UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al. Plaintiffs, v. ANDREW M. CUOMO, et al. Defendants.	)	No. 1:11-cv-05632-DLI-RR-GEL **Date of Service**: April 17, 2012

SENATE MAJORITY'S RESPONSE TO PLAINTIFFS' APRIL 12 SUBMISSIONS

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The Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully submit this memorandum in response to the Ramos Intervenors, Lee Intervenors, Drayton Intervenors, and Senate Minority Defendants' (collectively, "plaintiffs") April 12 submissions.

PRELIMINARY STATEMENT

The Court has invited plaintiffs to make submissions in support of a request for preliminary equitable relief that the Court draw an interim districting plan for the New York State Senate pending preclearance proceedings that are currently before the U.S. Department of Justice and the U.S. District Court for the District of Columbia. Only two plaintiffs made a timely motion in response to the Court's order, and all of the plaintiffs' submissions make the same meritless arguments that are either currently before the D.C. Court and the Department of Justice or have already been made and have been rejected by the United States Supreme Court and the Southern District of New York in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), *aff'd*, 125 S. Ct. 627 (2004), and by the New York County Supreme Court in *Cohen v. Cuomo*, Index No. 102185/12, slip op. (Sup. Ct. N.Y. Cty. Apr. 13, 2012).

As a threshold matter, however, the Court should not even reach the merits because it does not have authority to draw an interim districting map here. This is an impasse lawsuit, but there is no longer any impasse in connection with the Legislature enacting a redistricting plan for the State Senate. The Legislature has enacted, and the Governor has signed into law, such a plan. And, in connection with the DOJ preclearance process, the DOJ has represented that it anticipates making a determination on the 2012 New York Senate Plan by no later than April 27, 2012, more than five weeks before the petitioning period begins on June 5, 2012. Separately,

the D.C. Court has granted New York's motion to expedite the preclearance action that New York filed there.

In these circumstances, the Court does not have the authority to make determinations as to the likelihood that the DOJ or the D.C. Court will preclear the 2012 Senate Plan, let alone to draw interim lines on the basis of an unwarranted determination that particular challenges that these plaintiffs are pressing before the DOJ and the D.C. Court are likely to succeed. Those are issues for the DOJ and the D.C. Court to resolve, as they have been vested with the statutory authority to determine whether a plan complies with Section 5 of the Voting Rights Act of 1965. The Supreme Court's decision in *Perry v. Perez*, 132 S. Ct. 934 (2012), does not give a three-judge Court outside of the District of Columbia authority to make determinations on the merits of Section 5 preclearance. To the contrary, *Perez* makes clear: "Where a State has sought preclearance in the District Court for the District of Columbia, § 5 allows only that court to determine whether the state plan complies with § 5." 132 S. Ct. at 942. Where, as in *Perez*, a three-judge court is "faced with the necessity of drawing district lines by judicial order," the Supreme Court has made clear that such a court must be guided by a recently enacted plan and may deviate from it only to the extent that it stands a "reasonable probability of failing to gain § 5 preclearance" or that other challenges to the plan under the Constitution of Section 2 of the Voting Rights Act are "shown to have a likelihood of success on the merits." *Id.* at 942. But, unlike in *Perry* where preclearance would not be obtained in time for Texas' 2012 elections, here there is no "necessity" for the Court to draw an interim map, as the record shows that a preclearance determination for New York's 2012 Senate Plan will be made in time for the June 5, 2012 qualifying period. The Court does not, accordingly, have the authority to draw such a "contingency" map or make preliminary determinations—which will only work mischief on the

process before the DOJ and the D.C. Court—as to the likelihood of success for preclearance and plaintiffs' other claims in connection with drawing such an advisory map.

The Court should therefore dismiss this lawsuit or, at a bare minimum, deny the requests for preliminary equitable relief because there is no occasion for the Court to engage in an interim map-drawing exercise or make any preliminary determinations in connection with such an exercise. On the merits, however, these plaintiffs have also failed to carry their burden on their motions. Plaintiffs' claims are premised on two core arguments. First, that under the New York State Constitution, the Legislature was required to draw a 62-seat plan for the Senate and not a 63-seat plan. But the New York County Supreme Court has "declared that the formula prescribed in article III, § 4 of the New York Constitution does not forbid New York from increasing the size of the New York State Senate to 63 seats in 2012." *Cohen v. Cuomo*, Index No. 102185/2012, slip op. at 7-8 (Sup. Ct. N.Y. Cty. Apr. 13, 2012) (Ex G). In light of this ruling, plaintiffs cannot carry their burden to show any "likelihood of success" on the merits of their claims under the Voting Rights Act and the Constitution that are predicated on the now-rejected notion that a 63-seat Senate is unlawful. Second, plaintiffs rehash an equal population argument that, they nowhere mention, was squarely rejected in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), *aff'd*, 125 S. Ct. 627 (2005). The "regional discrimination" notion that permeates their claims is simply not cognizable. Nor, in any event, do the facts support this non-existent claim.

There is not, in short, any occasion for the Court to draw an interim redistricting map for the New York Senate while preclearance proceedings are pending before the DOJ and the D.C. Court. The Court has no authority to make preliminary determinations on issues that will be resolved by the DOJ or the D.C. Court. And, in any event, plaintiffs have not made the requisite

showing of a likelihood of success on their already-rejected claims that would warrant any deviation from the 2012 Senate Plan, even assuming that it were necessary for the Court to draw an interim map.

BACKGROUND

As the Court is aware, the Legislature enacted a redistricting plan for the State Senate and Assembly on March 14, 2012, and the Governor signed it into law the next day. *See* S.6696-A.9525. On March 16, the Senate plan was submitted to the DOJ for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and a preclearance complaint and a request for expedition was that same day filed in the U.S. District Court for the District of Columbia. (DE 258). The DOJ's review is limited: only three New York counties are covered by Section 5—Bronx, Kings (Brooklyn), and New York (Manhattan)—and therefore the DOJ is reviewing only the Senate districts contained in these counties. *See* 28 C.F.R. pt. 51 app. Parties to the present litigation—including the Lee Intevenors, Drayton Intervenors, Ramos Intervenors, and the Senate Minority Leader—subsequently submitted comment letters to the DOJ on the enacted plan. *See* DE 301 at 2.

On March 21, this Court held a status conference. The Court and plaintiffs focused on plaintiffs' malapportionment claims, which challenge the constitutionality of the 2002 plan. In light of the fact that the Legislature enacted a new plan, this Court questioned the plaintiffs on whether their claims are now moot; Plaintiffs and the Senate Minority Defendants insisted that the claims were not moot because the 2012 plan had not yet been precleared. *See, e.g.*, 3/21/12 Hr'g tr. at 6 (Hon. Raggi: "Is there any need for this action to go forward with respect to your remaining claims?" Mr. Mancino: "The short answer is yes . . . . Plaintiffs have three counts, Count One, Count Two and Count Four, which allege Federal Constitutional violations based on

the current, the 2002 State districting plan's violation of one person, one vote." Hon. Raggi: "But Defendants have no expectation of relying on those prior plans. Since this action was commenced, the State has enacted new plans."); *id.* at 49 (Hon. Raggi: "Tell me where we have it in a complaint before us."; Mr. Hecker: "It's the Plaintiffs' complaint alleging a statewide one person, one vote violation because there isn't a valid one person, one vote compliant plan in place in the 2002 election."; Hon. Raggi: "But even the minimums of notice pleading would require them to tell you that why it's deficient is because there's a 63-seat or 63 district plan.").

The Court then instructed the plaintiffs to amend their complaints to reflect the fact that Legislature has now enacted a plan. *See id.* at 65 (Hon. Raggi: "[W]e do not wish to guess at what the parties are pleading to the Court in light of some of the changed circumstances since the original complaint was filed. All Plaintiffs are to file amended complaints by March 27th."); *see also* 3/21/12 Scheduling Order. At the scheduling hearing, plaintiffs did not seek leave to amend their complaints to include claims *against the 2012 plan*, nor did the Court grant such leave. Moreover, counsel for the Senate Minority Defendants did not seek leave to realign himself as a plaintiff in this case; in fact, he expressly stated he did not plan to proceed as a plaintiff. *See* 3/21/12 Hr'g tr. 47 (Hon. Raggi: "You know, *you do sound more like a plaintiff than a defendant in this argument*. Are you planning on changing tables as this litigation goes forward?" Mr. Hecker: "I'm very comfortable sitting with my distinguished colleagues in this proceeding, and I also have lots of fun jousting with them over *Cohen*. And it is an unusual situation." (emphasis added)).

In response to the Court's order, plaintiffs filed amended complaints that continued to allege that the 2002 plan is malapportioned. *See* Pls.' First Am. Compl. (DE 255); Drayton Intervenors First Am. Compl., Counts I-III, VIII (DE 254); Lee Intervenors First Am. Compl.,

Counts I-III (DE 256); Ramos Intervenors First Am. Compl., Counts I, II, IV (DE 257). Plaintiffs' basic theory is that these claims against the 2002 plan are not moot because the 2012 plan still needs to be precleared before it may be implemented by the State. In addition to the malapportionment claims, intervenors amended their complaints to add entirely new claims against the 2012 plan, notwithstanding that they all allege that this plan is not yet operative.

The Senate Majority Defendants filed a motion to dismiss plaintiffs' malapportionment claims, arguing that these claims are premature because they are premised on multiple levels of speculation that the DOJ *might* object to the enacted plan; that, if that happens, the Legislature *might* not be able to address any such objections in time; and that a state court *might* find the Senate's plan unconstitutional. (DE 286-1). In the alternative, plaintiffs' claims should be dismissed on the merits because they are not entitled to the relief that they seek. *Id.* The Senate Majority Defendants also reserved the right to object to the plaintiffs' assertion of their newly asserted Section 2 and constitutional claims in their amended claims. *Id.* at 7 n.2.

