

**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,)	
)	
vs.)	
)	Civil Action No. 1:14-cv-00091-L-LDA
)	
City of Cranston, Rhode Island)	
)	
Defendant.)	

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

Plaintiffs Karen Davison, Debbie Flitman, Eugene Perry, Sylvia Weber, and American Civil Liberties Union of Rhode Island file this Reply to Defendant's Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

DATED: September 18, 2015

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I. INTRODUCTION

Plaintiffs have put forth clear and consistent legal arguments, which this Court has already endorsed; developed an extensive factual record that substantiates the material allegations in the Complaint; and seek a clear and limited remedy to vindicate their rights to Equal Protection of the laws. Defendant has shifted its legal arguments; has not pointed to evidence in the record that calls Plaintiffs' key facts into material dispute; and has muddied the waters with irrelevant claims about Plaintiffs' requested remedy. This Court should grant Plaintiffs' Cross-Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment.

II. ARGUMENT

a. Plaintiffs Rely Upon the Legal Principles that Prevailed at the Motion to Dismiss Stage

i. Requisite Legal Principles

The City argues that Plaintiffs have not put forth a legal principle that entitles them to judgment as a matter of law. Def.'s Opp. to Pls.' Cross-Mot. Summ. J. 2-4. Plaintiffs' legal arguments, however, have been clear and unchanging since their Opposition to the City's Motion to Dismiss.

- a. The Supreme Court has made clear that jurisdictions may not conclusively rely upon Census data, but must adjust such data if not doing so would produce known distortions. Pls.' Mem. Opp. to Def.'s Mot. Dismiss 17-18. This Court agreed. *Davidson v. City of Cranston, R.I.*, 42 F. Supp. 3d 325, 330 (D. R.I. 2014).
- b. The Supreme Court has identified two potential objectives of the one person, one vote principle: maximizing "electoral equality" or

“representational equality.” Pls.’ Mem. Opp. to Def.’s Mot. Dismiss 9-11.

This Court agreed. *Davidson*, 42 F. Supp. 3d at 327-30. Regardless of which objective Cranston chooses, counting the entire non-resident ACI population in Ward 6 serves neither goal. Pls.’ Mem. Opp. to Def.’s Mot. Dismiss 11-17. This Court agreed. *Davidson*, 42 F. Supp. 3d at 331.

- c. Because in this instance using unadjusted Census data serves no legitimate one person, one vote objective, this is precisely a case in which the City must adjust the data to preserve Plaintiffs’ right to Equal Protection of the laws. Pls.’ Mem. Opp. to Def.’s Mot. Dismiss 17-18, 21. This Court agreed. *Davidson*, 42 F. Supp. 3d at 332.

ii. Relevant Population

The City questions why Plaintiffs have focused on the ACI population rather than other group quarters populations in Cranston such as the juvenile correctional facility, the Eleanor Slater Hospital or the homeless shelter on state grounds, or the student population at Johnson & Wales University. Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 6-7. The clear answer is that only the ACI population is both sufficiently isolated from the community and sufficiently substantial in size as to cause unconstitutional distortions in representation and voting power.¹

¹ Those present at a nursing home, mental health facility, homeless shelter, or university dorm do not face nearly the same mandated isolation from the community, and many may in fact be residents of Ward 6, with the ability to vote from their Ward 6 addresses. At just 159 persons, the incarcerated juvenile population near the ACI grounds is simply not large enough to create material distortions. Cooper Supp. Decl. Ex. B at ¶2 (Pls.’ Ex. 6).

iii. One Person, One Vote Objectives

Defendant appears to have changed its position with respect to its fealty to one person, one vote objectives. The City has continuously argued—up until now—that Plaintiffs’ request for relief requires this Court to choose between two acceptable one person, one vote objectives: representational equality and electoral equality; and that this choice is a decision the Supreme Court has deliberately left to the political process. Def.’s Mem. Supp. Mot. Dismiss 9-13. Now, the City appears to be arguing that it did not seek to implement any recognized objective when drawing its districting plan—neither representational equality, electoral equality, nor (presumably) any other acceptable objective. Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 3 (“[T]he City’s Reply refutes either goal because no Supreme Court decision has articulated either standard is constitutionally required.”). Needless to say, a defense based on the idea that the City cannot explain its plan on either theory is no defense. In fact, the only possible basis for defending the City’s plan is that it pursues representational equality, as the City has argued all along and still implicitly recognizes through its conclusory statement that “adhering to strict population is constitutionally permissible.” Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 3. Plaintiffs’ response, and the basis of this lawsuit, remains the same: the counting of the ACI population in Ward 6 is “justified by neither the principle of electoral equality nor of representational equality.” *Davidson*, 42 F. Supp. 3d at 331.

