SUPREME COURT OF THE STATE OF NEW YORK
County of Albany

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Senator Elizabeth O'C. Little, Senator Patrick Gallivan, Senator Patricia Ritchie, Senator James Seward, Senator George Maziarz, Senator Catharine Young, Senator Joseph Griffo, Senator Stephen M. Saland, Senator Thomas O'Mara, James Patterson, John Mills, William Nelson, Robert Ferris, Wayne Speenburgh, David Callard, Wayne McMaster, Brian Scala, Peter Tortorici,

Plaintiffs,

-against-

New York State Task Force on Demographic Research and Reapportionment, New York State Department of Correctional Services,

Defendants,

and

NAACP New York State Conference, Voices of Community Activists and Leaders- New York, Common Cause of New York, Michael Bailey, Robert Ballan, Judith Brink, Tedra Cobb, Frederick A. Edmond III, Melvin Faulkner, Daniel Jenkins, Robert Kessler, Steven Mangual, Edward Mulraine, Christine Parker, Pamela Payne, Divine Pryor, Tabitha Sieloff, and Gretchen Stevens,

Proposed Intervenor-Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENOR DEFENDANTS' MOTION TO INTERVENE

Pursuant to rule 1012 (a) (2) of the Civil Practice Laws and Rules, NAACP New York State Conference ("NAACP"), Voices of Community Activists and Leaders ("VOCAL"), Common Cause of New York, ("Common Cause") ("organizational intervenors"), and Michael Bailey, Robert Ballan, Judith Brink, Tedra Cobb, Frederick A. Edmond III, Melvin Faulkner, Daniel Jenkins, Robert Kessler, Steven Mangual, Edward Mulraine, Christine Parker, Pamela Payne, Divine Pryor, Tabitha Sieloff, and Gretchen Stevens ("individual intervenors") (collectively, "proposed intervenors"), move to intervene as of right in this action and, in the alternative, permissively intervene pursuant to rule 1013 of the Civil Practice Laws and Rules. As set forth below, proposed intervenors satisfy the requirements both for intervention as of right and for permissive intervention and respectfully request that they be permitted to intervene as defendants in the matter *Little v New York State Task Force on Demographic Research and Reapportionment, et.al.*, index No. 2310-2011.

Preliminary Statement

Proposed intervenors seek to defend the constitutionality of part XX of chapter 57 of the Laws of 2010 ("part XX"), a recently-enacted New York law requiring that incarcerated persons be allocated for state legislative redistricting purposes to their last address preceding their incarceration, and for localities to exclude the prison population when conducting local redistricting. Part XX amends New York's previous method, which allocated incarcerated persons to the districts where they were incarcerated during redistricting, and thus Part XX makes the state's redistricting practice consistent with the

state constitutional definition of residence for incarcerated people: "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." N.Y. Const. Art II, § 4.

Part XX was specifically designed to remedy the injustice of the prior method of apportionment, which arbitrarily and artificially enhanced the voting power of both state and county legislative districts in which the prisons were located and which lacked any interest in common with the persons incarcerated. At the same time, the prior method unfairly diluted the voting power of individuals in all other districts. This dilution particularly affected voters living in the largely African-American and Latino state legislative districts from which most members of the incarcerated population come and to which they are likely to return, and voters living in a county that contains a prison, but who live outside of the local election district containing the prison. If plaintiffs prevail on their claims, these counties would be forced to treat incarcerated persons as ordinary constituents, thus skewing the balance of their local legislative districts.[1]

The proposed intervenors are voters and organizations that represent voters whose voting rights would be diluted if the challenged statute were invalidated. They include individual voters residing in urban downstate communities as well as upstate communities who would be harmed by assigning the incarcerated population to prison districts for purposes of redistricting, together with several membership organizations that have an interest in promoting fair representation and that have members whose rights are directly at stake in this litigation. Each of the proposed intervenors seeks to intervene because the relief sought by plaintiffs — an injunction restraining enforcement

[1] Prior to the passage of Part XX, counties were free to choose whether or not to count prisoners as residents of prisons for purposes of local redistricting. As noted below, 13 counties voluntarily chose to remove the prison population before redistricting.

of the statute and a declaration that the statute is unconstitutional — would deprive them of the very voting protections part XX was enacted to provide them.

Named defendants — the Department of Correctional Services ("DOCS"), which is required under part XX to supply data on prisoners, and the New York Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), which uses the data for developing statewide redistricting plans — have no personal stake in the voting rights protected by the statute and therefore no institutional incentive or interest in protecting those rights. Defendants are state agencies with ministerial duties pursuant to part XX, and therefore, will not — indeed cannot be expected to — adequately represent the voting rights and interests of proposed intervenors which this lawsuit seeks to nullify.

Proposed intervenors' position is distinct. As individuals and membership organizations representing individuals whose votes were diluted under the previous method of counting incarcerated individuals, proposed intervenors intend to argue not only that the State Constitution affords discretion to allocate incarcerated individuals to their home addresses for redistricting purposes, but also that such an allocation is required by state and federal equal protection requirements, and necessary to protect minority voting rights.

Proposed intervenors' concern that their voting rights will be inadequately represented by the present defendants is well-founded. At this time, defendant LATFOR has represented to the court that it does not intend to make any formal submission. Instead, LATFOR has emphasized only their need for a prompt resolution of the case to supply the certainty needed as to how to allocate incarcerated persons before they

complete their task, rather than the need to defend the voting rights protected by Part XX. Defendant DOCS, for its part, has asserted an affirmative defense that, if successful, would result in its dismissal from the case.

Moreover, a final judgment invalidating part XX would dispose of proposed intervenors' voting rights that are now protected by the statute. Accordingly, in every meaningful sense, proposed intervenors would be bound by that judgment. Under these circumstances and because this motion, made two business days after defendants' answer, is plainly timely, intervention should be granted either as of right or permissively.

Statement of Facts

I. Nature of the Case

On August 3, 2010, the New York Legislature duly passed part XX of chapter 57 of the Laws of 2010, legislation that required the state to allocate people incarcerated in New York State prison facilities to their home communities for redistricting purposes. The Governor signed the legislation into law on August 12, 2010. The law was submitted to the United States Department of Justice for preclearance under section 5 of the Voting Rights Act on March 8, 2011, and preclearance was granted on May 9, 2011.[2]

Prior to the enactment of part XX, New York allocated people incarcerated in state prisons to the legislative districts where they were incarcerated, rather than to the home communities where they are legally domiciled, despite the fact that most people in prison return to their home communities after release, and the median time that an

[2] If plaintiffs prevail in this action and New York reverts to the method of prisoner allocation in existence prior to the passage of part XX, many voters living in predominantly minority districts from which a disproportionate number of state prisoners hail will once again suffer the vote dilution remedied by part XX.

incarcerated person has been at his or her current facility is just over 7 months. (New York State Department of Correctional Services, HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008, at ii, available at http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf [accessed May 12, 2011].)

Under New York law, persons convicted of felony offenses and held in state prisons are not eligible to vote. Treating them as "residents" of the prison artificially inflates the voting strength of those who live in districts where prisons are located, and dilutes the voting strength of every New Yorker who lives in a district that does not house a state prison.

For example, following the 2001 redistricting cycle, a state senator from senate district 45, which includes 11 state prisons and a federal prison, represented 286,614 non-incarcerated constituents, while a state senator from neighboring senate district 43, where no prison is located, represented 302,261 non-incarcerated constituents. (*See* Prison Policy Initiative, New Senate Districts, April 22, 2002, at figure 10, http://www.prisonpolicy.org/importing/fig10.html [accessed May 12, 2011].) District 45 would not have met the minimum requirements for population size for representation but for the incarcerated population in the district. The voting strength of district 45's constituents is inflated by the prison population while the voting strength of district 43's constituents is diluted in comparison.

Notwithstanding the former policy, 13 New York counties voluntarily removed the prison population before redistricting to avoid unfairly inflating the voting power in their districts.[3]

Part XX requires, *inter alia*, defendant DOCS to provide to defendant LATFOR the address prior to incarceration for each person incarcerated in a state prison on Census Day. Part XX requires that LATFOR use the data provided by DOCS to develop a dataset allocating incarcerated individuals to the geographic units where they resided prior to incarceration and to include this reallocation in the state district plans that it presents to the legislature.

On April 4, 2011, plaintiffs, nine state senators representing districts with prisons, and nine private citizens, filed this action against defendants challenging the constitutionality of part XX and seeking injunctive relief.

II. Proposed Intervenors

Proposed intervenors are voters and organizations that represent voters whose voting rights would be diluted if part XX were invalidated. Proposed intervenors fall into four basic categories: (1) individual voters living in the largely African-American and Latino state legislative districts from which most members of the incarcerated population come, and who, if plaintiffs prevail, will experience vote dilution because incarcerated individuals from their district will be credited to prison districts; (2) individual voters living in any other state legislative district, whether upstate or downstate, that does not contain the largest concentration of prisons; (3) individual voters residing in New York counties that contain prisons, but who, if plaintiffs prevail, will experience vote dilution

[3] In fact, it is proposed intervenors' belief that at least 3 of the individual plaintiffs are from counties that removed the prison population when redistricting and that the Senators together represent 10 of the 13 New York counties that exclude the prison population when redistricting.

because their local county legislative district contains no prisons; and (4) New York non-profit membership organizations that have members residing in affected state legislative, county and municipal districts.

III. Interests of Proposed Intervenors in this Lawsuit

Proposed intervenors have a substantial interest in this case. First, if part XX is invalidated, individual intervenors will suffer a loss of voting strength, and a loss of equitable representation in the state and/or county legislature. (Bailey affidavit ¶¶ 14-15; Brink affidavit ¶¶ 14-15; Edmond affidavit ¶¶ 14-15; Faulkner affidavit ¶¶ 13-14; Mangual affidavit ¶¶ 11, 14; Mulraine affidavit ¶¶ 12-14; Parker affidavit ¶¶ 11-12; Payne affidavit ¶¶ 12-13; Pryor affidavit ¶¶ 16-17; and Ballan affidavit ¶¶ 10-11; Cobb affidavit ¶ 14; Kessler affidavit ¶ 10; Stevens affidavit ¶ 9.) The votes of individual intervenors who do not reside in state or county districts that include prison populations will be worth less than those of individuals who live in prison districts. (Bailey affidavit ¶ 15; Brink affidavit ¶ 13; Edmond affidavit ¶ 14; Faulkner affidavit ¶ 13; Mangual affidavit ¶ 13; Mulraine affidavit ¶¶ 12-14; Parker affidavit ¶ 11; Payne affidavit ¶ 12; Pryor affidavit ¶ 16; and Ballan affidavit ¶ 10; Cobb affidavit ¶ 14; Kessler affidavit ¶ 10; Stevens affidavit ¶ 9.) Some proposed intervenors live in communities disproportionately disadvantaged by incarceration of persons legally domiciled in their communities and whose proper voting strength was restored under part XX's policy of allocating incarcerated populations to their home communities. (Bailey affidavit ¶¶ 13-14; Edmund affidavit ¶¶ 13-14; Faulkner affidavit ¶¶ 12-13; Mangual affidavit ¶ 12; Parker affidavit ¶¶ 9-10; Payne affidavit ¶¶ 11-12; Pryor affidavit ¶ 16.)

Second, organizational intervenors will suffer a loss of political power both because the collective voting strength of their members will be diluted and because the organizations conduct their operations in districts that are impacted by the new policy. (Dukes affidavit ¶¶ 3, 8, 15, 19; Barry affidavit ¶¶ 3, 12-13, 29; Lerner affidavit ¶¶ 4, 7, 19-20.) Further, equal representation and building political power are central to each organization's mission, and each supported changing the policy to count people in prison at their home addresses as a way of furthering its institutional goals. (Dukes affidavit ¶ 10; Barry affidavit ¶ 28; Lerner affidavit ¶¶ 8, 8-11.) These organizations invested significant resources to bring about the policy change. (Dukes affidavit ¶ 24; Barry affidavit ¶¶ 20-24, 27, 31; Lerner affidavit ¶¶ 15-18.) A finding that part XX is invalid will both divert resources and frustrate the mission of each organizational intervenor. (Dukes affidavit ¶¶ 23-25; Barry affidavit ¶¶ 27-31; Lerner affidavit ¶¶ 19-21.)

Third, if plaintiffs' lawsuit is successful, some individual intervenors will suffer dilution of their voting strength in county elections. Indeed, separate and apart from the implications of this case for statewide redistricting plans, a ruling that part XX is invalid and requiring that incarcerated persons be counted where they are confined during redistricting would have a dramatic impact on redistricting at the county or local level, where total population numbers are smaller and where the presence of a large prison can dramatically skew the population balance between districts. Thus, even prior to the enactment of part XX, many counties with large prison populations did not count people in prisons as local residents when drawing countywide districts because of the severe distortions in voting strength that would result at the local level. (Jenkins affidavit ¶ 8; Sieloff affidavit ¶ 13.) Some individual intervenors are residents of these counties and do

not live in local districts with prisons. (Jenkins affidavit ¶ 7; Sieloff affidavit ¶ 13.) If plaintiffs prevail on their claims, individual intervenors who are residents of such counties will be subject to redistricting policies that artificially inflate the voting strength of residents in local districts that contain prisons, at the expense of neighboring residents whose districts do not contain prisons. (Jenkins affidavit ¶ 10; Sieloff affidavit ¶ 13.)

In sum, if plaintiffs' lawsuit is successful, the proposed individual and organizational intervenors will have diminished voting strength and diminished ability to influence the state and various county legislatures. They will have less ability to draw attention to the issues and problems that affect their daily lives and their communities, and they will have less ability to propose solutions to these problems and to ensure that these issues have fair hearing before the various legislatures. Those individual intervenors who are residents of counties that voluntarily removed incarcerated individuals from their population base for redistricting purposes prior to part XX will lose the equal representation that their elected representatives established when their county had the ability and independence to remove those in the local state prison from their population for redistricting purposes.

Argument

I. This Court Should Grant Intervention as of Right

New York courts have recognized that intervention should be liberally allowed under Civil Practice Laws and Rules. (*See Teleprompter Manhattan CATV Corp. v State Board of Equalization & Assessment*, 34 AD2d 1033 [3d Dept 1970]; *see also*, 3-1012 Weinstein, Korn and Miller, CPLR Manual § 1012.05.) Here, proposed intervenors are entitled to intervention as of right if they demonstrate: (1) the motion is timely, (2) the

representation of the applicants' interest by the parties is or may be inadequate, and (3) the applicant is or may be bound by the judgment. (CPLR 1012 (a) (2).) Proposed intervenors meet all of these requirements.

A. Proposed Intervenors Acted in a Timely Manner.

First, New York courts have stressed the importance of timely motions to intervene and have reinforced the wide discretion of trial courts to make that determination. (*See Matter of Romeo v New York State Dept. of Educ.*, 39 AD3d 916, 917 [3d Dept 2007] ("Intervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal.").) In evaluating the timeliness of a motion to intervene, courts consider "whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." (*Yuppie Puppy Pet Prods. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010].)

Here, proposed intervenors' are filing their motion to intervene a mere two business days after the defendant DOCS's answer was filed. Proposed intervenors are not requesting any changes to the filing deadlines or other litigation deadlines at this time. Accordingly, this motion will cause neither prejudice to the existing parties nor any delay in these proceedings. As there is no question that this motion is timely (*see e.g. Jeffer v Jeffer*, 28 Misc 3d 1238A [Sup Ct, Kings County 2010] (intervention allowed when motion to intervene filed over a year after Amended Complaint was filed)), proposed intervenors satisfy this minimal requirement for intervention as of right.

B. Defendants Will Not Adequately Represent the Interests of Proposed Intervenors.

Second, proposed intervenors' interests are distinct from and entirely unrelated to those of the named defendants. Proposed intervenors' interest is to defend their voting

rights protected by part XX. Defendants, however, have no such interest. They are more akin to stakeholders in an interpleader action whose interests are satisfied whichever way the case is decided. Regardless of how vigorous defendants' defense may be of their own interests, proposed intervenors' interests will not be adequately represented in that defense. Proposed intervenors thus satisfy the second requirement for intervention as of right.

Rule 1012 (a) (2) imposes no limits on the kinds of interests that a proposed intervenor may assert in support of a motion to intervene. Appropriately, New York courts interpret rule 1012 (a) to liberally allow intervention to protect an interest that is "bona fide" and related to an issue in the case. (*Yuppie Puppy*, 77 AD3d at 201 ("Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action.").)

Interests related to an ability to participate effectively in the political process, like those of proposed intervenors, are the kinds of interests New York courts have consistently allowed intervenors to protect. (*See e.g. Lenihan v Blackwell*, 209 AD2d 1048, 1049 [4th Dept 1994] (reversing denial of legislators' motion to intervene to challenge wording of ballot proposition and abstract); *McCall v Hynes*, 196 AD2d 618, 618-619 [2d Dept 1993] (reversing denial of motion to intervene in a matter involving the petition designating a candidate for public office); *Oleska v D'Apice*, 123 AD2d 302 [2d Dept 1986] (granting intervention of a party in an action allowing write-in votes for the Liberal Party); *Ramos v Alpert*, 41 AD2d 1012 [3d Dept 1973] (allowing county Republican Party chairman to intervene on behalf of party candidates in an action seeking to compel county election board to accept petitions for candidates); *Orans v Rockefeller*,

47 Misc 2d 493, 497 [Sup Ct, New York County 1965] (granting intervention by State Senate President Pro Tempore in a redistricting matter).)

To demonstrate inadequate representation under CPLR 1012, intervenors need only show that the representation "may" be inadequate. "Inadequacy of representation is generally assumed when the intervenor's interest is divergent from that of the parties to the suit." (*State ex rel. Field v. Cronshaw*, 139 Misc 2d 470, 472 [Sup Ct, Nassau County 1988]; *see also* Weinstein, Korn and Miller, New York Civil Practice § 1012.03.)

New York courts have not demanded a high degree of interest divergence in allowing intervention. Indeed, New York courts have found inadequate representation of interests where the divergence between the interests of an existing party and a would-be intervenor would appear to be minimal. For example, courts have granted intervention on the basis of the divergence of interests between an exclusive collective bargaining representative and persons who were formerly members of that bargaining unit and represented by that representative (*see Civil Service Bar Assoc., etc. v New York*, 64 AD2d 594, 595 [1st Dept 1978]); between a defendant town and the town's zoning board of appeals (*see Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 979-80 [3d Dept 2010]; and between a court-substituted counsel in a conservatorship proceeding and the proposed conservatee's former counsel in that proceedings who remained the trustee of the trust executed by proposed conservatee (*see In re Waxman*, 96 AD2d 908, 908 [2d Dept 1983]).[4] But here, the differences are stark.

[4] Under the federal rules governing intervention, on which the New York standards are "patterned" (*see Vantage Petroleum v Board of Assessment Review*, 91 AD2d 1037, 1040 [2d Dept 1983]), a private party's burden in demonstrating that the government may not adequately represent its interests is "treated as minimal" (*Trbovich v United Mine Workers of America*, 404 U.S. 528, 538 note 10 [1972]). Federal courts routinely find that, in litigation challenging a law, a private party that benefits from the challenged law should be permitted to intervene because that party's interests may not be adequately represented by the

In this case, proposed intervenors' interests are not minimally divergent from defendants' interests, but instead are widely divergent. Part XX is not central to defendants' institutional function or purpose, and its invalidation will not affect their role, mission or standing within the government. DOCS' interest in this case is implementing the technical requirements of the law by providing the requisite data to LATFOR. Similarly, LATFOR's interest is following the statutory mandate to use that data to reallocate people in prison to their home communities when drafting new districts in the state. LATFOR's and DOCS's only interest in this matter is administrative — the technical implementation of their statutorily imposed duties under part XX.

In contrast, proposed intervenors all have a personal stake in defending the constitutionality of part XX. The invalidation of Part XX would vitally affect the representational weight of the votes of intervenors in the affected districts and the allocation of political power geographically within the state, as well as the continued ability of localities to make the determination that representational interests of local residents, including intervenors, are best served by removing the prison population when redistricting. (Bailey affidavit ¶¶ 17-19; Brink affidavit ¶ 16; Edmond affidavit ¶ 16; Faulkner affidavit ¶ 15; Mangual affidavit ¶ 16; Mulraine affidavit ¶ 14; Parker affidavit ¶ 13; Payne affidavit ¶ 14; Pryor affidavit ¶¶ 18-22; and Ballan affidavit ¶ 12; Cobb

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State, which is tasked with representing the public generally. (*See e.g. N.Y. Pub. Interest Research Group, Inc. v Regents of the Univ. of the State of N.Y.*, 516 F2d 350, 352 [2d Cir 1975] (holding that pharmacists who benefitted from a statewide regulation were allowed to intervene in challenge by a consumer group to enjoin the regulation, because "there is a likelihood that" intervenors would "make a more vigorous presentation" of certain arguments than would the State); *Herdman v Town of Angelica*, 163 FRD 180, 189-91 [WD NY 1995] (environmental group permitted to intervene to defend town's ordinance where intervenors would raise arguments not presented by town); Wright, Miller and Kane, Federal Practice and Procedure: Civil § 1908.1 (3d ed rev 2010) ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.").)

affidavit ¶ 15; Kessler affidavit ¶¶ 11-12; Stevens affidavit ¶ 10; Jenkins affidavit ¶ 11; Sieloff affidavit ¶¶ 14-15; Dukes affidavit ¶¶ 26-28; Barry affidavit ¶¶ 32-33; Lerner affidavit ¶¶ 13-14.) The intervenors' voting rights are thus directly at stake in this lawsuit. By contrast, the named defendants have no such interest in protecting proposed intervenors' voting rights established by part XX. They have no institutional, political, personal, financial or other interest in whether part XX remains the law of the state. Their role is merely to share and apply prison data in whatever way state law requires.

Indeed, defendant LATFOR has affirmatively represented that it does not intend to file a responsive pleading or otherwise responded to the complaint, conclusively demonstrating that its representation of proposed intervenors' interests has been inadequate to date. (LATFOR May 11 ltr.) Far from asserting an interest in defending the voting rights protected by Part XX, LATFOR has indicated to this court that its primary interest is in the prompt resolution of the case. (*Id.*) Concern over LATFOR's adequacy of representation is heightened given that one of the Co-Chairman of LATFOR, a signer of the letter to the court, has publicly stated that he was exploring ways to prevent the implementation of Part XX: "I raised doubts then, as I do now, that [Part XX] is unconstitutional....We're reviewing a number of options, and we're analyzing what would be the most appropriate course to block this provision." (Vielkind, *Line Drawn on Prison Head Count Debate*, Albany Times Union, Jan. 31, 2011, section A, at 1.) Meanwhile, defendant DOCS has asserted that it cannot grant the relief plaintiffs seek because it has already fulfilled its data sharing responsibilities under Part XX (Def's Answer ¶ 23), which if successful, would result in its dismissal from the case. Moreover,

DOCS has not argued that the prior method of allocating prisoners to the prison district when redistricting violates principles of equal protection. (*Id.*)

Proposed intervenors, however, intend to defend vigorously Part XX and their voting rights protected under it. Proposed intervenors specifically intend to argue that the method of allocating incarcerated individuals mandated by part XX is in fact more consistent with, and indeed required by, both federal and state constitutional requirements. (*See e.g.* Dukes affidavit ¶ 29; Int.'s Answer Aff. Def. 3.) In other words, proposed intervenors intend to argue that a decision declaring part XX invalid under the State Constitution — and a requirement that the State allocate incarcerated individuals at their places of confinement for redistricting purposes — would dilute minority voting rights and abridge all intervenors' rights under the federal and state constitutions.

Proposed intervenors also intend to argue that voters residing in New York counties that voluntarily removed the prison population for purposes of local redistricting prior to part XX would have their votes diluted for the purposes of county elections if these counties are forced to include the prison population in redistricting. (*See e.g.* Sieloff affidavit ¶ 13; Jenkins affidavit ¶ 9.)

Given the differences between the respective views of defendants and proposed intervenors, and between the arguments that they intend to raise, defendants' representation of the interests of the proposed intervenors will clearly be inadequate.

In any event, proposed intervenors must only show that their interests *may* be inadequately represented. As proposed intervenors have amply demonstrated that their interests are substantially different from those of named defendants, this motion should be granted to allow proposed intervenors to protect their interests.

C. Proposed Intervenors Will Be Bound by the Judgment.

Finally, the judgment sought in this action — an injunction restraining enforcement of the statute and a declaration that the statute is unconstitutional — would determine proposed intervenors' voting rights. It would, in every meaningful and practical sense, bind proposed intervenors. Thus, intervention is the sole practical means by which they can defend their voting rights as established by part XX. Accordingly, proposed intervenors satisfy the third requirement for intervention as of right.

The requirement that an intervenor be "bound by the judgment," as set forth in the text of rule 1012 (a) , has been interpreted by many courts to require only that a proposed intervenor establish that it has a "real and substantial interest in the outcome of the proceedings." (*See e.g. Yuppie Puppy*, 77 AD3d at 201 (permitting intervention because proposed intervenors had a "real, substantial interest" in the outcome of the litigation)); *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 843 [2d Dept 2009]; *Dalton v Pataki*, 5 NY3d 243, 277-78 [Ct App 2005] (agreeing that proposed intervenor had a substantial interest in the matter); *Sieger v Sieger*, 297 AD2d 33, 36 [2d Dept 2002] (affirming a denial of intervention because the proposed intervenor did not establish a "real and substantial interest"); *County of Westchester v Department of Health*, 229 AD2d 460, 461 [2d Dept 1996] (finding that intervenors had a "real and substantial interest in the outcome of the proceedings"); *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825 [2d Dept 1988] (concluding that proposed intervenors did not submit evidence of a "real and substantial interest").)

As discussed above, proposed intervenors have plainly established their "real and substantial interest" in this case. Indeed, their interests are directly at stake and are the very interests the statute is designed to protect.

Some courts have interpreted "bound by the judgment" to require a showing that the judgment would be *res judicata* as to intervenors (*see e.g. Vantage Petroleum v Board of Assessment Review*, 61 NY2d 695, 698 [Ct App 1984]), even going so far as to consider the doctrine of privity (*see e.g. Kaczmarek v Shoffstall*, 119 AD2d 1001, 1002 [4th Dept 1986]).[5] That standard is inappropriate to a case of this kind involving the constitutionality of a statute, where a judgment would determine the validity of the legislative protections afforded the beneficiaries of the statute, like the proposed intervenors here.

Final resolution of the constitutional issue here, will as a matter of *stare decisis*, be as binding on proposed intervenors as a practical matter as if the judgment were *res judicata* and depending on the grounds for the relief, may well preclude a legislative resolution to the policy problem created when prison populations are used to artificially inflate the power of certain voters or prohibit localities from removing prison populations when redistricting even if they believe it is in their best interest to do so.

The "real and substantial interest" interpretation is more appropriate in cases such as this one, where the judgment would effectively nullify proposed intervenors' rights. Proposed intervenors have demonstrated that part XX protects important representational interests of proposed intervenors, and its invalidation would injure proposed intervenors

[5] This premise appeared in *Yuppie Puppy* (77 AD3d at 197). However, while the First Department in that case relied on *Vantage Petroleum* for the premise that the potentially binding nature of the judgment is "the most heavily weighted factor" in determining whether to permit intervention (*id.* at 202), ultimately the court allowed intervention because it concluded that the proposed intervenor had a "substantial interest in the outcome of this litigation" (*id.* at 201).

in a myriad of ways. Accordingly, proposed intervenors prove that they are or "may be bound by the judgment" for the purposes of rule 1012 (a) (2).

Because proposed intervenors have established all of the requirements for intervention by right pursuant to CPLR 1012 (a) (2), this Court should grant their motion to intervene.

II. The Court Should Also Grant Permissive Intervention

In the alternative to granting intervention of right, this Court should exercise its discretion to grant permissive intervention under CPLR 1013 because the proposed intervenors' representational interests are directly at stake and the named defendants not only do not have the same kinds of interests at issue, but have affirmatively indicated that they cannot be relied upon to protect those interests. The rule for permissive intervention provides:

> "Upon timely motion, any person may be permitted to intervene in any action when . . . the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

(CPLR 1013.)

As with rule 1012, courts should liberally construe CPLR 1013 to grant intervention. (*Bay State Heating & Air Conditioning Co. v American Ins. Co.*, 78 AD2d 147, 149 [4th Dept 1980].)

Courts have granted permissive intervention when the proposed intervenor can show that it would experience adverse effects as a result of the case, even where the injury is not pecuniary or financial in nature. (*See Town of Southold v Cross Sound Ferry Servs.*, 256 AD2d 403, 404 [2d Dept 1998] (granting an organization's motion to

intervene because an increase in noise, traffic, and air emissions experienced by its members established a real and substantial interest in the outcome of the action).) In fact, organizations with a mission closely linked to the policy objectives of a particular law, like organizational intervenors here, have been found to have a sufficient interest in the outcome of an action, justifying permissive intervention. (*See Prometheus Realty v City of New York*, 2009 NY Slip Op 30273[U], *4-5 [Sup Ct, New York County 2009] (granting permission to intervene in a challenge to an anti-harassment law to both a tenant council whose members were harassed by landlords and a neighborhood association with an interest in defending tenants against landlord harassment).)

Patterson Materials Corp. v Town of Pawling (221 AD2d 609, 610 [2d Dept 1995]) is also illustrative. In that case, two homeowner associations and an individual resident moved to intervene as defendants in an action challenging the validity of local laws that plaintiff alleged restricted its mining operations. The proposed intervenors never claimed to represent or be homeowners on the land where plaintiff was conducting its activities, but instead claimed to be adjacent to or in close proximity to where the plaintiff's operations might occur. The noise, dust, and traffic that would result if mining were permitted in the land close to proposed intervenors conferred a "real and substantial interest" in the outcome of the action justifying permissive intervention. (*Id.*)[6]

Similar to the proposed intervenors in all of these cases, the proposed intervenors in this case have a legally cognizable interest in preventing the representational distortion that would occur if the weight of each eligible voter in nearby legislative districts was

[6] *Patterson* also demonstrates that rule 1013 is not limited to intervenors that already have related lawsuits. (*See* 221 AD2d at 609; *see also McDermott v McDermott*, 119 AD2d 370, 374 [2d Dept 1986] [husband's pension fund granted permissive intervention in divorce proceeding between wife and husband].)

improperly inflated by including ineligible people in prison with few ties to that district, as is sought by plaintiffs' action.

Furthermore, it is indisputable that those proposed intervenors who reside in the home communities of large numbers of incarcerated persons, or who represent members who reside in the home communities, have a substantial interest in the elimination of the practice of allocating incarcerated populations to the prison district instead of to the home communities to which incarcerated persons almost invariably return upon release. (*Cf. Plantech Housing, Inc. v Conlan*, 74 AD2d 920, 921 [2d Dept 1980] (holding that movant is affected by the judgments in a tax certiorari proceedings in a real and substantial way because demands have been made upon it for a refund of taxes).)

Moreover, intervention by proposed intervenors will not cause delay in the proceedings nor prejudice to any party, as demonstrated above.

Conclusion

As all the affidavits attached to this memorandum of law demonstrate, proposed intervenors have important interests in the outcome of this lawsuit that will not be adequately represented by the existing parties, but will nonetheless be intimately affected by any decision this Court issues. Their unique and varied perspectives will be valuable to the Court in assessing the important and weighty democratic issues raised by this case, and intervention should be granted. Accordingly, proposed intervenors respectfully request that this Court permit their intervention pursuant to rule 1012 (a) (2), or in the alternative, rule 1013.

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Respectfully submitted,

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