UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, HOWARD LIEB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SHREIBER and WEYMAN A. CAREY,

Plaintiffs,

and

DONNA KAYE DRAYTON, EDWARD ELLIS, AIDA FORREST, GENE A. JOHNSON, JOY WOOLEY, SHEILA WRIGHT, LINDA LEE, SHING CHOR CHUNG, JULIA YANG, JUNG HO HUNG, JUAN RAMOS, NICK CHAVARRIA, GRACIELA HEYMANN, SANDRA MARTINEZ, EDWIN ROLDAN and MANOLIN TIRADO and YITZCHOK ULLMAN,

Intervenor Plaintiffs,

v.

ANDREW M. CUOMO, as Governor of the State of New York, ERIC T. SCHNEIDERMAN, as Attorney General of the State of New York, ROBERT J. DUFFY, as President of the Senate of the State of New York, DEAN G. SKELOS, a Majority Leader and President Pro Tempore of the Senate of the State of New York, SHELDON SILVER, as Speaker of the Assembly of the State of New York, JOHN L. SAMPSON, as Minority Leader of the Senate of the State of New York, BRIAN M. KOLB, as Minority Leader of the Assembly of the State of New York, THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND APPORTIONMENT ("LATFOR"), JOHN J. McENENY, as Member of LATFOR, ROBERT OAKS, as Member of LATFOR, ROMAN HEDGES, as Member of LATFOR, MICHAEL F. NOZZOLIO, as Member of LATFOR, MARTIN MALAVÉ DILAN, as Member of LATFOR, and WELQUIS R. LOPEZ, as Member of LATFOR,

Defendants.

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Case No. 1:11-CV-05632 (RR) (GEL) (DLI) (RLM)

ASSEMBLY MAJORITY'S MEMORANDUM IN OPPOSITION TO DRAYTON INTERVENORS' MOTION FOR PRELIMINARY INJUNCTION

Defendants, Honorable Sheldon Silver, as Speaker of the Assembly of the State of New York, and the Democratic Members of LATFOR, John J. McEneny and Roman Hedges, respectfully submit the following memorandum in opposition to the motion for preliminary injunction of Intervenors Drayton, et al., seeking to enjoin the 2012 Assembly redistricting plan ("Assembly Plan").

INTRODUCTION

The Second Circuit has articulated the standard for a preliminary injunction as follows:

> Generally speaking, a court should not grant a preliminary injunction unless the party seeking the injunction demonstrates (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) "sufficiently serious questions" on the merits and a balance of hardships that "tip[s] decidedly" in the movant's favor. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). We have held, however, that "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme," the district court should not apply the less stringent "serious questions" standard, but should instead require the movant to satisfy "the more rigorous 'likelihood of success' standard. . . ." *Able v. United States*, 44 F.3d 128, 131, 132 (2d Cir. 1995 (quoting, *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989) (internal quotations omitted)); *see also*, *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996).

Suffolk Parents of Handicapped Adult v. Wingate, 101 F.3d 818, 821 (2d Cir. 1996), cert. denied, 520 U.S. 1239 (1997) (emphasis added). In this case, "the moving party seeks to stay government action taken in the public interest pursuant to a statutory . . . scheme," id., namely the redistricting of the New York State Assembly by the State Legislature. Accordingly, Intervenors cannot prevail on their application for a preliminary injunction unless they meet the more rigorous standard of likelihood of success. Id.; Able v. U.S., 44 F.3d 128, 131-32 (2d Cir. 1995), rev'd on other gds., 155 F.3d 628 (2d Cir. 1998). As the Court explained in Able, the more stringent test for preliminary injunction of legislative enactments "reflects the idea that

governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." Id. at 131.

As shown herein, Intervenors cannot show likelihood of success on the merits because (1) Section 2 of the Voting Rights Act does not require the creation of coalition districts as the first Gingles precondition cannot be satisfied, (2) Intervenors' claim is predicated on Citizen Voting Age Population, an unaccepted and unreliable basis for districting, and (3) Intervenors' proposed districts are predominantly race-based in violation of Shaw v. Reno.

POINT I

THE DRAYTON INTERVENORS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

It is settled law that in order to state a claim for a violation of § 2 of the Voting Rights Act ("§ 2"), three threshold preconditions must be established, namely, (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that the minority group is "politically cohesive," and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). See Growe v. Emison, 507 U.S. 25, 40-41 (1993) (applying three Gingles requirements to § 2 cases involving single member districts).

