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

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DANIEL MARKS COHEN; RAQUEL BATISTA; PURVA BEDI; TODD BREITBART; RAYMOND W. ENGEL; JACQUELINE G. FORRESTAL; PATRICK L. FURLONG; ANDREW KULYK; JERRY C. LEE; IRENE VAN SLYKE; and SENATOR MARTIN MALAVÉ DILAN,

Index No. 12-102185

Petitioners,

-against-

GOVERNOR ANDREW M. CUOMO; LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE ROBERT J. DUFFY; SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE DEAN G. SKELOS; SPEAKER OF THE ASSEMBLY SHELDON SILVER; and THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

_____x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION PURSUANT TO UNCONSOLIDATED LAWS § 4221 TO DECLARE UNLAWFUL AND ENJOIN THE ENFORCEMENT OF CHAPTER 16 OF THE LAWS OF 2012

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Petitioners, by and through their attorneys, Cuti Hecker Wang LLP, respectfully submit this Reply Memorandum of Law in further support of their Petition.

PRELIMINARY STATEMENT

After months of anticipation, Respondents *still* have not explained why the Legislature decided to use Method A and Method B simultaneously, let alone provided a permissible explanation for doing so. Instead, Respondents falsely assert that it often has been done this way in the past, despite abundant evidence confirming that it *never* has been done this way in the past. Respondents further contend that Section 4 affords them boundless discretion to mix and match methodologies for any reason. And they purport to take offense that Petitioners have questioned their motives, asserting without supporting authority that their reasons for increasing the size of Senate are "entirely irrelevant" as a matter of law. Based on this remarkable view of their power and of this Court's authority to interpret and enforce the Constitution, Respondents boldly decline to put on any case at all, choosing to offer *no evidence* in support of their defense – no affidavit from Senator Skelos, from Mr. Carvin, or from any LATFOR official explaining the Legislature's reasoning, let alone demonstrating that there is precedent for using Method A and Method B in the same redistricting.

Respondents' obfuscation is troubling. The government has a duty to be candid with its citizens about the fundamental design of its political institutions. The government has no business "play[ing] fast and loose" with "constitutional requirements." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972). The Senate Majority may not manipulate the Senate size calculus – which is supposed to be an objective, evenhanded process – by employing an entirely unprecedented and internally inconsistent methodology that is so devoid of logic that

Respondents cannot even begin to explain it coherently. For these reasons and the reasons that follow, the Petition should be granted.

ARGUMENT

I. INCREASING THE SIZE OF THE SENATE TO 63 SEATS IN 2012 VIOLATES ARTICLE III, SECTION 4 OF THE NEW YORK CONSTITUTION

A. Method A and Method B Never Have Been Used in the Same Redistricting

The centerpiece of Respondents' defense[1] is their repeated but entirely unsupported assertion that past Legislatures have used Method A in Richmond-Suffolk and Method B in Queens-Nassau in the same redistricting. Resp. Br. at 2 (asserting that "all redistricting plans adopted between 1894 and 1972 . . . followed the same approach in Queens-Nassau and Richmond-Suffolk that the Legislature applied this year"); *id*. at 6 (asserting that Method A has been used "[i]n every reapportionment since 1894"); *id*. at 13 (arguing that Petitioners "conveniently ignore the Legislature's and the Court of Appeals' pre-1972 practice"); *id*. at 16 (asserting a "longstanding practice" and an "unbroken tradition" of using Method A "in Richmond-Suffolk"). That is demonstrably false. In fact, Method A and Method B *never* have been used in the same redistricting.

1. Redistrictings Prior to 1972

Contrary to Respondents' contention that the Legislature used Method A in Richmond-Suffolk for "all redistricting plans adopted between 1894 and 1972," *id*. at 2, the Legislature actually applied *no* formula to the Richmond-Suffolk combination prior to 1972 because the Richmond-Suffolk combination was *irrelevant* to the Senate size calculus prior to the 1970

[1] Respondents Cuomo, Duffy, Silver, and the New York State Board of Elections have taken no position on the Constitutionality of Chapter 16. The only Respondent who defends Chapter 16 is Senator Skelos. For ease of reference, however, we attribute Senator Skelos's arguments to "Respondents."

Census. As Respondents acknowledge, the Senate size formula prescribed in Section 4 applies only to those counties that have *at least three full ratios* (*i.e.*, 6% of the State's population). Less populous counties are disregarded. As set forth in the accompanying Reply Affidavit of Todd Breitbart, under every Census prior to 1970, the Richmond-Suffolk combination *did not reach* the three-full-ratio threshold for consideration under the Constitution's Senate size formula. Breitbart Reply Aff. ¶ 5.

