UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, et al.,

Plaintiffs,

v.

ANDREW M. CUOMO, et al.,

Defendants.

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Index No. 11-CV-5632 (DLI)(RLM)

Date of Service: January 17, 2012

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS KOLB'S AND OAKS'S MOTIONS TO DISMISS**

WILLKIE FARR & GALLAGHER LLP

Richard Mancino
Daniel M. Burstein
Jeffrey A. Williams
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
rmancino@willkie.com
dburstein@willkie.com
jwilliams@willkie.com

*Attorneys for Plaintiffs*

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Plaintiffs Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine, Warren Schreiber, and Weyman A. Carey respectfully submit this memorandum in opposition to the motions to dismiss Plaintiffs' Complaint filed by Defendants Brian M. Kolb and Robert Oaks ("Movants").[1]

## PRELIMINARY STATEMENT

In their motion to dismiss, Movants argue against established Supreme Court precedent, claiming that voters residing in overpopulated districts due to a failure of timely redistricting do not have standing to challenge the constitutionality of such districts, and they argue against both history and logic that redistricting cases do not become ripe until after a final redistricting plan has been enacted by the State Legislature and Governor. If that were the law, courts would be deprived of jurisdiction in redistricting cases altogether, given that the political process frequently results in no redistricting plan whatsoever absent court intervention. But that is not the law, as the lengthy line of cases known as "impasse suits" demonstrates: when the political process fails to produce a redistricting plan in a timely manner, courts can and must intervene. This is one of those circumstances.

Plaintiffs' well-pleaded allegations—which on this motion the Court will accept as true—demonstrate that New York's electoral and redistricting processes in 2012 are facing unprecedented uncertainty, rendering this action especially timely. New York's 2012 primary election will not take place at its usual time in September. Rather, it will almost certainly take place in June or August 2012. At the same time, the inevitability of a stalemate in the political redistricting process is far clearer this redistricting cycle than it has been in any other cycle in recent history. Governor Cuomo has repeatedly promised that he will veto any redistricting plan

[1] Defendants Kolb and Oaks separately moved to dismiss. Defendant Kolb's motion is docket #41. Defendant Oaks's motion, at docket #42, expressly incorporates the arguments made in Defendant Kolb's memorandum of law submitted in support of his motion. In this opposition, Plaintiffs respond to both motions. Citations to "Mov. Br." are to Defendant Kolb's memorandum of law.

that is the product of a process initiated by the New York State Legislative Task Force on Demographic Research and Redistricting ("LATFOR"), while the only redistricting process underway is that very LATFOR process which the Governor has denounced. There is no reason to believe that the Governor will not keep his promise, and there is no indication that any independent process that would receive the Governor's blessing will occur in a timely fashion. Thus, New York is facing an uncertain but certainly upcoming primary date, along with a clearly defined impasse that has no foreseeable resolution. The timing is just right for this action.

In addition, these are the proper Plaintiffs to bring this suit. Plaintiffs live in overpopulated districts that have not been redrawn following the latest census. The Supreme Court has plainly found that individuals in this exact same situation have standing to bring redistricting cases. Moreover, Plaintiffs' Complaint pleads specific injuries to Plaintiffs that are extant and ongoing, not the speculative "some day injuries" argued by Movants.

This action follows a long line of redistricting impasse lawsuits whereby eligible voters who live in overpopulated districts bring suit several months before a primary election, alleging constitutional violations based on the state's failure to redraw its decade-old district lines in light of the latest census. In such circumstances, courts hold that the suits are ripe, that the plaintiffs have standing, and that a cause of action exists for deprivation of those plaintiffs' constitutional rights. These Defendants' motions should therefore be denied.

## FACTUAL BACKGROUND

### A. Unprecedented Circumstances Surround the Current Action.

This action arises at a time of historical unpredictability in New York's political process. Federal law requires that New York's 2012 primary election be moved from September to an earlier date that has not yet been set, but which could be in June—three months earlier than past primaries. The Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2318 (the "MOVE Act"), "requires states to provide military and overseas voters a

minimum amount of time to apply for, receive, and return absentee ballots." (Compl. ¶ 77.) "New York's usual September primary date leaves too little time between the primary and general elections to comply with the MOVE Act." (*Id.*) As alleged in the Complaint and acknowledged by Movants, the primary election is likely to occur in June or August 2012. (Compl. ¶ 78; Mov. Br. at 3.) Judge Sharpe of the United States District Court for the Northern District of New York is expected to set a date for the primary election very soon.

In addition, the sitting Governor, whose approval is required to pass a redistricting plan (absent a highly unlikely veto override), has taken the unequivocal step of promising to veto any redistricting plan passed under the current, non-independent redistricting process. On February 17, 2011, Governor Andrew Cuomo's office released a statement acknowledging that "Governor Cuomo has pledged that if an agreement on permanent reform of the redistricting process is not reached, he will veto the redistricting plans passed by the Legislature if those plans have been developed under the existing process and prioritize partisan and incumbent interests over the voters' interests." (Compl. ¶ 71.) On July 6, 2011, Governor Cuomo reiterated his pledge, stating, "I will veto a plan that is not independent or a plan that's partisan . . . That's what I've said all along. That's what the people of the state of New York overwhelmingly support." (Compl. ¶ 72.) He further clarified that LATFOR is unable to produce non-partisan district lines. (*Id.*) And on September 30, 2011, when asked if he would veto the redistricting boundaries being drafted by LATFOR, Governor Cuomo responded "yes," and added that he:

> believe[s] the process is not independent, and I don't see how a non-independent process can come up with an independent product. I therefore would veto a bill that was not an independent product. It would then go to the courts. Period. And that's what I have said, and that's what I'm sticking by.

