

**NEW YORK  
CITY BAR**

**Albany Reform: The Road Ahead**

Passage of the 2011 Public Integrity Reform Act was an important step forward in making New York State government more functional, transparent and effective. But still more must be done to fully restore New Yorkers' confidence in their government. What further reforms are needed and how do we get there? Campaign finance, redistricting, ethics reform and more: the policy challenges and practical prospects for 2012.

Keynote Speaker:

**Mayor Edward I. Koch**, Founder, NY Uprising

Panelists:

**Dick Dadey**, Executive Director, Citizens Union

**Mitra Hormozi**, Kirkland & Ellis LLP; Chairperson, New York State Commission on Public Integrity

**Glenn Magpantay**, Director, Democracy Program, Asian American Legal Defense Fund

**Senator John Sampson**, Democratic Conference Leader, New York State Senate

**Thursday, December 8, 2011, 6:30 p.m.**  
**New York City Bar Association**  
**42 West 44<sup>th</sup> Street**

Sponsored by the Committees on Election Law,  
Government Ethics and State Affairs

*Please RSVP at:*

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Dear Candidate,

As you may know I recently founded New York Uprising PAC with the goal of reforming how Albany works. Last month we announced support for initial reforms from all four candidates for Governor. Today we turn our attention to you, members of and candidates for the State Legislature.

While you may have previously indicated support for “reform” conceptually, I believe voters are looking for candidates this year who will commit to specifics. That is why, on behalf of New York Uprising, I invite you to sign the three pledges enclosed, covering the following areas of reform: non-partisan independent redistricting, ethics reform and budgetary reform.

The Trustees of New York Uprising, with decades of government experience behind us, believe that these reforms, when enacted, will help you do the job you’ve dedicated your career to, irrespective of Party or Chamber. This isn’t just about placating an angry electorate -- although it may help.

In the coming weeks New York Uprising will begin naming those candidates and incumbents who are committed to reform and those who are not. We will further roll out a series of internet tools voters can use to help them distinguish the true reformers themselves. Note that New York Uprising will ONLY issue the seal of approval to those candidates and incumbents who have signed ALL THREE pledges.

Please email signed pledges back to [ed@nyuprising.org](mailto:ed@nyuprising.org) or mail to:

New York Uprising  
233 Broadway  
Suite 850  
New York, NY 10279

All the best,  
Ed Koch



## NEW YORK UPRISING ETHICS PLEDGE

The public demands that their elected officials and candidates for public office maintain the highest degree of ethics while running for office and serving in government. To reform New York State's government, the enactment of comprehensive ethics legislation by the Governor, Assembly and the Senate is mandatory. Therefore,

I, \_\_\_\_\_, pledge that as a Member of and/or a Candidate for the:

New York State Assembly, \_\_\_\_\_ District

New York Senate, \_\_\_\_\_ District

will support and vote to enact the following ethics reforms, regardless of the position of the Legislature's leadership, any caucus or of any chamber:

- **A State Ethics Commission**, having jurisdiction over all State elected and public officials in the Executive Branch, the Legislature, any public authority, public corporation or a State governmental entity and candidates for State office, having subpoena power, to investigate and sanction elected officials, public officials and candidates, for ethics, conflicts of interest, financial disclosure, campaign finance and lobbying violations.

- **A Comprehensive Annual Financial Disclosure Form**, requiring an elected official, public official or a candidate for any State office, their spouse, domestic partner and unemancipated child(ren), to disclose:

All sources and amounts of earned income, assets, gifts, liabilities and other financial information;

The names of clients of an elected official, public official or a candidate for any State office, who is associated with a law firm, consulting, brokerage or any professional services business with a description of the professional services rendered by the individual to the clients,

Any interest in a government contract and/or relationship to any not for profit organization.

Transparency requires that the annual Financial Disclosure Form shall be made public to any requesting individual or entity, but with the filer being permitted to request limited information exemptions, for instance, to protect the confidentiality of a client's legal matter.



- To Prohibit or Limit “Pay to Play” Campaign Contributions:

By impaneling a “Blue Ribbon” Commission to consider and make recommendations to implement:

Prohibiting a campaign contribution to a State elected official’s or a candidate’s campaign committee, from an entity that solicits or obtains any State business, contract, franchise, concession, pension fund investment agreement, grant or funding, engages in a real property transaction with, or promotes the adoption, defeat, modification or revocation of any bill, existing law, rule, resolution or regulation before, the Executive Branch, the Legislature, a public authority, public corporation or any other State governmental entity,

Limiting the amount of a campaign contribution to a State elected official’s or a candidate’s campaign committee by a lobbyist, owner or corporate officer, director, employee, of any entity and the entity’s partner’s, owner’s, officer’s, director’s and lobbyist’s spouse, domestic partner or unemancipated child(ren), if an entity solicits or does any business with the State, and

Ensuring that an individual who makes a contribution to a State elected official or candidate’s campaign committee publicly discloses to a State compliance unit all business dealings with any State governmental entity.

**Dated:** \_\_\_\_\_ **Signature of Member/Candidate** \_\_\_\_\_



## NEW YORK UPRISING RE-DISTRICTING PLEDGE

Elections are supposed to allow voters to choose their representatives, but New Yorker's have been denied true choice because elected officials have historically been able to draw district lines to choose their voters. New York legislative races are typically non-competitive because of these gerrymandered districts. Consequently, it is not surprising that New York State's legislature has one of the highest rates of incumbency in the nation. It is our common desire to improve New York State government and the democratic process in the State by ensuring that redistricting pursuant to the 2010 Census be constitutional and fair.

I, \_\_\_\_\_ pledge that if I am elected to the Legislature of New York State, I will support the creation of an independent, non-partisan Redistricting Commission to draft advisory maps for the Legislature to review and approve. Further, I will vote "no" on any proposal to establish a Commission that is not independent as described below.

In evaluating the independence of this Commission, I will determine that the Commission's authorizing legislation includes provisions endorsed by the Citizens Union and other government reform organizations, including:

### INDEPENDENCE

Members and Staff of the Commission will be independent from undue legislative influence, vetted for conflicts of interest, and not including persons holding elective or public office, a political party position, registered as lobbyists, or relatives of elected or public officials. The Commission shall be meaningfully diverse in membership, reflecting geographic, racial, ethnic, gender, religious and political variety.

### MEANINGFUL REDISTRICTING CRITERIA

Apportionment plans would be drawn according to the following principles:

All congressional senate and assembly districts shall be as nearly equal in population as practicable;

Value shall be placed on creating districts as competitive as possible;

Districts shall be contiguous;

Districts shall not be established that abridge or deny minority voting rights;

Districts shall not be drawn to favor or oppose any political party, incumbent, or candidates for office; Cracking, Stacking and similar techniques should be prohibited;

The most and least populous senate and assembly districts shall not exceed the mean population of districts for each house by more than one percent;



Counties and county subdivisions shall not be divided in the formation of districts, and where it is unavoidable, more populous counties or subdivisions will be divided in preference to those with smaller populations;

Villages shall not be subdivided;

Districts shall be as compact as possible, and

Districts shall unite communities of interest.

#### MEANINGFUL TRANSPARENCY

The Commissions authorizing legislation shall mandate the Commissions proposals be subject to public hearings throughout the State, following the release of proposed maps, which shall be published on the internet.

Dated: \_\_\_\_\_

Signature of Candidate \_\_\_\_\_





## NEW YORK UPRISING

### PLEDGE FOR RESPONSIBLE BUDGETING

It is widely acknowledged that New York State's budget process and practices are detrimental to the long-term future of the state. They produce budgets that are routinely late and include spending that outpaces inflation and revenue growth. To accommodate spending more money than they have, the leadership in Albany has often balanced budgets with gimmicks that push obligations into the future, resulting in structural imbalances and the accumulation of a crushing debt burden, an unhealthy share of which has been incurred to fund operating expenses. Simply put, we have been living beyond our means.

Achieving balanced budgets requires a fundamental restructuring of state finances. Elected officials must act to adopt transparent and responsible provisions for managing the state's finances. Long-term spending commitments, especially for public employee pensions and benefits, are growing at unsustainable levels, faster than anticipated revenue growth, and to the detriment of local governments. The high levels of taxation required to support this profligate spending jeopardize the state's competitive position and prospects for job growth.

I, \_\_\_\_\_, pledge that if I am elected, I will support the responsible budget practices described below:

- The adoption of Generally Accepted Accounting Principles (GAAP) to prepare and manage the state budget. Beginning in state fiscal year 2011-12, budget preparation on a GAAP basis, with GAAP balance required in fiscal year 2014-15;
- Legislation establishing GAAP requirements for bonds issued in 2014-15 and thereafter;
- The state's use of a rolling five year financial plan to better monitor the consequences of current tax and spending decisions on long-term finances, and as a planning tool;
- Enactment of laws establishing the requirement for a GAAP balanced budget and setting comprehensive limits on the amount of state-supported debt that can be issued based on affordability.
- Creation of an Independent Budget Office, to be overseen by a board of politically independent persons, to report on the state's financial health and comment on budgetary matters.
- Use of performance budgeting and outcome measurement to help policymakers determine whether programs are meeting stated goals and promote a more rational appropriation of state funds.



- Adoption of off-budget items in the regular budget process, such as the debt of public authorities, which are financial obligations of the state.

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Signature

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Date



## Summary of the Public Integrity Reform Act of 2011

On August 15, 2011, Governor Andrew Cuomo signed the Public Integrity Reform Act (L. 2011, ch. 399) (“Act”). The Act is organized into five parts lettered A through E, each of which has its own effective date.

So far, much of the public discussion regarding the Act has focused on just two aspects: (1) the composition and structure of the Joint Commission on Public Ethics (“JCOPE”), which has the duties and responsibilities of the former Commission on Public Integrity (“CPI”), as well as new duties and responsibilities, most notably, the authority to investigate whether a member or employee of the Legislature may have violated the State Code of Ethics set forth in Public Officers Law §74 or Public Officers Law §§73 or 73-a or Civil Service Law §107 and (2) new financial disclosure requirements including (a) requiring a reporting person, including a legislator, to disclose information regarding clients or customers if he or she engages in an outside business or profession, (b) an expanded list of categories of value, each of which is much narrower than the previous categories, (c) making categories of value reported on completed financial disclosure forms publicly available, and (d) making financial disclosure forms filed by elected officials publicly available online.

The following additional salient changes should also be noted:

- A lobbyist or client is required to disclose a “reportable business relationship” with a State officer or employee, including an elected official or legislative employee. Legislative Law §§1-c(w) (defining “reportable business relationship”), 1-e(c)(8), and 1-j(6).
- The definition of “lobbying” has been expanded to include efforts to have legislation introduced. Legislative Law §1-c(j)(1).
- A lobbyist or client who lobbies on its own behalf may be required to disclose certain funding sources. Legislative Law §§1-h(c)(4), 1-j(c)(4).
- Ethics training is required for lobbyists and for every State officer and employee who is required to file an annual statement of financial disclosure. Executive Law §94(10); Legislative Law §1-d(h).
- The prohibition against statewide elected officials, state officers or employees, members of the legislature or legislative employees providing certain compensated services has been expanded to prohibit them from rendering such services in relation to an executive order, legislation, or a resolution before the Legislature. Public Officers Law §73(2).
- JCOPE substantial basis investigation reports charging one or more violations of the ethics or lobbying laws may become public. Executive Law §94(19)(a)(6).
- Changes to the Lobbying Act’s definition of gift, which is generally defined as anything of more than nominal value, as follows:
  - A new exception for “food or beverage valued at fifteen dollars or less.” Legislative Law §1-c(j)(xii).
  - The “widely attended event” exception has been clarified. Legislative Law §1-c(j)(ii).
  - The exception for campaign contributions now includes “contributions made in violation of [Article 14] of the election law.” Legislative Law §1-c(j)viii).

-Mitra Hormozi



# PROGRAM BILL # 9

## GOVERNOR'S PROGRAM BILL

2011

### MEMORANDUM

**AN ACT to amend the public officers law, the executive law, the legislative law, the retirement and social security law, the criminal procedure law, and the election law to improve the enforcement and expand the reach of public ethics and certain election laws in New York State**

#### Purpose:

This bill would comprehensively reform both the requirements and enforcement of public ethics for New York State government officials to restore public confidence in our government. Among other reforms, the bill would establish a new Joint Commission on Public Ethics to oversee and investigate compliance with the financial disclosure and other ethics requirements by executive and legislative employees and elected officials in both branches of government, and to oversee the conduct of registered lobbyists; expand and enhance financial and client disclosures required of executive and legislative employees and elected officials, including disclosure of outside clients and customers; establish a new database to aggregate information concerning all firms and individuals that appear in a representative capacity before any state agency, public authority, board, or commission and make such information readily available to the public; require mandatory ethics training for executive and legislative employees and elected officials and lobbyists; increase penalties for violations of certain provisions of the code of ethics contained in the Public Officers Law § 74; require the reduction or forfeiture of a public officer's pension under certain circumstances where he or she has been convicted of a felony related to his office; expand the definition of "lobbying" to include advocacy related to the "introduction" of legislation and resolutions; require lobbyists that lobby on their own behalf and clients of lobbyists that devote substantial funds to lobbying in New York State to disclose the sources of such funding; and clarify certain definitions in the existing gift ban to facilitate better compliance and improve enforcement. The bill would also amend certain provisions of the election law to enhance penalties for violations of the campaign finance laws, and require the State Board of Elections to enforce requirements that entities and individuals that spend funds on advertising and other forms of advocacy to influence the outcome of elections or ballot proposals must disclose such expenditures.

#### Summary of Provisions:

Section one. The title of the bill being "Public Integrity Reform Act of 2011."

Section 2.

## **Part A: Ethics Enforcement & Financial Disclosure Reform**

Sections 1, 3, 5, 7, 10, 11, 12 and 13 make conforming changes by changing existing references in law to the State Ethics Commission and Legislative Ethics Committee or Commission to the newly constituted Joint Commission on Public Ethics, thereby subjecting all legislators and legislative employees to investigative jurisdiction of a unified, independent body, the current iteration of which has jurisdiction over only executive employees and statewide elected officials and lobbyists.

Section 2 amends subdivision 2 of section 73 of the Public Officers Law by prohibiting the receipt by any state officer or employee of any compensation for action or decisions regarding "any legislation or resolution before the state legislature" or any "executive order."

Section 3 amends paragraph (a) of subdivision 6 of section 73 of the Public Officers Law to require legislative employees not subject to section 73-a of the Public Officers Law to file financial disclosure forms with both the Joint Commission on Public Ethics and the Legislative Ethics Commission.

Section 4 establishes a new database ("Project Sunlight") to aggregate information concerning all firms and individuals that appear in a representative capacity before any state agency, public authority, board, or commission and requires that such state entities track and provide such information for inclusion in the database. The information in the database will be made publicly and readily available and will, for the first time, allow the public to understand more fully any potential conflicts of interest raised by such appearances.

Section 5 amends section 73-a of the Public Officers Law by providing that all financial disclosure statements be filed with the new Joint Commission on Public Ethics, which shall post those statements of elected officials on the internet and end the practice of redacting the monetary values and amounts reported by the filer. This section also provides for greater and more precise disclosure of financial information by expanding the categories of value used by reporting individuals to disclose the dollar amounts in their financial disclosure statements; newly requires disclosure of the reporting individual's and his or her firm's outside clients and customers doing business with, receiving grants or contracts from, seeking legislation or resolutions from, or involved in a case or proceeding before the State; and expressly authorizes the Joint Commission to impose civil penalties in addition to referring any potential criminal violations to the appropriate prosecutor, rather than just in lieu of such referral. If sufficient cause is found, the Joint Commission is also required to refer evidence of any violations of other state or federal laws to the appropriate prosecutor(s).

Section 6 amends section 94 of the Executive Law by replacing the Commission on Public Integrity with the Joint Commission on Public Ethics with jurisdiction over all elected state officials and their employees, both executive and legislative, as well as lobbyists. The bipartisan Joint Commission shall have 14 members, six appointed by the governor and lieutenant governor at least three of whom shall be enrolled members of the major political party that is not that of the governor; and eight appointed by the legislative leaders (four from each major political party). Among other restrictions, no individual shall be eligible to serve on the Joint Commission who is or has been within

the last three years a registered lobbyist, a statewide elected officeholder or member of the legislature, or a political party chairman, and no individual who is or has been a state officer or employee or a legislative employee within the last year is eligible to be appointed.

The executive director of the Joint Commission shall be selected without regard to his or her political party affiliation, and may be removed only for neglect of duty, misconduct, or inability or failure to discharge the powers or duties of the office, including the failure to follow the lawful instructions of the Joint Commission.

Among other new powers, the Joint Commission shall have jurisdiction to investigate potential violations of law by legislators and legislative employees and, if any violation is found, shall issue a written report to the Legislative Ethics Commission that sets forth the Joint Commission's findings of fact and conclusions of law. To continue and conduct a full investigation to determine if there is a substantial basis to find a violation of law, the Joint Commission requires a vote of eight members and such vote must occur within 45 days of receiving a complaint or referral or the Joint Commission's initiation of a preliminary review. The Joint Commission's investigative report must be made public within 45 days of being provided to the Legislative Ethics Commission (with the option of one 45-day extension), and that Commission must dispose of the matter and indicate in a public statement the nature and reasons for such disposition within 90 days. The Legislative Ethics Commission shall have exclusive jurisdiction to impose penalties on members of the legislature and legislative employees based upon the findings of fact and law in the Joint Commission's investigative report. With respect to executive employees and lobbyists, like the current Commission on Public Integrity, the Joint Commission shall have jurisdiction to investigate and penalize such individuals and the report and disposition of such matters will be made public.

A majority (8 members) of the board must consent to the initiation of the investigation, and at least two of whom are of the same branch and, except for executive employees not directly appointed by a statewide elected official, of the same party as the subject of the investigation. The same procedure applies to issue findings of fact and conclusions of law. If the subject of the investigation is a lobbyist, only a simple majority is required.

The Joint Commission and its staff will be subject to strict confidentiality restrictions to protect the integrity of its investigations, punishable as a Class A misdemeanor.

The commissioners of the Joint Commission shall be prohibited from making campaign contributions to candidates for elected executive or legislative offices during their tenure on the Joint Commission.

The Joint Commission shall conduct mandatory ethics training for executive and legislative officials that meets requirements set forth in this section, except where either chamber of the legislature already provides such training and that training meets the same requirements. The Joint Commission will also track, in coordination with the Legislative Ethics Commission, the status of compliance with these new training requirements by state agencies and by the legislature, and shall make such aggregate compliance statistics available to the public on an annual basis.



The Joint Commission will conduct a program of random reviews of financial disclosure statements to help determine compliance with applicable disclosure requirements.

Section 7 amends section 1-d of the Legislative Law to mandate online ethics training for lobbyists under the auspices of the Joint Commission.

Sections 7-a, 7-b, and 8 amend section 1-e, subdivision (b) of section 1-j and section 1-c of the Legislative Law, respectively, to require that lobbyists disclose the names of every state official and employee, including legislators and legislative employees, with whom the lobbyist has a "reportable business relationship," a term also newly defined in the bill.

Section 9 amends section 80 of the Legislative Law to clarify that the Legislative Ethics Commission will have the authority and jurisdiction to impose penalties upon members and employees of the legislature, but will no longer have investigative jurisdiction over the legislature. This section establishes the procedure to be followed by the Legislative Ethics Commission upon its receipt of an investigative report from the Joint Commission on Public Ethics to ensure that the Legislative Ethics Commission issues a public disposition of each matter within 90 days of receiving such report.

This section also establishes that written advisory opinions issued by the Legislative Ethics Commission shall be binding upon that Commission with respect to the imposition of any penalties, but the Joint Commission on Public Ethics shall have jurisdiction to investigate both whether the person's advisory opinion was supported by his or her full disclosure of the relevant facts and whether that opinion covered the person's actual conduct. The Joint Commission will have full authority to investigate conduct falling outside the proper scope of such an advisory opinion issued by the Legislative Ethics Commission.

This section further amends the Legislative Law to clarify that the executive director of the Legislative Ethics Commission may be removed for neglect of duty, misconduct in office, or inability or failure to discharge the powers or duties of office.

This section also amends the Legislative Law to increase the penalties for violations of certain provisions of the code of ethics contained in Public Officers Law § 74, including those provisions addressing financial conflicts of interest damaging to public confidence in the State government.

Sections 14 through 21 ensure that the existing authority, records, and business of the Commission on Public Integrity will be properly transferred to the Joint Commission on Public Ethics.

Section 22 provides for the effective date.

#### **Part B: Disclosure by Lobbyists Lobbying on Their Own Behalf and by Clients of Lobbyists of Their Sources of Funding for Lobbying Activities**

Section 1 amends subdivision c of section 1-h of the Legislative Law to require that registered lobbyists whose lobbying activity is performed on their own behalf and not pursuant to retention by a client, and that have spent at least \$50,000 and at least 3% of their total expenditures during the last year on such activity in New York State, must

disclose each source of funding over \$5,000 used for such lobbying. Such lobbyists may seek an exemption to avoid such disclosure based upon a showing that it may cause harm, threats, harassment, or reprisals to the source of funding or its property. If the Joint Commission declines to grant such an exemption, the lobbyist may appeal that decision to an independent judicial hearing officer pursuant to regulations developed by the Joint Commission.

In addition, not-for-profit organizations qualified as exempt organizations under I.R.C. § 501(c)(3) are exempted from this disclosure requirement. Not-for-profit organizations qualified as exempt under I.R.C. § 501(c)(4) shall also be exempted pursuant to regulations promulgated by the Joint Commission if their primary activities concern any area of public concern that would create a substantial likelihood that such disclosure would lead to harm, threats, harassment, or reprisals. The bill expressly identifies the area of "civil rights and civil liberties" as one area in which organizations are expected to qualify for such an exemption in the Joint Commission's regulations. Among other issues included in this area, organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.

Section 2 amends subdivision c of section 1-j of the Legislative Law to require that clients of lobbyists that meet the same threshold criteria as those set forth above must similarly disclose the sources of their funding for their lobbying activity. The same set of potential exemptions would apply to clients of lobbyists as well.

Section 3 provides for the effective date.

#### **Part C: Pension Forfeiture for Public Officials**

Section 1 amends the Retirement and Social Security Law by adding a new Article 3-B to establish a procedure whereby certain public officials who commit crimes related to their public offices may have their pensions reduced or forfeited under certain circumstances. This new article would apply prospectively to officials who enter any of the applicable retirement systems upon or after the effective date of the law.

Section 2 amends the criminal procedure law to require that criminal defendants whose pensions may ultimately be reduced or forfeited shall be notified of that possibility by the court prior to any trial or plea entered in their criminal case.

Section 3 provides for the effective date.

#### **Part D: Expanded Definition of Lobbying and Clarification of Definitions in Gift Ban**

Section 1 amends subdivisions (c) and (j) of section 1-c of the legislative law to expand the definition of lobbying to include advocacy to affect the "introduction" of legislation or a resolution. This section further amends these provisions principally to clarify certain definitions in the gift ban to assist public officials in their efforts to comply with that ban and to facilitate its enforcement.

Section 2 provides for the effective date.

### **Part E: Campaign Finance Enforcement**

Section 1 requires that the State Board of Elections issue regulations by January 1, 2012, setting forth and clarifying the requirements under existing law for individuals, corporations, political committees, and any other entities to disclose independent expenditures made for advertisements or any other type of advocacy that expressly identifies a political candidate or ballot proposal and that is not coordinated or approved by the candidate in question.

Section 2 amends section 14-106 of the Election Law to require that broadcast television scripts and internet advertisements used in political campaigns must be disclosed and provided to the board of elections.

Section 3 amends section 14-126 of the Election Law to increase substantially the penalties for violations of existing filing requirements and contribution limits.

Sections 4 and 5 expand or create jurisdiction in the county and supreme court for proceedings to enforce the requirements of the Election Law relating to campaign finance restrictions and specify the standards to be applied by the court in determining an appropriate penalty for such violations.

#### **Statement in Support:**

Once a national model, New York State government has been widely discredited for its corruption, for the lack of truly independent ethics oversight over all public officials, and for the failure to require more robust disclosure of outside income sources. Currently, our State government's ethics laws are policed by several separate entities using differing interpretations of the same laws, leading to an absence of true independence and fragmented enforcement. Our financial disclosure laws require disclosure of the amounts of outside income earned, but do not of the clients and customers of the reporting individual or his or her firm that may have business before the State.

This legislation establishes an independent Joint Commission on Public Ethics with robust enforcement powers to investigate violations of law by members of both the executive and legislative branches and oversee their financial disclosure requirements. It also provides for the Legislative Ethics Commission's jurisdiction to impose penalties on members based upon the investigations completed by the Joint Commission on Public Ethics.

This legislation also expands financial disclosure requirements significantly and, for the first time, makes such information fully available to the public. It requires disclosure of a reporting individual's clients and of clients of that individual's firm if those clients or customers are being represented with respect to a proposed bill or resolution before the legislature, have received contracts or grants from the State, or are the subject of or party in any proceeding by or before or involving a State agency. In addition, it narrows and increases the number of categories of value that must be

disclosed, and requires the Joint Commission to post the financial disclosure statements of elected officials on its website without value amounts or any other information redacted (except for unemancipated children).

The bill also establishes a new database called Project Sunlight that will be publicly available and will aggregate information from across the State government concerning the identities of any individual or firm that appears in a representative capacity before any State governmental entity. That information will allow members of the public to understand in detail and to assess any potential conflicts of interest that may be raised by such appearances.

The bill further addresses and expands both the scope and applicability of the lobbying disclosure requirements in this State. The bill requires the disclosure by lobbyists of any "reportable business relationships" over \$1,000 with public officials; expands the definition of lobbying to include advocacy to affect the "introduction" of legislation or resolutions, a change that will help to ensure that all relevant lobbying activities are regulated by the new Joint Commission.

