SUPREME COURT OF THE 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 STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, NEW YORK STATE DEPARTMENT OF CORRECTIONAL AND COMMUNITY SERVICES,

Defendants,

and

NAACP NEW YORK STATE CONFERENCE, VOICES OF COMMUNITY ACTIVISTS AND LEADERS-NEW YORK, COMMON CAUSE/NEW YORK, 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,

Proposed Intervenor-Defendants.

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INDEX NO. 2310-2011

PROPOSED INTERVENORS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO INTERVENE

Oral Argument Requested

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Preliminary Statement and Summary of Argument

Proposed intervenors agree with plaintiffs' position that "it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), 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.'" (Mem. of Law in Opp. to Mot to Intervene ("Pls.' Resp.") at 15-16 (citing *Perl v Aspromonte Reality Corp.*, 143 AD2d 824, 825 [2d Dept 1988].)

In proposed intervenors' memorandum in support of their motion to intervene, they show that no one has a greater interest in defending the validity of the challenged statute than they do: they are voters and organizations representing voters residing in districts for whose protection part XX was designed and enacted. (*See* Mem. of Law in Supp. of Proposed Intervenor Defs.' Mot to Intervene ("Mot to Intervene") at 7-9.) They would lose part XX protections and be directly injured should plaintiffs succeed in invalidating part XX and restoring the prior method of allocating incarcerated persons when redistricting. (Mot to Intervene at 9.)

Indeed, plaintiffs' standing in this action rests on the very same type of interest shared by proposed intervenors, i.e. the impact on the political influence of voters in districts to which incarcerated persons are allocated. If plaintiffs' arguments challenging proposed intervenors' interests were accepted, those same arguments would require dismissal of plaintiffs' complaint for lack of standing.

Plaintiffs' arguments are misguided on each of the criteria for intervention. As proposed intervenors show in their memorandum in support, the named defendants do not adequately represent intervenors' interests because neither of the defendants has the kind of direct interest in preserving part XX that proposed intervenors have. (*See* Mot to Intervene at 9-15.) Defendant LATFOR has made that clear by choosing not to file an answer and by informing the court that its only interest is in a prompt resolution of this action, regardless of its outcome. In more picturesque language, a LATFOR representative has recently told the media that "we don't have a dog in the fight." (*See* Jacob D. Potent, *Inmates at Center of Redistricting Battle*, The Legislative Gazette, May 23, 2011, available at http://www.legislativegazette.com/Articles-c-2011-05-23-

77554.113122-Inmates-at-center-of-redistricting-battle.html [accessed June 1, 2011].)

Meanwhile, defendant Department of Correctional and Community Services' ("DOCCS") only interest is counting incarcerated persons as directed by law. Indeed, DOCCS disclosed that it will defend itself by asserting that this action should be dismissed because DOCCS has already fulfilled its part XX legal requirement to transmit its data to LATFOR. (*See* Answer of Def. DOCCS at 4.)[1]

Plaintiffs' argument that proposed intervenors' motion should be denied because defendant DOCCS is represented by the Attorney General, who as a senator supported the passage of part XX, wrongly conflates the Attorney General's political and philosophical interests and his duties as the lawyer for DOCSS. (*See* Affirmation of David L. Lewis at para 13 and 14.) As the attorney for DOCCS, the Attorney General is obligated to represent DOCCS' interests, not his own. It is DOCCS' interests that are the measure of whether DOCCS may or may not adequately represent the interest of proposed intervenors. Plaintiffs are also mistaken on whether the proposed intervenors would be bound by a judgment in this action. Should this case

[1] This is contrary to plaintiffs' contention that DOCCS has not yet reported the information to LATFOR. (*See* Pls.' Aff. In Opp., para 29.)

result in a final judgment invalidating and enjoining enforcement of part XX and restoring the prior method of allocating prisoners, proposed intervenors would be bound by the judgment in every practical sense, regardless of whether the judgment were technically *res judicata*. New York courts do not elevate the technical criteria for intervention over the practical realities of the impact of an outcome on intervenors' interests, nor do they encourage needless additional lawsuits.

Plaintiffs incorrectly argue that intervention should be denied because this action would be delayed due to proposed intervenors' assertion of an affirmative defense under the state and federal guarantees of equal protection. That affirmative defense may need to be examined by the court if it were to consider invalidating part XX and restoring the prior method of allocating incarcerated persons to the district in which they were imprisoned, rather than the district in which they resided prior to incarceration. This defense would not be necessary to uphold the validity of part XX and, accordingly, the court could easily sever this defense, to be considered later only if necessary. The affirmative defense certainly does not justify denying intervention.

Finally, proposed intervenors reject the arguments that plaintiffs make pertaining to the merits but, in any event, those merits arguments are irrelevant to the question of whether to grant proposed intervenors' motion. Proposed intervenors are accordingly entitled to intervention as of right or, alternatively, permissive intervention.

I. Proposed Intervenors Satisfy All of the Criteria for Intervention as of Right

Proposed intervenors are entitled to intervention as of right because: (1) representation of the proposed intervenors' interests by the parties is or may be inadequate; (2) the proposed intervenors are or may be bound by the judgment, and (3) their motion is timely. (CPLR 1012 (a) (2).)

A. Proposed Intervenors Have a Substantial Interest Which May Not Be Adequately Represented by Named Defendants

Proposed intervenors' interests qualify as the very interests part XX was intended to protect. Part XX requires that incarcerated persons be allocated for redistricting purposes to the districts in which those persons resided prior to incarceration. It reverses the

prior method by which such persons were allocated to the districts in which they were imprisoned. Part XX sought to remedy the injustice of enhanced political influence enjoyed by voters in districts where prisons happened to be located and which shared no mutual interests with the prison population, while diminishing the political influence of the districts to which most of these incarcerated persons would return and with which they still have familial and other ties.

If, as plaintiffs assert, proposed intervenors' rights are too inchoate to support intervention because no action has been taken by DOCCS and LATFOR (Pls.' Resp. at 27),[2] then that alleged lack of ripeness also means plaintiffs cannot meet their threshold burden of demonstrating their injury in fact. (*See Society of the Plastics Industry v County of Suffolk*, 77 NY2d 761 [Ct App 1991]; *Lujan v Defenders of Wildlife*, 504 US 555 [1992].) But there is nothing inchoate about proposed intervenors' interests. Should this court grant the relief plaintiffs' request, incarcerated persons would have to be allocated to districts with prisons, thereby enhancing the political influence of those districts at the expense of the

[2] As a factual matter, DOCCS has represented to the court that it already has provided the required information to LATFOR.

districts where the incarcerated persons previously resided and other districts in which proposed intervenors reside.

Proposed intervenors' interests would not be adequately represented by the existing parties. The two defendant state agencies are tasked with the job of fulfilling their duties under state law, whatever that law may be. Defendant LATFOR has elected not to respond to plaintiffs' complaint and has informed the court that its sole interest is in a prompt resolution of this case. One of its members, Assemblymember John McEneny, has publicly affirmed LATFOR's lack of interest in the outcome of the legal proceedings, stating "[w]e don't have a dog in the fight. We will do whatever the court says. Right now we will do whatever the law says."[3] Defendant DOCCS, represented by the Attorney General, has asserted a defense that it has fulfilled its responsibilities under part XX.

Plaintiffs' emphasis on the interests of Attorney General Eric Schneiderman in their response misses the mark because neither the Attorney General's personal interests, nor the interests of his office are at issue in the case because plaintiffs have not sued the State or the Attorney

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[3] See Jacob D. Potent, *Inmates at Center of Redistricting Battle*, The Legislative Gazette, May 23, 2011, available at http://www.legislativegazette.com/Articles-c-2011-05-23-77554.113122-Inmates-at-center-of-redistricting-battle.html [accessed June 1, 2011]).

General. Instead, the Attorney General's clear role in this case is to represent the interests of its sole client, DOCCS. DOCCS' interests are primarily administrative, and diverge widely from proposed intervenors' genuine and substantive interests related to their ability to participate effectively in the political process. (*See* Mot to Intervene at 11-15.)

Moreover, even if the Attorney General had to intervene on behalf of the state, this would in no way preclude affected parties from intervening in cases involving the constitutionality of a state statute. (*See, e.g., Buffalo v State Bd. of Equalization & Assessment*, 44 Misc 2d 716 [Sup Ct, Albany County 1964]; *Jamaica Gaslight Co. v Nixon*, 110 Misc 494 [Sup Ct, New York County 1920].)[4]

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[4] Federal courts have also frequently permitted voters to intervene where government officials were not found to have identical interests. (*See, e.g., Georgia v Ashcroft*, 539 US 461, 477 [2003] (upholding D.C. District Court's grant to private parties' motion to intervene on grounds that intervenors' interests were not adequately represented by the existing parties); *Meek v Metro. Dade County*, 985 F2d 1471, 1478 [11th Cir 1993 per curiam] (ruling that voters are entitled to intervene in voting rights suit concerning challenge to at-large voting system); *Northwest Austin Mun. Util. Dist. No. One v Mukasey*, 573 F Supp 2d 221, 230 [D DC 2008] (granting multiple motions to intervene presented by African-American, Latino and other minority voters in case challenging the constitutionality of Section 5 of the Voting Rights Act), *rev'd on other grounds by* 129 US 2504 [2009]; *Miller v Blackwell*, 348 F Supp 2d 916 [SD Ohio 2004] (permitting intervention in a suit arising under the National Voter Registration Act after determining that claimants' interest in avoiding dilution of their votes was different from the interests of state election officials, thus, reducing likelihood that those officials could adequately represent interests of the intervenors); *Smith v Cobb County Bd. of Elections & Registrations*, 314 F Supp 2d 1274, 1311 [ND Ga 2002] (permitting African-American voters to intervene in suit concerning reapportionment of districts since they asserted a legitimate interest that was not adequately represented by

Proposed intervenors' interests as voters and organizations that represent voters will remain divergent from those of the State.[5] Where, as here, proposed intervenors' interest is divergent from those of the parties to the suit, inadequacy of representation is assumed. (*See State ex rel. Field v Cronshaw*, 139 Misc 2d 470, 472 [Sup Ct, Nassau County 1988].)

B. Proposed Intervenors Will Be Bound by the Judgment

Plaintiffs concede that "intervention should be liberally allowed when the proposed intervenor will be bound by the judgment" (pl. opp at 8). A judgment favoring plaintiffs in this action would render the statute unconstitutional and would bind proposed intervenors in every meaningful and practical sense. Plaintiffs argue that proposed intervenors will not be bound by the judgment

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any of the parties); *Johnson v Mortham*, 915 F Supp 1529 [ND Fla 1995] (permitting intervention in the context of redistricting).)

[5] Throughout the response, Plaintiffs misstate the interests of organizational intervenors, which seek to vindicate and protect both the rights of their members, and their own organizational interests, which would be frustrated by a reversion to the previous method of allocating prison populations. (*See generally Dental Socy. of New York v Carey*, 61 NY2d 330 [Ct App 1984], (establishing that organizations have standing when they advocate and represent the interests of their members who have standing), citing *Hunt v Washington State Apple Adv. Comm.*, 432 US 333 [1977].) Any interest organizational intervenors have in protecting their investment of resources into the passage of part XX is in addition to their interest in avoiding the harms to the voting and representational strength of their members threatened by Plaintiffs' lawsuit.

because each voter would retain the right to sue to claim a dilution of his or her vote. This argument is specious. This case could wholly extinguish proposed intervenors' ability to defend the constitutionality of part XX under the state constitution, as well as their claim that the prior method of allocating the prison population violated state equal protection principles.

If plaintiffs obtain the judgment they seek in this action, challenges to subsequent redistricting premised on the prior method of allocating incarcerated persons would be rejected on the basis of stare decisis. This court's decision is not likely to be the last word because the losing party is virtually certain to exhaust its appellate remedies. This case is therefore likely to determine the proposed intervenors' rights under New York and federal law. Precluding proposed intervenors at this key stage would deprive them of the ability to shape the record and proffer legal arguments that would affect the ultimate outcome.

In the particular cases cited by plaintiffs' memo, those proposed intervenors did have a future chance to dispute the claim in case of an adverse result. For instance, in *Kaczmarek v. Shoffstall*, the insurance company denied intervention could sue for a declaratory judgment if

the first court found that the defendant was liable to the plaintiff for negligence (119 AD2d 1001, 1002 [4th Dept 1986]). Similarly, in *Lesser v West Albany Warehouses*, insurance companies were denied intervention because they could contest their liability in a subsequent proceeding (17 Misc 2d 461 [Sup Ct, Albany County 1959]). In contrast, an adverse result in this case would render part XX unconstitutional and would deprive proposed intervenors forevermore of the opportunity to argue that part XX is constitutional.

In any event, the fact that a party seeking to intervene may conceivably vindicate its interests in a future proceeding is not a basis on which to deny intervention. (*See, e.g., Fund for Animals, Inc. v Norton*, 322 F3d 728, 735 [DC Cir 2003] ("[I]t is not enough to deny intervention under [Fed. R. Civ. P.] 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation"), quoting *Natural Res. Def. Council v Costle*, 561 F2d 904, 910 [DC Cir 1977]; *Akiachak Native Community v US Dept of Interior*, 584 F Supp 2d 1, 7 [DC 2008] ("Although Alaska, if not a party to the present case, would not be precluded from challenging a change to the existing regulatory bar in a subsequent case, under *Fund for Animals*, the prejudice caused by an

unfavorable judgment in the present case would sufficiently impair Alaska's interests for the purpose of satisfying [Fed. R. Civ. P.] Rule 24(a) intervention as of right").)

In fact, avoiding the need for a future proceeding would fulfill one of the purposes of intervention -- avoiding multiplicity of litigation. (*See Bay State Heating & Air Conditioning v American Ins.*, 78 AD2d 147, 149 [4th Dept 1980] (CPLR 1012 and 1013 "should be liberally construed in order to reduce multiplicity of lawsuits by disposing of common questions of fact and law in one action").)

Moreover, where the constitutionality of a statute is at issue, *res judicata* is a particularly inappropriate standard to determine whether a proposed intervenor is or may be bound by the judgment. This is because a constitutional ruling invalidating part XX would effectively prevent a legislative remedy directed at the problem that part XX seeks to address. In this respect, intervenors might not only be foreclosed by a decision in this case from seeking judicial relief in a subsequent case, but could also be effectively barred, by a constitutional ruling, from seeking further legislative remediation.

Plaintiffs rely heavily on *Vantage Petroleum* (*Vantage Petroleum v Bd. of Assessment Review*, 61 NY2d 695 [Ct App 1984]), but New York courts have consistently refused to read *Vantage Petroleum* as requiring *res judicata* in all types of cases.[6] Instead, many New York courts interpret the "bound by the judgment" requirement of CPLR 1012 to require only that a proposed intervenor establish a "real and substantial interest in the outcome of the proceedings. (See, *e.g.*, *Perl v Aspromonte Reality Corp.*, 143 AD2d 824, 825 [2d Dept 1988] ("intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings") (citing *Vantage Petroleum v Bd. of Assessment Review*, 91 AD2d 1037 [2d Dept 1983], *affd* 61 NY2d 695 [Ct App 1984]); *Berkowski v Bd. of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 843 [2d Dept 2009] (applying the "real and substantial interest" standard in an action involving municipal law); *Sieger v Sieger*, 297 AD2d 33, 36 [2d Dept 2002] (applying the "real and substantial interest" standard in an action for divorce);

[6] *Vantage Petroleum* involved a tax assessment. The appellate court, when determining whether proposed intervenor was bound by the judgment, considered whether proposed intervenor had a "real and substantial" interest in the case. The New York Court of Appeals wholly affirmed the ruling of the appeals court, and added additional commentary noting that "whether movant will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect," a conclusion entirely appropriate given that the judgment in that case fixing the value of property for taxation in one year would merely be evidence of its assessed value for a succeeding year, but would not dispose of the interests asserted by proposed intervenors.

Dalton v Pataki, 5 NY3d 243, 277-78 [Ct App 2005] (agreeing that proposed intervenor had a "substantial interest" in the matter).)

Proposed intervenors have made an incontrovertible showing of real and substantial interests, including those relating to proposed intervenors' political representation and voting strength. (Mot to Intervene at 7-9.) New York Courts have consistently found that interests related to an ability to participate effectively in the political process are the types of interests intervenors are allowed to protect (*see* Mot to Intervene at 11; *see also Smith v Cobb County Bd. of Elections*, 314 F Supp 2d 1274 [ND Ga 2002] (permitting intervention in the context of redistricting) *Johnson v Mortham*, 915 F Supp 1529 [ND Fla 1995] (permitting intervention in the context of redistricting)), regardless of whether *res judicata* requirements are technically met. (*See Wright v Rockefeller*, 376 US 52 [1964].) In sum, the cases cited by plaintiffs involving financial interests are inapplicable.

C. Granting Intervention Will Not Cause Delay

Proposed intervenors filed a timely motion a mere two business days after defendant DOCCS' answer was filed and are not requesting any changes to filing or litigation deadlines at this time. If this court is persuaded that

proposed intervenors' affirmative defense based on the equal protection clause might cause delay, it has the option to sever the defense until an appropriate time. As noted, that defense would only be relevant should the court consider invalidating part XX and restoring the prior method. It would not be necessary to address at all if part XX were held to be valid. Alternatively, the court could even strike the defense. But there is no basis for denying intervention solely because a proposed intervenor raised an affirmative defense that would otherwise not be before the court, especially one the court might not ultimately have to entertain.[7]

In fact, it is plaintiffs' position -- that intervenors should not be permitted to protect their rights implicated by this lawsuit because those rights can be litigated in the future (by some other set of plaintiffs no less, see Pls.' Resp. 14) -- that wastes court resources,

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[7] *East Side Car Wash v K.R.K. Capitol*, 102 AD2d 157 [1st Dept 1984], cited by plaintiffs, is inapposite because the underlying issue upon which intervenors sought resolution was not at issue in the case. In that case, a grant of intervention was overruled because the intervenor sought to "inject[] itself in the midst of a landlord-tenant dispute when there is another action pending which directly addresses the subject matter of [intervenor's] proposed replevin action." The court held that "a proposed intervenor is not permitted to raise issues which are not before the court in the main action" when the intervenor sought to introduce new issues that were completely immaterial to the action in which it sought to intervene: "The issues of whether the underground tanks are fixtures or chattels and whether [intervenor] owns said tanks even if they are chattels are neither relevant not material to the resolution of the issues posed in the instant 'sublease' action."

precludes the efficient administration of justice, and delays the vindication of rights. Intervention doctrine is supposed to prevent the multiplicity of lawsuits, not encourage it.

Proposed intervenors, therefore, contend that this motion will not cause delay.

Therefore, proposed intervenors are permitted to intervene as of right.

II. The Court Should Also Grant Permissive Intervention

This Court should also grant permissive intervention under CPLR 1013 because proposed intervenors' defense and the main action have common questions of law and fact and intervention will not likely delay the determination of the action or prejudice the rights of the existing parties. (CPLR 1013.)

A. Proposed Intervenors Share Common Questions of Law or Fact with the Main Action

The Court should grant permissive intervention where intervention will "reduce multiplicity of lawsuits by disposing of common questions of fact and law in one action." (*See Bay State Heating & Air Conditioning*, 78 AD2d at 149[4th Dept 1980].) Plaintiffs do not dispute that proposed intervenors share in common most of the questions

of fact and law to those presented in the main action, but make a series of irrelevant and repetitious arguments.

It is not required that each and every question of law and fact in a proposed intervenors' claim or defense be *identical* to those of the main action, as plaintiffs claim. (*See* CPLR 1013; *Teleprompter Manhattan CATV Corp. v State Bd. of Equalization & Assessment*, 34 AD2d 1033, 1034 [3d Dept 1970].) In any event, proposed intervenors' argument that plaintiffs' interests are divergent from those of defendants neither forecloses nor contradicts their argument that they share common questions of law or fact with the main action.

Moreover, as we have demonstrated in part I-C, intervention will allow for a more efficient and speedy resolution of the underlying issues and foster judicial economy.

III. Plaintiffs' Merits Arguments are Incorrect, and in Any Event, Irrelevant to a Motion to Dismiss

Plaintiffs misinterpret the New York constitution and misunderstand the data provided by the Census. (*See* Pls.' Resp. at 2-3, 5-7.) Proposed intervenors will address the relevant topics on the merits at the appropriate time. In ruling on the motion to intervene, this court should not

examine the ultimate merits of intervenors' claims before deciding intervention. (*See Myertin 30 Realty Development Corp. v Oehler*, 82 AD2d 913 [2d Dept 1981]; *see also Brennan v New York City Bd. of Educ.*, 260 F3d 123 [2d Cir. 2001] ("[E]xcept for allegations frivolous on their face, an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention") (citing *Oneida Indian Nation v New York*, 732 F2d 261, 265 (2d Cir 1984).) Proposed intervenors' claims are patently not frivolous.

Conclusion

For the reasons set forth above and in proposed intervenors' memorandum in support of their motion to intervene, proposed intervenors' motion to intervene should be granted.

Dated: June 6, 2011

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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SENATOR PATRICK GALLIVAN, :
SENATOR PATRICIA RITCHIE, :
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JAMES PATTERSON, JOHN MILLS, :
WILLIAM NELSON, ROBERT FERRIS, :
WAYNE SPEENBURGH, DAVID :
CALLARD, WAYNE McMASTER, :
BRIAN SCALA, PETER TORTORICI :
: Affidavit of Service
Plaintiffs, : Index No. 2310-2011 (Devine, J.)
-against- :
:
NEW YORK STATE LEGISLATIVE :
TASK FORCE ON DEMOGRAPHIC :
RESEARCH AND REAPPORTIONMENT,:
NEW YORK STATE DEPARTMENT OF :
CORRECTIONAL AND COMMUNITY :
SERVICES, :
Defendants, :
and :
:
NAACP NEW YORK STATE :
CONFERENCE, VOICES OF :
COMMUNITY ACTIVISTS AND :
LEADERS-NEW YORK, COMMON :
CAUSE/NEW YORK, MICHAEL :
BAILEY, ROBERT BALLAN, JUDITH :
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PAMELA PAYNE, DIVINE PRYOR, :
TABITHA SIELOFF, AND GRETCHEN :
STEVENS, :
Proposed Intervenor-Defendants. :

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AFFIDAVIT OF SERVICE

I, Chenwei Zhang, being duly sworn, depose and say that I am not a party to this action and am over the age of eighteen, hereby affirm under penalty of perjury that on June 6, 2011, the enclosed Proposed Intervenors' Reply to Plaintiffs' Memorandum of Law in Opposition to the Motion to Intervene, dated June 6, 2011, was served to plaintiffs' attorney and defendant, New York State Legislative Task Force on Demographic Research and Reapportionment, by courier; and the Attorney General, for defendant, New York State Department of Correctional and Community Services, by overnight mail:

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Chenwei Zhang

Sworn to before me this
6th day of June, 2011

MARK H. LADOV
NOTARY PUBLIC-STATE OF NEW YORK
No. 02LA6211303
Qualified in Kings County
My Commission Expires September 14, 2013

NOTARY PUBLIC