EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

TODD BREITBART, TOBIAS SHEPPARD BLOCH, GREGORY LOBO-JOST, RAUL ROTHBLATT, MARK WEISMAN, DAVID WES WILLIAMS,

Plaintiffs,

v.

ANDREW M. CUOMO, as Governor of the State of New York, ROBERT J. DUFFY, as President of the Senate of the State of New York, DEAN G. SKELOS, as the Majority Leader and President Pro Tempore of the Senate of the State of New York, SHELDON SILVER, as Speaker of the Assembly of the State of New York, the NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

No. 11 Civ. 5632 (DLI) (RR) (GEL)

COMPLAINT

----------X

Plaintiffs-Intervenors Todd Breitbart, Tobias Sheppard Bloch, Gregory Lobo-Jost, Raul Rothblatt, Mark Weisman, and David Wes Williams, by and through their counsel Cuti Hecker Wang LLP, for their Complaint allege as follows:

INTRODUCTION

1. Plaintiffs-Intervenors are six registered voters who reside in districts in and around New York City that are severely over-populated under the Senate plan adopted as part of Chapter 16 of the Laws of 2012 ("Chapter 16"). Plaintiffs-Intervenors seek to intervene on behalf of themselves and similarly situated voters in New York State whose constitutional rights are violated by the extreme population deviations in the Chapter 16 Senate Plan, which contravene the Fourteenth Amendment's equal population requirement.

2. Plaintiffs-Intervenors seek a declaratory judgment that the Senate Plan is unconstitutional, an order requiring that district lines be redrawn in accordance with the equal population requirement, and the assistance of Magistrate Judge Roanne L. Mann and Professor Nathaniel Persily in drawing district lines in conformity with the State and Federal Constitutions for this Court to review and adopt if acceptable.

JURISDICTION & VENUE

3. This action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1367, and 2201, and 42 U.S.C. § 1983.

5. Venue is properly lodged in this district pursuant to 28 U.S.C. § 1391.

PARTIES

6. Plaintiff Todd Breitbart is a citizen and resident of New York County, residing at 205 West End Avenue, New York, New York, which in the 2002 redistricting was part of Senate District 29, and under the newly enacted plan is part of Senate District 27. He is a registered voter. From 1980 through his retirement in 2005, Mr. Breitbart directed the staff work on redistricting for successive Minority (Democratic) Leaders of the New York State Senate. He has extensive experience drafting redistricting proposals, and evaluating the proposals of others, according to the provisions of Article III, Section 4 of the New York State Constitution and supervening federal requirements, including Fourteenth Amendment population equality standards and the Voting Rights Act of 1965. Mr. Breitbart submitted an affidavit as an expert witness for the Plaintiffs in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004), and as such he was deposed by counsel for the Defendants and noticed for cross-examination (although

the Defendants later chose to forgo the cross-examination). In 2007, he was the principal consultant to the Committee on Election Law of the Bar Association of the City of New York in the development of the Association's report on reform of the New York State redistricting process, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line-Drawing* (March 2007), and he was the principal drafter of the text of the report. Participating in the 2011-12 redistricting process, no longer as a legislative staff member, but independently as a concerned citizen, Mr. Breitbart testified four times before the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") and submitted voluminous written testimony on several aspects of the process. Mr. Breitbart submitted for LATFOR's consideration a thoroughly developed and extensively documented proposal for a 62-seat Senate. Mr. Breitbart also is a Petitioner in *Cohen v. Cuomo*, Sup. Ct. N.Y. Cnty. Index No. 102185/2012, the state court special proceeding pursuant to Unconsolidated Laws § 4221, seeking to enjoin the enforcement of Chapter 16, which law, among other things, increased the size of the State Senate to 63 seats from 62.

7. Plaintiff Tobias Sheppard Bloch is a citizen and resident of Queens County, residing at 89-03 Rutledge Avenue in Glendale, which in 2002 was in Senate District 15, and under the Chapter 16 Senate Plan would remain in Senate District 15.

8. Plaintiff Gregory Lobo-Jost is a citizen and resident of Bronx County, residing at 3150 Rochambeau Avenue, which in 2002 was in Senate Distrct 33, and under the Chapter 16 Senate Plan would be in Senate District 36.

9. Plaintiff Raul Rothblatt is a citizen and resident of Kings County, residing at 119 Prospect Place, which in 2002 was in Senate District 18, and under the Chapter 16 Senate Plan would be in Senate District 20.

10. Plaintiff Mark Weisman is a citizen and resident of Nassau County, residing at 33 Everett Street in Lynbrook, which in 2002 was in Senate District 9, and under the Chapter 16 Senate Plan would remain in Senate District 9.

11. Plaintiff David Wes Williams is a citizen and resident of Bronx County, residing at 1507 Metropolitan Avenue, which in 2002 was in Senate District 32, and under the Chapter 16 Senate Plan would remain in Senate District 32.

12. Defendant Governor Andrew M. Cuomo is the Governor of the State of New York and its chief executive officer. He is a participant with the New York State Legislature in the reapportionment of state legislative districts and the redrawing of district lines after the decennial census, as required by the United States and New York State Constitutions, and the laws of the State of New York. He is sued in his official capacity.

13. Defendant Lieutenant Governor Robert J. Duffy is the State's Lieutenant Governor and the President of the New York State Senate. As such, together with the Governor and the Legislature, he is responsible for reapportioning and redrawing state and congressional legislative districts every 10 years as required by the United States and New York Constitutions and the laws of the State of New York. Lieutenant Governor Duffy is sued in his official capacity.

14. Defendant Senate Majority Leader Dean G. Skelos is the President Pro Tempore of the State Senate and the Leader of the Senate Majority (Republicans). He is a Senator representing what from 2002 to 2012 was the 9th District, which is comprised of several Long

Island communities, including Rockville Centre (where he resides), Long Beach, and Valley Stream. He is sued in his official capacity.

15. Defendant Assembly Speaker Sheldon Silver is the Speaker of the New York State Assembly. He is a member of the Assembly representing what from 2002 to 2012 was Assembly District 64, which is comprised of several neighborhoods in lower Manhattan, including the Lower East Side (where he resides), Governors Island, and parts of the Brooklyn waterfront. He is sued in his official capacity.

16. Defendant New York State Board of Elections is the State agency responsible for administering and enforcing all laws relating to elections in New York State. Its primary business office is located at 40 Steuben Street, Albany, New York.

FACTUAL ALLEGATIONS

17. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that the boundaries of state legislative districts be redrawn following each decennial Census to ensure that the districts remain equipopulous.

18. Article III, Section 4 ("Section 4") of the New York State Constitution also mandates that state Senate districts be equal in population, and that the lines for these districts be redrawn after each federal census to ensure compliance with this equipopulousness requirement.

19. Although Section 4 speaks of districts of an "equal number of inhabitants, excluding aliens," in November 1969, the people of New York adopted a new constitutional provision, codified at Article III, Section 5-a ("Section 5-a") of the State Constitution, that defines "equal number of inhabitants, excluding aliens," to "mean the whole number of persons."

20. The line of Supreme Court cases beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), requires that a state redistricting authority (in New York, the Legislature) make an

"honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. Under *Reynolds*, states engaged in redistricting have a modicum of discretion to deviate modestly from population equality in the service of the state's traditional redistricting principles, but the legislature must do so honestly and in good faith, and the "overriding objective must be substantial equality of population among the various districts." *Id.* at 579.

21. In New York, Section 4 identifies the following legitimate constitutional redistricting principles: districts must "be in as compact form as practicable, . . . shall at all times consist of contiguous territory," and shall not "divide[] [any county] . . . in the formation of a senate district except to make two or more senate districts wholly in such county." Section 4 also imposes so-called "block-on-border" rules which require that "[n]o 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."

22. Prior to the Supreme Court's decision in *Reynolds*, these constitutional redistricting rules were inviolable. However, under *Reynolds* and its progeny, the Legislature must consider these constitutional principles in redistricting the state Senate, but such consideration must always be concomitant with an honest and good faith effort to adhere to the equal population principle to the maximum extent possible.

23. Courts also have alluded to the legitimacy of certain extra-constitutional redistricting principles, including retaining the cores of prior districts and protecting incumbents. These are tertiary considerations, subordinate to both the federal equipopulousness requirement

and the mandatory redistricting principles enshrined in the State Constitution, and a legislature is not required to take them into account. A legislature is not entitled to elevate these extra-constitutional concerns above the equal population principle or the constitutionally recognized redistricting principles. Moreover, the goal of maintaining the cores of prior districts is directly in tension with the core holding of *Reynolds* that districts are to be apportioned principally on the basis of population equality.

24. The Supreme Court, however, has been mindful of the difficulties legislatures face in harmonizing redistricting principles enunciated in state laws with the equipopulousness requirement. The Court therefore permits *de minimis* population variations. Precedent indicates that when a redistricting plan's overall deviation is below 10%, the plan is prima facie constitutional, and the burden falls on a plaintiff challenging the plan to put forward evidence raising some question as to whether the redistricting body has complied with the mandates of the Fourteenth Amendment. To be sure, though, this 10% demarcation is not a safe harbor. It is simply an indicator of which party – the state or the party challenging the redistricting – bears the initial burden. And the case law is clear that the 10% presumptive allowance does not excuse a redistricting authority from fulfilling the requirement, under *Reynolds* and its progeny, that it work honestly and in good faith to draw a plan that minimizes population inequality.

25. Put another way, a legislature has a modicum of discretion to depart from perfect population equality to pursue traditional state redistricting norms, but it has no discretion to depart from population equality to pursue partisan goals and certainly no discretion to purposely deviate from equipopulousness to secure the position and maximize the strength of the majority party in either house of the legislature.

A. The 2012 Senate Redistricting

26. On or about March 14, 2012, the Legislature approved, and on March 15, 2011, the Governor signed Chapter 16. On April 27, 2012, the Department of Justice precleared the law pursuant to Section 5 of the Voting Rights Act. (New York State has three covered counties – New York, Kings, and the Bronx – and its redistricting plans therefore are subject to DOJ review.)

27. The plan for the State Senate contained within Chapter 16 (the "Chapter 16 Senate Plan") increased the size of that body to 63 districts from 62, and drew the new district lines. The legality under Article III, Section 4, of the State Constitution of the increase in the size of the Senate is at issue in *Cohen v. Cuomo*; the appeal of that case was argued in the New York Court of Appeals on April 26, 2012, and the parties are now awaiting that Court's decision.

28. 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 total deviation between the smallest and largest districts is 27,034 people, or 8.80%. The mean deviation is 3.67% and the standard deviation is 3.85%. The 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.

29. The Chapter 16 Senate Plan contains far larger total, mean, and standard population deviations than are necessary to give due weight to the constitutionally recognized redistricting principles of county integrity, contiguity, and compactness. These large deviations were not in service of a good faith attempt to serve legitimate, constitutionally recognized redistricting principles. To the contrary, the Senate Majority rejected several alternative plans that had both lower deviations and that were more loyal to the constitutional redistricting

principles. Plaintiffs will prove that a plan can be drawn that is far superior to the Chapter 16 Senate Plan at honoring both the Fourteenth Amendment's equal population principle and the traditional state redistricting principles identified in Section 4, while also providing for more fair representation of minority groups.

B. The Chapter 16 Senate Plan's Deviations are Too Big and are Impermissibly Lopsided

30. In the Chapter 16 Senate Plan, the 26 districts wholly or partly within New York City – including two Bronx/Westchester districts, Senate Districts 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 26.93 districts of the mean population of 307,356. All of these New York City districts have populations 3.83% (Queens) or 3.47% (the rest of New York City) above the mean. The two districts adjoining New York City but wholly within Westchester County, Districts 35 and 37, have populations virtually at the mean (positive deviations of 107 persons, +0.03%, in each).

31. Comparing the New York City districts with the entire group of 28 districts to the north of New York City (Senate Districts 35 and 37-63), the Chapter 16 Senate Plan's 28 districts north of New York City have an 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.[1] These 28 districts are underpopulated an average of -4.13% below the statewide mean, with 22 of the districts having populations more than 4.6% below the statewide mean.

[1] Even leaving out the two districts adjoining New York City but wholly within Westchester County (Senate 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.

32. The Chapter 16 Senate Plan thus groups all of the maximally underpopulated districts north and west of New York City, and puts all of the most overpopulated districts in New York City. The cumulative effect of gathering the population extremes by region is that New York City alone receives almost one entire district (0.93) less than its percentage of the total state population warrants.

33. The Chapter 16 Senate Plan is more grossly malapportioned than was the 2002 Senate Plan, which was the subject of the litigation in *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004). Although the overall deviation in the 2002 Senate Plan was higher – 9.78% versus 8.80% – the standard and mean deviations were significantly lower in 2002 than they are this year: 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). These differences are significant. Mean deviation and standard deviation are both methods 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 deviation 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. (The plain numbers bear this out: In 2002, 19 districts were more than 3% above or below the mean; in

2012, that number has more than doubled, to 50 districts that are more than 3% above or below the mean.)

34. Moreover, as described in greater detail in the Breitbart Declaration, which is attached as Exhibit A to this Complaint ("Breitbart Decl."), the court in *Rodriguez* instructed that in making a regional comparison based on New York City districts, planners and advocates should focus on the New York City Districts alone, excluding the northern suburbs. *Rodriguez* found that in 2002 New York City had been "accorded" 26 districts, while in strict proportion to population the city would have been "entitled" to 26.2 districts. In the Chapter 16 Senate Plan, the 26 New York City districts (including the two Bronx/Westchester districts that have respectively 80.5 and 94.4% of their population in New York City) have the aggregate population for 26.93 districts of the ideal population – a disparity of more than nine-tenths of a district. That is, New York City is receiving nearly an entire district less in 2012 than it should based on its proportional share of the State's population.

35. The lopsided nature of the Chapter 16 Senate Plan is even more apparent when Long Island is considered together with New York City, as the *Rodriguez* court found appropriate. 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 (SD's 1-34 and 36) – comprising nine Long Island districts (SD's 1-9), 24 districts wholly within New York City (SD's 10-33), and the two Bronx/Westchester districts mostly within Bronx County (SD's 34 and 36) – have an aggregate population of 11,112,663, enough for 36.16 districts of the mean population (307,356). The region to the north is correspondingly overrepresented.

36. In comparison, in 2002, the 35 contiguous districts comprising the nine Long Island districts (SD's 1-9), 24 districts wholly within New York City (SD's 10-33), and two

Bronx/Westchester districts mostly within Bronx County (SD's 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).