(Compl. ¶ 73.)

Just this month, Governor Cuomo told the State Legislature that "it is imperative that an independent redistricting process produce new district maps for New York State after

each census and I would veto any lines not developed through such a process." (Gov. Andrew M. Cuomo, Annual Message to the Members of the Legislature of the State of New York 28-29 (Jan. 4, 2012), http://www.governor.ny.gov/assets/documents/Building-a-New-New-York-Book.pdf.) The force and consistency of Governor Cuomo's message demonstrate that he fully intends to follow through with his promise.

### B. Despite Nine Months Having Passed Since Release of the 2010 Census Data, the Redistricting Process Is Still in Its Infancy.

The results of the 2010 federal census were released to the New York Legislature and to the general public ten months ago, on March 24, 2011. (Compl. ¶ 59.) Since March, the only progress that New York has made in its redistricting process has been that LATFOR has held its first round of public hearings. (Compl. ¶ 96.) LATFOR has not released preliminary district maps nor held hearings to solicit comments on its preliminary maps nor adopted final maps nor transmitted those maps to the Legislature for its consideration. (*See* Compl. ¶¶ 94-97.) For its part, the Legislature has not taken up consideration of any proposed redistricting plans nor made any public statements that would suggest any impending resolution of the stalemate caused by the Governor's promise to veto any LATFOR-passed plans.

### C. Because of the Advanced Primary Date, Other Political Deadlines Required by the New York Political Calendar Are Also Advanced, and New Districts Must Be in Place Before Those New Deadlines.

Legislative leaders and election officials have asked Judge Sharpe in the Northern District of New York to move New York's primary election to June 26, 2012. (*See* Burstein Decl. Ex. D, at 1, Dec. 29, 2011, ECF No. 44-4; Burstein Decl. Ex. G, at 1, Dec. 29, 2011, ECF No. 44-7.) Moving the date of the primary will have a significant domino effect on New York's Political Calendar. It would require moving up the dates of a number of events which, under New York election law, are pegged to the date of the primary. For a June 26 primary election, the Political Calendar starts on March 6, 2012, which is the last day for State and County party

chairs to file statements of party positions for the primary elections. N.Y. Elec. Law § 2-120(1) (McKinney 2011) (112 days before the primary). The next date on the Political Calendar would be March 20, 2012, the first day for candidates to collect signatures for their designating petitions. N.Y. Elec. Law § 6-134(4) (McKinney 2011) (98 days before primary). Subsequent deadlines pepper the Political Calendar in the months leading up to the primary election. *E.g.*, N.Y. Elec. Law §§ 4-110, 5-210(3), 6-120(3), 6-158(1), 6-158(2) (McKinney 2011).

Advancing the primary date will not just compress the Political Calendar, but will also advance preparatory *political* activities such as candidate fundraising and expenditures and citizen engagement with candidates through meetings and forums. (Compl. ¶¶ 81, 82.) In the 2010 election cycle, candidates began expenditures as early as fourteen months before the primary. (Compl. ¶ 81.) Similarly, citizens and political parties began holding forums and candidates interviews five to six months in advance of the 2010 primary election. (Compl. ¶ 82.)

Finally, New York laws affecting voting rights, including redistricting laws, require "preclearance" under the Voting Rights Act of 1965. (Compl. ¶ 99.) The Voting Rights Act gives the United States Department of Justice 60 days from a preclearance application to reach a decision, and it often uses the entire 60-day period. (Compl. ¶ 101.) Thus, in order for New York to pass a final redistricting plan in time for that plan to be precleared before the March 2012 start of the Political Calendar for a June 2012 primary, the Legislature and Governor would likely have to pass final redistricting legislation no later than this month, January 2012.

**D. Past Rounds of Redistricting in New York Required Court Intervention.**

Although Movants criticize Plaintiffs for allegedly basing their lawsuit on "speculation," the primary basis for Movants' argument that Plaintiffs' case is untimely appears to be an "indication," via the "FAQ" section of LATFOR's website, that LATFOR "expects" its reapportionment plan to be in place for the 2012 elections. (Mov. Br. at 3.) In truth, the only speculation here is Movants' "indication" which, apart from going beyond the pleadings, is not

grounded in a realistic assessment of how redistricting plans have proceeded in the past. Movants' suggestion that the redistricting process has proceeded smoothly in past cycles, with LATFOR adopting redistricting plans and the Legislature and Governor enacting those plans into law, all in a timely fashion, is severely undercut by New York's actual redistricting history.

In 1992, LATFOR failed to adopt a congressional redistricting plan at all, and the Legislature did not adopt a congressional redistricting plan until ***after*** lawsuits were filed in both state and federal court, ***after*** the state court appointed three referees and the federal court appointed a Special Master to draft two separate congressional redistricting plans, ***after*** the state court referees and the federal court Special Master completed their different plans, ***after*** the state court adopted the referees' plan and the federal court was preparing to adopt the Special Master's plan, and ***after*** the beginning of the candidate petitioning process had to be postponed due to legislative inaction and the need for preclearance under the Voting Rights Act. *Diaz v. Silver*, 978 F. Supp. 96, 99 (E.D.N.Y. 1997); *Puerto Rican Legal Def. & Educ. Fund, Inc. ("PRLDEF") v. Gantt*, 796 F. Supp. 681, 684-86 (E.D.N.Y. 1992). The plan ultimately adopted by the Legislature was the one created by the state court referees, apparently under threat that the federal court would impose the Special Master's plan. *Diaz*, 978 F. Supp. at 99; *PRLDEF*, 796 F. Supp. at 685-86. The federal court subsequently adopted the Special Master's plan anyway as a contingency in case the plan passed by the Legislature and signed by the Governor did not obtain preclearance. *PRLDEF*, 796 F. Supp. at 684.

