UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Karen Davidson, et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Civil Action No. 1:14-cv-00091-L-LDA
City of Cranston, Rhode Island,	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Karen Davidson, Debbie Flitman, Eugene Perry, Sylvia Weber, and the American Civil Liberties Union of Rhode Island, Inc., respectfully submit this Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint. Plaintiffs assert that their Fourteenth Amendment right to Equal Protection of the laws has been violated by Cranston's 2012 Redistricting Plan, which counts the entire population of Rhode Island's only state correctional complex in Ward 6, leading to a maximum population deviation among true City residents of 28%, well outside the range considered acceptable by the Supreme Court's one person, one vote doctrine. This claim is justiciable and Plaintiffs, as residents of wards other than where the prison is located, have standing to claim that their voting strength has been diluted by the artificial inflation of the voting strength of the actual residents of Ward 6. Such a claim is amply supported by the Complaint's allegations concerning the lack of any meaningful political connection between the prison population and Ward 6 elected officials, allegations which are to be taken as true at this early stage. Hence, Plaintiffs have stated a claim for which relief may be granted and Defendant's Motion to Dismiss should be denied.

I. FACTUAL ALLEGATIONS OF THE COMPLAINT

A. The City of Cranston's 2012 Redistricting Plan counts the entire population of the state's only correctional facility in a single ward.

Following the 2010 Census, the City of Cranston redrew the districts used to elect City Council and School Committee members. Compl. ¶ 1 (referring to the "2012 Redistricting Plan"). Cranston houses Rhode Island's only state prison complex, the Adult Correctional Institution ("ACI"), which is situated in Ward 6. Compl. ¶ 14. As of the 2010 Census, the ACI contained an inmate population of 3,433. Compl. ¶ 15. During the public conversation leading up to Cranston's 2012 redistricting, the members of the City Council were confronted with the question of how and whether to count the incarcerated population of the ACI. At a public hearing on the proposed districting plan, Plaintiff American Civil Liberties Union of Rhode Island, Inc. testified as to the severe distortions that would be created by counting all of the inmates of the ACI in a single ward. Compl. ¶ 24. In spite of this testimony, the Cranston City Council approved a districting plan that includes the prison population in its base population count and counts the entire population of the only state correctional facility in Rhode Island in Ward 6. Compl. ¶¶ 1, 14.

B. The persons incarcerated at the Adult Correctional Institutions are not legally domiciled in Ward 6, cannot vote in Ward 6, and are not true members of the Ward 6 community.

As the factual allegations of the Complaint and Rhode Island law make clear, the overwhelming majority of persons incarcerated in the ACI are not legally domiciled in Ward 6, but remain residents of the communities where they lived prior to their

incarceration. Compl. ¶ 16; R.I. Gen. Laws § 17-1-3.1(a). Incarcerated persons at the ACI did not choose where they would be incarcerated. Compl. ¶ 17. They cannot voluntarily visit or patronize public or private establishments and cannot participate in the life of the Ward 6 community. Compl. ¶ 18. Their children are not even permitted to attend Cranston public schools by claiming residence of the parent at the ACI. Compl. ¶ 19. A significant majority of ACI inmates are not eligible to vote in City or School Committee elections because they have been convicted of a felony. Compl. ¶ 15; R.I. Const. art. II, § 1. The minority that are permitted to vote while incarcerated may not claim the ACI as their domicile for voting purposes, but must instead vote by absentee ballot from their pre-incarceration domicile. Compl. ¶ 15; R.I. Gen. Laws § 17-1-3.1(a). Given all of these well-pleaded facts, it is clear that those involuntarily confined do not have any influence on elected officials in Ward 6 such that they have a meaningful nexus with Ward 6 or can be meaningfully represented by local officials.

C. As a result of including the entire population of the ACI in a single ward, the maximum population deviation between Cranston's six wards is more than 28%.

Without the incarcerated population, Ward 6 has only 10,209 true constituents, compared with 13,000-14,000 constituents in each of the other five wards. Compl. ¶ 21. Persons involuntarily incarcerated in the ACI—who are in no sense true "residents" of Ward 6—constitute a full 25% of the people who make up Ward 6. Compl. ¶ 20. This results in the true maximum population deviation among all Cranston wards being more than 28%. Compl. ¶ 22.

In other words, because Ward 6 has significantly fewer actual residents than any of the other five wards, three Ward 6 constituents enjoy more political power than four similar people across the district line. Due to the distortions in the 2012 Redistricting Plan, the voting strength and political representation of individual residents living in Ward 6 are artificially inflated and the voting strength and political representation of all Cranston residents who do not reside in Ward 6—including the individual Plaintiffs who reside in Wards 1 and 4—are diluted.

II. STANDARD OF REVIEW

To prevail in a Motion to Dismiss, the Defendant must meet the heavy burden of demonstrating that Plaintiffs have completely failed to state a claim for which relief may be granted. Under Federal Rule of Civil Procedure 12(b)(6), "[t]he sole inquiry . . . is whether, construing the well-pleaded facts of the complaint in the light most favorable to the plaintiffs, the complaint states a claim for which relief can be granted." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011). The court must "accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom in the pleader's favor." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quoting *Santiago v. Puerto Rico*, 655 F.3d 61, 72 (1st Cir. 2011)). "[T]he court may not disregard properly pled factual allegations, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Ocasio-Hernández*, 640 F.3d at 12 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

Further, "[i]t is not necessary to plead facts sufficient to establish a prima facie case at the pleading stage." *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 54 (1st Cir. 2013) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)); *see also Twombly*,

550 U.S. at 569-70 (discussing how the plausibility standard it announced does not "run[] counter to" *Swierkiewicz*). Instead, to survive a motion to dismiss, a complaint must only contain "enough facts to state a claim to relief that is plausible on its face." *A.G. ex rel. Maddox*, 732 F.3d at 80 (quoting *Twombly*, 550 U.S. at 570). Assessing plausibility is a "context-specific task" in which the court may "draw on its judicial experience and common sense." *A.G. ex rel. Maddox*, 732 F.3d at 80 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). The First Circuit has admonished courts to avoid "thinking of plausibility as a standard of likely success on the merits," *Sepúlveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2012), and has made clear that in assessing plausibility, a court may not "attempt to forecast a plaintiff's likelihood of success on the merits," *Ocasio-Hernández*, 640 F.3d at 13 (citing *Twombly*, 550 U.S. at 556).

III. JUSTICIABILITY & STANDING

Defendant argues that Plaintiffs have presented a nonjusticiable claim, *i.e.*, that this lawsuit asks this Court to opine on matters best left to the political branches. Mem. of Law in Supp. of the City of Cranston's Mot. to Dismiss, ECF No. 8 ("Def.'s Br.") at 9-13. But the Supreme Court has unequivocally found that the "debasement or dilution of the weight of a citizen's vote," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, is a justiciable claim, *Baker v. Carr*, 369 U.S. 186 (1962). Local districting, not just congressional or state legislative line drawing, can violate the Equal Protection Clause and may also be challenged in court. *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 479 (1968) ("The Equal Protection Clause reaches the exercise of state power however

manifested, whether exercised directly or through subdivisions of the State."); *Kelleher v. Se. Reg'l Vocational Technical High Sch. Dist.*, 806 F.2d 9 (1st Cir. 1986).

Defendant insists that courts must leave districting decisions to the political branches, citing *Burns v. Richardson*, 384 U.S. 73 (1966). Def.'s Br. at 2. But that very case acknowledges that unadjusted "[t]otal population figures may . . . constitute a substantially distorted reflection of the distribution of state citizenry," *Burns*, 384 U.S. at 94, and contains an important qualification: "*[u]nless a choice is one the Constitution forbids*, the resulting apportionment base offends no constitutional bar," *id.* at 92 (emphasis added) (internal citation omitted). Plaintiffs here assert that counting the entire population of a state prison complex in one city council ward, resulting in a maximum population deviation of 28% in city and school board elections, is exactly such a choice that the Constitution forbids. Indeed, to the best of Plaintiffs' knowledge, in no municipality of the entire United States, other than Cranston, Rhode Island, is the state's entire incarcerated population concentrated in just one ward of the municipality.[1]

Defendant goes on to discuss the various types of political equality (*e.g.*, representational equality versus electoral equality) embodied by the one person, one vote doctrine, and claims that the instant case improperly requires this Court to take a position on which type is better for democracy. Def.'s Br. at 10-12. The Court does not need to

[1] In their Complaint, Plaintiffs did not specifically plead that Cranston is the only municipality in the United States in which the entire incarcerated population of the state is concentrated in just one municipal ward. If the Court deems this allegation material to the outcome of this motion, then Plaintiffs respectfully request leave to amend their complaint to include this allegation.

do so.[2] Even accepting Defendant's suggestion that the Court cannot disturb Rhode Island's adoption of "representational equality" as the governing one person, one vote paradigm, "representational equality" at a minimum requires even non-voting constituents to have "more or less equal access to their elected officials." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., dissenting in part). As explained *infra* Part IV.A., it is clear that when all of the Complaint's allegations concerning the lack of any meaningful nexus between the incarcerated population and the Ward 6 community are taken as true, ACI inmates are in no sense comparable to actual Ward 6 constituents, and therefore the actual constituents of Ward 6 enjoy more access to their local City Council and School Committee representative than do other voting or non-voting constituents of Cranston's other five wards.

