UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARK A. FAVORS, HOWARD LEIB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SCHREIBER, and WEYMAN A. CAREY,

Plaintiffs,

and

DONNA KAY DRAYTON, EDWIN ELLIS, AIDA FORREST, GENE A. JOHNSON, JOY WOOLLEY, and SHELIA WRIGHT,

Plaintiff-Intervenors,

and

LINDA LEE, SHING CHOR CHUNG, JULIA YANG, JUNG HO HONG,

Plaintiff-Intervenors,

and

JUAN RAMOS, NICK CHAVARRIA, GRACIELA HEYMANN, SANDRA MARTINEZ, EDWIN ROLDAN, MANOLIN TIRADO,

Plaintiff-Intervenors,

and

LINDA ROSE, EVERET MILLS, ANTHONY HOFFMANN, KIM THOMPSON-WEREKOH, CARLOTTA BISHOP, CAROL RINZLER, GEORGE STAMATIADES, JOSEPHINE RODRIGUEZ, and SCOTT AUSTER,

Plaintiff-Intervenors,

v.

ANDREW M. CUOMO, as Governor of the State of New York, ROBERT J. DUFFY, as President of the Senate of the State of New York, DEAN G. SKELOS, as Majority Leader and President Pro Tempore of the Senate of the State of New York, SHELDON SILVER, as

Case No. 1:11-cv-05632 (DLI)(RR)(GEL)

ROSE INTERVENORS' MEMORANDUM ON OTHER PARTIES' PROPOSED MAPS

Speaker of the Assembly of the State of New York, JOHN L. SAMPSON, as Minority Leader of the Senate of the State of New York, BRIAN M. KOLB, as Minority Leader of the Assembly of the State of New York, the NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT ("LATFOR"), JOHN J. McENENY, as Member of LATFOR, ROBERT OAKS, as Member of LATFOR, ROMAN HEDGES, as Member of LATFOR, MICHAEL F. NOZZOLIO, as Member of LATFOR, MARTIN MALAVE DILAN, as Member of LATFOR, and WELQUIS R. LOPEZ, as Member of LATFOR,

Defendants.

I. INTRODUCTION

When a legislature fails to enact a redistricting plan and a federal court is "left with the unwelcome obligation of performing in the legislature's stead," the court acts *in place of* the legislature, but it is not supposed to act *like* a legislature. *Connor v. Finch*, 431 U.S. 407, 415 (1977). "[A] state legislature is . . . best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Id.* at 414-15. Thus, when a legislature conducts redistricting, it is allowed to make *policy* choices, such as choosing to protect incumbents, choosing to emphasize compactness, or adopting a plan aimed at achieving partisan ends. *See, e.g., id.* A court, by contrast, takes the legislature's prior policy choices as a given, and must respect them while fixing only *legal* flaws in a plan, such as districts of unequal population. *See, e.g.*, *White v. Weiser*, 412 U.S. 783, 795 (1973) ("[A] district court should . . . honor state policies in the context of congressional reapportionment."); *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (noting that in properly "reconciling the requirements of the Constitution with the goals of state political policy," "the district court's modifications of a state plan are limited to

those necessary to cure any constitutional or statutory defect"). Thus, "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not . . . 'intrude upon state policy any more than necessary.'" *Weiser*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

Unfortunately, nearly all of the plans submitted by other parties in this case ignore these basic principles. Rather than accepting "the legislative policies underlying the existing plan," *Abrams v. Johnson*, 521 U.S. 74, 79 (1997), as the Court must, they ask the Court to make new policy. The Common Cause, Drayton, and Ramos Plans, for example, reject the New York Legislature's longstanding policy of seeking to retain incumbent members of Congress, a policy the Legislature has carefully chosen both "to maintain relationships [Representatives] ha[ve] already developed with their constituents," and because of "the powerful role that seniority plays in the functioning of Congress." *Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997), *aff'd* 522 U.S. 801 (1997). The Skelos and Kolb Plans, meanwhile, would have the Court adopt partisan Republican policy goals, goals a Court has no place pursuing and that the Legislature has refused to adopt. *See, e.g.*, *Connor*, 431 U.S. at 415 (explaining that in adopting a redistricting plan, "the court's task . . . must be accomplished . . . in a manner 'free from any taint of arbitrariness or discrimination'") (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *Wyche v. Madison Parish Policy Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) ("[A] court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies.").

