EXHIBIT L

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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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS MOTION

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I. ONE PERSON ONE VOTE.

As even Plaintiffs are now forced to grudgingly admit, binding Supreme Court precedent requires only that state legislative districts achieve "*substantial* equality of population" – not precise equality. Pls. Br. at 1 (emphasis added). Since the same precedent plainly establishes that an overall deviation of under 10% constitutes such "substantial" equality, it is clear, as Mr. Burgeson correctly testified, that the legislature made a "good faith effort" to achieve the requisite equality since they *succeeded* in achieving it. Pls. Br. at 4; *see* SUF Ex. 3, Motion to Dismiss ("MTD") Reply at 1-2.[1]

Thus, it is effectively conceded, and certainly mandated by binding precedent, that the legislature's plan would be perfectly constitutional and immune from judicial scrutiny if it contained a "patchwork pattern of overpopulated and underpopulated districts." Pls. Br. at 2-3. *See* MTD Br. at 2-8.[2] (Any other rule would be revolutionary, since the deviations here are lower than 52 state legislative plans, including three *court-ordered* plans. SUF 6.) Plaintiffs nonetheless argue that an entirely different rule applies simply because the overpopulated districts are contiguous to each other in an allegedly identifiable region. Thus, under Plaintiffs' novel theory, the overpopulation of Queens County districts is acceptable if the adjacent districts in Kings County are underpopulated, but are unacceptable if the underpopulated districts are in a different "region." But, in either instance, the votes of Queens County residents are superficially worth less than those voters in other districts and the "harm" (or lack thereof) is precisely the same regardless of whether the relatively "favored" districts are in adjacent Kings County or in adjacent Nassau County or in Erie County. To the extent Plaintiffs' theory is comprehensible, then, it must be (and apparently is) premised on the notion that there is

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[1] Mr. Burgeson's understanding of the Fourteenth Amendment's requirement for state legislative equality simply reflects binding Supreme Court precedent and was shared, until this litigation, by Plaintiffs' lead counsel. As Plaintiffs' counsel aptly summarized the law in his Supreme Court brief in *Board of Estimate v. Morris*, "[b]elow 10%, population deviations from numerical equality in state and local apportionment schemes are considered de minimis . . . ." 1988 WL 1025677, at *21-22 (U.S. Aug. 3, 1988).

[2] *See also Baines v. Masiello*, __ F. Supp. 2d __, 2003 WL 22299247, at *7 (W.D.N.Y. Oct. 6, 2003) ("In the absence of such proof [of a less-than-10% total deviation], plaintiffs have failed to meet their burden on this motion to show that there is a genuine issue for trial of their claim that the City's redrawing of the nine council districts violated the Equal Protection Clause."); *Cecere v. Nassau*, 274 F. Supp. 2d 308, 312 (E.D.N.Y. 2003).

some electoral or political harm visited on residents of *contiguous* overpopulated districts that is not manifested when the overpopulated districts are done in a patchwork pattern across a region. *See* Pls. Br. at 2-3.

But the undisputed evidence conclusively establishes that there is no negative effect on representation or voting in the overpopulated districts. In terms of citizens – *i.e.*, those who are eligible to vote – the New York City districts are substantially *underpopulated* and the Upstate is substantially *overpopulated*. *See* Opening Br. at 8; SUF 16; Burgeson Declaration Ex. 3. Thus, the citizens of New York City have suffered no population inequality or underrepresentation based on *citizen* population. Similarly, it is undisputed that there are far fewer enrolled voters in New York City than in Upstate, so, as a matter of fact, the votes of voters in the New York City districts are worth far more than the votes of the voters in Upstate districts. *See* Opening Br. at 8; SUF 18. Thus, even if the Court were authorized to find that a deviation of less than 10% was not "minor" in situations where the small population inequality caused some electoral or political inequity, there is no such inequity here since the "underpopulated" Upstate districts, in fact, had *more* eligible citizens and actual voters.

The Supreme Court's decision in *Burns v. Richardson*, 384 U.S. 73 (1966), conclusively establishes that "underrepresentation" and overpopulation, measured in terms of *total population*, visits no cognizable harm on contiguous "overpopulated" districts in a region if those districts are not substantially disfavored as measured by the *citizen* population or *registered voters*. There, the Court rejected a challenge by citizens of Oahu to a Hawaii state legislative apportionment plan, under which "Oahu with *79%* of total population would elect . . . *71%* of the House . . . ." *Id.* at 82 (emphasis added). Specifically, because it had relatively fewer registered voters, "[o]n the basis of total population, Oahu would be assigned *40* members of the 51 member house of representatives; on the basis of registered voters, it would be entitled to 37 representatives." *Id.* at 90 (emphasis added). The Court upheld using registered voters as the basis of apportionment, although "as against total population, [this measure] somewhat favored the other islands over Oahu" and those other islands were "primarily rural and agricultural," while Oahu was "the State's industrial center." *Id.* at 94, 76.

