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February 17, 2012

VIA ECF AND OVERNIGHT UPS

The Honorable Reena Raggi
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The Honorable Gerard E. Lynch
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The Honorable Dora L. Irizarry
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Favors v. Cuomo, 1:11-cv-05632-DLI-RLM

Dear Judges Raggi, Lynch, and Irizarry:

Defendants Dean G. Skelos, Sheldon Silver, John J. McEneny, Roman Hedges, Michael F. Nozzolio, and Welquis R. Lopez respectfully respond to the Court's Order To Show Cause issued on February 15, 2012. The Court should not appoint a special master at this time for at least two reasons.

First, there is no basis for the Court to take any steps toward crafting a redistricting plan for the State Assembly or State Senate. The State Assembly and State Senate primary elections are scheduled for September, nearly seven months from now, leaving more than ample time for the Legislature to complete its ongoing state legislative redistricting efforts. Indeed, the leaders of both houses of the Legislature, Defendants Skelos and Silver, have agreed that the Legislature will enact plans by March 1st. Thus, any steps toward judicial intervention in state legislative redistricting, including appointment of a special master, are premature at this juncture and will unnecessarily interfere with the ordinary legislative process.

Second, the Court also should not yet appoint a special master to commence congressional redistricting. The Legislature has authority to change the current June 26 congressional primary date and the political calendar, and can schedule the primary for as late as August 18. More important, appointing a special master would put the cart before the horse

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because the Court has not yet provided an opportunity for the parties to address, and has not set forth, the redistricting criteria to guide any such special master or the procedures to govern the parties' interaction with the special master (and the Court). While a special master can obviously provide technical assistance to the Court in drafting any remedial congressional plan, that remedial responsibility is a judicial function based on contested principles of law that need to be resolved prior to the special master's work, particularly because the crafting of a remedial plan is significantly complicated due to the loss of two districts from the prior benchmark plan. Thus, there is a clear need for judicial guidance on threshold legal issues, particularly issues under Section 2 and Section 5 of the Voting Rights Act, before the special master commences work. While such judicial guidance regarding the legal parameters and criteria guiding the creation of districts might somewhat delay the commencement of actual line-drawing, it will inevitably streamline the process and conserve judicial resources by precluding any legal missteps or improper prioritization of competing redistricting criteria that are likely to occur if the special master starts his work without guidance.

In short, if the Court has determined to begin the congressional redistricting process now, we recommend that it proceed by setting a scheduling conference, establishing a briefing schedule providing parties a fair opportunity to present arguments on the criteria that should guide any court-drawn plan (and their relative ranking), as well as establishing a process whereby parties can both advocate alternative maps to the Court and/or special master and comment on other parties' proposed maps.

I. THE COURT SHOULD TAKE NO ACTION WITH RESPECT TO THE LEGISLATURE'S ONGOING STATE LEGISLATIVE REDISTRICTING

For three reasons, the Court should not appoint a special master or otherwise commence a redistricting effort with respect to the State Assembly or State Senate. *First*, any judicial intervention in the Legislature's ongoing state legislative redistricting efforts would be premature because the State Assembly and State Senate primary elections are scheduled for September, nearly seven months from now. *See* N.Y. Elec. Law. § 8-100(a). It is well-established that federal courts do not step into a state's purview and begin taking steps toward drawing redistricting plans until "the 'eleventh hour' is upon us, if indeed not already past." *Rodriguez v. Pataki*, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002) (per Walker, C.J.; Koeltl, J.; and Berman, J.). Thus, federal courts do not even commence such efforts until approximately four months before the next primaries. *See* Memo. in Support of Certain Defs.' Mot. to Dismiss at 7–8 ("Defs.' Memo.") (DE 22-1); Reply in Support of Certain Defs.' Motion to Dismiss at 4 ("Defs.' Reply") (DE 53). This rule makes perfect sense: redistricting is quintessentially a legislative function, and premature judicial redistricting could result in wasted resources and irreparable voter confusion if a judicially drawn plan is subsequently overridden by a legislative enactment. *See* Defs.' Memo. at 10; Defs.' Reply at 5. Moreover, even prior cases that predate recent technological advances in redistricting software have shown that two weeks is plenty of time for

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a special master to draw a plan. *See, e.g., Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 684 (E.D.N.Y. 1992) (“*PRLDEF*”); *Rodriguez*, 207 F. Supp. 2d at 127. Because the Legislature still has months to complete its state legislative redistricting work well before the September primaries, the Court should avoid wading into that area at this time.

