UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KAREN DAVIDSON,
DEBBIE FLITMAN,
EUGENE PERRY,
SYLVIA WEBER, AND
AMERICAN CIVIL LIBERTIES UNION
OF RHODE ISLAND, INC.,

Plaintiffs

C.A. No. 1:14-cv-00091-L-LDA

v.

CITY OF CRANSTON, RHODE ISLAND,

Defendant

THE CITY OF CRANSTON'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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There are a variety of ways of claiming true constituency. They're not all legitimate. I suppose some are. It's a matter of argument.

- Plaintiff Eugene H. Perry

I. INTRODUCTION

As the ancient poet Virgil stated: "Fury itself supplies arms". The above-named plaintiffs (the "Plaintiffs") bring meaning to Virgil's words. Equipped with only a political agenda, Plaintiffs attack Cranston's redistricting with distinctions that fail to make a difference. At the end of their arguments, two facts are patent: (1) as a matter of law, there is no requirement that the City should not have counted the ACI Population in its redistricting; and (2) debating the question of whether to include or exclude the ACI Population would lead this Court down a rabbit hole laced with policy determinations that has for 50 years been left to the political process.

Plaintiffs have submitted extensive exhibits and alluded to numerous facts in support of their Cross-Motion for Summary Judgment. But in support of their Cross-Motion, they neglect to present a valid legal principle to which their claims can cling[1], i.e., how Cranston's apportionment of its wards violates the Equal Protection Clause of the United States Constitution. As a result, none of the so-called facts are germane or material to the issue presented. The illustrations they present may be interesting support for the public policy arguments underpinning the movement that coined the phrase "prison gerrymandering", but they present no legal basis to divert from United States Supreme Court precedent. As with any policy debate, each of Plaintiffs' arguments leveled to exclude the ACI Population is met with a counter-argument to include the ACI Population in the City's redistricting.

[1] As noted in the City's Reply, Plaintiffs unilaterally fabricate their own legal principle: that the Supreme Court has held "that in some circumstances jurisdictions must adjust raw Census data in order to meet the constitutional requirement." Plaintiffs' Memorandum [Doc. 21-1] at 8 (emphasis added). Plaintiffs' conclusion is misleading and erroneous. The Supreme Court, to date, has not articulated any requirement *to* deviate from total population.

Discovery has shown that the Plaintiffs, themselves, do not necessarily agree on the very premise of their claims, the manifestation of their alleged harm, or the requisite remedy. In their eagerness to eliminate the ACI Population from representational government, Plaintiffs confuse voting equality with equal representation, both forms of which the City's redistricting plan has met. Further, Plaintiffs distort the constitutional flexibility to rationally and reasonably deviate from adherence to basing redistricting on total population with a mandatory edict that has not been proclaimed.

As this Court is aware, the question of whether total population or voter population is the constitutionally preferred redistricting baseline is currently before the United States Supreme Court in *Evenwel v. Abott*, No. 14-940. Presumably, the Supreme Court's decision in *Evenwel* will provide the guidepost for legislative bodies to apportion their districts going forward. However, under the current status of the law, the City's redistricting meets constitutional requirements.

II. ARGUMENT

A. Plaintiffs' Do Not Meet the Summary Judgment Standard

1. Plaintiffs Do Not Put Forth a Legal Principle to Grant them Judgment as a Matter of Law

It is axiomatic that in order to prove one's case, he/she must present evidence sufficient that a factfinder may apply the law to the facts in order to draw a conclusion. *See e.g.*, *United States v. Gaudin*, 515 U.S. 506, 514, 115 S. Ct. 2310, 2316, 132 L. Ed. 2d 444 (1995) ("the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts"). Moreover, in a summary judgment context, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law." Plaintiffs' Memorandum [Doc. 21-1] at 2 (quoting Fed.R.Civ.P. 56(a))(emphasis added). Plaintiffs fail to assert any "law" in support of their motion, or their claims for that matter.

