

**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.)

**MEMORANDUM OF LAW AS COURT-ORDERED SUPPLEMENT
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court's April 7, 2016 Order, Plaintiffs Karen Davidson, Debbie Flitman, Eugene Perry, Sylvia Weber, and American Civil Liberties Union of Rhode Island, Inc., by counsel, respectfully submit this supplemental Memorandum of Law addressing the Supreme Court's recent decision in *Evenwel et. al. v. Abbott*.

I. INTRODUCTION

On April 4, 2016 the U.S. Supreme Court ruled in *Evenwel v. Abbott*, 578 U.S. __ (2016), that the State of Texas may elect to prioritize representational equality over electoral equality in drawing its legislative districts. This decision, while clarifying some important open questions about the meaning of one person, one vote, has no direct bearing on the instant case. *Evenwel* does, however, provide this Court with further guidance as to the meaning of representational equality, which supports Plaintiffs' central

argument that counting a concentrated population of incarcerated persons at their prison location serves the objectives of neither electoral nor representational equality. As such, the case provides no cause for this Court to depart from the sound analysis it offered in denying Defendant's Motion to Dismiss. *Davidson v. City of Cranston*, 52 F.Supp.3d 325 (D.R.I. 2014).

II. ARGUMENT

A. Evenwel is a case about the primacy of electoral or representational equality.

Plaintiffs in *Evenwel* asked the Supreme Court to mandate that the State of Texas, and by extension all U.S. jurisdictions, elevate the principle of electoral equality over representational equality in drawing districts. The *Evenwel* Court refused, and the driving force behind its decision is the imperative to protect the principle of representational equality. *Evenwel v. Abbott*, No. 14-940, slip op. at 13 (“...it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.”). Although the Court does not go so far as to preclude the choice of electoral equality, it notes with approval that past decisions have highlighted how drawing districts to maximize representational equality can do double duty, serving “both the State’s interest in preventing vote dilution and its interest in ensuring equality of representation.” *Id.* at 16.

B. Evenwel is not a case about the precise population base needed to achieve effective representational equality.

Evenwel has no direct bearing on the instant case because this case does not present or force a choice between two theories of equality. Plaintiffs have never disputed that

representational equality is a legitimate goal for the City of Cranston to pursue.¹ Instead, this case is about whether counting one unique population at a particular location—incarcerated persons at the prison facility—in fact serves or undermines the goal(s) of representational equality (or electoral equality). That question was simply not before the Court in *Evenwel* so the Court had no reason to address it. Hence *Evenwel* provides no direct binding authority here.

Throughout its opinion, the *Evenwel* Court uses the term “total population,” which it endorses as an appropriate baseline for districting. *Id.* at 1. It is clear, however, that the Court uses this term *in contrast to* “voter-population,” the baseline urged by the *Evenwel* Plaintiffs. As noted, *Evenwel* is a case about the relationship between representational and electoral equality; it is about whether jurisdictions are restricted to including only voters in their population baselines for districting purposes. *Evenwel* is not at all a case about precisely which nonvoters a jurisdiction must or may use to effectively pursue representational equality. As such, the Court gave scant attention to the meaning of “total population,” other than to contrast it with population bases tied to voting in some way (such as “registered-voter” or “voter-eligible populations”). *Id.* at 4.

The one exception underlines the above point. The Court states that “all States use total-population numbers from the census when designing congressional and state-legislative districts” and notes that several states “authorize the removal of certain groups from the total-population apportionment base” including four states that “exclude inmates who were domiciled out-of-state prior to incarceration.” *Id.* at 4. This juxtaposition

¹ For analysis on why choosing representational equality does not undermine the goal of ending prison gerrymandering, see Brief for Direct Action for Rights and Equality (DARE) et al. as Amici Curiae Supporting Respondents, *Evenwel v. Abbott*, 578 U.S. __ (2016) (No.14-940).

shows clearly that there is no contradiction between the Court’s broad use of the term “total population” and the notion that some populations may or must be excluded, counted elsewhere, or otherwise treated differently for specific reasons that go beyond the scope of the *Evenwel* case.²

In sum, *Evenwel* stands for the proposition that jurisdictions may pursue representational equality when drawing districts—nothing more.

C. Counting incarcerated persons at their prison location undermines representational equality, and electoral equality.

In explaining the underlying importance of representational equality, however, the Court does provide some further guidance as to why counting incarcerated persons at the prison location undermines its central goals:

As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.

Id. at 18-19 (Internal citations omitted).

Representational equality is important because it puts constituents—people who have a direct interest in local policy outcomes and who might seek assistance from elected officials—on equal footing. As the record in the instant case amply demonstrates, persons incarcerated at the Adult Correctional Institutions (ACI) are not “constituents” in

² The approach to total population taken by California, Delaware, Maryland, and New York—and noted without comment by the Court—is of course consistent with the approach Plaintiffs seek here.

any meaningful sense. With respect to the *Evenwel* Court's specific examples, they have absolutely no stake in the local public education system (in fact, their children are prohibited from attending Cranston schools), and have not sought, received, or been offered help from local officials for anything on record, let alone public benefits, which they cannot receive at the prison location. Statement of Undisputed Facts ¶¶ 18, 36, 37, 45, 46, 47, 49.

This Court's own Memorandum and Order denying Defendant's Motion to Dismiss made perfectly clear that counting the ACI prison population in Ward 6 serves the objectives of neither representational nor electoral equality. *Davidson v. City of Cranston*, 52 F.Supp.3d 325 (D.R.I. 2014). In addition, a more recent federal court decision addressing a substantially identical fact pattern has come to the same conclusion. *Calvin, et al. v. Jefferson County Board of Commissioners, et al.*, Case No. 4:15CV131-MW/CAS.

The district court in *Calvin* granted summary judgment to plaintiffs challenging districts drawn for a Florida Board of County Commissioners and County School Board. *Calvin*, citing this Court's Memorandum and Order, held that the county commission's decision to count a large group of incarcerated persons in a single county district (District 3) violated the Equal Protection Clause's one-person, one-vote requirement because doing so creates significant distortions that undermine the goals of achieving either electoral or representational equality. *Id.* at 47. Indeed, as the *Calvin* decision stated, “[t]o treat the inmates the same as actual constituents makes no sense under any theory of one person, one vote, and indeed under any theory of representative democracy.” *Id.* at 85.

This is because the *Calvin* court concluded that the prison population at issue lacks a “representational nexus” with local county officials. *Id.* at 72. After reviewing a set of facts demonstrating the isolation of the prison population, the lack of meaningful interaction between local representatives and incarcerated persons, and the insubstantial impact of the county Boards’ decisions on the lives of those involuntarily incarcerated at the prison facility—facts strikingly similar to those in the record in the instant case—the district court noted, “[g]iven these facts, it’s clear that the inmates lack a meaningful representational nexus with the District 3 representatives and with the Boards as a whole. It is difficult to see how the District 3 representatives ‘represent’ the inmates in the same way they represent others who are physically located in District 3.” *Id.* at 72. This basic reasoning is fully consistent with, and underlined by, the factors contributing to constituency the Supreme Court describes in *Evenwel*. *Evenwel* at 18-19.

III. CONCLUSION

Evenwel has now clarified that states (and by analogy local jurisdictions) may choose to pursue representational equality in drawing districts—a proposition Plaintiffs have never disputed. The question before this Court remains essentially the same: does the City of Cranston’s practice serve this permissible end, or the other potentially permissible end of achieving electoral equality? This Court’s ruling denying Defendant’s Motion to Dismiss and the *Calvin* decision both make abundantly clear that in fact counting incarcerated persons at their prison location for districting purposes undermines both representational and electoral equality.

As such, this Court should deny Defendant’s Motion for Summary Judgment, grant Plaintiff’s Cross-Motion for Summary Judgment, and order the City of Cranston to draw

district boundaries that comply with the one person, one vote mandate of the U.S. Constitution.

Each successive election conducted under the City's unconstitutional districting scheme effects a new violation of Plaintiffs' rights to Equal Protection under the law. To provide the best chance of securing relief before this violation is repeated in the upcoming 2016 election, Plaintiffs respectfully request that the Court issue its Order (or set a hearing if necessary) as soon as is practical and convenient.

The City of Cranston will conduct primary elections on September 13, 2016. Candidates must declare for office by the end of June. R.I. Gen. Laws §17-14-1. As such, to provide timely relief the City must move quickly to redraw its districts in time to give potential candidates sufficient notice as to what geographic area and population they will seek to represent. We recognize that it might not be possible to complete the redistricting process before the coming election; but we stand ready to assist the Court in any way to achieve this objective.

DATED: April 13, 2016

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By their attorneys:

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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).

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