Ultimately, it is the Rose Intervenors' Plan ("Rose Plan") that best "reconcil[es] the requirements of the Constitution with the goals of state political policy," and that is the plan the Court should adopt. *Upham*, 456 U.S. at 43.[1]

[1] The Rose Intervenors do not object to the Silver Plan.

II. ANALYSIS OF PLANS

A. The Common Cause Plan

"When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan." *Abrams*, 521 U.S. at 79. Despite this clear requirement, the Common Cause Plan rejects the legislative policies underlying New York's existing plan and asks the Court to make its own policy choices and draw a congressional plan from scratch based on those choices. This blatant disregard for New York's legislative policies not only precludes the Court from adopting the Plan as a whole, but it also prevents the Court from deriving any useful guidance from the Plan at all.

For example, the Common Cause Plan was intentionally and explicitly drawn by an "incumbent blind process,"[2] rejecting New York's longstanding legislative policy of seeking to preserve incumbent-constituent relationships and retain the seniority benefits incumbency brings to New York. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 352 (S.D.N.Y. 2004) (redistricting plan drawn in 2002 "reflects traditional districting principles including . . . preventing contests between incumbents"); *Diaz*, 978 F. Supp. at 122-23 (with the exception of race, "incumbency took priority over all other traditional criteria" in the legislature's drawing of congressional districts). This indifference to a key legislative policy underlying the existing plan resulted in nearly two-thirds of New York's incumbent members of Congress being drawn into districts with other incumbents in the Common Cause Plan. Some incumbent pairing is likely inevitable given New York's loss of two districts, but the Common Cause Plan pairs incumbents in 10 of 27 districts—five times the number of districts New York has lost. *See* Exhibit 1 (Incumbent Location in Proposed Plans). Under this Plan, New York would immediately lose more than one-third of its congressional delegation, and with it, the benefits of incumbency long recognized by the Legislature and New York's federal courts. *See Diaz*, 978 F. Supp. at 123 (incumbents provide constituents with representatives familiar with their concerns and seniority provides representatives with additional political power that can be used to help constituents). The

[2] Testimony of Common Cause to LATFOR (February 7, 2012), Mapping Blog for Citizens Redistricting Committee, http://www.citizenredistrictny.org/category/blog/.

Legislature could legitimately decide to adopt such a dramatic break from past practice; a court may not. *See, e.g.*, *Weiser*, 412 U.S. at 795 ("In fashioning a reapportionment plan or in choosing among plans, a district court should not . . . 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb*, 403 U.S. at 160).

Similarly, although New York has a longstanding legislative policy of seeking to preserve "the cores of existing districts," *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) ("*PRLDEF*"), the Common Cause Plan makes no effort to do so. Even a quick glance at the Plan reveals its indifference to this goal.[3] Under the current congressional plan, for example, northeast New York includes three districts (Districts 20, 23, and 24), but the Common Cause Plan ignores the legislative policy underlying these districts and transforms northeast New York into one giant district.[4] Similarly, on Long Island, existing Districts 2 and 3 divide the island along primarily north-south boundaries, but the Common Cause Plan divides them along an east-west line, disrupting longstanding patterns of representation. Meanwhile, the Plan splits current District 17 into four different districts, leaving only a small portion of the prior district's residents together. *See* Exhibit 2 (Common Cause Plan Core Constituency Report). The Plan also tears the core of District 18 in half, putting 319,670 residents into new District 16 and 355,155 into new District 17. *Id.*

