SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE, SENATOR PATRICK GALLIVAN, SENATOR PATRICIA RITCHIE, SENATOR JAMES SEWARD, SENATOR GEORGE MAZIARZ, SENATOR CATHARINE YOUNG, SENATOR JOSEPH GRIFFO, SENATOR STEPHEN M. SALAND, SENATOR THOMAS O'MARA, JAMES PATTERSON, JOHN MILLS, WILLIAM NELSON, ROBERT FERRIS, WAYNE SPEENBURGH, DAVID CALLARD, WAYNE McMASTER, BRIAN SCALA, PETER TORTORICI,

Plaintiffs,

-against- **Index No. 2310-11**

NEW YORK LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, and NEW YORK STATE DEPARTMENT OF CORRECTIONS,

Defendants,

-and-

MICHAEL BAILEY, ROBERT BALLAN, JUDITH BRINK, TEDRA COBB, FREDERICK A. EDMOND III, MELVIN FAULKNER, DANIEL JENKINSROBERT KESSLER, STEVEN MANGUAL, EDWARD MULRAINE, CHRISTINE PARKER, PAMELA PAYNE, DIVINE PRYOR, TABITHA SIELOFF, AND GRETCHEN STEVENS,

Defendants-Interveners.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is an action for declaratory judgment brought by nine New York State Senators, and nine of their constituents, challenging the constitutionality of Part XX of Chapter 57 of the Laws of 2010 ("Part XX"), effective August 11, 2010, and now codified as New York Correction Law § 71(8) and New York Legislative Law § 83-m(13).

Prior to the enactment of Part XX, representation of certain communities in the State legislature had been diluted by a districting system that counted State prison inmates as residents of the communities where they were incarcerated. Inmates are overwhelmingly from communities other than where the State's prisons are located.[1] By operation of a system that assigned these inmate-residents to areas where they were temporarily housed by reason of their incarceration, and where, given the choice, they likely would not choose to reside, the resident counts in their home communities were diminished, leading in turn to diminishment of legislative representation of those communities. By contrast, communities with prisons were given artificially-inflated representation in the legislature.

Under Part XX, instead of being counted as members of the communities where they are incarcerated and where they have no community connection or commonality, inmates are now counted in the communities where they lived before their incarceration. That is, Part XX remedies the inequitable dilution of representation that resulted from the prior law. Plaintiffs here seek restoration of the prior inequitable system of representation which concomitantly--and inappropriately-- had enhanced their political power. Plaintiffs allege that Part XX violates various provisions of the New York State Constitution.

[1] See: http://www.docs.state.ny.us/Research/Reports/2011/UnderCustody_Report.pdf, page i.

As the following arguments demonstrate, the plaintiffs' claims are without legal or factual foundation. Part XX is consistent with the United States Census Bureau's treatment of persons living in group quarters, and was passed in conformance with constitutional requirements found in Articles III and VII of the New York Constitution. Thus plaintiffs' motion for summary judgment should be denied, and their first and second causes of action dismissed. Furthermore, plaintiffs' equal protection claims fail because Part XX: (1) does not violate the one-person-one-vote principle; (2) is rationally related to several legitimate state interests; and (3) does not contain any irrational classifications or presumptions, all necessitating dismissal of the plaintiffs' third through sixth causes of action. Finally, in their seventh cause of action, the plaintiffs present the Court with a matter which is not justiciable. In sum, plaintiffs' challenge to Part XX should be dismissed.

STATEMENT OF FACTS

Chapter 57 of the Laws of 2010 was passed by both houses of the New York Legislature, and was signed into law by the Governor on August 11, 2010. Chapter 57 was a revenue bill that contained various provisions, including Part XX. See Kerwin Affirmation, Exhibit A. Part XX appears on pages 111-113 of that exhibit. Since the bill that became Chapter 57 was not an appropriation bill, it could have been, and was, amended by the Legislature. Thus the Legislature's authority under Article III, section 1 of the State Constitution was not diminished by an unconstitutional expansion of the Governor's Article VII powers.

A. The Parties to this Declaratory Judgment Action.

The nine plaintiff-Senators represent districts in which one or more State prisons are located. The six plaintiff-Senators who held office during the 2009-2010 session, and all of their Senate Republican colleagues voted against the bill which ultimately became enacted as Chapter

57. Complaint, ¶ 215. Three of the nine plaintiff-Senators (Senators Patrick Gallivan, Patricia Ritchie, and Thomas O'Mara) took office after Part XX was enacted.[2]

The Legislative Task Force on Demographic Research and Reapportionment ("the Task Force" or "LATFOR") is a defendant in this action. It is composed of six members. Legislative Law § 83-m(2). Two of the members are appointed by the Temporary President of the Senate, two of the members are appointed by the Speaker of the Assembly, and one member is appointed by each of the minority leaders of the Senate and Assembly. Id. (Thus, the Task Force is presently composed of three members of the Republican party and three members of the Democratic party.) The Task Force is strictly an advisory body. The Legislative Law provides that the Task Force is to "engage in such research studies and other activities as its co-chairmen may deem necessary or appropriate in the preparation and formulation of a reapportionment plan for the next ensuing reapportionment of senate and assembly districts . . . of the state and in the utilization of census and other demographic and statistical data for policy analysis, program development and program evaluation purposes for the legislature." Legislative Law § 83-m(3). That the Task Force is merely an advisory body is also made plain in Legislative Law § 83-m(5), which states, "The primary function of the task force shall be to compile and analyze data, conduct research for and make reports and ***recommendations*** to the legislature, legislative commissions and other legislative task forces." Id. (emphasis added).

Defendant New York State Department of Corrections and Community Supervision ("DOCCS"), sued herein as New York State Department of Corrections, or Correctional Services, is the agency responsible for the administration of correctional facilities within the

[2] There are also nine citizen plaintiffs who are voters and residents of Senate districts who alleged that they could be affected if the provisions of Part XX were ever implemented. Complaint, ¶ 21.

State. There are presently 67 State correctional facilities with 56,158 prison inmates.[3] The State's total population is 19,378,102.[4] Therefore, inmates account for less than three-tenths of one percent (0.3 %) of the entire population of New York State.

B. Part XX Amendments to Correction Law § 71(8) and Legislative Law § 83(m)(13)

Part XX was intended to remedy a perceived imbalance in New York's legislative districting that resulted from an improper allocation of State prison inmates to the districts where they were temporarily housed. In pertinent part, Part XX directs action by two entities in New York State government, one in the executive branch, DOCCS, and one in the legislative branch, the Task Force. Reduced to its essence, Part XX imposes three requirements. First, DOCCS is required to provide the Task Force with the pre-incarceration addresses for each inmate who was present in DOCCS' prisons as of the date of the enumeration by the United States Census, and who had a New York address. L.2010, Chapter 57, Part XX, § 1 (amending Correction Law § 71(8)). Second, for each such identified inmate, the Task Force is required to reassign him or her from the census block containing the address of the prison where the inmate is confined, to the census block containing such inmate's pre-incarceration address. L.2010, Chapter 57, Part XX, § 2 (amending Legislative Law § 83(m)(13)). Third, the Assembly and Senate districts are to be

[3] Inmate count as of 1/31/11. *See* http://www.docs.state.ny.us/Commissioner/Testimony/11Budget.html. The Court can take judicial notice of this information on the DOCCS website. *See, e.g., Goll v. The New York State Bar Ass'n*, 193 A.D.2d 126, 128 (1st Dep't 1993) (court took "judicial notice of [party's] public disclosures"); *Powers v. Taylor*, 207 Misc. 465, 470 (N.Y. Sup. Ct. 1955) (court took judicial notice of "public documents and records"); *Brandes Meat Corp. v. Cromer*, 537 N.Y.S.2d 177, 178 (2d Dep't 1989) (court can take judicial notice of "reliable documents, the existence and accuracy of which are not disputed"); *Seifert v. Winter*, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008) ("government documents are generally subject to judicial notice, includ[ing] public records and government documents available from reliable sources on the Internet") (omits internal quotation); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web"); *Brooks v. CBS Radio*, 2007 U.S. Dist. LEXIS 92213, *12 n.4 (E.D. Pa. Dec. 17, 2007) ("to evaluate a motion to dismiss, the Court may consider matters of public record and records of which the Court may take judicial notice, including government agency records").

[4] *See* http://2010.census.gov/2010census/data/apportionment-pop-text.php

drawn taking into account the new data after the resulting enumeration. L.2010, Chapter 57, Part XX, § 2 (amending Legislative Law § 83(m)(13)).

C. The Complaint in this Declaratory Judgment Action

Plaintiffs attack Part XX as violating four sections of the State Constitution: Article III, § 4; Article III, § 1; Article VII § 4; and Article I, § 11. Kerwin Affirmation, Exhibit B (Summons and Complaint). For relief, plaintiffs seek: (1) a declaration from this Court that Part XX mandates an unconstitutional method of counting incarcerated persons; (2) a permanent injunction against the Task Force, prohibiting it from counting incarcerated persons at addresses other than their places of confinement; and (3) a permanent injunction prohibiting DOCCS from transferring any information regarding the pre-incarceration addresses of the inmates confined in its prisons.

