UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

MARK A. FAVORS et al.,   Case No. 11 Civ. 5632 (DLI) (RR) (GEL)

              Plaintiffs,

                                                              DECLARATION OF
              v.   **ANDREW A BEVERIDGE**

ANDREW M. CUOMO et al.,

              Defendants.

---X

ANDREW A. BEVERIDGE declares the following to be true under penalty of perjury,

pursuant to 28 U.S.C. § 1746:

1.   I have previously filed a declaration in this matter, which included the list of cases

in which I have testified, as well my curriculum vitae.

2.   I have been retained by the Center for Law and Social Justice, Newman Ferrara

LLP, and Frederick Brewington, counsel for plaintiff intervenors *Drayton, et al* in the case

Favors et al., v. Cuomo, et al. to assess the extent to which various proposed and alternative

redistricting plans are dilutive of minority voting strength and do or do not have within them a

regional bias.

3.   I have followed this round of redistricting with interest and have testified at two

LATFOR hearings, one in August in White Plains and one on February 9, 2012 in Smithtown,

Long Island. At that hearing I presented testimony (a transcript of which is available at the

LATFOR website) and presented a review of several plans that had been put forward, including

the 2002 Senate Plan, the 2012 Senate Plan (from January 26, 2012), the so-called Unity Senate

Plan, the Common Cause Senate Plan and a plan drafted by Todd Breitbart as a Senate

Alternative.

4.   I also was quite concerned that LATFOR had chosen not to make available

Citizen of Voting Age data so that a reasonable assessment could be made of whether an

effective majority of a given group existed in a proposed district. I have included an update of

my testimony (submitted February 15, 2012) and the analysis of the various plans that reflected

the Citizen of Voting Age Population released on February 9, 2012. (See Exhibit 1.) Though

my testimony and report of February 15, 2012 is available in the comment section of the

LATFOR Justice Department filing, it is part of a over 3,900 page PDF document that is

unindexed .

5.   The CVAP estimates are available at the block group level in a Special Tabulation

prepared by the Census Bureau, at the request of the Department of Justice, on the basis of the

Bureau's 2006-10 American Community Survey (ACS) five year file. (See census.gov/rdo). A

block group is a subdivision of a census tract, containing two or more contiguous census blocks.

I disaggregated the CVAP data from the block group to the block level in proportion to voting-

age population, which is available at the block level. I then re-aggregated the data to the Senate

district level. The aggregation to Senate district level re-constitutes those block groups that are

wholly within the Senate district, and the block-level disaggregation is finally significant only

where Senate district boundaries split block groups.

6.   The five year ACS file is based upon a sample of roughly 10 percent of the

population, and thus is quite reliable, based as it is upon a sample of roughly 30,000 for a given

Senate District. The ACS replaced the long form portion of the Census, which was distributed to

about one-sixth of the population in the past.

7.   CVAP data was produced from the 2000 Census long form file, and I have

personally used it, and it has been accepted by various courts in the following cases where I

testified*: U.S. v. Village of Port Chester, Rodriguez v. Pataki and New Rochelle Voter Rights Committee, et al vs. New Rochelle, et al.*

8.   My main focus in this affidavit will be assessing an Alternative 63 seat plan and an alternative 62 seat plan, as well as the adopted Senate Plan, which largely followed the LATFOR's January 26. 2012 proposal.. Although the Senate plan eventually approved by the Legislature and signed by the Governor (the Chapter 16 Senate Plan) has some differences from the initial LATFOR proposal, these differences are minimal.

9.   The alternative 62 seat plan was presented to LATFOR after the February 9, 2012 Smithtown hearing: http://latfor.state.ny.us/justice2012/?sec=sendoj2012, plan_submission_19, under the heading, Joint Exhibit 22 – Alternative Plan Proposals.

10.   With this declaration is sbumitted a 63-District Senate Alternative Plan (the *63-District Alternative)*, demonstrating the unfavorable comparison between the 2012 Senate Plan and the *63-District Alternative.*

11.   The *63-District Alternative* demonstrates the failure of the Senate Majority to make an honest and good faith effort to comply with the Fourteenth Amendment's equal population requirement in crafting the Chapter 16 Senate Plan. The *63-District Alternative* has much in common with the Unity Plan that was submitted by the Drayton Intervenors and several other civil rights organizations. However, the *63-District Alternative* is a state wide plan that attempted to follow the US and New York State Constitution and Law, as well as traditional redistricting principles for the entire state.

12.   Attached hereto as Exhibits 2-4 are the following documents which are relevant to the comparison to the Chapter 16 Senate Plan to the *Senate Alternative Revision* and the *63-District Alternative*, as well as to other alternative plans that were submitted to LATFOR.

Exhibit 2: Comprehensive demographic tables for the 2002 Senate Plan (according to the 2010 census), the Chapter 16 Senate Plan, and all submitted plans, plus the new 63-district plan;

Exhibit 3: Maps illustrating the districts in the new 63-district plan;

Exhibit 4: Thematic maps showing the district population deviations for the 2012 Plan and the other two plans.

In addition, Exhibit 5 is data on an FTP site for the *63-Seat District Alternative* as well as a database with Citizen of Voting Age Population disaggregated to the census block level in Maptitude Format bin and DBF, which are not PDF files and I understand therefore cannot be uploaded to the Court's e-filing system. Instructions to download these files are in the accompanying footnote 1.[1]

13.	The revised 63-district plan is submitted in response to the Court's April 20 request for submissions of evidence. The *63 Seat Alterntaive* merely replaced the 24 upstate districts with 25 districts of suitable population, giving due attention to the New York Constitution's county-integrity rule.

14.	As will be seen, the plan is drawn with districts that are as equipopulous as possible, but have allowed strict adherence to the equal population principle to honor the redistricting principles identified in and endorsed by the New York State Constitution, and, to a lesser extent, the other, tertiary redistricting principles that the Supreme Court has said are not forbidden.

---

1 You can access the data with the information below::
There are several files, including the Block Equivalency File and the CVAP data base in Maptitude Bin format, in DBF format, in ASC format and in .CSV format. Some documentation regarding the CVAP data is also provided. These formats were used by the court in the past.

Login URL: https://andrewabeveridgeinc.sharefile.com/
Username: aabeveridge@gmail.com
Password: Favors123

If the above link does not work in your e-mail software, copy and paste the entire link below into your web browser: https://andrewabeveridgeinc.sharefile.com/

15.   To be sure, these other principles of redistricting – *e.g.*, compactness, contiguity, county protection, and, to lesser extent, preserving the cores of prior districts, and protecting incumbents – are in tension with the equal population principles enshrined in the Fourteenth Amendment, but the *63 Seat Alterntaive* better adheres *both* to the equipopulousness requirement *and* to most of the other traditional redistricting principles, particularly those that are constitutional requirements, than does the Chapter 16 Senate Plan. Comparing this plan to the Chapter 16 Senate Plan accordingly provides irrefutable objective evidence that the Senate Majority did not undertake an honest and good faith effort to fulfill the requirements of the Equal Protection Clause, and instead subordinated those requirements to its desire to maximize partisan advantage.

