19-576-cv

To Be Argued By:
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NAACP CONNECTICUT STATE CONFERENCE, JUSTIN FARMER, GERMANO KIMBRO, CONLEY MONK, JR., GARRY MONK, and DIONE ZACKERY,
Plaintiff-Appellees

v.

DENISE MERRILL AND DANNEL MALLOY,
Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT-APPELLANTS DENISE MERRILL AND DANNEL MALLOY

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On June 27, 2019, the Supreme Court confirmed what already was the law under *Evenwel*, *Gaffney*, *Burns*, and the consistent body of Circuit Court decisions applying those cases: One person, one vote claims are a simple "matter of math." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). Absent allegations of intentional discrimination—which Plaintiffs do not make—the Court's only role is to ensure that the population disparities between districts do not exceed 10% when measured by the total population baseline that the legislature chose. Beyond that, the Court has no business "assuming political . . . responsibility" for the redistricting process by overruling the legislature's decision based on the Court's "own political judgment" about whether or where particular groups are likely to receive "fair" and effective representation. *Id.* at 2498, 2499-2501. Such judgments involve "fundamental choices" about the "nature of representation" with which courts have "no constitutionally founded reason to interfere." *Gaffney v. Cummings*, 412 U.S. 735, 746 n.12, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Plaintiffs' claim is insubstantial on that basis, and thus barred by the Eleventh Amendment.

But *Rucho* did more than just confirm that Plaintiffs' claim is insubstantial for purposes of *Ex Parte Young*. It also made clear that Plaintiffs' claim that prisoners do not receive "fair and effective" representation—which is the entire basis for Plaintiffs' claim in this case—presents a nonjusticiable political question that federal courts lack subject matter jurisdiction to resolve. That is an independent jurisdictional bar that this Court must consider separate and apart from the Eleventh Amendment. And it is yet another reason why Defendants cannot, and should not, be required to litigate Plaintiffs' baseless claim in this case.[1]

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[1] Defendants did not have the benefit of *Rucho* when they filed their initial brief, and therefore did not expressly label the issue as one of justiciability at that time. Nevertheless, Defendants made essentially the same justiciability arguments in their opening brief that they make now under *Rucho*. *See* ECF No. 26 at 31-36 (arguing that Plaintiffs' standard is "unworkable," and that there are no "judicially manageable standards" to guide it). Because justiciability goes to the Court's jurisdiction and is a pure question of law that does not require further factual development, the Court can and must resolve it in the context of this appeal. *See, e.g.*, *Yong Qin Luo v. Mikel*, 625 F.3d 772, 775 (2d Cir. 2010); *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir. 2000). That is especially true given that Plaintiffs were aware of both *Rucho* and Defendants' arguments when they filed their Appellee brief. *See* ECF No. 92 at 26, 36; *see also id.* at 27 (addressing Defendants' argument about the lack of judicially manageable standards).

I. PLAINTIFFS' CLAIM PRESENTS A NONJUSTICIABLE POLITICAL QUESTION UNDER *RUCHO*

Plaintiffs do not invoke any of the grounds that the Supreme Court has identified as a justiciable basis for courts to interfere with the legislature's redistricting decisions. Specifically, they do not allege a racial classification of the sort raised in racial gerrymandering claims, which federal courts are uniquely situated to address. *Rucho*, 139 S. Ct. at 2495-96, 2502. Nor do they claim that Connecticut's map exceeds the 10% threshold when measured by the total population baseline that the legislature chose, which is the limited and justiciable "math" inquiry that applies under one person, one vote. *Id.* at 2501; *see infra* at 19-26; ECF No. 26 at 14-18, 27-31.

Rather, Plaintiffs go much farther and ask the Court to second guess and overrule the legislature's chosen total population baseline, to unilaterally dictate a new one that Plaintiffs prefer, and to then use ***that*** judicially imposed population baseline to manufacture the very 10% violation that Plaintiffs complain of. Thus, Plaintiffs' entire claim hinges on the Court's ability to impose their preferred population counting method for prisoners, as without it Plaintiffs concede there is no violation of one person, one vote.

As discussed below and in Defendants' opening brief, there is no "constitutionally founded reason" that even authorizes the Court to undertake this "serious intrusion" into the legislature's "exclusive[]" authority over the redistricting process. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Burns*, 384 U.S. at 92; *see infra* at 27-31; ECF No. 26 at 19-26. But even if the Court had such authority, Plaintiffs also do not identify a justiciable basis upon which the Court could exercise it.