Statistics confirm this obvious pattern. Fewer than half of the congressional districts in the Common Cause Plan—thirteen total—retain over 60 percent of the population from a single prior district. Ex. 2. By contrast, the Rose Plan has 21 districts that retain over 60 percent of the population from a prior district. *See* Dkt. # 141-3. Moreover, the Common Clause Plan has 11 districts that retain less than half of the population of any previous district. Ex. 2. In other words, more than one-third of the districts in the Plan are comprised mostly of populations from multiple previous districts. Thus, here again, the Common Cause Plan asks the Court to

[3] Common Cause Reform Plan NY State Congress, Citizens Redistricting Committee, http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/CCNY%20CONGRESSIONAL%20GUIDE%20--FEB%202012%20--%20FULLY%20REVISED.PDF.
[4] New York Congressional Districts 110th Congress, NationAtlas.gov, http://www.nationalatlas.gov/printable/images/pdf/congdist/pagecgd110_ny.pdf.

disregard the legislative policies underlying the current plan. Such a choice exceeds the proper role of the Court. *See Abrams*, 521 U.S. at 79; *Upham*, 456 U.S. at 43 ("An appropriate reconciliation of [the requirements of the Constitution with the goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect.").

Put simply, by any measure the Common Cause Plan thoroughly rejects "the legislative policies underlying the existing plan." *Abrams*, 521 U.S. at 79. As a proposal to the Legislature, the Plan was free to do that, and the Legislature could have decided to change its past practices and adopt the Plan. But as a proposal to this Court, the Plan is unacceptable because "a district court should . . . honor state policies in the context of congressional reapportionment," *Weiser*, 412 U.S. at 795, and unlike a legislature, has no authority "to compromise . . . state apportionment policies in the people's name," *Connor*, 431 U.S. at 414-15. The Plan may be motivated by high-minded theories, but they are different from the theories the Legislature has chosen to pursue. This departure from existing legislative policy is so profound that the Plan suggests few boundaries, even in isolated areas, that the Court could lawfully adopt.

The Common Cause Plan suffers from another, equally fundamental flaw: it is unconstitutional. Article I, Section 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The Supreme Court has established that the "'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality" in the number of residents in each congressional district. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). As shown by the Rose Intervenors and every other party's proposed plans, it is eminently "practicable" to draw congressional districts in New York that deviate from the ideal population by only one person. The Common Cause Plan, however, fails to meet this clear and easily achievable standard, with only 2 of its 27 districts within one person of the ideal population. *See* Exhibit 3 (Common Cause Plan Population Data). The Court thus cannot adopt the Common Cause Plan for this independent reason. *Cf. Chapman v. Meier*,

420 U.S. 1, 26 (1975) ("A court-ordered plan must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.").

The Common Cause Plan also fails to respect many traditional redistricting principles, such as preserving political subdivision boundaries. *See PRLDEF*, 796 F. Supp. at 687. For example, where current District 21 includes 4 complete counties (Albany, Schenectady, Schoharie, and Montgomery), the Common Cause Plan's corresponding District 20 includes only one whole county. The Plan also divides many communities of interest, contrary to longstanding New York policy. *See PRLDEF*, 796 F. Supp. at 687. Current District 2, for example, includes two large and growing African-American communities on Long Island in Huntington Station and Wyandach. The Common Cause Plan splits these communities, diluting their political influence. Current District 8 includes large Jewish communities in the west side of Manhattan, Borough Park, Brighton Beach, and Coney Island, but the Common Cause Plan splits these communities. North of New York City, current District 18 includes residents of White Plains, Scarsdale, New Rochelle, Rye, and Eastchester, and these residents comprise a community of interest because they share similar demographics and rely on a similar economy as commuters to New York. Under the Common Cause Plan, approximately 320,000 of these residents will become part of a district based in the Bronx that has a population with different demographics and economic interests. Ex. 2. The Rose Plan, by contrast, preserves all of these communities of interest.