16.   The following discussion proceeds in several sections. First, is laid out the basic contours of each of the relevant plans: the Chapter 16 Senate Plan and the two proposed alternatives. Then, their regional effect is compared. Next, is compared the regional apportionment in the Chapter 16 Senate Plan to that in the 2002 Senate Plan that was the subject of the *Rodriguez v. Pataki* litigation. Then is examined the adherence of the Chapter 16 Senate Plan to the traditional redistricting rules codified in the New York State Constitution, and compared to the adherence to such principles in the *63-District Alternative* (and, to a certain extent, in the *Senate Alternative Revision*). Next are discussed the extra-constitutional principles that may be considered in any redistricting, and examined their expression in the Chapter 16 Senate Plan and the *63-District Alternative* and *Senate Alternative Revision*. Then reviewed is the relevance of the size of the Senate. Finally, is detailed the many possible ways in which an additional Hispanic-Majority district could have been created, and was proposed to be created in

alternative plans provided to LATFOR, contrary to representations made by the Senate

Majority's counsel at the April 20, 2012 hearing.

The Basic Contours of the Chapter 16 Senate Plan and The *63-District Alternative*

17.   The Chapter 16 Senate Plan apportioned the State's population into 63 districts.

The mean district size, measured by total population, is 307,356. The deviation statistics for the

Chapter 16 Senate Plan are:

- Total deviation (range): 27,034 persons
- Total deviation %: 8.80%
- Mean deviation %: 3.67%
- Standard deviation %: 3.85%

The Chapter 16 Senate Plan has 23 districts with a population more than 4% below the ideal and

26 districts with a population more than 3% above the ideal. A full 50 districts are 3% or more

from the ideal population.

18.   The deviation statistics for the *63-District Alternative* are:

- Total deviation (range): 19,460 persons
- Total deviation %: 6.33%
- Mean deviation %: 1.49%
- Standard deviation %: 1.72%

The *63-District Alternative* has 15 districts with a deviation more than 2% below the ideal, only

two of which are more than 3% below the ideal. It has nine districts more than 2% above the

ideal. No district is more than 4% below, or more than 3% above the ideal.

19.   The deviation statistics for the 62-district *Senate Alternative Revision* are:

- Total deviation (range): 18,591
- Total deviation %: 5.95%
- Mean deviation %: 1.10%
- Standard deviation %: 1.29%

20.   Mean deviation and standard deviation are both methods (measures of dispersion)

for averaging the deviations from the mean of all districts in a plan, while total deviation (the

range between the single most and least populous districts) only takes account of extreme cases. The apportionment of districts cannot be accurately assessed without taking account of the population deviations among all districts in a plan. To understand the importance of the mean and standard deviations figures, consider this: If half the districts were at exactly 5% above the mean, and half were at exactly 5% below (possible with an even number of districts, not quite possible with an odd number), the mean and standard deviation would both be 5.00%. So the fact that the standard and mean deviations are significantly higher in 2012 than they were in 2002 means that substantially more districts are further from the mean.

21.   For example, in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd* 542 U.S. 947 (2004), the 3-judge court struck down legislative plans because they were malapportioned to favor rural areas and inner-city Atlanta at the expense of suburban areas, in a scheme to shore up Democratic incumbents, *id.* at 1325, 1331-34, *and* because the plans, with a total deviation of 9.97% for each house, *had average deviations above 3%*, while plans with lower average deviations had been rejected, *id.* at 1352. Conversely, low mean deviations may overcome an Equal Protection complaint against a plan with a relatively high total deviation. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 737, 750 (1973); *White v. Regester*, 412 U.S. 755, 764 (1973).

The Regional Apportionments Compared

22.   The *63-District Alternative*, like the *Senate Alternative Revision* submitted to LATFOR, apportions districts among regions of the state in proportion to their respective shares of the total state population. In contrast, the 2012 Senate Plan, by grouping all of the underpopulated districts upstate, most of them with negative deviations exceeding –4%, and by heavily overpopulating all of the New York City districts, all with positive deviations of at least

7

+3.47%, produces a regional malapportionment.

23.   In the discussion that follows, the current total population figures are based on the redistricting dataset created by LATFOR pursuant to Chap. 57 of the Laws of 2010, subtracting inmates of state and federal prisons from the places of incarceration and reallocating them, insofar as possible, to their prior home addresses.

24.   In the Chapter 16 Senate Plan, the 26 districts wholly or partly within New York City – including two Bronx/Westchester districts, Districts's 34 and 36, which respectively have 94.4% and 80.5% of their populations within New York City – have an aggregate population of 8,276,194, enough for 26.934 districts of the mean population of 307,356. All of the New York City districts have populations 3.83% (Queens County) or 3.47% (the rest of New York City) above the mean.

25.   The two adjoining districts wholly within Westchester County, Districts 35 and 37, have populations virtually at the mean (positive deviations of 107 persons, +0.03%, in each).

26.   Comparing the New York City districts with the entire group of 28 districts to the north (Districts 35 and 37-63, including the two districts wholly within Westchester County discussed in the preceding paragraph), the 28 districts to the north of New York City have the aggregate population (8,250,734) for 26.84 districts of the mean population. Because the populations of Districts 35 and 37 are almost exactly at the mean, these two districts do not affect the arithmetic of regional apportionment.[2] These 28 districts are underpopulated an average of

---

[2] Even leaving out the two districts adjoining New York City but wholly within Westchester County (Districts 35 and 37), which are virtually at the mean, the 26 remaining districts north and west of the City have an aggregate population of 7,635,808, enough population for only 24.84 districts of the mean population.

–4.13% below the statewide mean, with 22 of the districts having populations *more than 4.6%* below the statewide mean.

27.   The Chapter 16 Senate Plan thus groups all of the underpopulated districts north and west of New York City, maximally underpopulating most of them, and puts all of the most overpopulated districts in New York City, and and thereby deprives New York City of almost an entire district (0.93), and gives the upstate region one district (actually one and one-seventh) more than its proportional share of the total state population warrants.

28.   In the *63-District Alternative*, by contrast, there are 27 districts – not 26 – wholly or partly within New York City (proposed Districts 10-35 wholly within New York City, and the proposed Bronx/Westchester District 36). The *63-District Alternative* therefore has 27 districts – not 28 – to the north of New York City. Each proposed New York City district has a population 0.78% above the statewide mean, compared with 3.83% or 3.47% for the New York City districts in the 2012 Senate Plan. The cumulative effect of these small deviations does not produce a regional malapportionment in the *63-District Alternative*.

29.   If one made the New York City and lower Westchester districts (*i.e.*, those adjoining Bronx County) somewhat smaller, then the unvaoidable result was to pull the black and Hispanic districts in northern Manhattan too far south into the Upper East Side and Upper West Side. This detour, however, provides a perfect illustration of a *legitimate* use of flexibility with deviations, which flexibility may be necessary to provide appropriate representation for minority groups, not because they need the special favor of smaller districts, but because of the way district populations determine the location of districts. In this case, minority group representation is best served by making the black- and Hispanic-majority districts (and the adjoinng white-majority districts) somewhat larger than the mean (+0.78%).