D. Procedural Posture.

Defendant DOCCS answered the Complaint on May 13, 2011. Kerwin Affirmation, Exhibit C. Among the affirmative defenses asserted by DOCCS in its Answer are that the Complaint presents claims which are non-justiciable; that the Complaint fails to state a cause of action in whole or in part; and that the Complaint, insofar as it presents a facial challenge to Part XX, fails to state a cause of action.[5] Id. at ¶¶ 17, 19 and 22.[6]

On or about May 17, 2011, the NAACP, New York State Conference, and two other organizations and fifteen individuals (hereinafter "interveners") filed a joint motion to intervene as defendants in this matter. That application for intervention was consented to by defendant

[5] By presenting a facial rather than an as-applied challenge, plaintiffs must satisfy a heightened burden of proof. See pp. 9-10 infra, Their challenge is a facial one simply because they do not seek to contest a re-districting plan which has been implemented.

[6] LATFOR has not formally appeared in this action. Instead, its chairmen have filed a letter with the Court advising that it takes no position with regard to this litigation but only asks for a speedy resolution so that it may discharge its statutory mandate to make districting recommendations. Kerwin Affirmation, Exhibit D.

DOCCS, and was opposed by the plaintiffs. On August 4, 2011, this Court issued its Decision and Order granting the motion with regard to the individual proposed interveners, but denying it with regard to the organizations. By the Court's Order, an Answer on behalf of the intervener-defendants is due to be served by August 24, 2011.

On August 5, 2011, the plaintiffs served a motion for partial summary judgment, seeking judgment on their first and second causes of action. Their motion is supported only by their attorney's affirmation to which are attached as exhibits the Complaint; the Answer of defendant DOCCS; the May 11, 2011 letter from co-defendant LATFOR to the Court; and a document represented to be from the U.S. Census Bureau dated February 21, 2006. The attorney's affirmation is professed to be based upon his personal knowledge, or upon information and belief based upon his review of legislative history. Lewis Affirmation, ¶ 1. The legislative history is not annexed to his affirmation. The attorney fails to state in the affirmation the basis of his personal knowledge, and further fails to distinguish which statements are based upon personal knowledge, and which are based upon information and belief. Plaintiffs' notice of motion set August 23, 2011 as the return date. By stipulation of counsel, the return date has been reset to September 13, 2011. Defendant DOCCS opposes plaintiffs' motion, and cross-moves for dismissal of the Complaint under CPLR 3211(a)(7), or for summary judgment under CPLR 3212.

ARGUMENT

Standard of Review.

1. CPLR 3211(a)(7).

On defendant's motion to dismiss for failure to state a cause of action, plaintiff's claim is liberally construed and all facts asserted therein, as well as its submissions in opposition to

defendant's motion, are accepted as true. See CPLR 3026; 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); see also Nonnon v City of New York, 9 N.Y.3d 825, 827 (2007); State of New York v Shaw Contract Flooring Servs., Inc., 49 A.D.3d 1078, 1079 (3d Dept. 2008). Where, as here, a motion is premised upon claimant's failure to state a claim (see CPLR 3211[a][7]), the dispositive inquiry is whether the plaintiff has a cause of action, and not whether one has been stated, i.e., "whether the facts as alleged fit within any cognizable legal theory." Leon v Martinez, 84 N.Y.2d 83, 87-88 (1994); accord Nonnon, 9 N.Y.3d at 827. Affidavits and other evidentiary material may be considered to "establish conclusively that [the] plaintiff has no cause of action." Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 636 (1976); see Wilhelmina Models, Inc. v. Fleisher, 19 A.D.3d 267, 268-269 (1st Dept. 2005). A motion based on plaintiffs' failure to state a cause of action can be made at any time. CPLR 3211(e); Carpenter v. Plattsburgh Wholesale Homes, Inc., 83 A.D.3d 1175, n. 1 (3d Dept. 2011).

2. CPLR 3212.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad, 64 N.Y.2d at 853. A party moving for summary judgment must support the motion with evidentiary proof in admissible form sufficient to warrant judgment in his favor. Zuckerman, supra. While an attorney's affirmation submitted on a summary judgment motion

may in some instances be sufficient (see, Russo Realty Corp. v. Licari, 98 A.D.2d 745 [2d Dept. 1983]), where the movant's attorney had no or only limited personal knowledge of the facts necessary to be considered in determining a summary judgment motion, the attorney's affirmation, by itself, is insufficient to support judgment in favor of his or her party. Deronde Products Inc. v. Steve General Contractor, Inc., 302 A.D.2d 989 (4th Dept. 2003). Further, an attorney's affirmation consisting primarily of legal conclusions is itself insufficient to support a motion pursuant to CPLR 3212. Werdein v. Johnson, 221 A.D.2d 899 (4th Dept. 1995).

To obtain summary judgment, the movant must establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor (CPLR 3212(b)), and it must do so by presenting proof in admissible form. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. CPLR 3212 (b); Zuckerman, 49 N.Y.2d at 562.

Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible. The opposing party may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of presenting proof in admissible form (e. g., Phillips v. Kantor & Co., 31 N.Y.2d 307 [1972]; Indig v. Finkelstein, 23 N.Y.2d 728 [1968]; also CPLR 3212(f)). Whether the excuse offered will be acceptable must depend on the circumstances in the particular case. Notwithstanding that the burden on the opponent is not always as heavy as that on the movant, the opposing plaintiff must tender evidentiary proof to oppose a summary judgment; conclusory

assertions are insufficient. Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1067-1068 (1979).

3. Plaintiffs' Burden of Proof.

Proceeding as they are by a declaratory judgment action, plaintiffs present a facial challenge to the constitutionality of Part XX of Chapter 57 of the Laws of 2010. Complaint ¶ 1. As stated by the United States Supreme Court in Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008), a facial challenge to a statute's constitutionality is disfavored. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid', i.e., that the law is unconstitutional in all of its applications." Id. at 449, quoting United States v. Salerno, 481 U.S. 739, 745 (1987). New York's rule is similar. Matter of Moran Towing Corp. v. Urbach, 99 N.Y.2d 443, 448 (2003); Cohen v. State of New York, 94 N.Y.2d 1, 8 (1999); Amazon.com LLC v. New York State Department of Taxation and Finance, 81 A.D.3d 183, 194 (1st Dept. 2010).

Since "[l]egislative enactments enjoy a strong presumption of constitutionality ... parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002) [internal citations omitted]); McKinney's Cons. Laws of New York, Book 1, Statutes § 150, p. 320–321.

"Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." Id. "Only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality." Schultz Management v. Board of Standards and Appeals of City of New York, 103 A.D.2d 687, 689 (1st Dept. 1984), citing Sgaglione v. Levitt, 37 N.Y.2d 507, 515 (1975). "Thus, where an act is susceptible of two

constructions, one of which will make it constitutional and the other unconstitutional, the former will be adopted." McKinney's Cons. Laws of New York, Book 1, Statutes § 150, p. 324.

The New York Court of Appeals has stated with regard to re-districting, "A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" Wolpoff v. Cuomo, 80 N.Y.2d 70, 78 (1992), quoting Matter of Fay, 291 N.Y. 198, 207 (1943) [citation omitted]. Thus, where, as here, no redistricting plan is before the Court, and what is being challenged concerns steps antecedent to re-districting, plaintiffs' burden is correspondingly heavier; any conceivable rational redistricting plan that results from the process mandated by Part XX would be sufficient to defeat their challenge.

POINT I

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Plaintiffs have moved for summary judgment on their first and second causes of action. Bearing mind that the statute is presumed to be constitutional, and that they must prove beyond a reasonable doubt that Part XX is unconstitutional, plaintiffs' motion should be denied for the following reasons.

As a threshold matter, plaintiffs' motion is defective in that it is supported solely by an attorney's affirmation. That affirmation is alleged to be based upon personal knowledge, or upon information and belief. Lewis Affirmation, ¶ 1. There is no delineation in the affirmation as to which statements are based on personal knowledge, and which are based upon information and

belief. The affirmant likewise fails to provide the Court with any information as to the bases of his knowledge; he only identifies himself as counsel to the plaintiffs, and he fails to identify the sources of the information or the bases of the belief. Without these details, it is impossible for the Court determine whether the Lewis affirmation represents proof in admissible form sufficient to permit the entry of judgment in favor of the plaintiffs.

With regard to their first cause of action:

A. Plaintiffs Rely On Out-dated Census Bureau Policy From 2006.

The only document outside of the pleadings which the plaintiffs offer in support of their motion for summary judgment is a document titled "U.S. Census Bureau Report: Tabulating Prisoners at Their 'Permanent Home of Record' Address." Lewis Affirmation, ¶ 45 and exhibit D. The document is dated February 21, 2006. Plaintiffs are apparently unaware of the Census Bureau's 2010 policy change with regard to the allocation of persons in group quarters, which is addressed extensively in Point II, infra. This change completely undermines the plaintiffs' argument with regard to census enumeration.

B. Plaintiffs Misconstrue The Term "Inhabitants" As It Is Used In New York Constitution Article III, §§ 4, 5 and 5-a.

Plaintiffs maintain that Part XX ignores the definition of "inhabitants" in Article III, § 5-a. Lewis Affirmation, ¶ 5. Article III, § 5-a does not define that term. Rather that section of the Constitution provides

> For the purposes of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons.