The City, in its Motion for Summary Judgment [Doc. No. 16] and its Reply contemporaneously filed herewith, makes the unequivocal case that the rule of law is on its side. Because there is no legal precedent to support Plaintiffs' claim, Plaintiffs simply avoid positing a law to support their arguments hoping that the Court will overlook this prerequisite.

Plaintiffs spend considerable time attempting to devalue the ACI Population in conclusory fashion, but then completely fail to put forth any legal entitlement to judgment. Plaintiffs, of course, cannot put forth a rule of law because the United States Supreme Court has "never determined the relevant 'population' that States and localities must equally distribute among their districts," *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting), beyond total population. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

The crux of Plaintiffs' cross-motion for summary judgment is two-fold: (1) their "facts" conclude that the City's standard of deviation is above constitutional allowances; and (2) counting the ACI Population does not serve goals of either representational or electoral equality. With regard to the latter, the City's Reply refutes either goal because no Supreme Court decision has articulated either standard is constitutionally required. Rather, adhering to strict population is constitutionally permissible. *See e.g.*, *Burns v. Richardson*, 384 U.S. 73 (1966); *Garza v. Cnty. of Los* Angeles, 918 F.2d 763 (1990); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

As to the former argument, Plaintiffs fail to meet the first factor in the fundamental equation for proving a case: applying the law. Plaintiffs posit so-called facts, which

the City counters *infra*; however, Plaintiffs put forth no law to which to apply those facts. It is a veritable game of "we say it is improper to count the ACI Population; therefore, it is improper to count the ACI Population."

As this Court is clearly aware, Plaintiffs must put forth the law that the City is violating in order to be entitled to judgment on their claims. Throughout their entire motion [Doc. No. 21-1], Plaintiffs fail to cite to one law or case that would entitle them to relief. Instead, Plaintiffs postulate a legal standard and then apply their facts to create the illusion of a legal entitlement. Plaintiffs' entire case is nothing more than a circular argument without any legal support for their contention.

2. Plaintiffs Do Not Put Forth any "Material" Facts

Because Plaintiffs lack a legal basis for their claim, they fail to put forth any material facts. "A fact is 'material' only if it 'has the potential of determining the outcome of the litigation.'" Plaintiffs' Memorandum [Doc. 21-1] at 2 (quoting *Prescott v. Higgins*, 538 F.3d 32, 40 (1st Cir. 2008)). Not one so-called fact suggested by Plaintiffs has the potential of determining the litigation.

Expounding on the point above, Plaintiffs make bald and unsupported assumptions about the status of the law, then present conclusory policy statements as if those statements materially alter the legal landscape. Plaintiffs leap into the middle of the argument assuming that the ACI Population should not be counted (without legal support for that assumption). Plaintiffs miss the mark. All of their so-called facts fail to materially determine the outcome of this case. [2]

[2] Plaintiffs misinterpret the Court's decision on the City's motion to dismiss. The Court did not relieve Plaintiffs of their own requirement to put forth a legal standard that the City violated. Plaintiffs erroneously claim that the Court rejected defendant's legal argument. Even though this is not the case, Plaintiffs have yet to articulate a legal standard that the City has breached.

3. Plaintiffs' Case Is Premised on Policy Arguments

a. *Plaintiffs' Value Judgments Are Policy Arguments for the Political Branch.*

The facts marshalled by Plaintiffs are more germane to petitioning the appropriate legislative bodies, as opposed to a court of law. Whether it is good or bad public policy or somewhere in between, the State of Rhode Island has effectively determined in its Constitution and statutes that its and the City's elected officials represent the entire population within a given compact territorial area. *See* R.I. Const. Art. VII, § 1, R.I. Const. Art. VIII § 1; Cranston City Charter, Section 2.03(b), as "validated ratified and confirmed" by Chapter 183 of the Rhode Island Public Laws of 1963, and 12-LA135 and 12-LA 136 that "ratified, confirmed, validated and enacted" the City's 2012 redistricting.

No value judgments are made in the State's Constitution or statutes or the City's Charter as to the relative "worthiness" of various classes of inhabitants in a district as to whether they ought to be counted or not for redistricting purposes. The City and the State simply follow the methodology employed in determining the U.S. Census. Plaintiffs would have this Court enter a "valuation thicket" and determine what classes of individuals are worthy enough to count or not count for purposes of representation within elected governmental bodies; Plaintiffs' so-called "true constituents". The path Plaintiffs would direct this Court down ends at a point where approximately 3,433 persons would not be counted anywhere in the State of Rhode Island for local representational purposes, over half of whom ironically are ordinarily legally protected minorities in redistricting litigation. *See* Declaration of Kimball Brace at ¶¶ 24-27 (Plaintiffs' Exhibit 12) (Plaintiffs' expert purposely omits the minority groups' percentages even though removing the ACI Population would remove the highest Black and Total Minority percentages of any ward in the City and the Hispanic percentage is second only to the concentration in Ward 3).

The "valuation thicket" is just that—a dense tangle of competing public policy issues best left to a legislative body. Plaintiffs make much of the fact that some of the ACI Population are felons and, thus, cannot vote. It turns out after discovery that it is only a minority (37%) of the ACI population which has been convicted of a felony and, therefore, has had the right to vote taken away from them. *See* Affidavit of Caitlin O'Connor ¶ 4 (Plaintiffs' Exhibit 5).

Plaintiffs also cite to R.I. Gen. Laws § 17-1-3.1(a)(2), pointing out domicile is not lost solely by reason of confinement in a correctional facility. True enough, but there is nothing in that statute that prevents someone who is going to be confined at the ACI from changing his or her domicile to the ACI should he/she wish to do so. In fact, there are some inmates who are registered to vote from the ACI, albeit a small number. *See* Declaration of Kimball Brace ¶ 21 (Plaintiffs' Exhibit12).

Plaintiffs selectively use statistics to depict the nature of the prison population, implying virtually all are short-term visitors. Yet, they completely ignore the well-known phenomenon of prisoner recidivism, depicting the numbers as if each admission to the ACI is of a completely separate population. Moreover, there is no question many prisoners serve long sentences, including some serving life without the possibility of parole. *See, e.g.,* Cooper Suppl. Decl. Ex. C ¶ 26 (Plaintiffs' Exhibit 9); Brace Declaration ¶ 36 (Plaintiffs' Exhibit 12).

Virtually all the juveniles on the Howard Campus incarcerated in the Training School cannot vote because of their minority status, but Plaintiffs say it is alright to count them in the Ward 6 population under their theory of the case. Plaintiffs likewise appear unconcerned with counting people in the Eleanor Slater Hospital, the State's nursing home, or the homeless shelter all located on the Howard complex, notwithstanding either the temporary nature of their

presence or their own limitations on their ability to interact meaningfully with the rest of the City's Ward 6 population. Johnson & Wales University ("JWU") students who reside in dormitories in the City's Ward 1, perhaps for as a short period as a semester or one year, who actually vote in another city or state are fine to be counted in Ward 1 under Plaintiffs' theory of the case. *See* Brace Decl. ¶ 29 ("there are a large number of students attached to the [JWU] in the eastern part of Cranston and lower part of Providence"—approximately 1,538 according to the 2010 Census).[3] Rhode Island has many housing sites for the elderly and nursing homes in which only a high percentage of elderly reside. Are the areas where these facilities are more concentrated to be weighed more than the single family residential areas with high concentrations of children who cannot vote? And what about areas with high concentrations of illegal immigrants who also cannot vote? Are the inhabitants of those areas worth less for purposes of establishing local representation than the inhabitants of other areas where illegal immigrants cannot afford to reside and are not present?

Plaintiff Eugene H. Perry summarized the Plaintiffs' ill-thought and arbitrary line-drawing that distinguishes the ACI Population from their self-described "true constituent" in his deposition. When asked, "To your knowledge, is there a definition of 'true constituent'?" His response is telling:

> There are a variety of ways of claiming true constituency. They're not all legitimate. I suppose some are. <u>It's a matter of argument.</u>

Deposition of Eugene H. Perry 37:9-15 (Defendant's Exhibit A) (emphasis added). Seemingly, none of the plaintiffs can even decide among themselves what a "true constituent" is. Plaintiff

[3] Plaintiffs contend that R.I. Gen. Laws § 17-1-3.1(a)(2) prohibits the ACI Population from being counted. However, Plaintiffs' initial premise is incorrect as this statute only applies to establishing residency for *voting* purposes. Secondly, if Plaintiffs were correct, then students at Brown University, JWU, Providence College, etc., would have to be omitted from Providence's districting process as well. *See* § 17-1-3.1(a)(4) ("Attendance as a student at an academic institution, including the spouse and dependents of an elector who is a student" cannot claim residence at the school due to his/her factual physical presence in the voting district).

Flitman stated that "In my opinion, the constituents are the population that an elected official represents as part of their public duty." Flitman Dep. at 20: 23-25 (Defendant's Exhibit B). "I would say, in my opinion, say yes, they represent anybody that uses the services in that city or town." *Id.* at 21: 11-13 (Defendant's Exhibit B).

Interestingly, Plaintiffs cannot point to one action by the Cranston City Council or the School Committee that favored or disfavored Ward 6 residents over another ward in the City. *See, e.g.* Perry Deposition at 24: 3-11 (Defendant's Exhibit A) ("Q: Do you have an example of an event that occurred as a result of a council vote that unfairly advantaged Ward 6? A: An election. Q: Same question regarding the school committee. Can you give me one example of an action the school committee unfairly took that unfairly advantaged Ward 6? A: No.") This underscores the academic, theoretical nature of the Plaintiffs' arguments, and the very weak reed upon which they would have this Court be the first nationally to order incarcerated persons not be counted in apportioning electoral districts.

Plaintiffs make much of the fact that prisoners cannot interact like other members of society. That has always been true; it's one of the prime purposes of incarceration. Yet despite all of the voluminous apportionment litigation spawned since *Baker v. Carr* in 1962, Plaintiffs cannot point to one decision where a court has ordered incarcerated people not be counted for apportionment purposes.

Additionally, Plaintiffs do not propose a constitutionally reasonable plan. The plan recommended by Plaintiffs' expert simply does not count the ACI Population at all, likely because disbursing the ACI population among multiple City wards would make it difficult if not impossible to simultaneous meet all of the other legal requirements of apportionment such as

compactness, contiguity and seeking to protect communities of interests. Moreover, he is stuck with supporting Plaintiffs' required theory which does not count the ACI population anywhere.

There is no denying the potential practical ripple effect of adoption of the Plaintiffs' theory. If the ACI Population is comprised of people who are not "true constituents" and should not be counted, then presumably when the State apportioned after the 2010 Census Congressional District 1 would have had a clearly impermissible and unconstitutional higher population than Congressional District 2 in which the ACI is located. Declaration of Kimball Brace at ¶ 42 ("If one takes the ACI population out of Cranston and distributes the inmates to their home addresses, then the congressional plan would have a total deviation of 0.73% and be subject to a suit under a one-person, one-vote claim."). With respect to Congressional redistricting, mathematical exactitude is constitutionally required. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) ("Since 'equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives,' the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality")(internal citations omitted)). In recognition of that, the State made sure it had exactly the same population per the Census in each of Congressional Districts 1 and 2 in doing its apportionment after the 2010 U.S. Census. Brace Decl. at ¶ 42. The same decisional impact would effectively ripple through the State's apportionment for state senate and house districts, notwithstanding the fact the State did disburse the ACI Population among districts. *See* Brace Decl. ¶¶ 43-44 (Removing the ACI Population from the state house and senate population would create total deviations of 19.95% and 11.14 %, respectively, thus subjecting the state to a one person, one vote claim).

In summary, Plaintiffs have marshalled a series of policy arguments in support of one political theory regarding the representational and electoral natures of our democracy. However, none of the distinctions leveled are germane to the legal issue presented, which is whether the Cranston apportionment violates the Equal Protection Clause.

b. *The ACI Population Is a Part of the Ward 6 Community*

Much is made of the "isolation" of the ACI Population, as if the population and its facilities exist in a bubble or silo. First, on the political theory front, the reality is that most constituents (be they in prison or not) do not contact or reach out to their elected representatives for anything.[4] Moreover, "there's a large population that probably doesn't contact the city government at all[.]" Deposition of Fung at 66: 7-8 (Defendant's Exhibit C). Yet, Ward 6 Councilman Favicchio plainly is responsible under our governmental system for representing the interests of all in his ward, whether he has ever had direct contact with them or not, or whether they voted for him or not.[5]

Plaintiffs next argue that the impact of the ACI is "negligible" upon the City. *See* Plaintiffs' Memorandum at 14. Plaintiffs submit an affidavit which on its face does not support their proposition that there are no net costs to the City resulting from the presence of the ACI because of payments made by the Department of Corrections. *See* Affidavit of Brenda Brodeur (Plaintiffs' Exhibit 18). Ms. Brodeur's Affidavit, on its face, simply indicates that the payments by the Department to the City for "taxes, sewage, ambulance services" are "intended to reimburse the City for the full costs." Plainly, Ms. Brodeur would have no direct knowledge of all of the City's costs and, therefore, her statement cannot be conferred any weight.

[4] *See, e.g.* Deposition of Councilman Favicchio at 21:2-7 (Defendant's Exhibit D) (On average, he gets "five to ten" emails or letters a week from constituents).

[5] *See, id.* at 39:6 – 41:4 (Defendant's Exhibit D) (Councilman Favicchio believes that the ACI Population should be counted in Ward 6 because they are inhabitants and are similarly situated to other groups such as children and "undocumented aliens" and Ward 6 had the third highest voter turnout among the wards).

In any event, the stated "intent" is undeniably not fulfilled. State properties are exempt from taxation by municipalities. R.I. Gen. Laws § 44-3-3(1). The Rhode Island General Assembly has a program to make appropriations in lieu of property taxes ("PILOT Payments") to provide some recompense to communities for housing state properties and certain tax-exempt private properties. *See* R.I. Gen. Laws § 45-13-5.5. In no way does the City receive PILOT Payments equal to the taxes that would be generated based on the full value of the ACI facilities. Per the statute, the maximum appropriation cannot exceed 27% of the taxes that would have been collected. *Id*. Mayor Fung also indicated in his deposition that the City is not made whole. Fung Dep. 78:24 – 79:22; 82:19 – 83:19 (Defendant's Exhibit C).

As the facts elucidate, the impact the ACI Population has on the City, particularly Ward 6 constituents, is enormous. The City and Ward 6 indisputably would be much different places if there were no adult correctional facilities within their boundaries. Sufficient fire protection, public safety and rescue services capacity need to be available. Fung Dep. 82:19 – 83:19 (Defendant's Exhibit C); *see also,* Plaintiffs' Exhibit 26 (Deposition of Chief McKenna 19:8-22 (the City Fire Department respond to approximately 250 or so calls that originate from the ACI per year)). Prisoners and their visitors have an interest in where fire stations may be located and response time to the ACI. There have been prison escapes and sex offender issues in the past which clearly are of interest to the City and the Ward 6 residents near the ACI, in particular. Fung Dep. 57:5 – 62:10 (Defendant's Exhibit C). Plaintiffs depict the ACI and its population as basically a non-presence within Ward 6, neither having nor creating any political or policy concerns impacting the Ward. Directly refuting this are concerns that have arisen regarding sex offenders and prison release programs. *Id.*, *see also* Favicchio Dep. 23:3 – 24:21 (Defendant's Exhibit D).

Throughout this case, Plaintiffs lose sight of what, if they had their druthers, the actual fact dispute would be: the value of a person in the ACI Population and whether that population should be counted. It cannot be disputed that the ACI Population has an impact and effect on the City and Ward 6. There is no dispute that the ACI Population taxes City services. There is no dispute that portions of the ACI Population interact with the community. *See, e.g.*, Fung Depo. 54:15-55:8 (Defendant's Exhibit C). There is no dispute that the current Mayor and Ward 6 Councilman consider all 80,000 inhabitants of the City to be within the scope of their representation. *See* Fung Depo. and Favicchio Depo., *supra*. Accordingly, Plaintiffs' "factual dispute" does not require the Court to apply law to facts, but rather requires the Court to make a political evaluation of the value of counting or not counting the prisoners.

In the Complaint, Plaintiffs demand that none of the ACI Population be counted, period—"as if they don't exist." Brace Decl. ¶ 13. With no other option available, the ACLU and other plaintiffs are "advocating the elimination of minority population from representation in city government." Brace Decl. ¶ 26. Typically, the movement that coined the phrase "prison gerrymandering", which includes the Prison Policy Institute, seeks to break up prison populations and disburse that population count back to their original home districts to "bring more Democratic seats to Congress and the state legislature if the population could be shifted back to where the prisoners originally came from." *Id.* at ¶11. But generally, the point is not to eliminate an inmate's representational value completely. Here, that is exactly what Plaintiffs are seeking: to completely eliminate over 3,400 people from representation. Therefore, the true debate, which is anything but undisputed, is what is the value of a member of the ACI Population

to a democracy?[6] This is clearly not a question to be resolved on Summary Judgment nor is it, as *Burns* points out, a question for the judiciary.

B. Legislative Bodies Have the Choice but not the Mandate to Deviate from Strict Population

Plaintiffs have referenced two hundred local jurisdictions across the country, which have not counted prisoners for local apportionment purposes. The fact is these two hundred jurisdictions have chosen to do so voluntarily, based on their own policies deliberated and adopted by local elected officials, not because they were ordered to do so by a court.

Moreover, given the tens of thousands of political jurisdictions in the country, the statement of the City's expert is clearly correct: that the methodology Plaintiffs are proposing for apportioning districts nationally is a very rare and unusual one. Brace Decl. ¶ 9 (Plaintiffs' Exhibit 12) ("This case presents a novel approach to the normal redistricting process. Nearly all redistrictings begin with decennial Census total population data which are then divided geographically into single-member districts. Since *Baker vs. Carr*, 369 U.S. 186 (1962), states and local governments have relied upon Census data to define their districts.").

Plaintiffs point to the fact the State in apportioning its senate and house representative districts disbursed the ACI Population among multiple districts. Again, this was by legislative choice. Moreover, since such districts are not bound by municipal boundaries, there is clearly more flexibility to do that and still have districts that meet other legal requirements such as geographic compactness and contiguity.

[6] Councilman Favicchio answered this question to some degree by indicating that the ACI Population is part of his constituency as are the others within Ward 6 that he has to answer to who have to deal with the consequences of having the ACI in their ward. (Favicchio Depo. 39:6 – 40:22) (Defendant's Exhibit D).

C. Plaintiffs' Actual Desired Relief Cannot Be Achieved by the City

Plaintiffs would lead this Court to an unjust, nonsensical result because neither the Court nor the City of Cranston can, in the context of this case, order what the Plaintiffs really want: that the ACI Population be disbursed throughout the State and counted in the districts from whence they came at the time of incarceration.[7] This goal is and has been the true goal of the movement that coined the phrase "prison gerrymandering". *See* Brace Decl. ¶ 13 ("Elsewhere they are saying the people should be moved to another location in the state, but in Cranston they are seeking to just exclude the prison population, as if they just don't exist.").

Plaintiff Davidson said as much in her deposition: "The whole ACI population should not be counted in Ward 6. Those members who are residents in domiciles of Ward 6 prior to their being incarcerated at the ACI should continue to be counted." (Davidson Depo. 34: 25 – 35:4.) (Defendant's Exhibit E) The remaining population "should be counted where they resided and were domiciles of prior to their being incarcerated." (*Id.* at 38: 2-5) (Defendant's Exhibit E).

The City cannot provide this relief, even if the Court so ordered. The City cannot force another community to count a portion of this population. The only way to achieve Plaintiffs' overarching demand would be on a statewide basis.[8] However, because the state

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[7] Plaintiffs again, generally, all spoke to the desire that the ACI Population would not be eliminated from representation, but would be counted from whence they came. For example, Plaintiff Perry was clear:

> Q. So you mentioned "their own district," that's where they should be counted?
> A. Yes.

(Perry Depo. 27:13-15) (Defendant's Exhibit A). Further, Plaintiff ACLU's executive director, Steven Brown agreed: "I think that might be appropriate to count them from where they came from." (Brown Depo. 26:5-6) (Defendant's Exhibit F).

[8] Q. The ACLU is aware of Cranston proposed redistricting, obviously, because you provided testimony. Why is it the ACLU did not bring suit after the 2012 redistricting?
A. We were hopeful that we could get state legislation passed to address the issue.
Q. Are you still hopeful you're going to get state legislation passed?
A. Less hopeful. Less hopeful than I was.
(Brown Dep. 22:8-16) (Defendant's Exhibit F).

legislature has not accommodated their demands, Plaintiffs have evidently sought other avenues to press their agenda.[9]

D. Even if *Evenwel* Requires Voter Strength, the City's Apportionment Meets Constitutional Standards

1. Voter Strength Met

Equal Protection case law has never articulated a standard requiring a legislative body to strive to apportion based on the number of voters in each district. Even though Plaintiffs' filings do not indicate as such, this is the exact standard individual plaintiffs stressed in their own words.

According to Plaintiff Davidson, "[a]s long as the [registered voter] percentage was within the allowed percentage differential, I don't have a problem with it."[10] Each plaintiff in one way or another indicated that his/her true purpose for this suit is related to electoral equality:

> Because for every three people in Ward 6, it takes four people in every other ward to constitute the same votes, the same number of votes. (Davidson Depo. 33: 1-4) (Defendant's Exhibit E).
>
> * * *
>
> I don't think [the ACI Population] should be part of that voting population, because they reside someplace else. You know, they

[9] Despite frequent attempts, bills to reapportion state legislative districts to disburse the ACI Population fail to muster sufficient political will to pass both houses of the General Assembly. This past legislative session, H 5155, Jan. Sess. (R.I. 2015) entitled "Residence of those in Government Custody Act" was proposed, but held for further study and did not leave committee. A similar bill was proposed and passed in the state senate —S 0239, Jan. Sess. (R.I. 2015). However, the legislature has not passed this bill.

The January 2015 General Assembly session was not Plaintiffs' first failed attempt to advance their policy politically. Bills seeking to achieve Plaintiffs' policy agenda have been filed since at least 2012. *See* (H 7090, Jan. Sess. (R.I. 2012); H 5283, Jan. Sess. (R.I. 2013); S 2286, Jan. Sess. (R.I. 2014) and H 7263, Jan. Sess. (R.I. 2014)).

Of note, both S 0239 and H 5155 would also require those incarcerated in a federal facility be counted from where they originally lived as well; Plaintiffs silence regarding the federal Central Falls incarcerated population is deafening.

[10] Q: Would you feel that your vote was worth less than Ward 6's vote if Ward 6, by count, had more registered voters?

