M E M O R A N D U M

TO: Senator Dean Skelos
                    Senator Michel Nozzolio

FROM: Michael A. Carvin

DATE: January 5, 2012

RE: Senate Size

       You have inquired about the best method for apportioning the New York Senate. In March of 2002, I advised the Senate that the best method for determining the Senate size was the methodology referenced in that memo. (Attachment 1) I continue to believe that this methodology is most faithful to the Constitution. I note that if the 2002 methodology is again employed, the size of the New York Senate will be increased to 63 Senators.

       In this regard, I have reviewed Committee testimony offered by Mr. Todd Breitbart. As an initial matter, Mr. Breitbart's testimony confirms that the methodology used in 2002 is legally correct, as was already established by the fact that, during last-decade's contentious litigation, no party or court alleged or found any problem with this methodology. Mr. Breitbart himself candidly concedes that the "legal argument in Mr. Carvin's March 7, 2002 memorandum is reasonable, and it entails no intrinsic partisan bias." Testimony, p. 7.

       Mr. Breitbart, however, contends that utilization of the same 2002 methodology in 2010 would produce 62, not 63, Senate seats. He is mistaken. The attached tables show that utilizing the 2002 methodology produces 63 Senate seats in 2012. (Attachment 2)

       Mr. Breitbart's error is his incorrect assumption that the "Full Ratio" analysis for Richmond and Suffolk should be done by breaking apart the two counties' populations for calculation purposes. If this is done, as Mr. Breitbart's Table G-1 reflects, this provides a ratio of 4 for these two counties, constituting a net increase of 3 Senate districts from 1894. *Id.* at 15. The proper methodology, however, is to combine Richmond and Suffolk's populations for full ratio calculation purposes, as has been done in every redistricting and which reflects the Senate arrangements as they existed in 1894 ("District 1"). This proper calculation, as reflected in Mr. Breitbart's Table F-1 (*id.*), demonstrates that Richmond and Suffolk have a combined full ratio of 5, with a net increase of 4 from 1894. Mr. Breitbart's error in ascribing only three additional

districts to Richmond and Suffolk, rather than the correct 4, is the reason that he underestimates the Senate size for 2012 by one seat, when the 2002 methodology is applied.

I hope this is responsive. I would, of course, be happy to discuss this further.

2010 Senate Size Calculation

First Ratio 19,378,102 ÷ 50 = 387,562

Counties, or groups of counties, which have, or in 1894 had, sufficient population for three or more full *first ratios* and their current *first ratios.*

New York	1,585,873 ÷ 387,562 = 4.09
Bronx (west of Bronx River)	829,963 ÷ 387,562 = 2.14
Westchester	949,113 ÷ 387,562 = 2.45
Bronx (east of Bronx River)	555,145 ÷ 387,562 = 1.43
Kings	2,504,700 : 387,562 = 6.46
Queens	2,230,772 ÷ 387,562 = 5.76
Nassau	1,339,532 ÷ 387,562 = 3.46
District 1 (Suffolk/Richmond)	1,962,080 ÷ 387,562 = 5.06
Erie	919,040 ÷ 387,562 = 2.37

Comparison with the 1894 apportionment:

County	full *first ratios*	SD's in 1894	increase in *first ratios*
New York (w/Bronx, pt.)	6	12	0
Westchester (w/Bronx, pt.)	3	1	2
Kings	6	7	0
Queens (w/Nassau)	8	1	7
District 1	5	1	4
Erie	2	3	0
Increase in Senate			13

Senate district size @ 63:   307,589

2000 Senate Size Calculation

First Ratio. 18,976,457 / 50 = 379,529

Counties, or groups of counties, which have, or in 1894 had, sufficient population for three or more full *first ratios* and their current *first ratios:*