Thus, *Burns* firmly establishes two related points that are completely fatal to Plaintiffs' case. First, as Plaintiffs themselves helpfully note, the *Burns* Court found that the registered voter distribution "produced a distribution of legislators *not substantially different* from that which would have resulted from the use of a permissible population basis [such as total population]." Pls. Br. at 12 n.16 (quoting *Burns*, 384 U.S. at 93). Thus, the Supreme Court directly held that providing an identifiable urban region with *three districts less* (in a 51 district legislature) than would be proportionate to their 79% share of total population was not "substantially different" than a "permissible" "distribution of legislators." Burns, 384 U.S. at 93. Obviously, then, Plaintiffs' complaint about the "loss" of, at most, .69 of a Senate seat is not meaningfully different than the representation that needs to be provided under permissible equality rules.

Second, the *reason* that there was no cognizable harm in underrepresenting or overpopulating Oahu districts as measured by *total population* is because total population equality is only a rough proxy for equal voting strength, since "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state *citizenry*." *Id.* at 95 (emphasis added). That being so, Fourteenth Amendment equality is provided if there is "substantial equivalence" of districts "in terms of *voter* population or *citizen* population," as well as total population, and the Court therefore makes "no distinction between the acceptability of such a test and a test based on total population." *Id.* at 91 (emphasis added). For the same reason, the Court in the New York case of *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), "treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure" and the Court has never "suggested that the States are required to include aliens, transients . . . or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed." *Id.* at 91-92. Indeed, as Plaintiffs also helpfully point out, in New York, citizenship is the *preferred* measure of population equality since the New York State Constitution requires that Senate districts constitute roughly "equal numbers of inhabitants, *excluding aliens*." Pls. Br. at 11 n.16 (quoting N.Y. Const. art. III, § 4).

Since the legislature could have, with sufficient factual support, used "voter population or citizen population" as the measure of equal population, it obviously cannot be found to have disfavored "Downstate" residents when those residents are *favored* under both of these acceptable measures of population equality. In other words, any superficial suggestion created by total population numbers that the votes of New York City's citizens are not "approximately equal in weight" to those elsewhere is completely belied by the citizen population and enrolled voter figures. *Burns*, 384 U.S. at 91 n.20 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)). And, as even the quote Plaintiffs rely on makes clear, under the "one person, one *vote*" doctrine, Plaintiffs must show a "built-in bias against *voters* living in the State's most populous counties." Pls. Br. at 1-2 (quoting *WMCA*, 377 U.S. at 653-64). Indeed, far from reflecting "arbitrariness" or "bad faith," a state policy which explicitly overpopulated those districts containing fewer citizens and/or voters is a laudable effort to achieve actual voter and representational equality that would not occur by perfect total population equality.

This is particularly true since New York City's representation in the state legislature is proportionately *large* compared to its share of the total population. Even as Plaintiffs seek to measure it, New York City has 42.2% of the population and 42.3% of the seats in the Assembly and the Senate.[3]

Recognizing these fatal facts, Plaintiffs desperately seek to argue that the legislature's "real" reasons for overpopulating the Downstate districts was not to balance out the Assembly's representation, etc.,

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[3] Sixty-five of 150 Assembly seats (43.3%) plus 25.6 of 62 seats (41.3%) is 90.6 of 212 total seats, or 42.7%. Plaintiffs state that it is "inappropriate to count one Senate seat (out of 62) and one Assembly seat (out of 150) equally." Pls. Br. at 12 n.17. The adjustments advocated by Plaintiffs yield the 42.3% figure. (The average of 41.3% and 43.3% is 42.3%. Alternatively, New York City receives 62 of 150 adjusted "Senate" seats plus 65 of 150 Assembly seats, totaling 127 of 300 seats, or 42.3%.) Plaintiffs make the absurd suggestion that *Brown v. Thomson*, 462 U.S. 835 (1983), in *upholding* a state legislative district which was *60%* below the ideal population, somehow *sub silentio* overruled the Court's landmark *Reynolds* holding that an "apportionment in one house could be arranged so as to balance off minor inequities in the representations in certain areas in the other House." *Reynolds*, 377 U.S. at 577. *Brown*, however, considered only a single House district, rather than the House plan as a whole, simply because the plaintiff-appellants "deliberately have limited their challenge to the alleged dilution of their voting power resulting from the one [district]" and the Court saw "no reason why appellants should not be bound by the choices they made when filing this lawsuit." 462 U.S. at 846 & n.9. It is, of course, true that the deviations in one house can be *upheld* as acceptable without inquiring into issues concerning the apportionment in the other house. If, however, the Court were to accept Plaintiffs' invitation to examine the "regional fairness" of the Senate Plan, it must examine that issue in conjunction with the Assembly's representation because the "*indispensable*[ ] subject for judicial focus in a legislative apportionment controversy is the *overall* representation accorded to the State's voters, in *both* houses of a bicameral legislature." *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) (emphasis added).

but just some naked desire to "maintain [Upstate's] ascendancy in the Senate." Pls. Br. at 9. This assertion is flawed on every level.