Defendant next argues that Plaintiffs do not have standing to assert the interests of incarcerated individuals. Def.'s Br. at 15 n.8; 16. This argument is surprising, since Plaintiffs have never even made such a suggestion. Individual plaintiffs Karen Davidson, Debbie Flitman, Eugene Perry, and Sylvia Weber are all residents of the City of Cranston who vote regularly in wards other than that in which the prison complex is situated and are themselves directly harmed by Defendant's districting. Compl. ¶¶ 4-7. Because the prison population has been improperly included in the City's base count, the weight of their votes has been diluted and their right to equal representation, in terms of access to

[2] Although the Court need not decide whether the Equal Protection Clause requires representational equality or electoral equality, it must be noted that neither the Ninth Circuit majority opinion in *Garza v. Cnty. of Los Angeles,* 918 F.2d 763 (9th Cir. 1990) nor Judge Kozinski's partial dissent actually asserts that a court may not require a jurisdiction to adopt one or the other. Indeed, the two opinions diverge on which system a court *should* require a jurisdiction to adopt. *See id.*, 918 F.2d at 775 (jurisdiction should adopt representational equality); *id.* at 785 (Kozinski, J., dissenting in part) (jurisdiction should adopt electoral equality).

their elected officials and their ability to exercise their right to petition their government for redress, has been undermined. Therefore, the individual Plaintiffs undeniably have standing to challenge the denial of Equal Protection resulting from the districting plan adopted by the Defendant. *Baker*, 369 U.S. at 205-06 (noting that the Court had previously "squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.").

Organizational Plaintiff American Civil Liberties Union of Rhode Island, Inc. has approximately 100 members residing in Cranston who are adversely affected by the unequal population of the wards created by the 2012 Redistricting Plan. Compl. ¶ 8. The organization has standing to sue on behalf of its members because the members described have standing to sue in their own right (including the individual plaintiffs described above); the interest in voting equality it seeks to protect is core to the organization's purpose; and neither the claim nor the requested relief requires the participation of its individual members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) ("[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)) (internal quotation marks omitted)).

IV. ARGUMENT

A. Counting the entire population of the state's only correctional facility in a single city ward violates the one person, one vote requirement of the Equal Protection Clause.

In the landmark case of *Reynolds v. Sims*, *supra*, the Supreme Court sought to make real the promise of a democracy in which all have an equal voice. The *Reynolds* Court first highlighted a principle articulated the prior year in *Gray v. Sanders*, 372 U.S. 368, 381 (1963): "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Reynolds*, 377 U.S. at 558. It then applied this principle in a straightforward manner, stating that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. Five years later the Court stated the key animating objectives of the one person, one vote doctrine: "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). The Court has long applied these principles to the drawing of local district lines, not just congressional or state legislative districts, especially since important issues that have a significant impact on residents' daily lives are routinely decided at the county and municipal levels. *See Avery*, 390 U.S. at 481 ("[T]he States universally leave much policy and decisionmaking to their governmental subdivisions. . . . [I]nstitutions of local government have always been a major aspect of our system, and their responsible operation is today of increasing

importance to the quality of life of more and more of our citizens."). And the Court has set as a general guideline that population deviations greater than ten percent are not considered minor deviations and must be justified. *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983).

The guarantees of the Equal Protection Clause extend to Plaintiffs, who deserve equal influence and representation in the City of Cranston, their local democracy, where the issues hit closest to home and have the greatest impact on their daily lives. Using Rhode Island's only state correctional facility to fill out the population of one Cranston ward both undermines the objectives of the one person, one vote doctrine and denies Plaintiffs, who live in neighboring wards, equal standing before their city government.

Defendant suggests that its decision to count inmates as true residents of Ward 6 is dictated by the Rhode Island Constitution and the General Assembly, which require it to base its districting on population rather than voter registration figures (*i.e.*, that the City must adopt "representational equality" rather than "electoral equality" as the model). Def.'s Br. at 11. However, not only does the U.S. Constitution trump state law under the Supremacy Clause, the Rhode Island Constitution and Public Laws provisions Defendant cites do not even apply to municipal redistricting; they apply only to congressional and state legislative redistricting. Def.'s Br. at 2; R.I. Const. art. VII, § 1; R.I. Const. art. VIII, § 1; R.I. Public Laws 2011, ch. 106, § 2. Defendant even admits that it could choose to "apportion its wards under a different population basis than the State." Def.'s Br. at 11.

In any event, Defendant's suggestion that it has pursued a policy calculated to achieve "representational equality" in order to comply with the U.S. Constitution's one person,

one vote requirement, is factually and legally incorrect on its own terms. The concept of representational equality seeks to ensure that both voting and non-voting constituents in one district have approximately equal access to their elected officials as those in other districts so that they may have equal opportunity to discuss local concerns and petition their government for redress. *See Garza*, 918 F.2d at 775 ("Since the whole concept of representation depends upon the ability of the people [including non-voting constituents like non-citizens] to make their wishes known to their representatives, this right to petition is an important corollary to the right to be represented." (internal quotation marks omitted)); *id.* at 781 (Kozinski, J., dissenting in part) (representational equality "assures that constituents have more or less equal access to their elected officials"). But Cranston's policy of counting the entire population of Rhode Island's only state prison complex in Ward 6 undermines representational equality because, as the allegations of the Complaint make clear, persons incarcerated at the ACI do not function as actual residents of the community or as true constituents of local elected officials.

First, Rhode Island law repudiates any notion that, for purposes of voting and representation, incarcerated persons are legal residents of the place where they are involuntarily confined. To the contrary, incarcerated persons are legal residents where they are domiciled, *i.e.*, in their home communities, not at the prison location. Compl. ¶ 16. The statute could not be clearer: "A person's residence for voting purposes is his or her fixed and established domicile. . . . A person can have only one domicile, and the domicile shall not be considered lost solely by reason of absence for any of the following reasons: . . . Confinement in a correctional facility." R.I. Gen. Laws § 17-1-3.1. As a result, ACI inmates convicted of misdemeanors must vote absentee *at their pre-*

incarceration addresses, Compl. ¶ 15, which presents the absurd prospect of an incarcerated person voting for elected officials outside of Ward 6 and yet being simultaneously counted as a constituent of Ward 6 officials.

The Rhode Island statute is consistent with well-established law providing that, for a person to be domiciled in a particular location, both presence and intent to remain are required, and these same elements are absolutely necessary to effect a change in domicile. *See, e.g., Mitchell v. United States*, 88 U.S. 350, 353 (1874) ("Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains."). Incarcerated persons may be physically present at the prison location, but cannot be said to have chosen to be there, Compl. ¶ 17, and certainly have not manifested any intent to remain in the prison location or the surrounding ward beyond their forced confinement. *See People v. Cady*, 37 N.E. 673, 674 (N.Y. Ct. App. 1894) ("The domicile or home requisite as a qualification for voting purposes means a residence which the voter voluntarily chooses, and has a right to take as such, and which he is at liberty to leave, as interest or caprice may dictate, but without any present intention to change it. . . . [The prison] is not a place of residence."); *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991) (noting in the context of federal diversity jurisdiction that "since domicile is a voluntary status, a forcible change in a person's state of residence does not alter his domicile; hence the domicile of the prisoner before he was imprisoned is presumed to remain his domicile while he is in prison").

It is presumably for this reason that the children of persons incarcerated at the ACI are not permitted to attend public schools in Cranston by claiming residence of the parent

at the ACI. Compl. ¶ 19. In counting the ACI population at their prison location for purposes of districting and yet denying inmates the opportunity to vote at their prison location, Cranston seeks to treat them as members of the broader political community for the purposes of allocating representatives but not for the purpose of voting, legal domicile, or any other city service. The City must choose one or the other; it cannot have it both ways.

Second, persons incarcerated at the ACI are in no real sense members of the Ward 6 community. Inmates at the ACI cannot voluntarily visit or patronize public or private establishments in Cranston, such as restaurants, theaters, churches, libraries, or parks; or make use of public services such as public transportation or schools. Compl. ¶ 18-19. In other words, as former U.S. Census Bureau Director Kenneth Prewitt has said, "[i]ncarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration." Kenneth Prewitt, Foreword to Patricia Allard & Kirsten D. Levingston, Brennan Ctr. For Justice, *Accuracy Counts: Incarcerated People and the Census* (2004).[3] Construing these allegations to be true, as the Court must do on a motion to dismiss, such inmates cannot be considered truly "constituent" members of the Ward 6 community. The decisions that Cranston elected officials make about municipal policy do not directly affect the lives of a cohort of people who are in no real sense integrated into the local community or subject to its laws. For instance, those incarcerated at the ACI may not

[3] Available at http://www.prisonpolicy.org/scans/RV4_AccuracyCounts.pdf.

send their children to Cranston public schools, Compl. ¶ 19, and so are not affected by the decisions of the Ward 6 School Committee.[4]