In late March, the D.C. Court issued an order "agree[ing] with the [State] that the resolution of [the Senate's preclearance complaint] must be expedited," and ordering the DOJ to answer the preclearance complaint on an expedited basis. Order, *New York v. United States*, No. 1:12-cv-00413RBW (D.D.C. Mar. 30, 2012) (Ex D). The DOJ then filed its answer and a status report on April 13. *See* Answer (Ex F); Status Report (Ex E). In its status report, the DOJ explained, "The Attorney General has undertaken expedited review of this submission and has worked cooperatively with counsel for the New York Senate in obtaining necessary information and arranging necessary interviews." Status Report at 1. "Barring any unforeseen circumstances, the Attorney General anticipates making a determination on the New York Senate plan by April 27, 2012." *Id.* Thus, the DOJ anticipates resolving the Senate's preclearance

submission more than five weeks before the June 5, 2012 deadline for the petitioning period to begin, *see* N.Y. Elec. Law § 6-134(4), and more than nineteen weeks before the September 11, 2012 primaries, *see* N.Y. Elec. Law § 8-100(a).

Also on April 13, the Supreme Court of the County of New York rejected the challenge of a group of petitioners—including Senator Martin Milave Dilan, a defendant here—who claimed that the Legislature violated New York's Constitution by increasing the size of the Senate from 62 districts to 63. *See* Opinion, *Cohen v. Cuomo*, No. 12-102185 (April 13, 2012) (Ex G). As the court explained, "petitioners have not sustained their heavy burden of demonstrating beyond a reasonable doubt that the Legislature has acted unconstitutionally." *Id.* at 6. The Supreme Court accordingly "declared that the formula prescribed in article III, § 4 of the new York Constitution does not forbid New York from increasing the size of the New York State Senate to 63 seats in 2012." *Id.* at 7-8.

This Court in early April also issued an order directing "any party planning to move for preliminary equitable relief on the ground that one or more of the issues presented in the amended complaints that have been filed in this case has sufficient legal and factual merit to meet the standards set forth in the Written Scheduling Order issued on April 3, 3012 or that the Senate and/or Assembly Plan stands a reasonable probability of failing to gain section 5 preclearance, such that the Court should not defer to one or more aspects of the legislative plan in the absence of preclearance, must do so by 5:00 p.m. on April 12, 2012" 4/4/12 Clarification Order (emphasis omitted); *see also* 4/3/12 Scheduling Order (DE 287).

In response to this order, the Ramos Intervenors filed a preliminary injunction motion. (DE 305). Also, the Lee Intervenors filed a letter with the court, referring the court to comment letters that the Lee Intervenors, Drayton Intervenors, Ramos Intervenors, and the Senate

Minority Leader have submitted to the Department of Justice. (DE 304). And more than four hours after the Court's 5:00 p.m. deadline, the Drayton Intervenors filed a preliminary injunction motion and motion for expedited discovery. (DE 306-08). The Drayton Intervenors have expressly acknowledged, however, that they are "unable to fully present all the evidence necessary to succeed on either their Fourteenth Amendment [sic] or their claims under Section 2 of the Voting Rights Act." (DE 307 at 11).

Even though the Senate Minority Defendants' counsel have asserted no claims in this action and represented to the Court that they planned to continue proceeding as a defendant in this case, *see* 3/21/12 Hr'g tr. 47, they filed a submission in response to the Court's April 3 Order arguing that the Senate plan violates the New York Constitution and is retrogressive. (DE 303).

ARGUMENT

I. THERE IS NO BASIS FOR THIS COURT TO DRAW AN INTERIM PLAN FOR THE NEW YORK SENATE

The plaintiffs in this case originally challenged New York's 2002 districting plan for state electoral office as malapportioned in light of the 2010 Census, and urged this Court to intervene based on the presumption the Legislature would not enact a plan in time for the 2012 elections. That issue has been resolved without Court intervention. The Legislature has enacted a plan for the New York State Senate, well in advance of the primary elections, thus mooting plaintiffs' claim that there was an impasse emergency that warranted this Court to step in and draw a plan for New York's state electoral districts.

That would have been the end of this lawsuit if three counties in New York—Bronx County, Kings County, and New York County—were not "covered" jurisdictions for purposes of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. Section 5 suspends all changes to a covered jurisdiction's district lines and other election procedures until they are submitted to

and approved by either a three-judge panel in the U.S. District Court for the District of Columbia or the Attorney General of the United States. *See* 42 U.S.C. § 1973c(a); *Perry v. Perez*, 132 S. Ct. 934, 939 (2012). Accordingly, either the D.C. Court of the DOJ must preclear the New York's 2012 Senate Plan before it can go into effect. This Court, however, does not have any role in the Section 5 preclearance process. The "determination whether a covered change does or does not have the purpose or effect of 'denying or abridging the right to vote on account of race or color,'" pursuant to Section 5, "is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General." *Perkins v. Matthews*, 400 U.S. 379, 386 (1971). Indeed, the Supreme Court recently reaffirmed in *Perez* that federal courts other than the District Court for the District of Columbia "may not address the merits of § 5 challenges." 132 S. Ct. at 942 ("[W]e have made clear that other courts [*i.e.*, other than the District Court for the District of Columbia] may not address the merits of § 5 challenges.").

Accordingly, this Court's only further role is to dismiss this lawsuit or, if anything, to await the Section 5 determination by the DOJ or the D.C. Court. For example during the last redistricting cycle, the New York Legislature enacted the State Senate and Assembly plan on April 24, 2002, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 357 (S.D.N.Y. 2004), more than a month later in the election year than here. Yet, the three-judge court in *Rodriguez* did not presume that the DOJ would fail to review the plan in time or that the Legislature would fail to correct any Section 5 violations. Nor did the *Rodriguez* panel begin speculating about any potential Section 5 violations that the DOJ might find. Instead, the panel waited for the DOJ to do its job; and, because the DOJ ultimately did not object to the plan and precleared it on June 17, 2002, *see id.* at 358, there was nothing for the court to correct.

To be sure, there are unusual, emergency situations where a court other than the D.C. Court may have to intervene and draw an interim districting plan. In *Perez*, for example, the Supreme Court gave authority to a three-judge court in the Western District of Texas to modify the enacted plan for Texas to the extent particular aspects of the plan "stand a reasonable probability of failing to gain § 5 preclearance." *Id.* But in *Perez*, unlike here, a series of circumstances made it unlikely that Texas' newly enacted plan would receive preclearance in time for the 2012 elections. Among other things, Texas did not seek preclearance with the DOJ, and the D.C. Court denied Texas' motion to expedite the preclearance proceeding in the D.C. Court. Texas also had to have a precleared plan in place by February 1, 2012 for the current election cycle, but the D.C. Circuit scheduled a trial in the preclearance proceeding (where there were eleven intervenors) that would not be completed before February 3, 2012—thus ensuring that there would be no precleared plan for Texas in effect by the February 1 deadline. *See* Texas Merits Brief at 11-12, 26 (Ex H).

Faced with these extraordinary circumstances, the Supreme Court directed the Western District of Texas to draw an interim plan that deferred to the enacted, but-not-yet-precleared plan, except to the extent that particular districts "stand a reasonable probability of failing to gain § 5 preclearance." *Perez*, 132 S. Ct. at 942. But the Supreme Court did not purport to overrule decades of precedent establishing that when the D.C. Court or the DOJ stands ready to resolve Section 5 claims in a timely fashion before an election, a non-D.C. Court "may not address the merits of § 5 challenges." *Id.* (citing *Perkins*, 400 U.S. at 385).

The emergency circumstances the Supreme Court faced in *Perez* are completely unlike the situation before the Court here. Here, New York sought preclearance before both the DOJ and the D.C. Court. And both the DOJ and D.C. Court have indicated that they will resolve the

Section 5 claims before the petitioning period begins, unlike in *Perez* where the preclearance trial in the D.C. Court would not end until *after* the deadline for putting a plan in place for Texas. The DOJ explained in its recent status report for New York's 2012 Senate Plan that "[t]he Attorney General has undertaken expedited review of this submission [and] [b]arring any unforeseen circumstances, the Attorney General anticipates making a determination on the New York Senate plan by April 27, 2012." 4/13/12 Status Report at 1. That is more than *five weeks* before the June 5, 2012 petitioning period begins, see N.Y. Elec. Law § 6-134(4), and more than nineteen weeks before the September 11, 2012 primaries, *see* N.Y. Elec. Law § 8-100(a). Moreover, unlike in *Perez* where the D.C. Court denied Texas' motion to expedite, the D.C. Court issued an order "agree[ing] with [New York] that the resolution of [the Senate's preclearance complaint] must be expedited," and directed the DOJ to answer the preclearance complaint on an expedited basis. 3/30/12 Order. There is thus no reason to believe that the DOJ or the D.C. Court lacks sufficient time to resolve any Section 5 issues before June 5, 2012. And, in contrast to Texas, where the entire state is a covered jurisdiction for Section 5 purposes, only three counties in New York are covered jurisdictions. See 28 C.F.R. pt. 51 app. Reviewing whether three counties are compliant with Section 5 is obviously a far less onerous task than reviewing an entire state's redistricting plan.

Accordingly, because there is absolutely no reason to believe that the DOJ or the D.C. Court will fail to do their job, this Court is powerless to litigate any Section 5 claims—on a preliminary or any other basis. Indeed, no court has ever undertaken to determine whether there is a "reasonable probability" that a plan will fail to be precleared by the DOJ or the D.C. Court when those very entities, which are expressly charged with making the Section 5 preclearance by the Voting Rights Act, are reviewing the plan at issue and prepared to make a timely

preclearance determination. The Court should readily perceive how undertaking this analysis could only create mischief. Any determination by this Court that New York's Senate Plan either was or was not likely to be precleared by the DOJ or the D.C. Court would only interfere with the processes before the DOJ and the D.C. Court without any prospect of being binding on them. Indeed, the Senate Minority Defendants and several intervenors are making the same arguments here—in some cases based on the very same submissions—that they are making in the D.C. Court and before the DOJ.

So, if this Court were to expend its resources adjudicating whether there are reasonable probabilities of Section 5 violations and drawing hypothetical maps based on speculated violations, any remedial order it issues will merely be an advisory opinion. And, as soon as the DOJ or D.C. Court identify either any Section 5 violations or preclear the plan—and there is no reason to believe that the DOJ or D.C. Court will fail to do its job on time—this Court's order will be superseded, and therefore all of the time and effort spent by this Court and by the parties will have been wasted. There is simply no basis for this Court to engage in a wholly speculative, non-binding inquiry as to whether New York's 2012 Senate Plan will be precleared by the DOJ or the D.C. Court when both the DOJ and the D.C. Court are on track to make their preclearance determinations in a timely fashion and well in advance of the June 5, 2012 date for the commencement of the petitioning period here. For all of these reasons, the Court should now dismiss this lawsuit and, at a bare minimum, has no authority to engage in an inquiry or issue any orders opining as to what determinations the DOJ and the D.C. Court are likely to make.

