UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KAREN DAVIDSON, DEBBIE FLITMAN, EUGENE PERRY, SYLVIA WEBER, AND AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, INC.,	
Plaintiffs	C.A. No. 1:14-cv-00091-L-LDA
v.	
CITY OF CRANSTON, RHODE ISLAND,	
Defendant	

CITY OF CRANSTON'S REPLY MEMORANDUM OF LAW TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

The Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss (the "Opposition") is long on political theory and rhetoric, public policy issues best addressed to a legislative body, and citations to dissenting opinions and law review articles, but short on legal authority supporting a cause of action for violation of the Equal Protection Clause of the United States Constitution. One thing Plaintiffs and the City can all agree on is if persons incarcerated at the Adult Correctional Institution (the "ACI") are counted in the City of Cranston's (the "City" or "Cranston") Ward 6 consistent with the United States Census (the "Census") count, the maximum population variance among the Cranston ward districts is approximately 5% (see Complaint ¶22), well within the 10% population differential considered *de minimus* under the case law. *See e.g., Daly v. Hunt*, 93 F.3d 1212, 1217-18 (4th Cir. 1999). The other thing upon which there appears to be agreement is the maximum deviation is approximately 28% if the prisoners at the ACI are not counted as residents in Ward 6—a level above the 10% threshold at which a cause of action conceivably could exist.

Plaintiffs lament that at the 28% level of variance, their voting strength is being unconstitutionally "debased" or "diluted." Their entire argument is circular. The alleged debasing or dilution represented by the 28% number comes into play only if their legal theory—that Cranston *is required* by the Equal Protection Clause not to count the prisoners in Ward 6—is correct in the first place. Plaintiffs cannot cite to even one case in which a court has held that it is unconstitutional to count prisoners in accordance with the Census when reapportioning districts. Furthermore, the City has found no such case. Indeed, the cases cited by the the City, and many discussed by the Plaintiffs in the Opposition, affirmatively state that while it *may* be constitutional to vary from the Census count if that can be done in a constitutionally systematic manner, there is no constitutional mandate to do so.

II. ARGUMENT

a. Plaintiffs Misapply the Standard of Review to Assert Their Purported "Cause of Action".

In Plaintiffs' Opposition, Plaintiffs assert that several "facts" must be taken as true by the Court when weighing the motion to dismiss. However, Plaintiffs bleed the facts into conclusions of law in order to bolster their arguments. Essentially, Plaintiffs are not just asking the Court to assume facts to be true, but they also wish the Court to assume their legal conclusions applying those facts to be true, which is not the standard of review.

The City does not dispute that in reviewing a motion to dismiss, the Court must construe "*well-pleaded facts* of the complaint in the light most favorable to the plaintiffs". *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 7 (1st Cir. 2011) (emphasis added). Also, the Court must not "disregard properly pled *factual allegations*". *Id.* at 12 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added)). However, "unsupported conclusions or interpretations of law are rejected", *Ward v. Lotuff*, 2009 WL 3615970, at *1 (D.R.I. 2009)

(quoting *Dixon v. Shamrock Fin. Corp.*, 522 F/3d 76, 79 (1st Cir. 2008) (internal quotations omitted)), and the Court is not "required to take every single allegation at face value." *Wilson v. HSBC Mortg. Servs. Inc.*, 744 F.3d 1, 7 (1st Cir. 2014). Moreover, the Court must not take Plaintiffs' conclusory allegations "as gospel"; rather, it must review the materials before it to determine whether the Complaint sets forth allegations resulting in a plausible claim. *Id.* at 8-9 (In *Wilson*, the First Circuit found no reason to accept plaintiffs' allegation that an assignment was void based on plaintiffs' own characterization thereof, but sought to review the facts to make its own legal determination as to whether or not the allegations, if true, would give rise to a void or voidable assignment of mortgage).

