UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, et al.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:11-cv-05632-DLI-RR-GEL
	)	
	)	**Date of Service**: May 4, 2012
ANDREW M. CUOMO, et al.	)	
	)	
	)	
Defendants.	)	
	)	

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

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The Senate Majority Defendants—New York State Senators Dean G. Skelos and Michael F. Nozzolio, and LATFOR member Welquis R. Lopez—respectfully submit this second memorandum in response to the Court's April 20 Order. As shown below, Plaintiffs' evidentiary filings of April 27, 2012, are categorically insufficient to support their equal-population theory, let alone a preliminary injunction.

PRELIMINARY STATEMENT

Ten years ago, the *Rodriguez* plaintiffs brought an equal-population challenge to the 2002 Senate Plan. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (per curiam), *summ. aff'd*, 543 U.S. 997 (2004). The plaintiffs claimed that the 2002 Senate Plan violated the Fourteenth Amendment's one-person, one-vote requirement because it failed to place a 27th Senate district in New York City. *See id.* at 366–71. The gravamen of the *Rodriguez* plaintiffs' claim was the allegation that the 2002 Senate Plan "impermissibly and arbitrarily discriminates against 'downstate' residents" in New York City "by systematically overpopulating all of those districts and systematically underpopulating all of the 'upstate' districts." *Id.* at 366. The plaintiffs asserted that such "regional discrimination" is unconstitutional, alleged that the Legislature acted with the improper purpose of bolstering the Senate Majority's political fortunes, and "suggest[ed] that racial bias may have animated the plan because all fourteen Senate majority-minority districts were overpopulated and are 'downstate,' where most of the state's minority population lives." *Id.* at 366–69.

The 2002 Senate Plan had a maximum population deviation of 9.78%, which is below the 10% minor deviation presumed constitutional. *See id.* at 362–65. The three-judge court therefore held that "the defendants have no burden to justify the plan's minor deviation." *Id.* at 365-66. Instead, the three-judge court held, the plaintiffs bore the heavy burden to establish that

the presumptively constitutional minor deviation "result[ed] *solely* from an unconstitutional or irrational state purpose" and not even *in part* "from other State policies recognized by the Supreme Court to be appropriate reasons for deviations," such as "'preserving the cores of prior districts and avoiding contests between incumbent representatives.'" *Id.* at 366 (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)).

The three-judge court granted the defendants' motion for summary judgment because the plaintiffs failed to meet their burden of negating every conceivable rational basis for the 2002 Senate Plan's minor deviation. *See id.* at 366–71. As the three-judge court pointed out, the 2002 Senate Plan actually *under*populated New York City districts and *over*populated "upstate" districts as measured by citizen voting age population (CVAP) and registered voters. *See id.* at 369. And the 2002 Senate Plan did not result "solely" from any unconstitutional or irrational state purpose because it "promote[d] the traditional principles of maintaining the core of districts and limiting incumbent pairing." *Id.* at 370. The U.S. Supreme Court summarily affirmed the three-judge court's judgment in a decision binding on this Court. *See* 543 U.S. 997; *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) ("Summary affirmances . . . prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.").

The Breitbart Proposed Intervenors,[1] Drayton Plaintiffs, Lee Plaintiffs, and Ramos Plaintiffs (collectively, "Plaintiffs") bring *exactly the same* equal-population challenge to the 2012 Senate Plan that the *Rodriguez* court rejected in 2002 and whose rejection the U.S. Supreme Court summarily affirmed. The Senate Plan has a maximum deviation of only 8.8%,

[1] The Breitbart Proposed Intervenors did not move to intervene in this case until May 1, 2012. (DE 345). Defendants object to this untimely motion for the reasons explained in their opposition.

which is *smaller* than the 9.78% in the plan upheld in *Rodriguez* and well within the 10% constitutional presumption. *See* Breitbart Prop. Compl. ¶ 28 (DE 345-3). Yet like the *Rodriguez* plaintiffs, Plaintiffs contend that the Senate Plan violates the one-person, one-vote requirement because it fails to place a 27th Senate district in New York City. *See id.* ¶¶ 32–38; Drayton Am. Compl. ¶ 105 (DE 254); Lee Am. Compl. ¶¶ 103, 110 (DE 256); Ramos Am. Compl. ¶ 42 (DE 257). Plaintiffs also adopt the gravamen of the *Rodriguez* plaintiffs' theory, asserting that the Senate Plan discriminates against New York City by overpopulating New York City districts and underpopulating "upstate" districts. *See, e.g.*, Breitbart Prop. Compl. ¶¶ 32–38; Drayton Am. Compl. ¶ 105; Lee Am. Compl. ¶¶ 103, 110; Ramos Am. Compl. ¶ 42.

Like the *Rodriguez* plaintiffs, Plaintiffs assert racial discrimination and nakedly assert that the Senate Plan has a discriminatory effect on minority voters in New York City. *See, e.g.*, Breitbart Prop. Compl. ¶ 58; Drayton Am. Compl. ¶¶ 110, 114, 116, 123; Lee Am. Compl. ¶ 114; Ramos Am. Compl. ¶¶ 49–50, 77. But this assertion is even more meritless here than in *Rodriguez* because it has been expressly rejected by the Voting Section of the Justice Department, which is required under Section 5, as amended in 2006, to ensure that the Senate Plan, including the creation of the 63rd seat, has been shown to be *free* of any racially discriminatory purpose. *See* 42 U.S.C. § 1973c(c). In contrast, in the 2002 redistricting cycle, prior to the 2006 Amendments, the Justice Department was foreclosed from making such a discriminatory purpose inquiry and did not do so prior to the *Rodriguez* opinion.[2] Finally, Plaintiffs and their allies have claimed that the Senate Plan's creation of the 63rd seat was "all

[2] In 2000, the Supreme Court held that Section 5 of the Voting Rights Act did not "prohibit[] preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000). Congress overruled this holding in 2006, when it amended Section 5 to place the burden on the party seeking preclearance to prove that the redistricting plan does not have "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added).

inextricably bound with" the issues arising under their equal-population claim, 4/20/12 Hr'g tr. at 48, yet the New York Court of Appeals has unanimously endorsed creation of the 63rd seat, thus vitiating the premise upon which Plaintiffs have built their claim of racial discrimination. *See Cohen v. Cuomo*, No. 135 (N.Y. May 3, 2012) (per curiam) (DE 351).

Rodriguez thus squarely forecloses Plaintiffs' equal-population claim. There is therefore *no* reason for this Court to proceed with a preliminary injunction at this time. Indeed, such relief is rarely granted in redistricting cases—and the *Rodriguez* court declined to proceed in that fashion on the identical claim ten years ago. Proceeding with a preliminary adjudication now would enmesh the Court in a political thicket, require undue haste in the extremely short time frame leading up to commencement of the political calendar, and force resolution of several outstanding legal and factual questions on an incomplete record.

A preliminary injunction also could visit unwarranted irreparable harm on the public and the parties in this case. If the Court decided to grant the injunction but later decided to follow *Rodriguez* and reject Plaintiffs' claim (or was instructed to do so by the Supreme Court after direct appeal), an intervening election will have been held under an unnecessary and impermissible judicially-drawn plan. There will be no way to effectively unscramble this omelet after elections have been held under the unauthorized judicially-imposed districts, to undo the irreparable harm inflicted on voters, candidates, and Defendants injured by such an warranted judicial usurpation of the redistricting and electoral process. Voters will have voted, and candidates will have run in the wrong districts, thus providing improper representation. Returning to the proper, enacted districts in 2014 will not truly restore the status quo because incumbent-constituent relationships will have been disrupted, some losing candidates may have moved on to different endeavors and, worst of all, the Senate majority may have changed hands

by virtue of the erroneous, "preliminary" alteration of what turns out to be a constitutionally valid redistricting plan. Moreover, depending upon the status of the litigation, if the majority should switch, the new majority could potentially abandon any Supreme Court appeal of the judicially-drawn plan, thus forever denying Defendants an opportunity to contest any improper preliminary relief.

In light of all this, it seems evident that the most prudent, equitable, and orderly course is to *finally* resolve Plaintiffs' claims on the merits, without disrupting the current election schedule, rather than engage in a rushed, piecemeal, "temporary" adjudication of Plaintiffs' one-person, one-vote claim. This is particularly true since the *process* of adjudicating this preliminary matter will necessarily interfere with the current election schedule, creating unnecessary voter confusion and candidate hardships, since there is no way to fairly adjudicate the threshold legislative privilege issues and the merits in the limited time still left without greatly disrupting upcoming elections, particularly given the near-certainty of emergency appeals and/or stay applications to the Supreme Court with respect to any discovery or merits decision by the Court. Nor would it be fair or consistent with due process to reverse the result in *Rodriguez* (or require depositions of legislators or their aides) without providing Defendants (at least) a fair opportunity to appeal that controversial decision.

Thus, we submit that the Court should treat the one-person, one-vote claim in the same way as the Voting Rights Act and racial Equal Protection challenges brought by Plaintiffs—adjudicating the merits in the normal course, with time for resolution of Defendants' summary judgment motions and, if necessary, any trial on disputed, material facts. The only reason to even potentially depart from this orderly, eminently fair course would be if Plaintiffs had presented some clear violation of their fundamental rights, which would necessitate immediate

judicial corrections to preclude this deprivation for even one election cycle. But just the opposite is true here. All that is at stake is one more election under a plan with population deviations legally indistinguishable from that which the Supreme Court summarily affirmed in *Rodriguez*. At an absolute minimum, this demonstrates that Plaintiffs' legal claims of deprivation are quite dubious and that an election held under this population scheme cannot possibly visit any clear injury on them. This is particularly true since Plaintiffs' efforts to somehow distinguish *Rodriguez—i.e.*, by claiming that creation of a 63rd seat violates New York Constitution and that placement of this extra seat outside of New York City reflects a racial purpose—have been summarily rejected by the entities entrusted to resolve those claims, *i.e.*, the New York Court of Appeals (unanimously) and the Obama Justice Department.

Accordingly, there is simply *no* factor which favors preliminary adjudication or counteracts the palpable unfairness and disruption necessarily entailed in such a rush to judgment. Lest there be any lingering doubt on that score, we will briefly recite why *Rodriguez* conclusively demonstrates that Plaintiffs have no likelihood of success on the merits.

First, as with the 2002 plan, "the practical effect of the Senate Plan . . . is to dilute the votes of 'upstate' residents, not those who reside 'downstate'" because the Senate Plan *under*populates New York City districts and *over*populates upstate districts as measured by CVAP, registered voters, and turnout. *Rodriguez*, 308 F. Supp. 2d at 369. And even if Plaintiffs' regional discrimination theory were cognizable—and it is not, *see id.*—it still would fail on the facts. Even on total population measures, the Assembly Plan and the Senate Plan award New York City *one whole seat more* in the Legislature than its population would justify on strict proportional representation. This regional bias is even starker when measured by CVAP because the Assembly Plan and the Senate Plan give New York City *nearly ten whole seats more*

in the Legislature than its CVAP would entitle it to—and the Senate Plan alone gives New York City just under *two whole extra districts*.

Second, Plaintiffs cannot possibly establish that the Senate Plan's presumptively constitutional minor deviations "result[ed] *solely* from an unconstitutional or irrational state purpose" because, to the contrary, the Senate Plan adhered to "other State policies recognized by the Supreme Court to be appropriate reasons for deviations." *Rodriguez*, 308 F. Supp. 2d at 366. The Senate Plan appropriately seeks to offset (although it fails to eliminate) both the dilution in upstate voting strength caused by the CVAP overpopulation and the Assembly Plan's disproportionate representation of New York City. Moreover, like its predecessor, the Senate Plan "promotes the traditional principles of maintaining the core of districts and limiting incumbent pairing," *id.* at 366, 370—and, as Plaintiffs concede, does so better than Plaintiffs' proposed alternatives.