Awaiting a determination by the authorities that are vested by statute with making the Section 5 determinations will also not, as a practical matter, put undue pressure on a later three-judge Court or this Court if it seeks to retain jurisdiction over this lawsuit. If either the DOJ or

the D.C. Court identify any problems with the New York State Senate Plan that warrant denial of Section 5 preclearance, the role of any three-judge Court in putting in place a Senate plan for New York's 2012 elections is limited to correcting only those deficiencies identified by either the DOJ or the D.C. Court. As the Supreme Court explained in *Upham v. Seamon*: "We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General." 456 U.S. 37, 43 (1982). Thus, "in the absence of a finding that [particular districts] offended either the Constitution or the Voting Rights Act," a district court is "not free . . . to disregard the political program of the . . . Legislature," but is permitted only to remedy the specific problems identified by the DOJ or the D.C. Court in the covered districts and affected contiguous districts. *Id.*

For example during the 1992 redistricting cycle, the DOJ objected to two Assembly districts. *See FAIR v. Weprin*, 796 F. Supp. 662, 667 (N.D.N.Y. 1992). One week before the election process was to begin, *id.* at 666, the district ordered the special master to draft a remedial plan, *id.* at 674. Applying *Upham*, the court "directed the Special Master to draw new district lines for them, and for such contiguous districts as may thereby be affected, to bring those districts into compliance with the Voting Rights Act." *Id.* at 674. And "[w]ith respect to the remaining districts in the Assembly plan" the Court "defer[ed] to the legislature's plan and adopt[ed] its apportionment of those districts." *Id.* Thus, the Court did not direct the magistrate judge to modify the entire plan based on speculation about potential constitutional and Section 2 violations. And in any event, this remedial order was withdrawn six days later because the Legislature enacted and the DOJ promptly precleared a plan that had corrected this deficiency. *See* FAIR Docket #83 (Ex A). Thus, in light of the limited potential role for this Court, the Court

should—at a bare minimum—wait until the DOJ or D.C. Court decides whether any particular districts violate Section 5 before it engages in any process of line-drawing for New York State Senate districts.

Although the Senate Minority Defendants have not asserted any claims in this action or made a motion for preliminary equitable relief, they rely on *Branch v. Smith*, 538 U.S. 254 (2003), to support their notion that this Court still has authority to act with respect to plaintiffs' malapportionment claims. (DE 294 at 3; DE 314 at 2). In pertinent part, *Branch* addressed the propriety of a federal court order enjoining a state-court-drawn plan that "had no prospect of being precleared in time for the [] election," *id.* at 265, not whether a federal court has authority to begin drawing an interim map while a legislatively enacted plan awaits preclearance. But *Branch* reitereated that "'(a)bsent evidence that these state branches will fail *timely* to perform that duty [to reapportion electoral districts], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 262 (emphasis supplied by the Court in *Branch*; quoting *Growe v. Emison*, 507 U.S. 25, 34 (1993)).

Here, unlike in *Branch*, there is no evidence that the New York Legislature will fail to "timely" perform its duty to reapportion the State Senate. To the contrary, the Legislature has acted and the Senate Plan is now awaiting a preclearance determination which the DOJ has represented it will make by April 27. In *Branch*, by contrast, the district court only began drawing lines after it had made detailed findings that it had "serious doubts" as to whether the preclearance process in the DOJ would be completed prior to the election. Among other things, the district court noted that a series of events—including the prospect of an appeal from the state court's order—would likely reset the DOJ's 60-day clock. *See Smith v. Clark*, 189 F. Supp. 2d 503, 508-09 (S.D. Miss. 2002), *aff'd sub nom.*, *Branch v. Smith*, 538 U.S. 254 (2003). Even if

Branch had addressed the district court's authority to engage in this interim line drawing—and it did not—it would not provide authority for the Court to proceed here. As shown above, there cannot plausibly be any "serious doubts" as to whether preclearance proceedings before the DOJ and the D.C. Court will be completed in advance of the June 5 petitioning date for New York State Senate candidacy.

The Court does not, accordingly, have the authority to draw an interim New York State Senate Plan or make any preliminary determinations as to the merits of plaintiffs' claims or the likelihood of Section 5 preclearance in connection with such an exercise.

II. Plaintiffs' New Claims Should Not Be Adjudicated By This Court

Plaintiffs new Section 2 and constitutional claims are also not properly before this Court. Plaintiffs seem to believe that *Perez* transforms this Court into a court of general jurisdiction, authorized to entertain any interested party's concerns about the enacted plan. Again, nothing could be farther from the truth.

Perez reaffirmed the longstanding principle that when "'faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the [U.S.] Constitution or the Voting Rights Act.'" 132 S. Ct. at 941 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). Moreover, plaintiffs attempting to establish violations of Section 2 or the Constitution must file a complaint in district court, follow the same rules and procedures that any other plaintiff must follow, and must satisfy the same burden of proof that any other plaintiff must satisfy. *See id.* at 940, 941-42

In *Perez*, after the Texas Legislature enacted its redistricting plans, plaintiffs filed suit in the United States District Court for the Western District of Texas, alleging the enacted plan

violated the U.S. Constitution and Section 2 of the Voting Rights Act. *Id.* at 940. A full trial was held on the plaintiffs claims, and the court withheld judgment pending resolution of the preclearance process in the D.C. Court. *Id.*

Not surprisingly, the Supreme Court in *Perez* explained that in drawing an interim plan, the Western District of Texas need not ignore the evidence of Section 2 and constitutional violations that it had already reviewed. If plaintiffs satisfied their burden of establishing an entitlement to a preliminary injunction, the three-judge panel should modify the enacted plan to correct such violations. *See id.* at 941-42 (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, (2008)); *see also id.* ("There is no reason that plaintiffs seeking to defeat the policies behind a State's redistricting legislation should not also have to meet that standard."). But if plaintiffs cannot satisfy their burden, then the Court lacks the authority to modify the enacted plan. *See id.* at 944 ("Without such a determination, the District Court had no basis for drawing a district that does not resemble any legislatively enacted plan."). Thus, *Perez* does not alter plaintiffs' burden of proof, nor does it permit plaintiffs to flagrantly disregard the Federal Rules of Civil Procedure.

Plaintiffs new claims against the 2012 plan are therefore not properly before this Court. If plaintiffs would like to challenge some aspect of the 2012 plan, they should file a new complaint in the appropriate federal district court. And if they believe that they are entitled to a three-judge panel, they should file an application for a three-judge panel. And if they believe that their claims are entitled to expedited consideration, they should file a motion for expedited consideration. And if they believe that their complaint should be consolidated with this case, they should file a motion for consolidation.

Instead, plaintiffs flagrantly ignore the Federal Rules of Civil Procedure and ignore the limits of this Court's jurisdiction, urging this Court entertain a hodgepodge of concerns about the enacted plan. *First*, plaintiffs failed to seek leave from the Court, pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, to supplement their complaint with entirely new claims. Moreover, this Court's instruction to amend their malapportionment claims *against the 2002 plan* did not grant Plaintiffs *carte blanche* leave to amend their complaints to include entirely new claims *against the 2012 plan*. *Second*, the Senate Minority Defendants' claims are not properly before this Court, because, as the name implies, the Senate Minority Defendants are *defendants*. Should they wish to proceed as plaintiffs, they should file a motion to realign themselves as plaintiffs. *Third*, the so-called "Boone Plaintiffs-Intervenors" claims are not properly before this Court, *see* DE 307 at 21-24, because the "Boone Plaintiffs-Intervenors" have not even bothered to file a motion to intervene. *Fourth*, the Drayton Intervenors and Ramos Intervenors' motions are not properly before this Court because they failed to comply with the Court's 5:00 p.m. deadline, *see* Scheduling Order (DE 287), and then failed to file a motion pursuant Rule 6(b)(1)(B) of the Federal Rules of Civil Procedure establishing "excusable neglect" for this default.

And *fifth*, the plaintiffs' new claims are also not properly before this three-judge panel because they have failed to establish that they are even entitled to a three-judge panel. Entitlement to a three-judge panel is a jurisdictional inquiry, *see Kalson v. Paterson*, 542 F.3d 281, 287-88 (2d Cir. 2008), that is ordinarily resolved by a single federal district court judge, *see Laroque v. Holder*, No. 10-0561, 2010 WL 3719928 (D.D.C. May 12, 2010), because "[c]onvening a three-judge court places a burden on our federal court system," *Allen*, 393 U.S. at 561. In applying 28 U.S.C. § 2284(a), the Second Circuit has held that plaintiffs challenging a

redistricting plan are not entitled to a three-judge panel when their constitutional claims are "insubstantial." *Kalson*, 542 F.3d at 287. Moreover, plaintiffs are not entitled to a three-judge panel to resolve Section 2 claims unless these claims are "'inextricably intertwined with constitutional challenges.'" *Rodriguez*, 308 F. Supp. 2d at 355 (quoting *Page v. Bartels*, 248 F.3d 175, 190 (3d Cir. 2001)). Here, plaintiffs have made no attempt to establish that their constitutional claims are substantial and that their Section 2 claims are inextricably intertwined with constitutional challenges.

Plaintiffs claims are not properly before this Court for the following additional reasons:

Article III, Section 4 of the New York Constitution

The Senate Minority Defendants allege that the 2012 Senate plan violates Article III, Section 4 of the New York Constitution. (DE 303 at 2-4). This Court lacks subject matter jurisdiction over this issue of state-law, and the Eleventh Amendment bars this court from enjoining state officials' implementation of the Senate plan based on an alleged violation of state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Wolpoff v. Cuomo*, 792 F. Supp. 964, 965-67 (S.D.N.Y. 1992). And in any event, the Senate Minority Defendants provide no good reason why this Court needs to resolve this issue, where the Supreme Court of the County of New York has already rejected this claim, and the petitioners are seeking review of this claim before the New York Court of Appeals.