In the Opposition's "Factual Allegations", Plaintiffs clearly put the proverbial "cart before the horse." Plaintiffs state a fact, which must be taken as true: that the ACI houses an inmate population of 3,433. Opp. at 2. By the time Plaintiffs have concluded their "factual presentation", they self-servingly and circuitously desire this Court to take as true two resultant legal conclusions: (1) constitutionally, the 3,433 inmates must not be counted; and (2) once the inmates are omitted from the population, the maximum population deviation would exceed 28% among the Cranston wards. *Id.* at 3. However, these "allegations" are not facts to be taken as true, but rather are legal conclusions for the Court to draw based on the law. The Court is not obliged to take as true Plaintiffs' unsupported legal conclusion that the inmates must not be counted in the City or the alleged resultant effect thereof. Plaintiffs' problem is that they have absolutely no legal support that Cranston is required by the Constitution to omit the inmates in the first place.

The only salient fact in the entire Complaint is that the ACI in the City has 3,433 inmates that the Census counts toward the total population of the City. This is the only

allegation that this Court must take as true. Taking this allegation as true, the Court must determine if there is a legal requirement that the City omit the ACI inmate population from the total population provided by the Census when redistricting its wards. This is an issue to be determined as a matter of law and the Plaintiffs cannot push its bald conclusions upon the City or this Court. Moreover, the Plaintiffs' silence as to any law or constitutional mandate requiring the City to remove inmates from the population base in order to apportion its wards is deafening. Accordingly, the Complaint, as a matter of law, fails to state a claim for which relief can be granted and must be dismissed with prejudice.

b. <u>The Case Law Cited by Plaintiffs Does Not Stand for Propositions Asserted</u>

Plaintiffs' Opposition cites to several cases, statutes and law reviews that would lead the Court to believe that there is at least some body of jurisprudence supporting their position that the City improperly counted the ACI inmate population. However, the cases cited are at best inapposite to their claims and, at worst, Plaintiffs have completely mischaracterized the holdings therein.

The most egregious example may be Plaintiffs' use of and citation to *Hartung v. Bradbury*, 33 P.3d 972 (Or. 2001). In citing to *Hartung*, Plaintiffs introduced this case, and two others, by stating:

> 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, and even required such adjustments when severe distortions would otherwise obtain.

Opp. at 19 (citations omitted). The Plaintiffs' Opposition then provides in the parenthetical citation following their citation to *Hartung* as follows: "[T]he Secretary of State's decision [in

Hartung] 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." *Id.* Reading page 19 of the Opposition, one would believe that the Supreme Court of Oregon found that failing to remove the prison population from the overall data created an unreliable figure such that the Secretary of State erred in failing to adjust. Such characterizations of *Hartung* are misleading.

In *Hartung*, the petitioners contention was "that the official census data incorrectly attribute[d] the population of one census block to another census block in another district", namely a federal prison which housed nearly 2,000 inmates, which error was demonstrated through sound evidence to the Secretary of State and was acknowledged by the Secretary of State to the point of "virtual certainty". *Hartung,* 33 P.3d at 597-598. Basically, the error was not that the prison was counted, but that it was counted in the wrong district. *Id.* In light of such proven errors in the Census data in properly locating a prison population among census blocks, the court in *Hartung* held that the Secretary of State "incorrectly [had] assumed that, in determining the population of a district in the face of an *admitted error in the census data*, he nonetheless must rely solely on official census data." *Id.* at 598 (emphasis added).

In the case before the Court, there is no factual allegation of any such error within the Census data used by the City to apportion its wards. In stark contrast to Plaintiffs' representation of *Hartung,* the case is an example of how Census data, including the prison populations counted therein, are used by state and local governments to properly apportion their voting districts. It is a stretch beyond the most vivid imaginations that *Hartung* can in any way be read to stand for the proposition that prison populations should be pulled from Census figures in apportioning districts absent admitted error, particularly when the error was not that the prison

in *Hartung* was counted, but that it was counted in the wrong district.

