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, PETER TORTORICI,

Plaintiffs,

-against-

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

Defendants.

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INDEX NO. 2310-2011

MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO INTERVENE

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SUPREME COURT STATE OF NEW YORK
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PRELIMINARY STATEMENT

Plaintiffs respectfully submit the instant Memorandum of Law in Opposition to the Motion to Intervene filed by activists organizations, individuals and various entities claiming intervention as of right and seeking permissive intervention. For the reasons discussed below, the motions of each of the Intervenors, filed collectively as one motion should in all respects be denied.

STATEMENT OF FACTS

The instant action brought against the New York State Department of Corrections ("DOCS")[1] and the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) by a number of state senators, all of whom have prison populations in their districts and citizen voters all of whom were affected by the enactment of Section XX of the Laws of 2010. Article IV Section of the New York State Constitution provides that the federal decennial census shall be controlling for the purposes of reapportionment by the state of New York seats in the U.S. Congress, and the seats in the state legislature. Article II of the State Constitution provides only that "for purposes of voting, no person gains or loses a residence, when they are incarcerated. "Section XX of an Article VII budget bill created a means of counting incarcerated persons that is diametrically different from the means employed by the United States Census which counts prisoners where they are found, in their cells in their institutions. Section XX purports to count prisoners "in their homes", that is to say, where they came from without regard to their actual physical presence, the presence of others in that domicile or whether they will in fact ever complete their terms. Intervenors seek to in effect that

[1] Between the time of the filing of the complaint and the answer, the name of the agency was modified and now is called "DOCCS".

persons in areas from which prisoners came from should receive "extra votes" because someone who used to live there or near him should not be counted where they actually are.

Plaintiffs brought a declaratory judgment under CPLR 3001 seeking a declaration that Section XX is unconstitutional under the New York State Constitution. Proposed Intervenors sought agreement of the plaintiffs on the issue of intervention. Plaintiffs have refused to agree to permit intervention. The motion by the Intervenors followed.[2] Intervenors claim without a shred of support that this matter would determine their "voting rights". Intervenors seek to litigate whether Section XX is mandated by the Fourteenth Amendment, a matter more appropriate and significantly available for litigation on this issue when the legislature enacts reapportionment in 2012.

Intervention should not be permitted as of right or as a matter of discretion by the court on the basis that the Intervenors do not have an appropriate legal basis.

The intervention claims boil down to substantively claims that the advocacy groups have worked very hard to get the legislation enacted, spent resources and time in support of such legislation, and have devoted time to promoting the basic

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[2] As a consequence certain of the case law relied upon by proposed Intervenors is inapposite given that the parties in those cases agreed to intervention. See e.g. Dalton v. Pataki, 5 N.Y.3d 243, 278 (2005), cited by proposed Intervenors at p. 16 of their Memorandum of Law.

correctness of their own acts in getting such legislation passed. No law supports intervention on the basis of a citizen's investment in its own role in representative government. Another class of intervenors is citizen voters who claim that if the law were to be held unconstitutional then they would suffer dilution of voting rights of theirs under the 14th Amendment. Should Plaintiffs prevail on their constitutional claim, then proposed Intervenors are not bound by the judgment as to the issue of constitutionality, and would be able to litigate their claim in the appropriate context of voter dilution, in the context of a challenge to reapportionment. In this action they seek to inject new matter as an affirmative defense, as demonstrated by their proposed pleading and should not be permitted to intervene to litigate in effect a different case, bootstrapping into the question of constitutionality of this enactment, a general attack on the return to status quo, prior to the enactment. Finally, the Intervenors insist on the right to present their case because they believe that the defendants, DOCS and LATFOR will not defend their interests adequately. Both parties are, in effect, State of New York actors and are defended by the Attorney General, whose primary constitutional duty is to defend the constitutionality of legislation passed by the legislature and otherwise defend the state. This contention is untenable and should not permit

intervention. Further, it appears that the Attorney General having elicited a response from LATFOR regarding representation, turned over to the proposed Intervenors since they have LATFOR's "position" which was not a public document but was elicited by the Attorney General from LATFOR.

The proposed intervention rests upon one overt distortion of the state constitution concerning Article II Section 4 and a flawed major proposition in the reasoning that permits proposed Intervenors to assert that they belong in this action. The first and foremost distortion is the claim that prisoners are entitled to be counted at the homes at which they no longer are present because Article II permits it. In support of this claim, they assert a deliberately truncated, purpose driven edit of Article II. (See Page 1-2 of the Memorandum of Law) Proposed Intervenors wrote: "..thus Part XX makes the state's redistricting practice consistent with the state constitutional definition of residence for incarcerated persons" no person shall be deemed to have gained or lost a residence by means of his or her presence or absence while confined in any public prison..) NY Const. Article II Section 4. By so quoting the proposed Intervenors omit the clause that modifies their quote, and in effect demonstrates that, in harmony with the other sections of the State constitution, their argument is one of political will and not of law.

The entirety of the beginning of Article II Section 4 without ellipses reads as follows:

> §4. For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison. This section was last amended by vote of the people November 6, 2001.) (Emphasis added)

Felons are disenfranchised in this state and thus anyone incarcerated may not vote, and thus Article II Section 4 in its entirety and not purposely and ideologically edited makes Section XX of the law in direct conflict with the statute. Further ignored by proposed Intervenors is Article III Section §5-a which requires counting of inhabitants: For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons. But the linchpin of counting inhabitants in their prison cells is Article IV Section §4. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of

assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. (Emphasis added).

Given the clarity of the constitutional text, the absolute lack of case law in support of the proposed Intervenors claims of vote dilution as evidenced by their own memorandum of law, they should not be permitted to participate in the action.

Intervention should not be granted, and the motion should in all respects be denied.

POINT I

INTERVENTION AS OF RIGHT DOES NOT EXIST AS A MATTER OF LAW

Intervention under the CPLR is permitted only upon order of the court. CPLR 1012 or 1013; the sections are designated as "intervention by right" (CPLR 1012) or "intervention by permission" (CPLR 1013). CPLR 1012 permits intervention as of right CPLR 1012 permits intervention "1. when a statute of the state confers an absolute right to intervene; or 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment". Nardone v. Fierberg Co., 40 A.D.2d 60 (3d Dept. 1972). Once allowed in, an intervenor becomes a party for all purposes. Siegel, NY Practice, Section 178 at 295.

In the instant case there is no statute of this State conferring an absolute right to intervene, CPLR 1012 is in the disjunctive and permits intervention where the person may be bound by the judgment or the representation of the person's interest may be inadequate.

CPLR 1012 (a) (2) provides that "[u]pon timely motion, any person shall be permitted to intervene in any action * * * when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment". Intervention is a procedural device whereby a person not a party to the action can present a claim or defense in a pending action and become a party for the purposes of protecting his own interests.

Intervention should be liberally allowed when the proposed intervenor will be bound by the judgment. Nardone, Id.

A. Inadequacy of Representation

This Court may comfortably find that the Attorney General is adequately representing the proposed Intervenors. The Attorney General is the chief law enforcement officer in the state and as such is charged with among other duties defending the constitutionality of statutory enactments Executive Law 71. CPLR 1012 gives the Attorney General the right to intervene. Important to the procedure for challenging the constitutionality of a State statute is notification to the Attorney-General.

Executive Law § 71; CPLR 1012). This opportunity for participation by the State's chief legal officer insures that all of the people of the State may be represented when the constitutionality of their laws is put in issue. Notice to the Attorney General serves the additional function of ensuring the development of an adequate record upon which the court may base its determination. McGee v. Korman, 70 N.Y.2d 225, 231 (1987). Unlike McGee, the mechanism designed to afford a necessary opportunity to examine fully particular challenges to the constitutionality of statutes has been set in motion and satisfied by the Attorney General representing the state defendants.

There can be no claim that the Attorney General has not and will not adequately defend the statute. The statute uses the words "may be", which require a less than conclusive determination of adequacy. Inadequacy of representation is generally assumed when the intervenor's interest is divergent from that of the parties to the suit. (See, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1012:1-C1012:3, at 151, 152). There is no showing that the Attorney General will not contest the matter thoroughly and completely. In fact the evidence is to the contrary. First, there has already been a public row when the governor suggested that the Attorney General might be too close to the issue to defend it

himself. Advocacy groups including these proposed Intervenors and their representatives rallied around the Attorney General publicly in support of his ability and capability of defending the statute from attack. Such rallying was with good reason because it appears that the Attorney General, upon eliciting from the LATFOR a document indicating that they are not able to provide direction on the suit to the Attorney General, the non-public document appears an Exhibit to the proposed Intervenors papers, suggesting cohesion of interests. The adequacy of the Attorney General in the defense of constitutionality satisfies the legal requirement that the interests of the proposed Intervenors are protected. There can be no legitimate claim that the Attorney General has not and will not adequately defend the statute.