Similarly, in 2002, LATFOR failed to adopt a congressional redistricting plan, and the Legislature did not adopt a congressional redistricting plan until ***after*** lawsuits were filed in both state and federal court, ***after*** the state court appointed a referee and the federal court appointed a Special Master to draft two separate congressional redistricting plans, ***after*** the state court referee and the federal court Special Master completed their different plans, ***after*** the federal court adopted the Special Master's plan, and apparently ***after*** the beginning of the

candidate petitioning process had to be postponed due to legislative inaction and the need for preclearance under the Voting Rights Act. *Rodriguez v. Pataki ("Rodriguez II")*, 308 F. Supp. 2d 346, 355-58 (S.D.N.Y. 2004) (three-judge court); *Allen v. Pataki*, Index No. 101712/02 (Burstein Decl. Ex. E, Dec. 29, 2011, ECF No. 44-5; Burstein Decl. Ex. F., Dec. 29, 2011, ECF No. 44-6); N.Y. Elec. Law § 6-134(4). The timing of the Legislature's ultimate passage of a congressional redistricting plan shortly after the federal court's adoption of the Special Master's plan suggests that this passage occurred only in the face of pressure from the court. *See Rodriguez II*, 308 F. Supp. 2d at 357-58.

These facts demonstrate that in past redistricting cycles, courts have taken notice of legislative inaction and drawn their own redistricting plans when necessary to avoid harm to voters, candidates, and the electoral process, even when legislators still appear to be working toward a resolution. This Court should likewise intervene promptly in light of the urgency of the current redistricting cycle, the compressed Political Calendar that will result from the moving-up of the primary date, and the inevitability of a political impasse on redistricting.

## ARGUMENT

When a complaint is challenged under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim, as Movants have done here, a court must accept the factual allegations made in the complaint as true, drawing reasonable inferences in favor of the plaintiff. *See Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003); *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). In deciding such motions, courts may rely upon matters of public record, including publicly filed court documents in other lawsuits, prior opinions and orders in other lawsuits, and the facts set forth in those opinions and orders. *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006); *Quitoriano v. Raff & Becker, LLP*, 675 F. Supp. 2d 444, 446 (S.D.N.Y. 2009); *Yalincak v.*

*Barack Ferrazzano Kirschbaum Perlman & Nagelberg LLP*, No. 3:07CV00311(AVC), 2007 WL 2101033, at *1 (D. Conn. July 17, 2007).

## I. UNDER ESTABLISHED SUPREME COURT PRECEDENT, PLAINTIFFS HAVE STANDING TO CHALLENGE NEW YORK'S FAILURE TO TIMELY REDRAW DISTRICT LINES.

Movants argue that Plaintiffs lack standing to bring this case because they assert only speculative or "some day" intentions to engage in a harmed interest and therefore do not meet the "injury in fact" prong of the standing analysis. (Mov. Br. at 8-10.) Tellingly, to support this argument, Movants cite only cases outside the redistricting context, while at the same time ignoring Supreme Court precedent holding that plaintiffs in redistricting cases have standing to bring the exact claims asserted in this Complaint. Based on this precedent, Plaintiffs have standing to bring this action for three reasons: their interest in maintaining the effectiveness of their votes against dilution, their desire to communicate with and contribute money to their local candidates who have not yet been identified, and, for Plaintiff Howard Leib, his need to know where his district lies in order to decide whether to run for public office.

### A. Plaintiffs Have an Interest in Maintaining the Effectiveness of Their Votes.

The United States Supreme Court held in *Baker v. Carr* that Tennessee voters had standing in a suit alleging that, as a result of the state's failure to redraw its district lines, there was a disproportionate representation among districts disfavoring the counties in which the plaintiffs reside because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" 369 U.S. 186, 206-08 (1962); *see also Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 862 (E.D. Wisc. 2001) (holding that plaintiffs have met the "relatively modest burden" of establishing standing in voting rights cases through their allegation that "as the law stands today, their voting rights will be diluted in the 2002 congressional elections"). Plaintiffs' Complaint alleges precisely the same injury—that as a result of New York's failure to redraw its legislative districts, the districts in which they reside lack population equality, diluting

their voting power in violation of their constitutional rights. (Compl. ¶¶ 108, 109, 120, 122.) The Supreme Court separately found that plaintiffs have standing when their ability to elect a full slate of congressional representatives is at risk, which "undoubtedly satisfied the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999). Again, the Complaint specifically alleges that Plaintiffs risk losing their representation in Congress. (Compl. ¶¶ 65-66, 128-129.)

