UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.,

Plaintiffs,

v.

ANDREW M. CUOMO, et al.,

Defendants.

Index No. 11-CV-5632 (DLI)(RR)(GEL)

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MEMORANDUM OF LAW IN SUPPORT OF APPOINTMENT OF A SPECIAL MASTER

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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 of law in response to the Court's Order to Show Cause dated February 15, 2012 regarding the Court's proposed appointment of a Special Master. For the reasons stated below and in prior memoranda filed with the Court, Plaintiffs support the Court's appointment of a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, to create a new redistricting plan.

PRELIMINARY STATEMENT

In her February 13, 2012 Request to the Chief Judge of the Second Circuit Court of Appeals for Appointment of a Three-Judge Panel, the Honorable Dora L. Irizarry acknowledged the "current state of inaction in the New York State Legislature concerning redistricting" and proposed the appointment of a Special Master "to oversee and draw up a redistricting plan that is in compliance with federal and state constitutional and statutory law." Plaintiffs agree with Judge Irizarry and urge this Court to appoint such a Special Master to draw district lines.

The New York Legislature is out of time to create new congressional districts. The primary election will take place on June 26, 2012, and the candidate petitioning period starts much sooner, on March 20, 2012. But even March 20 is too late to have a congressional redistricting plan in place. Candidates and their petition-carrying supporters need to know where their districts lie sufficiently in advance of that date to prepare for the petitioning period. The harm caused by the Legislature's inaction is not theoretical: Plaintiffs are submitting with this memorandum affidavits demonstrating the significant prejudice suffered both by candidates and politically active citizens in not knowing where their congressional district boundaries will be.

Meanwhile, the state's legislative task force on redistricting (LATFOR), by the admission of its own co-chairman, does not know when that committee will take the *first step* of proposing a redistricting plan. If LATFOR ultimately proposes a plan, that plan needs to be approved by a divided Legislature, signed by a Governor who has vowed to veto it, and approved by the United States Department of Justice pursuant to the Voting Rights Act. None of these steps may be skipped, yet none of these steps has occurred.

This Court, on the other hand, is positioned to move much more quickly to protect the rights of New York's voters. The Court should do so by intervening promptly in the congressional redistricting process and drawing its own district lines. Given the complexities of redistricting, the appointment of an independent Special Master with experience in the redistricting process will significantly assist the Court in this effort. Once the Special Master has created a redistricting plan for the Court's consideration, the Court has the power to immediately order its redistricting plan into effect for the 2012 elections, thus bypassing many of the hurdles faced by the legislative process.

As an aid to the Court, Plaintiffs in Section III of this memorandum discuss several redistricting principles well-grounded in federal and state law that the Court may consider incorporating into its order appointing a Special Master to draw district lines. Those principles are population equality, fair representation of minority groups, contiguity, compactness, respect for political subdivisions, and preservation of communities of interest. Plaintiffs suggest the inclusion of those principles in an order appointing a Special Master.

Through the prompt appointment of a Special Master to create new redistricting plans, followed by their timely approval, this Court can avert chaos, ensure the fair and efficient

conduct of elections, and protect the rights of New York's citizens. Plaintiffs urge the Court to take such actions.

BACKGROUND

A. Unprecedented Circumstances Surround the Current Action.

This redistricting cycle takes place under particularly heightened uncertainty and a shortened time frame. As Judge Irizarry stated in her request for the appointment of this three-judge panel, "no congressional lines have been proposed through New York's legislative process much less adopted even though the petitioning period is less than six weeks away." (District Court's Request to Chief Judge of the Second Circuit Court of Appeals for Appointment of a Three-Judge Panel ("Dist. Ct. Request") 4, *Favors v. Cuomo*, No. 11-5632 (E.D.N.Y. Feb. 13, 2012), ECF No. 73.) Under the 2009 Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, 123 Stat. 2318, New York must hold its congressional primary election early enough for it to be able to provide military and overseas voters with sufficient time to apply for, receive, and return absentee ballots. In *United States v. New York*, No. 1:10-CV-1214 (GLS), Chief Judge Sharpe of the Northern District of New York noted the State's continued failure to comply with this law (Declaration of Daniel Burstein, dated February 17, 2012 ("Burstein Decl.") Ex. A (Memorandum-Decision & Order 2, *United States v. New York*, No. 1:10-CV-1214 (N.D.N.Y. Feb. 9, 2012), ECF. No. 64)), and thus concluded that New York must move up its congressional primary election from its typical date in September to June 26 for the 2012 election. (Burstein Decl. Ex. B (Memorandum-Decision & Order 8, *United States v. New York*, No. 1:10-CV-1214 (N.D.N.Y. Jan. 27, 2012), ECF No. 59.))

As Judge Irizarry notes, "Judge Sharpe expressly adopted a political calendar" that corresponds to the new June primary date. (Dist. Ct. Request 4, ECF No. 73 (citing Burstein

Decl. Ex. A.) Under this political calendar, the first relevant date is March 20, 2012, less than five weeks from now. That date is the beginning of the candidate petitioning period, during which potential candidates collect signatures on designating petitions in order for the candidates' names to be placed on the primary election ballot. (Burstein Decl. Ex. C (Status Report Ex. A, at 3, *United States v. New York*, No. 10-1214 (N.D.N.Y. Feb. 1, 2012), ECF No. 61 (as adopted by Mem. Op. & Order, *United States v. New York*, No. 10-1214 (N.D.N.Y. Feb. 1, 2012), ECF. 64.))) Signatures may only be collected within the 27-day period between March 20 and April 16, 2012. (*Id.*)

B. **Candidates and Citizens Need to Prepare Now for the Petitioning Period.**

Campaign activities such as petitioning require actions by candidates, voters, and political organizations well in advance of their start date on the political calendar. As set forth in the affidavits of congressional candidate Vincent Morgan, potential state senatorial candidate Howard Leib, and political party official Lillie Galan, information about districts is crucial to the ordinary political process, and the lack of information about those districts wreaks havoc on that process.

For example, Mr. Morgan describes the process whereby he must raise and spend money now in order to print petitions, and he must organize supporters now to carry petitions and gather signatures. (Burstein Decl. Ex. D (Morgan Aff. ¶ 5.)) Ms. Galan describes many more political activities that take place in advance of the petitioning period. She states that typically members of the Yonkers Democratic Committee meet with candidates for Congress and other offices two or three months before the start of petitioning. Then, in the meeting of their Executive Committee the month before petitioning starts, members vote to endorse candidates for Congress and other offices, and the Committee then has petitions printed with the names of the endorsed

candidates for its members to carry. (Burstein Decl. Ex. E (Galan Decl. ¶ 3.)) Printing petitions takes approximately one week. (*Id.*) This entire timeline has already been delayed this year because the Committee does not and cannot know who its local congressional candidates are. (Burstein Decl. Ex. E, at ¶ 4.)

Politically active citizens such as Plaintiffs Ms. Galan and Mr. Leib are currently stymied in their efforts to participate meaningfully in the political process because they do not know who their candidates are, and thus they do not know which candidates will be competing for their votes. (Burstein Decl. Ex. E, at ¶ 6, Burstein Decl. Ex. F (Leib Decl. ¶ 5.)) For such engaged voters, the process of meeting with and endorsing candidates offers a critical opportunity early in the campaign to learn about and influence a candidate's position on issues important to the voter. Participation later in the process, once a candidate becomes more well-known and his or her positions have crystallized, is no substitute for the interaction with candidates early in the process that the Plaintiffs seek, and which is currently blocked by the absence of a redistricting plan. (Burstein Decl. Ex. E, at ¶ 5.)

The prejudice to voters and candidates caused by the absence of a redistricting plan is particularly pronounced with regard to New York's congressional districts, in light of the imminent congressional primary election and the need to reduce New York's congressional districts from 29 to 27. (*See* Dist. Ct. Request 4, ECF No. 73.) The reduction in the number of the state's congressional seats means that every district must increase in size. No district can remain the same, thus creating even greater uncertainty among voters and candidates.

