EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIEL MARKS COHEN, et al.	)	Index No. 12-1012185
	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
	)	
GOVERNOR ANDREW M. CUOMO, et al.	)	
	)	
Respondents.	)	
	)	

SENATE MAJORITY LEADER'S MEMORANDUM OF LAW
IN OPPOSITION TO THE PETITION

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Respondent, Senate Majority Leader and President Pro Tempore of the Senate Dean G. Skelos, respectfully submits this memorandum of law in opposition to the Petition in this proceeding.

INTRODUCTION

Petitioners concede that Article III, Section 4 of the New York Constitution ("Section 4") "does not expressly contemplate the creation of counties that did not exist in 1894" and "does not expressly provide which method should be used" to calculate the increase in the size of the Senate due to population growth after 1894. Pet. ¶¶ 51, 56. Petitioners thus acknowledge that, when applying Section 4 to Queens and Nassau Counties, the Legislature has discretion to "combine either the populations of Queens and Nassau Counties (Method A) or their individual 'full ratios' (Method B)." Pet. ¶ 60. Petitioners further acknowledge that "there are certain differences between Richmond/Suffolk and Queens/Nassau" because Richmond and Suffolk Counties both existed and were combined into a single Senate district in 1894, whereas Nassau County did not yet exist in 1894. Mem. of Law in Support of Petition at 20 ("Pets.' Memo."). Indeed, the New York Court of Appeals has recognized that the Senate-size "computations and comparisons" with respect to new counties such as Nassau are "complex," has squarely held that "the Legislature must be accorded some flexibility in working out the opaque intricacies of the constitutional formula for readjusting the size of the Senate," and has deferred to the Legislature's "reasonable" Senate-size computations. *In re Schneider*, 31 N.Y.2d 420, 432–34 (1972).

Petitioners therefore do not claim, nor could they credibly claim, that the Legislature's use of one method rather than the other in Queens-Nassau or Richmond-Suffolk violated Section 4. Instead, Petitioners' sole claim hinges on the theory that Legislature's use of different methods in Queens-Nassau and Richmond-Suffolk is "inconsistent and arbitrary," and thus

according to them unconstitutional, even though they acknowledge that "there are certain differences between" those counties. Pets.' Memo. at 19–20. Petitioners' theory is completely untenable: if they were correct, then *all* redistricting plans adopted between 1894 and 1972, including the plan the Court of Appeals drew in 1966, violated Section 4 because each of those districting plans followed the same approach in Queens-Nassau and Richmond-Suffolk that the Legislature applied this year. And the Court of Appeals has upheld that approach as "consonant with the broad historical objectives" underlying Section 4 when it accorded the Legislature "flexibility" to choose among permissible approaches. *In re Schneider*, 31 N.Y.2d at 433–34.

Petitioners thus fail to overcome the "strong presumption" that the Legislature's redistricting plan is constitutional; and they have not carried their considerable burden to show "beyond a reasonable doubt" that the 2012 Senate Plan violates the New York Constitution. *See Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992). Indeed, nowhere do Petitioners state what number of Senate districts the Constitution requires this year. Instead, they lead the Court to believe that a "consistent" application of either method to Queens-Nassau and Richmond-Suffolk would yield a 62-seat Senate. Pet. ¶¶ 138–39. Yet while application of one of Petitioners' methods to both Queens-Nassau and Richmond-Suffolk would have yielded 62 seats, application of the other method would have yielded *64* seats. Thus, Petitioners' concession that the Legislature has discretion to choose between methods in Queens-Nassau necessarily means that the Legislature had discretion to choose among various Senate-size options. Petitioners therefore cannot possibly hope to demonstrate, let alone by the required proof "beyond a reasonable doubt," *Wolpoff*, 80 N.Y.2d at 78, that the Legislature's choice of a 63-seat Senate was not "reasonable" or rational, *In re Schneider*, 31 N.Y.2d at 434.

Petitioners resort to a series of *ad hominen* and completely irrelevant accusations regarding the Legislature's motive. But those accusations do nothing to suggest, much less prove beyond a reasonable doubt, a violation of Section 4. Petitioners' allegations that the Senate Plan discriminates against "the New York City area," is "severely malapportioned," and "divides more counties than necessary" (Pets.' Memo. at 23–24) are all beside the point because the equal population and county-division rules relate to the Legislature's drawing of Senate district *lines*, not its determination of the *number* of Senate districts. And these Petitioners are not challenging the drawing of the Senate lines in this special proceeding. In all events, even if they were, such a "regional discrimination" claim is not cognizable, but merely rehashes arguments that were raised by Petitioners' counsel in support of federal claims against the 2002 Senate Plan and *rejected* on summary judgment in federal court.

Petitioners' naked allegation that the Legislature acted with an improper political motive (*see id.*) also misses the mark because motive is entirely irrelevant to Section 4. And on Petitioners' own description, Section 4 codifies political considerations because it strikes "the balance of power" between "Democrats" in "downstate counties" and "Republicans" in "upstate districts." Pet. ¶¶ 36–37. Petitioners' contention that Section 4 in fact outlaws "political gerrymandering" and regional discrimination (Pets.' Memo. at 23–24) thus turn the text and history of Section 4 on their head.

In short, the Legislature's exercise of discretion to apply an approach that the Court of Appeals has declared "consonant with the broad historical objectives" of Section 4 was "reasonable" and constitutional, and Petitioners fail to overcome their significant burden to demonstrate otherwise. *In re Schneider*, 31 N.Y.2d at 433–34. The Petition should therefore be summarily denied.