30.   In the 62-district *Senate Alternative Revision*, the upstate region shows a mix of

under- and over-populated districts, and the most and least populous districts are both located

upstate. Indeed, *all* of the proposed districts in the 62-district alternative plan with populations

more than one percent above *or* below the ideal are located upstate. This pattern resulted from

using population deviations for the legitimate purpose of minimizing the division of counties, as

required by the New York State Constitution. For the reasons explained in the preceding

paragraph, when creating a 63-district plan, it was necessary to overpopulate all the New York

City and Long Island districts, and to underpopulate all the upstate districts. *But* the very small

magnitude of the deviations – only +0.78% for every New York City district, with just two

upstate districts more than 3% below the ideal – means that no cumulative malapportionment

results. Thus, the malapportionment of the Chapter 16 Senate Plan cannot be explained by any

legitimate purpose, and the plan must have been designed with the purpose of producing the

malapportionment.

Regional Apportionment: The 2002 and 2012 Senate Plans Compared

31.   The Chapter 16 Senate Plan is not only inferior in every relevant respect to the *63

Set Alternative* plan – higher deviations and, as discussed *infra*, less respect for the traditional

redistricting principles identified in the New York Constitution – but it is also markedly worse

than the 2002 Senate lines at issue in *Rodriguez v. Pataki*, with respect to its balance between

population deviation and other redistricting principles.

32.   The 2002 Senate Plan had an overall deviation of 9.78% – about 1% higher than

the Chapter 16 Senate Plan – but the Chapter 16 Senate Plan is less equipopulous by virtually

every other measure.

33.   The population deviations of the individual districts are much larger in the Chapter 16 Senate Plan than in the 2002 Senate Plan. In the 2002 Senate Plan, the mean deviation was 2.22% (compared with 3.67% in the Chapter 16 Senate Plan) and its standard deviation was 2.72% (compared with 3.85% in the Chapter 16 Senate Plan). As discussed *supra* at paragraph 13-15, these are significant differences. Again, if half the districts in a plan were at 5% above the mean, and half were at 5% below, the mean and standard deviations would both equal 5%.

34.   In 2002, the Senate Plan contained 19 districts with a population at least 3% above or below the mean, and had only seven upstate districts with negative deviations exceeding -4%, compared with 23 such districts in 2012. Seven New York City districts, all in Queens County, had positive deviations of +4.05% in 2002, and the other 19 districts wholly or party in New York City had positive deviations of 1.69% or 1.70%. In the Chapter 16 Senate Plan, no New York City district has a deviation of less than +3.47%. The Chapter 16 Senate Plan has a total of *50 districts* more than 3% above or below the ideal population – more than two-and-a-half times as many (19) as in 2002.

35.   In *Rodriguez*, the 3-judge court rejected Plaintiffs' focus on a cluster of overpopulated districts that included not only New York City but suburban counties to the north, *id.*, 308 F. Supp. 2d 346, 364-365 (S.D.N.Y. 2004), and instead focused on New York City per se. Finally, the affidavits on summary judgment establish that if every district were apportioned with perfect equality, the difference in 'downstate' representation from what was accorded under the enacted plan would be insignificant. New York City would have been entitled to 26.2 seats as compared with the 26 seats accorded to New York City under the enacted plan (with a seat defined as representing a district controlled or predominantly controlled by city-based

voters), • *id.* at 369.

36.   This year, it is *specifically* the New York City districts on which the *Rodriguez* court instructed we focus, excluding those in the northern suburbs, that are maximally overpopulated. The result is that the two-tenths-of-a-district disparity identified by the *Rodriguez* Court has now become more than nine-tenths, when the New York City districts alone are considered.

37.   The imbalance is worse when Long Island is considered together with New York City, as the *Rodriguez* court found is appropriate in the apportionment calculus. *See Rodriguez*, 308 F. Supp. 2d at 369. If New York City and Long Island are considered together in the Chapter 16 Senate Plan, the 35 contiguous districts in that area (Districts 1-34 and 36) – comprising nine Long Island districts (Districts 1-9), 24 districts wholly within New York City (Districts 10-33), and the two Bronx/Westchester districts mostly within Bronx County (Districts 34 and 36) – have an aggregate population of 11,112,663, enough for 36.16 districts of the mean population (307,356). The New York City -Long Island region receives *one and one-seventh district less* than its proportional share of the state population. warrants. The region to the north is correspondingly overrepresented

38.   Even if the two districts wholly within Westchester but adjoining Bronx County (Districts 35 and 37) were grouped with the New York City and Long Island districts, the arithmetic would remain lopsided, since those two districts are almost exactly at the mean. The 37 contiguous districts (1-37) covering Long Island, New York City, and Westchester, would then have an aggregate population of 11,727,589, enough for 38.16 districts of the mean population – again, more than a whole district less than allotted to that downstate area. So too if the comparison must be limited to Long Island and New York City proper, leaving out the two

Westchester municipalities in Districts 34 and 36, but retaining the parts of those districts that are in the Bronx. On such facts, the New York City-Long Island region may be understood to have not 35, but 34.75 districts. (33 + 0.944 [the NYC part of District 34] + 0.805 [the NYC part of District 36] = 34.749.) The seven counties have an aggregate population of 11,032,684. In proportion to their share of the total state population, the seven counties would be entitled to 35.90 districts, in comparison with the 34.75 districts they actually contain. The region to the north, with 28.25 districts, would be entitled proportionately to 27.10 districts. The disparity – 1.15 districts too few in New York City-Long Island, and 1.15 too many to the north – is almost *exactly the same* (differing by only one-hundredth of a district) as when the malapportionment is measured in terms of whole districts.

39.   In comparison, in 2002, the 35 contiguous districts comprising the nine Long Island districts (Districts 1-9), 24 districts wholly within New York City (Districts 10-33), and two Bronx/Westchester districts mostly within Bronx County (Districts 34 and 36), had an aggregate population of 10,897,220 – enough for 35.60 districts of the mean population for that year (306,072).

40.   Indeed, using the regional definitions for which the Majority Leader argued and the court found appropriate for such comparison in *Rodriguez* – i.e., including Long Island as indicated in the figures in paragraphs 27-29 – the New York City-Long Island region is underrepresented in the Chapter 16 Senate Plan to *almost twice* the degree as in the 2002 Senate Plan, losing 1.16 districts, rather than 0.60, to the area to the north, and the average district population deviation in the New York City-Long Island region is nearly twice as large in the Chapter 16 Senate Plan as it was in the 2002 Senate Plan. (The 35 New York City and Long

Island districts have an average deviation of +3.30% in the Chapter 16 Senate Plan, compared with an average of +1.72% in the 2002 Senate Plan.)

41.   The Chapter 16 Senate Plan therefore takes an already-malapportioned Senate plan, and increases the malapportionment by: (i) adding a Senate district; (ii) failing to provide an additional district to already under-represented New York City; and (iii) shoehorning the additional district into the already over-represented upstate region, by drawing almost all of the upstate districts with populations as far below the mean as it is possible to do while keeping the total deviation within 10%. Put another way, the Chapter 16 Senate Plan brings the total deviation below 10%, but it does so even while increasing the regional malapportionment. A total deviation of less than 10% could have been achieved by equalizing the district populations within New York City, and within the upstate region, but without increasing the existing regional malapportionment, bad as it already is under the 2002 Senate Plan. The aggregate population of 8,333,099 in the 26 previously existing New York City districts, as shown in the LATFOR's adjusted 2010 census database, could have been divided among 26 districts of 320,504 persons each, a deviation of +2.62% from the 62-district mean. The aggregate 2010 population of 8,193,829 in the 27 districts to the north could have been divided among 27 districts of approximately 303,475 persons each, an average deviation of –2.83% from the 62-district mean. As is thus apparent, the reduction, as compared with 2002, in the difference between the single most and least populous districts (the 'total deviation' or range) should not be used to mask the increase in an already discriminatory regional malapportionment of districts.