Congressional candidate Vincent Morgan describes in his affidavit the extent to which his candidacy is harmed by State officials' failure to enact a redistricting plan. Mr. Morgan is

running for Congress from the 15th Congressional District, facing the incumbent Charles Rangel. (Burstein Decl. Ex. D, at ¶ 7.) After more than 40 years in Congress, Congressman Rangel enjoys a deep-rooted political base as well as established fundraising and a smoothly-running political machine. Conversely, community leaders and other potential supporters refuse even to meet with Mr. Morgan, much less contribute to his campaign, until the new district lines have been settled. (Burstein Decl. Ex. D, at ¶¶ 4, 6.) Mr. Morgan is unable to plan his petitioning effort since he must gather signatures from registered voters within the Congressional District in which he is running, which is an as yet undefined group. (Burstein Decl. Ex. D, at ¶ 5.) And since Congressman Rangel is a household name outside of the 15th district, a last-minute shift in district lines does not harm him as it does a newcomer like Mr. Morgan, who needs more time to introduce himself to voters. Mr. Morgan and challengers like him are ever more disadvantaged the longer district lines remain unknown.

C. The Legislature Has Taken No Affirmative Steps Toward Passing a Congressional Redistricting Plan.

LATFOR and the Legislature needed one set of data to draw new congressional maps: the results of the 2010 census. That data became available eleven months ago, on March 24, 2011. (Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers New York's 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting, Mar. 24, 2011, http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn122.html.) Since then, LATFOR and the Legislature have made no identifiable progress on drawing congressional district lines. This week, LATFOR co-chairman Michael Nozzolio admitted that he does not know when a congressional redistricting plans will even be proposed by LATFOR. (Robert Harding, *Nozzolio Unsure When Proposed Congressional District Maps Will be Unveiled;*

Senate Dems Respond, auburnpub.com, Eye-On-NY Blog (Feb. 12, 2012, 1:03 PM) http://m.auburnpub.com/blogs/eye_on_ny/nozzolio-unsure-when-proposed-congressional-district-maps-will-be-unveiled/article_048a51d0-5413-11e1-83fb-0019bb2963f4.html.)

At the same time, Governor Cuomo has promised repeatedly to veto any redistricting plan that is not the product of an independent redistricting process. The LATFOR process, he has confirmed, is not an independent one. (Mem. of Law in Opp'n to Defs.' Kolb's & Oaks's Mots. to Dismiss 3-4, ECF No. 61 (collecting Governor's statements).) Late last month, upon the release of LATFOR's proposed Assembly and State Senate maps, Governor Cuomo again promised to veto the proposed districts, stating that "[t]he maps are unacceptable." (*Cuomo says he will veto NY redistricting plan*, Wall St. J., Jan. 27, 2012, http://online.wsj.com/article/APe3af7ba8048443c6a3f707932f4d990d.html.) Governor Cuomo's statements that he will veto any non-independent redistricting plan have been clear and consistent, and they demonstrate that he intends to follow through with this promise. Accordingly, with drafts of the congressional maps "yet to be produced" (Harding, *supra*), and a firm promise by the Governor to veto maps prepared by LATFOR, state officials are at an impasse in the redistricting process.

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

Judge Irizarry correctly observed that in the 1992 and 2002 redistricting cycles, "the New York State Legislature acted only after there was judicial intervention." (Dist. Ct. Request 5.) 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. Given this history and the current impasse situation, Judge Irizarry was right that the Court's prompt intervention is needed to ensure that new districts are drawn in a timely fashion.

ARGUMENT

I. Court-Supervised Redistricting Is Needed Now to Avoid Any More Damage to Plaintiffs' and Others' Constitutional Rights.

The United States Supreme Court has instructed that, "[w]hen those with legislative responsibilities do not respond [to their redistricting tasks], or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (internal citation omitted); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (when a census "renders the current plan unusable, a court must undertake the 'unwelcome obligation' of creating an interim plan"). Likewise, in *Chapman v. Meier*, the Supreme Court recognized that when a 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).

The time for the Court to take up its "unwelcome obligation" to help construct a redistricting plan has arrived. As set forth above and as Judge Irizarry recognized, in 1992 and 2002, the New York State Legislature finalized redistricting plans only after judicial

intervention. (Dist. Ct. Request 5, ECF No. 73.) This year, judicial intervention is once again necessary because "no congressional lines have been proposed through New York's legislative process much less adopted even though the petitioning period is less than six weeks [now less than five weeks] away." (Dist. Ct. Request 4, ECF No. 73.) There is not enough time left for all the required steps in the legislative redistricting process to take place. In order to have a legislatively-drawn plan in place sufficiently in advance of the March 20 start to the petitioning period to permit candidates and voters to prepare for petitioning, (1) LATFOR must draft and release a congressional redistricting plan; (2) the plan must be referred to the Legislature; (3) both chambers of the Legislature must introduce, debate, and adopt a plan; (4) the Senate and Assembly plans must reconcile and be identical to each other; (5) the Governor must sign the plan into law, despite his repeated promises to veto any LATFOR- or Legislature-drawn plan; and (6) the Department of Justice must evaluate and pre-clear the final plan pursuant to the Voting Rights Act. This process cannot finish in the time allotted – and it hasn't even started.

The petitioning period begins in one month, and the primary election will take place in four months. Courts in this Circuit have, on multiple occasions, begun the process of drawing their own district lines even earlier in the electoral cycle than this. In *Rodriguez v. Pataki ("Rodriguez I")*, the court appointed a Special Master to draw district lines on April 26, 2002, five months before the primary election. 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002) (order appointing Special Master) (observing that "the 'eleventh hour' is upon us, if indeed it has not already passed," the Court found it necessary "to prepare for the possibility that this Court will be required to adopt an appropriate redistricting plan.") And in *PRLDEF*, the court appointed a Special Master empowered to prepare a congressional redistricting plan for New York, noting that "the political processes had broken down" and that "the court is 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 684-85. As discussed above, the petitioning period in both 1992 and 2002 had to be postponed due to delayed redistricting. By beginning to draw lines immediately, this Court can avoid that type of unnecessary disruption this year. *See Montano v. Suffolk Cnty. Legislature*, 263 F. Supp. 2d 644, 648 (E.D.N.Y. 2003); *Smith v. Clark*, 189 F. Supp. 2d 503, 511 (S.D. Miss. 2002) ("changing the dates of the election schedule would be deleterious to the rights of the voters, the candidates and the political parties, and accordingly we are determined to avoid such a change of dates").

Some Defendants, who are legislative leaders and members of LATFOR, may suggest it is premature for the Court to start drawing its own lines before any voter's constitutional rights have been violated. But it is in fact critical for courts to intervene before it becomes too late to remedy constitutional violations. The court in *Flateau v. Anderson* noted, when intervening five months before the scheduled primary, that "[i]f we waited until there no longer was time in 1982 for the [redistricting] to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured." 537 F. Supp. 257, 266 (S.D.N.Y. 1982). And in the oral argument in *Perry v. Perez*, held on January 9, 2012, Chief Justice Roberts discussed the problem facing the Court when dealing with redistricting in the face of a primary election scheduled for April, noting that "we are all under the gun of very strict time limitations." (Burstein Decl. Ex. G (Transcript of Oral Argument at 39:13-14, *Perry v. Perez*, 132 S. Ct. 934 (2012) (No. 11-713, 11-714, 11-715), 2012 WL 38642, at *39.)) Courts are thus properly conscious of impending constitutional violations precisely because they are charged with taking prompt action to avoid the occurrence of those violations.