Third, Plaintiffs' allegations of political purpose are completely irrelevant under *Rodriguez* and inconsistent with the very evidence Plaintiffs invoke. Indeed, Plaintiffs do not square their allegation that the Legislature overpopulated politically disfavored Democratic areas with the fact that the Senate Plan overpopulates all districts on Republican-leaning Long Island, or offer any persuasive evidence of an improper purpose.

Finally, Plaintiffs' allegation of a racially discriminatory purpose and effect on New York City minority voters is irreconcilable with the fact that, under CVAP, voter registration, and turnout measures, the Senate Plan overvalues the votes of New York City minority voters even more heavily than the votes of other New York City voters. And, as noted, this allegation is at war with the Attorney General's preclearance of the plan, since Defendants had to *prove* that the 63-seat plan neither had the effect of diminishing minority voters' "ability to elect"

candidates of their choice relative to the benchmark 2002 Senate Plan, 42 U.S.C. § 1973c(b), nor was enacted with "*any* discriminatory purpose," *id.* § 1973c(c) (emphasis added).

Plaintiffs' evidentiary showings thus are categorically insufficient to allow their equal-population claim to proceed, and the Court should deny the request for a preliminary injunction.

BACKGROUND

On April 20, 2012, this Court ordered all plaintiffs "to produce their submissions as to evidence they have to date to support claims as to 10% variance" in the Senate Plan by April 27, 2012. Apr. 20, 2012 Order. Three groups of plaintiffs—the Drayton Plaintiffs, the Ramos Plaintiffs, and the Lee Plaintiffs—and the Senate Minority Defendants filed responses to the Court's order. *See* Declaration of Todd Breitbart for Senate Minority Defendants ("Breitbart Decl.") (DE 327); Declaration of Andrew Beveridge for Drayton Plaintiffs ("Beveridge Decl.") (DE 331); Ramos Pls.' Memo. In Support ("Ramos Memo.") (DE 337); Lee Pls.' Letter ("Lee Letter") (DE 340). As noted, *see supra* at 2 n.1, Mr. Breitbart and other individuals moved for leave to intervene as plaintiffs on May 1, 2012, and appended to their motion a proposed complaint and Mr. Breitbart's Declaration (DE 345). The Favors Plaintiffs who originally filed this lawsuit did not produce an evidentiary submission in response to the Court's order.

The Breitbart Declaration submitted by the Senate Minority Defendants and the Beveridge Declaration submitted by the Drayton Plaintiffs are nearly carbon copies of each other. Plaintiffs and the Senate Minority Defendants all adopt, either directly or by reference, the Breitbart and Beveridge Declarations. *See, e.g.*, Ramos Memo. at 9-11; Lee Letter at 1.

The Declarations identify five proposed alternatives to the Senate Plan, two of which create only 62 districts and therefore are irrelevant to the 63-seat Plan the Legislature adopted in accordance with the New York Constitution. *See Cohen*, No. 135 (N.Y. May 3, 2012). The

Declarations focus on the three remaining plans. *First*, Plaintiffs point to the *63-District Alternative* authored by Mr. Breitbart ("Breitbart Plan"). *See* Breitbart Decl. ¶¶ 5-9; Beveridge Decl. ¶¶ 10-14; Ramos Memo. at 11; Lee Letter at 2. The Breitbart Plan, however, was created for this litigation and completed on April 23, 2012—which was *last week* and more than one month *after* the Legislature enacted the Senate Plan. *See* Breitbart Decl. ¶ 5; Breitbart Decl. Ex. 2 at 1 (DE 327-2). Plaintiffs offer no explanation for this delay, which is particularly puzzling given that Mr. Breitbart has been actively involved in litigation regarding the Senate Plan, submitted a 62-seat proposed alternative Senate plan in February *after* the Legislature had announced its 63-seat Senate Plan, and took only "twelve hours . . . in a single night" to draft the Breitbart Plan. Breitbart Decl. ¶¶ 2-8.

Second, Plaintiffs invoke the 63-seat plan proposed by Common Cause on February 29, 2012 ("Common Cause Plan"). *See id.* ¶ 75; Beveridge Decl. ¶ 79. *Third*, Plaintiffs refer to the Unity Plan submitted in October 2011 and revised in December 2011. Breitbart Decl. ¶ 75; Beveridge Decl. ¶ 79. The Unity Plan proposes districts only for New York City and lower Westchester County and consecutively numbers those districts 10-38. *See* Unity Map, *available at* http://aaldef.org/United%20Map_NY%20Senate%20%2811x17%29.pdf.

Defendants submit this brief in response to the Court's statement that "it would be helpful if defendants could provide any views as to why plaintiffs' evidentiary showings are insufficient to allow this case to proceed." 4/20/12 Order. Defendants intend to move for summary judgment on Plaintiffs' equal-population claim shortly, and provide this brief now to assist the Court in understanding the shortcomings in Plaintiffs' submissions.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION

At the threshold, Plaintiffs' most recent evidentiary submissions provide no basis for preliminary relief under well-established law.

1. Before analyzing the Second Circuit's familiar preliminary injunction standard, it is necessary to address a few basic legal and logical principles that make it clear that Plaintiffs are not entitled to a preliminary injunction.

As an initial matter, when confronted with similar circumstances, courts uniformly eschew preliminary injunctions and opt to resolve challenges to statewide redistricting plans on a *final* basis rather than disrupt an orderly election on the basis of an incomplete record. If a final adjudication of largely legal issues is possible prior to the election, this is a potential option. If not, courts will defer resolution of the case until after the election, just as this Court has done with respect to Plaintiffs' Section 2 and Equal Protection claims concerning potential minority districts in the Bronx and Long Island. *See* 4/18/12 Hr'g tr. at 60. But courts do not resolve contentious redistricting challenges on a *preliminary* basis prior to the first election under the new plan.

This principle is aptly demonstrated by New York's past two redistricting cycles. In April 2002, plaintiffs in *Allen v. Pataki*, No. 101712/02 (N.Y. Sup. Ct.), filed a motion for a preliminary injunction, *see Rodriguez*, 308 F. Supp. 2d at 357, seeking to enjoin the 2002 Senate Plan under the same theory of liability Plaintiffs press here, *see* 5/9/02 *Allen* Order at 1-2 (Ex. A). The Supreme Court denied the motion, explaining that "courts have been especially reluctant to find irreparable harm, and to intervene in the state electoral process, in cases such as this where the constitutional violation is not manifestly clear." *Id.* at 5 (citing *Reynolds v. Sims*,

377 U.S. 533, 585 (1964); *Diaz v. Silver*, 932 F. Supp. 462, 465-66, 468 (E.D.N.Y. 1996) (per curiam); *Ashe v. Bd. of Elections*, No. CV–88–1566, 1988 WL 68721 (E.D.N.Y. June 8, 1988) (per curiam)). Indeed, under such circumstances, "the harm to the public interest from delaying an election, and the prejudice and confusion to voters, candidates and election officials has been found to outweigh the potential benefits of injunctive relief." *Allen* Order at 5. Thus, to the extent that "any of the claims cannot be resolved as a matter of law, the 'action [s]hould be subjected to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed' by the upcoming . . . primary and general election campaign periods." *Id.* at 6-7 (quoting *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992) ("*PRLDEF*")).

Indeed, that is exactly what the three-judge panel did in *Rodriguez*. After the Supreme Court denied the plaintiffs' preliminary injunction motion, *Allen* was removed to federal court and consolidated with *Rodriguez* before the three-judge panel. *See* 308 F. Supp. 2d at 355. Motions to dismiss, motions for summary judgment, discovery, and the trial on the plaintiffs' claims were not completed until after the November 2002 elections. *See id.* at 358–61. In fact, the court did not issue its final judgment until March 2004. *See id.* at 460–61. Thus, the claims against the Senate Plan, including the one-person, one-vote claim identical to the claim at issue at here, were "subjected to . . . normal litigation procedures . . . unhampered by the severe time constraints imposed by the upcoming . . . primary and general election campaign periods." *Allen* Order at 6-7 (quoting *PRLDEF*, 796 F. Supp. at 700).

Similarly during the 1990 redistricting cycle, plaintiffs in *PRLDEF* moved for a preliminary injunction in July 1992, arguing that the enacted Congressional plan violated Section

2 of the Voting Rights Act. 796 F. Supp. at 700. The three-judge panel denied the motion, concluding that "the public interest required that the November 1992 congressional elections go ahead on the plan that the state legislature had developed." *Id.* Moreover, the court concluded that the plaintiffs' claims should be resolved after the election through "normal litigation procedures." *Id.*

And even mid-decade, this Court denied a motion for a preliminary injunction filed in May 1996, *see Diaz* DE 49 (Ex. B), where plaintiffs alleged that the configuration of a congressional district violated the Equal Protection Clause, *see Diaz*, 932 F. Supp. at 463–64, pursuant to *Shaw v. Reno*, 509 U.S. 630 (1993). Again, the three-judge panel stressed that "it would appear most unlikely that a proper plan can be drafted by this court in sufficient time to avoid delaying at least the September primary." *Diaz*, 932 F. Supp. at 468. Consequently, "the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time." *Id.* And "this decision" is "in accord with the view that other courts have taken in similar situations." *Id.* at 468-69 (citing *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd, Bush v. Vera*, 517 U.S. 952 (1996); *Ashe*, 1988 WL 68721; *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 842–43 (N.D. Cal. 1992); *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991) (per curiam), *aff'd in part and vacated in part as moot*, 502 U.S. 954 (1991); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1362 (M.D. Ala. 1986); *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) (per curiam)).

Indeed, the Senate Majority Defendants are not aware of any case challenging a statewide redistricting plan where, if there was not time to hold a full-blown trial before the first election in

the redistricting cycle, the court granted a preliminary injunction based on an incomplete record. That is because if there is a rush to judgment, there is a substantial risk that the court will grant plaintiffs a remedial plan that they do not deserve and then have to undo the plan after the election, once a full trial on the merits is completed. As a practical matter, this creates all of the problems that mid-decade districting does, including disrupting "orderly campaigning and voting, as well as . . . communication between representatives and their constituents." *LULAC v. Perry*, 548 U.S. 399, 448 (2006) (Stevens, J., concurring in part and dissenting in part). Because the harm to the public outweighs any benefit from granting preliminary relief based on an incomplete record, it makes practical sense to postpone adjudication of challenges to statewide redistricting plans until after the election, where they can be resolved through "normal litigation procedures." *PRLDEF*, 796 F. Supp. at 700.

Here, as in *Allen*, *Rodriguez*, *PRLDEF*, and *Diaz*, there is simply insufficient time to adjudicate Plaintiffs' claim and implement any interim order, without severely disrupting an orderly election process. As this Court is aware, the petitioning period for Senate candidates begins in about a month, on June 5th. *See* N.Y. Elec. Law § 6-134(4). A motion for summary judgment will be submitted by the Senate Majority Defendants shortly, and it is our position that at a minimum, this Court should decide that motion before proceeding any further in this litigation, consistent with the Supreme Court's admonition in *Miller v. Johnson* that courts must "recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." 515 U.S. 900, 916–17 (1995).

