**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

No. 16-1692

**KAREN DAVIDSON; DEBBIE FLITMAN; EUGENE PERRY; SYLVIA WEBER; AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, INC.**,

Plaintiffs-Appellees,

**v.**

**CITY OF CRANSTON, RHODE ISLAND**,

Defendant-Appellant.

*On Appeal from the United States District Court*
*for the District of Rhode Island*

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# BRIEF OF PLAINTIFFS-APPELLEES KAREN DAVIDSON; DEBBIE FLITMAN; EUGENE PERRY; SYLVIA WEBER; AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, INC.

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## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff American Civil Liberties Union of Rhode Island, Inc. (RI ACLU) is a duly organized non-profit, non-partisan corporation with more than 1,800 members. As a non-profit corporation, RI ACLU does not issue stock; hence no parent corporation or publicly held corporation owns ten percent or more of its stock.

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## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiffs request that oral argument be heard in this matter given that an important constitutional issue affecting the fundamental right to representation in our democracy is at stake.

## I. JURISDICTIONAL STATEMENT & STANDARD OF REVIEW

As no final judgment by the district court is currently in effect, the instant case reaches this Court subject to 28 U.S.C. § 1292, on interlocutory appeal. To be final, judgment must be entered in a separate document. Fed. R. Civ. Proc. 58(a). Here, the district court entered but then vacated a judgment in a separate document. This is no doubt because the City had not yet presented its court-ordered remedial districting plan for the district court's review. Accordingly, there is no final judgment allowing appellate jurisdiction under 28 U.S.C. § 1291.

Generally, "a judgment is final only where it 'leaves nothing for the court to do but execute the judgment.'" *Consol. Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 325 (1st Cir. 1988) (internal citation omitted); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.") (internal citations omitted); *see also White v. Fair*, 289 F.3d 1, 6 (1st Cir. 2002) ("[T]he final judgment must issue on a separate document before the time for appeal begins to run."). If the order being appealed from is not final, the only ground for appellate jurisdiction is 28 U.S.C. 1292, governing interlocutory appeals. *Garzaro v. Univ. of Puerto Rico*, 575 F.2d 335, 337 (1st Cir. 1978). *See also Arthur v. Nyquist*, 547 F.2d 7, 8 (2d Cir. 1976); *Spates v. Manson*, 619 F.2d 204, 209 (2d Cir. 1980) ("We recognized . . . that if the court had prohibited the

defendant from engaging in certain practices, although also ordering the submission of a detailed plan of compliance, the order would be appealable" as an interlocutory appeal.); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 138 (3d Cir. 1977) (finding no final order and that interlocutory appellate jurisdiction was appropriate where there was no final judgment entered and where the district court had required defendants to submit remedial plans to the district court).

An appeal from interlocutory relief is reviewed for abuse of discretion. *Brown v. Chote*, 411 U.S. 452, 457 (1973). This is a deferential standard "and the deference it entails is most appropriate with respect to issues of judgment and the balancing of conflicting factors." *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004). "[A]bstract questions of law", however, are reviewed *de novo*. *Id.*

## II. STATEMENT OF THE ISSUES

May a municipal jurisdiction, consistent with the one person, one vote principles of the Equal Protection Clause of the United States Constitution, artificially inflate the size of one of its municipal districts with a sizable prison population that is physically isolated from the surrounding community and has no constituent-representative relationship with municipal elected officials, such that residents of neighboring districts receive only three-fourths of the representation as actual constituents in the prison district?

## III. STATEMENT OF THE CASE

This case challenges the City of Cranston's (the "City" or "Cranston") municipal redistricting plan, which counts thousands of individuals incarcerated in Rhode Island's only state prison complex, the Adult Correctional Institutions ("ACI"), as though they are ordinary constituents of a single municipal ward.

The following facts are undisputed. Following the 2010 Census, the City of Cranston redrew its six districts used to elect City Council and School Committee members. Joint Appendix ("JA") 445 (May 24 Order at 2). Rhode Island has a unified corrections system, and the only prison complex run by the state, the ACI, is situated in Ward 6 in the City of Cranston. *Id.*; DiNitto Aff. ¶ 2, June 2, 2015, R.24 PageID#415. The ACI contained an inmate population of 3,433. JA445 (May 24 Order at 2).

During the public conversation leading up to Cranston's 2012 redistricting the members of the City Council were confronted with the question of how and whether to count the incarcerated population of the ACI. At a public hearing on the proposed districting plan, Plaintiff American Civil Liberties Union of Rhode Island, Inc. testified as to the severe distortions that would be created by counting all of the inmates of the ACI in a single ward. JA063 (Pls.' Statement of Undisputed Facts ¶ 13).

In spite of this testimony, the Cranston City Council approved a districting plan that includes the prison population in its base population count and counts the entire population of the state-run correctional facilities in Ward 6. JA445 (May 24 Order at 2). The City counted the entire ACI population in Ward 6 despite the facts that:

- The population of the state-run prison is wholly isolated from the surrounding community. JA067 (Pls.' Statement of Undisputed Facts ¶ 30).
- Less than five percent (5%) of persons incarcerated at the ACI are actually from Cranston, and only one half of one percent (0.5%) legally reside in Ward 6. JA064 (Pls.' Statement of Undisputed Facts ¶ ¶ 16-17).
- The persons incarcerated at the ACI are typically present there for a short period of time (an average of just three days for those awaiting trial and just over three months for those serving prison sentences).[1] JA064-65 (Pls.' Statement of Undisputed Facts ¶ ¶ 20-21).

[1] Cranston purports to dispute this fact by questioning whether "median is the most accurate calculation to use for length of stay purposes" but offers no contrary evidence to suggest that any other type of calculation would produce a more accurate reflection of how long a typical person incarcerated at the ACI remains there. JA420 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 9).

- More than one-third (37%) of the population at the ACI cannot vote because of a felony conviction. JA065 (Pls.' Statement of Undisputed Facts ¶ 23); R.I. Const. art. II, § 1.
- Of the remaining 63 percent of incarcerated persons legally eligible to vote (because awaiting trial or convicted of a misdemeanor), 99 percent cannot vote as a resident of Ward 6 but rather must vote, pursuant to state law, by absentee ballot at their pre-incarceration addresses—the places they legally reside and actually live most of the time. JA064 (Pls.' Statement of Undisputed Facts ¶ 17); R.I. Gen. Laws § 17-1-3.1.