First, the actual purposes of the legislature are entirely irrelevant because, even where population deviation *exceeds* 10%, the issue is whether the legislative plan "*may reasonably be said* to advance [a] rational state policy." *Brown v. Thomson*, 462 U.S. 835, 843 (1983) (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973) (emphasis added)). Under this objective test, the legislature's state of knowledge or alleged hidden motives are immaterial. The legislature's true purpose is arguably relevant only in the "strict scrutiny" cases relied on by Plaintiffs, where it is alleged, for example, that the legislature had a racially discriminatory purpose. *See* Pls. Br. at 11 n.16 (citing *Bush v. Vera*, 517 U.S. 952 (1996)). Although Plaintiffs continue to play the "race card" through the back door, they cannot and do not allege any discriminatory purpose since all the majority-minority districts were treated precisely the same as majority white districts in the same "region." Consequently, the racial composition of the overpopulated districts in the legislative plan is of no legal significance. *See Washington v. Davis*, 426 U.S. 229, 241-2 (1976). Indeed, in the very *Shaw* case the Plaintiffs cite for their "appearances" point, the Supreme Court made clear that, even with respect to the *racial* equality requirements of the Fourteenth Amendment, minority voters have no special rights relative to non-minorities. Pls. Br. at 12; *Shaw v. Reno*, 509 U.S. 630, 652 (1993). This is obviously truer still with respect to the population equality component of the Fourteenth Amendment, since that applies equally to "all" citizens. *Reynolds*, 377 U.S. at 581. Thus, majority-minority districts are no different than other districts for *population* equality purposes and New York City is not entitled to some special protection because it contains a greater proportion of minorities than the rest of the State. In any event, all of the majority-minority districts are *underpopulated* on a citizen basis and the votes in those districts are worth *more* than those in the Upstate districts.[4]

[4] Compared to the average district statewide, the 14 majority-Black or majority-Hispanic VAP Senate districts have, on average, 9.27% few citizens (*see* Burgeson Declaration ¶ 7), 15.85% fewer citizens of voting

Most fundamentally, of course, there is absolutely no requirement that the State make any effort, good faith or otherwise, to avoid regional disproportionality – the only requirement is to avoid substantial population inequality. Plaintiffs offer no response to the fundamental point that, since the Fourteenth Amendment guarantees an "individual and personal" right applicable to "all of the State's citizens," it is, by definition, constitutionally irrelevant whether the citizens "victimized" by over-population are in the same region or different regions of the state. *Reynolds*, 377 U.S. at 561, 581. To be sure, as the *Reynolds* and *WMCA* opinions confirm, state legislative apportionment cannot be based on counties or other geographic areas, because the *districts* in the most populous counties will necessarily be overpopulated. *Reynolds*, 377 U.S. at 578; *WMCA*, 377 U.S. at 653. This simply reflects that apportionment may not be county or geography-based, but must be population-based, as the legislative plan is here. It in no way suggests that over-population of districts in counties contiguous to one another is somehow more problematic than over-population of districts in counties not adjacent to each other.

Thus, even if the legislative plan was designed to prefer one "region" over another, this is constitutionally irrelevant so long as constitutionally acceptable population equality is achieved. Were it otherwise, Plaintiffs' plan would be unconstitutional because it evinces an obvious "regional bias" against "Upstate" by denying it .36 of a Senate seat through "systematic" underpopulation of "Downstate." The Plaintiffs contend that their regional bias is "smaller" than the legislative plan but, as predicted, they cannot even offer an intelligible standard for defining "acceptable" underrepresentation of a "region" and, in any event, underrepresentation of "Downstate" in the legislative plan is plainly *de minimis*. In addition to *Burns*, the under-representation in *Mahan* of the "Northern Virginia region" was nearly identical to that alleged here – .68

(continued...)

age (based on Plaintiffs' own numbers), 16.26% fewer enrolled voters (based on 2000 enrollment numbers), and 24.24% fewer people who actually vote (based on an average of the 1996-2000 presidential, gubernatorial, and State Senate elections). These districts elect 22.6% of the Senate and contain 19% of the State's voting-age citizens, 18.9% of the State's enrolled voters, and about 17.1 % of those who actually vote in New York State.

of a seat – and the district court consequently added a seat from a different area of the state. *Howell v. Mahan*, 330 F. Supp. 1138, 1145 (E.D. Va. 1971). The Supreme Court reversed, even though the plan had an overall deviation of 16.4%. Similarly, *Brown* stated that the addition of a rural district 60% below the ideal population had a "*de minimis*" effect on the voting power of the rest of the state because the "only difference" was that it reduced the representation of the other counties from 44.44% of the legislative body to 43.75%, a similar .69% differential. 462 U.S. at 847 & n.10. Indeed, the Senate Democrats' proposed 61-seat plan deprived Upstate of 44% of a district, thus presumably demonstrating the acceptability of that "underrepresentation." Burgeson Declaration Ex. 5.