In sum, the Court faces a great responsibility in adopting a reapportionment plan, and because it "lacks the political authoritativeness that the legislature can bring to the task," "the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly." *Connor*, 431 U.S. at 415. The Common Cause Plan is unworkable because it ignores this fundamental principle. Rather than accepting "the legislative policies underlying the existing plan," *Abrams*, 521 U.S. at 79, it asks the Court to make a power grab by unilaterally declaring a new redistricting policy for New York. Precedent forbids this approach. *See, e.g.*, *Weiser*, 412 U.S. at 795 ("In fashioning a reapportionment plan or in choosing among plans, a

district court should not . . . 'intrude upon state policy any more than necessary.'") (quoting *Whitcomb*, 403 U.S. at 160). And adopting such a break from past policy would be particularly inappropriate here, where the Common Cause Plan fails to abide by even the most basic legal requirement of redistricting, the one-person, one-vote mandate.

B. The Drayton, Ramos, and Lee Plans ("Unity Plans")

Like the Common Cause Plan, the Drayton Plan and its variants, the Ramos and Lee plans (together the "Unity Plans"), ignore the Legislature's longstanding policy choice to recognize the benefits of incumbency. Though the Drayton Plan proposes lines for only 16 districts, it manages to draw eight Democratic incumbent Representatives, with decades of experience and seniority in Congress, into districts with other incumbents. *See* Ex. 1. The Plan's authors never mention or attempt to explain this choice. The Legislature could choose to adopt such a stark break from past policy; the Court should not.

Moreover, though the Unity Plans' goal of ensuring a voice for minority communities is laudable, if the Court were to adopt any of the Unity Plans on that basis, the plans would likely be rejected by the U.S. Supreme Court, which has consistently invalidated plans drawn with race as the "predominant factor." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Unity Plans' drafters have made clear that: "The *primary purpose* of the Unity Plan was to address the collective voting strength of each of the protected minorities." Ramos Br. 5 (emphasis added); *see also* Drayton Br. 8 (explaining that Unity Plan "was created . . . *for the protected population groups* in New York City") (emphasis added). But when a redistricting plan is justified on such race-based grounds, the Supreme Court will subject it to strict scrutiny and will uphold the plan only if (1) there was a compelling interest in using race as the predominant factor and (2) the use of race was narrowly tailored to meet that interest. *Bush v. Vera*, 517 U.S. 952, 976 (1996). This requires showing, at a minimum, that without such a predominant focus, a violation of the Voting Rights Act would otherwise occur. *Shaw v. Hunt*, 517 U.S. 899, 914-16 (1996). But the Unity Plans' authors have not presented the evidence necessary to prove such a violation. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (listing preconditions for establishing a

violation of Section 2 of the Voting Rights Act). The failure to offer evidence on this issue makes the Unity Plans' adoption extraordinarily risky, as the Supreme Court has been extremely hostile to redistricting decisions based on race. *See, e.g.*, *Hunt*, 517 U.S. at 910-18; *Miller*, 515 U.S. at 922; *Bush*, 517 U.S. at 976-81.

Moreover, there is no need to pursue such a risky strategy to ensure that minority voting strength is undiluted. The Rose Plan, following traditional redistricting principles and legislative policies, actually creates more "majority-minority districts," i.e., those in which "a minority group composes a numerical, working majority of the voting-age population," *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009), than any of the Unity Plans. *Compare* Dkt. # 141-2 at 2 (showing that the Rose Plan creates three districts in which African Americans are a majority of the voting age population and two districts in which Hispanics are a majority of the voting age population); *with* Dkt. # 140 at 30 (showing that the Drayton Plan creates two districts in which African Americans are a majority of the voting age population and one district in which Hispanics are a majority of the voting age population); *and* Dkt. # 142-7 at 1 (showing that the Ramos Plan creates two districts in which African Americans are a majority of the voting age population and two districts in which Hispanics are a majority of the voting age population). In short, the Unity Plans aim at a good end but pursue it by the wrong means, a means unlikely to survive review in the Supreme Court if adopted here.

The Unity Plans also suffer from a number of other flaws. For one, the Plans split innumerable political subdivisions to achieve their race-based goals, e.g., the Drayton Plan's proposed District 17 alone would needlessly split Mount Pleasant, New Castle, New Rochelle, Eastchester, Bronxville, and the Town of Mamaroneck. It also utterly fails to preserve the core of prior District 17. The Unity Plans also ignore many important communities of interest, e.g., while current District 8 combines portions of Manhattan and Brooklyn that each have among the highest concentrations of Jewish residents of any congressional district in the country, the Unity Plans all divide the Manhattan portion of the district from the Brooklyn portion.

