This data release has impacted this action by resulting in Plaintiffs' withdrawal of two of their counts and relegating the Complaint (which was premised in large part on those now-moot allegations of violation of the Prisoner Reallocation Law) to an impasse suit predicated on assumptions disconnected from the facts. As shown by the Oaks Declaration, there is no demonstrable impasse. New York – via LATFOR – has complied with the Prisoner Reallocation Law, has issued new district maps for public review and comment, has conducted public hearings across the State to solicit public comment on the proposed districts, and expects to conclude the redistricting process within the next few weeks. (Oaks Decl., ¶¶ 3-5)

The Designation Order appears to rely on factors: (i) Plaintiffs' unfounded allegations and entreaties; and (ii) the Sharpe Order's timeline with respect to Congressional primary election petitioning. (Designation Order at 3-4) The Sharpe Order should not be construed to strictly hold any primaries (state or federal) to the calendar set forth therein. Judge Sharpe specifically stated that his decision "in no way precludes New York from reconciling their differences and selecting a different primary date, or a different modified election calendar, all of which is UOCAVA compliant." (Sharpe Order at 5-6) Accordingly, the Sharpe Order does not constitute a justification for appointing a Special Master at this time.

B. The State's Continuing Efforts To Reapportion Are Entitled To Deference

Deference to a state's redistricting plan was recently examined by the Supreme Court in *Perry v. Perez*, *supra*. There, the Supreme Court recognized that "experience has shown the difficulty of defining neutral legal principals in this area, for redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment. [citations omitted]." *Id.*, slip op. at 4. Moreover, if a district court is called upon to create such a plan,

> a district court should take guidance from the State's recently enacted plan in drafting an interim plan. That plan reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth. This Court has observed before that "when faced with the necessity of drawing district lines by judicial order, a court, as a rule, should be guided by the legislative policies underlying" a state plan—even one that was itself unenforceable—"to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."

Id.

The cases cited in the Designation Order do not justify the appointment of a Special Master right now. Indeed, one of those cases stands for the proposition that a Special Master is not yet warranted and federal intervention in the redistricting process should occur only as an interim and last resort. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004). In *Rodriguez,* LATFOR released its 2002 preliminary redistricting proposals for the State Assembly and Senate in February 2002. *Id.* at 355-56. Two months later, LATFOR adopted the final proposals. *Id.* at 356-357. Two days after LATFOR adopted the proposals, the Senate and Assembly introduced the proposals as legislation and passed the bills. The Governor signed the plans into law on or about April 22, 2002. *Id.* at 356-358.

Importantly, and in contrast to the present situation, because the Legislature's actions resulted in enacted plans for only the state legislative bodies, the federal court intervened and issued an Order appointing a Special Master only to determine a redistricting plan for the Congressional districts. *Id.* In May 2002, the Special Master issued his redistricting plan, and around the same time, in a conjoining state action, a state-court appointed Referee issued a separate redistricting plan for the Congressional districts. *Id.* The federal court was clear that it would withdraw its suggested plans if the Legislature were to enact, and obtain pre-clearance for, the Legislature's redistricting plans. *Id.* at 357-359. Subsequently, all three plans (Congressional, Assembly and Senate) were enacted by the Legislature and precleared by the Department of Justice ("DOJ"). *Id.* Upon the issuance of the preclearance by the DOJ, the federal court withdrew the Special Master's redistricting plan. *Id.*

The Designation Order also referred to the cases *Diaz v. Silver*, 976 F. Supp. 96 (E.D.N.Y. 1997) and *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) as support for the need for the Court to intercede now. It is important to note that both of those cases also pertained solely to the issue of the development of new Congressional districts (*see PRLDEF v. Gantt, supra*, 796 F. Supp. at 686 ["the Special Master's plan shall operate as the plan for congressional districts for the State of New York for the 1992 elections"]). Neither provides any support for the Court interceding at this time with respect to the reapportionment of either the State Assembly or State Senate districts.

Further, the underlying lawsuits related to the 1992 redistricting were not brought until March 26, 1992 and March 31, 1992. *Id.* at 684. There, the Special Master was able to complete his work and develop proposed districts in two weeks. *Id.* at 685. Technology has changed dramatically since 1992, and it is now possible to develop new maps almost

instantaneously. Therefore, there is no immediacy to the need to appoint a Special Master, and the Court should defer, for now, to LATFOR and the State Legislature to complete their redistricting efforts.

The procedural history discussed in *Rodriguez* and *PRLDEF* supports this assertion and demonstrates the federal court's deference to the state legislature for apportionment of redistricting. Although there was federal court intervention in both cases, the "eleventh hour" did not occur until April 2002 and May 1992, respectively (*i.e.*, when a Special Master was appointed). Here, LATFOR, after receiving extensive public comment, is on the eve of releasing its final revised maps for the state legislative districts (Oaks Decl., ¶¶ 3-6), and the release of the maps for the Congressional districts is also anticipated to occur shortly. It is premature to appoint a Special Master when the state process is proceeding and there is still plenty of time before the "eleventh hour" is reached.

CONCLUSION

For the foregoing reasons, a Special Master should not be appointed at this time.

COUCH WHITE, LLP

Dated: February 17, 2012
Albany, New York

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

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of February, 2012, 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 Plaintiffs Donna Kaye Drayton, Edwin Ellis, Aida Forrest, Gene A. Johnson, Joy Woolley and Sheila Wright
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

John R. Cuti, Esq.
Julie Ehrlich, Esq.
Eric Jason Hecker, Esq.
Alexander G.P. Goldenberg, Esq.
CUTI HECKER WANG LLP
Counsel for Martin Malave Dilan,
305 Broadway
Suite 607
New York, New York
(212) 763-5000

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

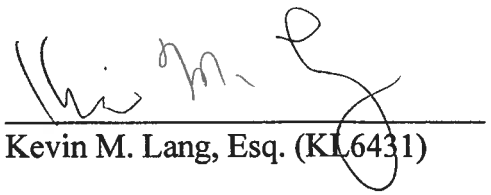
Jeffrey Dean Vanacore, Esq.
ARENT FOX KINTER PLOTKIN & KAHN
Counsel for Intervenor-Plaintiffs Scott Auster, Carlotta Bishop, Anthony Hoffman, Everet Mills, Carol Rinzler, Josephine Rodriguez, Linda Rose, George Stamatiades, and Kim Thompson-Werekoh
1765 Broadway
New York, New York 10019
(212) 484-3900

Grace Yang, Esq.
JONES DAY
Counsel for Intervenor-Plaintiffs Shing Chor Chung, Jung Ho Hong, Linda Lee, and Julia Yang
222 E. 41st Street
New York, New York 10017
(212) 326-3939

Jackson Chin, Esq.
Jose Luis Perez, Esq.
LATINOJUSTICE PRLDEF
Counsel for Intervenor Plaintiffs Nick Chavarria, Graciela Heymann, Sandra Martinez, Juan Ramos, Edwin Roldan, and Manolin Tirado
99 Hudson Street
14th Floor
New York, New York 10013
(212) 219-3360

James Herschlein, Esq.
Noah Barnett Peters, Esq.
KAYE SCHOLER LLP
Counsel for Intervenor-Plaintiffs Shing Chor Chung, Jung Ho Hong, Linda Lee, and Julia Yang
425 Park Avenue
New York, New York 10022
(212) 836-8000

Kenneth Kimerling, Esq.
Glenn Duque Magpantay, Esq.
ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND
Counsel for Intervenor-Plaintiffs Shing Chor Chung, Jung Ho Hong, Linda Lee, and Julia Yang
99 Hudson Street
New York, New York 10013
(212) 966-5932



Kevin M. Lang, Esq. (KL6431)

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