Without the non-resident incarcerated population, Ward 6 has only 10,227 actual constituents, compared with 13,000-14,000 constituents in each of the other five wards. JA159 (Declaration of William S. Cooper ("Cooper Decl.") at 16). Persons involuntarily incarcerated in the ACI constitute a full 25 percent of the people who make up Ward 6. JA158 (Cooper Decl. at 15). With these numbers, the true maximum population deviation among all Cranston wards is more than 28 percent. *Id.*

Plaintiffs filed their complaint February 19, 2014, alleging that due to the distortions in Cranston's 2012 Redistricting Plan, the voting strength and political representation of individual residents living in Ward 6 are artificially inflated and the voting strength and political representation of all Cranston residents who do not

reside in Ward 6—including the individual Plaintiffs who reside in Wards 1 and 4—are diluted.

On September 8, 2014, the district court denied the City of Cranston's motion to dismiss the case. JA006 (Civil Docket Sheet). On May 24, 2016, the district court denied the City's motion for summary judgment and granted Plaintiffs' cross-motion for summary judgment. JA458 (May 24 Order at 15). The Order then enjoined the City from holding further elections under the unconstitutional plan and required the City to propose a remedial plan within 30 days. *Id.* The City filed a notice of appeal on May 31, 2016, and this Court granted a stay of the May 24 Order pending appeal.

## IV. SUMMARY OF ARGUMENT

For generations, the Equal Protection Clause has guaranteed equal representation for equal number of people in the U.S. House of Representatives, States, and local jurisdictions. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Avery v. Midland Cnty., Tex.*, 390 U.S. 474 (1968). This guarantee extends to the individual Plaintiffs, constituents of Wards 1 and 4 in the City of Cranston, who deserve equal influence and representation in the City of Cranston, their local democracy, where the issues hit closest to home and have the greatest impact on their daily lives. Yet Cranston's City Council and School Committee districts fail to provide residents in City Wards 1 through 5 with

Equal Protection under the law. Wards 1-5 each contain 13,000-14,000 constituents, JA159 (Cooper Decl. at 16), whereas Ward 6 only has 10,227 actual constituents. This means that, for every four constituents in Wards 1-5 who seek access to their representatives, responsiveness to local concerns, or to petition their government for redress, only three compete for the attention of officials representing Ward 6. Plaintiffs thus enjoy only three-fourths of the representation in their local municipal democracy as their neighbors who live in Ward 6.

This is because the City chose to artificially inflate the population of Ward 6 by including the entire population of the ACI, Rhode Island's only state-run prison complex, despite the fact that persons who happen to be present at the ACI on Census Day are physically and politically isolated from the surrounding community and lack a constituent-representative relationship with local elected officials. The City defends its choice principally on the basis of the Census, which tabulates ACI inmates at the prison location. Yet Supreme Court precedent establishes that jurisdictions may not blindly or conclusively rely upon Census numbers when drawing their districts, but rather must look to the realities on the ground when seeking to achieve representational equality, the one person, one vote goal Cranston asserts it is pursuing with its 2012 plan. *Mahan v. Howell*, 410 U.S. 315, 320-321 (1973).

Counting the entire population of Rhode Island's prison facilities in a single City ward specifically undermines Cranston's asserted goal of representational equality. The vast majority of the ACI population are not legal residents of Cranston, much less Ward 6, JA064 (Pls.' Statement of Undisputed Facts ¶¶ 16-17), because they are not actually from Cranston and so cannot vote for local elected officials. R.I. Gen. Laws § 17-1-3.1 (incarcerated persons do not become domiciled for voting purposes at the prison where they are involuntarily incarcerated, but are domiciled in the jurisdictions where they came from prior to incarceration). In addition, the undisputed facts clearly establish that those involuntarily incarcerated at the ACI simply do not have the kind of meaningful relationships and ties to elected officials or the surrounding community that the Supreme Court has described as relevant to determining if someone is a constituent. ACI inmates, governed in their daily lives by the rules and regulations of the State of Rhode Island, do not have "an important stake in many policy debates" happening *in Cranston*; no "stake in a strong public-education system" *in Cranston*, in which their children cannot even participate; and no stake "in receiving constituent services, such as help navigating public-benefits bureaucracies." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). ACI inmates are not subject to Cranston "taxes" or Cranston "require[ments] to register their automobiles," and cannot "send their children to [Cranston] public schools."

*Evans v. Cornman*, 398 U.S. 419, 425 (1970). And their mere physical presence in Ward 6 does not alone establish that requisite constituent relationship. *See id.* at 424-25. Those who are involuntarily confined at the ACI can hardly be described as voluntarily professing any "element of allegiance" or willingly establishing an "enduring tie" to the Ward 6 community. *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992).

When the non-resident ACI population is properly removed from the redistricting data, the true maximum population deviation among the City's wards is more than 28 percent—well outside the maximum deviation limit of 10 percent. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

Defendant City of Cranston makes several arguments in defense of its unconstitutional districting scheme, but all of them lack merit. Chief among these arguments is that the Supreme Court's recent one person, one vote case *Evenwel v. Abbott* somehow provides Cranston with carte blanche to use whatever population base it chooses, regardless of actual conditions on the ground and serious distortions that may result. Defendant's Appellant Brief ("Def. Br.") at 9-11, EntryID#6014592. Instead, *Evenwel* simply confirms that jurisdictions may prioritize representational equality over electoral equality (a proposition Plaintiffs have never challenged); it does not establish the proper way to achieve this goal. *Evenwel* is simply *not* a case about the precise population base needed to achieve

effective representational equality, and therefore has no direct bearing on the instant case.

Cranston's remaining arguments are similarly unavailing. The judgment below should be affirmed.

## V. ARGUMENT

### A. Counting the Entire Population of Rhode Island's State-Run Correctional Facilities in a Single City Ward Violates the Equal Protection Clause

#### 1. *The Equal Protection Clause Guarantees Every Constituent of the City of Cranston Equal Representation for Equal Numbers of People*

The Equal Protection Clause of the Fourteenth Amendment prohibits the states, and by extension, their municipalities, from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This bedrock democratic principle guarantees equal representation for equal numbers of people in the City of Cranston—otherwise known as the "one person, one vote" principle. As the Supreme Court has explained, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (internal quotations and citations omitted). As a result, "the Equal Protection Clause requires that a State make an honest and good faith effort to

construct districts…as nearly of equal population as is practicable." *Id.* at 577. That is because "[e]qual representation for equal numbers of people is a principle designed to prevent the debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). As a general guideline, population deviations greater than ten percent in state or local districts are not considered minor deviations and must be justified. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). These principles are fully applicable to the drawing of local district lines such as those used in City of Cranston elections, because important issues that have a significant impact on residents' daily lives are routinely decided at the county and municipal levels. *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 481 (1968) ("[T]he States universally leave much policy and decisionmaking to their governmental subdivisions…[I]nstitutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.").