For example, according to the 1960 Census, the total citizen population of New York State (which was the apportionment basis until the addition of Section 5-a to Article III of the Constitution in 1970) was 16,240,786, yielding a ratio for that year of 324,816. *Id*. The population of Richmond County was 216,764 in 1960, or 0.67 ratios. *Id*. The population of Suffolk County was 650,112 in 1960, or 2.00 ratios. *Id*. Because the Richmond-Suffolk combination plainly had less than three full ratios under either Method A (2.67 ratios) or Method B (two full ratios), it simply was not part of the Section 4 calculus, period. *Id*.[2]

That changed after 1970. According to the 1970 Census, the total population of New York State was 18,241,266, yielding a ratio for that year of 364,825. *Id*. ¶ 6. The population of Richmond County was 295,443 in 1970, or .81 ratios. *Id*. The population of Suffolk County was 1,127,030 in 1970, or 3.09 ratios. *Id*. Because the Richmond-Suffolk combination first exceeded the three full ratio threshold in 1970 under either Method A (3.90 ratios) or Method B

[2] There are numerous other county combinations that shared a single district in 1894 and therefore would have to be combined using either Method A or Method B if they ever reached the 6% total population threshold. For example, Delaware, Chenango, and Sullivan Counties shared Senate District 26 in 1894, and Otsego and Herkimer Counties shared District 33. Breitbart Reply Aff. ¶ 4. But because these combinations of counties have never come close to having three full ratios, they never have been on the Senate size radar screen, just as the Richmond-Suffolk combination was not on the Senate size radar screen prior to 1972.

(three full ratios), the Richmond-Suffolk combination became relevant to the Senate size calculus in 1972 *for the very first time*. *Id*. ¶ 7.

For this reason, it is not surprising that neither *In re Dowling*, 219 N.Y. 44 (1916), nor *In re Fay*, 291 N.Y. 198 (1943), nor either of the opinions in *Matter of Orans*, 15 N.Y.2d 339 (1965), 17 N.Y.2d 107 (1966), nor any other pre-1972 case even *mentioned* the Richmond-Suffolk combination. Rather, the pre-1972 Senate size cases focused exclusively on the counties that had achieved three full ratios. *See*, *e.g.*, *Fay*, 291 N.Y. at 211 (Senate size table listing ratio calculations only for Kings, New York, Bronx, Queens, and Erie Counties).

Respondents are wrong about the Legislature's treatment of Richmond-Suffolk prior to 1972 for a second, independent reason: Prior to the advent of the federal one person, one vote rule, Method B was the only counting methodology that was consistent with state law. The reasons why Method A was incompatible with state law prior to *Orans* relate to the nature of Section 4's arcane mechanism for apportioning Senate districts by county – a mechanism that was held unconstitutional in *WMCA v. Lomenzo*, 377 U.S. 633 (1964), and *Orans*. Prior to *Orans*, the Senate size calculation was inextricably bound together with New York's county-based apportionment process, a key part of which focused exclusively on the full ratios of individual counties. *See Fay*, 291 N.Y. at 211-12; Ruth C. Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581, 627 (1962). Until that part of New York's apportionment process was struck down, the fact that the Senate size formula was tied to individual counties' full ratios meant that aggregating county populations under Method A was impermissible. This point was stressed in the lengthy and thoughtful Interim Report submitted by the Legislature's Joint Legislative Committee on Reapportionment (the "Committee") in support of the 1972 redistricting plan at issue in *Schneider* (the relevant pages of which are attached as Exhibit 1 to

the Breitbart Reply Affidavit). The Interim Report explained that Method B was the only method that was consistent with Section 4 prior to *WMCA* and *Orans*, and that Method A had become available for the first time in the wake of the "demise of the 'full ratio' rule for apportioning Senators." Interim Report at 10.

Given that Method A could not have been applied prior to *Orans* without violating the New York Constitution's county-based apportionment rules, and given that the Richmond-Suffolk combination did not become relevant to the Senate size calculation until 1972, Respondents' assertion that the Legislature used Method A in Richmond-Suffolk for "all redistricting plans adopted between 1894 and 1972," Resp. Br. at 2, is doubly false.

2. The 1972 Redistricting

As explained above, Richmond-Suffolk became relevant after the 1970 Census because it passed the three-full-ratio threshold. For this reason, and because *Orans* already had been decided, Method A and Method B both were available for the very first time in history.

As set forth in detail in Paragraph 14 of Todd Breitbart's March 15, 2012 Affidavit, although Richmond-Suffolk reached three full ratios in 1970 and therefore became relevant to the Senate size calculus, it did not make a difference whether the Legislature used Method A or Method B in Richmond-Suffolk in 1972 (because Richmond had .81 ratios and Suffolk had 3.09 ratios, which yielded three full ratios for Richmond-Suffolk under either Method A or Method B). *See also* Breitbart Reply Aff. ¶ 6. But as set forth in Paragraph 15 of that Affidavit, it *did* matter whether the Legislature used Method A or Method B in Queens-Nassau in 1972 (because Queens had 5.45 ratios and Nassau had 3.92 ratios, which would have yielded eight full ratios under Method B but nine full ratios under Method A).

On December 14, 1971, the Committee issued its thorough Interim Report recommending that the Legislature abandon Method B in favor of Method A for *all* county combinations in 1972. The Committee observed that "Section 4 sets forth a complicated formula under which in appropriate circumstances, the size of the Senate is increased." *Id*. at 9. It recognized that prior to the advent of the one person, one vote rule, the "full ratio" mechanism in Section 4 determined both (i) the number of Senators that were apportioned to the largest counties (those with more than 6% of the State's population) and (ii) the extent to which the Senate size would be increased. With respect to the apportionment part of Section 4, the Committee found that Section 4 "deni[ied] a large county its fair share of Senate districts" because of the requirement that all fractional remainders, even .99 of a full ratio, be rounded down and ignored for the largest counties but not the smaller counties. *Id*. at 10. The Committee observed that *WMCA* and *Orans* had struck down the apportionment part of Section 4 for this reason under the one person, one vote rule, concluding that the "demise" of the requirement that remainders be ignored for apportionment purposes "suggest[ed] to the Committee" that artificially ignoring remainders "*should no longer be viable for the purpose of computing the size of the Senate*." *Id*. (emphasis added). Recognizing that "[t]he original purpose of Article III, under which the size of the Senate is altered, was to prevent the growth of gigantic districts among the smaller counties as the state's population became increasingly urbanized," the Committee found that "[t]his policy can best be advanced" by *abandoning* Method B, which artificially ignores "major fractions" of ratios, and switching to Method A, which determines the size of the Senate based on total population without ignoring remainders. *Id*. The Committee specifically recommended using Method A for *all* county combinations. *Id*. at 10-11.

Schneider upheld the use of Method A for all counties. Unlike in this proceeding, the State put on a vigorous defense in *Schneider*. Assistant Attorney General George D. Zuckerman submitted a sworn affidavit (attached as Exhibit 2 to the Breitbart Reply Affidavit) authenticating and introducing the Committee's Interim Report into the record, which "carefully explained" the Legislature's "basis" for switching from Method B to Method A for all county combinations. Based on this affidavit and the Committee's thorough and transparent Interim Report, the Court of Appeals held that the consistent use of Method A was "valid" and did not "transgress any constitutional provision." 31 N.Y. 2d at 432. Although it indicated that a Legislature that was acting in "good faith" and not "play[ing] fast and loose" with Section 4 had some discretion to choose between Method A and Method B, the Court expressly determined that Method A is more "consonant with the broad historical objectives" underlying Section 4 than Method B. *Id*. at 429, 430, 432-33.

Neither the Legislature nor any party in *Schneider* remotely suggested that there was any basis for applying both Method A and Method B for different county combinations in the same redistricting, and nothing in the Court's opinion remotely suggested that using both methods simultaneously would be permissible.

3. The 1982 and 1992 Redistrictings

With respect to the Senate size, the 1982 and 1992 redistrictings were unremarkable. Using Method A rather than Method B made no difference in Richmond-Suffolk in either 1982 or 1992, although it did yield an extra Senate seat based on Queens-Nassau population growth in both 1982 and 1992. Breitbart 3/15/12 Aff. ¶¶ 16-19. The Legislature used Method A in Queens-Nassau in both 1982 and 1992, and in light of *Schneider*, nobody challenged the use of Method A in Queens-Nassau in either year.

4. The 2002 Redistricting

In 2002, the Legislature chose to abandon Method A and to use Method B for the first time in modern history. Respondents claim that the Legislature only abandoned Method A in favor of Method B for Queens-Nassau in 2002, but "continued" to use Method A for Richmond-Suffolk in 2002. Resp. Br. at 9 (asserting without evidentiary support that in 2002, "the Legislature applied [Method A] to Richmond-Suffolk"); *id*. at 10 ("The Legislature used the same approach to calculating the size of the Senate in 2012 that it used in 2002."); *id.* at 16 (asserting that in 2002 the Legislature "continue[d] the unbroken tradition" of using Method A in Richmond-Suffolk). This assertion is false for three reasons.

First, whether the Legislature used Method A or Method B in Richmond-Suffolk *made no difference in 2002 or in any prior redistricting*. As demonstrated in Section I.A.1, *supra*, Richmond-Suffolk did not reach three full ratios, and therefore was categorically irrelevant to the Senate size calculus, prior to 1972. As demonstrated in Section I.A.2, *supra*, although Richmond-Suffolk did reach three full ratios in 1970, it did not matter whether the Legislature used Method A or Method B in Richmond-Suffolk in 1972 because both methods yielded the same result in that year. As demonstrated in Section I.A.3, *supra*, it did not matter whether the Legislature used Method A or Method B in Richmond-Suffolk in 1982 or 1992 because both methods yielded the same result in those years as well. And as Paragraph 20 of the March 15, 2012 Breitbart Affidavit demonstrated, it did not matter whether the Legislature used Method A or Method B in Richmond-Suffolk in 2002 because both methods yielded the same result that year as well. It is irrefutable that 2012 is the first redistricting cycle in history in which it has made any difference whether the Legislature used Method A or Method B in Richmond-Suffolk. Respondents' unsupported insistence that the Legislature concluded in 2002 that Method B "is

more faithful to the Constitution" in Queens-Nassau, but that the Legislature nonetheless concluded that it would "*continue*[]" its "unbroken tradition" of using Method A in Richmond-Suffolk, Resp. Br. at 16 (emphasis added), suggests falsely that the method used for Richmond-Suffolk had been relevant to the Senate size calculation in prior redistrictings.

Second, the 2002 Carvin Memorandum said nothing whatsoever about using Method A in Richmond-Suffolk in 2002. The Committee's Interim Report, in marked contrast, could not have made it more clear that in 1972, the Legislature switched from Method B to Method A for *all* county combinations. *See* Interim Report at 11 (calculating the "combined populations" of Richmond and Suffolk pursuant to Method A). Surely Mr. Carvin would not have advised the Legislature to abandon Method A in favor of Method B in Queens-Nassau, but to "continue" its supposed "tradition" of using Method A in Richmond-Suffolk, without acknowledging this markedly differential treatment and explaining (i) why Method B is "more faithful to the Constitution" in Queens-Nassau but not in Richmond-Suffolk and (ii) why he was recommending such a radical departure from the Legislature's clear decision in 1972 to apply a *single* methodology to *all* county combinations. Respondents' only answer to this gaping hole in their defense is to make the unsworn claim that "the 2002 Carvin Memorandum discussed only *departures* from the Legislature's 1992 approach, not continuations of that approach." Resp. Br. at 17 (emphasis in original). But using two different counting methodologies in the same redistricting would have been precisely the kind of "departure" from prior practice that Respondents concede would have warranted explanation. Moreover, even assuming that Respondents are being candid with this Court about what Mr. Carvin intended to convey in the 2002 Carvin Memorandum, nobody reading the Memorandum could have understood it to be

recommending that the Legislature switch to Method B for Queens-Nassau but not Richmond-Suffolk.

Finally, if Mr. Carvin really had intended to advise the Legislature to use Method A in Richmond-Suffolk in 2002 even though the 2002 Carvin Memorandum said no such thing, then he easily could have sworn out an affidavit in this proceeding clarifying what he actually meant and what the Legislature actually did. The fact that Respondents rely exclusively on legal argument and present no evidence at all about what the Legislature did this year or in 2002 is both astonishing and telling. Respondents refer to the March 15, 2012 Breitbart Affidavit as "untested." Resp. Br. at 17. So why have they not "tested" it with affidavits of their own? Respondents' lawyers' unsworn and unsupported assertions that the Legislature applied Method A to Richmond-Suffolk in 2002 are insufficient, especially when the evidence in the record in this proceeding demonstrates so overwhelmingly that their claims are false.[3]

5. The 2012 Redistricting

As Paragraphs 23-24 of the March 15, 2012 Breitbart Affidavit make clear, 2012 is the first year in history in which the choice between Method A or Method B matters in both Queens-Nassau and Richmond-Suffolk. The 2012 Carvin Memorandum does not acknowledge this, nor does it acknowledge that whether to use Method A or Method B in Richmond-Suffolk never mattered before 2012, nor does it acknowledge that the Legislature adopted the unqualified conclusion in 2002 that Method B is "more faithful to the Constitution." Instead of acknowledging these important facts, the 2012 Carvin Memorandum simply asserts, without

[3] The Senate Majority observes that Petitioner Breitbart opined that *consistently* using Method B for *all* county combinations "entails no intrinsic partisan bias." Resp. Br. at 9. But Mr. Breitbart never suggested that using Method A and Method B simultaneously was permissible.

support or analysis, that Method A is the "proper methodology" for Richmond-Suffolk. It makes no effort to explain why Method B is "more faithful to the Constitution" in Queens-Nassau but Method A is the "proper methodology" for Richmond-Suffolk.

For all of these reasons, the heart of Respondents' defense relies on a blatantly false premise. The Legislature did not merely do this year what often has been done in the past. To the contrary, the Legislature has radically departed from every prior practice, choosing to use Method A in one part of the State and Method B in another for the first time ever in 2012.

B. The Legislature's Use of Method A and Method B in the Same Redistricting Fails Under Any Standard of Review

Respondents' effort to ratchet down the standard of review is based on a serious misreading of *Schneider* and the other cases on which they rely. In any event, Chapter 16 fails under any standard of review because it is unreasonable on its face and because Respondents have not offered a shred of evidence supporting it.

1. Respondents Apply the Wrong Standard of Review

The premise of Respondents' argument that they need only satisfy "rational basis" review, and that Petitioners must demonstrate a constitutional violation "beyond a reasonable doubt," is their bald assertion that the size of the Senate does not implicate any "fundamental right." Resp. Br. at 15. But that plainly is not so. The right to vote and the right to fairly constituted political bodies are not just fundamental but among the most fundamental of all rights. Because these rights are "preservative of other basic civil and political rights," any alleged infringement of these rights "must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Nor does anything the Court of Appeals said in *Schneider* confer on Respondents the boundless discretion to which they claim entitlement. *Schneider* expressly limited the Legislature's discretion to choose between Method A and Method B (i) to decisions made "in good faith," 31 N.Y.2d at 428, 429; *see also Fay*, 31 N.Y.2d at 429 (stating that Senate size increases must be done "in good faith"); (ii) by requiring that the Legislature not "play[] fast and loose" with "constitutional requirements," *Schneider*, 31 N.Y.2d at 430; and (iii) by mandating that the methodology chosen by the Legislature be "consonant with the broad historical objectives underlying the provision for increasing the size of the Senate," *id.* at 433. Moreover, *Schneider* held at most that the Legislature has discretion to choose *between* Method A and Method B. The Committee's Interim Report makes clear that the Legislature never claimed it had discretion to use *different* methodologies in Queens-Nassau and Richmond-Suffolk, nor could the Legislature credibly make that claim. After all, although a state has discretion to choose to measure population for purposes of one person, one vote based on total population, voting age population, or any other reasonable measure, *see Burns v. Richardson*, 384 U.S. 73 (1966), nobody could credibly suggest that a state may measure population equality by total population in some counties and voting age population in others. Because *Schneider* had no basis to consider whether the Legislature may apply *both* Method A *and* Method B simultaneously, and because Respondents have not begun to explain why doing so possibly could be "consonant with the broad historical objectives underlying the provision for increasing the size of the Senate," and because they have not introduced any evidence at all about why the Legislature made or reasonably could have made this peculiar choice, *Schneider* does not support Respondents' defense.[4]

[4] Respondents' assertion that *Schneider* "upheld" the "approach" of using Method

Respondents also rely heavily on *Wolpoff v. Cuomo,* 80 N.Y.2d 70 (1992), but that case had nothing to do with the Senate size calculation at issue in this proceeding. The issue in *Wolpoff* was whether the Legislature, in its effort to satisfy *Reynolds* and *WMCA* by drawing substantially equipopulous districts, had violated the requirements in the New York Constitution governing compactness and respecting county borders. As the Court in *Wolpoff* recognized, it was impossible both to satisfy the one person, one vote rule and to adhere strictly to the compactness and county borders rules in the New York Constitution: "[W]e examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements." 89 N.Y.2d at 78. Because the best way to "balance" these "competing" requirements is inherently *subjective*, *Wolpoff* held that this balancing is "a function entrusted to the Legislature" that warranted substantial deference. *Id*. at 79-80. Here, in marked contrast, the Senate size formula is *objective*, and the Legislature is not being called upon to *balance* anything. *See* 3 Charles Z. Lincoln, *The Constitutional History of New York* 218 (1906) (explaining that in designing Section 4, the Framers of the 1894 Constitution intended the formulae prescribed therein to be "mechanical contrivance[s]" with "little room for the exercise of legislative discretion"). The fact that *Wolpoff* declined to second guess the Legislature's effort to draw districts as close to equipopulous as practical while simultaneously (i) drawing districts as compactly as practicable and (ii) dividing as few counties as practicable hardly supports the

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A in Richmond-Suffolk and simultaneously using Method B in Queens-Nassau, Resp. Br. at 11, is totally false. *Schneider* plainly did not address, much less "uphold," the simultaneous use of Method A and Method B in the same redistricting.

proposition that the Legislature enjoys boundless discretion to add as many districts to the Senate as it pleases.[5]

This case is much more like *In re Dowling*, 219 N.Y. 44 (1916), than *Wolpoff*. In *Dowling* – the first case in which the Court of Appeals considered the requirements of the Senate size formula – the Court said nothing about deference to the Legislature. To the contrary, the Court emphasized that the "construction of the language of the Constitution is essential" and that Section 4 "should not be given a construction that leads to manifestly unintended results." 219 N.Y. at 55-56.

Notably, Respondents fail to mention – let alone distinguish – the cases Petitioners cited holding that a single legal provision cannot be given two different meanings, and that the Legislature's "unexplained inconsistency" in using both Method A and Method B simultaneously is impermissible. *United States v. Santos*, 553 U.S. 507 (2008); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005); *see also Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1368 (Fed. Cir. 2011) (rejecting attempt to "construe[] *the exact same statutory provision* and conclud[e] that it can be interpreted to have different meanings depending on" the factual circumstances) (emphasis in original); *Mei Fun Wong v. Holder*, 633 F.3d 64, 78 (2d Cir. 2011) (noting that an "unexplained consistency" in the interpretation of a statutory term supports holding that the interpretation is arbitrary). This is not

[5] Respondents are wrong in asserting that the Legislature "could not literally comply with Section 4." Resp. Br. at 14. To be sure, *parts* of Section 4 were rendered unenforceable by the one person, one vote rule, but as *Schneider* and *Orans* both recognized, the Senate size formula itself remains fully intact. *Schneider*, 31 N.Y.2d at 431-32 & n.5; *Orans*, 15 N.Y.2d at 351. Notwithstanding the ambiguity in Section 4 requiring the Legislature to choose between Method A and Method B, nothing about applying the Senate size formula implicates the extraordinarily complex and inherently subjective balancing of competing interests that was at the center of *Wolpoff*.

a "quasi-equal protection theory." Resp. Br. at 11. It is inherent in the rule of law that the same law cannot be given different meanings simultaneously, even if each of two meanings independently would be reasonable.

It is elemental that it is ultimately the province of the Courts – not the Legislature – to interpret the Constitution. *Andersen v. Regan*, 53 N.Y.2d 356, 372 (1981) (stating that it is "the court's duty to interpret" the constitutional provision at issue); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is"). Although *Schneider* held that the Legislature has some discretion to choose *between* Method A and Method B – so long as it is acting in "good faith" and not "play[ing] fast and loose" – no case supports Respondents' argument that the Legislature has discretion to mix and match Method A and Method B indiscriminately to arrive at whatever Senate size suits its agenda.

2. The Legislature's Failure to Provide a Persuasive Explanation for Why It Used Method A and Method B Simultaneously for the First Time Is Fatal Under Any Standard of Review

Regardless of the standard of review that the Court applies in this case, Respondents do not meet it. Respondents' brief nowhere explains *the actual reasons* why the Legislature used Method A and Method B simultaneously in 2012 for the first time in history. Read as charitably as possible, their brief proffers two unsworn reasons why, according to Respondents, the Legislature *could* have done what it did. Neither reason is at all persuasive.

Respondents first suggest that it is permissible to use Method A in Richmond-Suffolk and Method B in Queens-Nassau because "in 1894, Nassau did not exist and Richmond and Suffolk were combined into a single Senate district." Resp. Br. at 16. But Respondents make no effort to explain why this distinction justifies using Method A in Richmond-Suffolk and Method B in

Queens-Nassau, nor could they. After all, the area that is now Queens-Nassau was just as "combined into a single Senate district" in 1894 (District 2) as Richmond and Suffolk were (District 1). *See Fay*, 291 N.Y. at 217 (approving combination of Queens-Nassau using Method B in computing size of the Senate because "the territories of Queens County and Nassau County in 1894 comprised one district to which one senator was then apportioned"). This supposed "distinction" provides no greater justification for applying Method A in Richmond-Suffolk and Method B in Queens-Nassau than the observation that Richmond begins with an "R" and Queens begins with a "Q."

Respondents also suggest that "the Legislature's approach recognizes the disparate histories of Queens-Nassau and Richmond-Suffolk" in that Method B "places Nassau in the position it would have occupied if it had existed in 1894 and, thus, on par with counties that did exist then," whereas Method A "recognize[es] that the 1894 Constitution placed Richmond and Suffolk in one Senate district." Resp. Br. at 16. This makes no sense for two reasons. First, it is undisputed that Nassau was *not* an independent county in 1894, and the Legislature has no more of a legitimate interest in *pretending* that Nassau was an independent county in 1894 (that is, "plac[ing] Nassau in the position it would have occupied if it had existed in 1894") than it has in pretending that Richmond and Suffolk each had their own Senate district in 1894. Second, if Nassau had been an independent county in 1894, then its very small 1894 population would *not* have entitled it to its own Senate district. *See Sherrill v. O'Brien*, 188 N.Y. 185 (1907) (observing that the 1906 population of Nassau County was only 61,541). Instead, it would have shared a Senate district with Queens, Richmond and Suffolk, or some other county or counties. Respondents thus have not articulated any legitimate interest that the Legislature could have had in treating Richmond-Suffolk so differently than Queens-Nassau in 2012.

Moreover, even if either of the above arguments had any intuitive appeal – though they have none – the fact that Respondents failed to proffer any *evidence* that the Legislature actually considered either of these supposed reasons is fatal to Respondents' defense. *See*, *e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (affirming invalidation of municipal ordinance regarding the location of a home for the mentally impaired because "the record does not reveal any rational basis" for the City's assertion that the residents would pose some risk to the community). Respondents do not meet even this low bar. Unlike in *Schneider*, where the Legislature's submission included several sworn affidavits and a lengthy report from the Legislature's apportionment Committee explaining its decision to switch to Method A, Respondents offer no shred of evidence – no affidavits, no legislative reports, not even a stray email to or from a LATFOR official – to support their naked insistence that the Legislature decided to increase the size of the Senate for a rational reason. Even in *Wolpoff*, the Court demanded that the Legislature offer "enough evidence to support" its assertion of reasonableness and good faith. *Wolpoff*, 80 N.Y.2d at 80.

Because Respondents have not articulated any legitimate interest that the Legislature had in treating Richmond-Suffolk so differently than Queens-Nassau in 2012, and because they have proffered no evidence in defense of the Legislature's decision, the addition of the 63rd Senate district is unconstitutional regardless of whether the Legislature was politically motivated.