Section 2

This three-judge panel clearly has no jurisdiction over the Drayton Intervenors' Section 2 claims, *see* DE 307 at 16-24, because 1) these claims are not "'inextricably intertwined,'" *Rodriguez*, 308 F. Supp. 2d at 355 (quoting *Page*, 248 F.3d at 190, with plaintiffs' Equal

Protection Clause claim, and 2) this panel does not have jurisdiction to alter districts far outside New York's three covered counties.[1]

Inextricably Intertwined The Drayton Intervenors allege that the Senate plan violates Sections 2 because the Legislature failed to create a district in Nassau County where "Black voters all[y] with Hispanics to elect their candidates of choice." DE 307 at 24. It is beyond dispute that this Section 2 claim is unrelated to plaintiffs' allegations that the alleged overpopulation of downstate New York violates the Equal Protection Clause. DE 307 at 11-16. Plaintiffs never claim that the alleged overpopulation of downstate New York should be corrected by drawing the 63rd district on Long Island. Indeed, no party has even proposed an alternative plan that draws the 63rd district in Long Island. Likewise, the Drayton Intervenors do not propose correcting the alleged Section 2 violation in Nassau County by drawing the 63rd district on Long Island. Instead, they merely propose reconfiguring the existing districts. *See* DE 308-3 at 32. So, the resolution of the Section 2 claim is completely unrelated to the resolution of the Equal Protection Clause claim.

[1] Plaintiffs also fail to prove that they have standing to bring these Section 2 challenges. In *United States v. Hays*, the Supreme Court held that "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." 515 U.S. 737, 744-745 (1995). That standing, however, exists "only with respect to the [district in which the plaintiff resides]." *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*"). Where, on the other hand, a plaintiff resides outside an allegedly gerrymandered district, he lacks standing unless he can show that he "has personally been subjected to a racial classification." *Hays*, 515 U.S. at 745. It is "irrelevant" whether plaintiffs couch their claims as a challenge to the redistricting legislation "in its entirety." *Id.* at 746. And the rationale of *Hays*, articulated in a case involving racial gerrymander claims, applies with equal force to vote dilution claims. *See Hall v. Virginia*, 276 F. Supp. 2d 528, 531 (E.D. Va. 2003), *aff'd*, 385 F.3d 421. For only when a plaintiff can show that minority voting strength was diluted in his district can he show that he suffered any cognizable injury. Here, plaintiffs lack standing because do not identify an alternative plan that corrects the alleged Section 2 violation in New York City; and without knowing what district plaintiffs seek to correct, it is impossible to know whether any plaintiffs' voting strength was diluted. Likewise, the Drayton Intervenors fail to provide any proof that they actually live in Nassau County.

Likewise, Drayton Intervenors allege that the Legislature violated Section 2 by failing to draw an additional black-Hispanic district somewhere in New York City. *See* DE 307 at 18. And they apparently assume that this black-Hispanic district could have been drawn if the 63rd seat had been drawn in downstate New York rather than upstate New York. *See id.* at 17. But the Drayton Intervenors have failed to identify any alternative plan that purports to correct the overpopulation of downstate New York and cure the alleged Section 2 violation. In the absence of any proof that the Equal Protection Clause claim and Section 2 claim are inextricably intertwined, this court lacks jurisdiction over the latter claim.

Outside Covered Counties

Moreover, this Court lacks jurisdiction to cure any deficiencies outside the three covered counties. According to the April 3 scheduling order, this Court is proceeding to draw an interim plan in the event that the DOJ or D.C. Court fails to preclear the enacted plan. (DE 287 at 1). But only three counties in New York are covered by Section 5—Bronx, Kings (Brooklyn), and New York (Manhattan). *See* 28 C.F.R. pt. 51 app. So at most, this Court will only be required to draw an interim plan for the districts in these three counties. The Drayton Intervenors fail to explain how any district in Nassau County could possibly be affected by such an interim plan. And in the absence of such a showing, this Court lacks the authority to correct such an error on an interim basis. Likewise, the Drayton Intervenors failed to propose an alternative plan that corrects the alleged Section 2 violation in New York City. Because it is impossible to know whether plaintiffs are seeking to correct a district within any of the three covered counties, this Court lacks jurisdiction to resolve plaintiffs' claim.

Furthermore, the Drayton Intervenors fail to provide the Court evidence that they have standing to challenge the configuration of the districts in Nassau County. Because the Drayton

Intervenors fail to provide any actual evidence that they live in the district that they challenge, they have failed to establish standing to assert such a claim.

III. Plaintiffs' Claims Fail On The Merits

A. Plaintiffs' Section 5 Claims Fail On The Merits

Assuming that this Court decides to take the unprecedented step of adjudicating plaintiffs' Section 5 claims, these claims should be rejected.

Section 5 applies only to New York's three covered counties—Bronx, Kings (Brooklyn), and New York (Manhattan). 28 C.F.R. pt. 51 app. It preemptively "suspend[s] all changes in state election procedure[s]" in these counties "until [the changes are] submitted to and approved by a three-judge Federal District Court in Washington, D.C.[] or the Attorney General," who must be convinced that the change lacks both the "purpose" and the "effect" of "denying or abridging the right to vote on account of race or color." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2509 (2009) (citing 42 U.S.C. § 1973c(a)).

Under Section 5 of the Voting Rights Act, a redistricting plan impermissibly "denies or abridges the right to vote" if it "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or membership in a language minority group] to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). In its 2006 reauthorization of the Voting Rights Act, Congress specified that "[t]he term 'purpose' . . . shall include any discriminatory purpose." 42 U.S.C. § 1973c(c). In doing so, Congress partially abrogated *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), which had held that Section 5 only prohibits retrogressive purpose. 42 U.S.C. § 1973c(c). Congress further explained that Section 5's aim "is to protect the ability of [minority] citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d); *see also Beer v. United States*, 425 U.S.

130, 141 (1976) (holding that a redistricting plan violates Section 5 if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

"The 'benchmark' against which a new plan is compared is the last legally enforceable redistricting plan in force or effect." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011) ("*DOJ Guidance*") (citing *Riley v. Kennedy*, 553 U.S. 406 (2008)); *see also* 28 C.F.R. § 51.54(c)(1). The "comparison of the benchmark and proposed plans at issue" is based on "updated census data in each." *DOJ Guidance*, 76 Fed. Reg. at 7471. In these plans, the "ability of [minority] citizens to elect their preferred candidates of choice" in a district—which is protected by Section 5's anti-retrogression requirement—"either exists or it does not." *Id.*

In the unusual situation where a non-D.C. Court is litigating Section 5 claims, plaintiffs bear the burden of establishing Section 5 violations. Unless plaintiffs can establish that a particular aspect of the plan "stand[s] a reasonable probability of failing to gain § 5 preclearance," the court must defer to the enacted plan. *Perez*, 132 S. Ct. at 942. Reversing the burden and permitting non-D.C. courts to alter enacted plans unless the State disproves any hypothetical Section 5 claim would only "exacerbate[]" the "'serious constitutional questions' raised by § 5's intrusion on state sovereignty." *Id.* (quoting *Nw. Austin*, 557 U.S. at 204).

Here, the 2012 Senate plan clearly complies with Section 5. As the State demonstrates in its preclearance submission, the 2012 plan preserves minority voting strength in all Section 5 covered districts. *See* 3/16/12 Preclearance Cover Letter at 6-8 (Ex C).[2] Most importantly, all

[2] The complete preclearance submission for the Senate plan is available at http://www.latfor.state.ny.us/justice2012/?sec=sendoj2012.

eleven of the districts where minority populations are able to elect their preferred candidates of choice remain electable under the 2012 plan. *Id.*

Plaintiffs fail to satisfy their burden of establishing a reasonable probability that any particular aspect of the Senate plan violates Section 5. Indeed, none of the plaintiffs seriously dispute that the eleven districts where minority populations are able to elect their preferred candidates remain electable under the enacted plan. To be sure, the Lee Intervenors reference a comment letter by the Senate Minority Leader, where he notes the possibility that Senate District 29 might be retrogressive. DE 304-4 at 3, 14. But the comment letter underscores that this allegation is pure speculation. *See* DE 304-4 at 14 ("We still are in the process of evaluating this issue, and we will supplement these comments with additional comments on this issue as soon as possible."). Indeed, while the Senate Minority Defendants' April 12 filing before this court is nearly a carbon copy of this comment letter (*see* DE 303), they chose to omit any allegations about Senate District 29, further underscoring that they have no basis for making this claim. Thus, this allegation—even assuming it is properly before this court—fails to satisfy the reasonable probability standard.

Moreover, none of the plaintiffs allege that but for discriminatory purpose, an additional ability to elect district could have been drawn under the 63-seat plan. The Senate Minority Defendants only allege that an additional seat could have been drawn under a 62-seat plan (DE 303 at 7). This argument is premised entirely on the assumption that the New York Constitution requires the Legislature to draw a 62-seat plan, not a 63 seat plan—an assumption that has been proven incorrect by the Supreme Court of the County of New York's recent decision in *Cohen v. Cuomo*.

The Senate Minority Defendants nonetheless claim that the addition of a 63rd Senate district is retrogressive because there is now a smaller proportion of ability to elect seats: while under the benchmark plan, 11 out of 62 seats were minority seats, now 11 out of 63 seats are minority seats. This same argument, however, was squarely rejected by the Supreme Court in *Abrams*, 521 U.S. at 97-98. In *Abrams*, the Appellants argued that the Georgia Congressional plan drawn by the district court violated Section 5 because under the benchmark plan, "1 of the 10 districts (10%) was majority black, while under the District Court's plan 1 of 11 districts (9%) is majority black, and therefore blacks do not have the same electoral opportunities under the District Court's plan." *Id.* at 97. In rejecting this argument, the Court explained, "Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority. This the Voting Rights Act does not require." *Id.* at 97-98. Similarly here, under the Senate Minority Defendants' logic, every time the State of New York added a Senate seat, it would be have to be a minority district. "This the Voting Rights Act does not require." *Id.* at 97.

Senate Minority Defendants try to distinguish *Abrams* by arguing, "Th[e] increase did not dilute the voting power of minorities in Georgia's one majority-minority congressional district because that district constituted 1/435th of the House of Representatives both before and after the reapportionment." DE 303 at 8. But such an argument misconstrues how courts evaluate retrogressive effect. In determining whether a redistricting plan is retrogressive, a court must analyze the plan's impact on the number of minority districts in the covered jurisdiction, *e.g.*, *Abrams*, 521 U.S. at 995-98—not the plan's impact on the number of minority districts in the entire United States. By the Senate Minority Defendants' own absurd logic, a Congressional redistricting plan in Georgia that reduced the number of minority districts from one to zero

would not be retrogressive as long as Minnesota or some other state enacted a Congressional redistricting plan that increased the number of minority districts by one.

Additionally, even if *Abrams* is not dispositive, plaintiffs' claim lacks merit because plaintiffs rely on the wrong denominator. Because New York is only a partially covered jurisdiction, the proper denominator is the number of districts in the covered counties. This number has not changed; both under the benchmark plan and the enacted plan the covered counties contain 18 districts. *See* "View District Maps," The New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR Website"), http://www.latfor.state.ny.us/maps/. Thus, no retrogression has occurred, even under the plaintiffs' own theory.

Moreover, the annexation cases cited by Senate Minority Defendants are completely inapposite. DE 303 at 9. In those cases, towns reduced the voting strength of minority voters by *adding white population* to existing districts. That is a classic example of retrogression. But those cases have nothing to do with question of whether *adding districts* has a retrogressive effect on minority voters, where the Legislature does not reduce the number of existing minority districts.

And Senate Minority Defendants and the Lee Intervenors claim that the purported underpopulation of districts in upstate New York and the purported overpopulation of districts in downstate New York is somehow retrogressive. (DE 303 at 12-17; DE 304 at 2-4). As will be explained in further detail below, this is just a rehash of the same Equal Protection Clause claim plaintiffs alleged in *Rodriguez*, and the court rejected, 308 F. Supp. 2d at 363-71, and the Supreme Court affirmed, 543 U.S. 997 (2004). Plaintiffs' blatant attempt to dress a meritless

Equal Protection Clause claim in Section 5 garb does not satisfy the reasonable probability standard.

In any event, no court has ever found a Section 5 violation based on a claim that covered districts are overpopulated. What matters for Section 5 purposes is how many ability to elect districts are in the benchmark, and how many ability to elect districts are in the enacted plan. It is irrelevant for Section 5 purposes how many voters are in each of those ability to elect districts. By plaintiffs' own flawed logic, if a benchmark plan contained five ability to elect districts that are underpopulated, and the enacted plan contained six ability to elect districts that are overpopulated, the enacted plan would somehow be retrogressive—such a finding would be completely unprecedented.

Even if overpopulation was indicative of retrogression, plaintiffs fail to compare the enacted plan to the benchmark. A comparison of the eleven ability to elect districts shows similar overpopulation in the benchmark plan in 2002 as the enacted plan in 2012. *See* "View District Maps," LATFOR Website, http://www.latfor.state.ny.us/maps/ (compare statistics provided on "2002 District Maps" with statistics provided on "2012 District Maps").

Thus, plaintiffs fail to satisfy their burden of establishing a reasonable probability that any particular district violates Section 5.

B. Plaintiffs' Section 2 and Constitutional Claims Fail On The Merits

Plaintiffs seek a preliminary injunction based on the same constitutional and Section 2 violations they alleged in *Rodriguez* ten years ago.[3] Not only do plaintiffs attempt re-litigate the

[3] Senate Minority Defendants also allege the 63-seat plan violates the New York Constitution (DE 303 at 5-7), but as explained above, this Court is powerless to resolve this issue. But should this Court for some reason decide to litigate this issue, the brief filed by the Senate Majority Leader in *Cohen v. Cuomo* is attached. (Ex B).

same issues that were litigated and lost in *Rodriguez*, they also urge this Court to grant a preliminary injunction based an incomplete record.

Such an "extraordinary remedy," *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990), would be unprecedented. Preliminary injunctions are rarely granted in redistricting cases, *see, e.g.*, *Pope v. County of Albany*, No. 1:11-cv-00736, 2011 WL 365 1114, *3-7 (N.D.N.Y. Aug. 18, 2011); *Perry-Bey v. City of Norfolk*, 679 F. Supp. 2d 655, 662 (E.D. Va. 2010); *Nixon v. Kent Cnty*, 790 F. Supp. 738, 745 (W.D. Mich. 1992)), and are only granted where the record is more fully developed.

It is not surprising that successful motions for preliminary injunctive relief in redistricting cases are rare. That is because in a redistricting case, courts must presume the legislature's good faith and "exercise extraordinary caution" when reviewing adopted plans. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). As redistricting is "primarily the duty and responsibility of the State," judicial review of state redistricting legislation "represents a serious intrusion on the most vital of local functions." *Id.* at 915. (quotation marks and citation omitted). "[C]ourts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Id.* at 916-17.

A preliminary injunction is a highly intrusive remedy, especially when the record is not fully developed. Such a remedy potentially requires a court to alter a Legislature's duly enacted plan before an election based on a preliminary assessment of the evidence, and then undo the remedial plan after the election, should a trial reveal that no defect existed in the Legislature's plan in the first place. Thus, courts regularly refuse to grant preliminary injunctions where the

record is incomplete. *See., e.g., Pope*, 2011 WL 365 1114, *3-7 (denying motion for preliminary injunction where plaintiffs failed to "demonstrate[] a likelihood of success on the merits with respect to the three *Gingles* preconditions," including by failing to adduce statistical evidence of political cohesiveness or majority bloc voting); *Perry-Bey*, 679 F. Supp. 2d at 662 (denying preliminary injunction where plaintiff adduced no "statistical evidence" that three *Gingles* preconditions had been met); *Nixon*, 790 F. Supp. at 745 (denying motion for preliminary injunction where plaintiffs failed to prove political cohesiveness of minority groups).

For this reason alone, this Court should deny plaintiffs' motions for a preliminary injunction. As the Drayton Intervenors unabashedly acknowledge, they "are unable to fully present all the evidence necessary to succeed on their Fourteenth Amendment [claims] or their claims under section 2 of the Voting Rights Act." DE 307 at 11 n.1. In fact, they acknowledge that their putative experts "have been unable to fully complete their analysis's [sic] of, *inter alia*, racially polarized voting in New York State, the political cohesiveness of Blacks and of Blacks and Hispanic voters in New York City as well as in Nassau County, Defendants' adherence to traditional redistricting principles . . . , [and] the 'totality of the circumstances' under Section 2 of the Voting Rights Act." Gibbs Aff. ¶ 8 (DE 306-2). This admittedly meager evidence fails to make even a prima facie showing of a section 2 violation, let alone the "rigorous likelihood of success" required for a preliminary injunction. *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001). Should this Court grant interim relief at such an early stage in the litigation—where even plaintiffs' concede the record is not fully developed—it risks having to undo this remedial plan after the 2012 election, should a full trial on the merits reveal that there was no effect in the Legislature's plan in the first place.

And in any event, plaintiffs are not entitled to a preliminary injunction due to their inability to establish irreparable harm. Despite the constitutional stature of the right to vote, there is no "*per se* rule" that a violation of section 2 visits irreparable harm on voters because "corrective relief" other than a preliminary injunction "will be available at a later date, in the ordinary course of litigation." *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). The plaintiffs make no serious attempt to demonstrate that a failure to award a preliminary injunction will "impair the court's ability to grant an effective remedy" after a trial and thus, cannot establish a right to this extraordinary remedy. *Id.*

Indeed, the fact that courts regularly postpone implementation of a remedial redistricting plan before an election, even when a constitutional or Section 2 violation has been found, underscores the weakness of plaintiffs' claim that they will be irreparably harmed unless the 2012 Senate plan is enjoined prior to the election. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (holding that lower court properly postponed a remedy, in connection with a districting plan that was found "invalid," until after an imminent election in accordance with "well-known principles of equity").[4]

[4] *See also, e.g.*, *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) ("We affirm the District Court's action in permitting the 1966 election to proceed under H.B. 195 although constitutionally infirm . . . ."); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964) ("[T]he court below, acting under equitable principles, must now determine whether, because of the imminence of that election and . . . to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the [election] to be conducted pursuant to the [unconstitutional redistricting plan] . . . ."); *Old Person v. Brown*, 182 F. Supp. 2d 1002, 1017-18 (D. Mont. 2002) (declining to impose a remedy where the election cycle was already in "full swing"); *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (noting that, although the plaintiffs had "at least presumptively" shown the unconstitutionality of the redistricting plan, the Court had "granted them no relief" with respect to the ensuing elections), *aff'd sub nom., Republican Party of Shelby Cnty. v. Dixon*, 429 U.S. 934 (1976); *In re Senate Bill 177*, 294 A.2d 657, 660 (Vt. 1972) (with an election imminent, the Court withheld relief upon "equitable principles," even though the redistricting plan was invalid); *Davenport v. Apportionment Comm'n*, 304 A.2d 736, 739 (N.J. Super. Ct. App. Div.

Thus, when a court lacks sufficient time to fully adjudicate Section 2 or constitutional claim before the election, the prudent approach is to simply wait until after the election to fully resolve the issue, rather than grant injunctive relief on an incomplete record. That's exactly what the three-judge panel did in *Rodriguez* in 2002, when faced with same Section 2 and constitutional claims that this Court is facing today. And that's exactly what the state court did in *Allen v. Pataki* in 2002, when plaintiffs filed a motion for a preliminary injunction challenging the enacted Senate plan. The court rejected the motion, "'finding that neither injunctive relief nor an expedited trial was warranted.'" *Rodriguez*, 308 F. Supp. 2d at 357 (quoting Order, *Allen v. Pataki*, No. 101712/02 (N.Y. Sup. Ct. May 9, 2002)).