Respect for Traditional Redistricting Principles Under the New York Constitution

42.   The large deviations present in the Chapter 16 Senate Plan, and its regional bias, cannot be justified by reliance upon any of the traditional redistricting principles recognized in the New York Constitution or accepted by other courts.

43.   Compactness Compared: Article III, Section 4, of the NYS Constitution requires that Senate districts shall be in as compact form as practicable."

44.   The *63-District Alternative*, like the *Senate Alternative Revision* submitted to LATFOR, achieves a higher degree of compactness than the 2012 Senate Plan by *each of the eight measures* that are available as standard menu items in the Maptitude for Redistricting software package. For five of the measures – Roeck, Polsby-Popper, Population Polygon, Population Circle, and Ehrenburg – the value is always between 0 and 1, and the plan with the higher mean value (closer to 1) has the higher degree of compactness. For the Schwartzberg measure the value is more than one, and the plan with the lower mean value (again, closer to 1) has the higher degree of compactness. Likewise, for the Length-Width measure, the plan with the lower mean value has the higher degree of compactness. For the Aggregate Perimeter measure, the plan with the smaller sum has the higher degree of compactness.

45.   For each measure, the respective values of the Chapter 16 Senate Plan and the *63-District Alternative* are as follows. To be clear, the value for the Chapter 16 plan is listed first; the value for the *63-District Alternative* follows.

- Roeck (0.34; 0.38)
- Polsby-Popper (0.23; 0.35)
- Population Polygon (0.64; 0.72)
- Population Circle (0.38; 0.42)
- Ehrenburg (0.32; 0.36)
- Schwartzberg (2.27; 1.72)
- Aggregate Perimeter (9,295.02; 7,625.84)
- Length-Width (13.10; 10.74)

46.   County Integrity Compared: The strict rule in Article III, Section 4, of the New York State Constitution prohibiting the division of any county by Senate districts not wholly contained within the county, must now yield to the population equality standard arising from the Equal Protection Clause of the 14th Amendment. But the county integrity rule must still be observed to the degree that the population equality standard will permit. As will be clear from the following discussion, the *63-District Alternative*, like the *Senate Alternative Revision* submitted to LATFOR, minimizes departures from the county integrity rule. The Chapter 16 Senate Plan plan virtually erases county boundaries as the basis for drawing Senate districts.

47.   *Districts Wholly Within A Single Populous County.* Rockland and Albany Counties each have sufficient and correct population to constitute Senate districts by themselves. But the Chapter 16 Senate Plan divides them both, and, as is obvious from the promiscuous division of the surrounding counties, neither Albany nor Rockland is divided so that another nearby county can be kept intact. By contrast, the *63-District Alternative* proposes one district that is simply Albany County, and another that is simply Rockland County. Onondaga and Orange Counties each have the population for one whole district and a fraction. The *63-District Alternative* proposes one whole district in each of these counties, while the Chapter 16 Senate Plan fails to create one whole district in either. Nassau County provides another example. The Chapter 16 Senate Plan creates three districts wholly within Nassau County, while the *63-District Alternative* creates four. So too for Bronx County: The Chapter 16 Senate Plan creates two districts wholly within Bronx County, while the *63-District Alternative* creates three. Indeed, *there is no county* for which the Chapter 16 Senate Plan creates more wholly contained districts than the alternative. On the other hand, as can be seen from details above, the *63-District Alternative* creates *six more* districts wholly contained within a single county than does

the Chapter 16 Senate Plan: one each in Albany, Bronx, Nassau, Onondaga, Orange, and

Rockland Counties.

48.　　*Division of Minor Counties.* A **Minor county**, with respect to redistricting, is one

that does not have the population for even one wholly contained district. The Court of Appeals

has paid special attention to **Minor counties** in applying the county integrity rule. *See Schneider*

v. Rockefeller, 31 N.Y.2d 420, 427, n.1 (1972). Any given Minor county might be kept intact

within a single district, but some *Minor counties* will almost certainly have to be divided in a

plan that complies with the 14th Amendment population equality standard. Due respect for the

county integrity rule of the State Constitution requires, however, that the number of 杜inor

counties・divided, and the number of districts among which any such county is divided, be

minimized. The Chapter 16 Senate Plan divides 16 minor counties: Cayuga, Chenango,

Dutchess, Delaware, Herkimer, Livingston, Oneida, Ontario, Putnam, Rensselaer, St. Lawrence,

Saratoga, Schenectady, Tompkins, Ulster, and Washington. The *63-District Alternative*, *even*

though its total population deviation is much smaller, divides only seven minor counties:

Broome, Dutchess, Niagara, Ontario, Saratoga, Sullivan, and Ulster. (The *Senate Alternative*

Revision that was submitted to LATFOR likewise divided only seven minor counties, but the list

was different: Broome, Dutchess, Niagara, Ontario, Oswego, Saratoga, and Steuben.)

49.　　The *degree* to which the Chapter 16 Senate Plan divides individual minor counties

is also remarkable. There, four minor counties are divided among three districts: Cayuga

(Districts 50, 51, and 54), Delaware (Districts 42, 51, and 52), St. Lawrence (Districts 45, 47,

and 48), and Tompkins (Districts 51, 54, and 58). And the Chapter 16 Senate Plan divides Ulster

County among *four* districts (Districts 39, 42, 46, and 51). In the *63-District Alternative* only

two minor counties are divided among three districts: Broome (proposed Districts 44, 53, and

54), and Saratoga (proposed Districts 46, 47, and 48). The *63-District Alternative* divides no minor county among four districts.

50.   *Creation of Pairs of Bi-County Districts.* The Chapter 16 Senate Plan creates seven pairs of districts in which both districts contain parts of the same two counties (**bi-county districts**). It is never necessary to create a pair of bi-county districts merely to comply with the 14th Amendment population equality standard. The Fourteenth Amendment can *always* be satsisfied by creating a single district with the correct population share from each county. The pairs of bi-county districts in the Chapter 16 Senate Plan are:

- Monroe / Ontario: Districts 54 and 55
- Cayuga / Tompkins: Districts 51 and 54
- Delaware / Ulster: Districts 42 and 51
- Orange / Ulster: Districts 39 and 42
- Dutchess / Putnam: Districts 40 and 41
- Bronx / Westchester: Districts 34 and 36
- Nassau / Suffolk: Districts 5 and 8

The *63-District Alternative*, by contrast, has only one pair of districts that contain parts of the same two counties: Bronx/New York proposed Districts 31 and 32, which are designed to preserve appropriate representation for the Latino communities in the corresponding pair of bi-county districts from the 2002 Senate Plan (2002 Districts 31 and 28). Moreover, the Bronx/New York county line—*quite unlike the county lines that are breached by the pairs of bi-county districts in the Chapter 16 Senate Plan*—has lost almost all significance as a boundary between local government jurisdictions. Both counties are within New York City, and accordingly are subject to the City's uniform income and property tax rates, share a single local legislature and a single chief executive, are part of a single school system, and are protected by a single police department and department of corrections (unlike the county sheriff system that operates in most other, non-New York City, counties in the State). Yet the 2012 Senate plan

creates pairs of bi-county districts without restraint throughout the state, including a

Bronx/Westchester pair, while *avoiding* such a pairing only within New York City. It is true that

the boundaries of Queens County are preserved inviolate in the Chapter 16 plan, with exactly

seven wholly contained districts. But a rule that is extensively and unnecessarily ignored

throughout the 2012 Senate Plan can hardly explain one specific detail of the plan. Whatever

considerations may have governed the design of the Queens districts, respect for the county

integrity rule of the New York State Constitution was evidently not one of them.

51.   *The Block-on-Border Rule.* The **Block-on-border** (actually block-and-town-on-

border) rule derives from Article III, Section 4 of the New York State Constitution: No town,

except a town having more than a full ratio of apportionment, and no block in a city inclosed by

streets or public ways, shall be divided in the formation of senate districts; nor shall any district

contain a greater excess in population over an adjoining district in the same county, than the

population of a town or block therein adjoining such district. Counties, towns or blocks which,

from their location, may be included in either of two districts, shall be so placed as to make said

districts most nearly equal in number of inhabitants . The *63-District Alternative*, like the *Senate*

Alternative Revision, adheres strictly to the block- and town-on-border rules. The Chapter 16

Senate Plan, in contrast, adheres to the block-on-border rule in some places, but ignores it in

others.

52.   Although block-on-border does not operate across county or town boundaries, the

State Constitution permits and even requires that cities be divided where necessary to comply

with the block-on-border mandates. This means that there are massive block-on-border

violations in the Chapter 16 Senate Plan where Districts 34 (pop. 318,021) and 36 (pop. 318,023)

adjoin District 37 (pop. 307,463) along the boundary between the cities of Mt. Vernon and

Yonkers, and where District 34 adjoins District 37 along the boundary between Mt. Vernon and the town of Eastchester. In order to comply with the block-on-border rule, Districts 34 and 36 would have to be brought into almost exact numerical equality with District 37. That, in turn, would require block-on-border adjustments between Districts 37 and 35 in Westchester (where they adjoin within the city of Yonkers), and between both District 34 and District 36 and the districts adjoining them within the Bronx. As the changes ripple through, all the districts in Bronx, New York, Kings, and Richmond Counties would become somewhat less populous, and all the districts in those counties and the adjoining districts in lower Westchester would end up with nearly identical populations. This ripple effect can be seen in the *63-District Alternative*, which has almost exact numerical equality among all the districts in New York City and lower Westchester (including the two proposed districts in each of those plans that are wholly within Westchester). The designers of the Chapter 16 Senate Plan did not choose to ignore the rule to keep the City of Mt. Vernon intact. They divide it between Districts 34 and 36 – the two districts in the unnecessary Bronx/Westchester bi-county pairing. It is evident that the block-on-border rule was violated to avoid pushing District 34 further into the Bronx, which would have increased Hispanic voting power in that district

Extra-Constitutional Principles

53.   Having generally ignored federal and state constitutional rules, save only for keeping the total deviation below the burden-shifting threshold of 10%, the Majority Leader asserts that the skewed apportionment, and consequent failure to provide fair representation to minority groups, are explained by adherence to two traditional principles that are *not*

constitutional requirements: avoiding the pairing of incumbents and preserving the cores of existing districts.

54.   *Pairing of Incumbents.* The Chapter 16 Senate Plan has one incumbent pairing. The 62-district *Senate Alternative Revision* that submitted to LATFOR had three such pairings, but paired incumbents only when a constitutional principle was served by doing so. The *63-District Alternative*, which has only two such pairings, demonstrates that avoiding any pairing of incumbents – supposing that to be a paramount rule, which it is not – would not require the malapportionment of the Chapter 16 Senate Plan.

55.   The apportionment of districts in proportion to population in a 62-district Senate plan must result in the reapportionment of one district from upstate to New York City, and the consequent pairing of two upstate incumbents. The *Senate Alternative Revision* proposes to do this in Erie County, which is just short of the population for three districts, but has four resident senators. Senators Gallivan and Ranzenhofer are paired in proposed District 59. The *63-District Alternative* maintains the previously existing number of upstate districts, and so avoids any pairing of upstate incumbents. It does so while keeping deviations low and avoiding a regional malapportionment, as described in detail above.

56.   Article III, Section 4, of the State Constitution prohibits the division of towns that have less than the ideal district population. Although some Long Island towns that are relatively populous, but still below the constitutional threshold, must be divided to comply with the 14th Amendment population equality standard, respect for the constitutional rule requires that the division of such towns be avoided where possible. In Suffolk County, the Town of Huntington, which has less than the mean district population, and could otherwise be kept intact, is divided in the Chapter 16 Senate Plan to avoid pairing Senator Flanagan, who lives in Huntington, with

Senator Marcellino, who lives in Nassau County and represents a district that extends into Huntington. The *63-District Alternative*, like the *Senate Alternative Revision*, keeps the town of Huntington intact within a single Nassau/Suffolk district, and consequently pairs Senators Marcellino and Flanagan. But with respect to Long Island, the apportionment (as opposed to the redistricting) in the *63-District Alternative* and the *Senate Alternative Revision* is identical to the apportionment in the Chapter 16 Senate Plan: nine districts even in Nassau and Suffolk counties together. The division of Huntington to avoid pairing incumbents, however that decision may be regarded from a constitutional standpoint, does not depend in any way on the apportionment of districts between upstate and New York City, and explains nothing about that apportionment.

57.   The *63-District Alternative* and the *Senate Alternative Revision* pair Senators Golden and Savino in proposed District 24. Avoiding such a pairing would require creating something like the extremely non-compact districts that were created in this area in 2002, or the even less compact and more intricately intertwined districts that the Chapter 16 Senate Plan creates in the southern part of Brooklyn. Nevertheless, if avoiding the pairing of incumbents trumps the State Constitution's compactness rule – and it should not, because the latter is enshrined in the State Constitution, while the former is not – the Brooklyn districts in the *63-District Alternative* could be redrawn to avoid any pairing at all, while keeping the district populations and the apportionment exactly as proposed.

58.   As is therefore strikingly apaprent, whatever this Court determines to be the status of avoiding the pairing of incumbents as a traditional redistricting principle, it does not require, and in no way explains, the skewed apportionment of districts in the 2012 Senate Plan.

59.   *Preserving the Cores of Existing Districts.* In the *63-District Alternative*, the average district takes 69.46% of its population from a single pre-existing (2002 enactment)

district. In the Chapter 16 Senate Plan, the average district takes 77.24% of its population from a single pre-existing (2002 enactment) district. The Chapter 16 Senate Plan preserves the cores of existing districts to a marginally greater degree than the *63-District Alternative*, precisely because it is *less faithful* to those traditional redistricting principles that are *required* by the federal and state constitutions and federal law: population equality, fair representation of minority groups, minimizing division of counties, compactness, and block-on-border.

60. A redistricting plan will tend to alter existing districts to the degree that it: (a) reapportions districts fairly in response to the changed distribution of population, and makes an honest and good faith effort to minimize population deviations in the face of demographic change; (b) takes account of new or changed possibilities for creating compact districts in which minority group voters will have a fair opportunity to elect the representatives of their choice; and (c) adapts to the ways in which changed county populations present changed possibilities for keeping counties whole within districts of approximately equal populations. Moreover, if the designer of the redistricting plan conscientiously improves upon the previously enacted districts by adhering to a higher standard of population equality, dividing fewer counties, and achieving a higher degree of compactness, then the alterations will be *even greater* than those required by ten years of demographic change alone.

61. The *63-District Alternative* does *all of this* far better than the Chapter 16 Senate Plan. No reasons have been offered to show how the difference between preserving, on average, 69.4% or 77.24% of the cores of existing districts can explain or justify the Chapter 16 Senate Plan's vast departures from constitutionally and legally mandated redistricting criteria, or the rejection of several submitted plans that were much more faithful to constitutional and legal mandates.

62. If the traditions of avoiding the pairing of incumbents and preserving the cores of existing districts are to be elevated above constitutional rules, and not merely to be recognized as justifying minor population deviations, then the gold standard is to be found in the very plan that was struck down in *Reynolds v. Sims* in 1964. At that date, Alabama had not altered its legislative districts since 1901. The cores of existing districts were perfectly preserved, and the pairing of incumbents was absolutely avoided.

63. *Other Notes Regarding Constitutional and Extra-constitutional Criteria.* The Senate Majority's decision to locate the 63rd district upstate is irrelevant to and cannot be justified by any desire on the part of the Senate Majority to avoid pairing incumbents or to preserve the cores of existing districts. Even supposing that two contingently permissible considerations – avoiding the pairing of incumbents and preserving the cores of existing districts – are to be elevated above constitutional and legal requirements, and leaving aside the question of justification, these two principles cannot explain the decision to locate the 63rd Senate district upstate, with the extreme district population deviations (23 districts more than 4% below the mean) that such an arrangement requires.

64. As the *63-District Alternative* demonstrates, the pairing of any upstate incumbents can easily be avoided simply by maintaining the number of upstate districts that were created in 2002, while still minimizing the division of counties. A 63-district plan that maintains the previously existing number of upstate districts, and places the 63rd district in New York City, would have small population deviations, and would even have an apportionment that marginally favors the upstate region while apportioning districts among regions in approximate proportion to their respective shares of the total state population.

65. But the Chapter 16 Senate Plan goes further than avoiding the pairing of upstate

incumbents. It gives the upstate region one district and a fraction *more* than its proportional share of the total state population warrants, while giving New York City one district less, and maximally underpopulates almost all of the upstate districts, in order to make room for an additional 'open' district in which no incumbent Senator resides or is expected to seek re-election.

66.   The configuration of the open district, Senate District 46, shows that the principle of preserving the cores of existing district also had nothing to do with this decision. Of all the districts in the 2012 Senate Plan, District 46 is the one that *least preserves* the core of any existing district. The 2012 Senate districts take between 30.61% and 100.00% of their population from the single previously existing district that contributes the largest share of the new district's population. District 46 is the 30.61% district. It takes the following percentages of its population from the listed previously existing (2002) districts: District 44, 30.61%; District 46, 21.21%; District 42, 17.27%; District 51, 15.89%, District 39, 15.01%.

67.   Whatever may explain the decision to give the upstate region an extra district at the expense of New York City, and to maximally underpopulate the upstate districts to make room for an open seat, neither avoiding the pairing of incumbents nor preserving the cores of existing districts could have had anything to do with it.

68.   Each of the above comparisons between the Chapter 16 Senate Plan and the *63-District Alternative* understates the flaws of the former. To be sure, there are significant potential trade-offs among the redistricting criteria: population equality, preservation of local government units such as counties, and compactness. But the *63-District Alternative* is superior to the Chapter 16 Senate Plan on *every one* of these criteria. And if the *63-District Alternative* had the same population deviation as the Chapter 16 Senate Plan, it could keep even more

counties intact; if it divided more counties, it could achieve a higher degree of compactness. Comparing the plans one criterion at a time makes the Chapter 16 Senate Plan – bad as it is – look better than it is.

Population Trends Cannot Explain the Skewed Apportionment of the Chapter 16 Senate Plan

69.   The skewed apportionment of the Chapter 16 Senate Plan, and the upstate location of the 63rd district, cannot be said to reflect demographic trends, except in the sense that extreme population deviations have been used to counter the effect that those trends might have been expected to have on the apportionment of districts. The comparisons that follow first compare the total apportionment basis of 2002, which is the total population as reported by the Census Bureau for 2000, with that of 2012, which is the total population reported for 2010 as adjusted by LATFOR pursuant to Chap. 57 of the Laws of 2010 (subtracting prisoners from the places of incarceration, and reallocating them insofar as possible to their prior home addresses). The same comparison will then be made using the unadjusted census data for 2010.

70.   *Population Trends and the 63rd District Using Adjusted 2010 Population Data.* On the basis of adjusted 2010 population, the total population of New York State grew from 18,976,457 in 2000 to 19,363,397 in 2010, an increase of 2.04%. The area comprising the overpopulated 2012 Senate Districts 1-34 and 36 – Long Island and New York City, including the two Bronx/Westchester Districts 34 and 36 – shows a 2.49% increase, and the area comprising the New York City districts alone (again including Districts 34 and 36) shows a 2.32% increase. Both areas show a larger increase than the state as a whole.

71.   The area comprising the 28 districts north of New York City, Districts 35 and 37-63, shows an increase of 1.43%. If we exclude the two districts – Districts 35 and 37 – that adjoin New York City, are wholly within Westchester County, and have almost exactly the ideal

population (positive deviations in each of 107 persons, +0.03%), then the area comprising the 26 underpopulated districts to the north and west – Districts 38-63 – shows an increase of 1.33%. If we restrict our attention to the area comprising the 23 upstate districts with populations more than 4% below the mean – Districts 39 and 42-63 – the growth rate for that area is only 0.81%. That is less than half the statewide rate, and less than one-third of the growth rate in the area comprising the Long Island and New York City districts, and only a little more than one-third of the growth rate for the area comprising the New York City districts alone. If we look only at the area comprising the 22 districts with populations more than 4.6% below the mean, the growth rate is only 0.46%. That is *less than one-fourth the growth rate* in the area comprising the extremely overpopulated (+3.47% or +3.83%) New York City districts. The area comprising the 'open seat,' District 46, shows a growth rate of only 0.59%.

72. *Population Trends and the 63rd District Using Non-Adjusted 2010 Population Data.* The same regional differences emerge, although with different numbers and smaller magnitudes, if we isolate demographic change as revealed in the census from the statutory change in the apportionment basis (*i.e.*, the effect of the prisoner reallocation law).

73. On the basis of unadjusted 2010 population, the total population of New York State grew from 18,976,457 in 2000 to 19,378,102 in 2010, an increase of 2.12%. On the basis of unadjusted population, the area comprising the overpopulated 2012 Senate Districts 1-34 and 36 – Long Island and New York City, including the two Bronx/Westchester Districts 34 and 36 – shows a 2.26% increase, and the area comprising the New York City districts alone (again including Districts 34 and 36) shows a 2.06% increase.

74. On the basis of unadjusted population, the area comprising the 28 districts north of New York City, Districts 35 and 37-63, shows an increase of 1.92%. If we exclude the two

districts – Districts 35 and 37 – that adjoin New York City, are wholly within Westchester County, and have almost exactly the ideal population (positive deviations in each of 107 persons, +0.03%), then the area comprising the 26 underpopulated districts to the north and west – Districts 38-63 – show an increase of 1.85%. If we restrict our attention to the area comprising the 23 upstate districts with populations more than 4% below the mean – Districts 39 and 42-63 – the growth rate for that area, on the basis of unadjusted population, is only 1.31%. If we look only at the area comprising the 22 districts with populations more than 4.6% below the mean, the growth rate for that area, on the basis of unadjusted population, is only 0.99%. That is *less than one-half the growth rate* in the area comprising the extremely overpopulated (+3.47% or +3.83%) New York City districts. On the unadjusted population basis, the area comprising the 'open seat,' District 46, shows a growth rate of only 1.37%.

The Effect of the Size of the Senate

75.   Whatever may be said about the merits of the Senate Majority's decision to change the size of the Senate, the decision to create 63 districts cannot explain the rejection of the *Senate Alternative Revision* proposal, and in particular of the level of representation it would afford to minority groups. As explained above, proposed Districts 1-38, comprising all of Long Island and New York City, and most of Westchester County, and including all of the proposed districts in which minority group voters would be able to elect their preferred representatives on the strength of their own numbers, are *precisely identical* in the 62-district *Senate Alternative Revision* and the *63-District Alternative*.

76.   Common Cause New York, which had previously submitted a 62-district Senate plan (which is discussed in the following section of this declaration), submitted a properly

apportioned 63-district plan after the announcement in early January that the Senate was to be enlarged to that number. (This 63-district plan is also discussed *infra*.) The Common Cause 63-district plan also provides more representation than the Chapter 16 Senate Plan to both Hispanic voters (in New York City) and black voters (in Nassau County) than the Chapter 16 Senate Plan. It has a total deviation of 5.44%, a mean deviation of 1.05%, and a standard deviation of 1.35%, and it divides only nine minor counties.

77. Similarly, the districts proposed for New York City in the revised Unity Plan could have been fitted into a 63-district statewide plan with low population deviations and a fair apportionment of districts. Districts 10-38 in the revised Unity Plan, comprising all of New York City and two adjoining districts wholly within lower Westchester County, have an aggregate population of 8,972,182. In a 63-district plan, these 29 districts would have an average deviation from the statewide mean of +0.66%. The population of the entire area to the north and west of these 29 districts would be 7,554,746, which could be divided among 25 districts with an average negative deviation of -1.68%. (The revised Unity Plan, like the Chapter 16 Senate Plan and the other submitted plans, allows for the apportionment of nine districts even to Long Island, although it does not suggest how those districts are to be drawn.) The revised Unity Plan, like the other submitted plans (*e.g.*, the *Senate Alternative Revision* and the two Common Cause plans), contains one more New York City district than the 2012 Senate Plan, and at least one more district in which Hispanic voters could elect the representative of their choice. Whatever the reason for rejecting it, there would have been no difficulty in fitting into a 63-district Senate plan.

Additional Minority Group Representation Proposed in Every Statewide or Citywide Plan Submitted to LATFOR

78. During the course of the 2011-12 redistricting process, LATFOR received

submissions of three statewide Senate Plans, and one additional citywide plan for New York City

(extending also into the northern suburbs).

79.   In addition to the *Senate Alternative Revision*, (and which is discussed throughout

this declaration), LATFOR received the following proposed Senate plans, complete either for the

whole state or for New York City:

- The 62-district *Common Cause Reform Senate Plan*, a statewide plan submitted in revised form on February 23. The block equivalency file is available on the 'Senate's Department of Justice Submission' page of the LATFOR web site, as part of 'Joint Exhibit 22 – Alternative Plan Proposals,' listed as 'plan_submission_23'. The revised form of this submission makes use of the prisoner-adjusted database that was not available when the plan was originally proposed in December, and corrects block- and town-on-border errors in the earlier version. The earlier version, for which the block equivalency file was originally submitted to LATFOR on December 19, is not listed in Joint Exhibit 22. The extensive description and advocacy of this plan by Common Cause New York can be found on their own web site at: http://www.citizenredistrictny.org/wp-content/uploads/2012/02/CCNY-Senate-62-Guide-Feb-2012-Fully-Revised.pdf.

- The 63-district *Common Cause Reform Senate Plan*, a statewide plan submitted in revised form on February 29. The block equivalency file is available on the 'Senate's Department of Justice Submission' page of the LATFOR website as 'Joint Exhibit 22: plan_submission_24'. The extensive description and advocacy of this plan by Common Cause New York can be found on their own web site at: http://www.citizenredistrictny.org/wp-content/uploads/2012/03/CCNY-Senate-63-Guide-March-2012-Fully-Revised.pdf.

- The *Unity Plan*, including all of New York City and several counties immediately to the north, submitted on October 4, and in a substantially revised version on December 8, by a consortium of civil rights organizations, including those representing the Drayton plaintiffs: the Asian-American Legal Defense and Education Fund, the Center for Law and Social Justice at Medgar Evers College, Latino Justice/PRLDEF, and the National Institute for Latino Policy. The submission is available on the 'Senate's Department of Justice Submission' page of the LATFOR web site as 'Joint Exhibit 22: plan_subission_04' (the original October 4 version), and 'Joint Exhibit 22: plan_submission_ 07' (the revised December 8 version).

80.   Every one of these four submitted plans apportioned districts fairly between

upstate and New York City in proportion to each region's share of the total state population.

Every one of the four provided more representation for minority groups than the plan eventually

adopted, the Chapter 16 Senate Plan. In particular, every one of the four included at least one more district in New York City with a Hispanic majority, by any means of counting, and at least one more district in which, by any reckoning, Hispanic voters would be able to elect the representative of their choice.

81. *Measuring the Effectiveness of Districts.* The Chapter 16 Senate Plan's racial malapportionment is best understood by use of figures other than total population – to wit, Citizen Voting Age Population (or CVAP). It is this data that best indicates the *effectiveness* of a pluarilty or majority-minority district, which is the best way to understand a racial or ethnic group's voting power. That is, CVAP data is a more appropriate yardstick than total population for the specific purpose of determining whether members of a minority group have a fair opportunity to elect the representative of their choice in a given district, because CVAP permits an estimation of the potential voting power of different groups *within the district*.

82. As between CVAP and voting age population (VAP), CVAP data, while more difficult to measure precisely, is a finer tool if the goal is determining the power of different groups within a single district. This is because using the whole voting-age population of each group can be misleading if one or more of the groups includes a significant number of non-citizens. Since the Hispanic and Asian populations contain a large proportion of the recent immigrants, and hence of non-citizen residents, especially where the Hispanic populations are largely from places other than Puerto Rico, using VAP rather than CVAP can have two distorting effects: a. The potential voting power of Latino and Asian-American voters is overestimated; and, b. The potential voting power of both non-Hispanic whites and non-Hispanic blacks is correspondingly underestimated. This may produce the illusion that Latino or Asian-American voters have been given the opportunity to elect the representative of their choice in a district

configuration that does not actually achieve this. This may also produce the illusion that

African-American voters cannot elect the representative of their choice in a district configuration

that actually does enable them to do so.

83.   These considerations have nothing to do with the question of whether total

population or citizen population is the proper basis for apportionment of districts.[3] There is not

the least contradiction between the propositions that (i) districts should be apportioned according

to total population on the principle of equality of representation, and (ii) citizen voting-age

population should be used to determine whether members of a minority group will be able to

elect the representative of their choice in a given district.