This legislation also sheds sunlight on the activities of lobbyists and clients of lobbyists that devote substantial resources to such activities by requiring that they disclose each source of funding over \$5,000 used for such lobbying. Appropriate exemptions to this requirement would be made for 501(c)(3) organizations and those 501(c)(4) organizations for whom such disclosure could lead to harm to or harassment of their donors. Particularly in light of the impact of the U.S. Supreme Court's decision in *Citizens United v Federal Election Commission*, 130 S.Ct. 876 (2010), which threatens to open the door to corporations and other entities spending money to advocate for or against candidates, New York State must enhance disclosure of the sources of funding for advocacy across numerous areas of public concern. This bill would take a critical first step to provide such disclosure with respect to lobbying so that the public could better understand the real parties in interest behind substantial lobbying initiatives.

Moreover, in the wake of *Citizens United*, which effectively limited the ability of states and the federal government to ban electioneering communications by outside entities, it is increasingly important that disclosure of such expenditures be required and made publicly available. Under existing law, such independent expenditures must be disclosed and the entities that make them must register with the State Board of Elections. However, there remain significant concerns that such expenditures are not being disclosed and that the problem will only increase over time. Accordingly, this new requirement will not only clarify and publicize the requirements for registration and reporting of independent expenditures, and also help to identify any gaps in existing law that can be filled in the future.

In addition, this bill expands substantially the penalties that may be imposed for violations of the filing requirements and contribution limits in the Election Law, and provides for a special enforcement proceeding in the Supreme Court and jurisdiction in county courts to help improve enforcement efforts. These steps will provide a critical starting point for comprehensive campaign finance reforms in future years.

**Budget Implications:**

This legislation is not expected to have a significant impact on the budget.

**Effective Date:**

This act shall take effect as provided in each of Parts A through E.



## So Much Huff and Puff: Whether Independent Redistricting Commissions Are Inconsequential for Communities of Color

Glenn D. Magpantay<sup>1</sup>

### INTRODUCTION

Every ten years the boundaries of every congressional, state legislative, and city councilmanic district must be redrawn to make them equal in population.<sup>2</sup> Independent redistricting commissions (IRCs)<sup>3</sup> have recently<sup>4</sup> garnered a significant amount of support as the entities that should be redrawing these district boundary lines.<sup>5</sup> Election reformers and good government groups, such as Common Cause<sup>6</sup> and the League of Women Voters,<sup>7</sup> have argued that district-drawing should be taken out of the hands of those who would run for those

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1. Democracy Program Director, Asian American Legal Defense and Education Fund (AALDEF), New England School of Law, J.D., *cum laude*, 1998; State University of New York at Stony Brook, B.A. 1992.

2. See U.S. CONST. art. I; 2 U.S.C. § 2c (1994); *Karcher v. Daggett*, 462 U.S. 725, 744 (1983); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

3. Generally, independent redistricting commissions (IRCs) are governmental entities that are responsible for redrawing the boundaries of congressional, state legislative, or city councilmanic districts and are in some way divested or autonomous from the political process and removed from those who would be candidates for those new districts. See JUSTIN LEVITT & BETHANY FOSTER, BRENNAN CENTER FOR JUSTICE, *A CITIZEN'S GUIDE TO REDISTRICTING 20-22, 28-35* (2008) (reviewing commissions).

4. New York's Governor Andrew Cuomo announced legislation to establish IRCs for redistricting in New York. See *Governor Cuomo Announces Legislation to Establish Independent Redistricting Commission*, GOVERNOR ANDREW M. CUOMO (Feb. 17, 2011), <http://www.governor.ny.gov/press/021711independent-redistricting-commission> [hereinafter CUOMO].

5. GERRYMANDERING (Green Film Production Company 2009); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 675-82 (2006).

6. Common Cause, *Redistricting Reform*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4949997> (last visited Feb. 20, 2010).

7. League of Women Voters of California, *Vote Yes on Proposition 11 – November 2008*, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, <http://ca.lwv.org/action/prop0811/prop11.html>; CITIZENS REDISTRICTING COMMISSION, *BACKGROUND OF THE CALIFORNIA REDISTRICTING COMMISSION: A NEW EXPERIMENT IN DIRECT DEMOCRACY*, available at <http://www.wedrawthelines.ca.gov/downloads/backgrounder.pdf>; Barbara Bartoletti, Legislative Director, League of Women Voters of New York State, Testimony Before the N.Y. State Senate Majority Conference Senate Legislative Task Force on Demographic Research and Reapportionment (Dec. 16, 2010), available at [http://www.lwvny.org/advocacy/issues/Testimony\\_Redistricting121610.pdf](http://www.lwvny.org/advocacy/issues/Testimony_Redistricting121610.pdf); Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. LAW & PUB. POL'Y 37, 41 (2010).

districts.<sup>8</sup> They argue that IRCs ensure a transparent process, promote competitive districts, and give a voice to those who have been shut out of the political process. The campaign for IRCs has generated a significant amount of political and public support.<sup>9</sup>

However, advocates for communities of color have criticized IRCs. African Americans, Latinos, and Asian Americans have complained that the advocates of IRCs are not attuned to the mandates of the Voting Rights Act<sup>10</sup> and the concerns of minority voters.<sup>11</sup> Civil rights groups at first expressed some concerns privately about IRCs,<sup>12</sup> and later fought publicly against the establishment of such commissions.<sup>13</sup>

Civil rights groups fear that IRCs, and the accompanying guidelines and rules by which they operate, might undo the gains that people of color have

8. A number of scholars have also written about the benefits, drawbacks, and unintended consequences of independent redistricting commissions (IRCs). See Sam Hirsch, *The United States House of Unrepresentatives*, 2 ELECTION L.J. 179, 212 (2003); Huefner, *supra* note 7; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 641-45 (2002) (arguing for insulating redistricting from politics and that redistricting by elected officials is *per se* unconstitutional); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251 (1987). But see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

9. See CUOMO, *supra* note 4.

10. 42 U.S.C. § 1973 (2010). Section 2 of the Voting Rights Act as "§1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation" states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class has been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

11. See generally NAACP LEGAL DEF. AND EDUC. FUND, INC., POLITICAL PARTICIPATION GROUP, INDEPENDENT REDISTRICTING COMMISSIONS: REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY (2010), available at [http://naacpldf.org/files/publications/IRC\\_Report.pdf](http://naacpldf.org/files/publications/IRC_Report.pdf).

12. See LEAGUE OF WOMEN VOTERS & THE CAMPAIGN LEGAL CENTER, DEVELOPING AN ACTION AGENDA FOR REDISTRICTING IN 2011 (2011), available at <http://www.lwv.org/Content/ContentGroups/Organizational/PocanticoRedistrictingConferenceReportFINAL.pdf> (reporting from a July 2009 redistricting meeting convening at the Pocantico Conference Center in Tarrytown, NY on July 22-24, 2011 and discussing differences in perspectives from civil rights groups and good government groups on IRCs).

13. Civil rights groups like Mexican American Legal Defense and Educational Fund (MALDEF), NAACP Legal Defense and Educational Fund (LDF), and Asian Pacific American Legal Center oppose California's Proposition 11. John Wildermuth, *Prop. 11 Calls for Redistricting Revamp*, S.F. CHRON., Sept. 29, 2008, at B1 (reporting on how groups such as Common Cause and the League of Women Voters are supporting Prop. 11).



fought so long to achieve.<sup>14</sup> The creation of majority-minority districts in redistricting<sup>15</sup> – districts in which a majority of the voters are members of a racial or ethnic minority group – has enabled African Americans, Latinos, and Asian Americans to win races for elected office.<sup>16</sup> IRCs might tie the hands of minority cartographers, preventing them from drawing additional districts that give communities of color opportunities for political representation.

But does all this debate and discussion even matter? In this article, I argue that IRCs are actually inconsequential for communities of color, using the Asian American community in New York as an example.<sup>17</sup> In early 2000, I worked on redistricting at the Asian American Legal Defense and Education Fund (AALDEF) in New York. While advocating for the meaningful representation of Asian Americans, I witnessed firsthand the failings of IRCs in their ability to enhance minority representation.<sup>18</sup>

New York has both an IRC to draw council districts for the City<sup>19</sup> and a traditional partisan commission to draw legislative districts for the State.<sup>20</sup> I found that for Asian Americans in New York, redistricting done by an IRC did not provide much of a benefit.<sup>21</sup> The IRC never reached the goals that it was supposed to accomplish for the emerging Asian American community. In fact, the IRC was hardly independent and bowed to the will of incumbents.

On the other hand, Asian Americans fared much better under the partisan redistricting process, where current state legislators and their staffs redrew state

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14. For example, in New York, the NAACP Legal Defense and Educational Fund, Puerto Rican Legal Defense and Education Fund, and the Asian American Legal Defense and Education Fund, among others, urged for "the fair representation and meaningful participation of New York City's racial and ethnic minorities, as district lines for the City Council are redrawn." Letter from the N.Y. Voting Rights Consortium to the N.Y.C. Districting Commission (Aug. 30, 2002) (on file with author). They expressed concerns "about the absence of diversity on the Districting Commission" where there were "no Asian Americans on the Commission," the need to keep minorities communities together, preservation of minority-voting strength, and adherence to the Voting Rights Act. *Id.*

15. *Shaw v. Reno*, 509 U.S. 630, 634-37 (1993); *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

16. See *Bush v. Vera*, 517 U.S. 952, 1041 n.37, n.38 (1996) (Stevens, J., dissenting).

17. Albeit, the concerns and experiences of Asian Americans can be very different than for African Americans, Latinos, or even Native Americans. Asian Americans do not experience residential segregation in the same way as African Americans, for example. However, I have found unity and commonality in the political objectives of each group in redistricting, particularly in that they all seek increased representation in the legislature. I believe that Asian Americans make for an ideal case study to examine whether IRCs work well for communities of color.

18. Glenn D. Magpantay, Staff Attorney, Asian American Legal Defense and Education Fund, Statement to the New York City Districting Commission (Nov. 19, 2002) [hereinafter Magpantay Statement to NYC Districting Commission]; Hearing of the New York State Legislative Task Force for Demographic Research and Reapportionment, Queens, NY, Mar. 13, 2002 [hereinafter Queens Hearing 2002] (statement of Glenn D. Magpantay, Staff Attorney, Asian American Legal Defense and Education Fund), available at <http://latfor.state.ny.us/docs/20020313/queens.html>.

19. N.Y. CITY CHARTER ch. 2-A, § 50 (2004).

20. N.Y. CODE ANN. art 5-A, § 83-m (2010).

21. Indeed, my colleague and counterpart in the Latino community, Nina Perales at the Mexican American Legal Defense and Educational Fund (MALDEF), has said that "communities of color get screwed whether it's by an Independent Redistricting Commission or partisan line-drawers. It doesn't matter." Presentation Comments at NAACP LDF Redistricting Seminar, Arlie House, Warrenton, VA, Oct. 8, 2010. I think that is generally correct, albeit somewhat cynical.

legislative districts.<sup>22</sup> Those district-drawers recognized the growing Asian American population and drew a majority-Asian district<sup>23</sup> that sent the first Asian American to the state legislature in 2002.<sup>24</sup> The state redistricting process accommodated the Asian American community, despite having no guidelines guaranteeing minority representation.

This article illustrates and contrasts the expected results in New York's last redistricting cycle with regards to IRCs against the traditional politically partisan redistricting process. In this review, I find that what actually ensures the political representation of Asian Americans in redistricting, and perhaps other racial and ethnic minority groups, is not the independence of line drawers, but rather the federal Voting Rights Act.<sup>25</sup> The Act encourages the redrawing of districts that give racial and ethnic minorities the opportunity to elect candidates of their choice. Since redistricting is always subject to the requirements of the Act – regardless of whether it is done by an IRC or by a traditional politically partisan process – much of the discussion, debate, promotion, and challenges<sup>26</sup> over IRCs are simply huff and puff. The IRCs themselves do not matter for the representation of communities of color.

## I. BACKGROUND

### A. Redistricting

#### 1. History of Redistricting and Communities of Color

The U.S. Constitution requires that congressional, state legislative, and city councilmanic districts be equal in population.<sup>27</sup> Every ten years, a census is taken of the entire population.<sup>28</sup> Once the census figures are released, the boundaries of districts are redrawn to comport with population changes.

There are only a few restrictions in the redrawing of districts. Foremost, districts must be equal in population and they cannot intentionally discriminate against minority voters.<sup>29</sup> Districts must be reasonably compact and

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22. See *infra* discussion Part II.B.

23. NEW YORK STATE LEGISLATIVE TASK FORCE FOR DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, ASSEMBLY DISTRICT 25, available at <http://www.latfor.state.ny.us/maps/propossem/fa037.pdf>.

24. Steven Kurutz, *'Jimmy Cares' of Flushing Earns a Place in Civic History*, N.Y. TIMES, Nov. 7, 2004.

25. 42 U.S.C. § 1973 (2010).

26. See *supra* notes 4-15.

27. Congressional districts must be almost exactly equal in population pursuant to Article I, Section 2 of the U.S. Constitution. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). State and local legislative districts must be approximately but not exactly equal in population pursuant to the Fourteenth Amendment of the Constitution. *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). See also 2 U.S.C. § 2c (1994).

28. U.S. CONST. art. I, § 2, cl. 3.

29. 42 U.S.C. § 1973 (1994); *Karcher*, 462 U.S. at 727-28, 732, 741; *Wesberry*, 376 U.S. at 7-8; *Baker v. Carr*, 369 U.S. 186, 198-208 (1962).

contiguous.<sup>30</sup> The borders should follow natural geographical and political boundaries, such that they do not cross bodies of water, or divide cities and counties. They should not displace incumbents. Finally, they should encompass "communities of interest," groupings of people who have similar values, shared interests, or common characteristics.<sup>31</sup>

Historically, redistricting has been an opaque process whereby cartographers, supervised by legislators and monitored by a select group of minority voting rights attorneys, developed redistricting plans.<sup>32</sup> There were many instances where districts were unfairly gerrymandered, giving the majority political party unfair advantages, and minority political party unfair disadvantages in electing a representative.<sup>33</sup> In one example, the residence of a challenger was intentionally placed outside of an incumbent's district boundaries so that he could not enter the race in the future elections.<sup>34</sup>

The same applied to racial groups. An obvious example of racial gerrymandering has been the fragmenting of large minority population enclaves so that voters were divided between two or more districts and the community could never elect a candidate of their choice.<sup>35</sup> Had the geographic area been kept whole, the minority population would have been able to elect a minority candidate to represent them.<sup>36</sup>

The federal Voting Rights Act prohibits this intentional form of minority vote dilution, as well as other redistricting schemes that may, in effect, deny racial and ethnic minority political representation. The Act compels the drawing

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30. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

31. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006); *Miller*, 515 U.S. at 915-16.

32. See LEVITT & FOSTER, *supra* note 3, at 2-3, 8.

33. See generally *United States v. Hays*, 515 U.S. 737 (1995); *Miller* 515 U.S. at 900.

34. Jonathan P. Hicks, *In District Lines Critics See Albany Protecting Its Own*, N.Y. TIMES, Nov. 2, 2004, at B4.

35. See e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, the State tried to disenfranchise African Americans from political representation. The City of Tuskegee was square in shape but the redistricting "transformed it into a strangely irregular twenty-eight-sided figure. . . . The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections." *Id.* at 341. See also *State of New York Legislative Task Force on Demographic Research and Reapportionment: State Legislative Redistricting, Queens Public Hearing* (2002) (statement of Leyland Roopnaraine, Real Estate Broker, describing how Richmond Hill has a large South Asian population and is divided among five districts), <http://latfor.state.ny.us/docs/20020313/queens.html#spkr20>.

36. Asian American communities have suffered under this type of discrimination. See, e.g., Comment Letter from Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund, to Gerald Jones, Chief of Voting Section, U.S. Department of Justice (July 17, 1991) (on file with Voting Section, U.S. Dep't of Justice) (protesting early proposals in the 1980 New York State legislative redistricting that called for splitting Chinatown between two State Senate and two State Assembly districts). See also COAL. OF ASIAN PAC. AMS. FOR FAIR REDISTRICTING, FAIR REPRESENTATION, COALITION BUILDING, POLITICAL EMPOWERMENT 5, available at <http://www.apalc.org/pdffiles/capaftsum.pdf> (discussing the effect of residents of Los Angeles' Koreatown being divided into different districts, after the L.A. Riots of 1992 when residents sought cleanup and recovery money from lawmakers but were told they were part of another legislator's district).

of majority-minority districts when certain "preconditions" exist, as illustrated in *Thornburg v. Gingles*.<sup>37</sup> The minority community has to (1) be sufficiently numerous and compact to form a majority in a single district; (2) be politically cohesive, in that members of the minority group tend to vote alike; and (3) suffer from racially polarized voting in which the white majority votes as a bloc so as to routinely defeat the minority group's preferred candidate.<sup>38</sup>

Under these requirements in the 1990s, governments across the nation, at the local, state, and federal levels, drew a watershed of new majority-minority voting districts.<sup>39</sup> Fourteen states adopted congressional redistricting plans that doubled the number of congressional majority-minority districts from twenty-six to fifty-two.<sup>40</sup> Eleven states created sixteen new majority-Black districts, and six states added eleven new majority-Latino districts. With aggressive enforcement of the Voting Rights Act, communities of color made significant gains before 2000.<sup>41</sup>

## 2. Redistricting Post-2000

But much has changed since the beginning of the following decade. A combination of factors and events brought public awareness of redistricting to the

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37. *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986). The landmark *Gingles* case defined how the Voting Rights Act would remedy minority vote dilution by compelling the drawing of majority-minority districts that gave racial and ethnic minorities opportunities to elect candidates of their choice.

38. *Id.* at 50-52, 55. These criteria set a benchmark that denied some racial and ethnic groups, most notably Asian Americans, the ability of gaining representation through majority-minority districts. See, e.g., *Diaz v. Silver*, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)). In addition, if the minority group does not comprise at least a 51% majority district population, then there is no Voting Rights Act infraction. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

39. See Frank Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 2 (1995) (citing Press Release, U.S. Department of Commerce News, U.S. Bureau of the Census, Number of Congressional Districts with Black or Hispanic Majorities Doubles, Census Bureau Says, Revised, Mar. 24, 1993; *Black-and-Hispanic-Majority Districts*, CQ Weekly Report, July 10, 1993). Some conservative commentators argue that majority-minority districts are not needed to achieve minority representation. See, e.g., Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031 (1996). They point out that people of color are elected from both majority-white and majority-minority districts. See *id.* However, supporters of majority-minority districts counter that nearly every African-American member of the U.S. House of Representatives is elected from a district with a majority-black population. See Brenda Wright, *Voting Rights: Yes: Toward a Politics of Inclusion*, 79 A.B.A. J. 44 (1993).

40. See *Bush v. Vera*, 517 U.S. 952, 1041 n.37, n.38 (1996) (Stevens, J., dissenting).

41. Admittedly, the Voting Rights Act is under Constitutional attack from the U.S. Supreme Court. The gains compelled by the Act in the 1990s were questioned by the Court and a new line of cases emerged that curtailed the redrawing of majority-minority districts under *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson* 515 U.S. 900 (1995). More recently, although the Court upheld the enforcement provisions of the Act, the Justices' questioning signals the Court's unease with provisions of the Act. See *Nw. Austin Mun. Util. Dist. No. One v. Holder* 129 S.Ct. 2504 (2009). However, advocates are resigned to still fully deploy the Act to preserve minority representation and the U.S. Department of Justice has said that if they can "chew gum and walk at the same time," then they can enforce the Voting Rights Act and defend its constitutionality as well." Julie Fernandes, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, remarks at NAACP LDF Redistricting Seminar, Arlie House, Warrenton, VA, Oct. 8, 2010.

fore and invigorated reforms.<sup>42</sup>

The first factor was publicity of and participation in the decennial census, which had an inherent relationship to redistricting.<sup>43</sup> In 2000, the U.S. Census Bureau launched an extensive public education effort about the importance, impact, and legal requirement of the census.<sup>44</sup> Government officials hoped to reverse the declining rate of participation in the decennial census. Flyers, posters, and countless community-based organizations serving as census partners told of how the census was used to provide resources and representation for communities. Resources would come in the form of funding for schools and health care services, and representation would come through apportionment and redistricting.<sup>45</sup> A specific educational campaign focused on encouraging Asian Americans to participate in the census. The promotional effort ultimately inspired Asian Americans to participate in redistricting efforts as Asian Americans became much more aware of its importance.<sup>46</sup>

The second event was the national drama centering on the 2003 redistricting in Texas.<sup>47</sup> This was a blatant and shameless effort by U.S. House of Representatives Majority Leader Tom DeLay to increase Republican representation in Congress.<sup>48</sup> Following the 2000 census, the Texas legislature redrew and finalized voting districts in 2001. But then in 2002, Republicans won control of the state legislature. DeLay encouraged state lawmakers to create more Republican-leaning districts and break up Democratic districts. It was an unnecessary and opportunistic re-do that had no principled justification except to expand one party's political power. In staunch opposition and in the minority, Democratic state legislators fled to Oklahoma and New Mexico to prevent the opening of the legislative session.<sup>49</sup> The governor threatened to send law

42. See *infra* notes 43-54.

43. Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L. REV. 739 (2001).

44. PHILIP M. LIU & GLENN D. MAGPANTAY, AALDEF COUNTING ASIAN AMERICANS: AN EVALUATION OF CENSUS 2000 PROGRAMS AND POLICIES (2000); U.S. Census Bureau, *Advertising Campaign* (2000), <http://www.census.gov/dmd/www/advcampaign.html>; Deepa Iyer, *Will Asian Pacific Americans Count in the Next Decade?: The Importance of Census 2000 to Asian Pacific Americans*, 6 UCLA ASIAN PAC. AM. L.J. 44 (2000).

45. Iyer, *supra* note 44; U.S. Census Bureau, United States Census 2010, *10 Minutes 10 Questions*, UNITED STATES CENSUS 2010 (May 2009), [http://2010.census.gov/partners/pdf/factSheet\\_General.pdf](http://2010.census.gov/partners/pdf/factSheet_General.pdf).

46. It is also important to note that several foundations provided support for the census promotional activities since they saw it as a step in civic engagement, beginning with the census in early 2000, the elections in late 2000, and redistricting in the years following. See generally Funders' Committee for Civic Participation, *Funder's Census Initiative*, FCCP, [http://funderscommittee.org/our\\_issues/census/funders\\_census\\_initiative](http://funderscommittee.org/our_issues/census/funders_census_initiative) (last visited Feb. 28, 2011).

47. Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES, Oct. 13, 2003, at A1.

48. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html>; *Redistricting Tom Delay*, N.Y. TIMES (Dec. 14, 2005), <http://www.nytimes.com/2005/12/14/opinion/14wed2.html>.

49. David Barboza & Carl Hulse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. TIMES, May 14, 2003, at A17; *National Briefing Southwest: Texas: Democrats on the Run Again*, N.Y. TIMES, July 29, 2003, at A18.

enforcement to Albuquerque to forcibly bring hiding lawmakers back to Texas. The stalemate eventually ended and the newly redrawn districts were drawn again. Before the re-redistricting, Democrats held a seventeen to fifteen edge over Republicans. Afterwards Republicans held a twenty-one to eleven seat edge, a net of four new Republican districts. The plot put redistricting and the politically partisan exploitation of the process squarely in the public eye.<sup>50</sup>

The third dynamic that propelled redistricting reform was the energized base of "good government" groups who had worked on election reform beginning with the 2000 Presidential election debacle in Florida.<sup>51</sup> Those elections spurred Congress to enact the Help America Vote Act (HAVA),<sup>52</sup> which required a number of voting reforms.<sup>53</sup> Local and state advocates, civic groups, and civil rights organizations worked collaboratively on state implementation and other efforts to increase access to the voting process, such as same-day voter registration and vote-by-mail. These comprehensive plans to improve the American democratic system included redistricting reform.<sup>54</sup> Later in the decade, as the 2010 census approached followed by a new round of redrawing of voting districts, reformers narrowed in on redistricting reform.<sup>55</sup>

These three events brought national focus on redistricting. The newly exposed problems prompted efforts to improve the process. One of the leading items in the reform agenda was taking redistricting out of the hands of state legislatures and placing it with independent redistricting commissions.

#### B. *Independent Redistricting Commissions*

IRCs have long existed at the state and local levels but only in a few jurisdictions. There are several types of IRCs with varied mandates, requirements, and compositions.<sup>56</sup> Some commissions have full and final responsibility for drawing redistricting plans,<sup>57</sup> while others simply propose plans that the legislature must then enact. Some consist of members appointed by the legislative majorities and some are evenly balanced with a non-partisan

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50. The new redistricting plan was successfully challenged in court, but only insofar as minority representation was concerned. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

51. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <http://www.usccr.gov/pubs/vote2000/report/main.htm> (last visited Feb. 28, 2011).

52. 42 U.S.C. § 15301 (2006).

53. HAVA Section 301 (a) (1) required that voting systems allow voters to verify their candidate selections, correct any voting errors, and be notified before they cast their ballots if they accidentally voted for more than one candidate for a single office. 42 U.S.C. §§ 15301-545 (2002).

54. See, e.g., FAIRVOTE, REFORMS TO ENHANCE INDEPENDENT REDISTRICTING (2007), available at [http://www.fairvote.org/media/pep/redist\\_reform\\_enhance\\_0506.pdf](http://www.fairvote.org/media/pep/redist_reform_enhance_0506.pdf).

55. See *supra* notes 6, 7, 12.

56. See LEVITT & FOSTER, *supra* note 3, at 20-22, 28-35 (reviewing commissions). While different types of IRCs exist, this article argues that IRCs, in general, do not help or hurt the representation of racial and ethnic minorities; they are all inconsequential.

