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.

and

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,

Intervenor-Defendants.

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INDEX NO. 2310-2011

REPLY AFFIRMATION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Judge Assigned:
Hon. Eugene Devine

DAVID L. LEWIS, an attorney admitted to practice in the courts of this state, hereby affirms, as follows:

1. I am counsel to Plaintiffs 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 and Senator Thomas O'Mara, (collectively, the "Senator Plaintiffs") and, along with Steven Leventhal represent the above-captioned citizen Plaintiffs as well. As such, I am fully familiar with the facts and circumstances of this action in that I am and have been a counsel in the State Senate for the last decade and currently serve as Counsel to the Majority Leader and Temporary President Dean G. Skelos, as well as counsel to these Plaintiffs in this action. I make this affirmation in reply to the defendants and in further support of the Plaintiffs' motion for Summary Judgment based on my personal knowledge except where stated to be made on information and belief and, as to those allegations, I believe them to be true based on my review of the relevant legislative history and legislative documents.

2. Plaintiffs seek a declaratory judgment pursuant to CPLR § 3001 declaring that Part XX of Chapter 57 of the Laws of 2010 (hereinafter "Part XX") is unconstitutional pursuant to provisions of the New York State Constitution and also seek a permanent injunction permanently enjoining defendants New York State Legislative Task Force on Demographic Research and Reapportionment (the "Task Force") and New York State Department

of Corrections and Community Services (the "DOCCS")[1] – sued herein as "New York State Department of Corrections" – from implementing Part XX of the Laws of 2010.

3. Defendant and Defendant Interveners have cross moved for Summary Judgment on the entirety of the complaint, each and every cause of action contending that the law requires it.

4. Plaintiffs seek Summary Judgment on the First and Second Causes of Action in the Complaint on the basis that each Cause of Action presents solely an issue of law. No facts are in dispute as to the First Cause of Action. Affidavits by Robert Megna and Joseph Pennisi raise factual disputes concerning the Second Cause of Action. Counsel for Plaintiffs' concede that as a result of the documents filed by the Attorney General, no Summary Judgment can be had by the Plaintiffs on the Second Cause of Action.[2]

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[1] On April 1, 2011, defendant Department of Correctional Services merged with the Division of Parole and is now referred to as the Department of Corrections and Community Supervision ("DOCS").

[2] Whether amendments to the referenced Budget Bill S 6610 were a result of the Governor's re-submission of these budget bills or outright legislative amendments is not established by any formal document of the Legislature. A scrap of debate, whether correct or not is not sufficient to foreclose this factual possibility.

5. With regards to the First Cause of Action, Part XX violates two subdivisions of the Constitution, Art. III §4 requiring that only the federal decennial census shall be used for the reapportionment of the state legislature and the definition of "inhabitants" require the counting of prisoners where they are found, in the prison. Part XX also violates the New York State Constitution by rendering certain individuals in prison to be "non persons" for the purpose of reapportionment contrary to the exact language of the Constitution requiring the counting of all inhabitants.

6. The Courts of this state have long held that it would be dangerous in the extreme or extend the operation and effect of the Constitution by a construction beyond fair scope of its terms because of a restricted or more literal and limited interpretation may be thought to be inconvenient or impolitic. Article III of the State Constitution is a grant of limited powers by the People to the legislature. The legislature may not take an action directly contrary to its own constitution. When the legislature decides to exercise its power, it is limited in significant areas by the Constitution. Where the language of Article III § 4 and § 5-a is specific and where the language of Article II § 4 is restricted to issues of voting as opposed to enumeration, the constitutional command is clear. Part XX violates that command.

7. By the text of the Constitution, a specific definitive method of counting of the people of the population is determined and it is determined for use solely when enumerating persons for apportionment of political representation in the Senate and Assembly. The ratification of the State Constitution that set the Federal decennial census as controlling meant that the actual enumeration and determination of who may be counted and under what circumstances has been removed from the purview of the state legislature. To get that power back the Legislature must get it from the people and not seize it to itself. Part XX is unconstitutional because it is specifically does that the Constitution forbids: create an alternative census to the federal decennial census for use in the apportionment of Senate and Assembly districts. Part XX violates specific sections of the New York State Constitution. There is no need to "harmonize" the statute if it is facially or in practice violative.

