## PRELIMINARY STATEMENT

This memorandum is filed in reply to memoranda of law filed by the Attorney General and by Defendant Interveners, both dated August 18, 2011.

## POINT I

## PART XX VIOLATES ARTICLE III, SECTION 4 OF THE NEW YORK CONSTITUTION

The New York Constitution, Art. III §4, provides that the federal census "shall be controlling as to the number of inhabitants in the state or any part thereof" for the purposes of apportionment. This provision was intended to set a neutral standard and remove the counting of inhabitants from the pressures of partisan politics. Inasmuch as the enactment of Part XX no longer utilizes the data created for reapportionment by the Census, it violates the New York State Constitution. The Constitution provides few and specific exceptions in Article III § 4 so that, "if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed... [or] fails to give the information as to any civil or territorial divisions," then the State is empowered to conduct its own census to apportion the number of inhabitants in each district. The Census, however, is not insufficient for these

purposes, has not failed to provide the data required, and therefore the data regarding *inhabitants* must control.

There is simply no reasonable "mode of reconciliation" of Part XX's directive to count less than the full number of inhabitants per district, with the Constitution Article III § 4, which requires that the Census be controlling unless it patently fails to count the full number of inhabitants, or fails to give information as to each district in the State. Further, the Constitution's definition of the term "inhabitants" in Article III § 5-a as "the whole number of persons" is violated by Part XX's requirement that several classes of prisoners who are present in New York on Census Day simply not be counted in any district.

**POINT II**

**THE FEDERAL CENSUS IS CONTROLLING, NOT CENSUS DEPARTMENT POLICY**

The Attorney General and the Intervener Defendants, in their Memoranda of Law dated August 18, 2011, attempt to confuse the clear constitutional mandate of Art. III § 4 in many ways. The first and principal way is to call attention to the wealth of data published by the Census Department, and imply that the New York Constitution would permit the use of additional data gathered and provided by the Census Department data on Group Quarters, rather than the Census itself.

Census Department data is not some smorgasbord or "cafeteria plan" from which one may pick and choose in determining reapportionment data. The Census Department has consistently published data showing where the people of the entire country were counted on the decennial "census day," and that particular data must be taken as controlling under Art. III § 4. Since 1975, that data has been published in a report called Redistricting Data Summary File, pursuant to Public Law 94-171. *See,* Public Law 94-171.

The Attorney General and the Interveners concede that Art. III §4 requires use of census data "in so far as such census and the tabulation thereof purport to give the information necessary [for apportionment]," and the Census Department data certainly continues to do so. Since the very first census in 1790, this census data has followed the concept of "usual residence," defined as, "the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence." See, Census Bureau, 2010 Census Redistricting Data (Public Law 94-171) Summary File, at p. G-1. People in federal and state prisons are counted at the facility. Id. at p. G-5.

The "Introducer's Memorandum in Support" of this legislation blithely acknowledged that its method of counting prisoners was contrary to the Census Bureau's method, while

completely ignoring the requirement of Art. III § 4 that "the federal census … shall be controlling":

> This legislation counts people in prison at their address prior to incarceration only for the drawing of legislative districts. The Census Bureau will continue to count the prison population in the district where the prison is located.

In a "red herring" argument, the Attorney General and Interveners point out that the Census Department also publishes "GQ Data", which identify persons who are counted in "group quarters," including prisons but also including group homes and other types of residential treatment facilities. This was done, not because the Census Department considered the data appropriate for any particular use, but only to assist states, not New York, that have constitutional and statutory frameworks that require the counting of prisoners or other group home residents at some place other than their "usual residence."

The "GQ Data" identifies the total numbers of prisoners and other group quarter residents that were counted, and where they were counted, but does not attempt to identify their last known prior addresses. The "Director's Blog," annexed as Exhibit I to the Interveners' motion, notes the difficulty which the Census Bureau has in getting reliable data from prisoners, including that many prisons require census workers to use administrative records, and records from institutions have "missing data rates that approach 50 percent."