Once all of the three Gingles preconditions are satisfied, the majority group must also show that, under "the totality of the circumstances" it does not possess the same opportunities to participate in the political processes as other voters. Gingles, supra, at 79. Accord: Bartlett v. Strickland, 556 U.S. 1, 12 (2009); Johnson v. De Grandy, 512 U.S. 997, 1013 (1994). This inquiry requires an "intensity local appraisal" of the challenged districts.

"The question is . . . not 'whether line-drawing in the challenged area as a whole dilutes majority voting strength' . . . but whether line-drawing dilutes the voting strength [of the complaining majority] in . . . [the challenged] [d]istrict." League of United Latin American Citizens v. Perry, 548 U.S. 399, 437 (internal citations omitted).

Thus, to establish likelihood of success on the merits of their § 2 claims, Intervenors must satisfy all three Gingles preconditions and show that under the totality of the circumstances vote dilution exists in the challenged districts. Further, as the Supreme Court has explained, § 2 of the Voting Rights Act "places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders." Voinovich v. Quilter, 507 U.S. 146, 155 (1993).

Intervenors have not made the requisite showings. And, as explained below, they cannot do so given the realities of the challenged districts.

A. Coalition Districts Do Not Satisfy the Gingles Preconditions

The gravaman of the complaint of the Drayton Intervenors rests on the notion that the Non-Hispanic Black and Hispanic populations in Nassau County are compact and politically cohesive, entitling them to protections as a unit under the Voting Rights Act. Thus, the Drayton Intervenors amalgamate the Non-Hispanic Black and Hispanic communities in Nassau as a single "community of interest *** that would warrant their consideration as a coalition district" and on this basis posit a Section 2 violation. (Drayton Mem. p. 15.) They assert that the Supreme Court has not "held expressly that a claim under Section 2 can be stated where a jurisdiction has failed to establish a minority coalitional district." (Drayton Mem. p. 14, citing Bartlett v. Strickland, 129 S. Ct. 1231 [2009]). To the contrary, in Perry v. Perez, ___ U.S. ___, 132 S. Ct. 934 (2012), the Supreme Court, citing the same Bartlett v. Strickland case cited by

Intervenors, flatly stated: "If the District Court did set out to create a minority coalition district . . . it had no basis for doing so."[1] 132 S. Ct. at 944.

Bartlett involved cross-over districts, which the Supreme Court defined as "one[s] in which minority voters make up less than a majority of the voting age population [b]ut . . . the minority population, at least potentially, is large enough to elect a candidate of its choice with the help from voters who are members of the majority and who cross over to support the minority's preferred candidate." 556 U.S. at 9. Reasoning that "a party asserting a § 2 liability must show that the minority population in the potential election district is greater than 50%," the Supreme Court there held "that § 2 does not require crossover districts . . . ." Id. at 23. Simply put, cross-over districts do not satisfy the first Gingles precondition and thus the failure to create them cannot constitute a Section 2 violation.

The first Gingles factor similarly cannot be met in coalition districts, which likewise require crossover votes, albeit from another minority group rather than from the white majority. In both cases, no minority population "is greater than 50%" meaning that the first Gingles factor cannot be established. Hence, as the Supreme Court made clear in Perry, its logic in Bartlett is equally applicable to coalition districts, foreclosing Intervenors' claim here by reasons of the absence of the first Gingles precondition.[2]

As the Supreme Court observed in Bartlett:

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1 The Perry Court defined minority coalition district as precisely what Intervenors here seek, namely, as a district "in which the court expected two different minority groups to band together to form an electoral majority." Id.

2 Intervenors' contrary cases (Drayton Mem. p. 15) Concerned Citizens of Hardee Co. v. Hardee Co. Bd. of Commissioners, 906 F.2d 524, 526 (11th Cir. 1990), and Campos v. City of Baytown, TX, 840 F.2d 1240, 1244 (5th Cir. 1988), predate Perry and Bartlett.

> Nothing in § 2 grants special protection to a minority group's right to form political coalitions. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground."