Specifically, Plaintiffs' sole basis for overruling the legislature's chosen population base is their claim that prisoners do not receive "fair," "effective" or "equitable" representation from legislators in the district where they are incarcerated. *See* ECF No. at 4-5, 7, 18, 23, 25-27. *Rucho* expressly held that such a claim presents a nonjusticiable political question because there are no clear, precise or judicially manageable standards for determining what "fair" representation even means, much less for determining how much perceived unfairness is constitutionally permissible. *Rucho*, 139 S. Ct. at 2498-502. Plaintiffs' proposed standard is indistinguishable from the "fair" representation

standard that the Supreme Court rejected in *Rucho*, and it is nonjusticiable for the same reasons.[2]

A. Under *Rucho*, A Legal Standard That Asks Whether Individuals Receive "Fair" Political Representation Presents A Nonjusticiable Political Question

In *Rucho*, the Supreme Court addressed the question of whether so-called "partisan gerrymandering" claims are justiciable. In concluding that they are not, the Court made clear that it is "vital" for litigants to identify clear legal standards to "meaningfully constrain the discretion of the courts" in this area, as without such limitations "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility" for a "process that is

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[2] Plaintiffs correctly point out that one person, one vote claims—***as they exist under current law***—are justiciable. ECF No. 92 at 36. As discussed below, the reason the Supreme Court has found such claims to be justiciable is because they are limited to a simple "matter of math," and because they ***do not*** require or permit the standardless and inherently political judgments that are the basis for Plaintiffs' claim here. *Rucho*, 139 S. Ct. at 2501. Indeed, it is precisely because of that limitation that Plaintiffs' claim is insubstantial as a matter of law for purposes of *Ex Parte Young*. *See infra* at 19-31. By asking the Court to deviate from that established legal framework and incorporate their "fair and effective" representation arguments into the one person, one vote analysis, Plaintiffs go far beyond the clear, precise and limited inquiries that the Supreme Court has found to be justiciable under one person, one vote, and leap headlong into the realm of nonjusticiable political questions that *Rucho* prohibits.

the very foundation of democratic decisionmaking." 139 S. Ct. at 2498, 2499-500, quoting *Vieth v. Jubelirer*, 541 U.S. 267, 291, 306-08 (2004) (opinions of Scalia, J and Kennedy, J). To that end, the Court held that claims seeking to invalidate a State's legislative map are justiciable only if they are based on "judicially discernible and manageable" standards. *Rucho*, 139 S. Ct. at 2498. To satisfy that requirement, the standards "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'" *Id.*, quoting *Vieth*, 541 U.S. at 306-08 (opinion of Kennedy, J.).

Applying that requirement to the partisan gerrymandering claims before it, the Supreme Court held that those claims were nonjusticiable because there are no judicially discernible and manageable legal standards for resolving them. In doing so, the Court categorically rejected the challengers' argument that such claims could be resolved using a standard that asks whether people in the challenged district receive "fair" representation. The Court did so for three reasons, all of which are directly applicable here.

As an initial matter, the Court first held that there is "[no] basis for concluding" that federal courts are even "authorized" to second guess the legislature's redistricting decisions out of a desire to ensure "fair" representation. *Id.* at 2499. As discussed more fully below, that supports and confirms Defendants' argument under *Gaffney*, *Burns* and the consistent line of Circuit Court decisions applying those cases, all of which hold that courts have "no constitutionally founded reason to interfere" with such judgments absent a showing of intentional discrimination. *Gaffney*, 412 U.S. at 746 n.12, 749; *Burns*, 384 U.S. at 92; *Davidson v. City of Cranston*, 837 F.3d 135, 141-44 (1st Cir. 2016); *Chen v. Houston*, 206 F.3d 502, 527-28 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1225, 1227 (4th Cir. 1996); *see infra* at 27-31.

