**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

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| MARK A. FAVORS, et al.<br><br>Plaintiffs,<br><br>v.<br><br>ANDREW M. CUOMO, et al.<br><br>Defendants. | ) | No. 1:11-cv-05632-DLI-RR-GEL<br><br>**Date of Service**: August 24, 2012 |

**SENATE MAJORITY DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM AND ORDER ON LEGISLATIVE PRIVILEGE**

Michael A. Carvin (MC 9266)
Louis K. Fisher (admitted *pro hac vice*)
John M. Gore (admitted *pro hac vice*)
David J. Strandness (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
202/879-3939

Todd R. Geremia (TG 4454)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
212/326-3939

David Lewis (DL 0037)
LEWIS & FIORE
225 Broadway, Suite 3300
New York, NY 10007
212/285-2290

*Attorneys For Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez*

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The Senate Majority respectfully objects to Magistrate Judge Roann L. Mann's Memorandum and Order on legislative privilege (DE 487) ("Order").[1] The Assembly Majority likewise joins in the arguments set forth in this memorandum.

## INTRODUCTION

The magistrate ruled that the Senate Majority is protected against compelled disclosure by a form of qualified legislative privilege that, under the magistrate's formulation and application, amounts to no privilege at all. As a threshold matter, the magistrate declares that the legislative privilege is qualified "at best," but fails to address—or even mention—the governing principles from binding Supreme Court and Second Circuit decisions under which state legislators have the same privilege against disclosure in civil lawsuit that members of Congress have. That legislative privilege, rooted in the Speech and Debate clause for federal legislators and in parallel principles of common law for state legislators, is an *absolute* protection against compelled disclosure of confidential information related to legislative acts. As applied here, the legislative privilege thus protects the Senate Majority against compelled disclosure of its confidential documents concerning reapportionment of Senate districts for the 2010 cycle. On this ground alone, the magistrate judge's order should be overruled and the Court should order that the Senate Majority may invoke the legislative privilege without either the magistrate or this Court engaging in an amorphous weighting of multiple factors to determine whether, on a document-by-document basis after an *in camera* inspection, the Senate Majority may invoke a

[1] The Court must sustain an objection to a magistrate's pre-trial order where "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a). Although a magistrate's findings of fact are reviewed for clear error, this objection raises solely legal issues, which are reviewed under the "contrary to law" standard. Under that standard, a legal determination should be overruled where the magistrate "fail[ed] to apply or misapplie[d] relevant statutes, case law or rules of procedure." *Catskill Dev., LLC v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002) (internal quotation marks omitted).

"qualified privilege" against the intrusive and sweeping discovery sought by plaintiffs here.

Even if this Court were to sustain the magistrate's conclusory and erroneous ruling that the privilege is qualified, the magistrate's application of that qualified privilege in this case should not be sustained. The magistrate makes a series of rulings that each collapse on themselves and collectively eviscerate the legislative privilege. While the magistrate purports to reject the so-called "central issue exception," because it is a "rule-swallowing exception[]" that would pierce the privilege whenever "legislative deliberations are among the central issues in the case," Order at 37-38 n.22, Judge Mann proceeds to invoke the purported centrality of the Legislature's confidential deliberations to plaintiffs' claims—even though the magistrate purports to defer to the three-judge Panel's consideration of this issue on the pending summary judgment motions—in a manner that does, indeed, swallow the legislative privilege whole here.

On relevance, the magistrate at first rules that it is for the Panel to resolve the "potentially dispositive" issue of whether the Legislature's purpose and motivation is legally relevant to plaintiffs' claims, but then curiously declares that this factor weighs in favor of plaintiffs because the information they seek is "discoverable" within the meaning of the Federal Rules. Order at 55. That amounts to no privilege at all, because every party is of course protected by the bare minimum requirement in Rule 26 that only discoverable information is subject to discovery.

The magistrate's analysis of the next three factors—availability of other evidence, seriousness of the litigation, and the Senate Majority's role—only underscores that, if the Court is going to apply a qualified legislative privilege here, it should first resolve the threshold issue of what legal standards apply to plaintiffs' claims. On the availability factor, the magistrate ignores what plaintiffs themselves have conceded is "copious" publicly available and relevant evidence of the redistricting process, declares that the Legislature's internal process is "highly

relevant" to plaintiffs' claims (notwithstanding the magistrate's ruling two pages earlier in the Order that this issue is for the three-judge Court), and then says that the availability of "non-public, confidential deliberations . . . within LATFOR" weighs in favor of disclosure. Order at 57-58. At the same time, the magistrate rules that any failure by the Legislature to keep information "carefully cloistered" will waive the legislative privilege. *Id.* at 43. In other words, damned if you do, damned if you don't: keeping information confidential weighs in favor of abrogating the legislative privilege, and failing to keep it confidential does as well.

Likewise, the magistrate rules that the Senate Majority's "direct role" in the litigation "supports overcoming the privilege," especially in light of what the magistrate now calls the "central factor" of the Legislature's purpose in enacting the redistricting plan. Order at 59. But the Senate Majority has a "direct role" as a defendant only because it was *sued by plaintiffs*. And, if the Senate Majority had instead intervened, its role would be deemed "voluntary" and also weighted in favor of disclosure.

In analyzing the "seriousness of the litigation and the issues," the magistrate refuses to examine plaintiffs' actual claims or any of the issues presented by them. Instead, the magistrate rules that, as an abstract matter, redistricting cases "raise serious charges." While the magistrate expresses concern that any more specific inquiry into the claims and issues raised in a lawsuit, as opposed to considering what general "type" of claims are asserted, might "cut off the balancing test"—*i.e.*, uphold the privilege—the manner in which the magistrate formulates this factor instead virtually ensures abrogation of the privilege in any redistricting case and, indeed, in any case except those where a court is willing to say that the federal rights at issue are unimportant.

Finally, the magistrate acknowledges that allowing for discovery into the legislative process will have a chilling effect on the Legislature's deliberations, but erroneously declares

that abrogating the legislative privilege here will not chill future deliberations in light of a contemplated (but not-yet-ratified) plan for an "independent redistricting commission." Order at 60. The magistrate then orders an *in camera* inspection of all documents over which defendants have asserted the legislative privilege, and also orders defendants to revise and resubmit their logs in light of the Order. But the magistrate does not state what standards will govern this *in camera* review—other than that it will involve a "contextual investigation"—or how defendants are themselves supposed to reconsider what documents would remain privileged under the magistrate's qualified privilege analysis.

The Court should clarify this process by ruling, as a threshold matter, that the Senate Majority and other legislative defendants in this case have an absolute privilege against compelled disclosure, just as members of Congress do. In the alternative, the Court should address the threshold issue of what legal standard applies to plaintiffs' claims and, the Senate Majority respectfully submits, grant the motion for a protective order in its entirety on the basis of a properly applied qualified legislative privilege.

## ARGUMENT

### I. LEGISLATORS AND THEIR AGENTS CANNOT BE COMPELLED TO OFFER EVIDENCE OR TESTIMONY CONCERNING THEIR LEGISLATIVE ACTS

The magistrate does not seriously address the issue in the Order, but state legislators and their agents in civil cases have an absolute privilege against being compelled to offer testimony or evidence concerning their legislative activity, and this privilege is coextensive with the absolute privilege enjoyed by federal legislators. *See Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951); *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180-81 (4th Cir. 2011); *see also* Senate Majority's memoranda to the magistrate on this issue: DE 397 at 4-21; DE 442 at 442. This privilege is "well accepted," and its purpose is to enable legislators and those who

assist them to "focus on their public duties by removing the costs and distractions attending lawsuits." *Wash. Suburban*, 631 F.3d at 180-81.

The magistrate acknowledges that *federal* legislators are entitled to "absolute immunity from suit as well as from compelled discovery or testimony." Order at 33. Likewise, the magistrate agrees that state legislators are, like members of Congress, entitled to absolute immunity from a federal civil lawsuit. *Id.* at 34-35. Nonetheless, the magistrate concludes, without any analysis, that state legislators are not entitled to the same absolute privilege against discovery in civil cases regarding their legislative activity as their federal counterparts. *See id.* at 35-36. This conclusion is contrary to controlling precedent.

Under the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360, 370, 372-73 (1980), state legislators are not entitled to the same protections as federal legislators in *criminal* cases brought by the federal government. But it is well-established that state legislators are entitled to the same protections as federal legislators in *civil* cases. *See S. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 733 (1980) ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech of Debate Clause."); *Gillock*, 445 U.S. at 373 (noting that "*Tenney* and subsequent cases on official immunity have drawn the line [for state legislators] at civil actions"); *Tenney*, 341 U.S. at 372-75. In accordance with these binding principles, the Second Circuit has held that, in a civil lawsuit, "due to the 'shared origins and justifications of the Speech or Debate Clause and the doctrine of legislative immunity,' it [is] 'inappropriate for us to differentiate the scope of the two without *good reason*.'" *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 83 (2d Cir. 2007) (quoting *Star Distribs. Ltd. v. Marino*, 613 F.2d 4, 6 (2d Cir. 1980)) (emphasis added). Yet the

magistrate judge here fails to provide *any* reason why state legislators are provided the same immunity from liability as federal legislators in civil suits—including suits that address important federal interests—but should not be afforded the same absolute legislative privilege against disclosure as members of Congress in civil suits. *See, e.g.*, *Tenney*, 341 U.S. at 371 (civil action brought to vindicate First Amendment rights); *S. Ct. of Va.*, 446 U.S. at 726 (same).[2]

Nor is there any good reason. The Speech or Debate Clause itself is an *evidentiary* privilege against being "questioned in any other Place," U.S. Const. art. I § 6, cl. 1, including in a court and associated pre-trial proceedings. Legislative immunity from suit is thus derived from this broader evidentiary privilege, "not the other way around." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995) ("[T]he immunity from suit derives from the testimonial privilege, not the other way around."). There is, then, no good reason to refuse to acknowledge that state legislators have a *core* evidentiary privilege against disclosure when federal legislators have such a privilege and state legislators are entitled to the same *derivative* immunity from a civil suit as federal legislators.

In fact, legislative immunity would be meaningless if state legislators did not also have the more fundamental evidentiary privilege. Indeed, "[l]egislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes." *Wash. Suburban*, 631 F.3d at 181. And plaintiffs could always circumvent legislative immunity by suing non-legislators, *e.g.*, in a typical § 1983 lawsuit the plaintiff could name as a defendant the executive branch official who implements the law and then seek to depose legislators regarding their motives in enacting it. Through such pleading

[2] The magistrate judge states that the Second Circuit's decision in *State Employees* stands "for the limited proposition" that legislative immunity applies to both actions for damages and actions for injunctive relief, Order at 36 n.21, but fails to address the reasoning of that decision.

tricks, a lawsuit could create all of the same distractions that legislative immunity was meant to prevent "[b]ecause litigation's costs do not fall on named parties alone." *Wash. Suburban*, 631 F.3d at 181 ("'A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.'") (quoting *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988)). Indeed, discovery is in many respects even more burdensome on, and can be more costly to, a legislator than simply having to engage lawyers to defend against a lawsuit.

Because there is no good reason to deny state legislators the same evidentiary privileges enjoyed by federal legislators in civil cases, state legislators' entitlement to this absolute immunity from compulsory discovery is, contrary to the impression that the magistrate tries to create, "well accepted." *Id.* at 180. Rather than confront the principles on which the legislative privilege is based, the magistrate cites a series of inapposite, non-binding district court decisions for the proposition that legislative privilege is qualified. *See* Order at 36, 45. Most of these cases either are criminal cases where *Gillock* properly controls,[3] or are civil cases where *Gillock* is misapplied.[4] *See* DE 397 at 13-20; DE 442 at 1-4, 7 & n.4. The remainder apply the *deliberative process privilege*.[5] But, as the Magistrate Judge acknowledges, the deliberative

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[3] *See In re Grand Jury*, 821 F.2d 946, 952-56 (3d Cir. 1987) (criminal case applying *Gillock*).

[4] *ACORN v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007) (applying *Gillock*); *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (same); *Committee for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) (same); *Baldus v. Members of the Wisc. Gov't Accountability Bd.*, Nos. 11–CV–562, 11–CV–1011, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (relying primarily on *Committee for a Fair & Balanced Map*, which purports to apply *Gillock*).

[5] *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002) (deciding whether high ranking executive officials from a foreign government may invoke deliberative process privilege in a criminal case); *United States v. Irvin*, 127 F.R.D. 169, 170, 173-74 (C.D. Cal. 1989) (applying deliberative process privilege); *see also East End Ventures,*

process privilege "protects the decisionmaking processes of the *executive branch*" and "its protections are decidedly less robust" than the legislative privilege. Order at 37 n.22 (emphasis in original; quotation marks omitted). Indeed, while the magistrate criticizes courts that "have conflated the two privileges," *id.,* that is exactly what the magistrate does here.[6]

Indeed, the case that the magistrate primarily relies on—Magistrate Judge Maas' July 28 opinion in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)—suffers from both of these deficiencies. In ruling that the legislative privilege is qualified, *id.* at 100, Judge Maas primarily relies on a case applying *Gillock* in a criminal case, *id.* (citing *In re Grand Jury*, 821 F.2d 946, 957) (3d Cir. 1987)), and, even worse, a case applying the deliberative process privilege in a criminal case, *id.* (citing *In re Grand Jury*, 218 F. Supp. 2d 544, 553) (S.D.N.Y. 2002)). And not only was Judge Maas' order based on inapposite decisional law, it was predicated on a misunderstanding of the structure of LATFOR, as the magistrate judge acknowledges. *See* Order

(continued…)

*LLC v. Inc. Vill. of Sag Harbor*, No. CV 09–3967, 2011 WL 6337708, at *2 (E.D.N.Y. Dec. 19, 2011) ("conflat[ing]" legislative privilege with deliberative process privilege, *see* Opinion at 37 n.22);

[6] The magistrate only briefly addresses lower court decisions that recognize an absolute legislative privilege. According to Judge Mann, the "perfunctory ruling in [*Backus v. South Carolina*, No. 3:11–cv–03120, 2012 WL 406860 (D.S.C. Feb. 8, 2012)] does not provide a persuasive reason to depart from the clear weight of authority holding that the legislative privilege is qualified and subject to a judicial balancing test." Order at 46; *see* 2/8/12 *Backus* Order at 2 (DE 395-2). But the court in *Backus* did not have to address the issue at length because it was following the Fourth Circuit's decision in *Washington Suburban*, which applied "well accepted" precedent that the magistrate here fails to address. *See* 631 F.3d at 180. Also, relying on statements from the concurring opinion in *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), Judge Mann concludes that "[t]he spirit of *Marylanders*," is "that a legislator's evidentiary privilege is a qualified one." Order at 45 n.27. But the concurring opinion in *Marylanders* concluded only that certain private citizen members of a state redistricting commission could be deposed. *See* 144 F.R.D. at 305. In any event, any suggestion by the concurring opinion in *Marylanders* that legislative privilege should be qualified was subsequently abrogated by the Fourth Circuit's decisions in *Washington Suburban*, 631 F.3d at 181, and *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996).

at 49 n.29 ("To be sure, in the September 3, 2003 conference call cited by the Senate Majority, Judge Maas did in fact note that, 'at the time that he drafted the July 28, 2003 decision, he didn't contemplate the scenario that LATFOR had, in effect, four subsets in addition to the entity itself, one of which was a separate Senate Majority office.'" (citing 9/3/03 *Rodriguez* tr. at 7-8)).

Judge Mann downplays the importance of this misunderstanding. But, once Judge Maas understood how LATFOR was structured, he categorically barred plaintiffs from deposing any legislators or their agents. *See* DE 336-3 at 11:7-10 (where Judge Maas stated: "I can't at present conceive of a scenario where I, for example, even if [plaintiffs] requested it, would say Senator Bruno, or Speaker Silver, or any of their individual aides, has to be deposed."); DE 336-4 at 19:18-19 (concluding plaintiffs were barred from deposing the Secretary of the Senate because he "falls within the legislative privilege"); *see also Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 309 (S.D.N.Y.) (holding that plaintiffs were barred from questioning a Special Assistant to LATFOR on "the reasons why he and others in the Senate majority redistricting office drew the lines for particular Senate districts in the ways that they did"), *objection overruled*, 293 F. Supp. 2d 313, 315 (S.D.N.Y. 2003). According to Judge Mann, Judge Maas was confused about the application of the legislative privilege after he properly understood the structure of LATFOR. *See* Order at 49 n.29 ("However, Judge Maas qualified his statement, adding that 'exactly how that shakes out, frankly, I'm not certain,' since it was a 'somewhat confusing area.'" (quoting 9/3/03 *Rodriguez* tr. at 8 (citations omitted)). Even if that is correct, however, Judge Maas' confusion is all the more reason why Judge Mann should not have deferred to his opinion in declaring that the legislative privilege is only qualified.

The Court should, in sum, overrule the Magistrate Judge's determination that the legislative privilege is qualified. Under controlling principles applied by binding precedents

from the Supreme Court and the Second Circuit, state legislators have an absolute privilege against disclosure in civil suits that is coextensive with the privilege that federal legislators have. The Court should, accordingly, grant the motions for a protective order made by the Senate Majority and the Assembly Majority.

## II. EVEN IF LEGISLATIVE PRIVILEGE IS QUALIFIED, THE MAGISTRATE JUDGE MISAPPLIES IT

Even assuming that the legislative privilege should be qualified, the magistrate erroneously applies it. Judge Mann, relying on Judge Maas' order in *Rodriguez*, rules that the following five factors govern a determination as to whether and how legislative privilege precludes disclosure:

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

Order at 37 (quoting *Rodriguez*, 280 F. Supp. 2d at 101). The magistrate acknowledges that it would be improper to apply these factors in a manner so that "there would be few, if any, cases in which state legislators could shield their personal thought processes from view." *Id.* at 38 n.22 (quoting *Rodriguez*, 280 F. Supp. 2d at 99). Yet that is exactly what the magistrate judge does here.

Indeed, Judge Mann apparently is prepared to apply legislative privilege in a manner that would require far broader disclosure than that ordered by Magistrate Judge Maas and the three-judge panel in *Rodriguez*. There, the court categorically barred depositions on "the reasons why . . . the Senate majority redistricting office drew the lines for particular Senate districts in the

ways that they did."[7] *Rodriguez*, 293 F. Supp. 2d at 309 (ruling on plaintiffs' request to depose Mark Burgeson, the Special Assistant to then-LATFOR Co-Chairman Senator Dean G. Skelos). And, in *Rodriguez*, no legislators were deposed and the court did not permit discovery of documents, including partisan requests, that reflected confidential discussions among legislators and legislative aides.[8] Under Judge Mann's analysis, it would seem that courts could regularly compel majority leaders of state legislatures to testify about their subjective motivations in redistricting lawsuits, even over an assertion of the legislative privilege. But to the Senate Majority's knowledge, there is not a single published case where this has happened. Under the magistrate judge's analysis, however, a plaintiff could compel legislators to testify on any type of legislation where a plaintiff alleges that the law was motivated by political concerns or has a disparate impact on any racial group. This unprecedented application of even a qualified legislative privilege should be rejected by the Court.[9]

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[7] One day later, the three-judge panel affirmed this ruling. *See Rodriguez*, 293 F. Supp. 2d at 315. *See also* 9/3/03 *Rodriguez* Hr'g tr. at 11:7-10 (DE 336-3) (Judge Maas: "I can't at present conceive of a scenario where I, for example, even if Mr. Emery requested it, would say Senator Bruno, or Speaker Silver, or any of their individual aides, has to be deposed."); 9/11/03 *Rodriguez* Hr'g tr. at 19:19-22 (DE 336-4) (Judge Maas concluding plaintiffs were barred from deposing the Secretary of the Senate because "he's an official of the Senate that falls squarely within the legislative privilege").

[8] *Rodriguez v. Pataki*, Nos. 02 Civ. 618RMBFM, 02 Civ. 3239, 2003 WL 22109902, at *2 (S.D.N.Y. Sept. 11, 2003) (holding that documents that reflect "private discussions among legislators or between individual legislators and their aides . . . . need not be disclosed," even if, significantly, the materials constituted "partisan requests."). The three-judge court in *Rodriguez* also narrowed the scope of Magistrate Judge Maas' initial decision on legislative privilege, by emphasizing that it did not deal with "instances where LATFOR was acting solely as the surrogate of [then-majority leader] Senator Bruno or other individual members of the Legislature." *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003) (internal quotation marks omitted).

[9] The magistrate also indicates that she is inclined to rule that the Senate Majority somehow waived legislative privilege "with respect to documents related to the size of the Senate" by publishing a memorandum (DE 391-2) on this topic, notwithstanding that the magistrate elsewhere acknowledges that the Senate Majority did not intend for this document to be maintained as confidential. *See* Order at 43. Such a ruling would make legislative privilege

**1. Relevance**. The magistrate rules that "the relevance factor weighs in favor of disclosure." Order at 57. According to the magistrate, when evaluating relevance to determine whether disclosure should be compelled as part of a qualified privilege analysis, a court should simply apply the discoverability standard in Rule 26(b)(1) of the Federal Rules of Civil Procedure. *See id.* at 55 ("Suffice it to say, 'relevant information need not be admissible' to be discoverable"). If that were correct, however, legislative privilege would be utterly meaningless, because legislators would have no more protection from disclosure than any other litigant. Indeed, Rule 26(b)(1) presupposes that privilege *does not apply*. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense . . . ." (emphasis added)).

In the same paragraph, the magistrate also concludes, however, that it is "not the function of [the magistrate judge]" to resolve potentially dispositive disputes in connection with assessing the relevance factor because "[t]hose disputes are currently pending before the panel in connection with the defendants' pending motions for summary judgment." Order at 55; *id.* at 55 n.32. As the Senate Majority explained to the magistrate in its motion for a protective order and in its motions for summary judgment before this panel, evidence of legislators' motivations in enacting the 2012 Senate Plan are irrelevant here. Nevertheless, despite concluding that it is not the magistrate's function to resolve this dispositive dispute, the magistrate proceeds to decide that legislators' subjective motives *are* relevant—and, indeed, later says this issue is "at the core

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completely meaningless. Under this logic, any time the Legislature publishes a redistricting plan (or any other law for that matter) that it enacts—or files a brief defending such a law—it broadly waives legislative privilege over drafts and internal deliberations and communications addressing the same subject. That is obviously not the law. *See* DE 442 at 19-20; Senate Majority Defs.' Opp'n To The Senate Minority's Mot. To Compel Privileged Communications & Work-Product With Respect To The Size Of The State Senate 19-24 (DE 405).

of the plaintiffs' claims." Order at 59; *see also id.* at 58 (stating that "the internal legislative process is highly relevant to all of the plaintiffs' claims").

First, the magistrate states that this panel has adopted a rule that, according to the magistrate, makes the legislature's subjective motivation relevant to plaintiffs' one person, one vote claims against the Senate Majority. Order at 56 ("[T]he Panel presiding over this case has adopted that language [from *Reynolds v. Simms*, 377 U.S. 533, 577 (1964), that 'a State [must] make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable'] as the applicable legal standard for testing Equal Protection challenges to redistricting plans."). But, contrary to the impression left by the magistrate's order, the Court did not purport to resolve this legal relevance issue.[10] Indeed, when this Court denied plaintiffs' preliminary injunction with respect to their one person, one vote claims, the Court expressly stated: "[T]he parties vigorously dispute whether discovery into the subjective motivations of the drafters of the plan is either legally relevant or permissible in light of legislative privilege." *Favors v. Cuomo*, No. 11-cv-5632, 2012 WL 1802073, at *9 (E.D.N.Y. May 16, 2012); *see also id.* (noting that plaintiffs' "one person, one vote claims rest on novel, contested legal ground"). And, of course, this issue of the legal relevance of the subjective motivations of the drafters of the plan is currently a topic of extensive briefing before this Court on defendants' motions for summary judgment.[11]

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[10] In context, the Court, in dismissing the complaint of intervening plaintiff Itzchok Ullman, was referring to the constitutional requirement that state legislative districts be apportioned with "as nearly equal population as practicable." *Favors*, 2012 WL 1802073, at *9 (quoting *Reynolds*, 377 U.S. at 577); *see also id.* (noting that "Ullman's complaint does not allege that the Ramapo Assembly districts are malapportioned").

[11] The magistrate also asserts that it is irrelevant whether New York City districts are underpopulated relative to upstate districts in terms of citizen population (Order at 57 n.33)—again, failing to distinguish *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 369 (S.D.N.Y. 2004), and failing to respond to the Senate Majority's arguments, which are also before the Panel on

Second, the magistrate judge states that other district court opinions have rejected relevance challenges to discovery sought in support of claims under Section 2 of the Voting Rights Act. Order at 56. But the magistrate fails to note that, in denying plaintiffs' motion for a preliminary injunction, this Court set out the legal standard that governs plaintiffs' Section 2 claims and neither this standard nor anything else in the Court's order even remotely suggests that evidence of the Legislature's "purpose" is relevant to these claims. *See Favors*, 2012 WL 1802073, at *10 (setting out the "necessary preconditions" for a Section 2 claim and holding that plaintiffs "have introduced virtually no evidence on these factors"). For good reason too, because as the Senate Majority pointed out to the magistrate, the sole remaining Section 2 claim in this lawsuit against the Senate Majority, asserted by the Drayton Intervenors, does not even allege that the Legislature purposely discriminated against Blacks in failing to create an additional minority district. *See* Drayton Intervenors Am. Compl. (DE 254).

Nor do the Drayton Intervenors have to allege discriminatory purpose. The magistrate ignores the Senate Majority's argument—which is before this Court in connection with the Senate Majority's summary judgment motions—that evidence of the New York State Legislature's "purpose" in enacting the 2012 redistricting plan is, by design of Congress, not a requisite element of plaintiffs' Section 2 claims.[12] This is because, as the Senate Majority has

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defendants' summary judgment motions. *See* DE 397 at 25; DE 420 at 10-16; DE 442 at 12-13 & n.9; DE 468; DE 453 at 7-8.

[12] The magistrate notes a handful of district court cases cited by the plaintiffs for the proposition that subjective motivations are relevant to Section 2 claims. Order at 56-57. But Judge Maas in *Rodriguez* acknowledged that Section 2 "as amended, looks to the discriminatory results of a reapportionment plan, not the legislature's allegedly discriminatory purpose." 280 F. Supp. 2d at 102. Judge Maas went on to state that evidence of discriminatory intent nevertheless "can be considered," but cited as his principal authority a Supreme Court decision (that did not address a Section 2 claim and, in any event, was decided prior to the 1982 amendment to Section

explained, Congress amended the Voting Rights Act to render the entire question of legislative "motive" or "purpose" immaterial. *See Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) ("[Section] 2 focuses exclusively on the *consequences* of apportionment," which means that "[o]nly if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.") (first emphasis added). Indeed, Congress removed the "purpose" inquiry from Section 2 precisely because it was "unnecessarily divisive" and "asks the wrong question." *Gingles v. Thornburg*, 478 U.S. 30, 44, 71 (1986) (quoting S. Rep. No. 97-417 at 36, *reprinted in* 1982 U.S.C.C.A.N. 177, 214).

The magistrate essentially decides that anytime plaintiffs allege that legislators acted with an improper purpose, they should be entitled to discovery of legislators' subjective motivations.[13] *See* Opinion at 56-57. But plaintiffs can always allege a valid equal protection claim by claiming that a law "distributes benefits [or burdens] unequally," *Zobel v. Williams*, 457 U.S. 55, 60 (1982), based on "arbitrary or irrational" distinctions such as politics, *City of*

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2) which catalogs *objective, publicly available evidence* as relevant to this legislative purpose inquiry and, indeed, expressly states (citing *Tenney*) that testimony by legislators is appropriate only in "extraordinary instances" and "even then such testimony frequently will be barred by privilege." *Vill. of Arlington Heights v. Metro. Housing Dev't Corp.*, 429 U.S. 252, 265-68 (1977) (listing as sources of evidence of intent such as "impact of official action," "historical background of the decision," "sequence of events leading up the challenged decision," and "legislative or administrative history"); *see also id.* at 268 n.18 ("[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government."). The Wisconsin case cited by the magistrate, *Baldus v. Members of the Wisconsin Government Accountability Board*, did not even mention the 1982 amendments, and its conclusory assertion about the relevance of "a legislative body's discriminatory intent" is contrary to those amendments. *See* 2011 WL 6122542 at *1.

[13] Indeed, the Magistrate Judge ignores that the sole remaining Section 2 claim in this lawsuit against the Senate Majority, asserted by the Drayton Intervenors, does not even *allege* that the Legislature purposely discriminated against Blacks in failing to create an additional minority district. *See* Drayton Intervenors Am. Compl. (DE 254).

*Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 446 (1985), or allege racial discrimination based on an asserted disparate impact of a law. Indeed, many state legislative enactments—involving budgets, taxes, housing, education, etc.—can be claimed to have a "disparate impact" on Republicans, Democrats, "upstate," New York City, or minorities (particularly since a litigant may always claim that laws disproportionately affecting New York City will have a disparate racial impact).[14] Thus, under the magistrate's approach, plaintiffs challenging almost any law can abrogate legislative privilege—and not just in redistricting cases—by simply asserting that politics motivated an enactment or that it results in a disparate impact on some group and then claiming that the information they seek from legislators meets the minimal standards of discoverability under Rule 26(b)(1).[15]

This is not the law, and the magistrate judge's determination that the relevance factor weighs in favor of disclosure is erroneous and should be overruled. On a proper analysis of the legal standards governing plaintiffs' claims, information concerning the Legislature's motives and purposes in enacting the 2012 Senate Plan is irrelevant to this lawsuit.

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[14] *See also* Stephen Johnson, *Where's Cuomo? Governor Avoids Downstate*, N.Y. Amsterdam News, Mar. 17, 2011, at 4, 2011 WLNR 6888478 (alleging "New York City and downstate communities of color" will "most likely to be hurt by . . . proposed [state] budget"); Michael Barbaro & Nicholas Confessore, *Bloomberg Presses Cuomo on Teacher Seniority Rule*, N.Y. Times, Jan. 31, 2011, at A14, 2011 WLNR 1913883 (Mayor Bloomberg alleging "state cuts to New York City's education budget . . . would disproportionately hurt poor neighborhoods"); *see also* Erin Einhorn, *Obama's Budget A Bust, Say N.Y. Dems*, N.Y. Daily News, Apr. 12, 2011, at 16, 2011 WLNR 7041816 (Rep. Jerrold Nadler alleging that federal funding cuts "will hurt New York City terribly. . . . Many of the things hurt like mass transit and public housing funds are particularly New York oriented.").

[15] *See, e.g.*, *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988) (alleging fee charged for bus service "unconstitutionally places a greater obstacle . . . in the path of the poor than it does in the path of wealthier families"); *Harris v. McRae*, 448 U.S. 297, 321-22 (1980) (alleging that Medicaid's "selective subsidization" of some medical procedures but not others violates the Equal Protection Clause).

**2. Availability of Other Evidence**. The magistrate judge's interpretation of the availability factor similarly ensures that there would be few, if any, cases where disclosure would be precluded by a legislative privilege. The magistrate rules that this factor militates in favor of disclosure because "the information sought by the plaintiffs relates to *non-public, confidential deliberations* that occurred within LATFOR or one of the partisan LATFOR redistricting offices, or between legislators, their staffs, and retained experts, [and] such information likely cannot be obtained by other means." Order at 58. As an initial matter, such information is not relevant to plaintiffs' claims for the reasons discussed above and in the Senate Majority's summary judgment motions and, therefore, its non-availability to plaintiffs in the absence of an order abrogating the legislative privilege does not weigh in favor of disclosure.

Even putting to the side this dispositive relevance issue, legislative privilege would never apply under the magistrate judge's ruling on the availability prong of the five-factor qualified privilege analysis. By having the analysis turn on the fact that plaintiffs seek "non-public, confidential" information, the magistrate has imposed a self-executing rule: such information is, *by definition*, not publicly available. Moreover, under the magistrate's order, if a communication is confidential, it warrants less protection, *see id.*, but if a communication is non-confidential, it also warrants less protection because disclosing it may waive legislative privilege as to not only that document but the entire subject matter of the publicly disclosed communication. *See* Order at 41 (holding legislative privilege may be waived "when purportedly privileged communications are shared with outsiders"); *id* at 43.

The focus here should not be on whether plaintiffs are seeking confidential information—because otherwise this factor would *always* weigh in favor of abrogating the legislative privilege so long as a plaintiff says it is seeking such confidential information—but what evidence of the

Legislature's process in enacting the 2012 redistricting plan is available to plaintiffs and how extensive it is. And, under that proper inquiry, there is abundant evidence available to plaintiffs. Indeed, they have conceded that they already have access to "copious objective . . . evidence" in the form of maps and data of for the enacted and various alternative plans, transcripts and reports of many public hearings, legislative deliberations on the floor, and the Legislature's voluminous submissions to the United States Department of Justice. *See* DE 426 at 15.

Indeed, few bills before the New York Legislature are subject to a more transparent legislative process than the legislation at issue here. LATFOR held 23 public hearings across the state: after the first round of 15 public hearings, LATFOR published a proposed Senate redistricting plan and held nine more hearings to gather comments on the proposed plan. *See* Senate Preclearance Cover Letter at 2, http://www.latfor.state.ny.us/justice2012/senate1/Cover%20Letter/Preclearance%20Cover%20Letter.pdf. LATFOR also has maintained a website that provides the public access to maps and data for the enacted and several alternative plans, transcripts and reports of public hearings, and the Legislature's voluminous submissions to the United States Department of Justice. *See id.*; LATFOR Website, http://www.latfor.state.ny.us/. That is precisely the kind of public record on which a challenge to a redistricting plan turns. If the public record is insufficiently developed here, it is difficult to imagine *any* circumstance where it would be sufficiently developed to avoid abrogating legislative privilege.

The availability of evidence factor, in sum, weighs strongly in favor of upholding the legislative privilege here—even assuming it is qualified—and the magistrate judge erred in ruling otherwise.

**3. Seriousness of the Litigation**. The magistrate also erroneously concludes that, when analyzing the seriousness of the litigation, the "viability" of the plaintiffs' claims is

completely irrelevant. Order at 58. If that were true, however, plaintiffs would be entitled to legislators' confidential communications no matter how frivolous the underlying litigation may be, so long as the subject matter is of a "*serious type*." *Id.* Indeed, under the magistrate's reasoning, a plaintiff could gain access to legislators' confidential files by filing a lawsuit alleging that a state system of educating children with funds derived in part from local property tax is arbitrary and irrational and in violation of the Equal Protection Clause, notwithstanding the Court's holding to the contrary in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). After all, lawsuits alleging equal protection violations are of a "serious type." The pertinent point, though, is that such a lawsuit is not a serious one in light of the governing law, even if the source of law on which it purports to be based protects important rights.

Under a proper analysis, plaintiffs' claims here are not of a "serious type." That is because, among other things, (i) the Plaintiffs allege the same one-person, one-vote claim that was rejected by the three-judge panel and then the Supreme Court in *Rodriguez* (*see* DE 420); (ii) the Ramos Intervenors dropped their Section 2 claim (DE 459-1); and (iii) not only do the Drayton Intervenors allege the same Section 2 claims that were previously rejected by the three-judge panel in *Rodriguez*, (*see* DE 422), but they also claim that they are unable to propose an alternative redistricting plan at this time and need more time to evaluate data that has long been publicly available to them (*see* DE 454 at 1-5).

The inquiry, under Judge Maas' formulation of the five-factor balancing test that the magistrate invokes here, is not whether the claims asserted are, as an abstract matter, "of a serious type," as the magistrate judge ruled. Rather, the inquiry requires a determination of "the 'seriousness' of *the litigation and the issues involved*." *Rodriguez*, 280 F. Supp. 2d at 101 (emphasis added; internal quotation marks omitted). That requires an assessment of the

seriousness of the actual claims and the actual issues presented by the lawsuit and in connection with which plaintiffs seek discovery, not simply a declaration that all claims in redistricting cases are, as a general matter, "serious." If a proper determination of this factor "cut[s] off the balancing test," as it should upon examination of plaintiffs' claims, that does not "distort this factor," as the magistrate judge ruled (Order at 58-59), but only ensures that it has meaning.

**4. Role of the Government in the Litigation.** The magistrate ruled that the "role of the government" factor weighs in favor of disclosure here. Order at 59. But Senators Skelos and Nozzolio (and LATFOR member Welquis Lopez) are not "the government." Plaintiffs have sued Senators Skelos and Nozzolio and Mr. Lopez in their official capacities, and a lawsuit against individual legislators and their aides in an official capacity is "'not to be treated as a(n) action against the entity,' but rather, as an action against the individual legislators." *State Employees*, 494 F.3d at 87 (quoting *Scott v. Taylor*, 405 F.3d 1251 (11th Cir. 2005)). The legislative privilege also does not belong to the New York State Legislature as a whole, but to each individual legislator—it is a personal privilege, as the magistrate judge acknowledges (Order at 41 (noting that it is "well settled that the legislative privilege is a personal one") (internal quotation marks omitted)).

The magistrate judge also reasons that the Senate Majority's participation in this litigation as a defendant "weaken[s]" its "claim of privilege against compelled disclosure." Order at 41. But because the purpose of the privilege is to enable legislators and those who assist them to "focus on their public duties" and to serve as a bulwark against "political wars of attrition," *Wash. Suburban*, 631 F.3d at 180-81, the legislative privilege applies *regardless* of whether the Senate Majority is a named party, *id.* at 181 (citing *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F. 2d 856, 859

(D.C. Cir. 1988)). Indeed, it makes no sense to penalize the Senate Majority Defendants merely because the *Plaintiffs* chose to sue them. If that were the rule, plaintiffs would strategically sue legislators every time they sued the government. In doing so, they would force legislators to either sacrifice legislative privilege or sacrifice their right to participate in the litigation.

Even more bizarrely, the magistrate claims that because, according to the magistrate, "the *central issues* in this case [concern the Legislature's] subjective decision-making process, " "the legislature's direct role in the litigation supports overcoming the privilege." Order at 59 (emphasis added). Not only does this contravene the magistrate's earlier determination to defer to the Panel on this "dispositive issue" (*id.* at 55), but the magistrate's recognition of a "central issue[]" exception to legislative privilege directly contradicts the magistrate's prior criticism of such an exception. As the magistrate elsewhere in the order explains, "'[w]ere [the central-issue exception] a basis for denying a defendant's legislative privilege claim, there would be few, if any, cases in which state legislators could shield their personal thought processes from view.'" *Id.* at 37 n.22 (quoting *Rodriguez*, 280 F. Supp. 2d at 99 (alterations in original)). For this same reason, this Court should similarly reject the magistrate's notion that the purported "central role" of the Legislature's "subjective decision-making process" weighs in favor of abrogating the legislative privilege here.

**5. The Possibility of Future Timidity.** The magistrate judge initially suggests that "any chilling effect on legislative debate in the redistricting context is mitigated by the fact that New York State has now passed a new law designed to ensure a more independent redistricting process." Order at 59-60. As an initial matter, it is unclear why a law creating an independent redistricting commission should have any bearing on whether legislative privilege applies here. After all, commissioners acting in a legislative capacity would similarly be entitled to legislative

privilege, *see, e.g.*, *Johnson v. Metropolitan Government of Nashville*, Nos. 3:07–0979, 3:08–0031, 2009 WL 819491, at *3 (M.D. Tenn. Mar. 26, 2009), and their debate would similarly be chilled if legislative privilege is not recognized here. The magistrate misses the mark in stating that "allowing discovery in this case is unlikely to dissuade citizens from serving on a prestigious committee." Order at 60. This factor is focused on the "chilling effect on *legislative debate*," *id.* at 59 (emphasis added), not on a person's willingness to serve in a legislative capacity. While legislators may still run for office and citizens may still serve on a committee regardless of whether legislative privilege is honored, the abrogation of the privilege undoubtedly will inhibit both legislators and citizens from having "open and honest deliberations," as the magistrate recognizes. *Id.* at 60.

In any event, it is far from certain that an independent commission *will* draft the 2022 redistricting plan. As the magistrate notes (Order at 60), the Redistricting Reform Act contemplates a constitutional amendment, but does not actually effect that change and it has not yet been effected because a proposed constitutional amendment must pass two successive Legislatures before being considered for ratification. *See* N.Y. Const. art. XIX § 1. This Legislature cannot permanently bind a successor Legislature, and so there may not, in fact, be a redistricting commission in the next cycle as the magistrate judge presupposes.

Most importantly, as the magistrate judge acknowledges, "allowing discovery to draw back the legislative curtain has the potential, outside the redistricting context, to deter legislators from open and honest deliberations with one another, with their staffs, and with retained experts, for fear that any such communications will be discoverable in future litigation." Order at 60-61. Especially since the magistrate applies the *Rodriguez* factors in a manner that ensures that there

would be few, if any, cases against a legislator where disclosure would be precluded, the potential for this ruling to deter open and honest deliberations in the future is very real.

* * *

Other than revealing a general inclination to deprive the Senate Majority of the benefit of legislative privilege, the magistrate judge's seventy-two page opinion provides no real analysis of why the legislative privilege should be qualified instead of absolute and no real guidance on what types of documents are in fact subject to the qualified privilege that the magistrate will apply here after an *in camera* review. Despite this failure to provide any such guidance, the magistrate ominously threatens "a broad finding of waiver" if the Senate Majority guesses wrongly. Order at 69. While the Senate Majority will in good faith comply with Judge Mann's Order, the Senate Majority respectfully requests that this Court clarify the proper standard that should be applied, should this Court determine that legislative privilege is qualified. And, for the reasons discussed above, upon a proper application of even a qualified legislative privilege the Senate Majority's motion for a protective order should be granted and the Court should accordingly order that the Senate Majority is protected against compelled disclosure of any confidential information concerning redistricting for the 2010 cycle.

## III. THE COURT SHOULD OVERRULE THE MAGISTRATE'S RULING THAT THE SENATE MAJORITY'S PRIVILEGE LOG IS INADEQUATE

The Senate Majority also objects to the magistrate's ruling that the Senate Majority's privilege log is "deficient" and "must be revised." Order at 65. *First*, the magistrate correctly recognizes that, to assess the adequacy of a privilege log, a court must ask whether, "as to each document, the privilege log sets forth specific facts that, if credited, would suffice to establish each element of the privilege"; but the magistrate grossly misapplies that test in rejecting the Senate Majority's privilege log. *See id.* at 64–71. Indeed, there is no dispute that the Senate

Majority's privilege log complies with applicable Federal and Local rules—so, under the very cases the magistrate invokes, it is sufficient to support the assertion of privilege. *See, e.g.*, *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, No. 09-cv-3312, 2011 WL 6102014, at *3 (E.D.N.Y. Dec. 7, 2011) (applying requirements of local rule) (cited by Order at 63).[16]

*Second*, the magistrate mischaracterizes the Senate Majority's document descriptions in stating that "it is insufficient for the Senate Majority to describe each document as 'relating to' (or 'regarding') 'redistricting issues.'" Order at 67. In fact, the Senate Majority's privilege log describes each document as reflecting "*confidential information* relating to redistricting issues." DE 428-1 (emphasis added). Particularly when considered in connection with the other information provided on the privilege log—including the author, addressees, copyees, and date—these descriptions more than suffice to "set[] forth specific facts that, if credited, would suffice to establish each element" of legislative privilege, especially the absolute legislative privilege that, as shown above, properly attaches to the Senate Majority here. Order at 64. For purposes of applying the legislative privilege, so long as the information is confidential and it relates to legislative work, it is subject to the protection of the legislative privilege. *See* Order at 38 (noting that legislative privilege "encompasses legislative work product and *confidential* deliberations" regarding legislative matters) (emphasis added).

*Finally*, the magistrate is incorrect that the Senate Majority should be required to identify which of six categories the documents pertain to. *See id.* at 68. The reason is plain: the magistrate's categories would show what legal issue or issues each document relates to, but do

[16] The magistrate's order to provide further evidentiary submissions with respect to entries on the Senate Majority's log for documents protected by the attorney-client privilege (Order at 71) is particularly inappropriate because neither of the motions made to the magistrate challenges any attorney-client privilege assertion other than the Senate Minority's waiver argument that the magistrate rejected on the ground that the document at issue is not privileged.

not bear on whether they are properly protected by the legislative privilege. While plaintiffs may indeed be curious about this information, they are not entitled to it and it is not necessary to determine whether the legislative privilege applies even under the magistrate's qualified privilege analysis (where the magistrate draws no distinctions based on any topics). Indeed, the magistrate does not explain *why* the document descriptions in the Senate Majority's privilege log are purportedly "insufficient," or why providing the categories set forth in the Order is necessary to properly establish the applicability of the legislative privilege. Confidential communications regarding the quintessentially legislative activity of redistricting are privileged against disclosure, regardless of whether they pertain to "the size of the Senate, Assembly districts in Nassau County, district-line placement" or any other issue in this lawsuit (Order at 68). Because the Senate Majority's privilege log sets forth facts reflecting the communications' confidential and legislative character, it is sufficient under the applicable rules, and the magistrate erred in holding otherwise.

## CONCLUSION

The Senate Majority and the Assembly Majority therefore respectfully request that the Court overrule the Magistrate Judge's Order insofar as it rules that the legislative privilege is qualified, hold that the legislative privilege is absolute, and grant their motions for a protective order. In the alternative, the Court should grant the Senate Majority's and the Assembly Majority's motions on the ground that all confidential information concerning redistricting is protected against disclosure by a qualified legislative privilege.

Dated: August 24, 2012

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (MC 9266)
Louis K. Fisher (admitted *pro hac vice*)
John M. Gore (admitted *pro hac vice*)
David J. Strandness (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113
202/879-3939

Todd R. Geremia (TG 4454)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
212/326-3939

David Lewis (DL 0037)
LEWIS & FIORE
225 Broadway, Suite 3300
New York, NY 10007
212/285-2290

*Attorneys For Defendants Dean G. Skelos, Michael F. Nozzolio, and Welquis R. Lopez*

/s/ C. Daniel Chill
C. Daniel Chill (CC 6940)
Elaine M. Reich (ER 8800)
GRAUBARD MILLER
405 Lexington Avenue
New York, NY. 10174
212/818-8800

*Attorneys For Defendants Sheldon Silver, John McEneny, and Roman Hedges*

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 24, 2012, a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF system.

/s/ Todd R. Geremia
TODD R. GEREMIA