STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE, SENATOR PATRICK GALLIVAN; SENATOR PATRICIA RITCHIE; SENATOR JAMES SEWARD; SENATOR GEORGE MAZIARZ; SENATOR CATHARINE YOUNG; SENATOR JOSEPH GRIFFO; SENATOR STEPHEN M. SALAND; SENATOR THOMAS O'MARA; JAMES PATTERSON; JOHN MILLS; WILLIAM NELSON; ROBERT FERRIS; WAYNE SPEENBURGH; DAVID CALLARD; WAYNE MCMASTER; BRIAN SCALA; and PETER TORTORICI,

Plaintiffs,

-against-

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

Defendants,

-and-

NAACP NEW YORK STATE CONFERENCE; VOICE 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; CHRISTOPHER PARKER; PAMELA PAYNE; DIVINE PRYOR; TABITHA SIELOFF; and GRETCHEN STEVENS,

Proposed-Intervenor-Defendants.

DECISION/ORDER
Index No. 2310-2011

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

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DEVINE, J.:

In this action for declaratory and injunctive relief, proposed intervenor-defendants (proposed intervenors) move pursuant to CPLR 1012 (a) (2) for leave to intervene in this action

as of right or, in the alternative, pursuant to CPLR 1013 for permissive intervention. Plaintiffs oppose the motion. Defendant New York State Department of Corrections and Community Supervision (DOCCS)[1] appears by letter to note their lack of opposition to this application. Defendant New York State Legislative Task Force on Democratic Research and Reapportionment (LATFOR) indicates in a letter to the Court that it will not appear in this action, noting that counsel appearing for defendant can adequately address the merits of the case.[2]

On April 4, 2011, plaintiffs commenced this action, seeking, among other things, a declaration that Part XX of Chapter 57 of the Laws of 2010 (Part XX) is unconstitutional under the State Constitution. As relevant here, Part XX provides that, upon receiving certain data from DOCCS regarding the pre-incarceration residential addresses of inmates,[3] LATFOR

> 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 address of such correctional facility. . . . the assembly and senate districts shall be drawn using such amended population data set.[4]

Plaintiffs in this action are State Senators representing Districts in which correctional facilities are located and resident/voters of Senate Districts affected by Part XX.

Specifically, plaintiffs allege, *inter alia*, that Part XX "illegally diminishes the number of inhabitants required to be counted by the Constitution by declaring certain inhabitants of state

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[1] This defendant is sued here as the New York State Department of Corrections.

[2] *See* Letter of Senator Michael F. Nozzolio and Assemblyman John J. McEneny to the Court dated May 11, 2011.

[3] Now codified as Correction Law § 71 (8).

[4] Now codified as Legislative Law § 83-m (13).

prisons, who have long been counted, not to be counted."[5] The Verified Complaint alleges that the current Federal census "treats all incarcerated persons as inhabitants of their places of incarceration,"[6] and that the State Constitution requires that the Federal 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.'"[7] Accordingly, plaintiffs allege the State Constitution has been violated by the passage of Part XX, seeking, *inter alia*, a declaration to that effect and that LATFOR be enjoined 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."[8]

Against this backdrop, proposed intervenors seek to intervene either as of right or, alternatively, by permission in this action. The proposed intervenors consist of the following organizations: NAACP New York State Conference, Voices of Community Activists, and Leaders, and Common Cause of New York (collectively, organizational intervenors). The organizational intervenors assert that they are interested in voting rights, and at least two of them have strong interests in voting rights in minority communities. In addition, the following individuals seek to intervene: Michael Bailey, Robert Ballan, Judith Brink, Tedra Cob, Frederick A. Edmond III, Melvin Faulkner, Daniel Jenkins, Robert Kessler, Steven Mangual, Edward

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[5] Verified Complaint at ¶ 7, Lewis Affirmation, Exhibit A.

[6] *Id.* at ¶ 37.

[7] *Id.* at ¶ 42, quoting NY Const art III, sec 4.

[8] *Id.* at Wherefore Clause.

Mulraine, Christine Parker, Pamela Payne, Divine Pryor, Tabitha Sieloff, and Gretchen Stevens (collectively, individual intervenors). All of the individual intervenors, who live in different communities across the state, aver that they are voters and have a personal interest in the outcome of this litigation. Uniformly, they aver that, should Part XX be invalidated, their individual voting rights would be diluted. They assert that such dilution would be in contravention of the one person, one vote rule, which they assert Part XX upholds.

Upon a timely motion, "[a] nonparty may intervene as of right 'when the representation of the person's interest by the parties is *or may be* inadequate and the person is or may be bound by the judgment.'"[9] First, the Court notes that the proposed intervenors' application is timely. They moved just shortly after DOCCS interposed its answer and prior to any discovery in this matter.[10]

Next, the Court must consider whether the proposed intervenors' interest is adequately represented by DOCCS – the only appearing defendant in this matter. As the proposed intervenors aptly note, DOCCS "is responsible for the confinement and rehabilitation of approximately 57,000 offenders held at 67 state facilities; its mission is not to ensure the protection of minority voting or to help create a more equitable districting system."[11] Furthermore, since LATFOR has not appeared, it cannot represent the proposed intervenors' interests.

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[9] *Matter of Romeo v New York State Dept. of Educ.*, 39 AD3d 916, 917 (3d Dept 2007), quoting CPLR 1012 (a) (2) (emphasis in original); *see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 200 (1st Dept 2010).

[10] *See Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201.; *Matter of Romeo*, 39 AD3d at 917.

[11] Affidavit of Hazel Dukes at ¶ 28; *see* Affirmation of Peter Surdel, Esq., Exhibits 2-18 (containing affidavits of representatives of organizational intervenors and individual intervenors noting that their interests are different than those of DOCCS).

In opposition, plaintiffs argue that Attorney General is in the best position to defend the constitutionality and legality of Part XX. Plaintiffs contend, "[a]s the chief legal officer of the state it is his constitutional and statutory duty to defend the constitutionality of statutes."[12] While this proposition may be generally true, here the Attorney General is appearing to represent DOCCS, which does not have a genuine stake in whether any one person's voting interest is upheld or not. Thus, based on a review of the record, the proposed intervenors have demonstrated that their interests may not be truly represented by DOCCS.

The final issue with regard to intervention as a right is whether the proposed intervenors will be bound by any judgment stemming from this action. Plaintiffs argue that the proposed intervenors would not be so affected since any continuing claim of voter dilution could still be litigated in an action involving reapportionment after LATFOR draws the actual new district lines. While plaintiffs correctly contend that this right would still exist, this argument does not squarely address one of the central issues in this action – the constitutionality of Part XX.

In asserting that they would be bound by any judgment, proposed intervenors suggest that this statutory phrase has been interpreted to require only a showing that they have a real and substantial interest in the outcome of the proceedings. This interpretation is at odds with settled case law. As to whether the proposed intervenors will be bound by the judgment within the meaning of CPLR 1012 (a) (2), the Court of Appeals has explained that this "is determined by its *res judicata* effect."[13] Thus, here, the issue is whether any resultant judgment declaring Part XX

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[12] Affidavit of David L. Lewis, Esq., at ¶12.

[13] *Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of the Town of Babylon*, 61 NY2d 695, 698 (1984); *see Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 979 (3d Dept 2010).

invalid would have a binding effect on the proposed intervenors.

Generally, "[t]he interpretation of a statute presents a pure question of law."[14] Furthermore, where such a question is presented, neither principles of collateral estoppel nor res judicata will bar relitigation of that issue.[15] Thus, here, where the interpretation of a statute is at issue, res judicata will not come into play. Proposed intervenors contend that, while res judicata may not bar future litigation on this issue, they will be effectively barred by the doctrine of *stare decisis*. While this could occur, proposed intervenors would be in no different position than any other citizen when Courts determine questions of law in this State. Simply stated, proposed intervenors have not shown the type of privity needed to, as a matter of right, be allowed to intervene as parties in this matter.[16]

However, the individual intervenors have demonstrated their entitlement to permissive intervention. "CPLR 1013 provides that upon timely motion, a court may, in its discretion, permit intervention when, *inter alia*, the person's claim or defense and the main action have a common question of law or fact, provided the intervention does not unduly delay determination

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[14] *Matter of Held v New York State Workers' Comp. Bd.*, 58 AD3d 971, 973 (3d Dept 2009).

[15] *See American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 (1997); *Matter of Held*, 58 AD3d at 973; *Brown v State*, 9 AD3d 23, 27n2 (3d Dept 2004).

[16] *See Matter of Unitarian Universalist Church of Central Nassau v Shorten*, 64 Misc 2d 851, 854 (Sup Ct, Nassau County, 1970), *vacated on other grounds* 64 Misc 2d 1027 (noting: "The *stare decisis* effect of the judgement is not enough."); s*ee generally* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1012:3 (noting: "It is not enough, in order words, that the practical effect of the judgment may prejudice the proposed intervenor").

of the action or prejudice the rights of any party."[17] Generally, "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in the action."[18]

Here, the individual intervenors have shown that there is a common question of law – namely the validity of Part XX. While plaintiffs strongly urge the Court to deny intervention, arguing, in part, that these voters do not have a bona fide interest in this suit, the Court rejects this position. Several plaintiffs appearing in this action are similarly situated to the individual intervenors – both groups are voters that may be affected by inmate residential status under Part XX. Furthermore, nothing in the record or arguments demonstrate that intervention by these individuals will unduly delay any determination,[19] especially where the essential question is one of pure law. Thus, the Court exercises its discretion to grant the individual intervenors permission to intervene in this action,[20] noting that they have presented a proposed answer to the Court.[21]

As to the organizational intervenors, the Court denies that branch of their motion of permissive intervention. These intervenors have not demonstrated they have a real and

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[17] *Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 200-201; *see* CPLR 1013.

[18] *Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201; *see Berkoski v Board of Trustees of Inc. Vill. of Southampton*, 67 AD3d 840, 843 (2d Dept 2009).

[19] The Court notes that while several attorneys have appeared for proposed intervenors, they have submitted joint papers. Nothing to date that is before the Court indicates that by allowing intervention the process of resolving this action will be unduly delayed.

[20] *Berkoski*, 67 AD3d at 843-844.

[21] *See* CPLR 1014; *cf Farfan v Rivera*, 33 AD3d 755, 755 (2d Dept 2006).

substantial interest in the outcome of this proceeding.[22] While representatives to these organizations have averred that these organizations have interest in voting rights and two of them are especially concerned with minority voting rights, the outcome of this action will have no direct impact on the ability of these organizations to advocate on behalf of voters and minority voters.[23] Accordingly, the Court exercises its discretion to deny the organizational intervenors permission to intervene in this action.

Therefore, it is

ORDERED that the branch of the Proposed Intervenor-Defendants' motion pursuant to CPLR 1012 (a) (2) is denied in its entirety; and it is further

ORDERED that the branch of the Proposed Intervenor-Defendants' motion pursuant to CPLR 1013 is granted to the extent that the individual intervenors are granted permission to intervene and denied to the extend that the organizational intervenors are denied permission to intervene; and it is further

ORDERED that the individual intervenors are to serve an Amended Answer on all parties within 20 days of this Court's decision and order.

The remaining contentions not addressed herein have been found to be unpersuasive

This Memorandum shall constitute both the Decision and Order of the Court. This Original **DECISION/ORDER** is being sent to counsel for Proposed Intervenor-Defendants. The signing of this **DECISION/ORDER** shall not constitute entry or filing under CPLR 2220.

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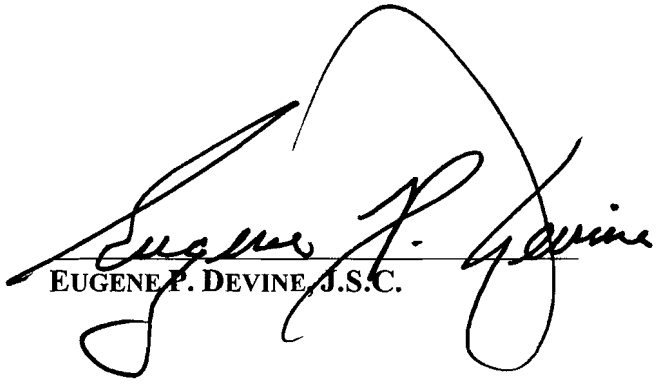
[22] *Berkoski*, 67 AD3d at 844; *cf Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 (2d Dept 2007).

[23] *Berkoski*, 67 AD3d at 844

Counsel for the defendant is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

SO ORDERED
ENTER

Date: 8/4/11
Albany, New York



EUGENE P. DEVINE, J.S.C.

cc: David L. Lewis, Esq.
Stephen M. Kerwin, Esq.

Papers Considered:

1. Notice of Motion to Intervene dated May 17, 2011;
2. Affirmation of Peter Surdel, Esq., affirmed May 16, 2011, with Exhibits 1-9 annexed;
3. Proposed Answer verified May 16, 2011;
4. Memorandum in Support of Motion to Intervene dated May 17, 2011;
5. Affirmation of David L. Lewis, Esq., affirmed June 1, 2011, with Exhibits A-C annexed;
6. Memorandum of Law in Opposition to the Motion to Intervene dated June 1, 2011;
7. Copy of Letter of Sen. Michael F. Nozzolio and Assemblyman John J. McEneny dated May 11, 2011;
8. Copy of Letter of Stephen M. Kerwin, Esq., dated May 26, 2011.