Courts have identified two potentially permissible ways in which jurisdictions can satisfy the one person, one vote principle: representational equality or electoral equality. *Kirkpatrick*, 394 U.S. at 531; *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 781-82 (7th Cir. 1990) (Kozinski, J., concurring in part and dissenting in

part). Jurisdictions that seek to achieve "representational equality" can do so by drawing their district lines such that each district contains roughly the same number of constituents, whether or not they can vote, which ensures that all constituents have approximately equal access to their elected officials compared to those in other districts, as well as equal opportunity to discuss local concerns and petition their representatives for redress.[2] As the Supreme Court explained in its recent one person, one vote case *Evenwel v. Abbott*, counting non-voting constituents is important because

> [n]onvoters 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.

*Evenwel*, 136 S. Ct. at 1132 (internal citations omitted). *See also Garza*, 918 F.2d at 775 ("Since 'the whole concept of representation depends upon the ability of the people [including non-voting constituents like non-citizens] to make their wishes known to their representatives', this right to petition is an important corollary to the right to be represented." (internal citations omitted)); *id.* at 781 (Kozinski, J., concurring in part and dissenting in part) (representational equality "assures that

[2] This is the system that is constitutionally mandated for the drawing of congressional lines. *See* U.S. Const. amend. XIV, § 2.

constituents have more or less equal access to their elected officials"). Thus, the Supreme Court held that a jurisdiction is permitted to pursue representational equality when engaging in redistricting. *Evenwel*, 136 S. Ct. at 1123. Cranston purports to redistrict on this basis.

Some judges have suggested that jurisdictions may also comply with the Equal Protection Clause by achieving "electoral equality," by drawing their district lines such that each district contains roughly the same number of voters.[3] This is based on the theory of weighing citizens' votes in various districts approximately equally such that voters in one district do not have substantially more power to choose their representatives than voters in neighboring districts. *Garza*, 918 F.2d at 781-82 (Kozinski, J., concurring in part and dissenting in part).[4]

Whether a jurisdiction pursues representational equality or electoral equality, it must also decide who it will choose to count in any particular district. On the issue of who is a constituent, Supreme Court decisions have illustrated two

[3] Cranston has not attempted to defend its electoral districts on the basis of electoral equality, and, as is explained in more detail below, could not do so if it tried.

[4] Many have argued that jurisdictions should not be permitted to pursue electoral equality, which ignores large swaths of non-voting constituents and can result in gross disparities in representation. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940), at 27-28. Yet since Cranston has not asserted an attempt to achieve electoral equality, and since counting the ACI population in Ward 6 serves neither representational nor electoral equality, this Court need not decide whether electoral equality is a permissible goal to decide this appeal.

underlying principles.[5] First, someone's mere physical presence or non-presence in a jurisdiction does not conclusively indicate whether that person is a constituent of local elected officials for Equal Protection purposes, and jurisdictions must look to the realities on the ground. *See Burns v. Richardson*, 384 U.S. 73, 94 (1966) ("Total population figures may…constitute a substantially distorted reflection of the distribution of state citizenry."). Thus, in *Evans v. Cornman*, 398 U.S. 419 (1970), the Supreme Court held that Maryland improperly excluded certain constituents from voting in Maryland elections simply because they technically lived in a federal enclave, not on state soil. The Supreme Court pierced through this technicality and listed a host of factors demonstrating that, for all practical purposes, these federal enclave-dwellers were in fact true constituents with meaningful ties to Maryland and as such could not be denied the franchise. For instance, the Court found that the enclave-dwellers were subject to state laws including criminal sanctions, taxes, and requirements to register their vehicles; "they send their children to Maryland public schools," *id.* at 424; and that "[i]n their day-to-day affairs, residents of the [National Institutes of Health] grounds are just as interested in and connected with electoral decisions as…are their neighbors who live off the enclave." *Id.* at 426. Similarly, the Supreme Court explained in

[5] As explained in more detail below, Part B.1 *infra*, the Supreme Court's recent case *Evenwel v. Abbott* does not speak to this issue.

*Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992), that for purposes of congressional representation, a person's residence "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place."

Second, the Supreme Court has held that jurisdictions may not conclusively rely upon Census numbers (*i.e.*, how many people are tabulated in any given location by the Census) when deciding who to count as constituents of a particular district, when real-world conditions establish that those numbers are inaccurate and should be adjusted in order to achieve a "good faith effort to achieve absolute equality" in population. *Mahan v. Howell*, 410 U.S. 315, 320-321 (1973) (internal citations omitted); *see also id.* at 330-32 (improper to defer to Census decision to count 36,700 Navy personnel who were "home ported" in a district as residents of that district, when only about 8,100 *actually* lived in that district). Thus, in *Mahan*, "[t]he legislative use of this census enumeration to support a conclusion that all of the Navy personnel on a ship actually resided within the state senatorial district in which the ship was docked *placed upon the census figures a weight that they were not intended to bear*." *Id.* at 330 n.11 (emphasis added). Several subsequent court decisions have confirmed that jurisdictions are not required to use raw Census data when doing so would lead to inaccurate results. *See, e.g.*, *City of Detroit v. Sec'y of Commerce*, 4 F.3d 1367, 1374 (6th Cir. 1993); *Assembly of State of California. v.*

*U.S. Dep't of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992). And, at times, constitutionality may require disregarding Census counts for prison populations. *Hartung v. Bradbury*, 332 Or. 570, 599 (Or. 2001), 33 P.3d 972, 987 ("…the Secretary of State's decision 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.").

In sum, to comply with Equal Protection requirements, jurisdictions such as Cranston must actually pursue and reasonably achieve at least one permissible one person, one vote objective. In pursuing representational equality (or electoral equality), a jurisdiction cannot conclusively rely upon where the Census tabulates persons, but rather must adjust Census data if otherwise serious distortions would occur—as is the case when including a large, concentrated population of persons with no clear ties to the surrounding community and no constituent-representative relationship with local elected officials. Courts have intervened in the past to correct similar grossly undemocratic distortions and, as explained below, the district court was correct to intervene in this case—a decision this Court should affirm on appeal.

