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**VIA ECF**

The Honorable Roanne L. Mann
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Favors v. Cuomo*, No. 1:11-cv-05632-DLI-RR-GEL (E.D.N.Y.)

Dear Judge Mann:

In accordance with the Court's Orders, Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez, proponents of the Senate Majority Plan, respectfully submit their responses and objections to the proposed Congressional redistricting plans submitted by Defendants Sheldon Silver, John McEneny and Roman Edges ("Assembly Majority") and Common Cause.

## I. ASSEMBLY MAJORITY PLAN

The Assembly Majority Plan raises significant concerns under the Voting Rights Act, and violates traditional redistricting principles by disregarding political subdivisions and cores of existing districts, pairing incumbents unnecessarily, and undermining political fairness. *See* Analysis of Assembly Majority Plan (Ex. A).

**Voting Rights Act: Districts 12 and 15**. The Senate Majority Plan preserves larger minority voting age populations than the Assembly Majority Plan in two key minority districts located in counties covered by Section 5 of the Voting Rights Act. The Assembly Majority's proposed district 12, where the incumbent is Representative Nydia Velazquez, has a Hispanic voting age population (HVAP) of 44.8%. The Senate Majority Plan's corresponding district, district 11, has a higher HVAP of 48.7%. While no racial bloc voting analysis has been performed, this difference might be material.

The Assembly Majority's proposed district 15, where the incumbent is Representative Charles Rangel, has an HVAP of 51%. The Senate Majority Plan's corresponding district, district 14, has a higher HVAP of 57.2%. This district presents a unique Voting Rights Act

challenge because it traditionally has been an African-American district, but the Hispanic population has emerged into the majority.

**Preservation Of Political Subdivisions And Communities Of Interest: Districts 2, 3, 9, 16, 26**. This Court has recognized the traditional redistricting criteria of "respect[ing] political subdivisions and preserv[ing] communities of interest." Feb. 28, 2012 Order ¶ 2(d) (DE 133). Federal courts have recognized—and drawn Congressional redistricting plans to comport with—New York's traditional principle of "respect[ing] the cores of current districts and the communities of interest that have formed around them." *Rodriguez v. Pataki*, No. 02 Civ. 618 (RMB), 2002 WL 1058054, *6 (S.D.N.Y. May 24, 2002).

The Assembly Majority Plan is at odds with these criteria because it unnecessarily divides political subdivisions and breaks up cores of existing districts. For example, on Long Island, districts traditionally have run north to south across the island. But the Assembly Majority Plan flips districts 2 and 3 to run east and west along Long Island's northern and southern shores. This change dramatically realigns the cores of the existing districts: whereas the Senate Majority Plan maintains 89.8% of the core of district 2 and 82.9% of the core of district 3, the Assembly Majority Plan reduces these figures to 60.5% and 66% respectively.

The Assembly Majority Plan also redraws district 9, the seat of Republican incumbent Representative Michael Grimm, to remove Republican voters and replace them with voters less likely to support Representative Grimm. The Senate Majority Plan does not make this change.

The Assembly Majority's proposed district 16, home to incumbent Representative Nita Lowey, unnecessarily splits county, city, and town boundaries and existing cores by dipping from Westchester into the Bronx. It compounds this by also extending district 17, where Representative Eliot Engel is the incumbent, into Westchester. The Senate Majority Plan's corresponding district for Representative Lowey remains wholly within Westchester.

The Assembly Majority Plan's district 26 unnecessarily splits Buffalo to capture African-American neighborhoods in the proposed district of incumbent Representative Kathy Hochul. In fact, the Assembly Majority's district 26 preserves only 53.5% of Representative Hochul's district. The Senate Majority Plan, on the other hand, maintains 73.1% of the core of Representative Hochul's district and keeps Buffalo in single district.

**Incumbent Protection: Districts 2, 5, 7, and 20**. The Assembly Majority has expressed its strong agreement that New York's traditional redistricting principles include "preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Memo. of Law at 5–6 (quoting *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 363 (S.D.N.Y. 2004) (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)) (DE 153). Moreover, this Court previously has concluded that the traditional criteria of incumbent protection was subordinated where a district

unnecessarily was drawn without an incumbent. *See Diaz v. Silver*, 978 F. Supp. 96, 122 (E.D.N.Y. 1997).

The Assembly Majority Plan contravenes these principles because it proposes two incumbent pairings around a neighboring district with no incumbent. In the first place, the Assembly Majority Plan for Queens pairs Representative Turner, a Republican, and Representative Crowley, a Democrat, in district 5—a heavily Democratic district—even though it leaves neighboring district 7 without an incumbent. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004) (overturning plan where "incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many" Republicans "as possible"), *summ. aff'd*, 524 U.S. 947 (2004); S. Issacharoff & Pamela S. Karlan, Where To Draw The Line?: Judicial Review of Political Gerrymanders, 153 U. Pa. L. Rev. 541, 552 (Nov. 2004) ("Contemporary partisan gerrymandering" may involve "redrawing the lines to place the residences of two incumbents in the same district"). The Assembly Majority Plan also pairs two Democratic incumbents, Representative Steve Israel and Representative Gary Ackerman, in district 2, even though that district also borders district 7 where no incumbent resides.[1]

By contrast, the Senate Majority Plan gives full effect to these principles because it creates only the one incumbent pairing required by the reduction in the number of Congressional seats and no district without an incumbent. It therefore furthers the State's "legitimate concerns about [preserving] the ability of representatives to maintain relationships they had already developed with their constituents." *Diaz*, 978 F. Supp. at 123.

**Political Fairness: Districts 5, 9, 16, and 26**. This Court has recognized that "political fairness" is a traditional redistricting criterion. *Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 691 (E.D.N.Y. 1992). This criterion prohibits sacrificing traditional redistricting principles "to achieve excessive and inappropriate political advantage." *Good v. Austin*, 800 F. Supp. 551, 556 (E.D. Mich. 1992). Moreover, political gerrymandering traditionally has been disfavored. *See, e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).

The Assembly Majority Plan blatantly attempts to advantage the Democratic Party and to harm the Republican Party and its voters. In recent legislative and statewide elections, Republican candidates have won an average of approximately 37% of the votes cast. *See* Election Results (Ex. B). Republicans currently hold eight of New York's twenty-nine seats, or 27.6%. Given the 2010 Census data and the decrease in New York's Congressional delegation to twenty-seven seats, it was expected that one seat would be lost from upstate New York and one seat from New York City, with Republicans retaining seven total seats, or 25.9%. Yet the

[1] The Assembly Majority also pairs a Republican incumbent, Representative Richard Hanna, and a Democratic incumbent, Representative Maurice Hinchey, in district 20. But as the Assembly Majority notes, Representative Hinchey has announced his retirement and will not be seeking reelection.

Assembly Majority Plan would inflict a three-seat loss on Republicans, with two seats lost in upstate and one seat lost in New York City. The Assembly Majority Plan thus leaves the Republicans' share at four out of twenty-seven seats, or 14.8%, even though Republican candidates in recent statewide elections have received around 37% of the total votes cast.

The Assembly Majority Plan subverts traditional redistricting criteria in the name of pairing incumbents and political gerrymandering. In addition to the incumbent pairs described above, the Assembly Majority Plan proposes a district 9 that swaps Republican neighborhoods for less favorable voters in an effort to weaken incumbent Republican Representative Grimm. The Assembly Majority's proposed district 16 unfairly favors incumbent Representative Lowey, a Democrat, by expanding her district into African-American neighborhoods in the Bronx. And the Assembly Majority's proposed district 26 preserves only 54% of the existing core, splits Buffalo, and captures Buffalo's African-American neighborhoods in a transparent effort to strengthen Representative Hochul, a Democrat.

## II. COMMON CAUSE PLAN

By Common Cause's own description, its Plan violates the one-person, one-vote requirement, contravenes the Voting Rights Act, and disregards traditional redistricting principles in favor of irrelevant data.

Common Cause's block equivalency data and maps also are at odds with each other. While Common Cause's block equivalency data and maps display proposed districts of the same shape, they use different systems for numbering those districts. Moreover, Common Cause does not use accurate residential addresses for certain incumbents. The discussion of Common Cause's proposed map below relies on its block equivalency data and incorporates accurate incumbent residential addresses. *See* Analysis of Common Cause Plan (Ex. C).

**Equal Population**. The Apportionment Clause requires Congressional districts to be equal in size with no exceptions above a handful of people. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Kirkpatrick v. Prisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher*, 462 U.S. 725; *see also Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (Congressional plan with an overall deviation of 19 people unconstitutional based on a finding that the state's justification was inadequate). The Common Clause Plan violates this requirement because it has a population deviation of up to 34 inhabitants between its proposed district 7 (717,690) and proposed district 26 (717,724). The Senate Majority Plan complies with this requirement because it creates fourteen districts with a population of 717,707, and thirteen districts with a population of 717,708.

**Voting Rights Act**. Common Cause's list of the "Criteria And Procedures For Drawing Common Cause Reform Maps" does not list the Voting Rights Act as a criterion that Common

Cause considered. *See* Criteria And Procedures For Drawing Common Cause Reform Maps, *available at* http://www.citizenredistrictny.org/criteria-and-procedure-for-drawing-common-cause-reform-maps/. Section 5 of the Voting Rights Act prohibits redistricting plans that have the effect of harming incumbents who are minority voters' candidates of choice, even if such a negative effect on the incumbent is inadvertent. *See, e.g.*, November 16, 2001 Objection Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Honorable Geoffrey Connor, Acting Secretary of State, State of Texas (objecting in part because plan "pairs a nonminority and a Hispanic incumbent"), in 2 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary, 109th Cong. (2005), at 2518–23 ("VRA Hearing") (Ex. D); June 5, 2000 Objection Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to David Mendez, Bicerstaff, Heath, Smiley, Pollan, Kever & McDaniel, in 2 VRA Hearing at 2508–12 (objecting in part because of change's effect on "incumbent African-American Trustee") (Ex. E); January 13, 1986 Objection Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Honorable Charles Stavley, Terrell County Judge, in 2 VRA Hearing at 2227–29 (objecting in part because of effect on "lone Mexican-American incumbent in existing Precinct 2") (Ex. F).

Yet the Common Cause Plan does exactly that because it takes at least two minority incumbents in counties covered by Section 5 out of their districts and pairs them with other incumbents. Common Cause's proposed district 7 pairs Representative Velazquez and Representative Edolphus Towns, and its proposed district 15 pairs Representative Rangel with Representative Jose Serrano.

The Senate Majority Plan, by contrast, does not remove any minority incumbents from their districts or pair any incumbents in any county covered by Section 5.

**Traditional Redistricting Principles**. Common Cause admits that, in drawing its plan, it "started from a blank slate without any reference to current political districts or incumbents." *See* Criteria And Procedures For Drawing Common Cause Reform Maps. The Common Cause Plan therefore blatantly violates the traditional criteria of preserving cores and communities of interest and of protecting incumbents. *See Rodriguez*, 308 F. Supp. 2d at 363; *Diaz*, 978 F. Supp. at 123.

The Common Cause Plan pairs a staggering eight sets of incumbents in its proposed districts 3 (Representatives Ackerman and Israel); 5 (Representatives Meeks and Turner); 7 (Representatives Velazquez and Towns); 12 (Representatives Crowley and Carolyn Maloney); 15 (Representatives Rangel and Serrano); 17 (Representatives Lowey and Nan Hayworth); 22 (Representatives Hanna and Ann Marie Buerkle); and 26 (Representatives Hochul and Brian

Higgins).[2] The Common Cause Plan also proposes no fewer than seven districts with no incumbent: districts 6, 8, 14, 16, 18, 24, 27.

The Senate Majority Plan creates only the one incumbent pair unavoidable due to the reduction in Congressional seats in New York, and leaves no district without an incumbent.

**Irrelevant Data**. Common Cause based its map-drawing exercise largely on "relevant" socioeconomic data such as "median household income, educational attainment, homeownership, public transit use, percentage of seniors and children in the population, type of occupation ('white collar,' 'blue collar,' or service sector), and country of origin (% foreign born)." *See* Criteria And Procedures For Drawing Common Cause Reform Maps. Such socioeconomic data, however, has never been considered a "relevant" traditional redistricting criterion. In fact, to the extent such data has been implicated in redistricting litigation, it has pertained solely to the totality-of-the-circumstances inquiry required to establish racial discrimination in violation of Section 2 of the Voting Rights Act. *See, e.g.*, *Rodriguez*, 308 F. Supp. 2d at 435. Thus, far from being the gravamen of a redistricting effort—as Common Cause would have it—such data is irrelevant here. The Senate Majority Plan properly rests on the appropriate data and criteria implicated by this Court's Order and traditional principles.

For the foregoing reasons, the Court should adopt the Senate Majority Plan.

[2] Common Cause also pairs Representative Hinchey, who is retiring, with another incumbent in its proposed district 19.

Respectfully submitted,

/s/ Michael A. Carvin

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cc: All counsel of record (via ECF)