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.

DEFENDANT DOCCS' MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs are challenging a properly enacted law, passed by a democratically elected legislature that made a policy judgment that both the State Constitution and the Census Bureau reserve for the State. Plaintiffs' primary arguments to undermine the legitimacy of that law (presented in their first two causes of action) have already been demonstrated to be unsound and certainly not warranting summary judgment in plaintiffs' favor. By their opposition to defendants DOCCS' cross-motion to dismiss or for summary judgment, it has become abundantly clear that judgment should be entered in favor of DOCCS on all of the plaintiffs' claims, and the constitutionality of Part XX upheld.

Plaintiffs moved for summary judgment on their first (alleging that Part XX violates Article III, section 4 of the New York Constitution) and second (alleging that passage of the legislation that included Part XX violated Article VII of the Constitution) causes of action. Defendant DOCCS and defendant-interveners opposed that motion. DOCCS crossed-moved for dismissal or for summary judgment seeking dismissal of the entire Complaint. In their reply and response, the plaintiffs concede that they are not entitled to summary judgment on their second cause of action. See Affirmation of David L. Lewis[1] dated September 1, 2011 (hereinafter Lewis Affirmation 9/1/11), at page 3 ("Counsel for the Plaintiffs concede…no Summary Judgment can be had by the Plaintiffs on the Second Cause of Action.").

Plaintiffs continue to maintain that they are entitled to summary judgment on their first cause of action, and oppose the defendant DOCCS' cross-motion, as well as the summary

[1]The Lewis affirmation is replete with legal argument, including citation to legal authority (see paragraphs 11, 30, 31, 33, 34, 35, 36, 40, 42, and 51). Counsel's affirmation violates 22 NYCRR 202.8 (Motion procedure), (c) ("Affidavits shall be for a statement of facts, and briefs shall be for a statement of relevant law"). Though he now reveals himself to be counsel to the Senate majority leader, he still fails to present his bases of knowledge of the few facts that he presents in his affirmation. Ironically, counsel may have been in a position to assert facts related to the plaintiffs' second cause of action, dealing with the Senate's passage of Part XX, but he is silent on that topic.

judgment motion made by defendants-interveners. As defendant DOCCS demonstrated in its papers in support of its cross-motion, and as is further demonstrated herein, DOCCS should be granted judgment against the plaintiffs, and the plaintiffs' motion for summary judgment should be denied.

Defendant DOCCS in its Memorandum of Law dated August 18, 2011 set forth the appropriate burden of proof imposed upon the plaintiffs in this action. See Defendant DOCCS Memorandum of Law dated August 18, 2011, pages 9-10. In their reply and response papers the plaintiffs ignore this argument, except to say that "'facially' or 'as applied' approaches are irrelevant to the constitutional analysis." Lewis Affirmation 9/1/11 at pages 23-24. This comment reveals a stunning disregard for long-established constitutional analysis whereby differing standards are applied depending on the nature of the challenge presented. See, generally, Amazon.com LLC. v. New York State Department of Taxation and Finance, 81 A.D.3d 183 (1st Dept. 2010).

Plaintiffs' effort to simply brush aside the distinction between the nature of the challenges is understandable. The combination of the various elements of their burden of proof requires them to prove beyond a reasonable doubt that there is no set of circumstances under which Part XX, which is strongly presumed to be so, could be constitutional. That is an extraordinarily heavy burden. Plaintiffs, by their silence in the face of defendant DOCCS' argument, tacitly acknowledge that burden. When plaintiffs' proof is viewed through the lens of the burden imposed upon them, it is clear that defendant DOCCS should have judgment in its favor and that the Complaint should be dismissed.

ARGUMENT

POINT I

IT IS CLEAR THAT THE PLAINTIFFS CANNOT SUSTAIN THEIR BURDEN OF PROOF ON THEIR FIRST CAUSE OF ACTION. THEIR MOTION FOR SUMMARY JUDGMENT ON THAT CLAIM SHOULD BE DENIED, AND DEFENDANTS' MOTION GRANTED.

Plaintiffs' first cause of action alleges that Part XX violates Article III, section 4 of the New York Constitution. Complaint, ¶ 87. Plaintiffs contend that the federal census counts prison inmates where they are incarcerated, while Part XX provides that state prison inmates who are from New York are to be counted in their pre-incarceration communities. This, according to the plaintiffs, violates the Constitution insofar as it provides that the census is controlling. Id. Plaintiffs also take issue with the portion of Part XX that provides that federal-prison inmates and inmates with no or non-New York addresses should not be counted in the process of redistricting. For the following reasons, plaintiffs' claims are specious. Their motion for summary judgment on that cause of action should be denied, and because plaintiffs cannot meet their burden of proof, DOCCS' cross-motion for judgment in its favor should be granted.[2]

A. Because Implementation of Part XX Is Based On Census Data, Part XX Does Not Undermine Article III Section 4's Provision That the Census Controls.

Part XX comports with Article III section 4's requirement that the census controls. Part XX accepts the Census Bureau's report on the number of people who live in the State and their locations within the State. Part XX also accepts the Census Bureau's report on the number and location of people found in group quarters, and, with additional data supplied by defendant

[2] Plaintiffs' reliance on Department of Commerce v. House of Representatives, 525 U.S. 316 (1999) (See Plaintiffs Reply Memorandum of Law, page 7) is misplaced for at least two reasons. First, the action, a challenge to the Census Bureau's plan to use statistical sampling rather than actual enumeration, was brought under the Census Clause of the United States Constitution which is not applicable in this matter. Second, without so stating, plaintiffs cite to the concurring opinion of Justice Scalia, not the Court's opinion which was written by Justice O'Connor.

DOCCS, removes inmates from the census blocks where they were found by the Census Bureau, and redistributes them to the communities where they lived prior to incarceration.

Plaintiffs' argument is based on the unsupported notion that Article III, section 4 requires strict adherence to the Census Bureau's reporting of inmates as residing at their places of incarceration. It does not. The purpose of the census is enumeration. Once a state has been enumerated, that state has it within its authority to determine for itself where segments of its population ought to be counted for the purpose of intrastate representation.

This point is best illustrated by a hypothetical whereby the Census Bureau, not New York, determined that those in group quarters, including inmates, should be counted in their home communities rather than in their group quarters communities. By their argument, apparently this would be acceptable to the plaintiffs who would cede to an entity which has no stake in the matter an issue totally internal to the state. When it adopted the federal census in place of its own enumeration as a money saving measure, New York did not relinquish to the federal government such a fundamental element of self-governance. That would be contrary to our federalist form of government. So, too, is the idea that a federal administrative agency can determine for New York how its legislative districting should be accomplished. Yet that is the import of the plaintiffs' construction of Article III, section 4. Plaintiffs have provided nothing from the legislative history of Article III section 4 to suggest that New York intended to be bound by Census Bureau practice. Indeed the history before the Court only shows that New York adopted the federal census in the place of its own as a money saving measure. See Kerwin Affirmation, exhibit E.

B. Neither The New York Constitution Nor The Census Directs Where State Prisoners Are To Be Counted.

The ultimate issue facing the Court in this litigation is where New York's prison inmates should be counted for purpose of legislative districting in the State. The answer to that question is not found in New York's Constitution nor in the federal census. In fact, in 2010 (See http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html#comments), and 2011 (See Lewis Affirmation 9/1/11, exhibit D, 2010 Census Advance Group Quarters Summary File, page 1-1), the U.S. Census Bureau determined to "assist those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation" (Lewis Affirmation, id.) by providing group quarters data to the states so as to allow them to make reasoned decisions as to where to attribute segments of their populations such as prison inmates. By this measure the Census Bureau acknowledged that it takes no position on the policy issue of where transients, like inmates, should be counted for districting purposes, and, leaves such choices to the states. Indeed, the New York Court of Appeals has stated that "[i]t is unquestioned that the States are granted considerable deference in determining the parameters of an apportionment population." Longway v. Jefferson County Board of Supervisors, 83 N.Y.2d 17, 22 (1993). New York, by enactment of Part XX has determined that for purposes of its legislative districting, its State prison inmates should be counted in their home communities. This is not "a choice…the Constitution forbids." Longway, 83 N.Y.2d at 22, quoting Burns v. Richardson, 384 U.S. 73, 92. Nor is it a choice the New York Constitution forbids.

C. "Inhabitant" Is Not Defined In the Constitution. The Legislature's Construction of That Term Must Be Accepted.

Plaintiffs contend that the term "inhabitant" is defined in section 5-a of Article III of the New York Constitution, (see Plaintiffs' Reply Memorandum of Law, Point III, pages 5-9), and means mere physical presence. Plaintiffs further maintain that this definition applies to "inhabitant" as used in section 4 of Article III, and that Part XX's use of a prior residence address rather than prison location is inconsistent with this definition of "inhabitant." In essence, plaintiffs maintain that inmates "inhabit" their prison cells and should be counted there for districting purposes.

Plaintiffs' premise is simply wrong. "Inhabitant" is not defined in section 5-a, nor elsewhere in the Constitution. As exhibit C to the Lewis Affirmation 9/1/11 establishes, section 5-a was added to Article III in order to modify the phrase "inhabitants, excluding aliens" which appears in sections 4 and 5 of Article III. Prior to the addition of section 5-a, redistricting was based upon citizen population rather than total population. Id. Because the number of aliens in the State at that time was so small compared to the State's total population, there was no benefit in trying to differentiate between the two. Id. at 1923-1924. Thus by operation of section 5-a, "inhabitants excluding aliens" in sections 4 and 5 of Article III came to mean "the whole number of persons" or, more succinctly, inhabitants and aliens.

Section 5-a does not define "inhabitant" as the plaintiffs maintain it does. Nor is that term defined elsewhere in the Constitution. In the absence of a definition in the Constitution, the Legislature's enactment of Part XX did not violate sections 4 or 5-a of Article III if "inhabitant" as used therein is interpreted as including an element of permanence or volition. That construction of "inhabitant" is consistent with numerous cases decided by New York and federal courts. See Intervener-Defendants' Memorandum of Law dated August 18, 2011, pages 11-16.

Furthermore, since it is the plaintiffs' burden here to prove their case "beyond a reasonable doubt," the plaintiffs have not sufficiently established that "inhabit" can only mean physical presence. The a Legislature's construction of "inhabitant" as used in Article III, section 4 as meaning other than a prison address, and specifically a pre-incarceration home address must be accepted. Indeed this construction of "inhabitant" is consistent with Article II, section 4's provision that, in substance, a residence is neither gained nor lost by reason of a person's incarceration.

D. Plaintiffs' Reliance On Longway v. Jefferson County Board of Supervisors Is Misplaced.

In their brief in opposition and in reply, plaintiffs cite Longway, supra, several times. See Plaintiffs' Reply Memorandum of Law, pages 6, 10, 11, and 13. Though plaintiffs rely on it heavily in support of their arguments, it is important to note what Longway does and does not stand for.

Longway came before the New York Court of Appeals on a question certified to it by the United States Court of Appeals for the Second Circuit. Longway, at 17. The question certified was, "Whether, for purposes of local legislative apportionment, 'population,' defined as 'residents, citizens or registered voters'…necessarily excludes transients, such as military personnel, incarcerated felons, and occupants of group homes[?]" Id. at 17-18. The Court of Appeals answered the certified question in the negative. Longway, at 25. In other words, the Court held that transients like inmates could be excluded, or could be included, in the "population" for redistricting purposes under the Municipal Home Rule Law ("MHRL").

To the extent that the plaintiffs imply that Longway requires that transients be included in the definition of "population" in the MHRL, they misread the Court's decision. In a footnote, the plaintiffs suggest that the Court equated "resident" with "inhabitant" as that term appears in

Article III. Plaintiffs' Reply Memorandum of Law, page11, footnote 1. What Longway does not provide is a definition of "inhabitant" as that term is used in Article III of the New York Constitution. In fact, the term "inhabitant," did not appear in the section of the MHRL that was before the Court, and any effort to construe that term in that context was unnecessary to the Court's consideration of the certified question.[3]

E. There Is No "Right To Be Counted." If There Is Such A Right, Plaintiffs Have No Standing To Assert That Right On Behalf Of Inmates Who Are Not Counted Under Part XX.

Plaintiffs assert a new constitutional right, the "right to be counted." Plaintiffs' Reply Memorandum of Law, pages 14, 15. Plaintiffs distinguish the right to vote, which they properly attribute to the United States Constitution, from a "right to be counted" which they find rooted in Article III, §5-a of the New York Constitution. Plaintiffs cite no judicial decisions which recognize this "right." While there may be a "right to be counted" as an element of the right to vote, plaintiffs assert the existence of such a right in the context of redistricting. If there is such a right, which is, at best, doubtful, plaintiffs have failed to plead that they are in danger of not being counted for the purpose of redistricting.

Insofar as the plaintiffs are attempting to assert that right on behalf of inmates who may not be counted among New York's population by operation of Part XX, they have no standing. "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." Caprer v. Nussbaum, 36 AD3d 176, 181 (2d Dept 2006). "An analysis of standing begins with a determination of whether the party seeking relief has sustained an injury." Mahoney v. Pataki, 98 N.Y.2d 45, 52 (2002) (citing Society of Plastic Indus. v. County of Suffolk, 77 N.Y.2d 761,

[3] See Point III, infra, at pages 13-14 for further discussion of Longway and how, by its approving citation to Burns v. Richardson, 384 U.S. 73 (1966), it lends support to Part XX.

762–773 [1991]). "The Court of Appeals has defined the standard by which standing is measured, explaining that a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law." Caprer, supra, at 183. A plaintiff, to have standing, "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 [1984]. If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. Stark v. Goldberg, 297 A.D.2d 203 (1st Dept 2002). The plaintiffs before this Court are not in danger of not being counted themselves, and cannot be heard to assert the putative "right to be counted" supposedly possessed by certain segments of the New York inmate population.

Plaintiffs assert that Part XX's exclusion of federal inmates, non-New York inmates in state prison, and inmates with no known New York addresses violates Article III, § 5-a's alleged requirement that redistricting be based on the entire state population, to the exclusion of no one. It was reasonable for the Legislature to exclude these categories of inmates from New York's population count because one group was known to be from states other than New York, so excluding them, though they were present involuntarily in New York, was appropriate. As to the other two groups, federal inmates and those with no known addresses, the Legislature made a reasonable determination that, absent some indication that they were from New York, they, too, should be regarded as non-New York residents. These were choices about representation that the Legislature was well within its authority to make.

However, if the Court should find that these category of inmates should be counted , the Court should employ the severability clause in Part XX (Kerwin Affirmation, exhibit A, page 113, § 4) to invalidate the provision that excludes these inmates from the population count while

at the same time preserving Part XX's core provision concerning state inmates with ascertainable pre-incarceration New York addresses.

POINT II

SINCE THE UNDISPUTED EVIDENCE PROVES THAT CHAPTER 57 WAS A NON-APPROPRIATION BILL THAT WAS AMENDED BY THE LEGISLATURE, PLAINTIFFS HAVE FAILED TO RAISE AN ISSUE OF FACT CONCERNING THEIR SECOND CAUSE OF ACTION.

As previously shown, plaintiffs' second cause of action was based on their mischaracterization of Chapter 57 of the Laws of 2010 as an appropriation bill. Defendant DOCCS has provided the Court with undisputed 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, which establish 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 Affidavit of Robert L. Megna, sworn to on the 12th day of August, 2011. This proof eviscerated plaintiffs' claim that the Governor's budgetary powers under New York Constitution Article VII, §§ 4 and 6, improperly prevented the Legislature from amending Chapter 57.

Although in counsel's reply affirmation plaintiffs concede that defendant DOCCS' proof precludes the Court from granting plaintiffs summary judgment on their second cause of action, plaintiffs vaguely maintain, without even addressing the point in their reply memorandum, that the defendants are not entitled to summary judgment because there supposedly remains a "factual possibility" that the Governor, and not the Legislature, amended the bills in question. See Lewis Affirmation, 9/1/11, ¶ 4, fn. 2. But plaintiffs have not offered even a scintilla of evidence to support this supposed "factual possibility".

Where an "affidavit is vague, conclusory, [and] contradicted by documentary evidence in the record", the offering party opposing summary judgment "falls far short" of the duty "to raise a factual issue". Sweeney v. McCormick, 159 A.D.2d 832, 833 (3d Dept. 1990) (citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) ("mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment).

Here, the undisputed proof before the Court -- including the printout of the legislative history of the relevant bills -- shows that several committees of the Senate and Assembly did in fact amend the legislation at issue. See Affidavit of Joseph F. Pennisi, Exhibit B. Consequently, plaintiffs' vague assertion, based on no evidence whatsoever, that there remains a "factual possibility" that the Legislature did not amend Chapter 57, is insufficient to establish a triable factual issue, and plaintiffs' second cause of action must be dismissed. See Kaplan v. Hamilton Medical Associates, P.C., 262 A.D.2d 609, 610 (2d Dept. 1999) (when an affidavit makes "conclusory statements . . . based either on facts not in evidence or which directly contradicted the evidence" the affidavit is "insufficient to meet the plaintiff's burden of showing a triable factual issue").

POINT III

DOCCS HAS DEMONSTRATED THAT PLAINTIFFS' EQUAL PROTECTION CLAIMS ARE MERITLESS AND, THUS, THE THIRD, FOURTH, FIFTH, AND SIXTH CAUSES OF ACTION SHOULD BE DISMISSED.

As shown in DOCCS' original memorandum of law, plaintiffs' equal protection claims are meritless. The third cause of action must fail 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 plaintiffs have failed to plead or demonstrate that such a deviation exists. See DOCCS' Memorandum of Law dated August 18,

2011, at 29-31. Similarly, the fourth cause of action lacks merit because plaintiffs lack standing to raise the alleged constitutional harm suffered by non-incarcerated individuals housed in group quarters. Even if plaintiffs had standing, the cause of action should still be dismissed because prisoners are not similarly situated to other persons living in group quarters. In any event, the purported classification plainly is rationally related to several legitimate government interests, which are thoroughly discussed in DOCCS' Memorandum of Law dated August 18, 2011 at pages 33-35. The fifth and sixth causes of action – which plaintiffs do not even discuss in their opposition papers – should be dismissed because Part XX does not contain any irrational classifications or presumptions. See DOCCS' Memorandum of Law dated August 18, 2011, at 35-37.

In response to DOCCS' summary judgment motion, plaintiffs attempt to resuscitate their equal protection claims by improperly transferring their burden to DOCCS, changing their arguments, and setting forth additional conclusory assertions. Obviously, plaintiffs commenced this action arguing that Part XX violates their equal protection rights. See Kerwin Affirmation, Exhibit B, Complaint. Just as obviously, DOCCS has never made a claim that Part XX violates its equal protection rights. Nevertheless, plaintiffs attempt to create a triable issue of fact by claiming that DOCCS and the intervenors "utterly failed to meet the burden that they assumed in moving for summary judgment to establish through competent evidence that no question of fact exists as to their equal protection claim." Lewis Affirmation 9/1/11, ¶ 39 (emphasis added); see also Plaintiffs' Reply Memorandum of Law, Point VI. Plainly, DOCCS cannot assume a burden to establish an equal protection claim that it has never asserted. The Court should reject plaintiffs' attempt to create an issue of fact by impermissibly shifting its heavy burden to establish an equal protection violation to DOCCS.

Plaintiffs have also changed their arguments in response to DOCCS' summary judgment motion. For instance, plaintiffs initially made it clear that their equal protection claim asserted in the third cause of action related to a diminution of their voting rights. Indeed, plaintiffs pleaded that "[t]he weight of the vote upstate counties [sic] is unfairly reduced in comparison to that of downstate counties." Kerwin Affirmation, Exhibit B, Complaint, ¶ 147 (emphasis added). Plaintiff further pleaded that Part XX "mandates reapportionment by unequal enumeration. It creates unequal populations, thereby diminishing the relative voting strength by virtue of population allocation." Id., ¶ 151 (emphasis added). Now, plaintiffs contend that "Defendants' reliance upon Burns v. Richardson, 384 U.S. 73 (1966) and similar lines of cases conflates the right to vote, protected by the federal constitution with the right to be counted. Put more simply, the method of counting persons such as prisoners in group quarters does not affect voting." Plaintiff's Reply Memorandum of Law, at 14.

Plaintiffs' belated and unjustifiable attempt to escape Burns should be rejected. Plaintiffs' effort to avoid Burns is understandable because the Court in that case explicitly addressed the exclusion of convicted individuals in the apportionment base, and did so in language that directly supports DOCCS' position:

> Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include . . . persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. 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.

Burns, 384 U.S. at 92 (emphasis added).[4] Burns plainly states that prisoners need not be included in the apportionment base; plaintiffs fail to explain how this specific language relates only to the right to vote as opposed to their newly-conceived "right to be counted."

Plaintiffs argue in a conclusory manner that a trial is necessary to determine some unidentified factual issue. See Plaintiffs' Reply Memorandum of Law, at 15-16; Lewis Affirmation 9/1/11, ¶ 52. However, as explained in DOCCS' Memorandum of Law dated August 18, 2011 at pages 32-33 and as essentially conceded by plaintiffs (Kerwin Affirmation, Exhibit B, Complaint, ¶¶ 166-167), prisoners are not similarly situated to other persons living in group quarters. Accordingly, no trial is necessary because no dispute exists concerning whether prisoners and other group quarter residents are similarly situated.

Plaintiffs also argue that Part XX fails to further New York's compliance with the one-person-one-vote doctrine. Plaintiffs contend that Part XX "counts fewer inhabitants, and thus cannot be justified on 'one person, one vote' grounds." Lewis Affirmation 9/1/11, ¶ 42. Plaintiffs further claim that Part XX creates two data sets, one federal and one state, which fail to enhance New York's compliance with the one-person-one-vote doctrine. See id., ¶ 44.

Contrary to plaintiffs' assertions, as explained in DOCCS' August 18, 2011 brief at pages 17 and 34, Part XX actually enhances New York's compliance with the one-person-one-vote doctrine. At the very least, because, as the Legislature concluded, it manifestly is plausible that Part XX remedies the dilution of voting strength in the communities where inmates resided and enhances New York's compliance with the one-person-one-vote doctrine, the Court's inquiry should be at an end. See Federal Communications Comm'n. v. Beach Communications, Inc., 508 U.S. 307, 313-314 (1993). Indeed, plaintiffs have failed to satisfy their burden of negating

[4] Notably, Longway, the case on which plaintiffs heavily rely, cited this portion of the Burns decision with approval. 83 N.Y.2d at 21-22.

every conceivable basis which supports the Legislature's passage of Part XX. See id. at 315; Matter of Wolpoff, 80 N.Y.2d 70, 78 (1992). Instead, they again are attempting to shift to DOCCS their burden to establish an equal protection violation.

In sum, the Court should reject plaintiffs' attempt to avoid summary judgment on their equal protection claims by improperly transferring their burden to DOCCS, changing their arguments to avoid controlling precedent, and setting forth additional meritless arguments. Instead, for the reasons set forth in DOCCS' Memorandum of Law dated August 18, 2011 and herein, the Court should grant DOCCS summary judgment on plaintiffs' equal protection claims and dismiss the third, fourth, fifth, and sixth causes of action in their entirety.

POINT IV

PLAINTIFFS DISREGARD FEDERAL AND STATE PRECEDENTS WHICH HOLD THAT PARTISAN GERRYMANDERING CLAIMS ARE NOT JUSTICIABLE.

Defendant DOCCS has demonstrated that the plaintiffs have failed to state a cause of action for partisan gerrymandering. See Defendant DOCCS' Memorandum of Law dated August 18, 2011, pages 37-43. In response, plaintiffs assert the unsupported "fact" that Part XX was enacted with the purpose of diluting upstate districts' count of inhabitants. See Plaintiffs' Reply Memorandum of Law, dated September 1, 2011, page 17. In a further feeble attempt to breathe life into this claim, plaintiffs cite the statement of a single senator as "clear evidence" of an intent to inject partisan politics into the redistricting process. Id. Even accepting that the plaintiffs have accurately represented the position of that single senator, there is nothing to establish that every other senator who voted in favor of Part XX was similarly motivated.

In a further desperate attempt to salvage this claim, plaintiffs cite a Supreme Court case from 1986 (Davis v. Bandemer, 478 U.S. 109) while disregarding more current Supreme Court precedent from 2004 (Vieth v. Jubelier, 541 U.S. 267) and 2006 (League of United Latin

American Citizens v. Perry, 548 U.S. 399) which expressed deep skepticism about the viability of gerrymandering claims. Furthermore, the plaintiffs ignore New York cases cited by defendant DOCCS (see DOCCS' Memorandum of Law dated August 18, 2011, pages 38-41) establishing that partisan gerrymandering claims are not justiciable.

Plaintiffs are right about one thing: "…at this point Part XX has not affected the lines of a single legislative district…" Plaintiffs' Reply Memorandum of Law, page 17. Notwithstanding this concession, the plaintiffs persist, asserting that the intent to remove certain persons from the count for a political purpose is sufficient to give rise to "imminent harm" that will "impact in a significant way …Republican represented districts." Id. It is clear that the plaintiffs are proceeding on sheer speculation, because, as they observe, not a single district line has been drawn.

CONCLUSION

Plaintiffs' motion for partial summary judgment was based on their first and second causes of action. Plaintiffs now acknowledge that they are not entitled to summary judgment on their second cause of action. Defendant DOCCS has demonstrated that not only should the plaintiffs be denied summary judgment on their first cause of action, but that it should have judgment in its favor on all of plaintiffs' claims.

Dated: Albany, New York
September 14, 2011

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