Moreover, if the Court presses ahead on a rushed schedule, it will need to resolve extensive discovery disputes, most notably those concerning seminal and important issues of legislative privilege. *See* DE 319, 343. And should this Court decide that the drafters of the Senate Plan are not entitled to an absolute testimonial privilege, the Senate Majority Defendants will seek to immediately challenge this decision before discovery begins. An adverse decision on legislative privilege is likely a collateral order that is immediately appealable, *see United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 658 (D.C. Cir. 2007) (adverse decision on Speech or Debate non-disclosure privilege); *see also Helstoski v. Manor*, 442 U.S. 500, 508 (1979) (adverse decision on Speech or Debate immunity); *United States v. Myers*, 635 F.2d 932, 935 (2d Cir. 1980) (same), because "[o]nce the information is disclosed, the 'cat is out of the bag' and appellate review is futile," *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (citation omitted) (per curiam).[3] Even if not, immediate appellate relief can be obtained by filing a writ of mandamus, *e.g.*, *In re City of New York*, 607 F.3d 923, 950–51 (2d Cir. 2010) (granting writ of mandamus and vacating disclosure order adverse to the law enforcement privilege), or by seeking an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

And even if discovery, evidentiary hearings, and adjudication of liability are somehow miraculously completed in less than a month, a decision for Plaintiffs would still be too late because substantially more time would be required to implement any remedy. Before a court-ordered plan can be imposed, the Legislature must be given an opportunity to cure any violations. *See Diaz*, 932 F. Supp. at 467 (citing *Miller*, 515 U.S. 900). The necessity for such a

[3] *Mohawk Industries v. Carpenter* expressly did not reach the question of whether "collateral order appeals should be available for rulings involving certain governmental privileges in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions." 130 S. Ct. 599, 603, 609 n.4 (2009) (internal quotation marks omitted).

legislative fix is particularly acute here because, unlike virtually all redistricting cases, the challenge here is not to an identifiable district or districts, where a finding of liability will provide precise guidance on the flaws in the district lines which can be fixed through a narrowly tailored remedy. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam). Rather, Plaintiffs' theory is that the *entire state* needs to be redrawn in some unidentified way by transferring an additional district from somewhere upstate to New York City. Needless to say, there are myriad ways to add a district to New York City, all of which will have an enormous ripple effect on the upstate districts. Thus, a liability finding that a seat needs to be added to New York City and the upstate "underpopulation" corrected will say virtually nothing about how the districts will be drawn to comply with this general command. Since the Court is obliged to adhere to the Legislature's plan to the extent it does not violate the Constitution, *id.* at 43; *Wise v. Lipscomb*, 437 U.S. 535, 539–40, 544 (1978) (plurality op.), it needs to know how the Legislature will fix the underpopulation problem in order to have something to defer to.

If the Court were to simply substitute its judgment and create a court-drawn plan, this "remedy" would greatly exceed the scope of the violation and improperly substitute judicial judgment for state legislative policy (and raise vexing questions about whether this judicial substitute needs to comply with the rule governing court-drawn plans—such as "achiev[ing] the goal of population equality with little more than *de minimis* variation," *Connor v. Finch*, 431 U.S. 407, 414 (1977); *Perry v. Perez*, 132 S. Ct. 934, 943 n.2 (2012) (per curiam)—or to preserve the malapportioned districts to the extent practicable). Worse still, any effort to use the Breitbart Plan would simply install an obvious *Democratic* gerrymander, which, at a minimum, would entitle Defendants to have discovery and prove the partisan bias underlying this "substitute." The inherently complex and vexing legal and factual disputes that would need to

accompany any remedy here, standing alone, precludes concluding any "preliminary" adjudication in a remotely reasonable time frame.

Moreover, even if liability was fully adjudicated by June 5, a decision for the Plaintiffs would come too late for the additional reason that there would likely be insufficient time for Defendants to appeal the decision to the Supreme Court before the primary elections. *See generally Ctr. for Int'l Envtl. Law v. Office of USTR*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (holding that "de facto deprivation of the basic right to appeal" is "irreparable harm"). Such a deprivation would be particularly egregious here since any appeal of a "preliminary" decision to grant relief at odds with the summarily affirmed *Rodriguez* result would, to say the least, have a robust chance of succeeding. That being so, surely it is neither prudent nor fair to come to a different result than *Rodriguez* without providing an opportunity to secure the Supreme Court's guidance on this different course.

Any attempt to resolve Plaintiffs' one-person, one-vote claims before the primary elections will therefore necessarily harm the public by disrupting New York's orderly election process. Thus, "to the extent that [Plaintiffs' one-person, one-vote claim] cannot be resolved as a matter of law, the 'action [s]hould be subjected to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed' by the upcoming primary and general election campaign periods." *Allen* Order at 6-7 (quoting *PRLDEF*, 796 F. Supp. at 700).

To be sure, courts do resolve a challenge to a redistricting plan before an election when 1) a plaintiff's claim is a straightforward legal challenge 2) that requires little or no discovery, and 3) can be litigated to final judgment and appealed before the plan needs to be implemented by the State, and 4) the State will have an adequate opportunity to enact remedial legislation.

See, e.g., *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992). But this case clearly does not fall into this category.

And to be sure, a preliminary injunction was granted in *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, where plaintiffs challenged a city council districting plan under Section 2 of the Voting Rights Act. 26 F.3d 271 (2d Cir. 1994) ("*Bridgeport III*") (affirming order with modification). But that case merely underscores how inappropriate a preliminary injunction would be in this case. That case, which involved far more limited legal and factual issues than here, was resolved over the course of several months—time that this Court does not have—and did not require the government to implement a remedial plan on the eve of an election.

The motion for a preliminary injunction in *Bridgeport* was filed in July 1993, *id.* at 272, and the order enjoining the plan and requiring the city to enact a new plan was entered three months later, *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, No. 3:93CV1476, 1993 WL 742750 (D. Conn. Oct. 27, 1993) ("*Bridgeport I*"), after seven days of evidentiary hearings, *Bridgeport III*, 26 F.3d at 273. Because the court issued the order only five days before the scheduled city council elections, the court *permitted* the elections to go forward under the existing plan, explaining that this was necessary to "permit[] ongoing effective governance." *Bridgeport I*, 1993 WL 742750, at *6. And the court ordered the city to enact a new plan within sixty days and conduct new elections sixty days later. *Id.*

Then the preliminary injunction was stayed pending appeal. *Bridgeport III*, 26 F.3d at 273. The Second Circuit did not resolve the appeal until five months later, in March 1994. *Id.* at 272 n.2; *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 280, 281 (2d Cir. 1994) ("*Bridgeport II*"). Moreover, the Second Circuit ordered that the district court

give the city more time to enact and implement a corrected plan. *Bridgeport III*, 26 F.3d at 278 n.9. In fact on remand, the district court ordered that the elections not occur until November 1994, well over a year from the date when the motion for a preliminary injunction was originally filed. *Id.* And after all that work, in September 1994, the Supreme Court ultimately vacated and remanded the order in light of *Johnson v. DeGrandy*, 512 U.S. 1283 (1994). On remand, plaintiffs moved to reinstate the preliminary injunction, but the district court denied their motion. *See Bridgeport* DE 132, 143, 144, 149 (Ex. C). Thus, *Bridgeport* vividly confirms the impracticality of preliminary relief with elections looming.

The practice of federal courts to eschew preliminary relief prior to the first elections under a new statewide redistricting plan reflects two general equitable principles and a principle specific to reapportionment.

First, preliminary injunctions that disrupt the status quo are strongly disfavored. "[T]he typical preliminary injunction . . . generally seeks only to maintain the status quo pending a trial on the merits." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006). But where, as here, plaintiffs seek to "alter the status quo by *commanding some positive act*," *id.* at 89 (internal quotations marks omitted & alterations in original), they must satisfy "a more rigorous burden," *SEC v. Unifund SAL*, 910 F.2d 1028, 1039 (2d Cir. 1990). Here, the status quo is a legislative enactment entitled to a presumption of constitutionality. *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 671 (N.D.N.Y. 1992) (citing *Clements v. Fashing*, 457 U.S. 957, 962-63 (1982)). Additionally, the policy against disrupting the status quo has special resonance here, where the status quo—*i.e.*, maintaining a districting plan with 26 Senate seats in New York City—has been in place for ten years, was approved by a three-judge panel in *Rodriguez*, and was summarily affirmed by the Supreme Court. Thus,

Plaintiffs' preliminary injunction, which seeks to add a 27th Senate seat in New York City, would be especially disruptive to the status quo, as it would overturn an aspect of the Senate Plan that has been maintained for a decade.

Second, preliminary injunctions are strongly disfavored when they "provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 150 (2d Cir. 1999). That is because granting relief under these circumstances is the functional equivalent of reaching a final decision on the merits based on an incomplete record. Under these extraordinary circumstances, plaintiffs are entitled to relief "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

Here, Plaintiffs request a preliminary injunction that provides them substantially all the relief they seek—namely a redrawn redistricting plan—and this relief cannot be undone even if the State prevails at trial after the election. The relief literally cannot be undone because candidates will have been elected to, and serving in, the Senate under elections held in districts now determined to be improper. More generally, elections under an interim plan are a bell that cannot be unrung—the election will lead to new incumbents, new voter expectations, and possibly a new majority. Even when subsequent elections are held under the Legislature's duly enacted plan, these changed circumstances will undoubtedly have a substantial effect on the election.

And to make matters even worse, when a preliminary injunction is granted on the eve of an election, it often cannot be undone on appeal, when, as here, there probably is insufficient

time for the Supreme Court to decide the appeal before the election. Should the interim plan cause the Democrats to gain control of the Senate—which is plainly Plaintiffs' goal—the Senate Majority Defendants' defense of this suit might be mooted after the election: the new Senate Majority leader, having benefited from the so-called interim plan, will undoubtedly support the interim plan and oppose the continuation of any litigation against it. Alternatively, if the Supreme Court were to stay this Court's preliminary order, *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *e.g.*, *Perez*, 132 S. Ct. at 940, this would render meaningless the time and effort this Court and the parties will have devoted to litigating this issue on an expedited basis.

Third, intervention by the courts in redistricting matters is strongly disfavored. "The [Supreme] Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539. That is because "the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). "Politics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), and in drawing a plan, a Legislature must "balanc[e] competing interests," *Easley*, 532 U.S. at 242. In sum, the Legislature must "make the sort of policy judgments for which courts are, at best, ill suited," *Perry*, 132 S. Ct. at 941.

Moreover, since redistricting is "primarily the duty and responsibility of the State," judicial review of state redistricting legislation "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Thus, courts must presume the legislature's good faith and "exercise extraordinary caution" when reviewing the adopted plan. *Id.* at 915-16. In particular, courts must "recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a

plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Id.* at 916–17.

For these reasons, a preliminary injunction is an exponentially intrusive remedy in the redistricting context. *See Diaz*, 932 F. Supp. at 465 ("[A] preliminary injunction enjoining an election is an extraordinary remedy involving the exercise of a very far-reaching power."). Where there is no readily available alternative plan available—as there clearly is not here for the reasons discussed above—this Court will need to dive into the political thicket and draft a remedial plan that makes wholesale changes to Senate districts in upstate New York and New York City. So, the Court will be required to "make the sort of policy judgments for which courts are, at best, ill suited." *Perez*, 132 S. Ct. at 941. Indeed, if the Court's remedial plan results in a Democratic majority, then the Court will be responsible for a dramatic change in state government on the basis of "preliminary" relief which may be subsequently reversed by this Court or the Supreme Court.