B. Bound by the Judgment

One seeking the right to intervene must establish both factors set forth in the statute and show that his interest will be inadequately represented by the parties and that he will be bound by the judgment. A third party will be permitted to intervene only when the third party will be bound by the judgment to the extent that the judgment will adjudicate the legal rights, duties and/or obligations of the third party. Kaczmarek v. Shoffstall, 119 A.D.2d 1001, 1002 (4th Dep't 1986) (affirming order that denied motion to intervene as of right;

because movant "is not a party, nor is it in privity with any party in the underlying action, it will not be bound by principles of *res judicata* by any judgment rendered in the action;" movant "would be entitled, in the event of an adverse result, to litigate...by bringing, or choosing to defend, a declaratory judgment action"); Unitarian Universalist Church v. Shorten, 64 Misc.2d 851, 854, (Sup. Ct. Nassau County 1970), vacated on other grounds, 64 Misc.2d 1027, (Sup. Ct. Nassau County 1970) (citing Weinstein, Korn & Miller); Lesser v. West Albany Warehouses, Inc., 17 Misc.2d 461, 463, (Sup. Ct. Albany County 1959) (under the CPA). Proposed Intervenors claim that the constitutional issue would be *stare decisis* and as binding as if the judgment were *res judicata* (Memo of Law p. 17). Such a position is erroneous. While *res judicata* and *stare decisis* are often confused, neither applies regarding the proposed intervenors. Because it is not in privity as a matter of law and because each voter retains the right to sue to claim a dilution of vote, an action will lie. Lastly if the proposed Intervenors are barred from entering the action then they cannot claim to be collaterally estopped by such action because they would not have been given a "full and fair opportunity to contest the decision said to be dispositive". See Kaczmarek, Id.

The claim that it would be bound by *stare decisis* cannot be a basis for intervention because it would turn every action into a class action. For each voter claiming a dilution of vote, a fact specific determination of that vote in that area is required. Thus dilution claims do not result in determination of essentially the same issue. For example were the Court to find Section XX unconstitutional, proposed intervenors would be free to pursue such claims elsewhere and would not be limited to the claim at bar. *Stare decisis* is not sufficient to bind a proposed intervenor to the judgment. In reality they object to the fact that the state constitution might preclude their policy solution to as problem that they have identified as one in which they are happy with the unconstitutional solution.

Proposed Intervenors will not be bound by the judgment. The Court of Appeals in Vantage Petroleum v. Bd. of Assessment Review, 61 N.Y.2d 695 (1984) in a memorandum opinion joined by Judge Meyer, held that whether the movant will be bound by the judgment is determined by its *res judicata* effect, citing in Unitarian Univ. Church v. Shorten, supra, where then Justice Meyer later Court of Appeals Judge Meyer discussed the issue of being bound by the judgment in the context of intervention. CPLR 1012 (a) 2. uses the term "and the person is or may be bound by the judgment". That language is practically

identical with the wording of subdivision (a) of rule 24 of the Federal Rules of Civil Procedure as it existed prior to 1966, and involves the logical dilemma, noted by the Supreme Court in Sam Fox Pub. Co. v. United States, (366 U.S. 683, 691) that whether a person is bound by a judgment to which he is not party but privy, may turn on whether his interests have been adequately represented by the party to whom he is privy. The proposed intervenors are not in privity with the plaintiffs or the defendants. Given that the defendants are agents of the State of New York, it is abundantly clear that the proposed Intervenors are not in privity with the state and cannot so claim. As demonstrated above the Attorney General of the State is a more than adequate representative of the interests of the proposed Intervenors, all of whom are citizens of this state and are aligned with the Attorney General himself on this very issue.

Here where it is clear that the proposed Intervenors will not be bound by *res judicata* to the existing action, there is no binding effect that would give a litigant the option of avoiding multiplicity of action and possible inconsistent results by intervening in the earlier proceeding unless it is clear that he will not be bound in a later action by the earlier judgment (see Committee Note of 1966 to Fed. Rules Civ. Pro.,

rule 24, subd. [a] as reported in 3B Moore, Federal Prac., par. 24.01 [10], p. 24-17; note, 63 Yale L.J. 408, 410, n. 16).

Proposed Intervenors claim that they would be somehow bound although they wisely do not claim *res judicata* effect. Indeed it is doubtful that the determination in this matter would be binding because the next time the matte could be challenged is in an action concerning reapportionment plan adopted by the legislature. None of these Plaintiffs need appear because a wholly new set of plaintiffs may bring such a suit and by so doing advocates and others involved in the issue will be able to dodge even the effect of a declaration of unconstitutionality by changing plaintiffs. The *stare decisis* effect of the judgment is not enough, Sam Fox Pub. Co. v. United States, 366 U. S. 683, 694 (1961).

A judgment is not binding within the meaning of CPLR 1012 unless it is *res judicata*. Sutphen Estates v. United States, 342 U.S. 19, 21; Lesser v. West Albany Warehouses, supra. But *res judicata* effect will be given to a judgment against not only the parties to the judgment but their privities as well. Unitarian Universalist, supra. The Plaintiffs herein are not in privity to the state actors and in the context of reapportionment with individual rights as voters, not in privity with each other.

POINT II

INTERVENTION AS A MATTER OF DISCRETION IS NOT WARRANTED AS A MATTER OF LAW AND FACT

Addressed to the sound discretion of the court, intervention by permission is appropriate "[u]pon timely motion, any person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013.[3] However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012 (a),

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[3] In contrast to the rule of intervention in a declaratory judgment action under CPLR 3001, which this matter is and the rules in an action under Article 78 of the CPLR, which this matter is not, consist of a truly liberalized "joinder" approach. CPLR 7802(d) confers upon the courts "broader authority to allow intervention . . . than is permitted" under the general intervention provisions. Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp., 291 A.D.2d 40, 48 (1st Dept. 2001); see also Greater New York Health Care Facilities Ass'n v. DeBuono, 91 N.Y.2d 716, 720 (1998). In Article 78 proceedings, "[t]he court . . . may allow other interested parties to intervene." CPLR 7802(d). However, to be an "interested" party, one must have a legally cognizable claim to intervene pursuant to CPLR 7802(d), rather than just a general interest in the result of the Article 78. New York Times v. City of New York Fire Dept., 195 Misc.2d 119, 122-23 (Sup Ct. New York County 2003) [citing Greater New York Health Care Facilities Ass'n, 91 N.Y.2d at 718, 720-21; Ferguson v. Barrios-Paoli, 279 A.D.2d 396, 398-9 (1st Dept. 2001)].

or as a matter of discretion under CPLR 1013 is of little practical significance," and that "intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings" Perl v. Aspromonte Realty Corp., 143 A.D.2d 824, 825 (2d Dept. 1988). Intervention should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective Intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." Osman v. Sternberg, 168 A.D.2d 490 (2d Dept. 1990.)

A. Common Questions of Law or Fact

While the proposed Intervenors have asserted that they have common questions of fact and law to raise that mirror the State's defense in this action, it has also raised a question of fact and law that they claim is peculiar to their interest but should as a consequence be fatal to their motion, the claim of vote dilution caused by a possible return to the status quo, and caused by the return of constitutionality to the law if Section XX is struck down. By asserting a right to intervention all the proposed Intervenors seek to have it both ways and thereby enter into this litigation as a party. For that reason the motion should be denied. A litigant is not permitted to have it both

ways. See Yuppie Puppy Prods v. Street Smart, 77 A.D.3d 197 (1st Dept. 2010). Intervention may not be a method in which a proposed party is able to argue for a unity of interest and its own interests that are not shared specifically by the Attorney General but by his actions generally defends and would if prevailing, vindicate those rights.

B. Delay

This is a case where the presence of the intervenor will create a lengthy discovery or trial process. Litigation of the proposed Intervenors' position regarding dilution of vote which they allege to be the consequence of the finding of unconstitutionality to individual voters would expand a declaratory judgment that is fundamentally a question of law, interpreting the state constitution into the adjudication of individual voter claims or classes of voters whose cause of action if any lies would not lie as against the Plaintiffs in this action or the defendants named in the action. Indeed if they were to prevail on their affirmative defense after an extensive trial, there would be no one against whom a judgment could be entered given their position that neither DOCCS nor LATFOR are implicated since the proposed Intervenors see them as mere ministerial agents. Again, proposed Intervenors cannot inveigle into a lawsuit by having it both ways. Having failed

to meet the standard for permissive or mandatory intervention, their motion should be rejected in all respects.

C. Real and Substantial Interest

Only where the proposed intervenor actually possesses a real and substantial interest and only then may intervention be liberally granted. Plantech Housing Inc. v. Kevin Conlan, 74 A.D.2d 920, 921 (2d Dept. 1980.) [refund of taxes will occur]; Subdivision v. Town of Sullivan, 75 A.D.3d 978 (2d Dept. 2010) [intervenor is charged with interpretation and application of the law at issue]. The Court of Appeals decision in Vantage Petroleum, supra, cited approvingly to Unitarian Universalist Church, supra, which held that even where the motion is timely, movants may be bound by the judgment and their representation by respondents has become inadequate, they have no right to intervene unless the interest which they seek to protect gives them the necessary standing." (64 Misc. 2d at 855-56). In other words, there must be some basis in law to defend the interest under which the putative party seeks to intervene. In the instant matter, the proposed Intervenors claim that their interest flows from a condition of unconstitutionality that would occur only if this court finds that Section XX is unconstitutional, thus their standing is predicated not upon anything that has occurred but exclusively on a matter that they contend flows from a constitutional correction. This is not

standing; this is an assertion of a "right" not in existence to be lost and not found in the existing situation. Section XX was enacted not to correct a constitutional defect but rather to present a political remedy to a political problem as seen by the advocates who are the proposed Intervenors, having failed to ever assert such a right anywhere, they cannot now bootstrap into this action by claiming that a declaration of unconstitutionality will harm their rights by dilution. There are other forums under other more ripe conditions for such litigation.

The party seeking to intervene must be affected in a real and substantial way. UBS Financial Services Inc. v. Gibson, 2007 NY Slip Op 33726(U), 2007 WL 4152240 (Sup Ct. NY Cty 2007); Subdivision v. Town of Sullivan, 75 A.D.3d 978 (2d Dept. 2010) [intervenor is charged with interpretation and application of the law at issue]. A third party is permitted to intervene only where he has an actual and ultimate interest in the results of the litigation. (Matter of Cavages, Inc. v Ketter, 56 A.D.2d 730.) This "interest" has been long defined as a property interest or some duty or right devolving upon or belonging to the person seeking the right to intervene. (United Baking Co. v Bakery & Confectionery Workers' Union Local 221, 257 App.Div. 501). Further, the fact that one may in some

manner be affected by the outcome of the proceeding is insufficient to form the basis for intervention.[4]

Examination of precedent tax certiorari cases manifests that intervention has been permitted where the proposed Intervenor demonstrates a direct financial stake, which is not the situation in the case at bar. In Matter of Burke Apts. v. Swan, (137 A.D.2d 321), the Appellate Division, Third Department, found the grant of intervention proper "given the school district's financial interest" in the outcome of the proceeding in the form of a potential tax refund (supra, at 323). In Matter of Teleprompter Manhattan Catv Corp. v. State Bd. of Equalization & Assessment, 34 A.D.2d 1033, (3d Dept. 1970) it was held that in a proceeding against the State Board of Equalization and Assessment alleging erroneous and unlawful assessments, the city in which the property was located would be permitted to intervene since the city had a financial interest in the assessment. The Court said (supra, at 1034): "Here there are identical questions of law and fact. In reality, the city rather than the board is the real party in interest." Proposed Intervenors are not a real party in interest because their interest if any is remote, speculative and fundamentally

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[4] Under the FRCP 24, governing intervention, this may be sufficient, but New York even in liberalizing its own rules in the CPLR never allows intervention in the same way that the federal civil rules do. The CPLR appears more restrictive. See NY PIRG v. Regents, 516 F.2d 350 (2d Cir. 1975).

political and not legal. Even where the issue is not directly financial, there must be a tangible interest that may be affected adversely by the judgment. See Matter of Appointment of A Conservator, 96 A.D.2d 908 (2d Dept. 1983) (trust res) where the intervenor will have to apply and enforce the law as the government agency so charged with that responsibility then it should be permitted to intervene. Subdivision v. Town of Sullivan, 75 A.D.3d 978 (2d Dept. 2010).

Even where a third party may be bound by a judgment and their representation is inadequate, intervention will not be permitted unless the movant has an interest which he seeks to protect sufficient to provide the necessary standing. (Matter of Unitarian Universal Church v. Shorten, 64 Misc.2d 851, vacated on other grounds 64 Misc.2d 1027. The only requirement for obtaining an order permitting intervention via this section is the existence of a common question of law or fact, the resolution of such a motion is nevertheless a matter of discretion. Kaczmarek v. Shoffstall, 119 A.D.2d 1001, 1002. As a consequence, when deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed Intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation (see Osman v. Sternberg, 168

A.D.2d 490). These latter considerations, which are grounded in general concepts of judicial efficiency and fairness to the original litigants, are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding. When that interest is less substantial or more indirect, other elements take on greater importance. Pier v. Board of Assessment Review, 209 A.D.2d 788 (3d Dept. 1994).

Mere interest in the success of one of the parties is an insufficient basis for intervention the proposed Intervenor must have a real and substantial interest. Vantage Petroleum v. Board of Assessment Review, 61 N.Y.2d 695, 698, (1984). A real and substantial interest is in the nature of direct economic effect, a direct effect upon property such as noise, traffic and air emissions on the streets where they reside. See Town of Southhold v. Cross Sound Ferry, 256 A.D.2d 403, 404 (2d Dept. 1998); Patterson Materials v. Town of Pawling, 221 A.D.2d 609 (2d Dept. 1995). In Southhold, the ferry causing the distress was already in operation causing actual and identifiable harm. In Patterson, the issue was that the Intervenors live where the mining was to take place if the local regulations failed. There it was beyond doubt that mining on the site would lead to noise, dust and traffic.

POINT III

INTERVENORS PROPOSED ANSWER DISQUALIFIES THEM FROM INTERVENTION

The proposed Intervenors are required by law to present to the court a proposed pleading, in this case an answer in order that the court may weigh the issue of intervention and the interests of the proposed Intervenors. In the instant matter the proposed Intervenors have put forth an answer which is identical to that of the Attorney General in one significant respect. It asserts a Fourteenth Amendment vote dilution claim as an affirmative defense. Therefore the proposed Intervenors are not presenting identical questions of fact and law. Matter of Teleprompter Manhattan Catv Corp. v. State Bd. of Equalization & Assessment, 34 A.D.2d 1033 (3d Dept. 1970).

In so doing the proposed Intervenors reveal that they seek to expand the lawsuit into areas that are extraneous factual issues. When the proposed Intervenor raises affirmative defenses not raised in the existing leading, intervention should be denied because new issues may not be raised upon intervention. St. Joseph's Hospital HLT v. Dept. of Health, 224 A.D.2d 1008, 1009 (4th Dept. 1996); East Side Car wash v. K.R.K. Capitol, 102 A.D.2d 157, 160 (1st Dept. 1984). A proposed Intervenor is not permitted to raise issues which are not before the court in the main action. See City of Rye v Metropolitan

Transp. Auth., 58 Misc.2d 932, rev'd on other grounds 24 N.Y.2d 627. The fact that Section XX is unconstitutional under the New York State Constitution does not perforce mean that the pre Section XX was therefore unconstitutional under the Fourteenth Amendment, an action never brought by anyone including activists and plaintiffs in the near decade since the last reapportionment cycle and representative of a legal position endorsed by no court anywhere in the United States. See article by proposed pro hoc vice admittee http://www.prisonpolicy.org/homeaddresses/report.html

The remedy in St. Joseph's was to strike the affirmative defense. Id. But in the case at bar as illustrated by Point, the Attorney General as the chief law enforcement officer of the state and duty bound to defend the constitutionality of a statute under attack, there is no interest that proposed Intervenors have that is greater than that of the Attorney General. Thus striking the affirmative defense is not the remedy, denial of the motion to intervene is a proper exercise of the court's discretion.

POINT IV

PROPOSED INTERVENORS MUST WAIT UNTIL THERE IS A REAPPORTIONMENT PLAN TO CLAIM DILUTION OF VOTES UNDER THE FOURTEENTH AMENDMENT

Where adequate alternatives exist to a grant of intervention, then the interest asserted by the proposed

Intervenors is safeguarded. See Visentin v. Haldane Cent School District, 2004 Slip Op 50936 (u) (Sup Ct. Putnam Cty 2004). Claims of voter dilution are more properly raised and addressed as a part of actions involving reapportionment since voter dilution claims depend upon the lines drawn, the surrounding areas and the various state constitutional demarcations that determine compliance with the rigors of the 14th Amendment. It is for this reason for example that the courts have allowed liberal intervention in election law matters. Such matters are special proceedings under Article 16 of the Election Law, are conclusive due to time limits of election special proceedings and unique rules regarding necessary parties. Thus where there is any unusual set of circumstances, the courts permit intervention stressing that it is particular and peculiar to the circumstances of the case. See Mtr of Leska v. D'Apice, 123 A.D.2d 302 (2d Dept. 1986); Ramos v. Alpert, 41 A.D.2d 1012, 1013 (3d Dept. 1973) ["peculiar facts"], aff'd 32 N.Y.2d 903 (1973). See also McCall v. Hynes, 196 A.D.2d 618 (2d Dept. 1993) [under the circumstances of this case] citing Ramos and protecting the right to an opportunity to ballot, an actual voting mechanism.

In the absence of being a necessary party to the action, then the right to intervene in constitutional challenges to reapportionment issues is limited. In reality, what

petitioner is attempting to do is to sue on its own behalf for a declaration of its potential clients' rights and it may not do so (see, Matter of Legal Aid Socy. v Scheinman, 53 N.Y.2d 12, 15; Hiscock Legal Aid Socy. v Hennessy, 101 Misc.2d 1046, 1048-1049, affd 78 A.D.2d 775, lv denied 52 N.Y.2d 703). Matter of MFY Legal Services v. Dudley, 67 N.Y.2d 706 (1986)). In Seawall Associates v. City of New York, 134 Misc.2d 187 (Sup Ct NY Cty 1986), the court permitted intervention on the basis that persons who sought to intervene actually lived in the buildings that were the subject of the lawsuit. In Mtr of New York County Lawyers Assn. v. Bloomberg, 908 N.Y.S.2d 872 (Sup Ct. NY Cty 2011), the court granted the application for members of a particularized bar association. Advocacy groups have not been allowed to intervene because their interest is not real and substantial as required by statute. The law requires that the persons who succeed in intervening demonstrate that the action will have a direct impact upon them. This, the advocacy group proposed, Intervenors cannot do. Berkoski v. Bd. of Trustees, 67 A.D.2d 840 (2d Dept. 2009).

Similarly the individual Intervenors do not have a direct and substantial interest in the instant action. While they speculate that the declaration of the law being unconstitutional would "dilute" their vote, their vote retains the same status as it has had over time. Indeed the only

alteration was the enactment of Section XX which potentially increased vote's efficacy. The enactment of the statute did not in reality do anything to the vote of anyone. It was enacted. DOCCS has not yet reported to LATFOR and LATFOR has not drawn a single district, held a hearing relative to the new districts or otherwise act to practically cause Section XX to "un dilute" anyone's vote. Indeed the rights alleged as a basis for intervention are not real and substantial because at the present time they are best inchoate. If the statute is, as the plaintiffs believe, unconstitutional, a ruling of this court will return matters to status quo ante, and the proposed Intervenors have the option to sure to claim such rights in the context of the entirety of a reapportionment plan. The striking down of the statute would provide no adverse consequences as a direct result of the declaration, and thus the proposed Intervenors seek entry to the action upon a purely speculative basis which falls short of the legal requirement for intervention and not markedly different from the inappreciable interest asserted by the school district in Vantage Petroleum v. Board of Assessment Review, supra.

To litigate that matter in this context is an inappropriate use of judicial resources which will be used once again during the redistricting cycle of 2012.

CONCLUSION

The motion to intervene should be denied in its entirety both as a matter of right and as a matter of discretion.

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Respectfully submitted,

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