Clearly that provision, at best, defines the phrase "inhabitants, excluding aliens." It provides no definition of its component term, "inhabitant;" nor is that term defined elsewhere in the Constitution. One source defines "inhabitant" as "one who resides actually and permanently in a

given place, and has his domicile there." BLACK'S LAW DICTIONARY 703 (5th ed. 1979). The same source defines "domicile" as that place where a person has his or her true, fixed and permanent home and principal establishment, and to which whenever he or she is absent he or she has the intention of returning. Id. 435. While the plaintiffs urge that "inhabitant" means one who is physically found at a location, these definitions make clear that more than mere presence is required. It requires permanency and an intention of returning. See Cor v. Westchester Co. Dept. of Social Services, 33 N.Y.2d 111, 116 (1973) ("Ordinarily a patient or inmate of an institution does not gain or lose a domicile but retains the domicile he had when he entered the institution"). Prisoners are not inhabitants of the prisons where they are incarcerated since permanency there is illusory given the State's discretion to move inmates from prison to prison.[7] And certainly an "intention of returning" to their prison communities upon release is unlikely for the vast majority of inmates. Plaintiffs' argument is based upon a distorted meaning of "inhabitant," which, by its more accurate definition, lends support for Part XX's mandate that prison inmates be counted in their pre-incarceration communities.

With regard to their second cause of action:

C. Plaintiffs Incorrectly Characterize Chapter 57 of the Laws of 2010 As An Appropriation Bill, When, In Fact, By The Admissible Evidence Before The Court, It Was A Non-appropriation bill.

Plaintiffs' second cause of action is based, in part, on their mischaracterization of Chapter 57 of the Laws of 2010. In their Complaint plaintiffs label Chapter 57 as an appropriation bill. The Lewis affirmation, deficient as it is as proof in admissible form for a summary judgment motion, carries forward the same error. Attorney Lewis' assertions on the point are meaningless given the absence of any presentation by him as to his qualifications to characterize Chapter 57.

[7] See footnote 15, infra, page 37.

Defendant DOCCS, on the other hand, has provided the Court with sworn statements from the former Secretary to the Senate Finance Committee Majority, who held that position at the time Chapter 57 was passed, and from the then- and current Director of the Division of the Budget, who assert that Chapter 57 was not an appropriation bill, and was subject to, and was in fact, legislatively amended before passage. See Affidavit of Joseph F. Pennisi, sworn to on the 18th day of August 2011, and the Affidavit of Robert L. Megna, sworn to on the 12th day of August, 2011. This distinction is crucial to plaintiffs' second cause of action. Plaintiffs' failure of proof on this point requires that their motion for summary judgment on their second cause of action be denied.

In addition to the foregoing, the following Points of Law supporting defendant DOCCS' motion for dismissal and summary judgment, also support denial of the plaintiffs' motion.

POINT II

PART XX IS CONSISTENT WITH CURRENT U.S. CENSUS BUREAU POLICY, AND HARMONIZES NEW YORK CONSTITUTION ARTICLE III § 4 AND ARTICLE II § 4.

A. Part XX Is Consistent With Current U.S. Census Bureau Policy.

Plaintiffs' contention that Part XX contravenes New York Constitution Article III § 4 (Complaint, first cause of action, ¶ ¶ 86-94) is meritless and none of their objections to Part XX is valid.

Article III, § 4 of the New York State Constitution provides, in part, that

> Except as herein otherwise provided, the federal census . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.

Contrary to plaintiffs' misleading argument--supported only by a 2006 report--the federal Census Bureau does not dictate that prisoners should be counted where they are incarcerated. The controlling feature of the 2010 federal census as it pertains to this litigation is that the states determine for themselves where prisoners are to be counted for districting, and the Census Bureau recently began providing the states with the tools to do so, including group-quarters[8] counts by census block. "This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale." See comments of Bureau Director Robert M. Groves at http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html#comments. Under Part XX, as in the past, the federal census will continue to control as to the number of inhabitants in the state or any part of it for the purpose of redistricting the Assembly and Senate.

Plaintiffs are misguided in their notion as to what the Constitution commands. The federal census, New York Constitution Article III, § 4, and Part XX are all consistent. At least as early as March 1, 2010 (prior to enactment of Part XX), the United States Census Bureau made clear that the states should decide where inmates and others in group quarters should be counted. Id. In his comments, Director Graves stated that the sorts of policy choices involved in defining inmate residency are best left to the states, and that the fact that the Census Bureau has continued to report inmates as residing at their places of incarceration simply reflects the difficulties encountered by the bureau in collecting information on inmates.

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[8] A group quarters is a place where people live or stay, in a group living arrangement, that is owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories. See http://www.census.gov/acs/www/Downloads/data_documentation/GroupDefinitions/2009GQ_Definitions.pdf

New York, in enacting Part XX, determined that, for legislative districting, State prison inmates with pre-incarceration addresses in New York would be counted in the communities where they lived before their imprisonment. While plaintiffs view Part XX as inconsistent with U.S. census practice, any perceived inconsistency was eliminated by the Census Bureau's specific guidance to the states that it was their responsibility to determine how to count inmates, and by its provision of the tools with which to do so. New York chose--consistent with Census Bureau policy--to not count for redistricting those inmates who had non-New York addresses, those who had no addresses of record, as well as those confined to federal prisons within New York. All of these choices by New York's Legislature are in conformity with Census Bureau policy, and comport with Article III, § 4 of the New York Constitution.

In addition, Part XX is consistent with the census provision of Article III, § 4 because that constitutional provision was intended merely to eliminate the prior, expensive practice of State-conducted enumeration [9], and to enable the State to rely on the federal census report instead of duplicating the federal government's effort. Under Part XX, the census still controls,

[9] Kerwin Affirmation Exhibit E, In the Matter of The Reapportionment of the State of New York Into New Senate and Assembly Districts, Pursuant to Joint Resolution Adopted By The Legislature of the State of New York, Counsel's Report, March 13, 1935, page 8; see also Kerwin Affirmation, Exhibit E, Public Papers of Alfred E. Smith, Forty-seventh Governor 1926, page 69 ("The Constitution of the State requires the Secretary of State to make a census of our population every ten years in order to apportion the districts…I am of the opinion that the State could use the figures of the Federal census for the purpose of legislative apportionment just as well as those of a separate State census. I have no knowledge that the State census has ever served any other purpose and it is exceedingly costly…"); Public Papers of Alfred E. Smith, Forty-seventh Governor 1927, page 65 ("I, therefore renew my recommendation that the Constitution be amended as to permit the State to take advantage of the Federal enumeration and make unnecessary the costly, wasteful proceeding [State enumeration] we went through a year ago."); Public Papers of Alfred E. Smith, Forty-seventh Governor 1928, page 96 ("Having received the Federal enumeration the State may thereafter make such tabulation of it as will meet the needs of the organizations and social agencies of the State that require the statistics….It is unreasonable to think that by an organization thrown together over night the State can make as good a job of enumeration as can the Federal government with a bureau organized and functioning continually for that purpose. Economy and common sense suggest that this recommendation be carried out."); and Public Papers of Franklin D. Roosevelt, Forty-eighth Governor, 1929, pages 137-138 ("I desire to renew the recommendation made…by my predecessor for an amendment to the Constitution abolishing the State enumeration and that legislation be enacted for the purpose of making available the federal census to be taken in 1930 for the purpose of reapportionment in the senate and assembly districts …The enumeration as taken has become political, extravagantly expensive and useless for any practical purpose.").

but on the issue of allocating inmates, the Census Bureau has determined that the states should follow their own polices as to the allocation of inmates for districting purposes. Part XX complies with that state constitutional provision because, in accord with that purpose, Part XX accepts the federal census report of the total population of the State, and of its political subdivisions, as a base line,[10] and subsequently makes an adjustment to the distribution of the Census' enumeration based on the judgment of New York's duly elected legislature. The legislature determined to change the place where persons confined to New York's own prisons are counted.

Even if there were a technical violation, Part XX is still valid because it is consistent with Article III, § 4 as interpreted by the Court of Appeals in Wolpoff v. Cuomo, 80 N.Y.2d 70 (1992)(in upholding state legislative re-districting plan, strict compliance with constitutional provisions is not necessary when the State is attempting to balance State and federal constitutional principles):

> The issue before us on these appeals is not whether the Senate redistricting plan technically violates the express language of the State Constitution. No one disputes that such a technical violation has occurred, and in *Matter of Orans,* we recognized that such violations were inevitable if the Legislature was to comply with Federal constitutional requirements. … Rather, we examine the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements. The test is whether the Legislature has "unduly departed" from the State Constitution's requirements … in its compliance with Federal mandates. "[I]t is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions"[citation omitted]. A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional " 'only when it can be shown

[10] Consistent with current U.S. Census Bureau policy, Part XX does reduce the census enumeration of New York for districting only, by eliminating from consideration while districting those inmates who have no pre-incarceration addresses of record, those who have non-New York addresses, and those confined to federal prisons in New York (believed to number approximately 5,900 in four federal prisons in New York as of December 2010). See Kerwin Affirmation, Exhibit A, Laws of 2010, Ch. 57, Part XX, § 2, page 112 adding new subdivision 13 to Legislative Law § 83-m.

> beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " [citation omitted].

Wolpoff, 80 N.Y2d 77-78.

In this instance New York was attempting to more closely comply with federal equal protection requirements articulated in Reynolds v. Sims, 377 U.S. 533 (1964) and the Voting Rights Act of 1965[11] while, at the same time, complying with the fundamental purpose of Article III, § 4. Kerwin Affirmation, Exhibit F, New York State Senate Introducer's Memorandum In Support. Part XX enhances New York's compliance with Reynolds' one-person-one-vote doctrine because people in prison are not residents of the districts where they are temporarily incarcerated and counted; they have no meaningful connection to those districts. That is, they do not own homes or rent apartments, send their children to local schools, vote for local representatives, or otherwise participate consequentially in the districts' civic affairs. See People v. Cady, 143 N.Y. 100, 106 (1894) (noting that a prison "is not a place of residence" and, thus, a prisoner cannot "gain a residence there"); but see Longway v. Jefferson County Bd. of Supervisors, 83 N.Y.2d 17, 22-23 (1993) (in the context of local legislative districting, seemingly not encompassed by New York Constitution Article III, § 4, concluding that prisoners are "integral parts of their respective [prison] communities"). As in Wolpoff, the legislature's reasonable attempt, as embodied in Part XX, to accommodate requirements of both Constitutions allows for some divergence from the language of the State Constitution.

[11] Part XX was submitted for approval to the Civil Rights Division of the United States Department of Justice for preclearance under section 5 of the Voting Rights Act on March 7, 2011. On May 9, 2011, the United States Attorney General, through the Department of Justice, advised that he did not interpose any objection to the changes made by Part XX.

B. Neither the Federal Census Bureau Nor Article III § 4 Mandates That Prisoners Be Counted For Purpose of Districting At Their Places Of Confinement.

Contrary to the plaintiffs' assertion, the federal Census Bureau never directed the states as to how to count prisoners or others in group quarters for purposes of districting. Furthermore, Article III, § 4 of the New York Constitution similarly does not mandate where prisoners should be allocated for districting. Plaintiffs' argument overlooks significant State constitutional language. Plaintiffs ignore that portion of Article III § 4 which provides,

> the federal census . . . shall be controlling … *in so far as such census and the tabulation thereof purport to give the information necessary therefor.*

Emphasis added.

In the absence of a clear command in the Constitution that inmates be counted at their places of confinement when drawing legislative districts, New York was free to allocate them to their prison locations, as it did for many years, or to allocate them to their pre-incarceration residences as Part XX now provides. Doing so does not violate the Constitution's mandate that the federal census "controls." It does control insofar as it gives information necessary for re-districting, such as total State population from which district population size can be calculated. It does not control where it does not (or did not) give the information necessary for New York to make decisions such as how to treat prison inmates while re-districting. As this provision of the State Constitution envisions, that is a policy choice for New York to determine for itself, and New York did so by enacting Part XX.

There is no basis in law which compelled New York to attribute prisoners to the location where they are temporarily housed. The determination of where prisoners should be counted is a judgment solely within the jurisdiction of the people's elected legislature. Part XX reflects the judgment of the legislature, and that judgment should not be upset by this Court absent proof

beyond a reasonable doubt that Part XX is unconstitutional. Amazon.com LLC v. New York State Department of Taxation and Finance, 81 A.D.3d 183, 194 (1st Dept. 2010).

C. Part XX Harmonizes New York Constitution Article III § 4 And Article II § 4.

Article II § 4 of the New York Constitution provides that

> 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 confined in any public prison.

That provision reflects the general principle that a person cannot lose his residence or domcile by reason of incarceration. Cor v. Westchester Co. Dept. of Social Services, 33 N.Y.2d 111, 116 (1973) Thus, an interpretation of Article III, § 4 which mandates the use of census data in which an inmate's residency is based on his place of incarceration, conflicts with Article II, § 4, which provides that, for purposes of voting, an inmate retains his pre-incarceration residency.[12] But cf. Longway v. Jefferson County Board of Supervisors, 83 N.Y.2d at 24 (1993).

The Legislature -- recognizing the tension between Article III § 4, and Article II, § 4 -- was entitled to choose to harmonize those provisions by enacting Part XX. See Kerwin Affirmation, Exhibit F, New York State Senate Introducer's Memorandum In Support of Senate Bill S6725A, a different bill which was substantively identical to Part XX. That legislative policy choice was clearly rational and consistent with the well-established principle that "apparently conflicting provisions in the Constitution . . . are to be harmonized by construction if reasonably practicable." Lanning v. Carpenter, 20 N.Y. 447 (1859). Moreover, in 2010 the Census Bureau clarified that it was up to the states to determine where prisoners were to be allocated. And, since the census does not direct one way or another how states are to allocate inmates in an

[12] Incarcerated felons and those on parole are barred from voting in New York Election Law § 5-106.

apportionment plan, the legislature properly harmonized these two State constitutional provisions by enacting Part XX.

D. Plaintiffs' Challenge Based Upon Article III, § 4 Must Fail.

The plaintiffs cannot sustain their burden of proving beyond a reasonable doubt that Part XX violates Article III, § 4 of the New York Constitution. Their disfavored facial challenge cannot overcome the presumption of constitutionality of legislative enactments. Plaintiffs are unable to establish that no set of circumstances exists under which Part XX would be valid. Indeed, Part XX complies with Article III, § 4 while bringing New York in closer conformity with Reynolds' one-person-one-vote principle, and the Voting Rights Act. It harmonizes Article III, § 4 with Article II, § 4, and is consistent United States' Census policy regarding persons in group quarters. It is the plaintiffs' burden to establish that the law is unconstitutional in all of its applications. As the foregoing illustrates, they cannot satisfy that daunting burden.

POINT III

PLAINTIFFS' SECOND CAUSE OF ACTION MUST BE DISMISSED BECAUSE PART XX WAS CONTAINED WITHIN AN ARTICLE VII NON-APPROPRIATION BILL THAT THE LEGISLATURE AMENDED PRIOR TO APPROVAL; THUS, THERE WAS NO INFRINGEMENT ON THE LEGISLATURE'S ARTICLE III, § 1 POWERS.

Plaintiffs' Second Cause of Action seeks a declaratory judgment stating that Part XX is void because the Governor unconstitutionally expanded his powers under the New York Constitution, Article VII ("Article VII"), specifically, Article VII, §§ 4 and 6, to encroach upon the Legislature's authority, set forth in the New York Constitution, Article III ("Article III"), § 1, to enact general, non-budgetary legislation. See Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 95-139. Without any evidentiary support other than plaintiffs' lawyer's unsupported assertions

in his Affirmation, plaintiffs' summary judgment motion merely rehashes the very same allegations made in the Complaint.

In sum, the argument set forth in the Complaint, and the identical argument set forth in the plaintiffs' summary judgment motion, hinge on plaintiffs' misunderstanding that the bill at issue was an "appropriation bill" which by its nature carries certain restrictions. Quite simply, however, Part XX was not part of an appropriation bill. Any restrictions applicable to appropriation bills thus did not apply to the bill that included Part XX. See Kerwin Affirmation, Exhibit A (Chapter 57 of the Laws of 2010); Affidavit of Robert L. Megna, ¶¶ 6-8; Affidavit of Joseph F. Pennisi, ¶¶9-10, and Exhibit B. Thus, the Governor did not encroach upon the Legislature's authority, and there was no conceivable violation of Article III, § 1 by the Governor's exercise of his Article VII powers.

Plaintiffs claim that: (i) "…the members of the State Legislature . . . had no power to remove the purely legislative, non-appropriation language from the Article VII bills" (see Complaint, ¶ 125), (ii) Section XX's enactment violated Article VII, §§ 4 and 6 (see Complaint, ¶¶ 2, 117, 126), and (iii) "The inclusion of a non-revenue item in an Article VII bill also violates Article VII" (see Complaint, ¶ 129). However, as explained in the Affidavit of Robert L. Megna, the Director of the New York State Division of the Budget, and also in the Affidavit of Joseph F. Pennisi, the Secretary to the New York Senate Finance Committee Minority: (a) the Legislature is permitted to amend an Article VII bill, and did in fact amend the Article VII bill at issue in this action to add Part XX; (b) Article VII, §§ 4 and 6 did not apply to Part XX because it was not part of an appropriation bill; and (c) Article VII does not preclude the inclusion of a non-revenue item in an Article VII bill. See Affidavit of Robert L. Megna, ¶ 5; Affidavit of Joseph F. Pennisi, ¶¶ 7-12.

An examination of the relevant sections of Article VII demonstrates that Chapter 57 was not an appropriation bill. See Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 104-111; Kerwin Affirmation Exhibit A, Chapter 57 of the Laws of 2010. To begin, Article VII, § 3 states: "At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein." Accordingly, Article VII, § 3 distinguishes between (1) "a bill or bills containing all the proposed appropriations and reappropriations included in the budget," and (2) "the proposed legislation, if any, recommended therein." The first category constitutes what are called "appropriation bills." The second category constitutes what are generally called "Article VII bills" or sometimes "non-appropriation bills" which includes "revenue bills."

Chapter 57 falls in the second category, a non-appropriation bill. Kerwin Affirmation, Exhibit A; Affidavit of Robert L. Megna, ¶¶ 6-8; Affidavit of Joseph F. Pennisi, ¶ 8. An "appropriation bill" is "a bill or bills containing all the proposed appropriations and reappropriations included in the budget" (Article VII, § 3). An "item" of appropriation is contained within an appropriation bill (Article VII, § 4). The term "non-appropriation" bill is not found in the Constitution. As noted above, the phrase used in the Constitution is found at Article VII, § 3 and is simply "proposed legislation," which is referred to in the Complaint and the Affidavit of Robert L. Megna as "non-appropriation bills"." See Complaint, ¶¶ 104-07; Affidavit of Robert L. Megna, ¶ 6. The Affidavit of Joseph F. Pennisi refers to these same bills as "non-appropriation bills" which includes, among others, "revenue bills." Affidavit of Joseph F. Pennisi, ¶ 5. See also Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 104-05, and Kerwin Affirmation, Exhibit A, Chapter 57 of the Laws of 2010. As stated in the Affidavit of Robert L.

Megna, "Article VII, § 3 does not limit the 'proposed legislation' that the governor may submit (non-appropriation bills) to revenue measures. Therefore, in addition to revenue measures, non-appropriation bills may, and do every year, contain proposals that require changes to permanent law, and proposals that do not relate exclusively to a specific budget year appropriation." Affidavit of Robert L. Megna, ¶ 5.

Appropriation bills have restrictions imposed upon them by Article VII that non-appropriation bills do not. See Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 109, 111. Article VII of the Constitution places upon the Governor the initial responsibility of proposing to the Legislature a statewide budget; the Legislature may not alter the Governor's appropriation bill, except to strike out or reduce items in the bill; but the Legislature may add items of appropriation provided that they are stated separately from the original items, and that each refers to a single object or purpose. Constitution, Article VII, §§ 2 and 4, see also Kerwin Affirmation, Exhibit B, Complaint, ¶ 109. This "no-alteration clause," is contained in Article VII, § 4, which states in relevant part:

> The legislature may not alter **an appropriation bill** submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose.

Article VII, § 4 (emphasis added).

The critical point is that the "no-alteration clause" of Article VII, § 4 applies exclusively to appropriation bills; it does not apply to non-appropriation bills, including bills like Chapter 57. Because a non-appropriation bill does not have any restrictions imposed by Article VII, § 4, it can be amended by the Legislature, just as any other general bill can be amended.[13] The

[13] According to the Senate's Rules in the 2009-10 session, a general bill in the Senate could be amended as follows:

legislative history of Chapter 57 demonstrates that the bills that resulted in that chapter law were amended several times in each house of the legislature. Affidavit of Joseph F. Pennisi, ¶ 10 and Exhibit B. Thus the introduction and passage of Part XX did not encroach upon the Article III legislative powers of the Senate and Assembly.

The same is true concerning the second provision of Article VII that plaintiffs raise here, Article VII, § 6, the "anti-rider clause." That clause states in relevant part that it, too, only applies to appropriation bills:

> No provision shall be embraced in **any appropriation bill** submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.

New York Constitution, Article VII, § 6 (emphasis added). Thus, both § 4 and § 6 of Article VII are applicable only to appropriation bills; they are not applicable to non-appropriation bills like Chapter 57. Accordingly, that Part XX was part of a non-appropriation bill as distinguished from an appropriation bill is critical in determining that the State Constitution has not been violated. Indeed, plaintiffs' argument obfuscates the clear constitutional distinction between these types of bills.

Plaintiffs rely on Pataki v. New York State Assembly, 3 N.Y.3d 75 (2004) for the proposition that Part XX was inappropriately included in an appropriation bill. By doing so, according to the plaintiffs, the legislature's authority was encroached upon. Plaintiffs are wrong on several counts. First, as set forth above and in the affidavits of Robert L. Megna and Joseph F. Pennisi, Part XX was not part of an appropriation bill at all. Second, because Part XX was

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> A non-sponsor may move to amend a bill at any time prior to the completion of its third reading provided that at least two hours before the time for the Senate to convene, a copy of the proposed amendment or amendments to any bill on the list of bills compiled under subdivision a of section six of this Rule has been served upon the sponsor of the bill, and filed with the Journal Clerk.

Rules of the Senate of the State of New York, Rule IX, § 4. Affidavit of Joseph F. Pennisi, ¶ 9, Exhibit A.

part of a non-appropriation bill (Kerwin Affirmation, Exhibit A), that bill could be freely amended by the Legislature, provided that amendment did not alter an appropriation bill. Affidavit of Robert L. Megna, ¶¶ 6-10, Exhibits A and B; Affidavit of Joseph F. Pennisi, ¶¶ 9-10. In fact, the legislative history of the bill shows that it was in fact amended in both the Assembly and the Senate before final passage. Affidavit of Joseph F. Pennisi, ¶ 10, Exhibit B. Indeed, the Legislature chose to approve this legislation only after the Legislature amended it by inserting the language of Part XX into the bill. Affidavit of Robert L. Megna, ¶¶ 9-10, Exhibits A and B; Affidavit of Joseph F. Pennisi, ¶¶ 10-11, Exhibit B. Plaintiffs' claim that the Senate's presiding officer would have ruled as unconstitutional and thus improper any attempt to amend the bill that contained Part XX is contradicted by the amendments the Legislature did, in fact, make to the bill. See Kerwin Affirmation, Exhibit B, Complaint, ¶ 114. Finally, Pataki v. New York State Assembly focused on what the Governor could include in appropriation bills, and the Legislature's authority to alter appropriation bills. It did not pertain to the inclusion of items in a non-appropriation bill, as occurred with Part XX. See Plaintiff's Memorandum of Law at 12 (quoting Pataki v. NYS Assembly addressing *appropriation* bills [4 N.Y.3d 75 at 97]).

Additionally, plaintiffs' claim that Part XX was contained within "a budget extender that appropriated funds to permit the State government to continue operating" (Complaint, ¶ 96) fares no better upon close examination. To the contrary, as a review of the entire content of S6610-C /A-9710-D (see Kerwin Affirmation, Exhibit A, Chapter 57 of the Laws of 2010) shows, this bill in fact was **not** part of a "budget extender that appropriated funds to permit the State government to continue operating." Quite simply, there were no provisions within Senate Bill 6610-C /Assembly Bill 9710-D that appropriated the expenditure of *any* funds. Affidavit of Robert L. Megna, ¶ 11; Affidavit of Joseph F. Pennisi, ¶¶13-18.

Indeed, contrary to plaintiffs' claims, the task of authorizing spending by the State government during the relevant time period had already been accomplished by other pieces of legislation prior to the August 3, 2010 vote taken in the Senate on the bill that contained Section XX.[14] Id.

In short, all of the appropriation bills for State fiscal year 2010/2011 were enacted prior to the August 3, 2010 Senate vote on S6610-C/A9710-D, the bill that contained Part XX. Affidavit of Robert L. Megna, ¶ 11; Affidavit of Joseph F. Pennisi, ¶¶ 14-18. This fact refutes plaintiffs' claim that the Senate was "faced with the alternative of shutting down the entire operation of State government, or accepting the non-appropriation measures placed within the appropriation bill." Kerwin Affirmation, Exhibit B, Complaint, ¶ 122. To the contrary, spending by the State government was already authorized before the bill containing Part XX was voted on by the Senate.

For all of these reasons, the Legislature's authority pursuant to Article III, § 1 was never infringed upon by the Governor's exercise of his Article VII powers. Consequently, plaintiffs' argument that the budget bill was used to improperly circumscribe legislative authority, see

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[14] Specifically,

- Chapter 50 of the Laws of 2010 (S6600-C/A9700-D) authorized spending for Public Protection and General Government Appropriations, and was signed by Governor Paterson on June 22, 2010. Affidavit of Joseph F. Pennisi, ¶ 14, Exhibit D.
- Chapter 53 of the Laws of 2010 (S6603-B/ A9703-C) authorized spending for Education, Labor and Family Assistance Appropriations, and was signed by Governor Paterson on July 2, 2010. Id., ¶ 15, Exhibit E.
- Chapter 54 of the Laws of 2010 (S6604-B/A9704-C) authorized spending for Health and Mental Hygiene Appropriations, and was signed by Governor Paterson on July 2, 2010. Id., ¶ 16, Exhibit F.
- Chapter 55 of the Laws of 2010 (S6605-C/A9705-D) authorized spending for Transportation, Economic Development and Environmental Conservation Budget Appropriations, and was signed by Governor Paterson on June 22, 2010. Id., ¶ 17, Exhibit G.

Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 95-139, is without merit and plaintiffs' Second Cause of Action must be dismissed.

POINT IV

THE EQUAL PROTECTION CLAIMS SET FORTH IN PLAINTIFFS' THIRD, FOURTH, FIFTH, AND SIXTH CAUSES OF ACTION ARE MERITLESS

Plaintiffs assert several causes of action alleging violations of the New York State Constitution's Equal Protection Clause. For the reasons that follow, plaintiffs' equal protection arguments are meritless and, thus, should be dismissed in their entirety.