Id. at 15, quoting, Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994).[3]

Indeed, even if such a coalition-based claim was legally viable, the Drayton Intervenors have utterly failed to present data establishing that the Black and Hispanic communities in Nassau County vote cohesively, as required by the second Gingles precondition. In this regard, Intervenors rely on the report of an expert, Dr. Robert Smith, which they allege "conclusively establishes that they [Blacks and Hispanics] vot[e] in a cohesive fashion." (Drayton Mem. p. 15.) Dr. Smith's report is purely sociological and contains no statistics and no voting analysis and thus does not support the claimed cohesion in voting. (See Exhibit B to McLaughlin Declaration.) However, "[w]ith respect to the second Gingles precondition . . . [p]roof of cohesion in actual elections is required." Rodriguez v. Pataki, 308 F. Supp. 2d 346, 372 (S.D.N.Y. 2004) (three-judge court), aff'd, 543 U.S. 997 (2004), citing Sanchez v. Colorado, 97 F.3d 1303, 1312 (10th Cir. 1996); Gomez v. City of Watsonville, 863 F.2d 1407, 1415 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989); NAACP v. City of Niagara Falls, 65 F.3d 1002, 1018 (2d Cir. 1995). Dr. Smith's report, thus, does not establish the requisite cohesive voting.

Two of Intervenors' three other experts, Dr. Beveridge and Mr. Lewis, also do not provide voting data establishing political cohesiveness of Blacks and Hispanics in Nassau County. (See Gibbs Declaration ¶ 8; Exhibit C to McLaughlin Declaration.) Indeed, the Second

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[3] In Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (en banc), cited in Barlett, the Court squarely rejected the contention that a § 2 claim is stated where the state fails to create coalition districts. Accord: Hall v. Virginia, 385 F.3d 421, 431 (4th Cir. 2004), cert. denied, 544 U.S. 961 (2005) ("A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2.").

Supplemental Expert Report of Dr. Michael McDonald (Exhibit A to McLaughlin Declaration), Intervenors' fourth expert, shows the reverse. Dr. McDonald analyzes a single election for Nassau County clerk in 2009.[4] In his report, Dr. McDonald relies "most especially on . . . two forms of regression analysis" because "they are "relied upon by the federal courts." (Id. at ¶ 9.) On the basis of his simple regression analysis, Dr. McDonald concludes "[e]stimated countywide, Hispanics do not show a tendency to coalesce with African American voters." (Id. at ¶ 34.) He concludes, on this basis, that Hispanic support for the Black candidate of choice, was "hardly distinguishable from, and perhaps a little lower than, the support percentage he received from [polarized] white voters. (Id. at ¶ 31.) Dr. McDonald's double regression analysis leads to the same conclusion. As Dr. McDonald states: "Hispanic support [for the Black candidate of choice] again shows no indication of coalescing with African Americans, when considered countywide." (Id. at ¶ 41.)

Since Intervenors cannot meet the first Gingles precondition and concededly are unable to establish the political cohesiveness required by the second Gingles factor, they do not meet the threshold precondition for demonstrating a § 2 violation.

B. Citizen Voting Age Population is an Unaccepted and Unreliable Basis for Districting

Intervenors' claim is untenable for the independent reason that their purported § 2 violation is constructed exclusively on an analysis based on Citizens of Voting Age tabulation released by the census bureau ("CVAP"). (McLaughlin Declaration Exhibit C, ¶ 5 and Exhibit 2 thereto.) Those citizenship statistics, unlike census numbers, are constructed from a sample, rather than an actual count, amalgamated over a five year period, and are therefore subject to

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[4] Dr. McDonald's report is flawed in that it relies on a single countywide election without analyzing any Assembly races.

large sampling errors for small areas, such as the ones here. For these reasons, their reliability is questionable. Dr. Beveridge himself has expressed concern as to the validity of the Census Bureau's American Community Survey CVAP data. See Memorandum from Professor Andrew Beveridge to Robert Groves, Director the U.S. Census Bureau, dated January 24, 2011, entitled Impact of Miscomputed Standard Errors and Flawed Data Release Policies on the American Community Survey, p. 3, available at www.ncsl.org (attached as Appendix A).

CVAP has never been used as a basis for redistricting in this State. Indeed, when this Court recently drew the new Congressional districts for the State of New York, the districts were constructed on the basis of population and voting age population as reported by the census bureau, not CVAP. Further, in making its Section 5 review, the Department of Justice likewise utilizes total and voting age population, not CVAP. See 28 C.F.R. § 51.28(a)(1).

Moreover, Dr. Beveridge's chart setting forth the composition of proposed and adopted Assembly Districts under CVAP (McLaughlin Declaration, Exhibit C, Exhibit 2), does not provide data on either the CVAP population of an ideal Assembly District or the deviation from that ideal CVAP his districts produce. Nor does he supply deviations based on CVAP for the Assembly Districts statewide. Thus, it is impossible to know whether Intervenors' CVAP-based districts comply with the one person, one vote mandate of Reynolds v. Sims.