C. The Legislature's Decision to Add a 63rd District Obviously Was Political, and the Legislature May Not Manipulate the Senate Size Formula to Gain Partisan Advantage

Tellingly, Respondents cite no authority in support of their remarkable claim that the Legislature's motive "is entirely irrelevant to Section 4." Resp. Br. at 3. In fact, no case has ever so held. Rather, *Fay* and *Schneider* both emphasized that the Legislature only has

discretion to choose between Method A and Method B when it is acting in "good faith." *Fay*, 31 N.Y.2d at 429; *Schneider*, 31 N.Y.2d at 429-30. Although *Schneider* held that the Legislature is entitled to "some flexibility in working out the opaque intricacies" of the Senate size formula, *id*. at 432, here Respondents have not worked out any "opaque intricacies" but rather merely have *hidden behind* the inherent complexities of Section 4 to manipulate the Senate size in an unlawful scheme to maximize partisan advantage.[6]

Respondents do not expressly deny that their motivation in increasing the size of the Senate was to benefit the Republicans at the expense of the Democrats. They certainly do not introduce evidence – in the form of an affidavit from Senator Skelos, from Mr. Carvin, or from a LATFOR official – demonstrating that their motivation was apolitical. Instead, Respondents make a series of legal arguments, none of which is persuasive.

Respondents first note that Petitioners have not asserted a malapportionment or a county division claim in this proceeding. Resp. Br. at 17-18. That is true. Petitioners claim that Respondents unlawfully manipulated the Senate size formula as part of a scheme to draw a redistricting plan that maximizes partisan advantage, and that the very significant and unnecessary malapportionment and county divisions in Chapter 16 provide further compelling evidence that Respondents' motivation in adding a 63rd district was impermissibly political and far exceeds the limits of the discretion identified in *Schneider*. It therefore is irrelevant that in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), a federal court rejected the claim that the regional malapportionment in the 2002 plan violated the one person, one vote rule. The process of *drawing district lines* is inherently political, but the process of *selecting a*

[6] As Respondents would have it, they could with impunity increase the size of the Senate for the admitted purpose of diluting the voice of minor party legislators, motive being "entirely irrelevant to Section 4." That obviously is not permissible.

methodology for applying the Senate size formula in Section 4 is not. No court has ever held that (and *Rodriguez* had no basis to consider whether) the Legislature has the same degree of latitude to pursue political goals in applying Section 4 that some courts have suggested it has in drawing district lines under the one person, one vote doctrine. To the contrary, *Schneider* held that the Legislature has discretion to determine in good faith which methodology is most "consonant with the broad historical objectives underlying" Section 4, 31 N.Y.2d at 433 – which the record demonstrates is what the Legislature did in 1972, and which Respondents at least pretended to do in 2002 – not to manipulate the numbers to gain partisan advantage.

To support their assertion that "Petitioners' contention that Section 4 in fact outlaws politically motivated regional discrimination is impossible to square with Section 4's text and history," Resp. Br. at 19-20, Respondents state that Section 4 was motivated by the desire "to prevent populous counties . . . from overpowering less populous counties." *Id*. at 20. But that is only half of the story. The historic compromise reflected in the Senate size formula in Section 4 was equally motivated by the desire to protect growing urban areas. *See Fay*, 291 N.Y. at 208 (the "object" of Section 4 was *both* "to restore the country districts to substantially the same position in which they were in 1846" *and* "to provide for the increased representation of the cities by the increase in number, so that there will be effective representation of the country as well as of the city districts") (quoting Revised Record, Constitutional Convention of 1894, Vol. IV, pp. 1253-54). Indeed, Section 4 tied voting power *directly* to population growth by requiring that any additional district to be added *to the area where the population grew* (which the debates clearly anticipated, and history has confirmed, inevitably would be in downstate urban areas). Ironically, this is precisely the *opposite* of what Chapter 16 purports to do. Chapter 16 adds an additional Senate district in the upstate region based upon population growth in the New

York City area. In any event, given that the pre-*Orans* apportionment rules that Respondents invoke have been struck down as unconstitutional, they are no more relevant to whether the Legislature may manipulate the Senate size for political purposes than the Three-Fifths Clause is relevant to Congressional apportionment.[7]

Respondents also assert, again without any evidentiary support, that "the Legislature can populate districts and break county lines just as easily in a 62-seat plan as in a 63-seat plan." Resp. Br. at 19. This misses the point. The point is not whether Respondents could have done similar violence to equal population and county integrity principles in a 62-seat plan, but rather that they obviously added a 63rd seat for the sole purpose of benefiting the Republicans, not as the result of any effort to interpret Section 4 sincerely and in good faith. As explained in greater detail in the Breitbart Reply Affidavit, the decision to increase the Senate size to 63 districts plainly was driven entirely by the desire to create an additional upstate district that the Republicans expect to win. In a 62-seat plan, they could not have created an additional upstate district without violating the one person, one vote rule. To accomplish that goal, it was necessary for Respondents both to maximally underpopulate most of the upstate districts and to enlarge the Senate to 63 districts so that the extra district could be shoehorned into the upstate region without pushing the total deviation above the presumptively unconstitutional ten percent threshold.

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[7] Respondents are wrong that *Reynolds* held that regional discrimination is permissible. Resp. Br. at 19. Much to the contrary, the core holding of *Reynolds* is that "all voters, as citizens of a State, stand in the same relation *regardless of where they live*." 377 U.S. at 565 (emphasis added); *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (striking down regional malapportionment and holding that "forty years of Supreme Court jurisprudence have established that the creation of deviations for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional").

Respondents attempt to dismiss the significance of the Burgeson memoranda, pointing out that Burgeson "advised *in favor* of a 62-seat Senate and *against* a 63-seat Senate in order to benefit Republicans." Resp. Br. at 22. But that was a decade ago. The July 20, 2001 Burgeson memorandum makes clear that in 2002 the Senate Majority considered a variety of possible Senate sizes, including 63 districts, but concluded it would not benefit the Senate Republicans to add a 63rd district that year. Burgeson advised the Senate Majority that a 63rd district could not be placed in the upstate region that year due to one person, one vote constraints. The only place a 63rd seat could have been placed in 2002 was Long Island, but that would have required drawing it as a Democrat-leaning district. So although adding that seat would have enabled the Republicans to "strengthen" the existing Long Island Republican incumbents, doing so would have given the Democrats an extra seat. In 2012, in marked contrast, the Senate Majority determined that by maximally underpopulating most of the upstate districts, it could add a 63rd district in the *upstate* region, where the Republicans expect to win it, without crossing the 10% deviation threshold. Breitbart Reply Aff. ¶¶ 23-24 & Ex. 3. Indeed, it has been widely reported that the Republicans have recruited a wealthy candidate who is prepared to self-finance his run for that open seat. *Id.* ¶ 25 & Exs. 4, 5.

Respondents argue that there is no significance to the fact that they did not announce the Senate size increase until after the pre-plan public hearings had concluded because LATFOR also held post-plan hearings. Resp. Br. at 22-23. But post-plan hearings aside, the timing of the announcement of the Senate size increase makes clear that it was politically motivated. The Burgeson memoranda confirm beyond dispute that the decision to increase the size of the Senate to 62 districts in 2002 was purely a partisan calculation, and that the 2002 Carvin Memorandum was nothing but a post hoc attempt to rationalize a decision that was made entirely for political

reasons. The 2012 timeline confirms that the same is true of the 2012 Carvin Memorandum. As the Breitbart Reply Affidavit explains in more detail, if the size of the Senate had been changed, as Respondents assert, by applying a settled legal doctrine to the new Census counts, then the new Senate size computation could have been announced within a week of the release of the Census data on March 25, 2011, not more than *nine months later* in January 2012. Breitbart Reply Aff. ¶¶ 25-27.

Finally, Respondents complain that Petitioners "nowhere state how many Senate seats the Constitution *requires* this year." Resp. Br. at 15 (emphasis in original). The flaw in this argument is that after *Reynolds*, *WMCA*, and *Orans*, Section 4 does not require a particular number of seats. It requires a coherent and consistent methodology, regardless of the number of seats that methodology yields. Consistently using Method B this year would yield 62 seats, and consistently using Method A would yield 64 seats. Thus, provided that the Legislature interprets Section 4 in good faith and does not "play[] fast and loose," the Legislature could draw a 62- or 64-seat Senate. But the fact that Respondents may have some discretion to choose between 62 and 64 seats does nothing to undercut Petitioners' claim that there is no constitutional methodology that yields 63 seats. If this Court grants the Petition, then the initial remedy, pursuant to Unconsolidated Laws § 4223, is a "tentative" order providing the Legislature 30 days in which to remedy the violation by statute. At that point, the Legislature theoretically could enact a 62- or 64-seat Senate plan.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Dated: New York, New York
April 4, 2012

By: _____

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

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Petitioners,

Index No. 12-102185

-against-

GOVERNOR ANDREW M. CUOMO; LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE ROBERT J. DUFFY; SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE DEAN G. SKELOS; SPEAKER OF THE ASSEMBLY SHELDON SILVER; and THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

AFFIDAVIT OF SERVICE

I, Ryan Watson, a paralegal at Cuti Hecker Wang LLP, hereby certify under penalty of perjury that I am not a party to the above action, am over 18 years of age, and reside in the County of Kings, New York:

On Wednesday, April 4, 2012, I served a true and accurate copy of the **Reply Memorandum of Law in Further Support of Petition** and the **Reply Affidavit of Todd Breitbart with accompanying exhibits,** upon the parties below by first class United States Mail:

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New York, NY

Ryan Watson

Sworn to Before Me This
4th Day of April 2012

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06/21/2014
STATE OF NEW YORK