

**NEW YORK STATE  
COURT OF APPEALS**

Preliminary Appeal Statement

Pursuant to section 500.9 of the Rules of the Court of Appeals

1. CAPTION OF CASE (as the parties should be denominated in the Court of Appeals):

STATE OF NEW YORK                      COURT OF APPEALS  
SENATOR ELIZABETH O'CONNOR LITTLE, et al.

(SEE FULL CAPTION ATTACHED AS 1-A)

-against-

NEW YORK STATE TASK FORCE ON DEMOGRAPHIC  
RESEARCH AND REAPPORTIONMENT, et al.,

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2. Name of court or tribunal where case originated, including county, if applicable:  
Supreme Court - State of New York, Albany County

3. Civil index number, criminal indictment number or other number assigned to the matter in the court or tribunal of original instance: 2310-2011

4. Docket number assigned to the matter at the Appellate Division or other intermediate appellate court: \_\_\_\_\_

5. Jurisdictional basis for this appeal:

\_\_\_\_ Leave to appeal granted by the Court of Appeals or a Judge of the Court of Appeals

\_\_\_\_ Leave to appeal granted by the Appellate Division or a Justice of the Appellate Division

\_\_\_\_ CPLR 5601(a): dissents on the law at the Appellate Division

\_\_\_\_ CPLR 5601(b)(1): constitutional ground (Appellate Division order)

CPLR 5601(b)(2): constitutional ground (judgment of court of original instance)

\_\_\_\_ CPLR 5601(c): Appellate Division order granting a new trial or hearing, upon stipulation for judgment absolute

\_\_\_\_ CPLR 5601(d): from a final judgment, order, determination or award, seeking review of a prior nonfinal Appellate Division order

\_\_\_\_ Other (specify) \_\_\_\_\_

6. How this appeal was taken to the Court of Appeals (choose one) (see CPLR 5515[1]):

SUPREME COURT OF THE STATE OF NEW YORK  
COURT OF APPEALS

-----x  
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,

INDEX NO. 2310-2011  
(ALBANY COUNTY)

Appellants,

-against-

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

Respondents.

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,

Intervenor-Respondents.

NOTICE OF APPEAL

Date filed: 12/12/2011

Clerk's office where filed: Albany County Courthouse

ORDER GRANTING LEAVE TO APPEAL (civil case):

Court that issued order: \_\_\_\_\_

Date of order: \_\_\_\_\_

CERTIFICATE OR ORDER GRANTING LEAVE TO APPEAL (criminal case):

Justice or Judge who issued order: \_\_\_\_\_

Court: \_\_\_\_\_

Date of order: \_\_\_\_\_

7. Demonstration of timeliness of appeal in civil case (CPLR 5513, 5514):

Was appellant served by its adversary with a copy of the order, judgment or determination appealed from and notice of its entry?  yes  no

If yes, date on which appellant was served (if known, or discernable from the papers served): 12/07/2011

If yes, method by which appellant was served:  personal delivery  
 regular mail  
 overnight courier  
 other (describe \_\_\_\_\_)

Did the Appellate Division grant or deny a motion for leave to appeal to this Court in this case?  yes  no

If yes, fill in the following information:

- a. date appellant served the motion for leave to appeal made at the Appellate Division: \_\_\_\_\_
- b. date on which appellant was served with the Appellate Division order granting or denying such motion with notice of the order's entry: \_\_\_\_\_, and
- c. method by which appellant was served with the Appellate Division order granting or denying such motion:

\_\_\_\_\_ personal service  
\_\_\_\_\_ regular mail  
\_\_\_\_\_ overnight courier  
\_\_\_\_\_ other (describe \_\_\_\_\_)

**8. Party Information:**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. Indicate the status of the party in the court of original instance and the party's status in this Court, if any. Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, third-party plaintiff, third-party defendant, intervenor. Examples of a party's Court of Appeals status include: appellant, respondent, appellant-respondent, respondent-appellant, intervenor-appellant.

No.	Party Name	Original Status	Court of Appeals Status
1	Senator Elizabeth O'Connor Little	Plaintiff	Appellant
2	Senator Patrick Gullivan	Plaintiff	Appellant
3	Senator Patricia Ritchie	Plaintiff	Appellant
4	Senator James Seward	Plaintiff	Appellant
5	Senator George Maziarz	Plaintiff	Appellant
6	Senator Catherine Young	Plaintiff	Appellant
7	Senator Joseph Griffo	Plaintiff	Appellant
8	Senator Stephen M. Saland	Plaintiff	Appellant
9	Senator Thomas O'Mara	Plaintiff	Appellant
10	James Patterson	Plaintiff	Appellant

**9. Attorney information:**

Instructions: For each party listed above, fill in the name of the one law firm and responsible attorney who will act as counsel of record, if the party is represented. Where a litigant is self-represented, fill in that party's data in section 10 below.