*2. Cranston's Current Districting Map Results in Gross Representational Inequality in Violation of the Equal Protection Clause*

Counting the entire population of Rhode Island's state-run correctional facilities in a single City ward, as Cranston has chosen to do in its 2012

Redistricting Plan, violates the Equal Protection Clause because it does not serve or achieve representational equality, the sole justification Cranston has offered to satisfy its constitutional obligations. Def. Br. at 10; Memorandum of Law in Support of City of Cranston's Motion to Dismiss at 11, R.8. PageID#34. Although pursuing representational equality is a legitimate goal, this does not mean that a federal court is required to take at face value the City's assertion that its plan actually serves that goal.[6]

Cranston's current districting map fails to *achieve* representational equality because the City improperly counts more than 3,400 people incarcerated at the ACI, Rhode Island's state-run correctional facilities, as supposed "residents" of

[6] Generally speaking, organizations that support counting incarcerated persons in their home communities for districting purposes also embrace the pursuit of representational versus electoral equality. Several major civil rights and pro-democracy organizations, for example, have publicly supported both shifting the Census Bureau's method for counting incarcerated persons and the government's defense of representational equality in the *Evenwel* case. *See* Full-Text Log of Current Submissions to "2020 Decennial Census Residence Rule and Residence Situations; Notice and Request for Comment," 80 Fed. Reg. 28950 (May 20, 2015) at 46-53, 85-90, 108-10, 120-24, 142-43, *available at* https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2015-12118_FRN_Comments.pdf; Brief for the American Civil Liberties Union and the ACLU of Texas as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940); Brief for the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940); Brief for Common Cause as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940); Brief for the Leadership Conference on Civil and Human Rights et al. as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940); Brief for the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Supporting Appellees, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No.14-940). For further 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*, 136 S. Ct. 1120 (2016) (No.14-940).

Cranston's Ward 6, when the undisputed facts clearly establish, as explained below, that the people who are involuntarily confined to the state-run prison cannot in any reasonable sense be described as actual constituents of Ward 6. Artificially inflating the population of Ward 6 with more than 3,400 non-constituents results in Ward 6 having only 10,227 actual constituents compared to approximately 13,000-14,000 in every other ward: a deviation between the most and least populous Cranston wards of 28.12 percent,[7] which is well outside the maximum deviation limit of 10 percent.[8] *See Brown*, 462 U.S. at 842-43. This means that the individual Plaintiffs, residents of Wards 1 and 4, currently enjoy only three-fourths of the representation in their local municipal democracy as their neighbors who live in Ward 6.

[7] The district court lists the deviation as "approximately 35%", JA446 (May 24 Order at 3), apparently by removing the entire prison population from the population base and from Ward 6, and then dividing the deviation between the most and least populous wards by the number of people in the least populous ward (Ward 6). Plaintiffs calculated the deviation by subtracting the non-resident ACI population (3,280) from Cranston's population base; reallocating persons at the ACI actually from Cranston to their proper wards; subtracting the non-resident ACI population from Ward 6 (3,415); and then dividing the resulting maximum population deviation by the population of an ideal district (versus the smallest district). The discrepancy produced by the different methodology is immaterial, as either deviation is well outside of the acceptable range.

[8] The City does not dispute this figure. There were some minor disagreements among expert witnesses about the exact population of the ACI, but the question of which precise population figure to use is not material to the central question of whether the districts meet population equality standards. *See* JA063 (Pls.' Statement of Undisputed Facts at ¶ 12). Regardless of which ACI population figure one uses, subtracting that number from Cranston's inflated Ward 6 population base always produces deviations well outside the acceptable range. Critically, the City has made no attempt to justify a population deviation of approximately 28 percent.

The undisputed facts demonstrate that the ACI population cannot be described as actual constituents of Ward 6 or the City of Cranston.[9] In other words, they do not resemble the non-voting constituents described in *Evenwel*, 136 S. Ct. at 1132, nor do they resemble the federal enclave residents of Maryland described in *Evans*, 398 U.S. at 423-24. They do not have a constituent-representative relationship with local elected officials, and therefore are not competing with actual Ward 6 residents for access, representation, or redress of concerns. This is clear for several reasons.

**First,** the overwhelming majority of persons incarcerated at the ACI are not legal residents of Cranston, much less Ward 6. Just 153-155 persons incarcerated at the ACI—less than five percent (5%) of the total facility population—came from Cranston prior to incarceration. JA446 (May 24 Order at 3). Just 18 of those persons, or a mere one half of one percent (0.5%) of the prison population, "had pre-incarceration addresses located in Ward Six." JA446 (May 24 Order at 3). Under Rhode Island law, those who did not live in Cranston prior to becoming incarcerated there do not become domiciled at their prison address by virtue of

[9] Cranston claims that the district court failed to consider the facts "in the light most favorable to the City…" Def. Br. at 18-21. This claim lacks merit, as explained in detail in Part V.B.2 below.

their incarceration and are not considered residents there for voting and other purposes. R.I. Gen. Laws § 17-1-3.1.[10]

**Second**, a negligible number of incarcerated persons vote in Ward 6—and many vote in other locations. As noted above, only 18 persons present at the ACI on Census Day have been identified as having lived in Ward 6 prior to incarceration, and therefore potentially eligible to vote in Ward 6 at their pre-incarceration address. The remaining 99-plus-percent of the ACI population either may not vote at all (approximately 37 percent who have been convicted of a felony), or must vote absentee from their prior address outside of Ward 6. JA065 (Pls.' Statement of Undisputed Facts ¶ 23); R.I. Gen. Laws § 17-1-3.1. Thus, Cranston's 2012 Redistricting Plan has led to the absurd result of many persons being counted in one place for purposes of local representation and yet being required to vote in a different location—a situation without parallel.[11]

[10] Note that Plaintiffs seek to retain all actual Cranston residents incarcerated at the ACI (voting and non-voting) in the baseline districting population. JA160-64 (Cooper Decl. at 17-21).

[11] College students, for example, may be counted in one place and vote in another; but they may also vote where they are counted because they are actual residents and members of the community. Defendant's suggestion that the district court's reference to college students somehow "contradicts its own premise" with respect to residency and voting location of the prison population is wholly off the mark. Def. Br. at 22. College students can sensibly establish residency in their city of study because they can credibly claim an indefinite intent to remain there. This is emphatically not the case for the vast majority of persons incarcerated at the ACI, as explained below.

**Third**, no one incarcerated at the ACI had any choice or discretion as to where they were incarcerated. JA064 (Pls.' Statement of Undisputed Facts ¶ 19). Thus, they are not, in any sense, voluntary residents of Cranston who willingly chose to join the Cranston community. *Cf. Mitchell v. United States*, 88 U.S. 350, 353-54 (1874) (voluntariness essential to establishing domicile for voting purposes).

**Fourth**, in no reasonable sense can persons incarcerated at the ACI be described as having "domiciled" there—that is, having a present intent to remain in the district *indefinitely*, *id.* at 353—because it is undisputed that most of the persons incarcerated at the ACI are present in Ward 6 for a very limited duration. The median length of stay for those serving a prison sentence is 99 days, and for those awaiting trial is just three days.[12] JA446 (May 24 Order at 3). More than two-thirds (69%) of all persons incarcerated at the ACI are typically released within six months; and approximately 84% are released within one year.[13] JA065

[12] As noted, Cranston purports to dispute this fact by questioning whether "median is the most accurate calculation to use for length of stay purposes" but offers no contrary evidence to suggest that any other type of calculation would produce a more accurate reflection of how long a typical person incarcerated at the ACI remains there. JA420 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 9).