Intervenors pronounce Assembly District 18 packed on the basis of their CVAP analysis which shows "60.85% Non-Hispanic Black and 79.74% Hispanics and Blacks combined." (Drayton Mem. p. 15; McLaughlin Declaration Exhibit C, Exhibit 2.) But, based on CVAP, as Dr. Beveridge concedes (id.), the district composition is not at all over concentrated. It comprises a 48.09% Non-Hispanic Black population.

Intervenor's claim that, in addition to packing District 18, five districts in Nassau, 13, 15, 18, 21 and 22, are cracked is belied by their own map. (McLaughlin Declaration, Exhibit

C, Exhibit 3.)[5] As Intervenors' map shows, the Black population in these five districts are naturally geographically dispersed. With regard to District 18, it cannot be simultaneously packed and cracked as Intervenors assert. (Drayton Mem. p. 15.) The minority population in District 22, at the western edge of Nassau County, is already contained within a single Assembly District and therefore is not cracked. The Black population in District 13, which is considerably north of District 18, is an island onto itself, separated from other areas of Black concentration by a substantial area of white population. The Black population of District 15 is extremely small, 2.35% (McLaughlin Declaration, Exhibit C, Exhibit 2) situated to the north and east of District 18 and widely separated from the Black populations of Districts 13 and 18. The District 21 Black population also sits as an island with a small Black population of 10.54%. (Id.) Thus, the Assembly did no cracking as it constructed its districts based on the locations of the existing Black populations, and where feasible, maintained them together in a single district.

C. Intervenors' Proposed Districts are Predominantly Race Based in Violation of Shaw v. Reno

Intervenors posit that the Legislature, in failing to create Dr. Beveridge's two proposed Black/Hispanic districts with Non-Hispanic Black (CVAP) majorities of 50.8% and 50.9% "dilutes the voting strength of the Black citizens and the Black and Hispanic citizens together" in violation of Section 2. (Drayton Mem. p. 15.) To the contrary, it is Dr. Beveridge's two proposed districts that cannot withstand constitutional scrutiny.

It is settled law that districts for which racial considerations serve as the dominant factor in their construction are unconstitutional. Shaw v. Reno, 509 U.S. 630, 652 (1993); Miller

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[5] The Exhibit 4 map impermissibly combines Non-Hispanic Black and Hispanic populations as a single unit. We do not address it as such combined populations cannot state a vote dilution claim.

v. Johnson, 515 U.S. 900, 916 (1995). Shape alone can demonstrate that race was the dominant factor in creating a district. Diaz v. Silver, 978 F. Supp. 96, 117 (E.D.N.Y. 1997) (three-judge court), aff'd, 522 U.S. 80 (1997). "An oddly-shaped district in which each curve corresponds to a racial concentration may be evidence that voters are being segregated by race." Id.

In addition, in the wake of Shaw v. Reno, the Supreme Court has looked to "the compactness of the challenged district to determine whether the shape of the district was based on racial considerations." See Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, supra. As the Supreme Court noted in Miller:

> [S]hape is relevant . . . not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

Id. at 912.

Here, Dr. Beveridge's proposed districts both are not compact and bizarrely shaped, strongly suggestive of unconstitutionality. As Dr. Beveridge's own maps make clear, each of two of his proposed districts meanders, takes in widely dispersed Black populations, and uses narrow corridors of white population to connect widely geographically disparate Black neighborhoods. (See Exhibits 3 and 4 to McLaughlin Declaration, Exhibit C.) Their winding shapes correspond to concentrations of minority populations, interspersed with narrow connectors of white population.

Since the Assembly districts created by Dr. Beveridge and submitted by Drayton Intervenors – which include portions of enacted Assembly Districts 13,15,18,19,21,22 – are not identified on the map submitted by Intervenors, we will simply describe them as the western Hempstead district and the multi-town district. In addition, because Intervenors' maps obfuscate

the contours of their peculiar districts, attached as an Appendix B are maps of Intervenors' two districts. These pictures are worth a thousand words.

The first western Hempstead district is shaped like a butterfly with its wings spread. It includes on its western border the Nassau neighborhoods with a substantial concentration of people identified as NH Black of South Floral Park, Elmont, North Valley Stream and the western portion of Valley Stream. A narrow corridor through a portion of the non-minority neighborhoods of Malverne and Malverne Park Oaks is employed to connect the heavily Non-Hispanic Black neighborhoods of Lakeview, Hempstead, the southern portion of West Hempstead, and the northeastern portion of Baldwin.