Further, Defendant mischaracterizes Plaintiffs’ position regarding one person, one vote objectives. In its Opposition, the City points the Court to various inadmissible testimony in which counsel for the defense asked individual, primarily non-lawyer plaintiffs to give their legal opinions about this case. Def.’s Opp. to Pls.’ Cross-Mot.

Summ. J. 15-16. Fact witnesses, however, do not provide legal opinions. Fed. R. Evid. 701, 704(a). Based upon this inadmissible and irrelevant testimony, the City then asserts that Plaintiffs “request to have this Court choose electoral equality,” even though it concedes that “Plaintiffs’ filings do not indicate as such.” Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 16, 15. Plaintiffs, of course, have consistently maintained that this lawsuit forces no choice between different one person, one vote objectives because Cranston’s decision to count the entire population of the only state-run prison in one city ward serves neither electoral nor representational equality.

b. Defendant Fails to Raise a Material Factual Dispute

i. Plaintiffs’ Undisputed Facts are Material

Defendant asserts that Plaintiffs “fail to put forth any material facts.” Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 4. This, of course, is a legal argument based upon the spurious claim that Plaintiffs “lack a legal basis for their claim.” *Id.* Were Defendant’s claim valid, this Court would have granted the City’s Motion to Dismiss.

In fact, Plaintiffs have asserted undisputed material facts demonstrating that the ACI population is typically present at the prison location for a short period of time and is effectively isolated from the surrounding Ward 6 community; the vast majority of the ACI population is not eligible to vote for Ward 6 officials; these officials have made little effort to contact or engage with persons incarcerated at the ACI, in contrast to widespread engagement with actual constituents throughout the ward and City; and that without improperly counting the ACI population, Cranston’s current city wards fail to meet established population equality standards. Statement of Undisputed Facts ¶¶ 11, 16-28, 33-50, 69-71.

ii. Plaintiffs' Undisputed Facts Remain Beyond Dispute

Defendant picks nits with various Undisputed Facts asserted by Plaintiffs, but fails to raise any material dispute.

a. Witness testimony

Defendant disputes Plaintiffs' characterization of certain witness testimony, but fails to raise any serious questions about the essential factual claims at issue.

- i. Undisputed Fact 15: The City disputes the fact that its own expert witness considered splitting the ACI into multiple state House districts “a reasonable course of action.” Mr. Brace’s testimony speaks for itself, and either way his view about what course of action is reasonable is not dispositive. Brace Dep. 139:17 – 142:13, 155:18 – 158:6 (Pls.’ Ex. 10).
- ii. Undisputed Fact 20: The City disputes that using median figures is the most accurate way to calculate average length of stay for persons sentenced and incarcerated at the ACI. Mr. Cooper explains in his deposition that using mean versus median measures would make little difference in the analysis. Cooper Dep. 43:18 – 45:4 (attached hereto as Pls’ Ex. 27).
- iii. Undisputed Fact 21: The City disputes that using median figures is the most accurate way to calculate the average length of stay for persons awaiting trial at the ACI. Further the City notes that Fact 21 “does not identify whether these persons held awaiting trial are also those who are incarcerated for longer sentences that are transferred to the intake center during trial” and suggests that this fact therefore has no value.

- a. Mr. Cooper explains in his deposition that using mean versus median measures would make little difference in the analysis. Cooper Dep. 43:18 – 45:4 (Pls.’ Ex. 27).
 - b. The City’s second objection is not clear. Undisputed Fact 20 clearly states that the median length of stay at the ACI of incarcerated persons who have been sentenced is 99 days. Cooper Suppl. Decl. Ex. C ¶ 26 (Pls.’ Ex. 9); Cooper Dep. 43:18 – 45:4 (Pls.’ Ex. 27).
- iv. Undisputed Fact 28: The City notes that the Myers Affidavit does not say specifically that persons incarcerated at the ACI cannot visit certain community institutions or make use of community facilities. The Myers Affidavit states clearly, however, that “other than to attend one of the various courts or work release approved employment there are no opportunities for incarcerated persons to leave the grounds of the ACI (except for home confinement) that are not described here.” Myers Aff. ¶2 (Pls.’ Ex. 15). Work details are strictly supervised and provide no opportunity for incarcerated persons to interact with the public. Reis Aff. ¶2 (Pls.’ Ex. 16). “Furloughed inmates are transported to the relevant destination with no stops permitted.” Reis Aff. ¶4 (Pls.’ Ex. 16). Given this combination of facts, it is not possible for incarcerated persons to visit Ward 6 accommodations or use City facilities.
- v. Undisputed Fact 30: The City states that its expert did not assert that no more than 15 persons are registered to vote at addresses that the Rhode Island Department of Corrections considers part of the ACI. The

Undisputed Fact, however, correctly asserts that Mr. Brace was unable to identify more than 15 persons who are registered to vote at addresses confirmed by the RI DOC to be part of the ACI. Brace Dep. 83:10 – 91:9 (Pls.’ Ex. 10).