57. Iowa is the most often cited example of a well functioning nonpartisan independent redistricting commission. See Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1336, 1387-90 (2005).

tiebreaker, while others consist of entirely non-partisan commissioners.<sup>58</sup>

Fourteen states have commissions for redrawing redistricting plans that may not have any state legislators as members. Seven of them prohibit any legislative appointees. Another five of the fourteen prohibit any public officials.<sup>59</sup>

<b>Who Draws Redistricting Plans<sup>60</sup></b>			
	<b>No Legislators</b>	<b>No Legislative Appointees</b>	<b>No Public Officials</b>
<b>Alaska</b>	X		X
<b>Arkansas</b>	X	X	
<b>Arizona</b>	X		X
<b>California</b>	X	X	X
<b>Colorado</b>	X		
<b>Hawaii</b>	X		
<b>Idaho</b>	X		X
<b>Iowa</b>	X		
<b>Missouri</b>	X	X	
<b>Montana</b>	X	X	X
<b>New Jersey</b>	X	X	
<b>Oklahoma</b>	X	X	
<b>Vermont</b>	X	X	
<b>Washington</b>	X		X

However, it not only matters who redraws districts but also how they are drawn.<sup>61</sup> States and localities have various objectives in redrawing districts, such as the preservation of compactness, continuity, political subdivisions, communities of common interest, and incumbents.<sup>62</sup> These have been approved as traditional criteria by the U.S. Supreme Court.<sup>63</sup>

58. See David G. Oedel, Allen K. Lynch, Sean E. Mulholland, & Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 VILL. L. REV. 57, 68-80 (2009) (citing David Oedel, Mercer Study (2007) (unpublished, on file with Mercer University Law School Furman Smith Law Library)).

59. Peter S. Watson, *How to Draw Redistricting Plans That Will Stand Up in Court*, Sept. 26, 2010, available at [http://www.ncsl.org/documents/legismgt/Watson\\_Redistricting\\_Plans.pdf](http://www.ncsl.org/documents/legismgt/Watson_Redistricting_Plans.pdf) (citing NATIONAL CONFERENCE OF STATE LEGISLATURES, LIMITS ON GERRYMANDERS app. C, D (2009)).

60. *Id.* (citing NATIONAL CONFERENCE OF STATE LEGISLATURES, LIMITS ON GERRYMANDERS tbl.8 (2009)).

61. It is important to note that IRCs generally recognize and affirm the need to increase the representation of those who have been traditionally underrepresented, including racial and ethnic minorities. See, e.g., AZ CONST. Art. 4, pt. 2, § 1; CA CONST. Art. 21, § 2; WA CONST. Art. 2, § 43. But IRCs often treat this as one out of many guidelines. The Voting Rights Act, by comparison, makes this an obligatory requirement in redistricting, regardless of whether done by an IRC of traditional politically partisan commission.

62. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 435 (2006); Miller v. Johnson, 515 U.S. 900, 915-16 (1995). For a detailed review by state, see LEVITT & FOSTER, *supra* note 3, at 20-22, 28-35.

63. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 435 (2006); Miller v. Johnson, 515 U.S. 900, 915-16 (1995).

Before even considering the representation of racial and ethnic minorities, district drawers must first aim to make districts equal in population, as required by the U.S. Constitution.<sup>64</sup> In the course of making districts equal in population, the manipulation of district lines using voter registration data, election returns, and the addresses of incumbents can predetermine the candidate who will win the election.<sup>65</sup> By looking at voter registration data and election returns, one can determine the number of registered Democrats and Republicans in a district, and whether the voters typically vote for the incumbent, challengers, or candidates of color.<sup>66</sup> Packing Republican voters into districts will result in the election of Republican candidates, as was done in Texas in 2003.<sup>67</sup> Addresses of candidates, whether incumbents or challengers, can be intentionally included in or excluded from district boundaries.<sup>68</sup>

In addition, redistricting often requires the preservation of communities of common interest.<sup>69</sup> For this, socioeconomic data is used to identify racial and ethnic minorities, high- and low-income neighborhoods, housing types, and other characteristics. Advocacy groups have been successful in arguing that Asian American population enclaves constitute communities of interest that should be kept together in redistricting plans.<sup>70</sup> But IRCs treat this as one factor out of many,<sup>71</sup> and in one instance, subordinated this showing to the protection of a non-Asian incumbent to represent Asian Americans.<sup>72</sup> These requirements generally apply to all redistricting processes, whether executed by an IRC or in the traditional system where districts are drawn by legislative bodies.

Since the post-2000 redistricting, the movement for reform has remained centered on IRCs.<sup>73</sup> Proponents say IRCs best embody principles of

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64. See U.S. CONST. art. I; 2 U.S.C. § 2c (1994); *Karcher v. Daggett*, 462 U.S. 725, 744 (1983); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

65. LEVITT & FOSTER, *supra* note 3, at 11.

66. See *Watson*, *supra* note 59 (reviewing data that may be used in redistricting).

67. See *discussion supra* note 37-40.

68. For example, in New York's redistricting, the homes of candidates who challenged incumbents were drawn outside of the district so they could not enter the race. Jonathan P. Hicks, *In District Lines Critics See Albany Protecting Its Own*, N.Y. TIMES, Nov. 2, 2004, at B4.

69. LEVITT & FOSTER, *supra* note 3, at 20-22, 28-35.

70. See, e.g., *Diaz v. Silver*, 978 F. Supp. 96, 123-24 (E.D.N.Y. 1997), *aff'd mem.*, 118 S. Ct. 36 (1997). See also *Magpantay*, *supra* note 43.

71. See, e.g., N.Y. CITY CHARTER ch. 2-A, § 52(1)(a)-(g) (2004).

72. In New York City, the district that encompassed Chinatown had never given Asian Americans representation in the City Council. Asian American voters did not vote for the current district's incumbent. Advocates urged the IRC to redraw anew and to adhere to the City Charter's redistricting requirements of preserving communities of common interest. A different district configuration was needed to ensure that Asian Americans could influence the outcome of the election. But, unfortunately, the Commission had succumbed to incumbency protection and maintained the district boundaries to ensure the incumbent's electoral advantage. For a fuller discussion, see *infra* notes 123-26.

73. American Bar Association H.D., Daily J., 2008 Midyear Meeting, Rep. No. 102A (2008), available at [http://www.abanet.org/leadership/2008/midyear/docs/Daily\\_Journal.doc](http://www.abanet.org/leadership/2008/midyear/docs/Daily_Journal.doc); Steven F. Huefner, *Don't Just Make Redistricters More Accountable to the People, Make Them the People*, 5 DUKE J. CONST. L. & PUB. POL'Y 37, 40-42 (2010) (discussing California's redistricting); Dick Dadey, Executive Director, Citizens Union of the City of N.Y., Testimony to the State Senate Majority Conference and Senate Legislative Task Force on Demographic Research and Reapportionment on the Need for



transparency, reduction of partisan influence, and increased candidate competition.<sup>74</sup>

But not all good government reforms are good for those that they govern.<sup>75</sup> Some of these efforts can in fact undermine the objectives of communities of color.<sup>76</sup> For example, increasing candidate competition could jeopardize minority office holders. Communities of color have historically been shut out of the political process. They have fought hard to finally achieve some level of political representation and can be loathe to changing the process now. Some liberals argue that redistricting reform keeps Republican gerrymandering in check. But efforts to bind Republican shenanigans can also dim the prospects for racial minorities to be elected.<sup>77</sup>

Good government advocates and communities of color recently have been on opposite sides of the IRC debate. Few empirical studies have examined IRCs in the context of minority representation and none have examined them while specifically taking into consideration the concerns of Asian Americans. My article addresses this gap in the scholarship, and is an opportunity to assess whether IRCs bear any meaningful benefits for communities of color.

## II. CASE STUDY BACKGROUND: REDISTRICTING IN NEW YORK

The last redistricting in New York provides an ideal case study to examine the impact of IRCs on the representation of communities of color. New York has both systems – an IRC for the New York City Council and a traditional partisan committee for the state legislature. The 2000 census uncovered a large and rapidly growing Asian American population, and both entities had to seriously

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Redistricting Reform (Dec. 14, 2010), *available at* [http://www.citizensunion.org/www/cu/site/hosting/Testimony/CU\\_Testimony\\_Senate\\_Redistricting\\_12\\_14\\_10.pdf](http://www.citizensunion.org/www/cu/site/hosting/Testimony/CU_Testimony_Senate_Redistricting_12_14_10.pdf); Bartoletti, *supra* note 7. More modest reforms include public review and input in the forms of public hearings, public review of preliminary plans, and making redistricting data and computer terminals with redistricting software available to the public. BRUCE E. CAIN & KARIN MACDONALD, TRANSPARENCY AND REDISTRICTING 3 (2006), *available at* [http://swdb.berkeley.edu/redistricting\\_research/Transparency\\_&\\_Redistricting.pdf](http://swdb.berkeley.edu/redistricting_research/Transparency_&_Redistricting.pdf).

74. LEVITT & FOSTER, *supra* note 3, at 60; ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON ELECTION LAW, A PROPOSED NEW YORK STATE CONSTITUTIONAL AMENDMENT TO EMANCIPATE REDISTRICTING FROM PARTISAN GERRYMANDERS: PARTISANSHIP CHANNLED FOR FAIR LINE-DRAWING 1-8 (2007), *available at* [http://www.nycbar.org/pdf/report/redistricting\\_report03071.pdf](http://www.nycbar.org/pdf/report/redistricting_report03071.pdf); THE REFORM INSTITUTE, BEYOND PARTY LINES: PRINCIPLES FOR REDISTRICTING REFORM 10-14 (2005).

75. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments . . . deriv[e] their just powers from the consent of the governed . . .").

76. NAACP LEGAL DEF. AND EDUC. FUND, INC., ASIAN AM. JUSTICE CTR., & MEXICAN AM. LEGAL DEF. AND EDUC. FUND, THE IMPACT OF REDISTRICTING IN YOUR COMMUNITY 35-37 (2010); POLITICAL PARTICIPATION GROUP, NAACP LEGAL DEF. AND EDUC. FUND, INC., INDEPENDENT REDISTRICTING COMMISSIONS: REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY 3 (2010). *See also* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, U.S. Department of Justice, to Lisa Hauser, Esq. & José de Jesús Rivera, Esq. (May 20, 2002), *available at* [http://www.justice.gov/crt/about/vot/sec\\_5/ltr/l\\_052002.php](http://www.justice.gov/crt/about/vot/sec_5/ltr/l_052002.php) (objecting to a legislative redistricting plan that retrogressed minority voting strength in violation of the Voting Rights Act adopted by the Arizona IRC).

77. *See generally* Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184 (2007).

consider this growth when they redrew districts.

A. *New York City Districting Commission*

The New York City Districting Commission redraws district boundaries for the City Council.<sup>78</sup> The Commission is an independent commission of fifteen members that does not include lawmakers. The New York City Charter outlines the Commission's membership, process, timeline, and redistricting requirements.

The City Council's majority political party appoints five members, and the minority party appoints three. The mayor appoints the other seven members. At least one resident from each city borough must be included in the Commission, as well as representatives of racial and ethnic minority groups.<sup>79</sup> Though there are no explicit prohibitions, no city council staff members have ever been appointed to serve on the Commission, unlike in the state legislative process.<sup>80</sup>

Requirements for transparency are extensive and specific. The Commission must allow for initial public comments before it redraws maps, and public review of proposed plans as well as final plans. It has also made its data publicly available and provided publicly accessible computer terminals for individuals to redraw and propose redistricting plans. The final districting plan must be adopted by at least nine members of the commission, or by a three-fifths vote.<sup>81</sup>

Redistricting guidelines are enumerated, prioritized, and mandated by the City Charter.<sup>82</sup> The first criterion is that districts must be equal in population.<sup>83</sup> Second, the plan must ensure "the fair and effective representation of racial and language minority groups in New York City."<sup>84</sup> Third, district lines must keep intact "neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other."<sup>85</sup> The Charter goes on to express other lower ranked criteria such as compactness, borough integrity, preservation of political party voting strength, and contiguity.<sup>86</sup> Nowhere in the Charter is it suggested that new districts must protect the reelection of incumbents or any mechanism to that effect.

The Commission, its accompanying guidelines, and its practices prompting

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78. N.Y. CITY CHARTER ch. 2-A, § 50 (2004).

79. *Id.* at ch. 2-A, § 50(b)(1) (2004). The Charter also required the representation of racial and language minority groups protected by the Voting Rights Act to be as close as practicable to their proportion of the city's population, but this was declared unconstitutional. *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 U.S. Distr. LEXIS 11481, at \*20 (S.D.N.Y. Aug. 3, 1992).

80. See *infra* notes 88-89.

81. N.Y. CITY CHARTER ch. 2-A, § 51(g) (2004).

82. *Id.* at ch. 2-A § 52(1)(a)-(g) (2004); *Badillo v. Katz*, 343 N.Y.S.2d 451, 461 (N.Y. Sup. Ct. 1973) (holding that districts that do not meet the criteria are void). *But see* *Brooklyn Heights Assoc. v. Macchiarola*, 82 N.Y.2d 101, 105 (N.Y. 1993) (requiring more of a balancing of the factors than "strict adherence").

83. N.Y. CITY CHARTER ch. 2-A, § 52(1)(a) (2004) (stating that the maximum population difference between the most and least populous district is 10% of the average district population, "according to figures available from the most recent decennial census").

84. *Id.* at ch. 2-A, § 52(1)(b) (2004).

85. *Id.* at ch. 2-A, § 52(1)(c) (2004).

86. *Id.* at ch. 2-A, § 52 (2004).

public access have been hailed as an exemplary model for IRCs.

B. *New York State Legislative Task Force on Redistricting (LATFOR)*

The New York State Legislative Task Force for Demographic Research and Reappointment (LATFOR) redraws district boundaries for the State Assembly, State Senate, and Congress.<sup>87</sup> The Task Force is a traditional partisan system. It includes six members appointed by majority and minority party leaders of both houses of the state legislature.<sup>88</sup> Four members are legislators and two are private individuals. The co-chairs are a State Senator and State Assembly member from the majority parties of their respective houses; an additional State Senator and State Assembly member are selected from the minority parties. The private individuals have always been legislative staff members of the majority party of each house. Rather than providing an independent voice, these private individuals have been interested parties who seek particular outcomes in the redistricting process. The Task Force's sheer structure operates so as to give control of redistricting to the majority party of each legislative house.

LATFOR is a typical politically partisan commission. It has historically had a very closed process in redistricting, save a few public hearings.<sup>89</sup> Only a few redistricting requirements are expressed in state law, and those are found in the New York State Constitution<sup>90</sup>—districts must be compact, contiguous, and convenient,<sup>91</sup> and they must respect political boundaries for cities and counties.<sup>92</sup> There are no explicit protections for communities of color in state law.

The New York City Districting Commission is a form of an IRC; the New York State LATFOR is a political legislative commission. The City Districting Commission takes redistricting out of the hands of individuals who would run for those districts. It has many guidelines promoting transparency and the representation of traditionally underrepresented communities. LATFOR is much more partisan, with an opaque process. It has few stated redistricting

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87. The New York State Legislative Task Force on Demographic Research and Reapportionment, *Frequently Asked Questions*, THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, <http://www.latfor.state.ny.us/faqs/> (last visited Oct. 10, 2011) ("'[R]edistricting' is undertaken by the state Legislature. In New York State, the Legislative Task Force on Demographic Research and Reapportionment analyzes the Census Bureau population figures used in the redistricting plan.")

88. N.Y. CODE ANN. art 5-A, § 83-m (2010). One commentator categorized New York as having an "advisory commission." LEVITT & FOSTER, *supra* note 3, at 20. Though this might be technically correct under a strict reading of the statute, how the statute has been applied, with all members being legislators and their staff, is in essence no different from a joint committee of the legislature. *Id.* at 74 ("A redistricting body is not necessarily independent from self-interested legislators even when no members are incumbents.")

89. See, e.g., New York State Legislative Task Force for Demographic Research and Reapportionment, *Legislative Redistricting Hearings*, THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, <http://www.latfor.state.ny.us/docs/20010507> (last visited Feb. 28, 2011).

90. N.Y. CONST. LAW art. III, §§ 4-5 (2010).

91. *Id.*

92. See, e.g., *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (N.Y. C.A. 1992); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 428 (N.Y. C.A. 1972).

requirements. Both must adhere to the requirements of the Voting Rights Act. The hope was that the City Districting Commission, an IRC, would be better for traditionally underrepresented communities of color.

C. *The Asian American Community in New York*

At the time when the City Districting Commission and LATFOR were redrawing districts, the Asian American population in New York had grown substantially, but it still had little political representation. Before 2000, no Asian American had ever been elected to the city council, state legislature, or Congress.<sup>93</sup>

According to the 2000 census, the Asian American population in New York City had increased by seventy-one percent over the past decade.<sup>94</sup> Asian Americans comprised more than ten percent of the city's population, numbering 872,777.<sup>95</sup> The overwhelming majority of Asian Americans in New York resided in New York City, and the overwhelming majority of Asian Americans in New York City resided in Manhattan, Brooklyn, and Queens. In Manhattan, there were 156,710 Asian Americans; in Brooklyn, 206,272; and in Queens, 433,553.<sup>96</sup>

Asian American populations also increased faster than the overall growth rates of the boroughs in which they resided.<sup>97</sup> In Manhattan, the Asian American population grew twelve times faster than the overall population of the borough itself, and in Queens, six times faster.<sup>98</sup> In fact, approximately one in five residents of Queens was of Asian descent.<sup>99</sup> The largest and most concentrated Asian American populations were located in Chinatown in Lower Manhattan and Flushing, Queens.

Several Asian Americans entered electoral races for legislative office but none had ever won. Hungry for political representation, Asian American community groups and advocates became heavily involved in the redistricting process.

### III. THE NEW YORK REDISTRICTING EXPERIENCE

Chinatown and Flushing had the highest voter registration rates of Asian Americans in New York City. By the 2002 redistricting, only one Asian

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93. State of New York Legislative Task Force on Demographic Research and Reapportionment: State Legislative Redistricting, Manhattan Public Hearing (May 17, 2001) [hereinafter *Fung Statement*] (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund).

94. *Id.*

95. See U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, GEOGRAPHIC AREA: NEW YORK CITY, NY tbl.DP-1 (2000), available at <http://censtats.census.gov/data/NY/1603651000.pdf>. Census 2000 figures included race alone or a combination of one or more other races.

96. See NEW YORK CITY GOVERNMENT, DEMOGRAPHIC CHARACTERISTICS - NEW YORK CITY, 1990 AND 2000 CENSUS, available at <http://www.nyc.gov/html/dcp/pdf/census/demonyc.pdf>.

97. *Fung Statement*, *supra* note 93.

98. *Id.*

99. *Id.*

American had been elected to legislative office in the state—John Liu from Flushing, who had successfully run for the New York City Council in 2001.<sup>100</sup> No Asian Americans were elected to the state legislature. Residents in Chinatown were still not represented by any candidate of their choice.<sup>101</sup> Though many Asian American candidates ran for office, they routinely lost to white candidates.<sup>102</sup> As the New York City Districting Commission and LATFOR were considering redistricting plans, they had to reckon with the Asian American populations in Chinatown and Flushing.

One would have expected that Asian Americans would fare much better in the nonpartisan, principled redistricting process for the City Council, and that they would be stymied in the more politically partisan and opaque process for the State Legislature. Surprisingly, the opposite ensued. The IRC proposed no gains for Asian Americans in the City Council, whereas the LATFOR redrew a new and open State Assembly district with an Asian American majority population.<sup>103</sup> In the following election, no other Asian Americans were elected to the City Council, but the first Asian American was elected to the State Legislature – Jimmy Meng.<sup>104</sup>

Moreover, what seems to have turned the redistricting process in favor of Asian Americans was not transparency, fair guidelines, or the inclusion of communities of interest. Rather, it was due to adherence to the Voting Rights Act, which required the drawing of a majority-minority district when the minority population was large enough to constitute a majority in a district.<sup>105</sup>

#### A. *New York City Council Redistricting*

The nonpartisan, independent New York City Districting Commission ("Districting Commission") proposed City Council district lines in Manhattan that Asian American groups protested.<sup>106</sup> The new districts in and around Chinatown were left essentially unaltered,<sup>107</sup> and provided no improvement in the prospects for the election of an Asian American candidate to represent the Asian

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100. Frank Lombardi, *Asian Wins a Primary in Queens*, N.Y. DAILY NEWS, Oct. 5, 2001.

101. Magpantay Statement to NYC Districting Commission, *supra* note 18; Queens Hearing 2002, *supra* note 18.

102. ASIAN AM. LEGAL DEFENSE AND EDUCATION FUND, CITY COUNCIL REDISTRICTING PLAN 7-8 (2002).

103. State Assembly District 25 has an Asian American majority population. ASSEMBLY DISTRICT 25, *supra* note 23.

104. Corey Kilgannon, *Asian Immigrants Become Political Force in Flushing*, N.Y. TIMES, Sep. 30, 2004, at B4.

105. See also *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009) (requiring at least a 50% + 1 majority to have a cognizable claim under the Voting Rights Act).

106. Comment Letter from the Asian American Bar Association of N.Y., to U.S. Department of Justice, Voting Section (Mar. 12, 2003) (on file with author) (opposing preclearance); *Redistricting of Chinatown Finalized*, SING TAO DAILY, Feb. 27, 2003 (Larry Tung, trans.), [http://www.gothamgazette.com/citizen/mar03/chinese\\_redistricting.shtml](http://www.gothamgazette.com/citizen/mar03/chinese_redistricting.shtml).

107. Only minor changes were made to make the districts conform to the average district size, which was 157,025 residents.

American community.<sup>108</sup> Instead, the Districting Commission redrew the district to ensure the election of the current non-Asian city council member, and the Districting Commission subordinated the Charter-mandated criteria to achieve this goal.<sup>109</sup>

Explicit redistricting requirements in the City Charter<sup>110</sup> should have been followed to give Asian Americans meaningful political influence. Admittedly there was insufficient population in Lower Manhattan to draw a majority-Asian City Council district that met the requirements of the Voting Rights Act.<sup>111</sup> Since Chinatown could not be its own district, how the Districting Commission would adhere to the Charter's requirements for minority representation would dictate Chinatown's political representation.<sup>112</sup> The Districting Commission developed three districting proposals and hosted a series of public hearings on these plans from late 2002 to early 2003.<sup>113</sup> On February 26, 2003, the Districting Commission adopted a final districting plan.<sup>114</sup>

Before 2000, Chinatown was in a city council district with Battery Park City, TriBeCa, SoHo, and the Financial District.<sup>115</sup> These other neighborhoods were predominantly white and economically affluent. White candidates coming from these neighborhoods routinely ran in the district, and their votes always overwhelmed the votes for Asian American candidates running from Chinatown. Generally, Asian Americans voted for Asian American candidates and whites voted for white candidates.<sup>116</sup> The result was that Asian Americans had never

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108. Leland T. Saito, *Asian Pacific American Electoral and Political Power: Panel 1: The Sedimentation of Political Inequality: Charter Reform and Redistricting in New York City's Chinatown, 1989-1991*, 8 UCLA ASIAN PAC. AM. L.J. 123, 135-40 (2002) (discussing the past redistricting effort).

109. *Searchlight 2002 - New York City Redistricting*, GOTHAM GAZETTE, Oct. 24, 2002, <http://www.gothamgazette.com/searchlight/redistricting2.shtml> (quoting minority advocates calling the redistricting plan "incumbent focused").

110. N.Y. CITY CHARTER, ch. 2-A, § 52(1)(b) (2004).

111. *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986); *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009).

112. Judith Reed, *Of Boroughs, Boundaries and Bullwinks: The Limitations of Single-Member Districts in a Multiracial Context*, 19 FORDHAM URB. L.J. 759, 772-73 (1991-1992).

113. *But see* Letter from Elaine Jones, Director-Counsel, et al., NAACP Legal Def. and Educ. Fund, Inc., et al., to Henry Calderon, Chairman, & William Floyd, Executive Director, N.Y. City Districting Commission (Mar. 10, 2003) [hereinafter Jones Letter] (on file with author) (raising concerns about defects in the public participation process).

114. Comment Letter Under Section 5 of the Voting Rights Act for New York City Council Redistricting 2003, Regarding Submission Number: 2003-1147, to U.S. Department of Justice, Voting Section, from the Asian American Legal Defense and Education Fund, New York, NY, April 29, 2003. Afterward, that plan needed to be pre-cleared, pursuant to Section 5 of the Voting Rights Act, before it could take effect. The City made its submission on March 31, 2003. The U.S. Department of Justice pre-cleared the plan in May and the new boundaries took effect. In November 2003, elections were held to fill the districts. Almost all of the incumbents ran and won those districts.

115. Saito, *supra* note 108, at 135-40; *City Council Changes: A Disappointment*, OUTLOOK, (Asian American Legal Defense and Education Fund, New York, NY), Spring 1992, at 1; Margaret Fung, *A District Like a Mosaic*, N.Y. NEWSDAY, Apr. 12, 1991, at 60 (advocating for a City Council district that included Chinatown with the Lower East Side).

116. Comment Letter from Margaret Fung, et al., Asian Am. Legal Def. and Educ. Fund, to Joseph Rich, U.S. Department of Justice, Chief of Voting Section (Apr. 29, 2003) [hereinafter Fung Letter] (on file with author).

been represented by a candidate of their own choosing.<sup>117</sup>

In this redistricting, Asian American advocates urged for anew, noting the history of racially polarized voting.<sup>118</sup> They also illustrated the stark differences between Chinatown and these four neighborhoods along income, housing, and community needs.<sup>119</sup> But they were unsuccessful; the Districting Commission kept Chinatown in the same district as Battery Park City, TriBeCa, SoHo, and the Financial District.

Chinatown should have been drawn into the same district as the adjacent Lower East Side.<sup>120</sup> Both neighborhoods had similar socioeconomic characteristics and shared several common interests and concerns. They constituted a single community of interest, meeting the City Charter's third most important redistricting criterion.<sup>121</sup> The minority voters in the Lower East Side were mostly Latino, but there were a growing number of Asian Americans.<sup>122</sup> Latinos and Asians were also politically cohesive in that they voted for the same candidates for office, and those candidates were Asian Americans from Chinatown.<sup>123</sup>

In this area, as well as elsewhere in the city, the Districting Commission redrew districts to ensure the election of current city councilmembers, and it subordinated its own Charter-mandated criteria to achieve this goal.<sup>124</sup> In Lower Manhattan, the district was carefully drawn around the incumbent's electoral powerbase of TriBeCa and SoHo where most of his supporters resided.<sup>125</sup> A new configuration that adhered to the Charter's mandate to respect communities of interest would have moved the incumbent outside of the district encompassing Chinatown. This would have then forced him to run against another sitting councilmember residing in Greenwich Village, a mostly white and equally affluent community.<sup>126</sup> To avoid such a result, the Districting Commission maintained the district boundaries most favorable to the incumbent. But this was not at all required or prompted by the City Charter.

