EXHIBIT K

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC RODRIGUEZ, et al.,
Plaintiffs,
- against -
GEORGE E. PATAKI, et al.,
Defendants.

02 Civ. 618 (RMB) (JMW) (JGK)

HOWARD T. ALLEN, et al.,
Plaintiffs,
- against -
GEORGE E. PATAKI, et al.,
Defendants.

02 Civ. 3239 (RMB) (JMW) (JGK)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The challenged Senate redistricting plan is watershed legislation. It was passed by both houses of the New York Legislature with the votes of two black Senators and all three Hispanic Senators in the Bronx and pre-cleared by the Department of Justice. Statement of Undisputed Facts ("SUF") 47, 53. It creates the largest number of majority-minority districts in New York's history—eight districts in which blacks constitute a majority and six in which Hispanics do so. SUF 51. Compared to the previous Senate districting plan, it adds two majority-Hispanic districts (one in the Bronx/Manhattan and another in Queens) and an additional majority-black district in Brooklyn. SUF 52. Moreover, under the plan, minorities enjoy at least substantial proportionality between the number of districts in which they constitute majorities and their percentage of the population in New York. SUF 196-220.

In the face of this unprecedented level of minority representation—and in a state where the Democratic Party, to say the least, is well represented—the Senate Democrats, who finance and control this lawsuit, SUF 54, have identified potential districts that they claim need to be redrawn pursuant to the following tautology: Because minorities support Democrats, the Voting Rights Act requires that all districts be redrawn to favor Democrats so that minorities can elect their candidates of choice. In the Plaintiffs' view, this requires the creation of Democratic districts not only on Long Island, where the electorate leans Republican, but also in the Bronx, a Democratic stronghold—even though *no* minority group would constitute a majority of the voting-age citizens in *any* of the proposed districts. SUF 79. In short, even in districts where no minority group constitutes a majority, and even where every voter is colorblind, the Plaintiffs' guiding principle is that the Voting Rights Act prohibits anything which would reduce the likelihood that a minority will elect its preferred candidate. But, as this Court long ago held, the Act is directed only "at procedures that deny racial minorities a fair opportunity to participate in the electoral process . . . *not* at those that may have the result of reducing the likelihood that a minority will elect its preferred candidate." *Butts v. City of New York*, 779 F.2d 141, 151 (2d Cir. 1985).

For three separate reasons, it is clear that the Voting Rights Act does not require Plaintiffs' proposed search-and-destroy mission for all Republican districts in all jurisdictions where any minorities reside. *First*, "a violation of" the Voting Rights Act is established *only* if "the political processes leading to nomination or election . . . are not *equally* open to participation by [minorities]." 42 U.S.C. § 1973(b) (emphasis added). Relatedly, the Act is violated only if minorities "have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). In short, the Act guarantees *equal opportunity*, not, as the Democrats argue, *preferential* treatment to minorities (much less to political coalitions of which minorities are a part).

That is, plaintiffs must show that the challenged districting plan results in minorities suffering a disadvantage, relative to whites, "on account of race or color." 42 U.S.C. § 1973(a). Here, the sum total of the denial of "equal opportunity" to minorities alleged by the Plaintiffs is that well-entrenched Republican incumbents who enjoy the support of a predominantly Republican electorate tend to defeat both white and minority Democrats, despite the preferences of both white and minority Democratic voters. Thus, minorities are in the same position as white Democrats in the challenged districts—and in the same position as white *Republicans* in predominantly Democratic areas like the Bronx. Every court, including the Second Circuit, has recognized that this sort of *partisan* political defeat does not constitute *racial* bloc voting or a denial of equal opportunity under the Voting Rights Act. This is why, as the Second Circuit has held, and the Plaintiffs' own experts have repeatedly acknowledged, analysis of racial bloc voting turns on elections with *minority* candidates, SUF 152, to determine whether the electorate makes *racial* distinctions in a manner that disadvantages voters belonging to a *racial* minority.[1] The statute and the cases interpreting it squarely

[1] To be sure, the test of a Section 2 violation is not whether the legislature established a voting procedure for a discriminatory purpose. Nevertheless, there can be no Section 2 violation unless a facially neutral redistricting procedure intersects with private, racially motivated voting to deny minorities an opportunity to elect their preferred candidates, thus abridging their right to vote "on account of race."

foreclose the Plaintiffs' contention that the Voting Rights Act is violated where *partisanship* reduces the likelihood that Democrats of any race will be elected.

Second, the Plaintiffs' error is compounded by the fact that the Voting Rights Act, by its terms, guarantees equal opportunity only for racial or ethnic minority groups, not for biracial political coalitions to which minorities belong on account of normal politics. Where, as here, a single racial group is not sufficiently large to constitute a district majority, the composition of the district is a *political* issue that does not implicate the Voting Rights Act. If a minority group must form a coalition with white voters, then it lacks "the potential to elect a representative of its *own* choice," *Growe v. Emison*, 507 U.S. 25, 40 (1993) (emphasis added), and it is the multi-racial *political* coalition, rather than a "protected" "class of citizens," whose potential ability "to elect" is allegedly thwarted.

Third, even assuming that all practices that "reduc[e] the likelihood that a minority will elect its preferred candidate," *Butts*, 779 F.2d at 151, must be eliminated, the Supreme Court has made perfectly clear that in choosing among competing redistricting alternatives, a state is *not* required to maximize the number of majority-minority districts. *See Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of § 2."). Just last Term, the Supreme Court reaffirmed that the Voting Rights Act affords states great latitude in deciding how to ensure minorities the opportunity to participate in the political process. *See Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511-12 (2003).[2] The Senate plan provides minorities with at least roughly proportional representation. SUF 196-220. The Voting Rights Act requires no more. Conversely, it is undisputed that the Plaintiffs' revised plan creates the maximum

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42 U.S.C. § 1973. Were it otherwise, Section 2 would become a statute that protects political parties from *political* defeat, rather than a law protecting minorities' right to vote free from discrimination.

[2] The Court has long recognized that federal interference with state districting "represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *see also Butts*, 779 F.2d at 147. The Court has explained that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "'is primarily a matter for legislative consideration and determination,'" *Connor v. Finch*, 431 U.S. 407, 414 (1977) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).

feasible number of majority-minority districts. SUF 221-25. In any event, the Plaintiffs cannot show, as required by *Gingles* and the statute's plain language, that a single minority group constitutes a majority of the citizen voting-age population in *any* of the districts they propose. SUF 79.

At bottom, this meritless lawsuit was manufactured by the Senate Democrats[3] in an attempt to use the Voting Rights Act for *political* gerrymandering. It is therefore unsurprising that the Justice Department's Civil Rights Division declined, despite the Senate Democrats' urging, to challenge virtually the same Long Island districts in the 1990's and precleared the Bronx districts in 2002. SUF 53, 61, 311. Indeed, while the Plaintiffs claim to seek to advance the interests of the Hispanic community, the proposed districts are, in fact, simply an effort by the Plaintiffs to elect white Democrats in these districts. In the Bronx, no speaker—Hispanic or non-Hispanic—ever suggested an additional Hispanic seat in the months of public hearings that took place before and after the Task Force released its redistricting plan for public comment in February 2002. SUF 39. Moreover, all civil rights groups solicited by the Senate Democrats to endorse their 61-seat proposal advocated creating *three* majority-Hispanic, one majority-black, and one majority-white district in the Bronx/Westchester area—precisely as the Senate plan achieved. SUF 37-38. In fact, *all three* Hispanic incumbents in the Bronx voted in favor of the Legislature's plan after the Senate Democrats unveiled their newly-invented "Hispanic district" at the eleventh hour. SUF 40-48. Indeed, the only concern that has been voiced by some Hispanics is that the Hispanic voting-age population in District 31, 53.3%, is *too low* to enable Hispanics to elect their preferred representatives. Needless to say, therefore, the Senate Democrats' proposed district, which has a Hispanic voting-age population of 50.08%, is wholly inadequate to empower Hispanic voters—and, indeed, would harm them by reducing the Hispanic populations in adjacent districts to at or below 53.3% in some cases. SUF 303.

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[3] The Senate Democrats prepared all proposed redistricting plans; prepared all revised plans; performed the statistical analyses; selected races to analyze; hired the law firm; selected the experts; and filed this action. SUF 56-60. For this reason, we sometimes refer to the nominal plaintiffs as the "Senate Democrats" – the real party in interest.

On Long Island, similarly, not a single Hispanic speaker at any public hearing advocated the Democrats' proposed alternative districts, while every Hispanic leader strongly endorsed the Senate plan. SUF 42. Indeed, Mark Bonilla, the Hispanic Town Clerk of Hempstead, was the Senate Majority's representative on the Task Force. SUF 46. This unanimous Hispanic opposition to the Democrats' proposed Long Island districts is explained by the Plaintiffs' own analysis of racial bloc voting, which shows that Hispanics would constitute roughly *1.2%* of the voters in Plaintiffs' proposed Suffolk District 4 and *0.8%* of the voters in the proposed Nassau County District 8. SUF 175-76. While the Plaintiffs' proposed redistricting plan will likely make Long Island more competitive for the Democratic party, it will do nothing to empower Hispanic voters, who will have virtually no say over their elected representative. It is hard to imagine more compelling facts establishing that the Senate Democrats' so-called "influence" or "coalition" districts are simply a device to increase the partisan interests of one political party while doing nothing to advance the interests of an ethnic minority.

A similar analysis of the facts demonstrating that there is no minority vote dilution in Congressional District 17, and the Court's prior adjudication of that issue, is provided in Daniel Chill's affidavit.

I. THE ONE-PERSON, ONE-VOTE CLAIM FAILS AS A MATTER OF LAW AND FACT.

Assuming *arguendo* that a State legislative plan with a maximum deviation below 10% is ever subject to challenge (*but see* SUF Ex. 2, Motion to Dismiss at 2-8), Plaintiffs have provided absolutely no evidence suggesting that the legislature failed to make a "good faith effort" to achieve population equality. First, all that Plaintiffs have even *attempted* to demonstrate is that the legislature's plan fails to provide "Downstate" acceptable proportional representation in the Senate. But the Fourteenth Amendment requires, at most, that States make a good faith effort to achieve *population equality*, not regional proportionality.[4]

[4] Proportional representation for regions and population equality are entirely different issues. A region could be proportionally represented even if half of its districts are overpopulated by 6%, so long as

It is axiomatic that the Equal Protection Clause protects citizens, not geographic areas, for the simple reason that, "[l]egislators are elected by voters, not farms or *cities* or economic interests." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (emphasis added); *see id.* at 575 ("Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities."); *accord Mirrione v. Anderson*, 717 F.2d 743, 745-46 (2d Cir. 1983) (affirming dismissal of regional discrimination claim because "[v]oting is a personal right" and "geographic communit[ies]" are "not entitled to protection"). Thus, it makes no difference whether the overpopulated districts are *adjacent* to underpopulated districts, or concentrated in one "region" of the State, because, "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. While a person's vote obviously may not be given "10 times the voting power of another person in a statewide election merely because he lives in a rural area," the Court has never suggested that an otherwise *permissible* deviation becomes impermissible simply because the slightly overpopulated districts are in a certain area (particularly where, as here, the area is both urban and rural). *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963). To the contrary, any such theory was rejected out of hand in *Mahan v. Howell*, 410 U.S. 315 (1973). In that case, the Supreme Court upheld a population deviation of *16.4 %* even though the lower court had conclusively found that the plan discriminated against Northern Virginia by "systematically over-represent[ing]" the Tidewater region. *See id.* at 344-45 (Brennan, J., dissenting). As the dissent correctly observed, "the Court discern[ed] no need even to acknowledge this . . . built-in-bias tending to favor particular geographic areas." *Id.* Thus, since there is no difference between a plan which overpopulates Buffalo or other "upstate" entities, and one which overpopulates New

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the other half were underpopulated by 6%. Such deviations would be perfect as a matter of "regional proportionality," even though they are plainly unacceptable under normal population equality standards.

