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

v.

CITY OF CRANSTON, RHODE ISLAND,

Defendant

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

THE CITY OF CRANSTON'S REPLY TO PLAINTIFFS' OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT

The City of Cranston (the "City") files this Reply to Plaintiffs' Opposition to the City's Motion for Summary Judgment[1] in order to: (a) remind the Court that it is not precluded—after denying the City's Motion to Dismiss—from granting the City's Motion for Summary Judgment; (b) refocus the legal issue at play; and (c) reiterate that the City's 2012 Redistricting Plan aligns with United States Supreme Court precedent.

Additionally, pursuant to LR cv 7(e), the City respectfully requests oral argument on the parties' Cross Motions for Summary Judgment. The City estimates one hour will be required

[1] Because Plaintiffs filed one memorandum of law both in opposition the City's motion for summary judgment and in support of their cross-motion for summary judgment, the City's Reply is limited solely to those arguments directly related to Plaintiffs' Opposition [Doc. No. 20] as provided in LR cv 7(b)(2). Under separate cover, the City opposes Plaintiffs' Cross-Motion for Summary Judgment.

I. ARGUMENT

A. The Court Is No Longer Restrained to Accept Plaintiffs' Allegations

The Court has not ruled upon the ultimate legal issue in this case. First and foremost, the Court was hamstrung at the motion to dismiss phase because it was required to "accept as true all allegations in the complaint and draw all reasonable inferences in the plaintiff's favor." *Davidson v. City of Cranston, R.I.*, 42 F. Supp. 3d 325, 327 (D.R.I. 2014) (citing *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir.1996)). The Court was compelled to consider the value of the ACI Population as alleged by the Plaintiffs. As a result, the Court was forced to render certain value judgments, thus submitting to the "representational versus electoral equality" debate. At this summary judgment stage, the Court is free from entertaining such an analysis.[2]

In its decision on the motion to dismiss, this Court questioned whether the ACI Population "further[ed] the Constitutional goals of either representational or electoral equality." *Id.* at 332. However, the Court need not and should not become mired in Judge Kozinski's academic invention.[3] *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Kozinski, J. dissenting), *cert. denied*, 498 U.S. 1028 (1991). No precedent binds this Court to pass judgment on either the value of the ACI Population or a legislative body's determination to include or exclude the ACI Population. In fact, the U.S. Supreme Court has cautioned against

[2] Contrary to Plaintiffs' dismissal of the holding of *Evenwel v. Abbott*, No. 14-940 (Feb. 4, 2015), the Western District of Texas Court's decision is directly on point. In *Evenwel*, the plaintiffs challenge Texas's apportionment of using total population to apportion its senatorial districts. There "Plaintiffs concede that PLANSl72's total deviation from ideal, using total population, is 8.04%. The crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics." *Evenwel v. Perry*, No. A-14-CV-335-LY-CH, 2014 WL 5780507, at *1 (W.D. Tex. Nov. 5, 2014). Although the *Evenwel* plaintiffs sought to use voter population rather than to exclude certain groups ineligible to vote, the district court still found that because the State's use of total population is not unconstitutional under the Equal Protection Clause, the plaintiffs' theory is contrary to *Burns*. *Id.* at *4. *Evenwel* is directly on point. The City's use of total population is not unconstitutional; therefore, Plaintiffs' theory is contrary to the reasoning in *Burns.*

[3] Note that with all that is made of J. Kosinski's dissent, it is only that—a dissent. No Court has yet to apply his analysis in its holding. Courts that have raised the conundrum resolve to ignore it. These courts have decided that, per the Supreme Court, it is a debate better left for the state legislatures. *Burns, 384 U.S.* at 92.

such judicial determination.[4] Suffice to say, there is no constitutional prohibition against including the ACI Population, nor a requirement to exclude the ACI Population; accordingly, the City's use of total population is entirely constitutional. Moreover, "Plaintiffs are asking [the Court] to 'interfere' with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." *Evenwel*, 2014 WL 5780507 at *4. This Court should "decline the invitation to do so." *Id.*

B. Plaintiffs Misinterpret and Mischaracterize the Legal Issue

This case, as most recently expressed in the City's Motion for Summary Judgment, is not about electoral versus representational equality. Indeed, the whole case turns on one question: whether, after resolving through discovery that the City has not engaged in any invidious discrimination against a protected class or group, the City is constitutionally prohibited from using total population, including the ACI population, to apportion its wards as a matter of law.[5] Once this Court parses through all of Plaintiffs' self-serving and circular arguments, it will find that Plaintiffs cannot point to any binding legal authority to support its contention that including the ACI Population in its apportionment base is constitutionally forbidden.

The City's position is in line with *Burns v. Richardson*, and all the other Circuit Court decisions weighing in on the academic debate, that the issue between electoral versus representational equality is better left to the states to determine. *Burns*, 384 U.S. 73, 92 (1966) ("The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."); s*ee also, Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Garza*, *supra*. The

[4] See *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.").

[5] The City also points out that such a determination would also invalidate state law since the City's apportionment has been adopted by the State General Assembly.

proposition that the judiciary is not the body to determine what groups of people should be counted for redistricting purposes is a fundamental theme of the *Burns* and *Evenwel* progeny, which Plaintiffs completely ignore. To be clear, the City's success does not rest on the Court choosing representational equality over electoral equality. Rather, the existing constitutional framework—which lacks a constitutional prohibition against using total population in the redistricting process—makes the City's case.

Plaintiffs' position, on the other hand, not only ignores Supreme Court precedent, but it is also contradictory. Plaintiffs state that the Court does not need to make a choice between representational and electoral equality. Opposition at 4. Yet, entering that debate is exactly what the Plaintiffs demand of the Court. Plaintiffs unabashedly put forth policy arguments judging the value of the ACI Population—whether members of that population can vote, whether they interact in the community, whether they are free to patronize local businesses and interact with other residents, etc. Opposition at 6. As raised in their Complaint, Plaintiffs' quintessential question is whether the members of the ACI Population are "true constituents." This very question and the presentation of such characteristics and measurements lies at the heart of Judge Kozinski's representational versus electoral equality debate. Although Plaintiffs rebuke the need for the debate, they are undoubtedly eliciting this Court to dive head first into that fray. However, under existing constitutional precedent, this Court must avoid such an evaluation.

Chen v. City of Houston is analogous to the case at hand. 206 F.3d 502 (5th Cir. 2000), In that case, the Fifth Circuit was faced with the "one person, one vote" issue related to the inclusion of the noncitizens in the apportionment base. 206 F.3d at 523. the plaintiffs in *Chen* put forth a nearly duplicate argument:

> Plaintiffs contend that data available to the City indicated that areas with concentrated Hispanic populations had an extremely

> high number of noncitizens. They argue that given this well-known fact, the City should have recognized that total population would not serve as a meaningful proxy for potentially eligible voters—areas with concentrations of Hispanics would have a far larger population than potentially eligible voters.

Id.

Parallel to Plaintiffs' challenge here, the *Chen* Court was faced with a challenge where there was a concentrated number of noncitizen, nonvoters of whom the city had knowledge. *Id.* Despite this knowledge, Houston still apportioned its districts using total population. *Id.* The *Davidson* Plaintiffs make the same argument: the ACI Population is a concentrated group that, according to them, devalues the surrounding wards' powers.

Similar to this Court's initial analysis, the *Chen* Court preliminarily entertained the plaintiffs' argument, gauging the value and impact of the nonvoting, noncitizen group in terms of electoral versus representational equality. *Id.* at 524-26. But the Court ultimately concluded that "in face of the lack of more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the political process." *Id.* at 528. With no change in Supreme Court jurisprudence, there is no basis for this Court to find that the City's strict adherence to total population is unconstitutional.

The City has been consistent all along: a debate between the two "equalities" is neither necessary nor constitutionally appropriate. The debate would only be required **if** there was a constitutional prohibition against using total population. Even if it were somehow determined that the ACI Population contributed to neither electoral nor representational equality, that would in no way create a constitutional prohibition forbidding the legislative body from including the ACI Population in its apportionment. Again, there is no such constitutional prohibition.

Using total population, regardless of the particular groups within that population—be they incarcerated, students, or illegal immigrants—is constitutional. Until Plaintiffs can point to one case holding otherwise, this Court must follow the Supreme Court precedent. Plaintiffs cannot in good faith assert that the ACI Population is any exception because the Supreme Court has specifically referenced the convicted population when holding that courts should refrain from interfering with state decisions. *See e.g., Burns,* 384 U.S. at 92 ("Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.").

C. This Case Simply Requires an Analysis of Numbers

This is a numbers case. Both Plaintiffs and the City have put forth their population numbers and deviation percentages. However, the Court cannot get to Plaintiffs' numbers until the U.S. Supreme Court decides that *counting* the ACI Population is "constitutionally forbidden." Accordingly, Plaintiffs' entire argument is based on a faulty premise.

Plaintiffs cite to *Mahan v. Howell,* 410 U.S. 315 (1973), for the proposition that "in some circumstances jurisdictions **must** adjust raw Census data in order to meet constitutional requirement[s]." Plaintiffs' Opposition at 8. Plaintiffs grossly mislead the Court with regard to the holding of *Mahan* by use of the term "must". Neither *Mahan,* nor any other case, has mandated that a legislature stray from total population. A legislature **may** adjust raw Census data if done for a justifiable and constitutionally-accepted purpose.

Plaintiffs distort decisions, such as *Mahan,* as stating something they do not. The *Reynolds v. Sims* progeny of cases does not **require** states and municipalities to deviate from

total population at all. In fact, time and time again, the courts look back to total population as the initial goal when legislatures, on their own, deviate from total population. *Swann v. Adams,* 385 U.S. 440, 444 (1967) (the *Reynolds* "opinion went on to indicate that variations from a pure population standard **might** be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines.") (emphasis added). As these cases make clear, it is the legislative body's decision to deviate from total Census figures; if they do, then they must do so in a constitutionally reasonable way.

In *Mahan,* for example, the Court was not reviewing a case where the challengers wanted the legislature to deviate from a total population base. Quite the contrary, the legislature had, of its own volition, "decided to diverge from a strict population standard based on legitimate considerations incident to the effectuation of a rational state policy." *Mahan*, 410 U.S. at 325, But the Court "reaffirm[ed] its holding that 'the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.'" *Mahan*, 410 U.S. at 324-25 (quoting *Reynolds*, 377 U.S. at 577). *Mahan*, much like the overwhelming number of "one person, one vote" cases, involve a Court reviewing whether the legislature made a "good-faith effort to achieve absolute equality," *Mahan,* 410 U.S. at 321, when that legislature deviated from a strict population standard.

Here, the Court is presented with the reverse situation. Plaintiffs challenge the City's use of a strict population basis to draw district lines—a concept that, again, has long been recognized as the constitutional standard. Plaintiffs demand that the City deviate from that standard. However, before the City can be required to deviate from total population, Plaintiffs

first must present a legitimate constitutional rationale, without getting into a representational versus electoral equality debate. Since Plaintiffs cannot cite such a prohibition in the first instance, their attack on the value of the ACI Population (including a significant minority population which under Plaintiffs' theory will be counted nowhere in Rhode Island for local representational purposes) is irrelevant.

It is true, as this Court aptly noted, that "[t]he Supreme Court has recognized the shortcoming of relying on Census figures to establish intrastate voting districts, and has never held that reliance on Census figures is constitutionally **required**." *Davidson v. City of Cranston, RI*, 42 F.Supp.3d 331, 330 (D.R.I. 2014) (citations omitted) (emphasis added). All the Supreme Court has done is to allow states the flexibility to deviate from Census figures in a reasonable and good faith way. However, as mentioned *supra*, there is a vast difference between allowing state legislatures to deviate from total Census figures and forbidding state legislatures from using them.

II. CONCLUSION

Simply put, the City's use of total population, including the ACI Population, is constitutionally permissible and is **not** forbidden by the Equal Protection Clause. This being purely a "numbers case," Plaintiffs have failed to put forth any constitutional basis that would **require** the City to deviate from its redistricting scheme. Because no factual issues remain and the law is in the City's favor, the City's Motion for Summary Judgment must be granted.

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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