Second, not only do federal courts lack constitutional authority to interfere with such legislative choices out of a concern for fairness, *Rucho* held that they also are not competent or "equipped" to do so. 139 S. Ct. at 2499. That is because there is no "clear, manageable and politically neutral" test for determining what "fair" representation even means, and such a standard therefore does not "meaningfully constrain" the court's discretion in any way. *Id.* at 2499-500, quoting *Vieth*, 541

U.S. at 291. Indeed, the Court discussed at length how "fair" representation could mean different things to different people, for any number of perfectly legitimate reasons. *Id.* at 2500. There are no judicially manageable standards for choosing which of those "visions of fairness" should prevail, much less for clearly and precisely describing what the prevailing vision is and how compliance with it should be measured. *Id.* Rather, such judgments "pose[] basic questions that are political, not legal," and any judicial decision about them would be "an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." *Id.*, quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Third, even if courts could define "fair" representation and figure out how to measure it, the Court held that such claims still would be nonjusticiable because the "determinative question" is not what fair representation means, but rather, how much deviation from perfect fairness is constitutionally permissible. *Id.* at 2501. But federal courts do not have any clear or precise standards for making that determination either. Having conjured up their own criteria for defining and measuring "fair" representation, therefore, courts would be

left to arbitrarily weigh, in their own discretion, "how much deviation from each [of those criteria] to allow." *Id.* Such "questions are unguided and ill suited to the development of judicial standards . . . ." *Id.* (citations omitted; quotation marks omitted).

B. Plaintiffs' "Fair And Effective" Representation Standard Is Indistinguishable From The "Fair" Representation Standard In *Rucho*, And It Is Nonjusticiable For the Same Reasons

As previously discussed, Plaintiffs' entire claim hinges on the Court creating a new legal standard that not only requires the Court to dictate where states must count certain individuals and population groups for redistricting purposes, but to do so based exclusively on the Court's own political judgment about whether and where those groups are most likely to receive "fair," "effective" or "equitable" political representation. *See* ECF No. at 4-5, 7, 18, 23, 25-27. Contrary to Plaintiffs' assertion in their brief, that standard is not limited to prisoners because they are "different from every other kind of temporary resident." ECF No. 92 at 27-28 (quotation marks omitted). To the contrary, regardless of how any judicial inquiry under Plaintiffs' proposed standard may turn out for different population groups, the standard itself indisputably would apply on a case-by-case basis to ***all***

groups and individuals covered by ***every*** legislative map. That includes other groups of temporary residents such as college students, military personnel, transient workers, migrants, and individuals residing in the district on temporary immigrant visas. To be justiciable, therefore, Plaintiffs' proposed standard "must be grounded in a 'limited and precise rationale'" that covers all of those potential future applications, and not just the specific circumstance of prisoners at issue here. *Rucho*, 139 S. Ct. at 2498, quoting *Vieth*, 541 U.S. at 306-08. The standard that Plaintiffs propose does not even arguably meet that high bar, whether for prisoners ***or*** for any of the other potentially limitless population groups one could imagine.

1. Plaintiffs Provide No Clear, Precise And Limited Rationale For Defining What "Fair And Effective" Representation Means, Or How To Measure It

Like the plaintiffs in *Rucho*, Plaintiffs do not provide any "clear," "limited and precise" or "judicially manageable" rationale for defining what fair representation even means—whether for prisoners or anybody else—much less for determining how to measure it. *Rucho*, 139 S. Ct. at 2498.

As an initial matter, Plaintiffs suggest that whether individuals receive fair representation depends on whether they can vote for the representative in the district, and whether they have equal "voting strength" compared to people in other districts. *See* ECF No. 92 at 4, 10-11, 16 n.7, 19. For the reasons discussed in Defendants' opening brief—which Plaintiffs do not attempt to refute—*Evenwel* already rejected that argument because there is no "voter-equality mandate in the Equal Protection Clause." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126 (2016); *see* ECF No. 26 at 14-16, 36-37. For purposes of one person, one vote, therefore, it makes no difference what an individual's voting strength is, or whether they have "the right to participate in the selection of the[] representatives" in the district. *Id.* at 1128-32.

Beyond their baseless "voter-equality" argument, Plaintiffs identify a number of other factors that courts conceivably could consider. But they provide no coherent explanation to demonstrate how those factors are even relevant to the analysis. Nor do they identify any clear or precise guidelines for courts to measure whether the criteria have been met, or to weigh those criteria against any of the countless other factors that conceivably may guide the Court's analysis.

First, Plaintiffs suggest fair representation could be measured by the extent to which each individual has a "meaningful connection," "allegiance" or "enduring tie[s]" to the district where they are counted. ECF No. 92 at 26, 30. But why are those things relevant? A person who lives in a district for a short time and who cares nothing for it certainly can still be fairly represented by the legislator in the district while the person resides there.

More fundamentally, what does it even mean for a person to have a "meaningful connection," and how should courts measure whether the connection exists and is constitutionally sufficient? Does it depend on how long a person has lived in a district, or how long they intend to stay there in the future? Or does it instead turn on how much a person likes a particular district and the people in it? Or perhaps it depends on how deeply the person has integrated their life into the fabric of a particular community? Or maybe it turns on where the individual has family or business ties? And regardless of which of these considerations control, how should courts determine where a person should be counted when the person has "ties" and "connections" to more than one district? Plaintiffs provide no answers to any of these questions.

Second, Plaintiffs suggest that whether individuals receive fair representation could depend on the extent to which they patronize establishments and use local services and infrastructure in the district. ECF No. 92 at 4-5. But Plaintiffs again fail to explain how that is even relevant to determining whether the individual receives fair and effective political representation from the legislator in the district. And they cannot plausibly do so, as legislators can of course fairly represent individuals regardless of whether they can or do use such things.

In any event, even if this criterion were relevant, the same questions arise: How much do individuals have to use the services and infrastructure in a district before the legislature constitutionally can count them there? Does it depend on how many different services or pieces of infrastructure the person uses, or is it the frequency that controls? Or maybe it depends on how important the services are to the person's life? Can courts consider any and all services and infrastructure that individuals conceivably may use in the district, or just the few that Plaintiffs cherry pick in their papers? Are some services more important than others in the constitutional analysis, and if so, how do courts distinguish and measure their relative importance?

Does it matter whether a person voluntarily chooses not to use the services or is affirmatively prohibited from doing so? If the latter, can or should courts assess the reason that a person is unable to use services or infrastructure in the district in determining whether the person receives "fair and effective" representation? And if a person routinely uses services and infrastructure in multiple districts, how should courts measure and weigh those competing uses to determine where the person should be counted? Plaintiffs again provide no clear, precise or even coherent rationale for answering any of these questions.

Third, Plaintiffs suggest that maybe fair representation can be measured by the extent to which each person has an "important stake" in local policy debates in the district. ECF No. 92 at 25-26. But the same questions abound, again with no clear or precise answers: What constitutes an "important stake," how should courts measure it, and what level of importance is constitutionally required? Does it depend on how many different policy debates the person is interested in? The intensity of the interest? The relative "importance" of the issue in the person's life? Or maybe what matters is the frequency with which a person acts on the interest or expresses it to his or her legislator?

Further, even if courts somehow could define the required types and levels of political interest and decide how to measure them, they still would have to figure out how to weigh those interests in the constitutional analysis. For example, if a person has an "important stake" in multiple policy debates in multiple districts, how should courts measure the relative importance of those competing interests and weigh them against each other to determine where the person should be counted? Are all policy debates relevant to the analysis, or just the ones that Plaintiffs selectively identify in their papers? Are some local policy debates more constitutionally relevant than others? How should courts identify those policy debates and measure their relative importance? And should courts distinguish between people who simply do not care about politics and those individuals whose lack of interest is limited to the specific district?

It goes without saying that ***all*** of these inquiries about the nature and "extent of political activity" a person exhibits are precisely the kind of "political thicket[s]" and "intractable apportionment slough[s]" that federal courts are supposed to avoid. *Gaffney*, 412 U.S. at 750; *Burns*, 384 U.S. at 92.

Finally, and most remarkably, Plaintiffs posit that perhaps a State's compliance with one person, one vote should be measured by the quality of representation that individual legislators actually provide to their constituents. To that end, Plaintiffs suggest that fair representation could be measured by things like how frequently a legislator physically visits each group and individual in their district, or how frequently the legislator directly communicates with his or her constituents. ECF No. 92 at 4, 26.

This last suggestion in particular is patently absurd. Federal courts are not roving arbiters of good government with the power to assess the extent to which individual state legislators adequately perform their legislative duties. The suggestion that federal courts could undertake these kinds of political inquiries, and do so for the very purpose of interfering with one of the "most vital" sovereign functions that states perform, is an affront to the foundational principles upon which our constitutional republic is based. *Perez*, 138 S. Ct. at 2324; *see, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984).