BACKGROUND

A. New York's Constitutional Provision For Enlarging The Senate

The New York Constitutions of 1777, 1821, and 1846 established the New York Senate with between twenty-four and forty-three seats. *See* Ruth C. Silva, *Apportionment In New York*, 30 Fordham L. Rev. 581, 597–603. By 1892, due to population growth in urban areas and particularly in New York City, one-half of the thirty-two senators then authorized had been apportioned to only four counties: New York, Kings, Monroe, and Erie. *See id.* at 614. "As senators were drawn from the rural areas to the large cities, the territorial extent of the rural districts increased." *Id.* Thus, the largest Senate district in 1892 "consisted of seven counties with 8,516 square miles." *Id.* "Consequently, there was strong sentiment in the 1894 [constitutional] convention to increase the number of senators in order to be able to apportion more senators to the rural areas and thereby reduce the territorial extent of the rural districts." *Id.*

The Constitution of 1894 adopted Section 4 with the "purpose and intent to prevent an increase in the number of senators from the larger counties of the state at the expense of the smaller counties of the state." *In re Dowling*, 219 N.Y. 44, 52 (1916); *see also* Silva, 30 Fordham L. Rev. at 616 (the drafters' intent was "to prevent the more populous counties from gaining senatorial representation at the expense of less populous counties in the future"); Pet. ¶ 36 (where petitioners' acknowledge that the purpose was to strike a "balance of power between the fast-growing metropolises of New York City and Brooklyn . . . and the less populous upstate counties"). Section 4 thus contains several provisions intended to limit the senatorial representation of populous counties. For example, Section 4 prohibited any county from having "four or more senators unless it shall have a full ratio for each senator" and "more than one-third of all senators," and any pair of contiguous counties from having "more than one-half of all

senators." N.Y. Const. art. III, § 4.[1] Section 4 also initially set the size of the Senate at "fifty members," and authorized the Legislature to increase the number of senators whenever "any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators." *Id.*

The Constitution provides for a four-step method to determine when such an increase is permitted. *See id. First*, "the total citizen population of the State, as determined by the last Federal census, is divided by 50—the minimum number of Senate seats." *In re Schneider*, 31 N.Y.2d at 431. That calculation produces the "so-called 'ratio' figure," which is equal to 2% of the state's total citizen population. *Id. Second*, "[c]ounties having three or more ratios—*i.e.*, more than 6% of the State's total citizen population—are then determined" by dividing county citizen population by the ratio and dropping any remainder, and each such county is "'allocated' one senatorial seat for each full ratio." *Id. Third*, "[t]he number of senators so allotted to each populous county is then compared with the number given to it in the Constitution of 1894." *Id.* at 431–32. *Finally*, "[t]he increase, if any, is then added to the 50 original seats to yield the 'whole number' of senators." *Id.* at 432.[2]

For example, Kings County had 7 Senate districts in 1894. *See* Silva, 30 Fordham L. Rev. at 617 n.192. Its population increased to 8 full ratios in 1906. *See id.* Thus, when it

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[1] Although these provisions no longer are valid under the one-person, one-vote rule, *see In re Orans*, 15 N.Y.2d 339, 351 (1965), they underscore that the intent of Section 4 was to prevent the more populous counties, especially the New York City counties, from overpowering the less populous counties in the Senate, *see* Silva, 30 Fordham L. Rev. at 603–13.

[2] "This procedure is used merely to compute the increase in the size of the Senate. Additional senators are not actually apportioned to the populous counties in this manner." *In re Schneider*, 31 N.Y.2d at 431 n.5. Rather, once the size of the Senate is determined, the Legislature draws a redistricting plan that comports with constitutional requisites, such as one-person, one-vote rule, as well as traditional redistricting criterion. *See id.* at 432.

reapportioned the Senate in 1907, the Legislature properly enlarged the Senate from 50 to 51 senators. *See In re Dowling*, 219 N.Y. at 55-56.

B. Combination of Counties That Existed in 1894: Single Ratio Method

Section 4 focuses the Legislature on whether population growth in "any county" warrants an increase in the total size of the Senate. N.Y. Const. art. III, § 4. However, certain counties had populations of less than one full ratio and, thus, were not sufficiently populous to warrant their own Senate district in 1894. *See id.*; *see also In re Schneider*, 31 N.Y.2d at 434. The 1894 Constitution grouped these counties into certain Senate districts. *See* N.Y. Const. art. III, § 4. Among these county groupings were "Richmond and Suffolk Counties, which under the 1894 Constitution constituted one Senate district." *In re Schneider*, 31 N.Y.2d at 434.

In every reapportionment plan since 1894, the Legislature has used these county groupings to conduct the Section 4 analysis because they reflect the position that those counties occupied under the 1894 Constitution. *See id.* In particular, at the second step of the four-step method, the Legislature combines the grouped counties' populations to compute a single full ratio. *See id.* If that number is equal to or greater than three full ratios, it is compared at the third step to the number of senators allocated to the county grouping in 1894. *See id.* The increase, if any, is added at the fourth step to the total number of senators. *See id.* Petitioners refer to this method as the "Combine Before Rounding Down Method" or "Method A." Pet. ¶ 5; *see also* Pets.' Memo. at 2. It may also be referred to as the "Single Ratio Method."

The Legislature has consistently applied the Single Ratio Method to Richmond-Suffolk. *See In re Schneider*, 31 N.Y.2d at 432; Pet. Ex. 5 at 1–2. For example, in 1972, the Legislature combined the populations of Richmond and Suffolk and calculated a single full ratio. *See In re Schneider*, 31 N.Y.2d at 432. Because that combined territory had one senator in 1894 and three full ratios in 1972, the Legislature added two senators to reflect those counties' growth. *See id.*

The same method has been used for Richmond-Suffolk in 1982, 1992, 2002, and 2012. *See* Pet. ¶¶ 7 ("During the 1972, 1982, and 1992 reapportionments, the Combine Before Rounding Down Method (Method A) was used consistently."), 85 (acknowledging that, for the 2002 reapportionment, "both methods yield the same result for [Richmond-Suffolk] given the 2000 Census data"), 11 (Legislature used Method A "with respect to the Richmond/Suffolk combination" in 2012).

C. Counties That Did Not Exist in 1894: Single Ratio Or Separate Ratio Methods

As Petitioners acknowledge, Section 4 "does not expressly contemplate the creation of counties that did not exist in 1894" and "does not expressly provide which method should be used" in such counties. Pet. ¶¶ 51, 56. Thus, "[w]here a county has been divided after 1894, the computations and comparisons become more complex" than with respect to counties that existed in 1894, *In re Schneider*, 31 N.Y.2d at 432, because Section 4 focuses on whether the population growth of "any county" warrants an increase in the size of the Senate, N.Y. Const. art. III, § 4. Therefore, as the Court of Appeals has held, "the Legislature must be accorded some flexibility in working out the opaque intricacies of the constitutional formula for readjusting the size of the Senate." *In re Schneider*, 31 N.Y.2d at 432.

The Legislature has historically exercised its discretion to use two different methods to conduct the Senate-size analysis in new counties. *See id.* In 1972, the Legislature opted to use the Single Ratio Method for such counties, and thus combined the populations of Queens and Nassau to calculate a single full ratio at the second step; and, at the third step, compared that single full ratio to the Queens-Nassau territory's allocation of one senator in 1894. *See id.* at 432–33.

In every redistricting between 1894 and 1972, the Legislature consistently used a method of "aggregat[ing] whole *ratios*," instead of population, "for counties that had been divided after 1894." *Id.* at 432 (emphasis in original); *see also In re Fay*, 291 N.Y. 198, 211–12 (1943). Under that method, the Legislature does not combine Queens' and Nassau's populations, but instead calculates separate full ratios for each county. *See In re Schneider*, 31 N.Y.2d at 432; *In re Fay*, 291 N.Y. at 211–12. The Legislature then combines those full ratios at the third step and compares that number to the single senator allocated to the Queens-Nassau territory in 1894. *See In re Schneider*, 31 N.Y.2d at 432; *In re Fay*, 291 N.Y. at 211–12. Petitioners refer to this method as the "Round Down Before Combining Method" or "Method B." Pet. ¶ 5; *see also* Pets.' Memo. at 2. It may also be referred to as the "Separate Ratio Method."

The Single Ratio Method and the Separate Ratio Method frequently yield the same increase in the size of the Senate. *See In re Schneider*, 31 N.Y.2d 432–34. In certain years, however, those methods yield different increases in the size of the Senate. *See id.* The reason is that the Constitution requires the use of only "full" ratios and the dropping of any remainder. N.Y. Const. art. III, § 4. Thus, in years when Queens' and Nassau's remainders add up to one full ratio, the Single Ratio Method combines those remainders and yields one more senator, while the Separate Ratio Method drops those remainders and yields one fewer senator. *See, e.g.*, *In re Schneider*, 31 N.Y.2d at 432.

This difference arose when the Legislature reapportioned the Senate in 1943. *See In re Fay*, 291 N.Y. 198, 211–12 (1943). New York's citizen population under the 1940 census was 12,401,329. *See id.* at 211. The ratio for that year therefore was 248,027. *See id.* Queens had a citizen population of 1,203,752, or 4.85 ratios. *See id.* Nassau had a citizen population of 383,266, or 1.55 ratios. *See id.* at 212. Under the Single Ratio Method, Queens and Nassau

would have had six full ratios, for a total increase of five senators over 1894. *See id.* Under the Separate Ratio Method, however, Queens had four full ratios and Nassau had one full ratio, for a total increase of four senators. *See id.* In 1943, the Legislature exercised its discretion, in accordance with the Constitution, to use the Separate Ratio Method and "apportioned four additional senators to th[e] Queens-Nassau territory." *Id.* at 212. The Court of Appeals used the same methodology in 1966, when it applied the Separate Ratio Method to Queens-Nassau, and drew a 57-seat Senate plan. *See In re Orans*, 17 N.Y.2d 107, 109–10 (1966) (per curiam); *In re Orans*, 17A N.Y.2d 1, 11–12 (1966). Applying the Single Ratio Method to Queens-Nassau that year would have yielded 58 senators. *See In re Orans*, 17 N.Y.2d at 109–10; *In re Orans*, 17A N.Y.2d at 11–12.

D. 2002 Reapportionment

In 2002, the Legislature returned to the pre-1972 practice for Queens-Nassau as "more faithful to the Constitution" and the position that Nassau would have occupied in 1894, and therefore applied the Separate Ratio Method to Queens-Nassau. *See* Pet. Ex. 1 at 3. At the same time, even though "each methodology would have yielded *the same number* of whole ratios for the Richmond/Suffolk combination in 2002" (Pets.' Memo. at 21 (emphasis in original)), the Legislature applied the Single Ratio Method to Richmond-Suffolk in keeping with the 1894 Constitution's grouping of those counties (Pet. Ex. 5 at 1–2).

When coupled with population shifts elsewhere in the State, those ratios yielded 62 senators. *See* Pet. Ex. 1 at 3. In the ensuing federal court litigation regarding the 2002 Senate Plan, no party challenged the use of the Separate Ratio Method in Queens-Nassau. In fact, Petitioner Todd Breitbart has testified publicly that applying the Separate Ratio Method to Queens-Nassau is "reasonable . . . and entails no intrinsic partisan bias." *See* Affirmation of Todd Geremia, Ex. A at 7.

E. 2012 Reapportionment: Separate Ratio Method

The Legislature used the same approach to calculating the size of the Senate in 2012 that it used in 2002. *See* Pet. Ex. 5 at 1–2. The Legislature thus applied the Separate Ratio Method to Queens-Nassau and the Single Ratio Method to Richmond-Suffolk. *See id.* When combined with changes elsewhere in the State, those calculations yielded a total of 63 senators. *See id.* The Legislature enacted a 63-seat Senate Plan, and Governor Cuomo signed it into law on March 15, 2012. *See* Pet. ¶ 108.

F. Petitioners' Attempt to Challenge the Legislature's 2012 Reapportionment

Petitioners initially filed suit before the Legislature enacted its 2012 redistricting plan for the Senate, seeking a judgment that the 63-seat Senate plan "proposed" by the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) was unconstitutional. This Court dismissed that suit on ripeness grounds on March 8, 2012. *See* Hecker Aff. Ex. 4.

Petitioners thereafter filed this petition on March 15, 2012, the day Governor Cuomo signed the Senate Plan into law. Petitioners invoke New York Unconsolidated Laws § 4221 and bring their petition as a special proceeding under CPLR § 403. *See* Am. Notice of Petition. Petitioners seek "a declaration and injunction barring Respondents from enforcing" the redistricting plan on the sole ground that Section 4 "forbids the Legislature from increasing the size of the Senate to 63 seats in 2012." Pet. ¶ 1. Petitioners, however, concede that Section 4 "does not expressly contemplate the creation of counties that did not exist in 1894" and "does not expressly provide which method should be used" to calculate the increase in the size of the Senate due to population growth in such counties. *Id.* ¶¶ 51, 56. Petitioners thus acknowledge that the Legislature has *discretion* to apply either the Separate Ratio Method or the Single Ratio

Method to Queens-Nassau (*id.* ¶ 60) and that "there are certain differences between Richmond/Suffolk and Queens/Nassau" given their disparate histories (Pets.' Memo. at 20).

Petitioners' entire claim, therefore, hinges on their assertion that the Legislature's 63-seat Senate Plan is "inconsistent and arbitrary" (*id.* at 19) because, in their view, Section 4's silence regarding new counties must be read to completely foreclose any "basis for using one method for the Richmond/Suffolk combination and another method for the Queens/Nassau combination" (Pet. ¶ 67). Petitioners also imply that "consistently" applying either method to Queens-Nassau and Richmond-Suffolk would yield 62 senators (*id.* ¶¶ 138–39), when the Single Ratio Method in fact would yield a 64-seat Senate in light of the 2010 Census (Pet. Ex. 5 at 3; Pets.' Memo. at 7–8).

ARGUMENT

The Legislature's adoption of the 63-seat Senate Plan was a constitutional exercise of its discretion in the "complex," "opaque" area of the Senate-size computation. *In re Schneider*, 31 N.Y.2d at 432. The Legislature adhered to the original, pre-1972 approach, resumed in 2002, of applying the Separate Ratio Method to Queens-Nassau, and exercised its discretion to use the Single Ratio Method to Richmond-Suffolk. That approach not only has been upheld by the Court of Appeals as "consonant with the broad historical objectives" of Section 4, but also places all counties, including new counties, in the position they would have occupied in 1894. *Id.* at 433. The Legislature's adoption of this approach is "reasonable" and within the scope of its discretion in applying Section 4. At a bare minimum, Petitioners have not shown, as they must to prevail here, that the 2012 Senate Plan is unconstitutional beyond a reasonable doubt. *See also id.* at 434 (where legislative determination in applying Section 4 is "reasonable" it "should not be disturbed").

A. The 63-Seat Senate Plan Is A Proper Exercise Of The Legislature's Discretion

Petitioners face a heavy burden in this proceeding. As the Court of Appeals has held, "a strong presumption of constitutionality attaches to [a] redistricting plan," and New York courts "upset the balance struck by the Legislature and declare the plan unconstitutional only when it can be shown beyond a reasonable doubt that it conflicts with the fundamental law, and that every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992); *see also In re Fay*, 291 N.Y. 198, 207 (1943) ("[A] presumption of constitutionality attaches to every statute enacted by the Legislature and that statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law . . . .") (internal quotation marks omitted); *Iannucci v. Board of Supervisors of County of Washington*, 20 N.Y.2d 244, 253 (1967) ("reapportionment legislation should not be declared unconstitutional unless it clearly appears to be so; all doubts should be resolved in favor of the constitutionality of an act") (internal quotation marks omitted). That rule directly impacts the scope of this Court's authority, too, because "a statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such conclusion is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the act is apparent on its face." McKinney's Consol. Laws of N.Y. Ann., Book 1, Statutes § 150 ("The courts should not strike down a statute as unconstitutional unless such statute clearly violates the Constitution."); *id.*, Comment, *Courts of First Instance*; *see also Comiskey v. Arlen*, 55 A.D.2d 304, 307 (2d Dep't 1976), *aff'd*, 43 N.Y.2d 696 (1977) (applying this doctrine).

These high standards have not been met by this petition. Petitioners recognize that the Legislature has discretion to apply the Separate Ratio Method in Queens-Nassau, *see* Pet. ¶ 60; Pets.' Memo. at 8, because, as one of them has acknowledged, that method is "reasonable," Geremia Aff., Ex. A at 7 (Breitbart Testimony). Accordingly, Petitioners' entire claim hinges on a cobbled-together, quasi-equal protection theory that the 2012 Senate Plan is "inconsistent and arbitrary" because Section 4's silence regarding new counties purportedly forecloses the Legislature from applying the Separate Ratio Method to Queens-Nassau and the Single Ratio Method to Richmond-Suffolk. Pets.' Memo. at 19–20.

Petitioners' theory fails for at least four reasons. *First*, if Petitioners were correct, then the Court of Appeals authored an unconstitutional redistricting plan in 1966, when it applied the Separate Ratio Method to Queens-Nassau. *See In re Orans*, 17 N.Y.2d at 109–10; *In re Orans*, 17A N.Y.2d at 11–12. In fact, under Petitioners' theory, *all* redistricting plans adopted between 1894 and 1972 would have been unconstitutional because they implemented this approach. *See, e.g.*, *In re Schneider*, 31 N.Y.2d at 432; *In re Fay*, 291 N.Y. at 212; Pet. Ex. 1 at 3. Yet *none* of those plans was invalidated on that basis. *See, e.g.*, *In re Schneider*, 31 N.Y.2d at 432; *In re Orans*, 17 N.Y.2d at 109–10; *In re Fay*, 291 N.Y. at 212; Pet. Ex. 1 at 3. Petitioners, in fact, conveniently ignore the Legislature's and the Court of Appeals' pre-1972 practice. *See* Pets.' Memo. at 3, 10–15.

Second, in *Schneider* the Court of Appeals expressly held that, although the Separate Ratio had been validly used in pre-1972 apportionments, there is "no authority according constitutional stature" to this Method; and the Court upheld the Legislature's exercise of its discretion to use the alternative approach under the Single Ratio Method as also consistent with Section 4. 31 N.Y.2d at 433–34. In so ruling, the Court held that "the Legislature must be

accorded some flexibility" in working out Senate redistricting using these two approaches. *Id.* at 433. Accordingly, the Legislature's exercise of its discretion in 2012 to use the Separate Ratio Method in Queens-Nassau (as had been done and upheld for all pre-1972 apportionments) and the Single Ratio Method in Richmond-Suffolk, which it also has discretion to use and which was expressly upheld in *Schneider*, is "reasonable" and, thus, constitutional. *Id.* at 434. At a bare minimum, Petitioners have not carried their burden to prove "beyond a reasonable doubt" that the Constitution forbids the Legislature from exercising its discretion in this manner, and that it is "impossible" to reconcile the Legislature's decisions with the Constitution. *Wolpoff*, 80 N.Y.2d at 79.

The Legislature's exercise of its discretion in this manner to determine the size of the size of the Senate within these flexible constitutional constraints comports with the well-established rule that "reapportionment is within the legislative power" and "'primarily a matter for legislative consideration and determination.'" *In re Orans*, 15 N.Y.2d at 352 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). Indeed, when strict compliance with the Constitution is impossible, the Legislature's discretion and the judiciary's deference to the Legislature are at their zenith. *See Wolpoff*, 80 N.Y.2d at 77–80. The Court of Appeals' decision in *Wolpoff v. Cuomo* is instructive. There, the Legislature could not strictly comply with the New York Constitution's prohibition on dividing counties because of the one-person, one-vote requirement of the federal constitution. *See id.* Similarly here, the Legislature could not literally comply with Section 4 because it does not address the calculation of full ratios in counties that did not exist in 1894. *See* N.Y. Const. art. III, § 4; *see also* Pet. ¶¶ 51, 56; Pets.' Memo. at 7. The Court of Appeals affirmed in *Wolpoff* that, in such a situation, "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature"

and that "[i]t is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elected representatives of the people, in this regard." 80 N.Y.2d at 79.

Third, Petitioners cannot prove, let alone "beyond a reasonable doubt," that the Legislature's approach "conflicts with" the Constitution and negates the "strong presumption of constitutionality," *id.*, because they nowhere state how many Senate seats the Constitution *requires* this year. To the extent that Petitioners suggest that applying either the Single Ratio Method or the Separate Ratio Method to both Queens-Nassau and Richmond-Suffolk would result in 62 seats (Pet. ¶¶ 138–39), they are mistaken. In fact, applying the Single Ratio Method to all of those counties would have yielded *64* seats.[3] Thus, even on their own theory that Section 4's silence purportedly mandates that the Legislature, as a matter of constitutional law, apply the same method to Queens-Nassau and Richmond-Suffolk (Pets.' Memo. at 19–21), Petitioners' concession that the Legislature had discretion to choose either method (Pet. ¶ 60) means that the Legislature also had discretion to choose among various sizes of the Senate in 2012. Petitioners apparently prefer a 62-seat Senate, but they nowhere disclose to the Court the 64-seat Senate option that their own analysis justifies.