The second, multi-town district, includes the eastern portion of Hempstead, Uniondale, Roosevelt, the eastern portion of Baldwin and the northern portion of Freeport which are populated with high concentrations of NH Black residents. The district continues north, creating a corridor through non-minority areas of East Garden City and includes a sliver of East Meadow, then narrows again crossing into the Town of North Hempstead to capture much of largely Black New Cassel and most of Westbury. The district then moves through a needle eye passage through white neighborhoods into the Town of Oyster Bay to include a community just south of Brookville. The map provided with Intervenors' submission is cropped in such a way that this district does not quite close and therefore the description is incomplete as it cannot be determined how far north into the Town of Oyster Bay it goes.

Apart from shape, here, there is direct evidence that Dr. Beveridge's district lines are entirely race driven. Intervenors' papers leave no doubt that race is the predominant factor underlying their misshapened districts. Intervenors neither attack the Legislature's districts, nor justify their own proposed districts, other than on the basis of race. Their papers are suffused with only discussions of race and Dr. Beveridge's districts are drawn solely to unite racial

communities. Such discussion of race as the predominantly motivating factor in and of itself dooms Intervenors' districts under Shaw v. Reno. See discussion in Diaz v. Silver, supra, at 118-119.

CONCLUSION

The Legislative plan is presumptively constitutional and entitled to great deference. "A state's redistricting law is ordinarily accorded deference as a constitutionally compliant enactment." Fund for Accurate & Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 671 (N.D.N.Y. 1992), aff'd, 506 U.S. 1017 (1992), citing, Clements v. Fashing, 457 U.S. 957, 962-63 (1982). Accord: In re Fay, 291 N.Y. 198, 207 (1943) (A reapportionment plan "can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld" [internal quotation marks omitted].). In Wolpoff v. Cuomo, 80 N.Y.2d 70, 78, 387 N.Y.S.2d 560, 563, the New York Court of Appeals stated:

> A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible (*Matter of Fay*, 291 NY 198, 207) (internal quotation marks omitted).

Against this powerful presumption, Intervenors seek to enjoin the entire 150 member Assembly Plan, despite the fact that their claimed violations involve a few isolated districts in Nassau. Such an injunction would constitute a serious intrusion by the judiciary into

the Legislative prerogative. See, e.g., Miller v. Johnson, supra, at 915 ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.").[6]

Critically, as has been demonstrated, Intervenors are unable to show, as they must, likelihood of success on the merits of their claim.

Accordingly, for all the foregoing reasons, the Drayton Intervenors' request for a preliminary injunction as to the Assembly Plan should be denied in all respects.

Dated: New York, New York
April 17, 2012

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6 Even, assuming arguendo Intervenors' deficiency in the Nassau districts, it would be improper for the Court to enjoin the entirety of the 150 seat Assembly Plan. Perry v. Perez, supra, and Upham v. Seamon, 456 U.S. 37 (1982), teach that the federal courts must defer to the unobjectionable aspects of a state's plan and may not draw an independent map insofar as the enacted plan is not objectionable. Perry, supra at 943. Further, in the absence of a claim that population variations in the districts are unlawful – and there are none as to the Assembly Plan – a court may not redraw the districts to achieve smaller of de minimus population deviations, but must defer to the existing population variations as constituted. Perry, supra at 943 and n. 2; Upham v. Seamon, supra, 456 U.S. at 42-43.

APPENDIX A

IMPACT OF MISCOMPUTED STANDARD ERRORS AND FLAWED DATA RELEASE POLICES ON THE AMERICAN COMMUNITY SURVEY

TO: ROBERT GROVES, DIRECTOR

FROM: ANDREW A. BEVERIDGE, PROFESSOR OF SOCIOLOGY, QUEENS COLLEGE AND GRADUATE CENTER CUNY AND CONSULTANT TO THE *NEW YORK TIMES* FOR CENSUS AND OTHER DEMOGRAPHIC ANALYSES*

SUBJECT: IMPACT OF MISCOMPUTED STANDARD ERRORS AND FLAWED DATA RELEASE POLICES ON THE AMERICAN COMMUNITY SURVEY

DATE: 1/24/2011

CC: RODERICK LITTLE, ASSOCIATE DIRECTOR; CATHY MCCULLY CHIEF U.S. CENSUS BUREAU REDISTRICTING DATA OFFICE

This memo is to alert the Bureau to two problems with the American Community Survey as released that degrade the utility of the data through confusion and filtering (not releasing all data available for a specific geography). The resultant errors could reflect poorly on the Bureau's ability to conduct the American Community Survey and could potentially undercut support for that effort. The problems are as follows:

1. The Standard Errors, and the Margins of Error (MOE) based upon them, reported for data in the American Community Survey are miscomputed. For situations where the usual approximation used to compute standard errors is inappropriate (generally where there a given cell in a table makes up only a small part or a very large portion of the total) it is used anyway. The results they yield include reports of "negative" numbers of people for many cells within the MOE in the standard reports.
2. The rules for not releasing data about specific fields or variables in the one-year and three-year files (so-called "filtering") in a given table seriously undercuts the value of the one-year and three-year ACS for many communities and areas throughout the United States by depriving them of valuable data. (The filtering is also based in part on the miscomputed MOEs.)

This memo discusses the issues underlying each problem. Attached to this memo are a number of items to support and illustrate my points.

A. MISCOMPUTED STANDARD ERRORS

Background

The standard errors and MOEs reported with the American Community Survey, were miscomputed in certain situations and lead to erroneous results. When very small or very large proportions of a given table are in a specific category then the standard errors are computed improperly. Indeed, there are a massive number of instances where the Margins of Error (MOEs) include zero or negative counts of persons with given characteristics. This happens even though individuals were found in the sample with specific

* I write as a friend of the Census Bureau. Since 1993 I have served as consultant to the *New York Times* with regard to the Census and other demographic matters. I use Census and ACS data in my research and have testified using Census data numerous times in court.

characteristics (e.g. Non-Hispanic Asian). Obviously, if one finds any individuals of a given category in a given area, the MOE should never be negative or include zero for that category. If it did, then the method by which it was computed should be considered incorrect. For instance, in the case of non-Hispanic Asians in counties, in some 742 counties where the point estimate of the number of non-Hispanic Asians is greater than zero, the published MOE implies that the actual number in those counties could be negative, and in 40 additional cases the MOE includes zero. Similarly, for the 419 counties where the point estimate is zero, the published MOE implies that there could be "negative" or "minus" Non-Hispanic Asians in the county. (See Appendix 1 for these and other results. Here I have only shared results from Table B03002. Many other tables exhibit similar issues.) This problem permeates the data released from the 2005-2009 ACS, and has contributed to filtering issues in the three-year and one-year files, which will be discussed later in this memo.

Issues with the ACS Approach to Computing Standard Error

This problem appears to be directly related to the method by which Standard Errors and MOEs are computed for the American Community Survey, especially for situations where a given data field constitutes a very large or very small proportion of a specific table. *Chapter 12 of the ACS Design and Methodology* describes in some detail the methods used to compute standard error in the ACS (see Appendix 2). It appears that the problems with using the normal approximation or Wald approximation in situations with large or small proportions are ignored. This is especially surprising given the fact that the problems of using a normal approximation to the binomial distribution under these conditions are well known. I have attached an article that surveys some of these issues. (See Appendix 3, Lawrence D. Brown, T. Tony Cai and Anirban DasGupta. "Interval Estimation for a Binomial Proportion." *Statistical Science* 16:2 (2001): p.101–33.) The article also includes responses from several researchers who have tackled this problem. Indeed, even Wikipedia has references to this problem in its entry regarding the "Binomial Proportion." Much of the literature makes the point that even in conditions where the issue is not a large or small proportion, the normal approximation may result in inaccuracies. Some standard statistical packages (e.g., SAS, SUDAAN) have implemented several of the suggested remedies. Indeed, some software programs even warn users when the Wald or normal approximation should not be used.

It is true that on page 12-6 of *ACS Design and Methodology* the following statement seems to indicate that the Census Bureau recognizes the problem (similar statements are in other documents regarding the ACS):

> Users are cautioned to consider "logical" boundaries when creating confidence bounds from the margins of error. For example, a small population estimate may have a calculated lower bound less than zero. A negative number of people does not make sense, so the lower bound should be set to zero instead. Likewise, bounds for percents should not go below zero percent or above 100 percent.

In fact, this means that it was obvious to the bureau that the method for computing standard errors and MOEs resulted in errors in certain situations, but nothing, so far, has been done to remedy the problem. Furthermore in the American Fact Finder MOEs which included negative numbers, where respondents were found in the area abound. (See Appendix 4, for an example.) It is equally problematic to have the MOE include zero when the sample found individuals or households with a given characteristic. I should note that exact confidence intervals for binomial proportions and appropriate approximations under these conditions are asymmetric, and never include zero or become negative. Therefore, the ACS's articulated (but not implemented) MOE remedy of setting the lower bound to zero would not be a satisfactory solution. Rather, the method of computation must be changed to reflect the accepted statistical literature and statistical practice by major statistical packages and to guard against producing data that are illogical and thus likely to be misunderstood and criticized.

