EXHIBIT M

No. 04-218

IN THE

Supreme Court of the United States

ERIC RODRIGUEZ, *et al.*,

Appellants,

v.

GEORGE E. PATAKI,
Governor of the State of New York, *et al.*,

Appellees.

On Appeal From The United States District Court for the Southern District of New York

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court erred in rejecting Appellants' one-person, one-vote challenge to the New York State Senate redistricting plan, where: the plan's minor population deviations were required to serve the traditional redistricting principles of avoiding contests between incumbents and preserving the cores of prior districts; Appellants did not allege that the deviations were part of a partisan or racial gerrymander; and Appellants alleged "regional discrimination" but were unable to identify a cognizable region, show cognizable harm, or provide evidence of animus against any geographic area.

2. Whether the district court erred in denying Appellants' motion to compel only insofar as the motion sought production of confidential legislative documents that are wholly irrelevant to Appellants' claims.

3. Whether the district court erred in limiting the deposition of an expert witness to matters encompassed by his expert report, where the same person was deposed as a fact witness and the court did not order restrictions on the fact depositions of this or any other witness.

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COUNTERSTATEMENT OF THE CASE

Following the release of the 2000 census results, New York State's Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") held public hearings throughout the State and received written comments and proposals from the public regarding State Senate, Assembly, and congressional districts. J.S. 6a-7a. LATFOR then released an initial set of proposed plans, held a second round of public hearings, received additional public input, and transmitted its final set of proposed plans to the Legislature. *Id.* In April 2002, the Legislature and the Governor enacted legislation containing new Senate and Assembly districts, which were almost identical to LATFOR's proposals. J.S. 10a. In June 2002, the Legislature and the Governor enacted new congressional districts, and the United States Department of Justice "precleared" the three new plans under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. J.S. 12a-13a.

"[T]he 2002 Senate Plan reflects traditional districting principles including: maintaining equality of population, preserving the 'cores' of existing districts, preventing contests between incumbents, and complying with the requirements of the Voting Rights Act." J.S. 3a.

Under the 2002 Senate Plan, the maximum population deviation between two districts is 9.78% of the ideal district size, and, on average, a district's population deviates from the ideal size by 2.22%. J.S. 25a. More than half of all post-2000-census state legislative plans, including some court-drawn plans, have maximum deviations above 9%; of these 54 plans, only one has a lower average deviation than the challenged plan. Mot. to Affirm Appendix ("App.") 5a-6a.

As a result of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, the 2002 Senate Plan contains three groups of contiguous districts, within which all districts have similar population deviations. Districts 1-9 (covering Nassau and Suffolk Counties) have

virtually zero deviations; Districts 10-38 (covering New York City, Rockland County, and portions of Westchester and Orange Counties) are slightly overpopulated; and Districts 39-62 (covering the remainder of the State) are slightly underpopulated. J.S. 270a. The "block-on-the-border" and "town-on-the-border" rules cause this pattern because they result in virtually perfect population equality among districts within the same county, as well as among districts in adjacent counties that share a district.[1]

Much of the State's population growth during the 1990's was within New York City and, accordingly, the 2002 Senate Plan provides the City with one more Senate district than under the prior plan. Because the Legislature increased the size of the Senate from 61 to 62 seats,[2] the Plan accommodates the City's growth without reducing the

[1] The state constitution provides that the population difference between two adjoining districts within the same county cannot exceed the population of a block (or town) on the border between the two districts. N.Y. Const. art. III, § 4. In other words, if the population difference can be reduced by shifting a border block (or town) from one district to another, then the block (or town) must be shifted. Where the blocks (or towns) are small, this rule results in nearly perfect population equality between two adjacent districts in the same county. And, because all districts within a county are contiguous, there is a "ripple effect" that results in virtual population equality among all districts in the county. In addition, where a district straddles a county line, the rule applies with respect to adjacent districts in *both* counties. As a result, the adjacent districts in *both* counties have the same population as the two-county district. Ultimately, due to the ripple effect, *all* districts in the two counties have essentially equal population. App. 6a-7a. In the 2002 Senate Plan, four of the five contiguous counties comprising New York City have cross-county districts, and the 21 districts in this area have populations that differ by no more than six people. J.S. 270a.

[2] As LATFOR's website noted, the state constitution contains a formula for determining the size of the Senate. N.Y. Const. art. III, §§ 3, 4. The Legislature is "accorded some flexibility in working out the opaque intricacies of the constitutional formula." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 432, 293 N.E.2d 67, 74, 340 N.Y.S.2d 889, 899 (1972).

number of districts elsewhere in the State. The Legislature thereby avoided the substantial reconfiguration that would have been required by the elimination of a prior district. As a result, "the Senate Plan did apply the accepted principle of maintaining the core of districts" throughout the State. J.S. 34a n.34. In addition, the Legislature avoided a contest between incumbents, which would have been required if one of the prior districts had been eliminated. The Plan "has only two incumbent pairings" and "thus reflects a legitimate effort to avoid incumbent pairs."[3] J.S. 29a n.30.

In January 2003, Appellants and Plaintiff-Intervenors filed a nine-count amended complaint.[4] The one-person, one-vote count did not allege that the minor population deviations in the challenged plan reflected intentional race discrimination. J.S. 27a & n.29. Appellants also did not assert a Fourteenth Amendment "partisan gerrymandering" claim, J.S. 30a-31a n.31, or otherwise allege that partisan considerations impermissibly affected the 2002 Senate Plan. Instead, Appellants claimed that the population deviations of the Plan resulted from "regional discrimination." The allegedly disadvantaged "downstate" region consisted of the slightly overpopulated Districts 10-38, which covered New York

[3] The 2002 Senate Plan also markedly improved the voting strength of New York's minority voters. The Plan includes two more majority-Hispanic voting-age population ("VAP") districts and one more majority-African-American VAP district than the prior plan. Of the 62 districts in the 2002 Senate Plan, eight are majority-African-American VAP, six are majority-Hispanic VAP, four additional districts are majority-minority VAP, and one is majority-white VAP with an African-American incumbent. J.S. 126a n.134.

[4] Appellants claimed that the Plan violated the Fourteenth Amendment's one-person, one-vote requirement; that the Plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by failing to include three more minority "coalition" or "influence" districts; and that the Plan's only majority-*white* district in Bronx County violated the Fourteenth Amendment under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny.

City, half of Westchester County, all of Rockland County, and two towns in Orange County. Appellants gave no basis—*e.g.*, no set of common interests—for defining this area as a "downstate" region; their definition is based on nothing more than the fact that the area corresponds to the slightly overpopulated districts. J.S. 18, 31a.

Attached to the complaint was Appellants' revised proposed redistricting plan. Whereas Districts 10-38 in the 2002 Senate Plan are all slightly overpopulated, Districts 10-38 in Appellants' plan are all slightly underpopulated.[5] App. 1a-4a. This difference reflects the fact that Appellants' plan eliminates an "upstate" district and adds a new "downstate" district, *in addition to* the new "downstate" district already created through the increase of the Senate size to 62 seats.

By eliminating an "upstate" district, Appellants' plan necessarily creates a contest between two incumbents. The shift also destroys a prior district and requires substantial changes to the surrounding districts. Moreover, Appellants' plan creates rather than eliminates inequalities between "regions." Under the 2002 Senate Plan, the slight overpopulation of "downstate" is offset by the slight underpopulation of Assembly districts in the same area.[6] In

[5] Appellants assert that, in the challenged plan, "every single downstate district is *substantially* overpopulated." J.S. 2 (emphasis added). In fact, 21 of the 29 "downstate" districts deviate from the mean by only 1.69 or 1.70%, which is only a hair above the 1.24% deviations of Appellants' plan. J.S. 270a. Seven of the eight other "downstate" districts with higher deviations are in Queens, and it is impossible to achieve lower deviations without drawing a district that crosses the county border, in violation of the whole-county policy embodied in the state constitution. N.Y. Const. art. III, § 4. Moreover, since Appellants misleadingly label the Queens districts as having deviations from "4% to 8%" (J.A. 8), it bears emphasis that *no* district deviates from the mean by 5% or more.

[6] New York City has 25.6 (41.3%) of 62 Senate seats and 65 (43.3%) of 150 Assembly seats. Thus, the City, with 42.2% of the State's population, has 42.7% of seats in the Legislature as a whole (42.3% of the Legislature if Senate seats are given greater weight). App. 18a-20a.

addition, New York City has 26 Senate seats (as opposed to 26.2 seats under a perfectly populated plan), "with a seat defined as representing a district controlled or predominantly controlled by city-based voters." J.S. 31a-32a. And New York City districts are substantially *under*populated in terms of eligible and enrolled voters. *See infra* p. 11. Appellants' plan's underpopulation of Districts 10-38, by contrast, would *exacerbate* the underpopulation of comparable Assembly districts; cause *greater* disproportionality between the number of New York City Senate seats (27) and the City's share under a perfectly populated plan (26.2); and *increase* disparities between "regions" in terms of eligible and enrolled voters. App. 9a, 15a, 17a, 19a-20a.

In March 2003, Appellees filed a partial motion to dismiss based upon, among other things, the fact that the Plan's maximum population deviation is less than 10%. The district court denied the motion to dismiss in its entirety.

In July 2003, Appellants moved to compel the production of documents by Appellee Joseph L. Bruno, the Senate Majority Leader. Senator Bruno had appeared in the case only after Appellants served him with a summons and complaint in early 2002. He had made a voluminous document production in response to discovery demands, while asserting privilege over those documents that reflected communications and deliberations of legislators and their aides. The magistrate judge ruled that, under federal common law, legislative privilege is a qualified privilege governed by a five-part balancing test. J.S. 198a-199a. Whereas Senator Bruno objected to the magistrate's rejection of an absolute privilege, Appellants did *not* challenge the magistrate's recognition of a qualified privilege. The district court affirmed the magistrate's order but reiterated the magistrate's emphasis that the order "does not relate to 'any depositions of legislators or their staffs.'" J.S. 209a.

Based on the guidelines set forth in the magistrate's original order, Senator Bruno produced hundreds of

additional documents while maintaining the assertion of privilege over a limited category. The magistrate then inspected the documents *in camera* and ordered the production of *all* documents except for those that were "akin to private discussions among legislators or between individual legislators and their aides" and, in all events, would have "add[ed] nothing to the discussion of the legality of the Senate majority's final plan." J.S. 213a, 214a. (The magistrate *did* compel the production of documents that reflected private legislative communications but were potentially helpful to Appellants' case.) Appellants objected neither to the magistrate's continued application of qualified privilege nor to his document-specific relevance determinations; instead, they maintained that the five-part balancing test required disclosure of *all* documents related to the specific districts they challenged. App. 38a-39a. Appellants also made a "waiver" argument (almost twenty months into the lawsuit and only ten days before the close of discovery), premised on a notion that Senator Bruno had voluntarily participated in the lawsuit by complying with Appellants' summons and then following the Federal Rules. In addition, Senator Bruno filed objections to the magistrate's order requiring production of additional documents. The district court affirmed. J.S. 228a-230a.

With respect to depositions, there was no order from the magistrate, and certainly no order affirmed by the district court, barring depositions of legislators, their aides, or any other fact witness. J.S. 1, 183a-232a. But Appellants did not depose any of these individuals, except for Mark Burgeson, "the primary drafter of the Plan." J.S. 10. In fact, their *only* unsuccessful argument as to depositions was that Mr. Burgeson, in his capacity as an expert on the Plan's *objective* characteristics, could be questioned regarding his and others' *subjective* thought processes in developing and enacting the Plan. App. 46a-47a. Although the magistrate and district court rejected Appellants' argument about Mr. Burgeson's *expert* deposition, there was no order or objection regarding

the scope of questioning at Mr. Burgeson's *fact* deposition, where Appellants were given wide latitude.

The district court granted Appellees' motion for summary judgment on several counts, including the one-person, one-vote claim. After trial on the remaining claims, the court entered judgment for Appellees on all counts.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE MINOR DEVIATIONS OF THE CHALLENGED PLAN ARE JUSTIFIED BY TRADITIONAL REDISTRICTING POLICIES AND ARE NOT ATTRIBUTABLE TO IMPERMISSIBLE FACTORS

Although Appellants struggle mightily to suggest that the court below applied an erroneous legal standard, the truth is that Appellants lost precisely and only because the undisputed evidence showed that they were unable to prove facts in support of their own legal theory. The district court *adopted* the legal framework advanced by Appellants. It held that a less-than-10% population deviation is *not* a safe harbor from a one-person, one-vote claim,[7] and that such a challenge will succeed if the plaintiff demonstrates that the deviations are actually attributable to an impermissible purpose. J.S. 21a-25a. This approach was identical to that of the district court in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 124 S. Ct. 2806 (2004), which Appellants hold up as the proper legal standard. As the court below made clear, in expressly distinguishing *Larios* on its facts,

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[7] This Court has held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). "[A]s a general matter, . . . an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

the only reason for the differing results is that, unlike the *Larios* plaintiffs, Appellants could not show that the population deviations were attributable to anything but traditional districting principles. J.S. 29a n.30, 34a n.34. Appellants offered no evidence that any aspect of the challenged plan was based on an impermissible or illegitimate purpose, much less that such a purpose—rather than the pursuit of legitimate redistricting principles—actually caused the population deviations at issue. The district court's fact-bound decision was correct, and it certainly presents no substantial question warranting this Court's plenary review.

A. Appellants' Claim of "Regional" Discrimination Would Fail If Such Claims Were Cognizable

Contrary to what their jurisdictional statement implies, the only allegedly impermissible motive that Appellants set out to prove was so-called "regional" or "geographic" discrimination. There is no contention or proof, for example, that the minor deviations were adopted to further an unlawful partisan gerrymander (under *any* definition of that concept), or were based on race discrimination. *See* J.S. 26a-27a & n.29, 30a-31a n.31. (Nor could there be such a contention, since it is undisputed that the plan provides equal treatment to *all* residents—minority and white, Democrat and Republican—within each alleged "region.") As explained below, moreover, there is no proof that the population deviations were attributable to alleged regional "animus." J.S. 22. To the contrary, the deviations concededly served the traditional districting principles of avoiding incumbent pairs and preserving existing district cores, as well as *minimizing* voter inequality. The plan here, therefore, plainly would satisfy *any* standard for determining the validity of minor population deviations—*i.e.*, those under 10%. For this reason, it is difficult to conceive of a worse vehicle for resolving the question of whether and when deviations below 10% constitute Fourteenth Amendment violations.

Nor can the case even shed general light on what, if anything, constitutes impermissible "regional discrimination." Under the undisputed facts, Appellants' hypothesized region is not an identifiable region; the votes of persons in the allegedly disadvantaged region are worth *more* than others in the State; and, to the extent that it is relevant, the region has proportional representation in the state legislature. Needless to say, a regional discrimination claim, whatever its legal merit in the abstract, cannot succeed unless there is a definable region and there is some discrimination.

1. Appellants' Definition of the Allegedly Disadvantaged "Region" Is "Self-Serving and Defective"

Importantly, Appellants do not challenge the accuracy of the district court's conclusion that their definitions of the "upstate" and "downstate" regions were "self-serving and defective" and "tailored to suit [Appellants'] litigation strategy." J.S. 18, 31a. Appellants claimed below that their "downstate" corresponded closely with New York City and its environs, but, in fact, their facially gerrymandered "downstate" excluded the two counties immediately to the east of the City on Long Island (Nassau and Suffolk Counties), included only half of the county immediately to the north of the City (Westchester County), veered abruptly across the Hudson River to include a county that is separated from the City by northeastern New Jersey (Rockland County), and proceeded northwest to pick up two towns in another rural county (Orange County) that has nothing in common with the City. J.S. 8. Thus, Appellants' hypothesized "downstate" region stretches to the Pennsylvania border and includes rural counties, but excludes all or half of each county that actually borders New York City. Moreover, contrary to Appellants' claim, there is no allegation or proof that the Plan contains "a built-in bias against voters living in the State's more populous counties." J.S. 16 (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-

54 (1964)). To the contrary, all of the most populous counties outside of the City—Nassau, Suffolk, Westchester, and Erie (J.S. 267a)—are either *underpopulated* in part or whole or have districts with perfectly equal population.

Accordingly, Appellants now concede the district court's point that geographic areas are not "classified as 'downstate' [by Appellants] on any basis other than that they are overpopulated." J.S. 31a; *see* J.S. 18 (terms "upstate" and "downstate" were "used only as a shorthand description of the geographic areas that . . . [are] under- and over-populate[d]" in the challenged plan). Appellants plainly are incorrect when they assert (J.S. 18) that it is "absurd" to require a "region" to be defined by something more than geography corresponding with overpopulated legislative districts. Needless to say, if a "region" can be defined solely by overpopulated territory, then *any* plan with overpopulated districts—*i.e.*, any plan with less than perfect population equality—would contain an overpopulated "region" that is the product of "regional" discrimination vis-à-vis the underpopulated districts/"region." The lower court was thus quite correct to dismiss Appellants' completely circular and meaningless concept.

In this regard, Appellants repeatedly emphasize the so-called "systematic" nature of the overpopulation in the challenged plan—*i.e.*, the fact that the overpopulated districts are contiguous instead of scattered throughout the State. But it is undisputed that, far from suggesting any sort of "regional" animus, this "pattern" is simply a function of the New York Constitution's "block-on-the-border" and "town-on-the-border" rules, which require that districts within a county, as well as districts in adjacent counties that share a district, have almost precisely the same population. *See supra* p. 2. Thus, if one district in an area where districts cross county lines is overpopulated, then all districts in that area must be overpopulated to the same extent. This phenomenon is exemplified by *Appellants' own* proposed alternative plan, which contains precisely the same "pattern,"

only in reverse, with every so-called "downstate" district *under*populated instead of overpopulated. App. 1a-4a.

Of course, the fact that the New York Constitution causes similar population patterns in large groups of *contiguous* districts is of no federal constitutional moment. The rights and voting strength of citizens in overpopulated districts is not affected in any way by whether the underpopulated districts are nearby, or far away.

2. Appellants Are Unable to Show Any Disproportionality

The undisputed facts established that persons in the allegedly disadvantaged "downstate" region had *greater* voting strength than in "upstate" and thus were *favored* under the 2002 Senate Plan. As the court noted, "both parties stipulate that the New York City districts . . . [are] substantially *underpopulated* rather than overpopulated" in terms of eligible voters (citizen voting-age population) and registered voters. J.S. 32a. "According to the *plaintiffs'* CVAP figures, the New York City districts in the Senate Plan are *underpopulated* by 12.0% and 'upstate' districts are *overpopulated* by 15.4%. With respect to registered voters, the weight of one New York City resident's vote, depending on the district of comparison, is worth 29.9% to 63.6% *more* than an 'upstate' citizen's vote." *Id.* (emphasis added). Thus, the "practical effect of the Senate Plan . . . is to dilute the votes of '*upstate*' residents, *not* those who reside 'downstate.'" *Id.* (emphasis added).

In the face of this stark showing of *enhanced* voting strength in "downstate," Appellants' only response is that "the Legislature reapportioned on the basis of *total* population" and that the Fourteenth Amendment "protects 'persons,' not merely voting age citizens." J.S. 18, 19 (emphasis in original). That is, of course, true, but entirely irrelevant. The right afforded to "persons" under the Fourteenth Amendment in the "one-person, one-*vote*" context is, of course, "the right of all qualified *citizens* to

vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added). The Constitution thus requires "that the *vote* of any *citizen* [be] approximately equal in weight to that of any other *citizen* in the State." *Id.* at 579 (emphasis added); *see also id.* at 568 ("[A]n individual's right to *vote* for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with *votes* of *citizens* living in other parts of the State." (emphasis added)). Indeed, the cases on which Appellants rely—including, most notably, *Larios*—speak in terms of the under-weighting of *votes*. *See, e.g.*, *Larios*, 300 F. Supp. 2d at 1337; *WMCA*, 377 U.S. at 653. (In *Larios*, unlike here, the same region was slightly overpopulated in terms of total population and *more* overpopulated in terms of eligible and enrolled voters. *See* Motion to Affirm at 19, *Cox v. Larios*, No. 03-1413 (filed May 13, 2004).)

Thus, if a plan *enhances* the weight of a "person's" vote relative to other districts, then the person has suffered no cognizable constitutional harm. Equality of total population—the most readily available statistic—is commonly used only as a rough *proxy* for voting equality, and the Court has emphasized that precise equality of total population is not required because, among other reasons, total population is not "a talismanic measure of the weight of a person's vote." *Gaffney*, 412 U.S. at 746; *see also id.* at 746-47 ("The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States."). For example, in *Burns v. Richardson*, 384 U.S. 73 (1966), the Court upheld the use of a plan with *substantial* deviations in total population (Oahu had 79% of Hawaii's population and elected 71% of the state house). *Id.* at 82. These deviations were not problematic because "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94. And, in terms of citizens and registered voters, there was no substantial inequality. *Id.* at 82, 96.

As this reflects, Appellants' true complaint is not about the voting equality of persons residing in "downstate," but is based on some perceived constitutional right to "proportional representation" of "downstate" Senators in the state legislature—*i.e.*, the percentage of "downstate" Senate seats must be equivalent to the percentage of population in "downstate." The Fourteenth Amendment does not, of course, vest any "region" with any right of proportional representation: "Legislators are elected by voters, not farms, or cities or economic interests." *Reynolds*, 377 U.S. at 562. But even if proportional representation of "cities" or "regions" was within the comprehension of the Fourteenth Amendment, New York City is provided with nearly perfect proportional representation in the Senate and is *over*-represented in the state legislature. As the district court emphasized, New York City would receive 26.2 seats if every district were apportioned with perfect equality, and it receives 26 seats under the 2002 Senate Plan.[8] J.S. 31a-32a. Moreover, when representation in the New York State

[8] Appellants do not dispute that districts "controlled or predominantly controlled by city-based voters" must be treated as New York City districts for purposes of any proportionality analysis. J.S. 31a-32a. Instead, they claim that "the record contain[s] no evidence whatsoever" to support the district court's treatment of two of the seats as controlled or predominantly controlled by city-based voters. J.S. 19 n.11. On the contrary, it is undisputed that New York City is home to 78% of the residents in these districts. App. 8a-9a. Even more bizarre is Appellants' assertion that "the drafters of the Plan purposefully siphoned 135,000 residents from Westchester" into these two districts. J.S. 19 n.11. Two highly technical memoranda, upon which Appellants exclusively rely, show merely that the drafters faced a choice between the challenged configuration (with about 135,000, or 22%, of these two districts' residents living in Westchester) and alternative configurations in which about 131,000, or 21%, of these two districts' residents would have lived in Westchester. J.S. 277a-278a, 281a-282a. There is no merit to Appellants' apparent assertion that predominant control of these districts shifted out of New York City when they were drawn to be 78% in the City (on average) instead of 79%.

Assembly is considered, as it must be,[9] New York City is *over*-represented in the Legislature as a whole, even in terms of total population.[10] *See supra* p. 4 n.6.

Consequently, the undisputed facts show that there is neither a cognizable "region" nor any disproportionality to support Appellants' claim of "regional discrimination."

B. It is Undisputed That the Challenged Deviations Are Necessary to Comply With Legitimate Redistricting Principles

At bottom, Appellants are left trying to transform a simple statistical *effect*—that certain contiguous districts have more population than others—into a showing that the *purpose* of the population deviations was to create this allegedly adverse effect. As the district court stated, however, "the plaintiffs only beg the question in repeatedly asserting that the pattern of overpopulation and underpopulation 'reflects an illegitimate effort to overrepresent an entire region of the State in order to maintain its ascendancy in the Senate, at the expense of another large region which the 2000 Census data showed had grown much more substantially over the past decade.'" J.S. 30a. The question begged by Appellants' assertion is: Do the population differences between the so-called "regions" stem from regional animus, or were the deviations related to one or more legitimate redistricting principles? In this regard, Appellants seem to think it

[9] *See Reynolds*, 377 U.S. at 577 (An "apportionment in one house could be arranged so as to balance off minor inequities in the representations of certain areas in the other house."); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) (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.").

[10] Again, the situation was the opposite in *Larios*, where the disadvantaged region was under-represented in both houses of the legislature. *See* 300 F. Supp. 2d at 1327, 1342.

enough to establish that the deviations were not inadvertent; thus, their repeated refrain that the deviations were "deliberate." J.S. i, 2, 9, 10, 11, 13, 17, 18, 21, 24. The question, of course, is not whether the Plan resulted from a cognitive act, but whether the purpose of that deliberate act is to harm a certain region or to further legitimate principles.

As is clear from the decision below and confirmed by the jurisdictional statement, Appellants do not dispute that the challenged deviations were *required* in order to further at least two redistricting principles approved by this Court as satisfying even the far more stringent requirements for *congressional* districts[11]: "preserving the cores of prior districts, and avoiding contests between incumbent [r]epresentatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).[12]

The plan that Appellants say the Legislature "easily could have drawn" (J.S. 9) would have overpopulated the "upstate" instead of the "downstate" and, in the process, removed an entire district from the "upstate" and transplanted it into the

[11] *See, e.g., White v. Regester*, 412 U.S. 755, 763 (1973) ("It is plain . . . that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats."); *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983).

[12] It is also undisputed that the slightly greater (albeit minor) deviations in the Queens districts were *required* to keep Queens County whole—that is, to avoid having a district that straddled the Queens County border. *See, e.g., Karcher*, 462 U.S. at 740 ("respecting municipal boundaries" is a legitimate legislative policy); N.Y. Const. art. III, § 4 (articulating state policy of respecting county borders). Appellants have it backwards when (J.S. 23) they cite *Kilgarlin v. Hill*, 386 U.S. 120 (1967), for the proposition that respect for county boundaries is irrelevant, merely because Appellants' revised plan (but not their original plan) preserved one more whole county statewide. *Kilgarlin* makes clear that the preservation of county lines must be "relate[d] [to] . . . specific inequalities among the districts." 386 U.S. at 124. Accordingly, the relevant point is that lower deviations could have been achieved in Queens *only* by crossing the county border.

"downstate," thereby causing the "upstate" to have one fewer district than in the 1990's plan. Obviously, with the same number of incumbents and one fewer district, a contest between incumbents would have been *unavoidable*. The cores of prior districts likewise would have been massively disrupted, by necessity, if a district had been eliminated and the others had been reconfigured to fill the void. The district court correctly relied on these facts in expressly distinguishing *Larios*, where "'core retention was not a concern in the redistricting process,'" and the legislature engaged in "wholesale distortion of district lines throughout the state in order to target and oust members of the minority political party." J.S. 34a n.34 (quoting 300 F. Supp. 2d at 1334).

Appellants do not dispute that, in other cases, deviations as minor as those in the 2002 Senate Plan—and, indeed, many deviations *greater* than 10%—are justified if needed to preserve the cores of prior districts. Appellants nevertheless maintain that preserving the cores of prior districts is not "a legitimate justification for a deliberate effort to nullify Census data." J.S. 24. But *every* plan that deviates from perfect population equality to preserve the cores of prior districts does so precisely to avoid the disruption that would be caused by slavish adherence to the new "Census data" and the resulting creation of new, unfamiliar districts. Thus, *every* departure from perfect population equality to preserve district cores *ipso facto* "nullif[ies] Census data"—to the extent Appellants' pejorative rhetoric is comprehensible at all. Consequently, Appellants' derisive characterization fails to distinguish the legion of cases sanctioning core preservation or to provide a basis for condemning the standard core preservation here.

Indeed, the claim that the challenged plan "nullif[ies] Census data" is especially inappropriate in this case. While preserving the prior districts in the so-called "upstate," the plan reflects the relative population shift from "upstate" to "downstate" by increasing the size of the State Senate from

61 to 62 seats and *adding* the new district to *New York City*. Thus, when confronted with the need to add a district to New York City in order to reflect its population growth, the Legislature chose to create an entirely new district for New York City instead of taking the district from elsewhere in the State, which would have necessitated a contest between incumbents and would have destroyed district cores. Accordingly, the 2002 Senate Plan increases the "downstate" share of Senate seats, commensurate with census figures showing more population growth in that area.

Appellants also concede, as they must, that the slight overpopulation of "upstate" was *required* in order to avoid the incumbent pairing necessitated by the elimination of an "upstate" district, which would have resulted from underpopulating those districts as Appellants proposed. Because the population deviations in "upstate" undisputedly were required in order to avoid an incumbent pair, the 2002 Senate Plan satisfies the very standard proposed by Appellants themselves—*i.e.*, that "a particular objective *required* the specific [population] deviations" at issue. J.S. 24 (quoting *Karcher*, 462 U.S. at 741 (emphasis and alteration added in J.S.)).