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117. *Redistricting*, *supra* note 76. The incumbent was Alan Gerson who was elected in 2001.

118. Fung Letter, *supra* note 116.

119. *Id.*

120. Magpantay Statement to NYC Districting Commission, *supra* note 18; Queens Hearing 2002, *supra* note 18.

121. Fung Letter, *supra* note 116.

122. TARRY HUM, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN NEIGHBORHOODS IN NEW YORK CITY: LOCATING BOUNDARIES AND COMMON INTERESTS 25 (2002) (discussion of Lower East Side).

123. Asian Americans are politically cohesive with Latinos in District 1. Both groups make up 53.8% of the VAP in the benchmark District 1. The Commission's expert, Dr. Lisa Handley, found that in 1993 and 1997, the preferred candidate of Asian American voters was also the preferred candidate of Latino voters. See Submission Under Section 5 of the Voting Rights Act for Preclearance for the 2003 Final Districting Plan for The Council of the City of New York, Mar. 31, 2003, at Appendix 1 at 16 (Dr. Lisa Handley Expert Report, 16-18).

124. *Searchlight*, *supra* note 109.

125. *Id.*

126. Combining Chinatown with the Lower East Side would not compromise the Latino power base in the Lower East Side. Asian Americans and Latinos already had a history of voting for the same candidates.

A review of Asian American voting patterns and demographics, and local interests and concerns in Chinatown and the surrounding neighborhoods, evidences the Districting Commission's deviation from the Charter's redistricting requirements in ensuring the fair and effective representation of racial minorities and keeping intact communities of common interest.<sup>127</sup>

### 1. *Asian American Voting Patterns*

An analysis of the distribution of the votes in the 2001, 1997, 1993, and 1991 city council elections shows that Asian Americans are politically cohesive and that voting is racially polarized within the district. More recent elections have greater numbers of Asian American voters due to ongoing voter registration drives.<sup>128</sup> Past years show the historical consistency of cohesion and racial polarization. Also, primary election results in New York are dispositive because the winners of the Democratic Primaries have always gone on to win in the General Elections.<sup>129</sup>

#### i. Asian Americans Vote for Asian American Candidates

In the 2001 City Council Primary Election, Asian American candidates received an overwhelming amount of support and votes from Chinatown. The Asian candidates received an aggregated forty percent of the total vote from an electorate that was forty-one percent Asian. In the election districts that were ninety percent or more Asian, the vote share for the three Asian candidates was ninety percent. The four white candidates received only nine percent support from voters in Chinatown.<sup>130</sup>

In the 2001 general election, Asian American voters in Chinatown again voted for one of three Asian candidates. In the same election districts, the vote share for the three Asian candidates was eighty-three percent. The two white candidates received seventeen percent support from voters in Chinatown.<sup>131</sup>

In both the 1997 and 1993 Democratic Primaries, there were one Asian and two non-Asian candidates. In 1997, Asian American support for the Asian candidate was close to ninety percent of the total vote in the election districts that were ninety percent or more Asian. The vote share for the two white candidates was thirty percent. In 1993, the vote share for the Asian candidate was seventy-seven percent. The two white candidates received almost twenty-three percent

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127. N.Y. CITY CHARTER, ch. 2-A, § 52(1)(b), (c) (2004).

128. *Language Assistance Provisions of the Voting Rights Act, Hearing on S. 2236 Before the Subcommittee on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102<sup>nd</sup> Congress 286 (1992) (statement of Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund, describing the yearly increase in Asian American voter registration and political participation).

129. See Submission Under Section 5 of the Voting Rights Act for Preclearance for the 2003 Final Districting Plan for the Council of the City of New York, March 31, 2003, at Appendix 1 at 16 (Dr. Lisa Handley Expert Report, 16-18).

130. Fung Letter, *supra* note 116.

131. *Id.*



support from voters in this area.<sup>132</sup>

In 2001, 1997, and 1993, all of the election districts with majority Asian populations voted heavily for Asian American candidates. These majority-Asian election districts were all located in Chinatown and the Lower East Side.<sup>133</sup> It is also worth noting that in each of these races the preferred candidate of Asian voters was also the preferred candidate of Latino voters in the district.<sup>134</sup> This demonstrates cross-racial political cohesion and underscores the needs to keep both groups together.

#### ii. Whites Vote for White Candidates

Asian Americans voted as a bloc for Asian American candidates. Likewise, whites voted as a bloc for white candidates in the 2001, 1997, 1993, and 1991 elections in the district.<sup>135</sup> An analysis of election districts that were an average of eighty-five percent white over eighteen years of age found the following<sup>136</sup>:

<b>Election</b>	<b>Percentage White Vote to White Candidates</b>	<b>Percentage White Vote to Asian Candidates</b>
2001 Democratic Primary	82% to 4 white candidates	18% to 3 Asian candidates
2001 General Election	83% to 2 white candidates	17% to 3 Asian candidates
1997 Democratic Primary	86% to 2 white candidates	14% to 1 Asian candidate
1993 Democratic Primary	90% to 2 white candidates	10% to 1 Asian candidate

Over the years, support slowly decreased for white candidates and increased for Asians. Asian American candidates were making tiny inroads into the white voting bloc and more and more Asian Americans were registering to vote and participating in elections. Unchanged, someday long into the future, Asian Americans might eventually win elected office in this area.<sup>137</sup> But advocates argued that the community deserved representation now.<sup>138</sup>

132. *Id.*

133. This analysis includes the Lower East Side election districts that are in District 1 only.

134. In 1993, Asian candidate Margaret Chin received seventy-seven percent of the Asian vote and fifty-eight percent of the Latino vote. In 1997, Asian candidate Jennifer Lim received seventy percent of the Asian vote and forty-six percent, the highest plurality, of the Latino vote. The Commission's expert also found cohesion between Asian and Latino voters. Handley Expert Report, *supra* note 123.

135. Fung Letter, *supra* note 116.

136. *Id.*

137. This is exactly what had happened. After several election cycles, in 2009, Margaret Chin was finally elected to District 1 to represent Chinatown. *2009 Election Results: City Council*, N.Y. TIMES, Nov. 9, 2009, available at <http://elections.nytimes.com/2009/results/city-council.html>.

138. See Martin Luther King, Jr., *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT (1964) (arguing against waiting for civil rights to come).

### iii. Asian American Candidates Lost to White Candidates

As an effect of this racially polarized voting, the preferred candidates of Asian Americans always lost their elections. White voters, concentrated in Battery Park City, TriBeCa, and SoHo, have repeatedly overwhelmed Asian American voters concentrated in Chinatown.<sup>139</sup>

Election	Total Vote to Asian Candidates (Vote Share)	Total Vote to White Candidates (Vote Share)
2001 General Election	40% to 3 Asian candidates	60% to 1 white candidates
2001 Democratic Primary	40% to 3 Asian candidates	60% to 4 white candidates
1997 Democratic Primary	30% to 1 Asian candidate	70% to 2 white candidates
1993 Democratic Primary	27% to 1 Asian candidate	73% to 2 white candidates
1991 Democratic Primary	33% to 1 Asian candidate	67% to 3 white candidates

Even if only one Asian American candidate had run in these elections and received all votes for Asian candidates, he or she would still have lost to the white candidates whose support came from white voters.<sup>140</sup> Moreover, even when multiple white candidates split the white vote, Asian American candidates still lost because the divided votes for the leading white candidates were still enough to overcome the votes for Asian candidates.<sup>141</sup>

The current system for redrawing the district has never granted Asian Americans representation in the City Council. The Districting Commission did not adhere to the City Charter's second-ranked mandated districting criteria, which was to ensure representation of racial and ethnic minorities.<sup>142</sup> Asian American voters did not vote for the current district's incumbent.<sup>143</sup> Asian American advocates urged the Districting Commission to develop a new district configuration to ensure that Asian Americans could influence the outcome of the election. Unfortunately, the Commission maintained the district boundaries that ensured the incumbent's electoral advantage.<sup>144</sup>

139. ASIAN AM. LEGAL DEFENSE AND EDUCATION FUND, *supra* note 102, at 7-8.

140. See Fung Letter, *supra* note 116.

141. *Id.*

142. N.Y. CITY CHARTER ch. 2-A, § 52(1)(b) (2004).

143. Community exit polls found that in the November 2001 City Council elections, only 5% of Asian American voters polled in Chinatown voted for white candidate, Alan Gerson, whereas 90% voted for one of the Asian candidates. Still, all of the Asian candidates lost to Alan Gerson. GLENN MAGPANTAY, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE ASIAN AMERICAN VOTE IN THE 2001 NYC MAYORAL AND CITY COUNCIL ELECTIONS 11 (2002).

144. Letter from Alan Gerson, N.Y. City Councilmember, to Gifford Miller, N.Y. City Council Speaker, (Jan. 15, 2003) [hereinafter Gerson Letter] (outlining the Councilmember's suggestions for the redistricting of his own district); see *Searchlight*, *supra* note 109.

## 2. *Demographics*

The Districting Commission did not follow the City Charter's third most important mandated districting criterion to preserve communities of common interest and association.<sup>145</sup> There was a definable community of interest in the neighborhoods of Chinatown and the Lower East Side. The Commission did not keep these two neighborhoods together and thus did not preserve a clear community of interest.

Community members testified before the Districting Commission to show how Chinatown and the Lower East Side shared many similar demographic characteristics.<sup>146</sup> Conversely, these two neighborhoods were demographically very different from TriBeCa, SoHo, Battery Park City, and the Financial District.

Many residents in Chinatown and the Lower East Side were foreign born and became citizens through naturalization. Because many were recent immigrants, they had limited proficiency in the English language and had specific needs for translation services. Conversely, residents of TriBeCa, SoHo, Battery Park City, and the Financial District were primarily white and native born.<sup>147</sup>

The City Charter also requires that districts keep intact neighborhoods with common interests along economic lines.<sup>148</sup> Chinatown and the Lower East Side were working class neighborhoods where the average household income was \$40,102. TriBeCa, SoHo, Battery Park City and the Financial District, on the other hand, were considerably more affluent, with an average household income of \$118,875.

These common socioeconomic characteristics drove shared interests among residents in Chinatown and the Lower East Side by race, nativity, English-language proficiency, and income.

## 3. *Interests and Concerns*

The Asian American Legal Defense and Education Fund commissioned a study to explore the concept of communities of interest.<sup>149</sup> This novel study had community residents define their own neighborhood boundaries and community interests.<sup>150</sup> More than four hundred and fifty community stakeholders were surveyed, in several Asian languages and dialects, about their neighborhoods.<sup>151</sup>

The study uncovered many shared interests and concerns among the residents of Chinatown and the Lower East Side.<sup>152</sup> Those interests included:

- employment (e.g., low wages, sweatshop conditions, labor

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145. N.Y. CITY CHARTER ch. 2-A, § 52(1)(c) (2004).

146. ASIAN AM. LEGAL DEFENSE AND EDUCATION FUND, *supra* note 102.

147. Magpantay Statement to NYC Districting Commission, *supra* note 18.

148. N.Y. CITY CHARTER ch. 2-A, § 52(1)(c) (2004).

149. HUM, *supra* note 122.

150. *Id.*

151. *Id.*

152. *Id.*

- exploitation, workers' rights, job availability);
- housing (e.g., lack of affordable housing, decrepit conditions, landlord accountability for substandard conditions);
- immigrants (e.g., the need for more immigrant services, immigrant rights and empowerment, immigrant alienation);
- education (e.g., bilingual services and teachers, English as a Second Language programs, overcrowded classes, poor education quality and performance, vocational education and adult literacy);
- health (e.g., the lack of health insurance, affordable and accessible health care and health care facilities); and
- neighborhood quality (e.g., sanitation particularly garbage and street cleanliness, and pollution, both air and noise).<sup>153</sup>

The neighborhoods of Chinatown and the Lower East Side had "established ties of common interest and *association*" as recognized by the City Charter.<sup>154</sup> Common associational ties were demonstrated by the existence of services utilized by both neighborhoods, such as community health clinics, immigrant service providers, and business assistance centers. These services were comprised of both municipal and private social service agencies.<sup>155</sup> The neighborhoods also shared ties of common association in struggles around political organizing. Asian Americans in Chinatown and Latinos in the Lower East Side worked together through advocacy groups and coalitions to press for policy changes to benefit both groups and neighborhoods.<sup>156</sup>

The City Charter recognizes that district lines need to keep intact neighborhoods with established ties and common interests.<sup>157</sup> Multilingual exit polls also uncovered Asian American voters' political opinions about their communities.<sup>158</sup>

On November 5, 2002, seven hundred voters responded to the following question at four polling sites in Chinatown: "The boundaries of City Council districts will soon be changed. Which one other neighborhood do you think should be included with Chinatown for the new City Council district?" The responses were clear:

Lower East Side	64%
SoHo/TriBeCa	14%
Financial District	15%
Battery Park City	8%

On November 6, 2001, five hundred voters responded at two polling sites: "Which neighborhood(s) share common interests/concerns with your own

153. *Id.*

154. N.Y. CITY CHARTER ch. 2-A, § 52(1)(c) (2004).

155. Fung Letter, *supra* note 116.

156. *Id.*

157. N.Y. CITY CHARTER ch. 2-A, § 52(1)(c) (2004).

158. Magpantay Statement to NYC Districting Commission, *supra* note 18.

neighborhood?" The responses were as follows<sup>159</sup>:

Lower East Side	59%
TriBeCa	20%
Financial District	11%
SoHo	9%
Battery Park City	7%

These results demonstrate that residents themselves understood and perceived the interrelationship between Chinatown and the Lower East Side.<sup>160</sup> A single community of interest existed between these two neighborhoods because of shared demographics, common interests and associations, and community perceptions about their areas. Asian American voters broadly supported keeping them together. Unfortunately, the Commission not only ignored these findings, but also merged Chinatown into a completely different area with starkly dissimilar interests and concerns.<sup>161</sup>

Conversely, Chinatown should not have been kept in the same City Council district with TriBeCa, SoHo, Battery Park City, and the Financial District.<sup>162</sup> The areas were not only dissimilar in their demographic make-ups, but also in their needs and concerns. For example, with regards to public safety, residents in TriBeCa, SoHo, Battery Park City, and the Financial District had positive police relations, whereas residents in Chinatown and the Lower East Side suffered from police misconduct and sought greater civilian oversight.<sup>163</sup> Regarding economic development, TriBeCa, SoHo, Battery Park City, and the Financial District sought the construction of new high-rise apartment buildings to appeal to professionals.<sup>164</sup> Chinatown and the Lower East Side were most concerned about gentrification, job creation, small business development, and enforcement of occupational safety regulations and labor/minimum wage laws.<sup>165</sup>

Chinatown and the Lower East Side should have been drawn into the same city council district. Such a district would have given residents the opportunity to be meaningfully represented by a candidate for whom they had voted. The Districting Commission instead opted to redraw districts in a way that ensured the reelection of the current city councilmember, who was not supported by the Asian American or Latino voters of the district.

The district boundaries were drawn to encompass the white neighborhoods

159. *Id.*

160. ASIAN AM. LEGAL DEFENSE AND EDUCATION FUND, *supra* note 102.

161. Fung Letter, *supra* note 116.

162. *Id.*

163. These findings were documented by the neighborhoods' respective Community Boards, which are community advisory committees. Chinatown and the Lower East Side are in Community District 3. TriBeCa, SoHo, Battery Park City, and the Financial District are in Community District 1. NYC Department of City Planning, *Community District Needs*, Manhattan, 2002.

164. *Id.*

165. *Id.*

where the incumbent would best perform in the election.<sup>166</sup> Had the district been redrawn in accordance with the mandates of the City Charter, the incumbent would have been displaced. He did not live in Chinatown and thus would have been placed outside of the district and forced to run against a fellow councilmember from an adjacent neighborhood. Unlike redistricting guidelines or laws for other states, the New York City Charter does not contain any provisions that minimize candidate competition, preserve the core of prior districts, or protect incumbents. It does require the protection of racial minorities or communities of interest. Unfortunately, these requirements were not met, and were, in fact, subordinated.<sup>167</sup> Independent redistricting commissions were supposed to minimize the influence that district candidates have on district drawers.<sup>168</sup> That did not occur.<sup>169</sup>

The Commission, typical of other IRCs, did embark on an outreach effort and conducted several hearings as part of its public input process.<sup>170</sup> But the Commission did not heed any of the calls from the community, notwithstanding extensive community testimony and a demonstration.<sup>171</sup> The independent districting commission was not independent at all. The Districting Commission ignored its Charter-mandated redistricting criteria, and instead succumbed to incumbency protection.<sup>172</sup>

There is little evidence to cite which reveals the Commission's decision-making process. There were few publically stated reasons for why the Commission drew the districts the way it did. Whatever rationales it provided simply affirmed its own result, maintaining that it fully complied with the Charter mandated criteria.<sup>173</sup> IRCs, such as the NYC Districting Commission, was a reform that advocates hoped would shed transparency to the system and reduce self-interested redistricting. The Asian American experience with IRCs had led to the opposite result.

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166. *Searchlight*, *supra* note 109; *see also* Jones Letter, *supra* note 113.

167. *See supra* notes 147-166.

168. *See supra* notes 81-88.

169. Gerson Letter, *supra* note 144 (outlining the Councilmember's suggestions for the redistricting of his own district).

170. N.Y. CITY DISTRICTING COMM'N, SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE FOR THE 2003 FINAL DISTRICTING PLAN FOR THE COUNCIL OF THE CITY OF NEW YORK (Michael P. Keogh 2003) [hereinafter Keogh].

171. Jones Letter, *supra* note 113; Fung Letter, *supra* note 116.

172. *Searchlight*, *supra* note 109. Had the redistrict been redrawn to encompass Chinatown and the Lower East Side, the incumbent would no longer have resided in the district, and even if he did, he would not have won the support of Asian American and Latino voters. It is not clear whether a lawsuit under the City Charter would have been successful. In *Brooklyn Heights Ass'n v. Macchiarola*, 82 N.Y.2d 101, 106 (N.Y. C.A. 1993), a challenge to a redistricting plan that violated the third-ranked priority of preserving a community of interest was unsuccessful in the context of providing minority representation. However, a lawsuit here would have considered the third-ranked priority of preserving a community of interest against an unstated criterion of incumbency protection. Courts have not considered this matter.

173. Keogh, *supra* note 170.

B. *New York State Assembly Redistricting*

The redistricting of the state legislature, on the other hand, resulted in a quite different outcome for Asian Americans. While redistricting for the New York City Council required transparency and respect for communities of interest,<sup>174</sup> redistricting for the New York State Legislature had no such requirements.<sup>175</sup> The only mandates for state legislative districts were equal population, compactness, continuity, and preservation of political subdivisions.<sup>176</sup> Nevertheless, self-interested partisan district drawers, who would presumably be most concerned with incumbency protection, surprisingly drew a new majority-Asian state assembly district with no incumbent.

The Asian American population in Flushing met the standards of the Voting Rights Act. The Act requires the drawing of a majority-minority district when the minority population is sufficiently large and compact to form a majority in a district, the minority population is politically cohesive in that its members tend to vote alike, and that voting is racially polarized so that the majority white population sufficiently votes as a bloc to defeat the minority community's preferred candidate.<sup>177</sup> Census data showed that the Asian American population was sufficiently numerous and compact to constitute a majority in a state assembly district.<sup>178</sup> Past election results demonstrated that Asian Americans were politically cohesive and that voting was racially polarized against white voters.<sup>179</sup> Furthermore, Asian Americans were becoming increasingly involved in the political process by registering to vote and in voting.<sup>180</sup>

Most Asian Americans in Flushing voted for the same candidates. During the November 2001 municipal elections, a community exit poll found in the vote for Mayor, fifty-five percent of Asian Americans in Flushing voted for Democrat Mark Green, forty-three percent voted for Republican Mike Bloomberg, and two percent voted for another candidate.<sup>181</sup> They also exhibited the same reason for their votes. Economy/jobs was the most important factor influencing voters' selection for Mayor.<sup>182</sup>

Moreover, Asian American voters were politically cohesive across

174. N.Y. CITY CHARTER, ch. 2-A, § 52(1)(c) (2004).

175. N.Y. CONST. LAW, art. III, §§ 4, 5.

176. N.Y. CONST. LAW, art. III, §§ 4, 5.

177. *See* *Thornburg v. Gingles*, 478 U.S. 30, 48-52 (1986).

178. The average State Assembly district size was 125,500 residents. *See* NEW YORK STATE LEGISLATIVE TASK FORCE FOR DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, 2002 ATLAS OF NEW YORK STATE CONGRESSIONAL AND LEGISLATIVE DISTRICTS: STATE SENATE AND STATE ASSEMBLY (2002).

179. Queens Hearing 2002, *supra* note 18.

180. Glenn D. Magpantay, *Ensuring Asian American Access to Democracy in New York City*, 2 AAPI NEXUS: ASIAN AM. AND PAC. IS. POL'Y, PRAC. AND COMM. 87 (2004) (UCLA Asian American Studies Center). *See also* Queens Hearing 2002, *supra* note 18 (statement of Leyland Roopnaraine, Real Estate Broker, representing Richmond Hill), available at <http://latfor.state.ny.us/docs/20020313/queens.html#spkr20>.

181. MAGPANTAY, *supra* note 143.

182. *Id.*

ethnicities. During the November 2001 City Council elections, ninety-four percent of Chinese, ninety percent of Koreans, and seventy-three percent of South Asian voters surveyed favored the same candidate for City Council.<sup>183</sup> That election resulted in the election of John Liu, the first Asian American elected to the any legislative office in New York.

There was also a definable community of interest in Flushing.<sup>184</sup> Asian American residents faced common issues such as language access and culturally competent social services, like health care and counseling.<sup>185</sup> They shared similar concerns about affordable housing, services for the elderly, public safety, quality education, and access to English language education. These concerns brought Asian Americans together, regardless of country of origin.<sup>186</sup>

Just as in the New York City redistricting, many community advocates testified before LATFOR and urged meaningful political representation of Asian Americans. They got what they asked for. LATFOR proposed a new Assembly district in Flushing that was fifty-three percent Asian American.<sup>187</sup> LATFOR was not compelled to draw a majority-Asian district under the state's redistricting requirements. And LATFOR did not have to provide any justification or rationale for how it drew, or how it originally aimed to draw, districts. In examining the entire state legislative redistricting process, one must conclude that LATFOR drew a majority-Asian district because it was adhering to the requirements under the Voting Rights Act to draw a majority-minority district. The minority population was large enough to support a majority-minority district.<sup>188</sup>

It was originally a foregone conclusion that LATFOR would protect the reelection of incumbent state legislators. There was already a non-Asian incumbent in the State Assembly district representing Flushing at the time of redistricting, just as there had been one in Chinatown for the City Council. In order to draw a new open majority-Asian state Assembly district without an incumbent, the district in which the current incumbent resided needed to be moved further east and elongated to the north and south to pick up more population.<sup>189</sup> LATFOR proposed new district boundaries that accommodated both the emerging Asian population and current non-Asian incumbent. As a result, in the following election, the first Asian American was elected to the state legislature.

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183. *Id.* See also *State of New York Legislative Task Force on Demographic Research and Reapportionment: State Legislative Redistricting, Queens Public Hearing* (2001) [hereinafter *Queens Hearing 2001*] (statement of Sayu Bhojwani, Executive Director, South Asian Youth Action) (explaining that Asian Americans share common interests even across ethnic lines), available at <http://latfor.state.ny.us/docs/20010601/queens.html#Spk6>.

184. HUM, *supra* note 122, at 1-2.

185. *Id.*

186. *Queens Hearing 2001, supra* note 183.

187. LATFOR, 2002 ATLAS OF NEW YORK STATE CONGRESSIONAL AND LEGISLATIVE DISTRICTS: STATE SENATE AND STATE ASSEMBLY A-37, A-171 (2002).

188. See *supra* notes 11-12.

189. *Id.*



## CONCLUSION

The New York redistricting that followed the 2000 census gives insight into understanding the relationship between independent redistricting commissions and minority representation. Redistricting is a highly political process that generally results in incumbent survival. In the traditional redistricting process by legislators, even the most well-intentioned lawmakers eventually succumb to legislative self-dealing for themselves and their colleagues in their caucus.<sup>190</sup> The self-interest is too powerful.

Reformers sought to curtail this conflict of interest with IRCs as the cure. IRCs took the process of district-drawing out of the hands of those who would run for those districts. IRCs were supposed to provide transparency, reduce partisan shenanigans, and promote a principled and fair redistricting process. But they were compromised as well.<sup>191</sup> As one advocate and former member of an IRC noted, "there is no such thing as an *independent* Independent Redistricting Commission. All commissions are beholden to the political parties and incumbents."<sup>192</sup>

In the early 2000s in New York, Asian Americans were developing political maturity. They had already won one City Council seat in Queens, and they had their sights set on representation of Manhattan Chinatown and in the state legislature.

Unfortunately, the IRC process yielded no improvements for Asian Americans.<sup>193</sup> The IRC subordinated its own mandated requirements in order to preserve the status quo and protect the current city council member. Yet at the same time, the politically partisan State Legislative Task Force moved the district boundaries of a current incumbent to create the opportunity for the election of the first Asian American to the State Assembly.<sup>194</sup> This, however, was largely the result of adherence to the Voting Rights Act.

Many observers predicted that the independent IRC process would yield better results for Asian Americans. Surprisingly, it was the traditional partisan redistricting process in which Asian Americans fared better. The experiences of Asian Americans in the redistricting of the New York City Council and State Assembly districts demonstrate how independent redistricting commissions may

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190. King & Browning, *supra* note 8; Hirsch, *supra* note 8 (describing "incumbency protection").

191. Gerson Letter, *supra* note 144 (outlining the Councilmember's suggestions about redistricting his own district).

192. Esmeralda Simmons, Center for Law and Social Justice and former member of the NYC Districting Commission in 1991, presentation at NAACP LDF Redistricting Seminar, Arlie House, Warrenton, VA, Oct. 8, 2010.

193. It was not until several elections and nearly a decade later that Asian Americans were able to finally win in the new district. See Jennifer Lee, *Victories Across City Resonate in Chinatown*, N.Y. TIMES, Sep. 17, 2009, at A28; Sara Kugler, *NYC Chinatown Could Get First Chinese Rep on Council*, USA TODAY, Oct. 4, 2009, available at [http://www.usatoday.com/news/nation/2009-10-04-chinatown-council\\_N.htm](http://www.usatoday.com/news/nation/2009-10-04-chinatown-council_N.htm); Bobby Cuza, *Asian-American Heritage: Political Clout Grows Among City's Asian Population*, N.Y. 1, May 17, 2010, available at [http://www.ny1.com/content/top\\_stories/118742/asian-american-heritage-week--political-clout-grows-among-city-s-asian-population](http://www.ny1.com/content/top_stories/118742/asian-american-heritage-week--political-clout-grows-among-city-s-asian-population).

194. See *supra* discussion Part III.B.

in fact be inconsequential for communities of color.

What truly determines whether redistricting will increase minority representation for Asian Americans is the Voting Rights Act and whether its requirements can be met to draw majority-minority districts. In the end, all of the controversy about independent redistricting commissions and its purported benefits for communities of color is really just huff and puff.



## How can I keep informed on the redistricting process?

### What is "One Person, One Vote"?

In the late 1950's and early 1960's, redistricting plans were challenged in the courts because gerrymandering had become so prevalent that Congressional districts had widely varying populations. In 1964 the U.S. Supreme Court ruled that in drawing district lines every single voter has the same power as every other voter – "one person, one vote." In the redistricting process, this means that all redistricting plans must allocate seats based on population to assure that all people, regardless of where they live, have equal legislative representation. This same principle applies when state and local governments are redrawing their district lines. This is the reason why redistricting occurs after each decennial census.

Redistricting updates will be posted on our website, [www.lwvny.org](http://www.lwvny.org). In addition, our publication "They Represent You" has all the information you need to know about your current federal, state and local representatives. You can also "like" us on Facebook or follow us on Twitter for up-to-the-minute information on redistricting.

### About the League

The League of Women Voters, a nonpartisan political organization, encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.

The Legislative Task Force on Demographic Research and Reapportionment (LATFOR) was established to research and study the techniques and methodologies to be used by the U.S. Commerce Department Bureau of the Census in carrying out the decennial federal census. They provide technical plans for meeting the requirements of legislative timetables for the reapportionment of Senate, Assembly and Congressional districts and conduct research projects relating to the collection and use of census data and other statistical information.

In an effort to maintain transparency, LATFOR will be holding hearings as well as posting videos of hearings on their website, [www.latfor.state.ny.us](http://www.latfor.state.ny.us), for the public to view and comment. The schedule of the New York City hearings is as follows (all hearings begin at 10am):

- Wed., Sept. 7, Queens Borough Hall, Meeting Room 213-1 & 2, 120-55 Queens Boulevard, Kew Gardens, NY
- Thurs., Sept. 8, Bronx Comm. College, Gould Memorial Library Auditorium, 2155 University Avenue
- Tues., Sept. 20, Brooklyn Borough Hall, 209 Joralemon Street
- Wed., Sept. 21, Assembly Hearing Room, 250 Broadway, Manhattan
- Thurs., Sept. 22, Staten Island, Location TBD
- Wed, Oct. , Long Island, Location TBD

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## ***What is the difference between reapportionment and redistricting?***

### ***Reapportionment >>>***

Reapportionment refers to the process of deciding the number of representatives in the federal Congress that are needed to represent the population of each individual state. The House of Representatives is made up of a total of 435 representatives of the 50 states, a number which cannot change without an act of Congress. This means that a gain in representatives in one state because of a population growth must also mean a loss of representatives in another state that lost population, or whose gain in population was less than that of other states. New York State currently has 29 seats in the House. However, because other states had a greater increase of population than New York since the 2000 census, New York State will be losing two of its current House seats. After reapportionment, each representative in the House will represent on average 720,000 constituents.

### ***Redistricting >>>***

Redistricting occurs after the data from the decennial census is analyzed. Unlike reapportionment, this data is used within each individual state to redraw geographic lines for Congressional, state and local elections. Each geographic district is to be drawn to contain population equal to every other district to the extent possible. Since New York is losing two seats in Congress, it will have to redraw the lines for all of the remaining 27 Congressional Districts. After the 2000 census, the New York State Legislature approved Assembly and Senate district boundaries permitting a deviation of plus or minus five percent. This means that the population of each Assembly and State Senate District must fall within five percent over or under the number of total population of every other district. Although this deviation may seem like a fairly small amount, the population in New York State varies so greatly that some districts could have a minus five percent deviation while others have a plus five percent deviation, producing a total deviation of ten percent between the districts.

## ***Redistricting in New York State***

**Who decides which Congressional and State Legislative districts I'm in?** While the League of Women Voters and other good government organizations have called for independent redistricting, the State of New York still has a bipartisan legislative task force, including seated legislators and non-legislators appointed by the Senate and Assembly leadership who draw district lines for the state legislature and the New York Congressional delegation.

### ***Why will my legislative districts change before the 2012 and 2013 elections?***

District lines are redrawn in order to accommodate changes in population. As mandated by the United States Constitution, a nationwide census is conducted by the federal government every ten years. The data collected from this census is used not only to analyze trends and give information on the makeup of people living within the United States, but also to accommodate changes in population as new district lines are drawn by the states for Congressional and state legislative seats, and by local government for their own legislatures.

The Legislative Task Force on Demographic Research and Reapportionment, known as LATFOR, is a task force appointed by the leaders of the state legislature to analyze data, conduct hearings and draw district

lines, subject to the approval of the legislature. LATFOR is comprised of six members. The Speaker of the Assembly and the Majority Leader of the Senate each appoint one legislator and one non-legislator and the Minority Leaders of both houses each appoint one legislator, giving the Task Force four legislators and two non-legislators. The district lines prepared by LATFOR must be approved by the Legislature and may be vetoed by the governor or challenged in court.

### ***What are the criteria for redrawing Congressional and State Legislative districts?***

Many factors are considered while redrawing district lines. Congressional districts in each state must be as close in population as possible to every other Congressional district in the country. All State Legislative districts should be compact and have uninterrupted

borders following reasonable lines. Often, in a process known as gerrymandering, lawmakers design districts in such a way as to protect an incumbent or a political party. This may result in districts that are very oddly shaped. Legislators must also consider the Voting Rights Act (VRA) of 1965, which was designed to deter and ultimately eliminate discrimination in voting practices. Among other things, the VRA requires certain districts to provide language services to voters who are not fluent in English and requires that the lines of certain districts be cleared by the US

Department of Justice before final passage. The purpose is to ensure that racial minorities are not discriminated against in the redistricting process. In New York City, this section of the VRA is in force in Brooklyn, Manhattan, and the Bronx. All changes must be pre-cleared by the Department of Justice.

### ***How are New York City Council district lines redrawn?***

At the local level, the body that makes laws for New York City is the City Council. There are 51 members in the City Council, each representing one district. The redistricting plans for City Council are determined by a Districting Commission of 15 members appointed by the Mayor and the current majority and minority parties in the City Council. The City Charter mandates that there be at least one member representing each of the five boroughs. Racial and language minority groups must also be represented in the commission. City Council redistricting will begin in 2012 and be completed in time for the 2013 City Council elections.



copy

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

ANDREW M. CUOMO, as Governor of the  
State of New York, ERIC T.  
SCHNEIDERMAN, as Attorney General of the  
State of New York, ROBERT J. DUFFY, as  
President of the Senate of the State of New  
York, DEAN G. SKELOS, as Majority Leader  
and President Pro Tempore of the Senate of the  
State of New York, SHELDON SILVER, as  
Speaker of the Assembly of the State of New  
York, JOHN L. SAMPSON, as Minority Leader  
of the Senate of the State of New York, BRIAN  
M. KOLB, as Minority Leader of the Assembly  
of the State of New York, the NEW YORK  
STATE LEGISLATIVE TASK FORCE ON  
DEMOGRAPHIC RESEARCH AND  
REAPPORTIONMENT ("LATFOR"), JOHN J.  
McENENY, as Member of LATFOR, ROBERT  
OAKS, as Member of LATFOR, ROMAN  
HEDGES, as Member of LATFOR, MICHAEL  
F. NOZZOLIO, as Member of LATFOR,  
MARTIN MALAVÉ DILAN, as Member of  
LATFOR, and WELQUIS R. LOPEZ, as  
Member of LATFOR,

Defendants.

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.  
★ NOV 17 2011 ★  
BROOKLYN OFFICE

**CV11 - 5632**

Index No. \_\_\_\_\_

COMPLAINT IRIZARRY, J.

T W N N N W

Plaintiffs Mark A. Favors, Howard Leib, Lillie H. Galan, Edward A. Mulraine.

Warren Schreiber, and Weyman A. Carey, by their attorneys, Willkie Farr & Gallagher LLP, for  
their Complaint herein, allege as follows:

## INTRODUCTION

1. New York's process of redistricting its State Senate, Assembly, and congressional districts over the past several decades has become an exercise in partisan self-dealing and incumbent protection. As a result of this process, many New Yorkers have long been denied any meaningful opportunity to select their own leaders.

2. New York citizens and public interest groups have called upon the Legislature to enact a system of independent redistricting, whereby the individuals drawing district lines are free from political pressure and therefore have the ability to draw those lines based upon standardized criteria, such as population equality, contiguity of districts, fair representation of minority groups, respect for political subdivisions like counties and towns, compactness of districts, and preservation of communities of interest. Despite the fact that majorities of both houses of the Legislature promised to enact such a system of independent redistricting, no such system has been adopted.

3. Meanwhile, the redistricting process following the 2010 census has stalled and threatens to throw the state's 2012 elections into a quagmire absent court intervention.

4. The legislative stalemate is a direct result of legislative inaction on reform of the redistricting process. The Governor has promised to veto any redistricting plan that is not the result of an independent process, and no such independent process is underway.

5. Accordingly, Plaintiffs ask this Court to avert this impending electoral disaster by appointing a Special Master to effectuate independent redistricting based upon fair criteria.



6. The redistricting process is also in danger of being conducted in violation of New York's law requiring prisoners to be counted for purposes of redistricting in their home communities. Under this prisoner reallocation law, any prisoners whose home residences are outside of New York or cannot be identified are not to be counted for purposes of redistricting. The law requires Defendant the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") to effectuate this reallocation of prisoners and to release to the public the amended population data counting prisoners at their home residences only.

7. The prisoner reallocation law was passed by both houses of the New York Legislature last year. It was signed into law by the Governor on August 11, 2010. The obligations it imposes on LATFOR are mandatory.

8. LATFOR has not released this amended population data counting prisoners in their home districts. It has only released population data improperly counting prisoners at their prison locations, and it has invited members of the public to submit proposed redistricting plans based upon this improper data. LATFOR thus has violated the prisoner reallocation law.

9. LATFOR's violation of the prisoner reallocation law threatens to derail the redistricting process, regardless of whether redistricting is accomplished with the supervision of this Court. LATFOR's inaction poses an imminent threat because the public has already begun submitting to LATFOR proposed redistricting plans based upon improper data and because LATFOR itself appears poised to draw up a preliminary redistricting plan that would be illegal for failure to comply with the prisoner reallocation law.

10. A Special Master appointed by this Court would require the proper, reallocated population data in order to accomplish Court-supervised redistricting.

11. Moreover, certain counties have already completed their county legislative redistricting processes using the improper data provided by LATFOR, and those new local districts may have to be completed again once LATFOR has released the proper data. The counties that have not already completed this process are already or should be working to do so.

12. Accordingly, Plaintiffs request that this Court require LATFOR to comply immediately with the prisoner reallocation law by releasing the amended population data, so that the public and the Special Master to be appointed by this Court have proper data with which to accomplish redistricting.

13. The Legislature's inaction on independent redistricting and LATFOR's blatant failure to follow state law have created a situation requiring the Court's prompt intervention. The 2012 elections and the votes of millions of New Yorkers are at stake.

#### PARTIES

14. Plaintiff Mark A. Favors is a registered voter in New York County in the State of New York, in the 71<sup>st</sup> Assembly District, the 30<sup>th</sup> Senatorial District, and the 15<sup>th</sup> Congressional District. Mr. Favors works as a registered public health nurse and in his spare time founded and serves as Executive Director of the Youth Civic Leadership Academy, which empowers low-income and minority youths as community leaders. Mr. Favors desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

15. Plaintiff Howard Leib is a registered voter in Tompkins County in the State of New York, in the 125<sup>th</sup> Assembly District, the 51<sup>st</sup> Senatorial District, and the 24<sup>th</sup> Congressional District. Mr. Leib is an entertainment and intellectual property attorney and an educator. Mr. Leib spends considerable time working to protect the rights of voters from all parties, including election day poll monitoring. He is actively considering becoming a 2012 candidate for State Senate from the 51<sup>st</sup> Senatorial District, nicknamed the “Abraham Lincoln riding a vacuum cleaner” district for its odd gerrymandered shape. However, Mr. Leib lives near the far Western border of the current 51<sup>st</sup> Senatorial District, and he does not know whether he will still live in that District following the current redistricting process, nor does he know who will be the eligible voters in his District. In order to make the important decision about whether to run for office and to begin building political support and raising money, Mr. Leib needs to know where the district lines lie as soon as possible. In addition, regardless of his own candidacy, Mr. Leib desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

16. Plaintiff Lillie H. Galan is a registered voter in Westchester County in the State of New York, in the 93<sup>rd</sup> Assembly District, the 35<sup>th</sup> Senatorial District, and the 17<sup>th</sup> Congressional District. Ms. Galan is retired from the New York State Office of Children and Family Services, having worked for the State for 32 years. She serves as President of the Community Advisory Board of Rockland Community Mental Health Center, an adult mental health clinic, and has served on that Board since the mid-1990s. She also serves as a District Leader in the Third Ward in Yonkers. Ms. Galan desires to communicate with the candidates for

New York State Senate, State Assembly, and the United States House of Representatives running in her district in the 2012 primary and general elections, and she is interested in volunteering for or contributing money to one or more of these candidates.

17. Plaintiff Edward A. Mulraine is a registered voter in Westchester County in the State of New York, in the 87<sup>th</sup> Assembly District, the 36<sup>th</sup> Senatorial District, and the 17<sup>th</sup> Congressional District. Reverend Mulraine is a pastor at the Unity Baptist Tabernacle in Mt. Vernon and engages in a number of local issues, particularly relating to anti-violence initiatives. Reverend Mulraine desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

18. Plaintiff Warren Schreiber is a registered voter in Queens County in the State of New York, in the 26<sup>th</sup> Assembly District, the 16<sup>th</sup> Senatorial District, and the 5<sup>th</sup> Congressional District. Mr. Schreiber is retired from the Metropolitan Transit Authority in the State of New York and serves as President of the Bay Terrace Community Alliance, a neighborhood coalition in Queens. Mr. Schreiber desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

19. Plaintiff Weyman A. Carey is a registered voter in Kings County in the State of New York, in the 58<sup>th</sup> Assembly District, the 21<sup>st</sup> Senatorial District, and the 10<sup>th</sup> Congressional District. Mr. Carey and his wife have lived in their East Flatbush, Brooklyn home since 1974. Together, Mr. and Mrs. Carey own and run Garden 54, an event facility adjacent to

their home. Mr. Carey serves as District Leader of the 58<sup>th</sup> Assembly District. He desires to communicate with the candidates for New York State Senate, State Assembly, and the United States House of Representatives running in his district in the 2012 primary and general elections, and he is interested in volunteering for or contributing money to one or more of these candidates.

20. Defendant Andrew M. Cuomo is the Governor of the State of New York. He is being sued in his official capacity.

21. Defendant Eric T. Schneiderman is the Attorney General of the State of New York. He is being sued in his official capacity.

22. Defendant Robert J. Duffy is the Lieutenant Governor and President of the Senate of the State of New York. He is being sued in his official capacity.

23. Defendant Dean G. Skelos is the Majority Leader and President *Pro Tempore* of the Senate of the State of New York. He is being sued in his official capacity.

24. Defendant Sheldon Silver is the Speaker of the Assembly of the State of New York. He is being sued in his official capacity.

25. Defendant John L. Sampson is the Minority Leader of the Senate of the State of New York. He is being sued in his official capacity.

26. Defendant Brian M. Kolb is the Minority Leader of the Assembly of the State of New York. He is being sued in his official capacity.

27. Defendant LATFOR is the New York State Legislative Task Force on Demographic Research and Reapportionment. LATFOR is charged by statute with researching the techniques and methodologies that the U.S. Census Bureau used in the decennial census and with providing a technical plan to meet the timeline for redistricting based on such census. LATFOR is further charged with developing a database in which all incarcerated persons are

allocated for redistricting purposes at their addresses prior to incarceration if such prior addresses can be determined, with excluding from the database any prisoners whose prior addresses are unidentifiable or out-of-state, with releasing this database to the public, and with providing this database to New York's local governments. (LATFOR is a Defendant in Counts IV through VII only.)

28. Defendants John J. McEneny, Robert Oaks, Roman Hedges, Michael F. Nozzolio, Martin Malavé Dilan, and Welquis R. Lopez are members of LATFOR. They are being sued in their official capacities.

#### **JURISDICTION AND VENUE**

29. This Court has jurisdiction over Plaintiffs' federal constitutional claims pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1983.

30. This Court has jurisdiction over Plaintiffs' Voting Rights Act claim pursuant to 42 U.S.C. § 1973j(f).

31. This Court has jurisdiction over Plaintiffs' declaratory judgment claim pursuant to 28 U.S.C. § 2201.

32. This Court has supplemental jurisdiction over Plaintiffs' related state law claims pursuant to 28 U.S.C. § 1367.

33. Venue is appropriate in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

34. Since this is an action challenging the apportionment of congressional districts and statewide legislative bodies, a three-judge Court should be convened pursuant to 28 U.S.C. § 2284.

## FACTUAL ALLEGATIONS

### I. **Background**

#### A. **The Redistricting Process**

35. Article III, Sections 4 and 5 of the New York State Constitution provide that after each decennial census, the New York State Senate and Assembly districts must be readjusted or altered so that each district contains, to the extent possible, an equal number of inhabitants, in as compact a form as possible.

36. Similarly, the United States Constitution requires that federal congressional boundaries be re-drawn every ten years to reflect population shifts shown in the census.

37. The process of re-drawing these district lines is known as redistricting. In New York State, redistricting is the responsibility of the State Legislature.

38. In 1978, the Legislature created LATFOR, an advisory task force on demographic research and reapportionment. LATFOR is made up of six members: four legislators (two each from the Senate and Assembly) and two non-legislators. One of the non-legislators is appointed by the President *Pro Tempore* of the Senate, the other by the Assembly Speaker. The current members of LATFOR are Defendants Assemblyman John J. McEneny, Assemblyman Robert Oaks, Senator Michael F. Nozzolio, Senator Martin Malavé Dilan, Dr. Roman Hedges, and Welquis R. Lopez.

39. According to its website, LATFOR's role is to "aid[] the Legislature by providing technical plans for meeting the requirements of legislative timetables for the reapportionment of Senate, Assembly and Congressional districts" and "analyze[] the Census Bureau population figures used in the redistricting plan." In plain English, LATFOR's primary role is to prepare the redistricting maps for the Legislature.

40. The redistricting plan must be approved by the Legislature and the Governor. In addition, three counties of New York City (Bronx, Kings, and New York) require that the United States Justice Department's Civil Rights Division or the United States District Court for the District of Columbia review and approve the plan for compliance with the Voting Rights Act.

**B. New York's History of Partisan Self-Interested Redistricting By the Legislature**

41. The current process for drawing district lines in New York State has been widely criticized as lacking independence from the Legislature, serving partisan interests, and protecting incumbent office-holders rather than the public interest.

42. Technological advances in redistricting technology now allow legislators the ability to hand-pick the voters who will elect them, rather than allowing voters to select the legislators. Sophisticated computer software and voter databases have transformed the redistricting process into a precise and highly manipulable science.

43. Over the last several decades, New York's legislators have effectively used their direct role in the redistricting process to protect existing incumbents and existing majorities in both houses. These efforts have ensured that, once elected, incumbents often face uncompetitive elections and little chance of defeat. For instance, between 1982 and 2008 nearly 3,000 legislative general elections were held, resulting in a mere 39 cases in which an incumbent lost in the general election. In the decade between 2000 and 2010, the incumbent reelection rate averaged a staggering 96%. Even in 2010, an historically anti-incumbent year, 92% of incumbent state legislators won reelection.

44. LATFOR lacks independence in this process. Two-thirds of LATFOR members are sitting legislators who are literally drawing their own districts. Partisan concerns



appear to be regularly taken into account when drawing district lines. For example, a July 20, 2001 memorandum to Defendant Senator Dean Skelos titled "Size of the Senate," which discusses increasing the Senate from 61 to 63 members, is focused primarily on the political considerations of different scenarios. The memorandum, written by a legislative redistricting staff member, notes that an additional district in Long Island would be problematic for Republicans because it "almost certainly would not be a republican pickup." The memorandum also states that a combined Queens-Long Island district would politically help certain senators. Another memorandum, dated December 18, 2001, entitled "The 135," describes how a legislative staff member drew two districts at the time represented by Senators Saland and Leibell "a little bit 'lite'" (*i.e.*, with lower population) in order to "maximize[] the Westchester portion attached to [the] Bronx" to make it more favorable for Senator Guy Veleva's district.

45. These memoranda suggest that LATFOR and legislative redistricting staff members take partisan outcomes and the best interests of incumbents into serious consideration when producing district maps.

46. Although the partisan legislative redistricting process currently has the force of state law, in the event of a breakdown in the process, it is the responsibility of a Court to supervise the redistricting process according to criteria that it deems to be just. The Court need not adhere to any elements of this partisan, self-interested redistricting process when carrying out this responsibility. Indeed, the Court in its supervision of this process is free to adopt the principles of independent redistricting in the interest of justice.

**C. Features of Fair Redistricting**

47. Independent redistricting proposals vary in their details, but they share the critical common theme that the line-drawers are disinterested individuals and are not the politicians whose chances of reelection often depend upon the results of the redistricting process.

48. The process of fair redistricting, whether independent or not, tends to be guided by certain criteria such as the ones that follow.

49. Population equality is a hallmark of fair redistricting proposals. The United States Supreme Court has held that a state's House of Representatives districts must be as equal to one another as practicable but that state legislative districts under certain circumstances may vary as much as ten percent between the most and least populous districts. Independent redistricting proposals typically reduce the maximum deviation, frequently to two percent.

50. Contiguity refers to the principle that no district should be separated from itself entirely by another district, *i.e.*, that each district shall consist of contiguous territory. Contiguity is required by the New York State Constitution.

51. Fair representation of minority groups refers to the principle that racial and linguistic minority groups should have an equal opportunity with other citizens to participate in the political process and to elect representatives of their choice. This principle is espoused in the federal Voting Rights Act.

52. Respect for political subdivisions refers to complex requirements in the New York State Constitution that essentially provide that wherever possible, districts should not cross over county lines and towns should not be divided into multiple districts.

53. Compactness refers to the principle that any two locations within a district should be as geographically close to each other as possible. Compactness is required by the New York State Constitution.

54. Preservation of communities of interest refers to the principle that communities that have shared interests including geographic, social, economic, and other interests should be united in districts where possible.

55. A redistricting process that applies the principles of population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest serves the interests of justice.

**D. New York's Legislators Committed to Independent Redistricting But Did Not Enact It**

56. In 2010, a coalition called New York Uprising asked candidates for the New York Legislature to sign a pledge to enact legislation to create an independent, non-partisan redistricting process that prioritizes specific criteria including population equality, competitiveness of elections, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest. The pledge calls for a redistricting process that expressly prohibits drawing districts favoring any political party, incumbent, or candidate for office.

57. One hundred thirty-eight current members of the New York Legislature signed this pledge, comprising a majority in each chamber. The vast support for this pledge by candidates for office who are now legislators demonstrates significant political support for independent redistricting.

58. Despite the fact that majorities of both houses of the Legislature committed to independent redistricting, the legislative process to enact such independent redistricting has broken down, and no independent redistricting process has been established. Upon information and belief, and as discussed further below, it is now too late in the redistricting cycle to establish an independent redistricting process by legislation.

**II. New York's Redistricting Process Has Reached a Stalemate, Requiring Court Intervention**

**A. Redistricting Is Necessary Because Use of Existing Districts Leads to Population Inequality in Violation of the United States and New York Constitutions**

59. In 2010, a federal census was conducted. The results of that census were released to the Legislature and to the public on March 24, 2011.

60. Under Article III, Sections 4 and 5 of the New York State Constitution, the New York Legislature is obligated to re-draw New York's State Senate and Assembly districts after each national census.

61. The 2010 census revealed significant population disparities among State Senate and Assembly districts that would make adherence to the current existing lines illegal.

62. For example, the results of the 2010 census show that the population disparity between New York's most and least populous State Senate districts is 25.4%, in violation of State and Federal law. Similarly, the population disparity between New York's most and least populous Assembly districts is 31%, also in violation of State and Federal law.

63. The New York Legislature has not yet re-drawn the Senate and Assembly district lines following the 2010 census.

64. Article I, Section 2 of the United States Constitution requires that members of the United States House of Representatives be apportioned among the states according to population, with the apportionment to be made every ten years.

65. Following the 2000 census, New York was apportioned 29 seats in the United States House of Representatives. However, New York lost two congressional seats following the 2010 census and is now entitled to only 27 seats in the House of Representatives.

66. Adherence to New York's existing House of Representatives districts would give New York two more seats than it is entitled to fill, in violation of Federal law. Upon information and belief, if New Yorkers were to elect 29 representatives to the United States House of Representatives in 2012, none of those representatives would be seated, thus depriving all New Yorkers of representation in that chamber.

67. In addition, the population disparity between New York's most and least populous House of Representatives districts is 17.9%, in violation of Federal law.

68. The New York Legislature has not yet re-drawn the district lines of New York's House of Representatives seats following the 2010 census.

**B. Governor Cuomo Has Promised to Veto Any Redistricting That Is Not the Product of an Independent Process**

69. New York Governor Andrew M. Cuomo campaigned for governor in 2010 pledging to implement independent redistricting in the state.

70. On February 17, 2011, Governor Cuomo introduced the Redistricting Reform Act of 2011, a program bill calling for independent redistricting. Nine months later, the Governor's bill has not received a vote in either chamber of the New York Legislature.

71. In announcing the bill, the Governor's office stated, "Governor Cuomo has pledged that if an agreement on permanent reform of the redistricting process is not reached, he will veto the redistricting plans passed by the Legislature if those plans have been developed under the existing process and prioritize partisan and incumbent interests over the voters' interests."

72. Governor Cuomo on July 6, 2011 stated even more clearly that he would veto any redistricting plan that was the product of the ordinary LATFOR-focused process. "I will veto a plan that is not independent or a plan that's partisan," he said. "That's what I've said

all along. That's what the people of the state of New York overwhelmingly support." When asked whether he believed LATFOR could produce non-partisan district lines, Governor Cuomo responded, "No, I don't. It's not non-partisan."

73. On September 30, 2011, as reported in the *New York Times*, Governor Cuomo reiterated this position. When asked whether he would veto the redistricting boundaries being drafted by LATFOR, Governor Cuomo responded "yes," and added that he "believe[s] the process is not independent, and I don't see how a non-independent process can come up with an independent product. I therefore would veto a bill that was not an independent product. It would then go to the courts. Period. And that's what I have said, and that's what I'm sticking by."

74. Governor Cuomo's unqualified statements make it clear that New York will be unable to adopt a redistricting plan absent an independent redistricting process.

**C. No Independent Process Is Currently Underway**

75. The legislature has not passed any plan that would provide for independent redistricting, and no body that has the force of law has initiated an independent redistricting effort.

76. The only formal redistricting process currently underway is being conducted by LATFOR, which has conducted hearings. Governor Cuomo has already stated that LATFOR lacks independence and that he will veto any redistricting plan drawn up by LATFOR. Accordingly, it is highly unlikely that any LATFOR plan will become law.

**D. The Accelerated Timeline Required in 2012**

77. The federal Military and Overseas Voter Empowerment Act (the "MOVE Act") requires states to provide military and overseas voters a minimum amount of time to apply for, receive, and return absentee ballots. New York's usual September primary date leaves too little time between the primary and general elections to comply with the MOVE Act. As a result,

beginning in 2012, New York can no longer hold its primary elections in September. On November 16, 2011, the United States Department of Defense denied a request by the State of New York to keep its 2012 primary date in September.

78. Discussions are currently underway by the New York Legislature to move the 2012 primary election to June or August.

79. A June 2012 primary election would advance the party nominating and candidate petitioning period, which ordinarily occurs from May through July, up to February through May 2012.

80. In advance of the nominating and petitioning period, prospective legislative candidates must determine whether they will run for office. In order to make this important decision, such individuals need to know in which district they reside and the contours of that district.

81. In practice, prospective candidates for public office begin building support and raising and spending money long before the nominating and petitioning period begins. For example, Defendant Skelos's campaign committee began making expenditures for the 2010 election at least as early as June 1, 2009 (fourteen months before the primary), and Defendant Silver's campaign committee began making 2010 election expenditures at least as far back as December 2, 2009 (nine months prior to the primary). For potential candidates to lay this campaign groundwork efficiently, and indeed to even make a decision to run, they need to know where their districts lie.

82. In addition, politically active citizens typically begin the process of determining which candidates to support and endorse well in advance of the state primary. For example, prior to the 2010 primary election, the Community Free Democrats, a Democratic club

on the Upper West Side of Manhattan, held a candidate forum with candidates for the United States House of Representatives and the New York State Assembly on April 22, five months before the September primary election. Similarly, on March 4, 2010 (six months in advance of the primary), the Westchester and Dutchess County Republican Committees convened a meeting to interview candidates for the Republican nomination for the 99<sup>th</sup> Assembly district. Citizen engagement with elections begins well before the election is held, and a delay in redistricting will leave voters and political parties unable to meaningfully engage in the political process.

83. Accordingly, time is running out for the redistricting process to conclude in a manner that does not significantly interfere with the electoral process. As of the date of this filing, an August primary would take place nine months from now, and a June primary in 2012 would take place in a mere seven months—leaving potential candidates unsure of their districts well within the window in which campaigns are typically up and running.

84. At the same time, no such process has yet begun that is likely to result in an enacted redistricting plan. Meanwhile, New York's Legislature is currently in recess for the year, and there has been no indication that it will reconvene for a special session. Now is the time for the Court's intervention.



### **III. LATFOR's Failure to Comply with the Prisoner Reallocation Law**

#### **A. New York Law Requires Prisoners to Be Counted in Their Home Communities**

85. In 2010, New York enacted Part XX of Chapter 57 of the Laws of New York (the "prisoner reallocation law"), which effectively banned the practice of counting prisoners for purposes of redistricting in the locations in which they are held as prisoners. The law now requires prisoners to be counted in those locations that they call home and to which they have community ties.

86. To transform from a system of counting prisoners at their prisons to a system in which prisoners are counted in their home communities, the prisoner reallocation law requires LATFOR and the New York State Department of Correctional Services and Community Supervision to work together to create a database of prisoners' addresses prior to incarceration and to adjust population data for redistricting purposes accordingly.

87. The prisoner reallocation law requires LATFOR to use this amended population data set to draw district lines.

#### **B. LATFOR Has Not Followed the Prisoner Reallocation Law**

88. The Department of Correctional Services and Community Supervision carried out its responsibilities under the prisoner reallocation law in late 2010 by transmitting to LATFOR a list of the home addresses of the prisoners in its system, to the extent those addresses were in-state and could be determined.

89. Upon receipt of this list of prisoners' home addresses, it was LATFOR's responsibility under the prisoner reallocation law to assign census blocks to each prisoner's home address and to amend the publicly available population data set, *i.e.* the census data for

redistricting purposes, to reflect the residences of these individuals as being in their home districts rather than in their prison districts.

90. LATFOR has not completed this process. On August 10, 2011, LATFOR member Roman Hedges announced that LATFOR's Assembly Majority staff was working on the amended population data and invited other members of LATFOR and its staff to participate in this process. On September 7, 2011, LATFOR's Assembly Majority staff released certain reports that purported to be the first step in the process of releasing amended population data. However, those reports were neither adopted nor substantively addressed by LATFOR itself, and on September 30, 2011, Defendant Senator Michael F. Nozzolio, Co-Chair of LATFOR, issued a letter that did not reference the staff work completed to date. Senator Nozzolio's letter instead appeared to suggest starting over from the beginning on the time-consuming prisoner reallocation process.

91. To date, LATFOR has taken no formal steps toward compiling or releasing the official amended data required by the prisoner reallocation law, except for asking its staff to make a recommendation on how to proceed. LATFOR therefore is in violation of the prisoner reallocation law and requires the Court's intervention.

92. Although there is currently a lawsuit challenging the constitutionality of the prisoner reallocation law, there is no stay in effect. The existence of a constitutional challenge does not excuse LATFOR's failure to comply in a timely fashion with a duly enacted law.

**C. The Time for LATFOR's Compliance with the Prisoner Reallocation Law Has Passed**

93. LATFOR's inaction on compliance with the prisoner reallocation law demonstrates that it does not have any intention or ability to comply with the law in a timely fashion absent Court intervention. Meanwhile, LATFOR has reached a point in its redistricting process at which it cannot proceed without complying with the prisoner reallocation law. In short, LATFOR has reached a dead end.

94. LATFOR's deliberative process in connection with the 2010 census and 2012 redistricting process, as in previous rounds of redistricting, involves several steps: (1) LATFOR releases the population data upon which the new districts will be based; (2) LATFOR holds a round of hearings so that the public may weigh in on the redistricting factors that they believe LATFOR members should consider in adopting new districts; (3) at the request of LATFOR members, interested groups and other members of the public submit proposed district lines to LATFOR based on the population data LATFOR has already released; (4) taking into consideration the testimony and maps submitted by groups and members of the public, LATFOR adopts a preliminary redistricting plan; (5) LATFOR holds another round of hearings so that the public may comment on the preliminary redistricting plan; and (6) LATFOR adopts a final redistricting plan for submission to the Legislature.

95. LATFOR attempted to perform step (1) by releasing population data counting prisoners at their prison addresses. However, the prisoner reallocation law prohibits using this data to draw new districts. As discussed above, LATFOR has not released amended population data counting prisoners in their home districts, which is the only data that may be used in this round of redistricting.

96. On November 2, 2011, LATFOR held its final hearing in the first round of hearings. Step (2) is now complete.

97. The next steps, public submission of proposed redistricting lines and the drawing of preliminary district lines by LATFOR, cannot possibly occur in compliance with the law until LATFOR has released population data that reallocates prisoners to their home districts pursuant to the prisoner reallocation law. Any submissions of proposed district lines by the public or by LATFOR using the original population data that LATFOR has already released would be a waste of time because those districts could not be adopted by LATFOR consistent with State law.

98. Accordingly, LATFOR is out of time to comply on its own. It cannot complete any more steps without complying with the prisoner reallocation law, and it has not done so. The Court's intervention is needed at this time to ensure compliance with the law.

**D. The Prisoner Reallocation Law Has the Force of Federal Law**

99. On May 9, 2011, the United States Department of Justice pre-cleared the prisoner reallocation law as a change in election law pursuant to Article 5 of the federal Voting Rights Act of 1965. New York State laws affecting voting rights require Voting Rights Act preclearance because three New York counties are "covered jurisdictions" pursuant to Article 5 of the Voting Rights Act.

100. As a result of this preclearance of the prisoner reallocation law by the Department of Justice, that law now has the force of federal law. Any return to counting prisoners at their prison locations would effect a further change in election law in New York, which would require additional preclearance by the Department of Justice. Failure to either comply with the prisoner reallocation law or accomplish such additional preclearance is a violation of the Voting Rights Act.

101. The Voting Rights Act gives the Department of Justice 60 days from an application for preclearance to reach a decision. Upon information and belief, the Department of Justice generally takes almost the full 60 days to make these determinations, thus further increasing the exigency of the current redistricting stalemate and further increasing the need for this Court to intervene immediately.

E. **LATFOR's Failure to Comply with the Prisoner Reallocation Law Interferes with Local Redistricting Efforts**

102. New York's prisoner reallocation law does not only affect redistricting of state and congressional legislative districts. The law also requires LATFOR to provide amended population data to local governments such as counties so that those local governments may count prisoners in their home districts as part of their own local redistricting efforts. LATFOR has not complied with this obligation.

103. Because LATFOR has not provided this amended population data to local governments, those local governments are unable to count prisoners in their home districts for local redistricting purposes.

104. Some local governments have already passed redistricting plans based on the initial, improper population data. Other local governments will need to pass redistricting plans in the near future, in time for the 2012 elections. Each local government will need LATFOR to comply with its obligations under the prisoner reallocation law as soon as possible in order to either correct its redistricting plan or to pass a compliant plan.

105. Thus, LATFOR's separate and distinct violation of the prisoner reallocation law by its failure to provide amended population data to local governments prejudices these local governments and, in turn, the citizens of those local communities including Plaintiffs. The Court's intervention is needed to redress this wrong.

**COUNT I**

**(Violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution;  
Pursuant to 42 U.S.C. § 1983)**

106. The allegations contained above are repeated and re-alleged as if fully set forth herein.

107. New York's districts were last adjusted in 2002, following the 2000 census. Now that the 2010 census has been completed, the New York Legislature's 2002 redistricting is out of date and may not be used for subsequent state legislative or congressional elections.

108. New York's current legislative districts lack population equality, in violation of the "one person one vote" requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

109. Certain Plaintiffs live in overpopulated districts, and therefore their voting power is diluted in violation of the Equal Protection Clause.

110. In addition, the 2010 prisoner reallocation law requires LATFOR to compile amended population data that allocates prisoners in their home communities rather than their prison communities. For prisoners from out of state or where their home communities cannot be identified, LATFOR is prohibited from including them in its population data. LATFOR has not complied with this requirement.

111. LATFOR is required to use this amended population data in conducting its redistricting work. LATFOR has not complied with this requirement.

112. Upon information and belief, certain Plaintiffs live in communities that would stand to gain population and therefore voting power by LATFOR's compliance with the

prisoner reallocation law. These Plaintiffs are therefore harmed by LATFOR's failure to comply with the law.

113. New York needs new State Senate, Assembly, and House of Representatives districts before the next elections for those bodies, which will occur in 2012.

114. Because New York's legislative redistricting process is hopelessly stalled, the ability to complete New York's 2012 elections in a timely and legal fashion is at significant risk.

115. To remedy these Equal Protection violations in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

116. The Court should appoint a Special Master to prepare a redistricting plan in light of the legislative stalemate.

117. In the interest of justice, the Special Master appointed by the Court should be entirely independent of partisan interests, and the Court's Order appointing the Special Master should require that the Special Master's redistricting plan be independent of partisan interests and should count prisoners in their home communities. The Court should order the Special Master to prioritize redistricting criteria including population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

118. Upon presentation of an appropriate independent redistricting plan by the Special Master, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

**COUNT II**

**(Violation of the Due Process Clauses of the 5th and 14th Amendments  
to the U.S. Constitution; Pursuant to 42 U.S.C. § 1983)**

119. The allegations contained above are repeated and re-alleged as if fully set forth herein.

120. As a result of New York's failure to adjust its state legislative and congressional districts pursuant to the 2010 census, certain Plaintiffs live in overpopulated districts, resulting in a dilution of their voting power.

121. Moreover, upon information and belief, as a result of LATFOR's failure to count prisoners in their home communities rather than in their prison communities, certain Plaintiffs have been harmed by the loss of voting power for their communities.

122. The diminishment of Plaintiffs' voting power constitutes a deprivation of Plaintiffs' rights without due process of law. The State of New York has deprived these Plaintiffs of their full rights to vote in state legislative and congressional races by allowing malapportionment of those districts and improperly denying Plaintiffs a fair and full weight in their votes for State Senate, Assembly, and United States House of Representatives.

123. To remedy these Due Process violations in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

124. The Court should appoint a Special Master to prepare a redistricting plan in light of the legislative stalemate.

125. In the interest of justice, the Special Master appointed by the Court should be entirely independent of partisan interests, and the Court's Order appointing the Special Master should require that the Special Master's redistricting plan be independent of partisan interests



and should count prisoners in their home communities. The Court should order the Special Master to prioritize redistricting criteria including population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

126. Upon presentation of an appropriate independent redistricting plan by the Special Master, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

### **COUNT III**

**(Violation of Article I, Section 2 of the U.S. Constitution; Pursuant to 42 U.S.C. § 1983)**

127. The allegations contained above are repeated and re-alleged as if fully set forth herein.

128. New York's current districts for the United States House of Representatives are too numerous by two seats, in violation of Article I Section 2 of the United States Constitution.

129. Plaintiffs each live in one of 29 congressional districts, even though New York is only permitted 27 congressional districts. Without proper redistricting, New York's representation in the United States House of Representatives is at risk. Plaintiffs, in turn, risk losing their votes in the elections for those congressional seats.

130. New York needs new House of Representatives districts before the next congressional elections, which will occur in 2012.

131. To remedy these constitutional violations in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

132. The Court should appoint a Special Master to prepare a redistricting plan in light of the legislative stalemate.

133. In the interest of justice, the Special Master appointed by the Court should be entirely independent of partisan interests, and the Court's Order appointing the Special Master should require that the Special Master's redistricting plan be independent of partisan interests and should count prisoners in their home communities. The Court should order the Special Master to prioritize redistricting criteria including population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

134. Upon presentation of an appropriate independent redistricting plan by the Special Master, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

**COUNT IV**  
**(Violation of the New York Constitution)**

135. The allegations contained above are repeated and re-alleged as if fully set forth herein.

136. New York's current State Senate and Assembly districts lack population equality, in violation of the population equality requirements of Article III, sections 4 and 5 of the New York State Constitution.

137. Certain plaintiffs live in overpopulated districts, and therefore their votes are diluted in violation of the New York State Constitution.

138. New York needs new State Senate and Assembly districts before the next elections for those bodies, which will occur in 2012.

139. To remedy these violations of the New York State Constitution in a timely manner, the Court should take control of the redistricting process and oversee the process of re-drawing district lines pursuant to fair and legal criteria.

140. The Court should appoint a Special Master to prepare a redistricting plan in light of the legislative stalemate.

141. In the interest of justice, the Special Master appointed by the Court should be entirely independent of partisan interests, and the Court's Order appointing the Special Master should require that the Special Master's redistricting plan be independent of partisan interests. The Court should order the Special Master to prioritize redistricting criteria including population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest.

142. Upon presentation of an appropriate independent redistricting plan by the Special Master, the Court should adopt that plan and order elections to proceed in 2012 using those districts.

**COUNT V**  
**(Violation of the New York Prisoner Reallocation Law)**

143. The allegations contained above are repeated and re-alleged as if fully set forth herein.

144. The 2010 prisoner reallocation law requires LATFOR to compile amended population data that allocates prisoners in their home communities rather than their prison communities. For prisoners from out of state or where their home communities cannot be identified, LATFOR is prohibited from including them in its population data. LATFOR has not complied with this requirement.

145. LATFOR is required to use this amended population data in conducting its redistricting work. LATFOR has not complied with this requirement.

146. The prisoner reallocation law requires LATFOR to release this amended population data to local governments for use in their local redistricting efforts. LATFOR has not complied with this requirement.

147. Upon information and belief, certain Plaintiffs live in communities that would stand to gain population and therefore voting power by LATFOR's compliance with the prisoner reallocation law. These Plaintiffs are therefore harmed by LATFOR's failure to comply with the law.

148. To remedy this violation of New York law, the Court should order LATFOR to comply immediately with the prisoner reallocation law requiring the processing and release of amended population data that counts prisoners only at their home residences.

149. The Court should order LATFOR to work cooperatively with the Special Master to be appointed by the Court so that the Special Master has immediate access to accurate information on prisoners' home residences in order to ensure that the Special Master's plan appropriately counts prisoners at their home residences in compliance with this law.

#### **COUNT VI**

**(Violation of the Voting Rights Act; Pursuant to 42 U.S.C. § 1973j(f) and 42 U.S.C. § 1983)**

150. The allegations contained above are repeated and re-alleged as if fully set forth herein.

151. The federal Voting Rights Act requires New York to obtain preclearance from the United States Department of Justice or the United States District Court for the District of Columbia for its statewide laws that change its election laws and voting rights. New York

obtained preclearance by the Department of Justice for the prisoner reallocation law, as required by the Voting Rights Act. The prisoner reallocation law therefore has the force of federal law.

152. Any failure by New York to comply with the prisoner reallocation law would constitute another change in election law and voting rights that would require further preclearance. New York has not applied for such preclearance.

153. Any failure by New York to comply with the prisoner reallocation law without obtaining further preclearance would constitute a violation of the Voting Rights Act.

154. Accordingly, unless New York promptly repeals the prisoner reallocation law and requests preclearance for such repeal, the Court should order LATFOR to comply immediately with the prisoner reallocation law requiring the release of amended population data that counts prisoners only at their home residences.

155. The Court should order LATFOR to work cooperatively with the Special Master to be appointed by the Court so that the Special Master has immediate access to accurate information on prisoners' home residences in order to ensure that the Special Master's plan appropriately counts prisoners at their home residences in compliance with this law.

**COUNT VII**  
**(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)**

156. The allegations contained above are repeated and re-alleged as if fully set forth herein.

157. For the reasons set forth in this Complaint, Defendants, through their inaction in the redistricting process, have deprived Plaintiffs, and all citizens of the State of New York similarly situated in malapportioned districts, of the constitutional right to vote by denying them equal protection and due process under the law in violation of the United States Constitution.

158. Plaintiffs are entitled to a declaratory judgment by the Court determining that Plaintiffs' constitutional rights have been violated, in order for Plaintiffs to obtain such further relief as may be necessary to vindicate those rights.

**RELIEF SOUGHT**

WHEREFORE, Plaintiffs respectfully request the following relief:

1. An order or judgment declaring New York's current State Senate, Assembly, and United States House of Representatives districts, last adjusted in 2002, to be invalid for failing to comply with the United States Constitution, the New York State Constitution, and state and federal law;
2. An order or judgment declaring that Plaintiffs' constitutional rights have been violated by Defendants' inaction in the redistricting process;
3. An order appointing an independent Special Master to propose new State Senate, Assembly, and House of Representatives district lines in conformity with the 2010 census, applicable state and federal law, and the following principles: population equality, contiguity, fair representation of minority groups, respect for political subdivisions, compactness, and preservation of communities of interest;
4. An order, judgment, or injunction directing that LATFOR immediately comply with the prisoner reallocation law;
5. An order requiring LATFOR and its members and staff to cooperate with the Special Master for all purposes, specifically including providing the Special Master with amended prisoner population data to ensure compliance with the prisoner reallocation law;

6. An order or judgment re-drawing district lines in conformity with the Special Master's proposal, assuming the Special Master's satisfactory completion of an independent redistricting proposal;

7. An order requiring Defendants to pay to Plaintiffs their reasonable attorney's fees and expenses, expert fees, costs, and other expenses incurred in prosecuting this action, pursuant to 42 USC § 19731(e) and 42 U.S.C. § 1988; and

8. Granting such other relief as the Court may deem just and proper.

Dated: New York, New York  
November 17, 2011

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CITIZENS UNION | ISSUE BRIEF AND POSITION STATEMENT

## State Campaign Finance Reform with Public Matching Funds

### INTRODUCTION

*Citizens Union of the City of New York is an independent, non-partisan civic organization of members dedicated to promoting good government and political reform in the city and state of New York. For more than a century, Citizens Union has served as a watchdog for the public interest and an advocate for the common good. Founded in 1897 to fight the corruption of Tammany Hall, Citizens Union currently works to ensure fair elections, clean campaigns, and open, effective government that is accountable to the citizens of New York. We do so by informing the policy debate and influencing the policy outcomes that affect the lives of all New Yorkers.*

*Believing that an informed citizenry is the cornerstone of a thriving local democracy, Citizens Union Foundation—the non-profit research, education, and advocacy organization affiliated with CU—publishes GothamGazette.com, a front row seat to New York City policies and issues.*

Citizens Union has long been concerned about the undue influence and possible corruption that some private campaign contributions can have on candidates and government officials. We remain supportive, however, of citizens having the continued opportunity to participate throughout the course of a candidate's campaign by making political contributions, because we believe it to be part of a healthy democracy. We also believe that candidates should have access to an adequate level of public matching funds in order to have the chance to campaign competitively.

The perception that elected officials in New York State are beholden to special interest groups and the campaign contributions they make undermines the public's confidence in the expected impartiality and integrity of the decisions being made by state government officials. Moreover, the amount of money raised and spent on campaigns increases disconcertedly with each election cycle. Money, or the lack thereof, too often becomes the determinative factor in the viability of candidates running for New York State elections.

New York State's campaign finance laws, having last been changed in 1975, are in dire need of reform. Of the thirty-six states that limit contributions to candidates by individuals, New York's individual contribution limits are only lower than Ohio for state legislative races and the highest in the nation for gubernatorial candidates. It also should be noted that many states – even those that do not limit individual contributions – prohibit contributions from corporations, which New York State does not.

Campaign finance reform in the state must occur in two major ways:

1. statutes and regulations must be changed to drastically reduce contribution limits, strengthen oversight and tighten enforcement, restrict, if not ban, soft money contributions, and require greater disclosure, and
2. public financing with sufficient funds matched from private contributions must be enacted.

*Citizens Union Foundation thanks the New York Community Trust, the Rockefeller Brothers Fund, and the Lily Auchincloss Foundation for their important support of its election reform and competitive elections work which made the original research possible for this issue brief.*

Elements of the first goal were embodied in a July 2007 agreement reached among the then Governor, Senate Majority Leader, and Assembly Speaker that was never translated into legislation. The second goal has been embodied in one form or another for three decades in the Assembly as a public matching funds bill that has been passed in nearly all of those years. Another form of public campaign financing has emerged recently and is known as full public financing. A full public financing bill was carried by then Senator David Paterson and Assemblymember Felix Ortiz starting in 1999, and a similar version is now carried by Minority Leader Malcolm Smith in the Senate.

**CITIZENS UNION RECOMMENDS**  
a broad set of statutory and regulatory changes,  
and reaffirms its support for the creation of a  
public matching funds system, strongly preferring  
it to a full public financing system.

This paper describes the current system and its regulations, and analyzes the two different systems of public financing. In reforming the state campaign finance system, Citizens Union recommends a broad set of needed statutory and regulatory changes, and reaffirms its support for the creation of a public matching funds system, strongly preferring it to a full public financing system.

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## NEW YORK STATE'S CURRENT CAMPAIGN FINANCE SYSTEM

Campaign finances are regulated in New York through a weak system of high contribution limits and lax disclosure requirements. Laws and regulations governing campaign finance are minimally enforced by a bipartisan appointed state board of elections which has the dual responsibility for holding elections and receiving campaign disclosure reports. The categories of regulation, or lack thereof, for New York State are as follows.

### *Disclosure*

In addition to two semi-annual reports every year, candidates for state office are required to file three campaign disclosure reports for each election (primary and general) during the campaign season. In the off election year, they need only file the two semi-annual ones. No disclosure reports are required, however, during the six-month legislative session when most political contributions are made and the state budget and legislation are passed making it difficult to track contributions that are made when important decisions are being made by the Governor and the Legislature.