There is no cognizable distinction between Plaintiffs here and those whose standing was upheld in *Baker v. Carr*. But rather than address how *Baker v. Carr* undercuts their attack on Plaintiffs' standing, Movants instead rely on standing decisions that do not arise in the redistricting context and are factually inapposite. In *Lujan v. Defenders of Wildlife*, the plaintiffs challenged a rule created pursuant to the Endangered Species Act, arguing that it would lead to an increase in the rate of extinction of endangered species of animals around the world, thus precluding plaintiffs from making future trips to Egypt to study crocodiles, or to Sri Lanka to view leopards. 504 U.S. 555, 562 (1992). In this context, the Supreme Court held that, although animals might be injured by the rule, these plaintiffs were not among those harmed. *Id.* at 562-63. Movant's reliance on *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), is similarly unavailing. There, the plaintiffs alleged that members of Congress were violating the Constitution's Incompatibility Clause by serving as reserve members of the military while in Congress, which injured them as citizens of the United States. *Id.* 210-11. The Supreme Court held that plaintiffs lacked standing because nonobservance of the Incompatibility Clause, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." *Id.* at 217. Finally, in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990), the Court held that a recently enacted federal statute made it perfectly clear that the plaintiff bank could not obtain the relief it requested, thus mooting the dispute and depriving the Court of a case or controversy to decide. The

"hypothetical state of facts" quoted by Movants (Mov. Br. at 8) referred to the Court's determination not to return to a non-existent world where the subject statute had not been passed. *Lewis*, 494 U.S. at 477.

Here, in contrast to the plaintiffs in the cases Movants cite, the Plaintiffs are the ones injured by New York's failure to redistrict. The Plaintiffs are part of a specific class of individuals who live in overpopulated districts and are not suing as just general citizens, and their claims have not been mooted by subsequent legislative action. Consistent with the Supreme Court's decisions in *Baker* and *Department of Commerce*, these Plaintiffs have a direct interest in maintaining the effectiveness of their votes and full representation in Congress and thus have standing to prosecute this case.

### B. Plaintiffs Have Standing as Politically Active Citizens Who Are Unable to Prepare for the Upcoming Elections.

Each Plaintiff alleges that he or she desires to communicate with local candidates for State Senate, Assembly, and United States House of Representatives in the 2012 primary and general elections and is also interested in volunteering for or contributing money to one or more of these candidates. (Compl. ¶¶ 14-19.) These allegations mirror those in *Arrington*, whose plaintiffs claimed "that they would like to communicate with and contribute financially to congressional candidates who may represent them but, due to the present uncertainty of district boundaries, are unable to identify appropriate candidates." 173 F. Supp. 2d at 865 n.15. Although mentioning these allegations only parenthetically, the court in *Arrington* ultimately found that these plaintiffs would be injured by failure to redistrict and thus that there was a case or controversy to adjudicate. *Id.* at 865-66. *Arrington* thus demonstrates that allegations regarding a plaintiff's desire to interact with candidates and her inability to identify appropriate candidates are cognizable in a standing analysis. *See also id.* at 861 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998), for the proposition that voting is "the most basic of

political rights" and that "in voting rights cases a minimal quanta of injury satisfies the injury in fact requirement").

Plaintiffs' injuries here are not, as Movants would have it, mere "some day intentions" that might lead to a cognizable injury. (Mov. Br. at 9 (quoting *Lujan*, 504 U.S. at 560).) In *Lujan*, the "some day intention" (which Movants tellingly do not describe) involved plaintiffs who wished to go to Egypt and Sri Lanka to view the animals that would be harmed by the new rule, and who described such intent as "I don't know [when]. Not next year, I will say. In the future." *Lujan*, 504 U.S. at 564. Plaintiffs by contrast are politically active citizens who have alleged a specific interest in participating in the 2012 elections. (Compl. ¶¶ 14-19.) The allegations in the Complaint establish that such citizen interaction begins six or more months in advance of the primary election. (Compl. ¶ 82.) Accordingly, with a possible June primary, Plaintiffs' interest in participating in the 2012 elections is actively stymied *now* by their inability to determine their districts and the candidates who are running therein.

### C. Plaintiff Leib Has Standing as a Potential Candidate Who Is Prevented from Identifying His District or Prospective Voters.

Contrary to Movants' assertions (Mov. Br. at 10), Plaintiff Howard Leib's active consideration of running for office in the current 51st Senatorial District in this very election year is likewise not the "some day intention" found lacking for standing purposes in *Lujan*. His ability to make the determination whether to run is, again, impaired *right now* by the absence of a redistricting plan. As he resides on the border of the current 51st Senatorial District, his district is likely to change. (Compl. ¶ 15.) Accordingly, he lacks access to information critical to a decision about whether to run for office, such as the identity of the incumbent or the makeup of the voting population in his future district. The fact that he may have "plenty of time to run for office" in the future is of no moment to the ongoing injury he suffers. In *Arrington*, the court considered the very scenario of a candidate who is preparing to run for office but is stymied by

the uncertainty of district lines, and the court indicated that such a plaintiff would have a valid claim in federal court. 173 F. Supp. 2d at 865.

Plaintiffs have identified multiple well-established grounds by which they have established standing to pursue these claims, and Movants' motions to dismiss on standing should be denied.

## II. MOVANTS' ARGUMENT THAT PLAINTIFFS' CLAIMS ARE UNRIPE FAILS, AS COURTS ROUTINELY FIND "IMPASSE" CLAIMS SUCH AS THEIRS TO BE RIPE FOR ADJUDICATION.

Movants argue that this action may become ripe "[o]nly 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 . . . ." (Mov. Br. at 13.) In advancing this proposition, Movants can cite no supportive authority, and they fail to address either the legislative impasse identified in the Complaint that will prevent this enactment from coming to pass (Compl. ¶¶ 59-84) or the significant body of law under which courts have accepted jurisdiction over state redistricting actions prior to the enactment of a plan. Movants moreover vastly oversell LATFOR's past success in passing final redistricting plans. In reality, redistricting actions are consistently deemed ripe much farther in advance of elections than this suit was filed, and their ripeness is not contingent on passage of a final redistricting plan by the Legislature and the Governor.