Even though avoidance of incumbent pairs indisputably required adoption of the slightly higher deviation alternative and thus satisfied even *Karcher*'s demanding standards, Appellants nonetheless argue that this is somehow not a legitimate justification because the plan as a whole did not achieve *perfection* with respect to the policy of avoiding pairs. That is, avoiding the "upstate" pair was purportedly unjustified because, elsewhere in the State, "two sets of downstate Democratic incumbents were gratuitously paired." J.S. 24. But a plan obviously need not *wholly eliminate* incumbent pairs to rely on that as a legitimate policy justifying deviations, any more than a plan need wholly eliminate divisions of municipalities or counties to invoke that as a justification for slight deviations.

In any event, the undisputed evidence establishes that the Plan minimized incumbent pairs, relative to *all* lower deviation alternatives, to the extent practicable. Appellants' alternative not only resulted in pairing "upstate" incumbents but, overall, had twice as many incumbent pairs as the 2002 Senate Plan, even after Appellants consciously revised the plan in order to minimize incumbent pairs to the extent possible.[13] As the district court noted, "the 2002 New York State Senate Plan has only two incumbent pairings while the Plaintiffs' Revised Plan produces four incumbent pairings." J.S. 29a n.30. Moreover, the only alternative proposed to the *Legislature* for its consideration "paired 20 incumbents, 17 of whom were Republican." J.S. 4a.

As this reflects, there is nothing to Appellants' unsubstantiated assertion that the "downstate" pairs were "gratuitous." To the contrary, *Appellants' own* plan originally paired incumbents in exactly the same areas[14]—presumably because both plans adjusted district lines to create new majority-minority districts. Based on the undisputed evidence, therefore, the challenged plan "reflects a legitimate effort to avoid incumbent pairs." J.S. 29a n.30.

Thus, as the district court correctly noted, this is not remotely like a case, such as *Larios*, where population deviations were used to *create* pairings of 47 incumbents, 37

[13] The plan attached to Appellants' original complaint paired 14 incumbents. App. 27a. Appellants produced their revised plan, with 8 paired incumbents (J.S. 29a n.30), long after the challenged plan had been enacted and, indeed, almost a year after Appellants filed this case.

[14] *See* App. 27a-28a. In addition, the incumbent pairings in the 2002 Senate Plan do *not* sacrifice the principle of avoiding contests between incumbents because, as Appellants are forced to admit (J.S. 14), the plan left "nearby open seats in both instances," allowing an incumbent to run in the nominally open district. *See* N.Y. Const. art. III, § 7. By comparison, if a district had been removed from the "upstate" to reduce population deviations, there would have been no nearby open seat through which a contest between incumbents could have been avoided.

of whom were Republican. J.S. 29a n.30. (In *Larios*, moreover, the defendants sought to justify the deviations by reference to "incumbency protection" that took the form, not of avoiding incumbent pairs, but of drawing safe districts for Democratic incumbents. 300 F. Supp. 2d at 1329-31.)

In sum, this case involves a state legislature's choice between two types of plans, both with only minor population deviations. The challenged plan's maximum deviation of 9.78% is commensurate with over half of the state legislative plans across the country, and with several *court-ordered* plans, all of which have deviations above 9%. App. 5a-6a. In addition, the Plan's 2.22% average deviation is *lower* than in all but one of the other state legislative plans with greater-than-9% maximum deviations, which means that most state legislative plans have *higher* average deviations than New York's Senate Plan. *Id.* To achieve slightly lower deviations in terms of *total* population, as in Appellants' alternative plan, one necessarily would be providing *less* equality between districts in terms of the weight of individual *votes*, and in terms of overall representation in the bicameral legislature. Adoption of the alternative type of plan also would *require* a contest between incumbents, destruction of the cores of prior districts, and violation of the Queens County border.

In light of these important interests, the enacted plan would plainly be unassailable if the overpopulated districts were scattered among regions. Consequently, Appellants' claim reduces to the absurd proposition that a legitimate plan which serves traditional districting principles somehow becomes improper if the effect falls disproportionately on one "region." Reflecting this confusion, Appellants repeatedly invoke cases making the obvious point that deviations creating stark voting inequality cannot be *justified* on the basis that they were designed to prefer one region. But this does not in any way suggest that a redistricting plan that would be permissible if the overpopulated districts were scattered in a piecemeal fashion among regions somehow

becomes constitutionally impermissible because it happens that the overpopulated districts are grouped in one region. "Regions" have no Fourteenth Amendment rights distinct from the "persons" in them. Thus, a plan that treats persons with sufficient equality to satisfy the Fourteenth Amendment if the overpopulated districts were distant from each other also satisfies the Constitution if the districts are contiguous.

Needless to say, *Larios* did not suggest that regional differences themselves invalidate an otherwise permissible redistricting plan. Instead, *Larios* turned on the fact that the (more significant[15]) deviations in that case, unlike those here, were *not* required to avoid contests between incumbents, to preserve the cores of prior districts, or to comply with any other traditional redistricting principle. In *Larios*, there was "no evidence that the population deviations in the plans were driven by the neutral and consistent application of any traditional redistricting principles." 300 F. Supp. 2d at 1349. Here, there is no evidence that they were driven by anything else.

C. Appellants' Claim That the District Court Applied the Wrong Legal Standard Lacks Merit

In a transparent effort to avoid the undisputed facts of the case, Appellants mischaracterize certain statements by the district court and then claim that the statements articulate an erroneous legal standard. This Court, of course "reviews judgments, not statements in opinions." *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (internal quotation marks omitted). And here, Appellants cannot prevail under

[15] Although the total population deviations in *Larios* were under 10%, the average deviations (3.47% and 3.78%) were far higher than in this case (2.22%), the deviations of the two houses of the legislature reinforced rather than offset one another, and the regional disadvantage was *higher* in terms of eligible and enrolled voters, whereas here the weight of votes in the allegedly disadvantaged region is *greater* than in other parts of the State. *See supra* pp. 12-14; 300 F. Supp. 2d at 1326-27.

any conceivable legal standard since the district court found, based on painstaking review, that "the plaintiffs failed to show that the deviation was not caused by the promotion of court-approved state policies," that they had "not produced evidence of irrational or unconstitutionally discriminatory behavior by the Legislature," and that they failed to present even "some evidence that the districting can be traced to impermissible considerations." J.S. 28a, 30a. Indeed, the undisputed facts showed that the 2002 Senate Plan was valid even under the familiar standard for deviations *above* 10%, and Appellants do not suggest that a plan with *lesser* deviations is held to *stricter* standards. Specifically, in this case, it is clear that "the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" *Brown*, 462 U.S. at 843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)). Accordingly, questions about whether and to what degree a plan with minor deviations is subject to *more lenient* standards (including whether, contrary to the district court, such plans are immune from one-person, one-vote challenge) are wholly irrelevant.

Even assuming it mattered, there is nothing problematic about the district court's language that Appellants attack. Seeking to erect a cathedral around the word "solely," Appellants claim (J.S. 19) that the court erred in stating: "'[A] plaintiff [can], with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent. To prevail, though, the plaintiffs have the burden of showing that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy.'" J.S. 24a-25a (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994) (three-judge court) (emphasis added below)). Appellants' selective quotation conveniently omits the lower court's clarification in the next sentence: "Thus, the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation. *See Karcher*, 462 U.S. at 740-44." J.S.

25a (quoting *Marylanders* (emphasis added below)). A plaintiff must therefore do more than simply point to "minimal[] devia[tions]" and "scant evidence of ill will by district planners" (J.S. 25a); instead, a plaintiff must show that the impermissible purpose was the actual reason for the challenged deviations.

Contrary to Appellants, therefore, the "ab[ility] to pay lip service to various traditional redistricting objectives" (J.S. 20) will not aid defendants unless those objectives were the actual reason for the deviations at issue. In all events, Appellants' entire discussion has a distinct other-worldly quality because, again, the court clearly found that the challenged plan does far better than "pay lip service" to traditional redistricting principles, and that there was no evidence of regional animus (or any other form of ill will) *at all*.

Moreover, the "sole[]" or "actual reason" standard is no more lenient than that used when a plan's deviations are *over* 10%, such that it is presumptively unconstitutional and must be justified by the state. Again, the question in such cases is whether the plan "*may reasonably be said* to advance [a] rational state policy." *Brown*, 462 U.S. at 843 (emphasis added). Thus, even if the "actual" or "sole" reason motivating the legislature was not a rational state policy, the state would still prevail if, objectively, the plan furthered that policy. Under the district court's standard, in contrast, the state would *lose* if the plan objectively furthered a rational state policy, but the sole or actual reason was illegitimate. The district court's standard is certainly no more *lenient* than that used for presumptively unconstitutional deviations and, of course, there is no basis for applying a more rigorous standard to these minor deviations.

As this reflects, the standard for evaluating population deviations is designed to avoid having the federal judiciary "bogged down in a vast, intractable apportionment slough," *Gaffney*, 412 U.S. at 750, and to avoid an amorphous inquiry

into the "motivation" of a multi-member legislature in the highly partisan redistricting context. *Cf. United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("Inquiries into [legislative] motives or purposes are a hazardous matter."). Appellants' proposed standard inevitably would plunge the judiciary into just this political thicket and require that all state legislative plans achieve perfect population equality. Specifically, Appellants contend that "'*any taint* of arbitrariness'" condemns *any* population deviations and that partisan motivation "cannot be a legitimate reason for deviating under ten percent." J.S. 19, 21-22 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis added in J.S.)). But, as this Court has noted, "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney*, 412 U.S. at 753, and it is always possible to design a plan with perfect population equality. Thus, virtually every plan is invalid under Appellants' syllogism, since all a plaintiff need do is show "partisan" considerations and propose a plan with lesser deviations. Perfectly legitimate plans, serving valid districting principles that would be acceptable if drawn by a neutral redistricting commission, would be condemned because there was a "taint" of politics in their enactment.

In all events, Appellants' discussion of whether politics justifies population deviations is irrelevant here, because Appellants never provided any evidence that the deviations resulted from partisan concerns and, contrary to Appellants' mischaracterization, the district court nowhere said that partisan concerns would justify the deviations, if that had been offered up as a justification.

Appellants blithely assert that "[t]he district court's opinion was premised on the assumption that so long as the total population deviation remains within ten percent, it is permissible for a legislature to deliberately construct districts of unequal size for the purpose of gaining partisan advantage." J.S. 21. In fact, the district court's *opinion* said no such thing, and its *judgment* certainly was not "premised"

on such reasoning. The court recognized that "politics surely played a role in redistricting in New York in 2002—as it does in most every jurisdiction." J.S. 4a. But Appellees never suggested—and the court never entertained the possibility—that "partisanship *justifies*" the population deviations. J.S. 22 (emphasis in original). Nor did they need to, since the population deviations at issue clearly were justified in light of traditional redistricting considerations *other* than politics.

Appellants themselves, moreover, never introduced partisanship as an issue; they chose to rely instead on allegations of regional disproportionality. Specifically, Appellants never suggested that the deviations somehow reduced Democratic representation, that the overall result of the redistricting was unfair or cognizable under *Davis v. Bandemer*, 478 U.S. 109 (1986), that Democrats and Republicans in the same region were treated differently with respect to population (or anything else), or that district lines were ungainly. In short, Appellants did not present anything analogous to the showing in *Larios*, or anything else to demonstrate that the deviations' purpose and effect was identifiable partisan gain.

Appellants' one feeble effort in this regard was to hold up as a "smoking gun" a memorandum from the 2002 Senate Plan's chief architect. But, as the district court observed, the memorandum actually "assists the defendants at least as much as it assists the plaintiffs because it plainly invokes the permissible policies that *Karcher* contemplates." J.S. 29a. Specifically, the memorandum shows an effort to promote "contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." J.S. 28a-29a. "[N]or is it surprising that a memorandum to the Republican State Senat[ors] in control of redistricting would describe a potential Democratic district as comprised of 'undesirable' voters"—who, in any

event, were located in *perfectly* populated (0.03% deviation) districts on *Long Island,* not in "upstate" or "downstate." J.S. 29a-30a.

In this connection, Appellants are either confused or disingenuous about the district court's citation to *Easley v. Cromartie*, 532 U.S. 234 (2001). J.S. 30a. As the court observed, *Cromartie II* established that a mere statistical racial effect (*i.e.*, the mere fact that a plan seems to separate African-American and white voters) does not suffice to show a racial purpose when there is a strong correlation between race and politics. J.S. 30a. Similarly here, the mere fact that "upstate" districts are overpopulated does not suffice to show that the Legislature harbored some "regional" animus against voters based on where they lived. *Id.* ("In New York State, the traditional correlation between 'upstate' districts and Republican political identification (21 out of 24 Senators upstate are Republican) means that the plaintiffs here needed to proffer more than a mere assertion of a Senate conspiracy for 'upstate' ascendancy to meet their burden of showing a violation of the one-person, one-vote principle.").[16] Far from holding that politics justify otherwise impermissible population deviations, the court simply used politics to illustrate why Appellants were unable to prove "regional" discrimination *at all*, much less that such discrimination—instead of any legitimate redistricting principle—was the actual reason for the challenged deviations.

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[16] Nor can Appellants be heard to complain that it is too difficult to prove "regional" discrimination if they are required to show more than the mere existence of regional differences. In light of the strong overlap between race and politics, it is generally *harder* to disentangle politics from race (in order to prove race discrimination) than it is to disentangle politics from alleged "regions." Such disentanglement, however, is clearly necessary to show that race played an impermissible role in redistricting, and even Appellants presumably would not contend that residents of cognizable "regions" receive *greater* protection than racial groups under the Fourteenth Amendment.

Conversely, the fact that there was a correlation between the "upstate" and Republican incumbents does not mean that the Senate Republican majority was precluded from pursuing neutral districting principles which "benefited" that area, or that these legitimate principles became illegitimate because of some political "taint," particularly since there was no identifiable negative effect on any voters or party. Yet, as the district court properly recognized, mindless invalidation of such legitimate plans would be the necessary result of accepting Appellants' theory that even minor deviations supported by neutral redistricting policies somehow become impermissible if they have a beneficial effect on a region or majority party. Establishing a statistical correlation between a party and a region is wholly insufficient to establish an illegitimate purpose or to condemn a plan that plainly advances neutral principles.

In short, since Appellants' case below focused only on alleged "regionalism" instead of politics, their current discussion of the issue—and, relatedly, their reliance on *Larios*—is entirely beside the point. In any event, since Appellants' *entire* "showing" of partisanship consists of the observation that the "upstate" is disproportionately Republican, this case does not provide a vehicle for analyzing the legitimacy of utilizing population deviations as a tool for a cognizable partisan gerrymander.

II. THIS APPEAL DOES NOT PRESENT A LEGISLATIVE PRIVILEGE ISSUE

Appellants also seek plenary review of a series of extraordinarily fact-specific evidentiary rulings on specifically identified documents and witnesses—rulings which were principally based on the idiosyncratic structure of New York State's redistricting task force, and none of which even purport to resolve any question on the scope of legislative privilege. Even if the Court were concerned with such extraordinary minutiae in normal circumstances, the dispositive point here is that the district court never barred a

single deposition of any Senator or legislative aide, and documents were withheld only on the ground that they were irrelevant to the dispute.

Contrary to the jurisdictional statement, the district court did not preclude Appellants from discovery of *any* remotely relevant evidence in this case. With respect to depositions, the district court did not hold that legislative privilege or any other privilege barred the deposition of any witness—including Senator Bruno, other legislators, Mark Burgeson ("the primary drafter of the Plan" (J.S. 10)), or other legislative aides. A perusal of Appellants' appendix confirms that there is no such order and, indeed, reveals the district court's admonition that it was *not* determining the question of "any depositions of legislators or their staffs" and not "determin[ing] whether Senator Bruno, Speaker Silver, and the remaining legislator/defendants are entitled to claim legislative immunity on the facts of this case." J.S. 209a; *see also* J.S. 221a ("It appears that the plaintiffs themselves delayed several fact witness depositions . . . .").

With respect to documents, the district court, over *Appellees'* strenuous objections, ordered the production of *all* requested documents except those that "would add nothing to the discussion of the legality of the Senate majority's final plan." J.S. 214a. Appellants do not and cannot challenge the determination that the protected documents "would add nothing to the discussion." The magistrate identified these documents after careful *in camera* inspection, and Appellants never asked the district court to review the documents or objected to the magistrate's document-specific relevance determinations. Before the district court, Appellants argued only that Senator Bruno had waived legislative privilege and that legislative privilege does not apply to *any* document—regardless of its individual relevance—that "pertains to challenged districts (which could include documents concerning districts adjacent to the

challenged districts)."[17] App. 39a. Accordingly, even if *legislative privilege* does not bar discovery of irrelevant documents, the court's ruling on these documents was correct on relevance grounds alone and, for the same reason, could not possibly have prejudiced Appellants.

In all events, even if the legislative privilege issue were not rendered irrelevant by the irrelevance of the documents themselves, Appellants' arguments lack merit. Appellants contend (J.S. 25-26) that there is never *any* legislative privilege for state legislators. Appellants, however, did not object when the magistrate rejected this argument and held instead that state legislative privilege is governed by a five-part balancing test. They have therefore waived any objection to this standard. Fed. R. Civ. P. 72(a).[18]

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[17] Appellants' one-person, one-vote claim is not district-specific but is based on alleged "regional" discrimination. Thus, Appellants contended only that the withheld documents were needed (regardless of individual relevance) for their Voting Rights Act and Fourteenth Amendment racial gerrymandering claims, none of which is raised in this appeal. App. 38a.

[18] In all events, if legislative privilege does not provide state legislators with complete immunity from discovery in civil actions, it at least protects those matters satisfying the magistrate's five-part test. Contrary to Appellants, the state legislative privilege is "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980); *cf.* N.Y. Const. art. III, § 11 (speech or debate clause nearly identical to federal counterpart). In addition, Appellants' reliance on criminal cases such as *United States v. Gillock*, 445 U.S. 360 (1980), is misplaced. "Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in *criminal* actions, [citing *Gillock*], [this Court] generally ha[s] *equated* the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Va.*, 446 U.S. at 733 (emphasis added). For legislators at all levels, moreover, the privilege extends to discovery as well as personal liability. *See, e.g., Bogan v, Scott-Harris*, 523 U.S. 44, 55 (1998) ("[I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators." (internal quotation marks omitted)).

Appellants also argue that the magistrate judge did not "actually perform[] . . . a balancing analysis." J.S. 26. The record is clearly to the contrary (*e.g.*, J.S. 213a-216a), as Appellants previously have *conceded*. App. 29a ("Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure."); App. 31a ("Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case.").

Appellants also cite *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), and claim that Senator Bruno "waived" legislative privilege by "willingly participat[ing] in the litigation." J.S. 28. But *Powell*, in which the legislators *intervened*, is precisely the opposite of this case, in which the legislators were *sued* by Appellants.[19]

Finally, Appellants argue that Fed. R. Civ. P. 26(a)(2)(B) and (b)(4)(B) required disclosure of all information known to expert witness Mark Burgeson, including the confidential legislative deliberations of State Senators and their aides. This is an extraordinarily odd argument because, again, the district court did not bar questioning of Mr. Burgeson at any of his *three* depositions or at trial. Appellants were free to ask any questions they desired, and they never sought to compel an answer on the ground that it had not been given or was incomplete. Thus, Appellants' assertion that the designation of Mr. Burgeson as an expert "opened up" a line

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[19] Appellants' appendix includes only one mention by the magistrate of the waiver argument. J.S. 202a-203a. Appellants did not object thereto, and the district court expressly stated that the magistrate had not reached the issue. J.S. 209a n.3. The jurisdictional statement does not identify or provide any other ruling or reasoning of the magistrate on the waiver claim. *See* Sup. Ct. R. 14.1(i), 18.3.

of questioning is a *non sequitur*: No line of questioning had been closed by the district court in the first place.

In all events, the questions that Appellants now say they, in retrospect, should have asked Mr. Burgeson as an expert would have been improper because they were well outside the scope of his expert report.[20] Evidence of individual legislators' *subjective* motivations would be wholly irrelevant to any effort by Appellants to challenge Mr. Burgeson's report, which simply identified and explained undisputed, *objective* facts about the various plans—*e.g.*, population deviations under different measures, county breaks, incumbent pairs, and the degree to which each new district encompassed the same population as a prior district. Indeed, the district court relied upon these undisputed facts themselves, rather than on any conclusions drawn by Mr. Burgeson, and the court's judgment thus would have been the same even if the report had been stricken entirely. Finally, Appellants obtained all relevant memoranda by Mr. Burgeson relating to the Legislature's line drawing, as evidenced by their heavy reliance on these memoranda in their summary judgment papers, at trial, and in their jurisdictional statement.

CONCLUSION

The judgment of the district court should be affirmed.

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[20] The district court did not preclude Appellants from deposing Mr. Burgeson as a *fact* witness on the subjective motivation of legislators in drawing district lines. The court only rejected Appellants' argument (App. 46a-47a) that deposition questioning on the subjective motives of legislators and their aides was within the appropriate scope of *expert* discovery. In addition, Plaintiffs only asked the district court to compel deposition testimony—not the production of documents—pursuant to the expert discovery rules. App. 47a.

Respectfully submitted,

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October 18, 2004

APPENDIX

CONTENTS

Demographic Table - Revised Plaintiffs' Senate Plan

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 01	306020	-52	-0.02%	
Plaintiffs' Dist. 02	306020	-52	-0.02%	
Plaintiffs' Dist. 03	306020	-52	-0.02%	
Plaintiffs' Dist. 04	306020	-52	-0.02%	
Plaintiffs' Dist. 05	305966	-106	-0.03%	
Plaintiffs' Dist. 06	305966	-106	-0.03%	
Plaintiffs' Dist. 07	305967	-105	-0.03%	
Plaintiffs' Dist. 08	305967	-105	-0.03%	
Plaintiffs' Dist. 09	305967	-105	-0.03%	
Plaintiffs' Dist. 10	302270	-3802	-1.24%	
Plaintiffs' Dist. 11	302270	-3802	-1.24%	
Plaintiffs' Dist. 12	302269	-3803	-1.24%	
Plaintiffs' Dist. 13	302269	-3803	-1.24%	
Plaintiffs' Dist. 14	302270	-3802	-1.24%	
Plaintiffs' Dist. 15	302270	-3802	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 16	302269	-3803	-1.24%	
Plaintiffs' Dist. 17	302270	-3802	-1.24%	
Plaintiffs' Dist. 18	302270	-3802	-1.24%	
Plaintiffs' Dist. 19	302270	-3802	-1.24%	
Plaintiffs' Dist. 20	302270	-3802	-1.24%	
Plaintiffs' Dist. 21	302269	-3803	-1.24%	
Plaintiffs' Dist. 22	302270	-3802	-1.24%	
Plaintiffs' Dist. 23	302269	-3803	-1.24%	
Plaintiffs' Dist. 24	302269	-3803	-1.24%	
Plaintiffs' Dist. 25	302271	-3801	-1.24%	
Plaintiffs' Dist. 26	302270	-3802	-1.24%	
Plaintiffs' Dist. 27	302270	-3802	-1.24%	
Plaintiffs' Dist. 28	302270	-3802	-1.24%	
Plaintiffs' Dist. 29	302270	-3802	-1.24%	
Plaintiffs' Dist. 30	302271	-3801	-1.24%	
Plaintiffs' Dist. 31	302271	-3801	-1.24%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 32	302270	-3802	-1.24%	
Plaintiffs' Dist. 33	302270	-3802	-1.24%	
Plaintiffs' Dist. 34	302269	-3803	-1.24%	
Plaintiffs' Dist. 35	302270	-3802	-1.24%	
Plaintiffs' Dist. 36	302271	-3801	-1.24%	
Plaintiffs' Dist. 37	302269	-3803	-1.24%	
Plaintiffs' Dist. 38	302270	-3802	-1.24%	
Plaintiffs' Dist. 39	312031	5959	1.95%	
Plaintiffs' Dist. 40	306218	146	0.05%	
Plaintiffs' Dist. 41	311538	5466	1.79%	
Plaintiffs' Dist. 42	309961	3889	1.27%	
Plaintiffs' Dist. 43	316361	10289	3.36%	
Plaintiffs' Dist. 44	314862	8790	2.87%	
Plaintiffs' Dist. 45	316334	10262	3.35%	
Plaintiffs' Dist. 46	309725	3653	1.19%	
Plaintiffs' Dist. 47	316644	10572	3.45%	

DISTRICT: Revised Plaintiffs' Plan	Population	Deviation from Ideal Population	Deviation Percentage	[Additional Columns Omitted]
Plaintiffs' Dist. 48	301747	-4325	-1.41%	
Plaintiffs' Dist. 49	315934	9862	3.22%	
Plaintiffs' Dist. 50	316661	10589	3.46%	
Plaintiffs' Dist. 51	303721	-2351	-0.77%	
Plaintiffs' Dist. 52	316662	10590	3.46%	
Plaintiffs' Dist. 53	316481	10409	3.40%	
Plaintiffs' Dist. 54	302684	-3388	-1.11%	
Plaintiffs' Dist. 55	302683	-3389	-1.11%	
Plaintiffs' Dist. 56	315692	9620	3.14%	
Plaintiffs' Dist. 57	315623	9551	3.12%	
Plaintiffs' Dist. 58	305002	-1070	-0.35%	
Plaintiffs' Dist. 59	307538	1466	0.48%	
Plaintiffs' Dist. 60	307538	1466	0.48%	
Plaintiffs' Dist. 61	307539	1467	0.48%	
Plaintiffs' Dist. 62	307539	1467	0.48%	

EXPERT REPORT OF MARK BURGESON

* * *

Population Equality

New York State has a total population of 18,976,457. Based on a 62-seat Senate, the ideal size of a Senate district is 306,072. The overall deviation for the 2002 Senate plan is 9.78%. The average deviation of the 2002 Senate plan is 2.2%. Each and every single district in the 2002 Senate plan is within a 5.0% deviation of the ideal. [See appendix 1.] Under the traditional standards of redistricting, these deviations fall within acceptable standards.

Based on information I have reviewed regarding other redistricting plans, the population deviations of the 2002 Senate plan are well within the normal range for New York State and nationwide. As a comparison, the New York State Assembly plan has an overall deviation of 9.43% and has an average deviation of 2.67%. [See appendix 2.] A check of the National Conference of State Legislatures' (NCSL)website: http://www.ncsl.org/programs/legman/redistrict/redistpopdev.htm) indicates that there are 24 states whose upper legislative house's overall deviation exceeds 9%, and 25 states whose lower legislative house's overall deviation exceeds 9%. [See appendix 3.] I have been provided with population summaries for two additional upper house plans and three additional lower house plans with deviations exceeding 9%. [See appendix 4.] With more than half of the state legislative houses having total deviations above 9%, the total deviation of the 2002 Senate plan can hardly be described as unusual.

I have also been provided with the average deviations for each of the state plans with greater than 9% total deviation. [See appendix 5.] Review of this information shows that only one of the 54 plans has a lower average deviation than the 2002 New York Senate plan. The average

of the average deviations in these plans is 3.03% for the lower houses and 2.93% for the upper houses, well in excess of the 2.22% average deviation for the 2002 New York Senate plan. Significantly, among the plans with comparable or greater deviations than the 2002 Senate plan are plans ordered into place by federal courts in Texas and New Mexico. New Mexico's two plans have overall deviations of 9.6% and 9.7%, and average deviations of 2.83% and 2.73%. For the Texas house, those figures are 9.74% total deviation and 2.65% average deviation. [See appendix 6.] It is my understanding that Dr. Beveridge did not consider the 2002 Assembly plan, plans ordered by other courts, nor other plans in other states. [Deposition transcript ("Tr.") at 126-29.] He did acknowledge, however, that the total and average deviations of the 2002 Senate plan do not violate equal population principles. [Tr. at 144.]

It has been noted that the slightly overpopulated districts in the 2002 Senate plan are districts 10-38, and that this pattern cannot reasonably be due to random chance. In my experience, the numerous legal requirements and other traditional principles of redistricting will never result in a plan coming together in a random manner. With respect to population equality, I have never understood equality to mean that overpopulated districts must be scattered throughout the state, rather than adjacent to one another.

In my experience, there have been many instances of large groupings of adjacent districts that are either overpopulated or underpopulated. For example, in the 1992 Senate plan, districts 1 through 9 were all underpopulated and districts 10 through 36 were all overpopulated. [See appendix 7.] Similarly, in the 2002 Assembly plan, districts 1 through 21 are all overpopulated and districts 22 through 63 are all underpopulated. [See appendix 2.] And, all the other Senate plans submitted by plaintiffs and/or the Senate Minority underpopulate districts 10 through 38, and two of

those plans overpopulate districts 39-62. [See appendix 8.] As Dr. Beveridge acknowledges [Tr. at 137], this type of pattern in other plans is just as unlikely to happen at random as the pattern in the 2002 Senate plan.

These patterns are almost always due to the "block-on-border" rule. Under the block on border rule in New York's Constitution, the difference in population between two adjacent districts within a county may not be greater than the population of any block on the border. In other words, if two adjacent districts could be made more equal in population by shifting a block on the border from one district to the other, then the rule generally requires that the shift be made. Since it is almost always possible to find blocks of very small populations on the border, the result of this rule is that those two districts will almost always be nearly identical in population. Alterations made to any one of those two districts, moreover, will result in a "ripple effect".

The "ripple effect" refers to adjustments, which are required to other districts when adjustments are made to one or more specific districts. That is, when a change is made to one particular district, that change will almost certainly mandate change to adjacent districts, and then to those adjacent, and so on throughout the entire area. Thus, equality of districts in urban areas can be shown to be the result of "block-on-border" and the "ripple effect", not random chance.

I understand that much of the complaint regarding the 2002 Senate plan revolves around the claim that "downstate" has disproportionate representation. I am not aware of any redistricting principle that makes disproportionality among regions relevant when the deviations between individual districts are small. As we have just seen, redistricting plans in New York typically include regions that are either overpopulated or underpopulated. I also understand that the 2002 Senate plan is being criticized for improper

mathematical "rounding down" of the number of "downstate" Senate districts by a fraction, instead of "rounding up" by a fraction as the Revised Plaintiffs' plan does. Again, I am not familiar with any redistricting principle that focuses on trivial differences among "regions".

If one were to engage in an analysis of different geographic regions, New York State could be broken down into three main geographic regions: Long Island (Nassau and Suffolk counties), New York City (the five New York City counties of Bronx, New York, Kings, Richmond and Queens), and "upstate" (the 55 counties north and west of the Bronx/Westchester county line). As shown in table 1, based on a strict, mathematically-equal apportionment (dividing the region's population by the ideal Senate district size – 306,072), Long Island would be allotted 8.9 Senate districts, New York City would be allotted 26.2 Senate districts and "upstate" would be allotted 26.8 Senate districts.

Table 1.

Region	Population	Pop/Ideal Size	SD Ratios
Long Island	2,753,913	2,753,913/306,072	8.9
New York City	8,008,278	8,008,278/306,072	26.2
Upstate	8,214,266	8,214,266/306,072	26.8

The 2002 Senate plan apportioned Senate districts, based on the above numbers, as follows:

Table 2a.

Region	Ratios	SD's
Long Island	8.9	9
New York City	26.2	26
Upstate	26.8	27

As table 2a shows, the 2002 Senate plan properly apportions control of the appropriate number of Senate districts consistent with the regions' population. There are

two Senate districts (34 and 36), which extend into "upstate" Westchester (total population of both districts in Westchester is 135,033). I agree with Dr. Beveridge that the representatives of such districts can be expected to vigorously represent New York City interests [Tr. at 96-97], such that New York City residents have 26 advocates in the Senate. If the portions extending into Westchester are nevertheless included in the "upstate" numbers, the chart is as follows:

Table 2b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	25.6	+2.2%
Upstate	26.8	27.4	- 2.1%

Comparable tables for the Revised Plaintiffs' plan are contained in tables 3a and 3b.

Table 3a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	27	- 3.1%
Upstate	26.8	26	+3.2%

The two Bronx/Westchester districts in the Revised Plaintiffs' plan are 35 and 36. Table 3b shows the data if the Westchester portions of these districts are included "upstate".

Table 3b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	26.2	26.5	- 1.3%
Upstate	26.8	26.5	+1.3%

Thus, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives New York City control of 27 districts where a more proportional apportionment would give New York City control of 26 districts, more in line with the population of the region. In looking at both plans, the differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the New York City region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

If, as Special Master Lacey and Prof. Grofman stated in the hearing before this same Federal panel [May 20, 2002 Tr. at 6, 56], the crucial divide between "upstate" and "downstate" is the Bronx/Westchester line, a slightly different average deviation occurs. Looking at Long Island and New York City as a whole then, one would see that that region would be strictly apportioned 35.2 districts, is allotted 34.6 districts and controls 35 districts under the 2002 Senate plan, as shown in the following table.

Table 4a.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	34.6	+1.6%
Upstate	26.8	27.4	- 2.1%

And the Revised Plaintiffs' plan.

Table 4b.

Region	Ratios	SD's	Avg. Dev.
LI/NYC	35.2	35.5	- 1.0%
Upstate	26.8	26.5	+1.3%

Again, as above, in contrast to the 2002 Senate plan, the Revised Plaintiffs' plan gives LI/NYC control of 36 districts where a more proportional apportionment would give LI/NYC control of 35 districts, more in line with the population of the region. In looking at both plans, the differences between plans are fractional. In other words, the Revised Plaintiffs' plan underpopulates the LI/NYC region by a fraction of a district, whereas the 2002 Senate plan overpopulates the same region by a fraction of a district.

As stated above, to the extent that there is any vague definition of "upstate", Westchester is generally considered an "upstate" county, but for argument's sake, following is a table showing the ratios if Westchester is included with New York City.

Table 5a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	28.6	+2.0%
Upstate	23.8	24.4	- 2.4%

And the Revised Plaintiffs' plan.

Table 5b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City/ Westchester	29.2	29.5	- 1.1%
Upstate	23.8	23.5	+1.4%

Here again, the 2002 Senate plan overpopulates this region by a fraction of a district, whereas the Revised Plaintiffs' plan underpopulates the region by a fraction of a district. In addition, the New York City/Westchester region under the 2002 Senate plan controls 29 Senate districts, which is more proportionate to its population than the Revised Plaintiffs' plan, which gives the region control of 30 Senate districts.

The most far-fetched definition of "downstate" I have seen includes half of Westchester, Rockland and two towns in Orange County. In my experience, this is the first time the Orange County towns of Warwick and Tuxedo are alleged to have more in common with Brooklyn than with their neighboring Orange County towns of Minisink or Wawayanda. Similarly, I agree with Dr. Beveridge that Ossining (included in "downstate" under this definition) has less in common with New York City than Ossining has with Mount Kisco (included in "upstate" under this definition). [Tr. at 101-02.] The pertinent data for that definition of "downstate" is nevertheless shown in tables 6a and 6b.

Table 6a.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	29.6	+2.1%
Upstate	22.9	23.4	- 2.7%

And the Revised Plaintiffs' plan.

Table 6b.

Region	Ratios	SD's	Avg. Dev.
Long Island	8.9	9	- 0.02%
New York City	30.2	30.5	- 0.9%
Upstate	22.9	22.5	+1.2%

No matter how the regions are defined, the 2002 Senate plan slightly underpopulates "upstate" Senate districts and slightly overpopulates New York City Senate districts, and the Revised Plaintiffs' plan overpopulates "upstate" Senate districts and underpopulates New York City Senate districts. Both plans apportion nine districts to Long Island. As I stated above, I have never known it to be significant whether a plan results in underpopulation or overpopulation of a region by a fraction of a district. I certainly know of no basis for concluding that underpopulation or overpopulation

by 0.6 districts is unacceptable, while underpopulation or overpopulation by 0.4 districts is acceptable.

Since I agree with Dr. Beveridge that neither plan provides New York City with perfect proportionality [Tr. at 69], I have examined whether overpopulating rather than underpopulating New York City districts has an effect on compliance with legitimate redistricting principles. In looking at the enacted plan, one can determine numerous legitimate advantages to overpopulating, rather than underpopulating, the New York City Senate districts:

1. First of all, by slightly overpopulating New York City Senate districts rather than underpopulating New York City (as the Revised Plaintiffs' plan does), the 2002 Senate plan provides almost perfect proportionality in terms of the number of Senate districts entitled to the city and the number of districts controlled by the city. That is, there are 24 Senate districts wholly in New York City and two whose overwhelming majority lie in Bronx County, thus allowing the city to control 26 districts, an almost perfect proportionality. By contrast, the Revised Plaintiffs' plan, which allots 27 districts to the region, is not proportional.

2. In addition, by slightly overpopulating the New York City Senate districts rather than underpopulating them, the 2002 Senate plan creates a much greater proportionality in terms of the number of people eligible to vote, the number of people enrolled to vote and the number of people who actually vote. Although not an attorney, I understand that the equal population principle is commonly known as "one person, one *vote*".

An accurate method of measuring voting strength as per "one person, one vote" is using eligible voters; that is, the voting age citizen population. I understand that Dr. Beveridge has sought to adjust for prison population on the theory that, for equal population purposes, representatives

should not be "given the benefit of people who can't vote." [Tr. at 296.] But Dr. Beveridge did not look at the number of eligible voters or relative voting rates, so he is unable to say that the votes of voters in "downstate" districts are worth less than the votes of voters in "upstate" districts. [Tr. at 159-60.]

Using Dr. Beveridge's table 27, New York State has a citizen voting age population of 12,513,359. [See appendix 9.] Using the same method as used to calculate the ideal Senate district size (total state population divided by 62) to calculate the average citizen population results in an average citizen voting age population per Senate district of 201,828 (12,513,359/62). A table showing the average citizen voting population per Region and average deviations from the average citizen population of the 2002 Senate plan is as follows:

Table 8a.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	184,518	- 8.6%
Upstate	215,470	+6.8%

This table reveals a substantial shift in the deviations from the average citizen voting age populations per Senate district. To emphasize, the average New York City Senate districts in the 2002 Senate plan are *underpopulated* according to citizen voting age population on an average of 8.6%. [Note: Dr. Beveridge's data do not break out by county within district, so the Westchester portion of the 34th and 36th are included in the New York City numbers. If those data were available, the averages would be altered slightly, not significantly. This note applies to tables 8, 9 and 10.] Long Island and "upstate" are overpopulated according to citizen voting age population by 4.5% and 6.8% respectively.

By underpopulating the New York City Senate districts, the Revised Plaintiffs' plan, by necessity, would further increase the negative 18+ citizen deviation for New York City districts and increase the deviation "upstate". This is illustrated in Table 8b, which is taken from Dr. Beveridge's report table 28. [See appendix 10.]

Table 8b.

Region	Avg. Citizen 18+ Pop.	Avg. Dev.
Long Island	210,911	+4.5%
New York City	177,573	-12.0%
Upstate	223,872	+15.4%

These patterns are even more starkly evident when examining voter enrollment and actual voter turnout. Appendices 11 to 12 contain SAS (Statistical Analysis Software from The SAS Institute) files generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. These files contain enrollment data by Senate district for 1996, 1998 and 2000. There are also files containing statewide election results by Senate district for the 1996 and 2000 presidential elections and the 1998 gubernatorial election. There are three files containing votes cast for state Senate in 1996, 1998 and 2000 by new Senate district. From these files are culled data to examine the average potential voter participation (enrollment) by Senate district for each geographic region. Again, the same methodology is used to calculate the overall statewide average enrollment/votes per Senate district and then to calculate the average enrollment/votes per Senate district in each region and the deviation from the statewide average. Table 9a illustrates the statewide enrollment/votes averages.

Table 9a.

Year	Enrollment	President/Governor	St. Senate*
2000	154,840	112,477	85,432
1998	153,269	80,406	64,786
1996	144,837	103,835	83,035

*Because of the fact that there is voter falloff going down the ballot, differences in Senate district lines, as well as many uncontested races, the State Senate numbers are calculated using the total votes cast minus the Blank/Void/Missing vote.

Table 9b illustrates the average enrollment/votes under the 2002 Senate plan for each geographic Region and year.

Table 9b.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	132,814 (-14.2%)	168,420 (8.8%)
Pres	130,488 (16.0%)	89,827 (-20.1%)	128,284 (14.1%)
St.Sen	107,384 (25.7%)	66,471 (-22.2%)	96,375 (12.8%)
1998			
Enr	167,561 (9.3%)	132,077 (-13.8%)	168,912 (10.2%)
Gov	90,237 (12.2%)	60,488 (-24.8%)	96,310 (19.8%)
St.Sen	79,175 (22.2%)	46,313 (-28.5%)	77,778 (20.1%)
1996			
Enr	156,342 (7.9%)	126,700 (-12.5%)	158,466 (9.4%)
Pres	118,180 (13.8%)	79,899 (-23.1%)	122,103 (17.6%)
St.Sen	101,048 (21.7%)	56,439 (-32.0%)	102,641 (23.6%)

This table clearly illustrates that, in terms of the relative value of potential votes and actual votes cast, the 2002 Senate plan results in greater vote value (i.e. underpopulates) for the New York City Senate districts and lesser vote value (i.e. overpopulates) for the Long Island and "upstate" districts. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is

the equivalent of .69 votes in a district on Long Island and .70 votes in a district "upstate".

Table 10 illustrates the average enrollment/votes per region for the three years, and the deviation from the statewide average for the Revised Plaintiffs' plan.

Table 10.

Year	Long Island	New York City	Upstate
2000			
Enr	177,731 (14.8%)	127,492 (-17.7%)	175,317 (13.2%)
Pres	130,488 (16.0%)	86,051 (-23.5%)	133,685 (18.9%)
St.Sen	107,384 (25.7%)	63,565 (-25.6%)	100,543 (17.7%)
1998			
Enr	167,561 (9.3%)	126,802 (-17.3%)	175,806 (14.7%)
Gov	90,237 (12.2%)	57,889 (-28.0%)	100,387 (24.9%)
St.Sen	79,175 (22.2%)	44,254 (-31.7%)	81,126 (25.2%)
1996			
Enr	156,342 (7.9%)	121,625 (-16.0%)	164,958 (13.9%)
Pres	118,180 (13.8%)	76,532 (-26.3%)	127,223 (22.5%)
St.Sen	101,048 (21.7%)	53,978 (-35.0%)	106,974 (28.8%)

By underpopulating the New York City Senate districts and overpopulating the "upstate" Senate districts, the Revised Plaintiffs' plan even further exacerbates the inequity between the New York City Senate districts and the "upstate" Senate districts in terms of voter enrollment and actual voter turnout. In other words, one vote cast in the 2000 Presidential election in a New York City Senate district is the equivalent of .66 votes in a district on Long Island and .64 votes in a district "upstate".

3. The 2002 population of Queens County is 2,229,379, and is thus entitled to 7.28 ratios (mathematically ideal district sizes). Seven whole districts within Queens results in a district population of 318,483, which has a deviation from the ideal of 12,411, or 4.05%. Six districts or

eight districts drawn wholly within Queens would exceed acceptable deviations: 21.39% and 8.95%, respectively. In the 2002 Senate plan, seven districts are drawn wholly within Queens, and the remaining 19 New York City districts are overpopulated by a minimal 1.69%. The "Composite" plan in Dr. Beveridge's report, table 23, has seven districts drawn wholly within Queens, and the remaining 20 New York City districts are underpopulated by 2.93%. Thus, another advantage of the 2002 Senate plan in the relatively slight overpopulation of the New York City Senate districts is that it allows the county of Queens to remain whole and, at the same time, keeps the remaining New York City districts under 2% deviation. By underpopulating the New York City region, as Plaintiffs seek to do, the choice must be made to either keep Queens whole and approach a 3% deviation for the remainder of the New York City districts (as under the "Composite" plan), or sacrifice the Queens county line (as under the Revised Plaintiffs' plan).

4. Another advantage to the slight overpopulation of New York City Senate districts and the slight underpopulation of the "upstate" Senate districts in the 2002 Senate plan is that it achieves a balance with the 2002 Assembly plan, which underpopulates the New York City Assembly districts and overpopulates the Long Island and "upstate" Assembly districts. The Assembly apportionment is as follows [see appendix 2]:

Table 11.

Region	Ratios	SD's	Avg. Dev.
Long Island	21.8	21	+3.7%
New York City	63.3	65	- 2.6%
Upstate	64.9	64	+1.5%

In light of the underpopulation of the New York City Assembly districts, underpopulation of New York City

Senate districts would have increased the overall "upstate"/"downstate" deviations in the legislature as a whole. An examination of these numbers reveals that a balance of sorts has been achieved when looking at the legislative plan as a whole: the 2002 Senate plan has slightly increased representation (over a strict, mathematically equal apportionment) of "upstate" New York and slightly decreased representation of New York City, and Long Island is almost perfectly apportioned; while the 2002 Assembly plan, to a slightly greater degree, has increased representation on New York City, and decreased representation of Long Island and "upstate".

Taken as a whole, the combined state legislative balance as enacted is as follows:

Table 12a.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	42.7% (90.6/212)
Upstate	43.3%	43.1% (91.4/212)

This shows a slightly *greater* representation percentage for New York City than warranted under strict mathematical precision and a slight underrepresentation for Long Island and "upstate". Table 12b illustrates the same calculations using the Revised Plaintiffs' plan.

Table 12b.

Region	Pop. Pct.	Representative Pct.
Long Island	14.5%	14.2% (30/212)
New York City	42.2%	43.2% (91.5/212)
Upstate	43.3%	42.7% (90.5/212)

Therefore, in terms of total representation in both houses of the New York State Legislature, both the 2002 Senate plan and the Revised Plaintiffs' plan overrepresent

the New York City area. This overrepresentation is greater in the Revised Plaintiffs' plan.

5. Another advantage in the relatively slight under-population of "upstate" districts is the fact that by having slightly less population, the geographic size of the districts is also smaller. Generally speaking, this will presumably result in more effective representation, as senators would require less traveling to meet with constituents throughout the district. Under the 2002 Senate plan, the average area of an "upstate" Senate district is 1,765 square miles. By contrast, the average area of an "upstate" Senate district under the Revised Plaintiffs' plan is 1,823 square miles. [See appendix 13.]

6. Yet another advantage of underpopulating rather than overpopulating the "upstate" area is that it serves the neutral principle of avoiding incumbent pairs. The 2002 Senate plan increases the size of the Senate from 61 to 62 seats and adds the new district to New York City. As a result, even with the slight overpopulation of New York City districts, the city has one more district than in the 1990's. Therefore, the overpopulation of New York City districts does not inevitably result in the pairing of incumbents.

By contrast, as acknowledged by Dr. Beveridge [Tr. at 260], an "upstate" incumbent pairing is the inevitable result of underpopulating rather than overpopulating the New York City Senate districts. By overpopulating the "upstate" districts, the Revised Plaintiffs' plan provides "upstate" with one fewer district than in the 1990's, which requires the pairing of at least two "upstate" incumbent Senators. Therefore, serving the important redistricting principle of avoiding incumbent pairs is another advantage of the slight overpopulation of the New York City districts and the slight underpopulation of the "upstate" districts in the 2002 Senate plan.

7. Similarly, by retaining the same number of "upstate" districts as in the 1990's, the 2002 Senate plan better preserves the cores and configurations of existing districts. As discussed below, this was the primary redistricting principle, after compliance with federal law, followed by Prof. Grofman and Special Master Lacey in drawing the Court's Congressional plan.

Appendices 14 and 15 contain "migration" reports generated by the Task Force's Redistricting application for the 2002 Senate plan and the Revised Plaintiffs' plan, respectively. They measure the percentage of an "old" (1992 SD) district that is within a newly drawn district, and the percentage of the new district that is made up of population from the old district. (Appendix 16 contains similar reports showing the overlap between the 2002 Senate plan and the Revised Plaintiffs' plan.) For example, in the 2002 Senate plan, the newly drawn 6th Senate district contains 97.3% of the population of the "old" 6th Senate district, and 98.9% percent of the new district 6 is made up of population from the "old" district 6.

Table 13 summarizes the migration reports showing the degree of preservation of existing districts for the 2002 Senate plan and the Revised Plaintiffs' plan "upstate".

Table 13.

Percentage of Population of 1992 Senate Districts contained in the most equivalent district in the newly drawn plans

SD	2002 Sen. Plan	Rev. Plain. Plan
35	84.3%	
37	87.7%	74.6%
38	100 %	57.5%
39	100 %	93.0%
40	98.5%	91.6%
41	100 %	77.2%
42	90.4%	59.2%
43	99.9%	60.8%
44	97.9%	93.6%
45	100 %	69.8%
46	100 %	82.9%
47	90.2%	59.2%
48	98.6%	57.1%
49	86.5%	44.9%
50	98.6%	40.8%
51	76.7%	92.3%
52	96.0%	66.9%
53	83.9%	55.5%
54	95.5%	83.0%
55	92.2%	91.6%
56	88.7%	29.5%
57	97.2%	70.4%
58	70.3%	73.4%
59	82.5%	74.5%
60	80.0%	59.7%
61	100 %	85.1%
62	94.5%	99.9%
AVG	92.2%	70.9%

Accordingly, from the calculations above, under the 2002 Senate plan, with an "upstate" average district size of 299,231, this means, on average, 23,340 people will have different representation in the State Senate than they did in

the 1990's. In the Revised Plaintiffs' plan, that number, based on an average "upstate" district size of 310,048, would rise to an average of 90,224. In "upstate", the Revised Plaintiffs' plan moves almost four times as many people to new districts.

In rearranging the "upstate" districts, due in part to the overpopulation of that area, the Revised Plaintiffs' plan is inconsistent with other principles in addition to preserving the cores of existing districts. Another ancillary principle is the preservation of certain geographical characteristics of Senate districts (e.g. maintaining southern tier districts, a north country district, etc.). One important geographical feature, one that Prof. Grofman mentioned in his affidavit, is the Hudson River. [See appendix 17, paragraph 49e.] The 2002 Senate plan maintains that historical boundary intact south of Saratoga County (where population requirements mandate combinations of towns/counties). [See appendix 18.] The Revised Plaintiffs' plan crosses the Hudson River three times south of Saratoga County. [See appendix 19.]

* * *

Finally, in assessing the advantages of a slight overpopulation rather than underpopulation of the New York City Senate districts, it is important to consider the viability of plans submitted to the Task Force for the Legislature's consideration, especially those which illustrated the underpopulation of New York City Senate Districts versus the overpopulation of "upstate" Senate districts. The public record shows that no such plans for a 62 seat Senate were submitted for consideration until one day before the scheduled redistricting vote. And even when submitting this plan to the Task Force on the day before the scheduled vote, Senator Dollinger made it clear that he was "not submitting this plan as a proposal for the Task Force to consider and adopt" but rather as "a legal benchmark" for the record. [See appendix 20.]

Upon review of this plan, it is clear that there were numerous gratuitous incumbent pairings. Appendix 21 contains reports showing incumbent pairs generated by the Task Force's redistricting application. It is a practical flaw for a plan to have excessive incumbent pairings. For example, Special Master Lacey rejected certain Congressional proposals primarily due to the "lack of political fairness" in the nature of two incumbent pairs that were made necessary by the loss of two districts. [See appendix 22 at 8-9.] The plan submitted by Senator Dollinger at the last minute, however, clearly would have resulted in Democratic partisan advantage by pairing incumbents. The plan paired six of the nine Republican senators on Long Island: Lack/Marcellino, Balboni/Hannon and Skelos/Fuschillo; four "upstate" Republican senators: Rath/Volker and Nozzolio/Hoffmann; in addition, three sets of R/D senators (Onorato/Maltese, Gentile/Marchi and Velella/Gonzalez).

Obviously, in the 10 R/R matchups, five Republican members would be eliminated. Appendix 23 contains SAS reports showing party enrollment and the results of 2000 Presidential election, the 1998 Gubernatorial election and the 1996 Presidential election for each district in the Dollinger 62 seat plan. Similar reports for the enacted plan and the Revised Plaintiffs' plan are contained in appendices 24 and 25, respectively. In the R/D matchups, Democratic incumbent Onorato would clearly defeat Republican Maltese in a district in which Al Gore outpolled George Bush in the 2000 presidential election by 63.0% to 26.7% and where Bill Clinton outpolled Bob Dole in the 1996 presidential election by 63.7% to 25.6%. Similarly, incumbent Democrat Gentile would defeat Marchi in a district where Marchi has previously represented about 29.4% of the district to approximately 67.4% for Gentile, and in which Clinton outpolled Dole 54.6% to 34.4% and Gore outpolled Bush 56.8% to 36.5%. [Appendix 26 contains the migration

reports for the Dollinger 62 seat plan.] Finally, Velella would clearly lose to Gonzalez, an Hispanic Democrat incumbent, in a district which is approximately 59.2% of Gonzalez' existing constituency and only 15.5% percent of Velella's existing constituency, is 55% Hispanic, and has typically voted heavily Democratic in the past (Clinton 84.7%, Gore 84.3%; even a popular Republican incumbent governor, George Pataki, was outpolled by Peter Vallone in this district 63.5% to 17.6% in the 1998 gubernatorial election). The Senate Minority's last-minute plan would have resulted in a loss of eight Republican senators from the pairings alone. As Prof. Grofman observed in his report to the Special Master, even a much more limited pairing of incumbents can be "a key indicator" of "a partisan gerrymander" (point 29). The partisan unfairness of the Senate Minority plan is unmistakable.

Significantly, the plaintiffs apparently saw the same thing, as they reduced the number of incumbent pairing in their Revised Senate plan to four: Lack/Marcellino, Hevesi/Maltese, Velella/Gonzalez and Volker/Stachowski. Lack/Marcellino and Velella/Gonzalez are discussed above. Hevesi/Maltese are matched in a district in which Clinton outpolled Dole in the 1996 presidential election by 64.2% to 26.2% and Gore outpolled Bush in the 2000 presidential election by 66.5% to 27.0%. In the case of Volker/Stachowski, they are matched in a district in which Clinton outpolled Dole 53.8% to 30.6% and Gore outpolled Bush by 56.3% to 36.4%. As discussed above, Dr. Beveridge characterized these pairings as inevitable; thus demonstrating that the Revised Plaintiffs' plan is "inevitably" worse than the 2002 Senate plan concerning the neutral principle of avoiding incumbent pairs. In any event, this plan was presented neither to the Task Force nor the Legislature, and was first disclosed in litigation after the Legislature had enacted its 2002 plan. Again, the only alternative 62 seat plan was submitted by Senator Dollinger,

as mentioned above. Even if submitted in a timely fashion, a plan that eliminates eight members of the majority cannot be expected to receive serious consideration in the redistricting process.

* * *

Dated: September 12, 2003

* * *

SUPPLEMENTAL STIPULATIONS OF UNDISPUTED FACTS

WHEREAS by Order dated October 20, 2003, the Court ordered all parties to submit a stipulation of agreed facts; and

WHEREAS the parties have submitted to the Court a Stipulation of Undisputed Facts dated October 27, 2003;

NOW THEREFORE, IT IS HEREBY FURTHER STIPULATED AND AGREED by and between counsel for Plaintiffs and counsel for Defendants, as a supplement to stipulations 1 – 176 contained in the parties' October 27, 2003 Stipulation of Undisputed Facts, as follows:

* * *

229. The Enacted 2002 Plan pairs four of the 2000 incumbents. This includes two Democrat-Democrat pairs:

(a) Senators Stavisky and Hevesi; and
(b) Senators Gentile and Lachman.

* * *

233. The Plaintiffs' Original Plan pairs fourteen of the 2000 incumbents. This includes four Republican-Republican pairs:

(a) Senators Lack and Marcellino;
(b) Senators Balboni and Hannon;
(c) Senators Hoffman and Nozzolio; and
(d) Senators Rath and Volker.

The Plaintiffs' Original Plan also includes three Democrat-Republican pairs:

(e) Senators Hevesi (D) and Maltese (R);
(f) Senators Gentile (D) and Marchi (R); and
(g) Senators Gonzalez Jr. (D) and Velella (R).

* * *

Dated: November 3, 2003

* * *

PLAINTIFFS' OBJECTIONS TO THE PRIVILEGE RULINGS OF MAGISTRATE JUDGE FRANK MAAS AND REQUESTS FOR RULINGS ON UNRESOLVED ISSUES

Plaintiffs, by and through their attorneys, hereby submit these objections to the privilege rulings made by Magistrate Judge Frank Maas.

