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 State Task Force on Demographic Research and Reapportionment, New York State Department of Correctional Services,

Defendants,

Index No. 2310-2011

NOTICE OF INTERVENORS-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

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,

Intervenors-Defendants.

.....

PLEASE TAKE NOTICE that, upon the Affirmation of Peter Wagner and the accompanying Memorandum of Law in Support of the Intervenors-Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, and upon all prior pleadings and proceedings, the undersigned counsel will move that this court, on September 13, 2011 or as soon thereafter as counsel may be heard, issue an order denying Plaintiffs' Motion for Summary Judgment and granting summary judgment in favor of intervenors-defendants on all counts.

PLEASE TAKE FUTHER NOTICE that, pursuant to agreement among counsel for all parties, responsive papers, if any, must be served by August 29, 2011 by overnight mail, and intervenors-defendants will serve any papers in reply by September 6, 2011 by overnight mail.

Dated: August 18, 2011

Respectfully submitted,

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Intervenors-Defendants.

.....

Index No. 2310-2011

AFFIRMATION OF PETER WAGNER IN SUPPORT OF INTERVENORS-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Peter Wagner, a member of the Massachusetts bar and *pro hac vice* granted August 4, 2011,

affirms as follows:

1. I am Executive Director of the Prison Policy Initiative and I, along with several colleagues from other organizations, represent intervenors-defendants in this action.

2. This court should deny Plaintiffs' Motion for Summary Judgment on counts 1 and 2 of the complaint in the above-captioned matter for the reasons set forth in intervenors-defendants' Memorandum in Support of Intervenors-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

3. This court should grant intervenors-defendants' Motion for Summary Judgment on all counts for the same reasons.

4. No genuine issue of material fact exists such that judgment as a matter of law is proper pursuant to CPLR § 3212.

FACTS

Overview

5. On August 3, 2010, the New York Legislature passed Part XX of chapter 57 of the Laws of 2010 (hereinafter, "Part XX"), legislation that required the state to allocate people incarcerated in New York prison facilities to their home communities for redistricting purposes. (*See* A. 9710 / S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney).)

6. The Governor signed the legislation into law on August 12, 2010. (*See* A. 9710 / S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney).)

7. The law was submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, and preclearance was granted on May 9, 2011. (*See* Letter from T. Christian Herren, Jr., Chief, Voting Section, U.S. Dep't of Justice, to Joel Graber, Special Litigation Counsel, Office of the New York Attorney General (May 9, 2011), *available at* http://www.prisonersofthecensus.org/little/doj_preclearance_letter.pdf.)

8. Article III, section 4 of the State Constitution, in pertinent part, provides:

> 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 therefore. . . . If a federal census, though giving the requisite information as to the state at large, fails to give information as to any civil or territorial divisions which is required to be known for such [redistricting] purposes, the legislature, by law, shall provide for such enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census."

(*See* N.Y. Const. art. III, sec. 4.)

9. Part XX, which allocates incarcerated persons for districting purposes, is consistent with article III, section 4. The term "inhabitants" in article III, section 4 is best interpreted as domiciliaries or legal residents. The domicile or legal residence of incarcerated persons is their last residence prior to incarceration. Article II, section 4 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 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.

(*See* N.Y. Const. art. II, sec. 4.) The same principle has been applied throughout New York law. The purpose of Part XX, among other things, was to harmonize the allocation of incarcerated persons with article II, section 4 and this long-established principle. (*See* New York State Senate Introducer's Memorandum in Support of S6725A.)

10. An incarcerated person remains domiciled at his or her home address. (*See id.*; *Corr v. Westchester Cnty. Dep't of Soc. Servs.*, 33 N.Y.2d 111, 115 (1973).)

11. An incarcerated individual who retains the right to vote in New York cannot use his or her place of incarceration as a voting address. (*See People v. Cady*, 98 Sickels 100, 106, 37 N.E. 673, 674-75 (1894).)

12. An incarcerated person is not a constituent of the district where he or she is confined. (*See id.*)

13. An incarcerated person remains a constituent at his or her home address. (*See* New York State Senate Introducer's Memorandum in Support of S6725A.)

Census Bureau Rules & Data

14. The U.S. Census Bureau does not mandate a single method of allocating incarcerated individuals for redistricting purposes. (*See* Robert Groves, Director, U.S. Census Bureau, *So, How Do You Handle Prisons?*, 2010 Census: The Director's Blog (March 12, 2010), http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File* (last visited Aug. 15, 2011, 6:20pm), http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html; Sam Roberts, *New Option for the States on Inmates in the Census,* N.Y. Times, Feb. 11, 2010, at A18, *available at* http://www.nytimes.com/2010/02/11/us/politics/11census.html; Hope Yen, *States Get New Leeway to Tally Prisoners in Census*, Associated Press, Feb. 11, 2010, http://articles.boston.com/2010-02-12/news/29291552_1_prison-populations-count-inmates-inmate-population.)

15. The U.S. Census Bureau provides states with tools to assist them in allocating incarcerated individuals as they see fit during the redistricting process, with the goal of empowering states to make their own determinations as to the proper allocating of such populations during redistricting consistent with state law and state policy determinations. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14; Roberts, *supra* ¶ 14; Yen, *supra* ¶ 14.)

16. The U.S. Census Bureau produces multiple data sets for use during redistricting. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14; Roberts, *supra* ¶ 14; Yen, *supra* ¶ 14.)

17. For instance, the U.S. Census Bureau produces a data file for use during redistricting, pursuant to Public Law 94-171 ("PL data file"). (*See* U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, http://www.census.gov/prod/cen2010/doc/pl94-171.pdf.)

18. The PL data file contains basic information on the U.S. population at the census block level. (*See id.* at 1-1.)

19. The PL data file is based on the Census Bureau's "usual residence rule," and allocates incarcerated individuals where they are confined. (*See id.* at G-5.)

20. The U.S. Census Bureau does not prescribe the PL data file or the usual residence rule as "necessary" to allocate incarcerated populations for redistricting purposes, nor does it mandate the exclusive use of such data for redistricting purposes. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

21. The U.S. Census Bureau provides states with another data set for use during redistricting, known as Group Quarters data ("GQ data"). (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

22. The GQ data includes, *inter alia*, information on the location of prison populations. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

23. State and local redistricting officials can overlay the GQ data file with the PL data file, in order to delete incarcerated populations from the census blocks where they are confined. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

24. The GQ data is intended to assist those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation. (*See* U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

25. The GQ data is intended to assist three states (Delaware, Maryland, and New York) that have legislation requiring the use of group quarters data in their line drawing. (*See* U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

26. The GQ data is intended to assist states with assigning prisoners to a locale other than where they are incarcerated, or to delete them from the redistricting formulas. (*See* Groves, *supra* ¶ 14.)

27. The Census Bureau has disclaimed that there is an objective or value-neutral way to allocate incarcerated populations during redistricting, and thus has expressly sought to empower states with the ability to make their own judgments as to where incarcerated

populations should be counted. (*See* Groves, *supra* ¶ 14; U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*, *supra* ¶ 14.)

Article III Exception

28. Statutes challenged under article III, section 4 of the State Constitution enjoy a "strong presumption of constitutionality" that is overcome "'only when it can be shown beyond reasonable doubt that [the challenged law] conflicts with [article III, section 4 of the State Constitution], and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" (*Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77-78 (1992) (*quoting Matter of Fay*, 291 N.Y. 198, 207 (1943)).)

29. Under article III, section 4 of the State Constitution, Census data is controlling only "in so far as such census and the tabulation thereof purport to give the information necessary" for redistricting purposes. (*See* N.Y. Const. art. III, sec. 4)

30. Article III, sections 4 and 5 of the State Constitution provides that Assembly and Senate districts must, respectively, have equal numbers of "inhabitants." (*See* N.Y. Const. art. III, secs. 4 and 5.)

31. An incarcerated person remains an inhabitant at his or her home address. (*See Kennedy v. Ryall*, 22 Sickels 379, 1876 WL 12772 at *4 (1876); N.Y. Const. art. II, sec. 4; *Corr v. Westchester Cnty. Dep't of Soc. Servs.*, 33 N.Y.2d 111, 115 [1973].)

32. The PL data file is based in part on the U.S. Census Bureau's "usual residence" rule. (*See* U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, *supra* ¶ 17, at G-2.)

33. A person's residence under the "usual residence" rule is not the same as a person's domicile, nor is it purported to be. (*See* U.S. Census Bureau, *Residence Rule and*

Residence Situations for the 2010 Census, *available at* http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html (last visited Aug. 15, 2011, 6:00pm).)

34. A person's residence under the "usual residence" rule is not the same as a person's legal residence for voting purposes, nor is it purported to be. (*See* U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census*, *supra* ¶ 33.)

35. A person's residence under the "usual residence" rule is not the same as the location at which a person is an inhabitant, nor is it purported to be. (*See* U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census*, *supra* ¶ 33; *Kennedy*, 22 Sickels 379, 1876 WL 12772 at *4.)

36. The federal census and its tabulation do not purport to give the information necessary for allocating incarcerated individuals for redistricting purposes in accordance with state law. (*See* U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census* (*supra* ¶ 33.)

37. Usual residence is defined as the place where a person lives and sleeps most of the time. (*See id.*)

Severability

38. Part XX § 4 provides that if any section, subdivision, paragraph, subparagraph, clause or other part of this act or its application is held to be invalid by final judgment of a court of competent jurisdiction, such invalidity shall not be deemed to impair or otherwise affect the validity of the remaining provisions or applications of this act that can be given effect without such invalid provision or application, but such invalidity shall be confined to the section, subdivision, paragraph, subparagraph, clause or other part of this act or its application directly

held invalid thereby, which are declared to be severable from the remainder of this act. It is declared to be the intent of the legislature that this act would have been enacted but for any such invalid provision or application thereof. (*See* Part XX, § 4.)

39. Part XX § 1, which is not implicated under Article III of the State Constitution, directs the Department of Corrections to deliver to the Legislative Task Force on Demographic Research and Reapportionment (LATFOR) information including, *inter alia*, the residential address prior to incarceration of each incarcerated person subject to the jurisdiction of the department. (*See* S. 6610-C, 233rd Leg., Part XX, 2010 N.Y. Sess. Laws 57 (McKinney), § 1.)

40. Part XX § 2 directs LATFOR to, *inter alia*, determine the census block corresponding to the street address of each incarcerated person's residential address prior to incarceration (if any), a command that is not implicated under article III of the State Constitution. (*See* Part XX, § 2.)

41. Part XX § 2 provides that assembly and senate districts shall be drawn using population data reflecting each incarcerated person's residential address prior to incarceration. (*See* Part XX, § 2.)

42. Part XX § 3, which is not implicated under article III of the State Constitution, requires that, for purposes of municipal redistricting, no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, by reason of being subject to the jurisdiction of the department of correctional services and present in a state correctional facility pursuant to such jurisdiction. (*See* Part XX, § 3.)

Budget Process

43. Article VII, section 3 of the New York Constitution provides that the governor presents the budget to the legislature along with two types of bills: (1) bills that contain "the

proposed appropriations and reappropriations included in the budget;" and (2) other "proposed legislation, if any, recommended therein." (*See* N.Y. Const. art. VII, sec. 3.)

44. Although appropriation bills are set forth in article VII, not all budget bills under article VII are appropriation bills. (*See* Compl. ¶ 104–05.)

45. Article VII, section 6 of the New York Constitution contains the "anti-rider" provision, which by its express terms applies only to appropriation bills and provides that "[n]o provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation." (*See* N.Y. Const. art. VII, sec. 6.)

46. Article VII, section 4 of the New York Constitution contains the "no-alteration" provision, which by its express terms applies only to appropriations bills and provides that "[t]he legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." (*See* N.Y. Const. art. VII, sec. 4.)

47. Chapter 57 of the Laws of 2010, which includes Part XX, does not begin with or contain the words "An Act making appropriations." (*See* S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney).)

48. Chapter 57 of the Laws of 2010 specifies no appropriations of money for any purpose. (*See id.*)

49. Chapter 57 of the Laws of 2010 was a revenue budget bill, not an appropriations bill. (*See* Compl. ¶ 115; Plaintiffs' Affirmation in Supp. Mot. Summ. J. ¶ 71.)

50. The legislature passed twelve "budget extender" bills between April 2010 and June 2010 which were titled using the words "emergency appropriation" and contained the effective dates of the budget extensions. (*See* A10469/S7277 2010 Leg., 233rd Sess. (N.Y. 2010); A10610/S7443 2010 Leg., 233rd Sess. (N.Y. 2010); A10740/S7529 2010 Leg., 233rd Sess. (N.Y. 2010); A10847/S7605 2010 Leg., 233rd Sess. (N.Y. 2010); A10924/S7689 2010 Leg., 233rd Sess. (N.Y. 2010); A11011/S7777 2010 Leg., 233rd Sess. (N.Y. 2010); A11102/S7846 2010 Leg., 233rd Sess. (N.Y. 2010); A11173/S7924 2010 Leg., 233rd Sess. (N.Y. 2010); A11182/S7932 2010 Leg., 233rd Sess. (N.Y. 2010); A11313/S8019 2010 Leg., 233rd Sess. (N.Y. 2010); A11370/S8089 2010 Leg., 233rd Sess. (N.Y. 2010); A11437/S8167 2010 Leg., 233rd Sess. (N.Y. 2010); A11514/S8284 2010 Leg., 233rd Sess. (N.Y. 2010) (available online at http://open.nysenate.gov/legislation/).)

51. Neither the title nor the text of Chapter 57 of the Laws of 2010 contained the language "emergency appropriation." (*See* S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney).)

52. Chapter 57 of the Laws of 2010 does not contain any language extending the previous budget. (*See id.*)

53. Chapter 57 of the Laws of 2010 was not a "budget extender." (*See id.*)

Equal Protection

54. There are numerous justifications for allocating incarcerated persons to the districts in which they resided prior to their incarceration and they greatly outweigh any justification for allocating them to the districts where they are incarcerated.