8. Defendants and defendant interveners as well as Senator Dilan, seeking amicus curiae status, have all sought to drive this lawsuit and the Court into error by misdirection. The tangible constitutional issue is not whether the Census permits enumeration of prisoners nor whether the Census has sought an alternate method of counting prisoners as part of their ongoing work of particularized enumeration.

9. The sole issue is whether the State Constitution prohibits the use of any enumeration other than the federal decennial census for enumeration of the inhabitants of the State, for the purpose of apportioning the legislature. Part XX counts prisoners at their prior addresses while the federal census continues to count prisoners at their places of incarceration. Art. III § 4 of the Constitution requires that the federal census be "controlling." These two basic facts make Part XX irreconcilable with the Constitution.

10. As a matter of law, Article III § 4 prevents the legislature from enacting this statutory, lesser inclusive enumeration. For reapportionment, the agencies of the state must not utilize any enumeration that does not count all the inhabitants of the state where they are found by the Census Bureau on Census Day. A statute that mandates not counting certain prisoners who are inhabitants under Article III § 5-a, creates a lesser enumeration contrary to the controlling Census enumeration and directly contradicts Article III, §§ 4 and 5-a.

11. The Census is an objective method that is insulated from the political process so as to prevent one party from acting to exclude persons so as to distort representation in its own favor. Genuine enumeration of all inhabitants, as the State Constitution requires, including all prisoners, is the most accurate way of determining population with minimal

possibility of partisan manipulation, according to the United States Supreme Court. See Department of Commerce v. House of Representatives, 525 U.S. 316, 348-349 (1999).

12. The crucial misbegotten reasoning in the defendants position is that they fail to acknowledge the fact that the Federal Decennial Census referred to in the Article III § 4 is the Census itself, the enumeration of persons where they are found, according to the Census defined "usual residence" and not a policy of the Census Bureau or its Director according to his blog.[3]

13. The Federal Decennial Census referenced in the state Constitution is the number produced, the actual headcount of the inhabitants of the state. The "Introducer's Memorandum in Support" of Part XX blithely acknowledged that its method of counting prisoners was contrary to the federal census, while completely ignoring the requirement of Art. III § 4 that "the federal census … shall be controlling":

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

[3] The blog of the Director is not an official document of the Census as it is not issued by the Bureau of the Census by notice and for comment prior to its adoption.

See Exhibit F to the Affirmation of Assistant Attorney General Stephen M. Kerwin, page 2, submitted in support of the Attorney General's position.[4]

14. Defendants mislead the Court by attempting to use the residence for voting purposes for the same purpose as enumeration despite the fact that the Constitution establishes that gaining or losing a residence is only regards to voting. It appears in Article II of the Constitution entitled "Suffrage".

15. The legislative history of the adoption of the amendment from the first makes it clear that the only issue this relates to is the protection of the rights of duly enrolled voters and no one else. The legislative history demonstrates that an issue existed as to who was to be counted primarily as between citizens and alien inhabitants. *See* Citizens' Committee Report to Governor Rockefeller December 1, 1964 (Exhibit A). In 1968, a concurrent resolution passed both houses of the legislature (S 4941-A) (Exhibit B). Floor debate on the issue demonstrated that the intention of the amendment was to provide that all the inhabitants of the state, are to be counted and rejected the use of specialized census data (Debate, Exhibit C). The proposed amendment was placed before the People as an

[4] Plaintiffs do not necessarily believe that a bill memorandum drafted by a single Senate sponsor, in support of a bill never acted upon by the legislature that is only "substantially similar" as opposed to identical to a bill that passed constitutes viable utile legislative history.

amendment to the State Constitution and it was ratified as Article III § 5-a.

16. Defendant interveners go to great lengths in their attempt to define inhabitants to fit issues of residence and/or domicile. A survey of the case law in this state demonstrates that the statutes and the courts define residence and domicile different ways for different issues. All of which is irrelevant and misleading. The Constitution itself defines inhabitants as whole persons. Cases which relate to voting or other purposes are inapposite to this inquiry. The issue is not one of the county in which one lives for voting purposes, venue, or which county shall pay for social or educational services or the like.

