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April 12, 2012

Via ECF

The Honorable Reena Raggi
United States Court of Appeals
For the Second Circuit
225 Cadman Plaza East
Brooklyn, NY 11201

The Honorable Gerald E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

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

Re: *Favors et al. v. Cuomo et al.*, No. 11 Civ. 5632

Dear Judges Raggi, Lynch and Irizarry:

The Asian American Legal Defense and Education Fund (AALDEF), together with Kaye Scholer LLP, represent Plaintiff-Intervenors Linda Lee, Shing Chor Chung, Jung Ho Hung and Julia Yang (the "Lee Intervenors") in the above-referenced matter. We write in response to the Court's Scheduling Order dated April 3, 2012 to submit to the Court issues presented in the complaints that have been filed in this case that meet sufficient legal and factual standards such that the Court should not defer to one or more aspects of the legislative plan.

Comment letters have been submitted to the Department of Justice from among others, the Lee Intervenors, Drayton Intervenors, Ramos Intervenors and the Senate Minority Leader, and are attached for this Court's review. The above-mentioned intervenor parties represent Asian American, Black and Latino voters in New York State, and all of these parties, including the Senate Minority Leader, have urged the Attorney General to interpose an objection because the Senate Plan was enacted with a discriminatory purpose and has a discriminatory effect. This Court may easily conclude based on these submissions to the Department of Justice urging the Attorney General to interpose an objection to the Senate Plan – including a submission from one of the defendants, the New York State Senate Minority Leader – that multiple districts in the State's enacted maps are subject to Section 5 challenges that are not insubstantial.

Nothing in the Supreme Court's decision in *Perry v. Perez*, 123 S.Ct. 934 (2012), shifted the allocation of burdens with respect to Section 5. Rather, the State retains its burden to secure preclearance and its burden of proving that each of its enacted plans "neither has the purpose nor

will have the effect of denying or abridging the right to vote on account of" race, color or language minority status. 42 U.S.C. §1973c(a). In fashioning its new redistricting plans, this Court should not incorporate the State's policy judgments with respect to any aspects of the State's enacted plans for which there are outstanding "not insubstantial" challenges under Section 5, in this case as more than aptly demonstrated through the objections lodged in the comment letters submitted to the Department of Justice.[1]

The "effect" prong precludes preclearance for voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," as measured against the jurisdiction's existing practice. *Beer v. United States*, 425 U.S. 130, 141 (1976). The retrogression prong prohibits changes from the existing, or benchmark plan that will, because of race, color, or membership in a language minority group, "diminish [] the ability ... to elect their preferred candidate of choice." 42 U.S.C. §1973c(c). The "purpose" prong precludes preclearance of voting changes motivated by "any discriminatory purpose." 42 U.S.C. §1973c(c). Until a newly enacted plan gains preclearance under Section 5, the State may not use that plan to conduct an election. 42 U.S.C. §1973c(a).

The district court cannot follow the State's policy judgments where aspects of the State's enacted plan "stand a reasonable probability of failing to gain [Section] 5 preclearance." *Perry v. Perez*, 123 S.Ct. 934, 941. Because judicial preclearance rests solely with the District Court for the District of Columbia, a local district court determining whether a Section 5 challenge "is not insubstantial" should take guidance, to the extent possible, from the submissions to the Attorney General and the Attorney General's assessment of the plan at issue.

All of the attached comment letters argue that the New York State Senate plan should be denied preclearance because the preclearance submission is incomplete, and the Senate Plan: 1) intentionally and purposefully discriminates against the federally protected minority residents of New York State by severely overpopulating all of the senate districts in which these groups have substantial population, 2) diminishes the ability of New York State's federally protected minority groups to effectively participate in the electoral franchise and reduces their ability to elect their candidates of choice, and 3) divides clusters of federally protected minority groups into numerous senate districts.

The State Senate plan intentionally places larger, overpopulated districts in New York City. Almost all of the senate districts with large Asian American, African American, and Latino populations are overpopulated and are in New York City. This affords less representation for racial and ethnic minorities in New York City and has a discriminatory effect on the opportunity

[1] The Court is respectfully referred to the arguments detailed in the attached comment letters submitted to the Department of Justice. In the interest of brevity and avoiding repetition the arguments in the comment letters will not be repeated in detail in this letter.

of Asian Americans, and other racial and ethnic minorities, to elect candidates of their choice. 28 C.F.R. § 51.59 (malapportionment of districts is to be considered under Section 5).

All of the New York City Senate districts have populations that are 3.47% or 3.83% ***above*** the mean population. The 26 overpopulated New York City Senate Districts (Senate Districts 10-34 and 36) contain 72.86% of the non-Hispanic Asian citizen voting-age population (CVAP) of New York State, 71.28% of the Hispanic CVAP, 67.29% of the non-Hispanic Black CVAP, but only 23.91% of the non-Hispanic White CVAP. In contrast, the 26 under-populated upstate Senate Districts (Senate Districts 38-63) contain 13.04% of the non-Hispanic Asian CVAP, 14.08% of the Hispanic CVAP of New York State, 21.21% of the non-Hispanic Black CVAP, but 55.92% of the non-Hispanic White CVAP.

The malapportionment of Senate districts in New York City has a discriminatory effect on the opportunity of Asian Americans, and other racial and ethnic minorities, to elect candidates of their choice. Therefore, the population deviations in the senate reapportionment have the intent and effect of diminishing minority voting strength. Therefore, the apportionment of State Senate districts between upstate and New York City in the enacted plan is subject to Section 5 challenges that are not insubstantial, and the Court should deviate from the State's plan in this respect.

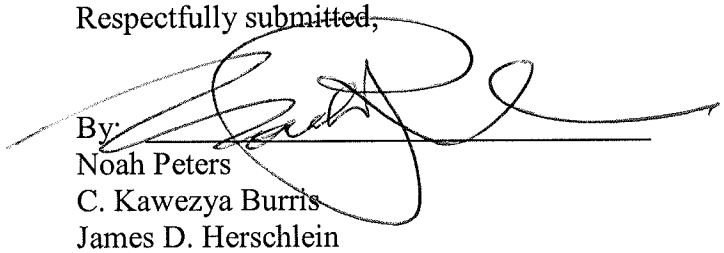
This Court must deviate from the State's enacted plans where there is a not insubstantial possibility that failing to do so would diminish the number or proportion of minority ability-to-elect districts as compared to the benchmark plan or would sanction aspects of the enacted plan that may have been adopted with a discriminatory purpose.

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 2012 Senate Plan, there are 13 minority opportunity districts, 10 in the covered counties, out of 63 seats in the Senate. Minority voting strength under the 2012 Senate Plan will be reduced compared with the 2002 benchmark plan. Because the Senate Plan reduces the number and proportion of minority ability-to-elect districts from 62 benchmark districts to 63 districts under the proposed plan, there is a reasonable probability that the plan will fail to gain preclearance.

Further, despite the substantial population growth among Asian Americans and Latinos in New York City and New York State over the last decade, the additional senate district was placed upstate and is a majority White district. The proposed senate plan reduces the percentage of Asian Americans in most of the senate districts in Brooklyn, despite the massive growth of the Asian American population in this borough and despite the fact that the ideal district population was reduced by adding an additional senate district. As set forth at greater length in the attached

submission from AALDEF, the Court should not defer to the enacted plan with respect to Senate Districts 20, 22, 23, and 27. The Lee Intervenors further urge that the Court not defer to aspects of the enacted plan challenged on Section 5 grounds in the other submissions attached hereto.

Respectfully submitted,



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cc: All Counsel – Via ECF