Certain Defendants may further argue that the Court should not start drawing its own district lines while LATFOR and the Legislature are still "hard at work" in this process. That

argument, though, ignores the Court's responsibility to protect citizens from the possibility that the legislative process will not succeed. In 2002, a three-judge panel in the Southern District of New York adopted the Special Master's plan for congressional districts and ordered its use for the 2002 congressional elections, finding that "its immediate adoption is required to ensure a timely and orderly New York State Congressional election process." *Rodriguez v. Pataki ("Rodriguez II")*, 308 F.Supp.2d 346, 357 (S.D.N.Y. 2004). Even so, the court noted that should the Legislature timely complete its own plan, the court was "willing, even eager, to accommodate timely state action and . . . [is] open to the possibility of withdrawing the Plan we are adopting if the State were to enact an appropriate and lawful plan of its own that allows for a full, fair, and orderly election process." *Id.* at 357-58 (first alteration in original) (quoting *Rodriguez v. Pataki*, Nos. 02-618 (RMB), 2002 WL 1058054, at *8 (S.D.N.Y. May 24, 2002)). Similarly, in 1992, a three-judge panel in the Eastern District of New York adopted the Special Master's plan for congressional redistricting while the Legislature's plan awaited Department of Justice preclearance under the Voting Rights Act, cautioning that "preclearance of the state plan may not occur, or it may be delayed." *PRLDEF*, 796 F. Supp. at 686 (citing *PRLDEF v. Gantt*, No. CV-92-1521 (SJ) (E.D.N.Y. June 11, 1992)). In both cycles, it was ultimately a plan passed by the Legislature that went into effect. Here, if political leaders believe they can enact a redistricting plan and obtain preclearance of that plan in a timely fashion, they should certainly be encouraged to do so. But the citizens of New York cannot afford to wait until that occurs.

There is no time to waste. New redistricting plans take time to draw, review, and adopt. Professor Nathaniel Persily, who has been appointed by courts many times to draw redistricting maps, advises that "[i]f I had just one recommendation to make (from the standpoint of one who draws maps), I would urge courts to avoid waiting until the last minute to begin drawing maps

and not to rush the line-drawing process." Nathaniel Persily, *When Judges Carve Democracies*, 73 Geo. Wash. L. Rev. 1131, 1146 (2005). Professor Persily suggests that

> in order to give the state enough time so that the process for ballot qualification, ballot printing and mailing, precinct redefinition, and election administration can go forward, a court should have as its goal the imposition of a plan no later than one month before candidates may begin qualifying for the primary ballot.

Id. at 1147. This year, that deadline would be February 20, which is surely unattainable for the imposition of a plan but may serve as a clarion call for the Court to move as quickly as possible to complete this process.

II. A Special Master Will Most Effectively Assist the Court in the Complex and Specialized Task of Redistricting.

Having established that this Court should immediately begin the process of drawing district maps, the next question is how the Court should proceed with this task. Plaintiffs agree with Judge Irizarry that this task is best achieved through the appointment of a Special Master who has specialized expertise in the complex redistricting process.

The task ahead of the Court is challenging. New York is currently divided into 29 congressional districts, but it must now be divided into 27 equally populated districts. As discussed above, the boundaries of every district must grow. Meanwhile, there is no plan currently in existence upon which the Court may rely as its starting point. The Court is not fixing constitutional defects in a few districts, but rather it is starting this process from scratch. Under these circumstances, and given the time constraints discussed above, the Court should appoint an expert to assist it. In federal courts, that expert is called a Special Master.

This Court has the authority in "exceptional conditions" such as these to appoint a Special Master pursuant to Federal Rule of Civil Procedure 53. The redistricting process is

uniformly considered an "exceptional condition" warranting such an appointment. In *Rodriguez I*, the Court concluded that "[p]reparing a timely and suitable plan of congressional districts thus presents an exceptional condition that requires the appointment of a Special Master to assist the Court." 207 F. Supp. 2d at 124; *see also Diaz*, 978 F. Supp. at 99, *Jackson v. Nassau Cnty. Bd. of Supervisors*, 157 F.R.D. 612, 615 (E.D.N.Y. 1994); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, Nos. 92CV283, 92CV720, 92CV0593, 1992 U.S. Dist. LEXIS 21617, at *2 (N.D.N.Y. Dec. 23, 1992).