In addition, Plaintiffs cannot dispute that the Supreme Court has assessed proportionality in terms of the districts *predominantly* within the affected county and have not even attempted to offer any reason for not assessing proportionality in this manner. Opening Br. at 7 n.5.[5] Here, there are 26 seats with over 70% of their population in New York City, which is only .16 of a seat less than perfect proportionality and well within Plaintiffs' undefined acceptable range. Thus, if proportionality is defined as the Supreme Court and common sense dictate, the undisputed facts establish that the legislative plan satisfies even Plaintiffs' own amorphous concept of proportionality.[6]

Finally, although introduction of an alternative plan with lesser deviations and which better complies with redistricting principles is legally insufficient to establish any problem with a plan with less than a 10%

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[5] Moreover, the only case to look at this issue measured proportionality in terms of the seats "controlled" in the relevant counties – that is, those districts predominantly within the counties at issue. *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1035 n.12 (D. Md. 1994) (county "control[led] precisely the number of state Senators that its population indicates it should control"); *accord Legislative Redistricting Cases*, 629 A.2d 646, 658 n.18 (Md. 1993) (emphasizing that Montgomery County would alone elect 7 senators and would "contribute significantly" to the election of an eighth, while Baltimore County would alone elect 5 senators and "largely control" the election of a sixth).

[6] In this regard, New York City must be the benchmark because it is the only arguably identifiable "region" since, as predicted, Plaintiffs have been unable to provide a scintilla of evidence that "Downstate" has ever been defined anywhere as anything remotely comparable to the geography covered by Districts 10 through 38, and New York City is the only alleged community with distinctive needs that has allegedly been treated "unfairly" by the state legislature. *See* Pls. Statement of Facts 129-34.

deviation, Plaintiffs have failed to even provide such evidence here.[7]

II. VOTING RIGHTS ACT ISSUES.

1. Plaintiffs also do not dispute any of the facts relevant to the first precondition in *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986); that a minority group constitute a majority in a district. They do not dispute that the combined citizen voting-age population ("CVAP") of blacks and Hispanics in the proposed District 8 is less than 50%, Pls. Counterstatement ¶ 80, and that neither blacks nor Hispanics constitute a majority of the CVAP in proposed District 36 in the Bronx. Nor do they challenge the uniform case law that CVAP is the measure of a "majority" for the first *Gingles* precondition. As Defendants showed in their motion to dismiss and in their opening brief, courts have unanimously ruled that plaintiffs cannot state a claim under Section 2 where a minority group does not constitute a majority, whether phrased as a denial of the ability to elect minorities' representatives of choice or as a denial of the ability to influence elections.[8] *See* SUF Ex. 2, MTD 21-38; Opening Br. at 11-12; *see also Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104 (S.D. Ohio 2003) (three-

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[7] The decision to slightly overpopulate New York City districts, as opposed to Plaintiffs' proposal to overpopulate Upstate districts, indisputably served the valuable redistricting goals of preserving the cores of existing districts and avoiding incumbent pairs, in addition to the enhancement of voter and representational equality described above. Plaintiffs make the obvious point that preserving cores and avoiding incumbent pairs is not more important than the Fourteenth Amendment but they cannot, however, deny the equally obvious point that these are important redistricting principles which justify selection of one plan with minor deviations over another plan with minor deviations (just as Special Master Lacey used these principles to select among various alternatives that achieved population equality). Plaintiffs seem to contend that avoiding incumbent pairs is a legitimate policy only if the plan avoids all such pairs. Under this reasoning, their proposed plan does not further the important redistricting principle of preserving counties, even *if* it were superior to the legislature's plan, because it did not preserve *all* counties to the extent permitted. *See* Pls. Facts 45 (describing High Deviation Plan that preserves more counties). The relevant point, of course, is that slightly underpopulating the Upstate districts "advanced the rational state policy" of avoiding an incumbent pair that was *necessitated* by Plaintiffs' proposal to eliminate an Upstate district. More generally, the legislature's plan is far superior to any alternative proposal made during the legislative process, since the Senate Democrats' proposed alternative had *10* pairs of 20 incumbents, and their newly revised plan has 4 such pairs, while the legislature had only 2 pairs of incumbents. One pair – in Queens – was caused by the creation of a new Hispanic-majority district in that county, as evidenced by the fact that the Plaintiffs' revised plan also pairs 2 incumbents in Queens.