A: As long as the percentage was within the allowed percentage differential, I don't have a problem with it. (Davidson, 41: 14-19) (Defendant's Exhibit E)

> have a permanent address someplace else. That's where they vote from. (Flitman Depo 19:17-20) (Defendant's Exhibit B).
>
> That my district . . . we're not being treated fairly. We do not, you know, they're making Ward 6 seem to have a larger voting population than they actually do, because they're counting the people in ward 6 that are in the prison. Where I live, they're counting people that are really using the services in the City, and it's just not equal, because the people that are in the ACI don't use the same services that my family does, including the schools or the libraries, things like that, on a regular basis. (Flitman Depo. 25: 7-17) (Defendant's Exhibit B).
>
> * * *
>
> Q. By [counting the ACI Population in Ward 6], that allegedly decrease your voting power, somebody from Ward 1? A. I agree." (Deposition of Weber at 32: 1-3) (Defendant's Exhibit G).
>
> * * *
>
> Q. How does counting the prisoners in Ward 6 seriously undermine population equality among districts?
> A. It does so by giving Ward 6 a tremendous advantage over other districts, because the 25 percent of the population consists of people who are barred from voting there[.] (Brown Depo. 23:19 – 24:2) (Defendant's Exhibit F).
>
> * * *
>
> A. No, [the ACI Population] would be counted in - - those that can vote and have not lost the vote can go to their own district, and they'll get counted. (Perry Depo. 28:20-22) (Defendant's Exhibit A).

However, Plaintiffs' request to have this Court choose electoral equality is not within the auspices of the judiciary based on Supreme Court precedent. Further, no court has ever chosen electoral equality over representational equality. *See Garza*, 918 F.2d at 774 ("apportionment for state legislatures must be made upon the basis of population").

Even if electoral equality were the rule (and it is not), it is interesting to note that there were more registered voters in Ward 6 than in Ward 3 in the City's redistricting,

notwithstanding the ACI Population in Ward 6. *See* Affidavit of Allan Fung at the City's Exhibit 1. Accordingly, the City met any electoral equality test.

2. The Purpose of the United States Supreme Court Taking up *Evenwel* Presumably Is either to Confirm Total Population or Create a Base for Legislatures to Use Going Forward.

Based on the Supreme Court's acceptance of jurisdiction of the *Evenwel* case, the inference can be made that the Supreme Court is going to make a prospective determination as to whether strict population or some modified basis is the constitutionally acceptable measurement. Under the current law, strict population is the constitutionally accepted methodology.

Despite J. Kozinski's dissent, the Ninth Circuit defined the one-person, one-vote requirement in favor of representational equality, holding that the "apportionment for state legislatures must be made upon the basis of population." *Garza*, 918 F.2d at 774 (emphasis added). In 1996 and 2000, respectively, the Fourth and Fifth Circuits held that local jurisdictions are allowed to choose their own apportionment basis. *See Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996); *Chen*, 206 F.3d at 528. Therefore, the issue likely before the Supreme Court in *Evenwel* is whether the constitution allows the use of total population or requires states to use voter population.

"The one-person, one-vote principle may, in the end, be of little consequence if [the Supreme Court] decide[s] that each jurisdiction can choose its own measure of population. But as long as [the Supreme Court] sustain[s] the one-person, one-vote principle, [the Supreme Court has] an obligation to explain to States and localities what it actually means." *Chen*, 532 U.S. 1046, 121 S. Ct. at 2021, *cert. denied* (Thomas, J. dissenting).

III. CONCLUSION

For the last fifty years, the "one-person, one-vote" principle has allowed local legislatures to choose their apportionment basis and divide their districts among total population. In 2012, following United States Supreme Court precedent, the City redistricted its wards using total population. Accordingly, Plaintiffs' claims are fatally flawed because there is no law requiring the City to deviate from using total population.

Plaintiffs, on the other hand, vociferously seek a policy change. The "facts" they present are not so much facts as much as they are policy arguments; arguments they have failed to successfully advance before the State legislature, which is where they belong.

Having failed to present a legal violation, Plaintiffs' "facts" are not material and do not affect the outcome of this case. Accordingly, judgment must enter for the City and against Plaintiffs.

CITY OF CRANSTON, RHODE ISLAND

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DATED: August 31, 2015

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on August 31, 2015.

/s/ David J. Pellegrino

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