Finally, of course, adjudicating the one-person, one-vote claims preliminarily will only resolve *one* of Plaintiffs' claims, but will not resolve their challenges concerning minority districts in the Bronx and Long Island. Thus, any relief here will not only be preliminary but potentially partial, because the Court will resolve these subsequent claims. It makes no sense from *anyone*'s perspective to have such bifurcated, piecemeal resolution of Plaintiffs' claims. It is far more logical to resolve all of Plaintiffs' claims at the same time, particularly since their Section 2 and race-based Equal Protection challenge to the failure to create an "extra" "Hispanic" district in the Bronx cannot plainly be reasonably disentangled from their one-person, one-vote claim that the failure to add a 27th seat to New York City has a racially discriminatory purpose and effect. Such piecemeal adjudication of Plaintiffs' claims clearly aggravates the

"intrusive potential of judicial intervention into the legislative realm," *Miller*, 515 U.S. at 916-17, and wastes scarce judicial resources.

In sum, the circumstances here are a paradigmatic example of where a preliminary injunction would be grotesquely disruptive, unfair to the defendants, unfair to the public, and potentially will put this Court in the position of dictating electoral outcomes.

2. Turning to the Second Circuit's familiar preliminary injunction standard, it is clear that Plaintiffs are not entitled to relief. "'A preliminary injunction is an extraordinary remedy never awarded as of right.'" *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Generally, a party seeking a preliminary injunction must establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (internal quotation marks omitted). "Additionally, the moving party must show that a preliminary injunction is in the public interest." *Id.* (citing *Winter*, 555 U.S. at 19–20).

And here, Plaintiffs' burden is especially onerous because they seek preliminary relief that interferes with the State's redistricting process, disrupts the status quo, effectively grants Plaintiffs all of the relief they seek, and the relief cannot be undone after the election. *See Unifund SAL*, 910 F.2d at 1039 (holding plaintiff "should be obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks").[4]

[4] Thus, Plaintiffs cannot satisfy their burden by merely establishing "sufficiently serious questions going to the merits of [their] case." *Forest City Daly Hous.*, 175 F.3d at 149.

Plaintiffs fail to establish that "extreme or very serious damage will result from a denial of preliminary relief." *Tom Doherty Assocs.*, 60 F.3d at 34. Despite the constitutional stature of the right to vote, there is no "per se rule" that a violation of the constitution or the Voting Rights Act visits irreparable harm on voters. Plaintiffs make no serious attempt to demonstrate that a failure to award a preliminary injunction will "impair the court's ability to grant an effective remedy" after a trial. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (voting rights case). Nor could they. The injury that they allege—the absence of a 27th Senate seat in New York City—has been in existence for the past five elections. Plaintiffs can hardly claim that they will be irreparably injured should New York City lack a 27th Senate seat for one additional election.

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

Plaintiffs also cannot establish a "clear . . . likelihood of success" on the merits, *Forest City Daly Hous.*, 175 F.3d at 149-50 (internal quotation marks omitted), as will be explained in further detail below. Indeed, the Drayton Intervenors unabashedly acknowledge that they "are unable to fully present all the evidence necessary to succeed on their Fourteenth Amendment [claims]." DE 307 at 11 n.1. This admittedly meager evidence clearly fails to satisfy the "rigorous" clear likelihood of success standard that Plaintiffs are required to meet here. *Forest City Daly Hous.*, 175 F.3d at 149-50.

More fundamentally, Plaintiffs have virtually no chance of success since they merely seek to relitigate the same claim that they lost on summary judgment in *Rodriguez*, and lost on appeal to the Supreme Court. The only way they even attempt to distinguish *Rodriguez* is by claiming racial animus, but this argument is highly suspect, because as detailed below, it is illogical, conclusory, echoes arguments from *Rodriguez*, and is irreconcilable with Department of Justice's preclearance of the Senate Plan. *See infra* Part II.C.2. In order to obtain preclearance, after all, it was the State's burden to prove the absence of "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). Because Plaintiffs cannot establish a clear likelihood of success, they are not entitled to a preliminary injunction.

Plaintiffs also fail to show that "a preliminary injunction is in the public interest," *Oneida Nation*, 645 F.3d at 164, or that "the balance of equities tips in [Plaintiffs'] favor," *Winter*, 555 U.S. at 20. Here, the harm caused by entering a preliminary injunction on the eve of an election far outweighs any possible benefit for all the reasons already stated. Particularly "[g]iven the presumed constitutionality of the redistricting statute, [and] the importance and complexity of the issues raised . . . , the public interest would not be served by a hasty and precipitous consideration of [Plaintiffs' one-person, one-vote claim]." *Allen* Order at 6.

For these reasons, this Court should deny Plaintiffs' request for a preliminary injunction.

II. PLAINTIFFS' EQUAL POPULATION CLAIM FAILS ON THE MERITS

Plaintiffs' recent evidentiary submissions do not in any way establish a likelihood of success on the merits or distinguish *Rodriguez*. Plaintiffs concede that the maximum population deviation in the Senate Plan is only 8.8% (*see* Breitbart Prop. Compl. ¶ 28), which is smaller than the 9.78% in the upheld 2002 Senate Plan and well within the 10% constitutional standard. *See, e.g.*, *Rodriguez*, 308 F. Supp. 2d at 366; *Brown v. Thomson*, 462 U.S. 835, 842 (1983);

Voinovich v. Quilter, 507 U.S. 146, 161 (1993). Thus, to prevail on their equal-population claims, Plaintiffs bear the heavy burden to establish that this is one of the rare cases where such a presumptively constitutional minor deviation "result[ed] *solely* from an unconstitutional or irrational state purpose" and not even *in part* "from other state policies recognized by the Supreme Court to be appropriate reasons for deviations." *Rodriguez*, 308 F. Supp. 2d at 366 (emphasis added).

Plaintiffs come nowhere close to satisfying their burden. Plaintiffs, in fact, merely rehash the *same* equal population theory that the three-judge court *rejected* on summary judgment in *Rodriguez*, and whose rejection the U.S. Supreme Court *summarily affirmed* in a decision binding on this Court. *See id.*; 543 U.S. 997. Yet Plaintiffs continue to ignore the undisputed fact that the Senate Plan greatly *over*values the weight of a New York City vote compared to an "upstate" vote. And Plaintiffs cannot prove that the Senate Plan serves no rational purpose because, in fact, the Legislature adhered to several legitimate state policies in drafting the Plan. Plaintiffs' equal-population claim therefore fails as a matter of law, and the Court should deny their request for a preliminary injunction. *See Rodriguez*, 308 F. Supp. 2d at 366.

A. Plaintiffs Bear The Heavy Burden Of Establishing That The Minor Deviations In The Senate Plan Resulted "Solely" From An Unconstitutional Or Irrational State Purpose

In a one-person, one-vote case, such as this one, where the maximum population deviation between the most populous and least populous districts is under 10%, there is no injury, absent extraordinary circumstances. That is because the Fourteenth Amendment principle of "one-person, one-*vote*," obviously "protect[s] the right of all qualified citizens to *vote*." *Reynolds*, 377 U.S. at 554 (emphases added). And it is quite clear that no citizen's voting rights are cognizably harmed by minor deviations from precise population equality across districts. *See id.* at 568.

As the Supreme Court stated in *Gaffney v. Cummings*, "it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." 412 U.S. at 745–46. Because total *population* figures are only a rough proxy for *voting* equality among *citizens*, minor population deviations provide no basis for inferring "that the vote of any citizen is [not] approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579; *see id.* at 568 (an "individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of [other] citizens").

Based on these principles, the Supreme Court has "established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations" that impose no cognizable injury. *Brown*, 462 U.S. at 842; *Gaffney*, 412 U.S. at 745. To the contrary, a plaintiff alleging an equal-population violation on such a minor deviation bears the heavy burden to establish that the plan at issue is one of the rare instances where these deviations are not *de minimis* and harmless. *See* Sen. Maj. Resp. To Court's Apr. 20 Order at 17 (DE 342-1).

Moreover, "an apportionment plan with a maximum population deviation under 10%" "require[s] [no] justification by the State." *Brown*, 462 U.S. at 842; *see also Rodriguez*, 308 F. Supp. 2d at 363. The plaintiff therefore must also demonstrate that "the minimal deviation results *solely* from an unconstitutional or irrational state purpose" and not even *in part* "from other state policies recognized by the Supreme Court to be appropriate reasons for deviations," such as "'preserving the cores of prior districts, and avoiding contests between incumbent representatives.'" *Rodriguez*, 308 F. Supp. 2d at 366 (quoting *Karcher*, 462 U.S. at 740) (emphasis added). In light of these dual daunting obstacles, it is hardly surprising that "nearly no

state districting plan with a maximum deviation below ten percent has ever been struck down by a court as violating population equality." *Id.* at 364.

That is, if such a plaintiff meets the daunting burden of showing that the under-10% deviation has more than a "minor" effect, she then must show that it serves no rational purpose. Therefore, the burden is on the plaintiff to *disprove* the existence of rational reasons (or, stated another way, to prove that the purpose of the deviations could only be an irrational or impermissible one).[5] Thus, in *Rodriguez*, the three-judge court granted the defendants' motion for summary judgment because the 9.78% deviation in the 2002 Senate Plan resulted in part from "the traditional principles of maintaining the core of districts and limiting incumbent pairing," even though the plan allegedly reflected improper regional and racial bias against the New York City area. *Id.* at 366, 370.

Plaintiffs intimate that *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam), *summ. aff'd*, 542 U.S. 947 (2004), changed the law governing equal-population claims and, thus, somehow undermined the *Rodriguez* rule. *See* Breitbart Decl. ¶ 16; Drayton Memo. at 1–2; Ramos Memo. at 7–17. But, as Plaintiffs well know, *Rodriguez* was both decided by the three-judge court and summarily affirmed by the U.S. Supreme Court *after Larios*. *Compare, e.g.*, *Rodriguez*, 308 F. Supp. 2d 346 (Mar. 15, 2004), *summ. aff'd*, 543 U.S. 997 (Nov. 29, 2004), *with Larios*, 300 F. Supp. 2d 1320 (Feb. 10, 2004), *summ. aff'd*, 542 U.S. 947 (June 30, 2004). Standing alone, this conclusively demonstrates that *Rodriguez*'s result is binding here and that *Larios* could not possibly have altered or relaxed this Court's obligation to follow *Rodriguez*.

[5] As explained more fully in the Senate Majority's Response to The Court's April 20 Order (DE 342-1), this requirement to *disprove* that the minor, under-10% deviations "'may reasonably be said to advance a rational state policy'" stems from the fact that the State need only prove such a rational interest if the deviation is over 10%. Sen. Maj. Resp. at 19 (quoting *Brown*, 462 U.S. at 843). Thus, since there is no burden on the State for under 10% deviations, the Plaintiff must disprove the existence of such rational state policies. *See id.*

Thus, Plaintiffs' burden is to persuasively distinguish their claims here from their claims in *Rodriguez*; it is plainly not Defendants' burden to distinguish *Larios*. This is particularly obvious because, *after* assessing Mr. Hecker's claims that *Larios* is in tension with *Rodriguez* on precisely the same grounds that he offers here (*see Rodriguez* Jurisdictional Statement at 20 (Ex. H)), the Supreme Court affirmed *Rodriguez summarily* without any briefing or argument. Thus, Mr. Hecker's prior efforts to claim "tension" between *Larios* and *Rodriguez* did not even raise a "substantial question" warranting submission of briefs. *In re Primus*, 436 U.S. 412, 414 (1978); *Sanks v. Georgia*, 401 U.S. 144, 145 (1971). This was obviously a conscientious, well thought-out determination, since eight justices disagreed with Justice Stevens' contention that probable jurisdiction and full briefing should be granted. *See* 543 U.S. 997. Thus, Plaintiffs are simply incorrect when they suggest that *Larios* opens the door to equal-population claims that *Rodriguez* unequivocally closed.

Moreover, *Larios* is completely compatible with the *Rodriguez* rule, as the three-judge court in *Rodriguez* recognized. *See* 308 F. Supp. 2d at 367–71 & nn.23, 27. In fact, *Larios* seemed to apply the same standard as *Rodriguez*, but came to a different result because of different facts. In *Larios*, the sub-10% deviations did, in fact, have the unusual effect of "dilut[ing] and debas[ing] the weight of certain citizens' votes," *Larios*, 300 F. Supp. 2d at 1322, "by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another," *id.* at 1329. Specifically, there were no relevant citizenship or registration deviations in *Larios*, so overpopulation *did* dilute voting power. *See Rodriguez* Mot. to Affirm at 12 (Ex. I). Thus, *Larios* is fundamentally distinguishable at the threshold level since, unlike *Rodriguez* and here, it did have an adverse effect on the over-populated districts'

voting power. And no case anywhere has found a one-person, one-vote violation without such an effect.

Moreover, the Georgia House Plan at issue in *Larios* paired forty-two incumbents, including thirty-seven of the seventy-four incumbent Republicans (50%), but only nine of the 105 Democratic incumbents (less than 9%), while the Georgia Senate Plan paired ten of twenty-four incumbent Republicans (42%) but only two of the thirty-two incumbent Democrats (6%). *See id.* at 1326–27. More generally, there was "no evidence that the population deviations in the plans were driven by the neutral and consistent application of any traditional redistricting principles" recognized by the Supreme Court as justifying minor deviations. *Id.* at 1349; *see also id.* at 1349–50 ("[T]he record evidence squarely forecloses the idea that any . . . legitimate reasons could account for the deviations.").[6] Thus, *Rodriguez* is also distinguishable from *Larios* because the *Rodriguez* plan could be said to further some "traditional redistricting principle."

Here, Plaintiffs offer *exactly* the same arguments that the three-judge court rejected in *Rodriguez* and whose rejection the Supreme Court summarily affirmed—so they cannot possibly hope to establish that the Senate Plan's minor deviations "result[] *solely* from an unconstitutional or irrational state purpose," *Rodriguez*, 308 F. Supp. 2d at 366 (emphasis added), much less that

[6] For example, in *Larios*, "one c[ould] easily discern . . . just by looking at the maps themselves" that the deviations could not have "resulted from an attempt to create compact districts." 300 F. Supp. 2d at 1350 (emphasis added). Moreover, the population deviations "did not result from an interest in respecting the boundaries of the state's various political subdivisions" because, among other things, the county splits "were significantly higher than they had been in previous redistricting." *Id.* The deviations also could not be explained based on an effort to preserve cores because "[t]o the extent that the cores of prior districts were preserved at all, it was done in a thoroughly disparate and partisan manner, heavily favoring Democratic incumbents while creating new districts for Republican incumbents whose constituency was composed of only a small fraction of their old voters." *Id.* at 1350-51. And the deviations could not be explained based on a policy of avoiding incumbent pairs because the plans "pitted numerous Republican incumbents against one another, while generally protecting their Democratic colleagues." *Id.* at 1347.

their claims satisfy the extraordinary circumstances identified in *Larios*. As explained below, the Senate Plan has *no* discriminatory effect on New York City because it, in fact, *over*values New York City votes, and the Legislature applied myriad legitimate and traditional state policies in devising the Plan, including preserving the cores of prior districts and limiting incumbent pairing. The Senate Plan therefore is lawful, and Plaintiffs' equal-population claims fail on the merits. *See id.* at 366–71.

B. The Senate Plan Benefits, Rather Than Harms, New York City Voters

Plaintiffs' central thesis is that the Senate Plan harms New York City voters by "overpopulating" New York City districts (on the basis of total population), and that the Legislature's purpose in inflicting this purported harm was regional, political and/or racial animus. Thus, the threshold dispositive question is whether the total population percentages in the Senate Plan did, in fact, harm the New York City area. If there is no discriminatory effect, then New York City voters obviously have suffered no cognizable harm. Indeed, if the plaintiff or the plaintiff's group is not being treated worse than others, then it is a *non sequitur* to ask whether or not the (nonexistent) adverse treatment was motivated by racial or political or legitimate purposes. Thus, because the Senate Plan has *no* discriminatory effect on New York City voters, Plaintiffs' equal-population claim necessarily fails.

First, Plaintiffs do not dispute that the Senate Plan actually *under*populates New York City districts, and *over*populates "upstate" districts, in terms of CVAP—so, like the plan upheld in *Rodriguez*, the Senate Plan actually discriminates *in favor of* New York City voters. *See* 308 F. Supp. 2d at 369 (rejecting equal-population claim because "the underpopulated 'upstate' districts have more eligible citizens and actual voters" than the "downstate" districts). Since the entire point of "one-person, one-vote" population equality is, of course, to prevent "dilution of the weight of a *citizen's* vote," *Reynolds*, 377 U.S. at 555 (emphasis added), CVAP is a basic

measure for determining whether a population deviation even potentially dilutes the weight of a citizen's vote, *see Rodriguez*, 308 F. Supp. 2d at 369. Indeed, the Supreme Court's one-person, one-vote case involving New York measured equality on the basis of "*citizen* population," *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 641 (1964), and the Supreme Court has repeatedly stated that eligible or actual voters would be an appropriate measure of Fourteenth Amendment population equality standards. Fourteenth Amendment equality is provided if there is "substantial equivalence" of districts "in terms of *voter* population or *citizen* population," as well as total population, and the Court therefore makes "no distinction between the acceptability of such a test and a test based on total population." *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (emphases added).

For the same reason, the Court in the New York case of *WMCA, Inc. v. Lomenzo* "treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure" and the Court has never "suggested that the States are required to include aliens, transients . . . or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed." *Burns*, 384 U.S. at 91–92. Since the Legislature could have, with sufficient factual support, used "voter population or citizen population" as the measure of equal population, it obviously cannot be found to have disfavored New York City residents when those residents are *favored* under both of these acceptable measures of population equality. In other words, any superficial suggestion created by total population numbers that the votes of New York City's citizens are not "approximately equal in weight" to those elsewhere is completely belied by the citizen population and enrollment figures. *Id.* at 91 n.20 (quoting *Reynolds*, 377 U.S. at 579).

The CVAP figures for the Senate Plan demonstrate that it underpopulates the New York City districts by 7.41%, and overpopulates "upstate" districts by 5.49%. *See* Ex. J.[7] Because there are fewer registered voters in the New York City districts than in the upstate districts, the average weight of one New York City resident's vote under the Senate Plan is approximately 10% more than the average weight of an upstate citizen's vote. *See id.*[8] And because actual voter turnout is lower in New York City districts than in upstate districts, the average weight of a New York City resident's vote in the most recent Presidential (2008) and State Senate (2010) elections is approximately *30%* and *65%* more than the weight of an upstate citizen's vote. *See id.* Thus, as in the 2002 Senate Plan upheld in *Rodriguez*, "[t]he practical effect of the Senate Plan . . . is to dilute the votes of 'upstate' residents, not those who reside 'downstate.'" 308 F. Supp. 2d at 369. And at the same time it visits this dilution on voters in Republican-leaning upstate, the Senate Plan also disfavors Republican-controlled Long Island, where it overpopulates all nine districts by 2.54% as measured by total population. *See* 2012 District Maps, http://www.latfor.state.ny.us/maps/.

Obviously, no court should *exacerbate* the Senate Plan's dilution of "upstate" voting strength in the name of ensuring that "one person's vote must be counted equally with those of all other voters in a State." *Reynolds*, 377 U.S. at 560. Plaintiffs' proposed plans, however, seek to do precisely that. According to Plaintiffs' own CVAP figures, the Breitbart Plan increases the

[7] Like Mr. Breitbart and Mr. Beveridge, Defendants use CVAP figures that have not been adjusted to reflect prisoner reallocation under Chapter 57 of the Laws of 2010. *See* Breitbart ¶ 80 (using this measure because "[i]mprisoned felons . . . are disenfranchised until the expiration of their sentences"); Beveridge Decl. ¶ 84 (same).

[8] The difference between the average weights of New York City votes and upstate votes are computed by dividing the average voter enrollment or turnout in the upstate districts by the average voter enrollment or turnout in the New York City districts and subtracting one. *See, e.g.*, *Rodriguez*, 308 F. Supp. 2d at 369 (considering how much more, by percentage, "the weight of one New York City resident's vote . . . is worth [than] an 'upstate' citizen[']s vote").

disparity between New York City and upstate districts, underpopulating New York City districts by 10.44% and overpopulating upstate districts by 9%. *See* Ex. K. The Breitbart Plan also inflates the average weight of a New York City citizen's vote, as measured by registered voters, to 18% more than the average weight of an upstate citizen's vote. *See id.* Measured by voter turnout in the 2008 Presidential and 2010 State Senate elections, the Breitbart Plan increases the average weight of a New York City citizen's vote to *38%* and *76%* more, respectively, than the average weight of an upstate citizen's vote. *See id.*

The Common Cause Plan's aggravation of this upstate vote dilution is even more drastic. Measured by CVAP, the Common Cause Plan underpopulates New York City districts by 10.98% and overpopulates upstate districts by 9.54%. *See* Ex. L. The Common Cause Plan also increases the average weight of a New York City citizen's vote, as measured by registered voters, to 19% more than the average weight of an upstate citizen's vote. *See id.* And when measured by voter turnout in the 2008 Presidential and 2010 State Senate elections, the Common Cause Plan increases the average weight of a New York City citizen's vote to *40%* and *79%* more, respectively, than the average weight of an upstate citizen's vote. *See id.*

Perhaps anticipating this analysis—and lacking a persuasive response—Mr. Breitbart and Mr. Beveridge, both of whom are "not . . . attorney[s]," take issue with the use of CVAP figures to measure the relative voting strength of New York City voters. Breitbart Decl. ¶ 79 n.2; Beveridge Decl. ¶ 83 n.3. Mr. Breitbart and Mr. Beveridge instead "concur . . . that the proper measure of a redistricting plan's compliance with the 14th Amendment's population equality principle has been and remains total population." Breitbart Decl. ¶ 79 n.2; Beveridge Decl. ¶ 83 n.3. Mr. Breitbart and Mr. Beveridge, of course, cite no authority for this proposition, which contradicts both the equal-population requirement's entire purpose of preventing "dilution of the

weight of a *citizen's* vote," *Reynolds*, 377 U.S. at 555 (emphasis added), and the Supreme Court's clear approval, discussed above, of legislatures' use of measures *other* than total population, such as citizen population or registered voters, to determine the population equality of legislative districts. *See, e.g.*, *WMCA, Inc.*, 377 U.S. at 648 (citizen population); *Burns*, 384 U.S. at 90–97 (upholding Hawaii's use of registered voter statistics in apportionment because "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry" and because use of voter registration statistics "substantially approximated [the apportionment that] would have appeared had state citizen population been the guide").

