UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK A. FAVORS et al.,

Plaintiffs,

No. 11 Civ. 5632 (RR) (GEL) (DLI)

v.

ANDREW M. CUOMO et al.,

Defendants.

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THE SENATE MINORITY'S RESPONSE TO
THE COURT'S APRIL 3 AND APRIL 4, 2012 ORDERS

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Senate Minority Leader John L. Sampson and Senator Martin Malavé Dilan (collectively, the "Senate Minority") respectfully submit this response to the Court's April 3, 2012 Order, as modified by the Court's April 4, 2012 clarification (the "April 3 Order").

PRELIMINARY STATEMENT

The Court's April 3 Order directed the parties to address, pursuant to *Perry v. Perez*, __ U.S. __, 132 S. Ct. 934 (2012), the extent to which the Court, in crafting a contingency Senate plan, "should not defer to one or more aspects of the legislative plan."

Perry held that when a court is drawing an interim plan while an enacted plan is awaiting preclearance, the court should incorporate those aspects of the enacted plan, but only those aspects of the enacted plan, that "do not lead to violations of the Constitution or the Voting Rights Act." *Id*. at 941 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). Importantly, *Perry* expressly held that the prospect that the enacted plan might be denied preclearance is *not* the *only* reason why a court drawing an interim plan should decline to defer to the enacted plan. "A district court . . . must, of course, take care not to incorporate into the interim plan *any legal defects* in the state plan." *Id*. at 941-42; *see also id*. at 942, 943 (deference unwarranted where there is a reasonable probability that the enacted plan violates not just Section 5 but also "the Constitution or § 2 of the Voting Rights Act"); *Upham v. Seamon*, 456 U.S. 37, 40 (1982) (deference to enacted plan is warranted only "in the absence of *any* finding of a constitutional or statutory violation" (emphasis added)). Deference to an enacted plan is inappropriate where there is a "reasonable probability" of a constitutional or statutory violation, *i.e*., where a party's showing of a constitutional or statutory violation in the enacted plan "is not insubstantial." *Perry*, 132 S. Ct. at 942.

Here, there are at least three reasons why the Court should not defer to the enacted 63-

district Senate plan: (i) the addition of the 63rd district violates Article III, Section 4 of the New York Constitution; (ii) the addition of the 63rd district has a retrogressive impact on the voting strength of minority communities in the New York City area; and (iii) the statewide malapportionment in the enacted plan has a retrogressive impact on the voting strength of minority communities in the New York City area. The enacted Senate plan also pervasively violates the county integrity requirement of the New York Constitution. Notably, unlike in *Perry*, these are not localized issues requiring "only minor . . . adjustments to the State's existing districts in order to devise an interim plan." *Id*. at 941. These are *statewide* issues that render the enacted plan unenforceable *in toto*.

Additionally, the Senate Majority has engaged in a persistent pattern of manipulation, obfuscation, and deception throughout the process of developing a Senate redistricting plan. The deference contemplated in *Perry* is reserved for legislative plans that are the result of an honest and good faith effort to effectuate legitimate state policies, which is the furthest thing from what the Senate Majority has done here.

ARGUMENT

A. The Addition of a 63rd Senate District Violates Article III, Section 4 of the New York Constitution

The Senate Minority previously submitted to this Court, at the Court's request, all of the parties' submissions in *Cohen v. Cuomo*, Index No. 102185/2012 (Sup. Ct. N.Y. Cnty.). *See* Dkt. Entry Nos. 288 & 289. These submissions demonstrate that the Senate Majority had no rational, good-faith basis for using two different methods for aggregating county populations in the Senate-size computation – what we refer to as Method A and Method B – *simultaneously* for the first time in history. Indeed, instead of introducing *evidence* demonstrating the Legislature's basis for applying different counting methodologies in different parts of the State – such as a

legislative report, an affidavit from Senator Skelos or Senate Majority counsel Michael Carvin, or even an email written by a LATFOR official – the Senate Majority rested its entire defense in *Cohen* on the demonstrably false assertion that Method A and Method B have been used simultaneously in the past. But Petitioners' Reply Brief demonstrates beyond a reasonable doubt that Method A and Method B *never* have been used in the same redistricting. *Cohen v. Cuomo* Pet'rs' Reply Br. at 2-11 (Dkt. Entry No. 289-1 at 6-15). Because the Senate Majority rested its entire defense on this central but demonstrably false assertion, it has no defense at all.

There plainly is at least a "reasonable probability" that the state courts will strike down the enacted plan under Article III, Section 4 of the New York Constitution. If that happens, then this Court will have the discretion to draw either a 62-seat plan (consistently using Method B) or a 64-seat plan (consistently using Method A). *See Schneider v. Rockefeller*, 31 N.Y.2d 420, 429, 430, 432-33 (1972) (holding that when the Legislature acts in "good faith" and does not "play[] fast and loose" with constitutional requirements, it has discretion either to use Method A consistently or to use Method B consistently). But there is no constitutional path that leads to 63 Senate districts in 2012.

Because removing the unconstitutional 63rd district will require radical changes to the entirety of the enacted Senate plan, there is nothing in the enacted plan for this Court to defer to as it develops a 62- or 64-seat contingency plan. To be sure, the Court's contingency plan is simply that – a *backup* plan that will not go into effect unless the state courts strike down the 63-seat plan (or, as discussed below, if the Department of Justice does not preclear the 63-seat plan).

But if the 63-seat framework is struck down, then one person, one vote constraints will make it impossible for this Court to salvage any aspect of the enacted plan.[1]

B. The Addition of a 63rd District Has a Retrogressive Impact on the Voting Strength of Minority Communities in the New York City Area

The Department of Justice is required to deny preclearance under Section 5 of the Voting Rights Act to any change in any standard, practice, or procedure with respect to voting that results in "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). It has long been settled that increasing the size of a legislative body is a covered change that is subject to preclearance. *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 503 (1992) (Section 5 applies to any "increase" in "the number of officials for whom the electorate may vote"); *City of Lockhart v. United States*, 460 U.S. 125, 131-32 (1983) (holding that "the addition of two seats to [the] governing body" is a "covered change[]" under Section 5); *see also Holder v. Hall*, 512 U.S. 874, 886 (1994) (O'Connor, *J.*, concurring) ("[O]ur precedents compel the conclusion that the size of the Bleckley County Commission is . . . a 'standard, practice, or procedure with respect to voting' under § 5.").

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[1] As demonstrated in Paragraphs 13-15 of the *Cohen v. Cuomo* Reply Affidavit of Todd Breitbart dated April 12, 2012 ("*Cohen v. Cuomo* Breitbart Reply Aff."), *see* Dkt. Entry No. 289-2 at 7-9, the enacted plan warrants no deference for the additional reason that it repeatedly and gratuitously violates the New York Constitution's county integrity rule. For example, Rockland and Albany Counties each have sufficient and correct population to constitute Senate districts by themselves. But the enacted Senate plan divides them both, and, as is obvious from the promiscuous division of the surrounding counties, neither Albany nor Rockland is divided so that another nearby county can be kept intact. By contrast, Mr. Breitbart's alternative 62-seat Senate plan creates one district that is simply Albany County, and another that is simply Rockland County. As Paragraphs 13-15 of Mr. Breitbart's Reply Affidavit demonstrate, there are myriad other examples of the manner in which the enacted Senate plan needlessly but pervasively violates the New York Constitution's county integrity rule.

The retrogressive effect of the addition of a 63rd Senate district is obvious. Under the 2002 benchmark plan, there were 14 minority opportunity districts statewide, and 11 in the covered counties, out of 62 seats in the Senate. Under the enacted Senate plan, there are, at most, 14 minority opportunity districts statewide out of 63 (11 in the covered counties). Because the numerator will at best remain static but the denominator will increase, the fraction of minority seats will decrease, and minority voting strength under the enacted Senate plan will be diluted compared with the 2002 benchmark plan. It is elementary that the ability of African American voters to elect the candidate of their choice in 8 districts (6 in the covered counties), or of Hispanic voters to elect the candidate of their choice in 6 districts (5 in the covered counties), is worth less in a 63-seat body than it is in a 62-seat body.

