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April 27, 2012

Via ECF

The Honorable Reena Raggi
United States Court of Appeals
For the Second Circuit
225 Cadman Plaza East
Brooklyn, NY 11201

The Honorable Gerald E. Lynch
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

The Honorable Dora L. Irizarry
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Favors et al. v. Cuomo et al.*, No. 11 Civ. 5632

Dear Judges Raggi, Lynch and Irizarry:

The Asian American Legal Defense and Education Fund (AALDEF), together with Kay Scholer LLP, represent Plaintiff-Intervenors Linda Lee, Shing Chor Chung, Jung Ho Hung and Julia Yang (the "Lee Intervenors") in the above-referenced matter. We write in response to the Court's Scheduling Order dated April 20, 2012 to submit to the Court evidence that we have to date, that supports our claim that the 10 percent variance that is reflected in the challenged plan is not supported by reasons that are constitutional or at least rational. We submit this letter and refer the Court to the Declarations of Todd Breitbart (and the attached exhibits) dated April 25, 2012 and Andrew Beveridge (and the attached exhibits) dated April 26, 2012, which sets forth the evidence we have demonstrating why the Senate Majority did not make the requisite honest and good faith effort to construct districts as nearly of equal population as practicable.

Both of the referenced Declarations show that preserving core districts and avoiding incumbent pairings clearly were not the reasons for the large population deviations, rather unconstitutional and irrational purposes were the real reasons, specifically securing and advancing the concentration of power in the upstate region, despite the region's slower growth than downstate, purely partisan reasons, or alternatively, intentional racial discrimination.

The Senate Majority would have this Court believe that the Chapter 16 Senate Plan was based on an honest and good faith effort to construct districts as nearly of equal population as practicable, and then only departed from equal population due to a legitimate state policy of preserving core districts and avoiding the pairing of incumbents. The Senate Majority might

possibly admit that another state policy goal was to preserve and advance the Republican party advantage in the Senate, and that this is a legitimate state policy. The result happened to produce deviations that consistently severely over populated New York City districts and consistently severely under-populated upstate districts.

Improper Regional or Partisan Purpose for the Malapportionment

At no time did the drafters of the plans nurture the ambition of drawing maps as close to equal in population as was reasonably practicable. Redistricting plans could have been easily drawn with smaller population deviations that served the goals of protecting incumbents and preserving cores of existing districts; in fact, some such plans were offered for consideration but were summarily rejected.[1]

Todd Breitbart submitted a 63-District Senate Alternative Plan (the *63-District Alternative)*, demonstrating the unfavorable comparison between the 2012 Senate Plan and the *63-District Alternative.* 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 Lee 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. Beveridge ¶4.

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. The plan is drawn with districts that are as equipopulous as possible, but have allowed strict adherence to the equal population principle to bend 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. Beveridge ¶14.

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

[1] The Senate Majority was unable to pit many Democratic incumbents against each other, because many of these senators are federally protected under Section 5 of the federal Voting Rights Act and represent districts within covered jurisdictions in New York City. Indeed, two Democratic senators not covered under Section 5 of the Voting Rights Act, were drawn into the same district.

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. Beveridge ¶15. We respectfully refer the Court to the Declarations of Mr. Breitbart and Mr. Beveridge which discuss these arguments in more detail.

Intent to Discriminate Based on Race

The State Senate plan intentionally places larger, overpopulated districts in New York City. Almost all of the State Senate districts with large Asian American, African American, and Latino populations are overpopulated and are in New York City. This affords less representation for racial and ethnic minorities in New York City and has a discriminatory effect on the opportunity of Asian Americans, and other racial and ethnic minorities, to elect candidates of their choice.

Every one of the 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. Beveridge ¶80.

In the Chapter 16 plan, all of the New York City Senate districts have populations that are 3.47% or 3.83% ***above*** the mean population. The 26 overpopulated New York City Senate Districts (Senate Districts 10-34 and 36) contain 72.86% of the non-Hispanic Asian citizen voting-age population (CVAP) of New York State, 71.28% of the Hispanic CVAP, 67.29% of the non-Hispanic Black CVAP, but only 23.91% of the non-Hispanic White CVAP. In contrast, the 26 under-populated upstate Senate Districts (Senate Districts 38-63) contain 13.04% of the non-Hispanic Asian CVAP, 14.08% of the Hispanic CVAP of New York State, 21.21% of the non-Hispanic Black CVAP, but 55.92% of the non-Hispanic White CVAP.

The 18 Senate Districts wholly or partly within the covered counties (Senate Districts 17-23, 25-34, and 36) contain 36.27% of the non-Hispanic Asian CVAP of New York State, 53.28% of the Hispanic CVAP, 52.61% of the non-Hispanic Black CVAP, but only 16.09% of the non-Hispanic White CVAP.

The malapportionment of senate districts in New York City has a discriminatory effect on the opportunity of Asian Americans, and other racial and ethnic minorities, to elect candidates of their choice.