Candidates for state office are not required to report the occupations and employers of their contributors, making it hard to track and know the source of contributions. Not also required is the reporting of accrued expenses and expenditures that are owed but not paid at the time a service is provided.<sup>1</sup> Reporting campaign expenses on a cash only basis makes it difficult to know during a campaign who provided what services and at what cost if the vendor does not expect to be paid until after the campaign. Additionally, New York has only limited disclosure requirements for independent expenditures by advocacy organizations for election-related advertising.

**CAMPAIGN FINANCES ARE  
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receiving campaign disclosure reports.

<sup>1</sup> "What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action" by Ciara Torres-Spelliscy & Ari Weisbard, published in *Albany Government Law Review*, Vol. 1, 2008.

Contribution Limits

Contribution limits vary depending on the entity receiving or giving the funds. “Hard money” contributions, with lower limits and stricter uses, are given directly to candidates by individuals, unions, or corporations. “Soft money” contributions, with higher limits and broader uses, are given to political action committees, political parties, or party housekeeping accounts for party building activities not intended to benefit a candidate specifically, but often do in both direct and indirect ways. The following chart outlines the current contribution limits in New York State.

Corporations can avoid the \$5,000 limit by having their subsidiaries make allowable contributions. Individuals can also avoid contribution limits by setting up shell limited liability corporations or using commonly controlled LLCs or partnerships to make multiple over the limit, but allowable contributions.

**NEW YORK STATE CAMPAIGN CONTRIBUTION LIMITS**

LIMITS <sup>2</sup>	To Candidates for Assembly	To Candidates for Senator	To Candidates for Governor	To PACS	To Party or Constituted Committees**	To Party Housekeeping***	Maximum Aggregate* Contribution
<b>From Individuals</b>	\$3,800 Primary \$3,800 General \$7,600 Total	\$6,000 Primary \$9,500 General \$15,500 Total	\$18,100 Primary \$37,800 General \$55,900 Total	\$150,000 Year	\$94,200 Year	Unlimited	\$150,000 Year
<b>From Unions</b>	\$3,800 Primary \$3,800 General \$7,600 Total	\$6,000 Primary \$9,500 General \$15,500 Total	\$18,100 Primary \$37,800 General \$55,900 Total	\$150,000 Year	\$94,200 Year	Unlimited	\$150,000 Year
<b>From Corporations</b> <small>(related subsidiaries may make separate contributions)</small>	\$5,000 Year	\$5,000 Year	\$5,000 Year	\$5,000 Year	\$5,000 Year	Unlimited	\$5,000 Year
<b>From PACS</b>	\$3,800 Primary \$3,800 General \$7,600 Total	\$6,000 Primary \$9,500 General \$15,500 Total	\$18,100 Primary \$37,800 General \$55,900 Total	\$150,000 Year	\$94,200 Year	Unlimited	\$150,000 Year
<b>From Political Parties</b>	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited

Funds may be raised and used for the primary only if the election is contested.

\*Aggregate refers to total contributions to candidates and committees in a given year by individuals or entities such as PACs and corporations.

\*\*Political Parties include County and State Committees, and Legislative Committees such as the Democratic Assembly Campaign Committee.

\*\*\*Party Housekeeping accounts are for the maintenance of a permanent party headquarters and staff, and ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates. Contributions to party housekeeping do not add to maximum aggregate contribution limits.

Pay-to-Play Regulation

Those that do business with the state have no additional restrictions on the contributions that they can make to candidates for public office. Contractors and lobbyists may give as corporations and individuals, with subsidiaries also able to make additional separate donations. There are no specific restrictions on contributions from lobbyists, who also often “bundle”

<sup>2</sup> Information and table format obtained from “What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action” by Ciara Tortes-Spelliscy & Ari Weisbard, published in Albany Government Law Review, Vol. 1, 2008.

contributions from multiple clients to maximize their fundraising contributions.

### Fines and Enforcement

The current maximum fine for failing to file a disclosure statement is \$500, and knowingly and willfully failing to file the statement within 10 days of the deadline is a misdemeanor. Penalties are also awarded for other violations, including a misdemeanor for knowing and willful acceptance or donation of a contribution in an amount exceeding the maximum contribution level. It is a class E felony to evade or attempt to evade contribution limits by making outside expenditures. However, there are no regular audits or on-going oversight provided by the Board of Elections that uncovers such violations and enforces compliance. Violations are often found when an inquiry is made from an outside source and rare is the instance when a penalty or fine is assessed.

**THERE ARE NO REGULAR AUDITS**  
or on-going oversight provided by the Board of Elections that uncover such violations and enforces compliance. Violations are often found when an inquiry is made from an outside source and rare is the instance when a penalty or fine is assessed.

### Personal Use and Fund Transfers

While personal use of campaign funds is prohibited, these funds may be legally used for activities that involve the holding of a public office or party position. This broad exception has resulted in the abuse of campaign funds in some cases, and allows the use of such funds on items unrelated to campaigning. Additionally, an unlimited amount of money can be transferred to candidates from party committees and housekeeping accounts allowing contributors another gateway to make over the limit contributions to candidates.

**AN UNLIMITED AMOUNT OF MONEY CAN**  
be transferred to candidates from party committees and housekeeping accounts allowing contributors another gateway to make over the limit contributions to candidates.

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## **PUBLIC FUNDING for CAMPAIGNS: MATCHING or FULL**

Unlike what exists for local candidates in the City of New York, there is no public financing system for candidates for state office. Citizens Union has historically supported a matching model because it believes that it encourages candidates to earn public funds as voter interest grows, and donor support builds, in their campaigns. It also allows citizens to continue participating throughout the course of a campaign by making contributions to the candidates of their choice. Knowing that there is some support for a full funding system as opposed to a matching one, Citizens Union has examined the issue and proposal for a full-matching system. Each system is described below, followed with an analysis of its respective merits and challenges.

### Full Public Financing or “Clean Money Clean Elections”

Full public financing, also known as “Clean Money, Clean Elections” (CMCE), is a voluntary system that provides significant public dollars to candidates in which as much of 90% or more of money received for a campaign are public funds. As one proposal for New York State offers, candidates would first qualify by collecting a set number (400 for Assembly, 1,000 for Senate) of small contributions (\$5-\$100) from voters in their district. Once qualified, participating candidates would agree to no longer engage in private fundraising and not use personal funds for their campaign. A grant of public funds would be given for the primary election and if the candidate advances, again for the general election. The grants would be based on an average of past spending for such campaigns and public funds would constitute as much as ninety percent of the money spent on campaigns. If a participating candidate is outspent by a non-participating opponent or independent expenditures, additional funds of up to four times the original grant would be given.

Proponents state that a CMCE approach in New York State would:

- significantly reduce, if not outright end, the influence of contributors on candidates and public policy,
- level the playing field and allow candidates with little access to fundraising and money to compete for elected office, and
- free-up candidates to focus on campaigning instead of raising money.

### Public Matching or Partial Funding

A campaign finance public funds matching program is now in place in New York City. Citizens Union has been a supporter of New York City's program since its inception in 1988, and has helped to strengthen it several times since then, most recently in 2007 when pay-to-play restrictions were added. It is worth noting that an important distinction of the City system is that it requires much greater disclosure and comparatively smaller limits or prohibitions on certain contributions (such as limitations on those from lobbyists) than for the State.

The matching funds or partial public funding campaign finance proposal which has passed the state Assembly many times is based on the program in New York City. It would be a voluntary system structured to give matching funds to participating candidates who agree to cap their election spending to a predetermined amount. In order to qualify for the public matching funds, candidates must raise a set number of small private contributions totaling a threshold amount. The program is structured to limit the influence of large gifts and increase the value of smaller contributions by matching gifts up to a set amount with public funds. Larger contributions would still be allowed and subject to strict and relatively low limits, but matching funds would be provided only for that portion of the contribution that is at or below the individual matching gift cap.

The more support candidates generate for their campaign through private dollars, the more public funds are provided. This approach to public funding can serve as an incentive for candidates to build 'proxy' like support for their candidacy by raising private money for their campaign, as well serve as a barometer of support from voters for the candidate. With partial funding, substantial public funds would still be a majority of the total funds raised and spent in a campaign, but it would also allow for voters to make contributions throughout the course of the campaign to the candidates that they support.

Like those in the New York City model, triggering provisions would need to be included to increase public payments or change expenditure limits in the event of a non-participating, high-spending opponent, or other factors. Depending on the level of spending and/or funds received by the opponent, public funds are first increased, and then the expenditure limit is increased or eliminated. The public match also increases.

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## CITIZENS UNION RECOMMENDATIONS

### 1. Enact a Public Matching Funds Campaign Finance Program

Citizens Union strongly believes that providing public funds to candidates to run for elected office is in the public interest and therefore is a legitimate governmental expenditure. Citizens Union also considers that a program of matching public funding is far preferable to that of a full matching program, and it is where we think the state of New York should begin with public financing.

### A PUBLIC FUNDS MATCHING SYSTEM WILL:

- allow contributors to give throughout the course of the campaign and help contribute positively to the progressive building of support for the candidate.
- expand the range and diversity of candidates who are financially able to run for office and make elections more competitive.

Citizens Union is concerned that full public financing limits citizens to contributing only during an early qualifying period that is long before campaigns peak and will have the unintended consequence of decreasing citizen participation in democracy and political campaigns. In addition to voting, the way most people express themselves in political campaigns is through modest contributions to their preferred candidates, which does not often occur until the campaign has reached the forefront of public attention.

A public funds matching system will:

- reduce the influence of special interests in elections and lessen the value of large contributions as long as the limits on the size of the contribution are low.
- increase the value of smaller gifts and empower contributors to make small gifts because of the added value of a public match at some multiple of a contribution up to a given amount, as public dollars are directly connected to the gift each contributor makes.
- allow contributors to give throughout the course of the campaign and help contribute positively to the progressive building of support for the candidate. Since many voters do not become fully engaged in campaigns until they are well underway, a public matching system allows these political expressions to be harnessed.
- expand the range and diversity of candidates who are financially able to run for office and make elections more competitive.
- allow for the state to provide public funds only to candidates who meet certain reporting and expenditure requirements throughout the course of the campaign, unlike full financing when one lump sum is provided upfront once a minimal threshold of private fundraising is met.

There will always be a lot of money waiting, and wanting, to be spent on campaigns and politics. Citizens Union is concerned that full public funding of candidate campaigns may simply force private contributions into political party committees and independent expenditure campaigns at a far greater level than currently exists. A matching system can help channel the inevitable flow of funds during a campaign into a well-regulated financing system, as well as extend the value of public dollars. Public funding will not necessarily diminish the amount of money that is raised and spent for political campaigns, especially in New York State, nor is that necessarily the goal of campaign finance reform. Rather, public funding will reduce the dependence of candidates on large donors and special interests, while making it easier for challengers and political newcomers to compete effectively with incumbents and more established politicians.

Citizens Union also is concerned over the estimated implementation cost of full public financing, initially estimated at least \$30 million over a four-year period. It is questionable as to whether this accurately reflects the true and full costs of campaigns for all four statewide offices and 212 legislative seats during a four year period, particularly since it will encourage candidates who might not otherwise would have chosen to run.

With both the matching and full public financing systems, Citizens Union is concerned about the impact self-financed candidates have on campaigns and the disparity that exists for candidates participating in the program who face a well-funded or self-funded opponent. Citizens Union is also concerned that public funds can be unnecessarily used by incumbents who face little opposition, or challengers looking to raise their profile for reasons other than seeking office. Both matters need to be addressed when public campaign financing is adopted.

Citizens Union believes that a strong public matching funds program must be accompanied by a system of drastically lower contribution limits, strengthened enforcement and oversight, restrictions, if not a ban, on soft money, and greater disclosure of contributions and expenses. In doing so, it reaffirms its support for these previously articulated positions.

## 2. Limit Size, Ban Some Forms, and Lower Scope of Contributions

- Significantly lower campaign contribution limits for candidates, all party and designated committees, political action committees, and party housekeeping accounts.
- Ban institutional contributions by corporations, limited liability companies, partnerships, trade unions and other organizations (except for committees formed specifically for a political purpose).
- Require that corporations and their subsidiaries, as defined by the Internal Revenue Code, be treated as a single entity with a combined aggregate limit of \$5,000 per calendar year.
- Strengthen the ban on the use of campaign contributions for personal use by clarifying what is a permissible campaign expense.
- Restrict, if not ban, soft money contributions.
- The use of contributions made to political parties for “housekeeping” activities should be limited to the construction and maintenance of party headquarters or offices and not as a funnel to candidates’ campaigns.
- Enact pay-to-play restrictions requiring disclosure of, and limiting the size of contributions from, those who lobby or do business with the state.
- Transfers by party committees to candidates or other committees should be limited to twice the limit set on individual contributors and contributions to party committees should be subject to the same ceiling placed on contributions to candidates.
- Create a safety valve for candidates facing opponents who have contributed a high number of times over the applicable individual contribution limit to their own campaigns. Under this provision, candidates facing self-financed opponents could accept donations up to twice the contribution limit until they raised an amount equal to self-financed candidate’s contribution.

### **A STRONG PUBLIC MATCHING FUNDS PROGRAM MUST BE**

accompanied by a system of drastically lower contribution limits, strengthened enforcement and oversight, restrictions, if not a ban, on soft money, and greater disclosure of contributions and expenses. In doing so, CU reaffirms its support for these previously articulated positions.

## 3. Increase Disclosure

- Require greater disclosure and reporting of campaign contributors and expenditures to include full name, home address, and employer/business name and address for each contribution, and require candidates to report this information in their periodic reports.
- Require that at least two periodic campaign finance reports be filed during the legislative session to reflect contributions given during the budget adoption and review process.
- Require that all party or constituted committees fall within the regulatory framework that covers political committees. All transfers by and between party committees should be regulated; all party committees should be required to file reports of receipts and expenditures five days before the general election each year.
- Require greater disclosure from those who make independent expenditures with the intent of informing the public and influencing the voters about a particular candidate.

- Amend State Finance Law to require persons seeking to do business with the State with a value of \$25,000 or more, to file a report listing all contributions or loans over a certain amount to any elected official holding New York statewide or legislative office made within two years of initiating the effort to do business with the State. In addition, persons who make such campaign contributions while doing business with the State should have to report them.
- Require transitional and inaugural expenses be fully disclosed with contribution limitations similar to those set for election campaigns.

#### *4. Strengthen Enforcement*

- Add a fifth non-partisan commissioner to the four member board of the state Board of Elections since a two - two tie between Republican and Democratic commissioners prevents any campaign finance investigation from moving forward. Alternatively, allow an investigation to move forward in the event of a two-two tie.
- Developing more effective enforcement mechanisms, including greater fines for exceeding contribution limits and violations of campaign finance disclosure laws. Citizens Union proposes that the maximum penalty for failing to file a statement required by law should be increased from \$500 to as much as \$5,000. Violations of the law which are currently punishable only as an A misdemeanor or an E felony should also subject the violator to high civil penalties (for example, \$20,000 for knowingly and willingly accepting a contribution that exceeds the ceiling).
- Create a discrete elections enforcement unit within the state Board of Elections with adequate resources and independence to investigate, either on its own initiative or upon complaint, potential violations of the Election Law and make recommendations for enforcement to the board.
- Ensure that the Attorney General and local district attorneys can independently of the state Board of Elections investigate and prosecute alleged violations of the Election Law.

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“Changing the Terms of New York State’s  
Budget Conversation”

By Richard Ravitch

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# Changing the Terms of New York State's Budget Conversation

By Richard Ravitch

In July of 2009, Governor David Paterson appointed me to the post of New York Lieutenant Governor in response to what he called a “crisis of governance” in the state. The most visible part of the crisis was the 31-31 party split that had paralyzed the New York State Senate for more than a month. The deeper crisis was the state’s inability to face its growing budget gaps and the troubled budget system that had produced them. Governor Paterson asked me to devise a plan to address the gaps and recommend changes to the state’s budget process. In March, 2010, I submitted a plan to eliminate the state’s structural deficits and prevent such deficits from recurring in the future.



The plan was not adopted. But over the course of that year, it became unavoidably clear that the state’s existing budget practices and assumptions were not sustainable. A fundamental change occurred in the public conversation about the budget, culminating in the election of a new governor, Andrew Cuomo, on a platform promising budget cuts. The governor’s first budget is a serious attempt to deliver on this promise. At the time of this writing we do not yet know the details of the budget as it will be enacted. What remains to be seen is whether New York can and will make the changes needed to begin a process of sustainable budgeting and investment in the state’s future.

## The Nature of the Problem

At the beginning of 2010, the New York State Division of the Budget estimated that the state’s spending would grow over the following four years at an average annual rate of 7.5 percent. In contrast, the state’s revenues would grow over the same period at an average rate of only 3.6 percent. The historical picture was just as discouraging: Over the 10 years from State Fiscal Years 1997-98 to 2007-08, the state’s spending grew at a rate that was 20 percent more than its revenue growth.

These figures reflect, in part, revenue declines caused by the recession and the subsequent disappearance of federal stimulus aid. However, it is also true that for at least a decade New York has had a chronic and growing

structural budget imbalance. That is, spending growth has exceeded the underlying growth in recurring revenues, even in periods of relative prosperity.

For State Fiscal Year 2010-11, the Executive Budget stated a deficit of \$8.2 billion. This number would have been even larger without almost \$10 billion in temporary revenue items such as tax increases and federal stimulus money. With these items removed, the gap totaled around \$18 billion. After the budget was submitted, the projected gap widened by an additional \$1 billion. Economist Carol O’Cleireacain estimated that somewhere between \$5 billion and \$5.5 billion of the gap represented recession-related revenue declines and spending increases. These factors could be expected to abate with economic recovery. But the remaining gap—the amount that would remain even with a recovery—amounted to more than \$13 billion. This was the size of the state’s structural budget imbalance.

The structural imbalance would lead to growing future deficits. The Division of the Budget projected these gaps at \$5.4 billion in 2011-12, \$10.7 billion in 2012-13, and \$12.4 billion in 2013-14. Robert Ward of the Rockefeller Institute calculated that closing gaps of this size would entail tax and fee increases of 15 to 25 percent, or spending cuts of an unprecedented 15 percent.

Just as disturbing as the size of the gaps was what I gradually discovered about the ways in which the state’s budgeting practices had enabled it to avoid facing the gaps.

New York, like most states in varying degrees, uses cash budgeting. This means that it can balance its budget in a technical sense by not paying expenses in the year in which they arise or by accelerating future revenues into the present year. In addition, though state law requires the enactment of a balanced budget for the General Fund, it does not require budget balance for other state funds—which account more fully a third of the state’s expenditures. Cash budgeting allows the state to balance the General Fund budget in part by shifting cash into the General Fund and moving spending obligations into other state funds.

Cash budgeting has also allowed the state to make heavy use of “one-shots”—non-recurring revenues or expenditure cuts that may show up in one year or a few years only to disappear in future years. In the eight years prior to 2010, the state used more than \$20 billion in non-recurring revenues to make its budget numbers balance.

The State Comptroller would later call this combination of devices and strategies the “Deficit Shuffle.”

It was clear by the time I took office, however, that the state is coming to the end of its ability to avoid the consequences of its structural budget imbalance. The pressures on state spending are accelerating, reflecting aging infrastructure, labor contracts, rising pension and health benefit obligations to state employees, and rising Medicaid costs, which are projected to increase twice as fast as gross domestic product over the next 10 years.

At the same time, New York’s overall economic future is uncertain. In 1950, we had 10 percent of the nation’s population; we are now at barely more than six percent. In the years preceding the recent recession, from 2000 to 2008, New York’s population grew much more slowly than the national average; we ranked only 41st among the states in population growth rate. During the same years, New York was the state with the single highest amount of out-migration. A million and a half New Yorkers left for other states; Florida gained about a third of the out-migrants.

The structure of New York’s economy, largely the downstate economy, has kept the state’s per capita income relatively high. But our income growth, as the recent recession demonstrated, is subject to a great deal of volatility.

### **The Five-Year Plan to Address the New York State Budget Deficit**

I concluded that New York could not solve its structural budget gap in a single year without unacceptably hurtful dislocations. Therefore, the plan that I submitted called for a multi-year planning process under which the state could achieve structural balance within five years. It began with a requirement that the governor submit to the legislature not just an annual budget, as is now required, but also a five-year plan to be adopted by the legislature.

The plan would project recurring state revenues and expenditures over five years, under current laws and explicit economic assumptions, and would identify the structural gaps that these numbers would produce. The initial plan would lay out options for policy initiatives to close the structural gaps over the course of the five years, calculating each year’s savings net of any up-front costs needed to achieve the savings. The plan would allow one-shots and a limited amount of borrowing, but only to meet temporary costs and only as part of the process that would bring the budget into eventual balance on the basis of genuinely recurring revenues. The plan would be adjusted periodically within the year to take account of the inevitable intervening changes.

The planning process would differ from current budgeting practices in two major ways. First, it would aim

at balance not just for the General Fund but for all non-federal-source state spending.

Second, the planning process would require the state to balance its budget according to Generally Accepted Accounting Principles (GAAP) as these principles are applied to governments by the Governmental Accounting Standards Board. In contrast with the state’s current practices, which recognize “receipts” when funds are received and “disbursements” when funds are paid out, GAAP would require revenues to be recognized when they are actually earned and would require expenditures to be recognized when the associated liabilities are actually incurred.

Governments that use versions of GAAP, like New York City, make adjustments—such as special rules for the treatment of surpluses—to take account of their particular circumstances. GAAP is not a panacea; no accounting system, GAAP included, is immune to manipulation. But it is no accident that GAAP has become the standard for accurate financial reporting in both the private and public sectors. It can reasonably be expected that GAAP budgeting would improve the quality of financial data on which budget decisions are based and provide more accountability than the state’s current system allows.

### **Ensuring Compliance with the Plan**

The state’s budgeting history gave little reason for confidence that a plan like the one I proposed would be self-enforcing. Therefore, the plan included mechanisms for producing compliance. One such mechanism was a Financial Review Board. Its members would be appointed by the governor and the legislature but would not be officers or employees of the state and would not have business with the state. Board members would be required to have general knowledge of the state’s economic and financial conditions and expertise in fields such as budgeting, accounting, or finance.

The Board would *not* be a “control board” and would have no direct budgetary power. Instead, its function would be to receive the financial plan, as updated throughout the year, and issue a finding as to whether the plan was projected to achieve structural budget balance by the end of the fifth year or—after the fifth year—whether the plan was in structural balance.

If the Board found that the submitted plan was not projected to achieve or maintain balance, the Board would be required to inform the governor and the state legislature. If the governor and legislature did not agree on corrective action within 15 days, the governor would be empowered to make across-the-board reductions to the extent necessary to achieve or maintain balance.

The five-year plan provided an additional mechanism to ensure budgeting compliance. It allowed the state to

engage in a limited amount of deficit borrowing in order to ease the five-year transition to structural budget balance—just as the Municipal Assistance Corporation, in the 1970s, was authorized to do transitional borrowing to give New York City time to bring its budgeting into compliance with GAAP. The state’s transitional borrowing would be subject to restrictions. The term of the borrowing would be the shortest period practicable. The borrowing could not exceed \$2 billion in any year. There would be no borrowing after the third year of the five-year plan. The borrowing would amount to no more than 10 percent of the state’s five-year cumulative deficit (then projected at approximately \$60 billion); the remaining 90 percent of the deficit-closing measures to reduce the structural gap would have to consist of spending reductions. No borrowing other than the transition borrowing could be used for the purpose of financing state operating deficits during the plan’s first five years.

In addition, the transition bonds, and all other state-supported debt issued during the plan’s first five years, would include a special covenant: The state would issue future state-supported debt only when the Board found that the state’s most recently updated financial plan was projected to achieve or maintain budget balance.

### **Reforms Needed to Make the Plan Work**

In addition to cash budgeting and the exclusive focus on General Fund budget balance, I concluded that other features of the state budgeting process were major obstacles to sustainable budget balance. One of them was the inadequate size of the state’s reserve funds; our reserves fall far short of what experts on state finance generally recommend, which is 10 to 15 percent of revenues.

If the state were to move to GAAP accounting, reserves would be especially important. In fiscal terms, the state is largely a pass-through entity; it collects and redistributes revenues and reimbursements. Under GAAP, the state would have less room to put off paying its obligations; therefore, it would need reserves of a size that was to ensure against volatility in its revenues and reimbursements. In our present climate of budget constraint, it is not realistic to expect the state to make large additional contributions to its reserves; but, for the longer run, the state must determine an adequate level of reserves and the rules for their use and replenishment.

Another overarching issue is the state’s peculiar fiscal year. Forty-six of the nation’s 50 states currently budget on a fiscal year that begins on July 1. Changing the beginning of New York’s fiscal year from its present April 1 to July 1 would address a number of problems in the current process. The state must currently engage in complex operations to manage the task of forecasting and budgeting for a fiscal year that begins on April 1 while the state’s highly volatile income tax receipts do not appear until after April 15. If the state were to move to budgeting under GAAP as

applied to governments, the problem would become still more pressing, because the state would be required to set aside adequate reserves to protect against possible inaccuracies in its revenue forecasts. Changing to a July 1 fiscal year would mitigate this problem by enabling the state to have its April 15 personal income tax receipts in hand when forecasting revenues for the coming year.

It is no small matter to change the starting date of a state fiscal year. Many localities and others that do business with the state are accustomed to the present state calendar. Further, changing to July 1 would require at least one fiscal year that does not consist of 12 months. In making my recommendation, however, I knew that New York State has professionals in the Division of the Budget and the Office of the State Comptroller who are more than competent to effect the change.

The last of the major reforms that I considered necessary to the five-year plan dealt with the deeper “crisis of governance.” For years, prospects for rational budgeting in New York have been harmed by the mutual suspicion between the governor and the legislature over their respective budgeting powers.