And here, there is clearly insufficient time to fully develop the record with regards to plaintiffs' Section 2 and constitutional claims before the 2012 elections, assuming they survive a Rule 12(b)(6) motion. It took the *Rodriguez* court two years to resolve these identical claims, and countless pleadings, depositions, expert reports, and hours of testimony. *See, e.g.*, *See id.* at 359-61 ("On January 24, 2003, the plaintiffs and plaintiffs-intervenors filed a Joint and Consolidated Amended Complaint. . . . The defendants filed their Answer to the Complaint on July 18, 2003 . . . . On March 7, 2003, the defendants moved to dismiss . . . . On June 24, 2003, following *extensive briefing and oral argument*, the Court denied the motion. . . . *Extensive discovery ensued* and was completed on or about September 26, 2003. . . . On October 3, 2003, the defendants moved for summary judgment . . . . In addition to the *extensive briefing*, the Court heard *lengthy oral argument* . . . . The trial was held before this Court between November 20 and November 25, 2003. It was preceeded by the submission of *extensive written filings by*

(continued…)

1973) ("With somewhat less severe time restrictions that this court now faces, our Supreme Court has declined to award immediate relief even where the complaint has had merit.").

all parties, which included, among other things, some *273 proposed exhibits; 252 stipulated facts (with subparts); legal memoranda; and proposed findings of fact and conclusions of law*. . . . [T]he parties also submitted *243 pages* of direct testimony by affidavit or declaration in advance of trial. . . . Following trial, on December 8, 2003, the parties *454 pages* of additional proposed findings of fact and conclusions of law." (emphases added)); *see also id.* at n.16 (setting forth the extensive summary judgment submissions). *See generally Rodriguez* Docket (Ex I). Similarly here, at most, this Court should deny plaintiffs' motions for a preliminary injunction, and wait until after the 2012 elections to fully litigate these issues.

And in any event, plaintiffs fail to even come close to establishing a likelihood of success, as they try to relitigate the same claims they alleged and lost in *Rodriguez* ten years ago.

Section 2

The Drayton Intervenors fail to establish the likelihood of success on their Section 2 claims. Section 2 prohibits government action "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Claims of "vote dilution" are cognizable under § 2. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). A plaintiff alleging a § 2 vote dilution claim must make three threshold showings: "(1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the majority must vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Bartlett v. Strickland*, 129 S. Ct. 556 U.S. 1, 11 (2009) (plurality opinion) (quoting *Gingles*, 478 U.S. at 50-51) (internal quotation marks and alterations omitted). If a party meets all three threshold *Gingles* requirements, then the "court proceed[s] to analyze

whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 12.

Nassau County The Drayton Intervenors allege that the configuration of the Senate districts in Nassau County violates Section 2 (DE 21-24). Plaintiffs alleged this identical claim ten years ago in *Rodriguez*, and lost, 308 F. Supp. 2d at 373-77, 381-404. And for many of the same reasons, this Court should reject this claim.

First, plaintiffs fail to propose an alternative plan with an additional *majority*-black or *majority*-Hispanic district, as required by the first *Gingles* precondition. *See Bartlett*, 556 U.S. at 26. Instead, they merely propose an alternative plan with "[a]n African American CVAP of 40.1," DE 308-3 at ¶ 17, where sufficient Hispanic voters allegedly cross over to support "a candidate of choice of the African American community," *id.* ¶ 18. But the Supreme Court in *Bartlett* foreclosed the possibility of establishing Section 2 liability on the basis of such a crossover district. *Bartlett* explains that, in a crossover district, where African-Americans constitute a numerical minority, "African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Bartlett*, 556 U.S. at 14. Accordingly, the failure to create a crossover district does not give minorities "less opportunity than other members of the electorate to elect representatives of their choice." *Id.* (quoting 42 U.S.C. § 1973(b)). *Requiring* the creation of crossover districts thus would "grant[] special protection to a minority group's right to form political coalitions" and inherently would "entitle[] minority groups to the maximum possible voting strength"—an advantage the Voting Rights Act does not provide. *Id.* at 15-16. Thus, plaintiffs' claim necessarily fails because they are not entitled to the creation of a crossover district.

Second, the Drayton Intervenors are not entitled to the creation of a coalition district. A coalition district is a district where multiple minority groups are combined in an effort to form a mutli-ethnic, minority controlled district. Plaintiffs claim that they satisfy the first *Gingles* precondition because their proposed district contains "a majority of Hispanic and African American CVAP of 56.6 percent." DE 308-3 ¶ 17. The logic of the *Bartlett* decision strongly suggested that such coalition districts, like crossover districts, are not entitled to protection under Section 2 because "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15. But the *Bartlett* Court left this issue unresolved. *See id.* at 14-15 ("We do not address that type of coalition district here.").

In *Perez*, however, the Supreme Court squarely resolved this question and held that plaintiffs are not entitled to the creation of coalition districts. The *Perez* court, citing *Bartlett* with a "*c.f.*," held that the lower court had "no basis" for creating "a minority coalition district." *Perez*, 132 S. Ct. at 944. Thus, the plaintiffs' Section 2 claim necessarily fails.

Third, the Drayton Intervenors' Section 2 claim necessarily fails because plaintiffs do not establish cohesive voting between black and Hispanic voters in Nassau County. Even assuming a coalition district may still satisfy the first *Gingles* precondition, plaintiffs must satisfy the second *Gingles* precondition by establishing "cohesion across minority groups." *Rodriguez*, 308 F. Supp. 2d at 387. "[T]o the extent minorities can be aggregated, cohesion between groups cannot be presumed, and plaintiffs bear the burden of proving such cohesion." *Id.* at 275. When plaintiffs brought this exact same Section 2 claim in 2002, they relied on expert Dr. Michael McDonald to determine whether blacks and Hispanics voted cohesively in Nassau County. *See id.* at 387. His study failed to prove cohesive voting behavior, as even plaintiffs conceded at trial.

See id. at 392 ("With respect to the second *Gingles* factor, the plaintiffs conceded during the trial that they could not prove cohesion between blacks and Hispanics.").

Ten years later, plaintiffs again rely on Dr. McDonald to analyze whether blacks and Hispanics vote cohesively in Nassau County. *See* DE 308-1. And again, Dr. McDonald's report showed insufficient evidence of black and Hispanic voting cohesion . *See, e.g.*, DE 308-1 at ¶ 34 ("Estimated countywide, Hispanics do not show a tendency to coalesce with African American voters."); *id.* ¶ 41 ("Hispanic support for Solages again shows no indication of coalescing with African Americans, when considered countrywide."); *id.* ¶ 59 ("Similar to what was presented when using the 2009 County Clerk election example to explain my methodologies, Hispanic voters appear not to coalesce with black voters but rather side with white voters.").

But unlike ten years ago, plaintiffs' counsel has chosen not to be candid with the Court. Rather than accurately describe Dr. McDonald's report, counsel for the Drayton Intervenors affirmatively misrepresent it, claiming "Dr. McDonald . . . found evidence that Black and Hispanic voters tended to vote as a coalition in support of the same candidates of choice." DE 307 at 22 (purportedly citing Dr. McDonald's Report). Such blatant misrepresentations are not a substitute for evidence of cohesion.

And to the extent that the Drayton Intervenors are trying to suggest that cohesion exists anytime a majority of Hispanics and blacks vote for the Democratic candidate rather than the Republican candidate in a general election, such a claim is absurd. Under that logic, Jews and blacks in New York are a cohesive voting bloc potentially entitled to their own coalition district anytime a majority of Jews and blacks vote for the Democratic candidate in a general election. Because plaintiffs cannot establish the second *Gingles* precondition, their Section 2 claim must fail.

Fourth, the Drayton Intervenors fail to distinguish their Section 2 claim from the identical Section 2 claim that was rejected by the *Rodriguez* court ten years ago. In addition to the lack of cohesiveness of between black and Hispanic voters, the *Rodriguez* court found several additional reasons why such a Section 2 claim challenging the configuration of Senate districts in Nassau County is without merit:

- "On its face, there has not been a history of cracking a minority population across four Senate districts [in Nassau County], and traditional redistricting principles do not demand or indicate that the minority communites in all of those areas should be united in one district." *Rodriguez*, 308 F. Supp. 2d at 385.

- Moreover, the fact that plaintiffs' evidence shows that "whites in Senate elections supported well-entrenched Republican incumbents who defeated all challengers, white or minority," *id.* at 393, "may say nothing about 'legally significant' white bloc voting, but only support the unremarkable proposition that groups that cannot muster a majority of voters will lose an election because they have fewer votes," *id.* at 394.

- Furthermore, plaintiffs "failed to satisfy their burden" in showing that "blacks would have the ability to elect candidates of choice in the Plaintiffs' Proposed District," *id.* at 403, as blacks in Nassau County have substantially lower turnout rates than white voters, *id.* at 401, and plaintiffs did not propose a majority black district, *id.* at 403.

Plaintiffs fail to even acknowledge these findings from the *Rodriguez* decision, nor do they attempt to distinguish their claim from the identical claim rejected by the *Rodriguez* court. Thus, plaintiffs' Section 2 claim should be rejected by this Court, just as it was rejected by the *Rodriguez* court ten years ago.

63-Seat Claim The Drayton Intervenors' Section 2 claim concerning the "63rd" Senate seat is also completely without merit. *See* DE 307 at 16-21. *First*, plaintiffs fail to satisfy the first *Gingles* precondition by failing to propose an alternative plan.

As the first *Gingles* precondition reflects, there must be a hypothetical alternative plan containing a majority-minority district that a challenged plan does not include. This is because "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an

'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*"). Thus, "a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Id.*; *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*") ("[T]he comparison must be with a hypothetical alternative . . . ."); *accord Colleton Cnty.*, 201 F. Supp. 2d at 635 (quoting *Bossier I* and *Bossier II*).

When a plan already includes majority-minority districts, a hypothetical "undiluted" plan must contain *more* of these districts in order for a § 2 claim to be potentially viable. In other words, a plaintiff cannot merely present a hypothetical reconfiguration where the number of majority-minority districts is the same as in the challenged plan. *See LULAC*, 548 U.S. at 429-30 (opinion of Kennedy, J.) ("If the inclusion of the plaintiffs [in a majority-minority district] would necessitate the exclusion of others, then the State cannot be faulted for its choice."). Rather, the plaintiff must allege "the possibility of creating *more* than the existing number" of reasonably compact, majority-minority districts. *Id.* at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)) (emphasis added).

Here, plaintiffs merely allege that the new 63rd Senate seat should be located downstate, rather than upstate. Yet the Drayton Intervenors fail to identify *any plan* that adds the new 63rd Senate seat downstate *and* contains more majority-black or majority-Hispanic districts than the current plan. In the absence of such a showing, they plaintiffs cannot prove vote dilution; no minority voter is harmed if an additional majority-white district is located upstate rather than downstate. Therefore their Section 2 claim necessarily fails.

Second, even if plaintiffs had proposed an alternative plan, this plan fails to satisfy the first *Gingles* precondition because it is not a majority-black or majority-Hispanic district.

Plaintiffs baldly assert, without citing any evidence, that "Blacks and Hispanics are sufficiently large and geographically compact to constitute a majority in another single-member Senate district in New York City." DE 307 at 18. Based on plaintiffs' own description of their proposed plan, they are not proposing a majority-black or majority-Hispanic district; they are proposing either a crossover district or a coalition district. And for all of the reasons explained above, *Bartlett* and *Perez* foreclose such claims.

Third, the Drayton Intervenors' Section 2 claim necessarily fails because plaintiffs do not establish cohesive voting between black and Hispanic voters. Vote dilution is a district-specific inquiry. *See, e.g.*, *Gingles*, 478 U.S. at 59 n.28. Without knowing where in New York City plaintiffs' proposed coalitional district will be located, it is impossible to know whether plaintiffs have satisfied their burden of showing cohesive voting between blacks and Hispanics. And in any event, the *Rodriguez* court found insufficient evidence of cohesive voting between blacks and Hispanics in New York City. *See* 308 F. Supp. 2d at 414. Plaintiffs fail to acknowledge this finding, or explain why they should fare better now.

In sum, the Drayton Intervenors have failed to establish a likelihood of success on their Section 2 claims.

Equal Protection Clause Claims

Plaintiffs' equal population claims retread the same arguments advanced a decade ago and rejected by the Court in *Rodriguez*. *See generally* 308 F. Supp. 2d at 362-71. Here, as in *Rodriguez*, "plaintiffs assert that the Senate redistricting scheme impermissibly and arbitrarily discriminates against 'downstate' residents . . . by systematically underpopulating all of the 'upstate' districts . . . ." *Id.* at 366. This alleged "regional discrimination," Plaintiffs say (again as in *Rodriguez*), "result[s] in a single Senate district being retained by voters located in the

'upstate' area when it should have been eliminated and an additional 'downstate' district created." *Id.* Once more as in *Rodriguez*, "[b]y implication, the plaintiffs suggest that racial bias may have animated the plan because . . . majority-minority Senate districts were overpopulated and are 'downstate,' where most of the state's minority population lives." *Id.* Not surprisingly, Plaintiffs say little of the Court's decision in *Rodriguez*, which granted summary judgment rejecting the same claims. Yet, just as in *Rodriguez*, their claims are legally and factually baseless. Their motion must therefore be denied.

Most importantly, the Senate Plan contains only *de minimis* population deviations that do not dilute anyone's vote. The principle of one-person, one-*vote* for state legislative plans, as articulated by the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), derives from the Fourteenth Amendment's "protect[ion] of the right of all qualified citizens to *vote*." *Id.* at 554 (emphasis added). And it is quite clear that voting rights are not harmed by minor deviations from precise population equality. Rather, an "individual's right to vote for state legislators is unconstitutionally impaired when its weight is *in a substantial fashion* diluted when compared with the votes of [other] citizens." *Id.* at 568 (emphasis added). The Fourteenth Amendment thus requires "that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State," and this approximate equality of voting strength is achieved through "*substantial* equality of population among the various districts." *Id.* at 579 (emphasis added).

Here, substantial population equality has been achieved because the *maximum* deviation—*i.e.*, the difference between the most-populous and least-populous district, is only 8.80% of the ideal district size. This deviation is a full percent *lower* than the maximum deviation of the plan upheld in *Rodriguez*. And it is well within the 10% threshold recognized by the Supreme Court. As of three decades ago, the Supreme Court's decisions had "established, as

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

As the *Rodriguez* Court observed, "nearly no state districting plan with a maximum deviation below ten percent has ever been struck down by a court as violating population equality." 308 F. Supp. 2d at 364. Indeed, a prior decision by a three-judge court in the Northern District of New York "indicated that plaintiffs who fail to demonstrate a maximum population deviation in excess of ten percent cannot survive a motion to dismiss." *Id.* (citing *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F.Supp. 662, 668 (N.D.N.Y.) (three-judge court), *aff'd mem.*, 506 U.S. 1017 (1992)). And that prior decision, which "seem[ed] to support the per se rule" foreclosing "all challenges to redistricting plans in which the maximum deviation is below" 10%, *id.*, was *summarily affirmed* by the Supreme Court.

Plaintiffs here seek to avoid the *de minimis* nature of the population deviations—and the fact that no person's vote is diluted—by relying on the extremely limited exception to the 10% rule recognized in *Larios v. Cox*, 300 F. Supp. 2d 1320 (S.D. Ga. 2004). But the same reliance on *Larios* was attempted by the plaintiffs ten years ago in *Rodriguez*, to no avail. Far from supporting a different outcome than in *Rodriguez*, the *Larios* decision was fully considered by the *Rodriguez* Court in rejecting the plaintiffs' claims.

Like the *Larios* Court, the *Rodriguez* Court held that the *de minimis* nature of less-than-10% deviations did not provide an absolute "safe harbor." Instead, the Court held that plaintiffs challenging such a plan "have the burden of showing that the deviation in the plan results solely

from the promotion of an unconstitutional or irrational state policy. Thus, the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the actual reason for the deviation. In addition, the plaintiff must prove that the minor population deviation is not caused by the promotion of legitimate state policies." *Rodriguez*, 308 F. Supp. 2d at 365 (internal quotation marks and citations omitted). *Larios* does not establish any different standard than the one under which the *Rodriguez* Court granted summary judgment for defendants on claims identical to those raised here.

Most important, the *Rodriguez* court expressly held that the extraordinary facts warranting rejection of the challenged plans under this standard in *Larios* did not apply to plaintiffs' claims in *Rodriguez* ten years ago. *See id.* at n.23, n.27. Unlike in *Larios* (where one challenged plan "paired 47 incumbents, 37 of whom were Republican" and the other contained "6 incumbent pairings involving 10 Republicans"), in *Rodriguez* "there [wa]s no pernicious pattern of Senate Republicans manipulating population deviations in order to . . . oust large numbers of Democrat incumbents." *Id.* at n.23. Here, the Senate Plan at issue has only *one* incumbent pairing (which is one better than in *Rodriguez*) and thus *Larios* is even less applicable to this case than to *Rodriguez*, where the population equality claims were rejected. *Id.* And the Supreme Court summarily affirmed *Rodriguez*. *See Rodriguez v. Pataki*, 543 U.S. 997 (2004). Thus, *ipso facto*, *Larios* does not apply to the claims advanced in this litigation, which are identical to the claims advanced in *Rodriguez*.

Just as Plaintiffs here mirror the *Rodriguez* plaintiffs in their inability to allege facts resembling *Larios*, so too do they mirror the *Rodriguez* plaintiffs in making the same arguments that the *Rodriguez* court rejected ten years ago.[5]

[5] Because Plaintiffs' arguments are the same as in *Rodriguez*, the briefing from *Rodriguez* applies fully here, and a copy of that briefing is being submitted for the Court's convenience.

First, Plaintiffs' claims of "regional discrimination" are simply not cognizable. It is axiomatic that the Equal Protection Clause protects citizens, not geographic areas. After all, "[l]egislators are elected by voters, not farms or *cities* or economic interests." *Reynolds*, 377 at 562 (emphasis added); *accord Mirrione v. Anderson*, 717 F.2d 743, 745-46 (2d Cir. 1983) (affirming dismissal of regional discrimination claim because "[v]oting is a personal right" and "geographic communit[ies]" are "not entitled to be grouped together"). Consequently, Plaintiffs' complaint that population deviations follow a "regional" pattern is meaningless because "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565; *see also Mahan v. Howell*, 410 U.S. 315 (1973) (upholding a population deviation of *16.4%* even though the lower court had conclusively found that the plan discriminated against Northern Virginia by systematically underpopulating the Tidewater region).

It is clear that Plaintiffs' equal population arguments are no more than non-cognizable "regional discrimination" claims. Plaintiffs do not (and cannot) show that Senate Plan's deviations are race-based. Although they make much of the notion that the "downstate" region contains more minorities than the "upstate" region, Plaintiffs ignore the fact that the Senate Plan's deviations do not differ based on whether a district is predominantly white or predominantly minority. On Long Island, for instance, where every incumbent is a *white* Republican, all nine districts are overpopulated by 2.54%. *See* Ex. R. Likewise, District 28 in Manhattan and District 24 on Staten Island, both of which contain 80% *white* voting age population, are overpopulated by 3.47%, the same as District 21 in Brooklyn, which contains 56% *black* voting age population, and District 33 in the Bronx, which contains 66% *Hispanic* voting age population. *See id.* Thus, because these deviations treat all equally, there is simply no

discrimination to speak of. Indeed, the *Rodriguez* plaintiffs made precisely the same race-based argument as part of their malapportionment claims, which the court rejected. *See* 308 F. Supp. 2d at 366.

Just as in *Rodriguez*, moreover, Plaintiffs' shape-shifting definitions of "upstate" and "downstate" are self-serving and illogical. The Drayton Intervenors define "downstate" as the five New York City counties, the Long Island counties, and the two whole districts in Westchester—*i.e.*, Districts 1-34 and 36. *See* DE 307 at 6. They give no reason, however, for leaving out Rockland County, which is at least as "downstate" as Westchester, or for omitting District 40, which at times reaches further south than large portions of District 37. The real reason, of course, is that the facts about these districts would get in the way of Plaintiffs' narrative: the Rockland districts and District 40 are underpopulated and thus would drag down the "downstate" average. *See* Ex. R. The Ramos Intervenors, meanwhile, leave a single district (District 37) out of the "downstate" mix, which further splits Westchester County along an even more illogical line. DE 305-1 at 8-9. The Lee Intervenors completely ignore the Westchester and Long Island districts, grouping them with neither the "upstate" nor the "downstate." And the Senate Minority, in a remarkable effort to turn every statistic in their favor, leave many districts uncounted and then *switch* their geographic groupings based on the point they are trying to make. Sometimes, the twenty-six New York City districts are "downstate," while the twenty-six non-New York City, non-Long Island, and non-wholly-Westchester districts are "upstate." *See* DE 303 at 10. Yet, at other times, when it would suit their statistical desires, the two wholly-Westchester districts are shifted to the "upstate" region. *See id.* at 12. And at all times the eleven Long Island and wholly-Westchester districts are "no-state"—completely left out of the equation.

The illogic of all this shows that Plaintiffs' (and the Senate Minority Defendants') regional definitions are invalid, just as in *Rodriguez*. The Court there found that the plaintiffs had engaged in the same "selective definition of state regions, which appears tailored to suit their litigation strategy." *Rodriguez*, 308 F. Supp. 2d at 369. Thus, Plaintiffs' claims of "regional discrimination," even if such claims were generally cognizable, cannot succeed because "to the extent that the plaintiffs seek to use the regional aspect of their claim as a proxy for a claim that a group of voters were systematically disadvantaged, their proposed definitions of 'upstate' and 'downstate' are self-serving and defective." *Id.*

Second, as a purely factual matter, the Senate Plan does not discriminate against the "downstate." As explained above, the population deviations between districts are *de minimis*, so no individual's vote is diluted. And even if the amount of representation given to a "region" were relevant, New York City receives a proportionate share of Senate seats based on total population. The Enacted Plan contains twenty-six districts within New York City's five counties—Districts 10-34 and 36. Two of these districts extend slightly into Westchester but both are overwhelmingly based in the Bronx. These twenty-six districts constitute 41.3% of the Enacted Plan's sixty-three total districts, while New York City's total population of 8,175,133 constitutes 42.2% of the State of New York's total population of 19,378,102. Thus, New York City's share of the Senate seats is only 0.9% less than its share of the total population, hardly the sort of gross disproportionality one would expect from a "design . . . permeated with malapportioned districts favoring one region and disfavoring another." DE 305-1 at 8. Put another way, New York City's 42.2% of population corresponds to 26.586 of 63 seats, only 0.586 more seats than under the Senate Plan. Again, this Court upheld an indistinguishable

result a decade ago. *See Rodriguez*, 308 F. Supp. 2d at 370 ("In this case, the overall effect of the deviation is only one seat (actually, two-thirds of a seat) in a 62-seat Senate.").

Furthermore, alternative plans either have similar overpopulation of New York City districts or, like the 63-seat Common Cause Plan, would simply have the opposite result, *under*populating the New York City districts and resulting in *more* than a perfectly proportional number of New York City districts. Because the choice is between assigning New York City either more or less than a perfectly proportional number of seats, the 0.9% differential in the Senate Plan is *de minimis* and plainly permissible.

In addition, as this Court recognized in *Rodriguez*, "the underpopulated 'upstate' districts have more eligible citizens and actual voters." *Id.* at 369. Thus, if anything, the deviations in the Senate Plan compensate for the lower percentage of eligible voters in "downstate" districts. Without these deviations (and perhaps even with them), the voting strength of "*upstate*" citizens would be significantly diluted. After all, the entire point of the Constitution's equal population mandate is to prevent "dilution of the weight of a *citizen's vote*." *Reynolds*, 377 U.S. at 555 (emphasis added). By comparison, alternative plans that underpopulate the New York City districts in terms of total population would *exacerbate* these citizen variations.

Further, New York City has *greater* representation in the New York State Legislature as a whole. In the enacted Senate and Assembly Plans combined, New York City contains 91 total seats (26 in the Senate and 65 in the Assembly) out of 213 total seats, or 42.7% of the Legislature. *See* "View District Maps," LATFOR Website, http://www.latfor.state.ny.us/maps/. This is 0.5% *more* seats than New York City is entitled to under Plaintiffs' own theory that seats should be proportionate to the region's share of total population. The reason for this positive skew *in favor* of New York City is that the enacted Assembly Plan underpopulates nearly all the

New York City districts, while overpopulating virtually all of the "upstate" districts. *See id.* It was thus entirely appropriate for the Senate to slightly overpopulate the New York City districts to balance the Assembly's slight underpopulation of the City. It has been clear from the genesis of the "one person, one vote" doctrine that "apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house." *Reynolds*, 377 U.S. at 577; *see also Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) ("It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house.").[6] In short, the Legislature cannot be faulted for adopting two plans that balance the minor deviations of each other. For this Court to hold otherwise would pervert both "one person, one vote" principles and the strong presumption of constitutionality due to the Senate Plan, especially considering that any remedy would be based on utterly arbitrary definitions of "proportionality" and "downstate" unrelated to any *legal* theory.

Finally, to overcome the presumption of constitutionality, Plaintiffs must "*prove* that the minor population deviation is not caused by the promotion of legitimate state policies." *Rodriguez*, 308 F. Supp. 2d at 365 (quoting *Marylanders*, 849 F. Supp. at 1032) (emphasis added). "If the burden the plaintiffs in minor-deviation cases were anything less than this substantial showing, then the plaintiffs would be able to challenge any minimally deviant redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials." *Rodriguez*, 308 F. Supp. at 365. Plaintiffs here, moreover, must carry this already

[6] The 63-seat Common Cause Plan, which was proposed by the Ramos Intervenors, would similarly underpopulate all New York City districts and thus would have exacerbated the Assembly Plan's "downstate" skew. *See* Ex. S. The Unity Plan proposed by the Lee and Ramos Intervenors, meanwhile, overpopulated all the New York City districts. *See* Ex. T.

weighty burden along with the additional burden for justifying a preliminary injunction of a duly enacted redistricting plan.

Yet, Plaintiffs point to *no* evidence of *any* impermissible intent. Plaintiffs set forth no "evidence that the districting can be traced to impermissible considerations," instead of traditional redistricting principles or simple politics.[7] *Rodriguez*, 308 F. Supp. 2d at 368 ("In New York State, the traditional correlation between 'upstate' districts and Republican political identification . . . means that the plaintiffs here needed to proffer more than mere assertion of a Senate conspiracy for 'upstate' ascendency to meet their burden of showing a violation of the one-person, one-vote principle."); *cf. Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (holding that to prove a *Shaw* claim, a plaintiff must show that race, rather than politics, predominated a redistricting scheme).

Nor are Plaintiffs aided by the fact that large, contiguous groups of districts are all underpopulated and others are all overpopulated, rather than overpopulated and underpopulated districts being interspersed in a checkerboard pattern. Again, the same was true in *Rodriguez*, where the plaintiffs claimed that contiguous Districts 10-38 were "systematically" overpopulated and contiguous Districts 39-62 were "systematically" underpopulated. 308 F. Supp. 2d at 366. The lack of a checkerboard pattern is a feature of all plans in New York, including enacted Assembly plans and proposed alternative plans for both Senate and Assembly, due to the New York Constitution's "block-on-the-border" and "town-on-the-border" requirements. These mandate 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. *See* N.Y. Cons. art. III, § 4. These constitutional constraints naturally result in adjacent districts

[7] In fact, the Drayton Intervenors forthrightly admit they do not have adequate evidence to support their claims. See DE 307 at n.1.

having equal or nearly equal population, such that adjacent districts typically are both underpopulated or both overpopulated. These patterns therefore do not suggest manipulation, much less impermissible population deviations.

Plaintiffs cannot possibly prove their claims because the Senate Plan adheres closely to traditional redistricting principles. The Senate Plan pairs only two incumbents, while the Unity Plan proposed by the Lee Intervenors and Ramos Intervenors would pair four incumbents, the Common Cause Plan proposed by the Ramos Intervenors would pair eighteen incumbents,[8] and the Breitbart Plan proposed by the Senate Minority would pair ten incumbents.[9] *See* Ex. Q. Furthermore, the Senate Plan maintains the cores of the districts in the Benchmark Plan, despite population shifts throughout the state, and does so much better than the alternatives proposed by Plaintiffs. *See* Exs. N, O, & P; *Rodriguez*, 308 F. Supp. 2d at 370 (upholding the 2002 Senate Plan because it "promote[d] the traditional principles of maintaining the core of districts and limiting incumbent pairing"). And, most tellingly, the Senate Plan better satisfies Plaintiffs' own criteria for locating the additional Senate seat. Over the past decade, the five counties contained in the new seat (District 46) experienced 3.36% relative growth, while the five counties in New York City experienced only 2.08% relative growth. *See* New York Quick Facts from the U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/36000.html. Thus, the new Senate seat was placed where more relative growth occurred, just as Plaintiffs would have it.

[8] To be clear, the 63-seat Common Cause Plan pairs nine incumbents, while the 62-seat Common Cause Plan (which could not serve as an alternative to the enacted Senate Plan) would pair *twenty-four* incumbents. *See* Ex. Q.

[9] The Beveridge Plan proposed by the Drayton Intervenors was never submitted to LATFOR for consideration and thus it is not clear how many incumbents it pairs. It is, of course, Plaintiffs burden to demonstrate that their alternative proposals better serve traditional redistricting principles. *See Rodriguez*, 308 F. Supp. at 365. And, in any event, Plaintiffs cannot show discriminatory intent based on the Legislature's failure to adopt a plan that was never even submitted for their consideration. *See City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980); *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (rejecting use of post-enactment evidence to show legislative intent). Thus, the Beveridge Plan is entirely irrelevant to this analysis.

At bottom, Plaintiffs' equal population claims are both legally and factually bankrupt. Thus, they do not even state actionable claims, let alone warrant injunctive relief. Especially in light of the Senate Plan's presumed constitutionality, this Court must deny Plaintiffs' preliminary injunction requests.

CONCLUSION

The Court should therefore deny plaintiffs' motions for preliminary equitable relief and dismiss this lawsuit. There is no basis for this Court to retain jurisdiction over this action or, if it does, to commence proceedings to draw an interim districting map for the New York State Senate during the pendency of preclearance proceedings before the DOJ and the D.C. Court or make any determinations of the merits of plaintiffs' claims in connection with such an interim map-drawing exercise.

Dated: April 17, 2012

Respectfully submitted,

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