Once the Special Master has drafted a plan, the Court may review it and order a final plan into effect. *See Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D. Ga. 2004). Unlike a legislatively passed plan, a Special Master-created and Court-ordered plan need not obtain preclearance under the Voting Rights Act. *See Connor v. Johnson*, 402 U.S. 690, 691 (1971). Thus, upon appointment of a Special Master, the Court will be poised to move quickly through the redistricting process in order to impose a new plan as soon as possible.

III. The Special Master Should Be Instructed to Follow Constitutional Requirements and Defer to the Expressed Policy of the Elected Branches Where Possible.

Under Fed. R. Civ. P. 53(b), the order appointing a Special Master must state, *inter alia*, "the master's duties." Courts in this Circuit handling redistricting cases in the past have taken that direction to mean that they had a responsibility to instruct the Special Master to adhere to specific principles or guidelines when creating redistricting plans. *See Rodriguez I*, 207 F. Supp.2d at 124 ("In developing the plan, the Special Master shall adhere to and, where possible, reconcile" various listed guidelines); (Burstein Decl. Ex. H (Report of Robert P. Patterson, Jr., Special Master, at 5, *Flateau v. Anderson*, No. 82 Civ. 0876 (S.D.N.Y. 1982)(quoting the criteria by which the Special Master was to be guided, provided by the Court).)

Plaintiffs request that the Court instruct the Special Master, should one be appointed, to prepare a congressional redistricting plan in accordance with the following criteria, which are either required by the Constitution and laws of the United States or are based upon legislative judgments to which the Court should defer.

A. **The Constitutional Requirement of Absolute Population Equality.**

Population equality is critically important for a redistricting plan. The Supreme Court has held that the constitutional foundation for the equal population requirement for congressional districts is the provision in Article I, Section 2 of the United States Constitution, that "The House of Representatives shall be composed of Members chosen … by the People of the several States," and that such language means that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 3, 7-8 (1964). The Court further clarified in *Kirkpatrick v. Preisler* that the one-person, one-vote standard "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. 526, 530-531 (1969); *Rodriguez II*, 308 F. Supp. 2d at 363 ("absolute population equality is required for congressional districts").

Adhering to these standards, in *Rodriguez*, the Special Master was instructed that "[d]istricts shall be of substantially equal population," 207 F. Supp. 2d at 125. Accordingly, the Report and Plan of the Special Master states the plan was created such that "[s]eventeen districts have a population of 654,361 and twelve districts have a population of 654,360 and achieve population equality with a zero deviation." (Burstein Decl. Ex. K at 21.) Similarly, the congressional redistricting plan in *Flateau* "contains total deviations of .1%."

Accordingly, the Special Master should be instructed to craft plans in accordance with Constitutional requirements and with the understanding, as demonstrated in *Rodriguez* and *Flateau*, that modern mapping techniques allow for the precision demanded by the Constitution.

B. **Fair Representation of Minority Groups.**

Redistricting plans must conform to the requirements of the Voting Rights Act ("VRA"). Section 2(a) of the VRA provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group]." 42 U.S.C. § 1973(a). Accordingly, the Special Master's redistricting plan must not abridge the voting power of any minority group by reducing their members' opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

In addition, Section 5 of the VRA requires that certain jurisdictions "preclear" changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973C(a). That is, before a legislatively drawn redistricting plan becomes legally effective in jurisdictions covered by Section 5, the plan must be reviewed and approved by the United States Department of Justice or the United States District Court for the District of Columbia to ensure that the new plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973C(a). The purpose of this section "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Three New York counties—Bronx, Kings and New York—are jurisdictions covered by Section 5, and, therefore, any changes to congressional districts in those counties would ordinarily have to be precleared. This Court, however, can adopt a redistricting plan without preclearance. *See Connor*, 402 U.S. at 691. Nonetheless, the Special Master should be cognizant of the covered jurisdictions and craft a plan that avoids retrogression with respect to the voting rights of racial minorities, as well as avoiding any denial or abridgment of the right to vote on account of race or color, particularly with regard to Bronx, Kings and New York counties.

