SUPREME COURT STATE OF NEW YORK
COUNTY OF ALBANY

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

Index No. 2310-11

Plaintiffs,

-against-

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

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs Senator Elizabeth O'C. Little, Senator Patrick Gallivan, Senator Patricia Ritchie, Senator James Seward, Senator George Maziarz, Senator Catharine Young, Senator Joseph Griffo, Senator Stephen M. Saland, and Senator Thomas O'Mara (collectively, the "Senator Plaintiffs") and Plaintiffs James Patterson, John Mills, William Nelson, Robert Ferris, Wayne Speenburgh, David Callard, Wayne McMaster, Brian Scala And Peter Tortorici, (collectively, the "Citizen Plaintiffs") respectfully submit this memorandum of law in support of their motion for summary judgment pursuant to CPLR §3212.

Plaintiffs seek a declaratory judgment pursuant to CPLR §3001 declaring that Part XX of Chapter 57 of the Laws of 2010 ("Part XX") is unconstitutional under the New York Constitution. Plaintiffs also seek a permanent injunction enjoining defendants New York State Legislative Task Force on Demographic Research and Reapportionment (herein "Task Force") and New York State Department of Corrections and Community Services ("DOCS")[1] – sued herein as "New York State Department of Corrections" – from implementing Part XX.

STATEMENT OF FACTS

On August 11, 2010, then-Governor David Patterson signed an appropriation bill (Assembly Bill A9710-D) into law as Chapter 57 of the Laws of 2010. Part XX of Chapter 57 amended the Correction Law, the Legislative Law and the Municipal Home Rule Law with respect to the collection of census data for the purposes of redistricting at the State and municipal levels. It changed the place where prisoners are counted for apportionment purposes from the place where they are incarcerated to the place where they last resided before their incarceration.

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

Part XX amended the Section 71 of the N.Y. Correction Law by adding a new subdivision 8 as follows:

(a) In each year in which the federal decennial census is taken but in which the United States bureau of the census does not implement a policy of reporting incarcerated persons at each such person's residential address prior to incarceration, the department of correctional services shall by July first of that same year deliver to the legislative task force on demographic research and reapportionment the following information for each incarcerated person subject to the jurisdiction of the department and located in this state on the date for which the decennial census reports population:

(i) A unique identifier, not including the name, for each such person;
(ii) The street address of the correctional facility in which such person was incarcerated at the time of such report;
(iii) The residential address of such person prior to incarceration (if any); and
(iv) Any additional information as the task force may specify pursuant to law.

(b) The department shall provide the information specified in paragraph (a) of this subdivision in such form as the legislative task force on demographic research and reapportionment shall specify.

Part XX amended the Section 83-m of the N.Y. Legislative Law by adding a new subdivision 13 as follows (in part):

… Until such time as the United States bureau of the census shall implement a policy of reporting each such incarcerated person at such person's residential address prior to incarceration, **the task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities.** For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph. **The task force shall develop and maintain such amended population data set and shall make such amended data set available to local governments, as defined in subdivision eight of section two of the municipal home rule law, and for the drawing of**

> **assembly and senate districts. The assembly and senate districts shall be drawn using such amended population data set.** (Emphasis added.)

Part XX also amended the N.Y. Municipal Home Rule Law §10(1)(ii)(a)(13)(c) by adding the following language to the definition of "population":

> [For the purposes of apportionment] …no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of corrections and community supervision and present in a state correctional facility pursuant to such jurisdiction.

Chapter 57 of the Laws of 2010 was an appropriations bill. Under Article VII of the Constitution, appropriations bills are treated differently from other legislation, and the power of the legislature is limited by a "no alteration" provision, Art. VII, §4. The legislature may not alter an appropriations bill except to strike out, reduce or add appropriation items. It must then enact or reject the bill in its entirety. Further, the content of an appropriations bill is limited to items which relate specifically to some appropriation in the bill. Art. VII, §6. There is no exception for items relating to apportionment or the counting of the State's population. Finally, Chapter 57 was presented by the Governor as an "extender", i.e. the alternative to the enactment of the bill would have been the shutdown of the entire state government.

The facts are more fully set forth in the affirmation of David L. Lewis, dated August 5, 2011.

ARGUMENT

POINT I

PART XX PURPORTS TO CHANGE THE METHOD OF COUNTING PRISONERS FOR PURPOSES OF APPORTIONMENT, IN VIOLATION OF THE NEW YORK CONSTITUTION

Article III, §4 of the New York Constitution provides that the most recent federal census shall determine the population in any part of the State for apportionment purposes. It states, in pertinent part, that:

> [T]he federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.

This constitutional provision requires the use of the Federal decennial census as a wholly objective method of enumeration, outside and above the political control of the state legislature. It establishes a neutral, objective source of data for New York apportionment.

Part XX supplanted this constitutional provision with a new method, which would create a new database for apportioning Assembly and Senate districts, and which would count prisoners at their respective last residential addresses prior to incarceration, if they can be determined. Further, it would disregard prisoners whose last prior addresses either couldn't be determined or were out of state. This directly violates Art. III §4, which makes federal census data controlling, as well as Art. III §§5 and 5-a, which require the enumeration of all non-alien inhabitants of the State.

In performing the federal census, the U.S. Census Bureau (the "Census Bureau") counts incarcerated persons at the address of the institution where they are housed. In a February 21, 2006 report entitled "Tabulating Prisoners at Their 'Permanent Home of Record' Address", the

Census Bureau explained the policy reasons for counting prisoners where they are confined rather than attempting to count them at some other "permanent home of record" address.[2] These reasons include, among others, the data quality and accuracy, the questionable validity of addresses provided by certain prisoners, the fact that many prior residence addresses may be outdated, and the incorrect assumptions that could result from counting prisoners at prior addresses (i.e., the implication that more housing is currently required there, or that the prisoners are available to contribute to the support of persons at that location).

Many of the prisoners in State correctional facilities serve long, indeterminate sentences. These prisoners may have no continuing connection to their prior addresses, and may not ever have the ability or intention to return there, certainly not within the term of the current decennial census. Other prisoners serve life sentences without the possibility of parole, and will never have the ability to return to their prior addresses.

The State prison population constitutes a burden on the resources of the communities where the prisoners are confined, including the local courts, hospitals and health services, water sewer and other infrastructure. Such communities must consider prison populations when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services. By contrast, State prisoners neither burden nor contribute to the communities where they previously resided.

The Census Bureau's method of counting prisoners is consistent with its method of handling other individuals and groups. Under the Census, persons are counted at the location where they are found. Thus a person can be counted in his home because it is the place where he resides. A prisoner confined in a penitentiary is found at that address and enumerated at that

[2] A copy of the February 21, 2006 report of the U.S. Census Bureau is attached as exhibit "D" to the affirmation of David L. Lewis, dated August 5, 2011.

place. A student is found in a dormitory and is enumerated there. A person confined to a rest home, a mental hospital or a rehabilitation facility is found there and counted at that address. No specific realignment of any of these persons back to their originating address is done by the Census.

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

Nor is the Census Bureau's method of counting prisoners, for apportionment purposes, as residents of their place of incarceration inconsistent with Art. II, Section 4 of the State Constitution, which provides, in pertinent part, that "[f]or the purposes 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." (Emphasis added.) This provision is completely irrelevant here, because felons are disenfranchised in this State. *See,* N.Y. Election Law §5-106. For the same reason, similar language at Election Law §5-104 pertaining to registration and voting is likewise irrelevant to the method of counting prisoners for purposes of apportionment.

Forbidding felons from voting has been found valid under the federal Constitution and the Voting Rights Act. Hayden v. Pataki, 449 F.3d 305 (2d Cir. *en banc* 2006).

Here, the amendments to the Correction Law, the Legislative Law and the Municipal Home Rule Law contained in Part XX violate Article III, §4 of the State Constitution, which requires that the Federal Census data be "controlling as to the number of inhabitants in the state or any part thereof for the purposes of apportioning members of assembly and readjustment or alteration of senate and assembly districts."

Under Art. III, § 5 of the Constitution, the apportionment process begins by taking "the whole number of inhabitants of the state, excluding aliens." The term "inhabitants excluding aliens" is further defined as "the whole number of persons." *See*, Art. III, §5-a.

However, Part XX completely excludes from the count all prisoners from outside New York State, and those whose prior addresses cannot be identified, despite the fact that they remain "inhabitants" of New York. Therefore, the enactment of Part XX violated Art. III, §§ 5 and 5-a, of the New York Constitution, which requires that the number of "inhabitants, excluding aliens" be considered for purposes of apportionment.

Further, by excluding from the count all prisoners from outside New York State, and those whose prior addresses cannot be identified, Part XX also violates the Constitutional requirement that Senate districts "shall contain as nearly as may be an equal number of inhabitants". *See*, Art. III, §4 of the Constitution.

Part XX denies equal protection in violation of Article I, Section 11 of the Constitution, by artificially increasing the representation of persons in certain urban areas, and decreasing the representation of persons in districts with prison institutions, whose community resources, including the local courts, hospitals and health services, water, sewer and other infrastructure are

burdened by the needs of the prison populations, and whose communities must consider these needs when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services.

Nor was Part XX adopted in accordance with the proper procedures for amending the State Constitution. These procedures, set forth at Article XIX, §1 of the State Constitution, include, *inter alia,* passage at two successive legislative sessions, and ratification by the voters. Article XIX, §1 of the State Constitution provides that:

> Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.

The failure to comply with the requirements for adopting an amendment to the State Constitution is fatal to any attempt at constitutional amendment. In Browne v. New York, 213 A.D. 206 (1st Dept. 1925), *aff'd* 241 N.Y. 96 (1925), the First Department held that "[t]he provisions of a constitution which regulate its amendment are not directory, but mandatory, and

that a strict observance of every substantial requirement is essential to the validity of the proposed amendment."

In affirming Browne, Judge Cardozo emphasized the importance of the amendment process, including the requirement of action by two legislatures and the people:

> There is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion. 241 N.Y. at 109.

The importance of the amendment process was again stressed in Frank v. State, 61 A.D.2d 466 (2d Dept. 1978), *aff'd on App. Div. opinion*, 44 N.Y. 2d 687 (1978):

> Since it prevents alteration of the fundamental law of the State, except by the most deliberative and time-consuming of processes, section 1 of article XIX must be deemed one of the most important provisions of our State Constitution. 61 A.D.2d at 469, n.2.

The enactment of Part XX constituted an improper and unauthorized attempt to change the constitutionally mandated method of counting prisoners for the purposes of legislative apportionment. Indeed, the manner of its enactment was the opposite of the deliberative, time-consuming process of amendment provided in the Constitution and required by the courts. Part XX was enacted as part of an appropriations bill despite the fact that it had nothing to do with the budget. The rules which govern appropriations bills effectively prevented alterations or amendments by the legislature. The fact that the bill was an "extender" meant that the only alternative to the enactment of the entire bill was the shutdown of the government of the State. This entire process was designed to be "hasty" and "ill considered", rather than "deliberative and time-consuming", as required for amendments to the Constitution.

The Constitution limits the power of the legislature, and laws passed in violation of the Constitution can have no effect:

> The legislature and the courts are alike bound to obey the Constitution, and if the legislature transgresses the fundamental law and oversteps in legislation the barriers of the Constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the Constitution itself against infringement.
> ….
> [I]f any provision of the fundamental law of the state intended to secure the equal representation of its citizens in the legislative department has been violated by the act in question, it is then properly the duty of the judicial department of power to declare it unconstitutional and, therefore, void. The judiciary has a duty to pronounce all legislative acts null which are contrary to the manifest tenor of the Constitution of the state. Sherrill v. O'Brien, 188 N.Y. 185, 196-97 (1907) (Citations omitted)

See also, Mooney v. Cohen, 272 N.Y. 33, 37 (1936), where the Court of Appeals stated that the Home Rule provision of the Constitution "has restricted the legislative powers of the Senate and the Assembly", and Roe v. Board of Trustees of the Village of Bellport, 65 A.D.3d 1211 (2d Dept. 2009), where constitutional courts were found to be beyond the power of the legislature.

Here, the Constitution provides a specific method of enumerating the inhabitants of the State, and yet Part XX provides a different method and achieves a different result. As the Court of Appeals said in King v. Cuomo, 81 N.Y. 2d 247 (1993):

> When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers ... as indicated by the language employed" and approved by the People…
>
> [I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms…That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves. 81 N.Y. 2d at 253 (internal quotes and citations omitted).

The enactment of Part XX amounts to a total disregard of the Constitution. There was no attempt to conform Part XX to the relevant constitutional provisions. As in N.Y.S. Bankers Association Inc. v. Wetzler, 81 N.Y. 2d 98 (1993), there can be no argument about substantial compliance:

> Here … there is a conceded violation of the constitutional provision and no basis for a claim of partial compliance. Without even a semblance of conformity, the Legislature simply proceeded to alter the Budget Bill submitted by the Governor in outright disregard of the dictates of the Constitution. It is self-evident that total noncompliance cannot amount to substantial compliance. 81 N.Y. 2d at 103-104.

In the case at bar, the Court can declare that Part XX is unconstitutional without affecting the rest of the appropriations bill. Part XX, section 4 (Severability) provides that:

> If any section, subdivision, paragraph, subparagraph, clause or other part of this act or its application is held to be invalid by a final judgment of a court of competent jurisdiction, such invalidity shall not be deemed to impair or otherwise affect the validity of the remaining provisions or applications of this act that can be given affect without such invalid provision or application, but such invalidity shall be confined to the section, subdivision, paragraph, subparagraph, clause or other part of this act or its application directly held invalid thereby, which are declared to be severable from the remainder of this act….

For the foregoing reasons, the Court should grant summary judgment in favor of the Plaintiffs declaring that Part XX of Chapter 57 of the Laws of 2010 is unconstitutional under the New York Constitution.

POINT II

PART XX WAS NOT A PROPER ADDITION TO AN APPROPRIATION BILL UNDER THE NEW YORK CONSTITUTION

Chapter 57 of the Laws of 2010 (Assembly Bill A9710-D), including Part XX thereof, was enacted as an appropriations bill. However, Part XX was nonfiscal and nonbudgetary in nature. The State Constitution restricts the content of appropriation bills. Article VII, §6 provides that:

> Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.
>
> **No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates**

> **specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.** (Emphasis added.)

In Pataki v. N.Y. State Assembly, 4 N.Y.3d 75 (2004), the Court of Appeals stated that "[A] Governor should not put into [an appropriation] bill essentially nonfiscal or nonbudgetary legislation." While the Pataki Court found that the provisions of the appropriations bill there were fiscal in character, it warned that:

> When a case comes to us in which it appears that a Governor has attempted to use appropriation bills for essentially nonbudgetary purposes, we may have to decide whether to enforce limits on the Governor's power in designing "appropriation bills" or to leave that issue, like the issues of itemization and transfer, to the political process…

4 N.Y.3d 75 at 97.

The purpose of Article VII is to restrict the power of the Legislature in budgeting areas. By the terms of the Constitution, the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items of appropriation or add items. Art. VII §4. The Legislature must then enact or reject the appropriations bill in its entirety. The "no alteration" provision is a Constitutional limitation on Legislative power. Further, the State Constitution explicitly limits the substantive content of an appropriation bill by the "anti-rider" clause, under which no provision shall be embraced in any appropriation bill, unless it relates specifically to some particular appropriation in the bill. Any such provision shall be limited in its operation to such appropriation. Art. VII §6.

Here, Part XX amended three different statutes in order to change the method of counting State prisoners for purposes of legislative apportionment. These nonfiscal and nonbudgetary enactments were not properly inserted into the appropriation bill. Rather, they should have been

enacted, if at all, as an amendment to Article III, §4 of the State Constitution, pursuant to the procedures for amending the Constitution set forth at Article XIX, §1.

Because Part XX was erroneously included as part of an appropriations bill, the State Legislature was deprived of the power otherwise granted to it by Article III of the Constitution to alter or remove it. Because the Governor placed the non-budgetary item into an Article VII budget revenue bill, no Senator was able to amend the Article VII bill to remove Part XX. See, Art. VII, §4. Furthermore, rather than utilize the deliberative, time-consuming process for amending the Constitution set forth in Article XIX, §1, the Governor presented Part XX as part of a budget "extender", the emergency enactment of which was required to avert an imminent government shutdown.

CONCLUSION

Part XX was an attempt to amend the Constitution without following the method for amendment proscribed by the Constitution itself. The enactment of Part XX constituted an improper and unauthorized attempt to change the constitutionally mandated method of counting prisoners for the purposes of legislative apportionment. The manner of its enactment was the opposite of the deliberative, time-consuming process of amendment provided in Article XIX and required by the courts. Part XX was enacted as part of an appropriations bill despite the fact that it had nothing to do with the budget. The constitutional provisions in Article VII which govern appropriations bills effectively prevented alterations or amendments by the legislature. In each area, legislative apportionment, budget bills, and amendments, the New York State Constitution establishes rules that must be followed. In each of these areas, the enactment of Part XX exceeded the power of the Legislature to change the method of apportionment, or to amend the

Constitution, and its inclusion in a budget bill exceeded the power of the governor to act. Each is an independent basis to find Part XX unconstitutional.

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

Dated: New York, New York
August 5, 2011

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