SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. HERMAN CAHN PART 49

Justice

Allen, et al

-v-

Pataki, et. al.

INDEX NO. 101712/02

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED

MAY 13 2002

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 5/9/02

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

- -X

HOWARD T. ALLEN, ERIC RODRIGUEZ, MARTIN MALAVE-DILAN, JEANNETTE SANTOS, DONALD J. JIRAK, RICHARD FLATEAU, CHARLOTTE A. TAYLOR, MERVYN A. CAMPBELL, SARAH BROCKUS, PATRICIA MCDOW, LISA BEST, VICTOR OLUWOLE, RUBEN RANGEL, IRIS PELLERANO, RUSSELL VELAZQUEZ, GUILLERMO LINARES, ISABEL EVANGELISTA, MARTHA L. PEPIN, MARISEFA REYES, MARIA URENA, TYRONE ZIMMERMAN, JOSE ALVARADO, IRVIN MCMANUS, WAYNE HALL, SAMUEL PRIOLEAU, WILLIAM RODRIGUEZ, NEVILLE MULLINGS, MARY ADAMS, EUGENE A. BURNETT, SR., HAZEL PALMORE, JOHNNY W. VELEZ, JUDITH CRUZ,

Index No. 101712/02

Plaintiffs,

-against-

GEORGE E. PATAKI, Governor of the State of New York, MARY O. DONOHUE, Lt. Governor and President of the Senate of the State of New York, ELIOT SPITZER, Attorney General of the State of New York, JOSEPH L. BRUNO, President Pro Tempore and Majority Leader of the Senate of the State of New York, SHELDON SILVER, Speaker of the Assembly of the State of New York, MARTIN E. CONNOR, Minority Leader of the Senate of the State of New York, CHARLES NESBITT, Minority Leader of the State of New York, and CAROL BERMAN, NEIL W. KELLEHER, HELENA M. DONOHUE and EVELYN J. AQUILA, Commissioners of the New York State Board of Elections,

Defendants.

- -X

CAHN, J.:

This action challenges, inter alia, the redistricting plan for the New York State Senate (the "Senate Plan"), which was signed into law by the Governor on April 24, 2002.[1]

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[1] No challenge is posed herein to the State Assembly redistricting plan which was enacted as part of the same statute.

Plaintiffs move for a preliminary injunction on their first cause of action under the Equal Protection Clause of the Fourteenth Amendment, to enjoin defendants from proceeding with the 2002 elections for the New York State Senate pursuant to the Senate Plan, and seek to compel the creation of an alternate, court-approved redistricting plan. The New York State Attorney General opposes the motion, joined by President Pro Tempore of the State Senate Joseph Bruno.

Pursuant to the 2000 Census, New York State's population is 18,976,457, an increase of 5.5% over 1990. In response to the Census, the New York State Legislature enacted, on April 10, 2002, a reapportionment plan for the State Senate which created 62 voting districts. Accordingly, the "ideal" population of each district for equal representation purposes would be 18,976,457 divided by 62, or 306,072 persons.

According to plaintiffs, the districts range in size from 290,925 to 320,851. The Amended Complaint alleges that the deviation between the smallest and largest districts is 9.78% of the ideal population, and that the average deviation from the ideal is 2.22%. Plaintiffs contend that this degree of deviation is so great that it could not have resulted from an honest, good faith effort to achieve population equality between districts. In particular, plaintiffs allege a geographic bias which uniformly favors upstate districts by underpopulating them and disfavors downstate districts by overpopulating them.[2]

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[2] Plaintiffs' definition of "downstate" excludes Nassau and Suffolk counties, and includes Rockland County and part of Orange County.

Plaintiffs also note that the disparities in district size under past Senate plans were not as great, with total deviations of 1.83% in 1972, 5.30% in 1982 and 4.29% in 1992, and average deviations of .12% in 1972, .83% in 1982, and .90% in 1992.

The motion for preliminary relief is denied. "The drastic remedy of a preliminary injunction is appropriate only where the moving party has established a likelihood of success on the merits, irreparable injury in its absence of such relief and a balancing of the equities in its favor" (Application of Non-Emergency Transporters of New York v Hammons, 249 AD2d 124 [1st Dept 1998]; see, Koultukis v Phillips, 285 AD2d 433 [1st Dept 2001]; East 13th St.Homesteader' Coalition v Lower East Side Coalition of Housing Dev., 230 AD2d 622 [1st Dept 1996]; W.T. Grant Co. v Srogi, 52 NY2d 496 [1981]). Furthermore, "[a] preliminary injunction is a provisional remedy . . . [i]ts function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (Residential Bd. Of Mgrs. of the Columbia Condominium v Alden, 178 AD2d 121, 122 [1st Dept 1991]; see, Morris v Port Auth. of New York and New Jersey, 290 AD2d 22 [1st Dept 2002]). Given the great deference to which districting legislation is entitled, and the disruption of the status quo that judicial interference into the state electoral process would necessarily create, the court finds that neither injunctive relief nor an expedited trial of this matter is warranted.

First, without adjudicating the merits of plaintiffs' claims, it must nevertheless be noted that "[a] strong

presumption of constitutionality attaches to [a] redistricting plan" (Matter of Wolpoff v Cuomo, 80 NY2d 70, 78 [1992]). A court "may upset the balance struck by the Legislature and declare the plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (Id.)(internal quotations and citations omitted). Furthermore, because "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature . . . [i]t is not the role of [any court] to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard" (Id. at 79). In view of these standards, to demonstrate a likelihood of success on the merits plaintiffs must establish "beyond reasonable doubt" that the Senate Plan is unconstitutional.

Significantly, the debate between the parties on this issue has centered not upon whether plaintiffs have met that high standard, but upon whether a lesser standard of stating a prima facie case has been met. Defendants note, and plaintiffs agree, that at least as a general matter, under federal law a total population variance of less than ten percent renders a state reapportionment plan prima facie constitutional (see, e.g., Voinovich v Quilter, 507 US 146 [1993]; Brown v Thompson, 462 US 835 [1983]; Connor v Finch, 431 US 407 [1997]; White v Regester, 412 US 755 [1973]); Fund for Accurate & Informed Representation v

Weprin, 796 F Supp 662 [NDNY] [three-judge panel] [finding that 1992 New York State Assembly plan with total population deviation of 9.43% was constitutional under ten percent rule], affd 506 US 1017 [1992]). While plaintiffs argue that the ten percent rule is not absolute, and that a variety factors -- the relatively high 9.78% total deviation, the higher than usual mean deviations, alleged Census undercounting and defendants' bad faith -- should permit an exception to the rule, these arguments fall short of convincing the court that the matter is beyond reasonable doubt.

The courts have been especially reluctant to find irreparable harm, and to intervene in the state electoral process, in cases such as this where the constitutional violation is not manifestly clear. Rather, the harm to the public interest from delaying an election, and the prejudice and confusion to voters, candidates and election officials has been found to outweigh the potential benefits of injunctive relief (see, Reynolds v Sims, 377 US 533, 585 [1964] ["[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws . . . [the court should] avoid a disruption of the election process which might result from requiring precipitate changes"]) Diaz v Silver, 932 F Supp 462, 465-66, 68 [EDNY 1996] [three-judge panel] ["a preliminary injunction enjoining" electoral processes "is an extraordinary remedy involving the exercise of a very far-reaching power . . . [c]aution is especially necessary because if

an injunction is granted . . . [the] court would be interrupting a state's election process . . . the harm to the public . . . outweighs the likely benefit to the plaintiffs of granting a preliminary injunction"]; Ashe v Bd. Of Elections of the City of New York 1988 WL 68721 [EDNY 1988[three-judge panel][citing "the public interest in maintaining an orderly system of registration and in holding a primary election on a regularly scheduled date"]). Indeed, even where the districting plan has been found to be infirm, the courts have permitted elections to go forward subject to later corrective action (see, Whitcomb v Chavis, 396 US 1055 and 396 US 1064 [1970]; Dillard v Crenshaw County, 640 F Supp 1347 [MD Ala 1986]; Watkins v Magus, 771 F Supp 789, 801-05 [SD Miss 1991][three-judge panel]["where, as here, the possibility of corrective relief at a later date exists, even an established Voting Rights Act violation does not in and of itself merit a preliminary injunction"], aff'd in part and vacated in part as moot, 502 US 954 [1991]).

Nor does it appear that pursuing an expedited resolution of this action, in advance of the next election cycle, would be the most prudent course of action. Given the presumed constitutionality of the redistricting statute, the importance and complexity of the issues raised (especially in connection with plaintiffs and intervenors' Voting Rights Acts claims), the public interest would not be served by a hasty and precipitous consideration of the various claims. Rather, to the extent that any of the claims cannot be resolved as a matter of law, the "action [sh]ould be subjected to the normal litigation procedures

of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed" by the upcoming the primary and general election campaign periods (Puerto Rican Legal Defense and Educ. Fund, Inc. v Gantt, 796 F Supp 698, 700 [EDNY 1992][three-judge panel]).

Accordingly, it is

ORDERED, that the motion for a preliminary injunction is denied.

The court will convene a preliminary conference to consider discovery and other proceedings, on June 6, 2002, at 11:00 AM, at IA Part 49, 60 Centre Street, New York, N.Y., Room 232.

Dated: May 9, 2002

ENTER:

J.S.C.