### A. Contrary to Movants' Argument, Plaintiffs Do Not Challenge a Future Reapportionment, But Rather the Failure by LATFOR and the Legislature to Timely Enact New Districts.

As an initial matter, Movants misconstrue what Plaintiffs complain about in bringing this lawsuit. They appear to be under the impression that Plaintiffs' challenge is to some nebulous not-yet enacted LATFOR Plan. That is not the case. The Complaint alleges clearly that the districts in which Plaintiffs reside, drawn in 2002 in response to the 2000 decennial census, are currently in violation of both the United States and New York State

constitutions, and that state leaders' failure to enact new districts in a timely fashion impairs their constitutional rights. (Compl. ¶¶ 107-109, 113-115, 120, 122-123, 128-131, 136-139.) In other words, "[t]o be very clear, then, the plaintiffs do *not* address their complaint to any apportionment scheme the state legislature may enact in the future. Doing so obviously would fail the case or controversy test." *Arrington*, 173 F. Supp. 2d at 859 (finding action ripe where plaintiffs challenged, in 2001, districts established pursuant to the 1990 census). This lawsuit is not an action challenging a future apportionment. Rather, it is a lawsuit arising out of a failure to timely enact a reapportionment after a decennial census, which is a lawsuit that is regularly found to be ripe, as discussed further below.

### B. Courts Routinely Maintain Jurisdiction Over Redistricting Cases Prior to the Enactment of a Redistricting Plan.

Contrary to Movants' contention, redistricting cases are ripe for adjudication prior to the final passage of a redistricting plan, and even before the time at which there has been a "final failure to reapportion to date." *Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982). Rather, such cases are ripe when such failure appears inevitable if the court does not direct reapportionment. *Id.* Movants acknowledge as much, conceding that federal courts should intervene if states "fail to make timely progress." (Mov. Br. at 6 (citing *Scott v. Germano*, 381 U.S. 407 (1965).) The purpose of the court's intervention even before the constitutional violation occurs is that failure by the court to act at that time would leave no time to take corrective action before the elections. *Flateau*, 537 F. Supp. at 262. When determining whether a redistricting challenge is ripe, a court should consider "the very realistic and practical problems facing all the parties and the public—that they must now begin preparing for the primary election." *Montano v. Suffolk Cnty. Legislature*, 263 F. Supp. 2d 644, 648 (E.D.N.Y. 2003) (citing *New York v. United States*, 505 U.S. 144, 175 (1992) for the proposition that "a statute is ripe for challenge when litigants must begin preparing to comply with it").

Consistent with these principles, courts have maintained jurisdiction over actions filed many months in advance of a primary election, and well before a final redistricting plan is enacted by the Legislature and Governor, which many times does not occur at all. During New York's last redistricting cycle in 2002, for example, plaintiffs filed suit on January 25, eight months in advance of the September 2002 primary election. *Rodriguez v. Pataki ("Rodriguez II")*, 308 F. Supp. 2d 346, 355 (S.D.N.Y. 2004) (three-judge court). During the previous cycle, actions were filed in both federal and state courts on March 26, 1992, six months in advance of the 1992 primary election. *Puerto Rican Legal Def. & Educ. Fund, Inc. ("PRLDEF") v. Gantt*, 796 F. Supp. 681, 684 (E.D.N.Y. 1992). During the 1982 redistricting cycle, a complaint was filed on February 10, 1982, seven months before the primary election. *Flateau*, 537 F. Supp. at 259. Each of these lawsuits proceeded for further adjudication; none was dismissed for lack of ripeness, lack of jurisdiction, or for any other reason.[2]

Contrary to Movants' assertion, courts have not waited for a duly enacted final plan in order to find cases ripe for adjudication, but instead have regularly accepted and maintained jurisdiction over actions where governments have failed to timely enact a redistricting plan. *See, e.g.*, *Flateau*, 537 F. Supp. at 260-62 (retaining jurisdiction because "[w]hile there has been no final failure to reapportion to date, the inevitability of such failure if this court does not direct reapportionment has persuaded us that the matter is ripe for adjudication"); *Montano*, 263 F. Supp. 2d at 645 (retaining jurisdiction of suit filed six months before primary election where county legislature "failed to timely reapportion the existing district lines of the Legislature"); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 623-27 (D.S.C. 2002) (retaining jurisdiction over suit filed nine months before primary election

[2] Although ripeness was not addressed in each of these decisions, courts "have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*." *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006).

where "the governing officials of the State of South Carolina, following receipt of the 2000 census data, failed to successfully fulfill this duty and have now reached an impasse.").

Movants' suggestion that courts lack jurisdiction over redistricting actions until after final legislative enactment is thus contrary to this entire body of law known as "impasse suits" whereby courts exercise jurisdiction over cases before such enactments occur. Movants' only case purportedly in support of their argument, *Longway v. Jefferson County Board of Supervisors*, 24 F.3d 397 (2d Cir. 1994), did not arise in the context of an impasse (as is alleged here) and is distinguishable on that basis. Indeed, the court in *Longway* expressly acknowledged that the legislature's unwillingness to effectuate redistricting was not before the court. *Id.* at 401.

Here, as in the impasse suits just discussed, Plaintiffs allege that the legislative process is at an impasse, and that as a result of that impasse, no redistricting plan can be enacted in a timely manner. (Compl. ¶¶ 59-84.) Those allegations must be taken as true for purposes of this motion. Since Plaintiffs' suit was filed either seven or nine months before New York's June or August 2012 primary election, well within the time in which courts consider such suits to be ripe, this Court too should determine this suit to be ripe.