Moreover, Mr. Breitbart's and Mr. Beveridge's contention that the New York Constitution requires the use of total population in *drawing* district lines (*see* Breitbart Decl. ¶ 79 n.2; Beveridge Decl. ¶ 83 n.3) "has no bearing on whether [a court] may analyze CVAP numbers in assessing the viability of a one-person, one-vote cause of action" and "to ascertain the practical effect of the Senate Plan on *actual voters*," *Rodriguez*, 308 F. Supp. 2d at 370 n.25 (emphasis added). And, in all events, Mr. Breitbart and Mr. Beveridge make no attempt to harmonize their rejection of CVAP figures to measure the voting strength of New York City voters with their embrace of such figures to measure the voting strength of New York City *minority* voters. *See* Breitbart Decl. ¶ 77 (embracing CVAP as the "data that best indicates the *effectiveness* of a plurality- or majority-minority district, which is the best way to understand a racial or ethnic group's voting power" (emphasis in original)); Beveridge Decl. ¶ 81 (same).

Second, perhaps recognizing that the Senate Plan inflicts no disfavor on New York City voters—and, in fact, *favors* such voters—Plaintiffs attempt to change the law by suggesting that the equal-population principle focuses on guaranteeing proportional representation for cities.

See, e.g., Breitbart Prop. Compl. ¶ 32; Drayton Memo. at 1–2. But the Equal Protection Clause obviously guarantees equality for citizens, not proportionality for cities. The Fourteenth Amendment "protect[s] *citizens* and not geographic areas." *Rodriguez*, 308 F. Supp. 2d at 369 (emphasis added); *see also Reynolds*, 377 U.S. at 562 ("Legislators are elected by voters, not farms or *cities* or economic interests." (emphasis added)); *Mirrione v. Anderson*, 717 F.2d 743, 745-46 (2d Cir. 1983) (affirming dismissal of regional discrimination claim because "[v]oting is a personal right" and "geographic communit[ies]" are "not entitled to be grouped together").

Indeed, the Supreme Court has conclusively rejected Plaintiffs' proportional representation theory and made clear that the Fourteenth Amendment does not guarantee a geographic area a number of legislative seats in proportion to its total population. In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court upheld a deviation of *16.4%* even though the lower court had conclusively found that the plan discriminated against Northern Virginia by systematically underpopulating districts in the Tidewater region.

The Supreme Court reached a similar result in *Burns*, where it held that underrepresentation and overpopulation, measured in terms of total population, visits no cognizable harm on a geographic region if voters within that region are not substantially disfavored as measured by citizen population of registered voters. In *Burns*, Hawaii populated districts based on registered voters rather than total population. *See* 384 U.S. at 90–91. Thus, even though Oahu had 79% of Hawaii's total population, it received only 71% of the seats in the Hawaii House—which translated into *three* fewer seats than it would have received on a strict proportional representation. *See id.* The Supreme Court nonetheless upheld Hawaii's approach and its use of registered voters as the basis for apportionment against an equal-population challenge. *See id.* at 90–98; *cf. LULAC*, 548 U.S. at 436 ("We proceed now to the totality of the

circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of *the citizen voting age population*." (emphasis added)).

In all events, even if Plaintiffs' proportional representation theory were not foreclosed, it still would fail because, even in terms of total population, New York City has *greater* representation in the state legislature than its population warrants. New York City has 42.2% of the State's population. *See* New York Quick Facts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/36000.html. The Assembly Plan has 150 districts, and the Senate Plan has 63 districts, for a total of 213 legislative seats. *See* 2012 District Maps, http://www.latfor.state.ny.us/maps/. On a strict proportional representation based on total population, New York City would receive 42.2% of the legislative seats, or 89.886 total seats. But the Assembly Plan underpopulates nearly all of the New York City districts. *See id.* Thus, the Assembly Plan and the Senate Plan apportion 91 of the 213 seats to New York City—which is more than *one whole seat* and 0.5% *more* than its portion of statewide population. These facts belie any contention that the Senate Plan harmed New York City voters. *See, e.g.*, *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) ("It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house.").

Moreover, even focusing on the Senate in isolation, New York City's 42.2% population share corresponds to 26.586 senators, and the Senate Plan places 26 districts in New York City. *See* 2012 District Maps, http://www.latfor.state.ny.us/maps/. This 0.586 difference is smaller than the three-seat deviation upheld in *Burns*—so, *a fortiori*, it does not have any cognizable

effect on New York City voters. *See Burns*, 384 U.S. at 90–98; *Rodriguez*, 308 F. Supp. 2d at 370 (rejecting equal-population claim where "the overall effect of the deviation is only one seat (actually, two-thirds of a seat) in a 62-seat Senate").

The overrepresentation of New York City is even more pronounced when measured by CVAP. The State's total CVAP is 13,004,820, and New York City's CVAP is 4,969,460. *See* Ex. E. New York City's population therefore has 38.2% of the statewide CVAP. *See id.* On a strictly proportional CVAP representation, New York City would receive 81.366 of the 213 seats in the Legislature, and 24.066 of the 63 Senate districts. *See id.* Yet the Assembly Plan and the Senate Plan award New York City *nearly ten whole seats more* (91 total) than its CVAP would support—and the Senate Plan itself awards New York City just under *two whole extra districts* (26 total). *See* 2012 District Maps, http://www.latfor.state.ny.us/maps/.

Finally, Plaintiffs' suggestion that the placement of a Senate district in the Hudson Valley (rather than adding a 27th seat in New York City) does not fairly reflect the State's population growth trend (*see, e.g.*, Breitbart Prop. Compl. ¶ 38; Drayton Am. Compl. ¶ 105; Lee Am. Compl. ¶ 103) is fundamentally flawed and certainly provides no rational basis for distinguishing *Rodriguez*. Plaintiffs correctly allege that New York City had 2.06% population growth over the last decade, but that was *lower* than the statewide population growth of 2.12% that Plaintiffs also correctly note. *See* Breitbart Decl. ¶ 68; *see also* New York Quick Facts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/36000.html. By stark contrast, in the 1990s growth relevant to *Rodriguez*, New York City experienced *9.3%* population growth, which was significantly *higher* than the statewide population growth of *5.5%*. *See* Ex. D.

Plaintiffs also disregard that, as a matter of simple math, New York City's below-average population growth over the last decade must have been offset by above-average population

growth elsewhere in the State. And while Plaintiffs are correct that their "self-serving and defective" "upstate" region, which merges the Hudson Valley with western New York, *Rodriguez*, 308 F. Supp. 2d at 369, *as a whole* had lower relative population growth rate than New York City (*see* Breitbart Decl. ¶¶ 70–73; Beveridge Decl. ¶¶ 65–69), they ignore that the population growth in the area where the new Senate district was actually *placed* far *exceeded* New York City's below-average population growth. The Hudson Valley experienced 5% population growth, and the five counties contained in the new Senate district experienced 3.36% population growth. *See* Ex. D; *see* New York Quick Facts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/36000.html. Thus, even on Plaintiffs' theory, the Legislature acted appropriately when it placed the 63rd district in the area of the State with the largest population growth.

C. The Senate Plan Promotes Traditional Redistricting Criteria And Does Not Reflect An Improper Purpose

Because Plaintiffs have failed to establish that the Senate Plan dilutes the voting strength of *any* voter, Plaintiffs cannot possibly prevail on their equal-population claim, and the Court should therefore deny their request for a preliminary injunction on this basis alone. *See supra* Parts II.A–B.

Moreover, even if they had established effect, this would not open up an inquiry into the Legislature's purpose. Even where, unlike here, the maximum deviation in a redistricting plan is *over* ten percent, the only relevant inquiry is the objective one of whether the population deviations "may *reasonably be said* to advance a rational state policy," not a subjective one into individual legislators' motivations. *Brown*, 462 U.S. at 843 (quoting *Mahan*, 410 U.S. at 328 (emphasis added)). And "[p]roving the motivation behind official action is often a problematic undertaking," *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), and "is often an unsatisfactory

venture" because "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983).[9]

But even if the Court were to engage in such an inquiry, it still should reject Plaintiffs' equal-population claim and request for a preliminary injunction because Plaintiffs have failed to prove that the presumptively constitutional minor deviation in the Senate Plan "result[ed] *solely* from an unconstitutional or irrational state purpose." *Rodriguez*, 308 F. Supp. 2d at 366 (emphasis added). To the contrary, the legislative record amply establishes that the Legislature adhered to "other state policies recognized by the Supreme Court to be appropriate reasons for deviations," *see id.*, and conclusively belies Plaintiffs' allegations of improper purpose.

The Legislature's clear pursuit of traditional principles would suffice to validate the Senate Plan even if it has deviations *greater* than 10% and required justification by the State. Plaintiffs therefore cannot succeed here, where the deviations are *less than* 10% and the burden in on Plaintiffs to show the *absence* of any pursuit of these policies. *See supra* Part I.A.

1. The Senate Plan Adheres To Legitimate And Traditional State Policies, And Any Alleged Political Purpose Is Irrelevant

The Senate Plan adhered to at least four "other state policies recognized by the Supreme Court to be appropriate reasons for deviations," any one of which is sufficient to defeat Plaintiffs' one-person, one-vote claim. *Rodriguez*, 308 F. Supp. 2d at 366.

[9] *See also Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.").

First, the Legislature adopted the Senate Plan to prevent the further "dilution of the weight of a citizen's vote" in the "upstate" region due to the higher CVAP levels in those districts as compared to New York City districts. *Reynolds*, 377 U.S. at 555; *see also supra* Part II.B. Indeed, as measured by CVAP, even the Senate Plan gives New York City nearly *two whole districts* more than its population would warrant on strict proportional equality. Plaintiffs' proposed alternatives exacerbate this "upstate" dilution by systematically overweighting New York City votes even further. *See* Part II.B. The Legislature thus acted with a *constitutional* purpose, not an "unconstitutional or irrational state purpose," when it adopted the Senate Plan. *Rodriguez*, 308 F. Supp. 2d at 366.

Second, the Legislature also acted with the proper purpose of offsetting (although it failed to eliminate) the Assembly Plan's disproportionate representation in favor of New York City. It is axiomatic that "apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house." *Reynolds*, 377 U.S. at 577; *see also Maryland Comm. for Fair Representation*, 377 U.S. at 673 ("It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house."). The Assembly Plan effects such inequities because it underpopulates nearly every New York City district—and, even when combined, the Assembly Plan and the Senate Plan still award New York City approximately *one whole seat* more than its total population would warrant on strict proportional representation and *nearly ten whole seats* more than its CVAP would support. *See supra* Part II.B.

The Legislature thus was faced with a choice whether to round the 26.586 Senate districts New York City would receive on a proportional total population measure up to 27 or down to 26.

Rounding up would have exacerbated the existing inequalities and disproportionate favoring of New York City. Rounding down partly alleviated these inequalities and therefore was the rational, sensible legislative decision.

Third, as in 2002, the Legislature consistently pursued the valid state purpose of "preserving the cores of prior districts." *Karcher*, 462 U.S. at 740; *see Rodriguez*, 308 F. Supp. 2d at 363, 370. Mr. Breitbart and Mr. Beveridge concede that, in the Senate Plan, "the average district takes 77.24% of its population from a single preexisting (2002 enactment) district," while in the Breitbart Plan, the average district takes only "69.46% of its population from a single pre-existing (2002 enactment) district." Breitbart Decl. ¶ 54; Beveridge Decl. ¶ 59. As the three-judge court held in *Rodriguez*, the Legislature's adherence to this policy defeats Plaintiffs' equal-population claim. *See* 308 F. Supp. 2d at 363, 370.[10]

Fourth, again as in 2002, the Legislature implemented the valid state policy of "avoiding contests between incumbent [r]epresentatives." *Karcher*, 462 U.S. at 740; *see Rodriguez*, 308 F. Supp. 2d at 363, 370. The Senate Plan pairs only two incumbents in the same district, while the New York City-only Unity Plan pairs four incumbents and the Common Cause Plan pairs eighteen incumbents. *See* Ex. F; Breitbart Decl. ¶ 49; Beveridge Decl. ¶ 54. Plaintiffs attempt to reduce their incumbent pairings in their post hoc Breitbart Plan—but that Plan *still* pairs eight incumbents, including four incumbent Republicans. *See* Ex. F. Among those four Republican incumbents is Senate Majority Leader Skelos, whom the Legislature rationally and constitutionally opted not to place in a district with another incumbent senator. *See id.*; *see also Rodriguez*, 308 F. Supp. 2d at 370.

