Ex. 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARK A. FAVORS, et al.,

Plaintiffs,

-against-

ANDREW M. CUOMO,
as Governor of the State of New York,
et al.,

Defendants.
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MEMORANDUM AND ORDER

11-CV-5632 (DLI)(RR)(GEL)

ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:

In response to a series of discovery demands by various plaintiffs in this redistricting litigation, three groups of defendants filed motions for protective orders, on the ground of legislative privilege.[1] On August 10, 2012, this Court issued a memorandum and order[2] that deferred ruling on those motions, and ordered the defendants to produce, among other things, the documents listed on their privilege logs for *in camera* review.

The Court has now completed its *in camera* inspection of those 12,792 documents, as well as supplemental submissions from the parties. For the reasons that follow, this Court denies as moot the motions for protective orders filed by the Assembly Majority defendants

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[1] As used in this opinion, the term "plaintiffs" includes three groups of plaintiff-intervenors (the Lee, Ramos and Drayton Intervenors), as well as the Senate Minority defendants (the "Senate Minority"), who filed a cross-claim and posture themselves as plaintiffs; the Senate Minority is therefore excluded from the Court's use of the term "defendants."

[2] See Memorandum and Order (Aug. 10, 2012), Electronic Case Filing ("ECF") Docket Entry ("DE") #487. That opinion, which is reported as Favors v. Cuomo, 285 F.R.D. 187 (E.D.N.Y. 2012), is incorporated by reference herein, and familiarity with its contents is assumed.

and Assembly Minority defendants (collectively, the "Assembly defendants"), because the discovery demands addressed to them have now been withdrawn. With respect to the motion for a protective order filed by the Senate Majority, the Court grants it in part, and denies it in part, in the manner detailed below.

BACKGROUND

I. Case History

The plaintiffs in this case include three plaintiff-intervenor groups, who joined this lawsuit against the defendants, comprising New York State Governor Andrew Cuomo, various New York State legislators, the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"),[3] and several LATFOR members. The amended complaints challenge the current State Senate Plan (the "Senate Plan"), which was redrawn following the release of 2010 Census data, and was enacted in March 2012.[4] The Lee, Drayton, and Ramos Intervenors challenge the validity of the 2012 Senate Plan under the United States Constitution, on the ground that that plan "improperly dilutes the voting power of African Americans, Asian Americans and Hispanics." Opinion and Order (May 16, 2012) at 5, DE #367, reported as Favors v. Cuomo, No. 11-CV-5632 (RR)(GEL)(DLI)(RLM), 2012

[3] LATFOR is a working group whose role is to assist the New York State Legislature in preparing and formulating reapportionment plans and in holding hearings in connection with proposed redistricting plans. See N.Y. Legis. L. § 83-m; Favors, 285 F.R.D. at 202-04 (providing description of LATFOR's structure, membership, and operations).

[4] Although the Court continues to include the Assembly defendants in its use of the term "defendants," all claims challenging the Assembly Plan have now been withdrawn. See Drayton Intervenors' Stipulation of Dismissal of Section 2 Claims re: N.Y.S. Assembly (Dec. 18. 2012) ("Stip. of Dismissal re Assembly"), DE #530.

WL 1802073, at *2 (E.D.N.Y. May 16, 2012), 881 F.Supp.2d 358 (E.D.N.Y. 2012). The Drayton Intervenors further challenge the Senate Plan under Section 2 of the Voting Rights Act ("VRA"), alleging that it fails to create new majority-minority districts in New York City. See id.; Drayton Intervenors' Amended Complaint (Mar. 27, 2012) ¶¶ 111-121, DE #254. The Senate Minority's cross-claim alleges that in drawing the Senate Plan, the Senate Majority, in conjunction with LATFOR, failed to make an "honest and good faith" effort to comply with the Fourteenth Amendment's Equal Protection Clause and its equal population principle. See Senate Minority's Amended Answer to Amended Complaint and Cross-Claim (May 23, 2012) at 9-11, DE #370. More specifically, the Senate Minority alleges that, in drawing the new district lines, the Senate Majority maximized population deviations among districts, underpopulating "all of the districts in the overwhelmingly non-Hispanic white, upstate regions of the State" and overpopulating "minority-concentrated New York City area-districts," because it was "the only way [the Senate] Majority could draw lines specifically intended to perpetuate the Republican majority in the Senate." See id. at 10-11.

II. Discovery Motions

The plaintiffs have sought broad discovery, jointly serving, on all defendants, twenty-nine expansively worded document demands and fifteen interrogatories. See Plaintiffs' Consolidated Initial Discovery Requests[5] (May 31, 2012), Ex. A to Decl. of Todd Geremia (June 18, 2012), DE #395-1. In substance, the plaintiffs have requested:

[5] Citations to specific discovery requests will refer to the number of the particular request (either "Document Demand" or "Interrogatory"), rather than to the page number in the document.

> [D]ocuments and information regarding the instructions given to the mapmakers, the reasons that the [Senate Plan] deviates from equal population, the use of traditional redistricting principles or partisan goals in the development of the plan, considerations of alternative plans and public proposals, the decision to add and placement of a 63rd district, regional malapportionment, attorney communications and time sheets, and documents intended for use in [dispositive] motions now pending before the [Three-Judge] Panel.

Favors, 285 F.R.D. at 195-96. The plaintiffs also seek documents and information relating to the use of racial and election data in formulating the Senate Plan and attempts to comply with New York Legislative Law Section 83-m(13), as enacted by Part XX of Chapter 57 of the Laws of 2010 of New York (hereinafter, "Section 83-m(13)"), concerning reallocation of state prisoners from the districts of their incarceration to their home addresses. See Document Demand #20. The plaintiffs' interrogatories have a similar focus, and also seek the identities of and contact information for the individuals involved in the redistricting process. See Favors, 285 F.R.D. at 196; Interrogatories #1-#3, #7-#8, #10, #13.

On June 11, 2012, the Senate Minority filed a motion to compel production of all of the defendants' documents "relating to or reflecting the determination of the size of the Senate in 2012." See Mem. of Law in Supp. of the Senate Minority's Mot. to Compel Regarding Waiver of Attorney-Client and Work Product Privileges with Respect to the Senate Size (June 11, 2012) at 1, DE #390. Shortly thereafter, the Senate Majority filed a memorandum in opposition to the Senate Minority's motion to compel, and the defendants all filed their above-mentioned motions for protective orders, asserting protection under what they claim is an absolute legislative privilege. See Senate Majority's Opp. to Mot. to Compel Privileged Commc'ns and Work-Product With Respect to the Size of the State Senate (June 25, 2012)

("6/25/12 Senate Maj. Opp."), DE #405; Mem. of Law in Supp. of Senate Majority Defendants' Mot. for Protective Order (June 18, 2012) ("6/18/12 Senate Maj. Mem."), DE #397-1; Assembly Minority's Mem. of Law in Supp. of Mot. for Protective Order (June 18, 2012), DE #399; Assembly Majority's Mem. of Law in Supp. of Mot. for Protective Order (June 18, 2012), DE #394.

On August 10, 2012, this Court issued its opinion preliminarily addressing the various discovery requests and privilege claims. See Favors, 285 F.R.D. 187. First, the Court determined that there had not yet been a subject-matter waiver of the attorney-client privilege with respect to the documents sought by the Senate Minority in their motion to compel, and therefore denied that motion, without prejudice. See id. at 197. Second, rejecting the defendants' argument that the legislative privilege is absolute, the Court ruled that, at best, the disputed documents were subject to a qualified legislative privilege, and ordered an *in camera* review of the withheld documents to allow a contextual assessment of the privilege claims. Id. at 212-13, 220-21, 225.