In short, the Unity Plans cannot be adopted because they thoroughly reject "the

legislative policies underlying the existing plan," *Abrams*, 521 U.S. at 79, they focus predominantly on race without demonstrating the compelling justification required for doing so, and they violate traditional redistricting criteria.

C. The Skelos Plan

The Skelos Plan is legally and practically inappropriate for adoption by the Court. Not only does it reflect nothing more than a partisan power grab, but it also risks violating federal law and compromises on a number of traditional redistricting criteria in the process.

1. The Skelos Plan Reflects a Partisan Grab for Power

The Skelos Plan, drafted and supported by the Republican Senate majority, is designed with one primary purpose: to favor Republicans. This sort of partisan policy goal is not what a court is supposed to pursue or endorse. *See, e.g.*, *Connor*, 431 U.S. at 415 ("[T]he court's task . . . must be accomplished . . . in a manner 'free from any taint of arbitrariness or discrimination.'") (quoting *Roman*, 377 U.S. at 710); *Wyche*, 635 F.2d at 1160 ("[A] court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies.").

The Rose Intervenors' expert affidavit, submitted by Dr. Stephen Ansolabehere, illuminates the extent to which the Skelos Plan is aimed at favoring the Republican Party. Dr. Ansolabehere applied partisan symmetry analysis and determined that, "[u]nder the Skelos plan," in an election where Democrats and Republicans "each win 50 percent of the vote," "the Republicans are expected to win 61 percent of seats . . . , for a pro-Republican bias of 11 points." Exhibit 4 ("Ansolabehere Aff.") ¶ 21. While "[s]mall deviations from" a 50-50 result "might be acceptable, . . . large deviations, such as the deviations in the Skelos . . . plan[], are viewed as violations of the basic principle of majority rule." *Id.* ¶ 23. Additionally, the Skelos Plan is drawn such that Republicans would win a majority of congressional seats even if they won as little as 46.8 percent of the statewide vote, while Democrats would have to win at least 53.2 percent of the vote before winning a majority of seats. *Id.* ¶ 22. In other words, the Skelos Plan is based on a principle of minority rule, in which the minority party in the State would win a majority of the power in a 50-50 election.

Additionally, Dr. Ansolabehere's analysis shows that the Skelos Plan would decrease the number of congressional districts that tend to vote for Democrats despite the fact that the vast majority of the population decline in the State took place in more Republican districts while most of the population increase in the State occurred in the most Democratic areas. *See id.* ¶¶ 12, 13, 16; *see also id.* Attachments 2-3. "Given that population declines occurred disproportionately in Republican areas, such a result can only be accomplished by packing high concentrations of Democratic voters into a smaller number of districts and efficiently spreading Republican voters across a larger number of districts." *Id.* ¶ 19. Thus, the Skelos Plan runs counter to population trends to reap gains for Republicans, at the expense of the actual partisan preferences of New York voters.

Indeed, even a non-expert can easily see the Skelos Plan for what it is: a blatant partisan grab for power. The Skelos Plan pairs a total of eight incumbents, seven of whom are Democrats and only one of whom is a Republican. Ex. 1. The Skelos Plan thus reflects a brazen attempt to use the judicial process to handicap Democratic incumbents, attempting to ensure that Republican losses in numbers nonetheless translate into gains in political power.

In short, the Skelos Defendants are trying to accomplish in court what the Republican Party could never achieve through the Legislature or the democratic process. The Court should accordingly reject the Skelos Plan as a partisan gerrymander unbefitting a court-drawn plan.