[13] The City purports to dispute this fact "as it does not indicate whether this analysis takes into account recidivism rates and repeat offenders" but offers no contrary evidence to suggest that the information is incorrect or unreflective of the amount of time a typical incarcerated person spends at the ACI. JA421 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 10). In addition, the concept of domicile requires a present intent to remain in the district indefinitely and does not take into account future unforeseen circumstances. Hence recidivism is irrelevant to whether persons incarcerated at the ACI are in fact domiciled in Ward 6.

(Pls.' Statement of Undisputed Facts ¶ 24). In other words, most of those who happen to be present at the ACI on Census Day spend the majority of the year and the vast majority of the ten-year redistricting period elsewhere.

**Fifth**, the district court correctly concluded based on the undisputed facts that the "ACI inmate population does not participate in the civic life of Cranston or Ward Six." JA447 (May 24 Order at 4). Indeed, the incarcerated population is almost entirely physically isolated from the rest of the community, rarely permitted to leave the facility, and unable to make use of basic City services or send their children to Cranston public schools based upon their ACI address. *Id.*; *compare, e.g.*, *Evans*, 398 U.S. at 424 (noting federal enclave residents were constituents of Maryland because "they send their children to Maryland public schools"). The City provides "minimal services to the ACI" as "most requests for police services are handled by the State Police" and "calls to the ACI represent only a negligible percentage of the [Cranston Fire] Department's total calls per year." JA447-48 (May 24 Order at 4-5). In fact, Ward 6 Councilman Michael Favicchio admitted that he could not think of any group of residents within the ward he represents that is more isolated than the people incarcerated at the ACI. JA067 (Pls.' Statement of Undisputed Facts ¶ 40). They simply have no "enduring tie" to the Ward 6 community. *Franklin*, 505 U.S. at 804.

**Sixth,** ACI inmates are simply not "connected with electoral decisions" of Cranston as are the Ward 6 residents who live outside the prison, *Evans*, 398 U.S. at 426, because Cranston officials do not "enact regulations or ordinances that bear on conditions at the ACI," JA448 (May 24 Order at 5).[14] This is wholly unsurprising, because the ACI is a state-run facility.

**Seventh,** the ACI population is unique in this regard; no other population in Cranston approximates incarcerated persons with respect to their total isolation and the specific factors identified in *Evans*. The district court noted correctly that the "ACI's inmates are different from other groups of non-voting residents of Cranston, such as the students at Johnson & Wales University mentioned by Defendant . . . . College students, for example, may register to vote from their campus address…[and] are most certainly affected by municipal regulations." JA454 (May 24 Order at 11). They are also, of course, free to move about the Cranston community, patronize local businesses, and interact with other Cranston residents. JA072 (Pls.' Statement of Undisputed Facts ¶ 68). Nursing home residents (also referenced by Defendant) may leave their facility to make use of community resources and interact with fellow Cranston residents, and have a genuine stake in local laws. Resident aliens and undocumented persons are also

[14] The City claims that some decisions of the Cranston City Council affect persons incarcerated at the ACI, Def. Br. at 19-20, but these supposed effects are at best tangential and certainly do not "bear on conditions" at the actual prison facilities.

governed by local laws, participate in the life of the community, and often live with family members who are citizens or legal residents (including children who often attend local schools). *See, e.g.*, *Calvin v. Jefferson Cnty. Bd.of Commissioners*, Case No. 4:15-cv-131, 2016 WL 1122884, *slip copy*, at *27 ("Prisoners are not like minors, or resident aliens, or children—they are separated from the rest of society and mostly unable to participate in civic life.").

All of the above factors establish that those involuntarily incarcerated at the ACI simply do not have the kind of meaningful constituent relationships that the Supreme Court has described as relevant to the kind of electoral decisions at issue here. ACI inmates, governed in their daily lives by the rules and regulations of the State of Rhode Island, do not have "an important stake in many policy debates" happening *in Cranston*; no "stake in a strong public-education system" *in Cranston*, in which their children cannot even participate; and no stake "in receiving constituent services, such as help navigating public-benefits bureaucracies." *Evenwel*, 136 S. Ct. at 1132. ACI inmates are not subject to Cranston "taxes" or Cranston "require[ments] to register their automobiles," and cannot "send their children to [Cranston] public schools." *Evans*, 398 U.S. at 425. And their mere physical presence in Ward 6 does not alone establish that requisite constituent relationship. *See id.*at 424-25. Those who are involuntarily confined at the ACI can hardly be described as voluntarily professing any "element of

allegiance" or willingly establishing an "enduring tie" to the Ward 6 community. *Franklin*, 505 U.S. at 798.

Because ACI inmates are not true constituents of Ward 6, the undisputed factual record unsurprisingly reflects a total lack of any representational relationship between Cranston elected officials and the persons incarcerated at the ACI. Cranston City officials have not meaningfully engaged the persons incarcerated at the ACI; do not campaign for support there; do not "endeavor to represent" those present there; and have largely conducted themselves as if the presence of more than 3,000 people within the City limits was of little consequence to them, even though those people are of great consequence to Cranston's unconstitutional districting scheme.[15] JA448 (May 24 Order at 5). Although those incarcerated at the ACI purportedly make up one quarter of the "population" in Ward 6 under Cranston's unconstitutional districting scheme, the very City Councilor who currently represents Ward 6 has made no effort to talk to persons incarcerated at the ACI in his capacity as City Councilor, to determine their interests, advocate on their behalf, or campaign for support there.[16] JA067 (Pls.'

[15] The City purports to dispute that local officials fail to consider the views or interests of the ACI population, but provides absolutely no hard evidence to the contrary; rather the City relies upon subjective and self-serving testimony from City employees. Def. Br. at 18.

[16] Cranston "disputes that Councilor Favicchio indicated that he does not advocate or consider the views of the ACI Population as a Council member." JA426 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 15). Yet the City does not dispute that the only contact Mr. Favicchio has had with persons incarcerated at the ACI has been with "individuals whom he

Statement of Undisputed Facts ¶¶ 37, 39). The Ward 6 School Committee member similarly has had absolutely no contact whatsoever with persons incarcerated at the ACI. JA067 (Pls.' Statement of Undisputed Facts ¶ 36). Mayor Fung has also made no effort to affirmatively communicate with, interact with, seek the support of, or ascertain the views of the ACI population.[17] JA068-69 (Pls.' Statement of Undisputed Facts ¶¶ 42, 44, 45, 47). The three at-large members of the Cranston City Council—the other elected officials who might in theory "represent" those present at the facility—have had no contact with persons incarcerated at the ACI. JA067 (Pls.' Statement of Undisputed Facts ¶ 36). And there is no evidence that the Cranston City Council has ever considered the needs or interests of the persons incarcerated at the ACI, or taken their views into account in its decision-making.

represents in his legal practice." Deposition of Michael Favicchio 29:15—33:22 (Ex. 21), R.24, PageID#478-480. The City cites absolutely no evidence that Mr. Favicchio attempted to ascertain the interests or views of persons incarcerated at the ACI or take any action to advocate on their behalf.

[17] The City purports to dispute that Mayor Fung did not interact with any incarcerated persons when he toured the ACI facility, but offers no evidence to the contrary. JA428 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 17). The City purports to dispute "the broad nature with which Plaintiffs couch Mayor Fung's interactions" but offers absolutely no evidence that Mayor Fung interacted with persons incarcerated at the ACI beyond the non-substantive interactions with incarcerated persons working at a senior center that Plaintiffs cited in Undisputed Fact No. 47. JA429 (Def.'s Resp. to Statements of Disputed and Undisputed Facts at 18).

JA069 (Pls.' Statement of Undisputed Facts ¶ 50).[18] None of this is surprising, because the ACI population is wholly disconnected from Cranston policy.[19]

The above demonstrates why counting the non-resident ACI population undermines representational equality—the very goal Cranston claims to pursue. Cranston's 2012 Redistricting Plan cannot be defended on electoral equality grounds either (a ground the City made no effort to advance in this case).[20] As noted above, a negligible number of persons incarcerated at the ACI are eligible to vote in Ward 6. Hence counting the population cannot serve to equalize the

[18] Those present at the ACI also do not petition Cranston officials with any regularity, and any such petitions fall on deaf ears: in the entire ten-year period prior to the filing of this lawsuit, only one letter from a person incarcerated at the ACI was submitted to a Cranston elected official, the Mayor, JA068 (Pls.' Statement of Undisputed Facts ¶ 46), and even that letter was left unanswered. *Id.* More important, the City was not able to produce a *single* communication from anyone incarcerated at the ACI to a Ward 6 City Councilor or a Ward 6 School Committee Member—the two elected officials in Cranston who purportedly represent the geographic area where the ACI is located. JA067 (Pls.' Statement of Undisputed Facts ¶¶ 36-37).

[19] In contrast to the lack of outreach and communication between Cranston elected officials and persons incarcerated at the ACI, it is undisputed that both Ward 6 Councilman Favicchio and Mayor Fung conducted significant outreach in the Cranston community in seeking election. JA067-68 (Pls.' Statement of Undisputed Facts ¶¶ 38, 41).

[20] Defendant argues that the district court ruling is somehow driven exclusively or primarily by concerns about "voter equality." Def. Br. at 11-13. This is plainly incorrect, as the ruling engages in substantial substantive analysis about whether persons incarcerated at the ACI have the characteristics of constituents, JA450-454 (May 24 Order at 7-11) ("The right to petition elected officials, a right not limited to voters, is also fundamental to representative government…."), and refers clearly to the fact that Cranston's district lines "serve to dilute the voting strength *and political influence* of the residents of wards 1, 2, 3, 4, and 5…." JA457 (May 24 Order at 14) (emphasis added). In any event it is irrelevant since counting the non-resident incarcerated population of the ACI in Ward 6 clearly does not serve the goal of representational equality as demonstrated in Part V.A *supra*.

number of eligible or actual voters across wards.[21] *See Calvin*, 2016 WL 112284 at *16 (holding prison gerrymandering satisfies neither representational equality nor electoral equality).

In sum, Cranston's decision to count the entire ACI population in Ward 6 is unlawful because it serves neither representational nor electoral equality and has resulted in serious population distortions in its 2012 Districting Plan, distortions that violate Plaintiffs' rights to Equal Protection.

## B. Defendant's Arguments are Meritless

Defendant raises several arguments in defense of its 2012 redistricting plan, most of which are red herrings and none of which has merit.

1. Evenwel *confirms that Cranston may pursue representational equality; it does not establish the proper way to achieve this goal.*

First, Cranston repeatedly invokes the Supreme Court's recent *Evenwel v. Abbott* case, 136 S. Ct. 1120, as if it were dispositive here; yet this reliance is wholly misplaced. *See* Def. Br.at 9-11. *Evenwel* is about whether a jurisdiction is permitted to pursue representational equality instead of electoral equality when

[21] Although it happens that Ward 6 may not contain the fewest registered voters in Cranston, this cannot save its districting plan since by its own admission the maximum deviation between wards as measured by registered voters is nearly 29%. Def. Br. at 12 n.5. This deviation between the number of registered voters in various wards is unsurprising since Cranston has asserted it was pursuing representational rather than electoral equality.

engaging in redistricting. *Evenwel* is *not* a case about the precise population base needed to achieve effective representational equality, and therefore has no direct bearing on the instant case.

Plaintiffs in *Evenwel* presented a single question to the Supreme Court, asking it to mandate that the State of Texas, and by extension all U.S. jurisdictions, must elevate the principle of electoral equality over representational equality in drawing districts. The *Evenwel* Court refused, in large part because of the imperative to protect the principle of representational equality. 136 S. Ct. at 1129 ("…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."). And as discussed above, the Court emphasized the importance of representational equality because "representatives serve all residents, not just those eligible or registered to vote," *id.* at 1132, and because "[b]y 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.* (internal citations omitted). While not precluding outright the choice of electoral equality, the Court emphasized 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 1131. Applying these

very principles to the facts of this case, the district court correctly concluded that persons incarcerated at the ACI

> share none of the characteristics of the constituencies described by the Supreme Court [in *Evenwel*]. They don't have a stake in the Cranston public school system and they are not receiving constituent services, such as help with public-benefits bureaucracies. They are not making requests of and suggestions to Cranston elected officials (or if they are, they are receiving no response), nor are they receiving "the protection of government," at least not from Cranston elected officials.

JA453-54 (May 24 Order at 10-11).

Unlike in *Evenwel*, however, Plaintiffs' claim in this case does not present or force a choice between two theories of equality – representational equality or electoral equality.[22] Rather, the issue here is whether counting one unique population at a particular location—incarcerated persons at the prison facility—in fact serves or undermines the goal of representational equality which is the sole basis the Defendant has advanced to defend its redistricting plan. That question was simply not before the Court in *Evenwel* so the Court had no reason to address it.

