

**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

**MEMORANDUM OF LAW IN SUPPORT OF THE CITY OF CRANSTON'S MOTION  
TO DISMISS**

The City of Cranston (the "City")<sup>1</sup> respectfully submits this memorandum of law in support of its motion to dismiss Plaintiffs'<sup>2</sup> complaint (the "Complaint") pursuant to Fed. R. Civ. Pro. 12(b)(6). In the Complaint, Plaintiffs seek declaratory and injunctive relief to invalidate the City's plan that redistricted its municipal wards in 2012. Plaintiffs' claim the plan violates equal protection.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted. As will be demonstrated, the City used a proper, if not preferred, methodology to reapportion its wards by its use of total population as determined by the census, and Plaintiffs are otherwise unable to show, as a matter of law, that the City's 2012 reapportionment was unconstitutional.

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<sup>1</sup> Based on the nature of the Plaintiffs' claims and requests for relief, the City may not be the proper party for two reasons: (1) the City alone is unlikely to be able to provide meaningful relief given the statewide repercussions that could be caused by adoption of Plaintiffs' legal theories; and (2) "the City" is not the actor causing the "harm" which is the crux of Plaintiffs' complaint. However, although the City does not waive and herein preserves such defenses, the City does not raise these defenses for purposes of this Motion.

<sup>2</sup> The named plaintiffs are Karen Davidson, Debbie Flitman, Eugene Perry, Sylvia Weber, each of whom allege to be residents of the City in wards other than Ward 6, and the American Civil Liberties Union of Rhode Island, Inc. (the "ACLU"). Collectively, the City will refer to all plaintiffs as the "Plaintiffs".

Moreover, not only is the City's 2012 redistricting plan constitutional, any argument for a different approach should be reserved to the political process within the legislative branch of government, as opposed to the judiciary. *See Burns v. Richardson*, 384 U.S. 73, 92 (1966).

## **I. FACTS AND BACKGROUND**

### **A. The City's 2012 Redistricting Plan**

In 2010 the U.S. Census Bureau (the "Bureau") conducted and published its decennial national census. From the Bureau's census, the Constitution of the State of Rhode Island requires the General Assembly to be apportioned "as nearly equal in population and as compact in territory as possible" according to each "new census taken by authority of the United States...." R.I. Const. Art. 7, § 1; R.I. Const. Art. 8, § 1. On June 22, 2011, the General Assembly adopted "An Act Establishing a Reapportionment Commission" requiring that the federal congressional and state legislative (both house and senate) districts be divided "as nearly equal in population as possible . . . as determined by the population reported in the federal census in 2010[.]" Public Laws 2011, ch. 106, § 2.

The City then embarked upon its own reapportionment plan and the City Council referred the "Resolution adopting a Redistricting Plan for the City's Six Wards" to its Ordinance Committee (the "Committee"). On March 15, 2012, the Committee held a meeting on proposed redistricting at which the Committee entertained multiple proposed redistricted maps. After consideration, the March 15<sup>th</sup> meeting was continued to March 29, 2012 for further deliberation and comment.

On March 29<sup>th</sup>, the Committee reconvened its public meeting on redistricting. At this meeting, several members of the community commented, including Ms. Hillary Davis of the ACLU. Compl. ¶ 24. After public comment and discussion, a slight modification was proposed

to plan version Q, which was later approved and accepted by the Committee as plan version Y (the “Plan”) at which time the Plan was sent to the full City Council.

On April 17, 2012, the City Council held a special meeting to approve the recommendation of the Committee as stated in the Plan. Without anyone from the public appearing to comment, the Plan was approved by the full City Council. In keeping with the principles declared by the Rhode Island Constitution and the apportionment of the General Assembly’s districts, the City’s Plan reapportioned its wards using the City’s population as reported by the Bureau’s 2010 census, which included 3,433 individuals incarcerated in the Adult Correction Institute (“ACI”). *See* Compl. ¶ 15. Under the Plan, the total population deviation between the lowest and highest ward districts is approximately 5 %. Compl. ¶ 22.

Based on the Plan’s apportionment of the City’s wards, the 2012 election cycle was held in the City without legal objection. Nearly two years after the Plan became effective and has been relied upon by the City and its residents to elect its representatives, through which the City governs, Plaintiffs now seek a declaration from this Court that the Plan, despite having been based on total population figures from the 2010 census, is unconstitutional.

**B. The Plaintiffs’ Challenge**

The Complaint makes one challenge to the Plan: that the City should not have used the City’s total population as reported in the 2010 census to reapportion its wards. Plaintiffs argue that the City must deviate from federal and state policy by discounting the inmates housed in the ACI from its population. Compl. at ¶¶ 15, 21. Plaintiffs’ Complaint is simply a challenge as to whether or not it is appropriate for a municipality to use unaltered census population data to apportion its representative districts. Since its first decisions on the “one person, one vote” principle, the Supreme Court of the United States has been clear to state

that the Equal Protection Clause, U.S.C.A. Const. Amend. 14, requires that apportionment be based on population. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.”). Moreover, when the Supreme Court has upheld a state’s deviation from a strict population basis apportionment standard, that deviation has been upheld under the Equal Protection Clause in circumstances when the redistricting “was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.” *Burns*, 384 U.S. at 93.

**C. Challenges Not Raised By Plaintiffs**

Although Plaintiffs allege that the Plan violates their right to equal protection under the 14<sup>th</sup> Amendment, Plaintiffs do not assert any claim that the City’s Plan was in any way driven by or resulted in discrimination of any class. In fact, the word “discrimination” is not even contained in the Complaint. The overwhelming case law regarding violations of the “one person, one vote” principle of equal protection relates to discrimination based on such factors as race, *see e.g. Shaw v. Reno*, 509 U.S. 630 (1993), occupation, *see Davis v. Mann*, 377 U.S. 678, 691 (1964) (“[d]iscrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible”), or military personnel, *see Mahan v. Howell*, 410 U.S. 315, 332 (1973) (citing *Davis*, 377 U.S. at 691) (“discriminatory treatment of military personnel in legislative reapportionment is constitutionally impermissible”). Plaintiffs do not allege discrimination to any particular group, let alone to themselves, but rather seek to deviate from the constitutionally permissible total population principle by creating a standard that has never been enunciated by the Supreme Court (or any other federal court) that “one person, one vote” constitutionally *mandates* the removal of inmates

from total population numbers for purposes of reapportionment. Plaintiffs, thus fail to state a *prima facie* case that the City has violated the Equal Protection Clause.

## II. STANDARD OF REVIEW

Under Rule 12(b)(6), “the Court must construe the complaint in the light most favorable to the plaintiff, taking all well-pleaded allegations as true and giving the plaintiff the benefit of all reasonable inferences.” *Lessard v. Tyco Elecs. Corp.*, 2009 WL 3319784, at \*3 (D. R.I. 2009) (citations omitted). “While well-pleaded facts are accepted as true, unsupported conclusions or interpretations of law are rejected.” *Ward v. Lotuff*, 2009 WL 3615970, at \*1 (D.R.I. 2009) (quotations omitted). Similarly, the Court is not “required to take every single allegation at face value.” *Wilson v. HSBC Mortg. Servs. Inc.*, 2014 WL 563457, at \*4 (1st Cir. 2014). Instead, the general rule of accepting well-pleaded facts as true exempts facts that are “conclusively contradicted by . . . concessions or otherwise.” *Id.* (citing *Soto-Negrón v. Taber Partners I*, 339 F.3d 35, 38 (1st Cir. 2003)). “When allegations, though disguised as factual, are so threadbare that they omit any meaningful factual content, we will treat them as what they are: naked conclusions.” *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 81 (1st Cir. 2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Peñalbert–Rosa v. Fortuño-Burset*, 631 F.3d 592, 595 (1st Cir. 2011); *see also Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 9 (1st Cir. 2011) (explaining that even though an averment may be couched as a factual allegation, it can be “so subjective that it fails to cross ‘the line between the conclusory and the factual’ ” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n. 5 (2007))).

To survive a motion to dismiss, a complaint “must allege ‘a plausible entitlement to relief.’” *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008) (quoting *Twombly*, 550 U.S. at 559). That is, “[f]actual allegations must be enough to raise a right to relief above the

speculative level”. *Twombly*, 550 U.S. at 545; see *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (“Plausible, of course, means something more than merely possible . . . .”) (citing *Iqbal*, 556 U.S. at 678-79). The plaintiff must allege facts supporting “each material element necessary to sustain recovery under some actionable legal theory.” *Campagna v. Mass. Dep’t of Env’tl. Prot.*, 334 F.3d 150, 155 (1st Cir. 2003) (internal quotation marks omitted). This “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Thomas*, 542 F.3d at 948.

### **III. ARGUMENT**

Plaintiffs fail to make a *prima facie* case under the Equal Protection Clause for two reasons: (1) apportioning representative districts based on total population is an acceptable methodology under the Equal Protection Clause and, using such methodology, the Plan falls well within the acceptable limits of deviation among district populations; and (2) even if the use of the Bureau’s 2010 census data purports to create “electoral inequality” by including the inmate population in the Ward 6 population figures, it is a legislative function as to whether “electoral equality” or “representational equality” is preferred such that the Court should refrain from interfering.

#### **A. The City’s Plan Is Constitutional on Its Face; Therefore, Plaintiffs Fail to State a Claim for Which Relief Can Be Granted.**

1. Plaintiffs Fail to Make a *Prima Facie* Case that the Equal Protection Clause’s “One Person, One Vote” Principle Has Been Violated by the City.

The City’s Plan is based on the total population data reported in the Bureau’s 2010 census data. When apportioning the six wards, the Plan stayed within a ten percent

maximum population deviation.<sup>3</sup> Accordingly, the City has met the constitutional burden under the Equal Protection Clause and Plaintiffs fail to state a claim for which relief can be granted.

The United States Supreme Court expounded on the principle of “one person, one vote” regarding apportionment of legislatures under the Equal Protection Clause in the seminal case of *Reynolds v. Sims*, *supra*. Therein, the Supreme Court articulated that “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.” *Reynolds*, 377 U.S. at 577. Although *Reynolds* directed its focus on the apportionment of houses of state legislatures, the Equal Protection Clause and its applications extend to municipalities. *See e.g. Avery v. Midland County, Tex.*, 390 U.S. 474, 479 (1968) (“[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.”).

Since its decision in *Reynolds*, the Supreme Court has not wavered on total population as being an appropriate basis for reapportionment. Shortly thereafter, the Supreme Court reiterated its holding in *Reynolds* in *Burns v. Richardson*, *supra*. In that case, the Court stated that although the “Equal Protection Clause does not *require* the States to use total population figures derived from the federal census,” any apportionment must comply “with the rule established in *Reynolds v. Sims*[.]” *Burns*, 384 U.S. at 91-92 (emphasis added). Accordingly, in *Burns*, the Supreme Court upheld Hawaii’s “registered voter distribution” because, after analyzing the apportionment, “it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population base.” *Id.* at 93.

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<sup>3</sup> The Complaint alleges that the Plan is actually closer to a five percent deviation. Compl. ¶ 22.

In reaching its decision, the *Burns* Court revisited its prior holdings in *Reynolds* and *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), particularly the Court’s discussions regarding “substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.” *Burns*, 384 U.S. at 91. The Court cautioned that the “decision to include or exclude any such group [e.g. aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.” *Id.* at 92.

Several years later, the Supreme Court “reaffirm[ed] its holding [in *Reynolds v. Sims*] that ‘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.’” *Mahan*, 410 U.S. at 324-25 (quoting *Reynolds*, 377 U.S. at 577). The *Mahan* Court also reaffirmed the Supreme Court’s holding that “so long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are *constitutionally permissible*”. *Id.* at 325 (quoting *Reynolds*, 377 U.S. at 579)(emphasis added). In that case, the Court upheld the legislature’s plan for reapportionment of the House of Delegates in order to respect the boundaries of political subdivisions. *Id.* at 328. That apportionment plan was upheld because maintaining political subdivisions was found to be a rational state policy *and* the population disparities of the plan were within tolerable constitutional limits. *Id.* at 328-29.<sup>4</sup>

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<sup>4</sup> The *Mahan* Court also concluded that in that case’s “unusual, if not unique, circumstances . . . the District Court did not err in declining to accord conclusive weight to the legislative reliance on census figures” because the state senate plan effectively caused discriminatory treatment of military personnel. *Id.* at 331-332. Again, it is worth noting that there is no allegation that the City’s Plan has discriminated against any particular group.

The fact that a state's apportionment plan is based on total population is not, in and of itself, the sole determining factor; the deviation of populations among legislative districts must also fall within acceptable bounds. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983). “[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” *Id.* (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)); *see also Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (“for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an ‘honest and good faith effort to construct districts . . . as nearly of equal population as is practicable’”) (quoting *Reynolds*, 377 U.S. at 577). Accordingly, “[i]f the maximum deviation is less than 10%, the population differential will be considered *de minimis* and will not, by itself, support a claim of vote dilution.” *Daly*, 93 F.3d at 1217-18. This *de minimis* deviation applies to legislatively enacted apportionment plans for state or local representatives. *Id.* at 1218 n. 7.

The total population deviation among the City's six wards under the Plan was well under the ten percent variance threshold. *See* Compl. ¶ 22. Therefore, Plaintiffs do not make out a *prima facie* case that the City violated the Equal Protection Clause. Accordingly, Plaintiffs fail to state a claim for which relief can be granted.

2. Because the City's Plan Is Within Constitutional Limits, Plaintiffs' Claims Are Best Left to the Political Process.

As the Bureau and other relevant information sources have become better able to distinguish various groups within a population, e.g. incarcerated individuals, courts have become faced with the question of what “population” should encompass. In analyzing this issue, various Federal Circuit Courts of Appeals have provided thoughtful historical reviews of the “one person, one vote” principle and the choice between the two schools of thought on what equality

is sought thereunder: “electoral equality” or “representational equality”.<sup>5</sup>

“Representational equality” refers to a principle that “assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy.” *Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J. dissenting). Stated another way, “the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state.” *Id.* at 774 (quoting *Reynolds*, 377 U.S. at 560-61). Representational equality is a valid legislative choice notwithstanding “[t]he framers [being] aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at a later time, aliens.” *Id.* (citing *Fair v. Klutznick*, 486 F.Supp. 564, 576 (D.D.C. 1980)).

“Electoral equality”, on the other hand, refers to the principle that, “regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives.” *Id.* at 782 (Kozinski, J. dissenting). Despite the on-going debate over which principle results in a better measure of political equality the courts have been consistent in deciding that the question of whether electoral or representational equality should be sought is an “eminently political question . . . left to the political process.” *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000); *see also Daly*, 93 F.3d at 1227 (where electoral equality and representational equality

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<sup>5</sup> Notably, many of the cases decided by the Circuit Courts of Appeals and federal district courts have faced similar questions as to the “one person, one vote” principle in the context of whether non-citizens should be excluded from apportionment populations. *See generally, Garza v. County of Los Angeles*, 918 F.2d 763 (9<sup>th</sup> Cir. 1990); *Chen v. City of Houston*, 206 F.3d 502 (5<sup>th</sup> Cir. 2000) (use of total population as opposed to the proposed use of citizen voter age population upheld).

cannot be achieved simultaneously, it “is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.”). The court in *Chen* additionally stated that: “our review of the history of the [14<sup>th</sup>] amendment cautions against judicial intrusion in this sphere—either for or against either particular theory of political equality.” 206 F.3d at 528; *see also Gaffney*, 412 U.S. at 749 (“From the very outset, we recognized that the apportionment task, dealing as it must with fundamental ‘choices about the nature of representation,’ is primarily a political and legislative process” (quoting *Burns*, 384 U.S. at 92)); *Daly*, 93.F.3d at 1227 (stating that “the district court’s actions here should have been tempered by the overriding theme in the [Supreme] Court’s prior apportionment cases weighing against judicial involvement”).

The Rhode Island Constitution and the General Assembly have effectively made the political decision that representational equality is favored by basing redistricting on total population. Likewise, the City has followed suit choosing to apportion its six wards based on total population. It is true that, based on the City’s Home Rule Charter, adopted by the City pursuant to the Home Rule Amendment, R.I. Const., Art. 13, should it choose to do so, the City may be empowered to apportion its wards under a different population basis than the State. *See Adv. Opinion to the House of Reps.*, 628 A.2d 537, 539 (R.I. 1993). Although a legislative body may choose to adjust its apportionment basis to approach electoral equality by assigning college students or active military personnel to their permanent home address for redistricting purpose, in so doing “as with prisoners, [the reapportioning entity] is not constitutionally obligated to make such adjustments.” *Fletcher v. Lamone*, 831 F.Supp.2d 887, 896 (D.Md. 2011), *aff’d* 133 S. Ct. 29, 183 L. Ed. 2d 671 (2012).

*Fletcher v. Lamone*, *supra*, is a recent case that illustrates the City’s position that

Plaintiffs' quest for a different apportionment basis is wholly directed to the wrong branch of government. In *Fletcher*, a three-judge panel rejected plaintiffs' arguments on many constitutional issues, primarily with regard to Maryland's "No Representation without Population Act" (the "Maryland Act"). 831 F.Supp.2d at 893-96.

The Maryland Act was a state legislative undertaking intended to "correct for the distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration." *Id.* at 893. The Maryland Act sought to balance those "overrepresented" districts with other districts. *Id.* To correct "this perceived imbalance, the [Maryland] Act requires that for purposes of drawing local, state, and federal legislative districts, inmates of state or federal prisons located in Maryland must be counted as residents of their last known residence before incarceration." *Id.* Plaintiffs in *Fletcher* maintained that "Maryland's adjustments to the census data result in malapportionment, in contravention of the 'One Person, One Vote' standard established in [*Reynolds, supra*]." *Id.* at 894.

The *Fletcher* Court began its analysis by looking to *Kirkpatrick v. Presler*, 394 U.S. 526 (1969) and *Karcher v. Daggett*, 462 U.S. 725 (1983), as they pertained to congressional districts, requiring that a "State make a good-faith effort to achieve precise mathematical equality" when apportioning its districts. *Id.* (quoting *Kirkpatrick*, 394 U.S. at 530-31). In order to meet the "One Person, One Vote" standard, "the Supreme Court concluded that because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality." *Id.* (quoting *Karcher*, 394 U.S. at 738 (internal citations omitted) (quoting *Kirkpatrick*, 394 U.S. at 528)). Although the Supreme Court has left the door open to allow states to modify census data, if any so choose, states are required to use "census data as a starting point." *Id.*

The *Fletcher* Court upheld the modifications made by the Maryland Act to the 2010 census data under *Karcher and Kirkpatrick* because the analysis started with the total census data which was then adjusted in a constitutionally systematic manner with regard to the prison population. *Id.* at 894-96. Nonetheless, the *Fletcher* Court, which was later affirmed by the Supreme Court, specifically noted that although Maryland used a systematic, multistep process to address individuals in Maryland prisons, “Maryland is not constitutionally obligated to make such adjustments.” *Id.* at 896.

Maryland found it within its political prerogative to legislatively reallocate its prison population while conducting its federal, state and local redistricting, but it did so under no constitutional mandate. Therefore, like Maryland, neither Rhode Island nor the City is held to a “federal requirement to do so.” *Id.* at 895 (citing *Perez v. Texas*, slip. op., 2011 WL 9160142 \*12 (W.D.Tex. 2011)).

It is also worthy of noting that even with the expanse of writing done on this very subject, there is no case that requires the relief requested by Plaintiffs. In fact, the Western District of Texas, San Antonio Division stated in *Perez*, after analyzing this very prisoner-related, Equal Protection Clause issue in which apportionment was challenged for its inclusion of prison populations, that the “Court has not located any case where any court has concluded that such prison counts violate the mandates of one person, one vote principle.” *Id.* at \*13.<sup>6</sup> Accordingly, there being no constitutional basis for Plaintiffs’ Equal Protection challenge, Plaintiffs fail to state a claim for relief that can be granted.

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<sup>6</sup> Defendant likewise has conducted a diligent search and has found no such case.

**B. In Addition to Failing to State a Claim under the Equal Protection Clause, the Complaint Fails Because the Relief, if Granted, Would in Itself Create Constitutional Deficiencies.**

In addition to the highly political nature of Plaintiffs' challenge shown above, the potential effects of Plaintiffs' requested remedy also require this Court to dismiss the Complaint. There are two additional issues that require consideration of the Court: (1) if Plaintiffs were successful in forcing the City to unilaterally redistrict the six wards by merely removing the incarcerated population from the base, the City would, in effect, deny those incarcerated persons local government representation anywhere, particularly in the City where the incarcerated population does have an interest in municipal governance; and (2) such functional disenfranchisement would have an "upstream" effect on the State and, potentially, federal apportionment in Rhode Island.

1. Functional Disenfranchisement

If Plaintiffs' relief were granted and the Court waded into the political policy thicket of electoral versus representational equality, the ultimate result would be untenable – approximately 3,433 people incarcerated in the ACI would be functionally disenfranchised from municipal governance. As people residing in Ward 6 of the City, they would be devoid of municipal representation on matters of local concern.

Plaintiffs believe that because an incarcerated person does not patronize restaurants, hotels, grocery stores, gas stations, parks, schools, etc., *see* Compl. ¶ 18, they have

no tie to the City.<sup>7</sup> However, an incarcerated individual does have an interest in roads, infrastructure, utilities, etc., that surround the ACI, particularly if they have friends or family that visit them. This is in addition to their potential interest in local environmental matters, and fire and ambulatory services as well.

Plaintiffs requested relief completely flies in the face of the representative nature that Equal Protection Clause seeks to protect. Completely omitting an incarcerating individual from the City's population without the opportunity to be counted somewhere else, would only lead to other potential constitutional violations.<sup>8</sup>

## 2. Upstream Effect

Plaintiffs seek to have this Court look at the City in a vacuum and pretend as if the City's omission of the incarcerated population would have no effect on the State and its apportionment base. Plaintiffs' Complaint begs the question: if it is unconstitutional for the City to count incarcerated individuals in establishing its wards, where must the State count incarcerated individuals when apportioning seats for the General Assembly or even Congressional seats? Reducing the City's (and potentially the State's) population by 3,433 individuals in the City and, likely those incarcerated in the Central Falls Detention Facility for

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<sup>7</sup> Plaintiffs' first error in this argument ignores the potential that there are incarcerated individuals who originally resided in the City and even Ward 6. Plaintiffs would have the Court merely group all individuals incarcerated at the ACI and deny them all any representation in matter of local concern regardless of their original residence, felony or non-felony status, life without parole or short-stay status, or even pre-trial detainment of someone with no prior record. Secondly, some other municipality could have a claim to count certain of these individuals as a resident. However, these Plaintiffs' lack standing to raise the potential dilution that residents from municipalities in which the incarcerated individual originated could seek to raise, and the City is powerless to cause an individual to be counted somewhere outside of its boundaries.

<sup>8</sup> Plaintiffs' status and allegations foreclose several claims that could (in the Plaintiffs' minds) be related to their underlying claim. First, no plaintiff alleges that he or she is claiming a diluted vote due to an incarcerated individual who originally resided in his/her ward as not being counted *for* his/her ward. Additionally, Plaintiffs lack standing to raise vote dilution for any incarcerated individual who originally resided in a municipality outside of the City, but is not counted there due to his/her incarceration. Moreover, and more obvious, these Plaintiffs lack standing to assert any functional disenfranchisement status on behalf of an incarcerated individual.

that matter, could have an effect on the apportionment of state office holders. Clearly, the redistricting of Rhode Island's two congressional districts surely would have failed to achieve the constitutionally requisite standard of "precise mathematical equality" for congressional reapportionment if the ACI population had been required to be spread over the State based on residence at the time of incarceration. *See Kirkpatrick*, 394 U.S. at 530-31. Furthermore, Plaintiffs' desire to omit incarcerated individuals from being counted in the City's Ward 6 effectively makes such individuals "persons without a country" within our State, since the census figures do not count them in any other cities or towns.

If Plaintiffs want incarcerated individuals counted somewhere else, Plaintiffs have no standing to pursue that claim and they have the wrong defendant. All the potential questions raised by Plaintiffs' Complaint are best dealt with through the political process and not the judiciary. *See Burns, supra*. Along those lines, the General Assembly has two bills pending before it that, through maintaining accurate records of where an incarcerated person originally resided, might lead to a principled way to deal with prisoners in the redistricting context should the *legislative body* in the future decide to make a policy change in favor of electoral equality. *See* S 2286, Jan. Sess. (R.I. 2014) and H 7263, Jan. Sess. (R.I. 2014), each entitled "Residence of Those in Government Custody Act".

#### IV. CONCLUSION

For the reasons stated, the City respectfully requests the Court grant its motion and dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.Pro. 12(b)(6).

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DATED: March 13, 2014

**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 March 13, 2014.

/s/ David J. Pellegrino

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