### C. Movants' Theory That the Court Lacks Jurisdiction Until Final Enactment of a Redistricting Plan Is Contrary to Logic and History.

By suggesting that this action could not become ripe until after LATFOR has passed final plans and after the Legislature and the Governor have enacted a final redistricting plan into law (Mov. Br. at 13), Movants ignore the strong possibility that such a redistricting plan may never be enacted into law. If Movants' rule were to be followed, the Court might never have the authority to remedy the constitutional violations that Plaintiffs allege here. Of course, such an outcome would be illogical and unacceptable.

History teaches that failures by LATFOR and by the Legislature and Governor to pass redistricting plans are not merely hypothetical scenarios but occur or would occur absent

court intervention in nearly every redistricting cycle. Movants' statement that "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" (Mov. Br. at 15) is inaccurate. In 1992, LATFOR may have passed state legislative redistricting plans, but "because of political differences, the Task Force, which had been 'studying, discussing and negotiating the issue for nearly a year', was 'not even close' to an agreement [on congressional redistricting] as of March 24, 1992," when a federal court took control of the process. *PRLDEF*, 796 F. Supp. at 684. It was only under threat that the federal court would impose the already-completed Special Master's plan that the Legislature passed its own congressional redistricting plan, and at that time the Political Calendar had already been delayed by the Legislature's inaction. *Id.* at 686, 697-98. A decade later, almost the exact same scenario occurred. *See Rodriguez II*, 308 F. Supp. 2d at 355-58. Going back further, New York did not enact a redistricting plan based on the 1960 census until 1964, and then only after having been ordered to do so by the United States Supreme Court. *Flateau*, 537 F. Supp. at 265 n.18.

Other states have failed completely to pass redistricting plans through the legislative process, requiring the imposition of court-created plans. *E.g.*, *Carstens v. Lamm*, 543 F. Supp. 68, 71-72, 93 (D. Colo. 1982); *In re 2003 Apportionment of the State Senate & U. S. Congressional Dists.*, 827 A.2d 844, 845 (Me. 2003); *Branch v. Smith*, 538 U.S. 254, 258-62, 282 (2002) (Mississippi); *Colleton Cnty. Council*, 201 F. Supp. 2d at 668-69. The lesson learned from these situations is that the Court must be able to take jurisdiction over cases before a final redistricting plan is enacted.

**D. The Particular Injuries Alleged by the Plaintiffs are Ripe for Redress.**

Moreover, as discussed in sections I(B) and I(C), *supra*, Plaintiffs' ability to participate in the 2012 election cycle is negatively impacted at this moment by Defendants' failure to engage in timely redistricting. As described in the Complaint, politically engaged

citizens such as Plaintiffs begin communicating with potential candidates for office in their districts six months in advance of the primaries. (Compl. ¶ 82.) Plaintiffs cannot meaningfully engage in such communication until they know in which districts they will reside at the time of the primary election. Similarly, although political campaigns often begin a year or more before the primary (Compl. ¶ 81), it is now five months before a possible June primary, and Plaintiff Leib cannot make an effective decision about whether to begin a campaign because Defendants' inaction has deprived him of the critical information about the district in which he would run, such as the identity of the incumbent and demographics and party affiliation of the voters therein.

Such ongoing injuries have been found to render a case such as this ripe. In *Arrington*, plaintiffs filed their challenge on February 1, 2001, more than nineteen months before the September 2002 Wisconsin primary election. 173 F. Supp. 2d at 858. Ruling later in the year 2001 but still more than nine months before the primary election, the court found the case to be ripe. *Id.* at 866-67. In reaching this conclusion, the court examined the question of when a litigant would need to begin to comply with a redistricting law:

> The Supreme Court has stated that a challenge to a statute becomes ripe when litigants need to start preparing to comply with it. *See New York v. United States*, 505 U.S. 144, 175 (1992). Thus, the present lawsuit would be ripe when citizens need to start preparing for the primary elections. Such elections will be held in the fall of 2002. But who is to say when a citizen (especially a potential candidate) must start preparing for them? If a candidate were to come forward today and declare that he or she is preparing to run for Congress but is stymied by the uncertainty of the congressional districts, would the court find the candidate's complaint challenging the current apportionment plan ripe? If not, why not? **Setting arbitrary deadlines (or reaching any other sort of arbitrary decision) is to be avoided.**

*Id.* at 865 (emphasis added) (footnote omitted). As Plaintiffs are "citizens" who "need to start preparing for the primary elections" and a candidate "preparing to run" but "stymied by the uncertainty" of the districts, Plaintiffs' injuries are likewise ripe for redress.

There is, accordingly, no basis for the Court to dismiss this action as unripe. Rather, as discussed below, the Court should retain jurisdiction and proceed promptly to the appointment of a Special Master and the process of Court-supervised redistricting.

## III. THE INVOLVEMENT OF THE COURT IN THE REDISTRICTING PROCESS IS PROPER AT THIS TIME, GIVEN THE LEGISLATURE'S FAILURE TO TIMELY PRODUCE A REDISTRICTING PLAN.

Upon a finding of ripeness, the Court's next inquiry in redistricting actions is to determine when time has run out for the political process such that it must begin the process of drawing its own lines. That issue is different from ripeness and therefore is not before the Court on this motion to dismiss. However, since Movants in their brief raise multiple issues surrounding this key determination, Plaintiffs assert that, for reasons described below, the time for the Court to begin drawing its own lines has arrived.

### A. When the Legislative Process Fails to Produce a Redistricting Plan in a Timely Fashion, It Is the Court's Responsibility to Intervene.