Abrams v. Johnson, 521 U.S. 74 (1997), does not insulate the addition of the 63rd Senate district from scrutiny under Section 5. *Abrams* involved the addition of a seat in Georgia's congressional delegation. That increase did not dilute the voting power of minorities in Georgia's one majority-minority congressional district because that district constituted 1/435th of the House of Representatives both before and after the reapportionment. Georgia's minority voters did not lose any influence in the House of Representatives by virtue of the fact that a non-minority district had shifted to Georgia from one of the other states that lost a seat due to interstate population shifts revealed in the 1990 Census. In this case, however, the increase in size was to *the Senate itself*. Because 14 effective districts (11 in the covered counties) have less value in a 63-seat Senate than in a 62-seat Senate, the influence of minority voters unquestionably has been diminished. Increasing the size of a state legislative body is very different than increasing the size of a state's congressional delegation where the size of the House of Representatives has not changed.

Although there is no case directly addressing the retrogressive effect of increasing the size of a state legislative body, the case law governing the retrogressive effects of land annexations provides a helpful analogy. In *City of Port Arthur v. United States*, 459 U.S. 159 (1982), the Supreme Court held that land annexations should not be denied preclearance just because the percentage of minorities in the post-annexation body is lower than the percentage in the pre-annexation body so long as the jurisdiction seeking preclearance has taken steps that "sufficiently dispel[] the impact" of the expansion "on the relative political strength of the [minority] community." *Id*. at 167. Similarly, in *City of Richmond v. United States*, 422 U.S. 358 (1975), the Supreme Court held that a land annexation that reduced the percentage of minority voters should be precleared because the body switched from a dilutive at-large system to a single-member ward system that "fairly reflect[ed] the strength of the [minority] community after the annexation." *Id*. at 371; *see also City of Port Arthur*, 459 U.S. at 168 (conditioning preclearance of a land annexation on the restructuring of the ward system and the elimination of a dilutive majority vote rule). In other words, as with the increase in the number of congressional districts in *Abrams*, the mere fact that a land annexation results in a lower percentage of minority voters does not itself render the annexation retrogressive. But when the jurisdiction has "substantially enlarg[ed]" the "number of white eligible voters without creating a corresponding increase in the number" of minority voters – thereby "reduc[ing] the importance of the votes of [minority] citizens" – a jurisdiction seeking preclearance bears "the burden of proving" that its electoral system as a whole does not unnecessarily dilute minority voting power. *City of Rome v. United States*, 446 U.S. 156, 187 (1980).

The Senate Majority cannot meet that burden here, as demonstrated by its failure to create an additional compact Hispanic district in the Bronx. The enacted Senate plan contains at

most six Hispanic opportunity districts statewide, and five in the covered counties: two majority-Hispanic districts as measured by citizen voting age population ("CVAP") (32 and 33); three effective plurality-Hispanic districts as measured by CVAP (13 (in Queens County), 18, and 31); and one allegedly effective plurality-Hispanic district (29). It is undisputable that another majority-Hispanic district could be created under the current 62 seat plan, without sacrificing the effectiveness of Districts 13, 18, 29, 31, 32, or 33.

The alternative plan that Mr. Breitbart submitted to LATFOR on February 15, 2012, *see* http://latfor.state.ny.us/justice2012/?sec=sendoj2012 (Joint Exhibit 22/Plan_Submission_16 & Plan_Submission_19), *last accessed* Apr. 12, 2012, demonstrates that an additional district with a Hispanic CVAP majority could be created entirely within Bronx County in place of the highly non-compact, non-Hispanic-white-plurality District 34, without compromising the existing ability of minority-group voters to elect the Senator of their choice, if: (i) New York City were apportioned a number of districts proportional to its share of the total state population; (ii) compact districts were created, as required by the New York Constitution, instead of the extremely non-compact districts that have been created; and (iii) only a single Bronx-Westchester district were created, in conformity with the New York constitutional rule that division of counties must be minimized, instead of the pair of Bronx-Westchester districts that have been created.

Significantly, as a direct result of the Legislature's failure to draw this additional compact majority-Hispanic district, Hispanic voting power is substantially diluted relative to the Hispanic proportion of the population. The CVAP of New York State is 12.13% Hispanic. But even assuming there are six effective Hispanic districts in the enacted Senate plan, that is only 9.52% of the 63 districts in the enacted Senate plan. 12.13% of 63 districts would be 7.64 districts, not

6 districts. Thus, by failing to draw the additional Hispanic district that indisputably could be drawn, the Legislature has not taken "sufficient[]" steps to "dispel[] the impact" of its dilutive and retrogressive decision to add a 63rd Senate seat. *City of Port Arthur*, 459 U.S. at 167.

This is not to suggest that drawing a Hispanic-majority district in the Bronx would be the only – or even an adequate – way to prevent the Senate size increase from having a retrogressive effect. There are other minority groups in New York that are under-represented in the current 62-seat Senate, and that would be further disadvantaged under the enacted Senate plan. Non-Hispanic black voters, for example, constitute 14.24% of the State CVAP, but there currently are only eight effective districts for black voters, representing 12.7% of the Senate. We point to the Senate Majority's glaring failure to draw an additional Hispanic district in the Bronx because the fact that it indisputably could do so confirms that the enacted Senate plan does not satisfy the requirements of the Supreme Court's case law on the retrogressive effects of annexations.

The retrogressive effect of the addition of the 63rd district flows directly from the Legislature's failure to heed the one person, one vote rule. As discussed below, the enacted Senate plan significantly overpopulates the New York City districts and significantly underpopulates the upstate districts, and this malapportionment has a dilutive and retrogressive impact on minority voting strength. For present purposes, it is important to recognize that had the Legislature drawn the 63rd district in the New York City area – the area that experienced the population growth that allegedly required the addition of the 63rd district – then retrogression could have been avoided. Indeed, the irony of the enacted Senate plan is that it is directly contrary to the intent of the framers of the New York Constitution's Senate size formula. The framers of that provision intended that any additional districts required by population growth would be placed in the counties where the population growth took place. *See* 4 Revised Record

of the Constitutional Convention of the State of New York 1254 (May 8, 1894 to September 29, 1894) (explaining that because of "the great increase of population in the cities, entitling them to additional representation in the Senate" and the simultaneous desire not to "decrease" the "representation of the country districts," the "object" of the Senate size formula is 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 the number of districts prescribed in the formula). By shoehorning an additional non-Hispanic white district in the upstate area even though the ostensible basis for adding a 63rd district is population growth in the New York City area, the Legislature plainly did not take steps that "sufficiently dispel[] the impact" of the 63rd district "on the relative political strength of the [minority] community." *City of Port Arthur*, 459 U.S. at 167.

Because removing the retrogressive 63rd district will require radical changes to the entirety of the enacted Senate plan, there is nothing in the enacted plan for this Court to defer to as it develops a contingency plan.

C. The Statewide Malapportionment In the Enacted Plan Has a Retrogressive Impact on the Voting Strength of Minority Communities in the New York City Area

The great majority of New York State's minority population lives within New York City, and especially within the three covered counties. Despite this fact, the enacted Senate plan significantly malapportions the Senate districts, at the expense of residents of New York City and of the two districts wholly within Westchester County, and in favor of residents of the 26 districts to the north and west, which have an aggregate population sufficient to support only 24.84 districts of the mean population. This shift of more than an entire Senate seat from the region containing most of the minority population to the region containing relatively few

minority voters results in "malapportioned districts" that "deny or abridge the right to vote of minority citizens." 28 C.F.R. § 51.59(a).

As set forth in greater detail in Appendix A to the Senate Minority's submission to the Department of Justice, *see* Hecker Decl., dated Apr. 9, 2012, Ex. A (Dkt. Entry No. 295-1 at 2-15), the 26 districts wholly or partly within New York City have an aggregate population of 8,276,194, enough for 26.93 districts of the mean population (307,356). All of the New York City districts have populations either 3.83% (in Queens) or 3.47% (in the other New York City counties) above the mean. In contrast, the 26 districts to the north and west of Westchester County have an aggregate population of 7,635,808, enough for 24.84 districts of the mean population. Of those 26 districts, 23 have populations more than 4% below the mean (22 with deviations more than 4.6% below the mean), and another is more than 3% below the mean.

The net effect of these significant population deviations is that the upstate region is given one district (actually, more than one district) more than it is entitled to based on its share of the population, and New York City is given one district less.

This shift of an entire district from the New York City region to the upstate region has a significant disproportionate racial impact. The 26 overpopulated New York City Districts contain 71.28% of the Hispanic citizen voting-age population ("CVAP") of New York State, 67.29% of the non-Hispanic black CVAP, and 72.86% of the non-Hispanic Asian CVAP, but only 23.91% of the non-Hispanic white CVAP. In contrast, the 26 underpopulated upstate districts contain 14.08% of the Hispanic CVAP of New York State, 21.21% of the non-Hispanic black CVAP, and 13.04% of the non-Hispanic Asian CVAP, but 55.92% of the non-Hispanic white CVAP.

The 18 districts wholly or partly within the three covered counties have enough aggregate population (5,724,377) for 18.62 districts of the mean population, meaning that those three counties alone have been deprived of nearly two-thirds of a seat. Those 18 districts contain 53.28% of the Hispanic CVAP of New York State, 52.61% of the non-Hispanic black CVAP, and 36.27% of the non-Hispanic Asian CVAP, but only 16.09% of the non-Hispanic white CVAP.

Although the 2002 benchmark plan contained regional population deviations that also disadvantaged New York City and the covered counties, the enacted Senate plan goes significantly further in siphoning voting strength from minority communities. According to the 2000 Census, the 26 New York City districts created in 2002 had enough aggregate population (8,143,307) for 26.61 districts of the mean population (306,072). Under the enacted Senate plan, the 26 New York City districts have enough aggregate population (8,276,194) for 26.93 districts of the mean population. New York City thus has been deprived of more than nine-tenths of a seat in 2012, compared with only six-tenths of a seat in 2002.

The retrogressive effect of the malapportionment on the covered counties is even more pronounced. According to the 2000 Census, the 18 districts in the covered counties had enough aggregate population (5,602,670) for 18.31 districts of the mean population. In the 2012 Senate plan, the 18 districts in the covered counties have enough aggregate population (5,724,377) for 18.62 districts of the mean population. Thus, whereas the covered counties were left three-tenths of a district short of their proportional share of the population in 2002, they are now left more than six-tenths of a district short. (In 2002, the 18 districts in the covered counties all had positive population deviations of approximately 1.69%. In the 2012 enacted Senate plan, the 18 districts in the covered counties all have positive deviations of 3.47% – more than double.

Conversely, in the enacted Senate plan there were only seven upstate districts with deviations more than 4% below the mean; in the enacted Senate plan there are 23.)

In contrast, the 27 districts north of New York City (including the two districts wholly within Westchester County) in the 2002 benchmark plan had enough aggregate population (8,079,237) for 26.40 districts of the mean population, while the 28 districts north of New York City (again including the districts wholly within Westchester County) in the enacted Senate plan have enough aggregate population for only 26.84 districts of the mean population. Thus, the 2002 benchmark plan gave the upstate region sixth-tenths of a district more than it deserved, but the enacted Senate plan gives the upstate region one and one-seventh districts more than it deserves.

The malapportionment in the enacted Senate plan is retrogressive even when compared with the 2002 apportionment as it stood after the 2010 Census. The 26 New York City districts in the 2002 benchmark plan have, according to the adjusted 2010 Census counts, an aggregate population of 8,333,099, which is enough population for 26.68 districts of the mean population in a 62-district plan (312,313). As demonstrated above, the 26 New York City districts in the enacted Senate plan have enough aggregate population for 26.93 districts of the mean population in a 63-district plan. Thus, even if the appropriate retrogression benchmark is the 2002 apportionment as measured by the 2010 Census, the malapportionment in the enacted Senate plan still is retrogressive because it deprives New York City of more than nine-tenths of a district, whereas the 2002 apportionment after the 2010 Census deprived New York City of less than seven-tenths of a district.