York City and its environs, Plaintiffs' claims of "Downstate's" lack of proportional representation says nothing about population inequality or otherwise justifies departing from the 10% rule.

This is particularly true since Plaintiffs concededly cannot identify *any* objective basis – articles, cases, etc. – for identifying either an acceptable level of regional proportionality or, indeed, even the alleged "Downstate" region they are allegedly seeking to protect. SUF 9-10. With respect to proportionality, Plaintiffs contend that the 1990's Senate plan was perfectly acceptable, even though "Downstate" had *.4* less of a Senate seat than was proportional to its population, but now contend that the 2002 Senate plan is egregiously unfair because "Downstate" has *.6* less of a Senate seat than proportionality mandates. SUF 12. Needless to say, there is no objective or judicially-manageable standard which would attach dispositive significance to a .2 differential in a single Senate seat. Moreover, when rationally defined, the Senate plan provides near perfect proportionality and is far more proportional than Plaintiffs' proposed alternative.[5]

With respect to what constitutes a region, Plaintiffs cannot provide a scintilla of evidence that anyone anywhere has ever defined "Downstate" the way they do for this litigation. SUF 9-10. Most tellingly, Plaintiffs' witnesses conceded that Rockland and Orange counties were included in "Downstate" solely because the Senate district there was overpopulated, thus confirming Defendants' assertion that Plaintiffs' "Downstate" is a litigation-specific invention designed precisely to create a misleading impression of regional disproportionality. SUF 10. For the same reason, Plaintiffs' malleable concept has nothing to do with recognized *regions*, since it could be applied to any contiguous grouping of overpopulated districts.

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[5] *See* SUF Ex. 2, Motion to Dismiss at 14-19. Under perfect proportionality tied to total population, New York City would receive 26.2 Senate seats. SUF 15. The legislature's plan provides the City with 26 such seats. *Id.* The 26 are districts located entirely or predominantly in New York City, which is the appropriate measure since the City will control those districts and because that is the manner in which the Supreme Court has adjudicated racial proportionality. In *Johnson*, 512 U.S. at 1014, the Court found that Hispanics were provided with a proportional number of Hispanic majority seats in Dade County because there was a proportional number of districts "located primarily within the County" or "at least in part within Dade County." Since there are no population equality cases examining regional proportionality (since no court has taken the theory seriously), *Johnson's* teaching on racial proportionality should govern in this context as well.

Most important, the slight "overpopulation" of districts in New York City and its environs on the basis of *total population* actually substantially *underpopulates* the New York City districts on the basis of eligible citizen voters and actual voters. Since the entire point of "one-person, one-vote" population equality is, of course, to prevent "dilution of the weight of a *citizen's vote*," a basic measure of whether a population deviation is unacceptable is whether it even potentially dilutes the weight of the citizen's vote. *Reynolds*, 377 U.S. at 555 (emphasis added). Indeed, the Supreme Court's "one-person, one-vote" case involving New York measured equality on the basis of "*citizen* population," and the Court has repeatedly stated that eligible or actual voters would be an appropriate measure of Fourteenth Amendment population equality standards. *See WMCA, Inc. v. Lomenzo,* 377 U.S. 633, 648 (1964) (emphasis added).[6] Here, according to Plaintiffs' own citizen voting-age population ("CVAP") figures, the New York City districts in the Legislature's Plan are *underpopulated* by 12%, but "Upstate" districts are *overpopulated* by 15.4%. SUF 17. With respect to registered (enrolled) or actual voters, the weight of a New York City resident's vote is worth 29.9% to 63.8% *more* than an Upstate citizen's vote. SUF 22. Thus, the Senate Plan, far from giving "Downstate" less political power, actually greatly *enhances* the weight of New York City votes relative to the rest of the State, both in terms of eligible and actual voters. Obviously, no court should *exacerbate* this dilution of "Upstate" voting strength in the name of ensuring that "one person's vote must be counted equally with those of all other voters in the State." *Reynolds*, 377 U.S. at 560.

Moreover, even in terms of total population, New York City has greater representation in the state legislature than its population warrants, since it has *42.7%* of the legislative seats and only 42.2% of the population. SUF 24. This is due to the fact that, in the Assembly plan, most of the New York City districts are underpopulated relative to the ideal. SUF 25. And, of course, it was appropriate for the Senate Plan to

[6] *See Burns v. Richardson*, 384 U.S. 73, 90-97 (1966) (Equal Protection Clause allowed Hawaii to apportion districts on the basis of *registered* voter population); *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) ("total population . . . may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters").

slightly overpopulate New York City districts to balance off the Assembly's slight underpopulation of the City, since it has been clear from the outset of the "one-person, one-vote" doctrine that "apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house." *Reynolds*, 377 U.S. at 577. *See also Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) ("It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house.")

Finally, the undisputed evidence establishes that the Legislature's preservation of the Queens County border (cut twice by Plaintiffs' proposed alternative) cannot be done without exacerbating population inequality and that slightly underpopulating "Upstate" districts serves the important purposes of preserving the cores of existing districts and avoiding the incumbent pairing that is *required* by Plaintiffs' proposal. SUF 27-36.

In short, when the Legislature was confronted with the option of Plaintiffs' proposal to overpopulate ("underrepresent") "Upstate" or slightly overpopulate ("underrepresent") "Downstate", it chose the alternative which best comported with equally weighted votes and proportional representation in the legislature. It would pervert both "one-person, one-vote" principles, and the doctrine of deference to legislative redistricting, for the Court to overturn the legislature's judgment in a manner which would *exacerbate* both representational and voting inequality, particularly since any such remedy would be based on utterly arbitrary definitions of "acceptable proportionality" and "Downstate" unrelated to any *legal* theory. In *Cecere v. County of Nassau*, 2003 WL 21785705 (E.D.N.Y. July 31, 2003), which Plaintiffs heavily relied on in the initial briefing, the Court, after tentatively allowing plaintiffs to proceed in a challenge to a redistricting plan with less than 10% deviation, granted defendants' *Motion to Dismiss* on alleged facts far worse than those presented here. We respectfully suggest the Court should follow *Cecere*, as well as the three-judge court in *FAIR v. Weprin*, 796 F. Supp. 662 (N.D.N.Y.) (three-judge court), *aff'd*, 506 U.S. 577

(1992), and dismiss Plaintiffs' "one-person, one-vote" claim without any further expenditure of judicial resources on this legally insufficient challenge.

II. THE PLAINTIFFS' SECTION 2 CLAIMS FAIL BECAUSE THE VOTING RIGHTS ACT DOES NOT GUARANTEE THE ELECTORAL SUCCESS OF PARTISAN COALITIONS TO WHICH MINORITIES BELONG.

The Voting Rights Act prohibits denying or abridging the right to vote "on account of race or color" by causing a "class of citizens" to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. The Act guarantees an equal opportunity for minority voters. It does not, however, mandate that redistricting plans be designed to maximize the electoral success of black or black-preferred candidates. Applying these principles, the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), established three objective preconditions for a claim under Section 2: (1) a minority racial group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the group must be politically cohesive; and (3) bloc voting by a majority racial group must usually defeat the minority group's preferred candidate. *Id.* at 50-51. If these preconditions are met, "the trial court is to consider 'the totality of the circumstances' and to determine . . . whether the political process is equally open to minority voters." *Id.* at 79 (internal citations omitted).

The Plaintiffs cannot satisfy the *Gingles* requirements.

A. The Plaintiffs Cannot Satisfy The Majority-In-A-District Requirement Of The First *Gingles* Precondition.

1. Section 2 Plaintiffs Must Show That A Minority Racial Group Could Constitute A Majority In A District.

As Defendants showed in their motion to dismiss, courts have unanimously rejected claims brought under Section 2 where a minority racial group does not constitute a majority of a potential district,[7] whether phrased as a denial of the ability to elect minorities' representatives of choice or as a denial of the ability to influence elections. SUF Ex. 2, Motion to Dismiss at 21-38. As the Supreme Court cogently explained, the "reason that a minority group . . . must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 51 n.17.

The Eastern District of Virginia recently reaffirmed this principle in *Hall v. Commonwealth of Virginia*, 2003 WL 21957378 (E.D. Va. Aug. 7, 2003), rejecting a proposed 40% black district which allegedly could elect a black candidate with white crossover voting. In rejecting the plaintiffs' claim *on a motion to dismiss*, the court held that, as a matter of law, "Plaintiffs cannot satisfy the first *Gingles* precondition because the relief they seek will fail to create an additional geographically compact *majority black* district . . . ." *Id.* at *5 (emphasis added).

Indeed, the "majority-in-a-district" requirement serves an important purpose: It prevents the Voting Rights Act from being transformed "from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Id.* at *6 (internal

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[7] *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), which held that the *Gingles* requirements applied only to at-large elections and recognized an influence claim, was overruled by the Sixth Circuit in *Cousin v. McWherter*, 46 F.3d 568 (6th Cir. 1995), and abrogated by *Growe v. Emison*, 507 U.S. 25 (1993), which recognized that *Gingles* applies equally to single-member districts. *See also O'Lear v. Miller*, 222 F. Supp. 2d 850, 861 (E.D. Mich.) (three-judge court) (dismissing Section 2 challenge "because we do not recognize 'influence' claims"), *aff'd*, 537 U.S. 997 (2002).

citations omitted). Where, as here, a single racial group is not sufficiently large to constitute a district majority, the composition of the district is a *political* issue that does not implicate the Voting Rights Act. The Voting Rights Act plainly addresses *only* the situation where "*members of a class of citizens protected by [the Act]* . . . have less opportunity than other members of the electorate . . . to *elect* representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). If a minority group must form a coalition with white voters, then it lacks "the potential to elect a representative of its *own* choice," *Growe*, 507 U.S. at 40 (emphasis added), and it is the multi-racial *political* coalition, rather than a "protected" minority "class of citizens," whose potential ability "to elect" is allegedly thwarted. Thus, the reason courts have uniformly rejected influence districts is that requiring such partisan gerrymandering would "require that [courts] abandon [their] quest for neutrality in favor of raw political choice." SUF Ex. 51, *Balderas v. Texas*, No. 6:01CV158, Slip op. at 13 (E.D. Tex Nov. 14, 2001).

2. The "Majority-In-A-District" Requirement Must Be Measured By The Citizen Voting-Age Population Of The Potential District.

As demonstrated above, Section 2 plaintiffs are "required . . . to prove that their minority group exceeds 50% of the relevant population of [a potential] district." *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999). It is well settled that the "relevant population" consists of the citizen voting-age population of the potential district. *See France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999) ("[T]he proper measure of population is the total citizens eligible to register and vote."); *see also Valdespino*, 168 F.3d at 853; *Negron v. Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *LULAC v. Clements*, 986 F.2d 728, 743 (5th Cir. 1993); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991); *Romero v. Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989); *Montano v. Suffolk County Leg.*, 268 F. Supp. 2d 243, 263 (E.D.N.Y. 2003).