Movants are of course correct that redistricting is primarily the responsibility of the State Legislature and the Governor to enact through the political process and that courts should be reluctant to draw their own district lines. (Mov. Br. at 5-7.) But in each case cited by Movants for that proposition, courts acknowledge there are circumstances, including legislative inaction in the face of an impending deadline, in which federal courts are obligated to intervene by drawing their own lines. In Movants' case, *Wise v. Lipscomb*, the Supreme Court stated that "when those with legislative responsibilities do not respond [to their reapportionment tasks], or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' *Connor v. Finch*, [431 U.S. 407, 415 (1977)], of the federal court to devise and impose a reapportionment plan pending later legislative action." 437 U.S. 535, 540 (1978). Likewise, in *Chapman v. Meier*, the Court recognized that if the legislature fails in its redistricting task, "the responsibility falls on the District Court and it should proceed with

dispatch to resolve this seemingly interminable problem." 420 U.S. 1, 27 (1975). And in *Scott v. Germano*, the Court held that "[t]he District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan . . . ." 381 U.S. 407, 409 (1965).

The time for court intervention foretold by the Supreme Court in each of these decisions has arrived here. The New York Legislature has had access to the 2010 census data since March 2011, and they have had ample opportunity to complete the redistricting process in the ten months since. (Compl. ¶ 59.) The Legislature has failed to redistrict during this time. Moreover, as described in the Complaint, the legislative process is hopelessly stalled, and it will not be completed in time for the 2012 Political Calendar and primary election. (Compl. ¶¶ 59-84.) The Court's prompt intervention is needed to avoid an impending constitutional crisis.

### B. In Determining When to Start Drawing District Lines, Courts Must Consider Both the Time Required to Adjudicate a Lawsuit and Dates in the Political Calendar.

In redistricting cases such as the ones discussed above in section II, plaintiffs filed suit before the courts' intervention became especially urgent, in obvious recognition that these cases take time to adjudicate. In each, the court initiated the court-supervised redistricting process at a time that it deemed appropriate. For example, in *Rodriguez v. Pataki ("Rodriguez I")*, the court appointed a Special Master to draw district lines on April 26, 2002, three months after the case was filed and five months before the primary election. 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002) (order appointing Special Master). Finding that "the 'eleventh hour' is upon us, if indeed it has not already passed," the court asked the Special Master to complete his work in only two weeks. *Id.* In *Montano*, on May 14, 2003, two months after the case was filed and five months before the primary election, the court gave the Suffolk County Legislature one day to adopt a redistricting plan before it would appoint a Special Master. 263 F. Supp. 2d at 645.

Only in the face of that threat did the legislature adopt a plan. *Id.* at 646. In *Flateau*, on April 2, 1982, two months after the case was filed and five months before the primary election, the court imposed upon the State Legislature a two-week deadline to pass a redistricting plan before the court would intervene and create its own plan. 537 F. Supp. at 262, 266 ("If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured."); *see also Colleton Cnty. Council*, 201 F. Supp. 2d at 625 (court appointed "technical advisor" to draw lines seven months before primary election).

Nor is the primary date the only relevant deadline for courts to consider when assessing the time needed to implement a redistricting plan. In deciding when to intervene, courts have also considered other dates in the Political Calendar, such as deadlines for declaring candidacy and the beginning of the candidate petitioning period. For example, in *PRLDEF*, the Court noted that it was "acutely aware of the pressing need for having a redistricting plan in place as soon as possible, preferably by June 9, 1992, which is the earliest date established by the New York Election Law for obtaining signatures on designating petitions." 796 F. Supp. at 685. Likewise, in *Smith v. Clark*, the court announced that it would draft and implement its own plan upon the state's failure to redistrict by two months before the state-law deadline for qualification of candidates. 189 F. Supp. 2d 503, 504-05 (S.D. Miss. 2002) (three-judge court), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254, 262 (2003); *see also Montano*, 263 F. Supp. 2d at 645 (referencing first day for candidates to gather petitions for primary election).

Here, the impending Political Calendar and primary election dates require the Court to begin the line-drawing process right away.

### C. The Strong Possibility of a June 2012 Primary Election Necessitates the Court's Immediate Intervention.

As stated in the Complaint and as Movants acknowledge, this year's primary election is likely to occur in June or August 2012. (Compl. ¶ 78; Mov. Br. at 3.) Indeed, certain legislative leaders and election officials have advocated for the primary election to be held on June 26, 2012, which must be considered the "worst case scenario" the Court should consider to schedule further proceedings, *Marylanders for Fair Representation, Inc. v. Schaefer*, 795 F. Supp. 747, 749 n.5 (D. Md. 1992), so as to avoid a situation in which "it would be too late for any timely remedy to be structured." *Flateau*, 537 F. Supp. at 262. Proceeding based on that primary election date and the dates on the Political Calendar in advance of that date will enable the Court to ensure that those political events proceed on time.

For a primary election on June 26, 2012, the Political Calendar starts in March 2012. (*See* Factual Background, *supra*, Section C.) Obtaining preclearance pursuant to the Voting Rights Act in time for this March 2012 start of the Political Calendar would likely require New York to pass a final redistricting plan this month, if indeed it is not already too late. The Court, however, can adopt a plan without preclearance, *Connor v. Johnson*, 402 U.S. 690, 691 (1971), and thus should consider March 2012 to be the final deadline to have a complete redistricting plan in place. Given the time required to adjudicate a lawsuit, including resolving motions, establishing a three-judge panel, selecting a Special Master, drawing plans, and considering and finalizing those plans, there is no time to spare.