2. The Skelos Plan Risks Violating the Voting Rights Act

The Skelos Plan also raises serious red flags under the Voting Rights Act. In 2002, the New York Legislature enacted a congressional redistricting plan that created three majority-African-American districts (existing Districts 7, 11, and 12) and one majority-Hispanic district (existing District 17). Exhibit 5 (New York 2000 Census Data by District). The Skelos Plan would decrease the number of majority-African-American districts by one, leaving only two such districts (proposed Districts 9 and 10), while increasing the number of majority-Hispanic districts by one.

This presents a potential problem under both Section 2 and Section 5 of the Voting

Rights Act. Under Section 2, one of the primary questions is whether a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *see also Bartlett*, 556 U.S. at 13 (defining "majority-minority districts" as those in which "a minority group composes a numerical, working majority of the voting-age population"). The Skelos Plan creates just two majority-African-American districts, while crafting a third district (District 5) that has an African-American voting age population of 45.8 percent. There is no question that the African-American population in the area is large and compact enough to form a majority of the voting age population in a third district. Indeed, the Rose Plan creates three such districts, all of which are fairly compact (Districts 6, 9, and 10). *See* Dkt. # 141-4 at 2. The Skelos Plan's failure to create an additional majority-minority district, which the Rose Plan demonstrates is attainable without compromising on compactness, suggests that the Skelos Plan may fall short under Section 2 of the Voting Rights Act.

Section 5 presents a similar hurdle for the Skelos Plan. In decreasing the number of majority-African-American districts relative to the benchmark plan, the Skelos Plan may reflect a retrogression for New York's African-American population. And it is no answer that the Skelos Plan maintains the same absolute number of majority-minority districts by adding a majority-Hispanic district. Where both African Americans and Hispanics are protected under the Voting Rights Act, it is insufficient to simply "swap out" the rights of one minority group for those of another, or to trade off the rights of minorities in one part of the state with those of minorities elsewhere in the state. *Cf. LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("A local appraisal is necessary because the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members. And a State may not trade off the rights of some members of a racial group against the rights of other members of that group.") (internal quotation marks and citations omitted). For this reason, the Skelos Defendants' calculation of the "average" voting age population among all of the districts they have determined relevant to the Voting Rights Act, *see* Dkt. # 144 at 3, only muddles the analysis.

In sum, the vulnerability of the Skelos Plan under both Section 2 and Section 5 of the

Voting Rights Act cautions against adoption of that plan.

3. The Skelos Plan Disregards Traditional Redistricting Criteria

The Skelos Plan, drawn with the primary purpose of favoring the minority party contrary to population and partisan trends, subverts several traditional redistricting criteria in the process.

The Skelos Defendants have submitted an entire memorandum extolling the virtues of preserving the cores of prior districts, noting that it is a "well-established, traditional districting principle in New York." *See* Dkt. # 145 at 1. Yet while the Skelos Plan does not entirely reconfigure prior districts, it does not preserve the cores of existing districts as well as the Rose Plan. While the Rose Plan contains 21 districts that retain over 60 percent of the population from a single prior district, the Skelos Plan contains only 20 such districts. *See* Dkt. # 141-3 at 2; Exhibit 6 (Skelos Plan Core Constituency Report). Moreover, while the Rose Plan contains nine districts that retain over 80 percent of the population from a single prior district, the Skelos Plan contains only eight such districts. Ex. 6 As a specific example, the Rose Plan keeps 78.6 percent of the core constituency of prior District 8 in its proposed District 8, but the Skelos Plan chops up prior District 8 among six separate districts, with the largest portion of the prior district, just 48.61 percent, located in proposed District 7, and the remaining shards scattered among proposed Districts 8, 10, 11, 12, and 13.

Even more damning is the extent to which the Skelos Plan fails to respect communities of interest and political subdivision boundaries. Most notably, the Skelos Plan's proposed District 7 combines the East and West sides of Manhattan below 92nd Street, artificially lumping together two distinct communities of interest. This Court has previously recognized the "traditional divisions and historical differences between the two communities" on the East and West sides, *Rodriguez v. Pataki*, 2002 WL 1058054, at *6 n.12 (S.D.N.Y. 2002) (internal quotation marks omitted), and for good reason. As any New Yorker knows, the East and West sides of the city include different political and social structures, as reflected in their separate local elected officials, community boards, and police precincts. Even the subway lines that link Manhattan communities together run north-south, not east-west. The Skelos Plan's approach to

Manhattan for partisan interests fails to consider the interests of well-established Manhattan communities and their residents.

