

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE, SENATOR
PATRICK GALLIVAN, SENATOR PATRICIA
RITCHIE, SENATOR JAMES SEWARD, SENATOR
GEORGE MAZIARZ, SENATOR CATHARINE
YOUNG, SENATOR JOSEPH GRIFFO, SENATOR
STEPHEN M. SALAND, SENATOR THOMAS
O'MARA, JAMES PATTERSON, JOHN MILLS,
WILLIAM NELSON, ROBERT FERRIS, WAYNE
SPEENBURGH, DAVID CALLARD, WAYNE
McMASTER, BRIAN SCALA, PETER TORTORICI,
Plaintiffs,

-against-

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

Defendants,

-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,
Defendants-Interveners.

**ATTORNEY'S
AFFIRMATION IN
OPPOSITION TO
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT AND
IN SUPPORT OF
DEFENDANT DOCCS'
MOTION TO DISMISS
AND FOR SUMMARY
JUDGMENT**

Index No. 2310-11

Devine, J.

Stephen M. Kerwin, being an attorney admitted to practice before the Courts of the State of New York, affirms the following to be true under the penalties of perjury:

1. I am an Assistant Attorney General and of counsel to Eric T. Schneiderman, Attorney General of the State of New York, who is the attorney for defendant New York State

Department of Corrections and Community Supervision ("DOCCS") in this matter.

2. I make this affirmation in opposition to plaintiffs' motion for summary judgment and in support of DOCCS' motions to dismiss pursuant to CPLR 3211 (a)(7), and for summary judgment pursuant to CPLR 3212.

3. In this action, the plaintiffs, nine New York State Senators, and nine voters and residents of certain senatorial districts, challenge the constitutionality of a law enacted in 2010 which makes a modification in the way in which inmates in New York State prisons are counted for purposes of redistricting. That law, Part XX of Chapter 57 of the Laws of 2010 (hereinafter, "Part XX"), is now codified as New York Correction Law § 71 (8) and Legislative Law § 83-m (13)(b). A copy of chapter 57 of the Laws of 2010 is annexed as Exhibit A. Part XX appears on pages 111-113 of the exhibit.

4. A copy of the Complaint in this matter is annexed as Exhibit B. It seeks a declaration that the amendments to the Corrections Law and the Legislative Law made by Part XX are null and void as unconstitutional; a permanent injunction against co-defendant New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") prohibiting it from "using amended data subsets regarding incarcerated persons in any other manner than counting them as inhabitants of their place of incarceration as enumerated by the Federal Decennial Census;" and "a permanent injunction against [DOCCS] prohibiting the transfer of any information of an incarcerated person's 'residence' as being any other than the address of the institution where they are incarcerated." Complaint, page 30.

5. Defendant DOCCS appeared in this action, by and through Attorney General Schneiderman, serving on May 13, 2011 the Answer attached as Exhibit C. Among the

affirmative defenses asserted by DOCCS in its Answer are allegations that the Complaint presents claims which are non-justiciable; that the Complaint fails to state a cause of action in whole or in part; and that the Complaint, insofar as it presents a facial challenge to Part XX, fails to state a cause of action.

6. Co-defendant LATFOR has advised the Court by letter dated May 11, 2011, that it would make no formal submission to the Court in response to this lawsuit. A copy of LATFOR's letter of May 11, 2011 is attached as Exhibit D.

7. Attached as Exhibit E are documents which are part of the legislative history of Article III, § 4, including: In the Matter of The Reapportionment of the State of New York Into New Senate and Assembly Districts, Pursuant to Joint Resolution Adopted By The Legislature of the State of New York, Counsel's Report, March 13, 1935, page 8; Public Papers of Alfred E. Smith, Forty-seventh Governor 1926, page 69; Public Papers of Alfred E. Smith, Forty-seventh Governor 1927, page 65; Public Papers of Alfred E. Smith, Forty-seventh Governor 1928, page 96; and Public Papers of Franklin D. Roosevelt, Forty-eighth Governor, 1929, pages 137-138.

8. Attached as Exhibit F is a copy the New York State Senate Introducer's Memorandum In Support of Senate Bill S6725A, revised on June 9, 2010. Upon information and belief, that bill was substantively identical to that which became Part XX in Chapter 57 of the Laws of 2010.

August 18, 2011
Albany, New York

s/

Stephen M. Kerwin