84.   A similar consideration explains why it is appropriate to count incarcerated felons

at their permanent homes for apportionment purposes, but LATFOR and the Majority Leader err

both in using VAP rather than CVAP and in using prisoner-adjusted voting-age population as the

basis for estimating the potential voting-power of different groups. Imprisoned felons remain

permanent residents of their homes prior to incarceration, and the State has determined that

---

[3] I concur with the position adopted by counsel that the proper measure of a redistricting plan's compliance with the 14th Amendment population equality principle has been and remains total population. As should be dispositive, the people of New York affirmatively selected total population as the basis of apportionment when, in 1969, they adopted Article III, § 5-a of the Constitution by plebiscite. Section 5-a requires that "[f]or the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of [Article III, including section 4] the term "inhabitants, excluding aliens," be redefined to "mean the whole number of persons." Accordingly, Article III, § 4's mandate that the Legislature engage in a reapportionment and redistricting after each decennial census, and that "[s]uch districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens," now requires the districts to contain as nearly as may be an equal whole number of persons. Although I am not an attorney, Mr. Carvin's reliance during the April 20, 2012 status conference on the fact that *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), looks to citizen population is plainly misplaced because, at the time *Lomenzo* was decided, the New York Constitution *still required the use of citizen population for apportionment purposes*. There are many other reasons why total population is the appropriate measure of a redistricting effort's compliance with the equal population principle, but these legal issues were addressed at length at the Court's April 20, 2012 conference, and are not the appropriate subject of this declaration.

districts are to be apportioned on that basis, but they are disenfranchised until the expiration of their sentences.

85.   *Comparing the Plans' Hispanic-Majority Districts.* I turn now to the characteristics of the Chapter 16 Senate Plan and of the proposed alternatives, all of which LATFOR and the Senate Majority rejected without explanation. As measured by CVAP, the Chapter 16 Senate Plan contains only two districts with a Hispanic majority (Districts 32 and 33), and four with a Hispanic plurality (Districts 13, 18, 29, and 31), all wholly within New York City. Measured by VAP, five of these six districts (Districts 13, 18, 31, 32, and 33) have a Hispanic majority, and one (District 29) has a Hispanic plurality.   The 62-district *Senate Alternative Revision* contains six districts in New York City with a Hispanic CVAP majority (proposed Districts 17, 31, 32, 33, 34, and 35), and one more with a Hispanic CVAP plurality (proposed District 14). Measured by VAP, all of these seven districts have a Hispanic majority. As explained above, the New York City districts in the *63-District Alternative* are identical to those in the *Senate Alternative Revision.* Even supposing that the Chapter 16 Senate Plan districts with Hispanic CVAP pluralities would all enable Hispanic voters to elect the representatives of their choice (a questionable proposition in the case of SD 29, with a CVAP that is only 42% Hispanic), the *63-District Alternative* and the *Senate Alternative Revision* would both create – by any measure – at least one more district in which Hispanic voters, on the strength of their own numbers, would be able to elect the Senator of their choice.

86.   The 62-district *Common Cause Reform Senate Plan* contains four districts in New York City with a Hispanic CVAP majority (proposed Districts 23, 32, 34, and 36), and three more with a Hispanic CVAP plurality (proposed Districts 25, 30, and 33). Measured by VAP, six of these seven districts have a Hispanic majority (proposed Districts 23, 25, 30, 32, 34 and

36), and one has a Hispanic plurality (proposed District 33). The 63-district *Common Cause*

Reform Senate Plan contains four districts in New York City with a Hispanic CVAP majority

(proposed Districts 17, 31, 33, and 34), and three more with a Hispanic CVAP plurality

(proposed Districts 13, 32, and 35). Measured by VAP, six of these seven districts have a

Hispanic majority (proposed Districts 13, 17, 31, 32, 33 and 34), and one has a Hispanic plurality

(proposed District 35).

87.   The revised *Unity Plan* contains three districts in New York City with a Hispanic

CVAP majority (proposed Districts 32, 33, and 34), and four more with a Hispanic CVAP

plurality (proposed Districts 14, 17, 31, and 35). Measured by VAP, six of these seven districts

have a Hispanic majority (proposed Districts 14, 17, 31, 32, 33 and 34), and one has a Hispanic

plurality (proposed District 35).

88.   In sum, *each* of the proposed alternative plans both apportions districts between

upstate and the New York City region in a way that reflects each region's share of the total state

population – which the Chapter 16 Senate Plan does not – *and* provides more representation for

minoirty groups – particularly Hispanics – than the Senate Majority's Chapter 16 Senate Plan.

89.   *Comparing the Plans' Black-Majority Districts.* The Chapter 16 Senate Plan not

only shortchanges Hispanic voters, but also fails to create majority black all of the districts that

could have, and should have, been drawn where black voters could elect the representative of

their choice. The Chapter 16 Senate Plan contains six districts wholly within New York City

with a black CVAP majority and one district with a black plurality where black voters would be

able to elect the representative of their choice; and one Bronx/Westchester district with a black

majority. By contrast, theThe *63-District Alternative* and the *Senate Alternative Revision* both

also contain *six* districts with a Hispanic CVAP majority, and a *seventh* district with a Hispanic

plurality in which Hispanic voters would be able to elect the representative of their choice, *and*

contain, wholly within New York City, six districts with a black CVAP majority and one district

with a black plurality where black voters would be able to elect the representative of their choice,

and both also contain one Bronx/Westchester district with a black majority. But additionally,

both alternatives also contain a black-plurality district in Nassau County where black voters

would be able to elect the representative of their choice. There is no comparable district in the

Chapter 16 Senate Plan. (This difference, although of great importance, is not due to the

malapportionment of districts between New York City and upstate. Both plans apportion nine

districts to Long Island, with no Nassau/Queens district.) Both alternatives provide this level of

representation to black voters, while also creating six districts with a Hispanic CVAP majority,

and a seventh district with a Hispanic plurality in which Hispanic voters would be able to elect

the representative of their choice.

90.   The Chapter 16 Senate Plan's provision of at least one less district in which

Hispanic voters could elect the representative of their choice, as compared either with the

rejected *Senate Alternative Revision*, or with the *63-District Alternative*, or compared with *any* of

the other alternatives submitted to LATFOR, is due to the Chapter 16 Senate Plan's *departure*

from other constitutional and legal rules that should be paramount – equality of population,

apportionment in proportion to population, compactness, limiting the division of counties, even

the block-on-border rule – and cannot be explained by adherence to the extra-constitutional

princples offered as fundamental principles by the Majority Leader.

Conclusion

91.   As the foregoing analysis makes undeniably clear, the Senate Majority's Chapter

16 Senate Plan – which groups all of the underpopulated districts in one part of the State and all

of the overpopulated districts in another part, which requires that 50 (out of 63) districts deviate by more than 3% above or below the mean, and which pays scant attention to the constitutionally recognized traditional redistricring principles – cannot possibly have been the product of an honest and good-faith effort to achieve population equality, and instead could *only* have been the result of a process designed to maximize partisan advantage at the expense of equipopulousness.

I declare the foregoing to be true under penalty of perjury, pursuant to 28 U.S.C. § 1746.

Andrew A. Beveridge
Yonkers, New York
April 26, 2012