Throughout its opinion, the *Evenwel* Court uses the term "total population," which it endorses as an appropriate baseline for districting. *See, e.g.*, 136 S. Ct. at

[22] In denying Defendant's Motion to Dismiss, the district court rejected this false choice, noting that "the inclusion of the ACI prison population is not advancing the principle of electoral equality" and "the prisoners' inclusion in Ward Six does nothing to advance the principle of representational equality." *Davidson v. City of Cranston*, 42 F. Supp. 3d 325, 331 (D. RI. 2014).

1123. 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 not 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 1124.

The one instance the *Evenwel* Court touched on the meaning of total population underscores that it was not deciding exactly who should be counted as part of the total population base under a representational equality scheme. The Court noted that although "all States use total-population numbers from the census when designing congressional and state-legislative districts", *id.* at 1124, 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 1124 n.3. This juxtaposition 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.[23] This, of course, is consistent with the *Burns* Court's statement, *supra*, that unadjusted "[t]otal population figures may…constitute a substantially distorted reflection of the distribution of state citizenry." *Burns*, 384 U.S. at 94.

In sum, *Evenwel* stands for the proposition that jurisdictions may pursue representational equality when drawing districts—nothing more. As the district court aptly noted, courts "cannot stretch the holding of Evenwel to cover the inmate population at ACI." JA455 (May 24 Order at 12). In addition, the guidance the *Evenwel* Court gives about the importance of representational equality supports Plaintiffs' position that counting the ACI population in Ward 6 undermines this goal.

*2. Cranston's remaining arguments lack merit.*

Defendant City of Cranston makes several other arguments in defense of its 2012 Redistricting Plan, all of which lack merit.

**First,** Defendant attempts to justify the distortion in the Cranston redistricting plan by insisting that courts must leave districting decisions to the political branches, citing *Burns*, 384 U.S. 73. Def. Br. at 7. But that very case acknowledges that unadjusted "[t]otal population figures may…constitute a

[23] The approach to total population taken by California, Delaware, Maryland, and New York—the four states referenced without comment by the Court—is of course consistent with the approach Plaintiffs seek here.

substantially distorted reflection of the distribution of state citizenry," *Burns*, 384 U.S. at 94, and contains an important qualification: *"[u]nless a choice is one the Constitution forbids*…the resulting apportionment base offends no constitutional bar . . . ." *Id.* at 92 (emphasis added).[24] As established above, counting the entire population of a state prison complex in one city council ward, resulting in a maximum population deviation of 28 percent in city and school board elections, is exactly such a choice that the Constitution forbids, precisely because it serves neither representational equality nor electoral equality.

**Second**, Cranston clings to the Census, arguing that "Cranston has drawn its ward boundaries based on the federal decennial census for over fifty years." Def. Br. at 2. As discussed above, however, jurisdictions cannot blindly adhere to Census data when they belie the actual facts on the ground. *See Mahan*, 410 U.S. 315. In fact, in recognition of the fact that many communities wish to end prison gerrymandering, the U.S. Census Bureau has, as of the most recent census, begun

[24] As aptly noted by the district court in *Calvin* in analyzing the Supreme Court's one person, one vote cases:

> none of these cases held…that a state or local government could draw districts in a way that violates *both* electoral and representational equality. Such a districting scheme would deny *all* denizens of some districts—voters and nonvoters alike—equal protection of the laws. It would of course dilute the voting strength of voters, but it would also dilute the representational strength of those voters *and* of their nonvoting neighbors. A scheme that violates both of these principles is unconstitutional under any interpretation of one person, one vote." *Calvin*, 2016 WL 1122884 at *16 (emphasis in original; internal citations omitted).

to provide a separate data file on "group quarters" populations (which includes prison inmates) in time for jurisdictions to adjust their counts for redistricting purposes. *2010 Advanced Group Quarters Summary File*, U.S. CENSUS BUREAU (April 2011) at 1-1;[25] *see also*, Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 W. MITCH. L. REV. 1241, 1248-49 (2012). Cranston can take full advantage of this system to ensure their compliance with the Equal Protection Clause.

**Third**, Cranston argues that the district court failed to consider evidence of connections between the ACI population and the surrounding community "in the light most favorable to the City" and relied upon an erroneous legal conclusion about whether persons at ACI can vote in Ward 6.[26] *See* Def. Br. at 18-20. The facts the City relies upon, however, are immaterial or irrelevant.

Cranston asserts that ACI inmates have an interest in the Cranston roads their family members might use to visit them, Def. Br. at 18, but such an interest is too abstract and attenuated to reasonably establish a constituent relationship—otherwise, certain California districts could artificially inflate their political power

[25] *Available at* http://www.census.gov/prod/cen2010/doc/gqsf.pdf.

[26] As the present paragraph makes clear, Cranston's assertions about the district court's treatment of the facts lack merit regardless of the standard. Yet because this case reaches this Court on interlocutory appeal the district court's application of the undisputed facts to the law is subject to an abuse of discretion standard making it impossible for the City to raise an even colorable claim in this regard. *See* Part I, *supra*.

by counting New York residents as their constituents, simply because their relatives use California airports to visit them in New York and they therefore have an "interest" in the quality of these California airports. Cranston points to conclusory, self-serving statements from City officials claiming that they do in fact care about the welfare of ACI inmates, Def. Br. at 18, but their subjective states of mind are irrelevant to this analysis; and the City fails to back up this subjective testimony with any hard evidence whatsoever. Cranston then points to the interests of *Cranston residents*, which are only tangentially affected by the facilities' minimal impact on the surrounding community, Def. Br. at 18-21; but those interests simply reaffirm that *those residents* are rightfully considered constituents of Cranston. They do not establish a constituent relationship between *ACI inmates* and Cranston. The evidence the City relies upon is simply irrelevant or too attenuated to be material to the analysis of whether ACI inmates are truly constituents of Ward 6. *See e.g., Triangle Trading Co., Inc. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) ("'[C]onclusory allegations, improbable inferences, and unsupported speculation,' are insufficient to establish a genuine dispute of fact" (internal citations omitted)); *Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994) (to defeat summary judgment "the nonmovant cannot simply rest on perfervid rhetoric and unsworn allegations" but rather must

undertake the "burden to produce specific facts, in suitable evidentiary form, to…establish the presence of a trialworthy issue") (internal citations omitted).

Cranston argues further that the district court erred in concluding that the vast majority of persons incarcerated at the ACI are not eligible to vote because Rhode Island law permits persons to affirmatively change their domiciles to a prison facility. Def. Br. at 21. Given the brief duration of most of the population's tenure at the ACI and the fact that the vast majority do not intend to remain there indefinitely, however, effecting a change of domicile would be absurd or impossible for all but a few persons present at the ACI. Probably for this reason, the City made no effort to document below even a single instance in which an individual at the ACI changed his or her domicile to the ACI. In any event, this is of limited relevance to the instant case since Cranston has asserted that it is pursuing representational, not electoral equality.