Under the 2002 senate plan, there were 14 minority opportunity districts statewide, and 11 in the covered counties, out of 62 seats in the Senate. Under the 2012 Senate Plan, there are 13 minority opportunity districts, 10 in the covered counties, out of 63 seats in the Senate. Minority voting strength under the 2012 Senate Plan will be reduced compared with the 2002 plan. The Senate Plan reduces the number and proportion of minority ability-to-elect districts from 62 benchmark districts to 63 districts under the proposed plan, there is a reasonable probability that the plan will fail to gain preclearance.

Further, despite the substantial population growth among Asian Americans and Latinos in New York City and New York State over the last decade, the additional senate district was placed upstate and is a majority White district. The proposed senate plan reduces the percentage of Asian Americans in most of the senate districts in Brooklyn, despite the massive growth of the Asian American population in this borough and despite the fact that the ideal district population was reduced by adding an additional senate district.

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 minority groups – particularly Hispanics – than the Senate Majority's Chapter 16 Senate Plan. Beveridge ¶88.

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 principles offered as fundamental principles by the Majority Leader. Beveridge ¶90.

Total Population is the Correct Data Set to Analyze the Regional Malapportionment

The Court should look to the total district population, and not Citizen Voting Age Population (CVAP), in assessing the malapportionment claims in this case. The most compelling discussion of whether legislative apportionment should be based on total population or CVAP is found in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). In assessing whether the district court below properly ordered Los Angeles County Board of Supervisors districts to be drawn on the basis of total population, the *Garza* court assessed Supreme Court case law, and found that the Court has "recognized that the people, including those who are

ineligible to vote, form the basis for representative government." *Garza*, 918 F.2d at 774 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964).

Crucially, the *Garza* court recognized that apportionment on the basis of population, as opposed to CVAP, has constitutional dimensions. Since non-citizens are entitled to various federal and local benefits, non-citizens have a right "to petition their government for services and to influence how their tax dollars are spent." *Id.* at 775. Therefore, "basing districts on voting population rather than total population would disproportionately affect these rights" for those living in areas with high percentages of non-citizens. *Id.* It would "dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative." *Id.* Districting on the basis of CVAP, instead of total population, ignores the fact that non-citizens have constitutional rights, and burdens the constitutional rights of voting age citizens in areas with high percentages of non-citizens. *Id.*

While the Fourth Circuit in *Daly v. Hunt* did not adopt the reasoning of *Garza* in full, it did express agreement with the key principle that "representatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative." 93 F.3d 1212, 1226 (4th Cir. 1996).

Both *Garza* and *Daly*, moreover, looked to state law in assessing whether legislative apportionment should be based on total population or CVAP. See *Garza*, 918 F.2d at 774; *Daly*, 93 F.2d at 1227. In this case, New York law plainly requires the use of total population, as opposed to CVAP, in apportioning State Senate districts. While the New York Constitution, at Art. 3, § 4, suggests that the Senate should be apportioned on the basis of "inhabitants, excluding aliens," the New York Constitution has been amended to provide that, "[f]or the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term 'inhabitants, excluding aliens' shall mean the whole number of persons." N.Y. Const. Art. 3, § 5-a; see also *Loeber v. Spargo*, 391 Fed.Appx. 55, 58 (2d Cir. Aug. 27, 2010) (Pooler, Sack and Raggi, JJ.) (holding that portion of complaint alleging that New York Senate and Assembly should be apportioned on the basis of CVAP was properly dismissed on the basis of Art. 3, § 5-a).

Rodriguez v. Pataki, 308 F.Supp.2d 346 (S.D.N.Y. 2004), is not to the contrary. The court's decision to dismiss the plaintiffs' malapportionment claim with respect to the State Senate districts in that case at the summary judgment stage was based on its reading of the factual record in that case, not its conclusion that CVAP, as opposed to total population, is the appropriate measure for measuring malapportionment. The *Rodriguez* court emphasized that the variations in total population between State Senate districts in that case were within the threshold permitted by the "ten percent rule" and thus *prima facie* constitutional. 308 F.Supp.2d at 365-366. Moreover, it took note of the fact 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.

It was only after assessing these and several other record-specific factors, and acknowledging that "[i]t does not appear that the New York legislature employed CVAP data in creating its 2002 Senate Plan, and thus the issue is not whether the court should defer to the state's decision to use a measure other than total population," that the *Rodriguez* court noted the issue of CVAP. *Id.* at 370. In this context, the *Rodriguez* court's acknowledgement of "the reality that the overpopulation of New York City districts ha[d] not, in fact, diluted the voting strength of 'downstate' voters" when CVAP is considered was clearly not meant to suggest that CVAP was the proper measure for assessing malapportionment claims.

Conclusion

The Senate Majority's Chapter 16 Senate Plan – which groups all of the under populated 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 redistricting 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.

We thank the Court for its consideration of the Declarations of Mr. Breitbart and Mr. Beveridge, and the issues presented in this letter.

Respectfully submitted,

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cc: All Counsel – Via ECF