On August 29, 2012, the defendants, collectively, furnished the Court with 12,792 documents, and each group of defendants filed personnel lists and amended privilege logs. See DE #495-#509. After conducting its *in camera* review, the Court requested additional information from the defendants, to clarify various relationships involved in the redistricting process and this litigation, and ordered the defendants to revise their privilege logs to indicate which legislators were asserting the legislative privilege over each document. See Order (Dec. 19, 2012) (the "12/19/12 M&O") at 6, DE #532. The defendants filed these amended privilege logs, as well as supplemental submissions describing and explaining the nature of the

relationships between legislators, legislative staff, LATFOR experts and staff, and any attorneys in the case. See DE #538-#544.

On January 31, 2013, the Court held a discovery hearing, during which it clarified a few issues with the parties, and ordered them to provide additional submissions to inform its decision on the legislative privilege. See Minute Entry (Jan. 31, 2013) ("1/31/13 Minute Entry") at 1, DE #552; see also Letter to Judge Mann from Drayton Intervenors (Feb. 4, 2013) ("2/4/13 Drayton Letter"), DE #553; Assembly Majority's Letter in Compliance with Jan. 31, 2013 Order (Feb. 4, 2013), DE #554; Assembly Minority's Letter in Compliance with Magistrate Judge Mann's Jan. 31, 2013 Order (Feb. 4, 2013), DE #555; Senate Majority's Letter Regarding January 31, 2013 Discovery Conference (Feb. 4, 2012), DE #556.

DISCUSSION

I. The Assembly Defendants' Motions for Protective Orders

After the Drayton Intervenors voluntarily dismissed the remaining claims challenging the Assembly Plan, see generally Stip. of Dismissal re Assembly, the Court directed the plaintiffs to reconsider and, if appropriate, revise their discovery demands. See Order (Dec. 26, 2012), DE #534. The Drayton Intervenors initially withdrew some of the consolidated discovery requests, with the consent of all plaintiffs. See Drayton Intervenors' Letter re: Discovery (Jan. 7, 2013), DE #535; 1/31/13 Minute Entry. They thereafter agreed to withdraw their demands for all of the documents contained in the privilege logs of the Assembly Majority and Assembly Minority, see 2/4/13 Drayton Letter at 2 – none of which is

relevant to the plaintiffs' challenges to the Senate Plan.[6] Accordingly, the motions of the Assembly Majority and Assembly Minority for protective orders are denied as moot, as there are no pending discovery demands addressed to those defendants.

II. The Legislative Privilege: Applicable Legal Standards

There are four discrete inquiries involved in the analysis of whether the qualified legislative privilege protects against compelled disclosure of (1) the 11,694 documents as to which the Senate Majority has asserted the privilege; and (2) the information sought from the Senate Majority by way of the plaintiffs' interrogatories. As a threshold matter, *in camera* review of the materials has raised questions about whether many of the activities reflected in the documents are actually "legislative"; therefore, the Court must first consider whether the withheld materials are sufficiently "legislative" in nature as to fall within the scope of that privilege. Second, the Court must determine whether the privilege has been properly asserted. Third, the Court must decide whether the legislative privilege, if properly asserted, has been waived with respect to any documents. Finally, for each category of documents as to which the privilege has been properly asserted and not waived, the Court must consider whether the plaintiffs' need for disclosure outweighs the reasons for affording the Senate Majority protection by virtue of the qualified legislative privilege.

The starting point in the Court's analysis is the Speech or Debate Clause, from which the legislative privilege derives. See generally U.S. Const. art. I, § 6; United States v. Johnson, 383 U.S. 169, 173-76 (1966). While not directly applicable to state legislators, see

[6] The Court presumes that the interrogatories served on the Assembly defendants have likewise been withdrawn.

Favors, 285 F.R.D. at 207-08, the Clause provides a useful framework for determining whether the legislative privilege applies to the documents and information sought by the plaintiffs.

By its plain language, the Speech or Debate Clause "appears to protect only [a] Senator's remarks on the Senate Floor." Bastien v. Office of Sen. Ben Nighthorse-Campbell, 390 F.3d 1301, 1305 (10th Cir. 2004). However, the Supreme Court has "long treated the Clause as constitutional shorthand for a more extensive protection." Id. Accordingly, the Clause has been interpreted as shielding legislators "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."[7] United States v. Brewster, 408 U.S. 501, 525 (1972). Nevertheless, because the privilege presents the potential for abuse, the Supreme Court has acknowledged that "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but [rather] to protect the integrity of the legislative process . . . ." Id. at 507. The privilege has thus been interpreted "broad[ly] enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow[ly] enough to guard against the excesses of those who would corrupt the process by corrupting its Members." Id. at 525. The Supreme Court has been "careful not to extend the scope of [Speech or Debate Clause] protection further than its purposes require." Forrester v. White, 484 U.S. 219, 224 (1988) (citing Gravel v. United States, 408 U.S. 606 (1972);

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[7] This Court evaluates the legislative privilege in light of federal standards, not state standards. See Favors, 285 F.R.D. at 209; Rodriguez v. Pataki, 280 F.Supp.2d 89, 95 (S.D.N.Y. 2003) (citing United States v. Gillock, 445 U.S. 360, 370 (1980)), aff'd, 293 F.Supp.2d 302 (S.D.N.Y. 2003).

Hutchinson v. Proxmire, 443 U.S. 111 (1979); Doe v. McMillan, 412 U.S. 306 (1973); Brewster, 408 U.S. 501; Johnson, 383 U.S. 169; Kilbourn v. Thompson, 103 U.S. 168 (1881)); see also United States v. Helstoski, 442 U.S. 477 (1979); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951); Bastien, 390 F.3d at 1314-15 (after analyzing Supreme Court cases relating to legislative immunity and legislative privilege, court concludes that, although Speech or Debate Clause protections are broad, they are "confined within the limits of formal, official proceedings").

While the Speech or Debate Clause, where it applies, grants federal lawmakers an absolute legislative privilege, "the legislative privilege for state lawmakers is 'at best, one which is qualified.'" Favors, 285 F.R.D. at 209 (citing Rodriguez, 280 F.Supp.2d at 100). Indeed, where "important federal interests are at stake . . . comity [to state legislators] yields." See Gillock, 445 U.S. at 373. Consequently, the qualified legislative privilege must be "strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." Favors, 285 F.R.D. at 209 (citing Rodriguez, 280 F.Supp.2d at 93-94). As with other privileges, the party seeking protection on the basis of legislative privilege bears the burden of establishing entitlement to it. See Almonte v. City of Long Beach, No. CV 04-4192(JS)(JO), 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) ("Almonte I").

As a general matter, when a state legislator invokes the legislative privilege, the privilege covers legislative work product and deliberations between and among legislators, and

protects legislators and their aides, see Favors, 285 F.R.D. at 202; see also Gravel, 408 U.S. at 616, subject to the same limitations attendant to claims of legislative privilege under the Speech or Debate Clause. See *supra* pp. 8-9. Although the privilege extends to legislative staffs and experts, "communications with 'knowledgeable outsiders' – e.g., lobbyists – fall outside the privilege." Favors, 285 F.R.D. at 212; see also Rodriguez, 280 F.Supp.2d at 101; Almonte I, 2005 WL 1796118, at *3 ("Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.").

A. Legislative Acts

In two cases decided on the same day, the Supreme Court determined that the touchstone of the inquiry under the Speech or Debate Clause is whether or not the activity in relation to which the protection is claimed is in fact "legislative." See Brewster, 408 U.S. 501; Gravel, 408 U.S. 606. In Gravel, the Court focused on the availability of the privilege to a legislative aide to Alaska Senator Mike Gravel, after Senator Gravel sought to quash a subpoena compelling that aide to testify before a grand jury about acts undertaken in connection with the Pentagon Papers. 408 U.S. at 608-09. The Supreme Court held that while Speech or Debate protection extended to the Senator's aide with regard to legitimately "legislative" acts, efforts to arrange for publication of the classified documents with a publishing house, the Beacon Press, were not legislative acts, and therefore the aide's testimony about attempts to effect such publication could be compelled, over the claim of legislative privilege. See id. at 622, 625-27.

In Brewster, the Supreme Court further explored Speech or Debate protection, in determining whether a Senator could be prosecuted for taking bribes in exchange for votes and other legislative favors related to the setting of postal rates.[8] 408 U.S. at 502. Rejecting the argument that a "casual[] or incidental[]" relationship to the legislative process is sufficient to sustain a claim of legislative immunity, id. at 528, the Court held that prosecution was permissible, because "[t]aking a bribe is, obviously, no part of the legislative process or function," 408 U.S. at 526, and because prosecution did not require inquiry into motivations for taking legislative actions. Id. at 528. The Court took pains to distinguish between "legislative" acts (which are protected by the privilege) and "political" acts (which are not):

> It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things generally done in a session of the House by one of its members in relation to the business before it, or things said or done by him, as a

[8] Although Brewster involved a claim of legislative immunity, the Supreme Court's analysis of the distinction between legislative and non-legislative acts is in harmony with its analysis in Gravel, the legislative privilege case decided on the same day.

representative, in the exercise of the functions of that office.

Brewster, 408 U.S. at 512-13 (citing Kilbourn, 103 U.S. at 204; Coffin v. Coffin, 4 Mass. 1, 27 (1808) (internal quotation marks omitted)). The Court emphasized in Brewster that "[i]n no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process . . . . Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to 'relate' to the legislative process." Brewster, 408 U.S. at 515-16.

In order to enable courts to determine whether activity is legislative or not, parties seeking protection "must point out the evidence in the record that establishes [a] legislative role." Almonte I, 2005 WL 1796118, at *3. And, while "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it," Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998), courts may inquire into the substance of purportedly legislative activities in order to evaluate whether they are, in fact,"legislative" in nature. See Virgin Islands v. Lee, 775 F.2d 514, 523-24 (3d Cir. 1985).

In accordance with the principles enunciated in Brewster and Gravel, claims of legislative privilege implicate the question of whether an act is "quintessentially legislative," an "integral step" in the legislative process, or bears "the hallmarks of traditional legislation." Bogan, 523 U.S. at 55. Courts have therefore held that floor debates, votes, and issuance of subpoenas to appear before Congressional committees are "legislative," see, e.g., Gravel, 408 U.S. at 617; Dombrowski, 387 U.S. at 84; Johnson, 383 U.S. at 173-76; Eastland, 421 U.S. at 505, but that matters such as preparation of newsletters and press releases are not, because, "by contrast, [they] are primarily means of informing those outside the legislative forum."

Hutchinson, 443 U.S. at 133; see also Manzi v. DiCarlo, 982 F.Supp. 125, 131 (E.D.N.Y. 1997) (holding that documents relating to Senate Majority Leader's decisions regarding allocations of funds are "essentially administrative decisions . . . and do not involve legislative decisions," and are therefore not protected by legislative privilege).

Although recent redistricting cases have tended to focus on balancing the *Rodriguez* factors to determine whether the assertion of the qualified legislative privilege has been outweighed, those decisions -- as well as this Court's August 2012 Memorandum and Order -- likewise recognize that the privilege attaches only to communications and information that can properly be characterized as "legislative" in nature. See, e.g., Rodriguez, 280 F.Supp.2d at 103 (allowing compelled disclosure of information regarding LATFOR operations, but affording protection to "information concerning the actual deliberations of the Legislature – or individual legislators – which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature"); Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 299-301 (D. Md. 1992) (for the purpose of deciding whether legislative privilege was available to non-legislator members of Governor's advisory committee on redistricting, court evaluates their "act[s'] proximity to the legislative arena," and the extent to those acts "fall within the sphere of legitimate legislative activity," Tenney, 341 U.S. at 376); see also Favors, 285 F.R.D. at 209.

To be sure, enacting a redistricting plan in New York is properly characterized as a "legislative" pursuit; the process is mandated by the State Constitution, and, once ratified by the Legislature and approved by the Governor, any such plan is prospective and broadly applicable. See N.Y. Const. art III, § 4. Nevertheless, it does not follow that any and all

tasks touching upon the redistricting process are "integral" to it, see Bogan, 523 U.S. at 55; thus, some corollary acts no doubt fall on the periphery, or outside the ambit, of the protection afforded by the legislative privilege.

Consistent with the general framework set forth in Brewster and its progeny, and in line with other recent federal redistricting cases, this Court's *in camera* review confirms that a legislative/non-legislative distinction can and should be drawn with regard to some of the documents responsive to the plaintiffs' discovery demands.[9] Accordingly, several categories

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[9] A district court case from the Northern District of Oklahoma, Lindley v. Life Investors Insurance Company of America, No. 08-CV-379-CVE-PJC, 2009 WL 2245565 (N.D. Okla. July 24, 2009), is instructive in this regard. That decision, although not involving redistricting, also addressed the extent of the legislative privilege in light of Brewster, its progeny, and Bastien:

> Items which are protected by legislative privilege include: (1) all formal actions in the official business of [the State Senate], including voting, conducting hearings, issuing reports and issuing subpoenas; (2) questioning witnesses in state investigative committee meetings; (3) committee reports distributed within the [State] Senate; (4) votes to authorize committee investigations and the issuance of subpoenas in those investigations; (5) [any] Senator's floor speech, its preparation and motives for the speech; (6) making, publishing, presenting and using legislative reports; (7) introducing material at committee hearings; (8) information gathering if in the course of formal committee action when the committee had subpoenaed witnesses or disclosed information during a hearing. Contrarily, the following is a list of items *not* covered by the legislative privilege: (1) errands performed for constituents or other members of the public; (2) making appointments with Government agencies; (3) assistance in securing Government contracts; (4) preparing news letter[s] to constituents or other members of the public; (5) news releases; (6) speeches delivered outside the Senate; (7) illegal acts; (8) personal acts; (9) promise[s] to vote a certain way or give a speech at a future date; (10) private publication of material included in the record of a subcommittee hearing; (11) informal meetings with constituents or other members of the public.

Id. at *11-12 (internal quotation marks omitted).

of acts reflected in the documents produced for *in camera* inspection are non-legislative, and the legislative privilege therefore will not shield such documents from disclosure.

For example, *in camera* review reveals that the memorandum from Michael Carvin of the Jones Day law firm, counsel for the Senate Majority defendants (the "Carvin Memorandum"), regarding the number of Senate districts required by the New York State Constitution, is not legislative. Although styled as a memorandum providing legal advice in connection with the redistricting process, the Carvin Memorandum was intended to serve, instead, as a communication with those outside the legislative forum, much like a press release. See 6/25/12 Senate Maj. Opp. at 2-3, 8 (stating that the Carvin Memorandum was meant to serve as a public statement). The documents reviewed by the Court show that the timing of the publication of the Carvin Memorandum on the LATFOR website, and the decision to format the release as a legal memorandum from Mr. Carvin, were tactical choices made for reasons unrelated to legislative deliberation.[10] Moreover, as is evident from the communications surrounding the publication of the Carvin Memorandum, the content of that document, rather than reflecting an integral step in the deliberative process, was meant to provide a post hoc, public rationale for a previously made decision on the size of the Senate.[11] Therefore, the

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[10] See, e.g., documents with the following Bates numbers: SENMAJPRIV00049629, SENMAJPRIV00049622, SENMAJPRIV00021843, SENMAJPRIV00200467-72, SENMAJPRIV00028078, SENMAJPRIV00154533-35, SENMAJPRIV00099237, SENMAJPRIV00053135-43, SENMAJPRIV00054818, SENMAJPRIV00054819, SENMAJPRIV00054820-28.

[11] See, e.g., documents with the following Bates numbers: SENMAJPRIV00028078, SENMAJPRIV00154533-35, SENMAJPRIV00099237, SENMAJPRIV00053135-43, SENMAJPRIV00054818, SENMAJPRIV00054819, SENMAJPRIV00054820-28.

legislative privilege does not protect documents relating to the Carvin Memorandum. Similarly, other memoranda published on the LATFOR website are properly categorized as public statements, as opposed to legislative acts, and documents concerning the preparation of such public statements fall outside the scope of the legislative privilege.[12]

Additionally, documents or communications prepared in connection with litigation are not legislative. Included in this category are documents reflecting communications with or activities conducted by Richard Engstrom, a redistricting expert hired by Jones Day for litigation purposes.[13] Similarly, documents and communications pertaining to the instant

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[12] Examples of such documents are those with the following Bates numbers: SENMAJPRIV00037074-75, SENMAJPRIV00149860 [4:22 p.m. email], SENMAJPRIV00005700-04, SENMAJPRIV00082068-85, SENMAJPRIV00054965-66; SENMAJPRIV00161618-19.

[13] Therefore, any documents including, or reflecting work performed by, Richard Engstrom are not "legislative." These documents include those with the following Bates numbers: SENMAJPRIV00068283 (attaching SENMAJPRIV00068284-86), SENMAJPRIV00068547, SENMAJPRIV00068572, SENMAJPRIV00068577 (attaching SENMAJPRIV00068578), SENMAJPRIV00068554 (attaching SENMAJPRIV00068555), SENMAJPRIV00068545, SENMAJPRIV00068592 (attaching SENMAJPRIV00068593-636), SENMAJPRIV00068575, SENMAJPRIV00068289 (attaching SENMAJPRIV00068290-91), SENMAJPRIV00068275 (attaching SENMAJPRIV00068276-80), SENMAJPRIV00068587 (attaching SENMAJPRIV00068588-91), SENMAJPRIV00068579 (attaching SENMAJPRIV00068580-82).

Earlier in this litigation, the Ramos Intervenors argued that the Senate Majority had waived any claim of legislative privilege with respect to communications with outside consultants such as Richard Engstrom. See Ramos Intervenors' Mem. in Opp. to Senate Majority's Mot. for Protective Order (July 2, 2012) ("7/2/12 Ramos Opp.") at 12-13, DE #430. In rejecting that argument in its August 10th opinion, see Favors, 285 F.R.D. at 212-13, this Court did not have the benefit of the following: *in camera* inspection of the Engstrom-related documents; a personnel list indicating that his "supervisor" was not a legislator (or legislators) but Jones Day; or an in-court representation by counsel for the Senate Majority, on January 31, 2013, that Jones Day had hired Engstrom for *litigation* purposes. The Court adheres to the view

(continued…)

litigation are not protected by the legislative privilege.[14]

The following activities are also "non-legislative," and thus documents relating to them are not subject to protection under the legislative privilege: inquiries from members of the public or media and responses thereto;[15] public remarks, statements crafted for public relations purposes, and public speeches made outside the Legislature by legislators or their representatives;[16] public testimony;[17] efforts made in connection with negotiation for and/or securing of government contracts, and remuneration of contractors or service providers;[18]

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[13](…continued)
that, as a general principle, communications with consultants participating in the legislative deliberative process do not necessarily result in a waiver of the legislative privilege; nevertheless, in the case of Engstrom, the privilege never attached to the communications or documents, because he was not retained to perform legislative acts. (Whether or not these documents are protected from disclosure by the attorney-client privilege or work product doctrine is a matter not addressed in this opinion.)

[14] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00054845-46, SENMAJPRIV00170798-800, SENMAJPRIV00163895, SENMAJPRIV00081632-33.

[15] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00039912-14, SENMAJPRIV00050735, SENMAJPRIV00050736, SENMAJPRIV00054847, SENMAJPRIV00152045-46.

[16] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00055360, SENMAJPRIV00055234, SENMAJPRIV00055320, SENMAJPRIV00055254–56, SENMAJPRIV00055229-30, SENMAJPRIV00055216-17, SENMAJPRIV00055361-62, SENMAJPRIV00055242.

[17] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00099651-64, SENMAJPRIV00135889-94, SENMAJPRIV00037095-149, SENMAJPRIV00061661-75, SENMAJPRIV00061676-82, SENMAJPRIV00055278.

[18] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00160066-67, SENMAJPRIV00160055–57, SENMAJPRIV00160052-53, SENMAJPRIV00055006-07, SENMAJPRIV00162331, SENMAJPRIV00055206-07,
(continued…)

administrative tasks;[19] correspondence with or about national political organizations;[20] submissions to the Department of Justice related to compliance with Section 5 of the VRA;[21] and any other "means of informing those outside the legislative forum." Hutchinson, 443 U.S. at 133.

On the other hand, materials prepared in connection with floor speeches, floor debate, committee meetings and reports, the casting of votes, or formal information-gathering by LATFOR or other representatives for legislators are "legislative" and the qualified legislative privilege thus extends to materials and information created in connection with these acts. Included in this category are documents and communications reflecting the following: the drafting of remarks to be made on the floor of the Legislature in support of proposed

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[18](…continued)
SENMAJPRIV00160050-51, SENMAJPRIV00145373-74, SENMAJPRIV00145371; SENMAJPRIV00149393, SENMAJPRIV00135799, SENMAJPRIV00150806-07, SENMAJPRIV00191056, SENMAJPRIV00151011, SENMAJPRIV00055008-19.

[19] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00124661, SENMAJPRIV00150486, SENMAJPRIV00099551, SENMAJPRIV00082143, SENMAJPRIV00124707-08, SENMAJPRIV00124754, SENMAJPRIV00124748-49, SENMAJPRIV00150177.

[20] One such document is that with Bates numbers SENMAJPRIV00135920-21.

[21] Indeed, the defendants categorize VRA submissions as "public." See Assembly Minority's Reply in Supp. of Mot. for Protective Order (July 9, 2012) at 3, DE #440. These unprivileged submissions include "macros, subroutines or programs" or other similar types of computer files "used in connection with racial block voting analyses of Census or other data." Rodriguez v. Pataki, Nos. 02 Civ. 618RMBFM, 02 Civ. 3239RMBFM, 2003 WL 22109902, at *4 (S.D.N.Y. Sept. 11, 2003) ("Rodriguez II"), aff'd, 293 F.Supp.2d 313 (S.D.N.Y. 2003). Examples of such documents include those with the following Bates numbers: SENMAJPRIV00098383-84, SENMAJPRIV00098156-57, SENMAJPRIV00212770-72, SENMAJPRIV00068559-62, SENMAJPRIV00068563, SENMAJPRIV00055624, SENMAJPRIV00124403-26, SENMAJPRIV00112282-372, SENMAJPRIV00100125-37.

legislation;[22] proposed changes to statutory language;[23] decisionmaking over placement of district lines;[24] exchanges between legislators or their aides and experts about possible changes to their districts;[25] consideration of public proposals;[26] and emails forwarding newspaper stories or other information to legislators or their staff, to be considered in connection with legislative deliberations.[27] Where the distinction between "legislative" and "non-legislative" is blurred, this Court will err on the side of concluding that the qualified privilege applies.[28]

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[22] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00098448-52, SENMAJPRIV00156672-76, SENMAJPRIV00156629-53, SENMAJPRIV00053241, SENMAJPRIV00053270-71, SENMAJPRIV00053241, SENMAJPRIV00196672-93.

[23] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00156833-35, SENMAJPRIV00159017-22, SENMAJPRIV00047389-96, SENMAJPRIV00047455-960, SENMAJPRIV00156608-10, SENMAJPRIV0068091, SENMAJPRIV00039768-88.

[24] Among these legislative documents are various early versions of the Senate Plan, and any accompanying reports. Examples of such documents include those with the following Bates numbers: SENMAJPRIV00162063, SENMAJPRIV00200488-90, SENMAJPRIV00196433-55, SENMAJPRIV00005541-68, SENMAJPRIV00005509-19, SENMAJPRIV00005520-30, SENMAJPRIV00211409, SENMAJPRIV00053468, SENMAJPRIV00201710-11.

[25] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00082592-93, SENMAJPRIV00018493-94, SENMAJPRIV00213992-93, SENMAJPRIV00095127.

[26] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00098638-39, SENMAJPRIV00055271-72, SENMAJPRIV00055273, SENMAPRIV00055653-54, SENMAJPRIV00055300-15, SENMAJPRIV00053058, SENMAJPRIV00008497-98, SENMAJPRIV00200266-70.

[27] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00136640-44, SENMAJPRIV00124434-35, SENMAJPRIV00055625-29, SENMAJPRIV00190401-03.

[28] When the Court conducts the qualified privilege balancing test, the extent to which certain

(continued…)

B. Assertion of Privilege

Even where the demanded documents or information are legislative in nature, the legislative privilege will not shield them from disclosure unless the privilege has been properly asserted; this is because the legislative privilege "is a personal one," which must be "asserted by each individual legislator." See Favors, 285 F.R.D. at 211 (quoting ACORN v. Cnty. of Nassau, No. CV 05-2301(JFB)(WDW), 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007) ("ACORN I"), aff'd, 2009 WL 2923435 (E.D.N.Y. Sept. 10, 2009)); Almonte I, 2005 WL 1796118, at *3 n.2. A legislator is not permitted to assert the privilege on behalf of another legislator. See Favors, 285 F.R.D. at 211; Almonte I, 2005 WL 1796118, at *3 n.2; A Helping Hand, LLC v. Baltimore Cnty., Md., 295 F.Supp.2d 585, 590 (D. Md. 2003). A legislator may, however, claim the legislative privilege (on his *own* behalf) over materials prepared by his aide in the process of completing tasks that "would have been legislative acts, and therefore privileged, if performed by the Senator personally." Gravel, 408 U.S. at 616 (internal citation omitted).

Here, the Senate Majority's privilege logs reflect that for each document, the legislative

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[28](…continued)
activity seems to approach the "non-legislative" sphere will weigh in favor of overcoming the privilege.

In a related vein, some courts have held that factual materials, as opposed to opinions, recommendations, or advice, are not protected from disclosure by the legislative privilege. See, e.g., In re Grand Jury, 821 F.2d 946, 959 (3d Cir. 1987); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *9-10 (N.D. Ill. Oct. 12, 2011); see also Manzi, 982 F.Supp. at 131; 7/2/12 Ramos Opp. at 12. Out of an abundance of caution, this Court has not treated factual materials as nonprivileged, but instead regards them as less deserving of protection under the balancing test.

privilege has been asserted by one or more legislator defendants. Although, in many instances, the legislator asserting the privilege neither authored the document nor was a party to the communication contained therein, the legislator may nevertheless assert the privilege where such documents were prepared by, or reflect communications with, members of the legislator's staff and/or alter egos assisting the legislator with deliberative redistricting tasks. As revealed in the Senate Majority's logs and personnel lists, these legislative "aides" include LATFOR experts and staff within the respective partisan LATFOR offices and, in limited circumstances, attorneys for legislators. Inasmuch as the process of redistricting necessitates the involvement of technical staff and advisors,[29] the plaintiffs have not offered any reasoned analysis as to why the privilege may not be invoked with respect to communications and acts of personnel assisting in the course of the redistricting process.

Having reviewed the case law and the withheld documents, this Court finds that many of the tasks undertaken by, and in consultation with, LATFOR, during the actual redistricting process, "would have been legislative acts . . . if performed by the [named] Senator[s] personally." Gravel, 408 U.S. at 616; but cf. Rodriguez, 280 F.Supp.2d at 101 (suggesting that certain of these individuals likely fall outside the scope of the legislative privilege). Therefore, the Court concludes that the legislative privilege has been validly asserted as to those documents that are "legislative" in character.

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[29] See, e.g., Bush v. Vera, 517 U.S. 952, 961-63 (1996) (describing some changes to the redistricting process due to increased technological sophistication of redistricting software used in Texas following 1990 Census – twenty years prior to this case); Larios v. Cox, 300 F.Supp.2d 1320, 1324 (N.D. Ga. 2004) (describing sophistication of redistricting software).

C. Waiver

Even if properly asserted, the legislative privilege nevertheless can be waived if "the parties holding the privilege share their communications with an outsider." See Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10 (citing ACORN I, 2007 WL 2815810, at *4); Favors, 285 F.R.D. at 212. As explained in a decision from this District: "If . . . individual defendant[s] had a legislative privilege, it means they were entitled not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders. It does not mean they were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others." Almonte I, 2005 WL 1796118, at *3. Therefore, courts in redistricting cases have concluded that the privilege is waived by voluntary public disclosure of internal legislative deliberations. See Favors, 285 F.R.D. at 211-12; Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10-11; ACORN I, 2007 WL 2815810, at *4.

Disclosure of information to a legislator's staff member or other legislative alter ego does not, without more, constitute a waiver of the qualified legislative privilege over materials generated in connection with legislative acts integral to redistricting. On the other hand, the legislative privilege is waived as to communications made in the presence of third parties who are outsiders to the legislative process. Thus, in this case, waiver has occurred where otherwise privileged information or materials were disclosed to those outside the deliberative process.[30] In contrast, publication of earlier versions of redistricting plans published on the

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[30] Because Richard Engstrom was hired by Jones Day to perform non-legislative tasks, the legislative privilege has been waived as to any legislative documents disclosed to him. Examples of these materials are those with the following Bates numbers:

(continued…)

LATFOR website did not work a waiver of the qualified legislative privilege in connection with LATFOR's preparation of the maps, since publication did not breach the legislative "cloister" by detailing internal deliberations and/or justifications for decisionmaking.[31]

D. Balancing Test - Qualified Legislative Privilege

This Court will now address whether certain categories of requested documents properly falling within the scope of the qualified legislative privilege, are nevertheless subject

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[30](…continued)
SENMAJPRIV00068540, SENMAJPRIV00068337-40, SENMAJPRIV00068341-45.

[31] In Rodriguez II, Magistrate Judge Frank Maas concluded that documents and communications relating to the decision to increase the size of the Senate could not be withheld on the basis of legislative privilege because that aspect of the legislative process had not been kept "carefully cloistered within the confines of its separate redistricting office." Rodriguez II, 2003 WL 22109902, at *3. The same could be said in this case, where the Senate Majority defendants themselves assert that their publication of the Carvin Memorandum was intended to "promot[e] open government and transparency in redistricting." 6/25/12 Senate Maj. Opp. at 2; see also id. at 8. Nevertheless, the Court need not rest its ruling on that ground. For the reasons previously discussed, documents relating to the Carvin Memorandum are not legislative, see *supra* pp. 15-16; and, more broadly, as discussed hereinafter, documents concerning the size of the Senate are discoverable under the *Rodriguez* balancing analysis. See *infra* pp. 28-29.

At this time, the Court need not, and therefore does not, reach the separate argument advanced by the Senate Majority, to wit, that, even though the Senate Minority is willing to waive the privilege, "a legislator who waives legislative privilege may not disclose communications or documents shared with legislators or agents who invoke the privilege." See Senate Majority's Letter re: Court's Dec. 19, 2012 Order (Jan. 14, 2013) at 4, DE #543. In any event, the Senate Minority defendants are entitled to any communications or documents to which they, or their legislative aides or assistants, were made privy during the redistricting process – not because the legislative privilege has been waived as to those items, but because those individuals also fall within the scope of the legislative privilege asserted over any such materials. Examples of such documents include those with the following Bates numbers: SENMAJPRIV00137152-53, SENMAJPRIV00145349, SENMAJPRIV00146320, SENMAJPRIV00149354-56, SENMAJPRIV00200415, SENMAJPRIV00124814, SENMAJPRIV00124445, SENMAJPRIV00127093, SENMAJPRIV00126969-80, SENMAJPRIV00126981-83.

to disclosure because, on balance, the privilege is overcome by the interests of justice and the plaintiffs' need for information material to this litigation. Contrary to the defendants' argument, compelling disclosure of a subset of the withheld documents does not unjustly "change the rules after-the-fact," Oaks Decl. ¶ 14, DE #538-2; for the past decade, courts in this Circuit have applied the *Rodriguez* balancing test to claims of legislative privilege.

At the outset, the Court notes that the plaintiffs' many discovery requests are overlapping: Some requests broadly seek virtually all documents, correspondence, and information related in any way to the redistricting process, whereas others are narrowly tailored to target information relevant to the specific claims at issue in this case. Analyzing categories of discovery demands in terms of how the information sought relates to the plaintiffs' claims is the most efficient way to resolve a discovery dispute that involves thousands of documents; in addressing categories of discovery requests, the Court will identify which demands relate to each discovery category. Where the Court concludes that the assertion of legislative privilege is overcome by the plaintiffs' need for that category of documents, it will be the responsibility of the Senate Majority to identify and disclose all such responsive documents.

"To determine whether the legislative privilege precludes disclosure, a court must balance the interests of the party seeking the evidence against the interests of the individual claiming the privilege." Favors, 285 F.R.D. at 209-10 (citing ACORN I, 2007 WL 2815810, at *2); Rodriguez, 280 F.Supp.2d at 96, 100-01. In conducting this balancing, courts consider five factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of

the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." Rodriguez, 280 F.Supp.2d at 100-01. If consideration of the first four factors leads to the conclusion that they outweigh the risk addressed by the fifth – possible future timidity – then the demanded document ought to be disclosed, despite the assertion of legislative privilege. If, on the other hand, those factors do not outweigh the danger of future timidity, then the qualified legislative privilege has not been overcome, and the Court grants the Senate Majority's motion for a protective order accordingly. See generally Favors, 285 F.R.D. at 207 (the balancing test required to determine whether the qualified legislative privilege is overcome substantially overlaps with, and hence subsumes, the analysis relevant to deciding whether to grant a protective order).

As an initial matter, the Court reiterates that in this case, several factors consistently weigh towards disclosure – across all categories of documents sought by the plaintiffs. See Favors, 285 F.R.D. at 217-25. For instance, while "relevance" and "availability of other evidence" (factors one and two) vary among discovery categories, the third factor ("seriousness of the claims") remains constant: "[I]t is indisputable that racial [discrimination] and malapportionment claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government,' and thus counsel in favor of allowing discovery." Favors, 285 F.R.D. at 219 (citing Rodriguez, 280 F.Supp.2d at 102). This principle applies with particular force in this case, where the plaintiffs have alleged, among other things, that the Senate Plan systematically and consistently overpopulates minority-concentrated New York City area districts, to a degree that exceeds the disparities left

undisturbed by the three-judge panel in Rodriguez. Simply put, the "plaintiffs' allegations are serious" and "raise profound questions about the legitimacy of the redistricing process and the viability" of the Senate Plan. Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *8.

Factor four, "the role of the government in the litigation," likewise remains constant as to each discovery category. First of all, this factor does not turn on whether the legislature as an entity is a party to the action; rather, it considers the role played by that body and its members in the allegedly unlawful conduct. See id. (in lawsuit against Illinois State Board of Elections, charging unlawful discrimination in 2011 congressional redistricting plan, court conducted *Rodriguez* balancing test and concluded that role of subpoenaed non-party legislators in conduct at issue in litigation weighed in favor of disclosure). Here, as in the Committee for a Fair & Balanced Map case, the legislators' role in the allegedly unlawful conduct is "direct," and therefore "militate[s] in favor of disclosure." Id. Furthermore, "the fact that the legislators here have declined to assert legislative immunity weakens their claim of qualified privilege . . . [and therefore] supports overcoming the privilege." Favors, 285 F.R.D. at 220.

Generally speaking, factor five, the chilling effect on the legislative process, weighs against displacing the privilege. On the other hand, the defendants' decision not to invoke legislative immunity, and their continued, voluntary involvement in this litigation, undercut their predictions of future timidity. Furthermore, the defendants offer no concrete proof that the compelled disclosure of certain legislative materials and information in Rodriguez in any way chilled legislative deliberations or debate, see Favors, 285 F.R.D. at 220, and the Court's

in camera inspection did not reveal such legislative timidity.[32]

1. Deviation from Population Equality and Regional Malapportionment

The plaintiffs seek documents concerning the regional malapportionment reflected in the Senate Plan, including "the reasons the Senate districts contained in the [] Senate Plan contain population deviations and the reasons why the districts . . . contain their particular population deviations." Document Demand #2.[33] Upon a balancing of the factors, the qualified legislative privilege must yield.

First, documents pertaining to equipopulousness and/or attempts to maximize the population variations between upstate New York districts and downstate New York City-area districts (where the majority of the State's minorities reside) for partisan purposes, or for the purpose or with the effect of diluting minority votes, are highly relevant to the plaintiffs' Equal Protection claims. See, e.g., Larios v. Cox, 300 F.Supp.2d 1357, 1342 (N.D. Ga. 2004), aff'd, 542 U.S. 947 (2004). Second, the plaintiffs have no other means of accessing this body of evidence; the defendants have heretofore declined to share these materials. Third, the Senate Majority defendants have addressed the issues of deviation from population equality and regional malapportionment in their motion for summary judgment and supporting submissions, providing their own explanations for and evaluation of the Senate Plan's population deviations – thereby heightening the plaintiffs' need for information relevant to these arguments. See generally Senate Majority's Motion for Summary Judgment on All Equal-Population Claims

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[32] To the extent that the above factors carry the same or similar weight in the Court's category-by-category analysis, they will remain unmentioned.

[33] This category also relates to Document Demands #8 through #11.

(June 29, 2012) ("6/29/12 Senate Maj. Equal Pop. Mem.") at 10-19, DE #420-2. Moreover, the Senate Majority's willingness to provide their own theories in court filings about how and why the Senate Plan disparately impacts "upstate" versus "downstate" regions tends to weaken their claim of legislative timidity. See id.

In fairness, the Senate Majority should not be permitted to selectively disclose analyses of these disparities, while shielding other documents on this subject. Therefore, under a balancing approach, documents falling within this category may not be withheld on the basis of the legislative privilege.[34]

2. Decision to Add and Placement of a 63rd District

The plaintiffs seek documents and communications concerning "the decision to increase the size of the Senate to 63," Document Demand #7, as well as the placement of that district. Document Demands #8, #18. The plaintiffs' need for these documents outweighs the defendants' interest in protection under the qualified legislative privilege. First, "information relating to the Senate size . . . is 'inextricably intertwined' with the plaintiffs' Equal Protection malapportionment claims." Favors, 285 F.R.D. at 219 (citation omitted). Second, these documents are relevant to whether the Senate Majority made "honest and good faith" attempts to comply with the equal population principle embodied in the Equal Protection Clause. See id. at 218. Finally, although the Senate Majority defendants claim to have "promot[ed] open government and transparency in redistricting," 6/25/12 Senate Maj. Opp. at 2, they have

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[34] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00161363-68,SENMAJPRIV00161892, SENMAJPRIV00200482-84, SENMAJPRIV00095107-08,SENMAJPRIV00195050, SENMAJPRIV00095109, SENMAJPRIV00195339-40, SENMAJPRIV00040086-87, SENMAJPRIV00242640-44.