**For Party No. 1 above:**

Law Firm Name: Lewis & Fiore  
 Responsible Attorney: David L. Lewis, Esquire  
 Street Address: 225 Broadway, Suite 3300  
 City: New York State: NY Zip: 10007  
 Telephone No: 212 285-2290 Ext. \_\_\_\_\_ Fax: (212) 964-4506  
 If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? yes no

**For Party No. 2 above:**

Law Firm Name: Lewis & Fiore  
 Responsible Attorney: David L. Lewis, Esquire  
 Street Address: 225 Broadway, Suite 3300  
 City: New York State: NY Zip: 10007  
 Telephone No: (212) 285-2290 Ext. \_\_\_\_\_ Fax: (212) 964-4506  
 If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? yes no

**For Party No. 3 above:**

Law Firm Name: Lewis & Fiore  
 Responsible Attorney: David L. Lewis, Esquire  
 Street Address: 225 Broadway, Suite 3300  
 City: New York State: NY Zip: 10007  
 Telephone No: (212) 285-2290 Ext. \_\_\_\_\_ Fax: (212) 964-4506  
 If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? yes no

**8. Party Information: (Continued)**

11.	John Mills	Plaintiff	Appellant
12.	William Nelson	Plaintiff	Appellant
13.	Robert Ferris	Plaintiff	Appellant
14.	Wayne Speenburgh	Plaintiff	Appellant
15.	David Callard	Plaintiff	Appellant
16.	Wayne McMaster	Plaintiff	Appellant
17.	Brian Scala	Plaintiff	Appellant
18.	Peter Tortorici	Plaintiff	Appellant
19.	New York State Task Force on Demographic Research & Reapportionment	Defendant	Respondent
20.	New York State Department of Correctional Services	Defendant	Respondent
21.	Michael Bailey	Intervenor/Defendant	Respondent
22.	Robert Ballan	Intervenor/Defendant	Respondent
23.	Judith Brink	Intervenor/Defendant	Respondent
24.	Tedra Cobb	Intervenor/Defendant	Respondent
25.	Frederick A. Edmond III	Intervenor/Defendant	Respondent
26.	Melvin Faulkner	Intervenor/Defendant	Respondent
27.	Daniel Jenkins	Intervenor/Defendant	Respondent
28.	Robert Kessler	Intervenor/Defendant	Respondent
29.	Steven Mangual	Intervenor/Defendant	Respondent
30.	Edward Mulraine	Intervenor/Defendant	Respondent
31.	Christine Parker	Intervenor/Defendant	Respondent
32.	Pamela Payne	Intervenor/Defendant	Respondent
33.	Diane Pryor	Intervenor/Defendant	Respondent
34.	Tabitha Sielfoff	Intervenor/Defendant	Respondent
35.	Gretchen Stevens	Intervenor/Defendant	Respondent

**For Party No. 4 above:**

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis, Esquire  
Street Address: 225 Broadway, Suite 3300  
City: New York State: NY Zip: 10007  
Telephone No.: (212) 285-2290 Ext. \_\_\_\_\_ Fax: (212) 964-4506  
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? yes  no

**For Party No. 5 above:**

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis, Esquire  
Street Address: 225 Broadway, Suite 3300  
City: New York State: NY Zip: 10007  
Telephone No.: (212) 285-2290 Ext. \_\_\_\_\_ Fax: (212) 964-4506  
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? yes  no

**CONTINUED ON ATTACHED SHEET**

(Use additional sheets if necessary)

**10. Self-Represented Litigant information:**

**For Party No. \_\_\_ above:**

Party's Name: \_\_\_\_\_  
Street Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Telephone No.: \_\_\_\_\_ Ext. \_\_\_\_\_ Fax: \_\_\_\_\_

**For Party No. \_\_\_ above:**

Party's Name: \_\_\_\_\_  
Street Address: \_\_\_\_\_  
City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
Telephone No.: \_\_\_\_\_ Ext. \_\_\_\_\_ Fax: \_\_\_\_\_

**11. Related motions and applications:**

Does any party to the appeal have any motions or applications related to this appeal pending in the Court of Appeals?  yes  no

If yes, specify:

- a. the party who filed the motion or application: \_\_\_\_\_
- b. the return date of the motion: \_\_\_\_\_
- c. the relief sought: \_\_\_\_\_

Does any party to the appeal have any motions or applications in this case currently pending in the court from which the appeal is taken?  yes  no

**9. Attorney Information (continued)**

For Party No. 6 above:

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis  
Street Address: 225 Broadway, Suite 3300  
City: New York, New York 10007  
Telephone No. (212) 285-2290 Fax: (212) 964-4506

For Party No. 7 above:

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis, Esquire  
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Telephone No. (212) 285-2290 Fax: (212) 964-4506

For Party No. 8 above:

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis, Esquire  
Street Address: 225 Broadway, Suite 3300  
City: New York, New York 10007  
Telephone No. (212) 285-2290 Fax: (212) 964-4506

For Party No. 9 above:

Law Firm Name: Lewis & Fiore  
Responsible Attorney: David L. Lewis, Esquire  
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City: New York, New York 10007  
Telephone No. (212) 285-2290 Fax: (212) 964-4506

For Party No. 10 above:

Law Firm Name: Leventhal, Sliney & Mullaney, LLP  
Responsible Attorney: Steven G. Leventhal, Esquire  
Street Address: 15 Remsen Avenue  
City: Roslyn, New York 11576  
Telephone No. (516) 484-5440 Fax: (516) 484-2710

For Party No. 11 above:

Law Firm Name: Leventhal, Sliney & Mullaney, LLP  
Responsible Attorney: Steven G. Leventhal, Esquire  
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For Party No. 12 above:  
Law Firm Name: Leventhal, Sliney & Mullaney, LLP  
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For Party No. 13 above:  
Law Firm Name: Leventhal, Sliney & Mullaney, LLP  
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For Party No. 14 above:  
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For Party No. 15 above:  
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For Party No. 16 above:  
Law Firm Name: Leventhal, Sliney & Mullaney, LLP  
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For Party No. 17 above:  
Law Firm Name: Leventhal, Sliney, Mullaney, LLP  
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For Party No. 18 above:

Law Firm Name: Leventhal, Sliney, Mullaney, LLP  
Responsible Attorney: Steven G. Leventhal, Esquire  
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For Party No. 19 above:

Law Firm Name: Attorney General of the State of New York  
Responsible Attorney: Stephen M. Kerwin, Assistant Atty General  
Street Address: The Capitol  
City: Albany, New York 12224-0341  
Telephone No. (518) 473-7184 Fax: (518) 474-7172

For Party No. 20 above:

Law Firm Name: Attorney General of the State of New York  
Responsible Attorney: Stephen M. Kerwin, Assistant Atty General  
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City: Albany, New York 12224-0341  
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**For Party No. 21-35 above: (Intervenors/Defendants)**

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(617) 849-5915 (Fax)

Sidney S. Rosdeitcher, Esquire  
1285 Avenue of the Americas  
New York, New York 10019  
(212) 373-3238  
(212) 492-0238 (Fax)

If yes, specify:

- a. the party who filed the motion or application: \_\_\_\_\_
- b. the return date of the motion: \_\_\_\_\_
- c. the relief sought: \_\_\_\_\_

Are there any other pending motions or ongoing proceedings in this case? If yes, please describe briefly the nature and the status of such motions or proceedings: \_\_\_\_\_

NO  
\_\_\_\_\_  
\_\_\_\_\_

- 12. Set forth, in point-heading form, issues proposed to be raised on appeal (this is a nonbinding designation, for preliminary issue identification purposes only):  
SEE ATTACHED SHEET

(use additional sheet, if necessary)

- 13. Does appellant request that this appeal be considered for resolution pursuant to section 500.11 of the Rules of the Court of Appeals (Alternative Procedure for Selected Appeals)?  
\_\_\_\_\_yes     no

If yes, set forth a concise statement why appellant believes that consideration pursuant to section 500.11 is appropriate (see section 500.11[b]): \_\_\_\_\_ (Fill in on lines below)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 14. Notice to the Attorney General.