Consequences of the Miscomputation

There are serious consequences stemming from this miscomputation:

1. **The usefulness, accuracy and reliability of ACS data may be thrown into question.** With the advent of the ACS 2005-2009 data, many of the former uses of the Census long-form will now depend upon the ACS five year file, while others could be based upon the one-year and three-year files. One of these uses is in the contentious process of redistricting Congress, state legislatures and local legislative bodies. In any area where the Voting Rights Act provisions are used to assess potential districting plans, Citizens of Voting Age Population (CVAP) numbers need to be computed for various cognizable groups, including Hispanics, Asian and Pacific Islanders, Non-Hispanic White and Non-Hispanic Black, etc. Since citizenship data is not collected in the decennial census, such data, which used to come from the long form, must now be produced from the 2005-2009 ACS. In 2000 the Census Bureau created a special tabulation (STP76) based upon the long form to report CVAP by group for the voting age population to help in the computation of the so-called "effective majority." I understand that the Department of Justice has requested a similar file based upon the 2005 to 2009 ACS. Unless the standard error for the ACS is correctly computed, I envision that during the very contentious and litigious process of redistricting, someone could allege that the ACS is completely without value for estimating CVAP due to its flawed standard errors and MOEs, and therefore is not useful for redistricting. I am sure that somewhere a redistricting expert would testify to that position if the current standard error and MOE computation procedure were maintained. This could lead to a serious public relations and political problem, not only for the ACS, but for census data generally.

   When a redistricting expert suggested this exact scenario to me, I became convinced that I should formally bring these issues to the Bureau's attention. Given the fraught nature of the politics over the ACS and census data generally, I think it is especially important that having a massive number of MOEs including "minus and zero people" should be addressed immediately by choosing an appropriate method to compute MOEs and implementing it in the circumstances discussed above.

   I should note that in addition to redistricting, the ACS data will be used for the following:

   1. Equal employment monitoring using an Equal Employment Opportunity Commission File, which includes education and occupation data, so it must be based upon the ACS.
   2. Housing availability and affordability studies using a file created for the Housing and Urban Development (HUD) called the "Comprehensive Housing Affordability Strategy (CHAS) file. This file also requires ACS data since it includes several housing characteristics and cost items.
   3. Language assistance assessments for voting by the Department of Justice, which is another data file that can only be created from the ACS because it is based upon the report of the language spoken at home.

   Because the ACS provides richer data on a wider variety of topics than the decennial census, there are a multitude of other uses for the ACS in planning transportation, school enrollment, districting and more where the MOEs would be a significant issue. In short, the miscomputed MOEs are likely to cause local and state government officials, private researchers, and courts of law to use the ACS less effectively and less extensively, or to stop using it all together.

B. FLAWED RELEASE POLICIES FOR DATA TABLES IN THE ONE-YEAR AND THREE-YEAR ACS FILES

Background

Having yearly and tri-yearly data available makes the ACS potentially much more valuable than the infrequent Census long form. However, much of that added value has been undercut by the miscomputation of MOEs coupled with disclosure rules for data in the one-year and three-year ACS files. This has meant that important data for many communities and areas have been "filtered," that is not released. The general rule, of course, is that data are released for areas with a population of 65,000 or greater for the one-year file and for areas with a population of 20,000 or greater for the three-year files. However, the implementation of the so-called "filtering rule," used to prevent unreliable statistical data from being released, has had the practical effect of blocking the release of much important data.

As chapter 13 of the *ACS Design Methodology* states:

> The main data release rule for the ACS tables works as follows. Every detailed table consists of a series of estimates. Each estimate is subject to sampling variability that can be summarized by its standard error. If more than half of the estimates in the table are not statistically different from 0 (at a 90 percent confidence level), then the table fails. Dividing the standard error by the estimate yields the coefficient of variation (CV) for each estimate. (If the estimate is 0, a CV of 100 percent is assigned.) To implement this requirement for each table at a given geographic area, CVs are calculated for each table's estimates, and the median CV value is determined. If the median CV value for the table is less than or equal to 61 percent, the table passes for that geographic area and is published; if it is greater than 61 percent, the table fails and is not published. (Chapter 13 of the *ACS Design and Methodology*, p. 13-7, see Appendix 5.)