Third, these same allegations, when construed as true, make it more than plausible that persons incarcerated at the ACI do not have any—let alone meaningful—access to or influence over the elected officials of Ward 6, their putative "representatives." As noted, the overwhelming majority of the persons incarcerated at the ACI are not residents of Cranston, much less of Ward 6 of Cranston, and so even if permitted to vote would be required to do so in a different jurisdiction. Compl. ¶ 15. This means that virtually none of the persons incarcerated at the ACI are permitted to vote in City Council or School Committee elections in Ward 6.[5] They are not able to meet with a local representative individually, or to attend City Council meetings. Moreover, any communications or entreaties to elected officials originating from ACI prison cells are likely to fall upon deaf ears. Unlike true nonvoting constituents such as minors or non-citizen aliens who may live with, conduct business with, or come into frequent general contact with actual residents and constituents, *cf. Garza*, 918 F.2d at 775, ACI inmates are not in a tenable position to influence the votes of the local electorate or to make their interests known to

[4] Defendant asserts that "an incarcerated individual does have an interest in roads, infrastructure, utilities, etc., that surround the ACI, particularly if they have friends or family that visit them. This is in addition to their potential interest in local environmental matters, and fire and ambulatory services as well." Def.'s Br. at 15. But these interests are extremely attenuated in nature. People often have an interest in roads or other general services in places where they are not domiciled (commuters, for example). In addition, such putative "interests" do not mean that incarcerated persons actually have equal influence over the Ward 6 representatives when compared to other residents. In any event, Defendant's attempt to litigate a factual matter is inappropriate on a motion to dismiss.

[5] Only the happenstance of a person convicted of a misdemeanor who happened to live in Cranston's Ward 6 prior to conviction would enable that person to vote in the same ward in which she is incarcerated—but, again, not from the prison location, but instead from her previous domicile.

city officials through constituents who share these interests. Due to their confinement and utter lack of influence, inmates at the ACI are in no meaningful sense comparable to the actual residents of Cranston with respect to their access to local elected officials, and hence should not be counted in the base population when the goal is to equalize representation.

In sum, incarcerated persons lack an "enduring tie" to the community that houses the prison in which they happen to be confined. *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992) (reasoning that for the purposes of congressional representation, a person's residence "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place"). One can fairly say that the relationship between ACI inmates and Ward 6 elected officials is characterized by a mutuality of disinterest. An elected official is more likely to consider a person whose legal residence is in the official's district but is temporarily incarcerated somewhere else to be a constituent, than a person who is incarcerated in the official's district but is domiciled elsewhere. *See, e.g.*, Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 Va. J. Soc. Pol'y & L. 229, 302 (2004); Senate Education, Health, and Environmental Affairs Committee, "Representative-Inmate Survey," 2010 Md. S.B. 400 at 22-28.

The Supreme Court's decision in *Evans v. Cornman*, 398 U.S. 419 (1970), helps illustrate how someone's mere presence or non-presence in a jurisdiction does not indicate whether that person is a true constituent for Equal Protection purposes. In *Evans*, the State of Maryland would not allow people living on the grounds of the National Institutes of Health ("NIH") to vote in state and local elections because such

persons technically lived on a federal enclave, not state soil. The Supreme Court, however, pierced through this technicality and listed a host of factors demonstrating that, for all practical purposes, these enclave-dwellers were in fact true constituents of Maryland and as such could not be denied the franchise. The factors the Court considered serve as a useful contrast to highlight the substantially different circumstances of inmates at the ACI: that "there are numerous and vital ways in which NIH residents are affected by electoral decisions," 398 U.S. at 424, including the fact that they are subject to state laws including criminal sanctions, taxes, and requirements to register their vehicles; "they send their children to Maryland public schools," *id.*; and that "[i]n their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as . . . are their neighbors who live off the enclave," *id.* at 426. The persons incarcerated at the ACI have no such connections to local affairs. Local criminal ordinances are irrelevant to the already-confined; they do not pay taxes to the City; they are not permitted to register or drive a motor vehicle; and, as discussed, they may not send a child to local schools and cannot vote in local elections. In every way that people living at the NIH enclave were true residents of the community (and hence entitled to the franchise there), those present in the ACI are not.

Artificially inflating the constituent population of Ward 6 with the ACI population has a real impact on the constituents of the other wards. The one person, one vote doctrine ensures that each citizen's vote is weighted equally regardless of where she happens to reside. By deliberately counting a discrete and substantial population as though they were ordinary constituents of a district, despite the fact that they are legally domiciled in other areas of the state and are not permitted to vote in that district, the

relative weight of the votes of the actual resident voters in that district are increased, and in corresponding fashion, the votes of the voting residents in neighboring districts are diluted.

In sum, because the persons incarcerated at the ACI are not true constituents of Ward 6, Ward 6 has 28% fewer true constituents (about 10,000) than the other wards (13,000-14,000), Compl. ¶ 21, and therefore gives three residents in Ward 6 as much influence as four residents in any other ward. This, at a minimum, presents a plausible case of vote dilution. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) ("To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government"); *Reynolds*, 377 U.S. at 562.

B. Cranston cannot rely conclusively on Census numbers when such reliance would lead to serious distortions that depart from one person, one vote standards

Defendant suggests throughout its brief that its reliance upon the Census is a talismanic shield against any one person, one vote challenge. The Supreme Court has rejected any such suggestion. In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court held that jurisdictions may not conclusively rely upon Census numbers and *are in fact required to adjust the data* to meet the constitutional mandate of a "good-faith effort to achieve absolute equality" in the population of their districts. *Id.* at 321. In that case, the Virginia state legislature assigned all naval personnel "home-ported" at the U.S. Naval Station in Norfolk, VA to the Fifth Senatorial District "because that is where they were counted on official census tracts." *Id.* at 330. But only about 8,100 of 36,700 total personnel actually lived within the Census tract in the Fifth District and "[t]he court had before it evidence that about 18,000 lived outside the Fifth District but within the Norfolk

and Virginia Beach areas, that if true, indicated a malapportionment with respect to such personnel." *Id.* at 331. The Court held that "the District Court did not err in declining to accord conclusive weight to the legislative reliance on census figures."[6] *Id.* at 331. Further, the Court noted that "[t]he legislative use of this census enumeration to support a conclusion that all of the Navy personnel on a ship actually resided within the state senatorial district in which the ship was docked *placed upon the census figures a weight that they were not intended to bear*." *Id.* at 330 n.11 (emphasis added).

Here, conclusively relying upon unadjusted Census data "place[s] upon the census figures a weight that they were not intended to bear." *Id.* at 330 n.11. When imperfections in the data may represent a significant percentage of the overall population base, as they can when drawing districts on a local scale, the data must be carefully assessed so as not to cause significant deviations from population equality. Indeed, recognizing that the unadjusted data may not serve the needs of local communities, and specifically that many communities have a clear desire to end the distorting effects of counting prison populations for the purpose of local districting, the U.S. Census Bureau has, as of the most recent Census, begun to provide a separate data file on "group quarters" populations (which includes prison inmates) in time for jurisdictions to adjust their counts for redistricting purposes. *2010 Census Advanced Group Quarters Summary File*, U.S. Census Bureau (April 2011) at 1-1;[7] *see also* Peter Wagner, *Breaking the*

[6] The *Mahan* Court did refer to the "unusual, if not unique, circumstances in this case," *Mahan*, 410 U.S. at 331, but these are analogous to the circumstances in the instant case—namely that the District Court had actual information that called into question the validity of the use of particular Census numbers for a particular purpose.

[7] Available at http://www.census.gov/prod/cen2010/doc/gqsf.pdf.

Census: Redistricting in an Era of Mass Incarceration, 38 Wm. Mitchell L. Rev. 1241, 1248-49 (2012).

It is not at all unusual or impracticable to disregard Census counts for prison populations in order to preserve constitutionality. Several court decisions have reaffirmed that states and localities are free to adjust the Census count when relying upon the unadjusted count would not accurately reflect the local population and therefore result in significant distortions in representation, *City of Detroit v. Sec'y of Commerce*, 4 F.3d 1367, 1374 (6th Cir. 1993); *Assembly of State of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992), and even required such adjustments when severe distortions would otherwise obtain, *Hartung v. Bradbury*, 33 P.3d 972, 987 (Or. 2001) ("[T]he Secretary of State's decision not to attempt to obtain additional or different reliable data regarding the population of the prison census block was one that no reasonable Secretary of State would make.").

Indeed, at least five states prohibit local governments from counting prison populations at the location of the prison for the purposes of drawing districts regardless of how minor a deviation might be caused by counting them there. Colo. Rev. Stat. § 30-10-306.7(5)(a); Md. Code Ann., Local Government, § 1-1307; Mich. Comp. Laws Ann. §§ 46.404(g) & 117.27a(5); Miss. AG. Op. #02-0060, Johnson, Feb. 22, 2002, 2002 WL 321998; N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(13)(c). Hundreds of counties and municipalities facing the same question have decided to exclude prison populations from their districting counts. *See, e.g.*, Essex Cnty., NY, Resolution No. 144, adopting Local

Law No. 2 of 2012;[8] Orleans County, NY, Local Law No. 3 of 2011.[9] Cranston could have similarly excluded the prison population since, as already explained *supra* Part IV.A., nothing in the Rhode Island Constitution or the laws of Rhode Island requires Cranston to include the ACI population.

Defendants rely heavily on the U.S. District Court for the District of Maryland's decision in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd* 133 S. Ct. 29 (2012), for the proposition that there is no constitutional requirement to adjust Census data.[10] This reliance is misplaced for two key reasons.

First, the main relevant holding of the case is that the State of Maryland may in fact adjust Census data to solve the exact problem Plaintiffs have filed this action to solve.

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[8] Available at http://www.co.essex.ny.us/BdOfSupervisors/Resolutions/20120507_May%202012%20-%20Res%20125-158.pdf.

[9] Available at http://orleansny.net/content/Laws/View/126:field=documents;/content/Documents/File/151.pdf.

[10] In an abundance of caution, Plaintiffs here address two cases turning aside challenges to the U.S. Census Bureau's overall practice of counting incarcerated persons at their prison locations, although these cases were not cited by Defendant: *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3d Cir. 1971); *Dist. of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992). Most likely, Defendant failed to cite them because, while addressing a similar issue, these cases are inapposite. The question in *District of Columbia* of whether the Census Bureau's counting practice is "arbitrary and capricious" under the Administrative Procedures Act, 789 F. Supp. at 1185, given the Bureau's overall mission, administrative structure, and technical restraints, is quite different from the question of whether a local government has the responsibility to adjust Census data when presented with clear evidence that conclusory reliance on that data will result in severe distortions that violate the Equal Protection Clause. And the *Bethel Park* case actually supports the logic for the instant action. "Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature. Therefore, appellants' contention that they will suffer injury because of Pennsylvania's reliance on the federal census for the apportionment of its legislative bodies is properly directed at appropriate state law . . . not the method of enumeration used in the federal census." *Bethel Park*, 449 F.2d at 582 n.4.

The ruling, therefore, is an implicit recognition of the seriousness of Plaintiffs' claim. And, in fact, the *Fletcher* Court notes that "[t]he manner in which counting prisoners where they are incarcerated results in overrepresentation can be seen most clearly at the local level," *Fletcher*, 831 F. Supp. 2d at 893 n.2, and that "[a]ccording to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones," *id.* at 895. The quite different question of whether the State is required to adjust Census data to solve this problem when severe distortions in local representation would otherwise result was not at issue in the case. There was no briefing on the topic or evidence entered specifically for or against this proposition and, hence, *Fletcher* is in no way dispositive of this issue.

Second, the *Fletcher* case addressed these questions in a context where the deviations from equality caused by improperly including prison populations in the base districting count were minimal. "In no case did the adjustments made by the [Maryland Department of Planning] exceed 1% of a district's population." *Id.* at 893. Here, by contrast, a full 25% of Ward 6's "population" is made up of incarcerated persons who are not residents of Ward 6 under state law.[11] Therefore, *Fletcher*'s dicta that "as with prisoners, Maryland is not constitutionally required to make such adjustments," *id.* at 896, cannot be stretched to provide authority for denying Plaintiffs the ability to challenge the much more severe distortions in representation they face here. Plaintiffs here are not arguing that every deviation from equality, no matter how small, caused by including incarcerated

[11] U.S. Census figures are clearly intended for use in apportionment of U.S. Representatives among the states. U.S. Const. art. I, § 2. At this scale, imperfections in the data are much less likely to cause major Equal Protection concerns. The Census Bureau's decision to make early group quarters data available, Wagner, *Breaking the Census*, *supra*, is based in part upon the Bureau's recognition that prison populations raise more significant concerns at the local level.

persons in the population count would necessarily give rise to an Equal Protection violation. Plaintiffs instead argue that Equal Protection is violated by the extreme population deviation caused by including the entire population of Rhode Island's only correctional facility in one city ward—a deviation of 28% that clearly falls far outside of the deviations found acceptable by the one person, one vote doctrine.

C. Defendant's additional reasons for asserting that Plaintiffs have failed to state a claim are wholly unavailing.

Defendant makes a series of additional claims in support of its position that Plaintiffs have failed to state a claim for which relief may be granted, but none of these arguments stands up to scrutiny.

First, Defendant states that "[w]hen apportioning the six wards, the Plan stayed within a ten percent maximum population deviation. Accordingly, the City has met the constitutional burden under the Equal Protection Clause and Plaintiffs fail to state a claim for which relief can be granted." Def.'s Br. at 6-7. This, of course, assumes an outcome in Defendant's favor on the very legal issue to be litigated in the case. The central question in this case is whether counting incarcerated persons at their prison locations for the purpose of drawing political districts serves or undermines the animating principles behind the one person, one vote doctrine. If the Court agrees with Plaintiffs that the practice defeats the core purposes of the doctrine, then the prison population should not be included in the population of Ward 6 and consequently the maximum population deviation is in fact 28%.

