SUPREME COURT 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 and PETER TORTORICI,

Index No. 2310-11

Plaintiffs,

-against-

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

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs 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, and Senator Thomas O'Mara (collectively, the "Senator Plaintiffs") and Plaintiffs James Patterson, John Mills, William Nelson, Robert Ferris, Wayne Speenburgh, David Callard, Wayne McMaster, Brian Scala And Peter Tortorici, (collectively, the "Citizen Plaintiffs") respectfully submit this memorandum of law in support of their motion for summary judgment pursuant to CPLR §3212.

Plaintiffs seek a declaratory judgment pursuant to CPLR §3001 declaring that Part XX of Chapter 57 of the Laws of 2010 ("Part XX") is unconstitutional under the New York Constitution. Plaintiffs also seek a permanent injunction enjoining defendants New York State Legislative Task Force on Demographic Research and Reapportionment (herein "Task Force") and New York State Department of Corrections and Community Services ("DOCS")[1] – sued herein as "New York State Department of Corrections" – from implementing Part XX.

STATEMENT OF FACTS

On August 11, 2010, then-Governor David Patterson signed an appropriation bill (Assembly Bill A9710-D) into law as Chapter 57 of the Laws of 2010. Part XX of Chapter 57 amended the Correction Law, the Legislative Law and the Municipal Home Rule Law with respect to the collection of census data for the purposes of redistricting at the State and municipal levels. It changed the place where prisoners are counted for apportionment purposes from the place where they are incarcerated to the place where they last resided before their incarceration.

[1] On April 1, 2011, defendant Department of Correctional Services merged with the Division of Parole and is now referred to as the Department of Corrections and Community Supervision ("DOCS").

Part XX amended the 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.

Part XX amended the 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.** (Emphasis added.)

Part XX also amended the N.Y. Municipal Home Rule Law §10(1)(ii)(a)(13)(c) by adding the following language to the definition of "population":

> [For the purposes of apportionment] …no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of corrections and community supervision and present in a state correctional facility pursuant to such jurisdiction.

Chapter 57 of the Laws of 2010 was an appropriations bill. Under Article VII of the Constitution, appropriations bills are treated differently from other legislation, and the power of the legislature is limited by a "no alteration" provision, Art. VII, §4. The legislature may not alter an appropriations bill except to strike out, reduce or add appropriation items. It must then enact or reject the bill in its entirety. Further, the content of an appropriations bill is limited to items which relate specifically to some appropriation in the bill. Art. VII, §6. There is no exception for items relating to apportionment or the counting of the State's population. Finally, Chapter 57 was presented by the Governor as an "extender", i.e. the alternative to the enactment of the bill would have been the shutdown of the entire state government.

The facts are more fully set forth in the affirmation of David L. Lewis, dated August 5, 2011.

ARGUMENT

POINT I

PART XX PURPORTS TO CHANGE THE METHOD OF COUNTING PRISONERS FOR PURPOSES OF APPORTIONMENT, IN VIOLATION OF THE NEW YORK CONSTITUTION

Article III, §4 of the New York Constitution provides that the most recent federal census shall determine the population in any part of the State for apportionment purposes. It states, in pertinent part, that:

> [T]he federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter 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 so far as such census and the tabulation thereof purport to give the information necessary therefor.

This constitutional provision requires the use of the Federal decennial census as a wholly objective method of enumeration, outside and above the political control of the state legislature. It establishes a neutral, objective source of data for New York apportionment.

Part XX supplanted this constitutional provision with a new method, which would create a new database for apportioning Assembly and Senate districts, and which would count prisoners at their respective last residential addresses prior to incarceration, if they can be determined. Further, it would disregard prisoners whose last prior addresses either couldn't be determined or were out of state. This directly violates Art. III §4, which makes federal census data controlling, as well as Art. III §§5 and 5-a, which require the enumeration of all non-alien inhabitants of the State.

In performing the federal census, the U.S. Census Bureau (the "Census Bureau") counts incarcerated persons at the address of the institution where they are housed. In a February 21, 2006 report entitled "Tabulating Prisoners at Their 'Permanent Home of Record' Address", the

Census Bureau explained the policy reasons for counting prisoners where they are confined rather than attempting to count them at some other "permanent home of record" address.[2] These reasons include, among others, the data quality and accuracy, the questionable validity of addresses provided by certain prisoners, the fact that many prior residence addresses may be outdated, and the incorrect assumptions that could result from counting prisoners at prior addresses (i.e., the implication that more housing is currently required there, or that the prisoners are available to contribute to the support of persons at that location).

Many of the prisoners in State correctional facilities serve long, indeterminate sentences. These prisoners may have no continuing connection to their prior addresses, and may not ever have the ability or intention to return there, certainly not within the term of the current decennial census. Other prisoners serve life sentences without the possibility of parole, and will never have the ability to return to their prior addresses.

The State prison population constitutes a burden on the resources of the communities where the prisoners are confined, including the local courts, hospitals and health services, water sewer and other infrastructure. Such communities must consider prison populations when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services. By contrast, State prisoners neither burden nor contribute to the communities where they previously resided.

The Census Bureau's method of counting prisoners is consistent with its method of handling other individuals and groups. Under the Census, persons are counted at the location where they are found. Thus a person can be counted in his home because it is the place where he resides. A prisoner confined in a penitentiary is found at that address and enumerated at that

[2] A copy of the February 21, 2006 report of the U.S. Census Bureau is attached as exhibit "D" to the affirmation of David L. Lewis, dated August 5, 2011.

place. A student is found in a dormitory and is enumerated there. A person confined to a rest home, a mental hospital or a rehabilitation facility is found there and counted at that address. No specific realignment of any of these persons back to their originating address is done by the Census.

In District of Columbia v. U.S. Department of Commerce, 789 F. Supp. 1179 (D.C. Cir. 1992), the United States District Court for the District of Columbia upheld the Census Bureau's method of counting prisoners as residents of the Commonwealth of Virginia, where they were incarcerated, rather than as residents of the District of Columbia, where most of the prisoners resided prior to incarceration. The District Court found the Census Bureau's procedure reasonable and concluded that it "interpreted the [United States] Constitutional command to enumerate the whole number of people on Census day to require enumeration at the place where the people are usually to be found …" Id. at 1189. *See also*, Borough of Bethel Park v. Stans, 449 F.2d 575, 582 (3d Cir. 1971) (the Census Bureau's procedures for tabulating prisoners in penitentiaries or correctional institutions "as residents of the state where they are confined" was proper).

Nor is the Census Bureau's method of counting prisoners, for apportionment purposes, as residents of their place of incarceration inconsistent with Art. II, Section 4 of the State Constitution, which provides, in pertinent part, that "[f]or the purposes of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while… confined in any public prison." (Emphasis added.) This provision is completely irrelevant here, because felons are disenfranchised in this State. *See,* N.Y. Election Law §5-106. For the same reason, similar language at Election Law §5-104 pertaining to registration and voting is likewise irrelevant to the method of counting prisoners for purposes of apportionment.

Forbidding felons from voting has been found valid under the federal Constitution and the Voting Rights Act. Hayden v. Pataki, 449 F.3d 305 (2d Cir. *en banc* 2006).

Here, the amendments to the Correction Law, the Legislative Law and the Municipal Home Rule Law contained in Part XX violate Article III, §4 of the State Constitution, which requires that the Federal Census data be "controlling as to the number of inhabitants in the state or any part thereof for the purposes of apportioning members of assembly and readjustment or alteration of senate and assembly districts."

Under Art. III, § 5 of the Constitution, the apportionment process begins by taking "the whole number of inhabitants of the state, excluding aliens." The term "inhabitants excluding aliens" is further defined as "the whole number of persons." *See*, Art. III, §5-a.

However, Part XX completely excludes from the count all prisoners from outside New York State, and those whose prior addresses cannot be identified, despite the fact that they remain "inhabitants" of New York. Therefore, the enactment of Part XX violated Art. III, §§ 5 and 5-a, of the New York Constitution, which requires that the number of "inhabitants, excluding aliens" be considered for purposes of apportionment.

Further, by excluding from the count all prisoners from outside New York State, and those whose prior addresses cannot be identified, Part XX also violates the Constitutional requirement that Senate districts "shall contain as nearly as may be an equal number of inhabitants". *See*, Art. III, §4 of the Constitution.

Part XX denies equal protection in violation of Article I, Section 11 of the Constitution, by artificially increasing the representation of persons in certain urban areas, and decreasing the representation of persons in districts with prison institutions, whose community resources, including the local courts, hospitals and health services, water, sewer and other infrastructure are

burdened by the needs of the prison populations, and whose communities must consider these needs when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services.

Nor was Part XX adopted in accordance with the proper procedures for amending the State Constitution. These procedures, set forth at Article XIX, §1 of the State Constitution, include, *inter alia,* passage at two successive legislative sessions, and ratification by the voters. Article XIX, §1 of the State Constitution provides that:

> Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.

The failure to comply with the requirements for adopting an amendment to the State Constitution is fatal to any attempt at constitutional amendment. In Browne v. New York, 213 A.D. 206 (1st Dept. 1925), *aff'd* 241 N.Y. 96 (1925), the First Department held that "[t]he provisions of a constitution which regulate its amendment are not directory, but mandatory, and

that a strict observance of every substantial requirement is essential to the validity of the proposed amendment."

In affirming Browne, Judge Cardozo emphasized the importance of the amendment process, including the requirement of action by two legislatures and the people:

> There is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion. 241 N.Y. at 109.

The importance of the amendment process was again stressed in Frank v. State, 61 A.D.2d 466 (2d Dept. 1978), *aff'd on App. Div. opinion*, 44 N.Y. 2d 687 (1978):

> Since it prevents alteration of the fundamental law of the State, except by the most deliberative and time-consuming of processes, section 1 of article XIX must be deemed one of the most important provisions of our State Constitution. 61 A.D.2d at 469, n.2.

The enactment of Part XX constituted an improper and unauthorized attempt to change the constitutionally mandated method of counting prisoners for the purposes of legislative apportionment. Indeed, the manner of its enactment was the opposite of the deliberative, time-consuming process of amendment provided in the Constitution and required by the courts. Part XX was enacted as part of an appropriations bill despite the fact that it had nothing to do with the budget. The rules which govern appropriations bills effectively prevented alterations or amendments by the legislature. The fact that the bill was an "extender" meant that the only alternative to the enactment of the entire bill was the shutdown of the government of the State. This entire process was designed to be "hasty" and "ill considered", rather than "deliberative and time-consuming", as required for amendments to the Constitution.

The Constitution limits the power of the legislature, and laws passed in violation of the Constitution can have no effect:

> The legislature and the courts are alike bound to obey the Constitution, and if the legislature transgresses the fundamental law and oversteps in legislation the barriers of the Constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the Constitution itself against infringement.
> ….
> [I]f any provision of the fundamental law of the state intended to secure the equal representation of its citizens in the legislative department has been violated by the act in question, it is then properly the duty of the judicial department of power to declare it unconstitutional and, therefore, void. The judiciary has a duty to pronounce all legislative acts null which are contrary to the manifest tenor of the Constitution of the state. Sherrill v. O'Brien, 188 N.Y. 185, 196-97 (1907) (Citations omitted)

See also, Mooney v. Cohen, 272 N.Y. 33, 37 (1936), where the Court of Appeals stated that the Home Rule provision of the Constitution "has restricted the legislative powers of the Senate and the Assembly", and Roe v. Board of Trustees of the Village of Bellport, 65 A.D.3d 1211 (2d Dept. 2009), where constitutional courts were found to be beyond the power of the legislature.

Here, the Constitution provides a specific method of enumerating the inhabitants of the State, and yet Part XX provides a different method and achieves a different result. As the Court of Appeals said in King v. Cuomo, 81 N.Y. 2d 247 (1993):

> When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers ... as indicated by the language employed" and approved by the People…
>
> [I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms…That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves. 81 N.Y. 2d at 253 (internal quotes and citations omitted).

The enactment of Part XX amounts to a total disregard of the Constitution. There was no attempt to conform Part XX to the relevant constitutional provisions. As in N.Y.S. Bankers Association Inc. v. Wetzler, 81 N.Y. 2d 98 (1993), there can be no argument about substantial compliance:

> Here … there is a conceded violation of the constitutional provision and no basis for a claim of partial compliance. Without even a semblance of conformity, the Legislature simply proceeded to alter the Budget Bill submitted by the Governor in outright disregard of the dictates of the Constitution. It is self-evident that total noncompliance cannot amount to substantial compliance. 81 N.Y. 2d at 103-104.

In the case at bar, the Court can declare that Part XX is unconstitutional without affecting the rest of the appropriations bill. Part XX, section 4 (Severability) provides that:

> If any section, subdivision, paragraph, subparagraph, clause or other part of this act or its application is held to be invalid by a final judgment of a court of competent jurisdiction, such invalidity shall not be deemed to impair or otherwise affect the validity of the remaining provisions or applications of this act that can be given affect without such invalid provision or application, but such invalidity shall be confined to the section, subdivision, paragraph, subparagraph, clause or other part of this act or its application directly held invalid thereby, which are declared to be severable from the remainder of this act….

For the foregoing reasons, the Court should grant summary judgment in favor of the Plaintiffs declaring that Part XX of Chapter 57 of the Laws of 2010 is unconstitutional under the New York Constitution.

POINT II

PART XX WAS NOT A PROPER ADDITION TO AN APPROPRIATION BILL UNDER THE NEW YORK CONSTITUTION

Chapter 57 of the Laws of 2010 (Assembly Bill A9710-D), including Part XX thereof, was enacted as an appropriations bill. However, Part XX was nonfiscal and nonbudgetary in nature. The State Constitution restricts the content of appropriation bills. Article VII, §6 provides that:

> Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.
>
> **No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates**

> **specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.** (Emphasis added.)

In Pataki v. N.Y. State Assembly, 4 N.Y.3d 75 (2004), the Court of Appeals stated that "[A] Governor should not put into [an appropriation] bill essentially nonfiscal or nonbudgetary legislation." While the Pataki Court found that the provisions of the appropriations bill there were fiscal in character, it warned that:

> When a case comes to us in which it appears that a Governor has attempted to use appropriation bills for essentially nonbudgetary purposes, we may have to decide whether to enforce limits on the Governor's power in designing "appropriation bills" or to leave that issue, like the issues of itemization and transfer, to the political process…

4 N.Y.3d 75 at 97.

The purpose of Article VII is to restrict the power of the Legislature in budgeting areas. By the terms of the Constitution, the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items of appropriation or add items. Art. VII §4. The Legislature must then enact or reject the appropriations bill in its entirety. The "no alteration" provision is a Constitutional limitation on Legislative power. Further, the State Constitution explicitly limits the substantive content of an appropriation bill by the "anti-rider" clause, under which no provision shall be embraced in any appropriation bill, unless it relates specifically to some particular appropriation in the bill. Any such provision shall be limited in its operation to such appropriation. Art. VII §6.