[8] Plaintiffs' reliance on inapposite dicta does not alter this uniformity. In *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1321-24 (S.D. Fla. 2002), the viability of "influence" districts was never in question, since the plaintiffs proposed *majority*-black districts and the Court, in *upholding* the plan, declined to decide "the percentage of total population, voting age population, or registered voters" that would be required to satisfy the first *Gingles* precondition. *See also Solomon v. Liberty County, Fla.*, 899 F.2d 1012, 1018 & n.7 (11th Cir. 1990), ("[t]he present case does not involve" influence districts because black VAP was 51%, and court therefore "l[eft] th[e] consideration [of this issue] for another time."); *McNeil v. Legislative Apportionment Comm'n of New Jersey*, 828 A.2d 840, 852 (N.J. 2003) (court, interpreting state law, held that provision of New

judge court) (first *Gingles* requirement precludes § 2 claim for failure to create districts where minority "group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected").

Plaintiffs attempt to evade *Gingles*' clear requirement and this avalanche of lower court precedent by arguing that *Gingles* did not mean what it said, but was rather a mistake because Justice Brennan did not understand that minorities could be elected in majority white districts. Specifically, Plaintiffs argue that *Gingles'* repeated statement that a "minority group must . . . constitute a majority in a single-member district" really means that a minority must be sufficiently numerous to help elect their preferred candidate with the aid of white crossover voting. *Gingles*, 478 U.S. at 50. But, of course, that is not what "majority" means and any such construction would render the first *Gingles* precondition utterly superfluous. Under Plaintiffs' view of the first *Gingles* prong, if minorities bloc vote under the second *Gingles* prong, and whites bloc vote in sufficient numbers under the third *Gingles* prong to defeat the minority preferred candidate, then Plaintiffs have established vote dilution sufficient to require increasing the minority population to the point at which the minorities' preferred candidate could be elected in combination with white crossover voting. Thus, the only required vote dilution showing is that minority preferred candidates lose because a sufficient number of the white majority votes against them. This, of course, is precisely the same showing that Plaintiffs would need to make if the first *Gingles* precondition were entirely eliminated. But Second Circuit precedent, as well as common canons of construction, preclude so collapsing the first *Gingles* precondition into the third *Gingles* precondition, and thus rendering the first precondition utterly irrelevant. As the Court explained in *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1011 (2d Cir. 1995):

> No matter how severe the racial polarization, if black voters could not constitute a majority in a hypothetical single-member district, then they cannot claim to be worse off by virtue of the [challenged] scheme. The issue . . . is distinct from whether the voting patterns

(continued...)
Jersey Constitution did not *prohibit* influence districts; saying nothing about whether such influence districts satisfy first *Gingles* precondition).

> indicate that . . . a substantial change in the character of the population arguably could affect . . . the ability of white voters to defeat the minority's preferred candidate [ ].

More generally, Justice Brennan obviously understood that minority candidates could be elected in majority white districts since that is how he defined districts where there was no legally significant racial bloc voting under the third *Gingles* prong and since at least one of the districts in *Gingles* had consistently elected a black candidate even though blacks constituted only 36.3% of the population. *See Gingles*, 478 U.S. at 76, 75 n.35. Such districts were not *required*, however, because, as Justice Brennan emphasized, a § 2 "violation is established if it can be shown that members of a protected minority group 'have less opportunity than other members of the electorate to . . . elect representatives of *their* choice'" – which minorities cannot do in influence or coalition districts where they are dependent on white voters. *Id.* at 67 (quoting § 2(b)) (emphasis in original). In contrast, extending § 2 to protect a bi-racial political coalition where minorities are a minority, does not protect against *minority* vote *dilution* or a denial of *equal* opportunity, but grants to minorities a preferential right -- enjoyed by no other group – to have their political coalition elect their preferred candidate, at least up to the point of proportionality. Thus, as Justice Brennan also emphasized, the "reason" that § 2 authorizes vote dilution claims only "in districts in which members of a racial minority would constitute a majority of the voters" is to insure that § 2 will "only protect racial minority votes from diminution proximately caused by the districting plan; [but] *would not assure racial minorities proportional representation.*" *Id.* at 50 n.17 (emphasis in original). Moreover, contrary to Plaintiffs' assertion, Justice O'Connor took no position on the first *Gingles* precondition because she believed that those preconditions, even *with* the majority-in-a-district requirement, impermissibly established a test for "a vote dilution claim [that would] create an entitlement to roughly proportional representation within the framework of single-member districts." *Id.* at 89 n.1, 93 (O'Connor, J. concurring).

Unable to find any authority holding that § 2 *requires* the creation of influence/coalition districts, Plaintiffs rely on *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), which authorized state legislatures, even under the more straightforward requirements of § 5, to *voluntarily* create influence districts even in place of majority-

minority districts – thus substantially enhancing state legislative autonomy to redistrict free from federal judicial interference. Although § 5, unlike § 2, bluntly "insures" preservation of "current minority voting strength," States are nevertheless free to *reduce* the number of majority-minority districts, creating "*fewer* minority representatives" and more districts where "minority voters may not be able to elect a candidate of choice" because such redistricting decisions constitute a "political choice" and state legislatures, not the federal judiciary, are the entities empowered in a democratic society to "choose one theory of effective representation over the other." *Id.* at 2502, 2510, 2512, 2513. *Ashcroft* is thus fatal to Plaintiffs' claims. Since it is now clear that, even under the blunt commands of § 5, federal courts may not require states to preserve existing "*majority-minority*" districts where minorities can elect their preferred candidates, because the VRA leaves such a "political choice" to legislatures, *a fortiori* federal courts cannot dictate the creation of *additional* "coalitional" districts on the theory that § 2 mandates that *any* cognizable group of minority voters *must* always be "able to elect a candidate of choice."

2. With respect to the second and third *Gingles* preconditions, Plaintiffs agree, as they must, that elections involving minority and white candidates are the "best test of racial polarization" (SUF 152), yet nevertheless simultaneously argue that the racial polarization inquiry is unaffected by whether white voters consider the race of the candidate or, rather, engage in colorblind partisan voting. This is an extraordinarily odd position since, as *Niagara* and every other court has explained, the *reason* that minority/white elections are the touchstone of racial bloc voting analysis is to determine "whether the majority is voting against candidates for reasons of race." *Niagara*, 65 F.3d at 1015; *see* Opening Br. at 23.[9] Thus, contrary to Plaintiffs' revisionist interpretation of the *Gingles* concurring opinions, the question of whether a candidate's race is

[9] As Plaintiffs correctly note, and as we clearly stated in our opening brief, Opening Br. at 24 n.15, the other reason to look at minority-white elections is to "determine whether minorities are voting for certain candidates because they are 'truly' minorities' representative of choice." *Niagara*, 65 F.3d at 1015. Thus, whether white candidates of the minorities' preferred party (usually Democratic) are elected (or not) does not say anything about whether minorities are able to elect their *true* representatives of choice – it only tells us whether minorities share the same partisan preferences as the white majority – an issue entirely distinct from whether there is *racial* bloc voting.

irrelevant is precisely the same question as whether partisanship, rather than race, explains divergent voting patterns between the races. Justice White's *Gingles'* opinion, relying on the *Whitcomb v. Chavis*, 403 U.S. 123 (1971) opinion he authored, clearly stated that, "if blacks and whites were voting differently simply because they were voting along partisan lines, there would be no unlawful racial polarization, because 'interest group politics,' not 'racial discrimination,' would explain the outcomes." *Niagara*, 65 F.3d at 1016, summarizing *Gingles*, 478 U.S. at 83 (White, J., concurring). Justice O'Connor expressly concurred with Justice White's "racial polarized voting" analysis and found that the plurality's view "conflicts with *Whitcomb*." *Gingles*, 478 U.S. at 101. Indeed, Justice O'Connor's concurrence specifically criticized Justice Brennan's plurality opinion *because* it equated "legally significant bloc voting by the racial majority" with "the extent of the racial minorities electoral success" – precisely the test for racial bloc voting urged by Plaintiffs. *Id.* at 92. This is why every lower federal court to address the issue has determined that racial bloc voting exists only if "white bloc voting is 'targeted' against black candidates" and "racial antagonism is . . . the cause of an electoral defeat suffered by a minority candidate." *Clarke v. Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994), *cited in Niagara*, 65 F.3d at 1016; *Uno v. Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995). *See* Opening Br. at 22 n.12.[10]

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[10] Contrary to Plaintiffs arguments, *Goosby v. Town of Hempstead*, 180 F.3d 476 (2d Cir. 1999), is no different than these cases, but agrees that Plaintiffs must rule out colorblind partisan voting as the reason for divergent voting patterns – it simply does so at the "totality of circumstances" stage, rather than as part of the *Gingles'* preconditions. Thus, *Hempstead* agreed with the First Circuit that "nonracial reasons for divergent voting patterns need to be considered under the totality of circumstances test" and that it was "proper to conclude" in the Fifth Circuit's *LULAC* decision "that divergent voting patterns among white and minority voters are best explained by partisan affiliation." *See Hempstead*, 180 F.3d at 496 (quoting *LULAC v. Clements*, 999 F.2d 831, 861 (1993)). As Plaintiffs' counsel here explained in the Opposition to Petition for Certiorari in *Hempstead*, the Second Circuit, like the Fifth Circuit in *LULAC*, requires an "inquir[y] into the relevance of non-racial explanations for white-bloc voting, such as partisanship," and only diverged from *LULAC* because it made a "*factual*" finding that "black citizens' failure to elect representatives of their choice to the Town Board is *not* best explained by partisan politics." Cert. Opp., 1999 WL 33632731, at *18, *26 (U.S. Dec. 27, 1999) (quoting *LULAC*, 999 F.2d at 860). Contrary to Plaintiffs' view, for summary judgment purposes, it does not matter *when* Plaintiffs must prove nonpartisan racial reasons, because the Plaintiffs have not and cannot make any such showing. *See Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 116 (2d Cir. 1999) ("where the nonmoving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim.") (citation omitted); *Chen v. Houston*, 9 F. Supp. 2d 745, 748 (S.D. Tex. 1998) (quoting *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995)). ("Because of the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, and the intrusive potential of judicial intervention into the legislative realm, federal courts should carefully apply the proper summary judgment analysis when assessing the adequacy of a plaintiffs' showing . . . and determining whether to permit . . . trial to proceed.") *Valladolid v. City of National City*, 1991 WL 421115, at *1 (S.D. Cal 1991), *aff'd*, 976 F.2d 1293 (9th Cir. 1992)