- vi. Undisputed Fact 31: The City states that its expert did not assert that no more than 10 persons are registered to vote on state grounds at addresses that may be part of the ACI. The undisputed fact, however, correctly asserts that Mr. Brace was unable to identify more than 10 persons who are registered to vote on state grounds at addresses that may be part of the ACI. Brace Dep. 83:10 – 89:18 (Pls.’ Ex. 10).
- vii. Undisputed Fact 37: The City disputes that Councilman Favicchio indicated that he does not advocate or consider the views of the ACI population. Plaintiffs, however, did not assert anything about Mr. Favicchio’s own views. Rather, Plaintiffs asserted more precisely that Councilman Favicchio did not talk directly to persons incarcerated at the ACI in order to be able to ascertain their views in order to advocate on their behalf. Mr. Favicchio testified that he never made any effort to talk directly to persons incarcerated at the ACI in order to determine their interests. Favicchio Dep. 33:17 – 33:22 (Pls.’ Ex. 21).

b. Impact and burden on City

The City claims that the impact of the ACI population on Ward 6 “is enormous.” Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 11. Despite this grand claim, the actual impact described by the City—largely the need for sufficient fire and police services—is both

minimal and largely unrelated to the ACI population. A very small percentage of total police and fire service calls in Cranston are related to the state grounds; and even of those calls, the vast majority are connected not to the ACI population, but rather to facilities that house persons not at issue in this lawsuit. Statement of Undisputed Facts ¶¶ 56-59 and accompanying Exhibits. Further, it is undisputed that even this minimal impact is the responsibility of the City as a whole, not solely of Ward 6 residents or officials.

Statement of Undisputed Facts ¶¶ 53-54; 60-62 and accompanying Exhibits. Hence, the (minor) impact provides no rationale for counting the entire ACI population in Ward 6.

Defendant further claims that it is not fully compensated for the ACI's impact on the City. Def.'s Opp. to Pls.' Cross-Mot. Summ. J. 11. This is largely based upon the claim that the City would have collected more tax revenue if the state grounds were not present in Cranston. *Id.* The City's claim may or may not be true, but it is largely irrelevant. First, the amount of tax revenue the City receives or forgoes based upon the presence of the ACI buildings is in no way tied to the actual population of the ACI. Def.'s Reply to Pls.' 2d Interrog. No. 13 (Pls' Ex. 19). Hence from this perspective the persons that comprise the ACI population are providing neither benefit nor burden.² Next, even if the ACI's alleged cost to the City was in any way connected to the facility's population, this cost does not accrue directly to Ward 6 in any way. Def.'s Resp. to Pls.' Statement Undisp. Facts No. 64. Even if the City could plausibly argue that the costs of the ACI justify counting the ACI population in the City at large (and it cannot), this would certainly not justify the distortions created by counting the entire population in Ward 6.

² The City has not attempted to dispute the fact that the fire and police services provided to actual incarcerated persons at the ACI are a negligible proportion of total fire and police services rendered in Cranston as a whole.

c. Incarcerated persons who may vote

The City points out that only a minority of persons incarcerated at the ACI have been stripped of their right to vote, as opposed to the majority assumed and alleged in the Complaint. Def.'s Opp. to Pls.' Cross-Mot. Summ. J. 6. Discovery did later confirm that a minority, not a majority, of persons incarcerated at the ACI are disenfranchised. Given that those incarcerated persons who may vote must do so from their home address, not the prison location, this only strengthens Plaintiffs' claim since a) it remains undisputed that the overwhelming majority of persons incarcerated at the ACI are not eligible to vote in Ward 6, where the City has chosen to count them; and b) even more incarcerated persons than expected are actually eligible to vote in their home communities, increasing the absurdity of counting them in Cranston's Ward 6. Def.'s Resp. to Pls.' Statement Undisp. Facts Nos. 16, 17.

d. Recidivism

Defendant asserts that Plaintiffs do not address the rate of recidivism at the ACI. Def.'s Opp. to Pls.' Cross-Mot. Summ. J. 6. Yet, the City provides no evidence that any portion of the ACI population spends, or has spent, a substantially longer portion of time in Ward 6 than Plaintiffs have documented in discovery. In the absence of contrary evidence, the mere mention of the concept of "the well-known phenomenon of prisoner recidivism" does not create a material factual dispute. *Id.*

e. Registered voters in various wards

Defendant notes in its Opposition that "there were more registered voters in Ward 6 than in Ward 3 in the City's redistricting." Def.'s Opp. to Pls.' Cross-Mot. Summ. J. 16. This assertion is immaterial because in choosing to draw districts based upon unadjusted

Census population data the City has clearly chosen not to pursue the goal of electoral equality. If the City were pursuing this goal, it would be doing so quite poorly.

According to figures provided by the City, the maximum deviation among voters between wards is 29%.³ Def.'s Resp. to Pls.' 1st Set Doc. Req. No. 2 (Bates 00019) (Pls.' Ex. 25). Further, counting the ACI population is not helpful on this front. Ward 6 has substantially fewer registered voters (at least 1000 fewer) than wards 1, 2, 4, or 5. *Id.* Ward 6 would certainly have more registered voters (and therefore be closer to parity with four of the other five wards) if its resident population was truly equal to the other wards and not artificially inflated by the ACI population.

f. Feasibility of Plaintiffs' Illustrative Plan

Defendant disputes, without evidence, the feasibility and lawfulness of Plaintiffs' Illustrative Plan for redistricting Cranston's city wards without the distortions created by improperly counting the non-resident ACI population. The City points to the fact that the summary paragraph of Mr. Cooper's declaration refers to a non-existent Cranston Ward 7 in an attempt to question the Illustrative Plan. Def.'s Resp. to Pls.' Statement Undisp. Facts No. 51. First, this errant reference is clearly a typographical error; as is perfectly clear from Figure 5 in his declaration, Mr. Cooper was referring to Ward 5, not a

³ The City has not asserted the voter-per-ward figures as an undisputed fact supporting its motion, which may be because voter registration rolls are of questionable reliability over the course of a decade, even as a measure of who is eligible to vote in a district. *See Burns v. Richardson*, 384 U.S. 73, 92-93 (1966). The very document the City points to, for example, notes that the "number is constantly changing." Def.'s Resp. to Pls.' 1st Set Doc. Req. No. 2 (Bates 00019) (Pls.' Ex. 25). So, the fact that Ward 3 appears to have fewer registered voters may be a quirk in the data. Nonetheless, as noted above this purported fact is entirely immaterial and so it is not necessary to parse the data further. The City is clearly not pursuing electoral equality; its expert, Mr. Brace, made no effort to argue that registered voter count would be an appropriate baseline for redistricting; and hence his belated offering by Defendant's counsel should be disregarded.

mythical Ward 7. Cooper Decl. Ex. C ¶34, Fig.5 (Pls.’ Ex. 9). Second, these mistaken references relate to the existing 2012 Redistricting Plan, *not at all* to Plaintiffs’ Illustrative Plan, and hence any inadvertent confusion is wholly irrelevant to whether the latter is legal and feasible. Finally, the feasibility of Plaintiffs’ Illustrative Plan is only tangentially relevant since Plaintiffs do not ask this Court to impose the Illustrative Plan as a remedy, but rather request that the Court order Defendant to propose its own feasible and legally acceptable plan.

g. Legal arguments as factual claims

Defendant makes a set of legal arguments dressed up as factual claims.

- i. Undisputed Fact 11: Defendant states that “[i]t is an undisputed fact that there is no law or case that would require the City to discount the ACI Population.” Def.’s Resp. to Pls.’ Statement Undisp. Facts No. 11.
- ii. Undisputed Fact 16: Defendant disputes the application of a Rhode Island statute. Def.’s Resp. to Pls.’ Statement Undisp. Facts No. 16.

c. **The City of Cranston Can Restore Plaintiffs’ Rights to Equal Protection of the Law**

Defendant argues that Plaintiffs seek to have incarcerated persons counted in their home communities, which is an outcome the City cannot control. Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 14. It is true that Plaintiffs in no way “attempt[] to devalue the ACI Population” or ask this Court to opine on “the value of a person in the ACI population.” Def.’s Opp. to Pls.’ Cross-Mot. Summ. J. 3, 12. In fact, to the extent that persons incarcerated at the ACI actually reside in the City of Cranston we encourage the City to count them in their ward of residence for districting purposes.

Rather, Plaintiffs seek only to vindicate their own rights to equal representation in their local democracy, the City of Cranston. This case is simply, and only, about whether Plaintiffs' local government may use the temporary presence of an isolated incarcerated population in Ward 6 to draw districts in a manner that serves no known conception of the one person, one vote principle and are thereby distorted by any definition.

III. CONCLUSION

In its Opposition to Plaintiffs' Cross-Motion for Summary Judgment, the City of Cranston raises no compelling legal arguments this Court has not already addressed in its ruling at the Motion to Dismiss stage, and fails to introduce any material factual dispute.

For the foregoing reasons, this Court should grant Plaintiffs' Cross-Motion for Summary Judgment, deny Defendant's Motion for Summary Judgment, enter declaratory judgment for Plaintiffs on all counts, enjoin Defendant from holding further elections under the current ward districting plan, enter a scheduling order providing Defendant 30 days to propose a new districting plan that satisfies constitutional requirements, and establish a schedule for adoption of a Court-ordered districting plan in the event Defendant fails to propose a new plan that satisfies constitutional requirements.

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).

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