New York's Equal Protection Clause states: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." New York Constitution Article I, § 11. The Equal Protection Clauses in the Federal and New York State Constitutions are protective of the same rights. See Hernandez v. Robles, 7 N.Y.3d 338, 362 (2006). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Bower Assoc. v. Town of Pleasant Val., 2 N.Y.3d 617, 631 (2004); City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985); see also Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Accordingly, "[t]o prove an equal protection violation, claimants must prove purposeful discrimination . . . directed at an identifiable or suspect class." Giano, 54 F.3d at 1057 (internal citation omitted).

As stated above at pages 9-10, generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, Texas, 473 U.S. at 440; see also Federal Communications Comm'n.

v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) (noting that the presumption of validity is "strong"); Matter of Wolpoff v. Cuomo, 80 N.Y.2d 70, 78 (1992) ("A strong presumption of constitutionality attaches to [a] redistricting plan"). Undeniably, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Federal Communications Comm'n., 508 U.S. at 313. Indeed, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. Where a "plausible reason[]" exists for the legislature's action, a court's "inquiry is at an end." Id. at 313-314 (quotation marks and quoted case omitted); see also Nordlinger, 505 U.S. at 11. Therefore, a party "attacking the rationality of the legislative classification ha[s] the burden to negative every conceivable basis which might support it." Federal Communications Comm'n., 508 U.S. at 315 (quotation marks and quoted case omitted); see also Matter of Wolpoff, 80 N.Y.2d at 78 (a court "will upset the balance struck by the Legislature and declare [a redistricting] plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law" and that reconciliation of the statute with the Constitution is impossible [quotation marks and quoted case omitted]); Iannucci v. Board of Supervisors of County of Washington, 20 N.Y.2d 244, 253 (1967) ("reapportionment legislation should not be declared unconstitutional unless it clearly appears to be so; all doubts should be resolved in favor of the constitutionality of an act" [quotation marks and quoted case omitted]).

Here, plaintiffs agree with the defendant that the rational basis test applies to plaintiffs' equal protection causes of action. See Kerwin Affirmation, Exhibit B, Complaint, ¶ 171

(pleading that "[t]he selection of prisoners is not a rational basis for treatment of such prisoners differently than others in group-quarters" [emphasis added]); id., ¶ 195 (pleading that "Section XX is not enacted with a rational basis and is unreasonable and, therefore, violates equal protection" [emphasis added]); see also id., ¶¶ 10, 173, 205. Such a concession by plaintiffs is appropriate in this case because Part XX does not classify any person by race, alienage, national origin, gender, illegitimacy, or any other suspect classification. See City of Cleburne, Texas v. Cleburne Living Center, 473 U.S.at 440-441 (1985). Similarly, Part XX does not impinge on any rights protected by the Constitution. See id. at 440. Quite to the contrary, the Legislature, by way of Part XX, sought to harmonize redistricting with the mandate of Article II, § 4 of the New York Constitution. Accordingly, the rational basis test is the appropriate standard to apply in this case.

A. The Third Cause of Action.

Plaintiffs contend that their equal protection rights have been violated under Article III, § 4 and Article I, § 11. In essence, plaintiffs seem to allege that Part XX violates the one-person-one-vote principle. Plaintiffs assert that "Part XX violates Article III, Section 4 which requires that each Senate District contain 'as nearly as may be' an equal number of inhabitants." Kerwin Affirmation, Exhibit B, Complaint, ¶ 141. In addition, plaintiffs claim that "[b]y including these fictional inhabitants (incarcerated persons) in the downstate population, [Part] XX exacerbates the diminution of votes in upstate counties." Id., ¶ 148. Plaintiffs cannot establish a one-person-one-vote claim and, thus, the third cause of action should be dismissed.

As relevant here, Article III, § 4 of the New York Constitution states: "Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an

equal number of inhabitants." This is consistent with Supreme Court precedent addressing the one-person-one-vote principle.

The Supreme Court has held that:

> the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Reynolds v. Sims, 377 U.S. 533, 568 (1964). The one-person-one-vote principle "prohibits the dilution of individual voting power by means of state districting plans that allocate legislative seats to districts of unequal populations and thereby diminish the relative voting strength of each voter in overpopulated districts." Rodriguez v. Pataki, 308 F.Supp.2d 346, 363 (S.D.N.Y. 2004), affd. without opn. 543 U.S. 997 (2004).

Still, "districting plans for state legislative seats require only 'substantial' population equality." Id. Thus, "minor deviations from absolute population equality may be necessary to permit states to pursue other legitimate and rational state policies." Id.

"[R]edistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause." Id. "Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional and there is no burden on the State to justify that deviation." Id. (quotation marks and quoted case omitted). In this case, the number of inmates affected by Part XX is so small compared to the total State population that any resulting deviation in district population would be minor, and could easily be addressed during re-districting.

Nevertheless, "a plan within the 'ten percent rule' is not per se immune from judicial review." Id. at 364. "[I]f the plaintiff can present compelling evidence that the drafters of the

plan ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others, a one-person-one-vote action will lie even with deviations below ten percent." Id. at 365 (quotation marks and quoted case omitted). To prevail on such a claim,

> the plaintiffs have the burden of showing that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy. Thus, the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation.

Id. (quotation marks and quoted case omitted) (emphasis in original). "In addition, the plaintiff must prove that the minor population deviation is not caused by the promotion of legitimate state policies." Id. (quotation marks and quoted case omitted).

Here, plaintiffs woefully have failed to demonstrate a prima facie one-person-one-vote equal protection violation. Plaintiffs have failed to plead that any redistricting plan exceeds a population deviation of ten percent. The complaint lacks any allegations that the redistricting plan has resulted in Senate districts that contain major deviations from absolute population equality; that is, a population deviation in the Senate districts in excess of ten percent. Indeed, it is impossible for plaintiffs to make such a claim because no Senate districts have been drawn or enacted yet. Because a *prima facie* violation of the one-person-one-vote principle necessarily depends on a showing that the Senate districts contain major deviations from absolute population equality, and because plaintiffs have failed to plead that such a deviation exists, the third cause of action must fail and should be dismissed.

B. The Fourth Cause of Action.

In the fourth cause of action, plaintiffs contend that Part XX "denies equal protection to all non-prisoners counted in group quarters." Kerwin Affirmation, Exhibit B, Complaint, ¶ 165. Plaintiffs assert that this is the case because "[o]nly incarcerated persons by Section XX are to be

reassigned out of group quarters where they are physically present and reassigned to other addresses where they once may have lived, but no longer do." Id., ¶ 164. Plaintiffs further allege that "[a]ll other persons counted in group quarters are to be counted where they eat sleep [sic] and live pursuant to the Federal Decennial Census." Id., ¶ 159. Plaintiffs have failed to allege that they have standing to assert this claim. Even if plaintiffs have standing, the claim lacks merit.

Plaintiffs have failed to allege that any plaintiff is a non-prisoner counted in a group quarter. Id., ¶¶ 12-21. Accordingly, plaintiffs lack standing to raise the alleged constitutional harms suffered by others (i.e., non-prisoners counted in group quarters). See Society of the Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 773 (1991) (noting the existence of "a general prohibition on one litigant raising the legal rights of another"). Therefore, the fourth cause of action should be dismissed in its entirety.

Even if plaintiffs had standing, the fourth cause of action is meritless. Initially, the Equal Protection Clause requires only persons similarly situated to be treated alike. See e.g. City of Cleburne, Texas, 473 U.S. at 439.

Prisoners are not similarly situated to other persons living in group quarters. The population of State prison inmates consists of persons who were involuntarily removed (unlike students or even members of the military who volunteered for duty) from the districts of their residences, rightfully so, and who were sent to districts which may be far from the districts where they resided. They typically have no connection to the district where they are incarcerated: they do not contribute to the tax bases; they do not, or only marginally and indirectly, contribute to the economy of the area where they are incarcerated (again, as distinguished from students and members of the military who generally enhance the economies where they are in group quarters).

They seldom, if ever, choose to remain in the communities where they are incarcerated unless, coincidently, that is the community where they resided prior to incarceration (in contrast, students frequently choose to permanently remain in their college or university communities following graduation). They have virtually no or minimal connection to community events where they are incarcerated, while others in group quarters are free to involve themselves in such events. The duration of their stay in the communities of incarceration can be fleeting, and is terminated involuntarily by decision of prison administrators. Because of these distinct characteristics of State prison inmates, Part XX rightfully makes special rules with regard to them. Thus, no requirement exists that inmates be treated the same as other persons living in group quarters. Plaintiffs essentially concede that prisoners are not similarly situated to other persons living in group quarters. See Kerwin Affirmation, Exhibit B, Complaint, ¶ ¶ 166 and 167.

Moreover, the Supreme Court has concluded that prisoners may be treated differently than other portions of the population for purposes of redistricting. See Burns v. Richardson, 384 U.S. 73, 92 (1966):

> The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids [citation omitted] the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby.

384 U.S. at 93 [footnote omitted]. Because prisoners are not similarly situated to other persons living in group quarters, plaintiffs' fourth cause of action lacks merit and should be dismissed in its entirety.

Even if plaintiffs had standing, and even if prisoners were similarly situated to other persons living in group quarters, plaintiffs' fourth cause of action would still fail because the

alleged classification plainly is rationally related to several legitimate government interests. Part XX has two primary purposes, both of which undoubtedly are legitimate government interests. Part XX aims to remedy the dilution of voting strength in the communities where inmates resided. The former method of counting prisoners for districting purposes diluted legislative representation in those communities, and inequitably enhanced the legislative representation of prison communities by transferring a portion of the population from inmates' home districts to prison districts. Part XX attempts to eradicate this untenable dilution of representation and voting strength.