In any event, wholly apart from the partisanship question, summary judgment is required because, under Plaintiffs' own racial bloc voting analysis, whites did not vote as a bloc against the candidates preferred by blacks and Hispanics in *75%* (15 of 20) of the minority/white elections in Nassau, *see* SUF ¶ 126; *see also* Braatz Declaration Ex. 22 at 1, and *73%* (22 of 30) of those elections in Suffolk, *see* SUF ¶ 123; *see also* Braatz Declaration Ex. 22 at 5, and in 72% (13 of 18) of those elections in Bronx/Westchester. *See* SUF ¶ 127; *see also* Braatz Declaration Ex. 22 at 3-4. Thus, accepting both Plaintiffs' legal definition of racial bloc voting and their factual analysis of this question, they cannot show that white bloc voting usually defeats minority preferred candidates in any of the districts at issue.

3. Plaintiffs fail to rebut any of the legal points in our opening brief establishing the invalidity of coalition suits. In any event, the undisputed facts establish that Plaintiffs cannot show the cohesion between blacks and Hispanics that even they concede is necessary to mount such a claim.[11] Moreover, these are "coalition" suits in name only, since Plaintiffs have now conceded that, under their own analysis, Hispanics constitute only *1.2%* of the voters in Plaintiffs' proposed Suffolk District 4 and *0.8%* of the voters in proposed Nassau County District 8. Pls. Counterstatement ¶¶ 175-176. Thus, as a practical matter, Plaintiffs are simply bringing an influence district claim on behalf of black voters, since Hispanics will have no say in the newly-proposed districts.

4. With respect to proportionality, in the face of our showing that Plaintiffs' plan would remove the *only* majority-white district in the Bronx (which has a white population of 17%) Plaintiffs have apparently abandoned their claim for an additional Hispanic district in that area, since § 2 obviously does not require such extraordinary extra-proportionality for minorities. Nor do they deny that the legislature's plan provides statewide proportionality in terms of the districts that can elect black and Hispanic candidates. Pls. Br. at 42-

[11] Plaintiffs' own data establishes that blacks and Hispanics voted cohesively against whites in only *two* of the 11 Democratic primaries in the Bronx/Westchester and were *never* so cohesive in a Democratic primary on Long Island; were so cohesive in only 25% (5 of 20) of the minority/white elections in Nassau, *see* SUF ¶ 108; *see also* Braatz Declaration Ex. 22 at 1; only 27% (8 of 30) in such elections in Suffolk, *see* SUF ¶

43. They nonetheless argue that this claim should await a determination at trial under the totality of circumstances. *Id.* This makes no sense because the proportionality numbers are undisputed and will not change at trial and *Johnson v. De Grandy*, 512 U.S. 997 (1994), squarely held that it is legal error to find a § 2 violation in the face of proportionality, even if minorities suffered from the lingering effects of discrimination. *See* Opening Br. at 32. Consequently, a New York federal district court recently granted summary judgment against black plaintiffs bringing a § 2 challenge to the Buffalo City Council because blacks would control 33% of the seats (in a 37.2% black city) even though the new plan would *reduce* black representation from *46%* of the seats; holding that "a § 2 vote dilution claim cannot be maintained if the minority community at issue is proportionately represented, notwithstanding the presence or absence of any other [*Gingles*] precondition factor." *Baines v. Masiello,* 2003 WL 22299247, at *12 (W.D.N.Y. Oct. 6, 2003).[12]

III. SHAW CLAIM AGAINST DISTRICT 34.

It is now undisputed that Plaintiffs' *Shaw* claim consists entirely of the assertion that District 34 is not compact and is adjacent to a majority black district, *see* Pls. Br. at 15-16, that indisputably needed to be maintained under § 5. Contrary to Plaintiffs' claim, the New York Court of Appeals in *Wolpoff v. Cuomo*, 80 N.Y. 2d 70, 78 (1992) did not interpret the Federal Voting Rights Act, but upheld District 34 as "compact" under the "State Constitution's requirements" – a state law determination that is binding on this federal court. In any event, drawing districts to comply with the Voting Rights Act does not violate *Shaw*; if it were otherwise, all of Plaintiffs' proposed districts would be unconstitutional since they seek to redraw current districts for the expressly racial purpose of increasing racial and ethnic percentages.

(continued...)