The "Director's Blog" also recognizes the justification for counting prisoners at the prison, particularly if they are serving long sentences, among various other alternative methods. The Director's Blog further points out that the Census Department is not involved in redistricting.

The Interveners' implication that Census Bureau policy should influence this case is absurd, both because the requirements of the New York Constitution are controlling, and because the Census Bureau expressly states that it is only providing data, and is not involved in redistricting. The Census Bureau itself has consistently followed the centuries old "usual residence rule" since the first census in 1790, and its tabulations continue to give the "information necessary" for apportionment, within the meaning of Art. III § 4.

**POINT III**

**"INHABITANT" IS DEFINED BY THE CONSTITUTION, AND IT DOES NOT MEAN "DOMICILIARY"**

Defendants and Defendant Interveners spill much ink attempting to re-define the term "inhabitant" in Art. III of the Constitution to mean "domiciliary." They argue that there must be some element of volition, or intent to remain, inherent in the term "inhabitant." However, no amount of theory, or cases from other contexts, can overcome the fact that Art. III §5-a of the Constitution defines "inhabitants, excluding aliens" as "the

whole number of persons." This term is used to set the ratio of apportionment in Art. III §5. Like the Census Department's usual residence rule, the definition of "inhabitant" contains no subjective element of intent or volition. Under the constitutional definition, a person may intend to leave as soon as he can, but he is still considered an inhabitant of the place where he is. As the Court of Appeals pointed out in Longway v. Jefferson Co. Bd. of Supervisors, 83 N.Y.2d 17 (1993), the use of "domicile" for apportionment purposes "would serve only to lend more confusion to the issue given the inherent difficulty in distinguishing between inhabitants and domiciliaries." 83 N.Y. 2d at 23.

Defendants and Defendant-Interveners attempt to confuse the meaning of Art. III § 5-a by pointing out that it was enacted to "end the exclusion of aliens", citing Loeber v. Spargo, 391 Fed. Appx. 55 (2d Cir. 2010). Be that as it may, the inclusion or exclusion of aliens does not add any element of volition or domicile to the constitutional definition of "inhabitant" or alter the meaning of the text.

The legislative intent surrounding the addition of Article III § 5-a is evidenced by Senator Greenberg's debate on the matter as it came to a vote in the Senate in 1968. He stated in his explanation of S.4941-A, "there may have been a time 30, 40 or 50 years ago when the difference or the distinction

between the citizen population and alien population in respect to determining the number of people who have a right to vote was necessary, and that is the number of people upon which apportionment of senatorial or assembly districts was based. That need does not exist anymore." *Senate Debate April 9, 1968* at p. 1923. The intent was to determine the *whole number of persons* inhabiting each district, irrespective of voting status. This was lauded not only as a cost-savings measure, since the State would no longer be required to conduct a separate enumeration of the citizen versus alien population, but also because it would utilize the Census data as it was provided. Id.

Indeed, as the Defendants and Defendant Interveners intend to conflate the issue of eligible voters with inhabitants, it is clear from other sources of legislative intent that various commissions struggled with the determination as to what "population" should be utilized to determine districts - Residents, Citizens, or Voters. See, *Citizen's Committee on Reapportionment Report to the Governor* December 1, 1964 at 11. At the time of this report, the requirements of the Constitution were that citizens only be counted. The subsequent enactment of S.4941-A and approval by the voters in 1969 eliminated this requirement in favor of the entire population.