Background

In his July 28, 2003 Opinion and Order, Judge Maas held that any legislative privilege asserted by Senator Bruno is, at best, a *qualified* privilege. *See* Jul. 28 Opinion and Order at 21. Accordingly, Judge Maas engaged in a sensitive balancing of Senator Bruno's claimed need for secrecy and Plaintiffs' competing need for disclosure. Judge Maas found that Plaintiffs' claims "raise[] serious charges about the fairness and impartiality of some of the central institutions of our state government," that the withheld materials are highly relevant to Plaintiffs' claims, that the materials cannot be obtained through other means, and that the presence of non-legislator members on LATFOR "tends to weaken any claim" that its deliberations and documents must remain secret. *Id.* at 23-35. "For all of these reasons," Judge Maas ordered Senator Bruno to produce all documents except those reflecting communications that "took place outside LATFOR" or "after the proposed redistricting plan reached the floor of the legislature." *Id.* at 26; *see also id.* at 29.

On August 18, 2003, this Court affirmed Judge Maas's Opinion and Order in its entirety. *See* Aug. 18 Order at 2 (*"For the reasons set forth below, the court affirms Magistrate Judge Maas's Order."*) (emphasis in original). This Court found that Judge Maas's Opinion and Order was "neither contrary to law nor clearly erroneous." *Id.* at 3. Reviewing his conclusions *de novo*, this Court held that Judge Maas "correctly analyzed the law pertaining to

legislative privilege," that "legislative privilege is not absolute," that Judge Maas considered the correct factors, and that he "appropriately balanced these factors" in concluding that the information Plaintiffs seek is discoverable. *Id.* at 3.

Subsequent to this Court's August 18 Order, Judge Maas engaged in a further analysis of which documents were created and disseminated within LATFOR (and therefore must be produced), and which documents were created and disseminated only "outside" of LATFOR (and therefore may be withheld as privileged). Applying this standard, Judge Maas ordered Defendants to produce all of the withheld documents that were sent to Debra Levine (the Executive Director of LATFOR) or Vinny Bruy (a former non-legislator member of LATFOR). Tr. Sep. 3, 2003 at 14:22-15:10, 17:21-23.

Judge Maas then engaged in a document-by-document in camera review of the remaining purportedly privileged documents. With one exception, Judge Maas held that Plaintiffs are not entitled to any of the documents that reflect requests by Senators to adjust the lines of their districts in ways they believed would enhance their chances to prevail in future elections. *See* Sep. 10, 2003 Memorandum Decision at 6.[1] Judge Maas then ordered Defendants to produce documents relating to the increase in the size of the Senate from 61 to 62 seats, finding that this "was not an issue the Senate majority sought to keep carefully cloistered," as reflected by the fact that LATFOR voluntarily posted on its website a legal memorandum that

[1] Judge Maas did order Defendants to produce one such document – a December 13, 2001 memorandum from Mr. Burgeson to Senator Skelos discussing the "removal of black population" in Queens. Judge Maas found that, with respect to this document, "the qualified privilege must yield to the plaintiffs' need for information." Memorandum Decision at 7.

Mr. Carvin sent Senators Bruno and Skelos on that subject. *Id.* at 7-8.

With respect to depositions, Judge Maas held that Plaintiffs may depose LATFOR staff, but that Plaintiffs may not depose individual legislators or the members of their staffs. *See* Tr. Sep. 11, 2003 at 12:25-14:22.[2]

Overall, Plaintiffs believe that Judge Maas's privilege rulings fairly and appropriately balanced the parties' competing interests, as he was required to do by the qualified privilege standard that governs this case. We take issue with Judge Maas's rulings only in a few limited respects. To begin with, Judge Maas should have held that whatever legislative privilege applies has been waived – both because of the active role that Senator Bruno voluntarily assumed as lead defendant in this case, and because of the documents that he has selectively and strategically produced. Second, Judge Maas should have required Defendants to produce all documents relating to the specific Senate Districts that are being challenged.

Finally, in light of the substantial delay in resolving the legislative privilege issues (which Plaintiffs have taken every possible step to avoid since this Court's ruling on Defendants' motion to dismiss in June), we request that this Court resolve an important issue relating to the Burgeson deposition that Judge Maas has not yet addressed. We also request that the Court clarify that Plaintiffs may take the depositions of LATFOR fact witnesses, a process that Defendants have effectively blocked, even though Plaintiffs

[2] As discussed below, Judge Maas has not yet ruled on the issue of the appropriate scope of the deposition of Mr. Burgeson, a LATFOR official who Defendants have now designated as a testifying expert witness. *See* Point D, *infra*. The fact that Defendants failed to produce Mr. Burgeson's expert report on August 26, as Judge Maas expressly required them to do, has made it next to impossible for the parties to complete discovery by the September 26 cutoff that this Court has ordered. *See* Point E, *infra*.

likely will not be able to finish all such depositions until shortly after the September 26 cutoff (an adjustment that will not affect the summary judgment briefing schedule in any way).

A. Senator Bruno Has Waived Whatever Legislative Privilege He May Have

Plaintiffs have repeatedly argued that Senator Bruno has waived whatever legislative privilege he may have in its entirety by willingly assuming the role of lead defendant in this case and by refusing to be dismissed from the litigation with prejudice.

In his July 28 Opinion and Order, Judge Maas initially declined to resolve Plaintiffs' waiver argument – "at least at th[at] juncture" – finding that Senator Bruno had made a "colorable" argument that his participation in this litigation was "required" by N.Y. Unconsolidated Laws § 4221. *See* Jul. 28, 2003 Opinion and Order at 26. Tellingly, Senator Bruno has since abandoned that argument, and for good reason. Putting aside that the plain language of § 4221 only requires the President of the Senate to be *served* with the complaint in a redistricting lawsuit, not to be *named* as a defendant, Senator Bruno is not even the President of the Senate. The President of the Senate is the Lieutenant Governor, Mary Donahue, not Senator Bruno. *See* N.Y. Const. art. 4, § 6 ("The lieutenant-governor shall be the president of the senate . . . ."). Accordingly, § 4221 indisputably does not apply to Senator Bruno *at all.*

Because § 4221 did not "require" Senator Bruno to participate in this litigation, his voluntary assumption of the role of lead defendant constitutes a waiver of whatever legislative privilege he might otherwise have enjoyed.[3] In *Powell v. Ridge*, 247 F.3d 520 (3rd Cir. 2001), the Third

[3] As noted below, Plaintiffs offered to voluntarily dismiss Senator Bruno from this litigation, with prejudice, but he declined the offer.

Circuit recently held that a legislator defendant cannot voluntarily seek to participate as a defendant in a lawsuit (by declining to assert legislative immunity) but then assert legislative privilege as a purported shield against participating in discovery:

> Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants. And, unlike the reluctant participants in those cases, the Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword.

Powell v. Ridge, 247 F.3d 520, 525 (3rd Cir. 2001). The Court squarely rejected the legislator defendants' contention that they should be permitted to "seek discovery, but not respond to it" or to "take depositions, but not be deposed." *Id.* at 522.

Judge Maas declined to follow the Third Circuit, relying instead on *Goldberg v. Rocky Hill*, 973 F.2d 70 (2d Cir. 1992), which, according to Judge Maas, stands for the proposition that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities (as opposed to their personal capacities). Judge Maas found that Senator Bruno's participation as a defendant did not constitute a waiver of his legislative privilege because Senator Bruno is only named in his official capacity and therefore, under *Goldberg*, could not have moved to dismiss on the basis of legislative immunity. *See*

Tr. Sep. 3, 2003 at 5:24-7:19. Judge Maas's reliance on *Goldberg* is misplaced for three reasons.

To begin with, the underlying basis for Senator Bruno's assertion of legislative privilege has always been that he *could* have asserted legislative *immunity* if he had chosen to. Indeed, each of Senator Bruno's submissions to Judge Maas and to this Court contains a lengthy discussion of the doctrine of legislative immunity and arguments about why legislative immunity "includes" a correlative legislative evidentiary privilege. *See, e.g.*, Ltr. of John Braatz to Judge Maas (Jul. 11, 2003), at 7 ("Legislative Immunity Plainly Includes Testimonial and Evidentiary Privilege"). If, under *Goldberg*, the fact that Senator Bruno is only named in his official capacity means that he does not enjoy *any* common law legislative immunity of the sort recognized in *Tenney v. Brandenhove* and its progeny, then his legislative privilege arguments fall entirely of their own weight.

Second, *Goldberg* plainly did *not* hold that state legislators cannot assert legislative immunity in cases is which they have been sued in their official capacities. To the contrary, the plaintiff in *Goldberg* had agreed to *voluntarily dismiss* the individual legislator defendants (who were municipal councilmen, not state legislators) before the immunity issue reached the Second Circuit, leaving the town itself as the lone remaining defendant. *See* 973 F.2d at 71. The only holding in *Goldberg* was that the *town*, not the individual municipal legislators, had no immunity: "[W]e hold that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983." *Id.* at 74.

To be sure, the *Goldberg* opinion contains (and Senator Bruno and Judge Maas both relied upon) a quote from *Kentucky v. Graham*, 473 U.S. 159 (1985), in which the Supreme Court said, in an entirely different context, that "[t]he only immunities that can be claimed in an official-

capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.* at 167. But *Kentucky v. Graham* involved the issue of official immunity for *executive* state officials, not legislators. Unlike the individual defendants in *Kentucky v. Graham*, nobody would maintain that Senator Bruno is a necessary party in this action, which challenges a state statute administered by the Executive defendants.

Finally, this Court should not take seriously the implicit premise of Senator Bruno's *Goldberg* argument – that he wished to avoid participating in this lawsuit altogether by moving to dismiss on the basis of legislative immunity, but that he read *Goldberg* and reluctantly concluded that he had no way out. That is nonsense. It is plain that Senator Bruno intentionally thrust himself into the center of the defense of this lawsuit from the very beginning, and that he did so for the simple reason that, as Majority Leader, his interests are particularly implicated by Plaintiffs' challenge to the 2002 Senate Plan.

Indeed, as this Court is aware, Plaintiffs recently requested that Senator Bruno stipulate to being dismissed from this litigation *with prejudice* under FRCP 41(a) – a stipulation that would have forever extinguished all of Plaintiffs' claims against him – but Senator Bruno expressly refused to consent to such a dismissal. *See* Ltr. of Richard D. Emery to Judge Berman (Aug. 6, 2003). If Senator Bruno had been at all disappointed by his apparent inability under *Goldberg* to move to dismiss on the basis of legislative immunity, then surely he would have snapped up Plaintiffs' offer to dismiss him voluntarily and with prejudice Rule 41(a).

Having refused to be dismissed from this case with prejudice, there is no question that Senator Bruno is precisely the kind of "self-made defendant" that the Third

Circuit held cannot hide behind the cloak of legislative privilege. *Powell*, 247 F.3d at 525.[4]

B. Senator Bruno's Selective and Strategic Document Production Constitutes a Waiver of Any Privilege Claims With Respect To Documents Concerning the 34th or 35th Senate Districts

Assuming legislative privilege has not been waived in its entirety, Senator Bruno's strategic and selective document production plainly constitutes a waiver of whatever privilege otherwise might have applied to documents concerning the 34th and 35th Senate Districts (which Plaintiffs have challenged under the Equal Protection Clause and the Voting Rights Act).

Senator Bruno produced a January 28, 2002 memorandum (Bates S21581-82) authored by Vincent Bruy, then a member of LATFOR, to Senator Skelos, the Co-Chair of LATFOR, discussing a proposal to place the largely white Town of Eastchester in Senator Spano's 35th Senate District instead of in Senator Velella's 34th Senate District, and to include an equally populated part of the City of Yonkers in the 34th Senate District instead of the 35th Senate District. *See* Hecker Decl., Exhibit A. The memorandum cites voting patterns, polling data, Mr. Bruy's previous political advice to Senator Spano, and the long-term political strategies of both

[4] In an August 11, 2003 letter to the three-judge Court, Senator Bruno attempted to avoid the consequences of *Powell v. Ridge* by citing *United States v. Helstoski*, 442 U.S. 477 (1979), for the proposition that any waiver of legislative privilege must be explicit and unequivocal. *Helstoski* plainly is inapposite. To begin with, that case involved the assertion of an *absolute* legislative privilege under the Speech and Debate Clause of the federal Constitution, not the assertion of whatever legislative privilege arises under federal common law, which, as this Court has held, is *qualified* at best. Moreover, *Helstoski* involved the assertion of privilege by a *criminal defendant* who was not even arguably immune from prosecution and who never was offered any form of dismissal; unlike here, it cannot be said that the defendant's participation in the criminal prosecution in *Helstoski* was in any way *voluntary*.

Senator Velella and Senator Spano. Defendants undoubtedly released this document in order to try to establish that Senate District 34 was drawn predominantly on the basis of political considerations and not, as Plaintiffs allege, predominantly on the basis of race.

Notwithstanding his strategic production of Mr. Bruy's January 28, 2002 memorandum, Senator Bruno nonetheless has asserted privilege and refused to produce any other memoranda that similarly are "between a Senator (or aide) and Mr. Burgeson or Mr. Bruy" – presumably because such memoranda are disadvantageous to his defense. Ltr. of John Braatz to Judge Maas (Aug. 25, 2003) at 4 (*see* Hecker Decl., Exhibit B).

By selectively producing only those supposedly "confidential" documents that he believes will help his case, Senator Bruno plainly is seeking, in the words of the Third Circuit, "to turn what has heretofore been the shield of legislative immunity into a sword." *Powell*, 247 F.3d 520, 525. Senator Bruno cannot rely affirmatively on those "confidential" documents that he likes but selectively withhold as privileged those documents he does not like. In light of his selective production, Judge Maas should have directed Senator Bruno to produce all documents relating to the 34th and 35th Senate Districts.[5]

[5] During a conference call with Judge Maas, Mr. Carvin asserted that no waiver could result from the production of the January 28, 2002 Bruy memorandum because it was produced "only under compulsion" and "because it's under court order." Tr. Aug. 27, 2003 at 58:10-16. Contrary to Mr. Carvin's statement, Senator Bruno was never specifically ordered to produce the January 28, 2002 Bruy memorandum. Rather, Senator Bruno *chose* not to assert privilege with respect to that document and *chose* instead to produce it. During the same colloquy, Mr. Carvin also suggested that "the only reason" that Senator Bruno did not withhold the document as privileged was that "it was from a non-legislator to a legislator, which is different than all the documents we're withholding." *Id.* at 58:11-13. We gather that Mr. Carvin misspoke, and that he did not mean to concede that each of the many memoranda on the revised privileged log between non-legislators and legislators is not

C. Judge Maas Should Have Ordered Defendants to Produce Documents Relating to the Districts That Plaintiffs Have Challenged

As we have repeatedly observed, the qualified privilege analysis that governs this case requires the Court to balance Defendants' asserted need for secrecy against Plaintiffs' need to discover evidence to prove their claims. The five factors that must be balanced are: (1) the relevance of the evidence at issue; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government actors who will recognize that their secrets are discoverable. *See* Jul. 28, 2003 Opinion and Order at 21-22; Aug. 8 Order at 3.