For these reasons, the time has arrived for the Court's intervention in the line-drawing process in advance of a June 2012 primary. In the event the primary election is scheduled for a date later than June 2012, the Court should retain jurisdiction over the case and intervene at such time as it deems appropriate. *See Miss. State Conf. of NAACP v. Barbour*, No.

3:11-cv-159, 2011 WL 1870222, at *9, n.6 (S.D. Miss. May 16, 2011 (citing *Branch v. Smith*, 538 U.S. 254, 262 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993)).

## IV. PLAINTIFFS HAVE STATED CLAIMS FOR DEPRIVATION OF THEIR RIGHTS DUE TO DEFENDANTS' FAILURE TO ACCOMPLISH REDISTRICTING IN A TIMELY FASHION.

Movants argue that Plaintiffs have failed to state claims for violation of their constitutional rights to Equal Protection and Due Process based solely on Movants' assumption—contrary to the Complaint's allegations, which must be taken as true—that the 2012 redistricting process will be completed in a timely fashion and therefore that a challenge to the 2002 legislative districts is invalid. (Mov. Br. at 19-25.) In making this argument, Movants not only make unsupported fact-like assertions outside the four corners of the Complaint that must be disregarded on this motion, but they also ignore the vast body of authority in redistricting cases.

Plaintiffs in redistricting actions regularly file suit for deprivation of their rights based on population inequality in the decade-old legislative districts that have not been adjusted for the new census, and courts universally recognize those claims as valid. For example, in the 1982 case *Flateau v. Anderson*, plaintiffs challenged the constitutionality of the districts that had been drawn pursuant to the 1970 census on the grounds that the 1980 census showed population shifts resulting in districts of unequal population. 537 F. Supp. at 259. Acknowledging the validity of this cause of action, the court held that districts from the 1970 census could not be used to conduct future elections, and it directed the legislature to reapportion the districts within two weeks. *Id.* at 262, 266. Likewise, in the 2002 case *Rodriguez v. Pataki*, plaintiffs alleged that "based on the 2000 Census, [the 1990] districts violate the United States Constitution and the Voting Rights Act of 1965, as amended." *Rodriguez II*, 308 F. Supp. 2d at 355. Accepting these allegations as stating a cause of action, the court proceeded to appoint a Special Master to draw new congressional districts. *Rodriguez I*, 207 F. Supp. 2d at 124-25. In the 2001 *Arrington*

case, the plaintiffs challenged the 1991 districts as "no longer as equal in population as required by the United States Constitution." 173 F. Supp. 2d at 859. The court found that such complaints challenging decade-old districts "are prevalent because existing apportionment schemes become 'instantly unconstitutional' upon the release of new decennial census data." *Id.* at 860 (collecting cases).

This action is in accord with such precedents. The Complaint states that "[t]he 2010 census revealed significant population disparities among State Senate and Assembly districts that would make adherence to the current existing lines illegal," and it proceeds to identify disparities of up to 31% between the most and least populous districts in the state. (Compl. ¶¶ 61, 62, 67.) The Complaint further states that "the New York Legislature's 2002 redistricting is out of date and may not be used for subsequent state legislative or congressional elections." (Compl. ¶ 107.) Plaintiffs' claims for deprivation of their constitutional rights are based in part on these facts. (*See* Compl. ¶¶ 106-34.) As acknowledged by Movants (Mov. Br. at 20), a population deviation larger than ten percent constitutes a *prima facie* constitutional violation. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

In light of the well-established principle that population inequality among districts constitutes a violation of voters' constitutional rights, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), Movants' reliance on the elements of an Equal Protection claim for discrimination based on sexual orientation (Mov. Br. at 20 (citing *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002)) has no bearing in this context. Movants cite no authority to contradict the long line of decisions recognizing the validity of claims virtually identical to Plaintiffs' for violation of their constitutional rights based on population inequality.

## V. IN LIGHT OF RECENT DEVELOPMENTS, PLAINTIFFS HAVE VOLUNTARILY DISMISSED THEIR CLAIMS BASED ON THE PRISONER REALLOCATION LAW, THUS RENDERING MOVANTS' ARGUMENTS ON THOSE CLAIMS MOOT.

Part XX of Chapter 57 of the Laws of New York (the "Prisoner Reallocation Law") required LATFOR to release amended population data counting New York prisoners at their home addresses for redistricting purposes, to the extent those addresses were in-state and could be determined. (Compl. ¶¶ 85-89.) At the time this action was commenced LATFOR had not complied with the Prisoner Reallocation Law. (Compl. ¶¶ 90-91, 144-46.) In January 2012, ten months after the release of the original unadjusted data from the 2010 census (*see* Compl. ¶ 59), LATFOR finally approved and released the amended population data as required by the Prisoner Reallocation Law. This compliance with the Prisoner Reallocation Law accomplished the goals sought by Plaintiffs in Counts V and VI of their Complaint. As a result, today Plaintiffs voluntarily dismissed Counts V and VI of the Complaint. Because those Counts relating to the Prisoner Reallocation Law are no longer part of this action, Movants' arguments relating to the Prisoner Reallocation Law are moot and need not be addressed herein.

## CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Movants' motions to dismiss this case.

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WILLKIE FARR & GALLAGHER LLP

By: _____
Richard Mancino
(A Member of the Firm)

Daniel M. Burstein
Jeffrey A. Williams
787 Seventh Avenue
New York, New York 10019
(212) 728-8000
rmancino@willkie.com
dburstein@willkie.com
jwilliams@willkie.com

*Attorneys for Plaintiffs*