17. The second constitutional failure, unaddressed in all the volumes of material filed by the Defendants and the Defendant Interveners is the fact that the statute as enacted specifically directs that natural persons found in the State on Census Day are not to be counted at any location, as required by Article III § 5-a. Before any argument can seek to harmonize the statute with Article III § 4, Article III § 5-a must be respected and read in conjunction with the rest of the Constitution. Even if one could justify counting prisoners at

their mythical residences,[5] it is impossible to reconcile Article III § 5-a which mandates the counting of all inhabitants with a section of law that specifically directs not counting certain inhabitants, entire classes of persons, solely because they are prisoners with no known addresses on file or are present in New York but incarcerated in a federal prison even though they may be, even under even Defendants' interpretation domiciled or resident within New York. Thus even a class of inhabitants capable of being counted somewhere within the State are rendered "non persons" by this law.

18. Inhabitants are defined by an enumeration, the census. The purpose of enumeration is count heads, to count population. It is designed to be counted exclusive of any motive, purpose or intent of the person counted, specifically to avoid the very problems created by this legislation. The entire method of census adopted by the Constitution is to count all inhabitants, where they are found. It creates a single data set for the establishing of districts. Alter the nature and quality of the data sets by political exclusions for any purpose, not constitutionally required and the process ceases to count "the whole number of persons" Article III § 5-a. One then only counts selected persons, and depart from the control of the

[5] From data which the Census Director in his blog concedes has an error rate of up to 50%.

Census count. Fundamentally the statute "un enumerates" persons rendering them non persons for counting purposes when they are to be mandated counted persons.

19. Reliance upon the Census documentation of persons in group quarters and materials released in April of 2011 as to the 2010 Group Quarters Census does not alter the State Constitutional command and does not alter the requirement that the enumeration be that of the entire inhabitants of the state. Attached hereto as Exhibit D is 2010 Census Advance Group Quarters Summary File Technical Documentation. It states clearly that the counting of prisoners in the institutions is still the policy of the Census. It is not that the Census policy is binding upon New York State because it is in the Census' policy but because the Constitution has made the federal decennial census count the binding method for this state in its re apportionment by a vote of the People ratifying Article III § 4.

20. Since the very first census in 1790, the Census Department has consistently published data showing where the people of the entire country were counted on the decennial "census day". New York State formerly conducted its own census. New York State Constitution Article II Section 4, Constitution of the State of New York, 1894. The Constitution was then amended to provide that beginning with the 1930 federal census,

that data must be taken as controlling for apportionment purposes, under the new Article III § 4. Since 1975, that federal census data has been published in a report called Redistricting Data Summary File, pursuant to Public Law 94-171. It is this information that provides the enumeration.

21. Starting in 1790, the census has followed the concept of "usual residence" in counting persons on census day. "Usual residence" is defined as, "the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence." See Exhibit D at p. G-1. People in federal and state prisons are counted at the facility. Id. at p. G-5.

22. The Census Department also publishes "GQ Data", which identify persons who are counted in "group quarters", including prisons but also including group homes and other types of residential treatment facilities.

23. This was done, not because the Census Department considered the data appropriate for any particular use, but only to assist states, whose constitutional framework for counting is different from that of New York. It also is used in non-apportionment contexts in that the information is useful to academics, scholars and others who find such data relevant or useful. Some states have constitutions and statutory frameworks that require the counting of prisoners or other group home

residents at some place other than their "usual residence". States are free to this. In New York such could be done by a vote of the People amending the Constitution after adoption of a concurrent resolution of the legislature by two successive legislatures.