In any event, there is no clear rationale to guide the Court's analysis on this point either: How many times must legislators interact with individuals in a particular group before their representation can be deemed constitutionally "fair and effective"? How substantive must those interactions be? Do legislators have to interact with all individuals within a particular group to satisfy their constitutional obligations, or just an arbitrary percentage of them? And even if courts could answer these questions, how are they supposed to categorize and describe the levels of population grouping to which the analysis applies? Should the inquiry be assessed at the level of the entire constituency, or should courts drill down to assess the legislator's representation of particular groups and subgroups? If the latter, as Plaintiffs seem to suggest, how many degrees of grouping and subgrouping should courts delve into? And are the relevant groupings limited to traditional equal protection classes like race and religion? Or do they extend to groupings based on things like party affiliation, social and economic status, special interest affiliations, or any of the other potentially limitless population categories one could imagine? Plaintiffs again provide no answers to these questions, because there are none.

More fundamentally, the measures of "fair" representation that Plaintiffs identify—constituent visits and communications—do not even begin to comprehensively describe the range of qualities and activities that a legislator conceivably may engage in to fairly and effectively represent groups and individuals in the district. As the Court emphasized in *Rucho*, moreover, what constitutes fair, effective or equitable representation is in the eye of the beholder, and there is no clear or precise rationale to guide the Court in choosing which of those potentially limitless "visions" should prevail. 139 S. Ct. at 2499.

Ultimately, there simply is no avoiding the fact that Plaintiffs ask the Court to wade into precisely the kind of "political thicket[s]" and "intractable apportionment slough[s]" that federal courts are supposed to avoid, to make its own "own political judgments" about the "nature of representation" without any "constitutionally founded reason" to do so, and to engage in these impermissible inquiries without any "clear," "precise" or "judicially manageable" standards to guide and constrain the Court's analysis. *Rucho*, 139 S. Ct. at 2498-499; *Gaffney*, 412 U.S. at 750; *Burns*, 384 U.S. at 92. That is the ***epitome*** of a nonjusticiable political question that federal courts lack jurisdiction to decide.

II. THE ELEVENTH AMENDMENT IS AN INDEPENDENT JURISDICTIONAL BAR TO PLAINTIFFS' CLAIM

Plaintiffs concede that the Court must assess whether Plaintiffs have alleged a "substantial" federal claim, and that *Ex Parte Young* does not apply if their claim is "insubstantial." ECF No. 92 at 2, 10-11. To that end, the parties have identified various ways to describe whether a claim is "insubstantial," and Defendants contend that Plaintiffs' claim meets all of them. ECF No. 26 at 13; ECF No. 92 at 15.

But regardless of how the Court chooses to interpret the word "insubstantial," the bottom line is that Defendants have accepted Plaintiffs' factual allegations as true, and contend that those allegations do not and cannot support a federal claim, ***as a matter of law***, because federal courts simply are not authorized or required to conduct the inquiries that Plaintiffs request as part of the one person, one vote analysis. That is a pure legal question that does not require factual development, and it is the exact same legal question this Court will face again in a future appeal even if it remands the case to the district court. Regardless of what meaning the Court ascribes to the word "insubstantial," therefore, the Court can and should conclusively decide Defendants' arguments on this pure legal question.

In that regard, the insubstantiality of Plaintiffs' claim already was clear from *Evenwel*, *Gaffney* and *Burns*, not to mention the consistent body of Circuit Court decisions applying those cases in *Cranston*, *Chen* and *Daly*. To the extent there is any doubt about that, however, the Supreme Court's recent decision in *Rucho* eliminates that doubt. Like *Evenwel* before it, *Rucho* makes clear that one person, one vote is a quantitative standard that is limited to a simple "matter of math" regarding the "numbers of people" in each district. *Rucho*, 139 S. Ct. at 2501; *Evenwel*, 136 S. Ct. at 1128-29, 1131. Absent intentional discrimination—which Plaintiffs do not allege—the Court is not constitutionally "authorized" to go beyond that objective inquiry and "assum[e] political . . . responsibility" for the redistricting process by making its "own political judgment" about whether and where particular groups are most likely to receive "fair" representation. *Rucho*, 139 S. Ct. at 2498, 2499-2501. To the contrary, such judgments involve "fundamental choices" about "the nature of representation" with which federal courts have "no constitutionally founded reason to interfere." *Gaffney*, 412 U.S. at 746 n.12, 749; *Burns*, 384 U.S. at 92.

A. *Rucho* Confirms What *Evenwel* And *Gaffney* Already Made Clear: One Person, One Vote Is An Objective And Quantitative Standard That Is Limited To A Mathematical Assessment Of The Number Of People In Each District

As discussed in Defendants' opening brief, the Supreme Court has made clear that ***States*** have discretion to consider factors other than "raw population figures" when deciding how to draw their legislative maps. ECF No. 26 at 28-30, citing *Gaffney*, 412 U.S. at 748-50. It has made equally clear, however, that ***federal courts*** have no such discretion when assessing the constitutionality of those maps. To the contrary, the legal standard for assessing compliance with one person, one vote is "total population alone." *Evenwel*, 136 S. Ct. at 1132, citing *Gaffney*, 412 U.S. at 750. That is a purely objective and quantitative standard that focuses "solely [on] the number of inhabitants" in each district. *See Evenwel*, 136 S. Ct. at 1127-29, 1131-32. It neither requires nor permits the federal courts to go beyond those numbers to assess the extent to which each population group or subgroup actually receives what they find to be "fair and effective" representation from the legislator in the district where they are counted. *See* ECF No. 26 at 27-31.

To the extent that *Evenwel* and *Gaffney* left any doubt about the narrow scope of the legal standard or the Court's limited role in applying it, *Rucho* removes that doubt and makes even clearer that Plaintiffs' claim is insubstantial as a matter of law.

As discussed above, in *Rucho* the Supreme Court held that so-called "partisan gerrymandering" claims are nonjusticiable. In doing so, the Court rejected the argument that courts could resolve such claims by inquiring whether people receive "fair" representation under the challenged map. Such inquiries involve "basic questions that are political, not legal," and federal courts lack jurisdiction to decide them. *Id.* at 2500.

As Plaintiffs correctly point out, in reaching that conclusion the Court distinguished between partisan gerrymandering claims and one person, one vote claims, which the Court noted are justiciable. ECF No. 92 at 36; *see supra* at 5, n.2. But Plaintiffs conveniently ignore the Court's explanation for ***why*** it drew that distinction, and that explanation is critical: One person, one vote claims are justiciable for the specific reason that they are "easy to administer as a matter of math." *Rucho*, 139 S. Ct. at 2501. In other words, unlike nonjusticiable

partisan gerrymandering claims, one person, one vote claims are justiciable precisely because they ***do not*** require courts to go beyond the numbers and make their "own political judgment" about whether particular groups or individuals receive "fair" or effective representation. *Id.* at 2498, 2499-2501. Indeed, if those inquiries were part of the analysis, then one person, one vote claims would be nonjusticiable for the same reasons that partisan gerrymandering claims are. *See supra* at 3-18.

In light of *Evenwel*, *Gaffney* and now *Rucho*, not to mention the First Circuit's directly on point decision in *Cranston*, there simply is no plausible argument about the limited scope of the Court's inquiry in this case. Plaintiffs do not allege that the legislature acted with a discriminatory intent. As a result, the Court's ***only*** task is to ensure, purely as a matter of math, that the population disparities between districts do not exceed 10% when measured by the time tested, judicially approved and facially neutral total population baseline that the legislature reasonably chose. There is no dispute that Connecticut's map falls comfortably within that threshold, and Plaintiffs' claim is insubstantial as a matter of law on that basis.

Like the district court below, Plaintiffs do nothing to dispute any of this in their brief. In fact, Plaintiffs' only real attempt to address Defendants' argument is to point out that *Evenwel* involved the question of whether to count particular individuals, not where to count them. ECF No. 92 at 23-25; *see id.* at 32-35. But that is a distinction without a difference, as it neither addresses nor refutes the underlying legal principles that prohibit courts from considering ***either*** of those questions. Specifically, under *Evenwel*, *Gaffney* and now *Rucho*, the one person, one vote analysis is limited to a mathematical assessment of the "numbers of people" in each district. *Rucho*, 139 S. Ct. at 2501; *Evenwel*, 136 S. Ct. at 1128-29, 1131-32; *Gaffney*, 412 U.S. at 748-50. And under *Rucho*, *Burns*, *Cranston*, *Chen* and *Daly*, federal courts have no constitutional authority to second guess how states choose to count prisoners and other unique population groups in those "numbers of people," and certainly not based on the "fair and effective" representation grounds that Plaintiffs present. *See infra* at 27-31. Those limitations apply to the same extent regardless of whether the requested judicial interference is based on questions about "whether" or "where" to count the group in question.

Plaintiffs' reliance on *Mahan v. Howell*, 410 U.S 315 (1973), does not compel a different conclusion. *See* ECF No. 92 at 18, 24-25, 35. In *Mahan*, the legislature relied on census numbers to count roughly 18,000 Navy personnel as residents of the district in which their ship was berthed, even though there was no dispute that many of those individuals actually lived and slept in different districts. In those "unusual, if not unique, circumstances," the Supreme Court required reapportionment to eliminate the "discriminatory treatment" of military personnel that resulted from the State counting them in a district where they indisputably did not reside. *Mahan*, 410 U.S. at 331-32.

As the First Circuit correctly held in *Cranston*, *Mahan* is "easily distinguishable" from this case. *Cranston*, 837 F.3d at 145. As an initial matter, by its terms *Mahan* is limited to the "unusual" and "unique circumstances" of that case, which have no relevance here. Unlike the military personnel in *Mahan*, prisoners are not being mistakenly counted in a district where they do not live and sleep, and they therefore do not (and cannot) complain of the same "discriminatory treatment" that flows from that kind of deliberate miscounting. *Cranston*, 837 F.3d at 145.

More fundamentally, in requiring reapportionment in the "unusual" and "unique circumstances" present in *Mahan*, the Supreme Court did not conduct anything like the political inquiries about the nature of representation that Plaintiffs request here. Nor did the Court purport to cast doubt on the rule established in *Burns*—which rule the Court subsequently reaffirmed in *Gaffney* more than four months ***after*** it decided *Mahan*—that federal courts simply have no constitutional authority to second guess the legislature's choice about how to count unique population groups like prisoners and military personnel absent a showing of discrimination. *Gaffney*, 412 U.S. at 746 n.12, 749. To the contrary, the Court required reapportionment in *Mahan* precisely because it determined that the legislature ***did*** subject the military personnel to "discriminatory treatment" by deliberately counting them in a district where they "admittedly did not reside." 410 U.S. at 332.

Mahan therefore does not support the meaning that Plaintiffs ascribe to it. Rather, it stands for the limited and unremarkable proposition that states cannot arbitrarily count individuals in a district in which they indisputably do not live and sleep when the census is taken. That simply has nothing to do with the issues in this case.

B. *Rucho* Also Confirms What *Burns* And Its Progeny Previously Made Clear: Federal Courts Have No Constitutional Authority To Interfere With The Legislature's Choice About How To Count Prisoners And Other Unique Population Groups In The Population Base

For the reasons discussed above, Plaintiffs' proposed "fair and effective" representation claims simply are not part of, or relevant to, the one person, one vote analysis. But not only that, federal courts are in fact constitutionally ***prohibited*** from considering those claims at all. Indeed, the Supreme Court consistently has held that the decision about what total population baseline to use, and in particular the decision about how to count prisoners and other unique population groups in it, involves "fundamental choices" about the "nature of representation" with which federal courts have "no constitutionally founded reason to interfere." *Gaffney*, 412 U.S. at 746 n.12, 749; *Burns*, 384 U.S. at 92. Absent intentional discrimination, therefore, the legislature's choice about how to count those unique population groups "***offends no constitutional bar***, and compliance with [one person, one vote] ***is to be measured thereby***" without interference from the courts. *Burns*, 384 U.S. at 92 (emphasis added).

This bar to judicial interference is clear from *Burns* and *Gaffney* alone. To the extent there is any doubt about that, however, *Rucho* again eliminates that doubt. *Rucho* expressly held that federal courts are not "authorized" to "assum[e] political . . . responsibility" for redistricting based on the courts' "own political judgment" about whether individuals receive "fair" representation. *Id.* at 2498, 2499-2501. Reading that together with *Gaffney* and *Burns*, there is no plausible argument that the Court has authority to second guess the legislature's choice about how to count prisoners without a showing of intentional discrimination, especially based on the "fair and effective" representation arguments that Plaintiffs present.

Further, if *Rucho*, *Burns* and *Gaffney* somehow are not enough to establish the insubstantiality of Plaintiffs' claim, *Cranston* is. In that case, the First Circuit rejected an ***identical*** prisoner-based claim precisely because questions about how to count prisoners have "long been recognized as [a] paradigmatically political decision[], best left to local officials, about the inclusion of various categories of residents in the apportionment process." 837 F.3d at 141-44; *see* ECF No. 26 at 20-26.

And to the extent that *Cranston's* application of *Burns* in identical circumstances also is somehow not enough, *Cranston* is far from the "single out-of-circuit case" that has reached that conclusion. ECF No. 92 at 32. To the contrary, the First Circuit is one of ***three*** different Circuit Courts that consistently have interpreted and applied *Burns* in the same way that Defendants argue here. Specifically, in *Chen* the Fifth Circuit also held that the legislature's choice of population base is an "eminently political question" that must be "left to the political process," and that such judgments do not violate the Constitution unless they were motivated by a discriminatory intent. 206 F.3d at 527-28. Similarly, in *Daly* the Fourth Circuit held that the choice of apportionment base "is quintessentially a decision that should be made by the state" through the "inherently political and legislative process," and that courts "should not interfere [with such choices] unless the apportionment base is unconstitutionally discriminatory on its face or produces an unacceptably wide variation from total population equality." 93 F.3d at 1225, 1227.

Plaintiffs do not even acknowledge *Chen* or *Daly* in their brief to this Court. Nor do they meaningfully address or distinguish the other cases in this body of appellate caselaw that is squarely against them. And perhaps most tellingly, Plaintiffs do not cite ***a single appellate case*** that even arguably has permitted the kind of extraordinary judicial interference that Plaintiffs request here.[3]

[3] In fact, the only cases that Plaintiffs cite are the district court's decisions in *Cranston* and a single district court decision from Florida. *See* ECF No. 92 at 16 n.7, citing *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016); *Davidson v. City of Cranston, R.I.*, 42 F. Supp. 3d 325 (D.R.I. 2014); *Davidson v. City of Cranston*, 188 F. Supp. 3d 146 (D.R.I. 2016), rev'd 837 F.3d 135 (1st Cir. 2016). Of course, the First Circuit unanimously rejected and reversed the district court's decision in *Cranston*—which the First Circuit characterized as "implausible" and "obvious[ly]" wrong—and those decisions therefore do not support Plaintiffs' claim at all. *Cranston*, 837 F.3d at 144. Similarly, the district court's decision in *Calvin*—which the County did not appeal—was issued ***before*** the Supreme Court decided *Evenwel* and *Rucho*, and it therefore has little to no bearing on the arguments in this appeal. Indeed, even Plaintiffs do not meaningfully rely on *Calvin* other than to note its existence in a footnote and one passing reference in the text. ECF No. 92 at 16 n.7, 27-28.

Instead, Plaintiffs again attempt to distinguish *Burns* and *Cranston* on their facts without addressing the legal principles upon which those cases are based, and for which Defendants cite them.

For example, as with *Evenwel*, Plaintiffs attempt to distinguish *Burns* and *Cranston* on the ground that they involved questions about whether to count particular groups, not where to count them. ECF No. 92 at 32, 34-35. For the reasons discussed above, that is a distinction without a difference because it neither addresses nor refutes the underlying legal principles established in those cases, which prohibit the courts from considering ***either*** of those questions. *See supra* at 24.

Plaintiffs also seek to distinguish *Cranston* on the ground that it was "a case about municipal prison gerrymandering," whereas this case involves purported prison gerrymandering statewide. ECF No. 92 at 33. But Plaintiffs again do not cite any case to demonstrate why that makes a legal difference, or whether and how the one person, one vote legal analysis concretely differs depending on whether the challenge is to a municipal or statewide legislative map. And they cannot cite such a case, as the legal framework is the same in both contexts. *Compare Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 674 (5th Cir. 2009).

CONCLUSION

For the reasons discussed above and in Defendants' initial brief, the Court must reverse and remand with instructions to dismiss the case for lack of jurisdiction because Plaintiffs' claim is nonjusticiable under *Rucho*, and also because the Eleventh Amendment bars it.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 6,333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

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CERTIFICATION OF SERVICE

I hereby certify that on this 26th day of August, 2019, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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