SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY
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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-

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

Defendants.

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INDEX NO. 2310-2011

AFFIRMATION IN OPPOSITION TO MOTION TO INTERVENE

DAVID L. LEWIS, an attorney admitted to practice before the Courts of the State of New York hereby affirms as follows:

1. I am the attorney for the plaintiffs in the above-captioned action and as such am fully familiar with the facts and circumstances herein.

2. I make this affirmation in opposition to the motion by the proposed Intervenors, NAACP New York State

Conference ("NAACP"), Voices of Community Activists and Leaders-New York ("VOCAL-NY"), Common Cause of New York ("Common Cause"), Michael Bailey, Robert Ballan, Judith Brink, Tedra Cobb, Frederick A. Edmond III, Melvin Faulkner, Daniel Jenkins, Robert Kessler, Steven Mangual, Edward Mulraine, Christine Parker, Pamela Payne, Divine Pryor, Tabitha Sieloff and Gretchen Stevens.

3. Plaintiffs brought an action for a declaratory judgment under CPLR 3001 and an injunction seeking a declaration that Section XX is unconstitutional under the New York State Constitution. The instant action for a declaratory judgment and an injunction was commenced on April 4, 2011 by service of a summons and complaint (Exhibit A).

4. The issue was joined by the service of an answer by the Attorney General of the State of New York on May 13, 2011 (Exhibit B).

5. The defendant New York State Department of Corrections (now known as the Department of Corrections and Community Supervision (DOCCS) is being represented by Eric T. Schneiderman the Attorney General of the State of New York. The New York State Task Force on Demographic Research and Reapportionment (LATFOR) is evenly divided between Democrats and Republicans and therefore, it appears cannot resolve how it wished for its attorney to proceed.

6. The instant action brought against the State Department of Corrections ("DOCS")[1] and the Legislative Task for on Reapportionment (LATFOR) by a number of state senators, all of whom have prison populations in their districts and citizen voters all of whom were affected by the enactment of Section XX of the Laws of 2010. Article IV §4 of the New York State Constitution provides that the federal decennial census shall be controlling for the purposes of reapportionment by the State of New York seats in the U.S. Congress, and the seats in the state legislature.

7. Article II of the State Constitution provides only that "for purposes of voting, no person gains or loses a residence, when they are incarcerated."

8. Section XX of an Article VII budget bill created a means of counting incarcerated persons that is diametrically different from the means employed by the United States Census which counts prisoners where they are found, in their cells in their institutions. Section XX purports to count prisoners "in their homes", that is to say, where they came from without regard to their actual physical presence, the presence of others in that domicile or whether they will in fact ever complete their terms.

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[1] Between the time of the filing of the complaint and the answer, the name of the agency was modified and now is called "DOCCS".

9. Intervenors seek to in effect that persons in areas from which prisoners came from should receive "extra votes" because someone who used to live there or near him should not be counted where they actually are.

10. Proposed Intervenors sought agreement of the plaintiffs on the issue of intervention. Plaintiffs have refused to agree to permit intervention. The motion by the Intervenors followed.

11. Intervenors claim without a shred of support that this matter would determine their "voting rights". Intervenors seek to litigate whether Section XX is mandated by the Fourteenth Amendment, a matter more appropriate and significantly available for litigation, on this issue when the legislature enacts reapportionment in 2012.

12. In cases of constitutional attack on statutes, Executive Law 71 and CPLR 1012 requires notice to the attorney general on the basis that the Attorney General of the state is in the best position to defend the statute and the lawsuit surrounding such claims. As the chief legal officer of the state it is his constitutional and statutory duty to defend the constitutionality of statutes.

13. Unlike many other matters within the jurisdiction of the Attorney General, the issue of where prisoners are to be counted for reapportionment purposes was one of a number of

signature issues of the Attorney General when he was a State Senator. He himself introduced legislation that later reappeared in the budget bill herewith challenged.

14. Capitol Tonight, an Albany based media outlet covered the matter succinctly. Bearing the headline, "Defending Schneiderman's Right To Defend", the item stated referred to the issue as "the prisoner counting law he championed while serving in the Senate that is now the subject of a lawsuit filed by some of his former Republican colleagues" (Exhibit C). After Governor Andrew Cuomo questioned whether the Attorney General should be the one to defend the lawsuit, many of the same groups that seek to intervene in this action on the basis that the Attorney General will not adequately defend their interests issued statements: "the NAACP Legal Defense & Education Fund, Community Service Society of New York, and Citizen Action of New York issued a statement decrying the Senate GOP suit", and stated that "Fortunately, there is no person who is more familiar with this issue or better prepared to defend this important civil rights victory than New York's Attorney General, Eric Schneiderman," the groups said.

15. CPLR 1012 governs intervention as of right. The intervenors seek to participate in this action on the basis of CPLR 1012(a)(2) which requires a finding by the court that the representation of the interest of the Intervenors by the

Attorney General of the State of New York is or may be inadequate and that the person is or may be bound by the judgment."

16. It is obvious that the arguments to be advanced on behalf of defendants will almost certainly be the same as wished to be asserted by the proposed Intervenors and as such intervention is unnecessary.

17. Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action. Distinctions between intervention as of right and discretionary intervention are no longer sharply applied.

18. However, intervention should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective Intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute. Courts may deny leave to intervene if they doubt the motive of the proposed Intervenor or if they deem further intervention unnecessary.

19. As demonstrated by the filing of a 177 page motion to intervene, proposed Intervenors seek to delay the

action in order to insure that the enactment, constitutional or not be applied to redistricting for this cycle.

20. The motion to intervene should be denied because the Intervenors do no more than posit the possibility that notwithstanding the fact that the state agency sued is represented by the state's chief law enforcement officer and the foremost proponent of the issue joined in the case, is defending their interests may not fully do that which they wish done. Such speculation is not enough to show that the proposed Itervenor's rights are not being adequately represented.

21. The Intervenors do not have a real and substantial interest, alleging voter dilution should the law in this state return to proper constitutional balance. Intervenors have a less than real and substantial legal interest, although they claim a political interest, by virtue of their effort and expenditures lobbying to pass the bill.

22. The Intervenors will not be bound by a judgment in this matter. Intervenors are not in privity and therefore, there is no *res judicata* effect and parties may be varied and different when there is a challenge leveled against an actual redistricting plan and therefore, there is on collateral estoppel. Indeed, if they are not allowed to intervene, they cannot be collaterally estopped since they have not had a fair and full opportunity to litigate the issue. Finally, the

allegation that they would be adversely affected by *stare decisis* and therefore, should be allowed to intervene would turn every action into a class action. The Intervenors will not be bound by any judgment determining the proceeding in any way more unique or different than any other citizen of the state who is in favor of a law that is later struck down.

23. The purpose of intervention is not to pack a courtroom or a calendar. It is to allow those with real and substantive claim to be heard and not to allow mass speculation to be the basis for participation in litigation, even of the proposed Intervenors claim the moral high ground.

24. To permit intervention on the basis alleged, would mean that the courts would become not a means of resolving disputes under the law but rather injected into the political decision making.

25. Thus every matter of litigation regarding allocation of power between the governor and the legislature under Article VII would allow intervention by anyone who either received, did not receive, or wants money from the state.

26. The Third Department in rejecting a motion to intervene by tribal representatives wrote in identical circumstances as the case at bar:

> ...the defense pursued by defendants is identical to the one that would be

> undertaken by the Tribe if it were a party to the action. Notably, the outcome of both actions turns on the resolution of pure legal issues involving the construction of State and Federal statutes and constitutions. No suggestion is made that the Tribe's lawyers would be likely to make a more persuasive argument on these issues than the ones that will be made by defendants if the actions are permitted to continue. Saratoga County v. Pataki, 275 A.D.2d 145 [3d Dept 2000] rev'd on other grounds "Saratoga I".

27. The instant action seeks a declaratory judgment to restore the status quo before facially unconstitutional statutes are applied. Whatever claim that others may seek redress upon, as to voter dilution, should not be a basis for intervention in an action challenging the constitutionality of New York State law under the New State Constitution. Conscious of course of the Supremacy Clause of the U.S. Constitution, Plaintiffs assert that the issues sought to be raised by these Intervenors are more than adequately addressable in a more than appropriate forum after there is a basis for a claim. Having waited almost a decade to make this claim in any other forum, proposed Intervenors should be able to wait until their claim ripens. Section XX provides something that no one has had before and has been in existence only for a few months, and will come into play only in this redistricting cycle. Prior to the enactment of a reapportionment plan the issue of state constitutionality must be solved before LATFOR can do its work.

28. Similarly the individual Intervenors do not have a direct and substantial interest in the instant action. While they speculate that the declaration of the law being unconstitutional would "dilute" their vote, their vote retains the same status as it has had over time.

29. The only alteration was the enactment of Section XX which potentially increased vote's efficacy. The enactment of the statute did not in reality do anything to the vote of anyone. It was enacted. DOCCS has not yet reported to LATFOR and LATFOR has not drawn a single district, held a hearing relative to the new districts, or otherwise act to practically cause Section XX to "un dilute" anyone's vote. Indeed, the rights alleged as a basis for intervention are not real and substantial because at the present time they are best inchoate. If the statute is as the Plaintiffs believe unconstitutional, then matters go back to status quo ante, and the proposed Intervenors have the option to sue to claim such rights in the context of the entirety of a reapportionment plan.

30. Intervention should not be permitted as of right or as a matter of discretion by the court on the basis that the Intervenors do not have an appropriate legal basis.

31. The intervention renders down to claims that the advocacy groups have worked very hard to get the legislation enacted, spent resources and time in support of such

legislation, and have devoted time to promoting the basic correctness of their own acts in getting such legislation passed. No law supports intervention on the basis of a citizen's investment in its own role in representative government.

32. Another class of Intervenors is citizen voters who claim that if the law were to be held unconstitutional then they would suffer dilution of voting rights of theirs under the 14th Amendment.

33. Should Plaintiffs prevail on their constitutional claim, then proposed Intervenors are not bound by the judgment as to the issue of constitutionality, and would be able to litigate their claim in the appropriate context of voter dilution, in the context of a challenge to reapportionment.

34. In this action they seek to inject new matter as an affirmative defense, as demonstrated by their proposed pleading and should not be permitted to intervene to litigate in effect a different case, bootstrapping into the question of constitutionality of this enactment, a general attack on the return to status quo, prior to the enactment.

35. No court anywhere has supported the proposed Intervenors theory that counting prisoners in group quarters violates the Fourteenth Amendment or dilutes votes. To the contrary, the attorneys seeking pro hoc vice status has all but

admitted that the constitutional provision that requires us of the federal census is not subject to attack, citing a case in the State of Massachusetts construing similar language in the Bay State constitution to that in our state constitution. See http://www.prisonpolicy.org/homeaddresses/report.html.

36. Finally the Intervenors insist on the right to present their case because they believe that the Defendants, DOCS and LATFOR, will not defend their interests adequately. Both parties are in effect, state of New York actors and are defended by the Attorney General, whose primary constitutional duty is to defend the constitutionality of legislation passed by the legislature and otherwise defend the state. This contention is untenable and should not permit intervention. Further, it appears that the Attorney General, having elicited a written response from LATFOR regarding representation, turned the document over to the proposed intervenors who have tendered it as an exhibit to this motion, before it was filed in a court, even though it is addressed to a judge of this court. It would seem that based upon the cohesion of interests and the appearance of the sharing of non-public documents, there is no doubt that the Attorney General is more than adequate in his role as a constitutional officer to properly defend rights of the proposed Intervenors.

37. The proposed intervention rests upon one overt distortion of the state constitution concerning Article II Section 4, and a flawed major proposition in the reasoning that permits proposed Intervenors to assert that they belong in this action. The first and foremost distortion is the claim that prisoners are entitled to be counted at the homes at which they no longer are present because Article II permits it. In support of this claim, they assert a deliberately truncated purpose driven edit of Article II (See Page 1-2 of the Proposed Intervenors Memorandum of Law. Proposed Intervenors wrote: "..thus Part XX makes the state's redistricting practice consistent with the state constitutional definition of residence for incarcerated persons" no person shall be deemed to have gained or lost a residence by means of his or her presence or absence while confined in any public prison..) NY Const. Article II Section 4.

38. By so quoting, the proposed Intervenors omit the clause that modifies their quote, and in effect demonstrates that, in harmony with the other sections of the State constitution their argument is one of political will and not of law.

39. The entirety of the beginning of Article II Section 4 without ellipses reads as follows: §4. For the purpose of voting, no person shall be deemed to have gained or lost a

residence, by reason of his or her presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison. This section was last amended by vote of the people November 6, 2001. (Emphasis added).

40. Felons are disenfranchised in this state and thus anyone incarcerated may not vote, and thus, Article II Section 4 in its entirety and not purposely and ideologically edited makes Section XX of the law in direct conflict with the statute.

41. Further ignored by proposed Intervenors is Article III Section :§5-a which requires counting of inhabitants: For the purpose 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.

42. But the linchpin of counting inhabitants in their prison cells is Article IV Section §4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter 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. (Emphasis added).

43. Given the clarity of the constitutional text, the absolute lack of case law in support of the proposed Intervenors claims of vote dilution as evidenced by their own memorandum of law, they should not be permitted to participate in the action.

WHEREFORE, based upon other and further legal argument set out fully in the Plaintiff's Memorandum of Law in Opposition, it is respectfully prayed that intervention should not be granted, and the motion should, in all respects, be denied.

DATED: New York, New York
June 1, 2011

/s/ DAVID L. LEWIS
DAVID L. LEWIS, ESQUIRE

TO: New York Legislative Task Force
On Demographic Research & Reapportionment
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New York, New York 10007

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EXHIBIT A

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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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-

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

Defendants.

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Index No. 2310-2011
Date Purchased 4-4-2011

Plaintiff(s) designate(s)
ALBANY
County as the place of trial

The basis of the venue is
DEFENDANT'S RESIDENCE

SUMMONS

Plaintiff(s) reside(s) at

County of

To the above-named Defendant(s)

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
April 4, 2011

DAVID L. LEWIS, ESQUIRE
Attorney for the Plaintiffs
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(212) 285-2290

Defendant's address:

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New York, New York 10007

NYS Department of Correctional Services
Building 2
1220 Washington Avenue
Albany, New York 12226-2050

SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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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 and PETER TORTORICI,

Plaintiffs,

-against-

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

Defendants.

----------X

Index No.

VERIFIED COMPLAINT

Plaintiffs, hereby complain of the defendants, New York State Legislative Task Force on Demographic Research and Reapportionment, and New York State Department of Correctional Services, as follows:

PRELIMINARY STATEMENT

1. This is an action seeking a declaratory judgment, pursuant to CPLR §3001 that Section XX of Chapter 57 of the Laws of 2010 is unconstitutional and, *inter alia*, a temporary restraining order and permanent injunction against the defendants from carrying out any acts in furtherance of Section XX.

NATURE OF THE ACTION

2. Plaintiffs bring this declaratory judgment action seeking an Order declaring that Section XX of Chapter 57 of the Laws of the New York ("Section XX"), amending the Correction Law and the Legislative Law as contained in an Article VII budget bill, is unconstitutional and thus, null and void, and temporarily restraining and permanently enjoining the New York State Legislative Task Force on Demographic Research and Reapportionment, and the New York State Department of Correctional Services from acting in accordance with said Section XX. 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. Section XX exacerbates vote dilution of certain communities and enhances the voting power of other communities by the fictitious movement of a phantom population of almost 58,000 non-voting prisoners into residences already occupied by others, and from upstate Republican districts to downstate New York City Democratic districts which constitutes political gerrymandering.

INTRODUCTION

3. Section XX was inserted by then-Governor David Paterson into an Article VII budget bill after extensive lobbying by Democratic State legislators, including the current Attorney General.

4. Section XX made no appropriation and did not relate to state revenues.

5. Amending the Correction Law and the Legislative Law, Section XX provided that for the purposes solely of redistricting, incarcerated persons shall be "counted as residents of their places of residence", and that such places shall be deemed to be those "prior to [their] incarceration" as opposed to the Federal Decennial Census place of enumeration, the place of their incarceration.

6. Section XX contained a severability clause.

7. Without amending the Constitution and without placing such an issue amending the Constitution before the People as required by the State Constitution, the legislative enactment of Section XX illegally removes from the State Constitution the requirement that the only basis for reapportionment purposes shall be the Federal Decennial Census and replaces it with a statutory exception to the use of the Federal Decennial Census, not listed as among the exceptions to the use of the Census in the State Constitution. The State Constitution sets out the limited number of exceptions to the use of the Census for enumeration. Section XX is not one of the conditions of such different and unconstitutional alteration of enumeration. Section XX illegally diminishes the number of inhabitants required to be counted by the Constitution by declaring certain inhabitants of state prisons, who have long been counted, not to be counted.

8. Section XX exceeds the permissible constitutional language for N.Y. State Constitution Article VII bills.

9. Section XX denies equal protection under New York State Constitution, Article I Section 11, to a segment of the population by exacerbating inequality in the enumeration of inhabitants artificially inflating urban districts at the expense of districts with prison institutions within such rural districts despite the fact that such districts bear the costs of such institutions.

10. Section XX also denies equal protection by enacting irrational classifications.

11. Section XX also provides unequal treatment to different classes of voters based upon geography and based upon political party so as to constitute a basis for partisan gerrymandering.

PARTIES

12. Senator Elizabeth O'C. Little is the duly elected representative of the 45th Senate District. Senator Little is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

13. Senator Patrick Gallivan is the duly elected representative of the 59th Senate District. Senator Gallivan is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

14. Senator Patricia Ritchie is the duly elected representative of the 48th Senate District. Senator Ritchie is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

15. Senator James Seward is the duly elected representative of the 51st Senate District. Senator Seward is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

16. Senator George Maziarz is the duly elected representative of the 62nd Senate District. Senator Maziarz is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

17. Senator Catharine Young is the duly elected representative of the 57th Senate District. Senator Young is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

18. Senator Joseph Griffo is the duly elected representative of the 47th Senate District. Senator Griffo is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

19. Senator Stephen M. Saland is the duly elected representative of the 41st Senate District. Senator Seward is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

20. Senator Thomas O'Mara is the duly elected representative of the 53rd Senate District. Senator O'Mara is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

21. The following plaintiffs, James Patterson, John Mills, William Nelson, Robert Ferris, Wayne Speenburgh, David Callard, Wayne McMaster, Brian Scala and Peter Tortorici are voters and residents of the Senate Districts affected by Section XX of Chapter 57 of the Laws of 2010, and whose votes are diluted by the enactment.

22. The New York State Legislative Task Force on Demographic Research and Reapportionment (the "Task Force") was established by Chapter 45 of the New York State Laws of 1978 to research and study the techniques and methodologies to be used by the United States Commerce Department, Bureau of the Census ("Census Bureau"), in carrying out the Federal Decennial Census.

23. The New York State Department of Correctional Services ("DOCS") is the department within the executive branch of New York State government charged with the administration of correctional services in all respects in New York State.

JURISDICTION

24. Each of the plaintiffs have been harmed or are about to be harmed by the actions of the defendant Task Force and the actions taken by DOCS.

25. Each of the Senator plaintiffs have standing as potential candidates, voters, taxpayers and residents of the Senatorial Districts to be impacted by Section XX, and in part

because the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.

26. Each of the Citizen plaintiffs have standing as voters, taxpayers and residents of Senatorial Districts to be impacted by Section XX, including having to bear the economic burden of sustaining prisoners in their communities by virtue of taxes in support of services to the prisons.

27. Venue is set in Albany County.

FACTUAL ALLEGATIONS

A. Revenue Bill Section XX

28. Chapter 57 of the Laws of New York of 2010 was an Article VII budget bill and an extender for the operation of government and a revenue bill, presented to the Legislature as a budget bill. It was the last in a series of extenders for the operation of government. If it did not pass, the entire government of the state would have been shut down.

29. Section XX of Chapter 57 did not have anything to do with the budget or revenue portions of the Article VII budget bill.

30. Section XX provides that in a year where the Federal Decennial Census is taken but does not implement "a policy of reporting incarcerated persons at such persons residential addressees prior to incarceration", then the DOCS shall provide such "information as to prisoners within their jurisdiction" including "the residential address of such person prior to incarceration" (if any) to the Task Force. Section XX goes on to provide that the Task Force shall "determine the Census block corresponding to the street address of each person's residential address prior to incarceration, if any, and the Census block of the prison."

31. A "block" is the smallest entity for which the Census Bureau collects and tabulates Federal Decennial Census information.

32. Section XX further provides that until the Census implements a policy of reporting prisoners at their residence addresses, the Task Force shall use the data to develop a database so as "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 their addresses where they are incarcerated.

33. Section XX also provides that persons whose addresses before incarceration were outside New York are to be considered from an unknown address, and thus not reported despite their presence in the State, and despite the fact that they are considered inhabitants under the State Constitution.

34. Section XX also provides that incarcerated persons for whom the Task Force cannot "identify their prior residential address shall be considered to be counted at an address unknown and shall be excluded from the data set."

35. The provision also recites that Senate and Assembly Districts shall be drawn using the "amended population data set".

36. The challenged statute requires that incarcerated persons be "backed" out of the count for the county where the prison is located and, by the use of administrative records maintained by the State, be allocated back to their counties of residence prior to incarceration.

37. The current Federal Decennial Census counts incarcerated persons as being within the state whose residence addresses prior to incarceration were outside the state, and treats all incarcerated persons as inhabitants of their place of incarceration.

38. Section XX also provides that where an incarcerated person is confined in a Federal correctional facility located within the State, then such person previously counted in the apportionment shall no longer count for apportionment purposes. This law now creates an exception such that certain persons required to be counted by the Constitution are now not counted.

39. Section II also excludes inhabitants from enumeration at all on the basis that the Task Force cannot find a residence address for a prisoner.

40. Therefore, Section XX enacts and empowers the Task Force and DOCS to conduct a state Census for a portion of the population, and thereby create its own enumeration.

B. The New York State Constitution

41. The New York State Constitution prescribes the exclusive permissible method and manner of enumeration for purposes of apportionment.

42. Article III Section 4 of the New York State Constitution provides that the Federal Decennial Census "shall be controlling as to the number of inhabitants in the state or any part thereof for the purpose of apportionment of members of the assembly and adjustment or alteration of senate and assembly Districts."

43. The Constitution states, in uncompromising specificity, that the Federal Decennial Census "shall be controlling", in determining the "number of inhabitants" in "any part "of the State".

44. The Constitution expressly set forth a limited and specific set of circumstances where a state enumeration is to be used instead of the Federal Census. None of those constitutional preconditions for the use of a state enumeration has occurred, nor do any of those exceptions relate to the counting of incarcerated persons.

45. Since 1931, the Federal Decennial Census has been controlling for apportionment purposes in New York.

46. The use of the Federal Decennial Census prevents political manipulation of the counting of inhabitants.

47. Section XX creates a specific exception to the use of the Federal Census that is not within the stated exceptions permitted by the Constitution.

48. The failure to count these prisoners as inhabitants, who place a burden upon the locality, violates the Constitution's determination that for apportionment purposes, inhabitants are to be counted at the place where they are counted in the Federal Decennial Census.

49. The elimination from enumeration mandates by Section XX are specifically prohibited by the Constitution requirement that the Federal Decennial Census "shall be controlling."

50. Such alteration of the enumeration of incarcerated persons constitutes political manipulation of the counting of inhabitants.

51. Article III, Section 4 mandates that Senate Districts be readjusted or altered so that each Senate District shall contain "as nearly as may be" an equal number of "inhabitants, excluding aliens."

52. Senate and Assembly Districts are set by enumerating inhabitants "inhabitants".

53. Article III, Section 5-a states: For the purpose 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.

54. The setting of districts by the use of inhabitants allows for objective manageable enumeration and requires no legal determinations as to residence and determination of intention.

55. The presence of a non-alien at any single address on the day of the Federal Decennial Census is the sole criteria for being enumerated.

56. Section XX unconstitutionally alters this method without a constitutional amendment.

57. The State Constitution mandates that population for the purposes of reapportionment be determined solely by the Federal Decennial Census, as the Census deems them to be counted, and thus requires the inclusion of incarcerated persons when counting the whole number of persons.

58. The State Constitution requires that incarcerated persons are to be counted as they are counted under the Federal Decennial Census, that is, at their place of incarceration.

59. Article II, Section 4 of the State Constitution provides: "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." For purposes of enumeration, they are inhabitants found at the place of incarceration.

60. Incarcerated persons sentenced to felony jail time have no right to vote under New York State law, and thus gain or lose nothing by being counted at the institution of confinement.

C. The Census

61. The Census Bureau counts persons at the place where they generally eat, sleep and work. This practice is known as the "usual residence" rule.

62. This has been the practice of the Federal Decennial Census based upon historical precedents dating back to the First Decennial Census Act of 1790.

63. Since 1850, the Federal Decennial Census counted incarcerated persons at their place of incarceration.

64. The Census Bureau has developed a set of special enumeration and residence rules for specific population groups. As part of each Decennial Census, the Census counts persons living in what it calls "group quarters". These include persons living in local jails, state and Federal prisons, college dormitories, homeless shelters, nursing homes, armed forces installations, persons on maritime vessels, migrant workers and other settings where numerous people may be housed in a single facility.

65. All residents in group quarters are counted as being inhabitants of the address where the group quarters is located, instead of where the residents might otherwise be living were they were not residents of group quarters, or where they might expect to return.

66. For the purposes of counting in the Federal Decennial Census, prison inmates are inhabitants of the institutions in which they are confined.

67. The Federal Decennial Census notes that the usual residence at which it counts people is not necessarily the same as a person's voting residence or legal residence.

68. The Census Bureau itself concluded that a system of counting incarcerated persons at any place other than their place of incarceration will decrease the accuracy of the Federal Decennial Census count.

69. The Federal Decennial Census is not a projection of future intentions, but one of present enumeration.

70. The Federal Decennial Census is used as a form of enumeration. It does not qualify or disqualify voters.

71. The Federal Decennial Census quantifies inhabitants for enumeration and is the basis for apportionment of representation.

72. Prisoners counted in group quarters do not gain or lose a residence for the purposes of voting.

D. Prisoners in the State of New York

73. The State Constitution's mandate to follow the Federal Decennial Census has always required that prisoners be counted for apportionment purposes in their group quarters, which are the correctional facilities where they are incarcerated.

74. The State Constitution provides that the method used in the Federal Decennial Census shall be controlling, and thus, prisoners are to be counted for apportionment purposes as the Census counts them (in the institution where they are incarcerated).

75. As of January 1, 2010, DOCS reported that it had a population of 58,378 incarcerated persons.

76. Prisoners in state correctional facilities serve long periods of confinement in the group quarters due to the length of their sentences.

77. Many prisoners serve sentences of an indeterminate length as the possibility for release and parole prior to the expiration of their sentences is determined by parole boards.

78. DOCS currently houses 213 inmates serving life sentences without possibility of parole. Under Section XX, these inmates are to be counted at their residence prior to their incarceration, and not as inhabitants of the institution where they are permanently confined.

79. Incarcerated persons do not have any other fixed abode in which they could properly be denominated as inhabitants. If they initiate an action relating to their incarceration, they are required to do so in the County where they are incarcerated.

80. Nearly half of the prisoners in DOCS custody (49%) are from New York City's five boroughs.

81. Twelve (12%) percent of the prisoners in DOCS custody are from the suburban counties of New York State.

82. Incarcerated persons draw upon the services of the communities in which their prisons are located.

83. Inmates use community resources including the local courts, hospitals and health services, water, sewer and other infrastructure. Such communities must consider incarcerated persons with their local population when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services.

84. Under New York State law, no incarcerated person has the right to vote in State elections.

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment under CPLR §3001)

85. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "84" of this Verified Complaint as if fully set forth herein.

86. Section XX creates a structural change by an artificial realignment of political power in the State, and it does so by impermissibly amending the meaning and text of the State Constitution by legislation.

87. Section XX of Chapter 57 of the Laws of 2010 is unconstitutional, contravening the text of the Constitution in Article III, section 4 requiring that Federal Decennial Census be "controlling" for purposes of apportionment.

88. The law is unconstitutional because it mandates that the State adopt a policy of counting incarcerated persons at their prior home addresses although the Federal Decennial Census counts such persons at their place of incarceration.

89. The law creates an unconstitutional method of counting inhabitants that differs from the enumeration method used in the Federal Decennial Census.

90. Section XX is unconstitutional because the State Constitution requires that no other method of enumeration may be used.

91. Section XX provides that the drawing of Senate and Assembly seats shall be done by amended population data sets. The use of such amended data sets violates the State Constitution, which does not permit the exclusions of incarcerated persons from apportionment counts in Senate Districts where prisoners are incarcerated.

92. Section XX undermines the arrangement of representation as determined by the State Constitution by excluding certain inhabitants who are counted by the Federal Decennial Census from the enumeration.

93. Section XX also alters the number of inhabitants in certain areas of the State by counting certain inhabitants located in upstate Senate Districts and transferring them to downstate Senate Districts.

94. Section XX realigns incarcerated persons to residences where they are not inhabitants as defined by the counting method of the Federal Decennial Census.

AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory judgment that Section XX is void as encroaching upon the powers of the legislature)

95. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "94" of this Verified Complaint as if fully set forth herein.

96. Chapter 57 of the Laws of 2010 was presented to the Legislature as an Article VII budget bill by then Governor Paterson. The budget bill included a budget extender that appropriated funds to permit the State government to continue operating.

97. Separately, Section XX of the revenue bill and budget extender provided for the alteration of the means by which incarcerated persons are counted for reapportionment.

98. Section XX did not relate to the State's revenue or budget.

99. Section XX is a permanent change to the methods of enumeration and apportionment.

100. Section XX is an abuse of the Article VII power of the Governor at the expense of and in derogation of Article III, Section 1 legislative powers.

THE BUDGET PROCESS

101. Each year the Governor and the State Legislature, the Senate and Assembly, engage in the process of creating a budget for the State of New York.

102. Of all the functions of government, the budget process is the most crucial.

103. The budget process is governed by the New York State Constitution and the New York State Finance Law.

104. Pursuant to Article VII, the Governor sends to the Senate and Assembly two types of bills. One type of bills appropriates money and is called appropriation bills. The second type of bills is called Article VII bills which do not appropriate money but are considered by the Governor as "relating to the budget."

105. Non appropriation bills generally contain programmatic provisions detailing the specific manner in which an appropriation is to be implemented, such as the source of funding, allocation and sub-allocation of moneys, and the criteria for disbursement.

106. Other provisions are often included concerning the operation of other government programs and the administration of government agencies.

107. Article VII bills are treated differently by the Constitution in order to insure that executive budgeting is the method of budgeting in New York.

108. The purpose is to restrict the power of the Legislature in budgeting areas.

109. By the terms of the Constitution, the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items of appropriation or add items. They must then enact or reject them in their entirety.

110. The "no alteration" provision is a Constitutional limitation on Legislative power, enacted by the People.

111. The State Constitution explicitly limits the substantive content of an appropriation bill by what is called the "anti-rider" provision that provides that 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. Any such provision shall be limited in its operation to such appropriation.

THE LAST BUDGET CYCLE: GOVERNMENT BY EXTENDER

112. In the last budget cycle, then-Governor Paterson presented Article VII bills that were not initially acted upon.

113. Thereafter, the then-Governor presented as Article VII bills what were denominated as budget extenders for the continued operation of the State government. As part of the extenders, the Article VII bills contained non-appropriation language.

114. This restriction on legislative power was demonstrated by the fact that any attempt by a Republican member of the Senate to propose an amendment to the extenders was ruled as unconstitutional and thus improper by the Senate's presiding officer.

115. By placing the non-budgetary item into an Article VII budget revenue bill and making it an extender for the continuation of the government, the State Legislature was unable to amend the Article VII bill to remove Section XX.

116. Article VII prevented the State Legislature from exercising its Article III, Section 1 powers to act on its own.

117. The no-alteration clause shielded the non-appropriation language of Section XX from the State Legislature's ability to exercise its constitutional powers and delete Section XX.

118. Section XX was substantive programmatic legislation that contained its own severability clause.

119. Section XX did not contain an appropriation.

120. Section XX was not a fiscal or a budgetary piece of legislation.

ARTICLE VII VIOLATIONS

121. The then-Governor, in placing Section XX in an Article VII bill and insulating it from legislative amendment, used an appropriation bill for essentially a non-budgetary purpose in excess of the then-Governor's constitutional powers.

122. By virtue of the then-Governor's presentation of the extender as embedded in an Article VII bill, the Legislature 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.

123. Section XX was enacted unconstitutionally in that it usurped the State Legislature's power under Article III, Section 1.

124. By reason of this usurpation and by reason that the sole alternative was to vote against the continuity of State government, members of the Legislature were deprived of their powers under Article III.

125. In this situation, the then-governor became omnipotent and the members of the State Legislature constitutionally helpless as it had no power to remove the purely legislative, non-appropriation language from the Article VII bills.

126. Section XX's enactment violates the anti-rider provision of the State Constitution, Article VIII, Section 6.

127. The enactment of Section XX should be voided.

128. The insertion of Section XX into a budget bill requires a judicial determination as to what effect limits such as the anti-rider clause of Article VII, Section 6 of the State Constitution impose on the content of Article VII bills.

129. The inclusion of a non-revenue item in an Article VII bill also violates Article VII.

130. Therefore a dispute exists concerning the constitutional authority to force the legislature to pass non-revenue items in a revenue bill and requires a judicial determination of the scope non-apportionment or non-revenue language in Article VII bills.

USE OF A BUDGET BILL TO IMPROPERLY AMEND THE CONSTITUTION

131. Any change in the counting of incarcerated persons for the purpose of redistricting must be made by voters via a Constitutional amendment, and not by the State Legislature through the use of a budget bill.

132. To enact a constitutional amendment, the text of the amendment must pass two successive legislatures before it can be presented to the People of the State for ratification.

133. The means of amending the State Constitution by enacting legislation in a budget bill is itself unconstitutional.

134. Where a constitutional amendment may be enacted in the absence of constitutional convention, which requires passage by two successive legislatures, the use of an Article VII bill abuses the power of the People to amend their constitution.

135. In the aftermath of a 1993 Court of Appeals determination, governors have provided non-appropriation Article VII bills that amended sections of law which had no relation to any specific items of appropriation, and could be enacted at any time of the year before or after the budget is approved.

136. In 2004, the Court of Appeals set the parameter of constitutional limits as to what Article VII non appropriation bills may contain.

137. The Court of Appeals stated that there may come a day when the power to enact a budget using Article VII language exceeds the power of the Governor and infringes on the powers of the Legislature.

138. The day has come.

139. A declaratory judgment should issue declaring Section XX as null and void as violative of Articles III and VII of the Constitution.

AS AND FOR A THIRD CAUSE OF ACTION
(Equal Protection under Article III, Section 4
and Article I, Section 11)

140. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "139" of this Verified Complaint as if fully set forth herein.

141. Section XX violates Article III, Section 4 which requires that each Senate District contain "as nearly as may be" an equal number of inhabitants.

142. Article III, Section 4 requires that in reapportioning districts in the Senate "each senate district contain as nearly as may be an equal number of inhabitants".

143. Section XX mandates the numerical movement of approximately 58,000 prisoners from the upstate counties in which they are inhabitants to other counties, principally those in the City of New York and other downstate locations.

144. Section XX removes 58,000 inhabitants from the current place of enumeration and adds phantom population principally to downstate counties.

145. It also eliminates inhabitants entirely from the State.

146. Section XX refuses to count inhabitants who can be found in prison facilities when the Task Force cannot assign an address to such inhabitant. The Census Bureau can find and assign an incarcerated person to their group quarter address, the prison facility, but under the Section XX they are not to be counted anywhere in violation of Article III, Section 5a.

147. Such a numerical assignment by statute exacerbates the weight of vote differential between upstate and downstate counties that already exists because even with the total population being counted, there remains the disparate presence in downstate counties of ineligible voters and traditionally lower voter turnout rates. The weight of the vote upstate counties is unfairly reduced in comparison to that of downstate counties.

148. Even if Senate Districts are of equal population, the weight of the vote of persons residing upstate is lessened because disproportionately more people residing downstate are ineligible or unwilling to vote. By including these fictional inhabitants (incarcerated persons) in the downstate population, Section XX exacerbates the diminution of votes in upstate counties.

149. The total differences in the proportionate weight of votes of citizens upstate is further exacerbated because of this dramatic shift and realignment to downstate of incarcerated persons ineligible to vote.

150. Removing 58,000 inhabitants and placing approximately 40,000 of them in New York City and surrounding suburban areas exacerbates the dilution of upstate votes.

151. Section XX mandates reapportionment by unequal enumeration. It creates unequal populations, thereby diminishing the relative voting strength by virtue of population allocation

152. The movement of 29,000 prisoners, approximately half of the DOCS's prisoners, into New York City alone will create a situation where without the actual population, the metropolitan counties will have greater numbers so as to have unequal representation and thus control over the affairs of the State.

153. Such adverse effect and exacerbation is a denial of equal protection under the State Constitution, Article I, Section 11.

AS AND FOR A FOURTH CAUSE OF ACTION
(Counting prisoners in other than group quarters violates equal protection because it is not a rational classification)

154. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "153" of this Verified Complaint as if fully set forth herein.

155. Section XX requires incarcerated persons, and only incarcerated persons, who are counted under a group quarters enumeration to be reassigned from such census enumeration and assigned to census blocs so as to be counted as if they were returned to their "home".

156. Group quarters enumeration by the Federal Decennial Census counts incarcerated persons and other individuals, such as persons in local jails, federal prisons, group homes,

residential treatment centers, health care facilities, nursing home facilities, hospitals, homeless shelters, other shelter facilities, such as domestic violence shelters, students in academic residences such as college and university dormitories, armed forces bases and installations, maritime personnel on vessels, migrant workers, and any other facility where persons may be housed in a group setting.

157. Section XX seeks to identify an originating residence only for incarcerated persons.

158. Section XX backs out incarcerated persons from the group quarter residence for reapportionment purposes, and assigns to them a "home" address which places them within a Census block.

159. All other persons counted in group quarters are to be counted where they eat sleep and live pursuant to the Federal Decennial Census.

160. Only incarcerated persons are to be artificially reassigned to addresses.

161. The State Constitution does not permit persons in group quarters be allocated back to their original place of residence or their original addresses.

162. Persons in group quarters however are not counted in their "homes", no matter how much they intend to return to their home.

163. None of these populations in group quarters are to be "backed out" of reapportionment Census information.

164. Only 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.

165. Section XX denies equal protection to all non-prisoners counted in group quarters.

166. In New York State, upon the conviction of a felony, a person loses the right to vote. Upon the commission of the crimes, persons incarcerated lose the right to determine their residence. For social purposes they are removed from the community. Persons incarcerated for such felonies lost the right to determine their own residence and they become prisoners of the state. Removed from the community, they lose freedom of movement and the right to return to a home.

167. Others in group quarters have not been so adjudged.

168. The treatment of non-prisoners in group quarters is unrelated to the achievement of any combination of legitimate purposes by the State such that the legislature's actions were irrational.

169. Such a selection of one group, prisoners who have no right to vote, and not others who generally retain the right to vote is an arbitrary, invidious and capricious classification.

170. The disparate treatment of persons residing in group quarters that possess the right to vote and are counted at the location of group quarters in the usual manner is a denial of equal protection. Section XX is a selection of preferential counting methods for persons specifically constitutionally barred and serves no legitimate state interest or purpose.

171. The selection of prisoners is not a rational basis for treatment of such prisoners differently than others in group- quarters.

172. Section XX serves no legitimate state interest.

173. The enactment is unreasonable, arbitrary and capricious by revising counting procedures to suit a single group of non voters.

AS AND FOR A FIFTH CAUSE OF ACTION
(Equal Protection violation by use of Irrational Classification and Enumeration because it creates a false enumeration)

174. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "173" of this Verified Complaint as if fully set forth herein.

175. Section XX is irrational as a means of enumeration and thus violates equal protection under Article I, Section 11 and Article III, Section 4. .

176. Section XX requires reassigning prisoners to addresses where they have not lived for years and may not live again.

177. People in institutional settings often have no other fixed place of abode and the length of their stay is often either indefinite or permanent. Such is the case with incarcerated persons.

178. The requirement to count prisoners at an address to which it is presumed they will return is irrational.

179. Section XX is irrational in that it pretends that all incarcerated persons will return to the home they came from after serving time, without any reason to believe such is the case.

180. Section XX makes no exception for the enumeration of prisoners serving life without parole or life sentences despite the fact that they will never return to the community from which they came.

181. Section XX makes no distinctions such that it returns to "residence" persons who have committed crimes against the inhabitants at that residence, be they spouses or children.

182. Section XX seeks to count persons at places even though they may have no ability or intention to return to such place thereby eliminating it as ever being a residence.

183. It makes no distinction exempting prisoners serving life terms who cannot return to the community.

184. It makes no distinction for those prisoners serving terms such that they will not return to the community during the Census decade in question because their sentences exceed the time period of utility of the Census.

185. The Census Bureau has developed a consistent and rational means of classifying persons as inhabitants of group quarters.

186. The Federal Decennial Census was selected to be the determining factor for reapportionment by the framers of the State Constitution to prevent political manipulation of the counting of inhabitants so as to receive a true enumeration.

187. The entirety of reapportionment process depends upon the veracity of the enumeration.

188. The counting of incarcerated persons at addresses selected as "home" constitutes phantom transportation of inhabitants.

189. The requirement to count incarcerated persons at an address at which they do not reside constitutes the phantom placement of inhabitants.

190. The reassignment of such persons when added to a census block, when such persons do not actually reside there, is not a true enumeration.

191. It skews the enumeration.

192. Such skewed enumeration manufactures additional political power where none exists or can exist.

193. Section XX further refuses to count persons found in the institution, but for whom no address can be found, thereby wiping out whole classes of inmates from the process of

apportionment, making them non inhabitants.

194. The group quarters method of counting is a historically reasonable means of interpreting the State Constitutional phrase "inhabitants", and should not be disturbed.

195. Section XX is not enacted with a rational basis and is unreasonable and, therefore, violates equal protection under Article I, Section 11.

AS AND FOR A SIXTH CAUSE OF ACTION
(Equal Protection violation by use of Irrational Classification and Enumeration because inhabitants already occupy the addresses now being assigned to prisoners)

196. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "195" of this Verified Complaint as if fully set forth herein.

197. Section XX backs out prisoners from being counted in their group quarters and assigns them to addresses where they may have once lived.

198. No reasonable belief exists that all or most of the state's prisoners most will reside or live at the addresses selected by them or for them within the next ten years.

199. Places where incarcerated persons once resided are not left empty to await their return as Section XX presumes.

200. Inhabitants already counted by the Federal Decennial Census reside in the census bloc to which prisoners are reassigned by Section XX.

201. Section XX adds inhabitants to places where existing inhabitants occupy the space and thus make it impossible for purported returning prisoners to occupy the same space without displacing current inhabitants. To count persons that are already at that place along with prisoners who are not actually there provides greater political strength of those places at the cost of where prisoners actually are.

202. To 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.

203. No empirical basis for such an assumption exists.

204. Restoration of phantom prisoners to a community provides additional political power to former addresses while leaving the burden of services costs and expenses to the locality where they remain actually housed.

205. Section XX's presumption that all prisoners will return to a previous addresses is unreasonable, irrational, arbitrary and capricious.

AS AND FOR A SEVENTH CAUSE OF ACTION
(Partisan gerrymandering)

206. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "205" of this Verified Complaint as if fully set forth herein.

207. Reapportionment determines political power.

208. The purpose of the enactment of Section XX was to shift power from the Republican Party representatives to the Democratic Party representatives.

209. In May of 2010, the then Democratic President of the Senate, Malcolm Smith stated publicly that it was the intention of the Senate Democrats, "are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years."

210. Currently incarcerated persons are counted as inhabitants of Republican-represented Senatorial Districts.

211. The reallocation of 58,000 incarcerated persons primarily to Democratic represented Senatorial Districts is partisan gerrymandering.

212. Section XX was introduced by the Democratic governor at the behest of the then majority Democratic Senators and Democratic Assembly persons.

213. It was introduced without any consultation with any Republican affected by the reallocation of prisoners.

214. From beginning to end, Section XX was a wholly partisan effort.

215. Not a single Republican Senator voted for Chapter 57 of the Laws of 2010.

216. Commentators and elected officials have conceded that Section XX, in whatever form, benefits the downstate Democrats at the expense of the upstate Republicans.

217. The enactment of Section XX is the legislative use of political classifications to burden the representational rights of Republican upstate voters.

218. Section XX was enacted with the purpose and effect of maximizing the strength of the Democratic Party as against the Republican Party, its voters and elected representatives.

219. The Democrats seek to enhance their power by concentrating political power in the downstate Democratic districts.

220. Republican Senators and members of the Republican Party are intentionally discriminated against by such political partisan manipulation.

221. Democratic leaders are seeking to regain the Senate majority by an unconstitutional scheme by an unconstitutional method for unconstitutional purposes, seeking to subvert the electoral will of the People of the State.

AS AND FOR AN EIGHTH CAUSE OF ACTION
(Permanent Injunction)

222. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "221" of this Verified Complaint as if fully set forth herein.

223. The only remedy in the instant action is a permanent injunction to prevent the unconstitutional application of Section XX by virtue of actions of the Task Force as ordered by Section XX.

224. The order of the Court that is herewith sought to prevent the Task Force from altering the means and methods of prisoner counting in the determining of apportionment of the State Legislature.

225. In order to obtain an injunction, plaintiffs must establish, first, a likelihood of success on the merits, second, irreparable harm on the absence of the injunction and, third, that the balance of equities exist in favor of granting the injunction.-

226. First, Plaintiffs have a likelihood of success on their merits because the State Constitution forbids the acts sought to be done in Section XX and there was no constitutional amendment to make such a change in the counting of inhabitants

227. Second, Plaintiffs suffer irreparable harm because such counting diminish the political power of the individual voters and diminishes the political power of the Senators by the constitutional offense of phantom inhabitants being moved out of district where the district services are still provided.

228. Other elements of irreparable harm exist as well. The difficulties of Census manipulation run the risk of multiple challenges as well as the danger of multiple yearly elections of the state legislature.

229. The ability to assign places of "residence" to prisoners is all but impossible.

230. It results in certain population not to be counted in violation of the State Constitution thereby altering the basis for apportionment as set forth in the Constitution

231. Removal of these inhabitants permanently distorts the Census and representation.

232. The delegating of the determination of inhabitants' place of abode to the Task Force is an illegal delegation of power.

233. The Census Bureau itself is undertaking a study of the feasibility with a report due this year.

234. The balance of equities favors the granting of a permanent injunction.

235. No application for the within relief has been made to any Court.

236. These proceedings represent the plaintiffs' only recourse under the law.

237. These pleadings are hereby certified as non-frivolous by counsel.

WHEREFORE, plaintiffs demand the following relief:

A. Declaratory judgment that the amendments to the Correction Law and the Legislative Law in Section XX of Chapter 57 of the Laws of 2010 regarding the methods of counting incarcerated persons are null and void as being unconstitutional;

B. A permanent injunction against the Task Force prohibiting them from using amended data subsets regarding incarcerated persons in any other manner than counting them as inhabitants of their place of incarceration as enumerated by the Federal Decennial Census;

C. A permanent injunction against DOCS prohibiting the transfer of any information of an incarcerated person's "residence" as being any other than the address of the institution where they are incarcerated; and

D. Such other and further relief as the Court may deem just and proper.

DATED: April 4, 2011

Yours, etc.

DAVID L. LEWIS, ESQ.
Attorney for Plaintiffs
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

ATTORNEY'S VERIFICATION

DAVID L. LEWIS, an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. I am the attorney for the plaintiffs in the instant action, and my office is located at 225 Broadway, Suite 3300, New York, New York, in the County of New York.

2. I have personally reviewed the contents of this document with my clients, and upon the conclusion of said review as to the facts alleged therein, believe the same to be true except where made under information and belief.

3. As to all other allegations, counsel has personal knowledge thereof and believes the within allegations to be true, to his personal knowledge.

4. This Verification is made by me as an attorney pursuant to the provisions of the CPLR and applicable case law due to the fact that I maintain my office in New York County and plaintiffs reside in other counties, and because time is of the essence.

Dated: New York, New York
April 4, 2011

DAVID L. LEWIS, ESQ.

EXHIBIT B

SUPREME COURT OF THE 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-

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

Defendants.

ANSWER OF DEFENDANT NEW YORK STATE DEPARTMENT OF CORRECTION AND COMMUNITY SUPERVISION
Index No. 2310-11

_____, J.

Defendant New York State Department of Department of Corrections and Community Supervision (sued herein as either the New York State Department of Corrections or as New York State Department of Correctional Services, and hereinafter referred to as "DOCCS"), by its attorney, Eric T. Schneiderman, Attorney General of the State of New York (Stephen M. Kerwin, Assistant Attorney General, of counsel) answers the Complaint dated April 4, 2011 as follows:

1. Denies the allegations in paragraphs 7, 8, 9, 10, 11, 24, 25, 26, 28, 29, 39, 40, 47, 48, 49, 50, 55, 56, 57, 58, 60, 71, 73, 79, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 105, 114, 115, 117, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 139, 141, 147, 148, 149, 150, 151, 152, 153, 160, 161, 165, 166, 168, 169, 170, 171, 172, 173, 175, 178, 179, 182, 187, 188, 189, 190,

191, 192, 194, 195, 198, 201, 202, 204, 205, 208, 210, 211, 214, 217, 218, 219, 220, 221, 223, 229, 230, 231, 232 and 236 of the Complaint.

2. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraphs 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 31, 37, 45, 46, 52, 54, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 76, 82, 83, 102, 106, 108, 110, 112, 113, 134, 135, 136, 137, 156, 159, 162, 163, 167, 177, 185, 186, 199, 200, 203, 207, 209, 212, 213, 215, 216, 224, 233 and 235 of the Complaint.

3. Admits the allegations in paragraphs 23, 27, 75, 77, 84, 101 and 104 of the Complaint.

4. With regard to paragraph 103, admits that the budget process is, in part, governed by the New York State Constitution and the New York State Finance Law.

5. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraph 21 except denies that the votes of plaintiffs are diluted by reason of Part XX.

6. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraph 22, and refers the Court to Chapter 45 of the Laws of 1978 as the best evidence and most accurate version of its content.

7. With regard to paragraph 78 of the Complaint, admits that as of January 1, 2010 DOCCS housed 213 inmates serving life sentences without the possibility of parole, but denies the balance of the allegations in that paragraph.

8. Admits the truth, as of January 1, 2010, of the allegations in paragraphs 80 and 81 of the Complaint.

9. Makes no response to the introductory statements in paragraphs 1 and 2 of the Complaint. To the extent those paragraphs include allegations, they are denied.

10. Makes no response to the statements in paragraph 237 of the Complaint in that they include no allegations. To the extent that the statements in those paragraphs are construed to be allegations, they are denied.

11. With respect to the allegations contained in paragraphs 4, 5, 6, 30, 32, 33, 34, 35, 36, 38, 118, 119, 120, 143, 144, 145, 146, 155, 157, 158, 164, 176, 180, 181, 183, 184, 193 and 197 of the Complaint, respectfully refers the Court to Part XX of Chapter 57 of the Laws of 2010 as the best evidence and most accurate version of its content. DOCCS denies the additional allegations in these paragraphs .

12. With respect to the allegations contained in paragraphs 41, 42, 43, 44, 51, 53, 59, 74, 107, 109, 111, 116, 132 and 142 of the Complaint, respectfully refers the Court to the New York State Constitution as the best evidence and most accurate version of its content. DOCCS denies the additional allegations in these paragraphs.

13. Paragraphs 133, 138, 225, 226, 227, 228 and 234 contain legal arguments, not allegations of fact, and are improper in a Complaint. To the extent that the statements in those paragraphs are construed as allegations, they are denied.

14. Repeats and re-alleges each response made herein to the allegations of the Complaint that are incorporated into paragraphs 85, 95, 140, 154, 174, 196, 206 and 222 thereof.

15. Denies each and every allegation of in the Complaint not specifically responded to above.

AFFIRMATIVE DEFENSES

16. Some or all of the Plaintiffs do not have standing to assert some or all of the claims alleged in their Complaint.

17. The Complaint presents claims which are non-justiciable.

18. Chapter 57 of the Laws of 2010 was approved by the New York State Senate in conformity with all parliamentary rules governing that body at that time.

19. Insofar as the Complaint presents a facial challenge to Part XX of Chapter 57 of the Laws of 2010, it fails to state a cause of action.

20. Part XX of Chapter 57 of the Laws of 2010 implements Article III, § 4 of the New York State Constitution, reconciles that provision with Article II, § 4 of the Constitution, and does not violate that constitutional provision, nor Article I, § 11 of the New York Constitution.

21. Enactment of Chapter 57 of the Laws of 2010 did not violate Article VII of the New York State Constitution.

22. The Complaint fails to state a cause of action, in whole or in part.

23. To the extent that DOCCS has already transmitted information required by Part XX, the plaintiffs assert claims for which relief could not be granted.

WHEREFORE, Defendant New York State Department of Corrections and Community Supervision respectfully requests that the relief requested in the Complaint be denied, that the Complaint and this action be dismissed, and that it be awarded costs and disbursements, together with such other relief as may be just.

Dated: Albany, New York
May13, 2011

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendant NYS Department of Corrections and Community Supervision
The Capitol
Albany, New York 12224-0341

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New York, New York 10007

New York State Legislative Task Force
On Demographic Research and Reapportionment
250 Broadway, Suite 2100
New York, New York 10007

VERIFICATION

Maureen E. Boll, being duly sworn, deposes and says that I am the Deputy Commissioner and Counsel of the New York State Department of Corrections and Community Supervision; that I have read the Complaint and the foregoing Answer to the Complaint, and the Answer is true to my knowledge, except as to those matters alleged upon information and belief, and that as to those matters, I believe them to be true.

_____s/_____
Maureen E. Boll

Sworn to before me on the
12th day of May 2011

_____s/_____
Notary Public

EXHIBIT C

Defending Schneiderman's Right To Defend

Capitol Tonight

Albany

http://www.capitaltonight.com/2011/04/defending-schneidermans-right-to-defend/

Civil rights groups and Assembly Democrats are rushing to defend AG Eric Schneiderman's right to fight for the prisoner counting law he championed while serving in the Senate that is now the subject of a lawsuit filed by some of his former Republican colleagues.

During a Red Room press conference this afternoon, Gov. Andrew Cuomo said the state will definitely defend the change, which was made as part of the 2010-2011 budget. But he also suggested Schneiderman might not be the best person to represent the state in this case.

> "We haven't worked out who defends it," Cuomo said. "The attorney general's office would normally defend an action like this. I know in this case the attorney general was involved in the legislation himself, so we have to sort through those issues."

(Recall that Cuomo has more than a passing interest in this lawsuit, since it challenges his right as governor to make policy through budget extender bills).

Around the same time Cuomo was speaking to reporters at the Capitol, the NAACP Legal Defense & Education Fund, Community Service Society of New York, and Citizen Action of New York issued a statement decrying the Senate GOP suit, calling it a "politically-motivated challenge (that) puts at risk one of the greatest civil rights accomplishments of the last decade in New York State."

> "Fortunately, there is no person who is more familiar with this issue or better prepared to defend this important civil rights victory than New York's Attorney General, Eric Schneiderman," the groups said.
>
> "We give him our full support in defending this statute to ensure that this year's redistricting process does not once again dilute the votes of communities of color."

Schneiderman also received support from Assembly Speaker Sheldon Silver, who reiterated through his spokesman, Michael Whyland, that the law is indeed constitutional and that it's "absolutely appropriate" for the AG to defend it – regardless of the role he played in its passage.

Assemblyman Hakeem Jeffries, who has become a spokesman for redistricting reform thanks to his experience of being drawn out of his own district after the last Census, also issued a statement in support of Schneiderman, calling the lawsuit "a transparent attempt to breathe life into the prison industrial complex."

Bjarni Thoroddsson | Apr 06, 2011 | View Comments |

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SUPREME COURT OF THE 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-

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

Defendants.

AFFIRMATION IN OPPOSITION TO MOTION TO INTERVENE

DAVID L. LEWIS, ESQUIRE

Attorney(s) for **Plaintiffs**

Office Address & Tel. No.:
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR.1200.41-a.

Dated: ..... Signature .....

Print Signer's Name .....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. , one of the judges of the within-named Court, at on 20 , at M.*

Dated:

Attorney(s) for

To:

Office Address & Tel. No.: