EXHIBIT A

Corrected Brief

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:11-cv-05632-DLI-RR-GEL
	)	
	)	**Date of Service**: April 27, 2012
ANDREW M. CUOMO, et al.	)	
	)	
	)	
Defendants.	)	
	)	

SENATE MAJORITY'S RESPONSE TO THE COURT'S APRIL 20 ORDER

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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 Court's April 20 Order.

PRELIMINARY STATEMENT

In connection with their one-person, one-vote claims under the Fourteenth Amendment, several plaintiffs, at the Court's invitation, made motions seeking the preliminary equitable relief of having the Court draw an interim New York State Senate redistricting map, pending preclearance by the U.S. Department of Justice, of the 2012 Senate redistricting plan. Today, the DOJ precleared New York's 2012 Senate plan.

On April 20, however, the Court instructed the Senate Majority to make this submission today, to show why they should not be required to identify the person or persons who drew the 2012 Senate redistricting map and produce them for a deposition, and to identify such individuals to the Court in an *in camera* submission. There are two separate grounds on which the Senate Majority should not have to provide this compelled discovery.

First, the Senate Majority and its legislative agents are protected by an absolute privilege against providing compelled testimony concerning conduct undertaken in their legislative capacity. Compelled testimony strikes at the core of the legislative privilege, which is intended to protect legislators and their agents against being questioned on their deliberations and communications concerning legislative activity. Courts in redistricting cases regularly apply this privilege and deny requests to depose legislators or their agents. And, indeed, in the last round of redistricting in New York, the *Rodriguez* Court ruled that plaintiffs were not permitted to seek deposition testimony from New York State legislators or their agents in support of plaintiffs' one-person, one-vote claims. The Senate Majority's legislative privilege should not now be

abrogated in this proceeding; and, if it is, any order compelling the Senate Majority to submit its map drawers to a compelled deposition will only likely delay these proceedings pending an appeal to the Supreme Court.

Second, this Court does not even have to resolve any privilege issues because testimony by the individuals who drew the 2012 Senate redistricting plan is irrelevant to plaintiffs' one-person, one-vote claim. As a general matter, a legislature does not have to justify a redistricting plans that has a maximum population deviation of less than 10%. Plaintiffs may overcome this presumption only by showing that the less-than-10% deviations in the 2012 Senate plan inflicted a cognizable injury on them. They cannot make that showing here, however, as the Senate Majority sets forth below and will explain further in our May 4 submission to the Court. On their one-person, one-vote claim, Plaintiffs complain that New York City Senate districts are overpopulated relative to "upstate" districts. But New York City districts are *underpopulated* relative to upstate districts in terms of the only population that matters when assessing a one-person, one-vote claim: citizen population. New York City votes are thus not diluted relative to "upstate" votes. Indeed, if anything, the enacted plan dilutes the votes of upstate voters relative to New York City voters.

The Legislature does not have to explain or otherwise "justify" a redistricting plan, like the 2012 Senate plan, that benefits plaintiffs. Indeed, it is plaintiffs' burden to show not only that they are harmed by the deviations (which they cannot show) but that the deviation in the 2012 Senate redistricting plan results solely from the promotion of unconstitutional or irrational state policy. And they cannot satisfy this burden, either. Among other things, the deviations in the 2012 Senate plan serve the legitimate state policies of avoiding dilution of the voting strength of upstate voters and offsetting deviations in the redistricting plan for the New York State

Assembly. Nor do plaintiffs have a cognizable claim of racial-based vote dilution in New York City because they have failed to cite any alternative 63-seat Senate plan that would add a 63rd seat "downstate" *and* create an additional majority-black or majority-Hispanic district in the City.

Plaintiffs have not, accordingly, established any basis for abrogating the legislative privilege here and compelling the testimony of the individual or individuals who drew the 2012 Senate redistricting plan, or even that any such testimony would be relevant to their one-person, one-vote claims. The Senate Majority therefore should not be compelled to disclose the identity of the person or persons who drew the 2012 Senate plan or produce such person or persons for depositions.

BACKGROUND

As the Court is aware, the Legislature enacted a redistricting plan for the New York State Senate. This plan was drafted by the Senate majority office of the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"). LATFOR's statutory responsibilities include "engag[ing] in such research studies and other activities as its co-chairmen may deem necessary or appropriate in the preparation and formulation of a reapportionment plan for the next ensuing reapportionment of senate and assembly districts and congressional districts of the state." N.Y. Legis. Law § 83-m ¶ 3. For approximately eight years of every decade, LATFOR functions as a nonpartisan body that collects election data and compiles it in a central computerized database, but following each decennial Census, LATFOR creates four separate redistricting offices: one for each of the Senate and Assembly majorities and the Senate and Assembly minorities.

The 2012 Senate redistricting plan drawn by the Senate majority office of LATFOR was passed by the New York Legislature on March 14, 2012, and signed by the Governor on March 15, 2012. A week after the Senate plan was signed into law, this Court held a status conference on plaintiffs' claims alleging that the 2002 Senate plan was malapportioned. At the end of that conference, the Court instructed the plaintiffs to amend their complaints to reflect the fact that the Legislature had enacted a plan. *See* 3/21/12 Hr'g tr. at 65; *see also* 3/21/12 Scheduling Order.

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). Intervenors also amended their complaints to add entirely new claims against the 2012 plan, including claims that the plan violates the one-person, one-vote principle of the Equal Protection Clause. The Senate Majority Defendants moved to dismiss plaintiffs' claims against the 2002 plan, *see* Maj. Defs.' Mot. To Dismiss (DE 286), which motion the Court denied, and reserved the right to object to Plaintiffs' assertion of new claims against the 2012 plan, Memo. Of Law In Support Of Senate Maj. Defs.' Mot. To Dismiss at 7 n.2 (DE 286-1).