It should further be noted that neither of the other cases cited by Plaintiffs in connection with the quoted statement from Plaintiffs' Opposition, namely *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993) and *Assembly of the State of California v. U.S. Department of Commerce,* 968 F.2d 916 (9th Cir. 1992), have holdings or can reasonably be seen as standing for the Plaintiffs' quoted propositions. Further, the distinguishing factors in such cases make any such attempt by Plaintiffs to use such cases as authority behind its ultimate legal argument—that prison populations *must* be removed from Census figures while apportioning legislative district—futile.

In *City of Detroit*, the court characterized the dispositive issue as "whether the Michigan legislature (or the federal court which acted in its place) is constitutionally compelled to use the unadjusted headcount reported by the Census Bureau". 4 F.3d at 1373. While at first blush the issue may seem to strike a similarity between the Plaintiffs claim before this Court, like with *Hartung*, when making such statement the court in *City of Detroit* was faced with the issue of the use of Census figures that contained an undisputed undercount of population and *not* a policy-based decision to exclude certain population from the otherwise sound Census figures. *See id.* at 1372. Similarly, in *Assembly of the State of California, supra*, the question faced by the court was whether a Freedom of Information Act request surrounding computer tapes containing census data that was requested by the State Assembly should be released in an attempt to adjust the acknowledged population undercount in the Census data. 968 F.2d at 917-19.[1]

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[1] It should be noted that the court in *Assembly of State of California, supra*, did not come close to expounding upon the issue that lies at the heart of this case— whether a state or local governmental entity *must* remove prisoners properly counted in the census when apportioning its districts. The closest *Assembly of State of California* gets to

The Plaintiffs have not alleged an error where the population of the prisoners housed at the ACI were designated by the Census, nor do they allege any other error or inaccuracy in the 2010 Census results on which the 2012 reapportionment was based. Absent any such allegations of errors, the just-discussed case law cited by Plaintiffs bear no weight on the question before the Court and provide no legal underpinning for Plaintiffs' claim. Further, the propriety of counting prisoners in their places of incarceration for purposes of the Census enumeration has been a question considered by numerous courts, as noted by the Plaintiffs, and has been held to *not* be erroneous. In *Borough of Bethel Park v. Stans*, the court held that the Bureau of Census properly enumerated college students, certain armed service members and prisoners in the states in which either their colleges, military bases or institutions were located. *See generally* 449 F.2d 575 (3rd Cir. 1971); *see also District of Columbia v. U.S. Dep't of Comm.*, 789 F.Supp. 1179, 1188 (D.D.C. 1992) (The court upheld that the enumeration of prisoners by the Census in a prison located in Virginia, but operated by the District of Columbia, as not arbitrary or capricious).

Furthermore, the City adamantly disagrees with the Plaintiffs' contention that "the *Bethel Park* case actually supports the logic for the instant action." Opp. at 20 n. 10. The Plaintiffs' have erroneously interpreted the following principle stated in *Borough of Bethel Park* as providing the legal support to their case that: "[a]lthough 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

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this issue is the court's fleeting citation to *Burns v. Richardson*, 384 U.S. 73, 91 (1966) and *Young v. Klutznik*, 652 F.2d 617, 624 (6th Cir. 1981) in a footnote in which it stated "[t]he states are not obliged to use official census data when drawing their state legislative districts, or their congressional districts". *See* 968 F.2d at 918 n.1 (internal citations omitted).

federal census for the apportionment of its legislative bodies is properly directed at appropriate state law". *See Borough of Bethel Park,* 449 F.2d at 582 n.4. The last piece of the just-quoted portion of the opinion in *Borough of Bethel Park*—"properly directed at *appropriate state law*"—is a principle that Plaintiffs' continuously ignore within this and other relevant case law on the subject of departures from the Census.[2]

Plaintiffs' Opposition cites to numerous state laws and examples of municipalities which have, through the political process, decided to exclude prison populations from their districts. Opp. at 19. While the City could endeavor to create what would likely be an even longer list of those states and municipalities that, like it, have not excluded prison populations, such examples by Plaintiffs, while creating fuel for their policy driven fire, do not provide any legal basis for compelling this Court to conclude that the principle of "one person, one vote" has been violated. In the same vein, the Plaintiffs' assertion that the City "*could have* similarly excluded the prison population" is a far cry from demonstrating that the City was under any constitutional mandate to do so. Opp. at 20 (emphasis added).

c. <u>Amending the Complaint Would Be Futile</u>

In their Opposition, Plaintiffs no less than two times request that this Court allow them to amend the Complaint rather than have a dismissal entered against them. More

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[2] The Plaintiffs' Opposition additionally cites to two U.S. Supreme Court decisions which are premised on factual scenarios that are remarkably distinguishable from those before this Court and, thus, do not provide the legal support for the Plaintiffs' position. In *Franklin v. Massachusetts*, the context in which the Court considered a person's "enduring tie" to the community and stated that residence "may mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place" was in the context of a challenge to the Census Bureau's allocation of overseas federal employees to their designated home states. 505 U.S. 788, 804 (1992). In the same vein, the Plaintiffs' citation to the Court's reasoning in *Evans v. Cornman* is similarly misplaced in that the question addressed by the Court was whether the people living on the grounds of the National Institution of Health should be afforded the right to vote in Maryland state and local elections and was *not* a challenge to apportionment. *See generally* 398 U.S. 419 (1970). The factual distinctions between the Plaintiffs' alleged harm and those in *Franklin* and *Evans* are abound, and it is a stretch to believe that the courts' reasoning in either case should be taken as a mandate for such considerations to be applied by a governmental entity when using to Census population figures in apportioning its districts.

specifically, the Opposition's Conclusion seemingly admits that the Complaint, as drafted, failed to state a claim and that additional facts may be necessary for the Complaint to survive: "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." Opp. at 25. However, amending the Complaint would be futile given that no fact that has been or could be raised impacts the legal hurdle Plaintiffs cannot overcome: there is no constitutional mandate requiring the City not to count the ACI population.

Generally, leave to amend a complaint should be "freely" given "when justice so requires." Fed.R.Civ.Pro. 15(a). However, "[f]utility of the amendment constitutes an adequate reason to deny the motion to amend." *Todisco v. Verizon Commc'ns, Inc.*, 497 F.3d 95, 98 (1st Cir. 2007) (citing *Adorno v. Crowley Towing & Transp. Co.*, 443 F.3d 122, 126 (1st Cir. 2006)). Moreover, such a "motion may also be denied if a proffered amendment comes 'too late,' or if it 'otherwise would serve no useful purpose.'" *Id.* (citing *Aponte–Torres v. Univ. of P.R.*, 445 F.3d 50, 58 (1st Cir. 2006)).

Granting Plaintiffs' request to amend is futile, would serve no useful purpose and would delay the inevitable. The "facts" Plaintiffs raise in the Opposition – e.g. "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" Opp. at 6 n. 1 – have no bearing on the outcome of the purported legal claim challenged. Plaintiffs again continue to confuse what this Court must determine as a matter of law and what *facts* it must presume to be true.

The only pertinent fact that has been alleged that must be taken as true is that the ACI has a population of 3,433 in Ward 6 of Cranston. Even if the "fact" that Cranston were the

only municipality in the Country in which the entire incarcerated population of the state is in one ward were alleged and taken as true, such a fact does not change the legal analysis and Plaintiffs still fail to state a claim for which relief can be granted. The Opposition glaringly makes one thing clear: there is no constitutional mandate that Cranston or any other state or municipality is required to remove inmate population from its population base when apportioning its wards.

As noted above, the only potential additional unpleaded "fact" offered up by the Plaintiffs is 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." Opp. at 6 n.1. One wonders how these particular Plaintiffs would know this to be fact in the first place. Nevertheless, note how constrained and limited the unpleaded allegation is in using the words "the entire incarcerated population of the state." Rhode Island is a very small state, and thus it has only one state prison—a likely uncommon situation across much of the United States. It is well known to the court that there is a detention center located in Central Falls, Rhode Island, so the statement is not literally correct unless intended to be limited to populations incarcerated at the hand of the State of Rhode Island. Whichever way it may be meant, the yet to be plead allegation would be immaterial to the outcome of the motion to dismiss. The allegation doesn't change the 5% versus 28% numbers, nor would it change the fact that not a single court has held that following the United States Census in counting prisoners violates equal protection when apportioning districts.