[10] Plaintiffs attempt to rebut this showing with the nonsensical contention that the Senate Plan's new district "*least preserves* the core of any existing district." Breitbart Decl. ¶ 61 (emphasis in original); Beveridge Decl. ¶ 66. But it makes no sense to refer to a new district as preserving the core of an "existing district" because it necessarily has no predecessor district.

The Legislature's pursuit of even one of these legitimate state policies defeats Plaintiffs' equal-population challenge to the presumptively constitutional Senate Plan. *See Rodriguez*, 308 F. Supp. 2d at 366. Accordingly, Plaintiffs' allegation that the Legislature acted with a political purpose (*see* Breitbart Prop. Compl. ¶ 48, Lee Letter at 2-3) is completely irrelevant. Indeed, the *Rodriguez* court rejected an identical one-person, one-vote claim ten years ago and was summarily affirmed by the Supreme Court even though "politics surely played a role in redistricting in New York in 2002—as it does in most every redistricting." 308 F. Supp. 2d at 353.

Plaintiffs' own cited authority, *Larios*, does not hold otherwise because there "the record evidence squarely forecloses the idea that any . . . legitimate reasons could account for the deviations" and the court expressly reserved the question of "whether or when partisan advantage alone may justify deviations in population." *Larios*, 300 F. Supp. 2d at 1349–50, 1352. And it is difficult to imagine how a political purpose could turn a presumptively constitutional minor deviation into a constitutional violation because courts *presume* that legislatures act with a political purpose. *See, e.g.*, *Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment."). Thus, if the Court were to find that the compelling policy of avoiding dilution of upstate votes was pursued by the Senate because a disproportionate number of Republicans reside upstate, this would provide no warrant for the Court to overturn that legitimate policy and penalize upstate voters (Republican and Democratic) by further diluting their votes, simply because it was "shocked, shocked" that political calculations had seeped into the pristine redistricting process.

Plaintiffs' political discrimination theory, moreover, rests on a nonsensical construction of the evidence. In the first place, Plaintiffs do not attempt to harmonize their political purpose

allegation with the fact that the Senate Plan overpopulates Republican-leaning Long Island even on Plaintiffs' preferred measure of total population and overpopulates upstate New York as measured by CVAP. *See* 2012 District Maps, http://www.latfor.state.ny.us/maps/; *see also supra* Part I.B.

Plaintiffs rest their political purpose allegations on a series of memoranda written by Mark Burgeson in 2001 regarding the Legislature's 2002 redistricting. *See* Documents in *Cohen v. Cuomo* (DE 288-1). Plaintiffs and their allies contend that these memoranda took the position that a 63-seat Senate would be politically disadvantageous to the Senate Majority and thus encouraged the adoption of a 62-seat Senate. *See id.* In 2002, the Legislature embraced these memoranda's supposed advice and adopted a 62-seat plan. Yet the *Rodriguez* court reviewed the memoranda and found them insufficient to prove improper political motive. Even "[p]utting aside the plaintiffs' questionable assumption that Burgeson's motives are a proxy for those of the Legislature," the *Rodriguez* court reached this conclusion because the memoranda "reveal[] many permissible redistricting considerations," including "preserving the cores of existing districts [and] desiring not to pit incumbents against one another." 308 F. Supp. 2d at 367. If these 2001 memoranda did not prove a constitutional violation in 2002 when the Legislature *embraced* the recommendation for a 62-seat Senate, they cannot possibly evince such a violation in 2012 when the Legislature *contradicted* that recommendation and exercised its discretion to apportion 63 Senate seats instead of 62.

In any event, Plaintiffs' use of these memoranda in this case is a complete *non sequitur*. Even though Plaintiffs assert that the memoranda established that a 63-seat Senate was politically *disadvantageous* in 2002, they ask the Court to infer, based on the memoranda alone, that a 63-seat Senate was politically *advantageous* in 2012 and that this conclusively establishes

improper political purpose. Plaintiffs simply cannot have it both ways: the memoranda establish that a 63-seat Senate is *either* bad *or* good for the Senate Majority, but not both.

Plaintiffs attempt to distinguish this case by saying that a 63-seat Senate is *now* advantageous to the Senate Majority in 2012 because population growth patterns now allow the 63rd seat to be placed in Republican-leaning "upstate." *See, e.g.*, Breitbart Prop. Compl. ¶ 38; Lee Letter at 2–3. Plaintiffs' evolving position rests on a misreading of the memoranda and a misunderstanding of the political dynamics of redistricting. The memoranda actually concluded that a 63-seat Senate would be politically *favorable* to the Senate Majority, and stated that the "only reason to go to 63 is to strengthen the Long Island delegation by combining politically undesirable areas in the extra district" in Queens and Nassau Counties. 7/20/01 Breitbart Memo. at 1 (emphasis in original) (DE 288-1 at 47). Plaintiffs overlook that the Legislature could have followed that politically advantageous course this year and placed an additional district downstate to strengthen the Republican-leaning Long Island districts. And Plaintiffs also offer no explanation as to why the Legislature could not have had the best of both worlds, adopted a 64-seat Senate that Plaintiffs' own analysis justifies, and placed one extra district in friendly territory "upstate" and one extra district to combine politically undesirable areas in and around New York City.

Plaintiffs' follow-on allegation that the timing of LATFOR's announcement of its 63-seat Senate Plan evinces political motivation (*see, e.g.*, Ramos Memo. at 4–10) likewise fails. By the time of this announcement in January 2012, the size of the Senate already had been extensively discussed in LATFOR public hearings across the State—including by Mr. Breitbart. *See* 9/22/11 Breitbart Testimony at 7 (DE 288-2 at 58). And after LATFOR's announcement, the 63-seat Senate Plan was the subject of another round of public hearings throughout the State, and

Common Cause had plenty of time to propose its 63-seat alternative plan before the Legislature acted. *See* LATFOR Public Hearing Schedule—Second Round, *available at* http://www.latfor.state.ny.us/hearings/docs/20120125hrg_schedule.pdf.

2. Plaintiffs' Allegations Of Racial Purpose Do Not Salvage Their One-Person, One-Vote Claim

Plaintiffs' final accusation is that that the Senate Plan reflects a racially discriminatory purpose and improperly dilutes the votes of New York City minority voters. *See* 4/20/12 Hr'g tr. at 6–8, 33; *see also* Breitbart Prop. Compl. ¶ 58; Drayton Am. Compl. ¶¶ 110, 114, 116, 123; Lee Am. Compl. ¶¶ 114; Ramos Am. Compl. ¶¶ 49–50, 77. But this accusation fails to distinguish this case from *Rodriguez*, is demonstrably false and, in all events, cannot rationally be adjudicated on a preliminary basis.

First, Plaintiffs' contention that racial discrimination was not advanced as a basis for the one-person, one-vote claim in *Rodriguez* (*see* 4/20/12 Hr'g tr. at 6–8) is wrong. The *Rodriguez* plaintiffs expressly pled racial discrimination in both of their amended complaints. *See Rodriguez* Am. Compl. ¶ 60 (DE 320-10); *Rodriguez* Joint and Consolidated Am. Compl. ¶ 112 (DE 336-7). The three-judge court also noted that "the plaintiffs suggest that racial bias may have animated the plan because all fourteen majority-minority Senate districts were overpopulated and 'downstate,' where most of the State's minority population lives." *Rodriguez*, 308 F. Supp. 2d at 366. And notwithstanding these allegations, the *Rodriguez* court rejected the plaintiffs' one-person, one-vote claim. *See id.* at 366–71.

Second, Plaintiffs' racial discrimination accusation changes precisely *nothing* in the conclusion above that their one-person, one-vote claim fails under *Rodriguez*. Plaintiffs still bear the burden of establishing that the Senate Plan's presumptively constitutional minor deviation "result[ed] *solely* from an unconstitutional or irrational state purpose." *Rodriguez*, 308 F. Supp.

2d at 366 (emphasis added). Yet, as demonstrated, the Senate Plan results at least in part from *legitimate* "state policies recognized by the Supreme Court to be appropriate reasons for deviations," such as offsetting the dilution of upstate citizens' votes, preserving the cores of existing districts, and limiting incumbent pairings. *See supra* Part II.C.1. Thus, like Plaintiffs' allegations of a political and regional discrimination, Plaintiffs' accusation of a racially discriminatory purpose is irrelevant to their one-person, one-vote claim and falls far short of sustaining their heavy burden in challenging the Senate Plan.

Accordingly, Plaintiffs' one-person, one-vote claims fail for the same reasons regardless of the extent to which they claim that the Legislature's allegedly improper motive was racial as opposed to political. Moreover, to the extent that Plaintiffs seek to distinguish allegations of racial purpose from allegations of political purpose, they fail to show that the challenged action—*i.e.*, the addition of the new Senate district to a part of the State that is both whiter and more Republican than allegedly disadvantaged New York City—is attributable to "race *rather than* politics." *Easley*, 532 U.S. at 243 (emphasis added). Because "race and political affiliation" often "are highly correlated," plaintiffs alleging a racially discriminatory purpose in redistricting cases must decouple the two and establish that racial purpose, rather than political purpose, caused the discriminatory effect. *Id.* at 242; *see id.* at 258 (reversing lower court finding of discrimination as "clearly erroneous" where plaintiff failed to demonstrate that racial purpose, rather than political purpose, caused the alleged discriminatory effect). Here, the correlation between race and politics is quite clear, since allegedly disadvantaged New York City is both less white and more Democratic than the allegedly advantaged "upstate." Plaintiffs, however, not only fail to offer *any* explanation or evidence allowing this Court to disentangle the alleged racial purpose from the alleged political purpose, but do not even *attempt* to do so. To

the contrary, Plaintiffs themselves allege that the Legislature acted with multiple purposes, such as "regional" and political bias in addition to the alleged racial discrimination. *See, e.g.*, Breitbart Prop. Compl. ¶¶ 32, 55; Drayton Am. Compl. ¶¶ 105, 109; Lee Am. Compl. ¶¶ 109, 114; Ramos Am. Compl. ¶¶ 42, 49–51.

Plaintiffs' embrace of the notion that the Legislature acted with other, non-racial purposes is fatal to Plaintiffs' attempt to use their allegations of racial purpose under as a way around *Rodriguez*. Regardless of the illegitimate purposes alleged by Plaintiffs, this case is indistinguishable from *Rodriguez* because Plaintiffs cannot meet their heavy burden of showing that the allegedly illegitimate purposes were *solely* responsible for the minor deviations and that legitimate purposes did not play *any* role in the challenged redistricting plan.