Thereafter, in early April, this Court issued an order indicating that, because the 2012 Senate plan was then still awaiting preclearance, it was necessary for the Court to preliminarily address plaintiffs' claims under the Constitution and § 2 of the Voting Rights Act "in order to provide Magistrate Judge Mann and Professor Persily with the legal framework under which they will craft any proposed interim plan for each house of the State Legislature." 4/4/12 Clarification Order; *see also* 4/3/12 Scheduling Order (DE 287). Accordingly, the Court ordered that

> any party planning to move for preliminary equitable relief on the ground that one or more of the issues presented in the complaints that have been filed in this case has sufficient legal and factual merit to meet the standards set out above, 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.

Id. The standards referenced in the Court's order were taken from *Perry v. Perez*, __ U.S. __, 132 S.Ct. 934 (2012), in which the Supreme Court instructed that "[w]here a State's plan faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent that those legal challenges are shown to have a likelihood of success on the merits." *Id.* at 942. As noted in the Scheduling Order, *Perry* also provides that courts should "tak[e] guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* A "'reasonable probability' . . . means in this context that the § 5 challenge is not insubstantial." *Id.*

The Ramos Intervenors and Drayton Intervenors took up the Court's invitation to make submissions seeking preliminary relief in the form of an interim redistricting map pending a DOJ determination on New York's preclearance submission for the 2012 Senate plan. Those motions alleged, among other things, that the 2012 Senate plan violated the Equal Protection Clause by allegedly overpopulating downstate New York and underpopulating upstate New York. *See* Ramos Intervenors' Mot. For Prelim. Injun. (DE 305); Drayton Intervenors' Mot. For Prelim. Injun. (DE 307). The Senate Minority Defendants and Lee Intervenors submitted briefing on other issues. *See* Senate Minority Resp. (DE 303); Lee Intervenors' Letter (DE 304)

In response to these submissions, the Senate Majority Defendants argued that 1) there is no basis for this Court to draw an interim plan for the New York Senate, 2) plaintiffs' new claims against the 2012 plan, including the one-person, one-vote claims, should not be adjudicated by this Court,

and 3) plaintiffs' claims fail on the merits. *See* Senate Maj.'s Resp. To Pls.' April 12 Submissions (DE 322).

On April 20, the Court held a conference to address certain issues in connection with plaintiffs' applications for preliminary relief. At the end of the conference, the Court ordered "that by Friday, April 27th, the plaintiffs produce a submission that provides the evidence they have to date to support their 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." 4/20/12 Hr'g tr. at 90. The Court also ordered Defendants "to show cause by April 27th why they should not be required to identify the person or persons who drew the challenged map . . . and be prepared to produce them for deposition." *Id.* The Court further ordered Defendants to "at least identify to the Court in camera the response to the question of who the person or persons are who are responsible for drawing the map," *id.*, which the Senate Majority Defendants have done in a separate *in camera* submission to the Court.

On April 27, 2012, the U.S. Department of Justice, Civil Rights Division, precleared the 2012 Senate redistricting plan, thus mooting any preliminary request in this case for an interim New York State Senate redistricting map pending DOJ preclearance. (DE 332).

ARGUMENT

I. The Drafters Of The Senate Plan Are Entitled To An Absolute Privilege Against Being Questioned On Deliberations And Communications Regarding Legislative Privilege.

Plaintiffs are not entitled to depose the individual or individuals who drew the Senate plan.

It is well-established that state legislators and their agents possess a privilege against being questioned on deliberations and communications regarding legislative activity. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951); *EEOC v. Wash. Suburban Sanitary Comm'n*,

631 F.3d 174, 180-81 (4th Cir. 2011). The purpose of this privilege is to enable legislators and those who assist them to "focus on their public duties by removing the costs and distractions attending lawsuits," and to serve as a bulwark against "political wars of attrition in which [legislators'] opponents try to defeat them through litigation rather than at the ballot box." *Wash. Suburban*, 631 F.3d at 180-81.

This privilege applies to any act that is "an integral part of the deliberative and communicative processes by which Members participate in committee and [floor] proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel*, 408 U.S. at 625. *See, e.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 & n.15 (1975) (Speech or Debate Clause applies to act of obtaining information regarding any "subject . . . on which legislation could be had") (internal quotation marks omitted); *Government of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985) ("fact-finding, information gathering, and investigative activities" are covered by legislative privilege because they "are essential prerequisites to the drafting of bills").

Moreover, the privilege is firmly rooted in history and tradition, and is incorporated into federal law through Rule 501 of the Federal Rules of Evidence. *See, e.g.*, *Tenney*, 341 U.S. at 372; *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403 (1979); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Wash. Suburban*, 631 F.3d at 181; Fed. R. Evid. 501 ("[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

In civil cases, such as this one, the legislative privilege possessed by state legislators and their staff is co-extensive with the constitutionally-rooted privilege that members of Congress enjoy pursuant to the Speech or Debate Clause. *See S. Ct. of Va.*, 446 U.S. at 733. As the Second Circuit has explained, "due to the[ir] shared origins and justifications . . . . the state legislative privilege . . . [is] on a parity with the similar federal privilege under the Speech or Debate Clause" outside the criminal context. *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 83 (2d Cir. 2007) (internal quotation marks omitted); *see also Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 8 (2d Cir. 1980).[1]

Since in the civil context, there is "parity" between federal and state legislators, state legislators enjoy both the immunity from suit and the evidentiary privilege that is extended to federal legislators. On the federal level, it is well established that absolute immunity from suit is derivative of the *broader* common law evidentiary privilege (which was incorporated in federal and state speech or debate clauses) that precludes legislative actors from being "questioned" for legislative acts. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 616 (1972) (Speech or Debate

[1] State legislative immunity is more limited than its federal analogue only in federal criminal prosecution. *See United States v. Gillock*, 445 U.S. 360, 373 (1980) ("[C]ases on official immunity have drawn the line at civil actions."). And to the extent *Gillock* was at all ambiguous on this point, a unanimous Supreme Court decision issued just three months after *Gillock* plainly establishes that state legislators do enjoy privileges akin to the Speech or Debate Clause protection afforded Congressmen, and that *Gillock* lessened that protection only in criminal cases. In *Supreme Court of Virginia*, the Court plainly stated that "[a]lthough the separation-of-powers doctrine justifies a broader privilege for Congressmen than state legislators in *criminal* actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have *equated* the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." 446 U.S. at 733 (emphasis added). The opinion also stated that "state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Id.* at 732 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). The Second Circuit reached the same conclusion in *State Employees Bargaining Agent Coalition*, holding that "due to the[ir] shared origins and justifications . . . . the state legislative privilege . . . [is] on a parity with the similar federal privilege under the Speech or Debate Clause" outside the criminal context. 494 F.3d at 83.

Clause required quashing of grand jury subpoenas issued to Senator and his staff even where Senator not generally immune from criminal prosecution); *Gillock*, 445 U.S. at 367, 373 n.11 (observing that Member of Congress would not be immune from prosecution but would be protected by evidentiary privilege); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1374-75 (2d Cir. 1988) (holding that Speech or Debate Clause applied to Senator as witness in case between two unrelated parties); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995) ("[T]he immunity from suit derives from the testimonial privilege, not the other way around.").

Since state legislative privilege is equated with the federal privilege, and springs from the same "origins and justifications," *State Employees Bargaining Agent Coal.*, 494 F.3d at 83 (internal quotation marks omitted), state legislative immunity plainly encompasses a testimonial and evidentiary privilege, as courts have consistently recognized. *See, e.g.*, *Wash. Suburban*, 631 F.3d at 181 (holding legislative privilege protects "against compulsory evidentiary process"); *Marylanders*, 144 F.R.D. at 297 ("Legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege.").[2] And the same privilege enjoyed by legislators extends to their "aides and assistants," who are "treated as one" with the legislators they serve. *Gravel v. United States*, 408 U.S. 606, 616 (1972) (internal quotation marks omitted).

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[2] *See also, e.g.*, *Holmes*, 475 A.2d at 984 ("Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation (as plaintiffs attempted to require) falls clearly within the most basic elements of legislative privilege."); *Cano*, 193 F. Supp. 2d at 1179-80; *Am. Ass. Of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276,1296 (M.D. Fla. 2002); *M Sec. & Inv., Inc. v. Miami-Dade County*, Fla., 2001 WL 1685515, *2 (S.D. Fla. Aug. 14,2001); *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 263 (D.D.C. 1995); *In re Perry*, 60 S.W.3d 857, 858 (Tex. 2001).

Moreover, because the privilege possessed by Members of Congress is absolute, *see, e.g., Eastland*, 421 U.S. at 501 ("[T]he prohibitions of the Speech or Debate Clause are absolute."), so is the privilege possessed by state legislators and their staff, *see, e.g.*, *Wash. Suburban*, 631 F.3d at 180-81 ("Absolute immunity enables legislators to be free, not only from the consequences of litigation's results, but also from the burden of defending themselves."). And because the privilege is absolute, it applies even where plaintiffs allege that legislators' motives are potentially relevant. *See, e.g., Bogan*, 523 U.S. 44; *Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege."). Indeed, as *Bogan* emphasized, it is fundamental error to make the issue of legislative privilege turn on whether there is an allegation or finding of illegal motive. Thus, *Bogan* overturned a lower court decision because it examined the legislators' allegedly unconstitutional "intent in resolving the logically prior question of whether their acts were legislative." *Bogan*, 523 U.S. at 54.

For all of these reasons, courts in redistricting and other voting rights cases have routinely denied plaintiffs' efforts to seek testimonial or documentary discovery of legislators or their staff. For example, in *Backus v. South Carolina*, No. 3:11–cv–03120, 2012 WL 786333 (D.S.C. Mar. 9, 2012), a case where plaintiffs allege *Shaw* claims and Voting Rights Act claims against statewide and Congressional redistricting plans, the court granted defendants a protective order prohibiting "plaintiffs from inquiring into any matters protected by legislative privilege," which "means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation." 2/8/12 *Backus* Order at 2 (Ex E).

Likewise in *Marylanders*, a three-judge federal court considered a one-person, one-vote claim, 144 F.R.D. at 294 n.4, similar to the claim at issue here, where the challenged plan's

maximum population variance was under 10%, *see Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994). The court ruled that legislative immunity precluded depositions of legislator leaders, "as well as any inquiry into legislative 'motives' concerning the introduction of the redistricting plan," *Marylanders*, 144 F.R.D. at 295, because legislative immunity "functions as an evidentiary and testimonial privilege," *id.* at 297, which is an "absolute" ban against testimony "regarding conduct in their legislative capacity," *id.* at 298 n.12. *See also, e.g.*, *Cano v. Davis*, 193 F. Supp. 2d at 1179; *Simpson*, 166 F.R.D. at 18; *In re Perry*, 60 S.W.3d. 857 (Tex. 2001).