The question of whether one is a resident and therefore an eligible *voter* is an entirely separate line of inquiry and can be determined by reviewing Article II § 4, which states:

> § 4. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

The legislative intent, as evidenced by the records of the Constitutional Convention of 1894, demonstrate that the issue was whether or not one was eligible to vote from a particular address. There was much debate as to whether or not the residents of such institutions, primarily former soldiers who were housed in hospitals, had sufficient ties to the community surrounding the institution, or whether they unfairly changed the outcome of elections in those areas. While this was a valid debate when dealing with *voting, it* has nothing to do with the enumeration of inhabitants for purposes of *apportionment*. See, e.g. Remarks of Mr. Lester, Revised Record of the Constitutional Convention of 1894 Vol. II p. 868. One such argument was posited: "This amendment will deprive no one of his vote in the locality where he belongs and where he ought

to vote. It simply deprives him of his vote in the locality or district where, by accident or by the chances of his life and the charity which has been extended to him he has become located." Remarks Mr. Hotchkiss, Revised Record of the Constitutional Convention of 1894 Vol. II p. 873.

**POINT IV**

**THE JUSTICE DEPARTMENT'S POSITION AND VOTING RIGHTS ISSUES ARE IRRELEVANT**

The Defendants and Defendant Interveners seek to imply that the U.S. Justice Department has approved Part XX. However, the Justice Department has not expressed any approval of Part XX, nor any disapproval of this action. Rather, the Justice Department's letter of May 9, 2011 actually stated that, "The Attorney General does not interpose any objection to the specified change.", and goes on to note that, "the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the change."

Incarcerated felons are not entitled to vote. See, N.Y. Election Law §5-106, Hayden v. Pataki, 449 F.3d 305 (2d Cir. *en banc* 2006). Therefore it is irrelevant here that Art. II §4 of the Constitution provides that "For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while … confined in any public prison". Unless the Attorney General

were to argue that incarcerated felons should be allowed to vote, which he does not, it is pointless for him to argue that, "Part XX enhances New York's compliance with Reynolds' [v. Sims] one-person-one-vote doctrine" (A.G. Memo at 17). It is equally pointless for him to argue that "Part XX harmonizes New York Constitution Article III §4 and Article II §4" (A.G. Memo at 19). Since incarcerated felons have no right to vote, there is nothing to "harmonize" with the voting rights provision of Art. II §4. His citation of Wolpoff v. Cuomo, 80 N.Y.2d 70 (1992) regarding harmonizing "competing Federal and State requirements" (A.G. Memo at 16) is equally pointless, as there are no relevant federal requirements to harmonize. This is especially true in view of the Attorney General's statement that "Part XX modifies enumerations of census blocks or 'geographic units,' not individual addresses …" (A.G. Memo at 36.) Part XX only concerns apportionment, not any individual's right to vote.

The Court of Appeals distinguished between the standards applicable to voting rights, and those used for apportionment, in Longway v. Jefferson Co. Bd. of Supervisors, 83 N.Y. 2d 17 (1993):

> As this section [Art. II §4] of the Constitution indicates, however, it applies "[f]or the purpose of voting." Unquestionably, different standards are involved when comparing an individual's actual right to vote to action the Legislature may take to facilitate apportionment. …[A]pportionment itself involves the application of different standards. …

> [T]here is no requirement in New York's Constitution … that obligates a local legislature, in the context of apportionment, to use the same standards required for voting purposes, specifically, presence and an intent to remain. … [E]ven though certain citizens within a given population may not have the right to vote, a 12-year-old child for example, that citizen nevertheless would properly be part of the population base for apportionment purposes. That residence in the apportionment sense be construed more broadly than in terms of voting rights is appropriate. The goals and objectives of the concepts differ significantly. 83 N.Y. 2d at 24-25.

The same case also clarified that the concept of "inhabitants of the state", when used for apportionment purposes in Art. III §§ 4 and 5 of the Constitution, could include transients such as military personnel, incarcerated felons, and occupants of group homes:

> [T]ransients are also integral parts of their respective communities. Military persons, children, mental patients and prisoners all affect the social and economic character of their environments. Their impact results in employment opportunities and contributes to the tax base. They also use services provided by the municipalities. Thus, their inclusion for apportionment purposes makes sense on several levels.
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> Plaintiffs urge also that the term "resident"[1] should be restricted to a person's domicile for apportionment purposes. That construction of the term would serve only to lend more confusion to the issue given the inherent difficulty in distinguishing

[1] The Court of Appeals was construing the terms "residents, citizens, or registered voters", which were used for apportionment purposes in the N.Y. Municipal Home Rule Law, instead of the term "inhabitants", which is used in Art. III §§ 4 and 5 of the Constitution. The Court of Appeals considered the term "resident" in the Municipal Home Rule Law to be the equivalent of the term "inhabitant" as used in the Constitution. 83 N.Y. 2d at 22.

between inhabitants and domiciliaries. 83 N.Y. 2d at 22-23.