Citizen voting-age population is the only measure consistent with the express language of the Voting Rights Act, which proscribes the "denial or abridgement of the right of any citizen of the United

States to vote on account of race or color." 42 U.S.C. § 1973(a) (emphasis added). Moreover, while the Supreme Court has not directly addressed "which characteristic of minority populations . . . ought to be the touchstone for proving a dilution claim," *De Grandy*, 512 U.S. at 1008, as noted above, all federal courts have recognized that citizen voting-age population is also the only measure consistent with the Court's precedents. "In order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient number of voters or of those who can readily become voters through the simple step of registering to vote." *Negron*, 113 F.3d at 1569. And "[i]n order to vote or to register to vote, one must be a citizen" of voting age. *Id.*

3. The "Majority-In-A-District" Requirement Cannot Be Satisfied Through A Black-Hispanic Coalition.

(a) Coalition Claims Are Not Cognizable.

The "majority-in-a-district" requirement, moreover, cannot be satisfied by combining blacks and Hispanics where the two groups together, but not separately, constitute a majority of the citizen voting-age population in a potential district. As an initial matter, the notion that blacks and Hispanics can be counted as a single, cohesive group for purposes of the first *Gingles* precondition or other redistricting issues is belied by the undisputed fact that all courts involved in redistricting always strive to create majority-black or majority-Hispanic districts, rather than coalition districts in which neither group constitutes a majority, but their combined VAP exceeds 50%. Indeed, the Second Circuit was confronted with just this choice in *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2d Cir.), *vacated on other grounds*, 512 U.S. 1283 (1994), and held that, where possible, "[i]t is preferable to create majority districts for each [minority] group." *Id.* at 279. The Second Circuit's preference for single majority-minority districts shows that blacks and Hispanics simply are not equivalent to a single minority group for purposes of the Voting Rights Act.

Recognizing such multi-racial "coalition claims," moreover, subverts both the text and the purpose of the Voting Rights Act. *First*, the text of the Voting Rights Act forecloses coalition claims. The statute originally protected only black voters and was amended in 1975 to reach four additional groups of minorities—persons of Spanish heritage, American Indians, Asian Americans, and Alaskan natives. *See* S. Rep. No. 94-529, *reprinted in* 1975 U.S.C.C.A.N. 774, 790. The separate enumeration of each group shows that Congress understood members of each group to possess homogeneous characteristics and, by negative inference, that "Congress did not envision that each defined group might overlap with any of the others or with blacks." *Nixon v. Kent County*, 76 F.3d 1381, 1390 (6th Cir. 1996) (internal citations omitted). Indeed, the fact that two groups are protected does not justify the assumption that a new group composed of both minorities is itself a protected group, since "[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition." *Id.* at 1392 (internal quotations omitted). In fact, the Act does not protect many minorities such as "Eastern European immigrants or minorities from the Indian subcontinent." *Id.* at 1390. Thus, "[t]he remedies of the Act only extend to members of a minority *specifically* protected by Congress." *Id.* at 1390-91 (emphasis added). Congress made no finding of discrimination against, and extended no statutory protection to, a *coalition* of minorities.

Moreover, Section 2 consistently speaks of a "class" of citizens in the singular. The Act requires a showing "that the political processes . . . are not equally open to participation by members of *a class* of citizens protected by subsection (a) . . . ." 42 U.S.C. § 1973(b) (emphasis added). *See also* 42 U.S.C. § 1973(b) (referring to "[t]he extent to which members of *a protected class* have been elected" (emphasis added)). "If Congress had intended to sanction coalition suits, the statute would read 'participation by members of *the classes* of citizens protected by subsection (a)' . . . ." *Nixon*, 76 F.3d at 1386. Likewise, "the central element necessary to establish a violation is a showing that '*its* members have less opportunity

than other members of the electorate,' not that '*their* members have less opportunity.'" *Id.* (internal citations omitted).

Second, the purpose of the Voting Rights Act—"to redress racial or ethnic discrimination which manifests itself in voting patterns or electoral structures"— likewise does not support coalition suits. *Id.* at 1392. For "[i]f a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from *political* minorities as opposed to *racial* minorities." *Id.* (emphasis added). The Voting Rights Act, however, was never intended to authorize "judicial superintendence of election outcomes in the name of protecting those less able to fend for themselves in the *political* arena when inability is undistinguished from political loss." *LULAC v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1507 (5th Cir. 1987) (Higginbotham, J., dissenting) (emphasis added). Indeed, it is axiomatic in a democracy that political coalitions whose ideas or candidates cannot secure a majority of votes lose. "That is not an unfortunate by-product of democracy, but is rather the *purpose* of democracy." *Nixon*, 76 F.3d at 1392. Coalition suits "provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure." *Id.* Therefore, permitting coalition suits would convert the statute into a guarantee of preferential treatment and proportional representation—a result directly foreclosed by the statute's plain language. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring); *Nixon*, 76 F.3d at 1390.

For these reasons, this Court, like the *en banc* Sixth Circuit in *Nixon*, should hold that coalition claims are never cognizable.[8]

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[8] Contrary to the Plaintiffs' argument, *Bridgeport Coalition*, 26 F.3d 271, in no way endorsed coalition claims and, indeed, rejected them to the extent the issue was presented. In *Bridgeport*, both the plaintiffs *and* the defendant proposed reapportionment plans including at least one coalition district. *See id.* at 272. The Court held that the defendant's reapportionment plan containing one black, one Hispanic, and three coalition districts had to be *replaced* with two black and two Hispanic districts. *See id.* at 277. Thus, *Bridgeport* shows that the Second Circuit has *not* endorsed coalition districts, but, to the contrary, has rejected the notion that blacks and Hispanics may be treated as a single, unified group. Moreover, *no* court

(b) If Coalition Claims Are Cognizable, The Plaintiffs Must Prove A High Level Of Cohesion Among Blacks And Hispanics In Party Primaries Involving Minority Candidates.

Courts that have assumed *arguendo* the viability of coalition claims have cautioned that sustaining such claims requires an extraordinary showing of cohesion among the disparate minority groups. Indeed, the Supreme Court unanimously instructed that, "[a]ssuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential" and must be held to a "higher-than-usual" standard. *Growe*, 507 U.S. at 41; *see also, e.g., Page v. Bartels*, 248 F.3d 175, 197 (3d Cir. 2001).

In the Fifth Circuit, which stands alone in recognizing coalition claims, a coalition is cognizable only if the disparate minority groups can be treated as an indivisible whole that votes cohesively. *See Campos v. Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988).[9] Even in that Circuit, needless to say, cohesion is not established merely by showing that blacks and Hispanics tend to vote for Democrats in general elections—a fact that is undisputed in almost all jurisdictions—since the shared partisan preferences of two racial or ethnic groups says nothing about whether they are joined by mere political expedience or by a common race, ethnicity, and shared history of unlawful discrimination.

(continued...)
outside the Fifth Circuit has recognized coalition claims. In the cases relied upon by the Plaintiffs, courts have assumed *arguendo* the possibility of coalition claims but found that *Gingles* was not satisfied because the facts did not establish cohesion between the disparate minority groups. *See Concerned Citizens v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990); *Badillo v. Stockton*, 956 F.2d 884, 886 (9th Cir. 1992); *Romero v. Pomona*, 665 F. Supp. 853, 858 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989).

[9] *Campos* has been the subject of intense criticism, both within and outside the Fifth Circuit. *See, e.g., Nixon*, 76 F.3d at 1384; *Campos v. Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of reh'g en banc); *LULAC*, 812 F.2d at 1503 (Higginbotham, J., dissenting); *LULAC v. Clements*, 999 F.2d 831, 894 & n.2 (5th Cir. 1993) (urging en banc court to "lay to rest the minority coalition theory of vote dilution claims").

Thus, the Fifth Circuit has cabined the cohesion theory in two ways. First, as discussed more fully below, the Fifth Circuit holds that partisan voting is different from racial bloc voting by minorities (or non-minorities), and requires plaintiffs to demonstrate that partisanship does *not* explain voting patterns among racial groups. *See LULAC v. Clements*, 999 F.2d 831, 863 (5th Cir. 1993). Second, the Fifth Circuit has made unmistakably clear that in assessing minority cohesion or bloc voting, courts must "focus on those races that had a minority member as a candidate." *Campos*, 840 F.2d at 1244.[10] As also explained below, this is necessary to determine if race, rather than partisanship, accounts for different voting patterns. Needless to say, since a greater preference for Democratic candidates of all races in a general election cannot satisfy the *Gingles* preconditions for a *single* minority group, such similar partisan voting in general elections obviously cannot establish the necessary cohesion between *two distinct* minority groups even in the Fifth Circuit. Therefore, the only meaningful measure of cohesion between minority groups consists of Democratic primary elections in which minorities compete and where partisanship is not a factor affecting voting. For this reason, applying Fifth Circuit precedent, a three-judge court in Texas rejected a black-Hispanic coalition claim because there was an "absence of cohesive voting between Latinos and African-Americans at the point in which it is meaningfully measured, the Democratic primaries." *See* SUF Ex. 51, *Balderas,* Slip op. at 12. Not surprisingly, this strong level of cross-racial cohesion is usually impossible to prove. *See LULAC*, 999 F.2d at 897 (Jones, J., concurring) (citing numerous cases in which courts have found a lack of cross-racial cohesion).

In short, the Plaintiffs' coalition claims are simply a transparent effort to evade the *Gingles* "majority-in-a-district" requirement by lumping together two distinct groups on the basis of their propensity to vote Democratic in general elections. But for the same reason that all federal courts have rejected a political coalition of black and *white* Democrats, alleged to constitute an electoral majority, as satisfying

[10] *See also LULAC v. N.E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1092 (W.D. Tex. 1995); *LULAC*, 999 F.2d at 864; *Williams v. Dallas*, 734 F. Supp. 1317, 1318 (N.D. Tex. 1990).

Gingles' first precondition, Plaintiffs' proposed coalition of black and Hispanic Democrats should also be rejected; particularly since "cohesion" is based principally on the two groups' tendency to vote Democratic in general elections. This is especially true, since under *Plaintiffs' own* electability analysis, the *combined* percentage of black and Hispanic *voters* is only *9.10%* in Plaintiffs' proposed District 4 in Suffolk; *23.7%* in proposed Nassau District 8; and *39.5%* in proposed Bronx District 36. SUF 175-77. Thus, Plaintiffs' proposed "coalition" of minority voters would be a stark voting minority in all three of their districts, where whites are wholly dominant (or, in the Bronx, at least equal partners). More generally, if two groups' support for Democrats in general elections demonstrated "cohesion" between the groups, there would be strong and obvious cohesion between blacks and white Jewish voters (or many other white sub-groups) in New York City. *But see United Jewish Org. v. Carey*, 430 U.S. 144 (1977). As this exemplifies, accepting "cohesion" based on two groups' allegedly similar ties to one political party would obliterate any distinction between political and racial coalitions, as well as between "coalition" and normal "influence" claims.

4. The "Majority-In-A-District" Requirement Precludes All Of The Plaintiffs' Section 2 Claims.

The Plaintiffs cannot satisfy the mandatory first requirement set forth in *Gingles*. *First*, the Plaintiffs' proposed district in Suffolk County, District 4, fails because the district is 22.65% Hispanic voting-age population and 18.74% black voting-age population. SUF 81. Thus, the minority groups do not constitute a majority of the potential district, *either* separately *or* as a coalition. *Second*, neither blacks nor Hispanics constitute a majority of the voting-age population in the Plaintiffs' Proposed District 8 in Nassau County. SUF 81. Moreover, the combined *citizen* voting-age population of blacks and Hispanics in the proposed District 8 is also less than 50%. SUF 80. As in District 4, the minority groups do not constitute a majority of the relevant population of the potential district, either separately or as a coalition. *Third*, neither blacks nor Hispanics constitute a majority of proposed Senate District 36 in the Bronx. The Plaintiffs' proposed Bronx-Westchester district (District 36) contains 25.98% black citizen voting-age population and

45.31% Hispanic citizen voting-age population. SUF 79. Thus, the third Count of the Plaintiffs' complaint depends on aggregating blacks and Hispanics to satisfy the "majority-in-a-district" requirement—a theory that, as shown above, should not be cognizable. *Finally*, neither blacks nor Hispanics constitute a majority of Plaintiff-Intervenor's proposed 17th Congressional District in the Bronx, because it is 35.77% non-Hispanic black VAP and 30.20% Hispanic VAP. SUF 361.

Even if this Court were to recognize a coalition theory, however, the Plaintiffs could not show that blacks and Hispanics are sufficiently cohesive to state a claim under Section 2. Courts within the Second Circuit have recognized that blacks and Hispanics are not cohesive, *see Butts v. City of New York*, 614 F. Supp. 1527, 1546 (S.D.N.Y.), *rev'd on other grounds*, 779 F.2d 141 (2d Cir. 1985), and that Hispanics themselves cannot be considered a "community of interest" because they lack any common culture or political agenda, *see Diaz v. Silver*, 978 F. Supp. 96, 124-25 (E.D.N.Y.), *aff'd*, 522 U.S. 801 (1997). Here, there is no evidence that Hispanics vote for black candidates or that blacks vote for Hispanic candidates in Democratic primaries. SUF 95-103. Indeed, blacks and Hispanics voted cohesively for only *one* candidate, (Fernando Ferrer in his 2001 bid for Mayor), when whites did not in *all* of the primary elections analyzed. SUF 102-03. The Plaintiffs' own expert, J. Phillip Thompson, concedes that blacks and Hispanics in the Bronx have "worked at cross purposes, creating hostility and mistrust on both sides." SUF 252-54. Indeed, Plaintiffs' expert and lay witnesses stated that Hispanics will vote for whites over blacks in the Bronx; and that blacks will vote for blacks over Hispanics. SUF 145. And in general elections, there is at best mixed evidence on whether blacks and Hispanics vote cohesively. SUF 95-124.

There is, therefore, a failure of Hispanics and blacks to vote together in the relevant geographical areas. Because the Plaintiffs cannot satisfy the "majority-in-a-district" requirement of the first *Gingles* precondition, this Court should grant summary judgment to Defendants on all of the Plaintiffs' Section 2 claims.

B. Any Failure Of Minorities To Prevail Is Not Attributable To White Bloc Voting.

Even if the Plaintiffs could satisfy the first *Gingles* precondition, their Section 2 claims would still fail as a matter of law because Plaintiffs' own evidence plainly fails to show any *racial* bloc voting by whites, which must be shown to satisfy the third *Gingles* precondition. *See Gingles*, 478 U.S. at 46 n.12. Yet again, the Senate Democrats conflate the effect of normal partisan politics on the electoral chances of the Democratic Party with the dilution of minority voting strength through discriminatory redistricting. However, if, as here, white Democrats and minority Democrats enjoy the same success rate, then any electoral losses by the Democratic Party are due to *partisanship*, not *race*, and there has been no *racial* bloc voting. To the extent minorities are unable to elect their preferred candidate in a particular local area, it is because they support the less popular political party in the area. An inability to elect candidates due to their lack of political popularity is the legitimate outcome of a democracy—namely that "*voting* minorities lose." *Nixon*, 76 F.3d at 1392.

In the seminal case of *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which was codified by the 1982 amendments to Section 2, the Supreme Court held that no vote dilution exists where the minority-preferred candidate loses because he belongs to the less-popular political party. *Id.* at 144. There, a three-judge district court held that a multi-member districting scheme "illegally minimize[d] and cancel[ed] out the voting power of a cognizable racial minority" because a politically and geographically cohesive group of black voters within the district would likely have elected more Democratic representatives under a plan with single-member districts. *Id.* at 144-45. The Supreme Court reversed, holding that there is no racial vote dilution, even in an at-large system where Democrats were excluded, where blacks' inability to elect stems from their partisan affiliation. As the Court put it, minorities are not protected against "*political* defeat at the polls." *Id.* at 153. The Court derisively described the plaintiffs' position as one under which "invidious discrimination . . . results when the ghetto, *along with all other Democrats*, suffers the disaster of losing too many elections." *Id.* (emphasis added).

Under *Whitcomb*, then, it is not enough to find that minorities are "losing elections"; the Court must find that there is a "built-in bias" against a minority group.[11] *Id.* at 153. Likewise, Justice Marshall made clear that there is no discriminatory result or vote dilution where a minority community's "lack of success at the polls was the result of partisan politics, not racial vote dilution." *Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J. dissenting); *see also White v. Regester*, 412 U.S. 755, 765-66 (1973); *De Grandy*, 512 U.S. at 1020; *Shaw v. Reno*, 509 U.S. 630, 661 (1993) (White, J., dissenting) (*Whitcomb* and *White* require "discrimination in the polity," not "mere suffering at the polls").

Moreover, in *Gingles*, five members of the Court rejected the plurality's proposed definition of racial bloc voting precisely because it might allow Section 2 plaintiffs to establish a *prima facie* case where, as here, a majority of whites vote differently than most blacks because blacks are affiliated with a different political party. As Justice White's concurring opinion explained:

> Under Justice Brennan's test [for racial bloc voting], there would be polarized voting and a likely § 2 violation if all the Republicans, . . . are elected, and 80% of the blacks in the predominantly black areas vote Democratic . . . This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149-160 (1971).

478 U.S. at 83 (White, J., concurring).

Justice White's hypothetical is this very case, and his opinion plainly states that the defeat of black-supported Democratic candidates in a Republican district because of partisan affiliation cannot establish *racial* bloc voting under the third *Gingles* precondition. Justice O'Connor, joined by three other members of the Court, expressly concurred with Justice White's analysis and found that the plurality's view "conflicts with *Whitcomb*." *Id.* at 101 (O'Connor, J., concurring). *See also NAACP v. Niagara Falls*, 65 F.3d 1002,

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[11] Although the *Whitcomb* plaintiffs brought their voting rights claim under the Equal Protection Clause, the standard employed by the Supreme Court applies with full force to claims under Section 2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 83 (O'Connor, J., concurring in judgment) ("Amended § 2 is intended to codify the 'results' test employed in *Whitcomb* . . . .").

1015-16 (2d Cir. 1995) (recognizing that a majority of the Court rejected Justice Brennan's view of racial bloc voting).

Every other federal court has also rejected Section 2 claims if minorities' lack of electoral success is attributable to the fact that their preferred political party is less popular, as opposed to racial bloc voting against minority candidates. For example, in *LULAC*, the full Fifth Circuit held that there was no racial bloc voting under Section 2 when minority "[e]lectoral losses . . . are attributable to partisan politics." 999 F.2d at 863; *see also id.* at 891-92 (the third *Gingles* precondition is not satisfied where "partisan affiliation, not race, caused the defeat of the minority-preferred candidates"). As the court explained, "[i]f we are to hold that these losses [of black-supported Democratic candidates] at the polls, without more, give rise to a racial vote dilution claim warranting special relief for minority voters, a principle by which we might justify withholding similar relief from white Democrats is not readily apparent." *Id.* at 861 (citing *Whitcomb*); *see also id.* at 879 ("The point is that a black Democratic voter and a white Democratic voter stand in the same position.").[12]

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[12] *See also De Grandy*, 512 U.S. at 1020 (Voting Rights Act does not immunize minorities "from the obligation to pull, haul, and trade to find common political ground."); *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (The Voting Rights Act "does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Uno v. Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics."); *Nipper v. Smith*, 39 F.3d 1494, 1546 (11th Cir. 1994) (*en banc*) ("To establish a case of liability under Section 2's results test, a plaintiff must demonstrate, under the totality of circumstances, that the voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the voting power of the minority group the plaintiff represents."); *S. Christian Leadership Conf. v. Sessions*, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (*en banc*) (finding no Section 2 violation because "factors other than race, such as party politics and availability of qualified candidates, were driving the election results and that racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate'"); *Askew v. Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997) (affirming district court opinion holding that "'race' must play a role in the defeat of black-preferred candidates before the Voting Rights Act is violated"); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1996 WL 172327, at *3 n.2 (D. Del. Apr. 10, 1996), *aff'd*, 116 F.3d 685 (3d Cir. 1997); *Johnson v. Mortham*, 926 F. Supp. 1460, 1475 (N.D. Fla. 1996) (three-judge court); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1236 (C.D. Cal. 2002) (Reinhardt, J.) (holding that when predominantly Democratic minorities "are placed in a district containing a majority of Democrats . . . the general election results are ordinarily not at all probative of whether there are meaningful differences between the preferences of [minority] and white voters"), *aff'd*, 537 U.S. 1100 (2003).

Likewise, in *Goosby v. Town of Hempstead*, 180 F.3d 476 (2d Cir. 1999), the Second Circuit embraced *LULAC* and recognized that plaintiffs must rule out "political partisanship [as] the reason that white bloc voting occurs." *See id.* at 493. While courts have disagreed about whether plaintiffs must make this showing as part of the *Gingles* preconditions or as an element of the totality of the circumstances, *compare LULAC*, 999 F.2d at 855, 892, *with Hempstead*, 180 F.3d at 493, the burden of proving the elements of a Section 2 violation—including both the *Gingles* preconditions *and* the totality of the circumstances—falls on the plaintiffs. *See Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993).[13]

Thus, *colorblind partisan* voting is not *racial* bloc voting. Indeed, even the Plaintiffs acknowledge this point, since they correctly emphasize that, "[*m*]*inority/white* elections provide the best test of racial polarization and of the ability of minority voters to elect candidates of their choice." SUF 152. *See Niagara*, 65 F.3d at 1016-17.[14] The reason to look at these elections with minority and white candidates, of course, is to see, as Judge Reinhardt has explained, whether "racial hostility on the part of [non-minority] voters towards [minorities]" is likely to affect elections. *Cano*, 211 F. Supp. 2d at 1236. Only "white bloc voting [that] is 'targeted' against black candidates" constitutes *racial* bloc voting, rather than colorblind partisan voting. *Clarke v. Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994). Thus, as even the Plaintiffs' expert concedes, a racial bloc voting analysis should consider whether "race is a factor" for voters or whether partisanship explains divergent results (although, inexplicably, he never analyzed this question). SUF 145.

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[13] In *Hempstead*, the court found that an at-large system violated Section 2 where *no* minority-preferred candidate had ever been elected to the relevant political body. *See* 180 F.3d at 495-96. That simply is not true here. The Democratic Party controls 24 out of 62 single-member districts in the State Senate. If, as the Senate Democrats argue, a minority-preferred candidate simply means a Democrat, then minorities are grotesquely *over*represented in the State Senate, which is 38% Democratic. More generally, of course, the at-large system in *Hempstead* is entirely different than the legislature's *single-member* plan, which provides at least rough proportionality to minority districts. *See Growe*, 507 U.S. at 40. ("multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts").

[14] *See also Cano*, 211 F. Supp. 2d at 1236; *Nipper*, 39 F.3d at 1540; *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989).

For these reasons, the Sixth Circuit expressly endorsed the view of Justice White (and four other Justices) that racial bloc voting cannot be shown where, as here, plaintiffs allege that the lack of minority electoral success is attributable to the fact that the district comprises too many members of a party with which minorities are not affiliated. The court explained that conflating colorblind partisan voting with racial bloc voting is both over- and under-inclusive:

> [The *Gingles* plurality's] interpretation [of racial bloc voting] is over-inclusive because, as Justice White makes clear, it would cause courts to find a § 2 violation in many cases where the defeat of blacks' preferred candidates had nothing to do with the inability of blacks to participate fully in the political process. Justice Brennan's approach thus transforms § 2 into a categorical guarantee of a certain level of success for blacks' preferred candidates. By its plain language, however, the Act guarantees racial minorities an equal *opportunity* to elect candidates of their choice, not a floor on the success rates of those candidates. When, in the competition inherent in the democratic process, a racial group's preferred candidates are defeated despite the ability of its members to participate fully in that process, the Voting Rights Act should not provide that group with a remedy which is unavailable to other supporters of defeated candidates.

Consequently, blacks can be said to suffer a cognizable Section 2 harm only when "white bloc voting is 'targeted' against black candidates." *Clarke*, 40 F.3d at 812.[15]

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[15] Conversely, if no attention were paid to candidates' race, the *success* of minority-preferred white candidates might *mask* racial bloc voting. That is, racial bloc voting would be masked whenever, as in the racially polarized but heavily Democratic South of the 1960's and 1970's, Democratic "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court). As the Sixth Circuit cogently explained:

> [A failure to pay attention to candidates' races] is underinclusive because it fails to recognize a § 2 violation in many instances where blacks truly do not enjoy an equal opportunity to "elect their candidate of choice . . . ." When white bloc voting is "targeted" against black candidates, black voters are denied an opportunity . . . to elect a candidate of their own race. If black voters nevertheless are able to elect . . . white [candidates] . . . . a court . . . will find no § 2 violation . . . . [even though] the Act's guarantee of equal opportunity is not met . . . .

40 F.3d at 812 (internal citations omitted).

In recognizing these two strands of cases, the Supreme Court held as a matter of law that plaintiffs cannot establish the existence of racially polarized voting where there is a "general willingness of white voters to vote for black candidates," even if to a lesser extent than they vote for white candidates. *See Abrams v. Johnson*, 521 U.S. 74, 93 (1997). Under these principles, there is simply no evidence of white bloc voting in New York. In general elections, white Democrats get the same vote share as Democrats in races involving blacks and Hispanics. SUF 130. Likewise, in mixed-race Democratic primaries, there is *no* evidence of any racial bloc voting on Long Island and there is no pattern of racial bloc voting in the Bronx, and minority Democrats regularly win primaries there.[16] SUF 95-103. More important, in mixed-race candidate elections overall, under *Plaintiffs'* own racial bloc voting analysis, white bloc voting could be said to have defeated minorities' candidates of choice in only 5 out of 20 contests (25%) in Nassau County, SUF 126; 8 out of 30 contests (27%) in Suffolk County, SUF 127; and 4 out of 18 (22%) in the Bronx, SUF 128. On the basis of the *undisputed* evidence, then, it is clear that white bloc voting does not "usually" defeat minorities' candidates of choice.[17] *See Gingles*, 478 U.S. at 50-51. This showing is especially notable since the Senate Democrats concededly ran minority candidates for 2002 Senate elections in the challenged areas "in order to establish a litigation record of a black [or Hispanic] Democrat losing" to the Republican incumbents. SUF 59.

Abrams, 521 U.S. 74, is also instructive. There, as noted, the Supreme Court held that minorities had not established the existence of racially polarized voting because there was a "general willingness of

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[16] Indeed, in respect to the 17th Congressional District, it is noteworthy that in the Engel/Seabrook/Zayas primary it was not white bloc voting, but failure of the black candidate, Seabrook, to garner sufficient Hispanic votes that caused his defeat. Chill Affd. Ex. A, Lichtman Report.

[17] Overall, white bloc voting could be said to have defeated minorities' candidates of choice in only 25 out of 60 contests (41.7%) even including the non-probative white/white contests in Nassau County; in 27 out of 61 or 57 contests (44.3% or 47.4%) in Suffolk County; and in 15 out of 38 contests (39.5%) in the Bronx/Westchester. SUF 97-102, 108-12, 118-19, 123-24.

white voters to vote for black candidates," albeit to a lesser extent than they voted for white candidates. *Id.* at 93 (internal citations omitted). Specifically, the Court found *no* Section 2 violation where "[t]he average percentage of whites voting for black candidates across Georgia ranged from 22% to 38%." *Id.* at 92. Likewise, in *Page v. Bartels*, 144 F. Supp. 2d 346, 365 (D.N.J. 2001), the court found no racial bloc voting where the plaintiffs' expert testified that white crossover voting averaged 35.6% and ranged from 17 to 66%. The Court contrasted this level of crossover voting with *Gingles*, where only 19.3% of whites voted for at least one black candidate. *See id.* at 366. Here, since white voters supported minority candidates to an even *greater* extent than in *Abrams* and *Page*, it follows *a fortiori* that there can be no racial bloc voting under *Gingles*. Under Plaintiffs' own calculations, white support for candidates in minority/white elections averages 35.5% in elections surveyed in Nassau County, 34.3% in Suffolk County, and 42.9% in the Bronx. SUF 131. In Nassau County, white support for such candidates ranges from 14.2% to 51.5%; in Suffolk County, from 15.1% to 51.7%; and in the Bronx, from 20.8% to 58.6%. SUF 132.

Even if there were evidence of racial bloc voting, however, the Democrats' proposed districts would not be the solution. The Plaintiffs' experts agree that equal opportunity under the Voting Rights Act requires the ability to elect minority candidates. SUF 152. Even using the Plaintiffs' flawed definition of racial bloc voting, their proposed districts would not enable minority voters to elect *white* Democratic candidates, much less minority Democrats. In the Democrats' proposed Suffolk County district, the Plaintiffs' total estimated vote for minorities' candidates of choice, based principally on races involving *white* candidates in Senate elections, would be *34.6%*, and the best-case scenario would be 45.3%.[18] SUF 166. Likewise, in the proposed Nassau County district, the projected vote share of the minority-preferred candidate is *45.3%*; the worst-case scenario is 24.4%, and the best-case scenario (assuming the lowest

[18] The "best-case" scenario is calculated through the completely unrealistic process of taking the lowest white turnout, the highest estimated white vote for a minority-preferred candidate, the highest minority turnout, and the highest estimated minority vote for a minority-preferred candidate in *any* election for *all* these categories. SUF 172.

possible white turnout, highest possible black turnout, etc.) is 54.5%.[19] SUF 167, 172, 173. These numbers reflect the Plaintiffs' projected vote share for *any* Democrat in Senate elections; obviously, if a candidate's race *were* a factor for white voters in Democratic primaries or general elections, the likelihood of electing a *minority* Democratic candidate would be even more significantly reduced. Of course, as is well settled, and as the Plaintiffs' own experts admit, minorities do not enjoy equal opportunity if "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court); SUF 152.

Apparently recognizing that this electability analysis – which uses the racial bloc voting analysis Plaintiffs apply to the *legislature's* districts – shows no chance of minority electoral success on Long Island under *their* proposed districts, Plaintiffs switch gears and use a wholly unacceptable, and different, alternative methodology for assessing the potential electoral success of their proposed districts. Although, as noted, Plaintiffs consistently state that the *best test* of minority electoral success is mixed-race contests, and otherwise focus on *Senate* elections, their alternative analysis of minority electoral success inexplicably is based on a single *aggregation* of votes in primarily *white-white* contests for *statewide* ("exogenous") offices. (Five of the seven statewide races arbitrarily selected involved only white candidates.) SUF 149-52. While the "analysis" might show that Senator Hillary Clinton is more likely to secure a majority of votes in two of Plaintiffs' proposed Long Island districts than in the existing districts, it says very little, under Plaintiffs' *own* standards, about whether a Democrat can win a Senate election in those districts, and absolutely nothing about whether a minority Democrat could win a Senate seat.

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[19] In the Bronx, for general elections, the projected vote share is 56.1%. SUF 168. However, in this predominantly Democratic area, the true test of potential electoral success will likely be the Democratic *primary*. The Plaintiffs attempted *no* racial bloc voting analysis to suggest that a minority candidate would likely prevail in such a primary. SUF 168. Moreover, in the Jesse Jackson 1988 Presidential primary, which Plaintiffs (absurdly) suggest is a test of minority candidates' potential success, Jackson *lost* in Plaintiffs' proposed District 36 (although winning the Plaintiffs' Districts 4 and 8). SUF 180.

Conversely, to the extent Plaintiffs' statewide races *are* an indication of minority voters' equal opportunity, these races show that the *existing* districts provide such an opportunity. In the ten statewide races[20] analyzed by Plaintiffs, the minority-preferred candidate received a *majority* of votes in *four* elections in *all* of the existing Long Island districts. SUF 158. Under *Gingles*, this 40% success rate for groups comprising 17% of the VAP provides equal opportunity as a matter of law. In *Gingles*, the Court upheld House District 23 because blacks, who constituted 36.3% of the population, won 33% of the seats and therefore enjoyed "proportional representation." 478 U.S. at 74; *see also id.* at 77. Moreover, the minority-preferred candidate "wins" in 7 of 10 elections in existing District 35 and in 6 of 10 elections in District 34. SUF 160. These results are identical (or nearly so) to the results in Plaintiffs' proposed District 4 (7 of 10 "wins"). SUF 163. Since Plaintiffs allege that their proposed District 4 provides an equal opportunity for minorities, it necessarily follows that existing Districts 34 and 35 in the Bronx/Westchester do as well.

In short, if Plaintiffs have correctly analyzed racial bloc voting and the chances of minority electoral success in the *legislature's* districts, then their alternative districts provide no realistic opportunity to elect even a white Democrat in those districts. Accordingly, the districts cannot be altered because the district lines did not "injure" minorities. *See Gingles*, 478 U.S. at 51 n.17. The correct answer, however, is that there is no competent evidence of racial bloc voting and, thus, no injury to cure.

Finally, the Plaintiffs' own analysis shows that the proposed districts do nothing for Hispanics, or even blacks. Hispanics will constitute *1.2%* of projected voters in the proposed Suffolk County district, *0.8%* in the proposed Nassau district, and *16.5%* in the proposed Bronx district. *Id.* Whites will constitute 90.9%, 76.3%, and 60.5%, respectively, of the projected voters in this district. SUF 175-177. Thus, acceptance of Plaintiffs' theory will mean that any time minority groups potentially constitute from 1% to

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[20] Incredibly, Plaintiffs' expert excluded three of these ten races precisely because they show *no* racial bloc voting and the expert believed, amazingly enough, that in analyzing *whether* racial bloc voting exists, one should exclude elections without racial bloc voting. SUF 157-58. Needless to say, arbitrarily excluding elections which *contradict* Plaintiffs' assertion of racial bloc voting is not an honest or unbiased methodology for assessing the truth of that assertion.