Is any party to the appeal asserting that a statute is unconstitutional?  yes    \_\_\_\_\_no

If yes, has appellant met the requirement of notice to the Attorney General in section 500.9(b) of the Rules of the Court of Appeals?  yes    \_\_\_\_\_no

**12. Issues proposed (continued):**

POINT I

THE FEDERAL CENSUS IS "CONTROLLING" ACCORDING TO THE STATE CONSTITUTION ARTICLE III SECTION 4 BUT PART XX OF CHAPTER 57 OF THE LAWS OF 2010 IS IN DIRECT CONFLICT WITH THE COMMAND THAT THE CENSUS IS CONTROLLING BY CREATING A LESSER INCLUSIVE CENSUS FOR REAPPORTIONMENT.

POINT II

THE CONSTITUTION'S USE OF THE TERM "CONTROLLING" REQUIRES THAT THE STATE APPORTIONMENT PROCESS NOT VARY FROM THE CENSUS METHODS OF ENUMERATION.

POINT III

THE NEW LAW PREVENTS THE ACTUAL ENUMERATION OF ALL THE INHABITANTS REQUIRED TO BE COUNTED BY THE PROCESS OF REAPPORTIONMENT AS DEFINED BY ARTICLE III SECTION 5-A.

POINT IV

THE NEW SECTIONS OF THE LEGISLATIVE LAW AND THE CORRECTIONS LAW VIOLATE THE EQUAL PROTECTIONS OF LAWS PROVISION OF ARTICLE I SECTION 11 OF THE CONSTITUTION OF VOTERS AND OTHERS BY THE CREATION OF AN ALTERNATE METHOD OF ENUMERATION FOR LEGISLATIVE REAPPORTIONMENT.

15. **ITEMS REQUIRED TO BE ATTACHED TO EACH COPY OF THIS STATEMENT:**

**A. A copy of the filed notice of appeal to the Court of Appeals (with proof of service), a copy of the order granting leave to appeal to the Court of Appeals (civil case), or a copy of the certificate granting leave to appeal to the Court of Appeals (criminal case), whichever is applicable;**

**B. A copy of the signed order, judgment or determination appealed from to this Court (use document issued by the court, not internet version);**

**C. A signed copy of any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review (use document issued by the court, not internet version);**

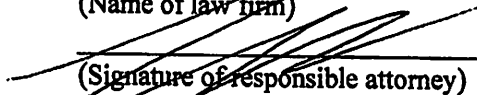
**D. Copies of all decisions or opinions relating to the orders set forth in subsections B and C above (use documents issued by the court, not internet versions); and**

**E. If required, a copy of the notice sent to the Attorney General pursuant to section 500.9(b) of the Rules of the Court of Appeals.**

**F. If required, a disclosure statement pursuant to section 500.1(f) of the Rules of the Court of Appeals.**

Date: 12/12/2011

Submitted by: LEWIS & FIORE  
(Name of law firm)

  
(Signature of responsible attorney)

DAVID L. LEWIS  
(Typed name of responsible attorney)

Attorneys for appellant SENATOR APPELLANTS  
(Name of party)

-or-

Date: \_\_\_\_\_

Submitted by \_\_\_\_\_, pro se  
(Signature of appellant)

\_\_\_\_\_  
(Typed/printed name of self-represented appellant)

STATE OF NEW YORK  
SUPREME COURT

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; and  
PETER TORTORICI,

Plaintiffs,

-against-

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

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,

Intervenors-Defendants.

Albany County Clerk  
Document Number 11041517  
Rcvd 12/05/2011 10:15:28 AM



**DECISION and ORDER**  
INDEX NO. 2310-2011

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(Eugene P. Devine, J.S.C., presiding)

APPEARANCES:

David L. Lewis, Esq.  
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225 Broadway, Suite 3300  
New York, New York 1007  
Attorney for Plaintiffs

Steven G. Leventhal, Esq.  
Leventhal, Sliney & Mullaney, LLP  
15 Remsen Avenue  
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Co-Counsel for Citizen Plaintiffs

Eric T. Schneiderman  
Attorney General of the State of New York  
By Stephen M. Kerwin, Assistant Attorney General  
The Capitol  
Albany, New York 12224  
Attorney for Defendant New York State Department of Corrections  
and Community Supervision

Wendy Weiser, Esq.  
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Attorneys for Intervenors-Defendants

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Attorneys for Intervenors-Defendants

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New York, NY 10004  
Attorneys for Intervenors-Defendants

Sidney S. Rosdeitcher, Esq.  
1285 Avenue of the Americas  
New York, NY 10019  
Attorneys for Intervenors-Defendants

**DEVINE, J.:**

In this declaratory judgment action, plaintiffs now seek summary judgment on their first cause of action which seeks a judicial declaration that Part XX of Chapter 57 of the Laws of 2010, which requires that inmates be counted for reapportionment purposes in their last known residence prior to their imprisonment rather than in the location of their assigned correctional



facility, violates the New York State Constitution.<sup>1</sup> Defendant New York State Department of Corrections and Community Supervision (DOCCS) opposes the motion for partial summary judgment and has cross-moved to dismiss the complaint or, alternatively, for summary judgment in its favor. In addition, the intervenors-defendants have cross-moved for summary judgment dismissing the complaint and have opposed plaintiffs' motion.

The Court must first address certain procedural matters, namely two applications to withdraw as counsel and a cross-motion from State Senator Martin Malave Dilan for leave to file an amicus curiae brief. The two applications to withdraw as counsel are granted as the intervenors-defendants are more than adequately represented and no party is prejudiced as a result. As to Senator Dilan's motion for leave to present an amicus curiae memorandum of law, in its discretion, the Court finds that, inasmuch as the proposed memorandum and supporting documents do not present any new arguments or perspectives that differ from those provided in submissions of DOCCS and the numerous intervenors-defendants, leave is denied.<sup>2</sup>

Furthermore, the Senator is a member of defendant New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR), which previously informed the Court that it would not render a separate submission in this action and was satisfied that the

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<sup>1</sup> In the instant motion, plaintiffs' also sought summary judgment on their second cause of action seeking a declaratory judgment that passage of Part XX in a budget appropriations bill encroached upon the Legislature's power pursuant to Article III, § 1 of the New York State Constitution. However, during oral argument on the motions, the parties stipulated that the second cause of action would be dismissed, thereby eliminating such cause of action from this Court's consideration.

<sup>2</sup> see Matter of Colmes v Fischer, 151 Misc. 222 [1934]; compare Matter of Empire State Assn. of Assisted Living, Inc. v Daines, 26 Misc.3d 340, 343 [Sup. Ct. Albany County, 2009]; Kruger v Bloomberg, 1 Misc.3d 192, 196 [Sup. Ct. New York County, 2003].

Office of the Attorney General, as counsel for DOCCS, would adequately address plaintiffs' contentions. As a member of a party to this action that has decided the manner in which it would appear in this case, the Court finds that it is unnecessary to grant Senator Dilan leave to participate separately from LATFOR and DOCCS merely because his opinion regarding the Attorney General's representation differs from that of the co-chairs of LATFOR.<sup>3</sup>

The underlying facts are, briefly, that Part XX amended the Correction Law, Legislative Law and Municipal Home Rule Law to require that prison inmates be identified and counted, for purposes of creating lines for the state's Assembly and Senate districts, in the census block containing the inmate's address prior to his or her incarceration. Specifically, Part XX requires DOCCS to report to LATFOR inmates' residential addresses prior to incarceration, if available, instead of the locations of their respective correctional facilities for redistricting purposes and, in the event the inmates' prior residential addresses are unknown, were outside the state, or the inmates were confined in federal institutions, LATFOR "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" to be used to draw new legislative districts.

In support of their claim of entitlement to a judgment declaring that Part XX violates Article III, § 4 of the state Constitution because the method of counting inmates in their prior residences rather than their place of incarceration deviates from that recommended by the U.S. Census Bureau, plaintiffs refer to a report issued by the Census Bureau in 2006.<sup>4</sup> In that report,

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<sup>3</sup> see Central Hanover Bank & Trust Co. v Saranac River Power Corp., 243 AD 843 [3d Dept. 1935].

<sup>4</sup> Article 3, § 4 states that the federal decennial census "shall be controlling as to the numbers of inhabitants in the state or any part thereof for the purposes of the apportionment of

the Census Bureau found that, at that time, it would be highly difficult to determine precise numbers of persons in each state “for apportionment purposes” unless prisoners were counted in their place of incarceration.<sup>5</sup> Despite the inherent difficulty in ascertaining consistent prisoner data, the Census Bureau recognized that Congress had required that prisoners be counted at their “permanent home of record,” a term which was not clearly defined. The 2006 Census Bureau report concluded that counting inmates in the manner recommended by Congress would likely increase census-related costs and would burden correctional facilities that would be required to collect such data. The Court finds, however, that this report merely highlighted the difficulties attendant in attempting to collect prisoner residential data and did not, as plaintiffs infer, preclude the current statutory enactment which requires that inmates be counted at their last known residence rather than at their correctional facility. Nonetheless, at present, the Census Bureau appears to have changed its approach to counting prison inmates, as Bureau Director Robert M. Groves has reported that states may now create their own methodology for counting inmates for apportionment purposes. In March 2010, Groves stated that the Census Bureau counts individuals at their “usual residence” and that, for inmates in particular, states were free to decide the manner in which prisoners were counted, namely, at the prisons, at their pre-incarceration addresses or altogether removed from “redistricting formulas” where residential information was unavailable.<sup>6</sup> And, as intervenors-defendants point out, the Census Bureau purposely released its

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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.”

<sup>5</sup> Affirmation of David L. Lewis, at exhibit D.

<sup>6</sup> Intervenors-Defendants’ Exhibit 1.

“Group Quarters” data early so that states, including New York, could enact redistricting plans that opted to count inmates at their pre-incarceration locations. Accordingly, plaintiffs have not demonstrated that Part XX has rendered the data provided by the Census Bureau to be anything less than ‘controlling’ in the redistricting process.

Further, plaintiffs’ assertion that to consider inmates whose addresses cannot be determined or are from outside the state contravenes that part of Article III that requires that all “inhabitants” be counted for apportionment purposes is unavailing. Specifically, Article III requires that Senate and Assembly districts be drawn “according to the number of their respective inhabitants, excluding aliens,” and the term “inhabitants” is defined as “the whole number of persons.”<sup>7</sup> Though inmates may be physically found in the locations of their respective correctional facilities at the time the census is conducted, there is nothing in the record to indicate that such inmates have any actual permanency in these locations or have an intent to remain. In fact, it is undisputed that inmates are transferred among the state’s correctional facilities at the discretion of DOCCS and plaintiffs have not proffered evidence that inmates have substantial ties to the communities in which they are involuntarily and temporarily located. Acknowledging that “legislative enactments carry an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt,” the Court finds and determines that, as to their first cause of action, plaintiffs have failed to demonstrate that, as

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<sup>7</sup> see Art. III, § 5, § 5-a.

a matter of law, Part XX violates the state Constitution.<sup>8</sup> Therefore, plaintiffs' first cause of action must be dismissed.

Turning to defendants' and intervenors-defendants' respective motions for summary judgment dismissing the remaining causes of action, the Court will first consider plaintiffs' claim that Part XX violates the one-person, one-vote principle. Specifically, plaintiffs allege in their complaint that the statute "exacerbates the weight of vote differential between upstate and downstate counties that already exists because even with the total population being counted, there remains the disparate presence in downstate counties of ineligible voters and traditionally lower voter turnout rates," without further explaining how the purported ineligibility of individuals who are counted "downstate" has any impact on LATFOR's mandate to create legislative districts which are "substantially equal in population," nor do plaintiffs provide any evidence substantiating such claims.<sup>9</sup> In the memorandum of support concerning the subject legislation, the bill's sponsor explains that, as inmates do not use local "schools, hospitals, or other public facilities," unlike other individuals who are considered part of "group quarters," such as college students and military personnel, to continue counting them as inhabitants of the state's prison communities tends to dilute minority voting strength in violation of the federal Voting Rights Act of 1965 and the one-person, one-vote rule. The sponsor goes on to explain that Part XX sought to rectify the "electoral inequities" created by enumerating prisoners as part of districts in which they were involuntarily and temporarily placed. As these policy

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<sup>8</sup> Matter of Frontier Ins. Co. v Town Bd. of Town of Thompson, 285 AD2d 953, 955 [3d Dept. 2001], quoting Elmwood-Utica Houses v Buffalo Sewer Auth., 65 NY2d 489 [1985].

<sup>9</sup> Longway v Jefferson County Bd. of Supervisors, 83 NY2d 17, 19 [1993]; see Reynolds v Sims, 377 US 533, 568 [1964].

determinations provided the requisite rational bases for enacting Part XX, the applications for dismissal of the equal protection claims must be granted.<sup>10</sup>

Furthermore, the Court agrees with defendants' assertion that plaintiffs' fourth cause of action must be dismissed for lack of standing. Under that claim, plaintiffs contend that Part XX denied equal protection rights to "all non-prisoners counted in group quarters," however, as no plaintiff confesses to being part of any "group quarter," plaintiffs cannot meet the threshold requirement of standing to assert this claim.<sup>11</sup> Plaintiffs' fifth and sixth causes of action, which repeat claims of equal protection violations, assert that Part XX irrationally counts inmates at their pre-incarceration addresses "even though they may have no ability or intention to return to such place thereby eliminating it as ever being a residence" and that counting them at their prior addresses impinges on the equal protection rights of other "persons," without further elaboration. Such claims are highly speculative and conclusory and fail to convince the Court that the underlying legislative enactment is anything other than rationally based and constitutionally sound. Finally, plaintiff's seventh cause of action, which purports to raise of a claim of partisan gerrymandering, alleges that Part XX is the product of a power play by Democratic lawmakers to usurp the strength of the "Republican Party, its voters and elected representatives." Even in the event such claims were justiciable,<sup>12</sup> the Court finds and determines, nonetheless, that there is nothing in the record which demonstrates that the subject enactment constitutes a breach of the

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<sup>10</sup> see e.g. Dalton v Pataki, 5 NY3d 243, 265-266 [2005].

<sup>11</sup> see Matter of New York Assn. of Convenience Stores v Urbach, 92 NY2d 204, 212 [1998].

<sup>12</sup> The United States Court of Appeals, in Veith v Jubelirer, 541 US 267 [2004], held that claims of political gerrymandering are non-justiciable.

legislature's obligation to substantially comply with the federal and state constitutions.<sup>13</sup>

Accordingly, it is now

**ORDERED** that the motions for leave to withdraw as counsel by Andrew Kalloch, Esq. and Allegra Chapman, Esq. are both granted; it is further

**ORDERED** that the motion for leave to file an amicus curiae memorandum of law by Senator Martin Malave Dilan is denied; it is further

**ORDERED** that plaintiffs' motion for partial summary judgment on the first cause of action is denied; it is further

**ORDERED** that plaintiffs' second cause of action is dismissed, on consent of all parties; it is further

**ORDERED** that defendants' and intervenors-defendants' motions for summary judgment dismissing plaintiffs' remaining causes of action are granted in their entirety and the complaint is dismissed.

Those assertions not specifically discussed herein have been considered and found to be unavailing.

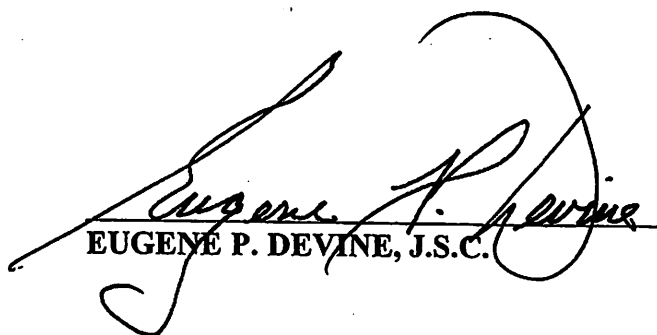
This Memorandum shall constitute both the Decision and Order of the Court. This original **DECISION and ORDER** is being sent to the Office of the Attorney General. The signing of this **DECISION and ORDER** shall not constitute entry or filing under CPLR 2220. Legal counsel for the defendants is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

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<sup>13</sup> see Matter of Wolpoff v Cuomo, 80 NY2d 70, 78 [1992], citing to Matter of Schneider v Rockefeller, 31 NY2d 420, 427 [1972].

SO ORDERED  
ENTER

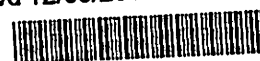
Date: *December 1*, 2011  
Albany, New York

  
EUGENE P. DEVINE, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion to Withdraw, Affirmation of Andrew L. 30, 2011.
2. Notice of Motion for Request to Withdraw, Affirmation of August 31, 2011.
3. Notice of Cross-Motion for Leave to File Amicus Curiae Brief, Affirmation of Leonard Kohen, Esq., Affidavit of Senator Martin Malave Dilan, with exhibits, dated August 17, 2011.
4. Notice of Motion for Summary Judgment, Affirmation in Support by David L. Lewis, Esq., with exhibits, and Memorandum of Law in Support of Motion, dated August 5, 2011.
5. Notice of Cross-Motion for Summary Judgment, Affirmation of Stephen M. Kerwin, Assistant Attorney General, with exhibits, and Memorandum of Law in Support of Cross-Motion and in Opposition of Motion for Summary Judgment, dated August 18, 2011.
6. Notice of Intervenor-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, Affirmation of Peter Wagner, Esq., with exhibits, and Memorandum of Law in Support of Motion and in Opposition of Plaintiffs' Motion, dated August 18, 2011.
7. Plaintiffs' Reply Affirmation in Support of Motion for Summary Judgment and in Opposition to Defendants' Motions for Summary Judgment, with exhibits, and Reply Memorandum of Law, dated September 2, 2011.
8. Defendants' Reply Memorandum of Law, dated September 14, 2011.
9. Reply in Support of Intervenor-Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, dated September 15, 2011.