Responding to a certified question from the Second Circuit, the Court of Appeals concluded that transients may be included in the population for the purposes of local legislative apportionment. 83 N.Y.2d at 25.

**POINT V**

**PART XX VIOLATES THE "EQUAL PROTECTION" RIGHTS OF THE PLAINTIFFS BUT CANNOT VIOLATE THE EQUAL PROTECTION RIGHTS OF DEFENDANTS AND DEFENDANT INTERVENERS**

Part XX provides that prisoners who are incarcerated in New York on Census Day shall not be counted if they originated from outside the state of New York, or if their prior addresses cannot be determined, or if they are housed in federal rather than state prisons. This bar to enumeration patently violates the Constitutional requirements of Article III § 4 and § 5-a that all inhabitants be counted. In this respect, Part XX directly conflicts with the constitutional requirement of actual enumeration. It mandates that certain inhabitants confined in prisons not be counted in the apportionment of Senate and Assembly seats. It is beyond dispute that the Federal Census found them present in the state for purposes of enumeration. Thus they must be counted by the explicit terms of Article III § 4.

The exclusion of these three classes of prisoners also violates the Constitutional requirement that Senate districts "shall contain as nearly as may be an equal number of inhabitants." See, Art. III §4 of the Constitution. Under Part XX, prisoners who can't be used to increase the representation of certain favored downstate districts are simply made to disappear. The result is that certain "inhabitants" are not counted in any district, despite the constitutional requirement that "the whole number of persons" be counted.

Part XX denies equal protection in violation of Article I, Section 11 of the Constitution, by adding persons to an enumeration who cannot be found at such address, and decreasing the representation of persons in districts with prison institutions, whose community resources, including the local courts, hospitals and health services, water, sewer and other infrastructure are burdened by the needs of the prison populations, and whose communities must consider these needs when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services. This burden on the localities was the rationale in the Longway case, supra, in favor of counting transients for local apportionment purposes.

The Attorney General and the Interveners assert that certain unnamed individuals have been deprived of equal

protection by the constitutionally mandated method of counting prisoners at their place of incarceration for purposes of apportionment; yet they offer no competent evidence, such as affidavits or otherwise, to support this conclusory claim. Enumeration is distinct from the organization of data that takes place thereafter. "One person, one vote" concerns the organization of data after basic enumeration has been completed. The Census provides the initial data. Defendants' reliance upon Burns v. Richardson, 384 U.S. 73 (1966) and similar lines of cases conflates the right to vote, protected by the federal constitution with the right to be counted. Put more simply, the method of counting persons such as prisoners in group quarters does not affect voting. Burns v. Richardson allows variations in the organizations of districts but does not allow for alteration in the way in which one counts population so as to deliberately exclude any countable population. This is especially true in the state of New York where Article III § 4 removes the actual enumeration from the political process. Enumeration is taken out of the hands of the legislature so as to prevent manipulation for any reason including partisan purposes. Significantly, Burns allows for the use of a means of enumeration that provides a better data set, i.e., counting more people, not a system that counts fewer people as Part XX requires. The instant legislation by its terms counts fewer

inhabitants, and thus cannot be justified on "one person, one vote" grounds.

The Defendants and Defendant-Interveners have utterly failed to meet the burden that they assumed in moving for summary judgment: to establish through competent evidence that no question of fact exists as to their equal protection claim.