New York	1,537,529 ÷ 379,529 = 4.05
Bronx (west of Bronx River)	794,139 ÷ 379,529 = 2.09
Westchester	923,459 ÷ 379,529 = 2.43
Bronx (east of Bronx River)	538,511 ÷ 379,529 = 1.41
Kings	2,465,326 ÷ 379,529 = 6.49
Queens	2,229,379 ÷ 379,529 = 5.87
Nassau	1,334,544 ÷ 379,529 = 3.51
District 1 (Suffolk/Richmond)	1,863,097 ÷ 379,529 = 4.90
Erie	950,265 ÷ 379,529 = 2.50

Comparison with the 1894 apportionment:

County	full *first ratios*	SD's in 1894	increase in *first ratios*
New York (w/Bronx, pt.)	6	12	0
Westchester (w/Bronx, pt)	3	1	2
Kings	6	7	0
Queens (w/Nassau)	8	1	7
District 1	4	1	3
Erie	2	3	0
Increase in Senate			12

Senate district size: @ 62 districts: 306,072

TO:	Senator Joseph Bruno
	Senator Dean Skelos
FROM:	Michael A. Carvin
DATE:	March 7, 2002
RE:	Senate Size

You have inquired about the best method for apportioning the New York Senate. This memo will not set forth all the constitutional provisions affecting the size of the Senate, or the mathematical calculations, but will focus directly on the relevant issues. After examining the relevant provisions of the New York Constitution, case law and historical evidence, I have concluded that the best way to implement the New York and federal requirements governing apportionment is (i) to combine the portions of Bronx County that, in 1894, were part of Westchester County or New York County with those respective counties to determine those counties' full ratios, and (ii) to calculate the full ratios of Nassau and Queens Counties independently, then aggregate those full ratios to determine the number of senators for the combined counties. In my view, this methodology is most consistent with the intent underlying the New York Constitution and fully lawful.

I note that if these modifications are adopted, the size of the New York Senate will be increased to 62 Senators.

1. **Westchester, New York and Bronx Counties**

As part of the constitutional scheme for determining the size of the Senate, the Legislature must compare modern-day counties to those that existed in 1894. **See** N.Y. Const. Art. III, § 4; **see also In re Fay**, 291 N.Y. 198 (1943); **In re Dowling**, 219 N.Y. 44 (1916) (holding that the term "county" in the constitutional phrase "except that if any *county* having three or more senators" means the "county" as comprised in 1894). This comparison is complicated, however, by the fact that some modern counties, namely Bronx and Nassau Counties, did not exist at that time.

With respect to contemporary Bronx County, it was in 1894 part of New York and Westchester Counties. To account for this anomaly, the legislature has sometimes considered the **entire** Bronx County and New York County as one unit when making the constitutionally-required historical comparisons. **See, e.g., In re Schneider**, 31 N.Y.2d at 433-34; **see also In re Fay**, 291 N.Y. 198 (1943) (approving redistricting plan that coupled New York and Bronx counties to determine first full ratios). This approach to allocating Bronx County is unsatisfactory, however, because it ignores the reality that Bronx County was not wholly a part of either New York or Westchester at that time.

While not technically impermissible, lumping all of the Bronx in with New York or Westchester is inconsistent with the spirit of the constitutional requirement that the Legislature "compare the number of senators allotted to the counties encompassing substantially the same territory as was contained in the original county, with the number of senators given the original count in the

Constitution of 1894." **Schneider v. Rockefeller**, 31 N.Y.2d 420, 432 (1972). Indeed, recognizing this problem, the 1971 Joint Legislative Committee on Reapportionment recommended that "[t]he comparison should be between the counties as organized in Senate districts in 1894 and the counties which today encompass the same 'territory,'" which means apportioning the Bronx between Westchester and New York. **See Interim Report of the Joint Legislative Committee on Reapportionment** 11 (Dec. 14, 1971).

This should be the course that we follow. The most accurate and constitutionally faithful way to compare modern New York, Westchester and Bronx Counties to the counties of 1894 is to determine the portions of Bronx County that were in New York and Westchester Counties at that time and allocate Bronx's population to those counties accordingly. Of the forty-one square miles that currently constitute Bronx County, roughly twenty-one of them were in Westchester in 1894 and twenty were in New York. **See** Ruth C. Silva, *Apportionment* in New York, 30 Fordham Law Rev. 581, 626-27 (April 1962). Since we are now aware of the specific contours of the old New York/Westchester County line, and modern computer software allows us to precisely determine the current population of that territory, there is simply no reason to fail to replicate the same territory that constituted the original counties. Under this formulation, Westchester has three full ratios, compared to its single full ratio of 1894. Since New York County has fewer ratios than it had in 1894, this means that two senate seats should be added to the Senate because of the increase in Westchester.

I have considered the objections that might be made to splitting the current Bronx County for ratio purposes, but they are devoid of merit. **First**, the New York Court of Appeals has approved dividing Bronx county in this method when it recognized in **In re Schneider** that this would be most consistent with the New York Constitution and "tak[e] into account that a portion of the Bronx belonged to Westchester in 1894, that in 1895 New York County annexed parts of Westchester County, and that in 1912 New York County ceded certain territory, including the territory annexed from Westchester in 1895, to form Bronx County." **See** 31 N.Y.2d at 433-34. **Second**, the overarching goal of apportionment is to accurately account for "increases in the population of the territory of the original county." **Id**. at 432-33. Without a doubt, the most precise, and thus most constitutionally true, way to determine the population increase in the New York, Westchester and Bronx Counties from 1894 to today is to compare the actual territories that comprised these counties then to the same territories now, which requires splitting Bronx County. **Finally**, it has never been the understanding of the New York Court of Appeals that the term "county" as used in the Constitution means the geographical county as it is comprised **today**. The Court has recognized that "county" can mean the aggregation of counties best approximating the "county" of 1894. **See, e.g., In re Fay**, 291 N.Y. at 217 (allowing for the aggregation of Nassau and Queens Counties). And if the Constitution allows for aggregation, it must also allow for division.

    2. **Nassau and Queens Counties.**

The area now comprising Queens and Nassau Counties was, with minor changes, in 1894 a single county - Queens. In light of this fact, the legislature has determined the ratios for Queens and Nassau Counties either by calculating the full ratios for each and aggregating those full ratios, **see In re Fay**, 291 N.Y. at 211-12, 217; **In re Orans**, 17A N.Y.2d 11,12 (calculating ratios in this manner); **see also In re Schneider**, 31 N.Y.2d at 432 (observing that prior to 1971 this was how counties were apportioned), or by aggregating the raw population of the two

counties and calculating a single full ratio, **see In re Schneider**, 31 N.Y.2d at 432. The New York Court of Appeals has approved both methods as "consonant with the broad historical objectives underlying the provision for increasing the size of the Senate." **See id.** at 433.

While the other method is permissible, I believe the traditional method of computing senators for Nassau and Queens -- calculating the full ratios for each county individually and aggregating those full ratios -- is more faithful to the Constitution. **See** Silva **supra** at 606 (discussing the concerns of Elihu Root that a county should not be allowed to combine territories and districts to "combine their remainders to gain an additional senator"). As noted, this method was used for many years, has already been approved by the New York Court of Appeals, and most accurately reflects the growth that has occurred in the territory of Nassau. **See In re Fay**, 291 N.Y. at 217-18 (holding that by calculating full ratios for Nassau and Queens, then aggregating those ratios, the legislature did not enact a statute that conflicts with the law). If these changes were adopted, Queens and Nassau Counties would be entitled to eight Senators, a net increase in seven over the one Senator Queens enjoyed in 1894. Since this is one less Senator than this area enjoyed in the 1990's, this would result in a decrease of one Senate seat. When this loss of one is combined with the net increase of two created in Westchester, the size of the Senate would increase by one, to sixty two.

If you have any questions or comments, please contact me at your earliest convenience.