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**SUBMISSION UNDER SECTION 5
OF THE VOTING RIGHTS ACT**

March 7, 2011

Christopher Herren, Esq.
Chief, Voting Section
Civil Rights Division
Department of Justice
1800 G St., N.W., Room 7254 - NWB
Washington, DC 20006

**Re: Request for Voting Rights Act § 5 Preclearance
of N.Y. Laws of 2010, Ch. 57, Part XX**

Dear Chief Herren:

Pursuant to § 5 of the Voting Rights of 1965, as amended, 42 U.S.C. § 1973c, this Letter Request submits for preclearance N.Y. Laws of 2010, Ch. 57, Part XX ("Part XX").

Part XX amends several New York statutes to enable the State Legislature and all local governments with districts to count State prison inmates for purposes of redistricting based on their census blocks of origin rather than the census blocks where they are presently incarcerated.

The legislation should be precleared because it directly benefits voters who are members of classes protected by § 5. As described in § 51.27(m) of this Letter Request, State prison inmates originate predominantly from urban districts, including jurisdictions subject to § 5, and are incarcerated in non-covered

jurisdictions. The legislation will appropriately adjust the weight of the vote of members of protected classes in New York's three § 5 counties, Bronx County, Kings County and New York County, all within the City of New York.

In accordance with 28 C.F.R. Part 51, § 51.23, this submission is made by the Attorney General of the State of New York as the chief legal officer of the submitting authority - the State of New York.

The format of this Letter Request is in accordance with 28 C.F.R. Part 51, § 51.27(a), describing the "required contents" of § 5 submissions, and also provides "supplemental contents" in accordance with § 51.28:

§ 51.27(a) -- "A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting."

A copy of N.Y. Laws of 2010, Ch. 57, Part XX is Ex. A to this Letter Request.¹

§ 51.27(b) -- "A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed."

Ex. B to this Letter Request are existing N.Y. Legislative Law § 83-m, N.Y. Correction Law § 71, and N.Y. Municipal Home Rule Law § 10(1)(a)(13), the three statutory provisions amended by Part XX.

¹ Part XX was amended by N.Y. Laws of 2010, Ch. 508, which changed the date from July to September 2010 for the New York State Department of Correctional Services ("DOCS") to provide State prison inmate demographic and geographical data to the State agency responsible for developing redistricting data, the New York State Advisory Task Force on Demographic Research and Reapportionment ("LATFOR"). As such, Chapter 508 itself does not implicate § 5. A copy of Chapter 508 is included in Ex. A.

§ 51.27(c) -- "If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting."

The "change affecting voting" is "readily apparent," in that the provisions of law amended by Part XX do not address the issue of the residency of persons incarcerated in State prison for purposes of redistricting.

§ 52.27(d) -- "The name, title, address, and telephone number of the person making the submission."

This submission is made by the Attorney General of the State of New York as the chief legal officer of the submitting authority, the State of New York, with contact information as above provided.

§ 51.27(e) -- "The name of the submitting authority and the name of the jurisdiction responsible for the change, if different."

Not applicable.

§ 52.27(f) -- "If the submission is not from a State or county, the name of the county and State in which the submitting authority is located."

Not applicable.

§ 51.27(g) -- "Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar)."

Part XX is an act of the State Legislature signed into law by the Governor on August 11, 2010.

§ 51.27(h) -- "A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change."

N.Y. Const. Art. III § 3(5) provides that the State Senate and Assembly shall redistrict every ten years following the federal census. N.Y. Municipal Home Rule Law § 10 generally provides that local governments shall redistrict every ten years following the federal census.

§ 51.27(i) -- "The date of adoption of the change affecting voting."

Part XX was enacted by the New York State Legislature on August 3, 2010, and signed into law by the Governor on August 11, 2010. The proceedings in the Legislature and before the Governor are set forth at Ex. C to this Letter Request.

§ 51.27(j) -- "The date on which the change is to take effect."

Part XX became effective, subject to preclearance with respect to the three covered counties, immediately upon the Governor's signing on August 11, 2010, pursuant to Part XX § 5. See Ex. A.

§ 51.27(k) -- "A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made."

The change will not be enforced or administered pending the present Letter Request for § 5 preclearance.

§ 51.27(l) -- "Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change."

The change sought to be precleared will not affect less than the entire § 5 covered jurisdictions of Bronx County, Kings County and New York County within the City of New York.

§ 51.27(m) -- "A statement of the reasons for the change."

A statement of the reasons for the change, and the methodology to be employed in the implementation of the change, is Ex. D to this Letter Request.

Briefly, the federal census counts persons where they are found without regard to residency or domicile. The State of New York prescribes that "no person shall be deemed to have gained or lost a residence . . . while confined in any public prison." N.Y. Const. art. II § 4. That constitutional principle is codified in N.Y. Election Law § 5-104(1) (containing the same language).

As stated in Ex. D, the New York State Department of Correctional Services ("DOCS") reports that of nearly 60,000 State prison inmates, over 70% are members of classes protected by the Voting Rights Act, and that over 70% are from urban communities, including the three counties covered by § 5.² This means that the weight of the vote of a resident of a covered county is less than it would be if the population base included State prison inmates who resided in that county prior to incarceration. The existing system for counting State prison inmates also produces negative results for upstate counties that do not have State prisons.

§ 51.27(n) -- "A statement of the anticipated effect of the change on members of racial or language minority groups."

The implementation of Part XX will have no retrogressive effect on members of racial or language minority groups in the three counties covered by § 5. On the contrary, the change will appropriately adjust the weight of the vote of members of protected classes in the three § 5 counties.

§ 51.27(o) -- "A statement identifying any past or pending litigation concerning the change or related voting practices."

There is no past or present litigation concerning the Part XX change or any related voting practices. Counting State prison

² These estimates are based on LATFOR's analysis of State prison inmate data provided to it by DOCS, set forth in Ex. E ("Preliminary Demographic Analysis of DOCS Data"), and on a DOCS report, entitled "Under Custody Report: Profile of Inmate Population Under Custody on January 1, 2010," available at <http://www.docs.state.ny.us/Research/Reports/2010/Undercustody>.

inmates for purposes of redistricting has not been subject to any Voting Rights Act litigation in the State of New York.³

§ 51.27(p) -- "A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made."

There is no prior practice in New York State law with respect to counting State prison inmates as residents of their counties of origin for purposes of redistricting. N.Y. Legislative Law § 83-m, N.Y. Corrections Law § 71 and N.Y. Municipal Home Rule Law § 10, the three statutory provisions amended by Part XX, do not concern the subject matter of Part XX.

§ 51.27(q) -- "For redistrictings and annexations: the items listed under § 51.28(a)(1) and (b)(1); for annexations only: the items listed under § 51.28(c)(3)."

See § 51.28(a)(1) and (b)(1) *infra*.

§ 51.27(r) -- "Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change."

The Attorney General's Office is not aware of any concerns on the part of members of classes protected by § 5, or advocacy organizations concerned with § 5, about the implementation of Part XX. The best information available to the Attorney General's Office is that members of classes protected by § 5, and advocacy organizations concerned with § 5, support and have advocated for Part XX.

³ In felon disenfranchisement litigation, Hayden v. Pataki, 449 F.3d 305, 328-29 (2d Cir. 2006) (*en banc*), the Second Circuit questioned whether certain plaintiffs residing in the three counties covered by § 5 had intended to assert a vote dilution claim on account of the fact that State prison inmates are not part of the population base of the districts of residence of such persons at the time of their incarceration. On remand, plaintiffs clarified that they had not intended to assert such a claim. Hayden v. Pataki, 2006 WL 2242760, *1 (S.D.N.Y. Aug. 4, 2006) (McKenna, D.J.).

Pursuant to § 51.28(h), a list of minority group contacts concerned with the proposed change is Ex. F to this Letter Request.

§ 51.28 -- "Supplemental Contents."

§ 51.28(a) -- "Demographic Information."

§ 51.28(a)(1) -- "Total And Voting Age Population Of The Affected Areas Before And After The Change, by Race And Language Group."

Ex. G to this Letter Request contains tables showing total population and voting age population ("VAP") for the three covered counties in 2009, according to the Census Bureau.

Demographic information for redistricting after the 2010 census has not yet been provided by the Census Bureau to the State of New York. Pursuant to P.L. 94-171, specific data tabulations are not required to be released to the State until March 31, 2011.

With respect to total population after the change,⁴ LATFOR has not yet completed full geographic analysis of the inmate data provided by DOCS. The DOCS "Under Custody Report," referred to *supra*, states that 49.6% of male inmates, and 39.3% of female inmates, were from New York City.

Another publically available DOCS report, entitled "New York State's Victim Notification Program: A Statistical Summary," states that, of 58,377 State prison inmates, as of January 1, 2010, inmates came from the following covered counties:

Bronx County	4,929
Kings County	10,281
New York County	4,854

Only the DOCS demographic and geographic data analyzed by LATFOR, and formatted in a way usable to State and local redistricting authorities, will be dispositive for purposes of Part XX, while the DOCS "New York State's Victim Notification Program" report, available at [http://www.docs.state.ny.us/Research/Reports/-2010/Victim Notification.pdf](http://www.docs.state.ny.us/Research/Reports/-2010/Victim%20Notification.pdf), does demonstrate that there is no reason to believe that there will be any change material to the application of § 5 standards in the three covered counties after

⁴ According to the DOCS "Under Custody Report" referred to *supra*, 687 inmates were aged between 16 and 18 as of January 1, 2010.

the population base for those counties is adjusted pursuant to Part XX.

§ 51.28(a)(2) -- "The number of registered voters for the affected area by voting precinct before and after the change, by race and language group."

Ex. H to this Letter Request is a data table listing the number of registered voters by Voting Tabulation District ("VTD") in the three counties covered by § 5. Additionally, the table lists total and voting age population by VTD data from the 2000 census, including race and ethnicity.

Ex. I to this Letter Request is a table prepared by the New York State Board of Elections listing, *inter alia*, the number of registered voters in the three covered counties as of November 1, 2010.

The "number of registered voters" in the three covered counties is not expected to significantly change after the implementation of Part XX, because State prison inmates are not eligible to register to vote.

§ 51.28(a)(3) -- "Any estimate of the population, by race and language group, made in connection with the adoption of the change."

See Ex. H.

§ 51.28(b) -- "Maps."

A map of the locations of New York State Department of Correctional Services facilities is Ex. J to this Letter Request.

§ 51.28(c) -- "Annexations."

Not applicable.

§ 51.28(d) -- "Election Returns."

Not applicable. Under New York State law, State prison inmates are not eligible to vote. N.Y. Election Law § 5-106(2), upheld by Hayden v. Pataki, 449 F.3d 305, 328-29 (2d Cir. 2006) (*en banc*), and Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010).

§ 51.28(e) -- "Language Usage."

Not applicable. Part XX does not, in the terms of § 51.28(e), "affect[] the use of the language of a language minority group in the electoral process."

§ 51.28(f) -- "Publicity And Participation."

Materials demonstrating public notice and public hearings with respect to Part XX include the following:

(1) Media reports concerning the proposed change are Ex. K to this Letter Request.

(2) Public notices that describe the proposed change and invite public comment or participation in hearings, and statements regarding where such public notices appeared, are Ex. L to this Letter Request.

(3) Minutes or accounts of public hearings concerning the proposed change are Ex. M to this Letter Request.

(4) Statements, speeches and other public communications concerning the proposed change are Ex. N to this Letter Request.

(5) Comments from the public concerning the proposed change are Ex. O to this Letter Request.

(6) The Legislative Memorandum In Support of Part XX is Ex. P to this Letter Request.

(7) Fact sheets and reports concerning the proposed change are Ex. Q to this Letter Request.

§ 51.28(g) -- "Availability Of The Submission."

The submission is available for inspection at the following offices of the Attorney General of the State of New York:

The Capitol
Albany, NY 12224-0341
(518) 474-5481

Main Place Tower, Suite 300A
350 Main Street
Buffalo, New York 14202-3750
(716) 853-8400

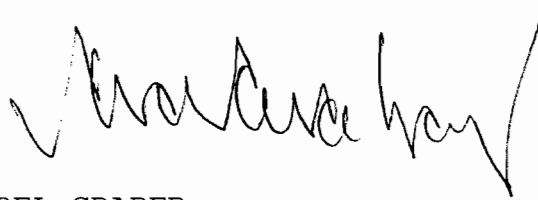
120 Broadway, 24th Floor
New York, NY 10271-0332
(212) 416-8645

§ 51.28(h) -- "Minority Group Contacts."

A list of minority group contacts concerned with the proposed change is Ex. F to this Letter Request.

For the reasons stated, it is respectfully requested that the Department of Justice render a determination pursuant to § 5 not objecting to the implementation N.Y. Laws of 2010, Ch. 57, Part XX.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joel Graber", with a long, sweeping flourish extending to the right.

JOEL GRABER
Special Litigation Counsel

Enc.

INDEX TO EXHIBITS

- Ex. A N.Y. Laws of 2010, Ch. 57, Part XX, and N.Y. Laws of 2010, Ch. 508.
- Ex. B N.Y. Legislative Law § 83-m, N.Y. Corrections Law § 71, and N.Y. Municipal Home Rule Law § 10(1)(a)(13), amended by N.Y. Laws of 2010, Ch. 57, Part XX.
- Ex. C Proceedings in the Legislature and before the Governor with respect to N.Y. Laws of 2010, Ch. 57, Part XX.
- Ex. D Description of reasons for Part XX and the methodology to be used in the implementation thereof.
- Ex. E "Preliminary Demographic Analysis of DOCS Data," prepared by LATFOR.
- Ex. F Minority group contacts concerned with the proposed change.
- Ex. G Population and voting age population in the three covered counties.
- Ex. H Data table listing the number of registered voters by Voting Tabulation District ("VTD") in the three counties covered by § 5, and total and voting age population by VTD data from the 2000 census, including race and ethnicity.
- Ex. I Registered voters in the three covered counties as of November 1, 2010.
- Ex. J Map of the location of New York State Department of Correctional Services facilities.
- Ex. K Media reports concerning the proposed change.
- Ex. L Public notices describing the proposed change and inviting public comment or participation in hearings, and statements regarding where such public notices appeared.
- Ex. M Minutes or accounts of public hearings concerning the proposed change.
- Ex. N Statements, speeches and other public communications concerning the proposed change.
- Ex. O Comments from the public concerning the proposed change.
- Ex. P Legislative materials concerning the proposed change.
- Ex. Q Fact sheets and reports concerning the proposed change.