Albany County Clerk  
Document Number 11041517  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

-----x  
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,

Intervenor-Defendants.  
-----x

PLEASE TAKE NOTICE that Plaintiffs hereby appeals to  
the Court of Appeals, pursuant to CPLR 5601(b)(2), from the  
judgment of the Supreme Court, Albany County, dated December 2,

INDEX NO. 2310-2011  
Albany County

Assigned Judge:  
Devine

Albany County Clerk  
Document Number 11046050  
Rcvd 12/12/2011 10:14:03 AM

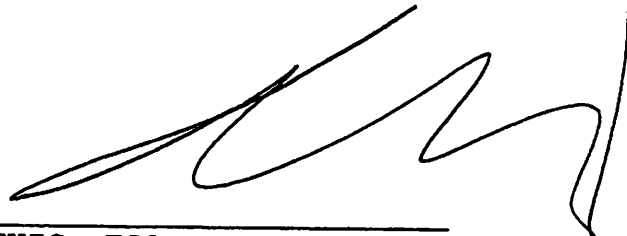


NOTICE OF APPEAL



2011 and entered on December 5, 2011, which directly involves only the question of the constitutionality of Part XX of the Laws of 2010, a statute of the State of New York, under the Constitution of the State of New York.

Dated: New York, New York  
December 8, 2011



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225 Broadway, Suite 3300  
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(212) 285-2290

TO: Clerk of the Court  
Supreme Court, State of New York  
County Courthouse  
16 Eagle Street, Room 128  
Albany, New York 12207

New York Legislative Task Force  
On Demographic Research & Reapportionment  
250 Broadway, Suite 2100  
New York, New York 10007

Eric T. Schneiderman  
Attorney General of the State of New York  
ATTN: Steven M. Kerwin, Assistant Attorney General  
Attorney for Defendant NYS Department of  
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Andrew L. Kalloch, Esquire  
New York Civil Liberties Union Foundation  
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Peter Wagner, Esquire  
Aleks Kajstura, Esquire  
Prison Policy Initiative  
P.O. Box 127  
Northampton, MA 01061

Sidney S. Rosdeitcher, Esquire  
1285 Avenue of the Americas  
New York, New York 10009



1. I am not a party to the action, am over 18 years of age and employed at Lewis & Fiore, 225 Broadway, Suite 3300, New York, New York.

2. On December 8, 2011, I served a true copy of the Notice of Appeal by mailing the same in a sealed envelope, with postage prepaid thereon, in an official depository of the United States Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

New York Legislative Task Force  
On Demographic Research & Reapportionment  
250 Broadway, Suite 2100  
New York, New York 10007

Eric T. Schneiderman  
Attorney General of the State of New York  
ATTN: Steven M. Kerwin, Assistant Attorney General  
Attorney for Defendant NYS Department of  
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The Capital  
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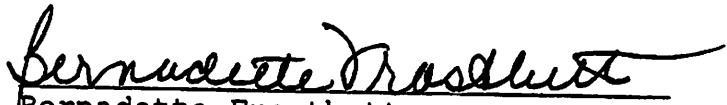
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New York, New York 10009

  
Bernadette Frostbutter

SWORN to before  
me the 26 day  
of December 2011.

  
NOTARY PUBLIC

CHARLES G. FIORE  
Notary Public State of New York  
No. 02FI4709443  
Qualified in Kings County  
Commission Expires May 31, 2015

Index No.

Year 20

**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 MAZIARE, 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.

**NOTICE OF APPEAL**

**DAVID L. LEWIS, ESQUIRE**

Attorney(s) for

Plaintiffs

Office Address & Tel. No.  
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New York, New York 10007  
(212) 285-2290

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: .....

Signature: .....

Print Signer's Name: .....

Service of a copy of the within

is hereby admitted.

Dated:

Attorney(s) for

**PLEASE TAKE NOTICE**

Check Applicable Box

NOTICE OF ENTRY

that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on

20

NOTICE OF SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the Hon. at one of the judges of the within-named Court, on

20 in M.

Dated:

Attorney(s) for

To:

Office Address & Tel. No.: