

SUPREME COURT OF THE STATE
COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE,
PATRICK GALLIVAN, SENATOR RICHARD
RITCHIE, SENATOR JAMES SEWARD,
GEORGE MAZIARZ, SENATOR CAROL
YOUNG, SENATOR JOSEPH GRIFFIN,
STEPHEN M. SALAND, SENATOR
O'MARA, JAMES PATTERSON, JOHN
WILLIAM NELSON, ROBERT FERRELL,
SPEENBURGH, DAVID CALLARD,
McMASTER, BRIAN SCALA and PETER

-against-

NEW YORK STATE LEGISLATIVE
COMMISSION ON DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT and NEW YORK
DEPARTMENT OF CORRECTIONS

-and-

MICHAEL BAILEY, ROBERT BALDWIN,
JUDITH BRINK, TEDRA COBB,
FREDERICK A. EDMOND III,
MELVIN FAULKNER, DANIEL JENKINS,
ROBERT KESSLER, STEVEN MANNING,
EDWARD MULRAINE, CHRISTOPHER
PAMELA PAYNE, DIVINE PRYOR,
TABITHA SIELOFF, and GRETCHEN

PLEASE TAKE NOTICE that

Dylan, member of the State Senate, sworn

Leonard Kohen, Esq., dated August 17, 2017

annexed *proposed* memorandum of law

papers and proceedings had herein, Senator Dilan will move this Court, before the Hon. Eugene P. Devine, Justice of the Supreme Court, County of Albany, at the courthouse located at 16 Eagle Street, Albany, New York on the 13rd of September, 2011 at 9:30 AM or as soon thereafter as counsel may be heard, for an Order granting Senator Dilan leave to enter into this proceeding the proposed memorandum of law as *amicus curiae*, and consequently, denying the summary judgment motion of the Plaintiffs and for such other and further relief that the Court deems just and proper.

Dated: August 17, 2011
New York, New York



Leonard Kohen, Esq.
Counsel for the Hon. Senator
Amicus Curiae
67 e 11th Street #703, New York
212.254.8371
leonard.kohen@gmail.com

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

Steven G. Leventhal, Esq.
Leventhal, Sliney & Mullaney LLP
Co-Counsel for Citizen Plaintiffs
15 Remsen Avenue
Roslyn, NY 11576

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

Hon. Eric T. Schniederma
Attorney-General of the State of New York
Attorney for Defendant
New York State Department of Corrections
and Community Supervision
The Capitol
Albany, NY 12224-0341

Individual Intervenors (via c/o Myrna Perez, Esq. and Dale Ho, Esq.):

Michael Bailey
1121 Atlantic Avenue
Brooklyn, NY 11216-2702

Robert Ballan
207 Lakeshore Drive
Norwood, NY 13668

Judith Brink
604 Warren Street
Albany, NY 12208

Tedra Cobb
365 Townline Road
Herman, NY 13652

Frederick A. Edmond III
194-14 Murdock Avenue
St. Albans, NY 11412

Melvin Faulkner
935 Schenck Avenue
Brooklyn, NY 11207

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Tupper Lake, NY 12986

Robert Kessler
63 White Hill Road
Hillsdale, NY 112529

Steven Mangual
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Bronx, NY 10458-6214

Edward Mulraine
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Mount Vernon, NY 10550

Christine Parker
1308 Eastern Parkway
Brooklyn, NY 11233

Pamela Payne
901 Washington Avenue
Brooklyn, NY 11225

Divine Pryor
246-14 135th Road
Rosedale, NY

Tabitha Sieloff
13 Jackman Drive, Apt. A
Poughkeepsie, NY 12603

Gretchen Stevens
563 County Route 21
Hillsdale, NY 12529

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Index No. 2310-11

-----X
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,

**AFFIRMATION OF
LEONARD KOHEN, ESQ.**

Judge Assigned:
Hon. Eugene Devine

Plaintiffs,

-against-

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

Defendants.

-and-

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,

Intervenor-Defendants.

-----X
LEONARD KOHEN, an attorney duly licensed to practice law in the State of New York,

affirms under the penalty of perjury that:

1. I am counsel to Hon. Senator Martin Malave Dilan (“Movant”), who moves for leave of this Court to file a Memorandum of Law as *Amicus Curiae*.

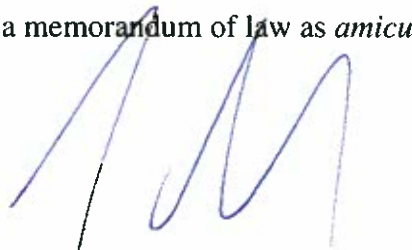
2. As the Movant sets forth in his accompanying affidavit, the pending summary judgment by Plaintiffs is the appropriate opportunity for him to be heard as an *amicus curiae* because, as a member of the Defendant, Legislative Task Force on Demographic Research (LATFOR), which is not appearing by its own counsel in this action, the Movant's point of view is one that is not presently fully represented to this Court. Redistricting is additionally a matter of important public interest. Moreover, his filing the proposed memorandum of law as *amicus curiae* will not cause any delay or otherwise prejudice the litigation.

3. Attached here as Exhibit A is the Proposed Memorandum of Law that Movant will submit should this Court grant his request to file as *amicus curiae*.

4. Also accompanying this Affirmation is a Memorandum of Law in Support of Senator Dilan's Motion to file as *amicus curiae*.

5. For the reasons set forth above, and in these accompanying motion papers, this Court should grant Senator Dilan's motion to file a memorandum of law as *amicus curiae*.

Dated: New York, NY
August 17, 2011



LEONARD KOHEN, ESQ.

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X Index No. 2310-11

SENATOR ELIZABETH O’C. LITTLE, SENATOR
PATRICK GALLIVAN, SENATOR PATRICIA
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Plaintiffs,

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

Defendants.

-and-

MICHAEL BAILEY, ROBERT BALLAN et al.,

Intervenor-Defendants.

-----X

**[PROPOSED] MEMORANDUM OF LAW
BY THE HON. SENATOR MARTIN MALAVE DILAN, *AMICUS CURIAE***

Leonard Kohen, Esq.
Counsel for the Hon. Senator Martin Malave Dilan, *Amicus Curiae*
67 e 11th Street #703, New York, NY 10003
212.254.8371

Jeffrey M. Wice, Esq.¹
Co-Counsel for the Hon. Senator Martin Malave Dilan, *Amicus Curiae*
250 Broadway #1930
New York, NY 10007
(212)298-5566

On the Brief: Paul C. Evans, Esq.

¹ Member, District of Columbia Bar; not admitted in New York

PRELIMINARY STATEMENT

New York State Senator Martin Malave Dilan submits this *amicus curiae* filing in support of the constitutionality² of a new law, Part XX of Chapter 57 of the Laws of New York of 2010 (“Part XX”), enacted in August 2010. Senator Dilan is the sole Member of the Defendant, the Legislative Advisory Task Force on Demographic Research and Reapportionment (LATFOR), to appear in this action and take a position with respect to Part XX.

Nine New York State Senators and other plaintiffs challenge Part XX in this litigation on purported State Constitutional grounds, notwithstanding that Part XX was enacted for the purpose of *bringing* New York into compliance with its State Constitution.

Part XX requires that the state and county governments draw legislative districts on the basis of corrected Census Bureau data to count incarcerated people at their home addresses, rather than where they are incarcerated. Part XX brings New York into compliance with its State Constitution, which states that “[f]or 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.” Article II, § 4.

Senator Dilan asks this Court to uphold the law as constitutional and consequently deny Plaintiffs’ summary judgment motion.

STATEMENT OF FACTS

Senator Dilan has requested leave of Court to file this *amicus curiae* brief, as a Member of the Defendant LATFOR, where he represents the Senate Minority Conference. While LATFOR has chosen not to make its own appearance in this litigation to defend Part XX,

² This memorandum of law is confined to discussing the constitutionality of Part XX based upon the long-standing principle in New York, in its Constitution (art.2, section 4) and case law, that was a focus in the Legislature, namely, that a place of incarceration is not a residence.

Senator Dilan submits this *amicus curiae* brief because LATFOR is the specific entity that is tasked with devising the redistricting plans to comply with “one person, one vote” population equality standard, the New York State Constitution, and the federal Voting Right Act protection of minority communities’ representation in government. By contrast, the only other defendant in this action, the New York State Department of Corrections and Community Service, does not have the same responsibility as LATFOR with respect to implementing the law.

The nine New York State Senator plaintiffs have much at stake based upon how prisoners are apportioned. As the Complaint specifically describes, all nine of the New York State Senators who filed this lawsuit represent districts with prisons whose inhabitants are counted for apportionment purposes as within their districts. Complaint, ¶¶ 12-20. It is for this reason alone, namely to retain their district population bases, that they have filed this action, and as further set out here, the constitutional grounds that they cite in support of their arguments are meritless.

ARGUMENT

Part XX of Chapter 57 of the Laws of 2010 is Constitutional under the New York State Constitution

The New York State Constitution requires that legislative districts be apportioned based on the residence of an incarcerated person prior to their incarceration. Part XX of Chapter 57 of the Laws of 2010 (“Part XX”) ensures that legislative districts will no longer be apportioned based instead on an incarcerated person’s place of confinement. It was the previous practice to count prisoners where they were confined that was unconstitutional. As discussed below, Plaintiffs’ argument that the State Constitution “requires” New York to use the federal census for apportionment purposes is incorrect.

Part XX reflects the long-established principle that a person does not involuntarily lose his domicile as a result of incarceration.

The domicile or home requisite for which the voter voluntarily chooses liberty to leave, as interest or can change it...[A prison] is not a place for that purpose. It is a place of confinement.

People v. Cady, 143 N.Y. 100 (1894); *Social Servs.*, 33 N.Y.2d 111, 115 (1972)

or lose a residence or domicile, but retain it.

Moore v. Wagner, 152 Misc.2d 478, 480 (1989)

law in New York that a person does not lose his domicile by being incarcerated.

Chris-Mac Co. v. Johnpoll, 130 Misc.2d 478, 480 (1989)

obviously has not chosen the prison as his home.

Street when he is paroled or released, and he has not

voluntarily changed his domicile. Nor does he lose his domicile by being incarcerated in a prison.”); 49 NY Jur 2d, Domicile and Residence (1978)

a place of confinement, and a person cannot lose his domicile by being incarcerated in a prison.

freedom of choice to come and go at one's own will.

determining residence and are not preserved by incarceration.

The notion that incarceration does not affect domicile is consistent with

the State Constitution, which states that a person does not lose his domicile by being incarcerated in a public prison.” Article II, § 4; *Green*, 100 Misc.2d 200, 207 (S.D.N.Y. 1983), *aff'd* 78 Misc.2d 100, 107 (S.D.N.Y. 1983).

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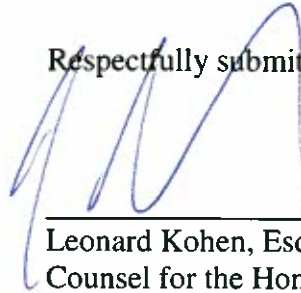
³ Many states also define legal residence as the place that one chooses to be. *See* Arizona State Constitution Article VII, § 3; Colorado State Constitution Article VII, § 4; Missouri State Constitution Article VIII, § 6; Nevada State Constitution Article II, § 2; Oregon State Constitution Article IV, § 4; Washington Constitution Article VI, § 4. Other states have this definition codified in statutes.

⁴ Since New York’s definition on prisoner “residence” differs from the federal census definition, the cases that Plaintiffs cite in their moving papers stand for a proposition that is irrelevant, namely, that the federal census can count incarcerated people as residents of the state in which they are incarcerated. *See District of Columbia v. U.S. Department of Commerce*, 789 F. Supp. 1179 (D.C. Cir. 1992) (upholding Census Bureau’s method of counting incarcerated people); *Borough of Bethel Park v. Stans*, 449 F.2d 575, 582 (3d Cir. 1971) (same). These cases have no bearing whatsoever on Part XX’s mandate where incarcerated people are determined to be residents within the state given that New York defines these concepts differently than the federal census, and that New York law governs with respect to where its inhabitants reside within the state.

CONCLUSION

For the foregoing reasons, this Court should uphold Part XX, and accordingly deny the Plaintiffs' summary judgment motion.

Respectfully submitted,



Leonard Kohen, Esq.
Counsel for the Hon. Senator Martin Malave
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212.254.8371
leonard.kohen@gmail.com

SUPREME COURT OF THE STATE OF NEW YORK
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McMASTER, BRIAN SCALA and PETER TORTORICI,

**AFFIDAVIT OF
HON. MARTIN MALAVE
DILAN**

Judge Assigned:
Hon. Eugene Devine

Plaintiffs,

-against-

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

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MICHAEL BAILEY, ROBERT BALLAN,
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EDWARD MULRAINE, CHRISTOPHER PARKER,
PAMELA PAYNE, DIVINE PRYOR,
TABITHA SIELOFF, and GRETCHEN STEVENS,

Intervenor-Defendants.

-----X
STATE OF NEW YORK: COUNTY OF KINGS ss:

MARTIN MALAVE DILAN, being duly sworn, deposes and says that:

1. I am a Member of the New York State Senate, in my fifth term of office
representing the 17th Senatorial District that comprises North Brooklyn.

2. I submit this affidavit in support of my motion for leave of court memorandum of law as *amicus curiae*. As further detailed in these motion papers, this Court to deny the Plaintiffs' pending motion for summary judgment and to Part XX of Chapter 57 of the Laws of 2010 ("Part XX") that is the subject of the

3. During the 2009-2010 legislative session, I served as the Co-Chairman of the Defendant, the Legislative Advisory Task Force on Demographic Research and Reapportionment (LATFOR), appointed by the President Pro Tempore of the Senate

4. Currently, I remain a LATFOR member, representing the Senate Conference.

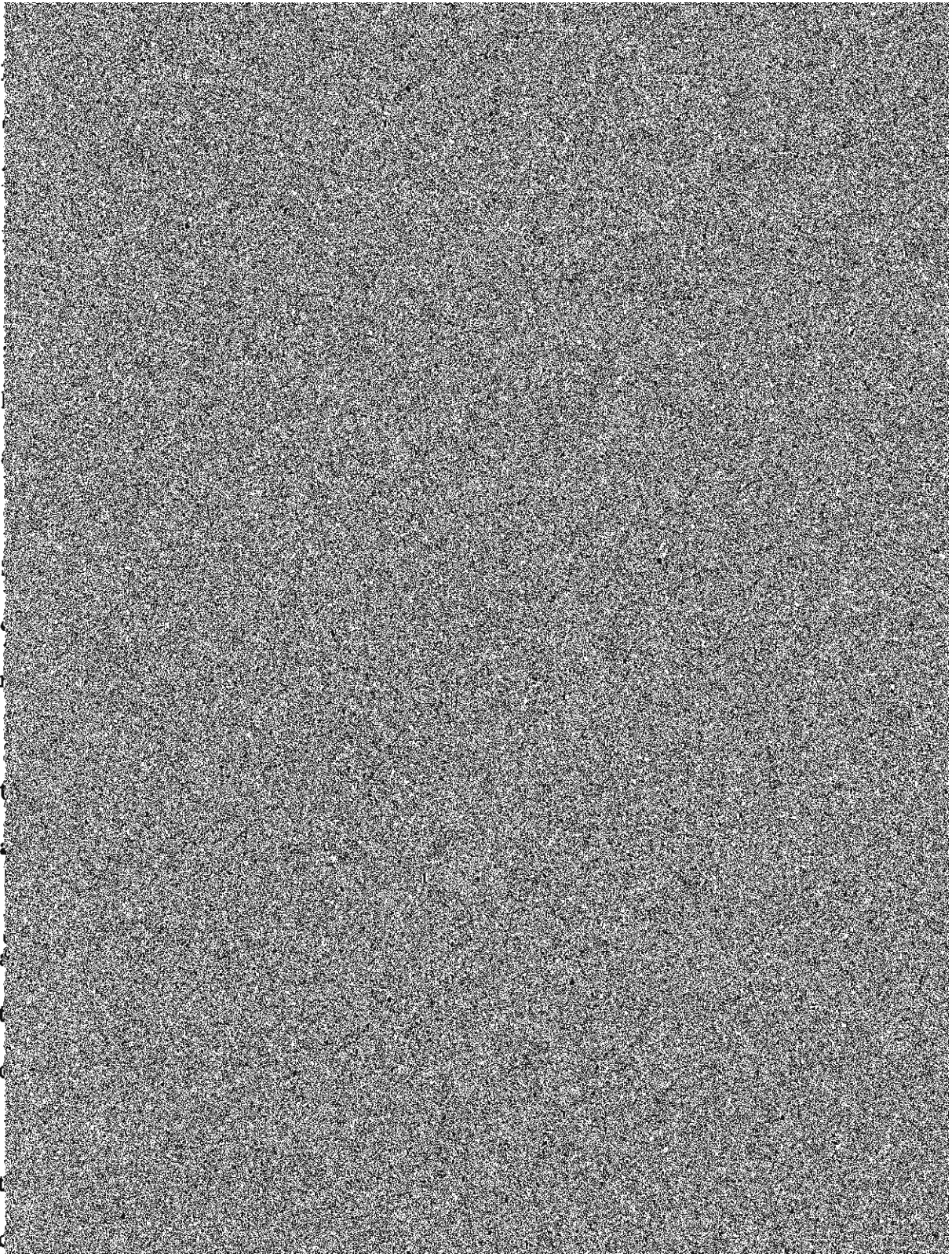
MY ROLE IN PASSING AND IMPLEMENTING CHAPTER 57

5. As a Member of the State Senate last year, I actively supported the enactment of Part XX. My staff assisted in the development and drafting of the bill and helped prepare the legislative history of the bill.

6. In essence, the law requires the New York State Department of Correctional Community Supervision (DOCCS) to collect the home addresses of incarcerated people and requires the state and county governments to draw legislative districts on the basis of Bureau data corrected to count incarcerated people at their home addresses.

7. Shortly after its enactment, in August 2010, I submitted a letter to Brian Fischer of DOCCS. This letter, attached as Exhibit A, was co-signed by me and from the State Assembly, Assembly Member Carl Heastie.

8. In the letter, we asked Commissioner Fischer to provide LATFOR with the necessary data in order to comply with and implement Part XX's mandate to reapportion populations or to remove those persons otherwise unassignable.



LATFOR'S INDISPENSIBLE AND ESSENTIAL ROLE SHOULD NECESSIATE A GRANT OF LEAVE TO FILE AN AMICUS BRIEF

16. It is LATFOR that must provide these technical plans for redistricting, must be premised upon the requirements that the Legislature must follow, which include "All districts must contain essentially the same number of people to preserve the principle of one person, one vote. Also, the federal Voting Rights Act requires that new boundaries be drawn in a manner which provides minority communities with opportunities to elect representative members of the legislature." The Bronx, New York and Kings counties are also "covered" counties under the Voting Rights Act, requiring compliance with the federal law before new laws take effect. The law, Part XX of Chapter 57 of the Laws of 2010, was approved under Section 17 of the State Constitution by the Justice Department on May 11, 2011.

17. Without the addition of my *amicus curiae* filing, given that I am the only LATFOR member wishing to assert facts and arguments in this litigation, the action would be bereft of a submission from those of us in the State government who are specifically tasked with devising the redistricting plans to comply with "one person, one vote," the New York State Constitution, and the federal Voting Rights acts protection of minority communities' representation in government. Notably, the only other defendant, DOCCS, as cooperated has been in this process, is not tasked with safeguarding the fundamental rights of voters.

18. Of the two defendants in this action, it is LATFOR that the State Legislature is tasked to implement Part XX and to recommend to the State Legislature redistricting plans.

¹ The New York State Legislative Advisory Task Force on Demographic Research and Reapportionment <<http://www.latfor.state.ny.us/faq/>> (visited on August 15, 2011) ("Frequently asked questions").

² See Decision/Order, Hon. Eugene P. Devine, dated August 4, 2011 ("...here the Attorney General is asked to represent [Department of Corrections and Community Service], which does not have a genuine stake in whether anyone person's voting interest is upheld or not.")

the Senate and Assembly. These plans are required to reassign prison populations to prior “homes of record” (or to remove prisoners without prior New York State “homes of record”). LATFOR plays an essential role in the process and should be part of any defense of the law.

19. On June 20, 2011, I indicated in a letter to this Court my interest in having appropriate counsel represent my interest in defending this law as a Member of LATFOR, a defendant in this matter. This letter is attached as Exhibit E.

20. On July 6, 2011, I submitted a Memorandum to my colleagues on LATFOR, attached as Exhibit F, indicating a need to comply with and implement the law. See Exhibit F, Memorandum re: 2011-2011 [sic] Agenda Items (“Although there is litigation concerning the constitutionality of the law, no temporary restraining order or injunction has been issued. Absent an order from the Court, LATFOR does not have the authority to proceed as though it had been enjoined from executing the law.”) No response was provided.

21. I was pleased to learn that on August 4, 2011, during a public hearing, both Co-Chairs of LATFOR announced that LATFOR intends to comply with Part XX, which is current law. This marked a reversal of some prior public statements of the Co-Chairs indicating their intent not to implement Part XX until this litigation was decided. For example, the LATFOR Co-Chairs explained in a letter to this Court on May 11, 2011 (Exhibit E, *supra*) that LATFOR had already begun the redistricting process and crafting the districts, but was waiting³ for the Court to rule on apportioning the prison population, fearing prejudice to the State, candidates and voters, and preferring to avoid “uncertainty.” Nonetheless, LATFOR continues to be passive in these proceedings.

³ See also Aff. of Sen. Dilan, Exhibit F, Memorandum by Sen. Dilan to Co-Chairs re: 2011-2011 [sic] Agenda Items (“Although there is litigation concerning the constitutionality of the law, no temporary restraining order or injunction has been issued. Absent an order from the Court, LATFOR does not have the authority to proceed as though it had been enjoined from executing the law.”)

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26. For foregoing reasons, this Court's decision is hereby affirmed. *amicus curiae* brief.

Sworn to before me
This 16th of August, 2011


NOTARY PUBLIC

Commission Expires 3/31/2012



Exhibit A



CO-CHAIRMEN
 Senator Martin Malavé Dilan
 Assemblyman Carl E. Heastie

**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

MEMBER
 Assemblyman Fred
 John L. Flateau,
 Roman B. Hedges
CO-EXECUTIVE DIRECTORS
 Matthew J. Drury
 Lewis M. Hoppe

August 26, 2010

Honorable Brian Fischer
 Commissioner
 Department of Correctional Services
 Building 2
 1220 Washington Ave
 Albany, New York 12226-2050

Dear Commissioner:

On August 11, 2010, Chapter Law 57 was signed by the Governor. This new law directs your department to provide the Legislative Task Force on Demographic Research and Reapportionment with certain information for each incarcerated person subject to your jurisdiction on April 1, 2010, the date of the federal decennial census count, including:

1. A unique identifier, not including the name, for each incarcerated person;
2. The street address of the correctional facility in which such persons were incarcerated at the time of the census;
3. The residential address of such persons prior to incarceration;
4. The race, Hispanic origin, age and gender of such persons; and
5. Any additional information as the task force may specify pursuant to law.

At this time, we are requesting that your office provide the Task Force with a complete dataset satisfying the above directives. To facilitate the translation of the data into a format that corresponds to the Census Bureau's PL 94-171 redistricting data, please direct your technical staff to contact our Co-Executive Directors as soon as possible, so we may discuss further specifications regarding file format and additional data columns, pursuant to Chapter Law 57.

The new law dictates that the Department of Correctional Services provide this data by September 1, 2010. Please refer to Chapter Law 57, Laws of 2010, Part xx, Section 1 if you have any questions regarding our request.

Sincerely,

Senator Martin Malavé Dilan
 Co-Chairman

Assemblyman Carl E. Heastie
 Co-Chairman

Cc: Matthew J. Drury, Co-Executive Director
 Lewis M. Hoppe, Co-Executive Director

Exhibit B

MARTIN MALAVE DILAN
SENATOR, 17TH DISTRICT

ASSISTANT MINORITY LEADER
FOR POLICY AND ADMINISTRATION

MEMBER
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH & REAPPORTIONMENT



THE SENATE
STATE OF NEW YORK
ALBANY 12247

March 2, 2011

RANKING MINORITY MEMBER
TRANSPORTATION

COMMITTEES
CIVIL SERVICE & PENSIONS
ELECTIONS
FINANCE
JUDICIARY
LABOR
RULES

Honorable Michael F. Nozzolio
CoChair, LATFOR
New York State Senate
Legislative Office Building
Albany, NY 12247

Dear Senator Nozzolio:

Last year, the Co-Executive Directors of this Task Force submitted a request to State Department of Corrections Commissioner Brian Fischer seeking clarification on inmate data formatting reports. The request asked for more information related to the following dataset files:

1. For each address-related field:
 - (a) the source of the data provided; (for example, is the information from a standard form or document? Whether information was obtained directly from the inmate?);
 - (b) when is it entered; and
 - (c) who recorded it? (for example, "the arresting officer" or intake personnel at the correctional facility)
2. Which address-related fields were referenced with the following legal residence entries:
 - (a) "same",
 - (b) "with grandmother"/brother/et al.; and
 - (c) "same as C" or "same as CL" or CLW or (E).
3. Regarding the race field, an explanation of the difference between "other" and "unknown" (of which there were 4,909 other and 934 unknown)? Among the 4,909 other, approximately 300 were identified as non-Hispanic and approximately 4,600 as Hispanic; the Task Force would like to know the meaning of "other" in the race column for the non-Hispanic inmates.

Chapter 57 of the Laws of 2010 requires legislative redistricting purposes.

I am requesting an update to learn of the geocoding effort. LATFOR will need this data to complete its work.

Thank you for your prompt consideration of this request.

inc. by

Martin Malave Dilan
MARTIN MALAVE DILAN
Senator
Member, LATFOR

Cc: Assemblyman John J. McEneny, C
Assemblyman Robert Oaks
Dr. Roman Hedges, LATFOR Member

ALBANY OFFICE: ROOM 903 • LEGISLATIVE OFFICE
BROOKLYN OFFICE: 786 KNICKERBOCKER AVENUE
WEBSITE: DILAN.NYSEN

Exhibit C



CO-CHAIRMEN

Senator Michael F. Nozzolio
Assemblyman John J. McEnery

**NEW YORK STATE
LEGISLATIVE TASK FORCE
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MEMBERS

Senator Martin Malave Dilan
Assemblyman Robert Oaks
Roman B. Hedges

CO-EXECUTIVE DIRECTORS

Debra A. Levine
Lewis M. Hoppe

March 7, 2011

Senator Martin Malave Dilan
New York State Senate
LOB Room 903
Albany, NY 12247

Dear Senator Dilan:

I am in receipt of your letter dated March 2, 2011.

Please feel free to request the information from the Commissioner of the NYS Department of Correctional Services, Mr. Brian Fischer.

Sincerely,

A handwritten signature in black ink that reads "Michael F. Nozzolio".

Michael F. Nozzolio
Senator, 54th District

Exhibit D



CO-CHAIRMEN

Senator Michael F. Nozzolo
Assemblyman John J. McEnery

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MEMBERS

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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

Your Honor:

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

The instant action seeks, *inter alia*, a declaration of Section XX of Chapter 57 of the Laws of 2010, regarding the co-chairpersons for redistricting purposes. We understand that the Attorney General is not appearing, or has already appeared, in this case.

At this time, LATFOR does not intend to make a formal request to the Court. We are satisfied that counsel who will appear for co-Respondent, the Department of Correctional Services, can adequately address the merits of the case. We would like to impress upon the Court of the importance to LATFOR that the case be resolved without delay.

LATFOR is tasked with developing proposals for the redistricting plans: the New York State Assembly, the New York State Congressional districts for the New York State delegation. This is a delicate task in its execution and requires input from, and agreement from, all affected constituencies, including pre-clearance from the United State Department of Justice.

Exhibit E

MARTIN MALAVE DILAN
SENATOR, 17TH DISTRICT

ASSISTANT MINORITY LEADER
FOR POLICY AND ADMINISTRATION

MEMBER
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH & REAPPORTIONMENT

June 20, 2011

Honorable Eugene P.
New York State Supreme Court
Albany County Court
16 Eagle Street
Albany, NY 12207

Re: Little, et al. v. New York State
on Demographic Research and Reapportionment
and NYS Department of State
Index No. 2310-2011

Your Honor:

I serve as one of four members of the
Research and Reapportionment Task Force
and minority conference. Other
leaders also appointed to the
Minority Conference.
in the matter.

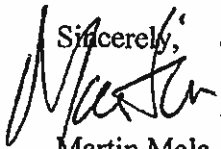
As a State Senator
57 of the Legislature
Majority Conference

A recent report
interest in demographic
Redistricting
ates-at-center

I appreciate

Thank you very much

Sincerely,



Martin Mala
Senator

ALBANY OFFICE: ROOM 1000
BROOKLYN OFFICE: ROOM 1000

Exhibit F

To: Senator Michael F. Nozzolio, Assembly Member John J. McEneny,
Assembly Member Robert Oakes, Welquis R. Lopez, Dr. Roman Hedges

From: Senator Martin Malavé Dilan

Date: July 6, 2011

Re: 2011-2012 LATFOR Agenda Items

Hearing Schedule: Locations

Hearing Schedule: Hours and Time Allotments

Hearing Record

Prison Population Reallocation

Racial Bloc-Voting Analysis

Size of the Senate

Redistricting Criteria

Hearing Schedule: Locations

A public hearing should be held in Nassau County. Hearings have been announced for Albany, Rochester and Syracuse. During the previous redistricting cycle, hearings were held also in Buffalo, Binghamton, Albany, White Plains, Hauppauge, and all five boroughs of New York City – but not in Nassau County. A ‘Long Island’ hearing held only in Suffolk County is not sufficient. Nassau is the sixth most populous county in the state – substantially more populous than Westchester, and with nearly three times the population of Richmond. It requires more time and effort for Nassau residents to go to Hauppauge than for New York City residents to travel to another borough.

A hearing should be held in Mineola. The large public turnout for the recent Nassau County Legislature’s redistricting hearings and meetings shows that there is keen public interest in redistricting in Nassau County. According to the *New York Times* (May 15), it took ten hours to hear from every person who testified in Mineola on May 9th. *CBS News* (May 16) estimated the public attendance at the hearing at 300. If LATFOR schedules no hearings in Nassau, it will be impossible to avoid the conclusion that LATFOR deliberately chose to make it difficult for Nassau residents to make their voices heard on the redistricting of the State Legislature and Congress.

Hearing Schedule: Hours and Time Allotments

It has been LATFOR’s practice to schedule hearings in the morning, as has now been done with the Albany, Rochester and Syracuse hearings. Experience shows that hearings on redistricting attract testimony not only from those professionally involved in the subject, or with a special personal interest, but from the general public. Many persons who might wish to testify have jobs and are unable to attend meetings during the day. Past New York City Districting Commissions hearings were held in the evening and LATFOR should follow their example. To accommodate all who wish to testify, LATFOR should consider opening each hearing in the early afternoon, taking a dinner break (unless there are still persons waiting to testify), and resume at an announced time in the early evening.

Occasionally groups of witnesses offer their testimony en masse. In such cases, although each witness should be held to the five-minute time limit, each witness should be entitled to his or her full five minutes. There is no reason that two or three witnesses should be limited to five minutes in total because they have presented themselves as a single panel.

Hearing Record

During the previous (2002) redistricting round, hearing transcripts were posted on the LATFOR web site. Statements submitted in writing, while available to the members and staff, and included in the documentation of the VRA §5 submission, were not readily available to the public. Statements submitted in writing – whether in person or received in the mail – should be scanned to create PDF documents, and those documents should be posted on the web site along with the hearing transcripts. Guidelines could be provided for submitting scannable documents, and the public could be encouraged to submit written statements in printed and electronic format. Since written testimony and letters are likely to have been created with word-processing software, this should be convenient for LATFOR and for the public. The same procedure should be followed for making redistricting proposals received from the public available to the public.

Prison Population Reallocations

Legislative Law §83-m (13) requires LATFOR to develop a redistricting database in which prisoners in federal and state custody have been subtracted from their place of incarceration, and in which prisoners in state custody are, to the extent possible, reallocated to their prior residential addresses. LATFOR is bound by this law, and does not enjoy the discretion to ignore it or to delay its implementation. Although there is litigation concerning the constitutionality of the law, no temporary restraining order or injunction has been issued. Absent an order from the Court, LATFOR does not have the authority to proceed as though it had been enjoined from executing the law.

Last year LATFOR staff was working on the required reallocation of prisoners in state custody, but that work apparently came to a halt in January. The Census Bureau has since made available an Advance Group Quarters Summary File, for the express purpose of helping New York State and other jurisdictions to subtract prisoner populations from their place of incarceration. More detailed information will be available when the Census Bureau issues Summary File 1 for New York State this summer.

My staff can provide to LATFOR a determination of the required subtractions, at the block level, based on the Advance Group Quarters Summary File and other data sources (which were used to distinguish prisoners in federal and state custody from those in local jails). These determinations should be revisited when Summary File 1 becomes available, but are not likely to require much revision (if revision is required).

Only LATFOR staff, however, can make the legally mandatory reallocations, since that requires the use of confidential information provided to LATFOR by the Department of

Corrections and Community Supervision, pursuant to Correction Law §71 (8). LATFOR staff must be instructed to resume this work immediately, and to complete it as soon as reasonably possible. LATFOR is required by law to do so.

If subsequent judicial rulings prohibit the use of the amended database for legislative redistricting, it can be set aside, and no harm will have been done. But in the absence of such rulings, further delay may seriously disrupt the redistricting process. LATFOR is also required by law to make this database available to local governments, which are required by the Municipal Home Rule Law to use it in redistricting or reapportioning local legislative bodies. Ongoing litigation does not challenge this provision of the Municipal Home Rule Law, except as to the method of enactment. LATFOR should also make the amended database—including all mandatory subtractions and reallocations—available to the public as the basis for legislative redistricting proposals to be submitted. Genuine public participation in the redistricting process will be impossible if the amended database is not completed and made available in good time.

Racial Bloc Voting Analysis and Political Database

In 2002, LATFOR commissioned expert consultants to prepare a racial bloc-voting analysis to determine whether certain senate districts in New York City would provide minority group voters with the opportunity to elect representatives of their choice.¹ The report did not become generally available, however, until the application was made for VRA § 5 preclearance of the already-enacted legislation.²

Any such report should be made public as soon as it is available, and should be made available to all members of LATFOR and of the Legislature for the proper evaluation of the redistricting legislation. It should be completed early enough so that it is not merely retrospective.

The 2002 report evaluated districts drawn in Queens County, as well as in the three counties subject to VRA §5 preclearance. This was appropriate, since the Legislature's responsibility to provide fair representation to minority groups is not limited to preclearance counties. For that reason, any such analysis should be extended not only to Queens County, but to every county in which the minority group population is significant in proportion to the mean population of senate or assembly districts.

The 2002 report analyzed several elections that were not part of the generally available LATFOR political database. Any political database compiled for the purpose of such a racial bloc-voting analysis should be made generally available.

¹ D. Paul Sullins and James W. Loewen, *Analysis of Reapportioned Minority Senate Districts in New York City*, April 24, 2002.

² See *Rodriguez v. Pataki* discovery records.

The LATFOR political database should now be made publicly available on the LATFOR website for use by any persons who may wish to make redistricting proposals to LATFOR, or to use the database to evaluate LATFOR's eventual proposals.

Size of the Senate

The size of the Senate can be established at this time. The county population totals provide all of the necessary data.

During the last redistricting round, the Senate Majority: 1) announced on the Task Force web site, beginning in the spring of 2001, that the Senate would have 61 districts, and solicited proposals from the public on that basis;³ 2) privately decided by July of 2001 – perhaps earlier – that 62 districts would be created,⁴ while still encouraging and accepting public proposals for 61-district plans; 3) announced publicly only in February 2002 that they intended to create 62 districts; 4) produced a legal opinion in March 2002, rejecting the constitutional interpretation followed in 1972, 1982, and 1992, and argued that NYS Constitution art. III, §4, required 62 districts,⁵ a decision that had actually been made long before for other reasons entirely;⁶ and 5) maintained that they could not seriously consider the public proposals of 61-district plans, since these were for the wrong number of districts.

Given the county population totals from Census 2010, either of the previous interpretations of art. III, §4—the interpretation followed in 1972, 1982, and 1992, or the new interpretation adopted in 2002—would yield a Senate of 62 seats. LATFOR should immediately determine whether the Senate will continue to have 62 seats, and should solicit public proposals on that basis without equivocation. Although it would be improper to adopt a different interpretation of art. III, §4, yielding a different number of senate districts, if any such reinterpretation is to be adopted, it should be done now – before the public

Redistricting Criteria

Many legislators have indicated their support for a more independent redistricting process. The redistricting criteria included in Governor Cuomo's redistricting reform legislation (S.3419 and A.5388) provide an excellent objective framework for developing fair and objective senate, assembly and congressional plans. I request that LATFOR

³ See the printed screen-shots available in the Senate Minority redistricting files.

⁴ Memoranda titled "Reapportionment Areas," May 4, 2001, at 1, and "Size of the Senate," July 20, 2001, at 1, *Rodriguez v. Pataki* SDNY 02 Civ. 618. The latter document has the file name, "Not 63."

⁵ Memorandum titled "Senate Size," March 7, 2002, from Michael Carvin, Esq., to Sen. Joseph Bruno and Sen. Dean Skelos, still available at <http://latfor.state.ny.us/docs/20020308>.

⁶ See n. 5, above, July 20, 2001 memorandum.

incorporate Governor Cuomo's criteria as guidelines for all
developed by this Task Force.

This criteria governs population equality, minimum 2 per-
legislative districts, strict population equality for congressional
minority communities, Voting Rights Act compliance, con-
adherence to state constitutional mandates.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X Index No. 2310-11

SENATOR ELIZABETH O’C. LITTLE, SENATOR
PATRICK GALLIVAN, SENATOR PATRICIA
RITCHIE, SENATOR JAMES SEWARD, SENATOR
GEORGE MAZIARZ, SENATOR CATHARINE
YOUNG, SENATOR JOSEPH GRIFFO, SENATOR
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WILLIAM NELSON, ROBERT FERRIS, WAYNE
SPEENBURGH, DAVID CALLARD, WAYNE
McMASTER, BRIAN SCALA and PETER TORTORICI,

Judge Assigned:
Hon. Eugene Devine

Plaintiffs,

-against-

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

Defendants.

-and-

MICHAEL BAILEY, ROBERT BALLAN et al.,

Intervenor-Defendants.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF MOTION BY
THE HON. SENATOR MARTIN MALAVE DILAN TO FILE *AMICUS CURIAE* BRIEF**

Leonard Kohen, Esq.
Counsel for the Hon. Senator Martin Malave Dilan, *Amicus Curiae*
67 e 11th Street #703, New York, NY 10003
212.254.8371

Jeffrey M. Wice, Esq.¹
Co-Counsel for the Hon. Senator Martin Malave Dilan, *Amicus Curiae*
250 Broadway #1930
New York, NY 10007
(212)298-5566

On the Brief: Patrick Michael McKenna

¹ Member, District of Columbia Bar; not admitted in New York

PRELIMINARY STATEMENT

The Hon. Martin Malave Dilan (“Movant”), a Member of the New York State Senate and a Member of the Defendant, the Legislative Advisory Task Force on Demographic Research and Reapportionment (LATFOR), submits this application for leave of Court to file an *amicus curiae* brief (accompanying these motion papers) in this action challenging the constitutionality of Part XX of Chapter 57 of the Laws of 2010 (“Part XX”).

This Court should grant leave because the viewpoint of the Movant, as a Member of LATFOR, is not presently represented by the parties in this action, redistricting is a matter of important public interest, and filing the proposed *amicus curiae* brief will not cause any delay or otherwise prejudice the litigation.

STATEMENT OF FACTS

The facts are more fully set forth in the accompanying affidavit by the Movant. During the 2009-2010 legislative session, when Part XX was enacted, the Movant served as the Co-Chair of LATFOR; he currently remains a LATFOR member, representing the Senate Minority Conference. As a Member of the State Senate last year, the Movant actively supported passage and enactment of Part XX. The Movant’s staff assisted in the development and drafting of the legislation, and helped prepare the legislative history of the bill.

Since enactment, the Movant has been working with the New York State Department of Corrections and Community Service (DOCCS) towards facilitating prisoner apportionment under Part XX. DOCCS personnel has cooperated with LATFOR at every step of the process. From the start of this year, since the time Senator Michael F. Nozzolio and Assembly Member John J. McEneny took over as Co-Chairs of LATFOR, the Movant has been requesting that they

proceed with the process of implementing
been a deliberate pattern of inaction by L
Moreover, it is only in the recent weeks
said it would comply with Part XX, after
present LATFOR Co-Chairs explained it
had already begun the redistricting process.⁶
Court to rule on apportioning the prison
voters, and preferring to avoid “uncertain
Chair letter).

While LATFOR has chosen not to
Part XX, Senator Dilan submits this amici
that is tasked with devising the redistricting
population equality standard, the New York
acts protection of minority communities’
other defendant in this action, the New York
Service, does not have the same responsibility.
The Movant is the only Member of LATFOR
on Part XX in this action, and consequently
presently represented in this action. See *J*
4, 2011 (“...here the Attorney General is
genuine stake in whether anyone person’

² See also Aff. of Sen. Dilan, Exhibit F, Memorandum
 (“Although there is litigation concerning the constitutional
injunction has been issued. Absent an order from the court,
though it had been enjoined from executing the law.”)

the proposed *amicus curiae* brief will not cause any delay or otherwise prejudice the litigation because, in this round of summary judgment motion practice, there is already an existing return date and this submission is being served at essentially the same time as other sets of papers on all parties arguing for or against the same dispositive relief.

ARGUMENT

Leave to appear as *amicus curiae* should be granted to a movant when a case involves “questions of important public interest.” *New York Coalition for Quality Assisted Living v Daines*, 24 Misc3d 1250(A) (Sup Ct Albany County 2009), 2009 WL 2960956 at *1 citing *Kruger v Bloomberg*, 1 Misc3d 192, 196 (Sup Ct New York County 2003) quoting *Colmes v Fisher*, 15 Misc 222, 223 (Sup Ct Erie County 1934) and the movant can assist the court by representing a point of view that may not be fully represented by the parties (*id.* at *1 citing *Kruger v Bloomberg* at 198).

This case involves quintessential issues of public interest. At the heart of this case lies an assault on the fundamental right to fair democratic representation. The plaintiffs seek to invalidate the law, which will dilute minority districts and manipulate the “one person, one vote” principle, affronts that LATFOR specifically is tasked to prevent. In this vein, Movant also meets the next criteria, in that he represents a point of view that is not fully represented by the parties. LATFOR is not appearing by its own counsel in this action, and as Senator Dilan sets forth in his accompanying affidavit:

Without the addition of my *amicus curiae* filing, given that I am the only LATFOR member wishing to assert facts and arguments in this litigation, the action would be bereft of a submission from those of us in the State government who are specifically tasked with devising the redistricting plans to comply with “one person, one vote,” the New York State Constitution, and the federal Voting Rights acts protection of minority communities’ representation in government. Notably, the only other defendant, DOCCS,

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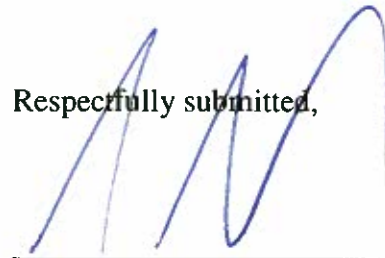
affidavits as

adverse impact on “one person, one vote” principle), and neither should the Movant file as *amicus curiae* come as a surprise to Defendant LATFOR in view of his regular communication with the LATFOR Co-chairs and with this Court. *See generally* Affidavit of Dilan, exhibits A – F. Lastly, and as previously addressed, this case concerns questions of important public interest, particularly the application of Part XX, widely reported, for example, as an issue of our day in news media, in terms of fair and equal democratic representation. Upon consideration of the above factors, the Movant’s application for leave to appeal as *amicus curiae* should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the Movant leave to file an *amicus curiae* brief.

Respectfully submitted,



Leonard Kohen, Esq.
Counsel for the Hon. Senator Martin Malave
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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SENATOR ELIZABETH O’C. LITTLE, SENATOR
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WILLIAM NELSON, ROBERT FERRIS, WAYNE
SPEENBURGH, DAVID CALLARD, WAYNE
McMASTER, BRIAN SCALA and PETER TORTORICI,

AFFIDAVIT OF
SERVICE

Judge Assigned:
Hon. Eugene Devine

Plaintiffs,

-against-

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

Defendants.

-and-

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,

Intervenor-Defendants.

-----X
STATE OF NEW YORK, COUNTY OF NEW YORK, ss.

ANDRES LEDESMA, being duly sworn, deposes and says that I am not a party to this
action, am above the age of eighteen, and reside in the State of New York, and,

That on August 18, 2011, I served the attached NOTICE OF CROSS MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AFFIRMATION OF LEONARD KOHEN, ESQ. (and attached Proposed Memorandum of Law by the Hon. Senator Martin Malave Dilan, *Amicus Curiae*), AFFIDAVIT OF THE HON. SENATOR MARTIN MALAVE DILAN (together with exhibits), and MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THE HON. SENATOR MARTIN MALAVE DILAN TO FILE *AMICUS CURIAE* BRIEF, by depositing true copies of each enclosed in a post paid overnight delivery wrapper, signature confirmation waived, in an official depository under the exclusive care and custody of United Postal Service, addressed to the following parties or their attorneys:

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

Steven G. Leventhal, Esq.
Leventhal, Sliney & Mullaney LLP
Co-Counsel for Citizen Plaintiffs
15 Remsen Avenue
Roslyn, NY 11576

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

Hon. Eric T. Schniederma
Attorney-General of the State of New York
Attorney for Defendant
New York State Department of Corrections
and Community Supervision
120 Broadway
New York, NY 10271

Hon. Eric T. Schniederman
Attorney-General of the State of New York
Attorney for Defendant
New York State Department of Corrections
and Community Supervision
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Dale Ho, Esq.
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Myrna Perez, Esq.
Brennan Center for Justice at New York University School of Law
Attorneys for Proposed Intervenor-Defendants
161 Avenue of the Americas, 12th Floor
New York, New York 10013

ANDRES LEDESMA

Sworn to before me this

_____ Day of August 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X Index No. 2310-11

SENATOR ELIZABETH O’C. LITTLE, SENATOR
PATRICK GALLIVAN, SENATOR PATRICIA
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Judge Assigned:
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Plaintiffs,

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

Defendants.

-and-

MICHAEL BAILEY, ROBERT BALLAN et al.,

Intervenor-Defendants.

-----X
**NOTICE OF CROSS MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF,
AFFIRMATION OF LEONARD KOHEN, ESQ. ,
AFFIDAVIT OF THE HON. SENATOR MARTIN MALAVE DILAN**

Leonard Kohen, Esq.
Counsel for the Hon. Senator Martin Malave Dilan, *Amicus Curiae*
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212.254.8371(o), 917.922.8442 (m)
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Jeffrey M. Wice, Esq.¹
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¹ Member, District of Columbia Bar; not admitted in New York