



Testimony of

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and the
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Good morning, Madam Chairperson, Mr. Co-Chair, and distinguished Assemblymembers. Thank you for the opportunity to speak at this very important hearing. My name is Justin Levitt, and I am an attorney at the Brennan Center for Justice at NYU School of Law, here today together with my Brennan Center colleague, Kahlil Williams. The Brennan Center is a non-partisan organization that unites scholars and advocates in pursuit of a vision of inclusive and effective democracy. Toward that end, the Center's Democracy Program promotes reforms that eliminate barriers to full and equal political participation and that foster responsive and responsible governance. The Center has conducted substantial research into redistricting processes across the nation, including the particular conditions under which district lines are drawn in New York State.

We are very pleased that the Committee and the Task Force have chosen publicly to scrutinize how New York State draws the boundaries for its congressional and state legislative districts. We commend you for prioritizing this critically important process, and for publicly airing this debate well before the next redistricting cycle is upon us. We further urge the Committee to ensure that action – that is to say, meaningful reform – follows in a manner as timely as these hearings.

Today, we briefly lay out an overview of the need for reform and some of the more important components that effective reform should incorporate. We describe the structure of the current system by which New York district lines are drawn, noting especially the potential for legislators to influence their own districts' boundaries, and the risks of such a system. We also describe an apportionment anomaly, in which incarcerated individuals are tallied not at their former residences, but in the districts where they are imprisoned, exacerbating existing population disparities. We then

propose several specific elements for a reform effort in New York, directed at addressing the concerns above: meaningful independence, meaningful diversity, meaningful guidance, and meaningful enumeration of prisoners in the districts that they understand to be their communities. Although we focus our discussion today on addressing concerns that may be most apparent in the content of state legislative districts, the same principles will also apply to congressional redistricting.

The New York redistricting system

We appreciate the opportunity to appear before you to discuss meaningful reform because the current redistricting process in New York State is substantially flawed. Each state's redistricting system is slightly different, in both design and implementation. As you know, New York is one of several states with an "advisory commission": a commission responsible for preparing data and draft plans for the legislature's review. Iowa, Maine, and Vermont, for example, also have sorts of advisory commissions – but these function very differently.

As in Iowa, New York's advisory commission – the Legislative Task Force on Demographic Research and Reapportionment – prepares data and submits draft plans for the legislature's approval. However, while Iowa's commission is comprised of nonpartisan career staff, New York's commission is partisan by design: four members of the legislature, majority and minority, and two citizens handpicked by the legislative leadership. And while the Iowa commission's plans – generally developed with little legislative input – are submitted at least twice for a pure up-or-down vote, the plans that arrive on the New York legislative floor have usually been developed with extensive input from individual legislators, and can be further modified thereafter.

There are many other differences between New York's advisory commission structure, and the way in which this structure has been deployed in the last few decades, and the redistricting structure of other states. Some of these distinctions are more relevant to the nature of the process, some less so. And, to be sure, New York is neither Iowa nor any of these other states, and should not look to transplant their procedures as-is. That said, there appears to be much of value to learn. The net effect of the particular manner in which New York has developed its redistricting system is that unlike many of these other states, many New York legislators become extensively involved in determining the bounds by which they are elected – and, further, are able to do so in ways not readily transparent to the public.

The risks when legislators draw their own districts

Such a process contains substantial risks. As you are keenly aware, the process of drawing legislative lines affects the interests of individual legislators, the interests of political parties, and the interests of represented communities – or, put differently, the public good. When legislators personally are able to set the lines by which they are elected, there arises a natural temptation to conflate the three, even when those officials act with the purest of motives. That is, even conscientious elected representatives might

be tempted to draw electoral lines that insulate their districts from effective challenge and promote their party's fortunes – because they believe themselves and their party best able to serve their constituents.

Such temptations – whether fueled by self-interest or zealous advocacy – weaken the democratic process and blunt the voice of the electorate. By drawing district lines to promote individual and party security, legislators with a hand in the districting process become enmeshed in the task of building districts based on favored constituents and disfavored ones. That is, representatives become involved in the business of choosing their constituents, rather than the other way around. And even if some individuals choose to forgo this temptation, a system that encourages legislators to design their own districts fosters the public perception that illicit self-dealing is at work.

The effect in New York: little effective challenge

These concerns are very much alive in New York. To many observers, it appears that legislative control of the districting process, without significant gubernatorial intervention, has produced a bipartisan gentleman's agreement ceding Democratic control to the Assembly and Republican control to the Senate. The chambers have remained continuously divided – with the same citizens electing Republican majorities in the Senate and Democratic majorities in the Assembly – for three decades. In no other state has the legislature been continuously divided for so long.¹ And it appears that the division has been maintained, at least in part, by legislative district lines drawn so as to eliminate significant electoral threat to incumbents of both parties.

The appearance of a bipartisan lockdown is driven, in part, by visible outcomes: districts are drawn in bizarre shapes, and elections are won with overwhelming margins. Neither factor would likely be especially worrisome, alone or together, if legislators were not themselves responsible for drawing their own districts. However, with the structural opportunity for self-interest, it looks to many as if the contest has been rigged.

First, consider the appearance of the legislative districts themselves. We understand that communities conducive to coherent representation rarely emerge in neat geometric patterns. Moreover, the fair and effective representation of minorities sometimes calls for combining pockets of populations into irregularly shaped districts. But some of New York's legislative districts take twists and turns that are so strange and so little premised on well-articulated communities of common interest, that it appears that the most compelling reason for the district's shape is simple electoral advantage. NYPIRG has memorably lampooned some such districts in its “Pablo Picasso/Salvador Dali Awards,”² but it is no laughing matter if the artistic twists are deployed to undermine effective political challenge.

¹ Citizens Budget Commission, *The Palisades Principles: Fixing New York State's Fiscal Practices* 24 (2004).

² Shaila K. Dewan, *Albany: The Lighter Side of Redistricting*, N.Y. TIMES (Mar. 12, 2002).

Second, New York's recent electoral outcomes give onlookers reason to believe that the odd district shapes are indeed designed to impede challenge. Turnover in New York is notoriously low, and electoral margins are notoriously high:

- In the last decade, as many state legislators (12) have died in office as have been defeated at the polls in November.
- When primaries are added to the mix, in ten years, out of 2332 possible elections, 22 incumbent legislators have been displaced by the will of the voters.
- Fewer than 6% of the state legislative races from 1994-2002 were decided by 10 points or less.
- The average margin of victory in this same period was more than 45%.

We certainly acknowledge that turnover is not justified merely for turnover's sake. There are benefits to an experienced legislative body, and in many cases, constituents are undoubtedly pleased with the representation they receive.³ Moreover, to the extent that tenure reflects electoral stagnation rather than constituent satisfaction, the district lines are not solely to blame: campaign finance and ballot access rules, for example, contribute to a sizable incumbency advantage. Yet a few anecdotes support the conclusion that district lines drawn to protect incumbents are at least partially to blame for an unnaturally low level of electoral challenge. For example, after Hakeem Jeffries won 41% of the 2000 primary vote against 20-year Assemblyman Roger Green, the district lines were redrawn, leaving Jeffries' residence just slightly outside of Green's new district.⁴ If incumbent legislators were insulated from the drawing of district lines, the new district's contours might have been easier to explain as coincidence.

The effect in New York: dilution

New York's redistricting process has also produced variations in district population size that provide apparent support to charges of personal and partisan self-interest. As you know, under the federal Constitution's "one person one vote" doctrine, legislative districts must be of substantially equal size to guarantee each citizen's voice equal weight. Congressional districts must be the product of a good-faith effort to achieve *absolute* population equality, while the Constitution permits a slightly larger population range among state legislative districts.⁵ Nevertheless, in the 1970s and 1980s,

³ It is well known, for example, that citizens can be dissatisfied with the conduct of a legislative body as a whole, while enthusiastically supporting their own legislator. See, e.g., Glenn R. Parker & Roger H. Davidson, *Why Do Americans Love Their Congressmen So Much More Than Their Congress?*, 4 LEGIS. STUD. Q. 53 (1979). Recent New York surveys show, however, a more disturbing pattern: fewer than half of New Yorkers apparently believe that their local legislators are looking out for their own constituents' interests. Siena College Research Institute, Empire Center for New York State Policy, Survey of New York State Voters, Jan. 3, 2006, at <http://www.empirecenter.org/pdfs/sr01-06.pdf>.

⁴ Doug Israel, *Why Gerrymandering Must Go*, GOTHAM GAZETTE, Feb. 14, 2005.

⁵ See *Karcher v. Daggett*, 462 U.S. 725 (1983); *Brown v. Thomson*, 462 U.S. 835 (1983).

the Supreme Court effectively set a 10% limit on the permissible deviation of state legislative districts: a state plan with a 10% discrepancy between the size of the largest district and the size of the smallest district would be considered presumptively unconstitutional.⁶

New York's state legislative districts now tread on the threshold of unconstitutional population disparity. In the Assembly, districts upstate (and on Long Island) have been packed with more voters than districts in New York City, rendering each upstate vote "worth" less. Indeed, the Assembly district disparities in the last redistricting cycle reached as high as 9.43% total deviation above and below the "ideal" district size. In the Senate, the reverse is true, with upstate votes worth more than their downstate counterparts. The most recent Senate disparity reached as high as 9.78%.

Against this background, both houses count individuals who are incarcerated as residents of prison facilities rather than as members of their former communities, despite the fact that most of these citizens cannot vote. Tallying incarcerated citizens where they are detained and stripped of the franchise contravenes much of what we understand by "representation," as the individual who is granted political authority over the district is neither chosen by the imprisoned citizens who live within his or her jurisdiction, nor is there any structural incentive for such an official to feel responsive to the imprisoned population. Furthermore, this enumeration contravenes the manner in which an inmate's legal geography is assigned in other contexts – including family law, federal court jurisdiction, and most pertinently, voting. The New York Constitution states: "For the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while confined in any public prison."⁷ To maintain both consistency and fairness, an incarcerated citizen should therefore be assigned by default to his or her last address before imprisonment. Yet because the State adopts federal census counts without modification, and because the census assigns a residence to incarcerated individuals based on the prison's location, such citizens are usually tallied far from "home."

If incarcerated citizens were tallied in their appropriate communities, the population variance of the State Senate districts – at the least – would very likely exceed the Constitution's 10% disparity threshold. Little data is currently available concerning the last prior residence of incarcerated New York citizens, but data is collected for the regions in which citizens are convicted; assuming that most prisoners are convicted in the rough vicinity of their residence, it appears that most incarcerated citizens are imprisoned upstate but previously resided elsewhere. Tallying such citizens as they should be tallied would reduce the population of the underpopulated upstate State Senate districts even further. For example, if even 13% of the Watertown Hub prison facilities' 5291 inmates previously resided outside of the State Senate district containing the Hub, the district would deviate 5.17% from the Senate district ideal . . . and would bring the State as a whole over the presumptively unconstitutional 10% threshold.⁸

⁶ See *White v. Regester*, 412 U.S. 755 (1973); *Brown*, 462 U.S. at 842-43.

⁷ N.Y. CONST. art. II, § 4.

⁸ Data aggregated from Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York* (2002), at <http://www.prisonpolicy.org/importing/>.

New York City is hit especially hard by this flawed count. In the 2000 cycle, the State’s redistricting process accounted for more than 43,000 City residents in districts hundreds of miles away from their constitutionally recognized homes.⁹ Moreover, the skewed count is especially keenly felt among racial and ethnic minorities; a disproportionate number of the 43,000 New York City prisoners removed from their communities in the apportionment process are African-American and Latino citizens. These communities lose tangible representation, and find their votes devalued, under New York’s current enumeration scheme.

Prospects for reform

All of the above present cause for concern, and the members of this Committee are to be commended for their attention to the issue. Even if the rates of incumbent challenge and vote dilution above are due to other factors entirely, the potential for self-dealing in the process creates the appearance of a conflict of interest tilting the electoral scales toward incumbents. This, in turn, creates a risk that the public will lose confidence in the impact of its vote altogether.

However, thanks to leadership within the Legislature and within this Committee – and thanks to the hearings set in motion in Utica, Buffalo, and here today, there are promising prospects for reform. We believe that other speakers will address some of the proposed bills already before the Legislature in greater detail. With the short time remaining, we would simply like to highlight four aspects of proposals for reform that we believe to be crucial in the effort to restore constituents’ faith in the fairness of the districting exercise.

First, an independent process. We have already described the appearance of impropriety that results when legislators are intimately involved in drawing their own district lines. For the benefit of the institution as a whole, and for the public good, we encourage the Legislature to place redistricting authority beyond the irresistible temptation of individual manipulation. The authority responsible for redistricting in New York State – and just as important, the staff supporting that process – should be meaningfully independent from undue legislative influence.

We stress the limiting adjective “meaningful” with the understanding that cosmetic independence will not suffice. Meaningful independence means freedom from pressure, influence, and possibly even ex parte contact. Furthermore, meaningful independence requires transparency to monitor the commission’s progress – and may require multipartisan balance to enforce.

There are at least two further substantial caveats to implementing a system that guarantees those who draw the district lines some measure of independence. One, it will not be adequate simply to import wholesale the procedure of another state. This is not to say that there is a dearth of models to learn from: Arizona uses a two-tier system of

⁹ *Id.*

nominations and appointments to select bipartisan redistricting commissioners who then jointly select a tiebreaker. Idaho uses a bipartisan redistricting commission with strict limits on running for office before or after appearing as a commissioner, and strict limits on the use of partisan data. Maine, as mentioned above, uses an advisory commission with “citizen commissioners” among the 15 individuals providing drafting support, and builds compromise into the process through a supermajority voting requirement; Iowa’s 100-person advisory commission is drawn from a nonpartisan career staff. Elements of each of these systems might be productively deployed in New York. And yet, as Angelo Falcón has recognized, using Iowa as a knee-jerk example for New York is like “mixing mangos with bananas.”¹⁰ If other states’ procedures are to be used as models, they must be adapted for New York’s particular political climate.