Negative Consequences of the Filtering Rules

These rules on their face are flawed, since they make the release of data about non-Hispanic blacks or non-Hispanic whites contingent on the presence of members of other groups living in the same area, such as Hispanic Native Americans or Alaskan Natives, Hispanic Asians, or Hispanic Hawaiian Natives or other Pacific Islanders. Therefore, for areas populated by just a few groups, the Bureau will not release the data about any group for that area. Thus, many cities, counties and other areas will not have important data about the population composition reported because they do not have enough different population groups living within the specified area. Furthermore, using the CV based upon the miscomputed standard error (most especially for the case of where few or zero individuals in the area are in a given category) means that the likelihood of reporting a high CV is increased and even more areas will not have some data released. (As noted in the section discussing the miscomputed standard errors, the computation of the standard error and thus the computation of CV is flawed.)

To demonstrate the impact of this rule, I assessed the "filtering" for the variable B03002 (Hispanic status by race) in the 2009 one-year release, using the Public Use Micro-data Areas (PUMAs). PUMAs are areas that were designed to be used with the Public Use Micro-Data files and are required to include at least 100,000 people. Due to the Bureau's release rules, the only areas released for the one-year and three-year files that provide complete coverage of the United States were the nation, States, and PUMAs levels of data. Using PUMAs, it is easy to understand the impact of the "filtering" rules since every PUMA received data in 2009.

For the Race and Hispanic status table (B03002), the table elements include total population; total non-Hispanic population; non-Hispanic population for the following groups: white; black; native American or Alaskan Native; Asian; native Hawaiian or other Pacific Islander; some other race; two or more races; two races including some other race; two races excluding some other race, and three or more races; and total Hispanic population and then population for each of the same groups listed above but for those that are Hispanic, such as Hispanic Asian, Hispanic native Hawaiian and other Pacific Islander, as well as Hispanic

White and Hispanic black. The table contains some 21 items, of which 3 are subtotals of other items of other items. (See Appendix 2 for an example.)

Plainly, many of the cells in this table are likely to be zero or near zero for many geographies within the United States. For that reason, it is not surprising that 1,274 of 2,101 PUMAs (well more than half) were "filtered" for the 2009 one-year file. Those not filtered are likely to be urban areas with a substantial degree of population diversity, while those filtered are often the opposite. The map presented on the final page of this memo shows graphically which PUMAs had table B03002 filtered. This particular example shows where the proportion of the population that was non-Hispanic white was not revealed in this table.

Looking at the map, the problem becomes clear. Vast portions of the United States are filtered, as represented by the green cross-hatch pattern. Parts of North Dakota and Maine for example do not have a report on the number of non-Hispanic whites. In a similar vein, there is at least one PUMA in New York City that is so concentrated in terms of non-Hispanic African American population that B03002 is "filtered."

Conclusion and Recommendations

Based upon this analysis, I would make three recommendations to the Bureau:

1) That a User Note immediately be drafted indicating that there is a problem with the MOEs (and the standard errors which are used to compute them) in the ACS for certain situations, and that the Bureau will recompute them for the ACS 2005-2009 file on an expedited basis. We are basically one-month from the start of redistricting with Virginia and New Jersey required to redraw their lines by early summer. Both states have substantial numbers of foreign-born individuals, many of whom are Hispanic, so the Citizens of Voting Age by group calculations are very important and dependent on clear ACS data.

2) That the MOEs for the 2005-2009 ACS, (as well as all of the one and three year files already issues) be recomputed using a method that takes into account the issues surrounding the "binomial proportion." That the ACS 2005-2009 data be re-released with these new MOE files. This should be done almost immediately for the more recent files and as soon as possible for the others.

3) That the Bureau adopt a new release policy based not upon whole tables (the specifications of which are in any event arbitrary), but rather based upon specific variables or table cells. In this way, the release of important data would not be subject to miscomputed standard errors, or to the size or estimated variability of other variables or cells. It also may make sense to dispense with "filtering" altogether. This policy should then be applied to previously released data, and the data should be re-released.

The problems identified in this memo are causing serious issues regarding the ACS's use in a wide variety of settings, and could seriously threaten the viability of this irreplaceable and vital data source if they became widely known. As a Census and ACS user, I truly hope that steps can be taken to remedy these problems swiftly.

APPENDIX B

Nassau County
Oyster Bay
North Hempstead
LD18B
Hempstead

Nassau County
Oyster Bay
North Hempstead
Hempstead
LD18A