Part XX also advances New York's adherence to the doctrine of one-person-one-vote, Reynolds v. Sims, 377 U.S. 533 (1964), because people in prison are not residents of the districts where they are incarcerated and counted; they have no meaningful connection to those districts. That is, they do not own homes or rent apartments, send their children to local schools, vote for local representatives, or otherwise participate consequentially in the districts' civic affairs. See People v. Cady, 143 N.Y. 100, 106 (1894) (noting that a prison "is not a place of residence" and, thus, a prisoner cannot "gain a residence there"); but see Longway v. Jefferson County Bd. of Supervisors, 83 N.Y.2d 17, 22-23 (1993).

Consequently, Part XX furthers the inarguably legitimate state interest of complying with the Equal Protection Clause's one-person-one-vote requirement, thereby working to reduce voter dilution in New York.

Furthermore, "the legislature must be allowed leeway to approach a perceived problem incrementally." Federal Communications Comm'n. v. Beach, 508 U.S. 307, 316 (1993). Thus, even if the counting of other persons living in group quarters for districting purposes presents some of the same problems as those presented by prisoners, the Legislature's decision to leave

those issues un-remedied for now does not violate the Equal Protection Clause. Id. at 315-316; Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955).

In sum, plaintiffs lack standing to assert the fourth cause of action. Even if the Court reaches the merits of the cause of action, it should be dismissed. As plaintiffs essentially concede, prisoners are not similarly situated to other persons who live in group quarters. And, in any event, the classification drawn by Part XX is rationally related to several legitimate state interests. Accordingly, the fourth cause of action should be dismissed in its entirety.

C. The Fifth Cause of Action.

In the fifth cause of action, plaintiffs contend that "Section XX is not enacted with a rational basis and is unreasonable and, therefore, violates equal protection under Article I, Section 11." Kerwin Affirmation, Exhibit B, Complaint, ¶ 195. This argument lacks merit.

Contrary to plaintiffs' contentions, Part XX contains no presumption that prisoners will return to any particular residential address after their prison term is complete. See id., ¶ 178. Rather, the legislation requires LATFOR "to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities." Kerwin Affirmation, Exhibit A, Part XX, § 2 (amending Legislative Law § 83-m) (emphasis added).

Plainly, Part XX requires prisoners to be counted, for redistricting purposes, at their residential addresses prior to incarceration. Part XX does not look to future residential addresses; it concerns itself solely with prisoners' residential addresses prior to incarceration. Accordingly, because Part XX does not contain the presumption alleged by plaintiffs, it obviously does not contain an irrational presumption that violates the Equal Protection Clause.

Furthermore, it is the plaintiffs' burden to negate every conceivable rational basis for Part XX. By their pleading, plaintiffs attempt to shift to the defendants a burden which is rightfully theirs (Washington State Grange v. Washington State Republican Party, 552 U.S. 442 [2008]; Amazon.com LLC v. New York State Department of Taxation and Finance, 81 A.D.3d 183, 194 [1st Dept. 2010]), one which they cannot sustain. Therefore, the fifth cause of action should be dismissed in its entirety.

D. The Sixth Cause of Action.

In the sixth cause of action, plaintiffs argue that "Section XX's presumption that all prisoners will return to a previous addresses [sic] is unreasonable, irrational, arbitrary and capricious." Kerwin Affirmation, Exhibit B, Complaint, ¶ 205. Plaintiffs contend that "[t]o count twice as many persons in a single residence when only one person actually lives there is irrational and deprives persons elsewhere of equal protection." Id., ¶ 202.

Plaintiffs assume that Part XX returns each prison inmate to the exact address where he or she lived prior to incarceration. That is not true. Part XX modifies enumerations of census blocks or "geographic units," not individual addresses, based on the judgment that, for legislative districting, a prison inmate should be counted at his or her prior address or one close to it. Plaintiffs further proceed on the unsubstantiated premise that an inmate's residence has become occupied by other unrelated persons so as to be unavailable for occupancy by the inmate. Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 199-200. This premise overlooks the possibility that an inmate's family may continue to occupy those premises, and that the inmate in all likelihood would return to his exact pre-incarceration address upon release. It was reasonable for the Legislature to determine that a person, involuntarily assigned to a prison would, at some point over the ten or more years that a re-districting plan is extant, return to or near his prior

residence. That is certainly a more reasonable assumption than to assume that a person in prison, subject to transfer at the discretion of a governmental agency to numerous other prisons[15], or to release from incarceration, would remain at the prison address where he was found on enumeration day, until the next enumeration day ten years later. Moreover, Part XX embodies a rational policy-making determination by New York's Legislature. Plaintiffs' sixth cause of action is based on an unreasonable premise and, thus, is meritless. Consequently, it should be dismissed.

In sum, Part XX does not violate the one-person-one-vote principle and is rationally related to several legitimate state interests. Further, the legislation does not contain any irrational classifications or presumptions. Therefore, the legislation does not violate the Equal Protection Clause. Accordingly, the Court should dismiss the third, fourth, fifth, and sixth causes of action in their entirety.

POINT V

PLAINTIFFS' SEVENTH CAUSE OF ACTION ("PARTISAN GERRYMANDERING") FAILS TO STATE A CAUSE OF ACTION, AND THAT CLAIM SHOULD BE DISMISSED.

Notwithstanding that a single district line has yet to be drawn, plaintiffs allege in their Seventh Cause of Action that Part XX constitutes "partisan gerrymandering." Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 206-221. The plaintiffs claim that Part XX is an effort to diminish the political power of the Republican Party and to enhance the power of the Democratic Party in New York State. Id., ¶ 208. Plaintiffs also allege "[f]rom beginning to end, Section XX was a wholly partisan effort" (Id., ¶ 214), and that "[n]ot a single Republican senator voted in favor of Chapter 57 of the Laws of 2010." Id., ¶ 215.

[15] See Correction Law § 23; Lugo v. Goord, 49 A.D.3d 1114 (3d Dept. 2008) (inmate has no right to select prison; DOCCS commissioner retains broad discretion to coordinate inmate transfers), lv denied, 10 N.Y.3d 714.

Plaintiffs proceed exclusively under New York law. Kerwin Affirmation, Exhibit B, Complaint, ¶ 2 ("Section XX is unconstitutional based upon the New York State Constitution, Article I, Section 11, Article III, Sections 1 and 4, and Article VII, Section 4"). Decisions from New York courts that have considered claims of partisan or political gerrymandering have ruled that such claims are not susceptible to judicial review.

In Schneider v. Rockefeller, 31 N.Y.2d 420 (1972)[16], the Court of Appeals reviewed a statute which redistricted and reapportioned the Legislature. Supreme Court had declared the statute valid, 68 Misc. 2d 869, and the Appellate Division affirmed that ruling. 38 A.D.2d 495. The principal issues before the Court of Appeals involved the juxtaposition of the Federal constitutional requirement that State legislative districts be substantially equal in population, see Reynolds v. Sims, 377 U.S. 533, and the State constitutional requirements that legislative districts be compact, contiguous, convenient and coterminous with traditional political subdivisions as required by New York Constitution, Article III, §§ 4, 5. 31 N.Y.2d 426. The remaining issues related to State constitutional requirements for enlarging the State Senate (New York Constitution, Article III, § 4), for enacting a bill into law (New York Constitution, Article III, §14), and for employing the latest Federal census data in reapportioning the Legislature (New York Constitution, Article III, § 4). Id.

The Court of Appeals affirmed, and ruled that the legislative plan was constitutional. It held that where the Legislature made a good faith effort to comply with the mandate of the equal-population principle as evidenced by near equality of population in legislative districts,

[16] The procedural posture of Schneider in Supreme Court is not entirely clear. See Schneider v. Rockefeller, 68 Misc. 2d 869 (N.Y. Sup. 1972). That decision observes that the respondents moved under CPLR 2215 for an order pursuant to CPLR 3211(a)(7) and 3212(a) adjudging the apportionment plan under review to be valid and constitutional. The CPLR 2215 motion was made in conjunction with another cross-motion for a protective order with regard to petitioners' demand for disclosure, as to which petitioners had moved to compel that disclosure. The Court ruled the redistricting plan valid and in accord with the federal and state Constitutions, and dismissed the petitions and granted the respondents summary judgment.

and had not unduly departed from state constitutional command that integrity of counties be preserved, the plan was constitutional. 31 N.Y.2d 428-429.

In considering the plaintiffs' equal protection challenge, the Schneider Court concluded that the gerrymandering of special interest groups was too sensitive and significant an issue to be decided on the record with its bare allegation that "Chapter 11 … constitutes an attempt to maximize the strength of one of the two major political parties by means of a gerrymander." 31 N.Y.2d 431. The Court held that even if it were to assume the justiciability of a gerrymander of a political interest group in the single-member district context, the record before it did not demonstrate the invidious effects of the alleged gerrymander, nor did it address the more basic threshold questions such as the necessary size and degree of common interests a group would have to possess before it would be entitled to protection. Id. The Court recognized that the gerrymander claim was a "political thicket," and that the case before it was not the occasion to decide whether, and to what extent, the courts ought to employ the Equal Protection Clause to police an alleged partisan execution of a judicial command to redistrict. Id. The present case is even less appropriate given the total absence of a redistricting plan for the Court to review.

The present plaintiffs' case is similarly based on the unsupported allegation that "[f]rom beginning to end, Section XX was a wholly partisan effort" (Kerwin Affirmation, Exhibit B, Complaint ¶ 214). Unlike here, at least the plaintiffs in Schneider were challenging a re-districting statute embodying the final judgment of the State's legislature and its governor on the issue of how the legislative districts should be drawn. On the contrary, plaintiffs here present a challenge to a statute that merely effects a change in the manner in which a small segment (0.3%) of the State's population is to be counted as an antecedent to actual district map-drawing. In this posture, this case is even deeper in the political thicket than that presented in Schneider.

As in that case, this is not an occasion where the Court should venture in and decide whether, and to what extent, it ought to police an allegedly partisan motivation in processes leading up to redistricting. Moreover, fundamental fairness, not partisan advantage, requires that the Census Bureau's population counts be adjusted in the manner provided by Part XX. Bearing in mind the plaintiffs' burden to prove beyond a reasonable doubt that Part XX is unconstitutional, it is clear that the plaintiffs will be unable to establish their partisan gerrymandering claim, particularly since the statute they challenge has not affected the lines of a single legislative district. Only by engaging in sheer speculation can the plaintiffs conjure up the dire circumstances which they present to the Court to justify their request for a judgment finding Part XX to be an unconstitutional gerrymander. That is not proof beyond a reasonable doubt.

Partisan gerrymandering was also alleged by the plaintiffs in Bay Ridge Community Council, Inc. v. Carey, 103 A.D.2d 280 (2d Dept. 1984),[17] appeal dismissed, 64 N.Y.2d 1015 (1985), order affirmed, 66 N.Y.2d 657 (1985), appeal dismissed sub nom. Rappleyea v. Carey, 478 U.S. 1015 (1986). That case presented a challenge to the constitutionality of Chapter 455 of the Laws of 1982, which re-apportioned the Senate and Assembly districts of the State. Among the issues presented on appeal was whether the law violated the Fourteenth Amendment because it invidiously discriminated against a political group, and because it impermissibly impaired the voting power of the voters of the community of Bay Ridge and amounted to a partisan political gerrymander. 103 A.D.2d 281-282. The Court ruled that such a claim was non-justiciable as a matter of law, citing WMCA Inc. v. Lomenzo, 382 U.S. 4, 5-6 (1965) [Harlan, J., concurring]; Cousins v. City Council of Chicago, 466 F.2d 830, 844-845 (1972), cert. den. 409 U.S. 893; Wells v. Rockefeller, 311 F.Supp. 48, 52 (1970), affd. 398 U.S. 901; and Koziol v. Burkhardt,

[17] In Supreme Court the respondents moved for judgment dismissing the petition (CPLR 3211(a)(7), and for summary judgment (CPRL3212). See Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 434 (N.Y. Sup. 1982).

51 N.J. 412, 241 A.2d 451, 453 (1968)). 103 A.D.2d 284. "[A] court is powerless to review a challenge to a reapportionment plan on the ground that it amounts to a partisan political gerrymander." Id. The Appellate Division rejected plaintiffs' argument that such claims were justiciable under Karcher v. Daggett, 462 U.S. 725 (1983), because Karcher applied only to Congressional districting, and because Karcher invalidated the congressional redistricting plan because the percentage deviation in population between the largest district and the smallest district was greater than the deviation present in alternative plans that were submitted to the Legislature. Id. New York State trial courts which have considered the question have hewed to the same position: political gerrymandering claims are non-justiciable. See e.g., Village of No. Syracuse v. County Legislature of Onondaga County, 74 Misc. 2d 842 (Onondaga Co. Sup. Ct. 1973) where the Court stated:

> No valid reason has been shown for not accepting this decision of the Legislature and for imposing instead by judicial decree Mayor Stott's proposal, which both the Commission and the Legislature duly considered and rejected. In this Court's opinion, to override the collective policy decision of the elected representatives of the residents of Onondaga County on this point would, under the circumstances, be an unwarranted and unwise act of judicial interference in a legislative function for which there is no support or justification in the reported decisions… The rule that reapportionment 'is primarily a matter for legislative consideration and determination,' [citation omitted] has been so often stated by the Supreme Court as to require little discussion [citations omitted].

74 Misc. 2d 851. See also Prentiss v. Cahill, 73 Misc. 2d 245 (Albany Co. Sup. Ct, 1973) where the Court wrote:

> [I]t is not the duty of the Court to police the political effect of legislatively proposed plans of reapportionment. If such plans meet the requisite constitutional standards, in that they are not patently invidious in proposing a political scheme of gerrymandering, they are entitled to approval. It is the people themselves, either by changing their political representation at the ballot box or by striking down a plan in a referendum, that should determine political issues, not the Courts.

73 Misc. 2d 251.

Similarly, federal courts in decisions since 2003 have held that claims of political gerrymandering are non-justiciable. See: Molinari v. Bloomberg, 564 F.3d 587 (2d Cir. 2009) and Shapiro v. Berger, 328 F.Supp.2d 496 (S.D.N.Y. 2004).[18]

Under the principles set forth in Schneider and Bay Ridge, the seventh cause of action alleged by plaintiffs here is clearly non-justiciable. Furthermore even if it was justiciable, the plaintiffs can point to no evidence, much less evidence beyond a reasonable doubt, of partisan intent, or of alternative plans that better meet the constitutional requirements of both more compactness and greater population equality. This is so because what they challenge is not a re-districting legislation, but a statute that modifies the method of population counting, antecedent to re-districting. Without a re-districting statute, a gerrymandering allegation is not possible since a claim of that nature depends upon the drawing of district lines which has not yet occurred in New York. Even if a gerrymandering claim against Part XX were possible at this juncture, it would nonetheless be non-justiciable for the lack of judicially discernible and manageable standards for assessing how much political activity should be permitted the legislators in representing their constituents and attempting to enact legislation, since "some intent to gain

[18] In the U.S. Supreme Court , the law on justiciablity of political gerrymandering claims is at best muddled. In recent years the Court decided three cases in the area, with each case revealing a splintered Court. While a seeming majority of Justices agree that political gerrymandering claims are justiciable, no standard for assessing such claims has emerged from the Court. This inability may reflect that in reality, such political gerrymandering claims are, in fact, non-justiciable under federal law. See Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267 (2004); and League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). In each case the Court issued multiple opinions, four in Davis, and five each in Vieth, and Perry, with each opinion garnering the support of various Justices, sometimes endorsing only part of the opinion. Only in Davis and Perry did parts of the Court's opinion garner the vote of a majority of the Justices. In Davis, the Court held that an equal protection challenge to a political gerrymander presented a justiciable case or controversy (478 U.S. at 118–127), but the Justices could not agree as to what substantive standard to apply. Compare 478 U.S. at 127–137 (plurality opinion), with 478 U.S. at 161–162 (Powell, J., concurring in part and dissenting in part). A four-Justice plurality in Vieth would have directly held such challenges to be non-justiciable political questions, while a fifth Justice joined them in affirming the dismissal of the case because of the absence of a standard by which to assess such claims. Vieth, 541 U.S., at 306 (Kennedy, J., concurring in judgment). In Perry, the Justices by-passed the justiciability question in favor of resolving the case by affirming dismissal because of the absence of a reliable standard for identifying unconstitutional gerrymanders. Perry, 548 U.S. 423.

political advantage is inescapable" in the legislative process. Urban Justice Center v. Pataki, 38 A.D.3d 20, 29-30 (1st Dept. 2006), appeal dismissed, leave to appeal denied, sub nom. Urban Justice Center v. Spitzer, 8 N.Y.3d 958 (2007).

The plaintiffs' Seventh Cause of Action for partisan gerrymandering presents a non-justiciable matter to the Court. As such, that claim should be dismissed.

CONCLUSION

Upon judicial review, legislative enactments enjoy a strong presumption of constitutionality as the products of a coordinate and co-equal branch of the government. For this reason, plaintiffs must establish their claim of unconstitutionality "beyond a reasonable doubt," the highest burden of proof that the American system of justice imposes on a party. See supra, pp. 8-9. In addition, in this case plaintiffs present a facial challenge to Part XX; such challenges are disfavored by the courts. To succeed, plaintiffs must negate every reasonable basis that supports the statute at issue. Faced with these combined requirements, plaintiffs cannot succeed.

Many of the plaintiffs' causes of action (First, Third, Fourth, Fifth, Sixth and Seventh) simply fail to state a claim, and can be dismissed pursuant to CPLR 3211 (a)(7), even while accepting the facts as plaintiffs present them. Plaintiffs' Second Cause of Action, if not dismissible on 3211(a)(7) grounds, should be dismissed under CPLR 3212 inasmuch as the undisputed material facts show that Part XX was enacted in full conformity with the applicable rules governing the internal procedures of the New York State Senate, and consistently with Article III, § 1 and Article VII, §§ 4 and 6 of the New York State Constitution.

Dated: Albany, New York
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