24% of the electorate, such influence districts must be created to help white Democrats – precisely the reason such allegations have been uniformly rejected. (This also explains why all Hispanic Senators in the Bronx and all Hispanic leaders on Long Island did not support the Democrats' proposed plan. SUF 42-48.)

The Plaintiffs have failed to establish legally cognizable racial bloc voting, as required by the third *Gingles* precondition.

C. There Is No Vote Dilution Because Minorities Enjoy Substantial Proportionality Under The Legislature's Plan.

The Plaintiffs' claims also fail because they cannot satisfy the statutory requirement of showing that, "based on the totality of the circumstances," the political process is not equally open to participation by the aggrieved group. 42 U.S.C. § 1973(b); *Niagara*, 65 F.3d at 1019. To the contrary, the record here demonstrates that minorities have a share of seats in the State Senate that is equal to or greater than their share of the relevant population.

The Plaintiffs' claims therefore fail under *Johnson v. De Grandy*. First, as a general matter, the *Johnson* Court squarely held that "[f]ailure to maximize cannot be the measure of § 2" because equating vote dilution with less than the maximum number of majority-minority districts would "obscure the very object of the statute and . . . run counter to its textually stated purpose." 512 U.S. at 1016-17. Here, Plaintiffs' proposed alternative creates the absolute maximum number of influence or majority-minority districts and their complaint is that the legislature failed to similarly maximize. SUF 221-25.

More important, *Johnson* makes clear that a redistricting plan that creates a number of majority-minority districts "substantially proportional" to the minorities' share of the relevant population cannot, absent very extraordinary circumstances, violate Section 2. 512 U.S. at 1024. "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.* at 1017. While "substantial proportionality" is not completely dispositive, the Supreme Court reversed the lower court's finding of a Section 2 violation on that basis alone, even though

the district court had correctly found that the *Gingles* preconditions were satisfied, that additional "reasonably compact" minority districts could be created, and that minorities "labored under a legacy of official discrimination." *Id.* at 1014, 1024. *Accord African-Am. Voting Rights Legal Defense Fund v. Villa*, 54 F.3d 1345, 1356 (8th Cir. 1995) (affirming grant of summary judgment); *NAACP v. Austin*, 857 F. Supp. 560, 568-71 (D. Mich. 1994); *cf. Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) ("[B]lacks who have influence proportional to their numbers . . . . [have] not state[d] a claim under § 2(b).").

In the present case, it is clear that the Senate plan achieves, at an absolute minimum, "substantial proportionality" within the meaning of *Johnson*. In the Bronx, Hispanics form 42% of the CVAP (45.2% of VAP) yet they control fully 60% – three of five -- of the districts that are all or mostly within the Bronx.[21] SUF 197. Hispanics and African-Americans combined form 75% of the CVAP (76.3% of VAP), and control four, or 80%, of the five districts.[22] SUF 199. (District 31 is also Hispanic-majority and a small portion of that is in the Bronx. SUF 334.) Plaintiffs nevertheless suggest yet *another* Hispanic "majority" district (District 36), so that Hispanics will "control" four of the five Bronx-based districts, with the fifth being a black majority district.[23] Apparently, even Plaintiffs recognized that they could not convince anyone remotely familiar with redistricting that minorities compromising 75% of the population are "entitled" to 100% of the districts, since their Senate proposal to Special Master Lacey did not have the additional Hispanic majority seat, but contained a majority-white Bronx-Queens district. SUF 309.

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[21] The *Johnson* Court said that it "need not choose" between citizen VAP and total VAP as the benchmark for proportionality to "decide the cases", but, as noted above, the lower courts have properly focused on CVAP as the appropriate measure of minority voting strength under Section 2. *Johnson*, 512 U.S. at 1021 n.18. *See* pp. 12-13, *supra*.

[22] Districts 28, 32 and 33 are Hispanic majority districts located entirely or predominantly in the Bronx, District 36 is a predominantly Bronx (also Westchester) black majority district, and District 34 is a majority-white Bronx/Westchester district located primarily in the Bronx. SUF Ex. 1, Am. Compl. Ex. A.

[23] Plaintiffs' proposed Districts 31, 32, 34 and 36 are largely in the Bronx and all Hispanic majority, while District 35 is majority-black. (SUF Ex.1, Am. Compl. Ex. B.) Also, District 33 is Hispanic-majority and in the Bronx, although most of the population is in Manhattan. *Id.*

Similarly, in New York City as a whole, blacks and Hispanics combined are 45.9% of the CVAP (47.7% of VAP), yet they control a combined 53.9% of the districts (14 of 26) under the Senate plan. SUF 204. Looked at slightly differently, the minorities' 45.9% share applied to the city's total of 26 seats translates to 11.9 seats, as against the 14 seats they actually control under the Senate plan. The numbers are similar for the groups individually: African-Americans are 24.8 % of the City's CVAP (23% of VAP), translating to 6.4 of the 26 seats; they have 8 in the Senate plan. SUF 202. The Hispanic CVAP in the City is 21.13%, equaling 5.5 seats; they actually have 6. SUF 203.

The picture is little different in broader areas. In the entire New York City and Long Island area (Districts 1-34, 36), the black and Hispanic CVAP is 36.53% (VAP is 39.89%), and under the Senate plan blacks and Hispanics form majorities in 14 of 35, or 40%, of the districts. SUF 212. This would seem to be the appropriate benchmark under *Johnson*, since the "area of the state" where Plaintiffs allege § 2 violations is the area stretching from Suffolk through the Bronx. 512 U.S. at 1022; *Austin*, 857 F. Supp. at 569 & n.5 (*Johnson* requires "limit[ing] the geographic scope" of proportionality analysis to specific areas challenged by plaintiffs). In New York State as a whole, in which the black and Hispanic CVAP is 24.04% (VAP is 27.67%), translating to 14.9 of the 62 seats, black and Hispanic voters currently control an almost exactly proportional 15 of the districts in the state.[24] SUF 218.

In addition, there are 4 districts in the state—Districts 12, 16, 23, and 25 -- in which black and Hispanic voters do not alone constitute a majority, but do constitute one when combined with other minority groups, such as Asians, *i.e.*, all voters other than non-Hispanic whites. SUF 220. All such groups combined constitute 29.4% of the state's CVAP, equaling 18.2 of 62 seats, as against an actual total of 19 seats. *Id*. Stated another way, although non-Hispanic whites are 70.6% of the state's CVAP, 69.35% of

[24] One of the minority-controlled districts in this calculation is District 57 in Erie County, in which minorities do not form a numerical majority, but nonetheless are consistently successful in electing their preferred black candidate and Plaintiffs agree they have an equal opportunity in that district. SUF 216.

the Senate seats are majority white; so whites have no greater relative proportion of seats than blacks or Hispanics. *Id.*

In short, these figures show that the representation of blacks and Hispanics in the New York State Senate – whether measured at the borough, city, region *or* statewide level – clearly satisfies the standard of being "substantially proportional" under *Johnson*. 512 U.S. at 1000.[25] *Johnson* makes equally clear, moreover, that a Section 2 violation cannot be found here in the face of such proportionality. As noted, the plaintiffs in *Johnson* proposed compact majority-minority districts that undoubtedly would elect black or Hispanic candidates, while here, the alleged racial "dilution" is the failure to create influence districts that, at best, can elect white Democrats. More important, here there is no evidence of "inconsistent treatment" of minority communities in the legislatures' plan, (*see* pp. 33-39, below) or any of the voting practices posited in *Johnson* as potentially sufficient to overcome proportionality. *Id.* at 1018. Moreover, official discrimination and its lingering effects are insufficient as a matter of law to show Section 2 problems in a proportionate plan, since the lower court in *Johnson* found such persisting discrimination. *Id.* at 1024. In any event, as New York voting rights cases have consistently found, there is no such official discrimination in New York or any of the other negative factors examined in the "totality of circumstances."[26] SUF 226-89.

D. The Plaintiffs' Allegations Of Purposeful Discrimination Do Not Excuse Them From Satisfying The *Gingles* Preconditions And Are Without Merit.

Defendants established in support of their motion to dismiss that the Plaintiffs' allegations of bad intent cannot excuse them from the *Gingles* preconditions. SUF Ex. 3, Reply Brief in Support of Motion to

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[25] There is also proportionality in the congressional districts in New York City. Of the 13 districts (Nos. 5-17) wholly or partly within the borders of New York City, nine contain a majority-minority population, *i.e.*, 69.23% of the total number of districts. Minorities comprise 59.62% of voting-age population in those 13 districts. SUF 384-85.

[26] Federal courts in New York have repeatedly found that minorities are unable to show a history of discrimination that has "touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Niagara*, 65 F.3d at 1020 (quoting Senate Rep. at 29); *see id.* ("no significant evidence" of such discrimination in New York City); *France v. Pataki*, 71 F. Supp. 2d at 330 ("no evidence of a history of official discrimination present in New York City affecting the African-American and Latino communities' ability to participate in the political process"); *Reed v. Babylon*, 914 F. Supp. 843, 886 (E.D.N.Y. 1996).

Dismiss at 14-15. Section 2 requires plaintiffs to show that a redistricting scheme "has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice." *Voinovich*, 507 U.S. at 155. The statute "speaks only of results and makes no distinction between the intentional and unintentional causes thereof." *See Turner v. Arkansas*, 784 F. Supp. 553, 571 n.16 (E.D. Ark. 1991) (three-judge court), *aff'd*, 504 U.S. 952 (1992). And, purely as a matter of logic, the *Gingles* standards are necessary preconditions to the existence of Section 2 effects. SUF Ex. 3, Reply Brief in Support of Motion to Dismiss at 14-15.

In any event, even if the Plaintiffs could bypass the *Gingles* requirements and import constitutional standards to a Section 2 claim, their claims would nonetheless fail. A plaintiff's burden under *Shaw v. Reno*, 509 U.S. 630 (1993), is an extremely "demanding one." *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring). "[T]he party attacking the legislature's decision bears the burden of proving that racial considerations are 'dominant and controlling.'" *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) ("*Cromartie II*"). Race must not simply be "*a* motivation for the drawing of a majority district." *Bush v. Vera*, 517 U.S. 952, 959 (1996). It must be the "*predominant* factor" motivating the legislature's districting decision. *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) ("*Cromartie I*") (emphasis added). Indeed, the Supreme Court has repeatedly stressed that, particularly where "race . . . correlates closely with political behavior," plaintiffs bear the burden of proving that "the legislature drew [the challenged] district's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." *Cromartie II*, 532 U.S. at 257; *see also Cromartie I*, 526 U.S. at 551-52. The Senate Democrats cannot meet this exacting standard because the Legislature's plan conforms to traditional and legitimate redistricting principles and, at worst, politics, rather than race, accounted for the drawing of the challenged districts.

1. It is clear that the challenged districts on Long Island were drawn consistent with non-racial redistricting principles employed throughout the state. First, the challenged districts on Long Island were

drawn to preserve the cores of existing districts. This important redistricting principle not only is permitted under the Fourteenth Amendment, but is in the public interest.[27]

Second, the districts were drawn to avoid placing two incumbents—especially Republican incumbents—in the same district and forcing them to run against each other for reelection. SUF 315-17. The Supreme Court has repeatedly "recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' as a legitimate state goal." *Vera*, 517 U.S. at 964 (quoting *Karcher*, 462 U.S. at 740); SUF 318-21.[28] Moreover, the Supreme Court has found the political desire to create a "safely Democratic district" to be a legitimate nonracial redistricting goal. *See Cromartie II*, 532 U.S. at 255.