Two, the fact that New York’s redistricting body should be independent does not mean that it should mindlessly carve the state into neat rectangles or circles. District lines serve a community only when they reflect the community, and communities do not evolve with mathematical exactitude. There will still be ample need for political compromise: the arbiters of district lines will be called upon to seek fair and equitable representation for racial and ethnic minorities, preserve preexisting municipal and county bounds, and grant representation to real communities of interest spread out in irregular fashion. Independence does not attempt to take the politics entirely out of the redistricting process. The difference is that, in a body with independence, those with a particular incentive to lock out competent challenge will not be given access to the keys.

Second, a diverse representative body. The need to reconcile the competing and complementary interests above demonstrates the second element of a successful effort at reform: the redistricting body must be meaningfully diverse. Those responsible for drawing district lines must reflect ample geographic, racial, ethnic, and political diversity, so as to prevent charges of self-dealing similar to those that have found a foothold in the current system, but on a group level rather than an individual level. That is, the redistricting body must be sufficiently diverse to be legitimate in the eyes of the citizens districted by its action.

As you know, in the context of New York’s uniquely rich multicultural mix, meaningful diversity is necessarily difficult to achieve, and there is no easy lawful formula that will effectuate a guarantee. Nevertheless, in a body of substantial size, it should be possible to provide a rich array of constituent representation. And if diversity criteria are applied both to a pool of nominees and to the body of individuals who eventually draw the district lines, with a fair means of selecting commissioners from among the nominees, the process should suit all represented populations equally.

Third, meaningful redistricting criteria. We recommend a diverse and independent redistricting body, because without the right set of arbiters, perfectly tailored goals will fail to produce desirable results. Similarly, without a set of meaningful and workable goals, the ideal group of line-drawers will be left unmoored. A redistricting

¹⁰ Angelo Falcon, City Section: Letters, *Political Parties and Redistricting*, N.Y. TIMES (July 16, 2006).

body must be guided by specific criteria, to adequately assess whether any given plan has succeeded in achieving the public good.

Certainly, any attempt to draw district lines must at least conform to applicable federal law. This includes the Constitutional equipopulation requirement – and the obligation to justify disparities even within a 10% deviation.¹¹ It also, of course, includes all of the protections of the Voting Rights Act, as renewed. However, even within these bounds, there are seemingly endless permutations of district lines. Any redistricting body requires further agreed-upon criteria to guide its choices and render them legitimate in the eyes of the population.

There are many available options. Some present affirmative requirements, such as the mandate to hew to pre-existing political geography, to develop districts that are reasonably compact, or to draw lines in order to further the representation of particular communities of interest. Others are negative injunctions, such as the obligation to avoid drawing lines in order to disadvantage a particular incumbent or challenger. The tradeoffs involved in selecting particular criteria are difficult, but so are many legislative decisions involving different means to promote the common good. What is most important is that the criteria that are chosen be clear, meaningful, and consistently applied.

Fourth, a fair and lawful enumeration. Even the ideal process and the ideal criteria would not rectify at least one stark injustice in the redistricting process. As mentioned above, the State Constitution provides: “For the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while confined in any public prison.”¹² Yet in calculating the population of legislative districts, the State currently does precisely the opposite, severing incarcerated citizens from their former residences, and deeming them to reside in the prison facility in which they are confined. The State should resolve the conflict – at least a conflict of values, and possibly a conflict of law – by apportioning districts based on the communities where incarcerated citizens lived before their imprisonment.

At least one bill concerning the enumeration of incarcerated citizens for redistricting, and several bills concerning the redistricting process, have now been introduced in both houses of the Legislature. Of the relevant bills currently before this Committee, we believe that the bill introduced by Representative Gianaris comes closest to meaningful workable reform. We believe that this bill should be used as the baseline for future discussion, augmented by the principles we have discussed.

In reviewing the way in which New York districts are drawn, this Committee has set itself a commendable and necessary task. These efforts enjoy the support of the people, with at least 75% of New York citizens seeking reform of the process to promote independent decisionmaking and remove the taint of potential self-dealing. We believe that the State will be well served by truly meaningful reform, and wish the Committee

¹¹ See, e.g., *Cox v. Larios*, 542 U.S. 947 (2004).

¹² N.Y. CONST. art. II, § 4.

well in its efforts. As with other states across the country, the Brennan Center stands ready to assist the people of New York and their representatives with comparative research, legal analysis, and drafting of particular provisions – among other services – in the interest of furthering redistricting reform. We thank you very much for your time – and we are more than happy to answer any questions that you may have.