IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

CIVIL ACTION NO: 8:11-CV-03220-RWT

PATRICIA FLETCHER, *et al.*

Plaintiffs,

V.

LINDA LAMONE, *et al.*

Defendants.

BRIEF OF THE HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC, THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, THE MARYLAND STATE CONFERENCE OF NAACP BRANCHES, SOMERSET COUNTY BRANCH OF THE NAACP, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE PRISON POLICY INITIATIVE AND DEMOS AS *AMICI CURIAE*

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INTEREST OF AMICI

The Civil Rights Clinic at Howard University School of Law engages in trial and appellate litigation in the service of human rights, social justice and economic fairness. The Clinic provides pro bono services to indigent, prisoner and pro se clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, voting rights, police brutality and unconstitutional prison conditions. Central to the Clinic's work has been its involvement in cases which involve the intersection of voting rights and racial discrimination. Among other things, the Clinic has repeatedly submitted amicus briefs to various federal courts, including the United States Supreme Court, when such issues have arisen. Because of the important voting rights issues in this case, specifically their impact on minorities throughout the state of Maryland, the matters raised in this case are of substantial concern to the Clinic.

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws. Since its founding in 1931, the ACLU of Maryland has appeared before various courts and administrative bodies in hundreds of civil rights and civil liberties cases – including numerous voting rights cases -- both as direct counsel and as *amicus curiae*. In 2009 and 2010, the ACLU of Maryland worked closely with the Legislative Black Caucus of the Maryland General Assembly to encourage enactment of the No Representation Without Population Act, a path-breaking civil rights law that promotes electoral fairness in federal, state, and local elections conducted throughout Maryland. In addition to working statewide on racial justice and election issues, the ACLU of Maryland has made Somerset County a particular focus of its civil rights work over the last five years, due to continuing problems with racial dis-

crimination there. For African-American residents of Somerset County, who have historically suffered discrimination in the electoral process, implementation of the No Representation Without Population Act during the 2011 redistricting will greatly enhance the fairness of local elections, leveling the playing field for the first time, and affording all residents equal opportunities to elect representatives of their choice. For these reasons, the ACLU of Maryland has a strong interest in the challenges to the No Representation Without Population Act raised by the plaintiffs in this case.

The Maryland State Conference of NAACP Branches is the State chapter of the national NAACP, a nonpartisan, interracial membership organization founded in 1909. The Somerset County Branch of the NAACP is the local unit of the national and state organizations, comprising members within Somerset County. The mission of the NAACP and its state and local affiliates is to ensure the political, education, social, and economic equality of all persons, and to eliminate racial discrimination. The Maryland State Conference and the Somerset NAACP have long been focused on ensuring full and equal voting rights for African Americans and other communities of color, by engaging in voting rights litigation, legislative advocacy, voter registration, and voter education efforts. The NAACP believes that prison-based gerrymandering, or the allocation of incarcerated persons to places where they are confined, instead of their home communities, has the effect of diluting minority voting rights. Counting of incarcerated persons at their place of confinement has created obstacles to equal electoral participation by African Americans in Maryland, and especially in Somerset County. For these reasons, both the state NAACP and Somerset NAACP organizations worked with the Maryland General Assembly to enact the No Representation Without Population Act, and they have substantial interests in making sure that this landmark civil rights law remains in place as the redistricting process moves forward throughout the state of Maryland.

The nonprofit nonpartisan Prison Policy Initiative conducts research on how mass incarceration affects the larger society, with a particular focus on how prison populations in the Census affect the electoral process. Since 2001, the organization has been leading a national effort to urge the Census Bureau to count incarcerated people as residents of their home addresses, and working with state and local governments, including Maryland, to develop interim solutions to the problem of "prison-based gerrymandering". As the issues raised in this case concerning the No Representation Without Population Act directly relate to the organization's mission and work, the organization has a substantial interest in this case.

Dēmos is a non-profit, non-partisan organization that works to build a robust and inclusive democracy, with high levels of electoral participation and civic engagement; an economy where prosperity and opportunity are broadly shared and disparity is reduced; and a revitalized public sector that works for the common good. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are key to Dēmos' goals. Dēmos works nationally and at the state level to end the distortions in representation caused by treating incarcerated persons as residents of the prison for purposes of redistricting, instead of as residents of their home communities. This practice denies fair representation to the home communities that remain the legal residence of incarcerated persons for virtually all purposes, and artificially inflates the representation of districts that contain prisons. Dēmos engages in research, public education and litigation to end the practice of prison-based gerrymandering, and actively supported Maryland's No Representation Without Population Act as a landmark reform that advances voting rights and ensures fairness in representation.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") was founded under the direction of Thurgood Marshall, and is the nation's oldest civil rights law firm. The quest for the unfettered par-

ticipation in civic and political life of all Americans has been and remains an integral component of LDF's mission. LDF has represented parties in voting rights cases before federal courts throughout the country and the United States Supreme Court. *See, e.g.*, *Nw Austin Mun. Util. Dist. No. One v. Holder* 129 S. Ct. 2504 (2009) (defending the constitutionality of Section 5 of the Voting Rights Act); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (defining the scope of Section 2 of the Voting Rights Act); *Smith v. Allwright*, 321 US 649 (1944) (abolishing the white primary). Consistent with its organizational mission, LDF is committed to ending the problem known as "prison-based gerrymandering," which dilutes minority representation and weakens the political power of minority communities. LDF has participated in the national effort to ensure that, for redistricting purposes, incarcerated individuals are counted as residents at their home addresses and not in the places where they are confined.

INTRODUCTION

In their motion for a preliminary injunction, the Plaintiffs challenge Maryland's landmark civil rights law, the "No Representation Without Population Act", alleging that the law violates the equal protection principle of 'One Person One Vote' and Article I of the U.S. Constitution. Plaintiffs are mistaken.

In enacting the No Representation Without Population Act, the state exercised its discretion under federal law to use the best possible data for redistricting, in this case to correct what the legislature determined was a systematic flaw in the federal census: the manner in which the census counts incarcerated people as if they were residents of the correctional facility, instead of their legal home residences. The legislature determined that the No Representation Without Population Act was necessary to correct the striking inequity that existed previously due to the crediting of incarcerated people to electoral districts where they cannot vote, where they have no community ties, and where they are not considered

residents for any other purpose other than the Census. The previous practice had a particularly negative effect on African-American communities, because African-Americans are disproportionately incarcerated, but the majority of Maryland's prison cells are located in overwhelmingly white districts. The new law addresses this problem by crediting incarcerated people to their last known addresses and ensuring that their home community of interest is given appropriate weight at the redistricting table.

Contrary to Plaintiffs' claims, the thoroughly documented and consistently applied implementation of the No Representation Without Population Act resulted in districts that are more equal than districts drawn prior to the laws' enactment, and so did not contain such an adjustment. Further, Plaintiffs cannot argue that the No Representation Without Population Act disadvantages them as African-American voters because the facts they cite demonstrate the opposite: As you would expect from a law designed to properly credit African-American communities with their true populations, the No Representation Without Population Act serves to enhance African-American representation.

STATEMENT OF FACTS

A. "No Representation Without Population Act" History and Justification

In April 2010, the Maryland legislature enacted the "No Representation Without Population Act"(SB 400, HB 496). The Act was proposed in response to a growing concern about the negative effects of the Census Bureau's practice of counting incarcerated people as residents of the prison location and not of their legal homes, a practice that the legislature determined distorts representation and had led to a particular problem in drawing fair districts for Somerset County. The state sought to address these concerns by reallocating people incarcerated in state and federal correctional facilities to their legal home residences for redistricting purposes.

The Legislature, supported by civil rights organizations and good government groups, saw the Census Bureau's practice of counting incarcerated people as residents of the correctional facility as a systematic flaw in the data that the Legislature had the ability to correct.

As former Census Bureau Director Kenneth Prewitt has explained: "Current census residency rules ignore the reality of prison life. Incarcerated people have virtually no contact with the community surrounding the prison. Upon release the vast majority return to the community in which they lived prior to incarceration."[1] Further, in Maryland as in most states, people incarcerated in state prisons and in federal custody within the state are not allowed to vote. Even if people in prison could vote, they would have to follow the same procedures as jail inmates and vote absentee at their home addresses.[2]

The prison reality that Director Prewitt spoke of is the fact that while the prison buildings themselves may exude permanence, the people inside are in fact quite transient. All but 321 (1.4%) of the people incarcerated in Maryland prisons can expect to be released,[3] most quite soon. In Maryland, the average time served to release is 30.3 months.[4]

A survey of Maryland legislators conducted prior to the Act's introduction also shows decisively that legislators view incarcerated persons as their constituents based on their home addresses, not based on the location of the prisons where they are incarcerated. The survey asked legislators who they would

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[1] Dr. Kenneth Prewitt, Forward, *Accuracy Counts: Incarcerated People & the Census*, (Brennan Center for Justice),April 8, 2004, at i, *available at* http://brennan.3cdn.net/d685e539baf1034ce1_w2m6iixeo.pdf (last viewed Nov. 30, 2011).

[2] *See Voting While Incarcerated: A Tool Kit for Advocates Seeking to Register, and Facilitate Voting by Eligible People in Jail*, (American Civil Liberties Union & Right to Vote), Sept. 2005, *available at* http://www.aclu.org/pdfs/votingrights/votingwhileincarc_20051123.pdf (last viewed Nov. 30, 2011).

[3] Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America,* (The Sentencing Project) July 2009, at 8, *available at* http://sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf (last viewed Nov. 30, 2011).

[4] Maryland Department of Legislative Services, *Dimunition of Term Credit: Its Role in the Operation of Correctional Facilities in Maryland and Other States,* (2008), at 11, *available at* http://dls.state.md.us/data/polanasubare/polanasubare_coucrijusncivmat/Dimunition-Credits.pdf (last viewed Nov. 30, 2011).

be more likely to consider a constituent: someone from their district who is incarcerated elsewhere, or someone who is from elsewhere but is incarcerated in their district. Virtually all legislators (92 %) said they would be more likely to consider persons from their district who are incarcerated elsewhere to be their constituents.[5] The researchers found similar results regardless of whether the legislator had a prison in his or her district. The survey also found that legislators are far more likely to receive communications from incarcerated persons whose home community is in their district than from persons who are incarcerated in a prison in the legislator's district.

On the basis of these facts, the Maryland General Assembly rightly concluded that the Census Bureau's current practice of crediting the state's incarcerated population to the wrong locations results in serious electoral inequities under both a "one person one vote" analysis and a racial fairness analysis.

B. How Prison-Based Gerrymandering Works in Maryland

The legislature determined that using large numbers of people from other parts of the state or nation to pad an otherwise underpopulated district containing a prison gives extra representation to the residents of that district while diluting the votes of all residents elsewhere. In Maryland, the state's incarcerated population is disproportionately from Baltimore, but the state's prison cells are concentrated in just a few areas, with the largest cluster in the rural western part of the state. In research presented to the Legislative Black Caucus of Maryland and published as Importing Constituents: Prisoners and Political Clout in Maryland,[6] the Prison Policy Initiative reported that 18 percent of the population credited to House of Delegates District 2B (near Hagerstown) is actually incarcerated people from other parts of

[5] Representative-Inmate Survey, Senate Education, Health, and Environmental Affairs Committee, Bill File: 2010 Md. S.B. 400 at 22-28.

[6] Peter Wagner & Olivia Cummings, *Importing Constituents: Incarcerated People and Political Clout in Maryland*, (Prison Policy Initiative), March 4, 2010, *available at* http://www.prisonersofthecensus.org/md/report.html (last viewed Nov. 30, 2011).

the state. In effect, by using uncorrected Census data to draw legislative districts after the 2000 Census, the legislature granted every group of 82 residents in this district as much political influence as 100 residents of every other district.

Thus, the No Population Without Representation Act reflected the state's conclusion that counting incarcerated people in the wrong place dilutes the votes of every resident of a district without a prison, and has a particularly negative effect on African-American voters. African-Americans are incarcerated in Maryland at a rate about 5.5 times higher than Whites,[7] but the largest prison complexes are located in disproportionately White parts of the state. Ninety percent of the African-Americans reported by the Census to reside in District 2B are actually incarcerated residents from other parts of the state.[8]

The Legislature was also aware of how prison population skews electoral representation in County Commissioner districts. In Somerset County, people incarcerated at Eastern Correctional Institution, a large prison, made up 64 percent of County Commission District 1, giving each resident in that district 2.7 times as much influence as residents of other districts. Civil rights groups were particularly concerned that the inclusion of the prison population in this district made it impossible for the district to elect an African-American to county government.

Somerset County, which until 2010 had never elected an African-American to county government, settled a voting rights act lawsuit in the 1980s by agreeing to create one district where African-Americans could elect the candidate of their choice. Unfortunately, a prison was built and the 1990 Census was taken shortly after the first election, leaving a small African-American vote-eligible popula-

[7] *See* Allen J. Beck, Ph.D., & Paige M. Harrison, *Prison and Jail Inmates at Miyear* 2005 table 14 (Bureau of Justice Statistics), May 21, 2006, at 11, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim05.pdf (last viewed Dec. 1, 2011).

[8] *Ending prison-based gerrymandering would aid the African-American vote in Maryland*, (Prison Policy Initiative), January 22, 2010, *available at* http://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf (last viewed Nov. 30, 2011).

tion in the district. This made it difficult for residents of the district to field strong candidates and for voters to elect an African-American Commissioner. An effective African-American district could have been drawn if the prison population had not been included in the population count.[9]

In October 2009, after reviewing research on how prison counts distorted state legislative districting, Delegate Joselyn Pena-Melnyk and Senator Catherine Pugh, now chair of the Legislative Black Caucus, began preparing a bill to address the problem. Notably, the entire Black Caucus in the House and all but two members of the Black Caucus in the Senate joined as co-sponsors of the bills.[10] HB 496 Special Orders, Seq No. 0715 (March 27, 2010); HB 496 Third Reading (HB) Calendar No. 20, Seq. No. 1036 (Apr. 8, 2010). The bill also received the support of members of both parties, urban and rural representatives, those with prisons and those without. Republican Senate Minority Leader J. Lowell Stolzfus, a Somerset County farmer, spoke from the floor in support of the Act:

> [W]e have a large prison in one election district in Somerset county and the population of that prison are counted toward that election district which gives an unfair advantage because it was designed to be a minority election district and unfortunately the history is, in Somerset county is not one that I'm proud of. We have a large minority population that's not minority it's 45 % and there are no minorities represented on the county council. This is a bill that needs to pass..."[11]

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[9] *See* Peter Wagner & Cindy Boersma, *"Maryland Bill" Podcast Episode #2*, (Prison Policy Initiative), May 27, 2010, *available at* http://www.prisonersofthecensus.org/news/2010/05/27/podcast2/ (last viewed Nov. 30, 2011); *Our View: Exclude Inmates From Voting District* THE DAILY TIMES (Somerset County, MD) Nov. 24, 2009, *available at* http://www.prisonpolicy.org/news/Delmarva_Daily_Times_MD_4_5_10.pdf (last viewed Nov. 30, 2011); *Semper Eadem: A Report by the ACLU of Maryland and the Somerset County NAACP on Continuing Racial Disparities in Somerset County Government*, (ACLU of Maryland and the Somerset County NAACP), May 19, 2009, *available at* http://www.aclu-md.org/aPress/Press2009/FinalReportwApp.pdf (last viewed Nov. 30, 2011).

[10] The two non-sponsoring Senate Caucus members, Senators Nathaniel Exum and Lisa Gladden, did vote in favor of the bill.

[11] Senate Proceeding #60, HB 496 Third Reading (HB) Calendar No. 20, Seq. No. 1036 (Apr. 8, 2010).

C. Endorsements of Civil Rights Groups

Changing how incarcerated people are counted for redistricting purposes has been championed by civil rights groups focused on voting rights and equality. For example:

- The Legislative Black Caucus of Maryland highlights the No Representation Without Population Act as one of its six legislative priorities that passed in the 2010 general session.[12]

- The National Black Caucus of State Legislators (NBCSL) issued a resolution (LJE-11-03)[13] calling for incarcerated individuals to be counted at their home addresses, praising Maryland for its No Representation Without Population Act.

- The African-American, Latino and Asian subcommittees of the Census Bureau's Race and Ethnic Advisory Committee have each passed resolutions calling on the Census Bureau to count incarcerated people at their home addresses.[14]

- The National Association for the Advancement of Colored People (NAACP) passed resolutions in 2008, 2009[15] and 2010 calling for incarcerated people to be counted at their home residential addresses. The 2010 resolution makes it clear that not counting prisoners is preferable to using those census numbers to artificially bolster the representation of predominately White districts containing prisons:

  > BE IT FURTHER RESOLVED, that the NAACP concludes that until the Census Bureau counts incarcerated people as residents of their homes, the fundamental principle of one person one vote" would be best satisfied if redistricting committees refused to use prison counts to mask population shortfalls in districts that contain prisons; . . . [16]

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[12] 2010 Legislative Priorities, Legislative Black Caucus of Maryland, Inc., http://www.legislativeblkcaucusmd.org/policy.html (last viewed Nov. 30, 2011).

[13] Peter Wagner, *NBCSL calls for end to prison-based gerrymandering*, (Prison Policy Initiative), January 6, 2011, *available at* http://www.prisonersofthecensus.org/news/2011/01/06/nbcsl/ (last viewed Nov. 30, 2011).

[14] The African-American subcommittee of the Census Bureau's Race and Ethnic Advisory Committee adopted resolutions in 2003, 2008, 2011, and the Hispanic and Asian subcommittees of the Census Bureau's Race and Ethnic Advisory Committee adopted a joint resolution in 2010. *See* Resolutions, Prison Policy Initiative, http://www.prisonersofthecensus.org/resolutions/ (last viewed Nov. 30, 2011).

[15] NAACP resolutions were ratified by the 99th and 100th Conventions in 2008 and 2009. *See* Resolutions, Prison Policy Initiative, http://www.prisonersofthecensus.org/resolutions/ (last viewed Nov. 30, 2011).

[16] *End "Prison-Based Gerrymandering"*, ratified by the NAACP at the 101st Convention, on July 13, 2010, *available at* http://www.prisonersofthecensus.org/resolutions/NAACP_2010.html (last viewed Nov. 30, 2011).

D. Analysis of Congressional Districts Under the State Plan and the Impact of the No Representation Without Population Act.

The No Representation Without Population Act mandates that the same adjusted redistricting data be used for congressional, state legislative, county and municipal redistricting. The effect of the law is smallest on Congressional districts, because the size of the prison population becomes a smaller portion of the total district population as the size of the district increases.

On October 20, 2011, Maryland Governor O'Malley signed SB1, which put in place new congressional maps. While *Amici* do not take a position on Plaintiff's allegations of partisan gerrymandering or the creation of a third majority-African American district, they note that the No Representation Without Population Act does not implicate either claim. Critically, rather than doing any harm to African American voters, the Act improves African-American voting strength because it properly credits many incarcerated African-Americans to their home communities.

The No Representation Without Population Act actually benefits the two majority African-American districts that were drawn in the Legislature's plan. District 4 was properly credited with 1,629 incarcerated people,[17] and District 7 was properly credited with 4,832 people.[18]

The largest impact of the law on the Congressional redistricting is in District 6, in Western Maryland. This district contains several large prisons, and it has the second largest White population in the state. Under plaintiff's theory, the prison population should have been counted in this district, so by plaintiff's calculations the district contains 6,754 extra people and therefore the No Representation

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[17] Declaration of William Cooper (Dec. 2, 2011), at 3, Table 2 [hereinafter Cooper Declaration].

[18] Complaint, at ¶67 (h); Cooper Declaration, at 3, Table 2.

Without Population Act allegedly dilutes the votes of the district's residents. Not one of the nine plaintiffs, however, lives in District 6.

The district that benefits most from the law in terms of its representation is District 7, in the Baltimore City area. Plaintiff Glover resides in District 7. Under plaintiff's theory, this district should not be credited with the 4,832 incarcerated persons who are legally residents of this district. That would require District 7 to gain an additional 4,832 residents. Under one person, one vote principles, adding population to a district only dilutes the voting strength of voters within the district.[19] Thus, if the No Representation Without Population Act is struck down, Plaintiff Glover's vote will be diluted as compared to the State Plan.

Plaintiffs Fletcher, Otts, Glover, Hagey, Harris, Thompson, Williams, and Spruill likewise all live in districts that were beneficiaries of the No Representation Without Population Act, as each district contains more home addresses of incarcerated people than it contains prisoners who were counted in those districts by the Census Bureau. Each of these plaintiffs would see their votes diluted if their claims are successful. Only Plaintiff Campbell resides in a district that is allegedly underrepresented as compared to ideal population size, a difference of only 1,753 persons, or 0.24 percent.[20]

Significantly, the Act did not in any way hinder the creation of a third African-American district. Moreover, if the Court were to invalidate the No Representation Without Population Act, and adopt a

[19] Under the sometimes confusing mathematics of the one person, one vote doctrine, persons in underpopulated districts enjoy a representational advantage – they are "overrepresented" – because the districts with smaller populations are able to elect the same number of representatives as the more populous districts elsewhere in the state. Conversely, districts that are larger than the ideal population size are at a representational disadvantage – they are "underrepresented" compared to the less populous districts, because their representative must attempt to represent the interests of a greater number of people. Accordingly, the term "underpopulated" is synonymous with the term "overrepresented," while the term "overpopulated" is synonymous with the term "underrepresented." To avoid confusion, Amici will henceforth refer to "underrepresented" or "overrepresented" districts, which is the terminology used in most court decisions, rather than using the terms "overpopulated" or "underpopulated," which are the terms used in the Complaint at ¶67.

[20] Cooper Declaration at 3, Table 2.

different plan that makes only those adjustments necessary to substitute the unadjusted Census database, those changes by themselves would not produce a third majority African American district. Changing the State Plan to include three majority African-American districts would require massive changes that have nothing to do with the No Representation Without Population Act. Such changes are wildly beyond the magnitude of the No Representation Without Population Act,[21] and, importantly, the scope of the Plaintiff's motion.

Plaintiffs' objections to the State Plan in terms of its partisan impact also would not be materially affected merely by invalidation of the No Representation Without Population Act. The changes that plaintiffs seek in order to improve the prospects of Republicans in District 6 go beyond any adjustments that would be necessitated by invalidating that Act.[22]

E. Treatment of Incarcerated Persons With Out-of-State Addresses

The law requires that incarcerated persons who reside out of state not be included in the population base used to draw Maryland's districts. There were 1,321 out-of-state prisoners.[23]

Plaintiffs assert that because incarcerated persons are disproportionately African-American, the No Representation Without Population Act's exclusion of 939 African-American out-of-state prisoners from the population base dilutes African-American votes – even though none of the 939 is eligible to vote.[24] This argument gets the result backwards.

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[21] *Id.* at ¶9.

[22] *Id.* at ¶¶12-14.

[23] Maryland Department of Planning, *Maryland Redistricting Population Count Released*, Press Release, (March 21, 2011), *available at* http://planning.maryland.gov/PDF/Press/PressRelease-Redistricting-032211.pdf.

[24] Complaint at ¶¶50-57.

The state's largest prisons are located in the overwhelmingly White First and Sixth districts on the Eastern Shore and in Western Maryland, respectively. Given that incarcerated persons in these prisons are not permitted to vote, the only result of including their population numbers as part of the prison districts is to use this population to increase the representation of the overwhelmingly White First and Sixth districts. Crediting these districts with disenfranchised and incarcerated African-American persons from other states would serve only to enhance the weight of a vote cast in these majority White districts and would actually *dilute* African-American voting strength. The NAACP has explicitly recognized this in the resolution it passed in 2010, which endorsed reallocation of prison populations but also noted that exclusion of incarcerated populations from the population base for redistricting is preferable to counting them at the wrong location.[25]

F. Census Data

The Census does not endorse a single dataset for redistricting use,[26] but rather publishes three different data products for state and local use in reapportionment and redistricting.

On Dec 21, 2010, the Census Bureau published the apportionment counts that are used to determine how many seats in Congress each state gets. The Maryland population was reported as

[25] *See End "Prison-Based Gerrymandering"*, a resolution of the NAACP at the 101st Convention, ratified July 13, 2010, *available at* http://www.prisonersofthecensus.org/resolutions/NAACP_2010.html (last viewed Nov. 30, 2011).

[26] Dr. Robert Groves, Director of the Census Bureau, *Prepared Statement*, presented at "2010 Census: Enumerating People Living in Group Quarters," Before the Subcommittee on Information Policy, Census and National Archives, Committee on Oversight and Government Reform, United States House of Representatives, February 20, 2010. ("I would like to stress that the Census Bureau does not participate in any redistricting activities. Our job is a completely nonpartisan, objective enumeration of the population. Simply put, the Census Bureau collects individual information and reports aggregates based on it. Fittingly, the Founding Fathers left it to the federal, state, and local governments to use the information for their political purposes. In that vein, the Census Bureau endeavors to compile the group quarters information in the Summary File for its key data users at the state and local level. How those levels of governments choose to use the data is squarely within their realm of authority.")

5,789,929.[27] This number includes overseas military and federal employees who are counted as at-large members of each state for reapportionment purposes but are not counted for redistricting purposes.[28]

On February 9, 2011, the Census Bureau published a PL94-171 redistricting data file for Maryland, showing a total state population of 5,773,552.[29]

On April 20, 2011, the Census Bureau published the Advance Group Quarters Summary File to aid states in identifying prison populations in redistricting data. The Bureau's announcement specifically mentioned that publication of this Summary File was intended to assist states such as Maryland in implementing their legislation requiring that incarcerated persons be counted at their home addresses.[30]

Thus, contrary to plaintiffs' assumption, no single source of data is required for redistricting, and the Census Bureau does not publish any one monolithic census redistricting product.

G. Planning Department Procedures and Regulations

The Maryland Department of Planning was tasked with completing the reallocation of incarcerated persons to comply with the No Representation Without Population Act. To guide its implementation of the law, the Department issued regulations (Title 34, Subtitle 5) governing the process. These regulations ensured a systematic treatment of the incarcerated population across the state.

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[27] U.S. Census Bureau, 2010 Census Briefs, *Congressional Apportionment*, at 2, (November 2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf (last viewed Dec. 1, 2011).

[28] *Id.* at 1 n.1.

[29] Complaint at ¶21.

[30] U.S. Census Bureau, Redistricting Data, *2010 Census Advance Group Quarters Summary File*, *available at* http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html (last viewed Nov. 30, 2011) ("This early release of data on the group quarters population may be beneficial to many data users including those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation. It will permit state and local redistricting officials to overlay this file with the 2010 Census Redistricting Data (Public Law 94-171) Summary File data. Three states (Delaware, Maryland and New York) have legislation requiring use of group quarters data in their line drawing. Other states exclude military, and Kansas reassigns intrastate college students back to their home town.")

In its regulations, the Department set out clear and unambiguous definitions of the facilities and individuals covered by the statute and regulations. The regulations describe the technical "geocoding" procedures that would be used to convert the addresses into Census blocks that can be used for redistricting, including the specific procedures to be used to recognize addresses that the computer system initially, but erroneously, reported as unrecognizable.

The state intended to improve the accuracy and fairness of the data used for redistricting by reallocating all state and federal prisoners to their last known addresses prior to incarceration. For the vast majority of individuals, incarcerated people were reallocated to their last known addresses within the state. For the small number of cases where that was not possible, because the person was homeless, because the address was not valid, etc., the individual was to remain as counted at the facility by the Census. As noted above, the 1,321 individuals in state custody who were out-of-state residents were not included in the population count.

The federal Bureau of Prisons refused to share information on home addresses with the Department of Planning, so the Department was unable to determine home addresses for the people confined at the FCI Cumberland and Camp Cumberland facilities. Consistent with the treatment of prisoners with unknown addresses in state custody, because no better addresses were available, the approximately 1,500 people in federal custody remained as counted at the facility.[31]

[31] See *Maryland Redistricting Population Count Released*, *supra* note 23, at 2 ("To implement the Act, MDP and DLS requested the last known addresses of the prisoners in Maryland's only federal facility located in Cumberland. The Federal Bureau of Prisons denied that request. MDP and DLS appealed that decision to the U.S. Department of Justice. That appeal is pending. Should it be granted, there could be a modest revision of the adjusted population to account for the redistribution of about 1,500 inmates at the federal prison in Cumberland who are currently being counted at that location, in accordance with the state regulations.")

ARGUMENT

I. Maryland's Implementation of the No Representation Without Population Act Is Constitutional.

A. The United States Constitution Permits States to Use Adjusted Census Data for the Purpose of Congressional Redistricting.

Plaintiffs' contention that the State Plan contains unacceptable population deviations is based on a misreading of *Karcher v. Daggett*, 462 U.S. 725 (1982) and *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969). While *Karcher* and *Kirkpatrick* require states to justify deviations from ideal district size in congressional plans, neither case purports to bar states from making adjustments to Census data when determining the population base that should be used in measuring ideal district size. And neither case holds that the enumeration methods of the federal Census Bureau are binding on the states. Indeed, both decisions expressly leave states with discretion to make appropriate adjustments to Census data when determining the population base for congressional redistricting, but simply require that if a state takes this approach, the adjustments must be systematic rather than haphazard. As *Karcher* states, "If a State does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." 462 U.S. at 732 n.4 (citing *Kirkpatrick*, 394 U.S. at 534-535).

Thus, while *Karcher* and *Kirkpatrick* hold that states should use the "best population data available" for the purpose of congressional redistricting, which will often be that provided by the Census Bureau, *Karcher*, 462 U.S. at 738; *Kirkpatrick*, 394 U.S. at 528, states may identify what they determine to be flaws inherent in the census or the manner in which it is conducted. In these instances, as lower courts both before and after *Karcher* have recognized, states may adjust the census data to account for these flaws before redistricting.

For example, in *City of Detroit v. Secretary of Commerce*, 4 F.3d 1367 (6th Cir. 1993), the Sixth Circuit noted that while *Karcher* emphasized the principle of precise mathematical equality when drawing congressional districts, *Karcher* in no way prohibited a state from exercising its discretion to use an apportionment base that corrects flaws in the Census counts that have been identified by the state:

> We agree with the District Court's interpretation that [t]he Court in *Karcher* did not hold that the states must use census figures to reapportion congressional representation. The Supreme Court merely reiterated a well-established rule of constitutional law: states are required to use the best census data available or the best population data available in their attempts to effect proportionate political representation. Nothing in the [C]onstitution or *Karcher* compels the states or Congress to use only the unadjusted census figures.

City of Detroit at 1373-74 (internal quotation marks and citations omitted); *see also id.* at 1374 ("If figures other than the census count are the best population data available, the Supreme Court did not, in *Karcher*, bar their use.").

In so holding, the Sixth Circuit reaffirmed a previous decision, *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), which held that "the state legislature is not required by the Constitution to accept the Census data in all respects." *id.* at 624. Accordingly, the court dismissed a lawsuit against the Census Bureau, reasoning that the plaintiffs' action would lie instead against the State if it refused to make necessary adjustments to the Census data when conducting redistricting. *See also id.* at 625 ("If the Census Bureau had erroneously undercounted the Detroit area by [twenty-five percent], the Michigan legislature would not be precluded from adjusting the figures for purposes of congressional apportionment.").[32]

Decisions in other Circuits subsequent to *Karcher* and *Kirkpatrick* similarly have noted that states remain free to make adjustments to Census data for purposes of congressional redistricting, including

[32] As the *Fletcher* plaintiffs note, the district court in *Klutznick* found that the plaintiffs had standing to sue the defendants under the erroneous belief that the Constitution required the states to rely on the numbers provided by the census. *See Young v. Klutznick*, 497 F. Supp. 1318, 1324 (E.D. Mich. 1980). However, plaintiffs here omit to mention that the Sixth Circuit subsequently reversed the district court's decision – finding that the Constitution, in fact, permits states to adjust census data, and thus that the *Klutznick* plaintiffs could not prevail against the Census Bureau. *Klutznick*, 652 F.2d at 624.

adjustments concerning prison populations. *See Assembly of State of Cal. v. U.S. Dep't of Commerce,* 968 F.2d 916, 919, 924 n.1 (9th Cir. 1992) (requiring Census Bureau to provide state legislative body with tapes showing adjustments to official Census count, even though such adjustments were not part of official Census data, explaining that "[t]he states are not obliged to use official census data when drawing their state legislative districts . . . or their congressional districts.") (citations omitted); *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, Dkt. No. 285, slip op. at 24 (W.D. Tex Sept. 2, 2011) (rejecting challenge to congressional and state legislative districts that counted incarcerated population at prison location, but noting that "the state could enact a constitutional amendment or statute that modifies the count of prisoners as residents of whatever county they lived prior to incarceration); *Cuomo v. Baldridge*, 674 F. Supp. 1089, 1106 n.31 (S.D.N.Y. 1987) ("[T]he Court does note that at least New York State, which itself chooses to use unadjusted census figures, certainly lacks standing to complain about the Bureau's decision not to adjust since it can easily avoid the consequences of that decision by its apportioning its districts on a different basis."). *Cf. Burns v. Richardson,* 384 U.S. 73 (1966) (noting that states have discretion to exclude incarcerated persons from population count for state legislative redistricting). *See also* Christopher M. Taylor, Note, *Vote Dilution and the Census Undercount: A State-by-State Remedy*, 94 *Mich. L. Rev.* 1098, 1119-1121 (1996) (explaining that *Karcher* and *Kirkpatrick* leave open the ability of states to make improvements to Census data when drawing congressional districts).

At bottom, plaintiffs' position is that the federal Census Bureau dictates the manner in which states can draw their own electoral districts, and that states have no discretion to improve upon census data. But that is a misreading of the case law: the only limitation on a state's discretion to make improvements to the census count for redistricting purposes is that any changes must be thoroughly documented and applied in a systematic, as opposed to haphazard, fashion. *See Karcher,* 462 U.S. at 732 n.4

("If a state does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner."); *Kirkpatrick*, 394 U.S. at 535 (rejecting Missouri's attempts to use an alternate population accounting to anticipate future population shifts because adjustments to the census numbers were not "applied throughout the State in a systematic manner"); *Klutznick*, 652 F.2d at 624 ("There is no reason to believe that states would not be free to adjust census figures . . . as long as the adjustment is thoroughly documented and applied in a systematic manner." (internal quotation marks omitted)). In the next section, *Amici* show that Maryland's implementation of the No Representation Without Population Act fully satisfies these requirements. [33]

Perhaps recognizing both the Supreme Court's and the Sixth and Ninth Circuit's statements on the matter, plaintiffs attempt to divert the court's attention from these cases through citation to a handful of district court cases which are no longer good law or whose reasoning has been undercut by subsequent decisions.[34] In addition to citing the district court's overturned decision in *Klutznick*, plaintiffs

[33] Plaintiffs alternatively argue that even if adjustments to the census totals are appropriate, the adjustments must satisfy the two-part test the Court set out in *Karcher*. This argument clearly misreads *Karcher* and confuses the question in this case with the very different question to which *Karcher's* two-part test is meant to apply. As discussed above, the two-part *Karcher* test is to be used to determine whether a state may be excused from the requirement that its districts be precisely equal in size. The relevant question in the present case is not whether the districts are equal in population. There is no question that the districts in the State Plan are equal in size with respect to the database created under the No Representation Without Population Act. Rather, the relevant question in this case is whether the unadjusted census numbers are the only permissible base from which to carve the equal-in-size districts. In any event, even if it were necessary to apply the two-part test in *Karcher,* the small deviations here would be fully acceptable under that test, because they are the result of a rational, consistently applied state policy. As *Karcher* points out, "Any number of consistently applied legislative policies might justify some variance[.]" 462 U.S. at 740; *see also id.* at 741, n.11 (noting that courts applying the equal population requirement of *Kirkpatrick* had nevertheless approved plans with small deviations, and citing, inter alia, *David v. Cahill,* 342 F. Supp. 463 (D.N.J. 1972), which approved a plan having a total deviation of 1.5% even though plans were available with lower deviations).

[34] The plaintiffs at once argue: (1) that the Supreme Court has yet to address the matter now at issue; and (2) that various Supreme Court decisions – cited selectively and out of context – support their current position. For example, plaintiffs cite to the Supreme Court's decision in *Department of Commerce v. United States House of Representatives*, in which the Court found that plaintiffs, residents of various states, had standing to challenge the census' methods despite the fact that the states in which the plaintiffs lived had yet to choose an apportionment base. 525 U.S. 316, 332-334 (1999). Importantly, the Court did not find so because Article I requires states to rely on the census for the purposes of congressional redistricting. Rather, it found that some states are required to do so by their own state constitutions, while other states regularly use census data for this purpose and, thus, that the plaintiffs had proven a substantial likelihood of being injured by the challenged conduct. *Id*.

also rely heavily on *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982). In concluding that states must use census data for the purpose of congressional redistricting, the *Travis* court relied on the district court's decision in *Klutznick*, which subsequently was reversed by the Sixth Circuit. *Id*. at 570. As in *Klutznick*, the *Travis* court emphasized the lack of Supreme Court jurisprudence on the matter, and noted that as of that time, the only other decision to address the matter was *Meeks v. Avery,* 251 F. Supp. 245, 248 (D. Kan. 1966).[35] *Id*. at 571. Given the significant developments in the law since the court's decision in *Travis*, the decision is entitled to little weight.

Finally, plaintiffs rely upon the district court's decision in *Preisler v. Secretary of State*, 279 F. Supp. 952 (W.D. Mo. 1967). We initially note that while citing heavily to that decision, the plaintiffs fail to mention that the court explicitly reserved deciding the proposition for which they cite it. *Id*. at 1003 ("We do not reach the precise question in *Preisler III* of whether any figures other than the federal decennial census may be used in support of a congressional districting plan."). By contrast, in *Avery v. Meeks,* which plaintiffs attempt to dismiss, the court directly held that Kansas' decision to draw its congres-

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at 334. Accordingly, the Court did not reach a conclusion contrary to that in *Klutznick* and *City of Detroit* as to the freedom of states to choose an apportionment base, but rather simply imposed a less stringent standard for standing. *See Klutznick*, 652 F.2d at 630 (criticizing the majority's conclusion that plaintiffs lacked standing because "it construes the causation component of the injury-in-fact requirement far too strictly.") (Keith, J., dissenting).

Plaintiffs also cite 13 U.S.C. § 141(b) for the proposition that states must use federal census data for the purposes of federal apportionment. But, by its terms, Section 141(b) only applies to apportionment between states, not within states. 13 U.S.C. § 141(b) ("The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress *among* the several States shall be completed within 9 months after the census date." (emphasis added)).

[35] Plaintiffs argue that this court should disregard the court's decision in *Meeks* because the court in *Meeks* relied on *Burns v. Richardson*, 384 U.S. 73 (1966), in reaching its decision. Contrary to plaintiffs' argument, the *Meeks* court did not cite *Burns*. In any event, the reasoning of *Meeks* is fully consistent with the Supreme Court's decisions in *Karcher* and *Kirkpatrick*, which leave open states' ability to depart from Census data so long as adjustments are made in a systematic and not haphazard manner. Moreover, plaintiffs are unable to explain why a state's discretion to exclude incarcerated population from the population base used for state legislative districts should not extend to congressional districts. A state's internal decisions about the population base for drawing congressional districts within its borders do not in any way threaten Article I's goal of ensuring a uniform approach to the apportionment of congressional districts across states. A state obviously cannot affect the number of congressional seats that it is entitled to by its decision about the population base to use for its own districts.

sional districts on the basis of the state's independent population count, as opposed to the federal census, did not violate Article I. 251 F. Supp. 245, 248 (D. Kan. 1966). The court explained that references in the Constitution "to the enumeration of the population of the various states have to do with the apportionment of representatives *among* the states, not within them." [36] *Id*. at 249-50. Thus, as *Avery* makes clear, Article I does not restrict a state's discretion with respect to the data used for drawing election districts within its own boundaries.

B. The State of Maryland's Adjustments Were Thoroughly Documented and Applied in a Systematic Manner.

Given the discretion afforded states to adjust the census data for redistricting purposes, the only remaining question is whether the state's adjustments pursuant to the No Representation Without Population Act were thoroughly documented and applied in a systematic manner. There is no question that the state's procedures implementing the law meet this standard.

As discussed above, the Maryland legislature enacted the No Representation Without Population Act in April, 2010, motivated primarily by concerns that the counting of incarcerated persons in the districts in which they are confined undermines the basic constitutional principle of one person-one, one-

[36] Plaintiffs' preliminary injunction motion rests on their contention that the reallocation of incarcerated persons violates Article I, Section 2 of the Constitution. Their memorandum of law addressing Counts 3 and 6 contains only a single sentence mentioning a possible Fourteenth Amendment claim. Pltf. Memorandum at 13 ("Additionally, this reassignment of some prisoners in the state and elimination of certain prisoners [the] Census has assigned to the state, but only a select group of these persons (namely those residing in state facilities but not the federal facility), raises the probability of a violation of equal protection under the Fourteenth Amendment."). This passing reference to a possible Fourteenth Amendment violation, supported by no argument, no factual discussion, no analysis, nor even citation of relevant case precedent, is not remotely adequate to place this issue before the Court. *See, e.g., Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("[A] bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review."). Even if the issue was properly before the court, none of the plaintiffs has standing to advance a claim that Equal Protection principles are violated by distinguishing between different groups of incarcerated persons, as none alleges that he or she is an incarcerated person affected by such classification. *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) (finding that plaintiffs who alleged equal protection violation based on exclusion of students from population base for redistricting lacked standing because none of the plaintiffs alleged that he or she was a student); *see generally Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

vote by dramatically increasing the voting power of persons in districts with penitentiaries over those that do not include such institutions. Liam Farrell, *Inmates to Play New Redistricting Role*, THE CAPITAL (Annapolis), Apr. 27, 2010 at A6 ("House sponsor Joseline Pena-Melnyk specified that the new law was meant to 'create equality among the districts in Maryland', prevent nonvoting prisoners from inflating a district size, and reflect the number of released inmates who go back to their homes."). For example, in the context of state legislative redistricting, state district 2B included approximately 7,000 persons temporarily incarcerated, accounting for 18 percent of the district's total population. Prison Policy Initiative, Importing Constituents: Incarcerated People and Political Clout in Maryland, Mar. 4, 2010, http://www.prisonersofthecensus.org/md/report.html (last viewed Nov. 30, 2011). The practical effect of such was that every group of 82 people in district 2B could exercise the same political power as 100 people in any other district.[37] By seeking to reassign incarcerated persons to their pre-incarceration addresses, the Act not only accords with fundamental principles of fairness, but reflects a more accurate understanding of legal domicile in Maryland. *See Kissi v. Wilson*, No. PJM-08-1638, 2008 WESTLAW 7555488 (D. Md. Aug. 29, 2008) ("[I]nmates usually retain the domicile they had prior to incarceration[.]"); *see also Brogden v. Smith,* 2011 WL 1539884 (N.D.W.Va., 2011), (magistrate's report and recommendation), *adopted*, *Brogden v. Smith,* 2011 WL 1526943 (N.D.W.Va. Apr 21, 2011) (same). *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992) (noting that 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," and upholding the enumeration of overseas federal em-

[37] The Census Bureau has recognized that states may desire to correct this inequity. Accordingly, in 2011, the Census Bureau announced that it would identify the populations of group quarters such as prisons. The 2010 Census Advance Group Quarters Summary File explicitly states, "Group quarters populations may be beneficial to . . . those in the redistricting community who must consider whether to include or exclude certain populations in redrawing boundaries as a result of state legislation." *See* United States Census Bureau, 2010 Census Advance Group Quarters Summary File, http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html (last viewed Nov. 20, 2011).

ployees at their last home of record — despite the fact that such individuals are not physically present in those communities).

Far from reassigning incarcerated persons in an ad-hoc, haphazard fashion, in implementing the No Representation Without Population Act, the state issued regulations setting out an elaborate procedure for reassigning incarcerated persons to the districts in which they resided before being incarcerated on a consistent, uniform basis. COMAR § 34.05.01 *et seq.* In those regulations, the Maryland Department of Planning sets out clear and unambiguous definitions of the facilities and individuals covered by the statute and regulations. *Id.* § 34.05.03. Additionally, the regulations describe the technical "geocoding" procedures that are used to convert the addresses into census blocks that are used for redistricting, including the specific procedures used to recognize addresses that the computer system initially, but erroneously, reports as unrecognizable. *Id. § 34.05.04.*

Nor is there any question that the procedures were implemented in the uniform fashion intended. The result of the process was that the vast majority of incarcerated individuals were reallocated to their last known addresses within the state. For the small number of cases where that was not possible, because the person was homeless, or the home address he or she provided was not valid, the individual was counted at the facility. Def.'s Opposition to Motion for Three Judge Panel, at 5. Finally, the 1,321 individuals in state custody who were out-of-state residents were not included in the districts drawn in the state.[38] *Id.*

The consistent procedure and application envisioned by the regulations and implemented by the state far outpace any of the rationales that previous courts have rejected as haphazard or unsystematic.

[38] Notably, this is consistent with how the federal census treats non-incarcerated out-of-state residents. *See* U.S. Census Bureau, Residence Rule And Residence Situations For The 2010 Census, *available at* http://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html (last viewed Nov. 23, 2011) (explaining where visitors and persons away from their usual residence are counted).

For example, in *Kirkpatrick,* the state claimed that it had drawn its congressional districts in order to achieve equal numbers of eligible voters, but the Court found that this explanation lacked any factual basis, noting that "Missouri made no attempt to ascertain the number of eligible voters and apportion accordingly." 394 U.S. at 534-535. *See also id.* at 535 ("[While] overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts."). Put differently, in *Kirkpatrick* it was clear that the various explanations offered by the state were constructed after the fact – to justify the results reached in the redistricting plan – and had not actually guided the state's decisionmaking process in drawing the districts. In sharp contrast, here the adjustments were made pursuant to a state statute and implementing regulations enacted well *before* any redistricting plan was created, and the adjustments contemplated by the statute have unquestionably been applied uniformly and in a principled manner.

For these reasons, the state's adjustment of the census data, pursuant the No Representation Without Population Act, is entirely within the state's discretion and consistent with the United States Constitution. Plaintiffs have not established a likelihood of success on the merits.

II. Plaintiffs Cannot Meet the Remaining Requirements for Injunctive Relief as to Counts 3 and 6.

Even if plaintiffs could establish a likelihood of success on their claims relating to the No Population Without Representation Act, they cannot meet their burden on the remaining three prongs of the test for preliminary injunctive relief: that they will suffer irreparable harm in the absence of an emergency injunction, that the balance of equities tips in their favor, and that an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20 (2008); *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d. 342 (4th Cir. 2009).

A. Plaintiffs Cannot Establish Irreparable Harm from the Alleged One Person, One Vote Violation Claimed in Counts 3 and 6 of the Complaint.

As noted above, the only claims at issue in the motion for a preliminary injunction are those in Counts 3 and 6, which allege that the No Representation Without Population Act violates the one person, one vote requirements applicable to congressional redistricting plans under Article 1, Section 2 of the Constitution, Thus, the presence of irreparable harm must be evaluated solely on the basis of plaintiffs' alleged injuries with respect to the equal representation requirements of the Constitution, and not with respect to any claims of racial discrimination, vote dilution or partisan gerrymandering set forth in the remaining counts of the complaint.

Even assuming that plaintiffs' claims of malapportionment were correct, plaintiffs cannot meet their burden of showing irreparable injury, for the simple reason that the plaintiff group predominantly resides in districts whose representation is enhanced, not diluted, by the reallocation of incarcerated persons to their home communities.[39] Eight of the nine plaintiffs reside in Districts 4, 5, 7 or 8 under the State Plan, all of which have smaller populations than the ideal district size, according to the calculations put forth by the plaintiffs themselves. (*See* Exhibit C to Complaint). This means that plaintiffs as a group are, according to their alleged facts, overrepresented in the State Plan. Thus, to the extent the plaintiffs' vote dilution theory is accepted, an injunction requiring use of unadjusted Census data as the population base would dilute plaintiffs' representation compared to the State Plan, by adding population

[39] It bears emphasis that *Amici* do not in any way concede that the State Plan is malapportioned; indeed, the State Plan achieves full population equality among all districts using the population base produced under the No Representation Without Population Act. As set forth in Section I of this Memorandum, use of this population base for congressional redistricting is fully consistent with constitutional requirements. In referring to plaintiffs' "overrepresentation" in the State Plan, *Amici* merely accept *arguendo* the plaintiffs' claim of malapportionment, in order to explain that the plaintiff group cannot demonstrate irreparable harm from the alleged population deviations.

to the districts where eight of the nine plaintiffs reside. The relevant table is reproduced here from Table 2 of the Declaration of Bill Cooper[40]:

District	Deviation	% Deviation
1	956	0.13%
2	1,753	0.24%
3	-1,600	-0.22%
4	-1,629	-0.23%
5	-1,222	-0.17%
6	6,754	0.94%
7	-4,832	-0.67%
8	-180	-0.02%

The Supreme Court's foundational cases establishing the requirement of population equality make clear that the constitutional harm flowing from malapportionment – if any -- is suffered in districts that are underrepresented, not those that are overrepresented. For example, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court held that voters in the Fifth Congressional District in Georgia were underrepresented and suffered cognizable harm under Article I, Section 2 because their district had two to three times more population than other districts, meaning that their Congressperson had to represent two to three times as many persons as the Congresspersons elected from other districts in the state. 376 U.S. at 8. Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), where the Court recognized a cognizable claim of discrimination with respect to population equality under the Fourteenth Amendment, the plaintiffs were voters in Jefferson County, Alabama, which had a population of over 600,000, and yet elected just one state senator, while other Alabama counties elected one senator with just over 15,000 people. 377 U.S. at 546.

[40] Plaintiffs make a non-material error in their population deviation calculations on page 11 of their memorandum in support of preliminary injunction. They incorrectly compared the adjusted population of the SB1 districts with the Census population of each SB1 district. The superior approach is taken in the Table 2 of the Declaration of William Cooper and in the text of the Plaintiff's complaint: Comparing the adjusted population of the SB1 districts with what would have been the ideal district size if unadjusted Census data had been used. Plaintiffs merely forgot to compensate for the 1,321 out-of-state prisoners in their calculations. The discrepancy is no more than a negligible 0.03% per district.

Lower courts applying these principles have routinely held that persons in overrepresented districts suffer no cognizable harm to support a one person, one vote claim, and indeed lack standing to bring such claims. *Wright v. Dougherty County, Ga.,* 358 F.3d. 1352, 1355 (11th Cir. 2004) (because plaintiffs resided in overrepresented districts, they "have not suffered any harm or injury by the malapportioned voting districts; in fact they have benefitted from it"); *League of Women Voters of Nassau County v. Nassau County Board of Supervisors,* 737 F.2d 155, 161 (2d Cir. 1984) (voters in overrepresented municipalities suffered no cognizable harm from challenged weighted voting system); *Fairley v. Patterson,* 493 F.2d 598, 603 (5th Cir. 1974) (in one person, one vote case, "injury results only to those persons domiciled in the under-represented voting districts"); *Skolnick v. Board of Commissioners of Cook County,* 435 F.2d 361 (7th Cir. 1970) (same).[41]

Here, issuance of an injunction requiring use of the unadjusted Census data would require adding population to the districts where most plaintiffs reside, a perverse result that would reduce rather than enhance their representation. Indeed, the fact that the population base produced by the No Representation Without Population Act results in districts that *enhance* the representation and voting power of the districts where most plaintiffs reside – including Districts 4 and 7, the majority-minority districts – is telling. It is exactly what one would expect from a statute that was designed to enhance the fairness of redistricting by allocating incarcerated persons to their predominantly urban home communities rather than crediting them to the prison community.[42] It also shows the complete mismatch between the plain-

[41] Plaintiffs err in arguing that a showing of likelihood of success obviates the need to demonstrate irreparable harm. The cases cited for that proposition deal solely with claims under the First Amendment, where harm is sometimes presumed. But even if such a presumption were applicable here, it cannot serve to obviate the need for plaintiffs to show that they are among the persons actually injured by the legislation they are challenging.

[42] Plaintiffs' Complaint alleges that the population base produced under the No Representation without Population Act results in overpopulation (and thus underrepresentation) of District 6 by 6754 persons, and underpopulation (and thus

tiffs' goal of vindicating minority voting rights, which they assert is at the heart of their complaint, and the one person, one vote claim the plaintiffs are attempting to use as a vehicle to secure a preliminary injunction.

In sum, the population shifts that would result from issuance of an injunction would primarily harm rather than benefit the plaintiffs in terms of the representational interests that are cognizable under the one person, one vote doctrine. An injunction that would harm the interests of most plaintiffs cannot at the same time be considered necessary in order to prevent irreparable harm. Moreover, given the need to consider the balance of equities, as discussed in the next section, the fact that one plaintiff, Winnie Mae Campbell, resides in an allegedly underrepresented district (District 2), cannot overcome the fact that the larger plaintiff group overwhelmingly benefits from the No Representation Without Population Act.

B. The Balance of Equities, as well as the Public Interest, Weigh Against Issuance of an Injunction.

Even if the irreparable harm test could be met by a showing of some minor harm to just one of nine plaintiffs, the fact that eight of nine plaintiffs would see their representation diminished through the grant of an injunction certainly means that the balance of equities does not tip in favor of injunctive relief. Indeed, it is the unusual case where the balance of equities within the plaintiff group itself points decidedly against the issuance of relief, without even considering the interests of defendants and of the general public.

But here, the balance of equities and the public interest taken as a whole also require denial of preliminary injunctive relief. As established in the Statement of Facts and in the discussion in Part I,

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overrepresentation) of District 7 by 4834 persons. Complaint, at ¶67. However, not one of the plaintiffs resides in District 6, the district alleged to suffer the greatest underrepresentation.

above, the No Representation Without Population Act serves compelling state interests. It remedies the distortion in representation that resulted from the previous practice of crediting incarcerated population, whose legal residence remains in their home communities, to prison locations that are predominately white and geographically far removed from the true residence of the incarcerated persons. It enhances the fairness of redistricting not only for the urban communities where incarcerated populations predominately have their home residence, but for any communities that do not contain large prisons. The Court should not intervene to invalidate a state law serving such important goals on the basis of a preliminary injunction motion when plaintiffs can point to no real harm they suffer and no controlling authority that requires such a result.

The disruption to the electoral process that would ensue from an injunction at this date also weighs against a grant of relief. "That the states have a vital interest in conducting an orderly election cannot be doubted." *Barthelmes v. Morris*, 342 F. Supp. 153, 160 (D. Md. 1972). *See Reynolds v. Sims,* 377 U.S. at 585 ("where an impending election is imminent, and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief"). The deadline for participation in party primaries is January 11, 2012. But the Court will not be in a position to rule on the entirety of the claims at issue in this case by that date.

If this Court were to enter injunctive relief solely as to Counts 3 and 6 of the complaint, the interim redistricting plan that it could order into effect would be strictly limited to making only those changes necessary to address the one person, one vote claims in those counts. *See Upham v. Seamon,* 456 U.S. 37, 43 (1982) (when federal court is called upon to create interim redistricting plan, court's modifications to state's plan must be "limited to those necessary to cure any constitutional or statutory defect"); *see also id.* at 41-42 (citing *Whitcomb v. Chavis,* 403 U.S. 124, 160-61 (1971) and *White v.*

Weiser, 412 U.S. 783, 794-95 (1973)); *Cane v. Worcester County*, 35 F.3d 921, 928 (4th Cir. 1994) (even if state fails to propose acceptable remedial plan, district court may not depart from state policy choices more than is necessary to correct the specific violation found). The Court would have no authority to order into effect, on this record, the larger and far more sweeping changes that are the primary goal of plaintiffs' lawsuit – such as creating a third majority-minority district and revamping the treatment of Montgomery County – because plaintiffs have specifically declined to request injunctive relief as to those claims. Given that any remedial plan based on Counts 3 and 6 would have minimal impact on the harms that plaintiffs allege from the State Plan, plaintiffs have not established that the balance of equities and the public interest favor issuance of relief.

This is especially true when the disruption to statewide election processes would, at most, benefit just one of the nine plaintiffs in this case, while actually harming the representational interests of the other eight plaintiffs based on the one person, one vote claims that comprise the sole basis for plaintiffs' motion. As mentioned above, the only plaintiff even arguably affected by the alleged malapportionment of the State Plan is Willie Mae Campbell, who is alleged to reside in District 2. According to the plaintiffs' own calculations, that district would, based on unadjusted census data, be overrepresented by just 0.27 percent -- or by just over 1,900 persons out of over 720,000 persons making up an ideal district.[43] Even assuming that the plaintiffs could prevail in their claim that Article 1 bars any adjustments to the database used for congressional redistricting, the potential harm of holding one election in a district that is allegedly out of alignment by 0.27 percent does not outweigh the disruption and burden of potentially requiring two different court-ordered plans to be implemented in two successive elections.

[43] Plaintiff's Memorandum In Support Of Its Motion For Preliminary Injunction As To Count Three and Six of the Complaint, table at top of page 11. As explained above at footnote 40, Plaintiffs in their complaint and the Declaration of William Cooper use a slightly different methodology. This difference is initially confusing, but not material.

"Preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power, and are to be granted only sparingly and in limited circumstances," *Microstrategy, Inc. v. Motorola*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotations marks and citation omitted). In addressing the requirements for injunctive relief in *Winter*, the Supreme Court emphasized the public interest requirement, stating, "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." 555 U.S. at 24 (internal quotations marks and citation omitted). Given that no Supreme Court decision controls the question whether a state may make adjustments to Census data in determining the population base for congressional redistricting; given the strong policy reasons supporting the No Representation Without Population Act; and given the deference that federal courts are required to show to state policy choices concerning redistricting, both the balance of equities and the public interest weigh strongly against a grant of preliminary injunctive relief on Counts 3 and 6 of the Complaint.

CONCLUSION

For the reasons stated above, plaintiffs' motion for a preliminary injunction should be denied.

Dated: December 2, 2011

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Amici Exhibit A

UNITED STATES DISTRICT COURT FOR MARYLAND

PATRICIA FLETCHER, et al., Plaintiffs, v. LINDA H. LAMONE, et al.,, Defendants.	:	Civil Case No.: RWT 11cv3220

DECLARATION OF WILLIAM S. COOPER

I, William S. Cooper, hereby declare the following:

1. I am a demographic and redistricting consultant in private practice. I give this declaration based upon personal knowledge.

2. For information on my experience preparing and assessing proposed redistricting maps for Section 2 litigation, Section 5 comment letters, compliance with one-person one-vote, and for use in other efforts to promote compliance with the Voting Rights Act of 1965, see Exhibit 1. For information on the data sources I employed for this declaration, see Exhibit 2.

3. I have been asked by the attorneys for the *Amici* in this case to determine whether the *No Representation Without Population Act* has a meaningful impact on the potential to create three African American-majority Congressional districts in Maryland.

4. Table 1 below compares the Any Part Black ("AP Black") voting age population percentage under the 2002 Congressional Plan with the 2011 Enacted Congressional Plan ("Enacted Plan") using both adjusted and unadjusted data.[1] The columns labeled "Difference"

[1] "Adjusted data" refers to the *2010 Adjusted Block Level Data* file for use with Maryland legislative redistricting pursuant to the *No Representation Without Population Act*. "Unadjusted data" refers to the 2010 *Maryland PL 94-171* file published by the U.S. Census Bureau for use in legislative redistricting.

show that the AP Black voting age population barely changes when unadjusted data is used rather than adjusted data. [2] In both instances, Districts 4 and 7 — the two majority-black districts — have slightly lower Black voting age percentages based on the unadjusted data. For District 4, the AP Black voting age population is less than one-tenth of a percentage point lower with the unadjusted data (-.08%). For District 7, the AP Black voting age population is about four-tenths of a percentage point weaker using the unadjusted data (-.39% for the 2002 Plan and -.38% for the 2011 Enacted Plan).

Table 1 – Comparison of Adjusted and Unadjusted Any Part Black 18+ Percentages

2002 Plan and 2011 Enacted Plan

District	2002 Plan			2011 Enacted Plan		
	Adjusted	Unadjusted	Difference	Adjusted	Unadjusted	Difference
CD 1	11.41%	11.58%	0.18%	11.36%	11.55%	0.19%
CD 2	32.23%	32.04%	-0.19%	30.70%	30.91%	0.21%
CD 3	19.36%	19.71%	0.35%	19.91%	19.82%	-0.09%
CD 4	57.66%	57.57%	-0.08%	55.76%	55.68%	-0.08%
CD 5	37.21%	37.16%	-0.05%	36.89%	36.84%	-0.05%
CD 6	5.95%	6.89%	0.94%	11.98%	12.80%	0.82%
CD 7	56.42%	56.04%	-0.39%	55.48%	55.10%	-0.38%
CD 8	17.55%	17.51%	-0.04%	12.38%	12.41%	0.03%

5. While the Enacted Plan achieves precise mathematical equality using the adjusted data, Table 2 below shows the deviations that would result if the State were required to use unadjusted data. If unadjusted data were required, some census blocks would have to be shifted to achieve ideal district population size. The two majority-black districts are underpopulated (and, thus, overrepresented), using the unadjusted data as the apportionment base. District 4

[2] "Any Part Black" refers to persons counted in the 2010 Census and reported as single-race Black or some combination of Black and another race. Throughout this declaration "Black", "African American" and "Any Part Black" (or "AP Black"), are referenced synonymously.

would have to add 1,629 persons and District 7 would have to add 4,832 persons – obviously, not enough to alter their majority-black status or materially affect the Black voting age percentages.

Table 2 – Enacted 2011 Plan Using Unadjusted Data

District	Population	Deviation	% Deviation	18+ Pop	18+ AP Black	% 18+ AP Black
CD 1	722650	956	0.13%	558168	64445	11.55%
CD 2	723447	1753	0.24%	552587	170788	30.91%
CD 3	720094	-1600	-0.22%	563748	111716	19.82%
CD 4	720065	-1629	-0.23%	542964	302327	55.68%
CD 5	720472	-1222	-0.17%	544906	200736	36.84%
CD 6	728448	6754	0.94%	551989	70627	12.80%
CD 7	716862	-4832	-0.67%	552615	304468	55.10%
CD 8	721514	-180	-0.02%	553611	68714	12.41%

6. As shown in Table 2, Districts 2 and 5 are the two districts under the Enacted Plan that potentially could be modified to create a third majority-black district. (Both districts have Black voting age percentages in the 30's using either adjusted or unadjusted data). With the unadjusted data as the apportionment base, District 2 is overpopulated by 1,753 persons and District 5 is underpopulated by 1,222 persons.

7. Table 3 below quantifies the impact that using the unadjusted data with the 2011 Enacted Plan could have on the Black voting age percentages in Districts 2 and 5. These are the two districts that are the closest to being African American-majority but are not. Under a hypothetical scenario most beneficial for the plaintiffs, I made the extreme (and improbable) assumptions that all persons shifted out of District 2 are of voting age and exclusively No Part Black and all persons shifted into District 5 are exclusively Any Part Black voting age. Any departure from these extreme assumptions would only reduce the impact of switching from the adjusted to the unadjusted data.

Table3 –Impact of Unadjusted Apportionment Data on AP Black Voting Age Compared to Adjusted Apportionment Data

			Resulting % 18+ AP Black (after shift to correct deviation)	
District	% 18+ AP Black Under 2011 Enacted Plan using Adjusted Data	Required Population Change using Unadjusted Data	*All persons shifted out of CD 2 are 18+ No Part Black*	*All persons shifted into CD 5 are 18+ Any Part Black*
CD 2	30.70%	-1753	31.01%	
CD 5	36.89%	1222		36.98%

8. District 2 is overpopulated by 1,753 persons using the unadjusted data, so if all persons shifted out of the district were No Part Black and of voting age, it would be 31.01% AP Black voting age. This is a miniscule increase of less than one-third of a percentage point (.31%) from 30.70% based on the adjusted data. District 5 would likewise show almost no change in AP Black voting age percentage after 1,222 persons are added to correct the deviation based on the unadjusted data -- from 36.89% AP Black voting age (adjusted) to 36.98% (unadjusted).

9. Thus, it is clear from Table 3 that using unadjusted data to modify the 2011 Enacted Plan would not by itself create a third majority-black district and would have virtually no impact on the Black voting age percentages in the two majority-black districts. From the standpoint of African American voting strength, nothing is gained by using the unadjusted data.

10. With the 2011 Enacted Plan as a starting point, hundreds of thousands of persons must be shifted in order to create a third majority-black district, regardless of whether adjusted or unadjusted data is used (see Table 4 below).

Table 4 –AP Black Voting Age Population Needed to Create a Third Majority-Black District under the 2011 Enacted Plan

	18+ Pop	18+ AP Black	% 18+ AP Black	50.0% Plus 1	18+ AP Black Needed for 50.0% Plus 1
Adjusted Data					
CD 2	550669	169051	30.91%	275336	106285
CD 5	545963	201408	36.84%	272983	71575
Unadjusted Data					
CD 2	552587	170788	30.91%	276295	105507
CD 5	544906	200736	36.84%	272454	71718

11. For example, District 2 alone needs over 105,000 voting age African Americans to hit a target of 50% plus one AP Black voting age. District 5 needs over 71,000 African Americans of voting age to become majority-black. Comparing adjusted data with unadjusted data, the difference between the voting age population required to create a third majority-black district amounts to just a few hundred persons – not enough by itself to make these districts majority-black. The larger changes that would be required to make either District 2 or District 5 majority-black would have a widespread ripple effect across all districts.

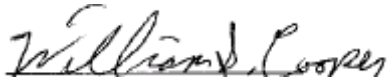
12. I was also asked by the attorneys for the *Amici* to determine: (1) the percentage of votes cast for the Democratic candidate in the 2008 Presidential Election in District 6 under the 2011 Enacted Plan and (2) whether modifications to correct the deviation in District 6 using unadjusted data as the apportionment base would affect the partisan outcome in the district for the 2008 Presidential Election.

13. I disaggregated 2008 precinct-level election results to the block level (to account for split precincts) and determined that Barack Obama received about 56% of the vote in new District 6.[3] By contrast, Obama received just 40% of the vote in old District 6.

14. Obama's margin of victory was over 40,000 votes in new District 6. Therefore, a shift of 6,754 persons out of District 6 to correct the overpopulation using the unadjusted data (see Table 2) would have no impact on the partisan outcome.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2011



William S. Cooper

[3] Source: Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", http://hdl.handle.net/1902.1/15549 V3 [Version]
Available for download at: : http://projects.iq.harvard.edu/eda/data

Exhibit 1 -- Summary of Redistricting Work

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I have a BA degree in Economics from Davidson College in Davidson, North Carolina.

Since 1986, I have prepared proposed redistricting maps of approximately 600 jurisdictions for Section 2 litigation, Section 5 comment letters, and for use in other efforts to promote compliance with the Voting Rights Act of 1965. I have analyzed and prepared election plans in over 100 of these jurisdictions for two or more of the decennial censuses – either as part of concurrent legislative reapportionments or, retrospectively, in relation to litigation involving many of the cases listed below.

Since the release of the 2010 Census in February 2011, I have developed statewide legislative plans on behalf of clients for two states (Virginia and South Carolina), as well as about 60 local redistricting plans in a dozen states – primarily for groups working to protect minority voting rights.

In March 2011, I was retained by the Sussex County, Virginia Board of Supervisors and the Bolivar County, Mississippi Board of Supervisors to draft new district plans based on the 2010 Census. In the summer of 2011, both counties received Section 5 preclearance from the Department of Justice.

I have been retained by way of a subcontract with OlmedilloX5 LLC to assist with 2011 redistricting for the Miami-Dade County Board of Commissioners and the Miami-Dade School Board. I have also prepared draft redistricting plans for the City of Grenada, Mississippi. Final plans will be adopted in both jurisdictions in late 2011 following public hearings.

I have testified in two redistricting lawsuits in 2011 in New Mexico and New York – *Archuleta v. City of Albuquerque* and *Pope v. County of Albany. Pope v. County of Albany is* ongoing. I am a consultant and expert for the plaintiffs in *Georgia State Conference NAACP, et al. v. Fayette County* (filed in 2011).

I also serve as a redistricting and demographic consultant to the Massachusetts-based Prison Policy Initiative for a nationwide project to end prison-based gerrymandering. I have analyzed 2011 election plans in over a dozen states as part of my work with PPI.

During the 2000's, I analyzed census data and prepared draft election plans involving about 300 local-level jurisdictions in 25 states. I produced these plans at the request of local citizens' groups, national organizations such as the NAACP and, in a few instances, by contract with local governments. Election plans I developed for two counties – Sussex County, Virginia and Webster County, Mississippi – were adopted and precleared in 2002 by the U.S. Department of Justice. A ward plan I prepared for the City of Grenada, Mississippi was precleared in August 2005. A county council plan I developed for Native American plaintiffs in a Section 2 lawsuit *(Blackmoon v. Charles Mix County*) was adopted by Charles Mix County, South Dakota in November 2005. A county supervisors' plan I produced for Bolivar County, Mississippi was precleared in January 2006. A plan I drafted

for Latino plaintiffs in Bethlehem, Pennsylvania (*Pennsylvania Statewide Latino Coalition v. Bethlehem Area School District)* was adopted in March 2009. Plans I developed for minority plaintiffs in Columbus County, NC and Cortez-Montezuma School District in Colorado were adopted in 2009.

In addition, during the post-2000 reapportionment process, I drafted proposed statewide legislative plans for clients in eight states – Florida, Montana, New Mexico, North Dakota, South Dakota, Tennessee, Virginia, and Wyoming. In August 2005, a federal court ordered the State of South Dakota to remedy a Section 2 voting rights violation and adopt a state legislative plan I developed. (*Bone Shirt v. Hazeltine*)

Since 1986, I have prepared election plans for Section 2 litigation in Connecticut, Florida, Georgia, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

I have testified at trial as an expert witness on redistricting and demographics in federal courts in the following voting rights cases:

Colorado
Cuthair v. Montezuma-Cortez School Board

Georgia
Cofield v. City of LaGrange
Love v. Deal
Askew v. City of Rome
Woodard v. Lumber City

Louisiana
Knight v. McKeithen
Reno v. Bossier Parish
Wilson v. Town of St. Francisville

Maryland
Cane v. Worcester County

Mississippi
Addy v Newton County
Boddie v. Cleveland
Boddie v. Cleveland School District
Ewing v. Monroe County
Farley v. Hattiesburg
Jamison v. City of Tupelo
Gunn v. Chickasaw County
NAACP v. Fordice
Nichols v. Okolona
Smith v. Clark

Montana
Old Person v. Cooney
Old Person v. Brown (on remand)

Nebraska
Stabler v. Thurston County

New York
Arbor Hills Concerned Citizens v. Albany County
Pope v. County of Albany

South Carolina
Smith v. Beasley

South Dakota
Bone Shirt v. Hazeltine
Cottier v. City of Martin

Tennessee
Cousins v. McWherter
Rural West Tennessee Indian Affairs Council v. McWherter

Virginia
Henderson v. Richmond County
McDaniel v. Mehfoud
White v. *Daniel*
Smith v. Brunswick County

Wyoming
Large v. Fremont County

In addition, I have filed declarations or been deposed in these voting rights cases:

Florida
Burton v. City of Belle Glade
Johnson v. DeSoto County
Thompson v. Glades County

Georgia
Jones v. Cook County
Johnson v. Miller
Knighton v. Dougherty County

Louisiana
NAACP v. St. Landry Parish Council
Prejean v. Foster
Rodney v. McKeithen

Mississippi
Clark v. Calhoun County (on remand)
Houston v. Lafayette County
Williams v. Bolivar County
Wilson v. Clarksdale
Stanfield v. Lee County
Teague v. Attala County (on remand)

Montana
Alden v. Rosebud County

North Carolina
Lewis v. Alamance County
Gause v. Brunswick County
Webster v. Person County

South Carolina
Vander Linden v. Campbell

South Dakota
Emery v. Hunt
Kirkie v. Buffalo County

Tennessee
NAACP v. Frost, et al.

Virginia
Moon v. Beyer

# # #

Exhibit 2 -- Sources and Methodology

I use a geographic information system software package called *Maptitude for Redistricting*, developed by the Caliper Corporation, for my redistricting work. This software is used by local and state governing bodies across the country.

I obtained the *2010 Adjusted Block Level Data* file for use with Maryland legislative redistricting pursuant to the *No Representation Without Population Act*. This is the dataset referenced as "adjusted data" in my declaration. The block file is available for download at:

http://www.mdp.state.md.us/redistricting/2010/dataDownload.shtml

I also obtained the block equivalency file for the 2011 Enacted Maryland Congressional Plan from the above website

For the comparative demographic analysis, I used the *Maryland PL 94-171* file published by the U.S. Census Bureau. The PL 94-171 data file is released in electronic format and is the complete count population file designed by the Bureau of the Census for use in legislative redistricting. This is the dataset referenced as "unadjusted data" in my declaration. The block level dataset is available for download at:

http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/Maryland/

I imported the two population files and the block equivalency file into a block-level geographic database for use with *Maptitude for Redistricting.*

To determine the percentage of the Democratic vote in the 2008 Presidential contest for District 6 (under the 2011 Enacted Plan), I used a file with precinct-level election data prepared

by researchers associated with the Harvard Election Data Archive.[1] The file with Maryland election results is available for download at:

http://projects.iq.harvard.edu/eda/data

I also imported this election dataset into *Maptitude for Redistricting* to conduct the vote analysis.

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[1] Source: Stephen Ansolabehere; Jonathan Rodden, 2011, "Maryland Data Files", http://hdl.handle.net/1902.1/15549 V3 [Version]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 2011, I electronically filed this Amicus Curiae brief on behalf of the Howard University School of Law Civil Rights Clinic, ACLU of Maryland, Maryland State Conference of NAACP Branches, Somerset County Branch of the NAACP, NAACP Legal Defense And Educational Fund, Inc., Prison Policy Initiative, and Demos, with the Clerk of the Court using the CM/ECF system.

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