37. 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 35-36 – 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.)

38. 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 New York City districts could have been divided among 26 districts of

320,504 persons each, a deviation of +2.62% from the 62-district mean. The aggregate 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 mean. As is thus apparent, the reduction in overall district deviations from the 2002 should not be used to mask the increase in an already discriminatory regional apportionment of districts.

C. The Chapter 16 Senate Plan Does Not Keep Counties Intact

39. Section 4 states that a redistricting plan shall not "divide[] [any county] . . . in the formation of a senate district except to make two or more senate districts wholly in such county." The Chapter 16 Senate Plan runs roughshod over this county integrity principle. And while this inviolable requirement must yield somewhat to population equality, it remains an important redistricting principle which the Senate Majority was required to consider in drawing the Chapter 16 Senate Plan. Plainly, it did not.

40. For example, 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 unrestrained division of the surrounding counties, neither Albany nor Rockland is divided so that another nearby county can be kept intact. The Chapter 16 Senate Plan also unnecessarily divides Onondaga and Orange Counties, which each have the population for one whole district and a fraction. The Chapter 16 Senate Plan does not create one whole district in either. The Chapter 16 Plan creates only three whole districts in Nassau County, while four were possible, and creates only two districts wholly in Bronx County, while three could have been drawn.

41. The Chapter 16 Senate Plan also divides 16 so-called "minor" counties – i.e., those counties that, with respect to redistricting, do not have the population for even one wholly

contained district. Any given "minor county" might be kept intact within a single district, but some "minor counties" almost certainly have to be divided in a plan that complies with the Fourteenth Amendment's population equality requirements. Due respect for the New York Constitution county integrity rule requires, however, that the number of "minor counties" divided be minimized. The Chapter 16 Senate Plan does not satisfy this requirement, dividing 16 "minor" counties. The degree to which the Chapter 16 Senate Plan divides individual "minor" counties is also striking. Four "minor" counties are divided among three districts: Cayuga (SD's 50, 51, and 54), Delaware (SD's 42, 51, and 52), St. Lawrence (SD's 45, 47, and 48), and Tompkins (SD's 51, 54, and 58). And the Chapter 16 Senate Plan divides Ulster County among four districts (SD's 39, 42, 46, and 51).

42. The Chapter 16 Senate Plan unnecessarily creates seven pairs of bi-county districts, *i.e.*, pairs of districts in which both districts contain parts of the same two counties. It is never necessary to create a pair of bi-county districts merely to comply with the Fourteenth Amendment population equality standard, because that requirement can always be satisfied by creating a single district with the correct population share from each county. Plaintiff Todd Breitbart's 63-district alternative plan, for example, creates a single pair of bi-county districts in the Bronx/New York Counties, but does so for the express purpose of preserving appropriate representation for Latino communities, and does so only with respect to county lines that have virtually no meaning as a practical matter, as both counties are part of New York City. *See* Breitbart Decl. ¶ 45.

D. The Chapter 16 Senate Plan's Districts Are Not Compact

43. The Chapter 16 Senate Plan's districts also are not compact, contrary to Article III, Section 4's principle that Senate districts "shall be in as compact form as practicable." In

fact, the Chapter 16 Senate Plan's districts are less compact that Plaintiff Todd Breitbart's 63-district alternative plan by every single measure of compactness that is available as a standard menu item in the Maptitude for Redistricting software package. *See* Breitbart Decl. ¶¶ 38-40.

44. Maptitude offers eight measures of compactness. 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 values for the Chapter 16 Senate Plan are listed first; the value for Mr. Breitbart's 63-District Alternative follows.

- Roeck (0.35; 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. In short, the only redistricting principles to which the Chapter 16 Senate Plan adheres with any consistency are the two extra-constitutional principles sometimes accepted by courts but nowhere mentioned in the State Constitution: preserving the cores of former districts and protecting incumbents (the Chapter 16 Senate Plan pairs only one set of incumbents – both Democrats). But, while the Equal Protection Clause does not prohibit consideration of these

factors, a Legislature is not required to take them into account, and they are not enshrined in the New York Constitution. And it is possible to achieve nearly the same respect for these purported extra-constitutional principles while still maintaining fealty to the constitutionally required redistricting factors. *See* Breitbart Decl. ¶ 56. But the Chapter 16 Senate Plan all but abandons consideration of the mandated constitutional principles because these principles limit the Senate Majority's ability to malapportion the Senate districts to meet its partisan purpose.

E. The Alternative Plans Presented to LATFOR and to this Court Are Superior in Every Relevant Respect

47. The significant deviations that mark the Chapter 16 Senate Plan could not have been the product of an honest and good faith effort to draw districts of equal population. Instead, they could only have resulted from the Senate Majority's decision to subordinate population equality to its desire to maximize its partisan agenda and retain its control. A redistricting body cannot depart from population equality for the purpose of furthering its political prerogatives, even when the plan's overall deviation is under 10%. Indeed, it is for this very reason that many courts, including the 3-judge S.D.N.Y. court in *Rodriguez v. Pataki*, and the 3-judge Northern District of Georgia court in *Larios v. Cox* – both in 2002 – have held that the 10% deviation is not a safe harbor.

48. The Senate Majority's failure to make an honest and good faith effort to comply with the population equality requirements of the Fourteenth Amendment is apparent when one compares the Chapter 16 Senate Plan to alternative plans. The Breitbart Declaration does this in great detail, and reveals the myriad failures of the Chapter 16 Senate Plan, and its plain purpose to elevate partisanship over equipopulousness and other constitutionally enshrined redistricting principles.

49. To be sure, there are potential trade-offs among the legitimate redistricting criteria of population equality, preservation of local government units such as counties, compactness, and contiguity, but plaintiff Breitbart's alternative plan is superior to the Chapter 16 Senate Plan with respect to every one of these criteria. And if the Breitbart alternative plan had the same overall 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.

50. In short, looking at all of the redistricting criteria together makes unavoidably apparent that the Chapter 16 Senate Plan's high overall, mean, and standard deviations are not justified by the elevation of and adherence to any other traditional restricting criteria. Such a plan plainly could not have been the product of an honest and good faith effort to achieve population equality.

CAUSE OF ACTION

(42 U.S.C. § 1983 – Equal Protection Clause)

51. Plaintiffs repeat and reallege the allegations in paragraphs 1-51 as if set forth fully herein.

52. The Equal Protection Clause requires that state legislative districts be of equal population, and imposes on state redistricting bodies – including legislatures – a duty to make an honest and good faith effort to draw equipopulous districts after each decennial Census.

53. A legislature may consider other state-law mandated redistricting principles, including, pursuant to the New York Constitution, compactness and contiguousness of districts, and the integrity of counties, but these factors must be balanced with the demands of the Equal Protection Clause and its requirement of equal population districts.

54. Moreover, a legislature may not depart from the population equality mandate to pursue the majority's political agenda, even when the legislature's redistricting plan has an overall deviation of less than 10%.

55. In crafting the Chapter 16 Senate Plan, the Senate Majority exalted its partisan agenda over the requirements of the one-person, one-vote rule. Rather than making an honest and good faith effort to adhere as closely as possible to the Fourteenth Amendment's equal population principle, the Senate Majority maximized the population deviations – while staying below the 10% threshold under which a plaintiff bears the burden of proffering prima facie evidence of the plan's unconstitutionality – because doing so (and increasing the size of the body by one district) was the only way the Majority could draw lines specifically intended to perpetuate the Republican majority in the Senate. As is plain by comparing the various characteristics of the Chapter 16 Senate Plan to an alternative that attempted to minimize deviation while honoring the other criteria identified in the New York Constitution and providing more fair representation for minority groups, the large deviations in the Chapter 16 Senate Plan could not have been the result of a careful balance between equipopulousness and other traditional redistricting criteria.

56. The Chapter 16 Senate Plan creates more districts that are further from the mean than did the 2002 Senate Plan, and creates a more harshly skewed regional effect than did the 2002 Senate Plan.

57. Under the Chapter 16 Senate Plan, all of the districts in the overwhelmingly non-Hispanic white, upstate regions of the State are underpopulated as compared to the ideal district. All of the districts in New York City – where the State's residents of color are concentrated – are

overpopulated as compared to the ideal district by more than 3.4% (and, in the case of Queens County, by a full 3.83%).

58. As a result of the Chapter 16 Senate Plan's overpopulating of minority-concentrated New York City-area districts, most of the black, Hispanic and Asian-American residents of New York State, along with their non-Hispanic white neighbors in New York City, are deprived of their due proportion of representation, while residents of the upstate region are overrepresented.

59. There is no legitimate justification for the Chapter 16 Senate Plan's discrimination against residents of the New York City area.

60. The Senate Majority did not make an honest and good faith effort to draw the Senate districts to comport with the demands of the equal population principle. To the contrary, the Senate Majority sought to maximize the population deviations in the Plan – while staying below 10% overall deviation – to enable it to secure its position and maximize its strength as the majority in that house.

61. The Chapter 16 Senate Plan violates the Fourteenth Amendment population equality requirement.

62. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

a. An order and judgment declaring that the Senate districts enacted as part of Chapter 16 of the Laws of 2012 violate the Fourteenth Amendment to the United States Constitution and its requirement that legislative districts be of equal population;

b. An order and judgment enjoining implementation of the Senate districts contained in Chapter 16 of the Laws of 2012;

c. An order and judgment directing Magistrate Judge Mann and court expert Nathaniel Persily, Ph.D, to redraw Senate district lines in conformity with the requirements of the Federal and State Constitutions, and with the New York Court of Appeals' forthcoming decision in *Cohen v. Cuomo*;

d. An order and judgment adopting the Magistrate Judge's district lines after the lines are subjected to public comment and if they are to the Court's satisfaction;

e. An order awarding Plaintiffs the costs of this action together with their reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and

f. Any further relief that the Court in its discretion deems necessary and proper to ensure the timely and lawful elections for the New York State Senate.

Dated: New York, New York
May 1, 2012

By: /s/ Eric Hecker
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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DECLARATION OF TODD BREITBART

TODD BREITBART declares the following to be true under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I directed the staff work on redistricting for successive Minority (Democratic) Leaders of the New York State Senate from 1980 through my retirement at the end of 2005. I had extensive experience drafting redistricting proposals, and evaluating the proposals of others, according to the provisions of Article III, Section 4 of the New York State Constitution and supervening federal requirements, including 14th Amendment population equality standards and the Voting Rights Act of 1965. I submitted an affidavit as an expert witness for the Plaintiffs in *Rodriguez v. Pataki* (2004), and as such I was deposed by counsel for the Defendants and noticed for cross-examination (although the Defendants later chose to forgo the cross-examination). In 2007, I was the principal consultant to the Committee on Election Law of the Bar Association of the City of New York in the development of the Association's report on reform of the New York State redistricting process, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line-Drawing*, and I was the principal drafter of the text of the report. Participating in the 2011-12 redistricting process, no longer as a legislative staff member, but independently as a concerned citizen, I

testified four times before LATFOR and submitted voluminous written testimony on several aspects of the process, including the determination of the number of Senate districts. I submitted for LATFOR's consideration a thoroughly developed and extensively documented proposal for a 62-seat Senate. I also am a Petitioner in *Cohen v. Cuomo*, the state court special proceeding pursuant to Unconsolidated Laws § 4221, seeking to enjoin the enforcement of Chapter 16 of the Laws of 2012 ("Chapter 16"), which law, among other things, increased the size of the State Senate to 63 seats from 62.

2. On February 15, 2012, I submitted a 62-district *Senate Alternative Revision* plan to LATFOR. The *Senate Alternative Revision* is publicly available on LATFOR's website. *See* http://latfor.state.ny.us/justice2012/?sec=sendoj2012, plan_submission_19, under the heading, "Joint Exhibit 22 – Alternative Plan Proposals." I also submitted to LATFOR a narrative comparing the *Senate Alternative Revision* to LATFOR's January 26, 2012 proposal, which Chapter 16 largely adopted. 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, my narrative comparison is still valid in all relevant respects. *See id.*, plan_submission_19, doc. 5: "The Senate Alternative Revision – 12 February 2012 – and Senate Majority Proposal Compared." The documentation for the *Senate Alternative Revision* includes:

- A block equivalency file (plan_submission_16).
- A narrative statement, with demographic tables, 'The Senate Alternative Revision – 12 February 2012 – and Senate Majority Proposal Compared.' (part of plan_submission_19).
- A set of maps illustrating the proposed districts (part of plan_submission_19).
- Thematic maps illustrating the relation of the proposed districts to a statistical analysis of 'communities defined by actual shared interests' (part of plan_submission_19).

- Thematic maps illustrating the five-decade-long pattern of systematic fracturing of Long Island black and Hispanic communities by Senate district boundaries, from which the Senate Alternative Revision proposes to depart (part of plan_submission_19).

- A pair of thematic maps comparing the population deviations in the Senate Alternative Revision and the Senate Majority proposal released on January 26, 2012.

Although the Chapter 16 Senate Plan differs somewhat from the Senate Majority Proposal released on January 26, those differences do not materially affect the comparison documented in the submission of the Senate Alternative Revision to LATFOR.

3. My 62-seat proposed plan was one subject of the Reply Affidavit, dated April 4, 2012, that I submitted in support of the Petitioners' reply in support of the petition in *Cohen v. Cuomo*. As demonstrated in that Affidavit, which I understand has been submitted to this Court, *see* Docket Entry No. 289-2, my 62-district *Alternative Revision* was superior to the redistricting plan adopted by the Legislature and signed by the Governor in every relevant respect: The *Senate Alternative Revision* has a lower overall and lower mean and standard deviations, better geographic distribution of under- and over-populated districts, better adheres to the traditional redistricting principles identified in Article III, Section 4 of the New York State Constitution, and provides more fair representation for members of minority groups.

4. I proposed the *Senate Alternative Revision* to LATFOR as a 62-district plan because I believed that to be the constitutionally correct number of districts, for reasons I explained in detail in 'The Senate Alternative Revision – 12 February 2012 – and Senate Majority Proposal Compared.'

5. I have now prepared the 63-District Senate Alternative Plan (the "*63-District Alternative*"), demonstrating that the unfavorable comparison between the 2012 Senate Plan and the *Senate Alternative Revision* did not result merely from comparing plans containing different

numbers of districts, and that the faults of the 2012 Senate Plan are no less evident when it is compared with a 63-district plan founded on valid principles.

6. 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.

7. Attached hereto as Exhibits 1-3 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 1*: Comprehensive demographic tables for the 2002 Senate Plan (according to the 2010 census), the Chapter 16 Senate Plan, and all submitted plans, plus my new 63-district plan;
- *Exhibit 2*: Maps illustrating the districts in my new 63-district plan;
- *Exhibit 3*: Thematic maps showing the district population deviations for the 2012 Plan and both of my plans.

In addition, attached hereto as Exhibit 4 is a DVD containing the block equivalency files for the *63-District Alternative*, which are not PDF files and I understand therefore cannot be uploaded to the Court's e-filing system. I understand that counsel for Senators Sampson and Dilan (who are also my counsel in the *Cohen* proceeding) will serve the files contained on the DVD on all counsel by email.

8. When I undertook to revise my proposal as a 63-district plan, in response to the Court's April 20 request for submissions of evidence, I had only to replace the 24 upstate districts with 25 districts of suitable population, giving due attention to the New York Constitution's county-integrity rule. This was the work of about twelve hours, accomplished in a single night. Had the designers of the 2012 Senate Plan wished to make "an honest an good faith effort" to keep population deviations low, to apportion districts fairly in proportion to population,

and to provide fair representation to minority groups in the context of a 63-district Senate plan, they could have accomplished the same work with as much ease and in as little time.

9. As I did when I created the *Senate Alternative Revision*, I have created the *63-District Alternative* independently. I have not consulted with the Senate Minority's elected officials, staff, or counsel, as to how they would like the districts drawn, nor have I tailored the plan to anyone's wishes. As I testified when I submitted my original 62-district proposal to LATFOR on February 9, 2012, the Senate Minority representative on LATFOR and his staff were seeing the proposal for the first time that day, at the same time as the other members and staff of LATFOR. The same was true of the slightly revised version I submitted on February 15. And as explained below, the Long Island, New York City, Westchester, Rockland, and Albany County portions of my 63-district plan – 40 out of the 63 districts – are identical to the proposal I submitted on February 15. I have drawn a plan 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.

10. 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 my alternative plan better adheres *both* to the equipopulousness requirement *and* to the most of the traditional redistricting principles, including all the principles that are constitutional requirements, than does the Chapter 16 Senate Plan. Comparing my 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.

11. The following discussion proceeds in several sections. First, I lay out the basic contours of each of the relevant plans: the Chapter 16 Senate Plan and my two proposed alternatives. Then, I compare their regional effect. Next, I compare 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. I then examine the adherence of the Chapter 16 Senate Plan to the traditional redistricting rules codified in the New York State Constitution, and compare it to the adherence to such principles in the *63-District Alternative* (and, to a certain extent, in the *Senate Alternative Revision*). I next turn to extra-constitutional principles that may be considered in any redistricting, and examine their expression in the Chapter 16 Senate Plan and the *63-District Alternative* and *Senate Alternative Revision*. Then, I review the relevance of the size of the Senate. Finally, I detail 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*

12. 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.

13. The deviation statistics for my *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.

14. The deviation statistics for my 62-district *Senate Alternative Revision* are:

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

15. 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.

16. 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 has been rejected, *id.* at 1352. Conversely, low mean deviations may overcome an Equal Protection complaint against a plan with a relatively high total deviation. *Cf., 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

17. The *63-District Alternative*, like the *Senate Alternative Revision* that I 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 +3.47%, produces a regional malapportionment.

18. 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.

19. In the Chapter 16 Senate Plan, the 26 districts wholly or partly within New York City – including two Bronx/Westchester districts, Districts 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 26.93 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.

20. 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).

21. 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.[1] These 28 districts are underpopulated an average of –4.13% below the statewide mean, with 22 of the districts having populations *more than 4.6%* below the statewide mean.

22. 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 thereby deprives New York City of almost an entire district (0.93), and gives the upstate region one district (actually one an one-seventh) more than its proportional share of the total state population warrants.

23. 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

[1] Even leaving out the two districts adjoining New York City but wholly within Westchester County (SD's 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.

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*.

24. I experimented with making the New York City and lower Westchester districts (*i.e.*, those adjoining Bronx County) somewhat smaller, but soon discovered that 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%).

25. In my 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 my 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 I adapted my previous proposal as a 63-district plan, I found it 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. 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

26. The Chapter 16 Senate Plan is not only inferior in every relevant respect to my 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.

27. 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.

28. 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 ¶¶ 15-17, 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%.

29. 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, but 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.

30. 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.

31. 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.

32. 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 (SD's 1-34 and 36) – comprising

nine Long Island districts (SD's 1-9), 24 districts wholly within New York City (SD's 10-33), and the two Bronx/Westchester districts mostly within Bronx County (SD's 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.

33. Even if the two districts wholly within Westchester but adjoining Bronx County (SD's 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.

34. In comparison, in 2002, the 35 contiguous districts comprising the nine Long Island districts (SD's 1-9), 24 districts wholly within New York City (SD's 10-33), and two Bronx/Westchester districts mostly within Bronx County (SD's 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).

35. 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.)

36. 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, according to LATFOR's adjusted 2010 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

37. 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.

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

39. The *63-District Alternative*, like the *Senate Alternative Revision* that I 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 and 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.

40. 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 my *63-District Alternative* follows.

- Roeck (0.35; 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)

41. 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* that I 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.

42. *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 my *63-District Alternative* creates three. Indeed, *there is no county* for which the Chapter 16 Senate Plan creates more wholly contained districts than my 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.

43. *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 "minor 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 I submitted to LATFOR likewise divided only seven minor counties, but the list was different: Broome, Dutchess, Niagara, Ontario, Oswego, Saratoga, and Steuben.)

44. 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 (SD's 50, 51, and 54), Delaware (SD's 42, 51, and 52), St. Lawrence (SD's 45, 47, and 48), and Tompkins (SD's 51, 54, and 58). And the Chapter 16 Senate Plan divides Ulster County among *four* districts (SD's 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.

45. *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 SD's 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. The Majority Leader has several times complained that the affidavits I submitted in *Cohen v. Cuomo* fail to acknowledge that the boundaries of Queen County are preserved inviolate, with exactly seven wholly contained districts. But a rule that is extensively and unnecessarily ignored throughout the Chapter 16 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 evidently was not one of them.

46. *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* that I submitted to LATFOR, 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.

47. 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 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

48. 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.

49. *Pairing of Incumbents.* The Chapter 16 Senate Plan has one incumbent pairing. The 62-district *Senate Alternative Revision* that I 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.

50. 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.

51. 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.

52. 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 I have proposed.

53. As is therefore strikingly apparent, 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.

54. *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.

55. 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.

56. The *63-District Alternative* (like the *Senate Alternative Revision* that I submitted to LATFOR before the 2012 Senate Plan was enacted) 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.

57. 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.

58. *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.

59. 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.

60. 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.

61. 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%.

62. 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.

63. 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*, like my 62-district alternative plan, the *Senate Alternative Revision*, 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

64. 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.

65. *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.

66. 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%.

67. *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).

68. 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.

69. 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

70. I designed the first alternative plan I submitted in this redistricting cycle, the *Senate Alternative Revision*, as a 62-district plan for the reasons explained in detail in the

documentation I submitted with that proposal to LATFOR. 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, my 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*.

71. As I indicated above, *supra* ¶ 8, the work of transforming my 62-district alternative into a 63-district alternative was completed in about twelve hours. Certainly, had the drafters of the Chapter 16 Senate Plan wished to make "an honest an good faith effort" to keep population deviations low, to apportion districts fairly in proportion to population, and to provide fair representation to minority groups in the context of a 63-district Senate plan, they could have done so with as much ease and in as little time as I did.

72. 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.

73. Similarly, the districts proposed for New York City in the revised Unity Plan

could have been fitted in to 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 it into a 63-district Senate plan.

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

74. 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).

75. In addition to the *Senate Alternative Revision*, which I submitted (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 some involved in this litigation: 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).

76. 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.

77. *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*.

78. As between CVAP and voting age population (or "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.

79. These considerations have nothing to do with the question of whether total population or citizen population is the proper basis for apportionment of districts.[2] There is not

[2] I concur with the position adopted by counsel for the Plaintiff-Intervenors and counsel for the Senate Minority (who are also my counsel in *Cohen v. Cuomo*), that the proper measure of a redistricting plan's compliance with the 14th Amendment population equality principle has

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.

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

81. *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. In making the comparison

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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.

between these alternative plans and the Chapter 16 Senate Plan, I have used a CVAP database prepared by Dr. Andrew Beveridge, Professor of Sociology at Queens College and the CUNY Graduate Center, and Chair of the Queens College Sociology Department. 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 averages. A block group is a subdivision of a census tract, containing two or more contiguous census blocks. Dr. Beveridge 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. Moreover, the statistical estimation error that is intrinsic to the ACS estimates becomes very small when those data are aggregated to the level of a Senate district of approximately 300,000 persons.

82. As measured by CVAP, the Chapter 16 Senate Plan contains only two districts with a Hispanic majority (SD's 32 and 33), and four with a Hispanic plurality (SD's 13, 18, 29, and 31), all wholly within New York City. Measured by VAP, five of these six districts (SD's 13, 18, 31, 32, and 33) have a Hispanic majority, and one (SD 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 District 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.

83. 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).

84. 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).

85. 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.

86. *Comparing the Plans' Black-Majority Districts.* The Chapter 16 Senate Plan not only shortchanges Hispanic voters, but also fails to create 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. The *63-District Alternative* and the *Senate Alternative Revision* both also 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 of my proposals 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 of my proposals 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.

87. 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.

Conclusion

88. 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 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.

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

Dated: April 26, 2012
New York, New York

TODD BREITBART