Indeed, it is interesting to note that in *Avery v. Midland County, Texas*, 390 U.S. 474, 482-83 (1968), a case cited by the Plaintiffs, there is discussion regarding the existence of 80,000 plus units of government in the United States, some of which clearly are broken down into voting districts or wards. It is hard to believe with that many political jurisdictions and

prisons much larger than the ACI in the United States that the City is the nation's largest outlier as portrayed by the Plaintiffs. Indeed, the website of Demos (whose counsel has been admitted pro hac vice in this case as representing the Plaintiffs) gives an example of a city council seat won with a total of two votes because 96% of the district's population was incarcerated in a large prison. *See The Census Count and Prisoners: The Problem, The Solutions and What the Census Can Do* available at: http://www.demos.org/publication/census-count-and-prisoners-problem-solutions-and-what-census-can-do (last visited April 7, 2014). Undoubtedly, there are many other near similar examples across the country,[3] yet the Plaintiffs seek to paint the City as the nation's worst outlier.

At the end of the day, Plaintiffs can continue to put forth any number of "facts" such as an inmate cannot vote or patronize a public establishment in the community. But these facts, or others like them, do not have any impact on the ultimate legal analysis because this entire case turns on whether or not there is a constitutional mandate requiring the City to remove the ACI population from its population base; a legal conclusion relied upon by Plaintiffs that does not exist. Therefore, any fact that Plaintiffs have made or will devise cannot alter the state of the law which is that the City is not constitutionally mandated to remove the ACI population from its population base in apportioning its wards. Accordingly, any amendment would be futile.

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[3] In the law review article *Breaking the Census: Redistricting in an Era of Mass Incarceration*, cited by the Plaintiffs on page 19 of the Opposition, examples are cited of other legislative districts in which prisoners are counted within the district or ward where the prison is located for purposes of apportionment. 38 Wm. Mitchell L. Rev. 1241, 1245-46 (2012). Those cited represent extreme examples of where prison populations account for more than half (and in some cases nearly all) of the population of the districts. *Id.* The article further notes what is referred to as the "most-well known example…in Anamosa, Iowa, where the state's largest prison constituted 96% of the city's second ward." *Id.* at 1245.

III. CONCLUSION

For the reasons discussed above, this Court should dismiss the Complaint as failing to state a claim upon which relief can be granted. Furthermore, the Court should not countenance Plaintiffs' plea that they should be allowed to amend the Complaint. Plaintiffs cite to no unpleaded facts which would change the 5% number or the 28% number, and they suggest no form of discrimination favoring or disfavoring any group (much less themselves) resulting from the Cranston redistricting. Virtually all reapportionment challenges in the courts involve some form of discrimination being alleged—for example, using census figures to "pack" or "crack" voting districts so as to disfavor a racial or other protected group, or, in the case of alleged political gerrymanders, drawing lines either to favor or disfavor a particular political party. No such allegations are present here, nor can they be made in good faith.

Despite the fact that there are no doubt many such examples, no court has ruled that it is a *per se* (or otherwise) violation of the Equal Protection Clause to count prisoners for redistricting purposes in accordance with how the U.S. Census counts them. Even if Plaintiffs' yet to be plead additional "fact" were correct, or at the very least not misleading, it would not serve to establish a legal theory upon which Plaintiffs may state a claim upon which relief could be granted. The gravamen of their complaint is the numbers disparity, and neither the numbers nor the circular reasoning of the Plaintiffs changes if they are allowed to amend the Complaint. The 28% variation creates the alleged cause of action, and the cause of action depends on the 28% being a necessary result flowing from an alleged constitutionality mandated way to reapportion not supported by even one court which has so held.

If ever there was a case that should end at the Motion to Dismiss stage for failure to state a claim, this is the one.

CITY OF CRANSTON, RHODE ISLAND

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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 April 7, 2014.

/s/ David J. Pellegrino

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