Second, Defendant notes, as if significant, that "Plaintiffs do not assert any claim that the City's Plan was in any way driven by or resulted in discrimination of any class" and

makes the unfounded assertion that "[t]he overwhelming case law regarding violations of the 'one person, one vote' principle of equal protection relates to discrimination based on factors such as race." Def.'s Br. at 4. This focus on invidious, race- or class-based discrimination is a red herring. The Supreme Court has never held that racial discrimination is an essential element of a one person, one vote claim. Rather, the standards the Court has laid out have focused upon the extent of deviation from population equality and whether the jurisdiction has made a good faith effort to achieve equality or has a rational, legitimate reason for departing from equality. In the seminal one person, one vote case, for example, the Court wrote that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable," *Reynolds*, 377 U.S. at 577, and that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment *just as much as invidious discriminations* based upon factors such as race or economic status," *id.* at 566 (emphasis added) (citation omitted). *See also Brown v. Thompson*, 462 U.S. 835, 844-45 (1983) ("This case presents an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy. This does not mean that population deviations of any magnitude necessarily are acceptable. Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds'* mandate of fair and effective representation if the population disparities are excessively high."); *Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (declining to create a safe harbor for population deviations under 10% and noting that "the equal-population principle remains the only

clear limitation on improper districting practices, and we must be careful not to dilute its strength"). Discrimination is, of course, one clear example of an illegitimate reason for departing from equality; but it is not the only one. Arbitrariness is another. *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (approving of "such minor deviations only as may occur in recognizing certain factors that are free from any taint of *arbitrariness or discrimination*" (emphasis added)).[12]

Third, Defendant argues that the relief sought by Plaintiffs would deny the prison population representation. Def.'s Br. at 14-15. This argument, however, assumes that incarcerated persons enjoy any meaningful representation by elected officials in the ward where their prison is located. As noted above, Plaintiffs assert that this is not in fact the case and welcome the opportunity to present evidence on this matter at trial. As Defendant's argument relies on an assertion of fact that disagrees with Plaintiffs' factual assertions, it has no place in a Motion to Dismiss.

Fourth, Defendant claims that the relief Plaintiffs seek would have an "[u]pstream [e]ffect" and that Plaintiffs ask the Court to "pretend as if the City's omission of the

[12] Defendant relies on *Perez v. Texas*, No. 11–CA–360–OLG–JES–XR, 2011 WL 9160142 (W.D. Tex. Sept. 2, 2011), but the *Perez* Court misreads *Mahan* as requiring a finding of discrimination. While it is true that the Court mentions the issue of discrimination in the course of reaching its ultimate conclusion, *Mahan*, 410 U.S. at 332, this was not the key issue at stake. The *Mahan* Court stated clearly that "[t]he principal question . . . presented for review is whether or not the Equal Protection Clause of the Fourteenth Amendment likewise permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality in the context of state legislative reapportionment." *Id.* at 320-21 (internal quotation marks omitted). As its standard, the Court affirmed its position in *Reynolds* that "(s)o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy some, deviations from the equal-population principle are constitutionally permissible." *Mahan*, 410 U.S. at 325 (quoting *Reynolds*, 377 U.S. at 579). In other words, the key matter the Supreme Court in *Mahan* was actually deciding was whether Virginia's conclusory reliance on flawed Census data was rational—and the Court concluded unequivocally that it was not.

incarcerated population would have no effect on the State and its apportionment base." Def.'s Br. at 15. No pretending, however, is required, because the City's districting practices are not tied in any way to those of the state. This is highlighted by the fact that the Rhode Island Constitution specifies rules for state legislative districting but is silent on local districting. R.I. Const. art. VII, § 1; R.I. Const. art. VIII, § 1.

Furthermore, a ruling by this Court that it is unconstitutional for the City of Cranston to draw districts that maintain a maximum population deviation of 28% as a result of improperly including the population of the ACI need not have any impact whatsoever on the drawing of state legislative or congressional districts. This is primarily because the population deviations at issue are so starkly different. The 3,433 inmates in the ACI represent approximately 25% of an average Cranston ward and create a maximum population deviation of 28%—well over the acceptable threshold according to established one person, one vote doctrine. The inclusion of these same 3,433 inmates, however, has a smaller impact on maximum population deviations at the state legislative and congressional levels. Thus, a determination that including the entire population of the ACI on one city council ward is impermissible does not in any way predetermine whether the inclusion of this population in the much larger state legislative and congressional districts rises to the level of a constitutional violation.

V. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss should be denied. To the extent that any of the arguments or facts put forward in this Memorandum are deemed to require amendment of Plaintiffs' Complaint, Plaintiffs respectfully request leave to amend said Complaint in lieu of dismissal of this action.

DATED this 31st day of March, 2014.

Plaintiffs,

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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 March 31, 2014.

/s/ Lynette Labinger