New York governors have strong authority in the passage of budget legislation; in recent years, the legislature has complained about governors’ taking advantage of this authority to insert substantive legislation into budget bills. On the other hand, New York Governors are unusually weak in their ability to make budgetary adjustments over the course of the year to keep the budget in balance. These features make co-operation between the two branches a matter of critical importance.

My plan gave the governor additional power, in the form of authority to make spending cuts if the governor and the legislature were unable to agree on corrective action in response to a finding by the Financial Review Board. I also recommended an accommodation to the legislature, by which the governor would agree not to insert language into executive branch appropriations bills that was more than incidentally legislative, while the legislature would be able to strike—though not amend or replace—language that was more than incidentally legislative.

### **The Five-Year Plan and 2010 Politics**

The state’s politics in 2010 were not hospitable to the five-year plan and its various attempts at balance.

Both the Office of Governor’s Counsel and the New York Assembly began drafting bills based on the five-year plan. But Governor Paterson chose not to submit a bill or to negotiate with the legislature concerning any of the drafts.

Instead, the enacted 2010-11 budget relied on techniques similar to those the state had employed in the past.

The Division of the Budget estimated that the enacted budget had made use of only \$600 million in non-recurring revenues; but the Budget Division arrived at that relatively low figure by counting any revenue as recurring if it promised to be available for more than one year. By contrast, the Office of the State Comptroller, counting revenues as non-recurring unless they are permanent, estimated that the 2010-11 budget includes several billion dollars in non-recurring revenues.

The state also used borrowing—but borrowing without the rules and accountability that constrained the borrowing in the five-year plan. For example, the state and its localities were allowed to spread their statutorily required contributions to the state pension plan over a longer period than was previously required. In effect, they were allowed to borrow from the pension plan in order to make the contributions to the pension plan that they were statutorily required to make. Similarly, the budget claimed a deficit reduction in the form of a reduction of certain corporate income tax credits—but committed the state to repay these amounts in three years.

But, underneath the conventional politics, the larger features of budget politics were changing, not only in New York but across the country. As the Center on Budget and Policy Priorities reports, 2012 is expected to be the states' most difficult budget year on record; so far, the states are projecting budget shortfalls of \$125 billion. At the same time, federal stimulus money, which played a major role in propping up state budgets during the recession, is ending. The proposed state budgets that have been released for the next fiscal year include deep cuts to state services, on top of the cuts already made since the start of the recession.

New York politics has reflected this trend; the budget that Governor Cuomo has outlined for New York State recognizes the severity of the budget problem, rejecting

formula-based spending increases and proposing substantial cuts in spending.

As of the date of this writing, we do not know what the budget will look like when enacted. In particular, we do not know how the budget's strategy of across-the-board cuts will affect the state's capacity to invest in its future.

A year ago, I wrote a piece for the *Albany Law Review* titled "Eating Your Seed Corn." It took its theme from the fact that farmers, after they harvest a year's crop of corn and before they sell or consume any of it, set aside part of it for the next year's planting. If a farmer fails to do so, he is, as the phrase goes, "eating his seed corn"—getting by in the short run, gambling on an upturn in his fortunes, and risking his long-term survival.

The seed corn of New York State and the United States as a whole is our physical and human infrastructure—our roads, bridges, mass transit, and water, as well as the system of higher education that maintains our human capital. The governor's current budget addresses part of the "seed corn" problem by finally facing the need to rein in unrestrained spending growth. But to deal with the issue of investment in the future, we will need a more searching examination of the balance between revenues and expenditures. The objectives of eliminating deficits, instituting a sensible budgeting process, and investing for the future will give rise to conflicts. The political system's responsibility to address these conflicts is compelling.

**Richard Ravitch was appointed Lieutenant Governor by Governor David A. Paterson on July 8, 2009. Prior to his appointment, Lieutenant Governor Ravitch was a Partner in the law firm Ravitch, Rice & Co. and served as Chairman of the Commission on MTA Financing, which Governor Paterson formed to examine financing options for the MTA.**

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April 27, 2011

Dear Standing Committee Chairs:

It has come to my attention as Counsel to the Majority that there may be a serious misinterpretation of Senate Rule VII, Section 4, Paragraph (e). This Rule, which provides for the petitioning of a public hearing on a bill, may have recently been improperly utilized for the purpose of advancing specific legislation and drawing public attention to the same.

The purpose of such a petition is to have a Standing Committee conduct a public hearing. It is not a vehicle to advance legislation for a vote. The intent of the petition process for a public hearing in the Senate Rules is to allow Senators to enable a Standing Committee to conduct a Public Hearing, on important issues to the state, pursuant to the investigatory or oversight function of such Committee. It was not intended to be used to try to report a bill out of a Committee. Public hearings are a natural extension of the Committee's responsibility "to conduct oversight of the administration of laws and programs by agencies within its jurisdiction". As they are not without cost, they are intended to be exercised judiciously, and with discretion, on important issues to New York State. As a result, several requirements have been imposed upon conducting a public hearing. These include requiring that multiple Senators be present to take testimony, that a record may be kept by stenography, video and/or webcasting, that testimony of witnesses can be compelled, that Committee expenses for the conduct of the public hearing can be obtained upon warrant to the Comptroller, and that specific prior notice of such public hearing must be formally provided to the public. Moreover, pursuant to the Senate Rules, the purpose of Public Hearings is "to permit interested persons, groups or organizations the opportunity to testify orally or in



writing on legislation or issues pending before such standing committee” when such legislation:

- Is of important public interest;
- Allocates significant public money outside of the budget;
- Regulates broad conduct; or
- Has a broad public impact.

There is a need for the Senate to be fiscally prudent and cautious in its expenses and costs (see, e.g., Legislative Law, Article 6 [statutory mandate establishing internal control responsibilities]). Committees, while important to the function and process of the Senate as a body, must also restrain their activities to comport with overall fiscal austerity measures. In much the same way as any legislation submitted for introduction must have with it a sponsor's memorandum detailing certain specific criteria such as fiscal impact and justification, a Committee, to properly consider a petition for a public hearing must have a valid petition before it. Such petitions should be valid only if they contain proper and necessary detailed information.

Upon consultation with the Secretary to the Senate, and our Chief Fiscal Officer it was determined that to be in compliance with the Legislative Law and the intent of the Senate Rules these petitions must include but are not limited to:

- itemized costs and expenses for the public hearing including necessary location and set up costs, security requirements, and travel expenses for members and/or staff expected to attend the hearing,
- specific information on who is expected to testify and what the broad categories of testimony, and any associated costs and expenses associated with the testimony,
- the availability of alternatives to a public hearing, and, why such alternatives are not adequate to meet the objectives of the petitioner(s),
- any other bills that may be implicated by the testimony of this public hearing, and
- whether any or all of the petitioners expect to submit any other petitions for public hearings for other bill(s) before this or other committees.

Invalid petition requests and acceptance of facially inadequate petitions would seriously diminish the value and role of public hearings conducted in the Senate, and also jeopardize important efforts to impose fiscal restraint on the operations of

the Senate, and eliminate opportunities in the future to address important issues for all Standing Committees.

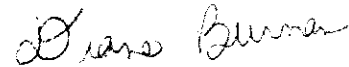
Accordingly, pursuant to the Senate Rules, a petition for a public hearing on a bill, under Senate Rule VII, Section 4, Paragraph(e), should not be submitted for the purpose of merely advancing specific legislation, but must be related to the Standing Committee's responsibility to conduct oversight of the administration of laws and programs by agencies within its jurisdiction, and to allow interested persons, groups or organizations the opportunity to testify orally or in writing on legislation or issues pending before such standing committee when such legislation is of important public interest, allocates significant public money outside of the budget, regulates broad conduct, and/or has a broad public impact. Further, at a minimum, any valid petition must contain the aforementioned information so as to permit the Secretary to the Senate and the Chief Fiscal Officer to ascertain the impact of the proposed hearing on the operations of the Senate as a whole, as well as inform the appointed committee members of the impact on the future operations of the Standing Committee.

Under the Senate Rules and the Legislative Law, any petition for a public hearing which does not comport to such requirements is therefore not a proper and valid petition before a Standing Committee and should not be considered by such Standing Committee.

I trust that this clarification of the Senate Rules satisfies questions raised on petitions for public hearings. This guidance in no way seeks to diminish any Senator's right for a public forum. In fact, the Senate Rules clearly provide for an alternative mechanism to advance, and to bring the public's attention to, a piece of legislation that has been introduced by an individual Senator. Pursuant to paragraph (b), Section 4 of Rule VII, a Public Forum, which is different from a Public Hearing, can be employed separate from the Standing Committee's oversight and investigation function. Such a Public Forum therefore may be convened by any Senator, who is a member of the Standing Committee, on any individual piece of legislation, provided that prior notice of the Public Forum is given to the Standing Committee Chair. Unlike a Public Hearing, the cost of a Public Forum must be borne by the Senator, or his or her party conference, that convenes the same.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Diane Burman".

Diane Burman

cc: Senator Dean G. Skelos, NYS Senate Majority Leader  
Senator John L. Sampson , NYS Senate Minority Leader  
Laura Wood, Esq. Counsel to the Senate Minority



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November 28, 2011

Via U.S. Mail and E-mail

Diane Burman  
Counsel to the Majority  
Room 335  
Capitol Building  
Albany, NY 12247

Dear Ms. Burman,

We have recently learned of a serious step backwards in the functioning of the New York State Senate, based upon an interpretation of the Senate Rules from your office that is plainly wrong. Specifically, in clear violation of Senate Rules first passed by a Democratic majority in 2009 and passed again by the Republican majority in 2011, you have instructed committee chairs to reject, without a public vote, petitions for hearings on specific bills. This “interpretation” of the Senate Rules has no support in either the text of the rules themselves or in the context of their passage. It is a change by fiat and an obvious attempt to reduce the transparency and accountability of the Senate without a change in the rules themselves. Of course, such a change would require a public vote by all members, and it would no doubt be politically embarrassing to those who supported it. Needless to say, we believe avoiding political embarrassment is an insufficient justification for the action taken by your office.

On April 27, 2011 you sent a letter (the “April 27 Letter”) to the chairs of the Senate’s standing committees expressing concerns about a “misinterpretation” of Senate Rule VII (4)(e), which expressly authorizes one-third of the members of a committee to schedule a public hearing on a “specific bill or number of bills within the jurisdiction of a committee, unless a majority of members of the committee rejects the hearing petition.” The tortured reading of Rule VII (4)(e) that follows directly contradicts the text and context of the rule, and undermines its democratic goals.

In the April 27 Letter, you write that Rule VII (4)(e) shall not apply to petitions for public hearings whose “purpose [is] advancing specific legislation and drawing public attention to the same.” In fact, as detailed later in this letter, that was the very purpose for which this rule was drafted. Instead, without support, you argue that hearings will only be permitted when they satisfy certain criteria. This list of criteria was apparently taken from subsection 4(a) of Senate Rule VII. But subsection 4(a) is not a proscriptive rule. It does not limit the subject of standing committee hearings, but rather “encourages” chairs of standing committees to hold certain kinds of hearings.

More importantly for the purposes of understanding subsection 4(e), subsection 4(a) should be irrelevant to its interpretation; it is an entirely different subsection of the Senate Rules. Subsection 4(e) establishes a *procedural standard* through which the members themselves, through their votes, can determine whether a particular bill requires a hearing. This is true *regardless of the topic of that hearing*, so long as its subject is a “specific bill or number of bills within the jurisdiction of a committee.”

Beyond the text, your letter ignores the context within which this rule was first enacted by the Democratic Senate majority in 2009 and then again by the Republican majority in 2011. If there were ambiguity in rule 4(e) that required interpretation (and there is not), the record surrounding the adoption of the rule would certainly make clear the unlawfulness of your interpretation.

The rule itself is the product of years of criticism of the imperial practices of the New York State Legislature, documented empirically in 2004 by the Brennan Center's widely-cited study, titled *The New York State Legislative Process: an Evaluation and Blueprint for Reform*.

The fundamental finding of that report deserves repeating, both because of its relevance to the rule in question and because of the Senate majority's ongoing efforts to ignore its democratic import.

In most legislatures, committee hearings serve four important purposes. First, they allow a committee to obtain the testimony of experts in the policy field at issue that addresses both the precise nature of the problems that require legislative attention and the wisdom of the specific bill under consideration. Second, hearings allow members of the public and other witnesses to comment on both the topic and the bill at hand. Third, through debate between committee members at the hearing, and media and public reactions to the hearing, legislators gain both specific ideas to improve the bill under consideration and a better understanding of the public consensus, or competing views, on the proper legislative course. Such fact gathering and debate are critical to shape and draft legislation, to determine legislative priorities, and to understand the intended and unintended consequences of a proposed bill. Fourth, hearings provide the chief mechanism for a legislature to oversee the administrative agencies for which it is responsible under the law.

In New York, however, a committee hearing devoted to a specific piece of legislation is all but unheard of. In the Senate, out of the 152 pieces of major legislation that were ultimately passed into law from 1997 through 2001 for which complete data were available, only one bill was the subject of a hearing devoted specifically to its consideration (*i.e.*, 0.7%). The Senate Majority Leader sponsored that bill. Moreover, in only eight cases (*i.e.*, 5.3%) were hearings held to address the general topic or problem addressed by a bill, and none of those hearings addressed the bill itself. Daniel Hevesi, a former Democratic State Senator, summed up the situation as follows: “[T]he system of governance in Albany is so broken that I don’t believe it functions any longer as a representative democracy. There’s no debate, no discussion, *never any hearings* (emphasis in original) (citations omitted).

As the Center’s follow-up reports in 2006 and 2008 make clear, nothing occurred in those years to alter the above findings. The Brennan Center and a number of other reform-minded groups continued to push for rules reform, including adoption of the practice, standard in state legislatures from New Hampshire to Texas, of encouraging standing committees to hold public hearings on specific pieces of legislation.

In April of 2009, the Senate Temporary Committee on Rules and Administration Reform’s draft report reaffirmed the important role public hearings play in identifying potential flaws in legislation and improving the final product. It quoted Lawrence Norden of the Brennan Center in support of this position: “[at hearings] in other states and in Congress, problems with legislation are sometimes brought out that legislators haven’t thought about. And that can result in changes to legislation and in changes...in the positions of legislators on that legislation.”

The report went on to recommend the adoption of a rule to allow for one third of the members of a committee to petition to hold a hearing on a specific bill.

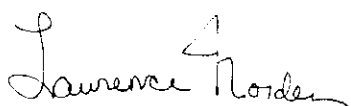
In July of 2009, after years of criticism about the lack of hearings on legislation, and following the turmoil that marked the early part of that year (including two changes in party control of the chamber), the Senate adopted a series of new rules, one of which is now numbered VII(4)(e). At the time, the Senate trumpeted the bipartisan passage of these rules in a joint statement that included then Senate President Malcolm A. Smith and Minority Leader Dean Skelos. The statement noted that the new rules would “increase transparency, strengthen the committee process, provide the public with more information, and give senators greater ability to bring bills to a vote in committees or by the full Senate.” It also pointed out that “committees will have guidelines to encourage public hearings on bills and invite speakers to committee meetings to discuss pending legislation.”

The Brennan Center and other reform groups applauded those changes as small but “important steps to empower rank and file members and increase chamber transparency,” and took particular note of the rule that would allow “one third of the membership of a committee to petition to hold hearings on specific bills (subject to the approval of a majority of the committee).”


Given that your reading of Senate Rule VII (4)(e) is unsupported by a plain reading of the text itself, the contemporaneous comments of the senators who passed it, or the context of criticism under which it was passed, we urge you to reconsider your finding. There is a serious danger to the integrity of the Senate chamber if senators can avoid the clear purpose of the Senate Rules by simply having majority counsel find that the rules mean what the majority would like them to mean, regardless of what they actually say.

If the majority conference determines, for whatever reason, that it does not want to hold public votes on petitions for public hearings as required by the Senate Rules, it should not hide behind a tortured reading of the rules that is without any support. Instead, it should vote to amend the rules, so that voters can see for themselves which senators supported a less deliberative and transparent chamber.

Sincerely,



Lawrence Norden  
Deputy Director, Democracy Program  
The Brennan Center for Justice  
at NYU School of Law



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Senior Fellow  
The Brennan Center for Justice  
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Eric J. Schmertz Distinguished Professor  
of Public Law and Public Service  
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## **Mayor Ed Koch**

Mayor Ed Koch saved the City of New York from bankruptcy, restoring its fiscal stability. During his three terms as Mayor from 1978-1989, he was responsible for placing the City on a GAAP (Generally Accepted Accounting Practices) balanced budget basis. He created a housing program which, over a ten-year period, provided more than 150,000 units of affordable housing financed by city funds in the amount of \$5.1 billion. Ed Koch created for the first time in New York City a merit judicial selection system and selected some of the most outstanding public servants to serve in his administration. Senator Daniel Patrick Moynihan said of Mayor Ed Koch, "He gave the city back its morale...And that is a massive achievement."

Prior to being Mayor, Ed Koch served for nine years as a Congressman and two years as a member of the New York City Council. He attended City College of New York from 1941 to 1943. In his last year of college, he was drafted into the Army where he served with the 104th Infantry Division. Ed Koch received two battle stars, Combat Infantry badge, and was honorably discharged with the rank of Sergeant in 1946. In that year, he also attended the New York University School of Law. He received his LL.B. degree in 1948 and began to practice law immediately thereafter.

Ed Koch is currently a partner in the law firm of Bryan Cave LLP. He hosts a Friday evening call-in radio program on Bloomberg AM 1130 (WBBR). Ed Koch is a weekly guest on NY1 television with former Senator Alfonse D'Amato and former Public Advocate Mark Green. He writes a weekly commentary, and he writes movie reviews which appear in *The Villager*. He also lectures around the country.

Ed Koch formed New York Uprising, an independent coalition that advocates for meaningful government reform across New York State, and seeks to "put an end to corruption in Albany to reinstate the public's faith in government by offering real, honest and sensible solutions that legislators can implement, adhere to and be held accountable for executing."

In 2004, Ed Koch was appointed by Secretary of State Colin L. Powell as Chairman of the U.S. Delegation to the Conference on Anti-Semitism sponsored by the Organization for Security and Cooperation in Europe (OSCE). The conference, held in April 2004 in Berlin, Germany, was extraordinarily successful in binding the 55 member nations in their resolve to reduce and seek the elimination of rising anti-Semitism by enacting civil legislation and educating the youth throughout the world of the dangers of anti-Semitism. Ed Koch is known and praised as a public figure with the common touch, a leader who is "a voice of reason." In April 2005, he was appointed to the United States Holocaust Memorial Council by President George W. Bush for a five-year term.

Additionally, Ed Koch is the author of numerous books which include *Mayor, Politics, His Eminence And Hizzoner*, *All The Best*, *Citizen Koch*, *Ed Koch On Everything*, *Giuliani: Nasty Man, I'm Not Done Yet: Remaining Relevant*, *Buzz: How to Create It and Win with It*, *The Koch Paper: My Fight Against Anti-Semitism*, and two children's books which he co-authored with his sister, *Pat Koch Thaler: Eddie, Harold's Little Brother* and *Eddie's Little Sister Makes a Splash*.



## **Dick Dadey**

Dick Dadey is the executive director of the Citizens Union and Citizens Union Foundation, both interrelated organizations working since 1897 in pursuit of good government and political reform in New York. Since becoming executive director in 2004, Dadey has led the revitalization of the historic group as it has once again become an effective watchdog on government and serves as influential civic affairs organization.

Dadey has an extensive background as an advocate for and leader on many different civic-related issues from LGBT equality to city parks to government reform. He has a long and varied history of being an issues advocate, lobbyist, political strategist, community organizer, and fundraiser, having spent twenty-five years of his professional life working for and with not-for-profit advocacy organizations. In addition to Citizens Union, he has served as executive director of three other non-profit organizations, City Parks Alliance, New Yorkers for Parks, and the Empire State Pride Agenda, having helped found the last organization in 1991.

Dadey directed government relations and client services for the New York City office of M&R Strategic Services, a national government affairs and public relations firm serving a diverse group of not-for-profit organizations. He also was the first ever development director for the organization, Human Rights Campaign, when it first was establishing its national fundraising operation.

Dadey presently serves as Treasurer on the boards of the Brooklyn Bridge Park Coalition, Friends of Hudson River Park, and the Brooklyn Heights Association.

A native of Syracuse, New York, Dadey graduated from Syracuse University with a B.A. in American Studies and lives in Brooklyn Heights.



## **Mitra Hormozi**

Mitra Hormozi is a partner in the New York office of Kirkland & Ellis LLP. She focuses on investigations and criminal litigation.

Before joining Kirkland, Mitra was Chief of the Organized Crime and Racketeering Section at the U.S. Attorney's Office for the Eastern District of New York, where she was involved in complex racketeering investigations involving mail and wire fraud, money laundering, extortion and murder. Mitra had oversight over dozens of investigators, agents and junior prosecutors, and indicted 64 defendants in one racketeering case. She also prosecuted the "Mafia Cops" case, a racketeering case involving two New York City police officers who were hit men for the mob. She argued and won the case before the Second Circuit. She was also on the trial team that tried the boss of one of the five organized crime families in New York.

Mitra later became Special Deputy Chief of Staff to then-Attorney General Andrew Cuomo. In that capacity, she oversaw the affirmative cases throughout the regional offices of New York and supervised high profile initiatives involving public integrity, the false claims act and internet fraud, including working on settlements with social networking sites such as Facebook. She also investigated state Senator Pedro Espada, filed a civil complaint against him and partnered with federal authorities to file a criminal indictment against him. In January 2011, Governor Andrew Cuomo appointed Mitra to Chair the New York State Commission on Public Integrity. The commission enforced the public officers law for the executive branch of state government and had oversight of the lobby laws for all branches of state government.



## Glenn D. Magpantay

Glenn D. Magpantay is the Director of the Democracy Program at the Asian American Legal Defense and Education Fund. His work at AALDEF includes enforcement of the federal Voting Rights Act with regards to bilingual ballots and redistricting, access to the vote, Asian American political opinion, and census public education, advocacy, and monitoring.

Mr. Magpantay has represented Asian Americans in high profile voting rights cases including *Chinatown Voter Education Alliance v. Ravitz*, an action against the New York City Board of Elections for compliance with the Language Assistance Provisions (Section 203) of the Voting Rights Act for Chinese and Korean assistance; *Rodriguez v. Pataki*, a challenge to New York's state legislative redistricting plan; and *US v. Boston* which resulted in Boston's first-ever bilingual ballots in Chinese and Vietnamese.

He oversees AALDEF's Asian American Election Protection efforts in fifteen states across the Northeast, Mid-Atlantic, and Midwest. In 2008, he coordinated the nation's largest multilingual exit poll of Asian Americans surveying over 16,000 voters in 11 states and 52 cities. He organized hundreds of pro bono attorneys to monitor poll sites to guard against anti-Asian voter discrimination. In 2009, he was summoned to testify before Congress about his findings.

He is a recognized authority on minority voting rights and Asian American political participation. He has published scholarly legal articles, authored a number of reports, and has given commentary to numerous media outlets including *The New York Times*, *USA Today*, *Boston Globe*, CNN, and National Public Radio. He teaches "Race & the Law" at Brooklyn Law School and "Asian American Civil Rights" at Hunter College/ CUNY.

Outside of his professional activities, Magpantay serves as co-director of the National Queer Asian Pacific Islander Alliance (NQAPIA), a national federation of Asian American, South Asian, Southeast Asian, and Pacific Islander lesbian, gay, bisexual, and transgender organizations.

Magpantay attended the State University of New York (SUNY) at Stony Brook on Long Island, and graduated *cum laude* from New England School of Law in Boston – after being admitted as an affirmative action beneficiary.





## **Senator John L. Sampson**

Senator John Llewlyn Sampson, Leader of the Democratic Conference was elected to the New York State Senate in 1996. He represents the 19th Senatorial District which encompasses Canarsie, East Flatbush, Parts of Brownsville, Crown Heights, East New York, portions of Old Mill Basin, Spring Creek Towers, and parts of Midwood and Kensington in Brooklyn.

Senator Sampson was born in Bedford Stuyvesant, Brooklyn, to American and Guyanese parents. At the age of two, he moved to the Brownsville/East Flatbush section of Brooklyn with his family, where he grew up. Senator Sampson was educated in New York City's Public School 233, and in 1983 he graduated from Tilden High School in Brooklyn. John received his Bachelor of Arts in Political Science in 1987 from Brooklyn College of the City University of New York. While in college, he was employed as a paralegal for the Corporation Counsel of the City of New York.

Following his graduation from Brooklyn College, Senator Sampson worked for Proskauer, Rose, Goetz & Mendelsohn as a litigation assistant. In 1988, he enrolled at Albany Law School.

During his studies there, he worked with the Department of Environmental Conservation until his graduation in 1991.

In April 1992, Senator Sampson was admitted to the New York Bar, at which time he became a staff attorney for the Legal Aid Society of New York, representing clients in administrative and housing court proceedings. In 1993, he began working in private practice representing clients in Real Estate, Criminal and Election matters.

In acknowledgment of his many achievements, John has been recognized by the Office of President, Borough of Brooklyn, City of New York, and is the recipient of numerous awards from many organizations, including: The Legal Aid Society; The Kings County Housing Court Bar Association; 100 Women for Justice; Metropolitan Jewish Health System; the Mid-Bedford Lions; the Greater New York Business League; the Outstanding Young American Award; and the Congressional Legal Service Award. The Senator is also a member of the Board of Trustees of Albany Law School. He is a former member of the Kingsbrook Jewish Medical Center Board of Trustees, and is currently a member of the Brooklyn Bar Association and other distinguished legal organizations.

Senator Sampson has the distinction of being the first African American to serve as the Chairman of the Senate Judiciary Committee. He has also served as Chair of the Senate Ethics Committee and the Senate Administrative Regulations Review Commission.

While Chair of the Judiciary Committee, Senator Sampson made his commitment known to improving diversity within the New York State Court System calling for more hiring of minorities and women for judgeships. Senator Sampson also conducted the confirmation hearings for Chief Justice of the New York Court of Appeals, Judge Jonathan Lippman.