refused to release these documents, except for selectively disclosing the Carvin Memorandum.[35] The plaintiffs' need for these materials thus outweighs any potential chilling effect, and documents falling within this category may not be withheld on the basis of the legislative privilege.[36]

3. Use of Traditional Redistricting Principles

The plaintiffs have sought "[a]ll documents relating to or evidencing any effort . . . to pursue or heed allegedly traditional redistricting principles." Document Demand #3.[37] Notably, in connection with their pending motion for summary judgment on the plaintiffs' equal population claims, the Senate Majority defendants have selectively disclosed materials that purport to show the promotion of certain redistricting principles – i.e., preserving district cores, avoiding incumbent pairing, and offsetting vote dilution. See 6/29/12 Senate Maj. Equal Pop. Mem at 4, 13, 16-21; Geremia Decl. in Support of Motion for Summary Judgment on Equal Population Claims (June 29, 2012) ("Geremia Equal Pop. Decl."), DE #419; id. Exs. A-E, G, J, M, DE #419-1, DE #419-2, DE #419-3, DE #419-4, DE #419-5, DE #419-7,

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[35] Documents relating to the Carvin Memorandum, which the Court has ruled are not legislative in nature, see *supra* pp. 15-16, constitute only a subset of documents responsive to Document Demand #7.

[36] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00019982-83, SENMAJPRIV00098448-52, SENMAJPRIV00054870, SENMAJPRIV00054848, SENMAJPRIV00068090, SENMAJPRIV00037180, SENMAJPRIV00037181-83, SENMAJPRIV00050751-52, SENMAJPRIV00005736-37, SENMAJPRIV00005748-53, SENMAJPRIV00046407-78, SENMAJPRIV00156654-71, SENMAJPRIV00028030, SENMAJPRIV00019962, SENMAJPRIV00037084-90, SENMAJPRIV00160070-88, SENMAJPRIV00160314, SENMAJPRIV00054901-05.

[37] This category also relates to Document Demands #8, #11 and #16.

DE #419-10, DE #419-13. The Senate Majority's reliance on these redistricting principles in moving for summary judgment, whether or not constituting a subject-matter waiver of the legislative privilege, significantly strengthens the plaintiffs' need for information relating to such principles and weakens the defendants' interest in nondisclosure. Accordingly, to the extent that any documents within this category relate to defenses, or arguments put in issue, by the defendants, those materials may not be withheld on the basis of the qualified legislative privilege.[38] Documents that pertain only to redistricting principles other than the three above-mentioned ones do not lose their protection unless the defendants intend to use such documents later in this litigation. See Favors, 285 F.R.D. at 212; Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *11.

4. Use of Partisan Goals in the Development of the Plan

The plaintiffs have demanded "[a]ll documents relating to or evidencing any consideration . . . of partisan goals relating to the 2012 Senate Plan." Document Demand #4.[39] The claims in this case pose the question of whether partisan redistricting that systematically maximizes regional population disparities may give rise to a violation of the "one-person, one-vote" principle of the Equal Protection Clause of the Fourteenth Amendment. Therefore, on the one hand, documents or communications that reflect attempts to redraw districts to entrench systemwide partisan advantage are relevant to this litigation. Nevertheless, partisan redistricting is not per se impermissible, see, e.g., Vieth v. Jubelirer,

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[38] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00135912, SENMAJPRIV00201632.

[39] This category also relates to Document Demand #16.

541 U.S. 267, 281 (2004), and, without more careful cabining, the plaintiffs' requests for documents that reveal "partisan goals" are overly broad. Moreover, most of the documents relevant to the plaintiffs' claims of partisan-based disparities and discrimination fall within other categories that are already subject to disclosure for the reasons stated by the Court. Therefore, the plaintiffs have not demonstrated a need for documents reflecting "partisan goals," sufficient to overcome the qualified legislative privilege. However, documents that refer to or reflect partisan goals or partisanship are not shielded from discovery if they also fall into categories that, as set forth in this opinion, are unprotected and/or discoverable under the *Rodriguez* balancing test.

5. Considerations of Alternative Plans and Public Proposals

The plaintiffs seek documents relating to the defendants' analyses of redistricting plans submitted to LATFOR by outside groups.[40] First, the Court concludes that the legislative privilege has been outweighed with respect to documents relating to third-party plans that the defendants have analyzed in their submissions to the Court, including the Breitbart, Common Cause, and Unity Plans, as well as submissions by Andrew Beveridge.[41] See Senate Majority's Motion for Summary Judgment on all Section 2 Claims (June 29, 2012) at 5-23, DE #422;

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[40] This category relates to Document Demands #5 and #6.

[41] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00098468, SENMAJPRIV00161261, SENMAJPRIV00036496, SENMAJPRIV00097888-94, SENMAJPRIV00097874-80, SENMAJPRIV00055525-616, SENMAJPRIV00055273, SENMAJPRIV00055271-72, SENMAJPRIV00055617-18, SENMAJPRIV00124815-16, SENMAJPRIV00124829-5526, SENMAJPRIV00160324-27, SENMAJPRIV00037189-204, SENMAPRIV00200611, SENMAJPRIV00008497-98, SENMAJPRIV00098638-39, SENMAJPRIV00055300-15, SENMAJPRIV00053058, SENMAJPRIV00200266-70.

Geremia Decl. in Supp. of Motion for Summary Judgment on Section 2 Claims (June 29, 2012), DE #421; id. Exs. A-B, D, DE #421-1; DE #421-2; DE #421-4; 6/29/12 Senate Maj. Equal Pop. Mem. at 12-13, 18, 22, 24; 6/29/12 Geremia Equal Pop. Decl., Exs. E, H-M, DE #419-5, DE #419-8, DE #419-9, DE #419-10, DE #419-11, DE #419-12, DE #419-13. However, the plaintiffs have not established a strong need for documents relating to submissions by any other outside groups or individuals. Many alternative submissions were published on the LATFOR website, and are publicly available; thus, to the extent that a comparison of submitted plans to the enacted Plan will aid the plaintiffs in proving their claims, they are in a position to obtain some information through means other than compelled disclosure. Therefore, the plaintiffs have not made a sufficient showing to outweigh the risk that compelled production of analyses of other plans submitted by the general public to legislators would inhibit legislators' consideration of public submissions in making redistricting decisions in the future.

6. Documents Related to Compliance with Section 83-m(13)

The plaintiffs demand "[c]opies of all electronic and hardcopy documents, . . . including all drafts prepared by, edited or reviewed by Defendants pertaining to the implementation or non-implementation of [Section 83-m(13)]." Document Demand #20. Although the plaintiffs in this case originally sought to compel the defendants to implement Section 83-m(13), it is undisputed that the defendants did eventually comply with the law, and that the enacted Senate Plan reflects such compliance. See Complaint (Nov. 17, 2011) ¶¶ 143-155, DE #1; Amended Notice of Voluntary Dismissal (Jan. 30, 2012), DE #66; Order re: Amended Notice of Voluntary Dismissal (Feb. 1, 2012). To some extent, the voluntary

dismissal of the claims relating to Section 83-m(13), and corresponding concession that the defendants did eventually implement the law, lessen the relevance of and the plaintiffs' need for the broad category of documents relating to the process of reallocating prisoners to the districts containing their home addresses.

Nevertheless, aspects of the manner in which the defendants chose to implement the law are relevant to the plaintiffs' remaining claims; a number of the documents reflect concerns as to the impact of the reallocation on regional population disparities, or reveal consideration of race and ethnicity[42] – both of which bear on whether "honest and good faith" efforts were made to comply with the equal population principle of the Equal Protection Clause, and whether any discriminatory intent motivated the formulation of the Senate Plan. Therefore, while the plaintiffs are not entitled to broad discovery pertaining to compliance with Section 83-m(13), to the extent that particular documents address the impact of prisoner reallocation on equipopulousness or population disparities, or reflect consideration of race or ethnicity, the qualified legislative privilege must yield.

7. Race and Ethnicity

The plaintiffs demand documents reflecting the role that considerations of race or ethnicity played in the redistricting process, including "[c]opies of all reports generated from demographic data, election data, racial bloc voting data and census data." Document Demand #26. Evidence of any attempts to disenfranchise minority voters is highly relevant to the

[42] Examples of such documents may include those with the following Bates numbers: SENMAJPRIV00054871, SENMAJPRIV00039746-47, SENMAJPRIV00244380-81, SENMAJPRIV00201632.

plaintiffs' Equal Population and VRA claims. Therefore, where documents reveal an awareness that the Senate Plan may dilute minority votes, the legislative privilege is overcome.[43] See Rodriguez, 280 F.Supp.2d at 102; Rodriguez II, 2003 WL22109902 at *3. On the other hand, race and ethnicity are not per se impermissible considerations in redistricting; those considerations are, in fact, necessary to ensure compliance with the VRA. Thus, reference to demographic data, alone, does not make a document probative of an improper purpose. Moreover, the plaintiffs have access to the enacted Senate Plan and, using demographic data available on the LATFOR website, may evaluate the Plan's impact on minority groups. Consequently, the plaintiffs are not entitled to wholesale access to the reports and datasets used by the defendants during the redistricting process merely because they may involve racial or ethnic data.

8. Overbroad Document Demands

Finally, the Court concludes that several of the plaintiffs' documents demands are overly broad, and that therefore the Senate Majority is entitled to a protective order with regard to them.[44] For example, the plaintiffs have sought materials ranging from "[a]ll documents relating to or evidencing any instructions or directions provided to the Plan Architects and/or to any LATFOR official relating to the 2012 Senate Plan," Document Demand #1, to "all electronic and hardcopy documents, including all drafts . . . pertaining to

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[43] Examples of such documents include those with the following Bates numbers: SENMAJPRIV00098354, SENMAJPRIV00055617-18, SENMAJPRIV00200638-39, SENMAJPRIV00054728-32, SENMAJPRIV00097446-47, SENMAJPRIV00082592.

[44] See, e.g., 6/18/12 Senate Maj. Mem. at 10 (objecting on grounds of overbreadth).

the creation of a post 2012 Census redistricting plan." Document Demand #17.[45] Just as courts have refused to allow the legislative privilege to block all inquiry into any activity "relating to the legislative process," Brewster, 408 U.S. at 515, this Court declines to effectively render the legislative privilege a nullity by granting the plaintiffs unfettered access to all materials "relating to" redistricting. Therefore, the Senate Majority's motion for a protective order is granted with respect to Document Demands #1, #17, #22 through #25, #27 and #28 – except to the extent that the Court has determined that documents or information falling within the scope of more targeted discovery demands either are not legislative or are subject to disclosure based on waiver or under the *Rodriguez* balancing test.

9. Interrogatories

No party has analyzed the plaintiffs' interrogatories under a standard different from that applicable to document demands. Nevertheless, responses to interrogatories are more akin to testimony than to disclosure of pre-existing documents. In only the rarest of circumstances will courts compel testimony from legislators asserting legislative privilege. See, e.g., Village

[45] The plaintiffs likewise seek "all documents provided to members of LATFOR by LATFOR staff or consultants during the redistricting process in connection with the redistricting," Document Demand #22; "[c]opies of all documents provided to the members of the Senate by LATFOR staff or consultants in connection with the redistricting," Document Demand #23; "[c]opies of all documents provided to the Governor or his staff by LATFOR, its staff or consultants, and the Senate . . . their staff or consultants regarding the redistricting of the Senate," Document Demand #24; "[c]opies of all reports, memoranda, analyses, and data utilized by LATFOR, the Senate . . . or any persons acting on their behalf," Document Demand #25; "[c]opies of all emails, letters or memoranda by and amongst the members of LATFOR, its staff or consultants, the members of the Senate . . . or their staff or consultants and/or any individual in connection with the redistricting process," Document Demand #27; and "[c]opies of any emails, correspondence, computer files, notes, and memoranda between LATFOR, its staff, members of the Senate . . . and their staff, and experts retained by same in connection with the redistricting," Document Demand #28.

of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977). Because interrogatories, like testimony, seek after-the-fact accounts of and explanations for the deliberative decisionmaking process, interrogatories served on legislators should, at a minimum, be subject to an even more exacting balancing test than are document demands.

For example, Interrogatories #4 through #6 and #14 essentially ask the Senate Majority defendants to provide their reasons for advocating and/or voting for the Senate Plan on the floor of the Legislature. Requiring legislators to explain their motives for legislative decisions and actions strikes at the core of the legislative privilege. See, e.g., Brewster, 408 U.S. at 525. Furthermore, the plaintiffs' need to question individual legislators (post hoc) about their motives is reduced in light of the Court's rulings allowing disclosure of certain categories of pre-existing documents relevant to the plaintiffs' claims. Therefore, the Court grants the Senate Majority's motion for a protective order with respect to these interrogatories.

In contrast, Interrogatories #1, #7 and #10 seek only factual information -- the identities of and contact information for those with relevant information -- rather than descriptions of the decisionmaking process. Therefore, the Senate Majority's motion for a protective order is denied with respect to those three interrogatories. Although Interrogatories #2, #3, #8 and #13 also ask the Senate Majority to identify certain individuals, responses to these interrogatories would entail explanations of legislative relationships in a manner that would disclose legislative deliberations. Accordingly, the Senate Majority's motion for a protective order is granted with respect to Interrogatories #2, #3, #8 and #13.

Finally, Interrogatories #11, #12 and #15 likewise require descriptions of aspects of the deliberative process. Moreover, the Court denied plaintiffs' broad demand for documents

regarding partisan goals, see *supra* pp. 30-31, and, in large part, their broad demands for documents relating to race and ethnicity. See *supra* pp. 33-34. The Court's rationale applies with equal force to these three interrogatories. The Court therefore grants the Senate Majority's motion for a protective order with respect to Interrogatories #11, #12 and #15.

CONCLUSION

For the foregoing reasons, the Court denies as moot the motions for protective orders of the Assembly defendants, and grants in part and denies in part the Senate Majority's motion for a protective order. More specifically, the Senate Majority's motion is denied with respect to any documents that relate to "non-legislative" acts, as defined herein. The Senate Majority's motion is likewise denied as to any documents over which the qualified legislative privilege has been waived, and as to any documents relating to any of the following categories: deviation from equipopulousness; any regional malapportionment evidenced in the Senate Plan; the decision to increase the size of the Senate by one district and the placement of that district; the role that any of three redistricting principles – preserving district cores, avoiding incumbent pairing, and offsetting vote dilution – played in the redistricting process; analyses of alternative plans discussed in the Senate Majority's submissions to the Court in this litigation; the impact of prisoner reallocation on population disparities and/or consideration of race or ethnicity in reallocating prisoners; and awareness that the Senate Plan may dilute minority votes. The Senate Majority's motion is granted with respect to the plaintiff's overly broad Document Demands #1, #4, #17, #22 through #25, #27 and #28; granted in part with respect

to Document Demand #20; denied with respect to Interrogatories #1, #7, and #10; and granted with respect to Interrogatories #2 through #6, #8, and #11 through #15.

Any objections to the rulings contained in this Memorandum and Order must be filed with the Three-Judge Panel on or before **February 25, 2013**. Failure to file objections in a timely manner may waive a right to appeal the Panel's order.

SO ORDERED.

Dated: Brooklyn, New York
February 8, 2013

/s/ *Roanne L. Mann*
ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE