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December 27, 2011

Hon. Andrew W. Klein
Clerk of the Court
State of New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *Little v. N.Y.S. Task Force on Demographic Research*
Alb. Cty. Index No. 2310-2011

Dear Mr. Klein:

We submit this letter on behalf of defendant-respondent the New York State Department of Correctional Services¹ in response to this Court's letter of December 16, 2011, which invited the parties to comment on whether the Court has jurisdiction to hear this appeal under C.P.L.R. § 5601(b)(2). While we share plaintiffs' desire to resolve this case without unnecessary delay, we do not believe it is possible to bypass an intermediate appeal. In fact, this Court lacks jurisdiction to hear this appeal for two reasons: the appeal is not limited to a question involving the constitutionality of a state statute, but rather also raises a threshold question of standing; and the questions the appeal does raise as to the constitutionality of a state statute are not sufficiently substantial.

¹ Although the department's name appears thus in the caption, it has been changed to the Department of Corrections and Community Supervision.

I. Background

At issue here is the validity of Part XX of Chapter 57 of the Laws of 2010, under which prison inmates are counted, for purposes of legislative redistricting, as residents of the communities in which they lived before their incarceration. The complaint challenges the validity of this statute on a number of grounds, each of which the Supreme Court rejected in the December 1, 2011 decision and order that plaintiffs seek to appeal directly to this Court.

More particularly, plaintiffs claim that Part XX violates the New York Constitution's guarantee of equal protection because it counts inmates differently from other individuals who live in group residences such as nursing homes, hospitals, college dormitories, and the like (Compl. at 21-23). Plaintiffs also claim that Part XX violates the State's equal protection guarantee for two additional reasons, namely that it violates the principle of "one person, one vote" (Compl. at 24-26), and that it also lacks a rational basis (*id.* at 24-27). Supreme Court readily rejected these latter two claims on the merits, but as to the group-residence claim, Supreme Court held that plaintiffs lack standing to raise the claim. (Decision and Order at 8-9.)

Plaintiffs also claim that Part XX conflicts with Article III, § 4, of the New York Constitution, under which the federal census "shall be controlling as to the number of inhabitants" for purposes of redistricting "in so far as such census and the tabulation thereof purport to give the information necessary therefor." Plaintiffs read this constitutional provision to require New York not only to use federal census data for redistricting, but also to follow federal policy choices about whether an individual is deemed to be an inhabitant of a given location for redistricting purposes. Supreme Court rejected plaintiffs' argument. (Decision and order at 5-8.) It explained that inmates do not voluntarily reside in prisons, do not form ties to the communities near prisons, and typically have no intent to remain in those communities. (*Id.* at 7.) Moreover, the federal Census Bureau expressly recognizes that states may choose to count prisoners at their pre-incarceration residences. (*Id.* at 6.)

II. Discussion

Jurisdiction under C.P.L.R. § 5601(b)(2) exists “where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.” Jurisdiction under § 5601(b)(2) does not exist here in part because one of plaintiffs’ equal protection challenges involves the threshold question of plaintiffs’ standing. Standing is precisely the kind of threshold question that defeats this Court’s jurisdiction under C.P.L.R. 5601(b)(2). *See N.Y.S. Club Ass’n v City of New York, appeal transferred* 67 N.Y.2d 717 (1986) (cited in this Court’s Civil Practice Outline for the proposition that the Court lacks jurisdiction where a case involves, *inter alia*, a standing issue). Accordingly, plaintiffs’ appeal should be transferred to the Appellate Division.

Jurisdiction under § 5601(b)(2) does not exist here for the additional reason that the constitutional questions presented are not substantial. *See Gerzof v. Gulotta*, 40 N.Y.2d 825 (1976) (the constitutional issue giving rise to jurisdiction under § 5601(b)(2) must be “substantial”). The issue of how to count prison inmates for purposes of redistricting is an important one. For the reasons set forth in Supreme Court’s decision and discussed above, however, plaintiffs’ various legal challenges are sufficiently lacking in merit as to fail to raise substantial constitutional questions.

Respectfully submitted,

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