And consistent with these principles, in *Rodriguez*—where plaintiffs alleged the same one-person, one-vote claim alleged here, *see* 4/17/12 Senate Majority's Response at 37-48—the magistrate judge found that plaintiffs were categorically barred from deposing legislators and their aides. *See* 9/3/03 Hr'g tr. at 11 (Ex C) ("I can't at present conceive of a scenario where I, for example, even if Mr. Emery requested it, would say Senator Bruno, or Speaker Silver, or any of their individual aides, has to be deposed."); 9/11/03 Hr'g tr. at 19 (concluding plaintiffs were barred from deposing the Secretary of the Senate because he "falls within the legislative privilege. I understand your position is he's an official of the Senate as opposed to Senator Bruno's right hand person, but it seems to me even if he's an official of the Senate that falls squarely within the legislative privilege.").

Moreover, plaintiffs specifically sought to depose Mark Burgeson, the Special Assistant to the New York State Task Force on Demographic Research and Reapportionment ("LATFOR") Co-Chairman Senator Dean G. Skelos. *Rodriguez v. Pataki*, Nos. 02 Civ. 618RMBFM, 02 Civ. 3239RMBFM, 2003 WL 22109902, at *2 (S.D.N.Y. Sept. 11, 2003). LATFOR was established by Chapter 45 of the New York State Laws of 1978, and it has the authority to engage in such

activities as its Co-Chairs deem necessary or appropriate in performing its functions which include, among other things, assisting the Legislature in preparing and formulating reapportionment plans for the New York State senate, assembly, and congressional districts. *See* N.Y. Legis. Law § 83-m ¶ 3 (Ex B). In carrying out its functions, LATFOR has all of the powers of a legislative committee, and holds public and private hearings in connection with proposed reapportionment plans for the senate, assembly, and congressional districts in New York. *See id.* § 83-m ¶ 10. The Co-Chairs of LATFOR may also employ such personnel as may be necessary for the performance of LATFOR's work, *see id.* § 83-m ¶ 4, and employees of LATFOR, including Burgeson, are considered employees of the legislature for all purposes, *see id.* § 83-m ¶ 12.

During redistricting periods LATFOR is composed of four separate redistricting offices, one each for the Senate and Assembly majorities and the Senate and Assembly minorities. 2003 WL 22109902, at *2. Thus, Burgeson reported to Senator Skelos, who was the Senate Majority Leader's legislative appointee to LATFOR. *Id.* Burgeson developed the Senate plan "exclusively within the confines of the Senate majority redistricting office." *Id.*

Based on these facts, the magistrate judge concluded that legislative privilege applied to Burgeson and barred plaintiffs from deposing him on "the reasons why he and others in the Senate majority redistricting office drew the lines for particular Senate districts in the ways that they did." *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 309 (S.D.N.Y. 2003). One day later, the three-judge panel affirmed this ruling. *See Rodriguez v. Pataki*, 293 F. Supp. 2d 313 (S.D.N.Y. 2003).[3]

[3] To be sure, the magistrate judge in *Rodriguez* indicated that when responding to a production request, defendants were only entitled to a qualified privilege. *See Rodriguez*, 280 F. Supp. 2d at 100-101, but did not apply this ruling to depositions, *see id.* at 96 ("Moreover, at

Similarly here, legislative privilege bars plaintiffs from questioning the individuals who drew the 2012 Senate plan. Like Burgeson, these individuals are employees of LATFOR, Levine-Schellace Declaration (Ex A), and therefore are "considered to be employees of the legislature for all purposes." N.Y. Legis. Law § 83-m ¶ 12; Levine-Schellace Declaration. Moreover, their work is "an integral part of the deliberative and communicative processes," *Gravel*, 408 U.S. at 625, by which the Legislature enacts a redistricting plan, as the Legislature has expressly acknowledged in the legislation authorizing the continuation of LATFOR. *See* N.Y. Legis. Law § 83-m ¶ 1.[4] And like Burgeson, after the 2010 Census was released, these individuals developed the Senate plan exclusively in the Senate majority's redistricting office, under the direction of the Senate Majority Leader, the Senate Majority Leader's appointee to LATFOR, and their agents. *See* Levine-Schellace Declaration. As a result, they should be

(continued…)

least at this juncture, the plaintiffs are not seeking any depositions of legislators or their staffs."), as the three-judge panel emphasized when affirming the magistrate judge's opinion, *see Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003) ("Magistrate Judge Maas's Order does not relate to 'any depositions of legislators or their staffs.'"). Moreover, the magistrate judge's finding that the privilege was qualified apparently had been based on an initial misunderstanding about the structure of LATFOR. *See* 9/3/03 *Rodriguez* Hr'g tr. at 7-8 ("My July 28th opinion and order found that privilege was not applicable to the extent that discussions took place as part of LATFOR. And, frankly, at the time that I drafted the decision, I didn't contemplate the scenario that seems to be the case, which is that LATFOR had, in effect, four subsets in addition to the entity itself, one of which was a separate majority or separate senate majority office."). In any event, this potential distinction between documents and depositions is of no moment here because the only issue is whether the drawers of the Senate plan should be deposed. Moreover, to the extent the magistrate was drawing a distinction between document production and depositions, it is clearly incorrect, as explained below.

[4] "The legislature hereby finds and declares that: (a) there is a need for intensive and thorough legislative study, research and inquiry into the techniques and methodology to be used by the bureau of the census of the United States commerce department in carrying out the decennial federal census; (b) a technical plan will be needed to meet the requirements of a legislative timetable for a reapportionment of the senate and assembly districts and the congressional districts of the state based on such census; and (c) the task force herein continued is necessary to assist the legislature in the performance of its responsibilities and in the conduct of legislative research projects relating thereto." N.Y. Legis. Law § 83-m ¶ 1

"treated as one" with the legislators that they serve. *Gravel*, 408 U.S. at 616 (internal quotation marks omitted). Therefore, plaintiffs should be barred from questioning the drafters on "the reasons why [they] drew the lines for particular Senate districts in the ways that they did." *Rodriguez*, 293 F. Supp. 2d at 309.