55. Incarcerated persons generally have no allegiance or ties to the community in which the prison is located. (*See* Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D.

Levingston, Brennan Ctr. for Justice, *Accuracy Counts: Incarcerated People and the Census* 6 (2004), *available at* http://www.brennancenter.org/content/resource/accuracy_counts/.)

56. Plaintiffs acknowledge that incarcerated persons "are removed from the community" in which they are confined. (*See* Compl. ¶ 166.)

57. Essex County, one of the counties represented by Plaintiff Little, passed a local law in 2003 acknowledging this removal: "Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County, and do not affect the social and economic character of the towns in which . . . the correctional facilities . . . are located." (Essex Cnty. Local Law No. 1 (2003).)

58. Incarcerated persons typically maintain ties to their pre-arrest communities, and return to those communities upon completion of their sentences, as evidenced by the fact that nearly every state has adopted a policy of releasing parolees back to the counties in which they were sentenced (not incarcerated). (*See* Kirsten D. Levingston & Christopher Muller, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at their Home Addresses in the Next Census* 9 (2006), *available at* http://www.brennancenter.org/content/resource/home_in_2010/.)

59. Most incarcerated persons are potential voters in the districts in which they previously resided. On completion of their sentences, their voting rights are restored and they can vote in the districts of their prior residence. (*See* Election Law § 5-106 (2).) Meanwhile, they cannot vote in the districts where incarcerated and their incarceration does not enable them to vote in those districts on completion of their sentence and release.

60. Such ties to pre-arrest communities are also evident in familial relationships. Fifty-five percent of inmates in state custody have minor children living in their home, or pre-

arrest, communities. (*See* Nat'l Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 82 (Daniel L. Cork & Paul R. Voss eds., 2006), http://print.nap.edu/web_ready/0309102995.pdf (citing Christopher J. Mumola, U.S. Dep't of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children* (2000)).)

61. Including incarcerated persons in the prison communities for apportionment purposes weakens the vote of any citizen who lives in a district that does not contain a prison.

62. Following the 2000 Census, seven State Senate districts lacked sufficient non-incarcerated population to meet requirements of population equality applicable to state legislative districts. (*See* Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in New York* (2002), http://www.prisonpolicy.org/importing/importing.html.)

63. Given that the incarcerated population is disproportionately African-American and Latino yet has historically been credited to disproportionately white prison communities, communities of color have suffered a diminishment of representation. (*See* New York State Senate Introducer's Memorandum in Support of S6725A, 6/9/10, at 2.)

64. New York State is approximately 68% white, but 77% of its prison population is African-American (51.3%) or Latino (25.9%). (*See* U.S. Census Bureau, *American FactFinder*, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited Aug. 15, 2011, 6:25pm) (data for New York State); N.Y. State Dep't of Corr. Servs., *The HUB System: Profiles of Inmates Under Custody on January 1, 2008*, at i (2008) ("*HUB System Profiles*"), http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf.) But 98% of all prison cells in New York State are located in disproportionately white State Senate districts. (*See* Prison Policy Initiative, *98% of New York's Prison Cells Are in Disproportionately White*

Districts (Jan. 17, 2005), http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/.)

65. New York's previous policy of including incarcerated population when creating state legislative districts diminished the voting strength of any resident of New York, upstate or downstate, who did not reside in a district containing a disproportionate number of incarcerated persons. For example, following the 2000 Census, a State Senator from District 45, home of several correctional facilities, represented only 285,442 non-incarcerated constituents, while a State Senator from neighboring upstate Senate District 43, where no prison is located, represented 302,261 non-incarcerated constituents. (Prison Policy Initiative, *District 45 Profile*, http://www.prisonersofthecensus.org/factsheets/ny/district_45_profile.pdf (last visited Aug. 15, 2011, 6:30pm) and LATFOR, *District 43 Map and Data*, http://www.latfor.state.ny.us/maps/2002sen/fs043.pdf (last visited Aug. 15, 2011, 6:30pm).) Many other upstate districts, such as 44 and 46, contain no or few prisons, and suffer similar vote dilution when incarcerated people are counted at prison locations.

66. Before Part XX was enacted, many upstate counties — including several represented by plaintiffs, such as Essex, Clinton, Franklin, and Dutchess — had decided to exclude incarcerated populations when drawing districts for local county government. (Prison Policy Initiative, *Fact Sheet: Thirteen Counties Reject Prison-Based Gerrymandering*, http://www.prisonersofthecensus.org/factsheets/ny/13_counties.pdf.)

67. Including prisons in local districts would lead to absurdly distorted results: in Franklin County, for example, including incarcerated population for county redistricting after the 2000 Census would have resulted in a county district with a majority incarcerated population. (*See id.*) Prior to the passage of Part XX, St. Lawrence County, for example, skewed county

representation by drawing the 2nd District (Ogdensburg) to include prison populations. The district was 25% incarcerated, effectively giving each group of 75 people in District 2 an equal say over county matters as 100 people elsewhere (Prison Policy Initiative, *Fact Sheet: Prison-Based Gerrymandering in St. Lawrence County*, http://www.prisonersofthecensus.org/factsheets/ny/st_lawrence.pdf.)

68. Incarcerated populations are different from other "group quarters" populations in significant ways warranting that they be allocated to their home communities for redistricting purposes. Unlike incarcerated persons, other group quarters populations — in colleges and universities, nursing facilities, shelters, military bases, *et cetera* — typically move to these residences on a voluntary basis and establish domicile and residency for voting purposes at the group quarters location. Unlike incarcerated persons, other group quarters populations interact substantially — shopping, going to restaurants, using recreational facilities, attending community events, *et cetera* — with the community in which they are physically located.

69. Prisoners have no such contact with the community in which the prison is located. (*See* Nat'l Research Council, *supra* ¶ 60, at 83 (observing that, unlike other group quarters residents, incarcerated individuals "do not — and cannot — live day-to-day in the communities from which they were sent to prison, and yet their possible eventual return creates demands for such local services as parole monitoring, substance abuse rehabilitation, and job counseling social services. They also do not live day-to-day in the communities in which the prisons are located, in that they do not drive on the roads or use other services.").)

70. Prisoners do not choose at which facility they will be placed; the Commissioner of the Department of Corrections decides where to place them. (*See* N.Y. Correct. Law § 23(1)

(McKinney 2010) (stating that Commissioner of Department of Correctional Services has authority to transfer prisoners).)

71. The median length of stay for an incarcerated person at any one facility is 7.1 months. (*See HUB System Profiles*, *supra* ¶ 64, at 38.) The median time to the earliest potential release date was only 15 months. (*Id.* at 18.)

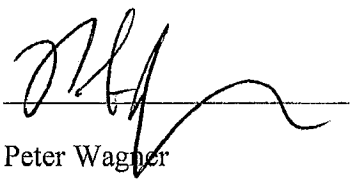
72. Only an insignificant percentage of incarcerated persons stay in prison for life: of the 56,315 persons under custody of DOCS as of January 1, 2011, only 223, or 0.4%, were serving sentences of "Life without Parole." (N.Y. State Dep't of Corr. Servs., *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2011*, at ii, 10, (2011), http://www.docs.state.ny.us/Research/Reports/2011/UnderCustody_Report.pdf.)

73. Upon release, the vast majority of incarcerated persons return to the community in which they lived prior to incarceration. In these, and in additional ways, prisoners differ from college students, the other sizeable group living, though in their case voluntarily so, away from "home." (Prewitt, *supra*, ¶ 55, at *i.*)

Partisan Gerrymander

74. Part XX does not mandate the drawing of any particular district lines. (*See* S. 6610-C, 233rd Leg., 2010 N.Y. Sess. Laws 57 (McKinney).)

75. The Legislature had numerous neutral rational bases for allocating incarcerated persons to the districts in which they formerly resided.



Peter Wagner

Mass BBO # 662207

Dated: August 17, 2011

Easthampton, Massachusetts

Sworn to me this 17th

day of August, 2011

Pamela B. Schumann

NOTARY PUBLIC

PAMELA B. SCHUMANN
Notary Public, Commonwealth of Massachusetts
My Commission Expires May 26, 2017

MASSACHUSETTS JURAT

Gov. Exec. Ord. #455 (03-13), §5(e)

Commonwealth of Massachusetts
County of Hampshire } ss.

On this the 17th day of August, 2011, before me,
Day Month Year

Pamela B Schumann, the undersigned Notary Public,
Name of Notary Public

personally appeared Peter J Wagner,
Name(s) of Signer(s)

proved to me through satisfactory evidence of identity, which was/were

Massachusetts Driver's License,
Description of Evidence of Identity

to be the person(s) whose name(s) was/were signed on the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her/their knowledge and belief.

Pamela B Schumann
Signature of Notary Public

Print Name: PAMELA B. SCHUMANN
Notary Public, Commonwealth of Massachusetts
My Commission Expires May 26, 2017

My Commission Expires:

Place Notary Seal and/or Any Stamp Above

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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 State Task Force on Demographic Research and Reapportionment, New York State Department of Correctional Services,

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,

Intervenors-Defendants.

.....

Index No. 2310-2011

MEMORANDUM IN SUPPORT OF INTERVENORS-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Committee on Community Supervision and Desistance from Crime, Committee on Law and Justice, Nat'l Research Council, *Parole, Desistance from Crime, and Community Integration* (2007) 29
Democratic Redistricting Will Send GOP To "Oblivion," Smith Says, City Hall News, (May 3, 2011) 40
Hope Yen, Associated Press, *States Get New Leeway to Tally Prisoners in Census* (Feb. 11, 2010) 8
Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003) 29
Kirsten D. Levingston & Christopher Muller, Brennan Ctr. for Justice, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at their Home Addresses in the Next Census* (2006). 30
LATFOR, *District 43 Map & Data*, (last visited Aug. 11, 2011) 35
Merriam-Webster Online Dictionary (last visited Aug. 15, 2011) 6, 22
N.Y. State Dep't of Corr. Servs., *HUB System: Profile of Inmates under Custody on January 1, 2008* (2008) 34
N.Y. State Dep't of Corr. Servs., *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2011* (2011). 30
Nat'l Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* (Daniel L. Cork & Paul R. Voss eds., 2006) 29
NYS DOB: 2010-2011 Budget Publications Archive, New York State Division of the Budget, *at* http://www.budget.ny.gov/pubs/archive/fy1011archive/1011archive.html 22
Prison Policy Initiative, *Fact Sheet: 13 Counties Reject Prison-based Gerrymandering*, (last visited Aug. 16, 2011) 31
Prison Policy Initiative, *98% of New York's Prison Cells Are in Disproportionately White Districts*, (Jan. 17, 2005) 34
Prison Policy Initiative, *District 45 Profile* (last visited Aug. 11, 2011) 35
Prison Policy Initiative, *Three Trends in New York that Require a Changed Census* (2007) 30
U.S. Census Bureau, *2010 Census: Advance Group Quarters Summary File* (last visited Aug. 15, 2011). 9
U.S. Census Bureau, *2010 Census: The Director's Blog: So, How Do You Handle Prisons?* (March 12, 2010) 8
U.S. Census Bureau, American FactFinder Webpage (last visited Aug. 15, 2011) 34
U.S. Census Bureau, *Census 2000 Evaluation E.5-Revised, Revision 1: Group Quarters Enumeration* (Aug. 6, 2003) 9
U.S. Census Bureau, *Residence Rule and Residence Situations For The 2010 Census* (last visited Aug. 15, 2011) 17

Regulations

49 N.Y. Jur. 2d Domicil & Residence § 36 (2010) 15

For the following reasons, intervenors-defendants respectfully request that the court deny Plaintiffs' Motion for Summary Judgment on Counts 1 and 2 of the Complaint, and, moreover, grant Intervenors-Defendants' Motion for Summary Judgment on all counts.

SUMMARY OF ARGUMENT

Part XX of Chapter 57 of the Laws of 2010 ("Part XX"), which allocates incarcerated persons to the districts in which they resided prior to incarceration for redistricting purposes, was enacted to remedy the defects of the prior method of allocating incarcerated persons to the districts in which they were imprisoned. That method not only violated the clear principle that incarcerated persons remain, under New York law, residents and domiciliaries of the districts in which they resided prior to incarceration, but also inflicted a serious injustice. It unjustly inflated the political influence of districts with prisons, based on the generally temporary and involuntary presence of incarcerated persons who had no ties with those districts. This unfairly discriminated against individuals living in all districts with no prisons or fewer prisoners, giving the districts with prisons greater influence than districts with many more actual residents. In particular, this malapportionment occurred at the expense of the districts from which the incarcerated persons were removed and with which these persons continued to have ties, and in most cases would soon return as potential voters. Most frequently, Latino and African-American communities were the victims, because these districts had heavy concentrations of low income and minority persons, while the districts in which the prisons were located were disproportionately white.

Plaintiffs challenge the validity of Part XX as a violation of various provisions of the State Constitution — including article III, section 4; article VII, section 6; and the Equal Protection Clause — and as a partisan gerrymander. Each of these challenges is without merit, and intervenors-defendants are entitled to summary judgment on all counts.

Count 1 of the Complaint claims that Part XX violates article III, section 4 of the State Constitution, which Plaintiffs assert requires that individuals — including prisoners — be allocated where they are physically present in accordance with certain data from the U.S. Census Bureau. But article III of the Constitution requires that districts have equal numbers of "inhabitants," a term that has been defined by New York law to mean "domiciliaries." And New York law, including provisions of the New York Constitution, treats incarcerated persons as remaining domiciliaries of the places in which they resided prior to incarceration, which remains unaffected by their incarceration. Moreover, the decennial census does not purport to provide data "necessary" to allocate incarcerated individuals for redistricting purposes. It specifically disclaims any such purpose, instead providing several data bases so as to leave states with discretion as to the allocation of such persons. Part XX is therefore not only entirely consistent with article III, section 4, it was also necessary to make the method of allocating incarcerated persons consistent with New York law.

Count 2 of the Complaint invokes the "anti-rider" provision of article VII, section 6 of the State Constitution, which prohibits the inclusion in an appropriation bill of subjects that do not relate to a particular appropriation. But Part XX was not included in

an appropriation bill; it is part of a tax revenue bill. The "anti-rider" provision simply has no application here.

Counts 3 through 6 invoke the Equal Protection Clause of the New York Constitution, but the Legislature had several rational bases for enacting Part XX — both to make the allocation of incarcerated persons consistent with basic principles of New York law and to remedy the injustices of the prior method described above. Plaintiffs' claims that Part XX discriminates against other group residents like college students or hospital patients ignores the fundamental distinction between incarcerated persons, all of whom are involuntarily removed to the prison districts and walled off from those communities, and other groups of individuals who voluntarily choose their residences and are generally part of the surrounding communities.

Count 7 claims that Part XX is an unconstitutional partisan gerrymander. As no district line drawing is involved, there is no "gerrymander." But in any event, allegations of partisan motive have long been held irrelevant where there are neutral rational bases for legislation. As indicated there are numerous such bases here.

Plaintiffs have moved the court to grant summary judgment on Counts 1 and 2. Intervenors-defendants oppose their motion and move the court to grant summary judgment on all counts in favor of intervenors-defendants.

STATEMENT OF FACTS

This case is about upholding New York legislation that ensures fair representation. Part XX of Chapter 57 of the Laws of 2010, duly passed by the Legislature and signed by the Governor on August 12, 2010, rectifies the longstanding

injustice of prison-based gerrymandering, a practice that violated both basic common law principles and New York constitutional principles holding that incarcerated persons remain residents and domiciliaries of the districts where they last lived prior to incarceration. (*See* intervenors-defs.' affirmation ¶¶ 6, 8-9.)

Incarcerated persons remain walled off within the districts in which they are physically imprisoned, yet they retain deep ties and contacts with their home communities to which they almost invariably return when their voting rights are restored upon the completion of their sentence. (*See* intervenors-defs.' affirmation ¶¶ 13, 56, 58-60, 73.) Nonetheless, prison-based gerrymandering relies upon the fiction of using the temporary and involuntary presence of incarcerated persons in the districts with prisons to boost those districts' population numbers when conducting redistricting. This setup resulted in an unjust inflation of the political influence of districts with prisons and the weakening of votes cast in all districts without large prisons. (*See* intervenors-defs.' affirmation ¶¶ 61-62, 67.)

A stark example is seen in Senate District 45, represented by State Senator Betty Little, the lead plaintiff in this case. Her current Senate District includes 12 state prison facilities. She represents 285,442 non-incarcerated constituents, while State Senator Roy J. McDonald in neighboring Senate District 43, where no prison is located, represents 302,261 non-incarcerated constituents. (*See* intervenors-defs.' affirmation ¶ 65.) The political representation and voting strength of Senator Little's district is highly inflated by counting in thousands of prison inmates who have no ties to the local community and are not Senator Little's constituents in any credible sense of the word. Meanwhile, the voting strength of Senator McDonald's district is diminished in comparison. Malapportionment

along these lines has been all-too-common: following the 2000 Census, seven State Senate districts lacked sufficient non-incarcerated populations to meet the requirements of population equality applicable to state legislative districts. (*See* intervenors-defs.' affirmation ¶ 62.)

Overall, prison-based gerrymandering in New York disproportionally reduced the representation of Latino and African-American communities which had high numbers of incarcerated persons removed for redistricting purposes, but to which these incarcerated persons continued to have ties and in most cases would soon return as potential voters. (*See* intervenors-defs.' affirmation ¶¶ 60-61, 63-64, 73.)

Part XX corrects this longstanding injustice and restores equal representation to those districts whose voting strength and representation were severely diminished under the former policy. (*See* intervenors-defs.' affirmation ¶ 61-63.) Under the new law, the Department of Corrections and Community Services is responsible for providing home address information for everyone incarcerated in state prison on Census Day to New York State's Legislative Task Force on Demographic Research and Reapportionment (LATFOR). (*See* Part XX, § 1.) LATFOR is then responsible for allocating and geocoding the data for those incarcerated individuals to their home communities for redistricting purposes. (*See id.* § 2.) The new policy helps ensure that all New Yorkers have equal representation in our state and local governments, and that every community has a proportionate ability to draw attention to the issues and problems that affect them, to propose solutions to these problems, and to have a fair hearing before the legislature and local governing bodies, without regard to whether that community happens to be located near a state prison.

ARGUMENT

ENUMERATION

I. Part XX is Consistent with Article III, Section 4 of the State Constitution.

Plaintiffs misread the requirements of article III, section 4 of the State Constitution, by alleging in Count 1 of their Complaint that this provision requires that, for redistricting purposes, incarcerated individuals be allocated where they are confined in accordance with the Census Bureau's "usual residence" rule. Plaintiffs' claim is incorrect, misinterpreting both the legal requirements of article III, and the nature of Census Bureau policy.

Article III, section 4 provides that:

> "the federal census . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the ... readjustment or alteration of senate and assembly districts . . . *in so far as such census and the tabulation thereof purport to give the information necessary therefore*. . . . If a federal census, though giving the requisite information as to the state at large, fails to give information as to any civil or territorial divisions which is required to be known for such [redistricting] purposes, the legislature, by law, shall provide for such enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census."

(emphasis added). Part XX is entirely consistent with the plain text of article III for two distinct reasons. First, as a factual matter, the census and its tabulation do not "purport" to prescribe a conclusive enumeration of incarcerated populations that is "necessary" or "required" [1] for redistricting purposes. Rather, the Census Bureau produces multiple data sets for the precise purpose of empowering states to implement legislation that, like Part XX, allocates incarcerated individuals to their home addresses.

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[1] Merriam-Webster defines "necessary" as "compulsory; absolutely needed : required." *See* "Necessary," Merriam-Webster Online Dictionary, 2011, http://www.merriam-webster.com/dictionary/necessary.

Second, as a legal matter, census data do not purport to provide the information necessary to allocate incarcerated populations for redistricting purposes in accordance with the requirements of New York law. Article III mandates that "inhabitants" be allocated equally among districts. But the practice of counting incarcerated individuals where they are confined does not reflect where those individuals are properly deemed "inhabitants" under New York law. New York law typically provides that a person is an "inhabitant" where that person is domiciled — which, for an incarcerated individual, is that person's last known address *prior* to confinement. To the extent that basic census data do not provide that information, such data are not controlling for redistricting purposes under article III.

Ultimately, Plaintiffs bear a heavy burden that has not been satisfied here. As the Court of Appeals has held, where, as here, the constitutionality of a law is questioned under article III, section 4 of the State Constitution,

> "[t]he issue before us . .. is not whether the [challenged law] technically violates the express language of [article III, section 4 of] the State Constitution. . . . A strong presumption of constitutionality attaches . . . and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'"

(*Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77-78 [Ct App 1992] (*quoting Matter of Fay*, 291 N.Y. 198, 207 [1943]).) As we demonstrate below, Plaintiffs have not come close to establishing "beyond a reasonable doubt" that "every reasonable mode of reconciliation of [Part XX] with the Constitution has been resorted to, and [that] reconciliation has been found impossible." (*Id.*)

A. The Census Bureau Does Not Prescribe Data That Are Purported to Be "Necessary" for Allocating Incarcerated Individuals for Redistricting Purposes.

Although Plaintiffs cite a report from 2006 concerning the Census Bureau's enumeration practices, Plaintiffs ignore the fact that, more recently, the Census Bureau has expressly acknowledged that it does not produce a definitive data set that is purportedly "necessary" to allocate incarcerated individuals for redistricting purposes. This year, the Census has released multiple data sets for the precise purpose of affording states discretion to make their own determinations as to the proper location of incarcerated individuals. As the Director of the Census Bureau recently explained,

> "This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale."

(*See* Ex. 1, Robert Groves, Director, U.S. Census Bureau, *2010 Census: The Director's Blog: So, How Do You Handle Prisons?* (March 12, 2010).[2]) Thus, for the first time during a redistricting cycle, the Census Bureau has released a data set known as the

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[2] *Available at* http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html. *See also* Ex. 2, Letter from Census Director Robert Groves to U.S. Rep. William Lacy Clay, dated Nov. 16, 2009 (describing initial proposal to release Group Quarters Data); *Clay Applauds Census Bureau Decision to Change Reporting Procedure for Prisoners*, Homepage of Rep. William Lacy Clay, http://lacyclay.house.gov/index.cfm?sectionid=29&parentid=7&sectiontree=7,29&itemid=334 (last visited Aug. 17, 2011) (describing "a ground-breaking agreement with the U.S. Census Bureau that will change how census counts of prisoners are reported to state and local governments. The policy change .. . moves up the date when counts of incarcerated populations are reported"); Hope Yen, Associated Press, *States Get New Leeway to Tally Prisoners in Census*, Feb. 11, 2010 ("This change will allow states to . .. decide where inmates should be considered residents — in rural towns, where prisons are often built, or in cities, where many prisoners come from"), *available at* http://www.chron.com/disp/story.mpl/nation/6862777.html; Sam Roberts, *New Option for the States on Inmates in the Census,* N.Y. Times, Feb. 11, 2010, at A18.

Group Quarters data ("GQ data"),[3] which provides information as to the location of prisoners, and which, as the Census Bureau has explained, was released *specifically to assist with the implementation of Part XX*:

> "[The GQ data will assist] those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation. It will permit state and local redistricting officials to overlay this file with the 2010 Census Redistricting Data (Public Law 94-171) Summary File data. Three states (Delaware, Maryland and New York) have legislation requiring use of group quarters data in their line drawing."

(*See* Ex. 3, U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*.[4]) There is no conflict between Part XX and the data produced by the census, and therefore, no violation of article III.

Plaintiffs argue that, under article III, the state must conform its redistricting practices to the Census Bureau's "usual residence rule," which counts incarcerated individuals in their prisons. (*See* Pls.' Mem. at 4.) But the Census Bureau does not prescribe reliance on that rule to allocate incarcerated populations for redistricting purposes. Although Plaintiffs baselessly assert that article III mandates exclusive reliance on census data incorporating the usual residence rule in order to prevent "political control" of the redistricting process, (Pls.' Mem. at 4.), Plaintiffs ignore the fact that the Census Bureau has disclaimed that there is an objective or value-neutral way to

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[3] For a basic explanation of the contents of GQ data, *see* Kimball Jonas, U.S. Census Bureau, *Census 2000 Evaluation E.5-Revised, Revision 1: Group Quarters Enumeration* at 1 (Aug. 6, 2003), *available at* http://www.census.gov/pred/www/rpts/E.5%20R.pdf.

[4] *Available at* http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html. Although the GQ data does not include the home address information of prisoners, this data set can be used during redistricting to delete incarcerated populations from individual census blocks, in order to make it easier for the states themselves to undertake the process of allocating such individuals to their home communities.

allocate incarcerated populations during redistricting, and thus has expressly sought to empower states with the ability to make their own judgments as to where incarcerated populations should be counted.

In any event, as the Fourth Department has explained, "legislative reapportionment is primarily a matter for legislative consideration and determination" under the State Constitution. (*Harradine v. Bd. of Sup'rs of Orleans Cnty.*, 68 A.D.2d 298, 302 [4th Dept 1979].) Judicial deference is particularly appropriate here, as statutes enjoy a "strong presumption of constitutionality" under article III, section 4 of the State Constitution. (*Wolpoff*, 80 N.Y.2d at 77-78.) In sum, because Part XX is entirely consistent with Census Bureau's data options and its policies concerning the prerogatives of the states, Part XX does not violate article III.

B. Under Article III, Basic Census Data Are Not Controlling Where, as Here, Such Data Do Not Provide Information as to Where Incarcerated Individuals Are "Inhabitants."

Plaintiffs' claim under Count 1 fails for a second reason: census data that count incarcerated individuals in their prisons do not conform to New York law concerning the meaning of the word "inhabitant." Article III of the State Constitution requires that, during redistricting, State Assembly and Senate districts shall, respectively, contain equal numbers of "inhabitants." (*See* art. N.Y. Const. art. III, sec. 4 (Senate districts shall "contain as nearly as may be an equal number of inhabitants"); N.Y. Const. art. III., sec. 5 (Assembly Districts "shall be apportioned . .. as nearly as may be according to the number of their respective inhabitants.").) To draw districts in conformity with this requirement, it is therefore "necessary" to have information as to the number of "inhabitants" in each part of the state.

With respect to incarcerated populations, however, census data based on the "usual residence rule" do not purport to provide information necessary to conduct redistricting in accordance with that requirement. As explained below, under New York law, the term "inhabitant" is generally synonymous with "domiciliary," and New York law further provides that incarcerated individuals are domiciliaries in their pre-incarceration communities. It follows, then, that incarcerated individuals are "inhabitants" of those communities under New York law, and not of the places where they are confined. Under article III, the Legislature is not bound by any data that fail to account for these legal rules. (*See* N.Y. Const., art. III, sec. 4.) Plaintiffs' view — that incarcerated individuals are, for redistricting purposes, "inhabitants" of their prisons — runs contrary to case law in New York, and would require this court to interpret the word "inhabitants" in a manner contrary to its usual usage by the Court of Appeals.

1. The Term "Inhabitant" in Article III, Section 4 is Best Understood as "Domiciliary" — A Voluntary Resident of a Place.

The Court of Appeals has held that "an inhabitant is defined to be one who has his domicile in a place or a fixed residence there." (*Kennedy v. Ryall*, 22 Sickels 379, 1876 WL 12772 at *4 [1876].) And the common law has long recognized that domicile requires two elements: (1) voluntary physical presence; and (2) an intent to regard the community of one's presence as one's home. (*Texas v. Florida,* 306 U.S. 398, 424 [1939] (*citing Mitchell v. United States*, 88 U.S. 350, 353 [1874] ("To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there.").) Thus, as one lower court in this state has explained, a person's status as an "inhabitant" entails an element of volition:

> "'[i]nhabitant' . . . means a domiciled person. . . . Legal residence or inhabitancy and domicil [sic], in general, mean the same thing. . . . And 'residence' is not terminated by absence for temporary reasons, though prolonged. .. . In all the various connections in which the word 'inhabitant' is used in the law, it refers to legal relation or status arising from the facts of home and intent, and never to the mere fact of locality of the person."

(*Mellen v. Mellen*, 10 Abb. N. Cas. 329 [NY County Sup Ct 1882].) Indeed, a long line of cases in this state[5] and from the U.S. Supreme Court[6] stretching back through the

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[5] *See, e.g.,In re Gaffney's Estate*, 141 Misc. 453, 252 N.Y.S. 649 (NY County Sur Ct 1931) (holding that the definition of the word inhabitant is "co-ordinate with that of resident," and citing dictionaries defining inhabitant as "[o]ne who has his domicile in a place"); *In re Seymour*, 107 Misc. 330, 332, 177 N.Y.S. 702, 703 (Westchester County Sur Ct 1919) (defining inhabitant as "[o]ne who dwells or resides permanently in a place, or who has a fixed place of residence ... one who has a legal settlement in a town, city or parish — a resident"); *In re Silkman*, 88 A.D. 102, 84 N.Y.S. 1025, 1031 (2d Dep't 1903) (Woodward, J., concurring) ("[T]he words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing."); *In re Town of Hector*, 24 N.Y.S. 475, 479 (Schuyler Cnty Ct. 1893) ("We do not see any well-founded distinction between 'inhabitancy' and 'domicile,' within the meaning of residency statute as applied to non-citizens."); *De Meli v. De Meli*, 120 N.Y. 485, 491 (1890) ("In legal phraseology residence is synonymous with inhabitancy or domicile."); *Crawford v. Wilson*, 4 Barb. 504, 522 (NY County Sup Ct 1848) ("[T]he terms legal residence or inhabitancy, and domicil [*sic*] mean the same thing."); *Roosevelt v. Kellogg*, 20 Johns. 208 (NY Sup Ct 1822) (the words resident and inhabitant "signify the same thing: a person resident is defined to be one 'dwelling, or having his abode in any place:' and inhabitant: 'one that resides in a place.'"). *But see Longway v. Jefferson County Bd. of Supervisors*, 83 N.Y.2d 17 [Ct App 1993] (concluding that in light of the wide legislative flexibility and discretion in the apportionment process, the terms "population" and "resident" in the Municipal Home Rule Law do not require excluding incarcerated persons from a municipality's population base).

[6] *See also Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 226 [1957] ("[T]he words 'inhabitant' and 'resident,' as respects venue, are synonymous."); *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449 (1892) ("[T]he phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant.'").

nineteenth century, as well as standard legal definitions,[7] demonstrate that a person is an "inhabitant" where that person is a domiciliary or legal resident.

2. Incarcerated Individuals Are Domiciled in — and Thus, Are "Inhabitants" of — Their Home Communities.

Crucially, the Court of Appeals has held that, because domicile encompasses an element of voluntariness, an "inmate of an institution does not gain or lose a residence or domicile, but *retains the domicile he had when he entered the institution.*" (*Corr v. Westchester Cnty. Dep't of Soc. Servs.*, 33 N.Y.2d 111, 115 [Ct App 1973] (emphasis added) (where Court of Appeals held a person may only obtain domicile in an institution "where the inmate pays his own way, is free to come and go, and has no other place or abode").) As the Court of Appeals definitively explained over a century ago, an incarcerated person does not establish a domicile (and thus does not become an inhabitant) where he is physically confined, but maintains that status at his pre-incarceration home:

> "The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses, and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it. . . . The Tombs [a jail in Manhattan] is not a place of residence. It is not constructed or maintained for that purpose. It is a place of confinement for all except the keeper and his family, and a person cannot, under the guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and gain a residence there."

(*People v. Cady*, 98 Sickels 100, 106, 37 N.E. 673, 674-75 [1894].[8])

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[7] *See Black's Law Dictionary* 782 (6th ed. 1990) ("Inhabitant. One who resides actually and permanently in a given place, and has his domicile there.... one is an inhabitant ... at the place where he has his domicile...").

[8] Courts continue to rely on *Cady* as the definitive ruling concerning the residence and domicile of incarcerated individuals. *See, e.g., Muntaqim v. Coombe*, 449 F3d 371, 375-76 [2d Cir 2006] (under New York law, [an incarcerated person's] involuntary presence in a New York

The rule that incarcerated individuals remain domiciled in their home communities is not only found in the common law — it is enshrined in a separate provision of the State Constitution: article II, section 4 of the State Constitution provides that, "[f]or 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." (*See also* N.Y. Election Law § 5-104(1) [McKinney 2010] (same).). Thus, although an incarcerated person is no longer physically present at his or her pre-incarceration home, the State Constitution conclusively establishes that an incarcerated person's residence or domicile[9] is determined *prior* to confinement, and does not change by virtue of incarceration. Incarcerated individuals therefore remain "inhabitants" of their home communities.

Although Plaintiffs argue that article II of the State Constitution is "irrelevant here, because felons are disenfranchised," (Pls.' Mem. at 6.), Plaintiffs ignore the fact that, while most incarcerated individuals (*i.e.*, those convicted of felonies) cannot vote, New York law clearly provides that incarcerated individuals maintain a legal residence for all purposes. This rule is consistent with general legal principles that hold that residence and domicile entail a notion of voluntariness, such that a person cannot lose his

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prison does not confer residency for purposes of registration and voting") (citing *Corr*,3 3 NY2d at 115, and *Cady*,9 8 Sickels at 106); *Laurence C. v. James T.R.*, 785 N.Y.S.2d 859, 861 [NY Fam Ct 2004] (noting that "for . . . purposes[] such as voting . . . it is a person's domicile rather than his or her place of incarceration that is determinative").

[9] Defendants-Intervenors recognize that the terms "resident" and "domiciliary" are not always used identically, but simply note that, under New York law, a prisoner remains *both* a resident and a domiciliary at his or her pre-incarceration address. *See Cady*, 98 Sickels at 106, 37 N.E. at 674-75.

or her residence or domicile in a particular place by being incarcerated elsewhere.[10] Indeed, New York courts have made clear that incarceration does not affect a person's residence or domicile for a wide variety of purposes, such as jurisdiction,[11] venue,[12] divorce proceedings,[13] and school residency proceedings.[14] In sum, Part XX simply harmonizes the State's redistricting process with the basic incontrovertible principle under article II of the State Constitution and New York common law that incarcerated individuals remain legally domiciled at their pre-incarceration homes, and not at the places where they are physically confined. Clearly, Plaintiffs have not established "beyond a reasonable doubt" that "every reasonable mode of reconciliation of [Part XX]

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[10] *See* New York Election Law § 1-104(22) (providing that a person's residence is defined in terms of voluntary choice and intention: "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return."); *Farrell v. Lautob Realty Corp.*, 612 N.Y.S.2d 190, 191 [N.Y. App Div 1994] ("[I]t is long-established law in New York that a person does not involuntarily lose his domicile as a result of imprisonment."); 49 N.Y. Jur. 2d Domicil & Residence § 36 (2010) (footnotes omitted) ("A prison is not a place of residence; it is a place of confinement, and a person cannot go there as a prisoner and gain a residence. The freedom of choice to come and go at one's whim or pleasure are bona fide elements of determining residence and are not present in a prison setting.").

[11] *See Laurence C.*, 785 N.Y.S.2d at 861 (court maintained jurisdiction over custody dispute despite father's incarceration in another state); *Moore v. Wagner*, 152 Misc 2d 478, 481 [Albany County Just Ct 1991] (court lacked jurisdiction over incarcerated plaintiff's claim because plaintiff did not obtain residence in Albany, and rejecting the argument that "residence entails mere physical presence"); and *Muntaqim*, 449 F3d at 375 (California resident did not become a New York resident by virtue of incarceration in New York, as "[r]esidence is critical since it is neither gained nor lost as a consequence of incarceration").

[12] *See Farrell*, 612 N.Y.S.2d at 191 (venue was proper in defendant's county of residence, despite the fact that defendant was incarcerated in a different county).

[13] *See, e.g., Beckett v. Beckett*, 520 NYS2d 674, 675 [3d Dept 1987] (prisoner was not a resident of the county where he was incarcerated for purposes of proceeding in divorce action).

[14] *See, e.g., Westbury Union Free Sch. Dist. v. Amityville Union Free Sch. Dist.*, 431 N.Y.S.2d 641, 643-44 [Sup Ct 1980] (child born to incarcerated mother is domiciled at mother's original residence before imprisonment because incarceration did not change mother's domicile).

with the Constitution has been resorted to, and [that] reconciliation has been found impossible." (*Wolpoff*, 80 N.Y.2d at 77-78.)

Article III, section 5-a of the State Constitution, on which Plaintiffs rely and which defines the term "inhabitants" as "whole persons," is not to the contrary. The use of the phrase "whole persons" in that provision did not abrogate the common law definition of an "inhabitant" as a "domiciliary," but simply ensures that citizens and non-citizens alike are included in the redistricting population base. (*See Loeber v. Spargo*, 391 Fed. Appx. 55, 58 [2d Cir. Aug. 27, 2010] (Table) (explaining that Article III, Section 5-a's use of the phrase "whole persons" was meant to end the "exclu[sion of] aliens" from the redistricting population base).) Although Plaintiffs contend that a person is an "inhabitant" of a district merely by virtue of his or her physical confinement there, physical presence is simply not determinative of whether a person is an "inhabitant" of a place.[15] A person is an inhabitant where that person is domiciled, which for an incarcerated person, is that person's last address *before* incarceration.

3. Census Data is Not Controlling Insofar as it Does Not Provide Information "Necessary" to Allocate Incarcerated Individuals for Purposes of Statewide

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[15] For instance, a person's military service outside of the State does not destroy that person's status as an "inhabitant" of the state, because "[t]he words 'not an inhabitant of or' usually resident within the state' require not mere absence from the state but such absence as destroys residence . . .. " *People v. Guariglia*, 187 Misc. 843, 849, 65 N.Y.S.2d 96, 102 [Kings County Ct 1946]. *See also In re Colebrook*, 55 N.Y.S. 861, 863 [Monroe Cnty Sup Ct 1899] (a person "may be living in the city of Rochester, and yet not be an inhabitant of the state. An inhabitant is understood to be one who has an actual fixed residence in a place."). Similarly, because a person's status as an inhabitant is connected to notions of legal residence, the fact that a person is registered to vote in a particular place — an inquiry separate from physical presence — is sufficient to establish that that person is an "inhabitant" of that place. *In the Matter of the Incorp. of the Village of Hampton Bays*, 40 Misc. 2d 434, 436 243 N.Y.S.2d 296, 298 [Suffolk County Ct 1963] ("[T]he individuals on the list ... of registered voters, *a fortiori*, are inhabitants ... and resided within the territory defined.").

Redistricting in Conformity with New York State Constitutional Requirements.

As the discussion above demonstrates, under the constitutional mandate that "inhabitants" be allocated equally among districts, incarcerated individuals should be allocated to their home communities, in accordance with New York law concerning domicile. The Census Bureau, however, has expressly acknowledged that data based on the Bureau's "usual residence rule" do *not* provide information required to allocate incarcerated individuals in conformity with that legal rule. (*See* U.S. Census Bureau, *Residence Rule and Residence Situations For The 2010 Census* ("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.").[16] *See also Opinion of the Justices*, 312 N.E.2d 208, 209-10, 365 Mass. 661, 663-664 [Mass. 1974] (observing that the Census Bureau's usual residence rule "is significantly different from the standard mandated by the definition of 'inhabitant,'" which is "synonymous with the words 'domiciliary' and 'domicil.'" [*sic*]).)

Thus, census data based on the usual residence rule are inconsistent with the legal rules that are necessary to ensure compliance with the constitutional command that "inhabitants" be allocated equally among districts. Under article III, the State remains free to rely on other sources of data in order to allocate incarcerated individuals for redistricting purposes. Summary judgment should therefore be granted to intervenors-defendants on Count 1 of the Complaint.[17]

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[16] *Available at* http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html.

[17] Even assuming *arguendo* that Plaintiffs have established a violation of article III, section 4 — which they have not — that claim would at best invalidate only the final sentence of

II. The Enactment of Part XX Was Procedurally Valid Pursuant to Article VII of the New York Constitution.

Plaintiffs argue that the inclusion of Part XX into a bill that became Chapter 57 of the Laws of 2010, violates the so-called "anti-rider" provision of article VII, section 6 of the State Constitution, which requires that a provision in "any appropriation bill" must "relate[] specifically to some particular appropriation in the bill." But, Plaintiffs' contention is baseless because the anti-rider clause in article VII, section 6 of the New York Constitution, by its plain terms, applies only to *appropriation* bills, which Part XX is not.[18]

Part XX, Section 2(b), which provides that the home address data of incarcerated individuals shall be used for Assembly and Senate redistricting. The severability clause of Part XX, Section 4 constitutes a clear expression of legislative intent. *See CWM Chemical Services, L.L.C. v. Roth*, 6 N.Y.3d 410, 423 [2006]. Thus, even if this Court were ultimately to determine that article III, section 4 requires that *Assembly and Senate* Districts must be redistricted according to the Census Bureau's usual residence rule, the remaining provisions of Part XX — such as the requirement under Part XX, § 3 that incarcerated individuals be counted at their home addresses for purposes of *county and municipal* redistricting — would remain constitutional.