Third, even if the allegation of racial purpose were relevant to the one-person, one-vote claim, Plaintiffs make no cognizable showing of discriminatory effect or result from which one could reasonably infer discriminatory purpose. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (a plaintiff that fails to prove discriminatory effect cannot satisfy the "'inordinately difficult'" burden of proving discriminatory purpose (quoting S. Rep. No. 97-417, at 36 (1982)); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("[P]laintiffs must show that they have been injured as a result" of the allegedly "intentional discrimination."). Initially, the Senate Plan has no adverse effect on the *weight* of the *votes* of minorities. Plaintiffs' witnesses embrace the use of CVAP figures to measure minority voting strength (*see* Breitbart Decl. ¶ 77; Beveridge Decl. ¶ 81)—and those figures demonstrate that the Senate Plan overvalues New York City minority votes even more heavily than it overvalues New York City votes generally. According to CVAP figures, the 14 New York City minority districts in the Senate Plan are underpopulated by 12%, while the upstate districts are overpopulated by 5.49%. *See* Ex. I. With

respect to registered voters, the average weight of a New York City minority citizen's vote is approximately 20% more than the average weight of an upstate citizen's vote. *See id.* And with respect to voter turnout in the most recent Presidential (2008) and State Senate (2010) elections, the average weight of a New York City minority citizen's vote is worth approximately *31%* and *76%* more than an upstate citizen's vote. *See id.* Thus, far from discriminating against New York City minority voters, "[t]he practical effect of the Senate Plan" is to greatly enhance the value of their votes. *Rodriguez*, 308 F. Supp. 2d at 369. And, of course, the Legislature was not required to *aggravate* this disparity between New York City minority voters and upstate voters in the name of achieving voter equality, *see Reynolds*, 377 U.S. at 560, as Plaintiffs' proposed plans do.[11]

Nor does the Plan have an adverse effect on the number of black-majority or Hispanic-majority districts. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 22 (2009) (plurality op.) (to establish discriminatory result under Section 2, a plaintiff must establish that the legislature failed to create an additional district where minorities are a numerical majority); *DeGrandy*, 512 U.S. at 1008 (discriminatory result under Section 2 "requires the possibility of creating *more* than the existing number of reasonably compact" minority districts (emphasis added)). Even that showing, however, is not alone sufficient because the *Rodriguez* court rejected the plaintiffs' racial bias allegation (and their claim under Section 2 of the Voting Rights Act) even though they did, in fact, propose a plan that created one more Hispanic-majority district in the Bronx than the

[11] As measured by CVAP, the Breitbart Plan underpopulates its 15 New York City minority districts by 14.02%, overpopulates upstate districts by 9%, and inflates the average weight of a New York City minority citizen's vote to between 19% and 88% more than the average weight of an upstate citizen's vote. *See* Ex. K. The Common Cause Plan underpopulates its 14 New York City minority districts by 14.61%, overpopulates upstate districts by 9.54%, and increases the average weight of a New York City minority citizen's vote to between 21% and 92% more than the average weight of an upstate citizen's vote. *See* Ex. L.

2002 Senate Plan. *See* 308 F. Supp. 2d at 366, 404–37; *see also DeGrandy*, 512 U.S. at 1017 ("Failure to maximize" the number of majority-minority districts "cannot be the measure" of a vote dilution claim).

Here, Plaintiffs failed to make even that threshold showing because, prior to the Legislature's adoption of the Senate Plan and this litigation, *no* party proposed a plan that added a majority-black or majority-Hispanic district to the minority districts in the Senate Plan. The benchmark 2002 Senate Plan contained 8 performing black districts and 6 performing Hispanic districts in New York City. *See Rodriguez*, 308 F. Supp. 2d at 366; Senate's Department of Justice Submission, *available at* http://www.latfor.state.ny.us/justice2012/?sec=sendoj2012. The Senate Plan retained those 14 performing districts and also added an Asian-majority district in Queens. *See* Ex. G; *see also* 2012 Senate District Maps, *available at* http://www.latfor.state.ny.us/maps/?sec=2012s.

Neither the Common Cause Plan nor the New York City-only Unity Plan (both proposed prior to the Legislature's enactment of the Senate Plan) created an additional black-majority or Hispanic-majority district. Those plans therefore cannot establish that the Senate Plan had a dilutive effect on minority voters in New York City. *See, e.g.*, *Bartlett*, 556 U.S. at 22; *DeGrandy*, 512 U.S. at 1008; *Rodriguez*, 308 F. Supp. 2d at 366, 404–37.

After the Senate Majority Defendants' counsel made this dispositive legal point at the April 20 hearing (*see* Apr. 20 Hr'g tr. at 77), Plaintiffs cobbled together the Breitbart Plan which, they allege, creates one more Hispanic-majority seat in the Bronx than the Senate Plan. *See* Breitbart Decl. ¶ 82. But the belated Breitbart Plan is of no moment in supporting Plaintiffs' discriminatory purpose allegations because it says nothing about the purpose of the Legislature

when it *enacted* its Plan. *See, e.g.*, *Vera*, 517 U.S. at 977 (an enacted plan need not "defeat rival [plans] designed by plaintiffs' experts in endless 'beauty contests'").

Indeed, the Breitbart Plan does not even suggest that the Legislature's Plan has a discriminatory effect because it is quite doubtful that it creates more districts where Hispanics could realistically elect their preferred candidate. *DeGrandy*, 512 U.S. at 1008. In their zeal to achieve their preordained goal of creating an "extra" Hispanic majority district, Plaintiffs are forced to lower the Hispanic percentages in the adjacent districts to the point where they endanger those districts' ability to elect an Hispanic-preferred candidate. *See Rodriguez*, 308 F. Supp. 2d at 431 (recognizing "doubts that a 55% Hispanic-majority district would be an effective majority-Hispanic district"). At a minimum, Plaintiffs provide no evidence that the reduction in VAP and CVAP from the benchmark districts does not diminish Hispanic voters' "ability to elect," which means they would not have been able to *prove* that these districts do not retrogress under Section 5. 42 U.S.C. § 1973c(c). Consequently, the Breitbart Plan does not establish discriminatory effect, and the Legislature would have had an obvious nondiscriminatory reason for rejecting that plan had it been introduced in the legislative process—*i.e.*, its noncompliance with Section 5's burden to prove nonretrogression.

In addition, as in 2002, the Senate Plan already achieves "substantial proportionality of minority representation in the Bronx" and "[t]he fact that Hispanics, who already control three out of the five districts in the Bronx, enjoy more-than-proportionate representation in that area is strong evidence that the . . . Senate Plan does not . . . dilute their voting strength." *Rodriguez*, 308 F. Supp. 2d at 353, 429; *see also DeGrandy*, 512 U.S. at 1024. Indeed, Hispanics control 60% the Bronx seats (3 of 5) even though they constitute only 51.2% of the Bronx VAP and 46% of the Bronx CVAP. *See* Ex. E; Ex. G. Hispanics also control 23% New York City seats (6 of

26) under the Senate Plan in substantial proportion of their population shares of 26.7% of New York City VAP and 22.5% of New York City CVAP. *See* Ex. E, Ex. G.

Moreover, the Attorney General's decision to grant preclearance—while not legally precluding a private challenge—entailed a finding that the State carried its burden to prove the absence of "*any* discriminatory purpose" in the Senate Plan. 42 U.S.C. § 1973c(c) (emphasis added). This decision is hardly surprising since it is undisputed that (1) all upstate residents, whether blacks in Buffalo and Rochester, or whites elsewhere, are underpopulated; (2) all New York City districts—white, Latino or black—were overpopulated; and (3) no plan introduced into the Legislature was able to use placement of the 63rd seat in the City to create an additional black or Hispanic-majority district. Since the only possible differential population treatment was based on "region," rather than race or ethnicity, and since the placement of the 63rd seat upstate could not rationally have been motivated by a desire to deny minorities an "extra" seat where they controlled selection of a candidate of choice (since no such alternative was presented to the Legislature), the Justice Department was compelled to recognize the virtual incoherence of Plaintiffs' inflammatory invocation of race.

In all events, this complicated question on the feasibility and viability of an extra Hispanic district cannot possibly be resolved in the short time remaining, as the Court recognized when it deferred consideration of Plaintiffs' Section 2 and Equal Protection challenges to the "failure" to create such a district in the Bronx (and a minority district on Long Island). *See* 4/18/12 Hr'g tr. at 56–60. More generally, this vividly exemplifies why it is not possible and quite counter-productive to try to resolve Plaintiffs' one-person, one-vote claim prior to the elections. Since Plaintiffs' only purported distinction of *Rodriguez* is their claim that a 27th seat was denied to New York City for racial reasons, and since that cannot be intelligibly resolved

absent assessment of whether an extra minority district is feasible, and since that question of feasibility cannot be resolved absent the fact-intensive Section 2 inquiry that this Court has already determined is impractical, Plaintiffs' racial purpose claim cannot be resolved in the one-person, one-vote context, either. It simply makes no sense to allow Plaintiffs to sneak in through the back door of their one-person, one-vote claim a racial purpose allegation regarding a purported failure to create a Bronx district that this Court has properly deferred on Plaintiffs' Section 2 claims.

Not only is it impractical to resolve these issues now, but the Court is going to return to them post-election anyway. It makes especially little sense to resolve them hastily now, in the context of the one-person, one-vote claim, and to set up the possibility of a conflicting resolution after a full hearing in the context of the Section 2 and race-based Equal Protection claims.

Finally, Plaintiffs have not even properly pled racial purpose allegations in their operative complaints. To the extent that Plaintiffs' complaints even touch on race-based allegations, they allege only that the Senate Plan "intentionally discriminates" against minority voters. Drayton Am. Compl. ¶ 109; Lee Am. Compl. ¶ 114. Yet that conclusory allegation at most pleads a discriminatory result, not a discriminatory result *caused by* a racial purpose—and it is Plaintiffs' burden to plead and prove that "the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (discriminatory effect "must ultimately be traced to a racially discriminatory purpose").

Indeed, Plaintiffs' own theory is that the Senate Plan discriminates against *all* New York City voters and in *favor* of all upstate voters. *See, e.g.*, Breitbart Prop. Compl. ¶ 58. Thus,

according to Plaintiffs, the Senate Plan treats New York City *minority* residents the same way it treats New York City *white* residents, and upstate *minority* residents the same as upstate *white* residents. *See id.* (alleging that, under the Senate Plan, "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" (emphasis added)). Therefore, since Plaintiffs allege that the relevant distinction drawn by the Legislature is between New York City and upstate, not any racial or ethnic classification, the most they are alleging is that this classification has a discriminatory *result*—it does not support a claim of discriminatory purpose.

Moreover, the fact that Plaintiffs' allegations of other, non-racial purposes, such as regionalism and politics, are at least equally "consistent with" the Legislature's action forecloses Plaintiffs from pleading even a "plausible" claim of racial purpose. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009). A three-judge court in Michigan recently applied the *Iqbal* standard to dismiss a one-person, one-vote claim charging racially discriminatory purpose because the plaintiffs' central allegation that the plan "pairs five of Detroit's minority incumbent representatives against one another, while it pairs only two of the state's ninety-six Caucasian incumbents against each other" was equally consistent with political and racial purposes. *See NAACP v. Snyder*, No. 2:11-cv-15385 at 20 (E.D. Mich. Apr. 6, 2012) (Ex. M). Here, of course, it is far *more* likely on Plaintiffs' pleadings that the Legislature acted with a political purpose to disadvantage Democratic-leaning New York City than that it acted with a racial purpose in a Plan that visits no harm on, and in fact overweights, minority voting strength.

CONCLUSION

For the foregoing reasons, Plaintiffs' equal-population claims fail, and the Court should deny Plaintiffs' request for a preliminary injunction.

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Respectfully submitted,

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