Moreover, although the issue is not presented here, we note that legislators and their aides are plainly entitled to the same absolute privilege when responding to a document request as they enjoy for a deposition request. Inquiry into contemporaneous documents intrudes even more directly into the thought processes, deliberations, and communications of legislators than does questioning at some later date about those prior deliberations. For this reason, legislative privilege clearly extends to the production of documents. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.33d 408, 421 (D.C. Cir. 1995) (holding that "[a] party is no more entitled to compel congressional testimony or production of documents than it is to sue congressman"); *MINPECO v. Conticommodity Services, Inc.*, 844 F.2d 856, 862-63 (D.C. Cir. 1988) (legislative privilege precludes "a fishing expedition into congressional files").[5]

In addition, even assuming that, at the time *Rodriguez* was decided, it was an open question whether legislative privilege is co-extensive with the constitutionally-rooted privilege that members of Congress enjoy pursuant to the Speech or Debate Clause, subsequent Second

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[5] *See also, e.g.*, *Simpson v. City of Hampton*, 166 F.RD. 16, 19 (B.D. Va. 1995) (denying motion to compel discovery of councilmembers' files); *2BD Associates Ltd. Partnership v. County Commissioners for Queen Anne's County*, 896 F. Supp. 528, 536 (D. Md. 1996) (legislative actor's files were privileged from discovery); *United Transportation Union v. Springfield Terminal Railway Co*., 132 F.RD. 4, 5-6 (D. Me. 1990) (holding that documents containing internal Congressional communications either between Congressmen or between Congressmen and their aides are privileged); *Campaign for Fiscal Equity*, 179 Misc. 2d at 912 (denying document discovery because documents "could reveal the various policy options considered by individual legislators"); *see also Searingtown*, 575 F. Supp. at 1298 (recognizing legislative privilege "preventing inquiry into the motivation for legislative acts").

Circuit case law plainly establishes that the two are co-extensive. *See State Employees Bargaining Agent Coal.*, 494 F.3d at 83 (holding "due to the[ir] shared origins and justifications . . . . the state legislative privilege . . . [is] on a parity with the similar federal privilege under the Speech or Debate Clause" (internal quotation marks omitted)).

In sum, an absolute testimonial privilege bars plaintiffs from deposing the individual or individuals who drew the 2012 Senate redistricting map about deliberations and communications regarding this legislative activity.

II. The Purpose Or Motives Of The Drafters Of The Senate Plan Are Irrelevant.

Even if legislative privilege is a qualified privilege—which it clearly is not—such a qualified privilege bars plaintiffs from deposing the drafters of the Senate plan because their motivations, political or otherwise, are clearly irrelevant.

According to the magistrate judge in *Rodriguez*, when determining whether "privilege should be honored," courts should consider the following factors:

> (i) *the relevance of the evidence sought to be protected*; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

280 F. Supp. 2d at 100-101 (emphasis added).

1. In this case, the purpose or motive underlying Senate plan is irrelevant. Here, it is alleged that the residents of New York City were harmed by "overpopulating" their districts (on the basis of total population), and that the Legislature's purpose in inflicting this harm was regional, political and/or racial animus. Thus, the threshold dispositive question is whether the total population percentages in the Senate plan did, in fact, harm the New York City area. If there is no discriminatory effect, then there is

obviously no cognizable harm which needs to be explained. If the plaintiff or the plaintiff's group is not being treated worse than others, than it is a *non sequitor* to ask whether or not the (nonexistent) adverse treatment was motivated by racial or political or legitimate purposes.

In a one-person, one-vote case where population deviations are under 10%, there is no injury, absent extraordinary circumstances. That is because the Fourteenth Amendment principle of "one-person, one-*vote*," obviously "protect[s] the right of all qualified citizens to *vote*." *Reynolds*, 377 U.S. at 554 (emphasis added). And it is quite clear that voting rights are not cognizably harmed by minor deviations from precise population equality. *Id.* at 568 (emphasis added).

As the Supreme Court stated in *Gaffney*, 412 U.S. at 743-44, "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Id.* at 745-46. Because total *population* figures are only a rough proxy for *voting* equality, minor population deviations provide no basis for inferring "that the vote of any citizen is [not] approximately equal in weight to that of any other citizen in the State," *Reynolds*, at 569; *see id.* at 568 (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.").

Based on these general principles, the Supreme Court has "established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations" that impose no cognizable injury. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745

(1973). Accordingly, the threshold question is whether the less-than-10% deviations are "minor" and thus impose no injury.

Since deviations under 10% are minor "as a general matter," the plaintiff's initial burden is to establish that this is one of the rare instances where these deviations are not *de minimis* and harmless. The failure to do so pretermits any inquiry into purpose. Again, legislatures need only explain actions that inflict some constitutionally cognizable harm and any other rule would render the 10% presumption meaningless. The whole point of the 10% rule is that, generally, "an apportionment plan with a maximum population deviation under 10%, require[s] [no] justification by the State," *Brown*, 462 U.S. at 842 while deviations over 10% do require such justifications, *id.* at 842-43. If legislatures must justify deviation under 10% even when plaintiffs have not overcome the presumption that such deviations inflict no harm, then there is no difference between such presumptively minor deviations and those exceeding 10%—in both cases, the Legislature must justify its actions under neutral districting principles.

In *Larios*, the under-10% deviations did, in fact, have the unusual effect of "dilut[ing] and debas[ing] the weight of certain citizens' votes," *Larios*, 300 F. Supp. 2d at 1323, "by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another," *id.* at 1329. Here, however, Plaintiffs cannot possibly establish that the "general" rule does not obtain; *i.e.*, that less-than-10% deviations visit a cognizable injury on them. As the Senate Majority Defendants will demonstrate in their May 4 submission, here, as in *Rodriguez*, plaintiffs cannot establish that the presumptively minor population deviations in the Senate plan diluted the voting

strength of any group of voters. Although the allegedly disadvantaged New York districts are slightly overpopulated in terms of total population, as they were in *Rodriguez*, these same districts are well below the average in terms of *citizen* voting-age population. In other words, although New York City is overpopulated in terms of *total* population, it is underpopulated in terms of the only population that matters when assessing "one-person, one-vote," *i.e.* the only "persons" entitled to "vote"—citizens. *See WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 648 (1964) (assessing population equality on the basis of *citizen* population). Thus, far from denying the right to vote, the 2012 Senate plan gives substantially more weight to votes in these New York City districts. And because the overpopulation of New York City districts has not, in fact, diluted the voting strength of 'downstate' voters," *Rodriguez*, 308 F. Supp. 2d at 370, plaintiffs have failed to establish any injury.[6] Indeed, the enacted plan "dilute[s] the votes of 'upstate' residents" relative to New York City voters. *Rodriguez*, 308 F. Supp. 2d at 369. Obviously, the Legislature does not need to "justify" a plan that *benefits* the plaintiffs and, equally obviously, the Court cannot order a remedy which *exacerbates* the *dilution* of upstate voting power to enforce a constitutional mandate to *equalize* voting power.[7]

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[6] Unlike in *Larios*, "there [wa]s no pernicious pattern of Senate Republicans manipulating population deviations in order to . . . oust large numbers of Democrat incumbents." *Rodriguez*, 308 F. Supp. 2d at 40. Here, the Senate plan has only one incumbent pairing (which is one better than in *Rodriguez*), *see* 4/7/12 Senate Majority's Response at 47, and thus *Larios* is even less applicable to this case than *Rodriguez*.

[7] As will be demonstrated by the Senate Majority Defendants' May 4 submission, the dilution of upstate voters is further exacerbated by disparities in registration between New York City and upstate, which provides even more evidence of the absence of constitutional injury. Indeed, *Burns v. Richardson*, 384 U.S. 73, 90-97 (1966), establishes that "underrepresentation" and overpopulation, measured in terms of total population, visits no cognizable harm on contiguous "overpopulated" districts in a region if those districts are not substantially disfavored as measured by citizen population or registered voters.

Finally, to the extent plaintiffs are alleging the Senate plan diluted the votes of black or Hispanic voters, plaintiffs cannot establish injury for an additional reason. Plaintiffs have failed to cite *any* alternative 63-seat plan that would add the 63rd seat downstate and create an additional majority-black or majority-Hispanic district. *See* Senate Majority Response at 36. So if the 63rd district is drawn downstate rather than upstate, this additional downstate district will necessarily be a majority-white district. No Hispanic or black voters could possibly be harmed by the fact that an additional majority-white district was located upstate rather than downstate. Thus, minority voters in New York City have suffered no injury.

In short, since no injury can be established, no analysis of legislative purpose is warranted. And because no analysis of legislative purpose is warranted, testimony about the drafters subjective motivations have no possible probative value.

2. Even where the maximum deviation is *over* ten percent, the only relevant inquiry is whether the population deviations "may *reasonably be said* to advance a rational state policy." *Brown*, 462 U.S. at 843 (1983) (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)) (emphasis added)). Obviously, the question whether a plan "may reasonably *be said* to advance a rational state policy," is an objective one; there is no issue as to the subjective or actual purpose of legislators concerning that policy.[8] Thus, if the deviation advances legitimate districting principles, the federal judiciary will not undo this legitimate state policy simply because the legitimate policy was pursued for political

[8] Thus, the Supreme Court typically does not even look at state legislators' testimony in its "one-person, one-vote" cases, but simply refers to arguments from counsel or compares alternative plans that have been submitted. *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835 (1983); *Mahan v. Howell*, 410 U.S. 315 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Swann v. Adams*, 385 U.S. 440 (1967); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Roman v. Sincock*, 377 U.S. 695 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1963).

purposes. Such an intrusive, counter-productive rule would be particularly inappropriate given that the Court *presumes* redistricting is motivated by politics. *Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment.").

Here, to illustrate, if the Court were to find that the compelling policy of avoiding dilution of upstate votes was pursued by the Senate because a disproportionate number of Republicans reside upstate, this would provide no warrant for the Court to overturn that legitimate policy and *penalize* upstate voters (Republican and Democratic) by further diluting their votes, simply because it was "shocked, shocked" that political calculations had seeped into the pristine redistricting process. Indeed, such a rule in New York would establish an endless merry-go-round where the federal judiciary, in a quixotic and counter-productive effort to invalidate perfectly legitimate population schemes because they are "tainted" by political motivations, strikes down *every* redistricting plan. Here, for example, both the Common Cause alternative and the enacted Assembly plan *systematically underpopulate* (on a total population basis) the New York City districts, Senate Majority's Response at 44, which provides an obvious benefit to the predominantly Democratic City and further exacerbates the stark dilution of upstate voting power. Thus, unless there is a rule whereby Democrats are subject to different Fourteenth Amendment standards than Republicans, the Court must inquire into the political motivations of the drafters of the Common Cause alternative and the Assembly plan—both of which facially demonstrate a New York City "bias"—before invalidating the Senate plan because of its (nonexistent in terms of citizens or registered voters) upstate "bias." Inquiry into the Assembly plan is particularly required because one

legitimate justification for population disparities recognized in the seminal *Reynolds v. Sims* case is compensating for disparities in the other state legislative house's plan. 377 U.S. 533, 577 (1964) ("apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house"); *see also* Senate Majority's Response at 44-45. (And, of course, if this Court is to depart from the square holding of *Rodriguez* and invalidate the Senate plan because of "political" purposes, there will be an immediate challenge to the equally political Assembly plan's underpopulation of New York City, which in fairness must be adjudicated prior to invalidating the Senate plan.)

The *Rodriguez* Court wisely recognized that it was a fool's errand to try and penalize the "minimal underpopulation of upstate districts" by focusing on whether it was "driven by" "permissible considerations" or by politics, particularly given the "traditional correlation between 'upstate' districts and Republican political identification." *Id.* at 368. Thus, *after* thoroughly examining the "Burgeson memorandum" (which Plaintiffs ballyhoo as the best sort of "smoking gun" evidence that they could even hope to produce through their intrusive discovery), the Court found no "constitutional harm" because, regardless of political motives, the "plan promotes . . . traditional principles" and therefore the "deviations" could not "result[] s*olely* from impermissible considerations." *Id.* at 362-68, 370.

The Court should follow this wise course, summarily affirmed by the Supreme Court after *Larios*. If it does so, then all the testimony about alleged political purposes is completely irrelevant because, as we presently show, the plan indisputably furthers

traditional districting principles and therefore cannot be motivated "solely" by impermissible "political" concerns.

3. Since the judicial inquiry for plans with deviations *over* 10% is whether they "may reasonably be said to advance a rational state policy," *Brown*, 462 U.S. at 843 (quoting *Mahan*, 410 U.S. at 328), plaintiffs challenging a less-than-10% plan must show that the plan *cannot* reasonably be said to advance such rational policies. That is, if such plaintiffs meet the daunting burden of showing that the less-than-10% deviation has more than a "minor" effect, they then must show that it serves no rational purpose. Again, since deviations over 10% place the burden on the state to justify the deviations objectively, they obviously cannot have the burden for less-than-10% deviations. Thus, the burden is necessarily on the plaintiff to *disprove* the existence of rational reasons (or, stated another way, to prove that the purpose of the deviations could only be an irrational or impermissible one).

Rodriguez (and the other cases permitting challenges to under-10% plans) recognize this truism, holding that plaintiffs "have the burden of showing that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy." *Rodriguez*, 308 F. Supp. 2d at 365 (quoting *Maylanders*, 849 F. Supp. at 1032 (emphasis added by *Rodriguez*)). *See id*. ("if the plaintiff can present compelling evidence that the drafters of the plan ignored all legitimate reason for population disparities" (quoting *Leg. Redistricting Cases*, 331 Md. 574 (1993)). Thus, even if a plan reflects political motives, it is permissible if it also further non-political purposes and is therefore not "solely" political.

As noted, *Rodriguez* applied this standard to uphold the plan. Even assuming the Burgeson memorandum reflected political motives about "politically undesirable" areas, "[t]he memorandum" also "shows that LATFOR was interested in contiguity, compactness, preserving

the cores of existing districts, desiring not to pit incumbents against one another, respecting then-current political subdivisions and county lines, and staying within the ten-percent-deviation parameter of *Brown*." *Id.* Because the memorandum suggests that a mix of motives explain the population deviations, "it fails to show that the deviations resulted solely from impermissible considerations." *Id.* at 368.

Larios seemed to apply the same standard, but came to a different result because of different facts. *Larios* expressly reserved the question of "whether or when partisan advantage alone may justify deviations in population." 300 F. Supp. 2d at 1352. It did not need to resolve the question of whether political purposes rendered invalid disparities that served neutral principles, "because here the redistricting plans are plainly unlawful." *Id.*; *see also id.* at 1352 ("It is simply not possible to draw out and isolate the political goals in these plans from the plainly unlawful objective.").

For example, "one can easily discern that *just by looking at the maps themselves*" that the deviations could not have "resulted from an attempt to create compact districts." *Id.* at 1350 (emphasis added). Moreover, the population deviations "did not result from an interest in respecting the boundaries of the state's various political subdivisions" because, among other things, "the county splits were significantly higher than they had been in previous redistricting." *Id.* And the deviations could not be explained based on an effort to preserve cores because "[t]o the extent that the cores of prior districts were preserved at all, it was done in a thoroughly disparate and partisan manner, heavily favoring Democratic incumbents while creating new districts for Republican incumbents whose constituency was composed of only a small fraction of their old voters." *Id.* at 1350-51. Likewise, the deviations could not be explained based on a policy of avoiding incumbent pairs because the plans "pitted numerous Republican incumbents

against one another, while generally protecting their Democratic colleagues." *Id.* at 1347. In sum, "the record evidence squarely forecloses the idea that *any* . . . legitimate reasons could account for the deviations." *Id.* at 1349-50 (emphasis added).

Here, as the Senate Majority Defendants will explain in their May 4 submission, plaintiffs will not be able to satisfy their burden because they will not be able to disprove every conceivable rational state policy that could explain the deviations in the Senate plan. Rather, they serve a number of rational policies, both those expressly endorsed in *Rodriguez* and others. Most obviously, the deviations in the Senate plan promotes the legitimate state policy of avoiding the dilution of the voting strength of upstate voters. *See* 4/17/12 Senate Majority's Response at 44. It will also serve the purpose of offsetting the Assembly plan's underpopulation of its New York City districts and its disproportionate representation of the City in the legislature. *See id.* at 44-45. And, again, placing the 63rd district upstate promotes the traditional principle of maintaining the cores of districts and limiting incumbent pairing. *See* 4/17/12 Senate Majority's Response at 47. Because rational state policies can explain the deviations in the Senate plan, plaintiffs will be unable to satisfy their burden of showing that the deviation in the plan results "*solely* from the promotion of an unconstitutional or irrational state policy." *Rodriguez*, 308 F. Supp. 2d at 365 (emphasis added). Since plaintiffs' claims therefore should be rejected without reference to the line drawers' political or other purposes, those purposes are not probative or material.

Moreover, allegations of racial animus do not make the subjective motives of the drafters of the 2012 Senate redistricting suddenly relevant. First, as noted, there is no cognizable racial effect and, consequently, there can be no dilutive purpose. *See, e.g.*, *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990); 4/17/12 Senate Majority's Response at 47. In

Rodriguez, just as here, "plaintiffs suggest that racial bias may have animated the plan because all fourteen majority-minority Senate districts were overpopulated and are "downstate," where most of the state's minority population lives." 308 F. Supp. 2d at 366; see also Rodriguez Am. Compl. ¶ 127, 134 (Ex G).[9] Yet, the *Rodriguez* court granted defendants' summary judgment motion even though there was no deposition testimony of the drafters' racial purposes.

Indeed, *Rodriguez* equated irrational purpose with constitutional purpose, and held that the same inquiry applies regardless of what improper purpose allege. *See Rodriguez*, 308 F. Supp. 2d at 365 (plaintiffs "have the burden of showing that the deviation in the plan results solely from the promotion of an *unconstitutional or irrational* state policy." (emphasis added)). Thus, plaintiffs must affirmatively disprove every conceivable rational state policy, regardless of what the alleged actual purpose is. So, "[j]ust as in the racial context where courts must deal with the overlap of racial identity and partisan identification," 308 F. Supp. 2d at 368 (citing *Easley v. Cromartie*, 532 U.S. 234 (2001)), "so in the one-person, one-vote context must the plaintiffs who challenge a plan with less than a ten-percent deviation," *id.*, "show that the deviations resulted *solely* from impermissible considerations, *id.* (emphasis added).

As in *Easley*, the existence of political or traditional neutral reasons means that there is no claim even if it is assumed that race also was a factor. So, there is no reason to inquire into whether race *actually* was a factor when, as here, permissible reasons exist. Because permissible reasons exist for the deviations in the Senate plan, testimony about the line drawers' motivations

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[9]Indeed, plaintiffs, using Section 2 language, allege only discriminatory results; as in *Rodriguez*, plaintiffs do not allege that the Legislature acted with racial animus. *See, e.g.*, Drayton Intervenors Am. Compl. ¶ 109; Lee Intervenors Am. Compl. ¶ 114. And the Ramos intervenors specifically allege regional discrimination, not racial discrimination. *See* Ramos Intervenors Am. Compl. ¶ 69.

are completely irrelevant. And because this testimony is irrelevant, plaintiffs should not be permitted to depose the drafters of the Senate plan, even if legislative privilege is qualified.[10]

Finally, the inherent irrationality of Plaintiffs' (vague) allegations of racial purpose is vividly confirmed by the Justice Department's recent preclearance of the Senate Plan. Even though the Senate bears the burden of *disproving any* discriminatory purpose under Section 5, the Department had no trouble summarily dismissing Plaintiffs' racial purpose arguments, which were identical to those presented here. This is hardly surprising since it is undisputed that (1) all upstate residents, whether blacks in Buffalo and Rochester, or whites elsewhere, are underpopulated; (2) all New York City districts—white, Latino or black—were overpopulated and (3) no plan introduced into the Legislature was able to use placement of the 63rd seat in the City to create an additional black or Hispanic-majority district. Since the only possible differential population treatment was based on "region," rather than race or ethnicity, and since the placement of the 63rd seat upstate could not rationally have been motivated by a desire to

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[10] The fact that the testimony is irrelevant is dispositive. But even if it somehow was not, the other four factors referenced in *Rodriguez* all underscore that the privilege should be upheld here. 280 F. Supp. 2d at 100-101. *First*, Plaintiffs have "availab[le]" to them the same "evidence" available to every other plaintiff seeking to interpret, or challenge the constitutionality of legislative action: the public record. 280 F. Supp. 2d at 101. Here, that record include LATFOR's maps and data, transcripts and reports of public hearings, and Defendants' voluminous submissions to the United States Department of Justice. *Second*, while, as a general matter, a case alleging constitutional violations is undoubtedly "serious," *id.*, there is *no* serious federal issue at stake in resolving a case resting on the same meritless allegations that the three-judge court *rejected* in *Rodriguez* and whose rejection the U.S. Supreme Court summarily affirmed. *Third*, "the role of the government in this litigation" is not as a plaintiff, so this factor militates in favor of upholding the privilege. *Id. Finally*, there can be no dispute that "the possibility of future timidity by government employees who will be forced to recognize that their secrets are voidable," *id*, weighs overwhelmingly in favor of upholding the privilege. The compelled disclosure of testimony will chill the willingness of legislators, their aides, and LATFOR staff to deliberate freely about legislative matters for fear that, at some later date, each and every one of their internal thoughts and privately expressed comments and ideas could be subject to public disclosure by way of a federal lawsuit.

deny minorities an "extra" seat where they controlled selection of a candidate of choice (since no such alternative was presented to the Legislature), the Justice Department was compelled to recognize the virtual incoherence of Plaintiff's inflammatory invocation of the race card. Surely such unsubstantiated rhetoric cannot be grounds for an unfettered fishing expedition into the Legislature's purposes.

CONCLUSION

The Senate Majority should therefore not be compelled to disclose the identity of the person or persons who drew the 2012 New York State Senate redistricting map or produce such person or persons for a deposition.

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Respectfully submitted,

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