24. The "GQ Data" identify the number of prisoners and other group quarter residents that were counted, and where they were counted, but nothing in any Census material attempts to identify their last known prior addresses.[6]

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

[6] Even the "Director's Blog", annexed as Exhibit I to the Interveners' motion, notes the difficulty which the Census Bureau has in getting reliable data from prisoners, including that many prisons require census workers to use administrative records, and records from institutions have "missing data rates that approach 50 percent." The "Director's Blog" also recognizes the justification for counting prisoners at the prison, particularly if they are serving long sentences, among various other alternative methods. The "Director's Blog" further points out that the Census Department is not involved in redistricting.

York State Constitution that directs the means and methods of counting.

26. The distinction made by the Defendants between prisoners and all other persons in group quarters, based upon the voluntariness of their commitment, is specious. Interveners' memorandum of law attempts to re-define the term "inhabitant" in Art. III of the Constitution to mean "domiciliary". They argue that there must be some element of volition, or intent to remain, inherent in the term "inhabitant". However, Art. III, §5-a of the Constitution defines "inhabitants, excluding aliens" as "the whole number of persons". This term is used to set the ratio of apportionment in Art. III §5.

27. Like the Census Department's usual residence rule, the definition of "inhabitant" contains no subjective element of intent or volition.

28. According to the Census, group quarters are places where people live or stay in a group living arrangement, which are owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement. These services may include custodial or medical care as well as other types of assistance, and residency is commonly restricted to those receiving these services. People living in group quarters are usually not related to each other. A review of the group

quarters persons demonstrates that many of those persons are not placed at those addresses on Census Day of their own volition. Persons in a variety of institutions, either mental institutions or places of physical confinement, are not there because they are volunteers. See Exhibit D, Appendix B-1 et seq. and Appendix G-1 et seq.

29. The entire purpose of the Census is to count objectively in the sense that there is no element of violation. It is an enumeration.

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

31. Unless the Attorney General were to argue that incarcerated felons should be allowed to vote, which he does not, it is pointless for him to argue that, "Part XX enhances New York's compliance with Reynolds v. Sims, 377 U.S. 533 (1964) one-person-one-vote doctrine". (A.G. Memo at 17). It is equally pointless for him to argue that "Part XX harmonizes New York

Constitution Article III §4 and Article II §4". (A.G. Memo at 19.) Since incarcerated felons have no right to vote, there is nothing to "harmonize" with the voting rights provision of Art. II, §4. His citation of Wolpoff v. Cuomo, 80 N.Y.2d 70 (1992) regarding harmonizing "competing Federal and State requirements" (A.G. Memo at 16) is equally pointless, as there are no relevant federal requirements to harmonize.

32. Later in his brief, the Attorney General admits that "Part XX modifies enumerations of census blocks or 'geographic units,' not individual addresses …" (A.G. Memo at 36.) Part XX only concerns apportionment, not any individual's right to vote.

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

> As this § [Art. II §4] of the Constitution indicates, however, it applies "[f]or the purpose of voting." Unquestionably, different standards are involved when comparing an individual's actual right to vote to action the Legislature may take to facilitate apportionment. …[A]pportionment itself involves the application of different standards. … [T]here is no requirement in New York's Constitution … that obligates a local legislature, in the context of apportionment, to use the same standards required for voting purposes, specifically, presence and an intent to remain. … [E]ven though certain citizens within a given population may not have the right to vote, a 12-year-old child for example, that citizen nevertheless would properly be part of the population base for

> apportionment purposes. That residence in the apportionment sense be construed more broadly than in terms of voting rights is appropriate. The goals and objectives of the concepts differ significantly. 83 N.Y.2d at 24-25.

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

> [T]ransients are also integral parts of their respective communities. Military persons, children, mental patients and prisoners all affect the social and economic character of their environments. Their impact results in employment opportunities and contributes to the tax base. They also use services provided by the municipalities. Thus, their inclusion for apportionment purposes makes sense on several levels. 83 N.Y. 2d at 22-23.

35. The Court of Appeals also distinguished between the term "inhabitant" and "domiciliary", and avoided using the concept of domicile for apportionment purposes:

> Plaintiffs urge also that the term "resident" should be restricted to a person's domicile for apportionment purposes. That construction of the term would serve only to lend more confusion to the issue given the inherent difficulty in distinguishing between inhabitants and domiciliaries. 83 N.Y.2d at 23.

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

37. The Attorney General's and the Interveners' policy arguments are irrelevant, in that policy can't be imposed in violation of the Constitution. But beyond that, their policy arguments are wrong. As the Court of Appeals noted in Longway, it is perfectly reasonable, and offends no one's constitutional rights, to count prisoners at their places of imprisonment for purposes of apportionment.

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

39. The Attorney General and the Interveners assert that certain unnamed individuals have been deprived of equal protection by the constitutionally mandated method of counting prisoners at their place of incarceration for purposes of apportionment; yet they offer no competent evidence, such as affidavits or otherwise, to support this conclusory claim. They have utterly failed to meet the burden that they assumed in moving for summary judgment to establish through competent

evidence that no question of fact exists as to their equal protection claim.

40. Defendant Interveners claim a violation of voting rights would occur if Part XX should be struck down. First, Defendant Interveners have possessed a similar "claim" in every redistricting for decades, and have asserted it before Defendant LATFOR, but have never litigated it to test its viability in a court of law. (See Exhibit E; 2002 Reapportionment Statement of Peter Wagner to LATFOR). No similar claim has been asserted in a courthouse in the last ten years, and no court has ever upheld such a challenge. See, District of Columbia v. U.S. Department of Commerce, 789 F.Supp. 1179 (D.C. Cir. 1992).[7] Second, it manifests a fundamental misunderstanding of equal protection in the context of the "one person one vote" rule.

[7] In District of Columbia v. U.S. Department of Commerce, 789 F.Supp. 1179 (D.C. Cir. 1992), the United States District Court for the District of Columbia upheld the Census Bureau's method of counting prisoners as residents of the Commonwealth of Virginia, where they were incarcerated, rather than as residents of the District of Columbia, where most of the prisoners resided prior to incarceration. The District Court found the Census Bureau's procedure reasonable and concluded that it "interpreted the [United States] Constitutional command to enumerate the whole number of people on Census day to require enumeration at the place where the people are usually to be found …" Id. at 1189. See also, Borough of Bethel Park v. Stans, 449 F. 2d 575, 582 (3rd Cir. 1971) (the Census Bureau's procedures for tabulating prisoners in penitentiaries or correctional institutions "as residents of the state where they are confined" was proper).

41. Part XX is also unconstitutional in that it denies equal protection to Plaintiffs in violation of Article I, § 11 of the Constitution, by artificially increasing the representation of persons in certain urban areas, when no such persons actually exists in the community to be counted. Part XX also decreases the representation of persons in districts with prison institutions, whose community resources, including the local courts, hospitals and health services, water, sewer and other infrastructure are burdened by the needs of the prison populations, and whose communities must consider these needs when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services. This burden on the localities was the rationale in the Longway case, supra, in favor of counting transients for local apportionment purposes.

42. In contrast, Defendant Interveners do not have an equal protection claim.[8] The "one person one vote" rule is not related to enumeration. It is tied to the right to vote. The enumeration is a data set, a series of numeric information data which is later organized into voting districts. Enumeration is

[8] Defendant-Interveners claim that the removal of prisoners from the count at their prior home addresses, and their location in prisons, violates the "one person, one vote" doctrine, a position not adopted anywhere by any court nor ever litigated by these parties, despite their participation in the hearings on the 2000 redistricting.

distinct from voting. The Census provides the initial data for enumeration. "One person, one vote" is tied to the organization of data after enumeration has been completed. Defendants reliance upon Burns v. Richardson, 384 U.S. 73 (1966) and similar cases conflates the right to vote, protected by the federal constitution, with the right to be counted. Put more simply, the method of counting persons such as prisoners in group quarters does not affect voting. Burns v. Richardson allows variations in the organizations of districts but does not allow for alteration in the way in which one counts population so as to deliberately exclude any countable portion of the population. This is especially true in the State of New York where Article III § 4 removes the actual enumeration from the political process. It is taken out of the hands of the legislature so as to prevent manipulation for any reason including partisan purposes. Significantly, Burns allows the use of a means of enumeration that provides for better data by counting more people, not a system that counts fewer people as Part XX requires. The instant legislation, by its express terms, counts fewer inhabitants, and thus cannot be justified on "one person, one vote" grounds.