Indeed, the Skelos Plan slices up communities throughout the State. While existing District 8 appropriately contains areas of both Manhattan and Brooklyn with high concentrations of Jewish residents, in particular Orthodox Jewish families with unique social service needs, the Skelos Plan divides this religious community, thereby muting the unified voice with which the community has historically been able to speak. In addition, the Skelos Plan's proposed District 12 truncates the Upper East Side and Upper West Side of Manhattan, diluting the voting power of the historical African-American community of Central and West Harlem. Its District 17 unnecessarily divides the Riverdale neighborhood in the Northwest Bronx, breaking apart a well-established community of interest. Moreover, the Skelos Plan's proposed District 23 expands a district that is already the largest in the State, eating up rural counties such as Herkimer, Hamilton, and Lewis that have little in common with the economic, cultural, and academic centers of the rest of the district. The only discernable purpose of this expansion is to make the district more Republican.

The Skelos Plan also disregards multiple political subdivision boundaries. For instance, although the Town of Brookhaven (the largest in the State) has traditionally been represented by one congressional district, the Skelos Plan divides it into two, breaking up the town's Hispanic community in the process. It then divides the town of Smithtown to offset the slicing apart of Brookhaven. The Skelos Plan also upends existing patterns of representation in the lower Hudson Valley for no apparent reason other than partisan politics, as it swaps roughly 160,000 residents of Greenburgh and Yonkers between districts, cutting off Greenburgh from the rest of Westchester County. Additionally, the Skelos Plan's proposed District 25 splits Erie County, carving up the district's population center and a number of towns that share a common interest.

Several districts in the Skelos Plan are also unnecessarily convoluted, ignoring the goal of compactness. Proposed District 17, for example, which takes the bulk of its population from the current District 17, relies upon an exceedingly narrow corridor to link population centers of the

district. Moreover, a comparison of the Skelos Plan's proposed District 20 with the Rose Plan's District 20 reveals that the Skelos Plan not only scores less than half as well as a quantitative measure, *see* Dkt. # 141-4 at 2; Exhibit 7 (Skelos Plan Compactness Report), but also cuts out compact cores of the prior district like Schoharie County in exchange for territory more than 65 miles to the south in Ulster County. The result is a long, narrow strip connecting far-flung areas of the State, and a district that resembles a backwards letter "E" instead of a compact square.

Finally, as noted above, the Skelos Plan not only pairs eight incumbents, it does so in a strategic manner so as to eliminate its proponents' Democratic rivals, sacrificing decades of experience, seniority, and relationships with constituents in the name of partisan convenience.

In sum, the Skelos Plan's prioritization of partisan politics over core redistricting principles renders it ineligible for serious consideration by the Court. Here, "the court's task is inevitably an exposed and sensitive one," and it "must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Connor*, 431 U.S. at 414-15 (quoting *Roman*, 377 U.S. at 710). The Skelos Plan falls far short of this mark.

D. The Kolb Plan

The fundamental flaw in the Kolb Plan, as in the Skelos Plan, is that it aims primarily to achieve highly partisan Republican policy objectives, objectives that a court has no business pursuing or endorsing. *See, e.g.*, *Connor*, 431 U.S. at 415; *Wyche*, 635 F.2d at 1160.

As demonstrated in the affidavit of Professor Ansolabehere, under the Kolb Plan, if Republican and Democratic congressional candidates each received 50 percent of the vote statewide, Republican candidates would win 59 percent of the seats. Ansolabehere Aff. ¶ 21. Moreover, Republican candidates could win over 50 percent of the seats while receiving only 45.7 percent of votes, and Democrats would have to receive at least 54.3 percent of the vote to achieve the same result. *Id.* ¶ 22. The Kolb Plan accomplishes this pro-Republican gerrymander even though New York's "population declines occurred disproportionately in Republican areas." *Id.* ¶ 16. In short, "[t]he practical consequence of" the Kolb Plan "is to build in a bias against Democrats." *Id.* ¶ 20. This is a practical consequence the Court should not endorse. Partisan

Republicans should not be allowed to achieve a result in court that they have been unable to achieve at the ballot box.

Further evidence of the Kolb Plan's partisan bias comes in its selective pairing of incumbents, which also ignores longstanding New York policy. *See, e.g.*, *Diaz*, 978 F. Supp. at 123. The Kolb Plan draws eight Democratic incumbents into districts that also contain other Democratic incumbents, while drawing *no* Republican incumbents into districts with other Republican incumbents. Ex. 1. The Democratic incumbents who would inevitably be displaced under this plan together possess decades of experience and seniority in Congress, immense clout that benefits all New Yorkers, and longstanding relationships with their constituents. For example, the Kolb Plan draws Representative Jerrold Nadler, who has served in Congress since 1992 and is one of the highest ranking Democrats on several committees crucial to New York's interests (e.g., Transportation and Infrastructure, Judiciary), into the same district as Representative Carolyn Maloney, who has also served in Congress since 1993 and is the senior New York Democrat on the Financial Services Committee, which oversees one of the most important industries to New York. The Court should not flout longstanding New York policy by casting aside the benefits of these Representatives' incumbency, especially where the reason for sacrificing these incumbents has nothing to do with correcting legal violations and everything to do with achieving partisan goals.

In achieving this partisan gerrymander, the Kolb Plan, like the Skelos Plan, also violates many other longstanding aspects of New York redistricting policy. The examples are innumerable, but for brevity's sake we detail only an illustrative sample.

To begin with, the Kolb Plan's District 17 ignores political subdivision boundaries and constituent-incumbent relationships. Specifically, while the city of New Rochelle is currently located entirely in one congressional district, the Kolb Plan would needlessly split the city into three districts, including one linked with Rockland County (District 17), one linked with New York City (District 15), and a third linked with Sound Shore communities (District 16). The Kolb Plan's District 17 also includes Representative Nita Lowey, who has served in Congress

since 1993 and sits on the powerful Appropriations Committee, but it divides her from over half of her current constituents.

Similarly, District 20 in the Plan ignores communities of interest, breaking off major parts of current District 21—Schoharie County and the City of Troy—and replacing them with new, suburban areas in Saratoga County that do not have similar demographics, history, or industry to the rest of the district. Kolb District 21, meanwhile, largely replaces current District 23. While District 23 is already the largest district in the state by area, the Kolb Plan would replace it with an even larger district, sweeping in communities with widely different interests, and for no apparent reason other than partisan gain. The district would also change shape drastically, losing several counties entirely (Oswego and Madison) and gaining many others.

Finally, the Kolb Plan intentionally and needlessly draws two Democratic incumbents into its proposed District 25 (Representatives Higgins and Hochul) while leaving no incumbent in neighboring District 24.

In short, the Kolb Plan single-mindedly pursues a policy goal—partisan gain—that courts have no business aiming to achieve. In doing so, it sacrifices longstanding policy choices and redistricting principles of the New York Legislature. The Plan is not an appropriate means of "reconciling the requirements of the Constitution with the goals of state political policy," and it should therefore be rejected. *Upham*, 456 U.S. at 43.

III. CONCLUSION

In sum, of the submitted plans, the Rose Plan best "reconcil[es] the requirements of the Constitution with the goals of state political policy." *Upham*, 456 U.S. at 43. Rather than accepting "the legislative policies underlying the existing plan," *Abrams*, 521 U.S. at 79, as required, the other plans discussed here all "'intrude upon state policy . . . more than necessary.'" *Weiser*, 412 U.S. at 795 (quoting *Whitcomb*, 403 U.S. at 160). The Rose Intervenors therefore ask that the Court adopt their plan, which, as "a district court should . . . , honor[s] state policies in the context of congressional reapportionment." *Weiser*, 412 U.S. at 795.

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