**POINT VI**

**FACTUAL ISSUES REMAIN TO BE ADJUDICATED WITH RESPECT TO THE EQUAL PROTECTION CLAIM OF DEFENDANTS. THEREFORE, SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS IS NOT APPROPRIATE**

Defendants and Defendant-Interveners claim that there is a rational basis to support the dilution of upstate districts in favor of primarily downstate urban districts. Even minor deviations may give rise to justiciable claims under Rodriguez v. Pataki, 308 F.Supp.2d 346, (S.D.N.Y. 2004). Further, it is unclear whether or not the deviations will prove to be minor - without doing a district by district analysis to determine a deviation in any particular district. The Defendants and Defendant Interveners have shown no proof that it is in fact so minor in any given Senate or Assembly district, and in fact no party can demonstrate such until districts are drawn.

Further, the Attorney General and Interveners claim that no protected right is impinged upon by Part XX. However, it has been clearly demonstrated that the right is that of being counted. N.Y. Const. Art. III § 5-a. This will require that in

order to count some subset of persons at an assumed address, it will not provide the same courtesy of divining what assumed address other Group Quarters residents should or could be counted at. Further it eliminates an unknown quantity of persons from the count entirely, because such a factual inquiry is made too difficult.

What is clear in the Attorney General's argument is that by systemically directing that one class of Group Quarters residents be removed from the Census count and backed out to either a different place, or to not be counted such that the Senate Plaintiffs will see their districts diminished, and that the other Plaintiff Residents who are similarly situated but not so treated will be subject to disparate treatment. This requires a factual inquiry by the Court, and therefore it is impossible for Defendants and Defendant-Interveners to satisfy the threshold requirements for summary judgment. See, Longway, supra; N.Y. Const. Article XI, § 1.

The one-person-one-vote requirement is not relevant to this inquiry, as established supra, is an issue separate and apart from the constitutional mandates of Article III of the Constitution.

**POINT VII**

**PARTISAN GERRYMANDERING IS A JUSTICIABLE CLAIM**

Part XX was enacted with the purpose of diluting upstate districts count of inhabitants. This fact, coupled with the statements of Senate Temporary President [at the time] Malcolm Smith, give clear evidence of the intent to inject partisan politics into the enumeration and redistricting process. See, Azi Paybarah, Smith's Promise of Republican 'Oblivion' in Redistricting Incites Outrage, May 3, 2010, available at http://www.observer.com/2010/politics/smiths-promise-republican-oblivion-redistricting.

The fact that partisan gerrymandering is not often found by the courts renders the claim no less justiciable. See Davis v. Bandemer, 478 U.S. 109 (1986). While at this point Part XX has not affected the lines of a single legislative district, the intent to remove certain persons from the count for apolitical purpose is sufficient to give rise to imminent harm. Regardless of where each prisoner will be counted or not counted, it is a certainty that they will not be counted in the census block of the prison institution. That will impact in a significant way primarily upstate and traditionally Republican-represented districts.

**CONCLUSION**

As admitted by the sponsor who introduced it, Part XX counts prisoners at their prior addresses while the federal census continues to count prisoners at their places of incarceration. Art. III § 4 of the Constitution requires that the federal census be "controlling". Therefore, Part XX is unconstitutional.

There are no valid policy arguments, and certainly no voting rights arguments, that require the counting of incarcerated felons at their prior addresses. The changes in apportionment that Part XX purports to make also violate the Constitution's method of establishing Senatorial districts with an equal number of inhabitants, and violate the equal protection rights of those residents and communities who bear the burdens of maintaining New York's prisons. In any case, a policy which is established by the Constitution cannot be changed without following the Constitution's method of amendment.

The Court should grant the motion for summary judgment in Plaintiff's favor on the First Cause of Action and enter a permanent injunction against defendants from proceeding to implement Part XX of Chapter 57 of the laws of 2010 and deny the motions of the Defendants and Defendant Interveners for summary

judgment or summary dismissal under C.P.L.R. 3211 (a)(7) or 3212.

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