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[27] *See* May 11, 2002 Affidavit of Bernard Grofman ¶ 39 ("preserving the cores" and "configurations" of existing districts is primary redistricting principle after equal population). *See also Abrams*, 521 U.S. at 84 (affirming remedial plan drawn by lower court that considered "maintaining[] district cores" as traditional redistricting principle); *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419, 426 (1991) (recognizing that States have a legitimate interest in "maintaining" an existing electoral system to preserve the "link" between an elected official and the official's base); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("preserving the cores of prior districts" was traditional criterion that could justify population deviation); *Diaz v. Silver*, 978 F. Supp. at 123 (finding incumbency protection through minimal "displacement" of constituents was traditional redistricting factor and noting that "[t]he legislators voiced their quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with their constituents"); *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 691 (E.D.N.Y. 1992) (maintenance of "the cores of existing districts" was traditional criterion to be considered in court-drawn plan); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (same); *Good v. Austin*, 800 F. Supp. 557, 560 (E.D. & W.D. Mich. 1992) (three-judge court) (same); *Dillard v. Greensboro*, 956 F. Supp. 1576, 1581 (M.D. Ala. 1997) ("plac[ing] incumbent legislators in districts consisting largely of their former districts" was traditional redistricting criterion to be considered in court-drawn remedial redistricting plan); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992) (three-judge court) (court-drawn plan "should avoid unnecessary or invidious outdistricting of incumbents" so that "[t]he voting population within a particular district is able to maintain its relationship with its particular representative"), *aff'd*, 507 U.S. 981 (1993); *King v. State Bd. of Elections*, 979 F. Supp. 619, 626 n.4 (N.D. Ill. 1997) ("maintenance of the cores of existing districts" is a traditional redistricting criterion), *aff'd*, 522 U.S. 1087 (1998).

[28] *See also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 346 (2000) (noting that proposed redistricting plan ignored school board's customary districting concerns in that it "would have pitted two pairs of incumbents against each other"); *Abrams*, 521 U.S. at 84, 98 (quoting *Karcher* and affirming remedial plan drawn by lower court that considered "[p]rotecting incumbents from contests with each other" as traditional redistricting principle); *Colleton*, 201 F. Supp. 2d at 647 (three-judge court) (stating that "[m]aintaining the residences of the incumbents" was proper consideration for court-ordered plan); *Smith v. Clark*, 189 F. Supp. 2d 529, 541 (S.D. Miss. 2002) (three-judge court) ("protection of incumbent residences" was neutral factor to be considered in drawing of court-ordered plan); SUF Ex. 51, *Balderas*, Slip op. at 8 (three-judge court) (noting that "no incumbent was paired with another incumbent" in court-ordered plan); *Dillard*, 956 F. Supp. at 1581 ("avoid[ing] contests between present incumbents" was traditional redistricting criterion to be considered in court-drawn remedial redistricting plan).

It is undisputed that the Plaintiffs' revised redistricting plan would obliterate the cores of existing districts and necessitate the pairing of Republican incumbents. SUF 311, 316. Moreover, since it is undisputed that no Senate plan has ever paired any Republican incumbent for any reason, SUF 36, it is clear that the legislature applied the same standard to the Long Island districts as it would have in a situation implicating no racial groups. In any event, Plaintiffs' *revised* plan was never submitted to the legislature and therefore says nothing about the legislature's intent. SUF 294. The only *timely* redistricting proposal put forth by the Democrats paired six of the nine Republican incumbent Senators on Long Island — an unprecedented number of pairs in the history of New York redistricting. SUF 317. Needless to say, the legislature had an obvious nonracial reason to reject this blatant Democratic gerrymander that would have required at least 33% of the Long Island Republican incumbents to leave the Senate.[29] *See Cromartie II*, 532 U.S. at 240, 253.

Finally, five of the 12 minority Senators, or 42%, voted for the legislature's allegedly "discriminatory" plan, which is especially notable since only one white Democrat voted in favor. SUF 48-49. As the Second Circuit held in *Butts*, such substantial minority support for a voting procedure, standing alone, powerfully rebuts allegations of discriminatory purpose. The Court therefore reversed as clearly erroneous the district court's contrary conclusion largely on this basis. *See Butts*, 779 F.2d at 147.

In the face of all of this, the Senate Democrats substitute rhetoric for reasoning and proclaim that the enacted plan "cracks" minority communities. But as the Supreme Court explained in *De Grandy*, "some dividing by district lines . . . is virtually inevitable," and allegations of splitting minority communities shows "only that lines could have been drawn elsewhere, nothing more." 512 U.S. at 1015. To constitute *evidence* of potential discriminatory action, plaintiffs must show that the Legislature failed to "emplo[y] the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction . . . ." *Id.*

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[29] As Professor Grofman observed in his affidavit in this case, pairing incumbents of only one party "is a key indicator . . . of partisan unfairness." Grofman Aff. ¶ 29.

Here, the Legislature indisputably used the same redistricting standards—preserving cores of districts and avoiding Republican incumbent pairs—throughout the state, and thus no "inconsistent treatment" can be inferred. *Id.* Specifically, in "Upstate," where there is generally no significant minority population, Plaintiffs agree that the plan preserves cores and avoids pairs, just as it does on Long Island. SUF 30, 32. It is also undisputed that all *nonminority* communities on Long Island were treated the same as they were in 1990's plan, so preserving district lines was not limited to the minority communities.[30]

In all events, as the Supreme Court has repeatedly emphasized, the Court's "decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Cromartie I*, 526 U.S. at 552. The Plaintiffs here have not even sought to suggest that the legislature's purpose was racial, rather than political.

2. The Senate Democrats also bring a *Shaw* claim, arguing that District 34 in the Bronx and Westchester constitutes an unconstitutional racial gerrymander. This unprecedented claim turns *Shaw* and the Fourteenth Amendment on their heads. In *Shaw,* the Court invalidated bizarre majority-minority districts because they "segregate" and "balkanize" voters. *Shaw*, 509 U.S. at 642, 657. Here, Plaintiffs challenge a majority *white* district because it allegedly should have been *replaced* with a majority-minority district; thus *increasing* the "segregation" condemned in *Shaw*. The deliberate fragmentation of minorities is, of course, also unconstitutional if the *Shaw* standards are met, but the only "fragmentation" alleged is the failure to affirmatively create the additional Hispanic seat in the Bronx. The shape of District 34 has nothing to do with the decision not to add this alleged additional district. The Plaintiffs' complaint would be precisely the same if the Hispanic district had not been created and District 34 was perfectly compact. Conversely, if District 34 was the same shape, and there was no possibility of creating an extra Hispanic

[30] Plaintiffs also allege that these same communities were split the same way in the *1970's*, when the minority community was indisputably too small to have any electoral effect. SUF 313.

district, there could be no assertion that District 34 had anything to do with race (other than the fact that it is adjacent to, and required by, a majority black district which no one challenges). Thus, the only connection between District 34 and any racial issue is whether the Legislature's rejection of the extra Hispanic district, and the preservation of District 34, was done for racial reasons.[31] Those issues are subsumed within the Plaintiffs' Section 2 "results" challenge in the Bronx and, in any event, the shape of District 34 adds nothing to the question.

The legislature had numerous neutral, non-racial reasons for keeping the Bronx/Westchester alignment the same, and rejecting the Hispanic district alternative offered by Plaintiffs. *First*, District 34 maintains existing district boundaries, thereby preserving established links between constituents and their elected official, Senator Guy Velella. SUF 322. *Second*, preserving District 34 avoids placing two incumbents in the same district and forcing them to run against each other for reelection. SUF 326. In contrast, the Plaintiffs' plan pairs Senator Vellela with Senator Gonzales in a majority Hispanic district, a result they correctly deem "unavoidable." SUF 327. *Third*, there is no evidence or reason to believe that the Legislature drew the boundaries of District 34 "because of race *rather than* because of political behavior . . . ." *Cromartie II*, 532 U.S. at 257. SUF 333. Obviously, the legislature had a powerful political incentive to avoid eliminating the district of a senior Republican incumbent and pairing him with a Democrat incumbent in a majority Hispanic district the Republican could not hope to win. SUF 328-32. On facts far more suggestive of racial purpose, including "'*direct*' evidence of discriminatory intent," *Cromartie II* held

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[31] Although it is not alleged in their complaint, Plaintiffs in discovery have suggested that the diminution of approximately 7% of the minority population within District 34 is somehow relevant to their *Shaw* challenge. This is genuinely mystifying. Oddly shaped districts are not subject to a *Shaw* challenge unless they segregate or dilute minority voting strength. Plaintiffs themselves have vigorously argued that the old District 34, before it was changed, provided minorities with absolutely no chance of electing their preferred representatives. SUF 332. Thus the 7% diminution could not have had any effect on minority voting rights. Rather, it is undisputed that any diminution caused in District 34's minority population was caused by adding the predominantly white Eastchester to District 34 in the Westchester part of the district. This obviously has nothing to do with race and does not affect Hispanic voters in the Bronx or Yonkers. If adding a white town to an existing white district constitutes a *Shaw* violation, the courts will be very busy indeed.

that the trial court committed *clear error* in finding that race was the predominant factor. 532 U.S. at 253.[32] *Fourth*, District 34 is sufficiently compact under *Shaw*. *See, e.g., Shaw*, 509 U.S. at 646. Indeed, in *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992), the New York Court of Appeals held that the predecessor to the present District 34, which was nearly identical to the district at issue here, was consistent with "the State Constitution's requirements regarding contiguity, compactness and integrity of counties." SUF 325. *Fifth*, the Democrats did not propose a majority-Hispanic seat during the redistricting process and have never proposed a *viable* Hispanic district. SUF 290-91. They proposed a district that would have contained a Hispanic voting-age population of 44.8%, and never attempted to provide any data that a Hispanic representative of choice could be elected in a district with so low a percentage of Hispanics. SUF 292. District 36 was increased to 50.08% Hispanic VAP only in Plaintiffs' revised plan (for purely racial purposes). SUF 294. In fact, *no* Hispanic has ever been elected in a 44.8% or 50.08% Hispanic voting-age population district in the Bronx or Westchester. SUF 295. Indeed, the Intervenors argue that a *53.3%* Hispanic VAP district does not contain enough Hispanics to elect a Hispanic candidate of choice, and the Democrats' own witnesses uniformly contend that a district with 50% Hispanics is insufficient. SUF 296. Indeed, Plaintiffs' expert's own data shows that Hispanics would constitute only *16.5%* of actual voters in the proposed District 36. SUF 177. *Sixth*, the Plaintiffs' proposed district would have raised serious Section 5 concerns. Creating this new Hispanic district would have reduced the percentage of Hispanics in the existing majority-Hispanic districts. SUF 297-306. The Plaintiffs have not analyzed or offered any evidence that reducing the number of Hispanics in these other districts would avoid retrogression in

[32] The Plaintiffs' alternative would also politically harm another Republican incumbent, Senator Spano, by moving his district out of his Yonkers base and far to the North. Spano would retain only 57.5% of his old district and would be in a Democratic district where President Bush received 37.9% of the vote. SUF 331.

minority voting strength relative to the 1990 districts, as required by Section 5.[33] Of course, even if Plaintiffs could show *now* that their 50.08% district is "performing" and the adjacent districts do not retrogress as a result of its creation, this would be irrelevant to the legislature's reasons for rejecting the proposed 44.8% district, since that was a different district and the legislature had none of the Plaintiffs' newly-minted data before it. SUF 307-08. This is particularly true since the legislature had to *prove* nonretrogression under Section 5 in the Bronx and needed to do so within the fast-approaching Court deadline. SUF 298. *Seventh*, the Democrats only proposed this new Hispanic district the *day* before the scheduled Senate vote and, even then, did not advocate its adoption, but described it as merely a "legal benchmark" – *i.e.*, a device to set up this lawsuit. SUF 292-93. *Dollinger*, 4/8 Task Force hearing. No one, including the Democrats, had ever suggested an additional Hispanic district before or after the Task Force's draft plan was introduced in February 2002. SUF 291. Thus, there was no time to consider the Democrats' eleventh-hour litigation ploy. *Eighth*, under the Senate plan, Hispanics already enjoy extraproportional representation in the Bronx. *See* pp. 29-32, *supra*.

For all of these reasons, no civil rights group or Bronx Hispanic Senator has ever endorsed Plaintiffs' new "Hispanic" seat. The sum total of Plaintiffs' politically-motivated complaint is that the Legislature should have sacrificed safe majority-minority districts to create another minority district that might elect a white Democrat. Under *Georgia v. Ashcroft*, 123 S. Ct. at 2511, however, the choice of whether "to create a certain number of 'safe' [majority-minority] districts . . . . [or] a greater number of districts in which it is likely—although perhaps not quite as likely . . . – that minority voters will be able to elect candidates of their choice" lies squarely with the state.

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[33] Moreover, prior to *Georgia*, the Justice Department took the position that states *could not*—as the Democrats suggested that the Legislature do here—cause retrogression in existing majority-minority districts in order to create an additional, "thin" minority district. *See Georgia*, 123 S. Ct. at 2507-08. Thus, the Defendants had a good-faith belief that they could not draw the district belatedly proposed by the Senate Democrats and secure Section 5 preclearance from the Justice Department.

Finally, even if the Plaintiffs could show a deprivation of minority voters' ability to *elect* their candidates of choice, their claim would still fail because they make no attempt to show a deprivation of an equal opportunity to participate in the political process. Section 2 requires a showing that members of a protected minority group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." *See* 42 U.S.C. § 1973(b) (emphasis added). In interpreting this language, the Supreme Court has held: "It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Chisom v. Roemer*, 501 U.S. 380, 396 (1991). Because the Plaintiffs cannot show *either* element required by Section 2, this Court should grant summary judgment in favor of Defendants.

III. THE LATINO INTERVENORS' CLAIM FAILS BECAUSE THEY CANNOT SATISFY THE *GINGLES* REQUIREMENTS AND HAVE NOT OFFERED AN ALTERNATIVE REDISTRICTING PLAN.

The Plaintiff-Intervenors challenge Senate District 31, which has a Hispanic majority of 53.3% VAP, and argue that Section 2 requires that this district be redrawn to comprise a 61% Hispanic majority VAP. *First*, the Intervenors cannot fulfill the third *Gingles* requirement because they have not even attempted to show that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" in Senate District 31. *Gingles*, 478 U.S. at 50-51. While their expert, Rodolfo De La Garza, found that Hispanics vote for Hispanics more often than whites do, SUF 145 the most this proves is that Hispanics are cohesive, as required by the *second Gingles* precondition. It says nothing about whether white bloc voting usually defeats the Hispanic candidate. That determination requires expert testimony regarding the *extent* of white bloc voting, as well as the relative turnout rates of white and Hispanic voters, to determine if white voting is sufficiently numerous and uniform to "usually" outvote the cohesive Hispanic electorate's choice.

Second, the Intervenors merely propose a *single* district that they claim the Senate should have drawn (and this district is for a *61* seat Senate plan). SUF 335-36. They never proposed an alternative redistricting plan for the entire state or for a 62 seat plan. The Supreme Court has made clear that whether a redistricting plan "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color" must be assessed relative to "a hypothetical alternative." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). That is, whether the voting power of minorities has been diluted must be assessed relative to an alternative proposed by plaintiffs. Here, the Intervenors proposed no viable alternative and provide no inkling of what effect their single district would have on adjacent Hispanic or black districts. SUF 337. Indeed, Special Master Lacey made clear that he would not consider redistricting proposals where the proponents of the proposal set forth only a single district. SUF 340.

Because the Intervenors have failed to meet their burden under both *Gingles* and *Bossier*, summary judgment should be granted to Defendants on the Intervenors' challenge to Senate District 31.

IV. THE COBED INTERVENORS' CLAIM FAILS.

In addition to the reasons already stated, Plaintiff-Intervenors' claim against CD17 fails for three independent reasons. *First*, they have not come close to establishing either Black-Hispanic cohesion or that white bloc voting usually defeats the minority-preferred candidate in CD17 and thus cannot meet the *Gingles* preconditions. Plaintiff-Intervenors' own expert concedes that black and Hispanic voters did not vote for the same candidate in the only election analyzed that encompassed the entire 17th or in all but one of the other elections analyzed (all of which only covered the New York City portion of the CD). Lewis Report, Chill Aff't Exhibit O, p. 5. Moreover, Plaintiff-Intervenors have not demonstrated that their proposed CD will have any meaningful effect of the outcome of elections. *Id.* at 9.

Second, this Court previously rejected Plaintiff-Intervenors' plan that added substantial minority population to the 17th Congressional District. In the City of New York, the Legislature followed the plan this

Court had ordered into effect, replicating those districts (or the portions within the City) exactly. Outside the City, the minority population in CD17 was reduced by a *de minimis* amount. Plaintiff-Intervenors are thus foreclosed from relitigating the issue in this lawsuit under the doctrine of "law of the case." *See* Chill Aff. at viii - xxiii. This "doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Prior rulings in such cases "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id.* at 619. *See also Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992); *United States v. Crowley*, 318 F.3d 401, 420 (2d Cir. 2003). In *Johnson Electric North America, Inc. v. Mabuchi Motor America Corp.*, 103 F. Supp. 2d 268, 280 (S.D.N.Y. 2000), the court noted that the law of the case doctrine "*mandates* that when a court makes a ruling of law that decision should continue to govern the same issues in subsequent stages in the same case, unless that decision is clearly erroneous and would work a manifest injustice." (emphasis added) (citation omitted). Here, the Legislature relied upon this Court's prior decision holding that its configuration within the boundaries of the City of New York, including those of CD17, did not infringe the voting rights of any minority community. Manifest injustice would result from any change in that prior decision. *See also Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 2003 WL 22139798 (N.D.N.Y. Sept. 17, 2003) (applying the law of the case doctrine in a voting rights case where, as here, the legislature had acted in reliance on the earlier decision in crafting its plan). In any event, the fact that CD17 replicates the court-drawn plan in the Bronx conclusively demonstrates its compliance with Section 2 and the Constitution.

Third, Plaintiff-Intervenors' proposed remedy violates *Shaw v. Reno*. In *Nipper*, 39 F.3d 1494, the Eleventh Circuit stated that:

> [t]he first *Gingles* precondition, informed by the second, dictates that the issue of remedy is part of the plaintiff's *prima facie* case in section 2 vote dilution cases. As the Supreme Court has

> explained, '[t]he geographically compact [minority]' and minority political cohesion' showings [in the *Gingles* threshold test] are needed to establish that the minority has the potential to elect a representative of its own choice. . . . The inquiries into remedy and liability, therefore, cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system.

Id. at 1530-31. *See also McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988).

Thus, in *Reed v. Babylon*, 914 F. Supp. 843 (E.D.N.Y. 1996), the court held that the plaintiffs failed to satisfy the first *Gingles* factor, because "plaintiff's plan, devised . . . with race as the near-sole consideration, could [not] be adopted by the Court as a remedy, . . . and survive strict scrutiny in an Equal Protection clause challenge." *Id.* at 872. The *Reed* Court further held that the plaintiffs' plan: "drawn with a near-exclusive focus on race, [fails to take into] account districting criteria such as compactness, respect for . . . geography, contiguity and the integrity of political subdivisions and communities of interests. Accordingly, the first *Gingles* prong has not been met. This ruling is fatal to plaintiffs' case." *Id.* at 873-74. Here too, plaintiff-intervenors' proposed remedy is a geographically contorted, race-based plan.[34] *Diaz*, 978 F. Supp. at 117 (finding 12th Congressional District unconstitutional because its oddly shaped configuration was racially motivated). Hence, as in *Reed*, Plaintiff-Intervenors' failure to proffer a lawful remedial plan is fatal to their § 2 claim.

V. THIS CASE SHOULD BE HEARD BY A THREE-JUDGE COURT.

The Plaintiffs argue that the Section 2 and constitutional claims in this case should be tried in two separate actions—one before a single judge and another before a three-judge panel, with separate opinions followed by separate appeals, one to the Second Circuit and one directly to the Supreme Court. As a threshold matter, this proposal is made too late. If the Plaintiffs truly believed that certain claims should be tried before a single judge, they were obligated to assert that position when the three-judge court

[34] Similarly, the Plaintiffs' revised Senate District 36 violates *Shaw* since it was redrawn for the sole purpose of increasing the Hispanic VAP from 44.8% to 50.08%.

was convened or, at the very least, prior to the three-judge court's consideration and resolution of the motion to dismiss *both* constitutional *and* statutory claims.

In any event, it is well settled that "a single district judge . . . may *not* resolve . . . Voting Rights Act issues in isolation while reserving . . . constitutional claims to a three-judge district court." *Page*, 248 F.3d at 190 (emphasis added). Pursuant to 28 U.S.C. § 2284(b)(1), the three-judge court was convened "to hear and determine this action." And "because statutory Voting Rights Act challenges to statewide legislative apportionment are generally inextricably intertwined with constitutional challenges to such apportionment, those claims should be considered a single 'action' within the meaning of § 2284(a)." *Page*, 248 F.3d at 190; *see also Armour v. Ohio*, 925 F.2d 987 (6th Cir. 1991) (vacating single judge's decision on a Voting Rights Act claim because the case also involved constitutional claims that necessitated a three-judge court).

Moreover, separate actions would prove completely unworkable. There would be substantial overlap of facts in the two cases, as well as a strong potential for conflicting resolution of similar or identical issues affecting a unified, statewide redistricting plan. For example, the Plaintiffs' Section 2 challenge in the Bronx/Westchester area is predicated on precisely the same allegations of malapportionment and racial gerrymandering that form the basis for the constitutional claims that the Plaintiffs concede must be heard by a three-judge court. Likewise, facts such as the Senate Plan's superior compliance with traditional redistricting principles are relevant to the Section 2 claims as well as the constitutional challenge to District 34. And the inefficiencies of the procedure suggested by the Plaintiffs would only be compounded by the inevitable appeals to the Second Circuit on some claims and the Supreme Court on others, with the potential for remand on different issues at different times.

The Plaintiff-Intervenors' claims must also be determined by the three-judge court. The Plaintiff-Intervenors' challenges to Senate District 31 and Congressional District 17 are inextricably intertwined with the remainder of the statewide redistricting plan challenged by the Plaintiffs and their Bronx challenge.

Moreover, the Plaintiff-Intervenors' Section 2 claims depend on many of the same factual and legal issues as the Plaintiffs' Section 2 claims. All of these claims should be determined by one court to avoid the risk of inconsistent standards and judgments with respect to the same statewide redistricting plan.

CONCLUSION

For the foregoing reasons, the motion for summary judgment should be granted.

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