43. Part XX also undermines "one person, one vote" in that it creates three different data sets, one for the apportionment of Congressional seats, which are not covered by

the legislation and could not be so covered without running afoul of the federal constitution, another different data set for the state legislature, and then a third data set for localities to apportion as they so choose.

44. The data set created by the legislation cannot be used for federal congressional redistricting because the data set specifically alters the data set to be less than the total population, by "backing out" certain prisoners. While the state reapportionment can be with a differential of plus or minus 5%, between individual Senate or Assembly districts, such a percentage is per se unconstitutional for federal congressional districts which must be equally apportioned. Because Part XX requires the creation of reapportioned bodies of covering the same physical and geographical area with two different data sets, the "one person, one vote" argument must fail, since it is specifically this violation that violates the "one person, one vote" and not the pre-existing system of counting prisoners where they were found.

45. Should the Court permit the legislation to stand, nothing would prevent the state legislature from determining that other classifiable persons should be removed from the count. Any enumeration that fails to count the whole number of persons as required by Article III § 5-a, would permit the counting, or not counting, of any other identifiable group based

upon any criteria selected by the legislature. Thus non-voting shut-ins could be excluded, or individuals under the age of fifteen who are not capable of consent, and therefore, are not living in group quarters by their own volition. The list could go on.

46. This is not an issue of whether the legislature acted wisely, which would be beyond the court's jurisdiction. Rather, it is an issue of whether the legislature acted constitutionally.

47. Contrary to the position of the Defendant Interveners, in the absence of the federally constitutional permissible end of getting a better count, no violation of "one person, one vote" occurs when the law under attack is struck down.

48. Part XX's method of creating s sub set of counted and uncounted prisoners is an inconsistent method of enumeration deviating from the actual census count in order to create a state census, based on none of the specified exceptions in Article III § 4. The statute is in conflict with the Constitution.

49. Defendants make much of the argument whether the law can be constitutional facially or as applied. If the state constitution is correctly read, then there cannot be a limited specified census for prisoners and a different one for the rest

of the state's inhabitants. Thus "facially" or "as applied" approaches are irrelevant to the constitutional analysis..

50. There are no valid policy arguments, and certainly no voting rights arguments, that require the counting of incarcerated felons at their prior addresses.

51. A policy basis that runs afoul of the state constitution is unconstitutional no matter how much it may be beloved or by whom. As the Court wrote in King v. Cuomo, 41 N.Y.2d 247 (1999):

> However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

52. Plaintiffs submit that the Defendant's applications to dismiss the remaining causes of action under CPLR 3211(a)(7) and/or for summary judgment under CPLR 3212 are without merit. Each of the remaining causes of action, raising equal protection and the issue of partisan gerrymandering, cannot be decided as a matter of law in the absence of a trial on the merits.

53. For the foregoing reasons, the Court should grant summary judgment in favor of Plaintiffs on the First Cause of Action declaring that Part XX of Chapter 57 of the Laws of 2010

is unconstitutional under Article III § 4 and 5a of the New York Constitution.

54. A permanent injunction against the Defendants should be issued as the final disposition of Plaintiffs' request for injunctive relief.

55. The Court should grant summary judgment in favor of the Plaintiffs, declaring that Part XX of Chapter 57 of the Laws of 2010 is unconstitutional under the New York Constitution, and permanently enjoining Defendants New York State Legislative Task Force on Demographic Research and Reapportionment and New York State Department of Corrections and Community Services – sued herein as "New York State Department of Corrections" – from implementing Part XX.

WHEREFORE, Plaintiffs pray that the Court grant the motion for summary judgment in their favor on the First Cause of Action and enter a permanent injunction against defendants from proceeding to implement Part XX of Chapter 57 of the laws of 2010, and deny the motions of the Defendants and Defendant Interveners for summary judgment or summary dismissal under C.P.L.R. 3211 (a)(7) or 3212.

DATED: New York, New York
September 1, 2011

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DAVID L. LEWIS, ESQ.