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Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
646.292.8310 Fax 212.463.7308
www.brennancenter.org

September 14, 2011

Via Overnight Mail

David Lewis, Esq.
Attorney for the Plaintiffs
225 Broadway, Suite 3300
New York, NY 10007

Re: *Little v LATFOR,* Index No. 2310-2011

Dear Mr. Lewis:

Please find enclosed documents from the Brennan Center for Justice at NYU School of Law, the Center for Law and Social Justice at Medgar Evers College, Dēmos, LatinoJustice PRLDEF, the NAACP Legal Defense and Educational Fund, Inc., the New York Civil Liberties Union, and the Prison Policy Initiative in connection with the filing of the Reply in Support of Intervenors-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

Please contact me if you have questions or concerns. My contact information is provided below.

Sincerely,

Tamara Joachim
Research Associate, Democracy Program
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, New York 10013
646.292.8310 (phone)
tamara.joachim@nyu.edu

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

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

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INTRODUCTION

Intervenors-Defendants have asked this Court to grant summary judgment on all Counts in their favor because Part XX of Chapter 57 of the Laws of 2010 is a constitutionally permissible way for the New York Legislature to end the distortions in representation caused by allocating incarcerated persons to the prison district instead of their home community. Plaintiffs move for summary judgment only as to Count 1, the claim invoking the enumeration clause of article III of the New York Constitution.

Given the presumed constitutionality of a statute, Plaintiffs have an exacting burden. That burden is not satisfied here. Instead, Plaintiffs seek from this Court some extraordinary rulings. Initially, Plaintiffs ask this Court to adopt a reading of article III of the New York Constitution that not only demands perfect accuracy when implementing a statute, but also requires ignoring Census Bureau representations, policies, and practices, as well as more than a century of common law that has defined the term "inhabitant" in that article as synonymous with "domiciliary." Next, Plaintiffs ask this Court to rewrite the anti-rider prohibition of article VII of the New York Constitution to apply to a revenue bill, when the plain text of article VII specifies that the prohibition only applies to appropriation bills. Further, Plaintiffs ask this Court to find that there could be no reasonable set of facts providing a rational basis for the Legislature to determine that incarcerated persons should be allocated as residents of their home community. Plaintiffs ask this despite the existence of a myriad of reasons for doing so, including the facts that incarcerated persons are treated as continuing residents of their pre-incarceration address for virtually all legal purposes and generally have no real ties to the prison district, and that the previous method of allocating incarcerated populations had an unfair impact on

communities with large concentrations of persons of color. Finally, Plaintiffs ask this Court to be the first in New York to strike down a statute as a partisan gerrymander, even though it draws no district lines nor even imposes a district map.

When a movant has met its burden to establish its entitlement to judgment as a matter of law, as Intervenors-Defendants have, the burden shifts to the non-movant "to offer competent evidence in admissible form establishing the existence of genuine, triable issues of material fact or demonstrate an acceptable excuse for failing to do so" (*Quinn v. Depew*, 63 AD3d 1425, 1428-29 [2005] (internal quotation marks and citations omitted)). There are no material facts in dispute and Intervenors-Defendants are entitled to summary judgment as a matter of law on all Counts.

ARGUMENT

I. Part XX Is Consistent with Article III of the New York Constitution.

Plaintiffs concede that they face a heavy burden on Count 1 of the Complaint, acknowledging that, in order to prevail, they must demonstrate that "[t]here is simply no reasonable 'mode of reconciliation'" between Part XX and the Constitution. (Pls.' Resp. Mem. at 2.) Here, Plaintiffs contend that the *only* reasonable way to read article III is to interpret it as imposing two requirements: (1) that New York must rely exclusively on the Census Bureau's "Public Law" Data File during redistricting; and (2) that the term "inhabitants" must be defined as "people who are physically present." (*See* Pls.' Resp. Mem. at 3-4.)

Plaintiffs misread article III in both respects. First, under the plain terms of article III, section 4, there is no single data set that is controlling as to the allocation of incarcerated individuals during redistricting, because the census data do not "purport to

give the information necessary" for such purposes. (NY Const, art III, sec 4.) Plaintiffs' contention that prisoners must be allocated in accordance with the Public Law Data File ignores the fact that the Census Bureau produces multiple data products for the express purpose of assisting with the implementation of laws like Part XX. Article III does not restrict the Legislature to using only a single data set, nor does it prohibit the Legislature from taking full advantage of the various data options provided by the Census Bureau; indeed, as the Court of Appeals has made clear, the Legislature is entitled to broad discretion with respect to matters relating to redistricting, such that statutes enjoy a "strong presumption of constitutionality" under article III, section 4 of the New York Constitution. (*Wolpoff v. Cuomo*, 80 NY2d 70, 77-78 [1992].)[1]

Second, Plaintiffs ignore over a century of common law that has defined the term "inhabitant" in article III of the Constitution as synonymous with "domiciliary." Part XX simply harmonizes article III with this long-established principle, and with another provision of the Constitution: article II, section 4, which provides that incarcerated individuals remain domiciled in — and thus, inhabitants of — their home communities. Although the Court of Appeals in one case held that a municipality was *permitted* to include incarcerated individuals as part of the local population, it also held that a legislature should have "considerable deference in determining the parameters of an apportionment population," including whether to include prisoners during redistricting. (*Longway v. Jefferson County Bd. of Supervisors*, 83 NY2d 17, 22 [1993].) But there is

[1] Plaintiffs seek to avoid the Court of Appeals' holding in *Wolpoff* with the tautological assertion that "[t]here is no need to 'harmonize' the statute if it is facially or in practice violative." (Pls.' Resp. Affirmation ¶ 7.) The very essence of *Wolpoff*'s holding, however, is that a court should make every attempt to reasonably harmonize a statute and the Constitution *before* finding the former "facially violative."

no authority for Plaintiffs' contention that article III *requires* that prisoners must be treated as "inhabitants" of a district simply by virtue of being incarcerated there.

Nor does article III require a perfect enumeration of all of the "inhabitants" of the State. Plaintiffs argue that Part XX violates article III by failing to count some incarcerated individuals at all, but Plaintiffs ignore the fact that *no data set* contains a perfect count of all of the inhabitants of the State of New York. Errors or discrepancies in the administrative data used during redistricting cannot be a basis for finding Part XX unconstitutional. (*See Wolpoff*, 80 NY2d at 77 (holding that "the issue" under article III is not whether a challenged statute "technically violates" the Constitution, because some minor errors are "inevitable").)

A. Data Based on the Census Bureau's "Usual Residence Rule" Does Not Control the Allocation of Incarcerated Individuals for Redistricting Purposes.

1. The Public Law Data File Does Not "Purport to Be Necessary" to Allocate Incarcerated Individuals for Redistricting Purposes.

Article III, section 4 states that census data is controlling only "in so far as such census and the tabulation thereof purport to give the information necessary [for apportionment]." (Pls.' Resp. Mem. at 3 (quoting NY Const, art III, sec 4).) The Census Bureau does not produce any particular data that "purport" (or "profess")[2] to give the information "necessary" (or "essential")[3] to allocate incarcerated individuals for redistricting purposes. Plaintiffs' assertion that, under article III, section 4 of the New

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[2] "Purport" is defined as "to profess to be" (American Heritage Dictionary 682 [4th ed. 2001]), or "[t]o convey, imply, or profess outwardly" (Black's Law Dictionary 1236 [6th ed. 1990]).

[3] "Necessary" is defined as "[a]bsolutely essential; indispensable" (American Heritage Dictionary 567 [4th ed. 2001]).

York Constitution, the Census Bureau's Public Law Data File is "controlling unless it patently fails to count the full number of inhabitants, or fails to give information as to each district in the State" (*see* Pls.' Resp. Mem. at 2) ignores the actual text of the article. In fact, the Bureau does not suggest that any particular method of allocating incarcerated individuals is the most appropriate one for redistricting. The Census Bureau acknowledges, contrary to Plaintiffs' contention that the enumeration of individuals must be conducted according to a "neutral standard" (Pls.' Resp. Mem. at 1), that there is no such value-neutral standard for allocating incarcerated individuals. The Census Bureau does not profess that any particular data set is "necessary" for state redistricting, but rather has released multiple data sets to empower states to make their own determinations as to the appropriate manner of allocating incarcerated individuals during redistricting. (*See* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 8-9 (citing statements of Census Bureau policy and descriptions of various census data).)

More expressly stated, there is no single data set from the Census Bureau that can be referred to exclusively as the "definitive method of counting of the people of the population" during the decennial census. (Pls.' Resp. Affirmation ¶ 7.) Rather, the Bureau produces no fewer than three different population counts as part of the enumeration, in addition to other data sets, that can be used for purposes of reapportionment and redistricting.

First, the Census Bureau produces a count of "the resident population for the 50 states, as ascertained by the Twenty-Third Decennial Census" for purposes of congressional apportionment.[4] This data set includes certain individuals who are not

[4] U.S. Census Bureau, 2010 Census: Apportionment Population and Number of Representatives by State, tbl. 1, available at

physically present in their home states, but who remain "resident[s]" there, and are therefore treated as whole persons within those states.[5] According to this data set, the 2010 Census counted 19,421,055 people living in New York State.[6]

Second, the Census Bureau produces a different data set known as the "Public Law Data File." That data set, which Plaintiffs assert must be the exclusive data source during redistricting (*see* Pls.' Resp. Affirmation ¶ 19), yields different figures as to the total number of people in each state,[7] calculating New York's population at 19,378,102,[8] a number that is 40,000 people fewer than the initial decennial census enumeration.

The Census Bureau then releases a *third* conflicting data set that is frequently used during redistricting: the American Community Survey data ("ACS data"), which is based on a rolling estimate of the population, and which produces yet another count of each state's total population,[9] tabulating New York State at 18,817,976 people[10] (or 500,000 fewer people than the total from the Public Law Data File).

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http://www.census.gov/population/apportionment/data/files/Apportionment%20Population%202010.pdf.

[5] For instance, this data set includes "overseas U.S. military and federal civilian employees (and their dependents living with them)," who are not physically present in their home states (*id.*)

[6] *Id.*

[7] For example, unlike the initial Census tabulation, the Public Law Data File does *not* include overseas federal employees in a state's total population. (*See* U.S. Census Bureau, 2010 Census Constituent FAQs 5, available at http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf ("[O]verseas counts are used solely for reapportioning seats in the U.S. House of Representatives").)

[8] *See* U.S. Census Bureau, 2010 Census Data (New York), available at http://2010.census.gov/2010census/data/ (New York's total population for this data set can be found by clicking on New York under the "Redistricting Data" header).

[9] The ACS data, unlike other data sources from the Census Bureau, includes citizenship information, and has been relied on by courts during past redistricting cycles (*see e.g. Rodriguez v. Pataki*, 308 F Supp 2d 346, 409 [SDNY 2004]; *see also* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count and Where to Count Them*, 32 Cardozo L.

Finally, in addition to these data sets, the Census Bureau produces the "Group Quarters" data, which provides information on the size and location of prison populations, and which is intended to assist with the implementation of laws like Part XX. (*See* Defs-Intervenors Mem. in Supp. of Mot. for Summ. J. at 8-9.) Contrary to Plaintiffs' assertion, these multiple Census data sets are not merely the product of the Census Director's "blog" (*see* Pls.' Resp. Affirmation ¶ 12). As one of Plaintiffs' own exhibits — an official document from the Census Bureau — makes clear, the Census Bureau produced the Group Quarters data as an additional data set to "assist those in the redistricting community who must consider whether to include or exclude certain populations." (U.S. Census Bureau, 2010 Census Advance Group Quarters Summary File 1-1 [Apr. 2011] (attached to Pls.' Resp. Affirmation as Ex. D).)[11]

Plaintiffs incorrectly assert that a state may not "pick and choose" from the various forms of available "Census Department data." (Pls.' Resp. Mem. at 3.) On the contrary, the Census Bureau's various data products "purport" to provide multiple options so that states and localities can "pick and choose" in making redistricting determinations, such as where to allocate incarcerated individuals. (*See* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 8 (quoting Census Director Robert Groves' statement "that states can leave the prisoners counted where the prisons are,

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Rev. 755, 757 [2011]). But because ACS data is based on a sample of only 2.5% of the population, it is often markedly different from the Public Law Data File. (*Id.* at 777.)

[10] *See* U.S. Census Bureau, American Community Survey: New York, available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US36&-context=adp&-ds_name=ACS_2009_5YR_G00_&-tree_id=5309&-_lang=en&-_caller=geoselect&-format=.

[11] Plaintiffs also erroneously claim that this particular data set is for certain states, but "not New York" (Pls.' Resp. Mem. at 4), but Plaintiffs' own exhibit states that the release of this data is intended to assist "[t]hree states (Delaware, Maryland, and New York)" that "have legislation requiring use of group quarters data in their line drawing." (*Id.*)

delete them from the redistricting formulas, or assign them to some other locale").) Plaintiffs do not explain how, under their reading of article III, the State is to determine which, among the multiple data sets produced by the Census, the State is "required" to choose; apparently, Plaintiffs read article III to require the State to choose the Census data set that is most politically advantageous to themselves and their own districts. But there is no authority for Plaintiffs' view that article III requires exclusive reliance on a single data set, or that New York must refuse to take advantage of the various data options offered by the Census Bureau.

Plaintiffs cannot ignore the actual text of article III, section 4, which states that data from the census is not controlling where, as here, it does not "*purport* to give the information *necessary*" for redistricting purposes (emphases added), even if the Census Bureau continues to enumerate incarcerated individuals in their prisons for purposes of many basic census counts. While Plaintiffs dismiss Intervenors-Defendants' reading of the Constitutional text as "absurd" because it acknowledges that the Census Bureau has "influence" in this process (*see* Pls.' Resp. Affirmation ¶ 25), Plaintiffs' position in this case is based on the same premise: that New York is required to count incarcerated individuals in their prisons under article III because that has supposedly been the Census Bureau's policy. (*See* Pls.' Resp. Mem. at 3.) But the text of article III, section 4 provides that the State must rely on census data only where such data "purport to provide the information necessary" for redistricting. Because no single data set from the Census Bureau professes to provide essential (or even appropriate) information for allocating incarcerated individuals, the State is free to avail itself of other data options.

2. The "Usual Residence Rule" Is Not Uniformly Tied to Physical Presence, Is Not Immutable, and Is Not Binding on the States.

Plaintiffs incorrectly argue that the State must adhere to the Census Bureau's usual residence rule in allocating prisoners because the Bureau itself "has consistently followed the centuries old 'usual residence rule'" (Pls.' Resp. Mem. at 5). In fact, the Census Bureau's general enumeration methods have changed over time: for decades, the Bureau enumerated individuals at a person's "permanent home," and adopted the current formulation of the "usual residence rule" in 1950.[12] Nor have incarcerated individuals been treated in the same manner throughout the Census Bureau's history, but rather have at times been enumerated in the "county and state in which the prisoner is known, or claims, to reside," rather than in their prison facilities.[13] Further, even now, the Census Bureau does not always treat physical presence in a place as determinative of a person's "usual residence," but rather has always allocated some individuals to particular locations regardless of a person's physical presence at or absence from a particular place. (*See Franklin v. Massachusetts*, 505 U.S. 788, 806 [1992] (explaining that overseas federal employees are allocated to their home states (despite living abroad), as are members of Congress, who themselves are physically present in Washington, D.C. for most of the year).) Even the First Decennial Census Act permitted individuals to be counted at a

[12] For instance, from 1920 to 1940, the Census Bureau defined a person's "residence" as that person's "permanent home," but that definition was changed in 1950 to the current formulation of where a person "lives or sleeps most of the time." (Letter from Charles Louis Kincannon, Director, Census Bureau, to Rep. William Lacy Clay and Rep. Adam Putnam [Apr. 9, 2004] (quoted in Kirsten D. Levingston & Christopher Muller, "Home" in 2010 6 [2006]), available at http://brennan.3cdn.net/40563ac2dd6e8d061d_ztm6b5i6e.pdf.)

[13] Nat'l Research Council, Once, Only Once, and in the Right Place: Residence Rules in the Decennial Census 84-85 [Daniel L. Cork & Paul R. Voss eds., 2006], available at http://print.nap.edu/web_ready/0309102995.pdf. As the National Research Council explains, the 1900 Census contained the Census Bureau's first express mention of counting prisoners, and

residence if "occasionally absent," and "placed no limit on the duration of the absence." (*Id.* at 804 (quoting Act of Mar. 1, 1790, sec 5, 1 Stat 103).)[14] Indeed, the Census Bureau has stated that it rejects physical presence as determinative of where a person should be counted:

> It 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.

(Br. of Appellant U.S. Census Bureau at 37, *Franklin v. Massachusetts*, 505 U.S. 788 [1992] [No. 91-1502], 1992 WL 672615.)

Most importantly, however, although the Census Bureau itself has particular policy reasons for enumerating incarcerated individuals in their prisons, those policy rationales do not apply to states engaged in redistricting. The Census Bureau's primary task is to determine the total population count of each state for purposes of apportioning congressional representation among the states, and it may make sense for the Census Bureau simply to count prisoners where they are confined, because the vast majority of incarcerated individuals located in a state are residents of that state. (*See Borough of Bethel Park v. Stans*, 449 F2d 575, 578 [3d Cir 1971] (describing the enumeration of prisoners where they are confined as a reasonable means of counting the number of individuals in each state).) But, as courts have made clear, it does not follow that states themselves must then rely on that method of enumerating prisoners when conducting redistricting: "[a]lthough a state is entitled to the number of representatives in the House

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instructed that, "if [prisoners] have some other permanent place of residence," that permanent address should be listed on the appropriate Census form, to be filled out by prison officials.

[14] During that first census, President Washington was counted at Mount Vernon even though he spent thirty-one of the thirty-six weeks of the enumeration period away from Virginia. (*Franklin*, 505 U.S. at 804 (internal citations omitted).)

of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature" (*id.* at 583 n 4).

Thus, the Census Bureau's reasons for enumerating incarcerated individuals in their prisons are inapplicable to the states themselves, because the Bureau does not "purport" that its enumeration methods — or that any particular data set produced by the Bureau — are "necessary" to allocate prisoners for redistricting purposes. Accordingly, article III, section 4 of the New York Constitution does not require the Legislature to adhere to the Census Bureau's "usual residence rule" with respect to incarcerated individuals.

B. Article III Does Not Require that Incarcerated Individuals Be Treated as "Inhabitants" of a District Merely Because They Are Physically Present There.

Without citing a single case, Plaintiffs maintain that, under article III, people must be treated as "inhabitants," for redistricting purposes, of those places at which they are physically present, and that no other reading of the constitutional text is permissible. That claim is wrong for three reasons.

First, Plaintiffs ignore case law dating back more than a century in New York holding: (1) that "inhabitant" means "domiciliary"; and (2) that an incarcerated person remains domiciled in his or her home community. (*See* Defs.-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 10-16 (citing cases).) Though Plaintiffs characterize this substantial line of case law as so "much ink" (Pls.' Resp. Mem. at 5), they fail to explain why these cases are inapplicable or distinguishable from the situation in this case. In fact, there is not a single case in New York (*see* Defs.-Intervenors' Mem. in Supp. of

Mot. for Summ. J. at 11) — or in any other jurisdiction[15] — holding that the word "inhabitant" *must* be defined in terms of mere physical presence.

Plaintiffs' position ignores basic dictionary definitions of "inhabitants,"[16] and how courts have consistently defined the term. Indeed, as the U.S. Supreme Court observed in a case concerning the enumeration of the population for purposes of congressional apportionment, if "the mere living in a place constituted inhabitancy," such a definition would have "exclude[d] sitting members" of the early Congress from being able to represent their home states, including one who was physically absent from his home state during his entire elected tenure. *(Franklin*, 505 U.S. at 805 (quoting M. Clarke & D. Gall, Cases of Contested Elections in Congress 497 [1834]).) As the Supreme Judicial Court of Massachusetts explained while interpreting a similar provision of the Massachusetts Constitution governing redistricting, the "standard of residency for Federal census purposes is significantly different from the standard mandated by the definition of 'inhabitant,'" because "a person shall be considered an 'inhabitant' of the place where he

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[15] *Mitchell v. Kinney*, 242 Ala 196, 5 So2d 788, 793 [Ala 1942] ("[T]he terms 'legally resides,' 'inhabitant,' 'resident,' etc., when used in connection with political rights are synonymous with domicile"); *Ewing v. Mallison,* 65 Kan 484, 490 [1902] ("The words 'inhabitant' and 'resident' are usually synonymous."); *Ross v. Fowler*, 42 Miss 293, 299-301 [1868] (accepting argument that "[t]he terms inhabitant and resident are synonymous."); *State v. Snyder*, 182 Mo 462, 500 [Mo 1904] ("'inhabitant' ... and ... 'resident' ... are synonymous."); *Noble v. Noble*, 190 P 1061, 1063, 97 Or 497, 502 [1920] ("There is ... not a single primary definition of 'inhabitant' that does not in some way include residence"); *In re Lesker*, 105 A2d 376, 378, 377 Pa 411, 414 [Pa 1954] ("[T]he definition of inhabitant is one who resides permanently in a given place."); *Hogue v. Hogue*, 242 SW2d 673, 676 [Tex Civ App 1951] ("The words 'inhabitant,' 'resident,' and 'citizen,' as used in our statute pertaining to divorce, have substantially the same meaning. Temporary absence ... does not break the continuity of the residence or change the domicile of origin.") (internal quotation marks omitted); *Atkinson v. Washington & Jefferson College*, 54 W Va 32, 47 [1903] (the terms "resident" and "inhabitant" are "used synonymously").

[16] "Inhabitant" is defined as "a permanent resident" (American Heritage Dictionary 439 [4th ed. 2001]), or "[o]ne who resides actually and permanently in a given place, and has his domicile there" (Black's Law Dictionary 782 [6th ed. 1990]).

is domiciled." (*Opinion of the Justices*, 312 NE2d 208, 209-10, 365 Mass 661, 663-64 [Mass 1974] (interpreting the former Mass Const, art II).)[17] Thus, consistent with article III's mandate that state legislative districts must contain equal numbers of "inhabitants," Part XX simply seeks to ensure that incarcerated individuals are allocated where they are most properly considered "inhabitants," *i.e.*, where they are domiciled.

Second, Plaintiffs' contention that article III, section 5-a of the State Constitution redefines the word "inhabitant" from the common law notion of domicile by limiting it to mere physical presence is wholly unsupported by any authority. As Plaintiffs note, article III, section 5-a defines the term "inhabitants" as "the whole number of persons," but Plaintiffs cannot cite any authority stating that the term "inhabitant," or even the phrase "whole number of persons," must signify mere physical presence. Ironically, one of Plaintiffs' own exhibits indicates that *residence*, and not mere physical presence, is the proper standard to utilize when allocating populations for redistricting purposes. (*See* Citizen's Committee on Reapportionment, Report to the Governor, Dec. 1, 1964, at 11 [1964] (attached as Ex. A to Pls.' Resp. Affirmation) (observing that there are "three recognized measures of population": (1) Residents; (2) Citizens; and (3) Voters," and noting the legislative intent to replace "citizens" with "residents" as the basis for

[17] Intervenors-Defendants note that after this opinion was rendered, the Massachusetts Constitution was subsequently amended to re-define the term "inhabitants," to mirror the federal census's residence rules. (*See* Mass Const, art CIX ("[E]very person shall be considered an inhabitant of the city or town of his usual place of residence in accordance with standards used by the United States from time to time in conducting the federal census.").) But New York's Constitution contains no analogous revision of the term "inhabitant." Indeed, the revised text of the Massachusetts Constitution demonstrates how far short the language of the New York Constitution falls in imposing a specific 'usual residence' rule for redistricting. Equally notable, the new constitutional text in Massachusetts contains no exceptions to the rule that census standards are controlling for redistricting purposes, and thus stands in stark contrast to the New York Constitution, which clearly provides that census data are controlling "in so far as such census and the tabulation thereof purport to give the information necessary" for redistricting purposes (NY Const, art III, sec 4).

redistricting).) Thus, the only purpose of article III, section 5-a's use of the term "whole number of persons" was to ensure that "residents," and not "citizens," form the redistricting population base (*see* Defs.-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 16), not to change the common law definition of "inhabitant" from "domiciliary" to "person who is physically present." Given that incarcerated individuals are not "residents" or "inhabitants" of the places where they are confined (*see* NY Const, art II, sec 4), Part XX is entirely consistent with state constitutional commands.

Third, even if Plaintiffs were correct that there is a distinction between a person's residence for purposes of voting, and that person's residence for purposes of redistricting, it does not follow that the New York Constitution *prohibits* the Legislature from treating a person's residence for these two purposes in the same manner. Undoubtedly, voting residence under article II of the State Constitution and redistricting residence under article III are two concepts that — if not identical — are closely related, such that it is certainly rational — even if not required — for the legislature to harmonize them, particularly given the "considerable deference" owed to the State "in determining the parameters of an apportionment population." (*Longway v. Jefferson County Bd. of Supervisors*, 83 NY2d 17, 22 [1993].)

In sum, Plaintiffs have not satisfied their burden under article III of demonstrating that "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and [that] reconciliation has been found impossible.'" (*Wolpoff v. Cuomo*, 80 NY2d 70, 77-78 [1992] (quoting *Matter of Fay*, 291 NY 198, 207 [1943]).)

C. Plaintiffs' Claim that Part XX Violates Article III, Section 5-a of the Constitution by Failing to Count Certain Prisoners Is Unavailing.

In their Reply Brief, Plaintiffs argue that article III, section 5-a of the Constitution "requir[es] the counting of all inhabitants" in the State, and that Part XX violates this command by "rendering certain individuals in prison to be 'non persons' for the purpose of reapportionment." (Pls.' Resp. Affirmation ¶ 5.) This contention is unavailing. While Part XX certainly seeks a wholly accurate count of inhabitants, there is *no single data set* produced by any agency that accurately captures all individuals who are physically present in New York — whether prisoners or otherwise — and courts have been sympathetic to the "enormous difficulties" of doing so (*see Cuomo v. Baldrige*, 674 F Supp 1089, 1104 n 28 [SDNY 1987]). Perfection in enumeration is simply an impossible goal, and cannot be mandated as a constitutional standard.

As Plaintiffs note, Part XX provides that certain prisoners will not be included in the statewide redistricting population base, such as prisoners whose homes of residence are outside of the State of New York and prisoners whose home address cannot be determined due to gaps or errors in the State's administrative records. (*See* Pls.' Resp. Mem. at 12.) Incarcerated individuals from out of state are not properly understood as "inhabitants" of New York, for reasons discussed *supra*, pp. 11-14, and need not be included in the redistricting data set. As for incarcerated individuals who lack home address information due to record-keeping errors, such imperfections in the administrative record are not a basis for a finding of unconstitutionality. The text of article III, section 5-a does not state that *every single individual* who is physically present in New York must be included in the redistricting data set, nor does it demand a perfect enumeration of all such individuals, and there is no case law to that effect.

Indeed, every possible enumeration of the state population — including the data sets produced by the Census Bureau itself — fails to count tens of thousands of individuals living in New York. The Census Bureau itself acknowledged in a report to Congress that its last decennial tabulation of the population of New York was incomplete, insofar as it failed to count 209,123 individuals in the State (and over 3 million people nationwide).[18] It is, therefore, difficult to see how much smaller errors could be constitutionally problematic. Even more pertinent here, the Census Bureau has often failed to count prisons in the correct geographic locale: the 2000 census data featured numerous mistakes with respect to prison populations; for instance, it counted prisoners confined in Green Haven Correctional Facility in the wrong town (Milan, instead of Beekman, in Dutchess County), and counted prisoners confined at Sing Sing Correctional Facility at a census tract located in the middle of the Hudson River.[19] And, even if the Census count were perfectly accurate on the day that it was conducted — which it is not — it ceases to be accurate by the time it is used for redistricting shortly thereafter. In any context, the notion that such "inaccurate data" accurately reflects the current population amounts to a "legal fiction." (*Henderson v. Perry*, 399 F Supp 2d 756, 774 [ED Tex 2005] (quoting *Georgia v. Ashcroft*, 539 US 461, 489 n 2 [2003]), *aff'd in part, rev'd in part, League of United Latin American Citizens v. Perry*, 548 US 399 [2006].)

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[18] U.S. Census Monitoring Board, Presidential Members, Final Report to Congress 125 [Sept. 1, 2001], available at http://govinfo.library.unt.edu/cmb/cmbp/reports/final_report/FinalReport.pdf.

[19] *See* Michael Gannon, *Sing Sing Behind Bars – Sand Bars, according to Census*, The Journal News (Westchester County), Nov. 24, 2001, section B, at 10 (attached as Exhibit 1).

Plaintiffs offer no persuasive reason why less significant administrative errors should be treated any differently here.[20] At bottom, there is not — nor could there be — a constitutional requirement that redistricting data perfectly capture the entire population of the State. As the Court of Appeals has explained, "the issue" under article III is not whether a challenged statute "technically violates" the Constitution, because some minor errors are "inevitable," but rather "whether the Legislature has unduly departed from the State Constitution's requirements." (*Wolpoff*, 80 NY2d at 77 (intern al citations and quotation marks omitted).) There has been no such departure here, as Part XX's intent is to enumerate all incarcerated individuals at their home addresses to the extent possible.

In any event, even if this Court were ultimately to determine that the failure to count a small group of incarcerated individuals violates article III, Part XX's severability provision saves the statute from a finding of unconstitutionality. (*See* Defs.-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 17-18 n 18.) The severability provision permits this Court to leave in place those provisions of Part XX that allocate prisoners who have a home address in New York State, while striking down those provisions requiring the exclusion of other prisoners from the redistricting data set. There is no basis to strike down Part XX in its entirety because implementation issues result in the failure to count a small number of prisoners.

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[20] Plaintiffs erroneously claim that Census Director Robert Groves has stated that existing data concerning the home address information of prisoners has an error of up to 50%. (*See* Pls.' Resp. Affirmation ¶ 17 n 5.) Director Groves, however, made that comment in the context of explaining that, nationwide, "[a]dministrative records for state prisons vary widely in content." (*See* Robert Groves, Director, U.S. Census Bureau, *2010 Census: The Director's Blog: So, How Do You Handle Prisons?* [Mar. 12, 2010] (attached to Defs.-Intervenors' Mot. for Summ. J. as Ex. 1).) Director Groves was not making any representation about the quality of New York's prison records, and there is no evidence that there is an error rate in New York's prison records approaching such a figure.

D. *Longway v. Jefferson County Board of Supervisors* Does Not Mandate that Incarcerated Individuals Be Allocated Where They Are Confined.

Plaintiffs' reliance on the Court of Appeals' decision in *Longway v. Jefferson County Bd. of Supervisors*, 83 NY2d 17 [1993], is also unavailing for three independent reasons.

First, the Court of Appeals in *Longway* did *not* hold that incarcerated individuals *must* be counted where they are confined for redistricting purposes, but instead held that, under the Municipal Home Rule Law as it then read, prisoners were not "necessarily excluded" from the local population base (*id.* at 18). Thus, although *Longway* held that a municipality is entitled to "considerable deference in determining the parameters of an apportionment population" *(id.* at 22), including broad discretion over whether or not to include prisoners in the local population for redistricting purposes, "the court *did not require such inclusion.*" (*See Kaplan v. County of Sullivan*, 74 F3d 398, 401 [2d Cir 1996] (emphasis added).) And, indeed, a number of counties in New York — representing a majority of the counties with large prison facilities — did not count incarcerated individuals as members of the local population for redistricting purposes before *Longway*, and do not do so now. (*See* Wagner Affirmation in Supp. of Defs-Intervenors' Mot. for Summ. J. ¶ 66.) Paradoxically, six state senators who are plaintiffs in this case represent nine of the thirteen counties that currently remove the prison population from consideration during local redistricting, including lead Plaintiff Senator Elizabeth Little, who represents Clinton, Essex, and Franklin Counties, all of which exclude prisoners from redistricting.[21]

[21] Notably, Essex County has publicly stated that it refuses to count prisoners because "[t]he inclusion of these federal and state correctional facility inmates unfairly dilutes the votes or voting weight." Essex County Local Law No. 1 of 2003 (attached as Ex. 4 to Defs-Intervenors'

To be sure, the Court of Appeals' decision in *Longway* discussed some of the reasons why a municipality might *choose* to include prisoners in the local population for redistricting purposes, including the notion that "transients are also integral parts of their respective communities." (83 NY2d at 22.) But the Court of Appeals did not state that these rationales amounted to a *requirement* that prisoners must be counted where they are confined. Rather, the Court simply noted that legislatures could have rational reasons to treat transients as members of the local community. (*See id.*) But even after *Longway*, courts in New York have recognized that there are competing policy reasons weighing in the other direction: "prisoners live in a separate environment and do not participate in the life of [the local community]," such that excluding them from the local population base is entirely consistent with constitutional requirements. (*Kaplan*, 74 F3d at 401-02.)

Ultimately, the Court of Appeals in *Longway* stated that it would be "reluctant" to issue a ruling that would have required municipalities to count the population in any particular way (83 NY2d at 23), because legislatures are owed "considerable deference in determining the parameters of an apportionment population." (*Id.* at 22.) Just as that considerable deference militated against a ruling requiring the exclusion of transients in *Longway*, so too does it counsel against a ruling requiring the *inclusion* of prisoners in the local population here. As Judge Feinberg of the Second Circuit observed in discussing *Longway*, the question whether to include prisoners as part of the local population

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Mem. in Supp. of Mot. for Summ. J.) The remaining Plaintiff Senators who represent counties that currently exclude prisoners from redistricting are as follows: Patrick Gallivan (Wyoming County); George Maziarz (Orleans County); Thomas O'Mara (Chemung County); Stephen M. Saland (Dutchess County); and James Seward (Greene County). (*Compare* Peter Wagner, *et al.*, *Phantom Constituents in Empire State* 1-2 [July 18, 2007], available at http://www.prisonersofthecensus.org/nycounties/nycounties.pdf (listing the thirteen counties that exclude prisoners from local redistricting), *with* New York State Senate, *Senators*, available at http://www.nysenate.gov/senators (describing the districts of each Senator).)

necessarily "'involves choices about the nature of representation' that will not be interfered with" by the judiciary. (*Kaplan*, 74 F3d at 401.)

Second, *Longway* was limited to a question of statutory interpretation, and did not address the requirements of the State Constitution during the redistricting process. (*See id.* at 401 (noting that the "Court of Appeals did not address whether the exclusion of inmates from an apportionment base [in the locality where they are imprisoned] was constitutional.").) The Court of Appeals' decision in *Longway* was limited merely to a certified question of statutory interpretation from the Second Circuit: "whether the term 'population,' defined by Municipal Home Rule Law sec 10(1)(ii)(a)(13)(c) as 'residents, citizens, or registered voters,' ... necessarily excludes transients, such as military personnel, incarcerated felons, and occupants of group homes." (83 NY2d at 19 (quoting *Longway v. Jefferson County Bd. of Supervisors*, 995 F2d 12, 14 [2d Cir 1993] (internal quotation marks omitted).) In answering that question of statutory interpretation, *Longway* did not provide a definitive ruling as to the requirements of article III of the State Constitution, or even address the proper allocation of prisoners specifically (as opposed to "transients" generally) in any detailed way.

Third, *Longway*'s holding concerning the meaning of the Municipal Home Rule Law is no longer good law, because the statutory provision that *Longway* sought to interpret has now been amended by Part XX itself, which makes clear that a person does not become a resident of a municipality for redistricting purposes by virtue of being incarcerated there. (*See* Part XX, sec 3.) Because Part XX effectively overrules the Court of Appeals' statutory holding in *Longway*, it should no longer be relied upon as binding precedent.

Intervenors-Defendants are entitled to summary judgment as a matter of law because the undisputed facts show that Chapter 57 of the Laws of 2010 was not an appropriation bill. Rather, the undisputed facts show that Chapter 57 was a revenue bill. The "anti-rider" clause of article VII, section 6 of the New York Constitution, which Plaintiffs' Complaint alleges has been violated by the inclusion of Part XX in a budget bill, only imposes limits on what the Governor may include in an appropriation bill. A ruling for Plaintiffs on this claim would require that this Court apply the anti-rider rule — for the first time — to a revenue bill, for which it was not designed and is wholly inapplicable. (*See* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 18-24.)

Although Plaintiffs must meet the burden of showing an issue of fact to defeat Intervenors-Defendants' Motion for Summary Judgment, the entirety of Plaintiffs' Response to Intervenors-Defendants' (as well as Defendant DOCCS') Cross Motion for Summary Judgment consists of a conclusory reference to two affidavits[22] submitted by Defendant DOCCS, and an oblique footnote.

Plaintiffs have not introduced evidence contesting the substance of the affidavits. These affidavits, submitted in support of DOCCS' Cross Motion for Summary Judgment, do not put in dispute the only material fact — that Chapter 57 was not an appropriation bill. Rather, the affidavits constitute sufficient evidence to demonstrate that Chapter 57 was not an appropriation bill, but was in fact a revenue bill.

[22] *See* Pls.' Resp. Affirmation ¶ 4 ("Affidavits by Robert Megna and Joseph Pennisi raise factual disputes concerning the Second Cause of Action.")

Meanwhile, the footnote is certainly not material, or by its own admission, even in dispute.[23] The footnote text makes an unsupported reference to a supposed lack of a formal legislative document showing the bill was amended. This fact is not material to the issue of whether Chapter 57 was an appropriation bill. Even if the footnote could be read to put any fact in dispute, which it cannot, such dispute would relate only to the ancillary issue of whether Chapter 57 was amended; the footnote does nothing to dispute the material fact that Chapter 57 was not an appropriation bill.

The only evidence introduced demonstrates that Chapter 57 of the Laws of 2010 was plainly a tax revenue bill, not an appropriation bill, thus making the anti-rider provisions of the New York Constitution inapplicable.[24] Accordingly, Intervenors-Defendants are entitled to summary judgment on Count 2.

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[23] *See id.* ¶ 4, n 2 ("Whether amendments to the referenced Budget Bill S 6610 were a result of the Governor's re-submission of these budget bills or outright legislative amendments is not established by any formal document of the Legislature. A scrap of debate, whether correct or not is not sufficient to foreclose this factual possibility."). If this statement is designed to bolster Plaintiffs' tangential sub-point regarding the "no-alteration" clause of article VII, section 4, it is unavailing for that purpose, because the no-alteration provision does not apply to revenue bills such as Chapter 57.

[24] Plaintiffs do not present evidence suggesting that Chapter 57 was proposed by the Governor as "an act making appropriations" or that it contains appropriations of money for any purpose. Plaintiffs do not present evidence suggesting that the bill contains "emergency appropriation language," extends the previous budget, or places conditions on, or contains substantive policy decisions regarding how to spend funds appropriated in other bills. In contrast, the website of the New York State Division of the Budget identifies the bill that became Chapter 57 before it was codified, S6610-C/A9710-D under the heading "Revenue Budget Bill," not as an appropriation bill. (*See e.g.* New York State Division of the Budget, NYS DOB: 2010-2011 Budget Publications Archive, available at http://www.budget.ny.gov/pubs/archive/fy1011archive/1011archive.html.) The website lists all of the Governor's proposed appropriation bills under a separate heading titled "2010-11 Appropriation Bills," and properly excludes S6610-C/A9710-D from that list. (*See id.*)

In sum, the Court should grant summary judgment in favor of Intervenors-Defendants on Count 1 because there is no triable issue of material fact, and as a matter of law, Part XX is harmonious with article III of the State Constitution, which does not compel the state to allocate incarcerated individuals for redistricting purposes according to any particular data set promulgated by the Census Bureau, and which does not require that individuals be treated as "inhabitants" merely on the basis of physical presence. This reading of article III heeds the Court of Appeals' admonition that the Legislature should have "considerable deference in determining the parameters of an apportionment population." (*Longway*, 83 NY2d at 22.) But even if this were not the case, Plaintiffs' claim would still fail. At best, Plaintiffs have shown that there are competing plausible interpretations of article III. But to prevail, Plaintiffs must establish "beyond reasonable doubt" that "every reasonable mode of reconciliation of [Part XX] with the Constitution has been resorted to, and reconciliation has been found impossible.'" (*Wolpoff*, 80 NY2d at 77-78 (quoting *Matter of Fay*, 291 NY 198, 207 [1943].) As demonstrated above, Plaintiffs have clearly not satisfied that burden here.

II. The Anti-Rider Provision Does Not Apply to Part XX, Which Was Part of a Revenue Bill.

Plaintiffs "concede that ... no Summary Judgment can be had by the Plaintiffs on the Second Cause of Action" — Plaintiffs' argument that the Governor exceeded his authority by including Part XX in a budget bill (*see* Pls.' Resp. Affirmation ¶ 4). Summary judgment should be granted to Intervenors-Defendants on this claim because the claim cannot survive as a matter of law, and Plaintiffs fail to demonstrate any triable issue of material fact.

III. Part XX Adheres to Equal Protection Requirements.

A. Plaintiffs' Arguments Cannot Overcome the Deference Owed to the Legislature in Determining the Appropriate Treatment of Incarcerated Persons in Redistricting.

Plaintiffs' Equal Protection claims (Counts 3-6) must meet the difficult burden of establishing a violation under "rational basis" review (*see* Complaint ¶¶ 10, 173, 195, 205) (asserting Equal Protection violations on grounds of "irrational" classifications). Under the extraordinarily deferential "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[.]" (*Port Jefferson Health Care Facility v. Wing*, 94 NY2d 284, 290-91 [Ct App 1999]; *see also id.* (noting that a court "may even *hypothesize* the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack"); *Heller v. Doe*, 509 US 312, 320 [1993].) In their Memorandum in Support of their Motion for Summary Judgment, Intervenors-Defendants thoroughly discussed and documented the strong and legitimate reasons for the Legislature's determination that incarcerated persons more properly are allocated to their home residences for redistricting purposes (*see* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 28-38). In the section of their response that discusses the Equal Protection claims, Plaintiffs offer nothing that could overcome the deference owed to the Legislature under rational basis review, instead reiterating their policy preference for continuing to claim incarcerated populations as residents of prisons near which the Plaintiffs reside. This policy preference cannot establish an Equal Protection violation.

As noted in Intervenors-Defendants' Memorandum in support of Intervenors-Defendants' Motion for Summary Judgment, cases such as *Burns v. Richardson*, 384 US 73 [1966], confirm the deference owed to states in determining the appropriate population base for calculating population equality (Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 26-27). Plaintiffs' reliance on *Burns* as supporting their Equal Protection claim is thus mystifying. Indeed, their description of its holding is completely erroneous. For example, Plaintiffs state that *Burns* "does not allow for alteration in the way in which one counts population so as to deliberately exclude any countable population." (Pls.' Resp. Mem. at 14.) Plaintiffs include no page reference to *Burns* to suggest where that holding may be found — and in fact, *Burns* actually says the opposite: *Burns* notes that the Supreme Court's Equal Protection precedents have *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 US at 92.)

In a similar vein, Plaintiffs assert that *Burns* allows an alternative apportionment base only if it results in "counting more people, not a system that counts fewer people." (Pls.' Resp. Mem. at 14.) Again, Plaintiffs provide no page citation to *Burns* to support this assertion, which simply cannot be squared with the express statement in *Burns* quoted above. (384 US at 92.)

Even though *Burns* suggests that the Legislature could have simply excluded incarcerated persons from the population base as a matter of policy choice, Part XX actually ensures that most incarcerated persons will still be counted, but at their actual residential address — the address they retain for virtually all legal purposes in New

York.[25] Thus, if anything, Part XX is more protective of prisoners than Equal Protection principles require. Plaintiffs' new-found concern[26] for those discrete categories of incarcerated persons who will not be included in the population base — namely, those whose residence is out of state, whose home residence cannot be determined, or who are in federal prisons in New York — is simply misguided. Out-of-state residents, by definition, need not be included in the population base for redistricting; the other two categories simply reflect the reality that home addresses for such individuals may not be immediately available. This does not create an Equal Protection violation, because perfection is not required in carrying out valid legislative goals. (*See e.g. Gonzales v. Raich*, 545 US 1, 17 [2005] ("We have never required Congress to legislate with scientific exactitude"); *City of New Orleans v. Dukes*, 427 US 297, 305 [1976] (a "statute is not invalid under the Constitution because it might have gone farther than it did")

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[25] Contrary to Plaintiffs' arguments, New York law treats incarcerated persons as residents of their home community for many purposes, not just for purposes of voting as set forth in article II, section 4 of the Constitution. (*See Farrell v. Lautob Realty Corp.*, 612 NYS2d 190, 191 [NY App Div 1994] (venue was proper in defendant's county of residence, despite the fact that defendant was incarcerated in a different county); *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); *Laurence C. v. James T.R.*, 785 NYS2d 859, 861 [2004] (court maintained jurisdiction over custody dispute despite father's incarceration in another state); *Westbury Union Free Sch. Dist. v. Amityville Union Free Sch. Dist.*, 431 NYS2d 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); *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).)

[26] While Plaintiffs focus much of their response on the alleged violation of Equal Protection rights of those whose addresses cannot be determined or are in federal prison, their Complaint fails to allege a claim on behalf of such persons. Instead, the Complaint's Equal Protection Counts (Counts 3, 4, 5 and 6) all allege harm to Plaintiffs as voters or to non-prisoners housed in group quarters. If Plaintiffs now wish to amend their Complaint to assert the Equal Protection rights of incarcerated persons who may be excluded from the count if their address cannot be determined, they should be required to do so through the procedures set forth in NY CPLR 3025(b), not through a reply brief on a summary judgment motion. Of course, the current Plaintiffs would lack standing to raise such a claim in any event, given that none of them is an incarcerated person.

(citations and internal quotations omitted); *Bain Peanut Co. v. Pinson*, 282 US 499, 501 [1931] ("We must remember that the machinery of government would not work if it were not allowed a little play in its joints.").)[27]

Plaintiffs also suggest that *Longway v. Jefferson County Bd. of Supervisors*, 83 N.Y.2d 17 [1993], somehow establishes an Equal Protection requirement for treating incarcerated persons as residents of the prison. That is a clear misreading of *Longway*. In *Longway*, as already noted, the Court merely held that the Municipal Home Rule Law, *prior to its amendment by Part XX*, did not *compel* a municipality to exclude incarcerated persons from the population base for redistricting. While the *Longway* Court cited the possible impact of transient populations on the community as providing a rational basis for a municipality's decision to include them in redistricting, that in no way suggests that Equal Protection *forbids* a municipality, much less the State Legislature, from making a different choice. Indeed, by rejecting a challenge to the municipality's redistricting choices, *Longway* affirmed the deference that courts should give to such choices (*Longway*, 83 NY2d at 22) ("It is unquestioned that the States are granted considerable deference in determining the parameters of an apportionment population.").[28]

Thus, even if Plaintiffs had brought forward competent evidence supporting their conclusory statements about the impact that incarcerated populations allegedly have on

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(*See e.g. Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 773 [1991] (noting that standing requirements generally preclude one litigant from raising the legal rights of another).)

[27] Plaintiffs cite article III, section 5-a in support of their Equal Protection arguments. This serves merely to confuse the issues. The New York Equal Protection Clause is a separate provision of the Constitution, and is the basis for Counts 4 through 6 of the Complaint, while Count 3 is based on both the Equal Protection Clause and article III, section 4. Intervenors-Defendants have responded above, in Section I, to Plaintiffs' arguments concerning article III, section 5-a, which is irrelevant here. Moreover, Plaintiffs' arguments concerning article III, section 4's requirement of "equal number of inhabitants" also have been addressed above in Section I.

the prison community — and they have not — such evidence would at most establish that there may be differing views as to the best policy with respect to the treatment of incarcerated persons for purposes of redistricting. Such differing policy views cannot establish a violation of Equal Protection; they are for the Legislature to resolve, not the courts. (*See e.g. Federal Communications Comm'n v. Beach Communications, Inc.*, 508 US 307, 313 [1993] ("equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").)

Indeed, if Plaintiffs were correct that Equal Protection *requires* the inclusion of incarcerated persons in the prison community for redistricting, then many New York counties that have long excluded incarcerated persons when drawing their local districts would be forced to begin including those populations when drawing their local districts as well. As Intervenors-Defendants have previously noted (*supra* pp. 18-19; *see also* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 31), well before Part XX was enacted, thirteen upstate counties had decided to exclude incarcerated populations when drawing districts for local county government. (Prison Policy Initiative, Fact Sheet: Thirteen Counties Reject Prison-Based Gerrymandering [Dec. 18, 2009].)[29] In places such as Franklin County, an Equal Protection rule requiring inclusion of prison population would have resulted in a district with a *majority* incarcerated population after the 2000 Census — an absurdly distorted result. Several of the Plaintiffs in the current case are residents of counties that entirely excluded incarcerated persons from their local county districts after the last census; yet none have sought to challenge this exclusion on

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[28] *See also supra* pp. 18-21 (discussing *Longway*'s inapplicability to this case).

[29] Available at http://www.prisonersofthecensus.org/factsheets/ny/13_counties.pdf.

Equal Protection grounds.[30] A policy that is perfectly acceptable for county governments cannot become a violation of Equal Protection requirements merely because it will now be applied to state legislative districts as well.

B. Intervenors-Defendants Have Not Moved for Summary Judgment on Their Affirmative Defense, Rendering Irrelevant Plaintiffs' Argument that Intervenors-Defendants Have Not Sustained Their Evidentiary Burden.

In Part V of their response brief, Plaintiffs appear to be under the misimpression that Intervenors-Defendants have moved for summary judgment on their affirmative defense under the Equal Protection Clause (*see* Pls.' Resp. Mem. at 13-14.) While Intervenors-Defendants have pleaded as an affirmative defense that New York's previous practice of crediting incarcerated populations to the prison district, regardless of actual residence, violated Equal Protection, Intervenors-Defendants have not moved for summary judgment on that claim.[31] Intervenors-Defendants instead have moved for summary judgment solely as to the claims pleaded by Plaintiffs in their Complaint. Accordingly, Plaintiffs' arguments as to whether Intervenors-Defendants have supported their Equal Protection claim with sufficient evidence are simply irrelevant.

C. There Are No Material Issues of Disputed Fact that Can Save Plaintiffs' Equal Protection Claims from Summary Judgment.

Plaintiffs argue in Point VI that there are disputed issues of fact preventing summary judgment on their Equal Protection claims, but they identify only one such issue: whether any population deviations in the districts that will be drawn by the Legislature "will prove to be minor." (Pls.' Resp. Mem. at 15.) Plaintiffs then go on to argue that no such assessment can be made until the districts are actually drawn. (*Id.*)

[30]These include Wayne Speenburgh (Greene County) and Peter Tortorici (Cayuga County).

Plaintiffs do not identify which of their four Equal Protection arguments depends upon this assessment of population deviations in the plan to be adopted by the Legislature, but presumably they are referring to Count 3, which alleges that Part XX dilutes the voting strength of prison districts.

Plaintiffs do not appear to realize that if the Court cannot adjudicate Plaintiffs' claim until some future, contingent event occurs — such as the enactment of a redistricting plan by the Legislature — this does not establish the existence of a disputed issue of material fact. Instead, it establishes that the claim in question is not ripe and should be dismissed for that reason alone. "[I]f the anticipated harm is insignificant, remote or contingent the controversy is not ripe." (*Church of St. Paul and St. Andrew v. Barwick*, 67 NY2d 510, 519 [1986] (citing *Matter of New York State Inspection, Sec. & Law Enforcement Employees v. Cuomo*, 64 NY2d 233, 240 [1984]) (Plaintiffs' challenge to constitutionality of Landmarks Preservation Law was not ripe when agency action could ameliorate harm); *see also Federation of Mental Health Centers v. DeBuono*, 275 AD2d 557 [3d Dept 2000] (declaratory action challenging implementation of city's Mandatory Medicaid Managed Care Program was unripe, as Petitioner's causes of action were predicated on administrative determinations that had not yet been made).)

Accordingly, if the Plaintiffs are correct that resolution of Count 3 must await the Legislature's adoption of a redistricting plan, the Court should dismiss Count 3 for that reason. Because this is the only issue of disputed fact identified by Plaintiffs with respect to Plaintiffs' Equal Protection claims, the Equal Protection claims are in all other respects concededly ripe for summary judgment.

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[31] Adjudication of that claim will of course be unnecessary if summary judgment is granted against Plaintiffs.

For all of the foregoing reasons, and those set forth in Intervenors-Defendants' Memorandum in Support of Intervenors-Defendants' Motion for Summary Judgment, the Court should grant summary judgment dismissing Counts 3 through 6 of the Complaint.

IV. Part XX Can Not Be Invalidated as a Partisan Gerrymander.

Plaintiffs cannot make out their claim that Part XX is an impermissible partisan gerrymander because Part XX indisputably involves no drawing of district lines, and the case law is clear that it is not unconstitutional for legislators to promote and enact laws that incidentally advance their partisan interests, so long as there are other reasonable and valid justifications for the law. There certainly are reasonable and valid justifications for Part XX.

In Plaintiffs' response to Intervenors-Defendants' Motion for Summary Judgment on this claim, Plaintiffs do not even try to present contrary facts or contrary law. Instead, Plaintiffs' sole defense against the motion is that partisan gerrymandering claims are justiciable (*see* Pls.' Resp. Mem. at 17). This proposition is not clearly established by New York law (*see e.g. Bay Ridge Community Council, Inc. v. Carey*, 479 NYS2d 746, 749 [NY App Div 1984], *aff'd* 486 NE2d 830 [1985] ("a court is powerless to review a challenge to a reapportionment plan on the ground that it amounts to a partisan political gerrymander")). But in any event, this Court does not have to reach that question because Part XX is not a partisan gerrymander.

A partisan gerrymander has a commonly understood definition — "[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 US. 267, 272 n 1 [2004 plurality] (citing Black's Law Dictionary

696 [7th ed. 1999]).) Plaintiffs do not dispute this definition, nor do they present any facts suggesting Part XX can be deemed a partisan gerrymander. Senator Smith's statement, or the statement of any other legislator, even if reflective of thoughts and intents, does not transform the passage of legislation into a partisan gerrymander when that legislation clearly does not "divide a geographical area into electoral districts." (*Id.*) Thus, even if, arguendo, political gerrymandering claims were justiciable — a matter of considerable uncertainty — a political gerrymandering challenge to Part XX is entirely premature inasmuch as the statute at issue prescribes no district lines and imposes no district map.

In actuality, Plaintiffs' real contention is that the Legislature of New York was influenced by improper political motives when Part XX was passed; Plaintiffs have mislabeled the passage of Part XX as a "partisan gerrymander." But this claim is also not actionable. Legislation frequently has partisan, political consequences, and the case law is clear that those consequences are an insufficient basis for invalidating a plan where legitimate policy interests support the measure. (*See* Defs-Intervenors' Mem. in Supp. of Mot. for Summ. J. at 39-40.) Plaintiffs may disagree with the policy choice made by the Legislature to pass Part XX, but they do not and cannot dispute that there are a myriad of reasons for doing so (*see id.* at 25), and that is enough. There is no triable fact here, and summary judgment is appropriately granted for Intervenors-Defendants on Count 7.

CONCLUSION

For the reasons outlined above and in the Memorandum in Support of Intervenors-Defendants' Motion for Summary Judgment, it is respectfully requested that the Court enter summary judgment on all Counts in favor of the Intervenors-Defendants.

Dated: September 12 2011

Respectfully submitted,

MYRNA PÉREZ
WENDY WEISER
Brennan Center for Justice at New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (646) 292-8329
Facsimile: (212) 463-7308
E-mail: myrna.perez@nyu.edu
E-mail: wendy.weiser@nyu.edu

JOAN P. GIBBS
ESMERALDA SIMMONS
Center for Law and Social Justice at Medgar Evers College, CUNY
1150 Carroll Street
Brooklyn, New York 11225
Telephone: (718) 804-8893
Facsimile: (718) 804-8833
E-mail: jgibbs@mec.cuny.edu

BRENDA WRIGHT
Dēmos: A Network for Ideas and Actions
358 Chestnut Hill Avenue, Suite 303
Brighton, MA 02135
Telephone: (617) 232-5885, Ext. 13
Facsimile: (617) 232-7251
E-mail: bwright@demos.org

JUAN CARTAGENA
JOSE PEREZ
JACKSON CHIN
LatinoJustice PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
Telephone: (212) 739-7494
Facsimile: (212) 431-4276
E-mail: jcartagena@latinojustice.org

JOHN PAYTON
DEBO P. ADEGBILE
RYAN P. HAYGOOD

DALE HO
NATASHA M. KORGAONKAR
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013
Telephone: (212) 965-2200
Facsimile: (212) 965-7592
E-mail: dho@naacpldf.org
E-mail: rhaygood@naacpldf.org

ARTHUR EISENBERG
ALEXIS KARTERON
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, New York 10004
Telephone: (212) 607-3300
Facsimile: (212) 607-3318
E-mail: aeisenberg@nyclu.org
E-mail: AKarteron@nyclu.org
E-mail: AKalloch@nyclu.org

PETER WAGNER, ESQ.*
ALEKS KAJSTURA, ESQ.*
Prison Policy Initiative
P.O. Box 127
Northampton, MA 01061
Telephone: (413) 527-0845
Facsimile: (617) 849-5915
E-mail: pwagner@prisonpolicy.org
E-mail: akajstura@prisonpolicy.org

SIDNEY S. ROSDEITCHER
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 373-3238
Facsimile: (212) 492-0238
E-mail: srosdeitcher@paulweiss.com

*Admitted *pro hac vice*

To:

DAVID LEWIS, ESQ.

Attorney for the Plaintiffs
225 Broadway, Suite 3300
New York, NY 10007
Telephone: (212) 285-2290

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224
Telephone: (518) 474-4843

NYS Legislative Task Force On
Demographic Research and
Reapportionment
250 Broadway, Suite 2100
New York, New York 10007
Telephone: 212-618-1100

EXHIBIT 1

N1-198 #249

Subject: LexisNexis(TM) Email Request (702:0:70804623)
Date: Saturday, November 9, 2002 5:37 AM
From: LexisNexis Print Delivery (TM) <didsp00@lexisnexis.com>
To: <peterwagner@mac.com>
Category: Followup required

Saved Search Update Report: November 09, 2002 102030
Print Number: 702:0:70804623
Name: prison w/10 census
Selected Library: NEWS
Selected File(s): CURNWS

Saved Search: PRISON W/10 CENSUS

Update Schedule: Daily
Report Format: FULL
Date Saved: November 05, 2002 Previous Results: 425
Last Update: November 09, 2002 Last Update Results: 2
Next Update: November 09, 2002 Total Results (Nov 09): 427

Note:

1 of 2 DOCUMENTS

The Journal News (Westchester County, NY)

November 24, 2001 Saturday

SECTION: NEWS; Pg. 10B

LENGTH: 737 words

HEADLINE: OSSINING

BYLINE: Michael Gannon, Staff

BODY:

Sing Sing behind bars - sand bars, according to census

Map error ties prison to census tract that sits in Hudson River

Michael Gannon

The Journal News

A U.S. Census Bureau error has placed Sing Sing prison and its surrounding neighborhood in the wrong statistical subdivision, illustrating a larger problem with counting the population of large facilities around the country, said a state census expert.

Sing Sing was placed in the wrong census tract, but was still counted as part of the Ossining community. While in Sing Sing's case the error will have little tangible effect, similar mistakes made in other parts of the country have the potential to cause major problems, said Robert Scardamalia, executive director of the New York Data Center, the state agency that oversees the use of New York state's census figures.

Census data measuring things such as race, age, income and education levels form the basis for allocating sizable amounts of federal and state money to particular communities. Population data gathered in the census also is used to redraw congressional districts and to allocate county sales tax revenue. Assigning population from large institutions like prisons or colleges to the wrong communities could significantly skew census figures and affect what a community receives.

"This is the Census Bureau's problem," Scardamalia said. "We didn't create the problem and local governments didn't create the problem. The onus is on the bureau to do a nationwide analysis."

In Dutchess County, Green Haven Correctional Facility was mistakenly assigned to Milan, instead of Beekman, altering race, age, income and education-level data in both towns, Scardamalia said. In other states, institutions were placed in the wrong counties, he added.

Michael Lipkin, the U.S. Census liaison in the Westchester County Planning Department, said Sing Sing and Purchase College in Harrison were the only two instances in Westchester where large institutions were misplaced.

Population comparisons between 1990 and 2000 showed significant population drops in the census tracts that were supposed to contain the college and the prison.

Lipkin said the errors were of little concern to Ossining or Harrison because, while the institutions were in the wrong tracts, they remained in the right communities.

Census tracts are small statistical subdivisions of counties, delineated by local committees working with the Census Bureau. Tracts contain between 1,000 and 8,000 people, but typically include about 1,700 housing units and 4,000 people.

There were more than 60,000 census tracts in the United States in Census 2000.

Tracts are designed to have homogeneous population characteristics, economic status, and living conditions at the time they are established.

Census tract 133.03, the tract that should contain Sing Sing, contains no population data in Census 2000. Tract 133.04, part of which falls in the middle of the Hudson River, mistakenly was assigned the Sing Sing tract's numbers.

Census 2000 assigned tract 133.04 a total population of 6,957 people, an increase of 2,283 from the tract's 1990 population of 4,134. Sing Sing alone contains 2,269 people, according to Census 2000.

Officials do not know the exact cause of the Sing Sing and Purchase errors. Scardamalia said, however, that errors can be caused by something as simple as a clerical mistake - entering the wrong number on a census form. The reason can sometimes be more subtle, and more difficult to correct.

For instance, a college's administrative offices may be located in a different census tract than its dormitories. The administrative address, however, sometimes is mistakenly listed as the student population's address, altering the corresponding census tract's numbers, Scardamalia said.

It is too early to tell how Census 2000 errors in which large institutions were placed in the wrong community will affect everyday life in those places, Scardamalia said.

The amount of errors in Census 2000, however, is far greater than in the 1990 census, although Scardamalia wasn't sure why.

The causes may become clearer after the New York Data Center and Cornell University complete a statewide study of large institutions and where they were counted, Scardamalia said.

The center will forward the results to the U.S. Census Bureau and encourage the federal agency to conduct its own, nationwide study, he said.

LOAD-DATE: November 8, 2002

2 of 2 DOCUMENTS

The Journal News (Westchester County, NY)

March 16, 2001 Friday

SECTION: NEWS; Pg. 2A

LENGTH: 812 words

HEADLINE: Counting us up: How the census works

BYLINE: Elizabeth Ganga, Staff

BODY:

Bureau labors for years to get numbers

Elizabeth Ganga

The Journal News

Years before April 1, 2000, "Census Day," the government began preparing for the nationwide population count.

The Census Bureau began developing the questions for the 2000 count in the early 1990s, focusing in on government's need for data about the country. The bureau submitted the questions to Congress in March 1998 and conducted a dress rehearsal census in April 1998.

Twelve regional census centers were established across the nation, along with an area office in Puerto Rico. Also, 922 local census and field offices were established, where the bureau recruited huge numbers of temporary employees to collect and process data. At its peak, the census staff reached 860,000.

One major part of census preparations was developing an accurate list of all

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-

Index No. 2310-2011

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

AFFIDAVIT OF SERVICE

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.

AFFIDAVIT OF SERVICE BY OVERNIGHT DELIVERY

Jonathan P. Brater hereby subscribes and affirms under penalty of perjury that: he is not a party to this action; is over the age of eighteen years; and that on September 14, 2011, served a copy of the following document: Reply in Support of Intervenors-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment by UPS overnight delivery upon the following counsel in the above-referenced matter:

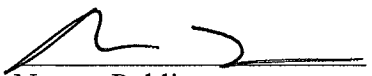
DAVID LEWIS, ESQ.
Attorney for the Plaintiffs
225 Broadway, Suite 3300
New York, NY 10007
Telephone: (212) 285-2290

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224
Telephone: (518) 474-4843

NYS Legislative Task Force On
Demographic Research and Reapportionment
250 Broadway, Suite 2100
New York, New York 10007
Telephone: 212-618-1100

Jonathan P. Brater
Brennan Center for Justice at
New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (646) 292-8389
Facsimile: (212) 463-7308

Sworn to before me this
14th day of September, 2011



Notary Public

MARK H. LADOV
NOTARY PUBLIC-STATE OF NEW YORK
No. 02LA6211303
Qualified In Kings County
My Commission Expires September 14, 2013