

# LEWIS & FIORE

ATTORNEYS AT LAW  
225 BROADWAY  
SUITE 3300  
NEW YORK, N.Y. 10007  
(212) 285-2290  
FAX (212) 964-4506

DAVID L. LEWIS  
CHARLES G. FIORE

December 22, 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. NYS Task Force on Demographic Research  
Index No. 2310-2011 (Albany County)**

Dear Mr. Klein:

I write in response to the letter of this Court of December 16, 2011 to set forth the reasons justifying the retention of subject matter jurisdiction under C.P.L.R. 5601 (b)(2). Copies of the documents requested in the December 16<sup>th</sup> letter are filed along with this letter.

I am counsel to plaintiffs-appellants Senator Elizabeth O'Connor Little, Senator Patrick Gallivan, Senator Patricia Ritchie, Senator James Seward, Senator George Maziarz, Senator Catharine Young, Senator Joseph Griffo, Senator Stephen M. Saland and Senator Thomas O'Mara, (collectively, the "Senator Plaintiffs").

The issues in the case are all substantial constitutional issues. First, whether the State Constitution prohibits the use of any enumeration, other than the federal decennial census, for enumeration of the inhabitants of the State for the purpose of apportioning the legislature. New York State Constitution, Article III Section 4. Second, whether the counting of prisoners at places other than the prisons, or the deliberate non-counting of prisoners due to unavailable data

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violate the requirement of enumeration of inhabitants in N.Y. State Constitution, Article III, Section 5-a. Third and finally whether the application of the newly enacted law violates the Equal Protection Clause of the New York State Constitution Article I Section 11.

Plaintiffs brought an action for a declaratory judgment on the basis that Part XX of Chapter 57 of the laws of 2010 which amended Section 71 of the Correction Law and Section 83-m (13) of the Legislative Law, is unconstitutional in that the laws violate Article III sections 4 and 5-a of the New York State Constitution and also violate the New York State Constitution, Equal Protection Clause, Article I, Section 11.

New York State Constitution, Article III Section 4 states that the federal decennial census "shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring...". In contravention of the Constitution's text, Chapter 57 of the Laws of 2010 required the State to use a competing, and varied census to alter the enumeration of one single specific class of persons: prisoners. The law forbids the counting of prisoners where they are found on Census Day, which is the place of their incarceration. Instead the laws now require that the prisoners be "backed out" of the Federal Decennial Census' enumeration totals and counted either in their mythic "homes", i.e., where they can be claimed once to have had an address, or if the address listed is not in the State or cannot be found with certainty, not be counted at all, thereby violating Article III Section 5-a, which mandates a counting of the "whole number of persons". The law essentially transformed inhabitants under the Constitution into a class of new "non-inhabitants" that will be wiped out as non-existent for counting purposes of reapportionment.

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Plaintiffs moved for summary judgment on the first cause of action alleging constitutional violation.<sup>1</sup> The defendants and defendant-intervenors then cross moved for summary judgment on all the causes of action. The Court heard oral argument on October 4, 2011. On December 2, 2011, Supreme Court, Albany County issued an order denying plaintiffs motion for summary judgment and dismissed the complaint in its entirety, holding that there was nothing unconstitutional about the enacted statutes.

#### **JURISDICTION OF THE COURT OF APPEALS TO HEAR THIS MATTER**

Plaintiffs assert the jurisdiction of this Court to hear an appeal from Supreme Court, Albany County, an original court of record, on the basis that this matter constitutes a substantial constitutional question, N.Y. Const. art. VI, § 3(b)(1) and (2) and C.P.L.R. 5601(b). The lawsuit solely challenges Part XX on the basis that the law violates two subdivisions of the Constitution. The State Constitution requires for the enumeration of its persons that the federal decennial census alone shall be "controlling" in the counting of inhabitants in the reapportionment of the state legislature, and with only certain non-relevant exceptions, no other census can be created or used.

The statute separately also violates the constitutional requirement that all inhabitants be counted. The definition of "inhabitants" contained in the State Constitution, the "whole number of persons", requires the counting of prisoners where they are found, in the prison. Part XX renders some inhabitants, who are found in prison on Census Day as "non persons" for the purpose of reapportionment contrary to the exact language of the Constitution requiring the counting of all inhabitants.

Additionally the statutes violate the equal protection of various persons in this state.

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<sup>1</sup> Plaintiffs consented to the dismissal of the Second Cause of Action at oral argument on October 4, 2011.

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**A. CONSTITUTIONAL JURISDICTION OF THIS COURT TO HEAR THE MATTER**

Plaintiffs now seek, as of right access to this Court, pursuant to the New York State Constitution Article IV Section 3, which provides in pertinent part, as follows:

N.Y. Const. art. VI, § 3(b)(2) provides:

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In civil cases and proceedings as follows:

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding 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; and on any such appeal only the constitutional question shall be considered and determined by the court.

**B. STATUTORY JURISDICTION TO HEAR THIS MATTER**

C.P.L.R. 5601(b) also is a basis for direct appeal to the Court of Appeals on the specific provision that permits direct appeal upon constitutional grounds. Tracking the language of the state constitution, N.Y. C.P.L.R. 5601(b)(2) provides in pertinent part:

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United

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States under the constitution of the state or of the United States.

**1. THE CONSTITUTIONAL ISSUE IS SUBSTANTIAL**

For a direct appeal from a court of original jurisdiction, the constitutional issue must be "substantial". See Gerzof v. Gulotta, 40 N.Y.2d 825 (1976). Whether a substantial constitutional question is presented is a determination that must be made upon a case by case basis. See People ex rel Conway v. Follette, 26 N.Y.2d 706 (1970).

The constitutional questions raised in this matter are substantial and not the product of an ingenuity of counsel. They are not fanciful questions. Arthur Karger, *Powers of the New York Court of Appeals* § 7:5, 221, 226 (3d ed. 2005). The issues are of direct and immediate impact upon the time sensitive issues of reapportionment of the legislature. The constitutional questions raised by this appeal, clearly "have colorable merit and not to be advanced solely or primarily as the predicate for appeal as of right." 9 Jack B. Weinstein, Harold L. Korn & Arthur R. Miller, *New York Civil Practice: CPLR P 5601.09* (2d ed. 2005). The test is tied to the particular case and the issues raised.

This case presents the question of whether statutes enacted by the legislature in derogation of definitive and specific constitutional commands concerning the means and methods of enumeration for the reapportionment of the State Legislature can be upheld. Apart from the obvious need for expedited review, the issue of counting prisoners is a vitally important element in the determination of the sizes of Senate districts in the reapportionment process and thus is crucial to the reapportionment process and population counts which dictate state legislative lines. The issue of who shall be counted, how shall they be counted, as well as whether some inhabitants can be merely eliminated from the count by legislative fiat, is a specific and substantial constitutional question resolvable solely by this Court. The issue of enumeration, counting and

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identifying who shall be counted, is essential to the constitutionality of the process of counting.

In the past, this Court has held in a direct reapportionment question that where the only issue is the constitutional validity of the reapportionment statutes, the matter can be heard directly by the Court of Appeals. See, In The Matter of Orans, 15 N.Y.2d 339, 345 (1965) [the appeal presents only questions as to the constitutional validity of statutes, it comes direct to us and not to the Appellate Division]. In a similar vein, this Court heard an appeal involving the validity of a certain section of the Election Law regarding election of delegates to the State Constitutional convention. In that case, Rice v. Power, 19 N.Y.2d 106, 108 n.1 (1967), this Court held:

The threshold question which confronts us -- whether the case is properly before this court on a direct appeal (N. Y. Const., art VI, § 3, subd. b, par. [2]; CPLR 5601, subd. [b], par. 2) -- is to be answered in the affirmative. Analysis establishes that the appeal involves solely the validity of section 330 of the Election Law as applied by section 2 of chapter 371 of the Laws of 1965 to the election of delegates to the Convention.

Given the nature of the constitutional interests at stake, the novelty of the statutes challenged and the claim that the statutes are in direct contravention to the specific language of the Constitution, such issues are significant constitutional issues, and the Court should hear the matter. See e.g. Matter of David A.C., 43 N.Y.2d 708, 709 (1975); Rose ex rel. Clancy v. Moody, 83 N.Y.2d 65 (1993). Further, the constitutional challenges is not ancillary to other claims, but rather is the sole claim presented to the Supreme Court, Albany County and are the sole issues on appeal. See Weinstein, Korn & Miller, supra.

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**2. THE APPEAL CHALLENGES ONLY THE VALIDITY OF TWO STATUTES**

As a jurisdictional limitation upon such appeals, a direct appeal from a court of original instance requires that the constitutional question must challenge the validity of a statute, and the court will consider only that question on the appeal. In this instance the entire appeal of the plaintiffs challenged the constitutionality of two statutes the amended Corrections Law<sup>2</sup> and the Legislative Law.<sup>3</sup>

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<sup>2</sup> Section 71 of the N.Y. Correction Law by adding a new subdivision 8 as follows:

(a) In each year in which the federal decennial census is taken but in which the United States bureau of the census does not implement a policy of reporting incarcerated persons at each such person's residential address prior to incarceration, the department of correctional services shall by July first of that same year deliver to the legislative task force on demographic research and reapportionment the following information for each incarcerated person subject to the jurisdiction of the department and located in this state on the date for which the decennial census reports population:

(i) A unique identifier, not including the name, for each such person;

(ii) The street address of the correctional facility in which such person was incarcerated at the time of such report;

(iii) The residential address of such person prior to incarceration (if any); and

(iv) Any additional information as the task force may specify pursuant to law.

(b) The department shall provide the information specified in paragraph (a) of this subdivision in such form as the legislative task force on demographic research and reapportionment shall specify.

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**3. CONSTITUTIONALITY IS DIRECTLY AT ISSUE IN THE ORDER  
BELOW**

Another, significant limitation on the appealability of the constitutional question is that it must be "directly involved" in the order from which the appeal is taken. New York Constitution, Article VI, Section 3(b); C.P.L.R. 5601(b). The

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<sup>3</sup> Section 83-m of the N.Y. Legislative Law by adding a new subdivision 13 as follows (in part):

Until such time as the United States bureau of the census shall implement a policy of reporting each such incarcerated person at such person's residential address prior to incarceration, the task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities. For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force 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 created pursuant to this paragraph. The task force shall develop and maintain such amended population data set and shall make such amended data set available to local governments, as defined in subdivision eight of section two of the municipal home rule law, and for the drawing of assembly and senate districts. The assembly and senate districts shall be drawn using such amended population data set.



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constitutional challenges is directly at issue in the case at bar because it was the sole claim presented to the Supreme Court, Albany County, and are the sole issues on appeal. Direct involvement has been understood to require that the constitutional question is "necessarily involved" in deciding the case. Karger Id. § 7:8, at 230. That is, there cannot be another, non-constitutional ground that independently supports the determination from which the appeal is taken. In this matter, the only question is the constitutional challenges to the above quoted statutes.

The Supreme Court dismissed the complaint upon the summary judgment of the defendant and the defendant intervenors and dismissed plaintiff-appellants' motion for summary judgment on solely the constitutional validity of the statutes in question. Thus the constitutionality of the statutes is directly and necessarily involved in the decision of the case. Karger, Id. § 7:8, at 230.

This appeal can only be determined by a construction by this Court of the text of the Constitution of the State. No other non-constitutional issue is presented by this appeal.

In the present matter, the statutory language set out above in footnotes 3 and 4 is challenged as unconstitutional because it is facially in direct conflict with the language of Article III Sections 4 and 5-a, and because it consequently violates equal protection of the laws under Article I Section 11 the matter is a substantial constitutional question.

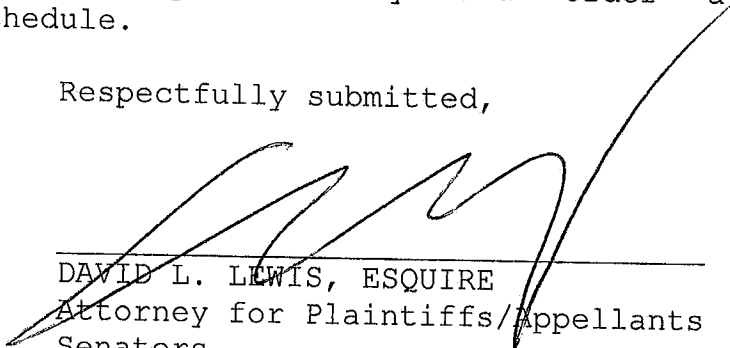
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## CONCLUSION

Given the substantial Constitutional nature of the time constraints presented by the reapportionment process, it is respectfully urged that this Court can and should hear this matter as of right from a court of original jurisdiction under its Constitutional and statutory authority and order a calendaring and briefing schedule.

Respectfully submitted,



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DAVID L. LEWIS, ESQUIRE  
Attorney for Plaintiffs/Appellants  
Senators

DLL/bf

Enc.

cc: Steven M. Kerwin, Esq. (w/o documents)  
Myrna Perez, Esq. (w/o documents)  
Dale Ho, Esq. (w/o documents)  
Steven G. Leventhal, Esq. (w/o documents)