So too with the 18 districts that are wholly or partly within the covered counties. These 18 districts as drawn in 2002 had an aggregate population of 5,770,080 in the 2010 census,

which is enough population for 18.50 districts of the mean population for a 62-district Senate. As demonstrated above, the 18 districts in the covered counties in the enacted Senate plan have enough aggregate population for 18.62 districts of the mean population in a 63-district plan. Thus, the malapportionment in the enacted Senate plan is retrogressive because it deprives the covered counties of .62 districts, whereas the 2002 apportionment after the 2010 Census only deprived the covered counties of half of a district.

The entirely avoidable malapportionment in the enacted Senate plan is not just grossly unfair, and it does not just dilute minority voting strength. It dilutes minority voting strength significantly more than the 2002 benchmark plan, regardless of whether the benchmark is evaluated using 2000 or 2010 Census data.

Moreover, the regional malapportionment in the enacted Senate plan does not result from adherence to any neutral or compulsory redistricting principles. Rather, the districts in the enacted Senate plan are less compact than the districts in proposed alternative plans that were submitted to LATFOR by every standard measure that is included in the Maptitude for Redistricting software package. Many of the districts in the enacted Senate plan are so non-compact that they are impossible to follow except on a large-scale map. *See* 28 C.F.R § 51.59(f) (citing extent to which plan ignores "relevant factors such as compactness and contiguity" as an important factor in preclearance analysis).

As set forth in greater detail in Appendix B to the Senate Minority's submission to the Department of Justice, *see* Dkt. Entry No. 295-1 at 17-19, for New York State as a whole, the districts in the enacted Senate plan divide so many counties, divide them into so many pieces, and create so many pairs of bi-county districts, that the enacted Senate plan virtually erases county boundaries as a basis for drawing districts. This is directly contrary to Article III, Section

4 of the New York Constitution, which prohibits dividing any county into multiple Senate districts not wholly contained within the county. Although that rule must now accommodate the one person, one vote requirement, the preservation of county boundaries insofar as possible remains a stated redistricting standard, which the enacted Senate plan was required to follow but did not. *See* 28 C.F.R § 51.59(g) (citing "[t]he extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards" as an important factor to weigh in considering preclearance).

Despite the extreme district population deviations in the enacted Senate plan, the plan does not use those deviations to serve any legitimate purpose, such as limiting the division of counties. On the contrary, the large deviations are used to provide the "wiggle room" (as one of the 2001 LATFOR memoranda put it) to deprive New York City of one Senate district to which it should be entitled in proportion to its share of the state population, and to add an extra district upstate.

D. The Enacted Senate Plan Deserves No Deference Because the Senate Majority Did Not Act in Good Faith

In addition to the substantive issues discussed above, the enacted Senate plan is unworthy of deference because it is not the result of a good-faith effort to draw districts that comply with state and federal law. To the contrary, the enacted Senate plan results from a calculated effort by the Senate Majority to manipulate what is supposed to be an objective mathematical formula, obfuscate critical constitutional issues, and deceive the public and the courts in furtherance of its attempt to maintain political power that the State's demographics no longer support.

The Senate Majority's pattern of deception began in 2002, when LATFOR announced that it had adopted Mr. Carvin's recommendation that it switch from Method A to Method B because Method B supposedly is "more faithful to the Constitution." A series of internal

memoranda that LATFOR subsequently was compelled to produce in litigation confirms beyond dispute that LATFOR never engaged in any good-faith effort to determine which methodology actually is more consistent with the Constitution. *See Cohen v. Cuomo* Pet'n Exs. 1-4 (Dkt. Entry No. 288-1 at 39-51); *Cohen v. Cuomo* Breitbart Reply Aff. Ex. 3 (Dkt. Entry No. 289-2 at 41-42). Rather, these memoranda demonstrate that during the prior redistricting, LATFOR arrived at its Senate size calculation *by no later than July 2001 for entirely political reasons*, and that the putative constitutional "analysis" that Mr. Carvin supplied the following year was a *post hoc* attempt to cloak partisan gamesmanship that the Senate Majority did not anticipate would ever become public.

The Senate Majority did the same thing again in 2012. As Paragraphs 25-27 of the Breitbart Reply Affidavit explain in more detail, if the new Senate size had been calculated by applying a settled legal doctrine to the 2010 Census data as the Senate Majority contends, then the calculation could have been performed and announced within a week of the release of the Census data for New York State on March 25, 2011. Instead, the Senate Majority did not announce the Senate size increase until January 2012 – more than *nine months later* – by which time LATFOR had already conducted *all* of the public hearings that were intended to afford interested citizens the opportunity to help LATFOR craft an appropriate redistricting plan. Indeed, as a direct result of the fact that the Senate Majority failed to inform the public prior to or during the hearing process that LATFOR had radically departed from its prior methodology and decided to add a 63rd Senate district, the hearing process focused largely on 62-seat proposals that the Senate Majority secretly knew were entirely irrelevant.

To this day, the Senate Majority still has not offered any evidence demonstrating why it decided to use both Method A and Method B simultaneously in 2012 for the first time in history.

This stands in sharp contrast to every previous Senate size case, in which the Legislature has relied on detailed and thoughtful legislative reports setting forth in detail why it decided to do what it did. *See*, *e.g.*, *Cohen v. Cuomo* Breitbart Reply Aff. Ex. 1 (Dkt. Entry No. 289-2 at 17-25) (Interim Report of the Joint Legislative Committee on Reapportionment (Dec. 14, 1971) (explaining why the Legislature concluded, in light of new one person, one vote requirements, that Method A should be used instead of Method B)). Rather than proffering an affidavit from Senator Skelos, Mr. Carvin, or a LATFOR official explaining candidly why the Legislature decided to use Method A and Method B simultaneously for the first time in 2012, the Senate Majority literally proffered no evidence of its reasoning at all. Instead, the Senate Majority attempted to mislead the *Cohen* court by asserting falsely in that proceeding that Method A and Method B often have been used simultaneously in the past. *See supra* at 3.

The Senate Majority's effort to avoid accountability continued once its redistricting proposal reached the Senate floor. During the debates that were held in the Senate on March 14, 2012, several members of the Senate Minority questioned LATFOR Co-Chairman Senator Michael Nozzolio about the impact of the Senate size increase (as well as other aspects of the Senate Plan) on minority voters. Rather than addressing whether the addition of a 63rd Senate district would have a retrogressive effect on minority voting strength, the Senate Majority abruptly cut off the debate two hours ahead of schedule and brought the plan up for an immediate vote. At least eight Senators who were planning to speak, including three African-American Senators (Senators John L. Sampson, Ruth Hassell-Thompson, and Andrea Stewart-Cousins), were not permitted to voice their views.

The Senate Majority's preclearance submission to the Department of Justice continues its stark pattern of obfuscation. The Senate Majority was required, pursuant to 28 C.F.R. §

51.27(c), to provide a "clear statement" of all "change[s] affecting voting" that are subject to preclearance. But the Senate Majority's submission nowhere acknowledges that it used a radically different methodology to arrive at 63 districts in 2012 (Method A in Richmond-Suffolk and Method B in Queens-Nassau) than the methodology that was precleared in 2002 (consistently using Method B for all county combinations because Method B is "more faithful to the Constitution" than Method A). Nor does the Senate Majority's preclearance submission provide any CVAP data – it relies exclusively on VAP data, which does not accurately reflect the voting power of minority communities with disproportionately low citizenship rates – much less any racial bloc voting ("RBV") or electability analyses demonstrating that the minority opportunity districts in the benchmark plan remain effective.

This pattern of manipulation and deceit provides an independent basis for declining to defer to the enacted Senate plan when crafting a contingency plan. The deference contemplated in *Perry* is reserved for a legislative plan that results from an honest and good faith effort to comply with federal law and to effectuate legitimate state policies. The Senate Majority's 63-seat plan contravenes fundamental democratic principles and warrants no deference.

CONCLUSION

For the foregoing reasons, the Court should not defer to the enacted Senate plan when crafting a contingency plan that will go into effect if the enacted Senate plan is not precleared or is struck down in *Cohen*.

Dated: April 12, 2012
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