Documents reflecting Senators' requests to move the borders of the districts that Plaintiffs are challenging could hardly be more relevant to their claims. Although Plaintiffs need not necessarily prove discriminatory intent in order to prevail on their Voting Rights Act claims, Judge Maas correctly recognized that Plaintiffs may prevail on their Voting Rights Act claims by fulfilling *either* the "intent test" or the "results test," and that contemporary statements by legislators therefore are "highly relevant." Jul. 28, 2003 Opinion and Order at 24. This holding directly applies to documents reflecting requests to move borders, which obviously are central to Plaintiffs' Equal Protection Clause challenge to the 34th Senate District – a claim that requires proof that the district was drawn predominantly on the basis of race.

Plaintiffs readily accept, as Judge Maas held, that there is no substantial need for Plaintiffs to discover

(continued...)

privileged and should be produced. In any event, there is no basis to distinguish the January 28, 2002 Bruy memorandum that Senator Bruno did produce from the similar memoranda that he refuses to produce.

documents pertaining to districts that are not challenged in this lawsuit. But by failing to distinguish between discovery that pertains to challenged districts (which could include documents concerning districts adjacent to the challenged districts) and discovery that does not, Judge Maas necessarily failed to engage in the required balancing analysis, the very heart of which is the relevance inquiry. Because Plaintiffs have established a substantial – indeed, compelling – need for discovery relating to the districts they have challenged, Judge Maas should have ordered that those documents be produced.

D. Because Judge Maas Has Not Yet Ruled On the Scope of Mr. Burgeson's Expert Deposition, and Because Time Is of the Essence, This Court Should Resolve That Issue So the Deposition Can Proceed

As this Court is aware, Judge Maas ordered Defendants to produce Mark Burgeson – one of the chief architects of the 2002 Senate Plan, who has been a LATFOR employee since 1980 and who currently serves as Special Assistant to LATFOR Co-Chairman Skelos – to be deposed on a single, limited subject: the nature of LATFOR's operations. Through this limited deposition, Judge Maas wished to obtain more information about the way LATFOR operated in order to determine whether the documents over which Senator Bruno has asserted legislative privilege were created and disseminated "within" LATFOR or "outside" LATFOR – a distinction that Judge Maas found important in his privilege analysis. Mr. Carvin agreed to produce Mr. Burgeson on the limited subject of the nature of LATFOR's operations, but Mr. Carvin refused to permit Plaintiffs to question Mr. Burgeson about his intimate role in the design of the 2002 Senate Plan. *See* Tr. Sep. 3, 2003 at 9:15-24. This limited deposition of Mr. Burgeson took place on September 5, 2003.

After Mr. Burgeson's limited deposition was completed, Defendants revealed for the first time that they intend to use Mr. Burgeson as an expert witness in this case. According to Mr. Carvin's September 10, 2003 letter to Judge Maas (*see* Hecker Decl., Exhibit C), Mr. Burgeson's role as an expert witness will be to provide a purportedly "objective" assessment "of the enacted and alternative plans based upon accepted redistricting principles and publicly available information." Mr. Carvin nonetheless argued to Judge Maas that "Mr. Burgeson's involvement as an expert does not affect the application of legislative privilege to the fact discovery sought by Plaintiffs," because he "will not touch in any way upon the deliberative process or motivations of legislators or their aides in the development and enactment of the challenged plan."

In light of Defendants' designation of Mr. Burgeson as an expert witness, Plaintiffs plainly are entitled to the production of all purportedly privileged documents sent by or to Mr. Burgeson regarding the 2002 Senate Plan, and Plaintiffs plainly are entitled to depose Mr. Burgeson about his role in the redistricting process. When Defendants say that Mr. Burgeson's expert testimony will consist of an "objective assessment of the enacted and alternative plans based upon accepted redistricting principles and publicly available information," what they really mean to say is that he will testify about how an *outsider*, without the benefit of full information, could *characterize* the 2002 Senate Plan as having been drawn. But Mr. Burgeson is no outsider; to the contrary, he concededly was one of the chief architects of the challenged plan. Plaintiffs thus are plainly entitled to cross-examine Mr. Burgeson about whether his "objective" analysis of the plan is consistent with his *subjective* knowledge of how the plan *actually* was drawn.

As Plaintiffs argued to Judge Maas in Mr. Hecker's letter dated September 10 (*see* Hecker Decl., Exhibit D), whether Mr. Burgeson's "objective assessment" is consistent

with his *own actions in this very litigation* could hardly be more probative of the credibility of his expert opinion. Mr. Burgeson cannot be allowed to provide an "objective" analysis of the 2002 Senate Plan, based only on publicly available information, when he may well know for a fact that the inferences he purports to draw about how the plan was crafted are inconsistent with the deliberations that actually took place.

In footnote 1 of his September 10 Memorandum Decision, Judge Maas reserved decision on this issue. During a conference call the following day, Judge Maas explained that he did not believe the issue would be ripe for adjudication until Mr. Burgeson's expert report was produced on September 12. *See* Tr. Sep. 11, 2003 at 15:21-16:13.

Defendants produced Mr. Burgeson's expert report on September 12 (see Hecker Decl., Exhibit E), and it confirms beyond any doubt that the Burgeson materials that have been withheld on privilege grounds must be produced. In his expert report, Mr. Burgeson opines at length about *his activities* with LATFOR and about the activities of others to which he was privy. Indeed, his entire report is a defense of the 2002 Senate Plan, of which he was the primary draftsman. Because the information relied upon in Mr. Burgeson's report necessarily overlaps with the information he used when drawing the Senate districts, it cannot seriously be disputed that his designation as a testifying expert constitutes a waiver of whatever legislative privilege he might otherwise have been entitled to assert. Mr. Burgeson cannot be permitted to provide selective, sanitized testimony about the supposed nature of the 2002 Senate Plan but refrain from producing and being questioned about contemporaneous documents or instructions that he authored or received and that may well contradict his theoretical opinion.

Although Judge Maas has yet to rule on this issue, at this point we believe it would be prudent for this Court to resolve it. Objections to Judge Maas's ruling likely will be taken no matter what he decides, and there is not nearly enough time left in the discovery schedule to await the resolution of a further round of objections before proceeding with this expert deposition. Plaintiffs respectfully request that this Court order Defendants to produce all of the withheld documents that were authored by or sent to Mr. Burgeson, and to permit him to be questioned about those documents and about any other aspects of his intimate role in the 2002 redistricting.

E. To the Extent That Any of Senator Bruno's Assertions of Legislative Privilege Are Rejected, the Court Should Permit Plaintiffs, If Necessary, To Continue To Take Depositions After September 26

Despite Plaintiffs' best efforts to complete document and deposition discovery before the September 26 cutoff, and through no fault of their own, it is now likely that doing so will not be possible. Although Judge Maas ruled long ago that Senator Bruno's assertions of legislative privilege would be rejected at least in substantial part (a ruling that this Court affirmed), and although Judge Maas has ordered him to produce a variety of purportedly privileged documents, Senator Bruno has refused to turn over the vast majority of those documents pending resolution by this Court of his objections to Judge Maas's rulings. Plaintiffs effectively are precluded from taking fact witness depositions until documents have been produced. And in any event, *Defendants have expressly refused to comply* with Judge Maas's order that they produce LATFOR staffers for deposition, pending resolution by this Court of their objections to that ruling. *See* Tr. Sep. 11, 2003 at 12:4-11.

Making matters significantly worse, Defendants flouted Judge Maas's order that they produce by August 26

all expert reports that do not respond to Plaintiffs' expert racial bloc voting analyses. As detailed in Mr. Emery's letter to Judge Maas dated September 16, 2003 (*see* Hecker Decl, Exhibit F), Defendants did not produce Mr. Burgeson's expert report (which does not even arguably speak to racial bloc voting) until September 12 – two and a half weeks past the deadline. Indeed, Defendants did not even reveal that they were planning to use Mr. Burgeson as an expert witness until September 5, by which time the parties had been litigating privilege issues relating to Mr. Burgeson *for months*. Had Defendants identified Mr. Burgeson as an expert and produced his report by August 26 as Judge Maas ordered them to do, all of the Burgeson privilege issues could have been advanced, and we would not now find ourselves, one week before the discovery cutoff, without the ruling from this Court that Defendants insist is necessary before documents and witnesses will be produced.[6]

Plaintiffs have proposed a simple solution to Defendants: to the extent that this Court orders any documents to be produced and allows any depositions of LATFOR staffers to go forward, Plaintiffs should be permitted to take those depositions after September 26, if necessary. Importantly, the modest accommodation Plaintiffs seek *would not affect the summary judgment schedule in any way*, for there is no reason why Defendants cannot work on their summary judgment papers while LATFOR staffer depositions are being finalized. Inexplicably, Defendants refused to join Plaintiffs in this request to this Court, stating only that they believe the September 26 cutoff is "binding on both sides."

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[6] It should be noted that Senator Bruno has moved to preclude a supplemental expert report submitted by Plaintiff-Intervenor PRLDEF, arguing that the supplemental report "obviously" would cause him to "suffer severe prejudice" because "there are only 10 days remaining in the discovery period." *See* Ltr. of Louis Fisher to Judge Maas (Sep. 16, 2003) (*see* Hecker Decl., Exhibit G).

It bears emphasis that Plaintiffs have seen this problem lurking on the horizon for quite some time and have done everything humanly possible to avoid it. When Judge Maas first indicated during the August 27 teleconference that he intended to defer making definitive privilege rulings until Mr. Burgeson could be deposed regarding the nature of LATFOR's operations, Plaintiffs immediately wrote a letter to Judge Maas urging him not to wait an entire week for the Burgeson deposition (Defendants were unable to produce him sooner) because "precious time will be lost between now and then." *See* Ltr. of Richard Emery to Judge Maas (Aug. 27, 2003) at 2 (*see* Hecker Decl., Exhibit H); *see also* Tr. Aug. 27, 2003 at 51:6-12. Because Judge Maas did not issue his written privilege rulings until September 10, Plaintiffs pressed for a compressed schedule through which objections would be fully briefed by September 12, but Defendants would not agree to that schedule (because they were too busy deposing Plaintiffs' experts). *See* Tr. Sep. 11, 2003 at 10:1-11:1. This is precisely the "doomsday scenario" that Plaintiffs have repeatedly warned about and sought to avoid. *See* Tr. Sep. 3, 2003 at 48:15-22.

Although they refuse to consent to Plaintiffs' modest and eminently reasonable proposal, Defendants sought to extend fact discovery for themselves. In fact, Defendants have demonstrated that they agree with Plaintiffs that fact discovery cannot be completed until the privilege issues are resolved. In his September 5 letter to Judge Maas identifying Defendants' expert and fact witnesses (*see* Hecker Decl., Exhibit I), Mr. Carvin expressly reserved the right to supplement his lists, observing that he could not provide a complete list "until . . . the legislative privilege issue is resolved." If Defendants cannot even identify their witnesses until these issues are resolved, then surely Plaintiffs cannot be expected to complete document and deposition discovery until these issues are resolved.

CONCLUSION

For the reasons set forth above, Plaintiffs objections to Judge Maas's privilege rulings should be sustained, and the September 26 discovery cutoff should be extended briefly to allow Plaintiffs to depose fact witnesses who Defendants have refused to produce.

Dated: September 17, 2003
New York, New York

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September 22, 2003

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Dear Chief Judge Walker, Judge Berman, and Judge Koeltl:

This firm represents the Plaintiffs in this matter. We write briefly to note our limited objection to Judge Maas's Discovery Order dated today.

In the objections we submitted to this Court on September 17, we argued that Defendants' designation of Mr. Burgeson as a testifying expert witness constitutes a waiver of whatever legislative privilege otherwise would have applied to the documents and testimony relevant to his earlier activities as primary draftsman of the Senate Plan. As we pointed out, Mr. Burgeson cannot be permitted to offer a purportedly "objective" analysis of how the 2002 Senate Plan appears to have been drawn without also providing information about how he, as chief architect of the plan, *actually drew it*. *See* Sep. 17 Objections, Point D, at 11-13; *see also* Sep. 18 Reply, Point C, at 7-9.

In the Order he issued today, Judge Maas held, without explanation, that Mr. Burgeson's designation as a testifying expert witness "does not open the door for the plaintiffs to inquire into the reasons why he . . . drew the lines for particular Senate districts in the ways that [he] did." Discovery Order (9/22/03) at 4. We respectfully object to that ruling. Judge Maas offered no reason at all, much less a persuasive reason, why questioning about Mr. Burgeson's concededly intimate role in the redistricting is not directly probative of the credibility of his expert opinion and why it is not expressly permitted, notwithstanding any assertion of privilege, by Rules 26(a)(2)(B) and 26(b)(4)(B) of the Federal Rules of Civil Procedure.

This is especially true in light of Mr. Burgeson's express concession during his limited deposition last Friday

that *there is "no way" he could "separate" his experience as chief architect of the plan with his preparation of his expert report.* Tr. 9/19/03 at 14:25-15:23 (emphasis supplied) (relevant excerpts attached hereto as Exhibit A).

For these reasons, and for the reasons stated in our previous papers, this Court should rule that Plaintiffs are entitled to depose Mr. Burgeson as any other expert in any other litigation would be deposed – including questioning about prior experience in drafting the redistricting plan that is the heart of this case. Defendants cannot wield Mr. Burgeson's expert report as a sword but seek to hide him behind the shield of legislative privilege. *See Powell v. Ridge*, 247 F.3d 520, 525 (3rd Cir. 2001)

Finally, a quick word on depositions. In our papers, we explained why we believe that this Court should allow Plaintiffs to take depositions after the discovery cutoff with respect to the fact witnesses who Defendants would not allow to be deposed, despite Judge Maas's order, pending the resolution of objections to this Court. In their reply, Defendants requested that discovery not take place during the week of September 29 because they will be working on their summary judgment papers. *See* Defendants' Reply (9/18/93) at 13. We have no objection to this request. If this Court does not rule in time for Plaintiffs to depose fact witnesses by September 26, then we would agree to take those depositions during the week of October 6 (which would not in any way affect the summary judgment schedule).

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