Finally, because the Legislature's determination of the size of the Senate does not involve "a suspect class or fundamental right," the courts must uphold that determination so long as any "distinctions between similarly-situated" entities "are rationally related to a legitimate

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[3] The Separate Ratio Method yielded 8 full ratios in Queens-Nassau and, when combined with the Single Ratio Method in Richmond-Suffolk and changes elsewhere in the State, a 63-seat Senate. *See* Pet. Ex. 5 at 3; Pets.' Memo. at 7–8. The Single Ratio Method would have yielded 9 full ratios in Queens-Nassau and, when combined with the Single Ratio Method in Richmond-Suffolk and changes elsewhere in the State, a 64-seat Senate. *See* Pet. Ex. 5 at 3; Pets.' Memo. at 7–8. Thus, Petitioners' implication that "the methodology used in 1972, 1982, and 1992" is coterminous with applying the Single Ratio Method in Queens-Nassau and Richmond-Suffolk this year (Pet. ¶¶ 138–139) is flawed.

government interest." *Walton v. Corr. Servs.*, 13 N.Y.3d 475, 492 (2009); *see also Walsh v. Katz*, 17 N.Y.3d 336, 344–47 (2011). Petitioners, however, concede that Queens-Nassau and Richmond-Suffolk are *not* similarly situated. In fact, Petitioners state that "there are certain differences between Richmond/Suffolk and Queens/Nassau" because, in 1894, Nassau did not exist and Richmond and Suffolk did and were combined into a single Senate district. Pets.' Memo. at 20.

Petitioners further recognize both that the Legislature has discretion to apply the Separate Ratio Method in Queens-Nassau and that longstanding practice calls for the application of the Single Ratio Method in Richmond-Suffolk. *See id.* at 8, 21. This historical difference alone shows that Queens-Nassau and Richmond-Suffolk are not "similarly situated," *Walton*, 13 N.Y.3d at 492, and, thus, that the Legislature's approach was not "inconsistent and arbitrary" (Pets.' Memo. at 21). Indeed, the Legislature's approach recognizes the disparate histories of Queens-Nassau and Richmond-Suffolk: while the Separate Ratio Method places Nassau in the position it would have occupied if it had existed in 1894 and, thus, on par with counties that did exist then, *see* N.Y. Const., art. III, § 4, the Single Ratio Method continues the unbroken tradition of recognizing that the 1894 Constitution placed Richmond and Suffolk in "one Senate district," *In re Schneider*, 31 N.Y.2d at 434; *see also* Pets.' Memo. at 9.

B. Petitioners' *Ad Hominen* And Irrelevant Allegations Are Unavailing

Apparently recognizing that their central theory is untenable, Petitioners resort to a series of *ad hominen* and irrelevant allegations regarding the Legislature's purported motives. *See* Pets.' Memo. at 19–25. But none of Petitioners' assertions even supports, much less proves "beyond a reasonable doubt," *Wolpoff*, 80 N.Y.2d at 78, that Section 4's silence regarding the treatment of new counties forbids the Legislature from enacting a 63-seat Senate plan.

First, Petitioners attempt to rewrite history with Petitioner Breitbart's untested affidavit, baldly asserting that the Legislature in fact applied the Separate Ratio Method to Richmond and Suffolk in 2002. *See* Pets.' Memo. at 20–21. That assertion is completely irrelevant because the 2002 Senate Plan is not at issue here, and the Legislature has broad discretion to select among the various methods in this area of constitutional silence. *See supra* Part I.A. Moreover, Petitioners cannot possibly prove this allegation: in fact, they concede that they "do not know whether the Legislature used Method A or Method B for Richmond/Suffolk in 2002" (Breitbart Aff. ¶ 21) as that choice "was irrelevant . . . because it is undisputed that each methodology would have yielded *the same number* of whole ratios for the Richmond/Suffolk combination in 2002" (Pets.' Memo. at 21). Thus, the *only* record evidence regarding what the Legislature did is the 2012 Carvin Memorandum, which confirms that the Legislature applied the Single Ratio Method to Richmond-Suffolk in 2002. *See* Pet. Ex. 5 at 1–2.

Petitioners therefore pivot to attacking the 2002 Carvin Memorandum, and ask the Court to infer a constitutional violation from its omission of any mention of Richmond-Suffolk. *See* Pets.' Memo. at 21. Yet the 2002 Carvin Memorandum discussed only *departures* from the Legislature's 1992 approach, not *continuations* of that approach. *See* Pet. Ex. 1 at 3. It thus provided no occasion to revisit the unbroken practice of applying the Single Ratio Method to Richmond-Suffolk which, as Petitioners concede, was "irrelevant." Pets.' Memo. at 21.

Second, Petitioners say that the Senate Plan is "malapportioned" or "divides far more counties than is necessary," but they do not assert any claims in this proceeding on this basis. Pets.' Memo. at 23–24. The reasons are plain. In the first place, a claim that the Senate Plan purportedly violates the one-person, one-vote rule arises under the *federal* Constitution and, thus, would permit Respondents to remove this case to federal court. *See Reynolds*, 377 U.S. at 586;

28 U.S.C. § 1441(a). Moreover, Petitioners cannot possibly prove that the Senate Plan is malapportioned because they acknowledge that the maximum total deviation in the Plan is only 8.80%, which is "smaller than" the 9.78% in the upheld 2002 Senate Plan and well within the 10% deviation presumed constitutional. Pets.' Memo. at 18; *see also Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). And Petitioners cannot establish an actionable county-division claim because such divisions are "inevitable if the Legislature [is] to comply with Federal constitutional requirements" such as the one-person, one-vote requirement Petitioners also invoke. *Wolpoff*, 80 N.Y.2d at 77–78; *see also In re Schneider*, 31 N.Y.2d at 427 (even if petitioners urge "alternate plans" that "minimize or eliminate violations of county lines," it is not a court's "function to determine whether a plan can be worked out that is superior" to the Legislature's plan).

In addition, Petitioners offer only faulty legal theories and evidence to support their equal population and county-division allegations. Petitioners rest both allegations on Petitioner Breitbart's conclusory affidavit, which does nothing more than parrot the legal and factual assertions in Petitioners' Memorandum. *Compare* Breitbart Aff. ¶¶ 44–47 *with* Pets.' Memo. at 17–19. Petitioners also fail to mention that *no* court has ever deemed "standard deviation and average deviation" as even *relevant* measures of equal population, but that *every* court instead has treated total maximum deviation as the *dispositive* measure. Pets.' Memo. at 18; *see also Mahan v. Howell*, 410 U.S. 315, 319–23 (1973); *Brown*, 462 U.S. at 842; *Voinovich*, 507 U.S. at 161.[4] Petitioners further neglect to inform the Court that much of the difference in the standard

[4] The reason is that the one-person, one-vote rule protects individual voters, so the only relevant question is the difference between the vote weighted least heavily and the vote weighted most heavily in the same redistricting plan. *See Mahan*, 410 U.S. at 319–23; *Brown*, 462 U.S. at 842; *Voinovich*, 507 U.S. at 161. Where that difference is not significant enough to dilute any

and average deviations they identify reflects population shifts on Republican-leaning Long Island, where the Legislature kept Districts 1 through 9 whole without breaking the Queens-Nassau border, even though doing so increased each district's overpopulation from 0.03% in 2002 to 2.54% in 2012. *See* 2012 Senate District Maps, *available at* http://www.latfor.state.ny.us/maps/?sec=2012s. And Petitioners do not identify *where* in the State any of the allegedly unnecessary county divisions were made. Nor do they mention that the Legislature *avoided* dividing Queens, *see id.*, in their favored "New York City" area (Pets.' Memo. at 24).

Third, perhaps realizing the facial flaws in their equal population and county-division allegations, Petitioners attempt to shoehorn those allegations into their Section 4 claim, by suggesting that Section 4's silence regarding new counties somehow incorporates these other constitutional norms and prohibits a "political gerrymander" that "discriminat[es]" against the "New York City area." Pets.' Memo. at 23–24. Nothing could be further from the truth: the Legislature's drawing of Senate district *lines*—and, thus, its alleged malapportionment and county divisions—has absolutely nothing to do with its determination of the *number* of Senate districts. Indeed, the Legislature can populate districts and break county lines just as easily in a 62-seat plan as in a 63-seat plan.

Petitioners also ignore that the Constitution does not protect the "New York City area" or any other *region* against political discrimination. That is because "the principle of population equality protect[s] citizens and not geographic areas." *Id.* at 369; *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Legislators are elected by voters, not farms or cities or economic

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(continued...)

individual's vote, multiple voters' subjection to a similar non-dilutive differential does not add up to a constitutional violation. *See Mahan*, 410 U.S. at 319–23; *Brown*, 462 U.S. at 842; *Voinovich*, 507 U.S. at 161.

interests."). And Petitioners' own description confirms that Section 4 codified political considerations in order to maintain "the balance of power" between "Democrats" in "downstate counties" and "Republicans" in "upstate districts." Pet. ¶¶ 36–37. Section 4 accomplished this objective not only through the Senate-size provision, but also by limiting the number of senators in large counties. *See* N.Y. Const. art. III, § 4. While these latter provisions no longer are valid under the one-person, one-vote rule, *see In re Orans*, 15 N.Y.2d 339, 351 (1965), they underscore that Section 4 was enacted to prevent populous counties, especially those in New York City, from overpowering less populous counties in the Senate, *see* Silva, 30 Fordham L. Rev. at 603–13. Accordingly, Petitioners' contention that Section 4 in fact outlaws politically motivated regional discrimination is impossible to square with Section 4's text and history.

Fourth, on the substance, Petitioners' regional discrimination allegation mirrors—and suffers from the same flaws as—the regional discrimination allegation that certain plaintiffs, relying on Petitioner Breitbart's testimony, *lost* on summary judgment in federal court in 2002. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365–71 (S.D.N.Y. 2004). In fact, the striking similarities between Petitioners' theory and the theory advanced in *Rodriguez* warrant denial of this Petition on the strength of *Rodriguez* alone. For example:

- **Regional Discrimination Not Cognizable**. The *Rodriguez* plaintiffs alleged that the 2002 Senate Plan evinced an impermissible political motive and "arbitrarily discriminate[d]" against "downstate" districts "by systematically overpopulating all of those districts and systematically underpopulating all of the 'upstate' districts." 308 F. Supp. 2d at 366. The *Rodriguez* court rejected that allegation because "the principle of population equality protect[s] citizens and not geographic areas" and the 2002 Senate Plan complied with the 10% total deviation rule. *Id.* at 369. The law has not changed in this regard since *Rodriguez*, and the 2012 Senate Plan complies with the 10% total deviation rule, as Petitioners recognize. *See* Pets.' Memo. at 18.

- **"Self-Serving And Defective" Definitions: Westchester County**. The *Rodriguez* court rejected the plaintiffs' "upstate" and "downstate" definitions as "self-serving and defective" because they split certain counties, including Westchester, and omitted some districts entirely. 308 F. Supp. 2d at 369. Petitioners' definitions likewise place

District 36 in their downstate, "New York City" region and District 40 in their "upstate" region, even though both extend into Westchester, and omit Districts 35 and 37 in Westchester. Pets.' Memo. at 18. There is no "discern[ible]" basis for splitting Westchester "other than that [District 36 is] overpopulated" and Petitioners' wish to capture it in their "New York City" area. *Rodriguez*, 308 F. Supp. 2d at 369. And Petitioners' omission of Districts 35 and 37 is "convenient[]" because those districts are "populated at close to their ideal level" and disprove regional discrimination. *Id.*

- **"Self-Serving And Defective" Definitions: Long Island**. The *Rodriguez* court also rejected the plaintiffs' regional definitions because they omitted Districts 1 through 9 on Republican-leaning Long Island. 308 F. Supp. 2d at 369. Petitioners likewise fail to mention Districts 1 through 9 (Pets.' Memo. at 18), presumably because those districts are overpopulated by 2.54% each and, therefore, disprove Petitioners' theory that overpopulation of districts evinces political discrimination against New York City Democrats (*see id.* at 22–25).

Fifth, Petitioners try to impugn the Legislature's motive and advance the naked assertion that the 63-seat Senate Plan was "a transparently partisan attempt by the Republicans to maintain their control of the Senate." Pets.' Memo. at 22. Aside from resting on the "questionable assumption that [the Republicans'] motives are a proxy for those of the Legislature," *Rodriguez*, 308 F. Supp. 2d at 368, Petitioners' assertion overlooks that the Legislature's purported motive is completely irrelevant under Section 4. Instead, on rational basis review, the question is whether the Legislature's Senate-size determination is "reasonable," *In re Schneider*, 31 N.Y.2d at 434—or, in other words, whether "any state of facts reasonably may be conceived to justify it," *Lighthouse Shores v. Islip*, 41 N.Y.2d 7, 13 (1976). And even where motive is relevant to the redistricting inquiry, such as in a case alleging racial discrimination, courts *presume* that a legislature has a political motive because "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Petitioners' political motivation accusation also fails as a matter of proof. Petitioners invoke a series of memoranda written by Mark Burgeson in 2001 that, Petitioners assert, establish that "Senate Republicans made the decision to increase the size of the Senate from 61

seats to 62 in 2002 for partisan purposes." Pets.' Memo. at 23. But Petitioners fail to mention that these memoranda were before the *Rodriguez* court, which found them insufficient to prove improper political motivation because they "reveal[] many permissible redistricting considerations." 308 F. Supp. 2d at 367. Critically, Petitioners also fail to come to grips with the fact that the Burgeson memoranda advised *in favor* of a 62-seat Senate and *against* a 63-seat Senate in order to benefit Republicans. *See id.* If the Burgeson memoranda did not prove a constitutional violation in 2002 when the Legislature *embraced* the recommendation for a 62-seat Senate in these memos, they cannot possibly evince such a violation in 2012 when the Legislature *contradicted* the recommendation in the Burgeson memoranda and exercised its discretion to apportion 63 Senate seats instead of 62. Even now, Petitioners offer no coherent reason why 63 seats are more advantageous to Republicans than 62 seats. They only want to have it both ways, and invite the Court to improperly (and in the absence of any proof) ascribe a political motive to *any* number of districts other than the 62 seats they prefer this year.

Petitioners also contend that "the best evidence of the Republicans' *mens rea* is the fact that the 2012 Carvin Memorandum tried in vain to *hide* the fact that LATFOR had used both Method A and Method B simultaneously." Pets.' Memo. at 24 (emphases in original). This is a complete mischaracterization: the 2012 Carvin Memorandum makes clear that, in 2002 and 2012, the Legislature followed the pre-1972 approach for Queens-Nassau and Richmond-Suffolk in order to put all counties in the position they would have occupied if they had existed in 1894. *See* Pet. Ex. 5 at 1–2. It thus provides no support for Petitioners' political motivation theory.

Finally, in a last-ditch effort to salvage their constitutional challenge, Petitioners object to the timing of LATFOR's announcement of the 63-seat Senate Plan, alleging that it did not occur until after LATFOR "already had held all 14 of the public hearings that supposedly had been

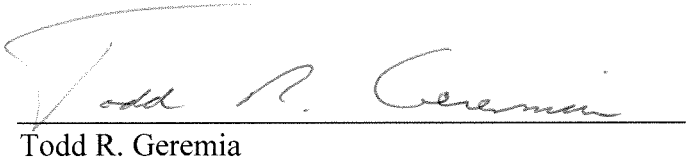
convened to afford the public the opportunity to express their views on redistricting alternatives." Pets.' Memo. at 26. Petitioners simply misrepresent the facts. Petitioners refer only to LATFOR's *first* round of public hearings, where, as Petitioners admit, LATFOR considered the public's input "on the number of Senators it wanted." *Id.*; *see also* Pet. ¶ 14. Petitioners fail to mention that LATFOR held a *second* round of public hearings *after* announcing its 63-seat Senate proposal, and received public input on the 63-seat Senate Plan and other issues. *See* LATFOR Public Heating Schedule—Second Round, *available at* http://www.latfor.state.ny.us/hearings/docs/20120125hrg_schedule.pdf. Petitioners' contention that "LATFOR ensured that interested citizens would have no meaningful opportunity to participate in the redistricting process" (Pets.' Memo. at 26–27; Pet. ¶ 14) is thus wrong at best and disingenuous at worst.

CONCLUSION

The Court should therefore deny the Petition.

Dated: March 29, 2012

Respectfully submitted,



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AFFIRMATION OF SERVICE

I, Todd R. Geremia, an attorney admitted to practice in the State of New York and not a party to this action, hereby affirm under penalties of perjury that the foregoing Senate Majority Leader's Memorandum of Law in Opposition to the Petition was served by overnight mail and e-mail on March 29, 2012, upon the following counsel for the Petitioners:

Eric Hecker
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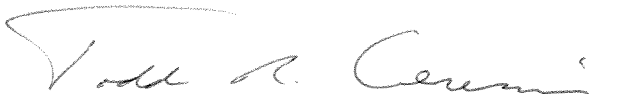
Dated: March 29, 2012



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