[18] Notwithstanding article VII's plain text, even if, *arguendo*,t he anti-rider clause were held to apply to non-appropriation bills, the anti-rider clause would not bar inclusion of Part XX because it is still sufficiently related to the budget. Courts have shown extreme deference to the political branches in budgetary matters. *See, e.g., Pataki v. New York State Assembly*, 4 N.Y.3d 75, 97 [2004] ("[T]o invite the Governor and the Legislature to resolve their disputes in the courtroom might produce neither executive budgeting nor legislative budgeting but judicial budgeting — arguably the worst of the three."). Consistent with that deference, courts have set a low standard for determining whether legislation satisfies the relationship required by the anti-rider clause. *See, e.g., Rice v. Perales*, 594 N.Y.S.2d 962, 968 [NY Sup Ct 1993] (rejecting an anti-rider clause challenge to a provision within an appropriations bill authorizing the Commissioner of Social Services to change the manner in which welfare benefits issued to a mixed household are calculated because the provision was related to "the function of the budget — the allocation of funds").

A. The Anti-Rider Clause Limits the Contents of Appropriation Bills and Does Not Apply to Chapter 57 of the Laws of 2010, which Was Duly Passed as a Tax Revenue Bill.

1. The Plain Text of the Anti-Rider Clause States Unambiguously that it Applies Only to Appropriation Bills.

As Plaintiffs acknowledge in their Complaint, not all bills that concern the budget are "appropriation bills" under article VII of the State Constitution.[19] Under article VII, the Governor submits the budget to the Legislature along with two types of bills: (1) bills that contain "the proposed appropriations and reappropriations included in the budget;" and (2) other "proposed legislation, if any, recommended therein," such as tax revenue bills. (N.Y. Const. art. VII, sec. 3; *see also Silver v. Pataki*, 730 N.Y.S.2d 842, 844 [2001] (recognized the existence of non-appropriation budget bills even though the term "non-appropriation bill" is not found in the New York Constitution).)

By its plain terms, the anti-rider clause in article VII, section 6 of the New York Constitution applies only to appropriation bills:

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

(N.Y. Const. art. VII, sec. 6 (emphasis added).)

By its clear and express terms, the anti-rider clause applies exclusively to provisions placed in *appropriation* bills. As discussed below, *see infra* Part II.A.3, appropriations bills are readily identifiable in both form and substance. Where, as here, a constitutional provision is unambiguous, it must be construed according to its plain meaning. (*See Anderson v. Regan*, 442 N.Y.S.2d 404, 406–07 [Ct App 1981].) Thus,

[19] *See* Compl. ¶¶ 104–05 (acknowledging that pursuant to article VII, the Governor sends the legislature two types of bills, only one of which is an appropriation bill).

article VII's restrictions on "appropriation bill[s]" has a clear, specific referent, and does not apply generically to any budget-related bill, such as a tax revenue bill, regardless of such a bill's attenuated connection to appropriations. Here, Plaintiffs are asking the court to apply the anti-rider clause to Chapter 57 of the Laws of 2010, beyond the clear and express terms of the New York Constitution. Indeed, the operative language of the anti-rider clause, permitting inclusion in appropriation bills of only those provisions that "relate[] specifically to some particular appropriation in the bill," would be meaningless if applied in the context of a revenue bill that makes no appropriations whatsoever.[20] Such a tortured reading cannot be borne by the words of the New York Constitution and would violate the familiar canon of construction that, when practicable, a statute should be interpreted so as to give meaning and effect to all of its language.[21]

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[20] Other sections of article VII also treat appropriation bills differently than other legislation. Section 4 of article VII instructs that the legislature "may not alter an appropriation bill . . . except to strike out or reduce items therein," but it may add items of appropriation if they are "stated separately and distinctly from the original items of the bill and refer each to a single object or purpose." N.Y. Const. art. VII, § 4. Section 4 also provides that only an appropriation bill becomes law upon passage by both houses, without further action by the Governor, and it makes a further distinction between a general appropriation bill and a bill that makes appropriations for the Legislature or judiciary, to which the restrictions do not apply. *Id.* The framers' careful wording demonstrates a clear intent to distinguish appropriation bills from other types of bills, and to place restrictions on appropriation bills — such as the restriction on riders — that do not apply to other types of budget legislation.

[21] *See, e.g.*, N.Y. Stat. Law § 231 (McKinney 2010) ("In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning."). Additionally, according to the *expressio unius est exclusio alterius* canon of construction, we can infer from the express inclusion of appropriation bills to the exclusion of all other bills that non-appropriation bills were intended to be excluded. *See, e.g.*, N.Y. Stat. Law § 240 (McKinney 2010) ("[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.").

2. New York Courts Have Interpreted the Anti-Rider Clause to Apply Only to Appropriation Bills.

No case has ever applied the anti-rider clause to any bills other than appropriation bills. Consistent with the plain language of article VII, the Court of Appeals has refused to apply article VII's prohibitions to budget-related bills other than appropriation bills. In *Pataki v. New York State Assembly*, the New York State Legislature argued that the Governor abused his power over appropriation bills by using a non-appropriations budget bill to transfer the State Library and State Museum to the control of a new agency. The court quickly rejected the argument, reasoning that "[t]he Governor proposed *other budget legislation*, not appropriation bills, to create the new agency." 4 N.Y.3d 75, 99 [2004] (emphasis added). Other decisions confirm that the anti-rider provision of article VII applies only to appropriations bills, and not to other budget bills. (*See, e.g.*, *People v. Tremaine*, 252 N.Y. 27, 47-50 [1929] (holding that the anti-rider clause does not permit the Legislature to add general legislation to an appropriation bill); *Schuyler v. South Mall Constructors*, 32 A.D.2d 454, 457 [3d Dept 1969] (rejecting a challenge under the anti-rider clause because the statutory provision in question related to a specific appropriation that was tied to the subject of the challenged legislation and was limited to its operation); *Rice v. Perales*, 594 N.Y.S.2d 962, 968 [Sup Ct 1993] (holding that under the anti-rider clause, non-appropriation legislation contained within an appropriation bill need only have an association with the budgeting process rather than to a specific appropriation in the underlying bill).)

3. Chapter 57 of the Laws of 2010 was Not an Appropriation Bill Nor a Budget Extender and is Not Subject to the Anti-Rider Prohibition of Article VII, Section 6 of the New York Constitution.

Plaintiffs needlessly add confusion to this issue by alternately referring to Chapter 57 at times as an "appropriation bill," (*See* Pls.' Affirmation in Supp. Mot. Summ. J. ¶¶ 59, 75–76; Compl. ¶ 121), at other times as a "budget extender," (Pls.' Affirmation in Supp. Mot. Summ. J. ¶ 75, Compl. ¶ 115), and yet at other times as a "revenue bill." (Pls.' Affirmation in Supp. Mot. Summ. J. ¶ 71, Compl. ¶ 115.). Only the latter is accurate.

Appropriation bills are clearly identifiable because they "appropriate" — or set aside — public funds for some purpose or purposes.[22] In implementing the 2010-2011 executive budget, the Governor proposed and the Legislature enacted six appropriation bills, all of which are clearly characterized on their first page as "An act making appropriations," and list dollar amounts to be appropriated for various programs, services, and purposes.[23] The website of the New York State Division of the Budget, which lists annual budget publications from 1999 until the present, clearly identifies and demarcates appropriations bills under a separate heading to distinguish them from other types of budget bills.[24]

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[22] *Black's Law Dictionary* defines "appropriation" as "The act of appropriating or setting apart . . . designating the use of application of a fund. *See* "Appropriation," *Black's Law Dictionary* at 101 (6th ed. 1990) Similarly, Merriam-Webster's Dictionary defines "appropriate" as "to set apart for or assign to a particular purpose or use." *See* "Appropriate," Merriam-Webster Online Dictionary, 2011, http://www.merriam-webster.com/dictionary/appropriate. For an example of an appropriation bill submitted by the Governor, *see* 2010 N.Y. Laws 54, *available at* http://www.budget.ny.gov/pubs/archive/fy1011archive/eBudget1011/fy1011appropbills/HMH.pdf (containing appropriations for "Health and Mental Hygiene").

[23] *See, e.g.*,N YS DOB: 2010-2011 Budget Publications Archive, New York State Division of the Budget, *at* http://www.budget.ny.gov/pubs/archive/fy1011archive/1011archive.html.

[24] *See id.*

Chapter 57 of the Laws of 2010, however, was *not* an appropriation bill. It was not proposed by the governor as "an act making appropriations." In fact, it contains *no appropriations of money for any purpose*. The bill also contains no "emergency appropriation language" nor extends the previous budget. Nor does the bill place conditions on, or contain substantive policy decisions regarding, how to spend funds appropriated in other bills. Instead, Chapter 57 of the Laws of 2010 was plainly a tax *revenue* bill devoted almost entirely to amending provisions of the New York Tax Law dealing with tax revenue.[25]

This fact is legally significant and fatal to Plaintiffs' claim because, by its express terms, only appropriation bills are subject to the "anti-rider" provision of N.Y. Const. art. VII, § 6.

Plaintiffs' naming Chapter 57 a "budget extender" bill is similarly unavailing. Assuming that "budget extenders" are a type of appropriation bill covered by N.Y. Const. art. VII, sec. 6, it is clear that Chapter 57 was not a "budget extender" bill. The Legislature passed twelve "budget extender" bills between April 2010 and June 2010 containing "emergency appropriation" language and the effective dates of the budget extensions.[26] The sole purpose of those pieces of legislation was to extend the previous budget in order to keep the state operating until a final budget could be enacted into law. These bills were also characterized on their first page as "an act making appropriations."

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[25] The website of the New York State Division of the Budget acknowledges this by identifying 2010 Budget Bill #36, not as an appropriation bill, but instead as an article VII bill under the heading "Revenue Budget Bill." *See id.* The website lists all of the governor's proposed appropriation bills under a separate heading titled "2010-11 Appropriation Bills" and properly excludes Budget Bill #36 from that list. *See id.*

[26] *See, e.g.*, A10610/S7443 2010 Leg., 233rd Sess. (N.Y. 2010); A10740/S7529 2010 Leg., 233rd Sess. (N.Y. 2010), *available at* http://open.nysenate.gov/legislation.

Plaintiffs' repeated mislabeling of Chapter 57 as a "budget extender" does not overcome the fact that Chapter 57 does not contain the necessary language or perform the function of actually extending the budget.

Finally, Plaintiffs' invocation of the "no-alteration" clause of article VII, section 4 as a reason why Part XX was an unconstitutional addition to Chapter 57 is based largely on statements that are irrelevant at best, and patently false at worst. The "no-alteration" clause is inapposite because, like the anti-rider clause, it only applies to appropriation bills, which Chapter 57 is not. Thus, Plaintiffs' baseless assertion that this constitutional provision "shielded" Chapter 57 from "any attempt by any Senator to exercise his or her constitutional power to try to cause Part XX to be deleted" (Pls.' Affirmation in Supp. Mot. Summ. J. ¶ 72) is contradicted by the language of the "no-alteration" clause, which provides: "[t]he legislature may not alter an appropriation bill submitted by the governor except to *strike out* or reduce items therein." (N.Y. Const. art. VII, sec. 4 (emphasis added).) This provision squarely sets forth the opportunity for the Legislature to strike undesirable portions from even appropriation bills, which again, Chapter 57 is not.

Thus, some legislators,and others , may disagree as a policy matter with the addition of Part XX in Chapter 57, but its mere inclusion does not violate the anti-rider clause of article VII because it is not part of an appropriations bill or a budget extender.

EQUAL PROTECTION

III. Part XX Does Not Violate Equal Protection Because the Legislature's Choice to Allocate Incarcerated Persons to Their Home Communities is Compelled by the New York Constitution and is Rationally Based.

All of Plaintiffs' equal protection claims[27] boil down to the assertion that the New

[27] Plaintiffs allege that Part XX should be struck down on New York State equal

York Legislature lacked a rational basis for allocating incarcerated persons to their home communities, rather than to their place of incarceration, in determining their residence for purposes of redistricting. This argument is without merit, both factually and legally. The Legislature had a rational basis for determining that incarcerated persons are properly allocated as residents of their home community rather than of the prison community for purposes of redistricting, for several reasons:

(1) Incarcerated persons are treated as continuing residents of their pre-incarceration address for virtually all legal purposes under New York law;

(2) Incarcerated persons generally have no ties to the community in which the prison is located;

(3) Including incarcerated persons in the apportionment counts of the prison location unfairly diminishes the voting strength of all persons who live in a district that does not contain a prison;

(4) Incarcerated populations are different from other "group quarters" populations in significant ways warranting that they be allocated to their home communities for redistricting purposes; and

(5) The previous method of allocating incarcerated populations had an unfair impact on communities with large concentrations of persons of color.

Thus, Part XX has a rational basis. Under both New York State and federal equal protection precedent,[28] the Legislature is entitled to broad discretion in allocating the

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protection grounds because: (1) allocating incarcerated persons to their home communities for redistricting purposes unfairly weakens the voting strength of upstate residents, in violation of article III, section 4 as well as article I, section 11 of the New York State Constitution (Count 3); (2) allocating incarcerated persons, and not all transient groups, to their home communities amounts to an improper classification without rational basis in violation of equal protection under article I, section 11 of the New York State Constitution (Count 4); and (3) allocating incarcerated persons to their home residences lacks a rational basis, again allegedly in violation of article I, section 11 (Counts 5 and 6). (*See* Pls.' Compl. Counts 3-6, ¶¶ 140-205.)

[28] New York cases addressing equal protection claims under article I, section 11 in the context of redistricting typically apply federal precedents addressing similar claims under the Fourteenth Amendment. *See e.g.*, *Seaman v. Fedourich*, 16 NY2d 94 [Ct App 1965] (addressing

appropriate population base for state and local redistricting. Plaintiffs' effort to substitute their judgment for that of the Legislature is insufficient to establish a violation of equal protection requirements. Moreover, contrary to Plaintiffs' allegations, Part XX does not infringe upon the rights of upstate voters as a class; indeed, hundreds of thousands of upstate residents live in districts that do not contain large prisons, and the legislation thus enhances fairness in representation for these upstate residents as well as for the state as a whole.

A. The Legislature is Entitled to Broad Discretion in Allocating Incarcerated Individuals for Purposes of Determining the Appropriate Population Base for State and Local Redistricting.

Under the one-person, one-vote doctrine of *Reynolds v. Sims*, the "'overriding objective,' of any legislative apportionment or (districting) plan . . .' must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen.'" (*Seaman v. Fedourich*, 16 NY2d 94, 102 [Ct App 1965] (quoting *Reynolds v. Sims*, 377 U.S. 533 [1964]).) The requirement of substantial population equality among districts, however, does not by itself settle the question of what population base a state may use in calculating population equality for its state legislature or local districts. [29] On that question, the Supreme Court,

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claims under both article I, section 11 of New York Constitution and Fourteenth Amendment of U.S. Constitution, and applying *Reynolds v. Sims*, 377 U.S. 533 [1964] and its progeny).

[29] *See Daly v. Hunt*, 93 F3d 1212, 1227 [4th Cir. 1996] (decision on appropriate population base for determining population deviations "is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment"); *Dona v. Bd. of Supervisors*, 48 Misc 2d 876, 878-81 [St. Lawrence County Sup Ct 1966] (upholding, against state and federal equal protection challenge, exclusion of hospital inpatients and university population when conducting local redistricting); *Dobish v. New York*, 53 Misc 2d 732, 733 [Wayne County Sup Ct 1967] (upholding exclusion of state school inpatient population in drawing county supervisor districts, and noting that "were they to be accorded representation on the 'one person, one vote' principle, their number alone would in effect

in *Burns v. Richardson* (384 U.S. 73, 92 [1966]) has granted states broad discretion to make determinations about the "nature of representation." As *Burns* notes, the Court has never "required [States] to include . . . persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." (384 U.S. at 92.)

Given the discretion appropriately afforded to the Legislature in determining how to allocate populations such as incarcerated persons for redistricting purposes, as well as the absence of any of the indicia for heightened scrutiny, Part XX creates no equal protection violation so long as the Legislature had a rational basis for enacting it. (*See City of Cleburne v. Cleburne Living Ctr.*, 473 US 432, 440 [1985] ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").) As explained below, Part XX readily meets that standard.

B. The Legislature Had a Rational Basis for Enacting Part XX and, as such, the Law Does Not Violate the Equal Protection Provisions of the State Constitution.

When reviewing governmental action using a rational basis standard of review, "a classification must be upheld against an equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification. . . .I ndeed, a court may even *hypothesize* the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision

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disenfranchise the residents of any of the four towns in the county, each of which has a citizen population less than the patient population of the . .. school"). *Cf. Thayer v. Garraghan*, 29 AD2d 825, 826 [3d Dept 1968] (upholding city's districting plan where it did not use figures certified by the Census Bureau but did use other population data made available by Bureau), *aff'd* 21 NY2d 881 [Ct App 1968].

under attack." (*Port Jefferson Health Care Facility v. Wing*, 94 NY2d 284, 290-291 [Ct App 1999].)

Part XX clearly has a rational basis. First, it is in their home communities that incarcerated individuals are legal domiciliaries, and it is rational to count them there for purposes of allocating political representation. As shown above (*see supra* Part I), this is consistent with the correct reading of article III, section 4. Part XX brings New York redistricting practices into line with the legal principle set forth in article II, section 4 of the State Constitution that "[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while confined in any public prison." (N.Y. Const. art II, sec. 4; *see also Corr*, 33 NY2d at 115 ("An inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution.").)

Second, incarcerated individuals do not develop an "allegiance" or an "enduring tie" to a particular district by being incarcerated there. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 804 [1992], discussed *infra*. As Plaintiffs themselves acknowledge, incarcerated persons are involuntarily "removed from the community" in which they are confined (Compl. ¶ 166; *see also Kaplan v. County of Sullivan*, 74 F.3d 398, 401 [2d Cir 1996] (Feinberg, J., concurring) (observing that "prisoners live in a separate environment and do not participate in the life of [the surrounding] County.").) It is this very removal that warrants their being allocated to their home residence for redistricting purposes. Incarcerated persons typically have no ties or interests in common with the location where they happen to be incarcerated, and cannot be described as "constituents" of those

places in any meaningful sense of the word.[30] Indeed, one of the counties represented by lead plaintiff Senator Little, Essex County, passed a local law in 2003 confirming these points: "Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County, and do not affect the social and economic character of the towns in which . . . the correctional facilities . . . are located." (Essex Cnty.L ocal Law No. 1 [2003] (establishing that the population base to be used to apportion the Essex County Board of Supervisors shall exclude state and federal inmates) (Ex. 4).)

By contrast, incarcerated individuals' ties to the outside world are typically maintained through family and friends from the home communities[31] to which they typically return upon release.[32] That some prisoners do not return to their districts, or

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[30] Plaintiffs claim the "State prison population constitutes a burden on the resources of the communities where the prisons are confined, including the local courts, hospitals and health services, water sewer and infrastructure . .." (Pls.' Memorandum of Law in Support of Mot. for Summ. J., at 5.) However, Plaintiffs provide no data to support this assertion. Nevertheless, as held in *D.C. v. U.S. Dep't of Commerce*, 789 F Supp 1179, 1182 [D.C. 1992], discussed *infra*, "[t]he level of support a locality needs to provide in order to 'claim' residents for census purposes is clearly a decision for which there are no judicially manageable standards available."

[31] For example, most inmates in state custody (55%) have minor children living in their home communities. *See* Nat'l Research Council, *Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census* 82 (Daniel L. Cork & Paul R. Voss eds., 2006), available at http://print.nap.edu/web_ready/0309102995.pdf (citing Christopher J. Mumola, U.S. Dep't of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children* (Aug. 2000)).

[32] *See* Committee on Community Supervision and Desistance from Crime, Committee on Law and Justice, Nat'l Research Council, *Parole, Desistance from Crime, and Community Integration* (National Academies Press 2007), at 10; Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 7 (2003). Recognition of the fact that incarcerated individuals almost always return to their home communities is reflected in the fact that nearly every state has adopted a policy of releasing parolees back to the counties in which they were sentenced. *See* Kirsten D. Levingston & Christopher Muller, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at their Home Addresses in the Next Census* 9 (Feb.

that an insignificant percentage will remain in prison for life,[33] does not undermine the Legislature's judgment in allocating them to the district of last residence. (*See Gonzales v. Raich*, 545 US 1, 17 [2005] ("We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class.") (internal citations omitted); *see also Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 108 [2003] ("'[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 [1980]).) Moreover, incarcerated persons, upon release, remain potential voters in the districts in which they previously resided, notwithstanding their temporary absence in prison. Their incarceration in the prison district gives them no right to vote there.

Third, Part XX is also grounded on clear evidence showing the increasing representational distortion caused by the inclusion of incarcerated populations in prison districts for purposes of redistricting.[34] Including incarcerated persons in the

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15, 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_36223.pdf. It is possible to draw maps predicting where incarcerated individuals will move upon release with a high degree of statistical certainty. *See id.*

[33] Of the 56,315 persons under custody of DOCCS as of January 1, 2011, only 223, or 0.4%, were serving sentences of "Life without Parole." *Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2011*, State of New York Department of Corrections and Community Supervision (Apr. 2011), at ii, 10, *available at* http://www.docs.state.ny.us/Research/Reports/2011/UnderCustody_Report.pdf.

[34] New York has seen explosive growth in prison population compared to just a few decades ago: in 1970, New York was incarcerating only 69 out of every 100,000 persons, but by 2000 the incarceration rate had grown nearly five-fold, to 337 out of every 100,000. Prison Policy Initiative, Three Trends in New York that Require a Changed Census (2007), available at http://www.prisonersofthecensus.org/newyork.html (last visited April 20, 2011).

apportionment counts of the prison communities leads to absurd numerical distortions to the disadvantage of anyone who lives in a district that does not contain a prison. The record following the 2000 Census showed that seven state senate districts lacked sufficient non-incarcerated population to meet requirements of population equality applicable to state legislative districts. (*See* Prison Policy Initiative, *Importing Constituents: Prisoners and Political Clout in New York* (2002 .[35])

Well before Part XX was enacted, 13 upstate counties had decided to exclude[36] incarcerated populations when drawing districts for local county government. (Prison Policy Initiative, *Fact Sheet: Thirteen Counties Reject Prison-Based Gerrymandering.*[37]) If Plaintiffs' equal protection claim were successful, and the upstate counties that previously excluded incarcerated population for local redistricting (as well as the municipalities within them) were to begin including prison population when drawing local districts, such inclusions would lead to absurdly distorted results: in Franklin County, for example, including incarcerated population for county redistricting after the 2000 Census would have resulted in a county district with a majority incarcerated population. (*Id.*)

Fourth, contrary to Plaintiffs' arguments, bringing New York's redistricting practices in line with its residency rules concerning incarceration did not require the Legislature also to make changes to the allocation of other group quarters populations,

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[35] *Available at* http://www.prisonpolicy.org/importing/ (last visited Aug. 15, 2011).

[36] As noted above, New York courts have previously upheld exclusion of transient populations in local redistricting. *See supra* note 30 (discussing *Dona v. Bd. of Supervisors*, 48 Misc 2d at 878-81; *Dobish v. New York*, 52 Misc 2d at 733).

[37] *Available at* http://www.prisonersofthecensus.org/factsheets/ny/13_counties.pdf (last visited Aug. 15, 2011).

because the characteristics of these populations differ greatly from those of incarcerated persons. Unlike incarcerated persons, other group quarters populations — those in colleges and universities, nursing facilities, shelters, military bases and the like — typically move to these residences on a voluntary basis, and are generally able to establish domicile and residency for voting purposes at the group quarters location.[38] Indeed, for incarcerated persons, the median length of stay at any one prison is only 7.1 months.[39] Moreover, other populations such as students and military personnel are free to interact substantially with the community — shopping, going to restaurants, using recreational facilities, attending community events. For all intents and purposes, they are a part of the community in which they are counted.

By contrast, a prisoner can have *no* contact with the surrounding community and cannot develop any relationships with it.[40] A prisoner is not present in a particular

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[38] *See Cesar v. Onandaga County Board of Elections,* 54 AD2d 1108 [4th Dept 1976]; (upholding right of student to register by establishing intent to make school community his residence), *lv dismissed* 40 NY2d 1079 [Ct App 1976]; *Iafrate v. Suffolk County Board of Elections*, 42 NY2d 991 [Ct App 1977] (upholding right of voluntary resident of psychiatric facility to register).

[39] State of New York Department of Correctional Services, *HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008*, 38 (2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf (last visited May 2, 2011]. The median time to the earliest potential release date was only 15 months. *Id.* at 18.

[40] *See also* Nat'l Research Council, *supra* note 32 at 83 (observing that, unlike other group quarters residents, incarcerated individuals "do not — and cannot — live day-to-day in the communities from which they were sent to prison, and yet their possible eventual return creates demands for such local services as parole monitoring, substance abuse rehabilitation, and job counseling social services. They also do not live day-to-day in the communities in which the prisons are located, in that they do not drive on the roads or use other services."). One former director of the Census Bureau has echoed these points, observing that "[i]ncarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration. (In these, and in additional ways, prisoners differ from college students, the other sizeable group living, though in their case voluntarily so, away from 'home.')." *See* Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten

county by choice, but rather is placed at a particular facility at the discretion of the Commissioner of the Department of Correction, and can be moved at any time for any reason. (*See* N.Y. Correct. Law § 23(1) [McKinney 2010] (stating that Commissioner of Department of Correctional Services has authority to transfer prisoners).)

Even without such evident differences between incarcerated persons and other group quarters populations, the Legislature was not required to address all group quarter populations before addressing the allocation of incarcerated populations in Part XX. (*City of New Orleans v. Dukes*, 427 U.S. 297, 305 [1976] (a "statute is not invalid under the Constitution because it might have gone farther than it did") (citations and internal quotations omitted).) As the Court of Appeals has held, "equal protection does not require that all persons be dealt with identically," so long as the Legislature's distinctions "have some relevance to the purpose for which the classification is made." (*Neale v. Hayduk*, 35 NY2d 182, 186 [Ct App 1974] (citing *Walters v. City of St. Louis*, 347 U.S. 231, 237 [1954] (Legislature had rational basis, and thus did not violate equal protection guarantees of U.S. Constitution, in setting different political party enrollment deadline for voters moving between counties from those moving within the county), *lv dismissed* 420 U.S. 915 [1975]; *see also Dalton v. Pataki*, 5 NY3d 243, 266 [Ct App 2005] (noting that "[e]ven in voter classification, a State is not prohibited from recognizing the distinctive interests of the residents of its political subdivisions," and rejecting equal protection challenge to state law allowing only certain local legislatures — not all — to give prior approval for video lottery terminals), quoting *City of New York v. State of New York*, 76

D. Levingston, Brennan Ctr. for Justice, *Accuracy Counts: Incarcerated People and the Census* 6 (2004), *available at* http://www.brennancenter.org/content/resource/accuracy_counts/.

NY2d 479, 486 [Ct App 1990] (upholding legislation allowing Staten Island residents, but not New York City residents, to vote on the issue of secession); *Weingarten v. Robles*, 309 AD2d 614, 615 [1st Dep't 2003)] (applying rational basis test in evaluating whether local law on ballot placement violated petitioners' First and Fourteenth Amendment rights); *Corning v. Bd. of Elections of Albany*, 88 AD2d 411, 414 [3rd Dept 1982, *aff'd* 57 NY2d 746 [Ct App 1982] (upholding constitutionality of polling-place-hours law on equal protection grounds, applying rational basis test and holding that "classification [was] neither capricious nor arbitrary but rest[ed] upon some reasonable consideration of difference or policy" (quoting *Wiessman v. Evans*, 56 NY2d 458, 465 [Ct App 1982])).)