**Fourth**, Cranston argues that jurisdictions must always be free to count incarcerated persons at the prison location, but their argument leads to absurd results. According to Defendant's position, a legislative map featuring a district with just one household of three actual residents situated next to a prison with a population of 5,000 persons would comply with the Equal Protection Clause. It cannot be the case that the Constitution permits just three constituents (and perhaps only one voter) to command the same representation as 5,000 residents of adjacent

districts. While this hypothetical is extreme, it is not fanciful. In Anamosa, Iowa, the incarcerated population of the state's largest prison constituted 96% of the city's second ward, as counted by the Census. Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. TIMES, Oct. 23, 2008, *available at* http://www.nytimes.com/2008/10/24/us/politics/24census.html. With only 58 actual constituents in the ward, the winner of the 2005 election for city council won with just two write-in votes (neither his own). *Id.* The city's residents later voted to move to at-large districts, which eliminated the problem. Michelle Phillips, *Voters Eliminate Wards in Anamosa Election*, ANAMOSA JOURNAL-EUREKA, November 8, 2007 at 1, *available at* http://www.prisonpolicy.org/scans/Anamosa-Journal-Eureka-101508.pdf.

**Fifth**, Cranston suggests that recognizing that incarcerated persons do not enjoy a constituent-representative relationship with elected officials at the prison location will somehow lead to uncertainty, manipulation, or excessive litigation. Def. Br. at 14-18. This argument fails because, as noted above, incarcerated persons are readily and clearly distinguishable from other resident but non-voting populations. With respect to virtually every metric considered by courts, incarcerated persons fall on one side of a clear line and every other conceivable population falls on the other. Two district courts have examined the precise issue at bar in the instant case and have concluded without difficulty that incarcerated

persons can (and must) be meaningfully distinguished from actual residents for the purpose of drawing legislative districts.[27] JA454 (May 24 Order at 11); *Calvin*, 2016 WL 112284 at *27-28.

**Sixth**, Cranston claims that the "District Court's order had the perverse result of giving over 3,400 men and women housed in the ACI zero representation anywhere in the state for purposes of local apportionment," Def. Br. at 5, and falsely asserts that the district court found that "the interests and concerns of prisoners are not important enough to matter for apportionment purposes . . . ." Def. Br. at 16. This is a red herring.

Plaintiffs' legal claims and the district court's ruling are fully consistent with the worthiness of incarcerated persons as citizens. In fact, Plaintiffs believe strongly that incarcerated persons should be counted—in the correct place. This is made plain by the fact that under the remedial redistricting plan proffered by Plaintiffs, persons incarcerated at the ACI whose home residences are actually in Ward 6 would remain allocated to Ward 6. JA160-164 (Cooper Decl. at 17-21).

[27] Cranston raises the prospect that a population found to lack a constituent-representative relationship might suddenly "become highly engaged" as a result of manipulation "by outsiders with an agenda." Def. Br. at 17. Given that incarcerated persons are the only population that aptly fits this description, this concern is highly speculative. Even if incarcerated persons were encouraged to direct extensive communications to local elected officials, most would be unable (and likely unwilling) to meaningfully address their concerns. In addition, communications with elected officials are, of course, only one of several indicia of the constituent-representative relationship and, as noted above, not alone dispositive. Other indicia (such as physical isolation from the community) appear even less subject to manipulation.

Other jurisdictions can and should count incarcerated persons in their home communities.[28] Incarcerated persons are much more likely to receive meaningful, effective representation in their home communities where many may vote and most have "enduring ties" such as family and business relationships. *Franklin*, 505 U.S. at 804. The district court ruling simply recognizes the reality that the ACI population has no meaningful tie to the Ward 6 community, and consequently no meaningful constituent relationship with local Cranston officials.[29] Counting incarcerated people in the wrong place does not solve the problems associated with not counting them as constituents of the places where they are actually from. A person who is incarcerated does not magically receive the benefits of being an actual resident—such as being able to vote in local elections or send her children to

[28] The City's brief implies that the district court's ruling opens the door to lawsuits by incarcerated persons seeking to be counted in their home communities. Such claims are not dependent upon the resolution of the present question, since whether or not they are counted in redistricting for the City Council or School Committee in Cranston, people incarcerated at the ACI are still denied representation in Providence and other communities across the state. Such lawsuits have been and continue to be unlikely, however, because few communities are likely to have enough residents who are both incarcerated elsewhere and live in concentrated enough areas in the home community to distort local population counts sufficiently to raise substantial one person, one vote claims. *See* Rhode Island Dep't of Corrections, Reentry Analysis 2010, *available at* http://www.doc.ri.gov/administration/planning/docs/Reentry%20Report.pdf.

[29] Similarly, the *Calvin* Court asserted correctly that the persons incarcerated at the local prison "do not have 'political equality' with the other denizens of Jefferson County vis-à-vis the [relevant elected officials]—not in terms of voting, of course, but also not in terms of representation… . That lack of political equality is not a consequence of my decision, but a factual predicate of it. In short, I have not decided that the [prison] inmates lack political equality with their 'neighbors' in Jefferson County—the State of Florida has." *Calvin*, 2016 WL 112284 at *28.

local schools—simply by being allocated to a certain location on a spreadsheet. Nor does such a person spontaneously achieve a constituent-representative relationship with local officials. Cranston officials' utter lack of concern for the views and needs of the ACI population, which the record undisputedly reflects, makes this painfully obvious.

* * *

The City of Cranston's decision to count the entire population of Rhode Island's only state-run prison in Ward 6 serves neither of the established objectives of the one person, one vote principle. Without artificially inflating Ward 6 with the prison population, the 2012 Districting Plan's maximum deviation falls well outside the acceptable range, denying Plaintiffs and their neighbors in Wards 1-5 Equal Protection under the law. The prison population is unique in its physical and political isolation from the surrounding community, such that recognizing the lack of a constituent-representative relationship between incarcerated persons and local elected officials articulates a clear, limited principle that preserves the rights of actual Cranston residents while doing no harm to the interests of the individuals incarcerated at the ACI.

## VI. CONCLUSION

For the above reasons, the district court's May 24 Order should be affirmed, and the case remanded for entry of a final judgment.

Dated: July 26, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Adam Lioz, hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,469 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman) in 14-point size.

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## CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the United States Court of Appeals for the First Circuit's CM/ECF system on July 26, 2016, will be sent electronically to the counsel of record for Defendant, who are registered as ECF filers. In addition, a hard copy will be sent to their office via overnight mail.

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