Second, the abundance of time for the Legislature to enact timely state legislative redistricting plans is evidenced by the fact that State Assembly and State Senate leaders have agreed that the Legislature will enact plans by March 1st. *See, e.g., Senate GOP Hopes To Pass Redistricting Plan By March 1* (reporting statements by Defendants Skelos and McEneny), *available at* <http://www.capitaltonight.com/2012/02/senate-gop-hopes-to-pass-redistricting-plan-by-march-1/> (last visited Feb. 17, 2012). Indeed, the New York State Legislative Task Force On Demographic Research And Reapportionment (LATFOR) yesterday completed its public hearings on its proposed State Assembly and State Senate maps. *See Public Hearing Schedule—Second Round*, *available at* http://www.latfor.state.ny.us/hearings/docs/20120125hrg_schedule.pdf (last visited Feb. 17, 2012). There certainly is no reason for this Court to take action regarding state legislative redistricting given the imminence of the Legislature’s action. Moreover, in past redistricting cycles, the Legislature has *always* enacted timely state legislative redistricting plans, and special masters have been appointed only to address *congressional* redistricting. *See, e.g., PRLDEF*, 796 F. Supp. at 684; *Rodriguez*, 207 F. Supp. 2d at 127.

Third, even if the Court were to commence judicial redistricting now, a congressional plan would necessarily have to be done before any state legislative plans. In the time it will take to conduct any orderly congressional redistricting, the Court will have much more reliable information concerning whether a redistricting plan for both houses of the Legislature will be timely enacted. There will be plenty of time at that point to commence state legislative redistricting if it is needed.

II. EVEN WITH RESPECT TO CONGRESSIONAL REDISTRICTING, THE COURT SHOULD NOT APPOINT A SPECIAL MASTER AT THIS TIME

Defendants recognize that Judge Sharpe has scheduled New York’s congressional primaries for June 26. While that is more than four months from now, it is true that the time for judicial action is drawing nearer. Nonetheless, it is still somewhat premature to commence the judicial remedial process and, in all events, that process should not commence with authorizing a special master to start line-drawing—that process should commence only after the Court, with input from the parties, establishes the substantive and procedural guidelines governing the special master’s work. The Court therefore should not appoint a special master at this time for two reasons.

First, the congressional primary date and political calendar remain subject to change by the Legislature. Defs.’ Memo. at 10–11; Defs. Reply at 5–6. Even Judge Sharpe acknowledged

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“the public and political outcry caused by . . . having selected a June [congressional] primary date,” and conceded that his orders do not “preclude[] New York from . . . selecting a different primary date, or a different modified election calendar,” that comply with federal law. Feb. 9, 2012 Order at 3–6 (DE 72 at 6–9); *see also* Jan. 27, 2012 Order at 7 (DE 65 at 8). A primary date complies with federal law so long as it is at least 80 days before the November 6 general election—*i.e.*, August 18 or earlier. *See* Jan. 27, 2012 Order at 8 (DE 65 at 9). Moreover, because there is no right to an extended campaign, the Legislature can not only postpone the commencement of the political calendar, but also compress campaign deadlines into a shorter timeframe. *See* Defs.’ Memo. at 9–10; Defs.’ Reply at 6. Indeed, Judge Sharpe did exactly that when he shortened the period for collecting designating petition signatures in order to accommodate the Court-selected June primary date. *See* Table Of Political Calendar Events Adjusted To Comply With Court Order at 2 (DE 72 at 11). That the Legislature still has authority—and time—to modify the political calendar reinforces that appointment of a special master would be premature.

Second, in all events, a special master should not be appointed until the Court, with the parties’ input, sets forth guidance for the master. Indeed, courts in redistricting cases provide extensive guidance regarding the substantive criteria for the parties and the special master to apply in drawing districts, as well as procedures for parties to present evidence, plans, and legal argument to the special master and the Court. *See, e.g., PRLDEF*, 796 F. Supp. at 685; *Rodriguez*, 207 F. Supp. 2d at 124–25. The rules and criteria governing court-drawn plans are hardly crystal clear and a number of issues, particularly important and sensitive Voting Rights Act issues, require careful consideration and precise guidance by the Court before the special master can meaningfully consider proposed alternative plans and draw lines.

A court’s up-front formulation of these criteria and procedures reflects “the difficulty of defining neutral legal principles” to guide redistricting, *Perry v. Perez*, No. 11–713, slip op. at 4 (U.S. Jan. 20, 2012) (per curiam); facilitates efficient work by the Court, the parties, and the special master; and ensures that the special master’s proposal and the Court’s adopted plan comport with governing legal standards and traditional redistricting norms, *see PRLDEF*, 796 F. Supp. at 685; *Rodriguez*, 207 F. Supp. 2d at 124–25. Therefore, before appointing a special master, the Court should prescribe substantive criteria and procedures for any such master, and provide the parties an opportunity to comment on those issues.

In all events, the Court should limit its consideration of appointing a special master to the congressional context. That redistricting obviously must be given highest priority in light of the current primary schedule, and will occupy the Court, the parties, and any special master, while according the Legislature due time to enact State Assembly and State Senate plans.

For the foregoing reasons, the Court should not appoint a special master at this time.

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Respectfully submitted,

/s/ Michael A. Carvin

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cc: All counsel of record (via ECF)