Fifth, communities of color in New York have suffered a particular diminishment of representation, given that the incarcerated population is disproportionately African-American and Latino, but has historically been credited to disproportionately white prison communities. (*See* New York State Senate Introducer's Memorandum in Support of S6725A, 6/9/10, at 2.[41]) Part XX is rationally related to the goal of correcting representational inequity of these communities by allocating incarcerated persons to their home counties, many of which have higher concentrations of people of color. It is important to note, however, that New York's previous practice of allocating incarcerated

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[41] New York State is approximately 68% white, but 77% of its prison population is African-American (51.3%) or Latino (25.9%). *See* U.S. Census Bureau, *American FactFinder*, *available at* http://factfinder.census.gov/home/saff/main.html?_lang=en; N.Y. State Dep't of Corr. Servs., *HUB System: Profiles of Inmates under Custody on January 1, 2008*, at i (2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf. But 98% of all prison cells in New York State are located in disproportionately white State Senate districts. *See* Prison Policy Initiative, *98% of New York's Prison Cells Are in Disproportionately White Districts*, (Jan. 17, 2005), *available at* http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/.

populations to the prison location when creating state legislative districts did not solely disadvantage "downstate" districts. Rather, the State's previous policy distorted the representational strength of *any* New York community, whether downstate or upstate, that did not contain a disproportionate number of incarcerated persons in its district. To take one example, under the redistricting plan adopted following the 2000 Census, New York's Senate was elected from 62 districts with an average population size of over 306,000 constituents. However, the inclusion of prisoners in the population of the districts where prisons are located resulted in substantial malapportionment. For instance, a State Senator from Senate District 45, host to Clinton Correctional Facility and numerous other prisons, represented only 285,442 non-incarcerated constituents, while a State Senator from neighboring upstate Senate District 43, where no prison is located, represented 302,261 constituents. (*See* Prison Policy Initiative, *District 45 Profile* http://www.prisonersofthecensus.org/factsheets/ny/district_45_profile.pdf (last visited August 11, 2011) *and* LATFOR, *District 43 Map and Data*, http://www.latfor.state.ny.us/maps/2002sen/fs043.pdf (last visited August 11, 2011).)

The comparative representation of the "upstate" voters in Senate District 43 was diminished, not enhanced, by crediting incarcerated persons to prison districts.[42]

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[42] Plaintiffs argue that Part XX will create disparities between "upstate" and "downstate" regions, but even if that were as a factual matter true, as held in *Rodriguez v. Pataki*, 308 F Supp 2d 346, 363 [SD NY 2004] (three-judge court), alleged disparities between "upstate" and "downstate" regions in a legislative redistricting plan are insufficient to establish a violation of equal protection guarantees. The *Rodriguez* Court rejected a one-person, one-vote equal protection challenge to a redistricting plan for the New York Senate that overpopulated "downstate" districts and underpopulated "upstate" districts, when the plaintiffs did not show "irrational or unconstitutionally discriminatory behavior by the Legislature." *Id.*

In sum, it is entirely rational for the Legislature to determine that, for purposes of redistricting, incarcerated individuals should be allocated to their home communities. It is in those communities — and not the prison districts — where such individuals remain legal residents, where they maintain an enduring tie, and where they most often return.

Indeed, plaintiffs improperly rely on *D.C. v. U.S. Dep't of Commerce*, 789 F Supp 1179 [D.C. 1992] — a case which says nothing to the contrary. In that case, the District of Columbia sought a determination that the Census Bureau's inclusion of a correctional facility's inmates in Virginia, rather than in D.C., which claimed to be covering much of the inmates' costs, violated the Constitution and the Census Act. In reviewing the case, the court determined only whether the agency, in making its determination, abused its discretion and acted arbitrarily and capriciously. Finding that the Bureau had a rational basis for its decision, even if it could have found a "better way," the court found no constitutional or statutory violation. (*Id.* at 1189.) The District Court held, that the Census Bureau was permitted to allocate incarcerated persons to the counties in which the prisons were located — no more, no less. It said nothing about what a state must do with this data and, given the nature of the case, it did not address the broad discretion a state enjoys in redistricting matters, as noted in *Burns*. (384 U.S. at 92; *see* discussion *supra* Part III.A). The Bureau, moreover, itself provides information to states and localities to facilitate allocation of incarcerated individuals for redistricting purposes as the state or locality sees fit. (*See* discussion *supra* Part I.[43])

[43] Similarly, in *Borough of Bethel Park v. Stans*, 449 F2d 575 [3d Cir 1971], the Third Circuit found that the Census Bureau's allocation of several groups, including incarcerated persons, to the states in which these groups were physically present did not lack a rational basis. Again, that holding in no way compels the conclusion that equal protection *mandates* this policy for states.

Plaintiffs argue that the only rational way to treat incarcerated individuals for redistricting purposes is to count them where they are physically present at the time the Census Bureau conducts its enumeration. But there is no authority for that proposition. Rather, the Supreme Court has held that it is entirely rational in some circumstances *not* to treat physical presence as determinative of a person's residence for purposes of allocating political representation, on the grounds that a person's "residence" "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." (*Franklin v. Massachusetts*, 505 U.S. 788, 804 [1992] (upholding the enumeration of overseas federal employees at their last home of record — despite the fact that such individuals are not physically present in those communities).[44]) Indeed, the Census Bureau itself has observed that "[i]t is far too late in the Nation's history to suggest that enumeration of the population of the States must be based on a rigid rule of physical presence on the census date — a rule that has never been applied and that is especially out of place in an age of ever-increasing mobility." (Brief of Petitioners at 37, *Franklin v. Massachusetts*, 505 U.S. 788 [1992] (No. 91-1502), 1992 WL 672615.) Thus, it is rational in some circumstances to allocate individuals based on where they have an enduring tie, rather than in the places where they are physically present.

Given the Legislature's valid reasons for enacting Part XX, as described above, Plaintiffs' hodge-podge of objections to Part XX do not come close to establishing that

[44] The Court in *Franklin* also observed that under the first Decennial Census Act, a person could be deemed a resident of an area even if physically absent, and "placed no limit on the duration of the absence." *Id.*

the legislation violates equal protection requirements. Accordingly, summary judgment should be granted to Intervenor-Defendants as to counts 3 through 6 of the Complaint.

PARTISAN GERRYMANDER

IV. Alleged Partisan Motives for Part XX Are Invalid as a Matter of Law Given the Rational Bases for Part XX's Enactment.

Plaintiffs' seventh cause of action asserts that Part XX is an impermissible partisan gerrymander. This claim is without merit for two reasons. First, the enactment at issue involves no drawing of district lines at all. It does not, therefore, constitute a gerrymandering of district lines, much less an impermissible partisan gerrymander. Second, it is not unconstitutional for legislators to promote and enact laws that they perceive to advance their partisan interests if there are other reasonable and valid justifications for the law, which is certainly the case for Part XX. Accordingly, even if, *arguendo*, a legislative desire to advantage a political party were to raise sufficient constitutional concerns warranting judicial scrutiny of a politically motivated measure, Part XX would survive such scrutiny because its enactment is supported by valid interests, including an interest in correcting what had previously been a discordance with New York's common law of domicile and with article II, section 4 of the New York Constitution.

A. Part XX Involves No Drawing of District Lines.

It is clear that Part XX cannot be described as a "political gerrymander," because it does not entail the drawing of electoral district lines and is not a redistricting plan. As the U.S. Supreme Court has explained, "[t]he term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of

highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" (*Vieth v. Jubelirer*, 541 U.S. 267, 272 n.1 [2004 plurality] (*citing Black's Law Dictionary* 696 (7th ed. 1999)).) Part XX, however, does not "divid[e] a geographic area into electoral districts." (*Id.*) Accordingly, plaintiffs' claim that Part XX constitutes an impermissible partisan gerrymander is unsupportable as a matter of logic and as a matter of law.

B. Part XX Cannot Be Invalidated Upon the Claim that it Seeks to Effect a Partisan Advantage.

Plaintiffs, by their claim of "partisan gerrymander," presume that enactment of legislation influenced by improper political motives, if such can be proven (which they cannot), amounts to a constitutional violation. (*See, e.g.*, Compl. ¶¶ 208, 216, 218, 219.). That legislation may advantage one party over another cannot, in and of itself, serve as a basis for judicial invalidation. There are a myriad of legislative measures that may well advantage one party over another. Legislation frequently has partisan, political consequences. But, it would be absurd to suggest that such consequences render the legislation impermissible. Indeed, the Supreme Court has observed that political considerations can never be entirely excluded from redistricting and that such considerations are an insufficient basis for invalidating a plan where legitimate policy interests support the measure. (*Gaffney v. Cummings*, 412 U.S. 735, 752 [1973] ("It would be idle . .. to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.").)

The Supreme Court has reaffirmed this proposition, holding that "partisan considerations" will not, in and of themselves, render legislation invalid. (*See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203-04 [2008].) In *Crawford v. Marion*

County Election Board, the Court reviewed an Indiana statute that required voters to present a government-issued photo identification as a condition for voting at the polling place. (*Id.*) The statute was challenged, *inter alia*, upon the ground that it was politically motivated and, therefore, violated the Fourteenth Amendment. In rejecting that challenge, Justice Stevens, writing for the Court, observed:

> "It is fair to infer that partisan considerations may have played a significant role in the decision to enact [Indiana's photo ID law]. . . . But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for [the ID law] are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute."

(*Id.*) Plaintiffs' cause of action resting upon partisan motivation[45] or effect, without more, is thus legally insufficient. As demonstrated above, *see supra* Part III, the State has valid, neutral interests justifying allocation of incarcerated persons to their home communities, in keeping with the common law principles of domicile, and thus is not subject to challenge based solely on an allegation of partisan motivation.

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[45] Even if politically motivated legislation could be invalidated simply upon that ground, the Complaint in this case is insufficient with respect to such a claim. Plaintiffs identify one statement by one legislator, Malcolm Smith, as the basis for their claim that the measure at issue here is impermissibly motivated. But, Mr. Smith's statement was unconnected to this Legislation. *See* Edward-Isaac Dovere, *Democratic Redistricting Will Send GOP To "Oblivion," Smith Says*, City Hall News (May 3, 2011) *available at* http://www.cityhallnews.com/2010/05/democratic-redistricting-will-send-gop-to-oblivion-smith-says/. The statement by a single legislator alone cannot establish legislative intent. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

CONCLUSION

For the reasons discussed above, we respectfully request the court to grant summary judgment in favor of intervenors-defendants on all counts.

Dated: August 18, 2011

Respectfully submitted,

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*Admitted *pro hac vice*

Exhibits

Exhibit 1

Robert Groves, Director, U.S. Census Bureau, *2010 Census: The Director's Blog: So, How Do You Handle Prisons?* (March 12, 2010)

Exhibit 2

Letter from Census Director Robert Groves to U.S. Rep. William Lacy Clay, dated Nov. 16, 2009

Exhibit 3

U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*

Exhibit 4

Essex County Local Law No. 1 (2003)

Exhibit 1

So, How do You Handle Prisons?

Posted on March 1, 2010 Comments 7

In my travels around the country, I get a lot of questions about unusual housing situations and how the 2010 Census will enumerate people who live there. A common one concerns prisons.

The decennial census has the goal of counting everyone living in the country in the "right" place. That is, it is insufficient for us to have a perfectly accurate count of the total population if we cannot place each person enumerated in some location. (This burden flows from the need to reapportion the House across states and then to redistrict the states based on counts down to the block level.)

Since the Census Act of March 1790, we have placed each enumerated person at their "usual residence." With some persons, where they are living now is not where they might think of themselves usually living. For example, I've blogged earlier about how many of the victims of Hurricane Katrina think of themselves as living on the Gulf Coast even though, since the event, they've lived far inland. I talked about how some college students in dormitories think of themselves as really living in their parental home, even though they only spend summers there. So too, many prisoners may think of themselves as living somewhere other than prison.

For some prisoners, however, they are only temporarily incarcerated. For persons in short-term jails, awaiting a hearing, we direct that the person should be included at their residence that they usually occupied before the jail incident. For those in hospitals for a short-term stay we direct that they be counted among their usual household.

Thus, conceptually there needs to be some time-based cutoff. The Census Bureau rules note that if in the last year the majority of the months were spent at a residence, then the person should be included in that residence's count. Could such a rule be used for prisoners?

One can easily see that the problem is a logistical one. There are logistical issues and conceptual issues:

Enumerating in prisons. We seek to have each prisoner fill out an individual census form, but we don't succeed in all institutions. In some prisons with very large security

issues, prison management directs us to use the administrative records of the institution to enumerate.

Defining "usual residence" outside the prison. There are several optional definitions that could be used:

- Where the prisoner lived immediately prior to the arrest.
- Where the prisoner lived at the time of the arrest.
- Where the prisoner lived at the time of the sentencing.
- Where the prisoner's former household now lives.
- Where the prisoner wants to live after exiting the institution.

Administrative records for state prisons vary widely in content and how they're updated. When we have used records from institutions we have missing data rates that approach 50 percent. So changing the residence rule for prisoners would probably demand a greatly increased level of use of individual census forms in prisons; this requires more cooperation from prison officials.

Choosing which definition of a non-prison residence is best is not obvious; logical arguments can be made for each of the five above.

Some have argued that different rules could be used for different prisoners. For example, those who serving long term sentences, have been at the prison for some time and will be there for years more, might be counted as residents of the prison. Others, the argument goes, could be counted as residents of one of the five ideas above. Such a design would also require linking to some administrative rules to apply the sentence length rule.

Some users of census data care about this for redistricting purposes within states. They observe that prisoners often resided in areas far removed from the location of the prison and should be counted where they're from. They note that the former homes of the prisoners are "cheated" of the benefits derived from the census counts. They argue that the locales of the prisons unfairly benefit from the counted prisoners, even though the prisoners do not enjoy the benefits that the census counts provide to the area.

This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale.

As a nonpartisan scientific organization, the Census Bureau is not involved in redistricting. We collect the information under uniform rules that offer the promise of accurate counts. We provide this early release to allow users more information in doing their jobs.

Counting members of all group quarters is complicated; we re-evaluate our "residence rules" after each census, to keep pace with changes in the society. We'll do that again after the 2010 Census.

Exhibit 2

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001
OFFICE OF THE DIRECTOR

NOV 16 2009

The Honorable William Lacy Clay
Chairman
Information Policy, Census and National
Archives Subcommittee
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington DC 20515-6143

Dear Mr. Chairman:

This is in response to your letter of October 6, 2009, and a follow-up to our earlier response to you on October 16, 2009, regarding options for producing earlier tabulations of the population that will be counted in correctional facilities during the 2010 Census.

As mentioned in my October 16, 2009, response, it is too late to change the format of the Redistricting Data (P.L. 94-171) Summary File. We did assess the feasibility of a special product and have determined that it is feasible to create an early version of Table P41. This table is part of our planned Census 2010 Summary File 1 data products. The table includes:

Universe: Group Quarters (GQ), Population by GQ
Type Total:
Institutionalized population for four categories of GQ:
Correctional facilities for adults;
Juvenile facilities;
Nursing/Skilled nursing facilities;
Other institutional facilities;
Noninstitutionalized population for three categories of GQ:
College/University student housing;
Military Quarters;
Other noninstitutional facilities;

The data will be tabulated and available according to several standard geographic summary levels: State, State-County, State-County-Census Tract, and State-County-Census Tract-Block. Barring unforeseen circumstances, we propose to release this as a special product through the FTP site (only) in May 2011.

If you would like the Census Bureau to move forward with this proposal, please have a member of your staff contact our Congressional Affairs Office at (301) 763-6100.

Sincerely,

Robert M. Groves
Director

U.S. CENSUS BUREAU
Economics and Statistics Administration. Washington, D.C. 20233
U.S. Department of Commerce

CONGRESSIONAL AFFAIRS OFFICE

fastfacts.census.gov

DATE: November 17, 2009

	Telecopier	Telephone
FROM: **Angela Manso**	301-763-3780	301-763-6100
TO: Representative Wm. Lacy Clay, Chairman Sub. on Information Policy & Census	202-225-2392	202-225-2406

Attn: Darryl Piggee attached:

In response to your letter of October 6, 2009 and follow-up to earlier response to you on October 16, 2009 regarding option for producing earlier tabulations of the population that will be counted in correctional facilities during the 2010 census. Hard copy of letter to follow.

Exhibit 3

Redistricting Data

2010 Census Advance Group Quarters Summary File

The Census Bureau, in response to Federal and state officials, as well as other data users, is providing an early version of Table P-42 from the 2010 Census Summary File 1, showing the seven types of group quarters. No characteristics of the group quarters are provided. The institutionalized group quarters categories include correctional facilities for adults, juvenile facilities, nursing facilities/skilled-nursing facilities and other institutional facilities; while the non-institutionalized group quarters categories include college/university student housing, military quarters and other non-institutional facilities. Data are provided for states, counties, census tracts and blocks. This table is only available via the FTP, so will not be found in the American Fact Finder.

This early release of data on the group quarters population may be beneficial to many data users including those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation. It will permit state and local redistricting officials to overlay this file with the 2010 Census Redistricting Data (Public Law 94-171) Summary File data. Three states (Delaware, Maryland and New York) have legislation requiring use of group quarters data in their line drawing. Other states exclude military, and Kansas reassigns intrastate college students back to their home town.

In addition, this product may be useful in determining if a geocoding error has occurred. The Count Question Resolution (CQR) Program provides state, local, and tribal governments the opportunity to challenge their 2010 Census housing unit and group quarters counts. The CQR program begins June 1, 2011, prior to the release of the Summary File 1.

2010 Census Advance Group Quarters Summary File Technical Documentation [PDF] 4.85 MB

2010 Census Advance Group Quarters Summary File FTP Data

2010 Census Advance Group Quarters Microsoft Access Shells – These shells (MS Access 2007 and MS Access 2003 versions) contain the file import specifications, example tables, an example block level query, and a brief data dictionary extract, to assist you with importing and extracting the data. These shells are used similarly to the ones in the instructions titled How to use Access Shells.pdf [PDF] 880 KB

Source: U.S. Census Bureau | Redistricting Data Office | Last Revised: July 01, 2011

Exhibit 4

FAX TRANSMISSION

Essex County Board of Supervisors
P.O. Box 217
Elizabethtown, NY 12932
(518) 873-3353
FAX: (518) 873-3356
email: dpalmer@co.essex.ny.us

TO: Peter Wagner

DATE: April 9, 2007

FAX #: 413-527-2758

PAGES: 5 , including cover sheet

FROM: Deb Palmer

Mr. Wagner:

Per your email request on weighted voting in Essex County, I am attaching the copy of Local Law No. 1 of 2003 that you asked for.

I am also going to give a copy of your email to our County Attorney so he can determine if in fact a mistake was made with calculations to the two towns that you mentioned.

Let me know if there is anything further that you need.

Deb Palmer

No. 283

RESOLUTION ADOPTING LOCAL LAW NO. 1 OF 2003 ADOPTING A PLAN OF APPORTIONMENT OF THE ESSEX COUNTY BOARD OF SUPERVISORS

The following resolution was offered by Supervisor Moses, who moved its adoption.

WHEREAS, a public hearing on proposed Local Law No. 1 of 2003 was held on December 16, 2002; and

BE IT RESOLVED, that the Essex County Board of Supervisors hereby adopts proposed Local Law No. 1 of 2003, adopting a plan of apportionment of the Essex County Board of Supervisors based upon the 2000 United States Census pursuant to Municipal Home Rule Law §10, subdivision 1(ii) a (13), as follows:

"ESSEX COUNTY LOCAL LAW NO. 1 OF 2003

A local law adopting a plan of apportionment of the Essex County Board of Supervisors based upon the 2000 United States Census pursuant to Municipal Home Rule Law §10, subdivision 1(ii) a (13).

BE IT ENACTED by the Board of Supervisors of Essex County as follows:

§ 1. ***Legislative Findings***

New York Municipal Home Rule Law §10, subdivision 1, paragraph (ii), subparagraph a (13), provides for the apportionment of a county legislative body based upon a plan utilizing a population (defined as 'residents, citizens, or registered voters') base from the latest statistical information obtainable from an official enumeration done at the same time for all residents, citizens, or registered voters of the County.

The 2000 Census determined that Essex County has a total population of 38,851. Included in that population, however, are 2,194 persons confined in the state and federal correctional facilities located in the towns of Moriah and North Elba, a figure which represents 5.6472 % of the total population of Essex County. The largest portion of state and federal inmates – 1,898 – are located in the town of North Elba, with 1,182 being incarcerated in the Federal Correctional Institution in Ray Brook and 716 being incarcerated in the New York State Correctional Facility known as Camp Adirondack. These 1,898 incarcerated individuals represent 21.914% of the town of North Elba's population of 8,661 and 4.885% of the County population. Also, the population in the town of Moriah of 4,879 includes 296 persons who are incarcerated in the New York State Correctional Facility known as Moriah Shock, which represents 6.066% of the town's population and 0.761% of the County population.

Persons incarcerated in the state and federal correctional institutions have been convicted of criminal acts constituting felonies and their presence in Essex County is considered involuntary. These incarcerated persons: are not residents of the County since they are here involuntarily and can be relocated by the Commissioner of Corrections at the latter's discretion; are not entitled to vote and thus are not voters in Essex County; and receive no services from the County – except when they commit new criminal acts and are brought before County Court, or when they are entitled to assignment of counsel as indigents in connection with parole hearings under New York Executive Law Article 12-B. Persons incarcerated in state and federal correctional institutions live in a separate environment, do not participate in the life of Essex County, and do not affect the social and economic character of the towns in which are located the correctional facilities where they are incarcerated are located.

The inclusion of these federal and state correctional facility inmates unfairly dilutes the votes or voting weight of persons residing in other towns within Essex County. This is particularly so if the 1,898 inmates in the town of North Elba are included in its population total of 8,661 since those inmates would then represent 21.914% of the town of North Elba's

population.

The Board of Supervisors finds that the population base to be utilized in and by the plan apportioning the Essex County Board of Supervisors should exclude state and federal inmates[1].

§ 2. ***Vote of Board of Supervisors Apportioned***

(a) This local law constitutes a plan establishing the voting powers of individual members of the Essex County Board of Supervisors providing for substantially equal weight for all the voters of Essex County as required by Municipal Home Rule Law §10, subdivision 1, paragraph (ii), subparagraph a (13).

(b) The population base to be utilized in apportioning the votes of the Essex County Board of Supervisors shall be the 2000 United States Census exclusive of those persons incarcerated in the state and federal correctional institutions and facilities located within Essex County.

(c) For purposes of apportionment under this local law, the total population of Essex County is 36,667, and the population of each town is as follows:

Town	Population	Town	Population
Chesterfield	2,409	Newcomb	481
Crown Point	2,119	North Elba	6,763
Elizabethtown	1,315	North Hudson	266
Essex	713	St. Armand	1,321
Jay	2,306	Schroon	1,759
Keene	1,063	Ticonderoga	6,167
Lewis	1,200	Westport	1,362
Minerva	796	Willsboro	1,903
Moriah	4,583	Wilmington	1,131

(d) Notwithstanding the provisions of any general, special or local law to the contrary, at all meetings of the Board of Supervisors the supervisor of each town in Essex County elected at the general election of 2001 and at each general or special election thereafter, and any successor chosen to complete the term of office of any such supervisor so elected, shall be entitled to cast the number of votes set forth in sections 3 and 4, as applicable, of this local law.

§ 3. ***Simple Majority Vote***

In voting on any motion or resolution requiring a simple majority vote for passage or adoption:

(a) the total number of weighted votes for the Board shall be 2843; and

(b) the minimum number of weighted votes required to pass such motion or adopt such resolution shall be 1422; and

---

[1] The Board incorporates as part of these legislative findings the letters dated February 14, 2002, April 24, 2002 and October 21, 2002, from the Essex County Attorney.

(c) the respective Supervisors of the eighteen (18) towns comprising the County of Essex shall have the number of votes set forth opposite the name of the town wherein he/she is elected, said number of votes being as follows:

Town	Vote	Town	Vote
Chesterfield	194	Newcomb	39
Crown Point	170	North Elba	481
Elizabethtown	106	North Hudson	22
Essex	58	St. Armand	106
Jay	188	Schroon	142
Keene	86	Ticonderoga	387
Lewis	97	Westport	110
Minerva	64	Willsboro	153
Moriah	351	Wilmington	91

§ 4. ***Two-Thirds Vote***

In voting on any motion or resolution requiring a two-thirds vote for passage or adoption:

(a) the total number of weighted votes for the Board shall be 3916; and

(b) the minimum number of weighted votes required to pass such motion or adopt such resolution shall be 2611; and

(c) the respective Supervisors of the eighteen (18) towns comprising the County of Essex shall have the number of votes set forth opposite the name of the town wherein he/she is elected, said number of votes being as follows:

Town	Vote	Town	Vote
Chesterfield	257	Newcomb	51
Crown Point	226	North Elba	755
Elizabethtown	140	North Hudson	29
Essex	76	St. Armand	141
Jay	246	Schroon	188
Keene	113	Ticonderoga	533
Lewis	127	Westport	145
Minerva	85	Willsboro	203
Moriah	480	Wilmington	121

§ 5. ***Repeal of Prior Law***

Local Law No.1 of 1982 is hereby repealed.

§ 6. ***Effective Date; Permissive Referendum***

This local law is subject to permissive referendum pursuant to Municipal Home Rule Law §24 and shall not take effect until at least forty-five (45) days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of the County voting on a proposition for its approval if within forty-five days after its adoption there be filed with the Clerk of this Board a petition protesting against such local law, signed and authenticated as herein required by qualified electors of the County, registered to vote therein at the last preceding general election, in number equal to at least ten per centum of the total

number of votes cast for governor at the last gubernatorial election in the County."

This resolution was duly seconded by Supervisor Canon, and adopted upon a roll-call vote as follows:

AYES:	1263	votes	
NOES:	783	votes	(Rushby, Seney)
ABSENT:	380	votes	(Glebus, Morency, Connell, Sayward)

FRENCH: Discussion? Roll-call vote.

PALMER: Mr. Morrow-yes; Mr. French-yes; Mr. Merrihew-yes; Mr. Jackson-yes; Mr. O'Neill-yes; Mr. Both-yes; Mr. Glebus-absent; Mr. Kelly-yes; Mr. Rushby-no; Mr. Canon-yes; Mrs. Seney-no; Mr. Doble-yes; Mrs. Moses-yes; Mrs. Morency-absent; Mr. Dedrick-yes; Mr. Connell-absent; Mrs. Sayward-absent; Mrs. Ashworth-yes. Carried.

No. 284

RESOLUTION ADOPTING LOCAL LAW NO. 2 OF 2003 FIXING THE 2003 SALARIES OF COUNTY OFFICERS WHO ARE ELECTED OR WHO ARE APPOINTED FOR A FIXED TERM

The following resolution was offered by Supervisor Canon, who moved its adoption.

WHEREAS, a public hearing on proposed Local Law No. 2 of 2003 was held on December 15, 2002; and

BE IT RESOLVED, that the Essex County Board of Supervisors hereby adopts proposed Local Law No. 2 of 2003, fixing the 2003 salaries of County officers who are elected or who are appointed for a fixed term, as follows:

"ESSEX COUNTY LOCAL LAW NO. 2 OF 2003

A local law fixing the 2003 salaries of County officers who are elected or who are appointed for a fixed term.

BE IT ENACTED by the Board of Supervisors of Essex County as follows:

§1. The annual salaries during fiscal year 2003 for the following County officers who are elected or who are appointed for a fixed term shall be as follows:

Position	2003 Salary
County Clerk	$ 50,955.00
Real Property Tax Services Director	53,486.00
Superintendent of Public Works	67,586.00
Commissioner of Social Services	65,980.00
Sheriff	57,617.00
Personnel Officer	50,000.00
County Auditor	41,086.00
Public Health Director	63,110.00