Here, Part XX amended three different statutes in order to change the method of counting State prisoners for purposes of legislative apportionment. These nonfiscal and nonbudgetary enactments were not properly inserted into the appropriation bill. Rather, they should have been

enacted, if at all, as an amendment to Article III, §4 of the State Constitution, pursuant to the procedures for amending the Constitution set forth at Article XIX, §1.

Because Part XX was erroneously included as part of an appropriations bill, the State Legislature was deprived of the power otherwise granted to it by Article III of the Constitution to alter or remove it. Because the Governor placed the non-budgetary item into an Article VII budget revenue bill, no Senator was able to amend the Article VII bill to remove Part XX. See, Art. VII, §4. Furthermore, rather than utilize the deliberative, time-consuming process for amending the Constitution set forth in Article XIX, §1, the Governor presented Part XX as part of a budget "extender", the emergency enactment of which was required to avert an imminent government shutdown.

CONCLUSION

Part XX was an attempt to amend the Constitution without following the method for amendment proscribed by the Constitution itself. The enactment of Part XX constituted an improper and unauthorized attempt to change the constitutionally mandated method of counting prisoners for the purposes of legislative apportionment. The manner of its enactment was the opposite of the deliberative, time-consuming process of amendment provided in Article XIX and required by the courts. Part XX was enacted as part of an appropriations bill despite the fact that it had nothing to do with the budget. The constitutional provisions in Article VII which govern appropriations bills effectively prevented alterations or amendments by the legislature. In each area, legislative apportionment, budget bills, and amendments, the New York State Constitution establishes rules that must be followed. In each of these areas, the enactment of Part XX exceeded the power of the Legislature to change the method of apportionment, or to amend the

Constitution, and its inclusion in a budget bill exceeded the power of the governor to act. Each is an independent basis to find Part XX unconstitutional.

The Court should grant summary judgment in favor of the Plaintiffs, declaring that Part XX of Chapter 57 of the Laws of 2010 is unconstitutional under the New York Constitution, and permanently enjoining defendants New York State Legislative Task Force on Demographic Research and Reapportionment and New York State Department of Corrections and Community Services – sued herein as "New York State Department of Corrections" – from implementing Part XX.

Dated: New York, New York
August 5, 2011

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SUPREME COURT 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 and PETER TORTORICI,

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

Defendants.

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Index No. 2310-11

AFFIRMATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DAVID L. LEWIS, an attorney admitted to practice in the courts of this state, hereby affirms that:

1. I am counsel to plaintiffs 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 and Senator Thomas O'Mara, (collectively, the "Senator Plaintiffs") and, along with Steven Leventhal, also represent the above captioned citizen plaintiffs. As such, I am fully familiar with the facts and circumstances of this action; I make this affirmation in support of plaintiffs' motion for summary judgment based on my personal knowledge, except where stated to be made on information and belief and, as to those allegations, I believe them to be true based on my review of the relevant legislative history.

2. Plaintiffs seek a declaratory judgment pursuant to CPLR §3001 declaring that Part XX of Chapter 57 of the Laws of 2010 (hereinafter "Part XX") is unconstitutional pursuant to provisions of the New York State Constitution and also seek a permanent injunction pursuant to CPLR §6301 *et seq*., permanently enjoining defendants New York State Legislative Task Force on Demographic Research and Reapportionment (the "Task Force") and New York State Department of Corrections and Community Services (the "DOCS")[1] – sued herein as "New York State Department of Corrections" – from implementing Part XX.

3. Plaintiffs now move for summary judgment pursuant to CPLR §3212 (e) on the First Cause of Action and on the Second Cause of Action in the verified complaint.

4. Plaintiffs seek summary judgment on the First and Second Causes of Action in the verified complaint on the basis that each Cause of Action presents solely an issue of law.

5. As to the First Cause of Action, Part XX violates Art. III, §4 of the State Constitution, which requires that the Federal Decennial Census shall be used for the reapportionment of the state legislature, and ignores the definition of "inhabitant" in Art.III, §5-awhich,read together with Art. III, §5, requires the counting of the whole number of persons, excluding aliens.

6. As to the Second Cause of Action, Part XX violates Art. VII, §6 of theState Constitution which restricts the Executive from enacting a budget bill for non-fiscal policy purposes, rather than for appropriation purposes.

7. Thus the motion for summary judgment asks solely questions of law: does Part XX violate Articles III and VII of the New York State Constitution? If Part XX violates either of

[1] On April 1, 2011, defendant Department of Correctional Services merged with the Division of Parole and is now referred to as the Department of Corrections and Community Supervision ("DOCS").

the stated Articles of the Constitution then plaintiffs should have summary judgment granted in their favor.

8. No genuinefactual dispute exists concerning the enactment of Part XX and the relevant facts of the case.

9. The motion for summary judgment and for a permanent injunction is predicated wholly upon the issue as to the constitutionality of Part XX.

PROCEDURAL HISTORY TO DATE

10. This action was commenced by the filing of a summons and verified complaint on April 4, 2011. A copy of the verified complaint is attached hereto as exhibit "A".

11. On May 13, 2011, defendant DOCS, by its counsel the New York Attorney General, joined issue by service of a verified answer. A copy of the verified answer of DOCS is attached hereto as exhibit "B".

12. By a letter dated May 11, 2011, the co-chairpersons of defendant Task Force informed the Court that the Task Force "does not intend to make a formal submission to the Court", that the Task Force is "satisfied that counsel who will appear for co-Respondent [sic] Department of Correctional Services can adequately address the merits of the case", and that the Task Force "respectfully urges the Court to proceed with this action in a manner designed to result in a prompt resolution". A copy of the May 11, 2011 letter of the co-chairpersons of defendant Task Force is attached hereto as exhibit "C".

13. Motions for admission *pro hac vice* and to intervene were filed on behalf of certain proposed intervenor-defendants, and are currently *sub judice.*

FACTS

14. On August 11, 2010, then-Governor David Patterson signed an appropriation bill (Assembly Bill A9710-D) into law as Chapter 57 of the Laws of 2010. Part XX of Chapter 57 amended the Correction Law, the Legislative Law and the Municipal Home Rule Law with respect to the collection of census data for the purposes of redistricting at the State and municipal levels. It changed the place where prisoners are counted for apportionment purposes from the place where they are incarcerated to the place where they last resided before their incarceration.

15. Part XX amended the §71 of the N.Y. Correction Law by adding a new subdivision 8 which provides 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.

16. Part XX amended §83-m of the N.Y. Legislative Law by adding a new subdivision 13 which provides in part as follows:

> … 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.** (Emphasis added.)

17. Part XX also amended the N.Y. Municipal Home Rule Law §10(1)(ii)(a)(13)(c) by adding the following language to the definition of "population":

> [For the purposes of apportionment] …no person shall be deemed to have gained or lost a residence, or to have become a resident of a local government, as defined in subdivision eight of section two of this chapter, by reason of being subject to the jurisdiction of the department of corrections and community supervision and present in a state correctional facility pursuant to such jurisdiction.

18. Part XX provides that when the Federal Decennial Census does not implement "a policy of reporting incarcerated persons at such persons residential addressees prior to incarceration", then the DOCS shall provide such "information as to prisoners within their jurisdiction" including "the residential address of such person prior to incarceration" (if any) to the Task Force.

19. Part XX goes on to provide that the Task Force shall "determine the Census block corresponding to the street address of each person's residential address prior to incarceration, if any, and the Census block of the prison". A "block" is the smallest entity for which the Census Bureau collects and tabulates Federal Decennial Census information.

20. Part XX further provides that until the Census implements a policy of reporting prisoners at their residence addresses, the Task Force shall use the data to develop a database so that "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 their addresses where they are incarcerated.

21. Part XX also provides that persons whose addresses before incarceration were outside New York are to be considered as having an unknown address, and thus not reported despite their presence in the State, and despite the fact that they are considered "inhabitants" under the State Constitution, Art III §5-a.

22. Part XX also provides that incarcerated persons for whom the Task Force cannot identify a prior residential address shall be considered as having an unknown address and shall be excluded from the data set.

23. The provision also recites that Senate and Assembly Districts shall be drawn using the "amended population data set". The use of such amended data sets would mean that the Federal Decennial Census would no longer be controlling. It would thus violate the State Constitution, which does not permit the exclusion of incarcerated persons from apportionment counts in Senate Districts where prisoners are incarcerated.

24. The challenged statute requires that incarcerated persons be "backed out" of the count for the county where the prison is located and, by the use of administrative records maintained by the State, be allocated back to their counties of residence prior to incarceration.

25. The current Federal Decennial Census counts incarcerated persons as being within the state even if their residence addresses prior to incarceration were outside the state, and treats all incarcerated persons as inhabitants of their place of incarceration.

26. Part XX also provides that where an incarcerated person is confined in a Federal correctional facility located within the State, then such person shall no longer count for apportionment purposes. Thus, persons required by the State Constitution to be counted would not be counted.

27. Part XX also excludes from enumeration prisoners for whom the Task Force cannot find a prior residence address, despite the fact that such prisoners are "inhabitants" as defined by Art. III §5-a of the State Constitution.

28. Therefore, Part XX empowers the Task Force and DOCS to conduct a state Census for a portion of the population, and thereby create their own enumeration.

29. Chapter 57 of the Laws of 2010 was an appropriations bill. Under Article VII of the State Constitution, appropriations bills are treated differently from other types of legislation, and the power of the legislature in enacting an appropriations bill is limited by a "no alteration" provision, Art. VII, §4 of the State Constitution. The legislature may not alter an appropriations bill except to strike out, reduce or add appropriation items. The Legislature must then enact or reject the bill in its entirety. Further, the content of an appropriations bill is limited to items which relate specifically to some appropriation in the bill. *See*, Const. Art. VII, §6.

30. Chapter 57 was presented by the Governor as an "extender", i.e. the alternative to the enactment of the bill would have been the shutdown of the entire state government.

31. Chapter 57 also included a severability clause providing that, if any part of Chapter 57, including Part XX, were struck down, then the rest of the legislation would remain in effect.

THE CONSTITUTION OF THE STATE OF NEW YORK

32. Article III, §4 of the New York State Constitution provides that the most recent Federal Census shall determine the population in any part of the State for apportionment purposes. It requires that the Federal Census data be "controlling as to the number of inhabitants in the state or any part thereof for the purposes of apportioning members of assembly and readjustment or alteration of senate and assembly districts." It states, in pertinent part, that:

> [T]he federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter 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 so far as such census and the tabulation thereof purport to give the information necessary therefor.

33. Under Art. III, §5 of the State Constitution, the apportionment process begins by taking "the whole number of inhabitants of the state, excluding aliens." The term "inhabitants excluding aliens" is further defined as "the whole number of persons." *See*, Art. III, §5-a.

34. Art. II, §4 of the State Constitution provides, in pertinent part, that "[f]or the purposes of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while… confined in any public prison." (Emphasis added.)

35. Regarding the Second Cause of Action, the relevant constitutional provision is found in Article VII, §6, whichprovides that:

> Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.
>
> **No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such**

> **provision shall be limited in its operation to such appropriation.** (Emphasis added.)

36. The People and the People alone may alter the State Constitution by amendment. Article XIX, §1 of the State Constitution, includes, *inter alia*, passage at two successive legislative sessions, and ratification by the voters. Article XIX, §1 of the State Constitution provides that:

> Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.

PART XX VIOLATES ARTICLE III OF THE STATE CONSTITUTION AS A MATTER OF LAW (FIRST CAUSE OF ACTION)

37. Part XX violates the State Constitution because it sets up a method of enumeration other than the Federal Decennial Census when it comes to prisoners; because it specifically does not count "the whole number of people" in that it omits certain inhabitants from

the count; and it prevents legislative districts from being constitutionally constructed when they are required to contain as near as possible an equal number of inhabitants, under Article III §4.

38. Pursuant to Article III §4, the Federal Decennial Census is controlling for purposes of apportionment. Section 4 makes certain exceptions that relate to the existence of extraordinary events surrounding a census that are not relevant in this century. The use of the federal census for apportionment purposes prevents political manipulation by the Legislature of the process of enumeration. Article III is a restriction upon the powers of the Legislature as to enumeration. By the text of the State Constitution, a specific definitive method of counting of the population is mandated when enumerating persons for apportionment of political representation in the Senate and Assembly.

39. The State Constitution, Article III Section 4 is a delegation by the People of the State of New York of the process and procedures of actual enumeration to the Federal Decennial Census. It is designed to ensure that legislative districts' inhabitants are counted by a wholly objective, neutral method of enumeration, outside of and above the political control of the State Legislature.

40. The Census Bureau counts persons at the place where they generally eat, sleep and work. This practice is known as the "usual residence" rule. Since 1850, the Federal Decennial Census has counted incarcerated persons at their place of incarceration.The Census Bureau has developed a set of special enumeration and residence rules for specific population groups. As part of each Federal Decennial Census, the Census counts persons living in what it calls "group quarters". These include persons living in local jails, state and Federal prisons, college dormitories, homeless shelters, nursing homes, armed forces installations, persons on maritime vessels, migrant workers and other settings where numerous people may be housed in a

single facility. All residents in group quarters are counted as being inhabitants of the address where the group quarters are located, instead of the locations where those residents might otherwise be living if they were not residents of group quarters, or where they might someday expect to return.

41. Enumeration is merely the counting of persons. The State Constitution requires the counting of "inhabitants, excluding aliens", which is defined as "the whole number of persons" in Article III§5-a. Thus all prisoners are required to be counted. Any formulation that fails to count all prisoners is not a count of the whole number of persons.

42. Under the Federal Decennial Census, persons are counted at the address where they are found. Thus a person can be counted in his home because it is the place where he resides. A prisoner confined in a penitentiary is found at that address and enumerated at that place. A student is found in a dormitory and is enumerated there. A person confined to a rest home, a mental hospital, a rehabilitation facility is found there and counted at that address. No specific realignment of any of these persons back to their originating address is done by the Federal Decennial Census.

43. Based on the decades-old practice of the Federal Census, persons housed in group quarters are counted in those quarters, and prisoners are counted in their place of confinement.

44. The Census Bureau, whose determinations were made "controlling" by the vote of the People in ratifying Article III of the State Constitution, has determined that the counting of prisoners at their places of confinement is an objective method of enumeration, and the setting of districts by the use of inhabitants allows for objective, manageable enumeration, requires no legal determinations as to residence and determination of intention, and excludes no one from the count.

45. In a February 21, 2006 report entitled "Tabulating Prisoners at Their 'Permanent Home of Record' Address" (attached hereto as exhibit "D"), the Census Bureau explained the policy reasons for counting prisoners where they are confined rather than attempting to count them at some other "permanent home of record" address. These reasons include, among others, the data quality and accuracy, the questionable validity of addresses provided by certain prisoners, the fact that many prior residence addresses may be outdated, and the incorrect assumptions that could result from counting prisoners at prior addresses (i.e., the implication that more housing is currently required there, or that the prisoners are available to contribute to the support of persons at that location).

46. The Census Bureau notes that the usual residence at which it counts people is not necessarily the same as a person's voting residence or legal residence. The method for counting used by the Census Bureau is constitutional. Article II, §4 of the State Constitution, when properly and completely read, relates solely to voting and says so specifically: "**For the purposes of voting**, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence, while… confined in any public prison." (Emphasis added.). Prisoners without the right to vote cannot have their voting rights adversely affected by this method of counting.

47. The Census Bureau's method of counting prisoners, for apportionment purposes, as residents of their place of incarceration is consistent with the state prohibition against removing the right to vote on the basis of loss of residence alone in Article II §4. Prisoners, unlike others in group quarters, have already lost their right to vote by law. Felons are disenfranchised in this State. *See*, N.Y. Election Law §5-106. For the same reason, similar language at Election Law §5-104 pertaining to registration and voting is likewise not relevant to

the method of counting prisoners for purposes of apportionment, because they may not register or vote without committing a further crime. Felony disenfranchisement has been upheld as a legitimate state prerogative and not violative of the State Constitution, including any voting rights claim. Hayden v Pataki, 449 F.3d 305 (2d Cir. 2006).

48. Many of the prisoners in State correctional facilities serve long, indeterminate sentences. These prisoners may have no continuing connection to their prior addresses, and may not ever have the ability or intention to return there; certainly not within the term of the current decennial census. Other prisoners serve life sentences without the possibility of parole, and will never have the ability to return to their prior addresses.

49. In the apportionment of Senate and Assembly seats alone, Part XX provides that despite their presence in New York State on Census Day, prisoners, and no other persons living in group quarters, who originate from outside the state of New York shall not be enumerated. This bar to enumeration violates the Constitutional requirement of Article III, §5-a that all non-alien inhabitants be counted. Part XX in this respect directly conflicts with and cannot be harmonized with the constitutional requirement of actual enumeration, once it mandates that certain inhabitants confined in prisons no longer exist for enumeration in the apportionment of Senate and Assembly seats. Part XX eliminates inhabitants that are constitutionally required to be counted.

50. Part XX also bars enumeration of persons found in the state who may or may not be from within the state, but whose prior addresses cannot be identifiedbecause of missing information. The Federal Census found them present in thestate for the purpose of being enumerated, and thus they should be counted by the explicit terms of Article III §4, yet Part XX edits the census numbers to exclude them. The editing of the census to add or subtract

inhabitants violates the explicit constitutional provision that the Federal Decennial Census"shall be controlling" and cannot be harmonized in the face of a direct constitutional command.

51. Part XX's rules of enumeration now control the Censusin violation of the State Constitution.

52. Where theLegislature wishes to change policy it is free to do so, unless the State Constitutionby its terms precludes the Legislature from acting in a contrary manner or from causing a contrary result.

53. Where there is an explicit constitutional command, it excludes all other possibilities.

54. The ratification of the State Constitution set the Federal Decennial Census as controlling, and removed from the purview of the state legislaturethe actual enumeration and determination of who may be counted and the method for doing so. To get that power back, the Legislature must get it from the people and not arrogate the power to itself. Part XX is unconstitutional because it is specifically does what the State Constitution forbids: it creates an alternative census to the Federal Decennial Census for use in the apportionment of Senate and Assembly districts.

55. The enforcement of the State Constitution by voiding Part XX would not violate the Federal Constitution. No court has ever upheld a Federal Constitutional challenge to the use of the Federal Census data for apportionment. *See*, District of Columbia v. U.S. Department of Commerce, 789 F. Supp. 1179 (D.C. Cir. 1992).[2] Prisoners without the right to vote cannot have their voting rights adversely affected by this method of counting.

[2] As stated in the accompanying memorandum of law, in District of Columbia v. U.S. Department of Commerce, 789 F. Supp. 1179 (D.C. Cir. 1992), the United States District Court for the District of Columbia upheld the Census Bureau's method of counting prisoners as residents of the Commonwealth of Virginia, where they were incarcerated, rather than as residents of the District of Columbia, where most of the prisoners resided prior to

56. The defendants' rattling the federal constitutional sabre is no basis for this Court to sustain an obviously unconstitutional action. An entire court system exists to hear such claims. No such claim was raised ten years ago in the redistricting challenges heard at that time. Further, this court could hear such a claim if it were properly made.

57. The sole consequence of striking down Part XX would be confined to barring realignment of prison populations. It would not have an impact on financial or fiscal matters, because Part XX has its own severability clause, at§4 (Severability) which provides that:

> If any section, subdivision, paragraph, subparagraph, clause or other part of this act or its application is held to be invalid by a final judgment of a court of competent jurisdiction, such invalidity shall not be deemed to impair or otherwise affect the validity of the remaining provisions or applications of this act that can be given affect without such invalid provision or application, but such invalidity shall be confined to the section, subdivision, paragraph, subparagraph, clause or other part of this act or its application directly held invalid thereby, which are declared to be severable from the remainder of this act….

58. For the foregoing reasons, the Court should grant summary judgment in favor of plaintiffs on the First Cause of Action declaring that Part XX of Chapter 57 of the Laws of 2010 is unconstitutional under Article III §§4 and 5-a of the New York State Constitution.

PART XX VIOLATES ARTICLE VII OF THE STATE CONSTITUTION AS A MATTER OF LAW
(SECOND CAUSE OF ACTION)

59. Chapter 57 of the Laws of 2010 was a budget bill, i.e., an appropriations bill introduced by the Governor under the authority of Article VII of the State Constitution. It included in and among the appropriations a separate Part XX, with its own severability clause. It was the last in a series of bills that were presented to the Legislature for the continuation of

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incarceration. The District Court found the Census Bureau's procedure reasonable and concluded that it "interpreted the [United States] Constitutional command to enumerate the whole number of people on Census day to require enumeration at the place where the people are usually to be found …" *Id*. at 1189. *See also,* Borough of Bethel Park v. Stans, 449 F.2d 575, 582 (3d Cir. 1971) (the Census Bureau's procedures for tabulating prisoners in penitentiaries or correctional institutions "as residents of the state where they are confined" was proper).

government in light of the failure of the Legislature and the Governor to come to agreement on an actual budget for that year.

60. Part XX makes no appropriation.

61. Part XX does not relate to state revenue or to the budget.

62. Each year the Governor and the Legislature engage in the process of creating a State budget. The process is strictly governed by the State Constitution. Pursuant to Article VII of the State Constitution, the governor sends to the Senate and Assembly two types of bills. One type of bill appropriates money and is called an appropriation bill. The second type of bill, which is considered an Article VII bill, does not appropriate money, but is considered by the governor as "relating to the budget". Bills of this second type are called non-appropriation bills. They generally contain programmatic provisions detailing the specific manner in which an appropriation is to be implemented, such as the source of funding, allocation and sub-allocation of moneys, and the criteria for disbursement. Other provisions are often included concerning the operation of other government programs and the administration of government agencies.

63. The State Constitution treats Article VII bills differently than other legislation, in order to insure that executive budgeting is the method of budgeting used in New York.

64. The purpose of Article VII is to restrict the power of the Legislature in budgeting areas. By the terms of the State Constitution, the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items of appropriation or add items. They must then enact or reject an appropriations bill in its entirety. The "no alteration" provision is a Constitutional limitation on Legislative power, enacted by the People.

65. Because New York State is considered primarily an executive budget state, the State Constitution restricts the power of the legislature in the budget process, such that there is a

"no alteration" clause in Article VII §4. The clause bars the legislature from altering the Governor's appropriations. The legislature must vote on the appropriation bill which the Governor presents to them. It can refuse to take it up, in which case there is no budget. Government then functions only for a set period, by extender bills. The legislature does not have the power to alter Article VII appropriation bills that are extenders. If it fails to pass the extender, the government shuts down, because it lacks the appropriations for the maintenance of government.

66. The State Constitution explicitly limits the substantive content of an appropriation bill by what is called the "anti-rider" provision that provides that no provision shall be embraced in any appropriation bill, submitted by the governor, or in a supplemental appropriation bill, unless it relates specifically to some particular appropriation in the bill. Any such provision shall be limited in its operation to such appropriation.

67. Appropriation bills were usually confined to making appropriations, but in the 1990s then Governor Pataki and the Legislature repeatedly clashed over the power of the Legislature. The resulting constitutional battle had to be resolved by the Court system. It fell to the Court of Appeals to interpret and set the parametersof Article VII. The principal issue was whether appropriations bills were limited to items that related to appropriations.

68. In 2004 the Court of Appeals decided Pataki v. N.Y. State Assembly, 4 N.Y.3d 75 (2004) stating that "[A] Governor should not put into [an appropriation] bill essentially non-fiscal or non-budgetary legislation." While the Pataki Court found that the provisions of that appropriations bill were fiscal in character, it warned that:

> When a case comes to us in which it appears that a Governor has attempted to use appropriation bills for essentially nonbudgetary purposes, we may have to decide whether to enforce limits on the Governor's power in designing "appropriation

> bills" or to leave that issue, like the issues of itemization and transfer, to the political process…

4 N.Y.3d 75 at 97.

69. In the last budget cycle, then-Governor Paterson presented Article VII bills that were not initially acted upon. Thereafter, the then-Governor presented as Article VII bills what were denominated as budget extenders for the continued operation of the State government. As part of the extenders, the Article VII bills contained non-appropriation language.

70. Based on the Constitutional restriction on the Legislative power, any attempt by a Republican member of the Senate to propose an amendment to the extenders was ruled as unconstitutional and thus improper by the Senate's presiding officer.

71. Because the Governor placed the non-budgetary item into an Article VII budget revenue bill, and made it an extender for the continuation of the government, no Senator was able to amend the Article VII bill to remove Part XX.

72. The no-alteration clause shielded the non-appropriation language of Part XX from an attempt by any Senator to exercise his or her constitutional power to try to cause Part XX to be deleted.

73. The enactment of Part XX was the direct result of the interjection into an appropriation bill of other legislation that had been introduced but not passed by the Senate outside of the budget process.

74. Part XX amended three different statutes in order to change the method of counting State prisoners for purposes of legislative apportionment. These non-fiscal and non-budgetary enactments were not properly inserted into the appropriation bill. Rather, they should have been enacted, if at all, as an amendment to Article III, §4 of the State Constitution, pursuant to the procedures for amending the State Constitution set forth at Article XIX, §1.

75. Part XX's enactment in a budget extender for the continuation of government, as part of an appropriations bill, deprived the individual Senate Plaintiffs of the power otherwise granted by Article III of the State Constitution to alter or remove legislation that effects a policy change.

76. The use of an appropriation bill imposed upon member legislators, such as the Senate plaintiffs, the specific restriction of Article VII on matters that were non-budgetary and non-fiscal, so as to prevent the exercise of their legitimate Article III powers.

77. This effected a specific unconstitutional restriction on the Article III §1 power of the Legislature, contrary to the purpose of Article VII.

78. Part XX violates Article VII §4 because it is an illegal expansion of executive budgetary powers into the Legislative power to make laws. It involved the enactment of pure policy, which is the realm of the Legislature, not the Executive.

79. Part XX further violates Article III §1 by restricting the legislative power of the Senate and Assembly to make the policy of the state, by making legislative power subordinate to the budget power of the governor.

80. Finally, Part XX was designed to amend the State Constitution without following the method proscribed by the State Constitution itself and involving participation by the people. The enactment of Part XX constituted an improper and unauthorized attempt to change the constitutionally mandated method of counting prisoners for the purposes of legislative apportionment. Indeed, the manner of its enactment was the opposite of the deliberative, time-consuming process of amendment provided in the State Constitution and required by the courts. Part XX was enacted as part of an appropriations bill despite the fact that it had nothing to do with the budget. The rules which govern appropriations bills effectively prevented alterations or

amendments by the legislature. In each area, legislative apportionment and budget bills, the New York State Constitution states what may be done. In each of these areas, the enactment of Part XX exceeded the power of the Legislature to amend the State Constitution, and the inclusion of it in a budget bill exceeded the power of the governor to act. Both are independent bases to find Part XX unconstitutional.

81. Part XX is clearly unconstitutional in view of the unambiguous text of the State Constitution, and the interpretation of the relevant sections by the Court of Appeals.

82. Summary judgment for plaintiffs is appropriate in this matter, because there are no material issues of fact in this case. Questions of policy, whether correct or not, cannot control whether a matter is constitutional.

83. Only judicial intervention can restore the Constitutional balance. It is an unavoidable duty of the Supreme Court to restore that balance, and the Supreme Court cannot tolerate a conspicuous constitutional violation.

84. A permanent injunction against the defendants should be issued as the final disposition of a request for injunctive relief.

WHEREFORE plaintiffs pray that Court grant the motion for summary judgment in their favor on the first and the second cause of action, or upon either cause of action, and enter a permanent injunction against defendants from proceeding to implement Part XX of Chapter 57 of the laws of 2010.

Dated: New York., N.Y.
August 5, 2011

David L. Lewis

DAVID L. LEWIS

EXHIBIT A

SUPREME COURT 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 and PETER TORTORICI,

Plaintiffs,

-against-

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

Defendants.

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Index No. 2310-2011

VERIFIED COMPLAINT

Plaintiffs, hereby complain of the defendants, New York State Legislative Task Force on Demographic Research and Reapportionment, and New York State Department of Correctional Services, as follows:

PRELIMINARY STATEMENT

1. This is an action seeking a declaratory judgment, pursuant to CPLR §3001 that Section XX of Chapter 57 of the Laws of 2010 is unconstitutional and, *inter alia*, a temporary restraining order and permanent injunction against the defendants from carrying out any acts in furtherance of Section XX.

NATURE OF THE ACTION

2. Plaintiffs bring this declaratory judgment action seeking an Order declaring that Section XX of Chapter 57 of the Laws of the New York ("Section XX"), amending the Correction Law and the Legislative Law as contained in an Article VII budget bill, is unconstitutional and thus, null and void, and temporarily restraining and permanently enjoining the New York State Legislative Task Force on Demographic Research and Reapportionment, and the New York State Department of Correctional Services from acting in accordance with said Section XX. Section XX is unconstitutional based upon the New York State Constitution, Article I Section 11, Article III, Sections 1 and 4, and Article VII, Section 4. Section XX exacerbates vote dilution of certain communities and enhances the voting power of other communities by the fictitious movement of a phantom population of almost 58,000 non-voting prisoners into residences already occupied by others, and from upstate Republican districts to downstate New York City Democratic districts which constitutes political gerrymandering.

INTRODUCTION

3. Section XX was inserted by then-Governor David Paterson into an Article VII budget bill after extensive lobbying by Democratic State legislators, including the current Attorney General.

4. Section XX made no appropriation and did not relate to state revenues.

5. Amending the Correction Law and the Legislative Law, Section XX provided that for the purposes solely of redistricting, incarcerated persons shall be "counted as residents of their places of residence", and that such places shall be deemed to be those "prior to [their] incarceration" as opposed to the Federal Decennial Census place of enumeration, the place of their incarceration.

6. Section XX contained a severability clause.

7. Without amending the Constitution and without placing such an issue amending the Constitution before the People as required by the State Constitution, the legislative enactment of Section XX illegally removes from the State Constitution the requirement that the only basis for reapportionment purposes shall be the Federal Decennial Census and replaces it with a statutory exception to the use of the Federal Decennial Census, not listed as among the exceptions to the use of the Census in the State Constitution. The State Constitution sets out the limited number of exceptions to the use of the Census for enumeration. Section XX is not one of the conditions of such different and unconstitutional alteration of enumeration. Section XX illegally diminishes the number of inhabitants required to be counted by the Constitution by declaring certain inhabitants of state prisons, who have long been counted, not to be counted.

8. Section XX exceeds the permissible constitutional language for N.Y. State Constitution Article VII bills.

9. Section XX denies equal protection under New York State Constitution, Article I Section 11, to a segment of the population by exacerbating inequality in the enumeration of inhabitants artificially inflating urban districts at the expense of districts with prison institutions within such rural districts despite the fact that such districts bear the costs of such institutions.

10. Section XX also denies equal protection by enacting irrational classifications.

11. Section XX also provides unequal treatment to different classes of voters based upon geography and based upon political party so as to constitute a basis for partisan gerrymandering.

PARTIES

12. Senator Elizabeth O'C. Little is the duly elected representative of the 45th Senate District. Senator Little is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

13. Senator Patrick Gallivan is the duly elected representative of the 59th Senate District. Senator Gallivan is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

14. Senator Patricia Ritchie is the duly elected representative of the 48th Senate District. Senator Ritchie is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

15. Senator James Seward is the duly elected representative of the 51st Senate District. Senator Seward is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

16. Senator George Maziarz is the duly elected representative of the 62nd Senate District. Senator Maziarz is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

17. Senator Catharine Young is the duly elected representative of the 57th Senate District. Senator Young is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

18. Senator Joseph Griffo is the duly elected representative of the 47th Senate District. Senator Griffo is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

19. Senator Stephen M. Saland is the duly elected representative of the 41st Senate District. Senator Seward is also a voter in that District. Within that district are prisons whose inhabitants are counted for apportionment purposes as within that District.

20. Senator Thomas O'Mara is the duly elected representative of the 53rd Senate District. Senator O'Mara is also a voter in that District. Within that District are prisons whose inhabitants are counted for apportionment purposes as within that District.

21. The following plaintiffs, James Patterson, John Mills, William Nelson, Robert Ferris, Wayne Speenburgh, David Callard, Wayne McMaster, Brian Scala and Peter Tortorici are voters and residents of the Senate Districts affected by Section XX of Chapter 57 of the Laws of 2010, and whose votes are diluted by the enactment.

22. The New York State Legislative Task Force on Demographic Research and Reapportionment (the "Task Force") was established by Chapter 45 of the New York State Laws of 1978 to research and study the techniques and methodologies to be used by the United States Commerce Department, Bureau of the Census ("Census Bureau"), in carrying out the Federal Decennial Census.

23. The New York State Department of Correctional Services ("DOCS") is the department within the executive branch of New York State government charged with the administration of correctional services in all respects in New York State.

JURISDICTION

24. Each of the plaintiffs have been harmed or are about to be harmed by the actions of the defendant Task Force and the actions taken by DOCS.

25. Each of the Senator plaintiffs have standing as potential candidates, voters, taxpayers and residents of the Senatorial Districts to be impacted by Section XX, and in part

because the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.

26. Each of the Citizen plaintiffs have standing as voters, taxpayers and residents of Senatorial Districts to be impacted by Section XX, including having to bear the economic burden of sustaining prisoners in their communities by virtue of taxes in support of services to the prisons.

27. Venue is set in Albany County.

FACTUAL ALLEGATIONS

A. Revenue Bill Section XX

28. Chapter 57 of the Laws of New York of 2010 was an Article VII budget bill and an extender for the operation of government and a revenue bill, presented to the Legislature as a budget bill. It was the last in a series of extenders for the operation of government. If it did not pass, the entire government of the state would have been shut down.

29. Section XX of Chapter 57 did not have anything to do with the budget or revenue portions of the Article VII budget bill.

30. Section XX provides that in a year where the Federal Decennial Census is taken but does not implement "a policy of reporting incarcerated persons at such persons residential addressees prior to incarceration", then the DOCS shall provide such "information as to prisoners within their jurisdiction" including "the residential address of such person prior to incarceration" (if any) to the Task Force. Section XX goes on to provide that the Task Force shall "determine the Census block corresponding to the street address of each person's residential address prior to incarceration, if any, and the Census block of the prison."

31. A "block" is the smallest entity for which the Census Bureau collects and tabulates Federal Decennial Census information.

32. Section XX further provides that until the Census implements a policy of reporting prisoners at their residence addresses, the Task Force shall use the data to develop a database so as "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 their addresses where they are incarcerated.

33. Section XX also provides that persons whose addresses before incarceration were outside New York are to be considered from an unknown address, and thus not reported despite their presence in the State, and despite the fact that they are considered inhabitants under the State Constitution.

34. Section XX also provides that incarcerated persons for whom the Task Force cannot "identify their prior residential address shall be considered to be counted at an address unknown and shall be excluded from the data set."

35. The provision also recites that Senate and Assembly Districts shall be drawn using the "amended population data set".

36. The challenged statute requires that incarcerated persons be "backed" out of the count for the county where the prison is located and, by the use of administrative records maintained by the State, be allocated back to their counties of residence prior to incarceration.

37. The current Federal Decennial Census counts incarcerated persons as being within the state whose residence addresses prior to incarceration were outside the state, and treats all incarcerated persons as inhabitants of their place of incarceration.

38. Section XX also provides that where an incarcerated person is confined in a Federal correctional facility located within the State, then such person previously counted in the apportionment shall no longer count for apportionment purposes. This law now creates an exception such that certain persons required to be counted by the Constitution are now not counted.

39. Section II also excludes inhabitants from enumeration at all on the basis that the Task Force cannot find a residence address for a prisoner.

40. Therefore, Section XX enacts and empowers the Task Force and DOCS to conduct a state Census for a portion of the population, and thereby create its own enumeration.

B. <u>The New York State Constitution</u>

41. The New York State Constitution prescribes the exclusive permissible method and manner of enumeration for purposes of apportionment.

42. Article III Section 4 of the New York State Constitution provides that the Federal Decennial Census "shall be controlling as to the number of inhabitants in the state or any part thereof for the purpose of apportionment of members of the assembly and adjustment or alteration of senate and assembly Districts."

43. The Constitution states, in uncompromising specificity, that the Federal Decennial Census "shall be controlling", in determining the "number of inhabitants" in "any part "of the State".

44. The Constitution expressly set forth a limited and specific set of circumstances where a state enumeration is to be used instead of the Federal Census. None of those constitutional preconditions for the use of a state enumeration has occurred, nor do any of those exceptions relate to the counting of incarcerated persons.

45. Since 1931, the Federal Decennial Census has been controlling for apportionment purposes in New York.

46. The use of the Federal Decennial Census prevents political manipulation of the counting of inhabitants.

47. Section XX creates a specific exception to the use of the Federal Census that is not within the stated exceptions permitted by the Constitution.

48. The failure to count these prisoners as inhabitants, who place a burden upon the locality, violates the Constitution's determination that for apportionment purposes, inhabitants are to be counted at the place where they are counted in the Federal Decennial Census.

49. The elimination from enumeration mandates by Section XX are specifically prohibited by the Constitution requirement that the Federal Decennial Census "shall be controlling."

50. Such alteration of the enumeration of incarcerated persons constitutes political manipulation of the counting of inhabitants.

51. Article III, Section 4 mandates that Senate Districts be readjusted or altered so that each Senate District shall contain "as nearly as may be" an equal number of "inhabitants, excluding aliens."

52. Senate and Assembly Districts are set by enumerating inhabitants "inhabitants".

53. Article III, Section 5-a states: For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term 'inhabitants, excluding aliens" shall mean the whole number of persons.

54. The setting of districts by the use of inhabitants allows for objective manageable enumeration and requires no legal determinations as to residence and determination of intention.

55. The presence of a non-alien at any single address on the day of the Federal Decennial Census is the sole criteria for being enumerated.

56. Section XX unconstitutionally alters this method without a constitutional amendment.

57. The State Constitution mandates that population for the purposes of reapportionment be determined solely by the Federal Decennial Census, as the Census deems them to be counted, and thus requires the inclusion of incarcerated persons when counting the whole number of persons.

58. The State Constitution requires that incarcerated persons are to be counted as they are counted under the Federal Decennial Census, that is, at their place of incarceration.

59. Article II, Section 4 of the State Constitution provides: "For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his or her presence or absence . . . while confined in any public prison." For purposes of enumeration, they are inhabitants found at the place of incarceration.

60. Incarcerated persons sentenced to felony jail time have no right to vote under New York State law, and thus gain or lose nothing by being counted at the institution of confinement.

C. **The Census**

61. The Census Bureau counts persons at the place where they generally eat, sleep and work. This practice is known as the "usual residence" rule.

62. This has been the practice of the Federal Decennial Census based upon historical precedents dating back to the First Decennial Census Act of 1790.

63. Since 1850, the Federal Decennial Census counted incarcerated persons at their place of incarceration.

64. The Census Bureau has developed a set of special enumeration and residence rules for specific population groups. As part of each Decennial Census, the Census counts persons living in what it calls "group quarters". These include persons living in local jails, state and Federal prisons, college dormitories, homeless shelters, nursing homes, armed forces installations, persons on maritime vessels, migrant workers and other settings where numerous people may be housed in a single facility.

65. All residents in group quarters are counted as being inhabitants of the address where the group quarters is located, instead of where the residents might otherwise be living were they were not residents of group quarters, or where they might expect to return.

66. For the purposes of counting in the Federal Decennial Census, prison inmates are inhabitants of the institutions in which they are confined.

67. The Federal Decennial Census notes that the usual residence at which it counts people is not necessarily the same as a person's voting residence or legal residence.

68. The Census Bureau itself concluded that a system of counting incarcerated persons at any place other than their place of incarceration will decrease the accuracy of the Federal Decennial Census count.

69. The Federal Decennial Census is not a projection of future intentions, but one of present enumeration.

70. The Federal Decennial Census is used as a form of enumeration. It does not qualify or disqualify voters.

71. The Federal Decennial Census quantifies inhabitants for enumeration and is the basis for apportionment of representation.

72. Prisoners counted in group quarters do not gain or lose a residence for the purposes of voting.

D. Prisoners in the State of New York

73. The State Constitution's mandate to follow the Federal Decennial Census has always required that prisoners be counted for apportionment purposes in their group quarters, which are the correctional facilities where they are incarcerated.

74. The State Constitution provides that the method used in the Federal Decennial Census shall be controlling, and thus, prisoners are to be counted for apportionment purposes as the Census counts them (in the institution where they are incarcerated).

75. As of January 1, 2010, DOCS reported that it had a population of 58,378 incarcerated persons.

76. Prisoners in state correctional facilities serve long periods of confinement in the group quarters due to the length of their sentences.

77. Many prisoners serve sentences of an indeterminate length as the possibility for release and parole prior to the expiration of their sentences is determined by parole boards.

78. DOCS currently houses 213 inmates serving life sentences without possibility of parole. Under Section XX, these inmates are to be counted at their residence prior to their incarceration, and not as inhabitants of the institution where they are permanently confined.

79. Incarcerated persons do not have any other fixed abode in which they could properly be denominated as inhabitants. If they initiate an action relating to their incarceration, they are required to do so in the County where they are incarcerated.

80. Nearly half of the prisoners in DOCS custody (49%) are from New York City's five boroughs.

81. Twelve (12%) percent of the prisoners in DOCS custody are from the suburban counties of New York State.

82. Incarcerated persons draw upon the services of the communities in which their prisons are located.

83. Inmates use community resources including the local courts, hospitals and health services, water, sewer and other infrastructure. Such communities must consider incarcerated persons with their local population when budgeting and planning for fire, rescue, police, water, sewer, sanitation, road maintenance and other public services.

84. Under New York State law, no incarcerated person has the right to vote in State elections.

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment under CPLR §3001)

85. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "84" of this Verified Complaint as if fully set forth herein.

86. Section XX creates a structural change by an artificial realignment of political power in the State, and it does so by impermissibly amending the meaning and text of the State Constitution by legislation.

87. Section XX of Chapter 57 of the Laws of 2010 is unconstitutional, contravening the text of the Constitution in Article III, section 4 requiring that Federal Decennial Census be "controlling" for purposes of apportionment.

88. The law is unconstitutional because it mandates that the State adopt a policy of counting incarcerated persons at their prior home addresses although the Federal Decennial Census counts such persons at their place of incarceration.

89. The law creates an unconstitutional method of counting inhabitants that differs from the enumeration method used in the Federal Decennial Census.

90. Section XX is unconstitutional because the State Constitution requires that no other method of enumeration may be used.

91. Section XX provides that the drawing of Senate and Assembly seats shall be done by amended population data sets. The use of such amended data sets violates the State Constitution, which does not permit the exclusions of incarcerated persons from apportionment counts in Senate Districts where prisoners are incarcerated.

92. Section XX undermines the arrangement of representation as determined by the State Constitution by excluding certain inhabitants who are counted by the Federal Decennial Census from the enumeration.

93. Section XX also alters the number of inhabitants in certain areas of the State by counting certain inhabitants located in upstate Senate Districts and transferring them to downstate Senate Districts.

94. Section XX realigns incarcerated persons to residences where they are not inhabitants as defined by the counting method of the Federal Decennial Census.

AS AND FOR A SECOND CAUSE OF ACTION
(Declaratory judgment that Section XX is void as encroaching upon the powers of the legislature)

95. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "94" of this Verified Complaint as if fully set forth herein.

96. Chapter 57 of the Laws of 2010 was presented to the Legislature as an Article VII budget bill by then Governor Paterson. The budget bill included a budget extender that appropriated funds to permit the State government to continue operating.

97. Separately, Section XX of the revenue bill and budget extender provided for the alteration of the means by which incarcerated persons are counted for reapportionment.

98. Section XX did not relate to the State's revenue or budget.

99. Section XX is a permanent change to the methods of enumeration and apportionment.

100. Section XX is an abuse of the Article VII power of the Governor at the expense of and in derogation of Article III, Section 1 legislative powers.

THE BUDGET PROCESS

101. Each year the Governor and the State Legislature, the Senate and Assembly, engage in the process of creating a budget for the State of New York.

102. Of all the functions of government, the budget process is the most crucial.

103. The budget process is governed by the New York State Constitution and the New York State Finance Law.

104. Pursuant to Article VII, the Governor sends to the Senate and Assembly two types of bills. One type of bills appropriates money and is called appropriation bills. The second type of bills is called Article VII bills which do not appropriate money but are considered by the Governor as "relating to the budget."

105. Non appropriation bills generally contain programmatic provisions detailing the specific manner in which an appropriation is to be implemented, such as the source of funding, allocation and sub-allocation of moneys, and the criteria for disbursement.

106. Other provisions are often included concerning the operation of other government programs and the administration of government agencies.

107. Article VII bills are treated differently by the Constitution in order to insure that executive budgeting is the method of budgeting in New York.

108. The purpose is to restrict the power of the Legislature in budgeting areas.

109. By the terms of the Constitution, the Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items of appropriation or add items. They must then enact or reject them in their entirety.

110. The "no alteration" provision is a Constitutional limitation on Legislative power, enacted by the People.

111. The State Constitution explicitly limits the substantive content of an appropriation bill by what is called the "anti-rider" provision that provides that no provision shall be embraced in any appropriation bill, submitted by the governor, or in such supplemental appropriation bill, unless it relates specifically to some particular appropriation in the bill. Any such provision shall be limited in its operation to such appropriation.

THE LAST BUDGET CYCLE: GOVERNMENT BY EXTENDER

112. In the last budget cycle, then-Governor Paterson presented Article VII bills that were not initially acted upon.

113. Thereafter, the then-Governor presented as Article VII bills what were denominated as budget extenders for the continued operation of the State government. As part of the extenders, the Article VII bills contained non-appropriation language.

114. This restriction on legislative power was demonstrated by the fact that any attempt by a Republican member of the Senate to propose an amendment to the extenders was ruled as unconstitutional and thus improper by the Senate's presiding officer.

115. By placing the non-budgetary item into an Article VII budget revenue bill and making it an extender for the continuation of the government, the State Legislature was unable to amend the Article VII bill to remove Section XX.

116. Article VII prevented the State Legislature from exercising its Article III, Section 1 powers to act on its own.

117. The no-alteration clause shielded the non-appropriation language of Section XX from the State Legislature's ability to exercise its constitutional powers and delete Section XX.

118. Section XX was substantive programmatic legislation that contained its own severability clause.

119. Section XX did not contain an appropriation.

120. Section XX was not a fiscal or a budgetary piece of legislation.

ARTICLE VII VIOLATIONS

121. The then-Governor, in placing Section XX in an Article VII bill and insulating it from legislative amendment, used an appropriation bill for essentially a non-budgetary purpose in excess of the then-Governor's constitutional powers.

122. By virtue of the then-Governor's presentation of the extender as embedded in an Article VII bill, the Legislature was faced with the alternative of shutting down the entire operation of State government, or accepting the non-appropriation measures placed within the appropriation bill.

123. Section XX was enacted unconstitutionally in that it usurped the State Legislature's power under Article III, Section 1.

124. By reason of this usurpation and by reason that the sole alternative was to vote against the continuity of State government, members of the Legislature were deprived of their powers under Article III.

125. In this situation, the then-governor became omnipotent and the members of the State Legislature constitutionally helpless as it had no power to remove the purely legislative, non-appropriation language from the Article VII bills.

126. Section XX's enactment violates the anti-rider provision of the State Constitution, Article VIII, Section 6.

127. The enactment of Section XX should be voided.

128. The insertion of Section XX into a budget bill requires a judicial determination as to what effect limits such as the anti-rider clause of Article VII, Section 6 of the State Constitution impose on the content of Article VII bills.

129. The inclusion of a non-revenue item in an Article VII bill also violates Article VII.

130. Therefore a dispute exists concerning the constitutional authority to force the legislature to pass non-revenue items in a revenue bill and requires a judicial determination of the scope non-apportionment or non-revenue language in Article VII bills.

USE OF A BUDGET BILL TO IMPROPERLY AMEND THE CONSTITUTION

131. Any change in the counting of incarcerated persons for the purpose of redistricting must be made by voters via a Constitutional amendment, and not by the State Legislature through the use of a budget bill.

132. To enact a constitutional amendment, the text of the amendment must pass two successive legislatures before it can be presented to the People of the State for ratification.

133. The means of amending the State Constitution by enacting legislation in a budget bill is itself unconstitutional.

134. Where a constitutional amendment may be enacted in the absence of constitutional convention, which requires passage by two successive legislatures, the use of an Article VII bill abuses the power of the People to amend their constitution.

135. In the aftermath of a 1993 Court of Appeals determination, governors have provided non-appropriation Article VII bills that amended sections of law which had no relation to any specific items of appropriation, and could be enacted at any time of the year before or after the budget is approved.

136. In 2004, the Court of Appeals set the parameter of constitutional limits as to what Article VII non appropriation bills may contain.

137. The Court of Appeals stated that there may come a day when the power to enact a budget using Article VII language exceeds the power of the Governor and infringes on the powers of the Legislature.

138. The day has come.

139. A declaratory judgment should issue declaring Section XX as null and void as violative of Articles III and VII of the Constitution.

AS AND FOR A THIRD CAUSE OF ACTION
(Equal Protection under Article III, Section 4
and Article I, Section 11)

140. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "139" of this Verified Complaint as if fully set forth herein.

141. Section XX violates Article III, Section 4 which requires that each Senate District contain "as nearly as may be" an equal number of inhabitants.

142. Article III, Section 4 requires that in reapportioning districts in the Senate "each senate district contain as nearly as may be an equal number of inhabitants".

143. Section XX mandates the numerical movement of approximately 58,000 prisoners from the upstate counties in which they are inhabitants to other counties, principally those in the City of New York and other downstate locations.

144. Section XX removes 58,000 inhabitants from the current place of enumeration and adds phantom population principally to downstate counties.

145. It also eliminates inhabitants entirely from the State.

146. Section XX refuses to count inhabitants who can be found in prison facilities when the Task Force cannot assign an address to such inhabitant. The Census Bureau can find and assign an incarcerated person to their group quarter address, the prison facility, but under the Section XX they are not to be counted anywhere in violation of Article III, Section 5a.

147. Such a numerical assignment by 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. The weight of the vote upstate counties is unfairly reduced in comparison to that of downstate counties.

148. Even if Senate Districts are of equal population, the weight of the vote of persons residing upstate is lessened because disproportionately more people residing downstate are ineligible or unwilling to vote. By including these fictional inhabitants (incarcerated persons) in the downstate population, Section XX exacerbates the diminution of votes in upstate counties.

149. The total differences in the proportionate weight of votes of citizens upstate is further exacerbated because of this dramatic shift and realignment to downstate of incarcerated persons ineligible to vote.

150. Removing 58,000 inhabitants and placing approximately 40,000 of them in New York City and surrounding suburban areas exacerbates the dilution of upstate votes.

151. Section XX mandates reapportionment by unequal enumeration. It creates unequal populations, thereby diminishing the relative voting strength by virtue of population allocation

152. The movement of 29,000 prisoners, approximately half of the DOCS's prisoners, into New York City alone will create a situation where without the actual population, the metropolitan counties will have greater numbers so as to have unequal representation and thus control over the affairs of the State.

153. Such adverse effect and exacerbation is a denial of equal protection under the State Constitution, Article I, Section 11.

AS AND FOR A FOURTH CAUSE OF ACTION
(Counting prisoners in other than group quarters violates equal protection because it is not a rational classification)

154. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "153" of this Verified Complaint as if fully set forth herein.

155. Section XX requires incarcerated persons, and only incarcerated persons, who are counted under a group quarters enumeration to be reassigned from such census enumeration and assigned to census blocs so as to be counted as if they were returned to their "home".

156. Group quarters enumeration by the Federal Decennial Census counts incarcerated persons and other individuals, such as persons in local jails, federal prisons, group homes,

residential treatment centers, health care facilities, nursing home facilities, hospitals, homeless shelters, other shelter facilities, such as domestic violence shelters, students in academic residences such as college and university dormitories, armed forces bases and installations, maritime personnel on vessels, migrant workers, and any other facility where persons may be housed in a group setting.

157. Section XX seeks to identify an originating residence only for incarcerated persons.

158. Section XX backs out incarcerated persons from the group quarter residence for reapportionment purposes, and assigns to them a "home" address which places them within a Census block.

159. All other persons counted in group quarters are to be counted where they eat sleep and live pursuant to the Federal Decennial Census.

160. Only incarcerated persons are to be artificially reassigned to addresses.

161. The State Constitution does not permit persons in group quarters be allocated back to their original place of residence or their original addresses.

162. Persons in group quarters however are not counted in their "homes", no matter how much they intend to return to their home.

163. None of these populations in group quarters are to be "backed out" of reapportionment Census information.

164. Only incarcerated persons by Section XX are to be reassigned out of group quarters where they are physically present and reassigned to other addresses where they once may have lived, but no longer do.

165. Section XX denies equal protection to all non-prisoners counted in group quarters.

166. In New York State, upon the conviction of a felony, a person loses the right to vote. Upon the commission of the crimes, persons incarcerated lose the right to determine their residence. For social purposes they are removed from the community. Persons incarcerated for such felonies lost the right to determine their own residence and they become prisoners of the state. Removed from the community, they lose freedom of movement and the right to return to a home.

167. Others in group quarters have not been so adjudged.

168. The treatment of non-prisoners in group quarters is unrelated to the achievement of any combination of legitimate purposes by the State such that the legislature's actions were irrational.

169. Such a selection of one group, prisoners who have no right to vote, and not others who generally retain the right to vote is an arbitrary, invidious and capricious classification.

170. The disparate treatment of persons residing in group quarters that possess the right to vote and are counted at the location of group quarters in the usual manner is a denial of equal protection. Section XX is a selection of preferential counting methods for persons specifically constitutionally barred and serves no legitimate state interest or purpose.

171. The selection of prisoners is not a rational basis for treatment of such prisoners differently than others in group- quarters.

172. Section XX serves no legitimate state interest.

173. The enactment is unreasonable, arbitrary and capricious by revising counting procedures to suit a single group of non voters.

AS AND FOR A FIFTH CAUSE OF ACTION
(Equal Protection violation by use of Irrational Classification and Enumeration because it creates a false enumeration)

174. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "173" of this Verified Complaint as if fully set forth herein.

175. Section XX is irrational as a means of enumeration and thus violates equal protection under Article I, Section 11 and Article III, Section 4. .

176. Section XX requires reassigning prisoners to addresses where they have not lived for years and may not live again.

177. People in institutional settings often have no other fixed place of abode and the length of their stay is often either indefinite or permanent. Such is the case with incarcerated persons.

178. The requirement to count prisoners at an address to which it is presumed they will return is irrational.

179. Section XX is irrational in that it pretends that all incarcerated persons will return to the home they came from after serving time, without any reason to believe such is the case.

180. Section XX makes no exception for the enumeration of prisoners serving life without parole or life sentences despite the fact that they will never return to the community from which they came.

181. Section XX makes no distinctions such that it returns to "residence" persons who have committed crimes against the inhabitants at that residence, be they spouses or children.

182. Section XX seeks to count persons at places even though they may have no ability or intention to return to such place thereby eliminating it as ever being a residence.

183. It makes no distinction exempting prisoners serving life terms who cannot return to the community.

184. It makes no distinction for those prisoners serving terms such that they will not return to the community during the Census decade in question because their sentences exceed the time period of utility of the Census.

185. The Census Bureau has developed a consistent and rational means of classifying persons as inhabitants of group quarters.

186. The Federal Decennial Census was selected to be the determining factor for reapportionment by the framers of the State Constitution to prevent political manipulation of the counting of inhabitants so as to receive a true enumeration.

187. The entirety of reapportionment process depends upon the veracity of the enumeration.

188. The counting of incarcerated persons at addresses selected as "home" constitutes phantom transportation of inhabitants.

189. The requirement to count incarcerated persons at an address at which they do not reside constitutes the phantom placement of inhabitants.

190. The reassignment of such persons when added to a census block, when such persons do not actually reside there, is not a true enumeration.

191. It skews the enumeration.

192. Such skewed enumeration manufactures additional political power where none exists or can exist.

193. Section XX further refuses to count persons found in the institution, but for whom no address can be found, thereby wiping out whole classes of inmates from the process of

apportionment, making them non inhabitants.

194. The group quarters method of counting is a historically reasonable means of interpreting the State Constitutional phrase "inhabitants", and should not be disturbed.

195. Section XX is not enacted with a rational basis and is unreasonable and, therefore, violates equal protection under Article I, Section 11.

AS AND FOR A SIXTH CAUSE OF ACTION
(Equal Protection violation by use of Irrational Classification and Enumeration because inhabitants already occupy the addresses now being assigned to prisoners)

196. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "195" of this Verified Complaint as if fully set forth herein.

197. Section XX backs out prisoners from being counted in their group quarters and assigns them to addresses where they may have once lived.

198. No reasonable belief exists that all or most of the state's prisoners most will reside or live at the addresses selected by them or for them within the next ten years.

199. Places where incarcerated persons once resided are not left empty to await their return as Section XX presumes.

200. Inhabitants already counted by the Federal Decennial Census reside in the census bloc to which prisoners are reassigned by Section XX.

201. Section XX adds inhabitants to places where existing inhabitants occupy the space and thus make it impossible for purported returning prisoners to occupy the same space without displacing current inhabitants. To count persons that are already at that place along with prisoners who are not actually there provides greater political strength of those places at the cost of where prisoners actually are.

202. To count twice as many persons in a single residence when only one person actually lives there is irrational and deprives persons elsewhere of equal protection.

203. No empirical basis for such an assumption exists.

204. Restoration of phantom prisoners to a community provides additional political power to former addresses while leaving the burden of services costs and expenses to the locality where they remain actually housed.

205. Section XX's presumption that all prisoners will return to a previous addresses is unreasonable, irrational, arbitrary and capricious.

AS AND FOR A SEVENTH CAUSE OF ACTION
(Partisan gerrymandering)

206. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "205" of this Verified Complaint as if fully set forth herein.

207. Reapportionment determines political power.

208. The purpose of the enactment of Section XX was to shift power from the Republican Party representatives to the Democratic Party representatives.

209. In May of 2010, the then Democratic President of the Senate, Malcolm Smith stated publicly that it was the intention of the Senate Democrats, "are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years."

210. Currently incarcerated persons are counted as inhabitants of Republican-represented Senatorial Districts.

211. The reallocation of 58,000 incarcerated persons primarily to Democratic represented Senatorial Districts is partisan gerrymandering.

212. Section XX was introduced by the Democratic governor at the behest of the then majority Democratic Senators and Democratic Assembly persons.

213. It was introduced without any consultation with any Republican affected by the reallocation of prisoners.

214. From beginning to end, Section XX was a wholly partisan effort.

215. Not a single Republican Senator voted for Chapter 57 of the Laws of 2010.

216. Commentators and elected officials have conceded that Section XX, in whatever form, benefits the downstate Democrats at the expense of the upstate Republicans.

217. The enactment of Section XX is the legislative use of political classifications to burden the representational rights of Republican upstate voters.

218. Section XX was enacted with the purpose and effect of maximizing the strength of the Democratic Party as against the Republican Party, its voters and elected representatives.

219. The Democrats seek to enhance their power by concentrating political power in the downstate Democratic districts.

220. Republican Senators and members of the Republican Party are intentionally discriminated against by such political partisan manipulation.

221. Democratic leaders are seeking to regain the Senate majority by an unconstitutional scheme by an unconstitutional method for unconstitutional purposes, seeking to subvert the electoral will of the People of the State.

AS AND FOR AN EIGHTH CAUSE OF ACTION
(Permanent Injunction)

222. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs "1" through "221" of this Verified Complaint as if fully set forth herein.

223. The only remedy in the instant action is a permanent injunction to prevent the unconstitutional application of Section XX by virtue of actions of the Task Force as ordered by Section XX.

224. The order of the Court that is herewith sought to prevent the Task Force from altering the means and methods of prisoner counting in the determining of apportionment of the State Legislature.

225. In order to obtain an injunction, plaintiffs must establish, first, a likelihood of success on the merits, second, irreparable harm on the absence of the injunction and, third, that the balance of equities exist in favor of granting the injunction.-

226. First, Plaintiffs have a likelihood of success on their merits because the State Constitution forbids the acts sought to be done in Section XX and there was no constitutional amendment to make such a change in the counting of inhabitants

227. Second, Plaintiffs suffer irreparable harm because such counting diminish the political power of the individual voters and diminishes the political power of the Senators by the constitutional offense of phantom inhabitants being moved out of district where the district services are still provided.

228. Other elements of irreparable harm exist as well. The difficulties of Census manipulation run the risk of multiple challenges as well as the danger of multiple yearly elections of the state legislature.

229. The ability to assign places of "residence" to prisoners is all but impossible.

230. It results in certain population not to be counted in violation of the State Constitution thereby altering the basis for apportionment as set forth in the Constitution

231. Removal of these inhabitants permanently distorts the Census and representation.

232. The delegating of the determination of inhabitants' place of abode to the Task Force is an illegal delegation of power.

233. The Census Bureau itself is undertaking a study of the feasibility with a report due this year.

234. The balance of equities favors the granting of a permanent injunction.

235. No application for the within relief has been made to any Court.

236. These proceedings represent the plaintiffs' only recourse under the law.

237. These pleadings are hereby certified as non-frivolous by counsel.

WHEREFORE, plaintiffs demand the following relief:

A. Declaratory judgment that the amendments to the Correction Law and the Legislative Law in Section XX of Chapter 57 of the Laws of 2010 regarding the methods of counting incarcerated persons are null and void as being unconstitutional;

B. A permanent injunction against the Task Force prohibiting them from using amended data subsets regarding incarcerated persons in any other manner than counting them as inhabitants of their place of incarceration as enumerated by the Federal Decennial Census;

C. A permanent injunction against DOCS prohibiting the transfer of any information of an incarcerated person's "residence" as being any other than the address of the institution where they are incarcerated; and

D. Such other and further relief as the Court may deem just and proper.

DATED: April 4, 2011

Yours, etc.

/s/

DAVID L. LEWIS, ESQ.
Attorney for Plaintiffs
225 Broadway, Suite 3300
New York, New York 10007
(212) 285-2290

ATTORNEY'S VERIFICATION

DAVID L. LEWIS, an attorney duly admitted to the practice of law before the Courts of the State of New York, does hereby affirm under the penalties of perjury:

1. I am the attorney for the plaintiffs in the instant action, and my office is located at 225 Broadway, Suite 3300, New York, New York, in the County of New York.

2. I have personally reviewed the contents of this document with my clients, and upon the conclusion of said review as to the facts alleged therein, believe the same to be true except where made under information and belief.

3. As to all other allegations, counsel has personal knowledge thereof and believes the within allegations to be true, to his personal knowledge.

4. This Verification is made by me as an attorney pursuant to the provisions of the CPLR and applicable case law due to the fact that I maintain my office in New York County and plaintiffs reside in other counties, and because time is of the essence.

Dated: New York, New York
April 4, 2011

DAVID L. LEWIS, ESQ.

EXHIBIT B

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 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, and NEW YORK STATE DEPARTMENT OF CORRECTIONS,

Defendants.

ANSWER OF DEFENDANT NEW YORK STATE DEPARTMENT OF CORRECTION AND COMMUNITY SUPERVISION
Index No. 2310-11

_____, J.

Defendant New York State Department of Department of Corrections and Community Supervision (sued herein as either the New York State Department of Corrections or as New York State Department of Correctional Services, and hereinafter referred to as "DOCCS"), by its attorney, Eric T. Schneiderman, Attorney General of the State of New York (Stephen M. Kerwin, Assistant Attorney General, of counsel) answers the Complaint dated April 4, 2011 as follows:

1. Denies the allegations in paragraphs 7, 8, 9, 10, 11, 24, 25, 26, 28, 29, 39, 40, 47, 48, 49, 50, 55, 56, 57, 58, 60, 71, 73, 79, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 105, 114, 115, 117, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 139, 141, 147, 148, 149, 150, 151, 152, 153, 160, 161, 165, 166, 168, 169, 170, 171, 172, 173, 175, 178, 179, 182, 187, 188, 189, 190,

191, 192, 194, 195, 198, 201, 202, 204, 205, 208, 210, 211, 214, 217, 218, 219, 220, 221, 223, 229, 230, 231, 232 and 236 of the Complaint.

2. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraphs 3, 12, 13, 14, 15, 16, 17, 18, 19, 20, 31, 37, 45, 46, 52, 54, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 76, 82, 83, 102, 106, 108, 110, 112, 113, 134, 135, 136, 137, 156, 159, 162, 163, 167, 177, 185, 186, 199, 200, 203, 207, 209, 212, 213, 215, 216, 224, 233 and 235 of the Complaint.

3. Admits the allegations in paragraphs 23, 27, 75, 77, 84, 101 and 104 of the Complaint.

4. With regard to paragraph 103, admits that the budget process is, in part, governed by the New York State Constitution and the New York State Finance Law.

5. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraph 21 except denies that the votes of plaintiffs are diluted by reason of Part XX.

6. Denies sufficient knowledge or information to form a belief as to the truthfulness of the allegations in paragraph 22, and refers the Court to Chapter 45 of the Laws of 1978 as the best evidence and most accurate version of its content.

7. With regard to paragraph 78 of the Complaint, admits that as of January 1, 2010 DOCCS housed 213 inmates serving life sentences without the possibility of parole, but denies the balance of the allegations in that paragraph.

8. Admits the truth, as of January 1, 2010, of the allegations in paragraphs 80 and 81 of the Complaint.

9. Makes no response to the introductory statements in paragraphs 1 and 2 of the Complaint. To the extent those paragraphs include allegations, they are denied.

10. Makes no response to the statements in paragraph 237 of the Complaint in that they include no allegations. To the extent that the statements in those paragraphs are construed to be allegations, they are denied.

11. With respect to the allegations contained in paragraphs 4, 5, 6, 30, 32, 33, 34, 35, 36, 38, 118, 119, 120, 143, 144, 145, 146, 155, 157, 158, 164, 176, 180, 181, 183, 184, 193 and 197 of the Complaint, respectfully refers the Court to Part XX of Chapter 57 of the Laws of 2010 as the best evidence and most accurate version of its content. DOCCS denies the additional allegations in these paragraphs .

12. With respect to the allegations contained in paragraphs 41, 42, 43, 44, 51, 53, 59, 74, 107, 109, 111, 116, 132 and 142 of the Complaint, respectfully refers the Court to the New York State Constitution as the best evidence and most accurate version of its content. DOCCS denies the additional allegations in these paragraphs.

13. Paragraphs 133, 138, 225, 226, 227, 228 and 234 contain legal arguments, not allegations of fact, and are improper in a Complaint. To the extent that the statements in those paragraphs are construed as allegations, they are denied.

14. Repeats and re-alleges each response made herein to the allegations of the Complaint that are incorporated into paragraphs 85, 95, 140, 154, 174, 196, 206 and 222 thereof.

15. Denies each and every allegation of in the Complaint not specifically responded to above.

AFFIRMATIVE DEFENSES

16. Some or all of the Plaintiffs do not have standing to assert some or all of the claims alleged in their Complaint.

17. The Complaint presents claims which are non-justiciable.

18. Chapter 57 of the Laws of 2010 was approved by the New York State Senate in conformity with all parliamentary rules governing that body at that time.

19. Insofar as the Complaint presents a facial challenge to Part XX of Chapter 57 of the Laws of 2010, it fails to state a cause of action.

20. Part XX of Chapter 57 of the Laws of 2010 implements Article III, § 4 of the New York State Constitution, reconciles that provision with Article II, § 4 of the Constitution, and does not violate that constitutional provision, nor Article I, § 11 of the New York Constitution.

21. Enactment of Chapter 57 of the Laws of 2010 did not violate Article VII of the New York State Constitution.

22. The Complaint fails to state a cause of action, in whole or in part.

23. To the extent that DOCCS has already transmitted information required by Part XX, the plaintiffs assert claims for which relief could not be granted.

WHEREFORE, Defendant New York State Department of Corrections and Community Supervision respectfully requests that the relief requested in the Complaint be denied, that the Complaint and this action be dismissed, and that it be awarded costs and disbursements, together with such other relief as may be just.

Dated: Albany, New York
May13, 2011

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendant NYS Department of Corrections and Community Supervision
The Capitol
Albany, New York 12224-0341

By: _____s/_____
Stephen M. Kerwin
Assistant Attorney General
Telephone: (518) 473-7184
Fax: (518) 402-2221 (Not for service of papers)
e-mail: stephen.kerwin@ag.ny.gov

TO: David L. Lewis, Esq.
Attorney for Plaintiffs
225 Broadway, Suite 3300
New York, New York 10007

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

VERIFICATION

Maureen E. Boll, being duly sworn, deposes and says that I am the Deputy Commissioner and Counsel of the New York State Department of Corrections and Community Supervision; that I have read the Complaint and the foregoing Answer to the Complaint, and the Answer is true to my knowledge, except as to those matters alleged upon information and belief, and that as to those matters, I believe them to be true.

_____s/_____
Maureen E. Boll

Sworn to before me on the
12th day of May 2011

_____s/_____
Notary Public

EXHIBIT C

The Assembly
State of New York

JOHN J. Mc ENENY
Member of Assembly

May 27, 2011

Mr. David Lewis, Esq.
Attorney for the Plaintiffs
225 Broadway, Suite 3300
New York, New York 10007

Dear Mr. Lewis;

Enclosed for service is a copy of a letter dated may 11, 2011, from the Co-Chairpersons of the New York State Legislative Task Force. The original will be filed with the court clerk.

Sincerely,

John J. McEneny
Member of Assembly

Enc.

104TH District - City of Albany, Towns of Guilderland, New Scotland and the Helderberg Hill Towns of Berne, Knox, Westerlo and Rensselaerville
Legislative Office Building, Room 648, Albany, NY 12248, (518) 455-4178, FAX (518) 455-5737, e-mail: mcenenj@assembly.state.ny.us

NEW YORK STATE
LEGISLATIVE TASK FORCE
ON DEMOGRAPHIC RESEARCH
AND REAPPORTIONMENT
250 Broadway-21st Floor
New York, New York 10007-2563
(212) 618-1100
FAX (212) 618-1135

CO-CHAIRMEN
Senator Michael F. Nozzolio
Assemblyman John J. McEneny

MEMBERS
Senator Martin Malavé Dilan
Assemblyman Robert Oaks
Roman B. Hedges

CO-EXECUTIVE DIRECTORS
Debra A. Levine
Lewis M. Hoppe

May 11, 2011

Honorable
Supreme Court, Albany County

Re: Little, et al. v. New York State Legislative Task Force on Demographic Research and Reapportionment and NYS Department of Correctional Services
Index No. 2310-11

Your Honor:

The undersigned are the co-chairpersons of The New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), a defendant herein. LATFOR is the entity responsible for developing redistricting plans for the New York State.

The instant action seeks, inter alia, a declaration of unconstitutionality of Section XX of Chapter 57 of the Laws of 2010, regarding the counting of incarcerated persons for redistricting purposes. We understand that the Attorney General will be appearing, or has already appeared, in this case.

At this time, LATFOR does not intend to make a formal submission to the Court. We are satisfied that counsel who will appear for co-Respondent Department of Correctional Services can adequately address the merits of the case. However, we write to impress upon the Court of the importance to LATFOR that the case proceed to judgment without delay.

LATFOR is tasked with developing proposals for three different sets of districting plans: the New York State Assembly, the New York State Senate, and the Congressional districts for the New York State delegation. This is a massive undertaking, delicate in its execution and requires input from, and agreement of, various different constituencies, including pre-clearance from the United State Department of Justice.

LATFOR has begun the redistricting process and needs to know how to apportion the prison population now, while the districts are being crafted. To implement lines and have them later overturned, if such a statutory challenge were successful, would wreak havoc with the political process in New York and would be prejudicial to the State, candidates and voters alike. We believe that the best interests of all would be served by avoiding the uncertainty imposed by a challenge waiting in the wings.

For these reasons, LATFOR most respectfully urges the Court to proceed with this action in a manner designed to result in a prompt resolution.

Respectfully submitted,

Michael J. Nozzolio 5/11/11

Signature Date

11th May 2011

Signature Date

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE, et al.,
Plaintiffs,

-against-

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

and

NAACP NEW YORK STATE CONFERENCE, et al.,
Proposed Intervenor-Defendants

AFFIDAVIT OF SERVICE

2310-2011

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

John J. McEneny, being duly sworn, deposes and says:

I am over eighteen years of age.

On May 27, 2011, I caused to be mailed the annexed **Letter dated May 11, 2011 requesting the Court to proceed with action in a manner designed to result in a prompt resolution** upon the following individuals, by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a U.S. Mail box in the City of Albany, a depository under the exclusive care and custody of the United States Postal Service, directed to the said counsel for NAACP Legal Defense and Educational Fund, Inc. and counsel for plaintiffs at the address designated by them for that purpose, as follows:

Dale Ho
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013

David Lewis, Esq.
Attorney for the Plaintiffs
225 Broadway, Suite 3300
New York, New York 10007

John J. McEneny

Sworn to before me this
27th day of May, 2011

Jeffrey M. Dvorin
Assistant Attorney General

EXHIBIT D

February 21, 2006

U.S. Census Bureau Report: Tabulating Prisoners at Their "Permanent Home of Record" Address

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Contents

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Executive Summary

In the Conference Report accompanying the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (P.L. 109-108), Congress directed the U.S. Census Bureau to study tabulating prisoners at the address of their "permanent home of record," rather than at their place of incarceration.

In the course of its study, the Census Bureau considered a range of options and data sources, including administrative records data from the Federal Bureau of Prisons, and consulted corrections officials at the federal, state, and local level. The following uncertainties and challenges were identified:

Definition of "Permanent Home of Record": There is no generally agreed-upon definition of the concept "permanent home of record."

Method of Data Collection and Access: Address information for prisoners would need to be collected either through individual enumeration procedures or through access to administrative records. A complete address that can be coded to a block and verified to exist is required if the residents of the address are to be included in redistricting data.

Our study revealed that interviewing every prisoner would rely on full participation, coordination, and support with thousands of correctional facilities. Because interviewing every prisoner would require security considerations and detailed coordination involving the scheduling of each prisoner for an interview, we do not think interviewing all prisoners is feasible.

We could attempt to collect address information from administrative records. Our study found that the records are incomplete, inconsistent, and not updated. Often, there is a street number and street name missing, and only the city and state are available. In addition, there is no validation procedure used by the correctional systems to ensure that the address on the administrative record is correct. Therefore, relying on administrative records alone is not a viable option because some prisoners' addresses either will not be provided, or will be incomplete, or will be in some way unusable for census purposes.

Data Quality and Accuracy: New census operations would be required to verify the existence of the addresses and to validate the residency of the prisoners at the addresses provided by them. If the address provided by the prisoner is not valid, new procedures would need to be developed to either revert back to counting the prisoner at the correctional facility location or to conduct further follow-up interviews to determine a valid address.

Consistency: A change in the manner by which prisoners are tabulated will be inconsistent with how other Group Quarters populations are tabulated. This has serious implications for the methods used to tabulate college students, nursing home residents, and other persons that reside in Group Quarters.

Lawfulness: It is unclear how the Census Bureau can satisfy its legal obligation to report the whole number of persons in each State for apportionment purposes if it tabulates prisoners at an address other than where they are confined.

Cost: The estimated cost is approximately $250 million to interview all prisoners in all federal, state, and local correctional facilities and to process the address information reported by the prisoners. This is more than a 1,200 percent increase over the cost of enumerating prisoners in Census 2000. This cost does not include the development and field testing of interviewing, verification, or validation procedures.

Timeliness: The census operations required to tabulate prisoners at their "permanent home of record" address introduce the risk of not meeting statutorily mandated dates to deliver census data. It is unclear how many weeks or months would be required for large correctional facilities to arrange for Census Bureau field enumerators to schedule interviews conducted in a safe, confidential environment.

1. Introduction

The Conference Report accompanying the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, contains the following wording:

> "The conferees direct the Bureau to undertake a study on using prisoners' permanent homes of record, as opposed to their incarceration sites, when determining their residences. The Bureau should report back to the Committees on Appropriations on its findings within 90 days of enactment of this Act."[1]

2. Summary of Findings

The Census Bureau consulted four types of subject matter experts for this study: the Bureau of Justice Statistics, the Federal Bureau of Prisons, state corrections departments, and state and local correctional facilities. Internal sources were also consulted to include information on related surveys conducted by the Census Bureau for the Department of Justice and information on the American Community Survey.

In the course of its study, the Census Bureau considered a range of options and data sources. The results of the study and the implications of changing the census law and its procedures led to the following conclusion from the Census Bureau:

> Counting prisoners at a "permanent home of record" address, rather than at their place of incarceration, would result in increased cost both to the decennial census program and to the federal, state, and local correctional facilities that would be required to participate in data collection efforts. Our study raises concerns that this change would result in decreased accuracy for a possibly large proportion of millions of individuals confined on Census day. The completeness of the census count would be compromised for prisoners that cannot provide a valid address, and we have no method of determining how many individuals would fall into that category. Further, a fundamental shift for the enumeration of correctional facilities would likely have a negative impact on other Group Quarters enumerations.

If Congress were to mandate that the Census Bureau tabulate prisoners at their "permanent home of record" address (however that may be defined), prisoners would have to be interviewed individually and the Census Bureau would have to verify both the existence of a living quarter at the address and the validity of counting the prisoner at the address. There are operational and cost implications associated with this. Based on data from the Bureau of Justice Statistics, we estimate that there will be 2.6 million adults and juveniles in federal, state, and local correctional facilities in 2010. It will cost approximately $250 million to have all prisoners interviewed in all correctional facilities and to process the address information reported by the prisoners. This is

[1] H.R. Conf. Rep. No. 109-272, at 140 (2005).

more than a 1,200 percent increase over the cost of enumerating prisoners in Census 2000.

If Congress mandates this change and funds the collection of "permanent home of record" addresses, the following major challenges and issues still exist:

- The Census Bureau would need additional authority to access all prisoners in all federal, state, and local correctional facilities for enumeration, which would impose an additional financial burden on the correctional facilities to support the data collection. Not only would additional security need to be provided, but, due to Title 13 protections, all interviews would need to take place in an area that would provide confidentiality to every prisoner during the time of the interview.

- Some addresses will either not be provided or will be unusable for census purposes. In cases where a valid address is not obtainable, new procedures would need to be developed to either revert back to counting the prisoner at the correctional facility or to conduct further follow-up interviews to determine a valid address.

- If a valid residential address (i.e., a complete address that can be verified to exist) were provided, the Census Bureau would have to verify the validity of tabulating the prisoner at that address which would require a new census operation to interview the current residents of the address.

- A change in the way the residence rule is applied to prisoners will cause debate over how other Group Quarters populations (e.g., college students and military personnel) are tabulated.

- Any change to the way the Congress directs the Census Bureau to conduct the census or tabulate the results will change the way states are apportioned; congressional, state, and local legislative districts are drawn; and government funds are distributed.

3. Background on Usual Residence

3.1 Legal Requirements

Article I, § 2, cl.3 of the United States Constitution requires that Representatives be "apportioned among the several States...according to their respective Numbers" determined by an "actual Enumeration" of the people in each state and as amended by the Fourteenth Amendment, requires that the count include the "whole number of persons in each State."[2] The manner of conducting the enumeration was clarified by the first Census Act, establishing the "concept of usual place of abode" (which has been modernized to "usual place of residence").

[2] U.S. CONST. art. I, § 2, cl.3, *amended by* U.S. CONST. amend. XIV, § 2.

This statute, enacted for taking the 1790 Census, provided:

> That every person whose usual place of abode shall be in any family on the aforesaid first Monday in August next, shall be returned as of such family; and the name of every person, who shall be an inhabitant of any district, but without a settled place of residence, shall be inserted in the column of the aforesaid schedule, which is allotted for the heads of families, in that division where he or she shall be on the said first Monday in August next, and every person *occasionally* absent at the time of the enumeration, as belonging to that place in which he usually resides in the United States.[3] (*emphasis supplied*)

Because the interpretation of the Constitution by the First Congress is persuasive,[4] it is assumed that the residence rule reflects the intention of the Founding Fathers, many of whom were in the First Congress, regarding the meaning of Art. I, Sec.2, Cl.3 of the Constitution.

The Supreme Court has established the standard of review for conducting the decennial census. That is, the procedures must be "consonant with, though not dictated by, the text and history of the Constitution . . . [and promote] the underlying constitutional goal of equal representation."[5]

Court decisions have upheld the Census Bureau's procedures for determining a person's usual residence.

- In Franklin v. Massachusetts, the Supreme Court upheld the Census Bureau's decision to count federal employees (military and civilian) temporarily stationed overseas at their home of record[6] and articulated the standard of review that applies to the Census Bureau residence rule. That standard inquires whether the Census Bureau's residence rule is "consistent with the Constitutional language and Constitutional goal of equal representation."[7] The Court concluded that the Census Bureau's use of the home of record data as the usual residence for federal employees temporarily stationed abroad promoted the goal of equal representation.[8] It is significant to note that the overseas federal employees were allocated back only to the state level. Unlike Franklin, where the

[3] 1 Stat. 101 (1790) (*emphasis supplied*).

[4] Bowsher v. Synar, 478 U.S. 714, 723-724 (1986); State of Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888).

[5] Franklin v. Massachusetts, 505 U.S. 788, 806 (1992).

[6] The Department of Defense defines "home of record" to be "the State declared by the person upon entry into military service, and determines where he or she will be moved after military service is complete." Franklin v. Massachusetts, 505 U.S. 788, 793 (1992).

[7] Id. at 804.

[8] Id. at 806.

military administrative data were the only data available, there are actual addresses for prisoners in correctional institutions – the address of the institution itself.

- In District of Columbia v. U.S. Department of Commerce, the U.S. District Court for the District of Columbia upheld the Census Bureau's residence rule counting prisoners in a detention facility located in Virginia, but operated by the District of Columbia, as residents of Virginia although the facility housed prisoners most of whom previously resided in the District of Columbia.[9] The District Court found the Census Bureau's procedure reasonable and concluded that the Census Bureau "has interpreted the Constitutional command to enumerate the whole number of people on Census day to require enumeration at the place where the people are usually to be found...[t]he determination is designed to be administered easily, without in-depth factual analysis."[10]

- In Borough of Bethel Park v. Stans, the Court of Appeals for the Third Circuit found proper the Census Bureau's procedures for tabulating prisoners in penitentiaries or correctional institutions "as residents of the state where they are confined."[11] Similarly, the Third Circuit considered reasonable the Census Bureau's policy of tabulating college students at the location of the college rather than at their parent's home address, concluding that the "Bureau is entitled to limit its inquiry to the objective facts as to where the student chooses to generally eat, sleep and work."[12] The Third Circuit acknowledged the Census Bureau's substantial responsibility in tabulating people according to each state and justified the necessity in using a "definite, accurate and verifiable standard."[13] As the Constitution commands that congressional districts have an equal number of people for congressional elections, the Third Circuit maintained that it is the states, not the Secretary of Commerce or Director of the Census Bureau, which are under the Constitutional obligation to "draw their congressional districts in a manner which conforms with the requirements of the Constitution" for equal representation.[14]

---

[9] District of Columbia v. U.S. Department of Commerce, 789 F. Supp. 1179 (D.C.C. 1992). The District Court also articulated that the original purpose of the enumeration is congressional apportionment and that the "level of financial support an area receives from a locality has never explicitly defined census enumeration." Id. at 1187. This conclusion that distribution of federal funds to the states is secondary to the original Constitutional purpose of the census is also acknowledged by the Supreme Court in Wisconsin v. City of New York. Wisconsin v. City of New York, 517 U.S. 1, 5-6 (1996). Recently, Congress has further reiterated that the "sole Constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several states." Pub. L. No. 105-119, Title II, § 209(a) (1997).

[10] Id. at 1189.

[11] Borough of Bethel Park v. Stans, 449 F.2d 575, 582 (3d Cir. 1971).

[12] Id. at 579.

[13] Id.

[14] Id. at 582.

Thus the courts have determined that the application of the residence rule to tabulate prisoners at the correctional facility where they are incarcerated is in compliance with the Constitution and the underlying goal of equal representation.

3.2 The Concept of Usual Residence

The Census Bureau counts people at their usual residence. The concept of usual residence has been followed since the first census in 1790. Usual residence is customarily defined as the place where the person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence.

Determining usual residence is easy for most people. However, given our nation's wide diversity in types of living arrangements, the usual residence for some people is not easily determined. A few examples are people without housing, commuter workers, people with multiple residences, college students, live-in employees, military personnel, and migrant workers. To apply the concept of usual residence to these different situations, the Census Bureau developed a residence rule with various applications to fit particular living arrangements.

According to the concept of usual residence, prisoners in correctional facilities, including prisons, jails, detention centers, etc. are counted at the correctional facility.[15] The current plan for the 2010 Census, like Census 2000 and previous censuses, is to tabulate prisoners at the place of their incarceration.

4. Correctional Facilities Enumeration in Census 2000

To collect information about all people within the scope of the decennial census and consistent with the concept of usual residence, the Census Bureau developed a number of procedures for enumerating people who live in Group Quarters (i.e., places with living arrangements other than the standard house or apartment).[16] The enumeration procedures for people living in group situations are designated as Group Quarters Operations. In census terms, correctional institution buildings where prisoners and staff live or stay are considered to be Group Quarters. The Census Bureau tabulates the prisoners and staff living or staying at each building as residents of the correctional facility in the decennial census.

[15] http://www.census.gov/population/www/censusdata/resid_rules.html

[16] 1990 CPH-R-2A, *1990 Census of Population and Housing History, Part A*, Chapter 6, Bureau of the Census, October 1993.

In Census 2000, the tabulated population in Group Quarters was approximately 7.8 million people. Of that, the tabulated population in correctional facilities was almost 2.0 million people.[17]

Due to safety and privacy concerns and to avoid disruption of residents and/or disturbance of normal routines, the Census Bureau found it administratively feasible and practical to authorize the staff of some correctional facilities to conduct the enumeration of prisoners. Census Bureau staff were present and sometimes were available to oversee the process. Census Bureau staff administered the census oath of confidentiality to the corrections staff to protect the confidentiality of the data they collect, trained the corrections staff on the enumeration procedures, provided all necessary enumeration materials, and collected the completed census questionnaires.

The Individual Census Report was the questionnaire used to collect Census 2000 data from the prisoners and staff living at the correctional facilities. Although it is preferred that people complete the Individual Census Report questionnaire for themselves, the Census Bureau recognizes that there are many circumstances involving personal safety or disruption to the facility for which the use of administrative records is more appropriate to complete the enumeration. The Census Bureau's procedures accommodated the use of administrative records (for counts and characteristics) and the transcription of that information onto a census questionnaire.[18] In Census 2000, more than half of the census questionnaires completed in correctional facilities used administrative records as the basis for reporting.[19]

5. Related Surveys Conducted by the Census Bureau

As part of the research for this report, information on other surveys conducted by the Census Bureau at correctional facilities was studied to learn if address information for the prisoner population was collected.

The Census Bureau conducts ten periodic surveys that are sponsored by the Department of Justice. Seven of the surveys are at the institution level, collecting data about the institution and/or summary data about the prisoners. One survey, the Census of Juveniles in Residential Placement, collects specific information for each juvenile in residential placement. This survey does not collect pre-placement address information.[20] Two surveys ask sampled prisoners for

[17] Jonas, Kimball (2003b), *Census 2000 Evaluation E.5- Revised: Group Quarters Enumeration*, August 2003.

[18] D-678, *Census 2000 Self-Enumerating Places Training*, Bureau of the Census, February 2000.

[19] Jonas, Kimball (2003b), *Census 2000 Evaluation E.5- Revised: Group Quarters Enumeration*, August 2003.

[20] *GOV list of the surveys conducted on behalf of the Department of Justice*, Charlene M. Sebold, Chief, Criminal Justice Statistics Branch, Governments Division, U.S. Census Bureau, December 13, 2005.

their address before their arrest date. However, the surveys do not ask for a specific house number and street address. Both surveys ask, "At the time of your arrest, in what city or place did you live?"[21]

The American Community Survey is a survey of a sample of households and a sample of people in Group Quarters conducted monthly throughout the decade. Launched in 2003, the American Community Survey collects the data previously collected on the census long form. In addition to recording the Group Quarter's address, the American Community Survey asks for the place (name of city, town, or post office, or military installation, or base) where the respondent lived one year ago, for people one year or older who lived in the U.S., but did not live at the same address as at the time of enumeration.[22]

None of these surveys collect house number and street name addresses for prisoners.

6. Research and Results

6.1 Information from the Bureau of Justice Statistics

Staff at the Census Bureau consulted with Bureau of Justice Statistics to gain insight into the collection of address information on the prisoner population in state and federal prisons.

In 1998, the Bureau of Justice Statistics conducted an Inventory of State and Federal Corrections Information Systems of all 50 states, the District of Columbia, and the federal prison system, representing 52 departments of corrections. To develop the inventory, a survey was conducted that asked about the availability of information to profile and describe the characteristics of the prisoner prior to incarceration, including the address of the prisoner prior to incarceration, that is, city, state or country.[23] At the time the inventory was developed, 25 percent of the states either did not record address information or only had address information in paper documents. Bureau of Justice Statistics experts advised that they do not believe these findings have appreciably changed since the 1998 survey.

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[21] *Survey of Inmates in Local Jails Items Booklet* (SIJ-47), August 2001; and *Survey of Inmates in State and Federal Correctional Facilities Items Booklet* (NPS-45), July 2003.

[22] FORM ACS-1(GQ) (2006), The American Community Survey, October 2005.

[23] 1998 Inventory of State and Federal Corrections Information Systems Survey Instrument, *State and Federal Corrections Information Systems, An Inventory of Data Elements and Assessment of Reporting Capabilities*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, August 1998.

The decennial census would not be able to use information from the Inventory of State and Federal Corrections Information Systems because:

- The information systems do not collect house number and street name address for the prisoner population. In the census, a house number and street name are required to ensure that the prisoner is counted in the correct census block. The identification of a specific census block is required if the residents of the address are to be included in redistricting data.

- Even if the address information collected was more detailed than city, state, or country, the address information is not consistently collected for all prisoners nationwide.

6.2 Federal Correctional Facilities

The Bureau of Prisons is responsible for the custody and care of approximately 188,000 federal offenders in more than 106 institutions. Approximately 85 percent of these prisoners are confined in Bureau of Prisons-operated correctional facilities or detention centers. The rest of the prisoners are confined through agreements with state and local governments or through contracts with privately-operated community corrections centers, detention centers, prisons, and juvenile facilities.[24]

In December 2005, the Census Bureau contacted experts at the Bureau of Prisons concerning the availability of administrative information on the federal prisoner population. The Bureau of Prisons maintains a database of all federal prisoners. The database includes fields for capturing the prisoner's name, demographic data, and pre-incarceration address. As an initial step to assess the quality and usability of the database, the Census Bureau obtained a subset of the information on the file for all records in the database. The Census Bureau received the pre-incarceration address information contained in their database, when available. The pre-incarceration address consisted of the street address, city, state, and ZIP code. Staff at the Census Bureau computer matched the addresses provided by the Bureau of Prisons to the Master Address File maintained at the Census Bureau. In addition, staff attempted to geocode[25] the addresses using the Topologically Integrated Geographic Encoding and Referencing (TIGER)[26] database maintained at the Census Bureau. The identification of a geocode is required if the residents of an address are to be included in redistricting data.

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[24] http://www.bop.gov/about/index.jsp

[25] "To geocode" means to assign an address, living quarters, establishment, etc., to one or more geographic codes that identify the geographic entity(ies) in which it is located. For living quarters, geocoding usually requires identification of a specific census block. The identification of a specific census block is required if the residents of the address are to be included in redistricting data.

[26] TIGER is a digital (computer-readable) geographic database that automates the mapping and related geographic activities required to support the Census Bureau's census and survey programs.

Of the records on the file, about 40 percent contained complete addresses that geocoded in TIGER and matched to an address in the Master Address File. Of the remaining records on the file, about 60 percent of the addresses are not useable by the Census Bureau to tabulate the prisoners at their reported pre-incarceration address.

6.3 State Departments of Corrections Offices

The Census Bureau's Regional Offices contacted the state Departments of Corrections in eight states: California, Florida, Maine, New York, North Dakota, Texas, Vermont, and Wyoming. These states represent the four states with the largest number of people in state correctional facilities and the four states with the smallest number of people in state correctional facilities based on the *Prisoners in 2004* results.[27]

In the decennial census, the enumeration of prisons primarily occurs at the individual correctional facility, using administrative records maintained by the correctional facility. Typically, it does not occur using data from a central administrative office of the governmental unit. Although enumeration historically occurs at the facilities, for purposes of this study, the state Departments of Corrections were contacted to learn about the availability of a centralized source of address information.

Information gathered from these eight state Departments of Corrections indicates similar themes or findings regarding the collection and maintenance of address information on prisoners. Detailed address information (that is, addresses needed to tabulate the prisoner population at the block level) for all prisoners in correctional facilities does not currently exist in administrative records.

6.4 State and Local Correctional Facilities

Staff from the Census Bureau's Regional Offices contacted wardens, sheriffs, and administrative personnel from seven state correctional facilities and 16 local facilities to gather more specific information about the availability of address information for each prisoner.

Of the 23 facilities contacted, eight reported they were familiar with the term "permanent home of record" address, but each facility defined the term differently. Fifteen facilities reported they were not familiar with the term.

The information obtained from the facilities was similar to the information obtained from the state Departments of Corrections. Detailed address information for all prisoners in correctional facilities does not currently exist in administrative records.

[27] *Prisoners in 2004*, Bureau of Justice Statistics Bulletin, October 2005.

7. Practical, Operational, and Policy Implications

7.1 Practical and Operational Implications

There is no generally agreed-upon definition of the concept "permanent home of record."

To collect "permanent home of record" addresses consistently for all prisoners would require collecting the information from each prisoner individually (either through a Census Bureau interviewer or through special sworn status corrections staff) and presents major operational issues for both the correctional facilities and the Census Bureau.

- The use of centralized administrative record data to collect "permanent home of record" addresses is not an option. Detailed address information for all prisoners in correctional facilities does not currently exist. It is possible that Congress could direct every federal, state, and local correctional facility to develop an administrative record that includes a 'permanent address of record' for each prisoner. Our study did not examine changing current correctional facility procedures or implementing new requirements for correctional facilities.

- It will cost about $250 million for the Census Bureau to interview all prisoners in all federal, state, and local correctional facilities and to process the address information reported by the prisoners. This is more than a 1200 percent increase over the cost of enumerating prisoners in Census 2000. This estimate does not include the substantial amount of funding that will be required by correctional facilities to support the census enumeration. Nor does it include the development and field testing of interviewing, verification, or validation procedures.

- In Census 2000, 61 percent of the prisoners were in correctional facilities with over 1000 prisoners.[28] Interviewing prisoners in these large facilities would require an extensive coordination procedure that would rely heavily on the active participation of thousands of federal, state, and local correctional facilities. Each interview would have to be scheduled in advance and space would be needed that would provide safety to the interviewer and confidentiality to the prisoner.

- Officials at the correctional facilities must preserve standard routine activities. We have not investigated the degree to which interviewing prisoners would represent a serious disruption to prison operations.

[28] Jonas, Kimball (2003b), *Census 2000 Evaluation E.5- Revised: Group Quarters Enumeration*, August 2003.

- Correctional facilities have strict requirements about who is allowed to enter a correctional facility. Some facilities require as much as six months lead time in approving the specific census workers who will be interviewing the prisoners. This lead time is not possible in a census environment because of the short term nature of census jobs. New procedures would need to be developed to obtain security entrance for Census interviewers. Because these interviewers are temporary employees hired specifically to conduct the decennial census, the Census Bureau would likely need to modify its recruitment, screening, and security clearance of potential correctional facility interviewers. And, the federal, state, and local correctional facilities would need to establish a quick and orderly method for interviewers to have access.

There will be instances where the Census Bureau will not be able to tabulate prisoners to an address other than the correctional facility.

- An unknown number of addresses outside the United States (e.g., Canada or Mexico) will be "permanent homes of record" of the prisoners.

- Some prisoners were experiencing homelessness when they entered the facility and they do not have an address.

- No address, other than the correctional facility, will be provided for some prisoners.

Prisoners' addresses obtained during enumeration will present challenges.

- The Census Bureau will not be able to assign many addresses to a specific block.

- For addresses that do not match to an address on the Master Address File, census workers must visit the block to which the addresses were geocoded in order to determine if they existed.

- The quality of some addresses obtained from the enumeration of prisoners will result in an increase in the volume of addresses requiring field visits. An increase in the volume due to processing the prisoners' addresses raises resource issues and poses the potential risk of not meeting statutorily mandated dates to deliver census data.

- If the prisoner's address is valid, (i.e., geocoded and on the Master Address File), it could be another correctional facility.

- If the address is a valid residential address, the Census Bureau must confront the issue if it is legal and reasonable to tabulate the prisoner at the residential address without checking the validity of the prisoner's residency at the address provided. Depending upon the length of the incarceration, some addresses could be out-dated by several years. According to the Bureau of Justice Statistics data, based on the 1997 Survey of Inmates in State Correctional Facilities, an estimated 19 percent of inmates in state prisons served less than 12 months, 71 percent of inmates in state prisons served between 12 months and

119 months, and nearly ten percent served more than 120 months (i.e., ten or more years).[29]

- Checking the validity of residency requires a new census operation because the Census Bureau would have to also interview the current residents at that address. This has Title 13 implications since the Census Bureau cannot ask the current residents if they know the prisoner who supplied the address.[30] The questions would have to be phrased similar to asking who should be included in the household and if they think they missed anyone, especially anyone who was in a jail, prison, or detention facility on Census Day. If the current residents do not mention the name of the prisoner who supplied the address, the Census Bureau would have to determine if it is reasonable to add the prisoner to the household at the address.

- In addition to legal/Constitutional requirements, tabulating prisoners at an address other than at the correctional facility has implications for household characteristics, such as household size. The inclusion of incarcerated people into households when they are not there will give the false impression that they may be contributing to family economic resources when, in fact, they are not. Alternatively, such inclusion could give the false impression that there are more demands on family economic resources than is actually the case. Such inaccurate descriptions may in turn mask or distort true needs of the community. This could be detrimental to local communities which decide to propose programs, distribute funds, or identify needs based on family structure (e.g., the need for more housing with more bedrooms based on the inclusion of people who are not living in the community).

7.2 Policy Issues

There will be unanticipated effects of changing the concept of usual residence.

In addition to apportioning the seats in the U.S. House of Representatives, the decennial census provides the basis for congressional and legislative district boundaries drawn by the states and for most local redistricting plans. Census data are also used in most formulas that distribute federal, state, and local funding. Consequently, any change in the way the Census Bureau counts prisoners will affect apportionment; congressional, state, and local legislative redistricting; and distribution of government funds.

- A change in the way the concept of usual residence is applied to prisoners will be inconsistent with how other Group Quarters populations (e.g., college students and military personnel) are tabulated.

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[29] *Prisoners in 1998*, Bureau of Justice Statistics Bulletin, August 1999.

[30] 13 U.S.C. § 9(a) (West 2005).

- A change to tabulating prisoners at a "permanent home of record" address would result in prisoners not being included in the census population totals for the jurisdiction in which the prison is located even though they live and sleep in that jurisdiction.

Redistricting congressional and legislative boundaries is the responsibility of each state.

The Census Redistricting Data Office attended meetings with 35 states and the District of Columbia during calendar year 2005. The remaining states and the Commonwealth of Puerto Rico will host meetings during calendar year 2006. The purpose of the meetings was to provide information regarding the 2010 Decennial Census and the Census Redistricting Data Program. Issues such as where to count prisoners were discussed at each meeting.

Concern was expressed about changing the rule for tabulating prisoners. The concern primarily focused on the issue that other Group Quarters populations would be targeted for change.

8. Conclusion

Counting prisoners at a "permanent home of record" address, rather than at their place of incarceration, would result in increased cost both to the decennial census program and to the Federal, State, and local correctional facilities that would be required to participate in data collection efforts. Our study raises concerns that this change would result in decreased accuracy for a possibly large proportion of millions of individuals confined on Census day. The completeness of the census count would be compromised for prisoners that cannot provide a valid address, and we have no method of determining how many individuals would fall into that category. Further, a fundamental shift for the enumeration of correctional facilities would likely have a negative impact on other Group Quarters enumerations.