C. Deference to Redistricting Principles Articulated in the New York State Constitution.

When crafting a redistricting plan, "a court must defer to legislative judgments on reapportionment as much as possible." *Upham v. Seamon*, 456 U.S. 37, 39 (1992). In many cases this means that the court should defer to the plan most recently enacted by the Legislature. Because of the absence of an enacted plan reflecting the results of the 2010 census, and because the 2002 plans are no longer viable, the Court should defer to the will of the elected branches as indicated by the redistricting principles enunciated in the New York State Constitution.

The most recent plan enacted by New York was the 2002 congressional redistricting plan, which has been rendered unusable by the results of the 2010 census. *Perry*, 132 S. Ct. at 941 ("sweeping changes to the State's current districts" including alteration of the number of congressional districts makes the prior plan unusable); *Upham*, 456 U.S. at 39 (a court is forbidden to defer to legislative judgments "when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans."). Unlike in *Perry*, no congressional district maps have been drafted by LATFOR, much less

enacted into law after having been passed by the Legislature and signed by the Governor. *Perry*, 132 S. Ct. at 941. Fortunately, the proposed Special Master here need not be set adrift without the "criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Id.* Nor is this a situation where "the old state districts [are] the only source to which a district court could look." *Id.* The New York State Constitution articulates a number of redistricting principles to which the Special Master should defer when crafting a redistricting plan. Although the New York State Constitution specifically refers to Assembly and State Senate districts, it is a general indication of the duly enacted policy preferences of the elected branches of government toward redistricting, and it should therefore carry significant weight for this Court.

1. **Contiguity**

The New York State Constitution requires that districts be in "contiguous territory." N.Y. Const. art. III, §§ 4-5. A case predating the constitutional provision, *In re Sherrill v. O'Brien*, 81 N.E. 124, 131 (N.Y. 1907), defined contiguity in this context as "not territory nearby, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other territory." In the order appointing the Special Master in *Flateau*, the court ordered the Special Master to take into account contiguity, stating that "each district must consist of contiguous territory so that it is not necessary to go out of the district in order to travel from one part of the district to another." (Burstein Decl. Ex. H, at 5.); *see also Rodriguez I*, 207 F. Supp. 2d at 125 (The appointed Special Master "shall adhere to" guidelines including "[d]istricts shall be of substantially equal population, compact, and contiguous."). Accordingly, the Special Master should be instructed to create contiguous districts using a standard definition of "contiguous" such as that employed in *Sherrill* or *Flateau*.

2. **Compactness**

The New York State Constitution also requires that districts be "as compact as practicable." N.Y. Const. art. III, §§ 4-5. Compactness can be measured in multiple ways. Geographic dispersion measures assess how tightly packed the geographic area is, often measuring the shape of a district against a circle (the most compact shape). (Burstein Decl. Ex. I (Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. Pols.1155, 1160-61 (1990).) Compactness may also be measured by looking to the perimeter of a district. One measure, employed by the court in *Flateau*, looked to the total perimeter of all of the districts in the state, seeking to make them as short as possible.[1] (Burstein Decl. Ex. H, at 6.) However, because in this measure the scale of larger districts "might allow gerrymandering in urban areas because lengthened borders there could be balanced by slight changes in the borders of rural districts," the preferred perimeter measure is to compare the perimeter of a district against its area. (Burstein Decl. Ex. I, at 1164-65.) Finally, compactness may be measured by looking at population dispersion within the district, whereby a district with two densely populated cities separated by a lightly populated rural area would be less compact than a district where population is distributed evenly throughout. *Id.* at 1165-67.

Although the New York State Constitution does not specify which measure of compactness should be used, Professor Niemi recommends that, because the various measures are not substitutable, "multiple measures should be used whenever possible." (Burstein Decl. Ex. I, at 1177) Thus, Plaintiffs request that the Special Master be ordered to create compact

[1] The *Rodriguez I* court did not specify which type of compactness the Special Master was to use. 207 F. Supp. 2d at 125.

districts, and to consider and reconcile the dispersion, perimeter and population density aspects of compactness where possible.

3. Respect for Political Subdivisions

The New York State Constitution requires that state legislative districts be drawn without dividing counties where possible. N.Y. Const. art. III, §§ 4-5. Although this requirement cannot apply to congressional redistricting given the need for absolute population equality under the United States Constitution, it nonetheless suggests that New York policymakers consider respect for political subdivision boundaries to be an important factor in the creation of districts. The New York Court of Appeals, in *In re Orans*, held that "the historic and traditional significance of counties in the districting process should be continued where and as far as possible." 206 N.E.2d 854, 859 (N.Y. 1965). The New York State Constitution likewise specifies that towns should not be divided by district lines, with the exception of towns with a population well in excess of the proper size for a given district. N.Y. Const. art. III §§ 4-5. This districting criterion should still be taken into consideration as the will of the elected branches. *In re Orans*, 206 N.E.2d at 859 (prohibition on dividing town lines should "be respected if it be mathematically possible so to do and still obey the 'one man, one vote' basic rule."). The Special Master should be instructed to respect county and town integrity where consistent with the other factors discussed in this section.

4. Preservation of Communities of Interest

The New York State Constitution also states that Assembly districts should be "of convenient … territory." N.Y. Const. art. III § 5. No court appears to have interpreted this provision. While geographical compactness or contiguity may relate to convenience, the New

York State Constitution addresses that concept through the requirement that districts be compact and contiguous, as discussed above. Thus, convenience must carry a distinct meaning.

In the context of the New York Constitution, convenience may refer to the manner in which elected legislators interact with their constituents. In particular, maintaining communities of interest grouped in districts would be considered "convenient" for both legislators and the members of those communities. For example, a small community that speaks a language other than English can be gathered into one district or divided into two districts. The more convenient approach would be for that community to be grouped in a single district, enhancing the ability for the group's elected representative to learn that language or employ someone who speaks that language, thus enhancing that group's access to its representative. It is also more convenient for a representative to represent a smaller number of intact communities of interest rather than a larger number of fractured communities with potentially divergent interests.

It is also much more convenient for voters to interact with and hold accountable their elected officials when such voters' communities are within the same media market as the rest of the representative's district. As one commentator has noted:

> When a congressional district covers a single media market, or at least does not snake across several, it makes it easier for the media to track and report on the representative and his or her actions. This in turn makes it easier for the public to identify their elected official and that official's actions. And a single media market also makes it easier to publicly oppose or challenge a representative's policies through letters to the editor, paid media, or "earned media" generated through demonstrations.

Jason C. Miller, *Community as a Redistricting Principle: Consulting Media Markets in Drawing District Lines*, 86 Ind. L.J. Supp. 1, 3 (2010). Conversely, the lack of congruence between district and media market lines *inconveniences* voters as well as their representatives. *See Landell v. Sorrell*, 382 F. 3d 91, 130 (2004) ("[T]he lack of congruence between media markets

and district boundaries render [television] advertising an inefficient and ineffective way to communicate with voters."). Indeed, research has shown higher levels of voter participation in districts with greater levels of conformity to media markets. (Burstein Decl. Ex. J (Richard N. Engstrom, *District Geography and Voters*, *in* Redistricting in the New Millennium 65, 77 (Peter F. Galderisi ed., 2005)).)

Moreover, maintaining communities of interest is a traditional districting principle that courts have found to be entitled to deference in the redistricting process. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 433 (2006); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1086 (N.D. Fla. 1992) (noting that one "long, irregularly shaped district traverses parts of seventeen counties and involves three major media markets. The communities linked in this sprawling district are likely to have competing interests and do not constitute communities of interest.") Accordingly, the Special Master should be instructed to consider the convenience of voters and their representatives, particularly with regard to preservation of communities of interest and conformance of district lines to media markets.

CONCLUSION

For the foregoing reasons, Plaintiffs support the Court's appointment of a Special Master to begin the process of creating a new redistricting plan. Plaintiffs would be pleased to respond to any submissions in opposition to such appointment, to the extent such response would be beneficial to the Court.

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