118; *see also* Braatz Declaration Ex. 22 at 3-4, and in 28% (5 of 18) of such elections in the Bronx/Westchester. *See* SUF ¶ 123; *see also* Braatz Declaration Ex. 22 at 5.

[12] Our Reply brief in support of the Motion to Dismiss fully rebuts Plaintiffs' assertion that the *Gingles* preconditions are relaxed if purpose is alleged in a Section 2 case. Reply Br. at 14-15. Alternatively, *Shaw* is the appropriate constitutional standard since, as Plaintiffs note, *Shaw* claims are "'analytically distinct' from vote dilution" claims and Plaintiffs cannot show vote dilution if they cannot establish the *Gingles* preconditions. Pls. Br. at 32.

Moreover, Plaintiffs challenge none of the multitude of nonracial reasons set forth in our opening brief. Most fundamentally, *Shaw* plaintiffs must show that "hypothetical alternative districts would have *better* satisfied the legislature's other nonracial *political* goals as well as traditional nonracial districting principles." *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (emphasis added). Plaintiffs, of course, cannot show that completely eliminating Republican Senator Velella's current District 34 and placing him in a Hispanic-majority district with a Hispanic incumbent would *better* serve the Republican majority's political goal of electing a Republican than would keeping Senator Velella in essentially the same district that he has easily won for many years. Contrary to Plaintiffs' apparent belief, *Defendants* need not *prove* this self-evident political reality. Rather, "*[p]laintiffs* must show that [the challenged district] is *unexplainable* on grounds other than race." *Id.* at 241-42. Since there is a blazingly obvious political explanation for the legislature's District 34, Plaintiffs cannot show that it is unexplainable on this political ground and, since the political explanation is so blazingly obvious, no member of the legislature needed to be handed political data to know the legislature's District 34 was better for Senator Velella than the overwhelmingly Democratic Hispanic majority district (and, in any event, all such political data was readily available on LATFOR's website).[13]

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[13] With respect to CD 17, Plaintiff-Intervenors argue that a court may ignore its own prior ruling, "if they choose," because the law of the case mandates *only that lower courts follow the mandate of a higher court after remand . . . .*" Gibbs Aff. ¶ 20 (emphasis added). This is contrary to both Supreme Court precedent and the very cases cited by Plaintiffs. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[A]s a rule courts should be loathe to [revisit prior decisions of their own] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"); *see also Zhejiang Tongxiang Imp. & Exp. Corp. v. Asia Bank*, 2003 U.S. Dist. LEXIS 997, at *5 (S.D.N.Y. Jan. 23, 2003) ("The major reasons to reexamine a prior ruling [of the same court] are 'an intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice.'"); *Flemming v. City of New York*, 2002 U.S. Dist. LEXIS 15937, at *11 (S.D.N.Y. Aug. 21, 2002) (same). Plaintiffs' do not even allege that such circumstances are present here. On the merits, Plaintiffs' racial bloc voting analysis is facially invalid because it examines voting throughout the Bronx, not the specific territory covered by CD 17. *See Gingles*, 478 U.S. at 59 ("The inquiry into the existence of vote dilution . . . is district specific . . . courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district"). *See also Cano v. Davis*, 211 F. Supp. 2d 1208, 1240 (C.D. Cal 2002), *aff'd*, 537 U.S. 1100 (2003); *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1151 (5th Cir. 1993). Plaintiffs also misstate basic § 2 law. The *Gingles* preconditions apply to single-member plans (*Growe v. Emison*, 507 U.S. 25, 40 (1993)), and are necessary prerequisites that must be satisfied before examining the totality of circumstances. *See DeGrandy*, 512 U.S. at 1011; *Niagara*, 65 F.3d at 1019. And, of course, the only issue here is the *legality* of the legislative plan, not whether the Plaintiffs' proposal is "better." *Upham v. Seamon*, 456 U.S. 37, 42-43 (1982).

CONCLUSION

For the foregoing reasons, and the reasons set forth in their moving memorandum, defendants respectfully request that their motion for summary judgment be granted, and Plaintiffs' cross motion be denied.

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CERTIFICATE OF SERVICE

I, JOHN R. BRAATZ, of full age and not a party to these proceedings, hereby certify under penalty of perjury that on October 31, 2003, I caused to be served in *Rodriguez, et al. v. Pataki, et al.*, United States District Court, Southern District of New York, No. 02 Civ. 0618 and *Allen, et al. v. Pataki, et al.*, No. 02 Civ. 3239, true and correct copies of: the Declaration of Mark Burgeson, dated October 30, 2003, with exhibits; the Reply Affidavit of C. Daniel Chill in Support of Defendants' Motion for Summary Judgment With Regard to the Eighth Cause of Action, sworn to October 30, 2003, with exhibits; and the Reply Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Cross Motion, dated October 31, 2003, by Federal Express overnight (Saturday) delivery service, and electronic mail, on each of the following:

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