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December 23, 2011

Via E-mail and Overnight Mail

Andrew W. Klein
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

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

Dear Mr. Klein:

Please find enclosed the Intervenors-Respondents' letter in response to the court's jurisdictional question 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. Copies of this letter have been served on the parties.

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

Sincerely,

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December 23, 2011

Hon. Andrew W. Klein
Clerk of the Court
State of New York
Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Little v. NYS Task Force on Demographic Research*
Index No. 2310-2011 (Albany County)

Dear Mr. Klein,

Intervenors-Respondents respectfully request that this Court decline jurisdiction over Plaintiffs' appeal of the Supreme Court's decision in *Little v. LATFOR*, No. 2310-2011 [Sup Ct Albany County Dec. 1, 2011]. The Supreme Court properly dismissed Plaintiffs' challenge to Part XX of Chapter 57 of Laws of 2010 ("Part XX"), "which requires that inmates be counted for reapportionment purposes in their last known residence prior to their imprisonment rather than in the location of their assigned correctional facility." (Decision and Order at 3). This case does not present a substantial question of constitutional law under CPLR 5601(b)(2).

As this Court has held, merely claiming that a statute violates the State Constitution is not sufficient to meet the requirements for a direct appeal under CPLR 5601(b)(2). Jurisdiction under this section requires that the issues present "only" a "substantial" question of constitutional law. (*See, e.g., Temple v. Liebmann*, 7 NY 2d 1049 [1960]; *Uviller v. Luger*, 38 NY2d 854 [1976]; *see also,* KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS, [3rd ed] § 7.5). Even claims that are not frivolous may still be dismissed as insubstantial. (*See Matter of Kachalsky v Cacace,* 2010 NY Slip Op 1349, 1-2 [2010] (Smith, J., dissenting).[1]

[1] Cases cited by Appellants are wholly inapposite. Neither of the two family law cases, *Rose ex rel. Clancy v. Moody*, 83 NY2d 65, 67 [1993] or *In re Adoption of David A.C.*, 43 NY2d 708 [1977], involved the extraordinary request of a direct appeal from the Supreme Court and instead were appeals of appellate division decisions. In any event, *David A. C.* was dismissed by the Court of Appeal, like this case should be, because "it was no more than a restatement of questions whose merit has been clearly resolved against appellant's position," (43 NY2d 708, *underlying merits issue rev'd by Caban v. Mohammed*, 441 US 380, 385 [1979]). Unlike this case, two of the cases in fact did raise substantial constitutional questions. *In re Orans*, 15 NY2d 339, 345 [1965], involved a redistricting statute that was in violation of "the flat, positive and unmistakable command of the State Constitution," unlike this case in which there is no conflict. In additionas described later in this section, courts are required to construe the statute in a way that preserves its constitutionality. Similarly, *Rice v. Power*, 19 NY2d 106, 109 [1967], involved the question of roles played by the New York Supreme Court and the Constitutional Convention,

Initially, there are non-constitutional questions surrounding Plaintiffs' lack of standing on several of their claims, which defeats jurisdiction under CPLR 5601(b)(2). But even if this were not the case, this appeal presents no substantial constitutional question. Plaintiffs urge that Part XX violates Article III § 4 of the State Constitution, which requires that, for the purposes of reapportionment, the federal census "shall be controlling as to the number of inhabitants in the state or any part thereof...insofar as such census ... purport to give the information necessary therefor." Plaintiffs' argument in this regard is insubstantial for two reasons: First, the argument is premised on the mistaken claim that there is a conflict between Part XX and "the federal census" when, in fact, the U.S. Census Bureau issues data to assist with the implementation of legislation like Part XX. Second, Part XX is a reform that renders New York policy more consistent with Article III's requirement that election districts contain equal numbers of "inhabitants," as that term is properly understood under this Court's precedents.

Plaintiffs further argue that Part XX violates Article III Section 5-a of the State Constitution which requires "the actual numeration of all inhabitants." But Part XX is consistent with this constitutional requirement in its recognition that the term "inhabitant," properly understood, means "domiciliary" and that, under New York law, prisoners do not acquire domicile at their prison addresses, because they do not voluntarily reside in the prison facilities. Finally, Plaintiffs claim that Part XX violates the equal protection clause of the State Constitution, alleging that the counting of prisoners as residents at their pre-incarceration addresses is irrational. But, there are many rational justifications for the policy implemented by Part XX.

In sum, Plaintiffs have failed to raise a substantial question because they cannot overcome the extremely heavy burden they bear in this case. This is a facial challenge to the constitutionality of a statute, where Plaintiffs' "burden is a heavy one" (*Schulz v State of New York*, 84 NY2d 231, 241 [1994]. Moreover, Plaintiffs challenge a statute that sets the "parameters of an apportionment population," a context in which this Court has held that the legislature is entitled to "considerable deference." (*Longway v. Jefferson County Bd. of Supervisors*, 83 NY2d 17, 22 [1993]. *See also Burns v. Richardson* 384 U.S. 73, 92 [1966]) (acknowledging that courts must show deference to states when considering incarcerated persons for an apportionment base)). Ultimately, Plaintiffs cannot satisfy the burden they bear in attempting to establish a violation of Article III of the State Constitution, namely, that "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 NY 2d 79, 77-78 [Ct App 1992] (quoting *Matter of Fay*, 291 NY 198, 207 [1943]).)

Each of these matters is amplified below.

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the determination of which affected whether an aggrieved party was entitled to any form of judicial review at all.

The Issue of Plaintiffs' Lack of Standing to Raise Several of Their Claims Defeats Jurisdiction over This Appeal Under CPLR 5601(b)

At least two of Plaintiffs' claims implicate issues of standing, which preclude jurisdiction over a direct appeal. *See* New York Court of Appeals Civil Practice Outline, February 2011, Section 3.a (citing *NY State Club Ass'n v. City of New York*, 67 NY2d 717 [1986], *appeal transferred*).

First, Plaintiffs assert that Part XX violates Article III, Section 5-a of the State Constitution by excluding certain incarcerated individuals—namely, those who are not New York State residents, or whose addresses cannot be determined—from the population base during redistricting. *See* Plaintiffs' Letter at 2. None of the Plaintiffs, however, are incarcerated individuals, and Plaintiffs therefore lack standing to bring this claim. (*See Fairley v. Patterson*, 493 F.2d 598, 604 [5th Cir 1974] (plaintiffs lacked standing to challenge exclusion of students from redistricting plan because no plaintiffs were students).)

Second, Plaintiffs assert the Equal Protection rights of "voters and others." *See* Plaintiffs' Preliminary Appeal Statement, Issues Proposed, Point IV. Plaintiffs argued below that Part XX violates the Equal Protection provision of Article I, Section III of the State Constitution because Part XX allocates incarcerated populations to their home addresses without similarly reallocating other group populations such as students and military personnel. As the Supreme Court correctly noted, however, none of the Plaintiffs is a resident of a group quarters location, and therefore no Plaintiff has standing to challenge the differing treatment of these groups. (Decision and Order at 9; *See also, e.g. Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 773 [1991] (a litigant lacks standing to raise the legal rights of another)). Plaintiffs also challenged the legislature's decision to exclude incarcerated persons from the population base when their home residence is out of state, or cannot be determined, but Plaintiffs also lack standing to pursue that challenge because, again, none of the Plaintiffs is an incarcerated person. (*See Fairley*, 493 F.2d at 604.)

These standing issues alone thus prevent the Court from exercising jurisdiction over this appeal. Because a direct appeal under CPLR 5601(b)(2) is only proper where the *only* issue involved is the constitutionality of a statute, these standing questions, which are non-constitutional issues, bar jurisdiction under CPLR 5601(b)(2). (*See* New York Court of Appeals Civil Practice Outline, February 2011, Section 3.a).

Even if the standing issues did not preclude jurisdiction, this proposed issue fails to present a substantial constitutional question, for the reasons stated below.

Points I and II Fail to Present a Substantial Constitutional Question

Under Points I and II of their Statement of Issues, Plaintiffs claim that Article III, Section 4 of the State Constitution requires that incarcerated individuals be counted in the

places where they are confined during legislative redistricting. That claim is insubstantial for two simple reasons.

First, this claim is premised on the mistaken notion that there could be some sort of conflict between "the federal census" and Part XX. But, there is no single data set from the Census Bureau that can be referred to exclusively as the definitive method of counting the population. As the lower court correctly observed, the federal Census has "changed its approach to counting prison inmates," leaving states "free to decide the manner in which prisoners [a]re counted, namely, at the prisons, at their pre-incarceration addresses or altogether removed from redistricting formulas where residential information was unavailable." (Decision and Order at 6, quotation marks omitted).

Specifically, the 2010 Census included a data set known as the Group Quarters data ("GQ data"), which provides information as to the location of prisoners, and which was released *specifically to assist with the implementation of legislation like Part XX*:

> "[The GQ data will assist] those in the redistricting community who must consider whether to include or exclude certain populations.... Three states (Delaware, Maryland and New York) have legislation requiring use of group quarters data in their line drawing."

(U.S. Census Bureau, *2010 Census Advance Group Quarters Summary File*[2]).

Thus, rather than requiring any particular method, the Census seeks to empower states to make their own determinations as to how to allocate incarcerated individuals:

> "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."

(Robert Groves, Director, U.S. Census Bureau, *2010 Census: The Director's Blog: So, How Do You Handle Prisons?* (March 12, 2010)[3]).

Plaintiffs' claim under Counts I and II is insubstantial for a *second* reason: Part XX is consistent with Article III's requirement that election districts contain equal numbers of "inhabitants."[4] This Court 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

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[2] *Available at* http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html.

[3] *Available at* http://blogs.census.gov/2010census/2010/03/so-how-do-you-handle-prisons.html.

[4] *See* NY Const art III, §4 (Senate districts shall "contain as nearly as may be an equal number of inhabitants"); NY Const art. III., §5 (Assembly Districts "shall be apportioned ... as nearly as may be according to the number of their respective inhabitants.").

379, 1876 WL 12772 at *4 [1876].).[5] This Court has also held that 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 NY2d 111, 115 [1973] (emphasis added)).[6] Allocating incarcerated individuals to their pre-incarceration addresses is therefore an appropriate means of counting all individuals in conformity with Article III's requirement that districts contain equal numbers of inhabitants.

In claiming that the State must rely exclusively on data that do not conform to these rules on domicile and inhabitance, Plaintiffs misread the plain text of Article III, Section 4, which provides that Census data are controlling only "in so far as such census and the tabulation thereof purport to give the information necessary" for redistricting purposes. To the extent that any data from the federal Census continues to count incarcerated individuals where they are confined, rather than where they are "inhabitants," such data do *not* provide information "necessary" for redistricting, and therefore are not controlling under the plain terms of Article III, Section 4.

Point III Fails to Present a Substantial Constitutional Question

In Point III of their Statement of the Issues, Plaintiffs argue that Part XX prevents "the actual enumeration of all the inhabitants" of the State, in alleged violation of Article III, Section 5-a of the State Constitution. Point III also fails to raise a substantial constitutional question.

The only purpose of Article III, Section 5-a is to end the "exclu[sion of] aliens" from redistricting. *Loeber v. Spargo*, 391 Fed. Appx. 55, 58 [2d Cir Aug 27, 2010]. As the lower court correctly noted, Article III, Section 5-a does not require that "inmates whose addresses cannot be determined or who are from outside the state" be included within the count used for redistricting purposes. (Decision and Order at 7). 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 authority to that effect.

In fact, Plaintiffs' interpretation of Article III, Section 5-a is impossible to satisfy. Although Part XX certainly seeks a wholly accurate count of inhabitants, perfection in enumeration is simply an impossible goal, and cannot be mandated as a constitutional standard. Indeed, the Census Bureau itself acknowledged that the 2000 Census failed to

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[5] *See also* Black's Law Dictionary 782 [6th ed. 1990] ("Inhabitant. One who resides actually and permanently in a given place, and has his domicile there.") (citing *Ex parte Shaw*, 145 US 444, 449 (1892)).

[6] *See also* NY Const art. II, § 4 ("[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.").

count 209,123 individuals in New York.[7] In any context, the notion that such "inaccurate data" from the Census 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].).

Point IV Fails to Present a Substantial Constitutional Question

Plaintiffs' Equal Protection claim is resolved by the U.S. Supreme Court's decision in *Burns v. Richardson*, which specifically stated that the 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." (*Burns*, 384 US at 92.).

Even leaving aside *Burns*, Plaintiffs cannot prevail given the deferential "rational basis" standard of review applicable here, under which "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, 290-291 [1999]). Here, there is simply no substantial question as to the rationality of allocating incarcerated persons to their home communities for purposes of redistricting. *First*, it is in their home communities that incarcerated individuals are legal domiciliaries, and thus it is plainly rational to count them there for purposes of allocating political representation. *See supra* pgs. 4-5.

Second, the legislature had a rational basis to conclude that incarcerated individuals are not constituents of the places they are confined because they 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]). 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")).[8]

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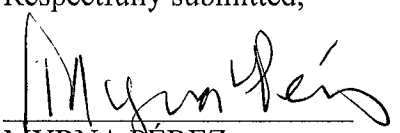
[7] *See* U.S. Census Monitoring Board, Presidential Members, *Final Report to Congress* 125 [Sept. 1, 2001], available at http://govinfo.library.unt.edu/cmb/cmbp/reports/final_report/FinalReport.pdf.

[8] 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 County Local 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)).

Moreover, Plaintiffs cannot make out a substantial Equal Protection claim on the grounds that Part XX fails to reallocate other group quarters populations. "[E]qual 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 [1974]; *Dalton v. Pataki*, 5 NY3d 243, 266 [2005]. Part XX clearly satisfies that standard. There are obvious differences between prisoners and other group quarter populations — such as people in college dormitories, nursing facilities, shelters and the like — who typically move to these residences on a voluntary basis. Unlike prisoners, they are generally able to establish domicile and residency for voting purposes at the group quarters location,[9] and are free to interact substantially with the community — shopping, using local services, and attending community events. They are a full part of the community in which they are counted. Accordingly, Plaintiffs' Equal Protection claim presents no substantial constitutional question supporting jurisdiction under CPLR 5601(b)(2).

Dated: December 23, 2011

Respectfully submitted,



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[9] *See Cesar v. Onandaga County Board of Elections,* 54 AD2d 1108 [4th Dept 1976]; (upholding right of student to register to vote), *lv dismissed* 40 NY2d 1079 [1976]; *Iafrate v. Suffolk County Board of Elections*, 42 NY2d 991 [1977] (upholding right of voluntary resident of psychiatric facility to register to vote).

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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,

Appellants,

-against-

INDEX NO. 2310-2011

AFFIDAVIT OF SERVICE

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

Respondents.

and

MICHAEL BAILEY, ROBERT BALLAN,
JUDITH BRINK, TEDRA COBB,
FREDERICK A. EDMOND III, MELVIN
FAULKNER, DANIEL JENKINS, ROBERT
KESSLER, STEVEN MANGUAL,
EDWARD MULRAINE, CHRISTINE
PARKER, PAMELA PAYNE, DIVINE
PRYOR, TABITHA SIELOFF, AND
GRETCHEN STEVENS,

Intervenor-Respondents.

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AFFIDAVIT OF SERVICE BY OVERNIGHT DELIVERY

Lianna Reagan hereby subscribes and affirms under penalty of perjury that: she is not a party to this action; is over the age of eighteen years; and that on December 23, 2011, served a copy of the following document: Intervenors-Respondents' letter in response to the court's jurisdictional question by UPS overnight delivery upon the following counsel in the above-referenced matter:

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Sworn to before me this
23rd day of December, 2011

Notary Public

Erica Weinstein
Notary Public, State of New York
No. 01WE6117587
Qualified in Kings County
Commission Expires November 01, 2012