

November 12, 2021

Submitted by email

Special Commission on Reapportionment
Rhode Island General Assembly
Providence, RI 02903
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Re: Ending Prison-Based Gerrymandering in Rhode Island

Chair Archambault, Chair Phillips, and Members of the Special Commission on Reapportionment:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes to urge the Rhode Island General Assembly’s Special Commission on Reapportionment (“Commission”) to end the racially discriminatory and anti-democratic practice of prison-based gerrymandering when drawing its maps for the General Assembly during this current redistricting cycle. As this Commission is well aware, the maps that the General Assembly ultimately adopts may be in place for at least a decade and have significant impact on *all* people’s access to representation and *all* voters’ access to representatives who make monumental policy decisions.

Before drawing districts for the Rhode Island Senate and House of Representatives, the Commission should adjust 2020 Census data to reflect that incarcerated people are residents, both legally and practically, of their pre-incarceration homes—not the prisons where they were temporarily and involuntarily held on one day, Census Day. This is necessary to ensure fair and accurate representation both for incarcerated people and their home communities, which otherwise suffer reduced political power compared with the rest of the state while jurisdictions that house prison facilities—in this case the Adult Correctional Institutions—unfairly benefit from inflated political power.

I. Prison-Based Gerrymandering Unfairly Distorts the Populations and Demographics of Rhode Island’s Legislative Districts.

Prison-based gerrymandering is the practice of counting incarcerated people at their prison locations, rather than their pre-incarceration homes, for redistricting purposes. It is a stark distortion of representation that disproportionately harms people of color, both in Rhode Island and in the shrinking number of states nationwide where it remains in use. Prison-based gerrymandering artificially and arbitrarily *inflates* the political power of the predominantly white residents who live in legislative districts where prisons are

located, while *diluting* the political power of all other Rhode Islanders—and especially of the communities of predominantly Black and Latino people who have lost the greatest number of family-members, loved ones, friends, and neighbors to mass incarceration.

a. Prison-Based Gerrymandering Distorts Both Representational and Voting Power

Prison-based gerrymandering distorts both essential aspects of representative democracy: (1) “representational equality,” the right of all people to have an equal opportunity to access, petition, and develop relationships with their elected representatives; and (2) “electoral equality,” the right of all voters to have their votes weighted equally.¹

Foundationally, under our federal Constitution’s “one person, one vote” principle, everyone has an equal right to representation.² This is because, as the Supreme Court recognized in *Reynolds v. Sims*, “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people.”³ Regardless of age, voting eligibility, or citizenship, every person has the same fundamental right to access and petition their elected representatives.⁴ Indeed, “the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”⁵ But people incarcerated in prisons are not functional constituents of the elected officials who serve the jurisdictions housing those prisons; rather, they maintain much stronger ties to their home communities, where most will return upon release. This means people living near prisons have less competition in petitioning or developing meaningful relationships with their elected officials than people living in the largely Black and brown communities that see their populations artificially undercounted due to prison-based gerrymandering.

¹ *Calvin v. Jefferson County Bd. of Commissioners*, 172 F. Supp. 3d 1292, 1303-26 (N.D. Fla. 2016) (ruling a prison-based gerrymandering scheme unconstitutional because it violated “both electoral and representational equality”); see also *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126 (2016) (describing “voter equality” as “the right of eligible voters to an equal vote,” and describing “representational equality” as the principle “that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives”); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (“Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.”).

² *Calvin*, 172 F. Supp. 3d at 1303 (characterizing this right as “the interest in being represented on an equal footing with one’s neighbors”).

³ 377 U.S. 533, 560-61 (1964).

⁴ *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 775-76 (9th Cir. 1990).

⁵ *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

In addition, our Constitution, federal statutes, and other laws ensure the equal weight of our vote.⁶ This is because the right to vote includes “the right to have the ballot counted at full value without dilution or discount.”⁷ Significantly, many incarcerated persons cannot vote at their prison location. Some are convicted of felonies and cannot vote at all; many others, however, must vote absentee from their actual legal residence, which is their pre-incarceration address. This means that people are being counted where they cannot vote or participate in civic, social, or political life, and residents in jurisdictions housing prisons enjoy disproportionate voting power.

b. Substantial Distortions in Rhode Island

Rhode Island provides a striking illustration of prison-based gerrymandering’s distorting effects on legislative redistricting maps. Rhode Island’s entire prison population is held in the Adult Correctional Institutions (“ACI”), a complex of seven correctional facilities located within a single square mile in the City of Cranston.⁸ Outside the prison walls, Cranston’s population is predominantly white.⁹ However, the majority of people who are imprisoned in the ACI are Black or Latino—about 30% of those serving sentences in the ACI are Black, and an additional 26% are Latino.¹⁰

While at the ACI, incarcerated people cannot use their temporary prison addresses to vote in local, state, or federal elections.¹¹ Indeed, those serving felony sentences cannot vote at all.¹² And people who are awaiting trial or serving misdemeanor sentences, who remain eligible to vote, can vote only at their pre-incarceration residences by absentee ballot.¹³ In fact, nearly two-thirds of the people present at the ACI at any given time are eligible to vote, yet must

⁶ See, e.g., *Reynolds*, 377 U.S. at 568 (“an individual’s right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”); 52 U.S.C. § 10301 (prohibiting all forms of racial discrimination in voting, including electoral schemes that dilute the weight of a racial or language-minority group’s votes); U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses* 24 (Dec. 2017), <https://www.justice.gov/criminal/file/1029066/download> (explaining that various federal statutes prohibit “such acts as diluting valid ballots with invalid ones”).

⁷ *Reynolds*, 377 U.S. at 555 n.29.

⁸ R.I. Dep’t of Corrections, *Fiscal Year 2020 Annual Population Report* 4 (Sept. 2020), <http://www.doc.ri.gov/docs/FY20%20Annual%20Population%20Report.pdf>.

⁹ U.S. Census Bureau, *QuickFacts: Cranston city, Rhode Island*, <https://www.census.gov/quick-facts/cranstoncityrhodeisland> (reporting that Cranston’s population—including people incarcerated there—is 69.9% non-Hispanic white, 15.5% Latino, and 6.3% Black).

¹⁰ R.I. Dep’t of Corrections, *supra* note 8, at 13. As of July 30, 2020, 29.8% of individuals serving sentences at ACI were Black and 25.8% were Latino, for a total of 55.6%. *Id.* By contrast, only 40% of individuals serving sentences at ACI were white. *Id.*

¹¹ See *Davidson v. City of Cranston, Rhode Island*, 837 F.3d 135, 138 (1st Cir. 2016).

¹² R.I. Const. art. II, § 1.

¹³ *Davidson*, 837 F.3d at 138 (“Those inmates at the ACI not imprisoned for felonies may vote by absentee ballot in their pre-incarceration communities, provided that they meet that community’s absentee-ballot requirements.”).

do so from a different location, demonstrating the absurdity of counting them for redistricting purposes in the prison jurisdiction.¹⁴

People imprisoned in the ACI remain constituents of their home communities, not Cranston, the jurisdiction that houses the prison. They overwhelmingly call other areas of the state home and nearly always return to their pre-incarceration home communities when they are released. According to the Rhode Island Department of Corrections (“DOC”), only 8.9% of Rhode Islanders released from incarceration at the ACI last year remained in Cranston upon the completion of their sentences.¹⁵ All other Rhode Islanders returned to other areas of the state, with a plurality of 29.6% returning to Providence.¹⁶

In fact, most people spend relatively little time at the ACI, and instead spend the vast majority of a 10-year districting cycle in their home communities. The median stay for people at the ACI who are awaiting trial is just three days.¹⁷ For those serving actual sentences, the median stay is just over three months.¹⁸ More than two-thirds (69%) of all persons incarcerated at the ACI are typically released within six months, and nearly 85% are released within one year.¹⁹

For the short time they are present, incarcerated persons are completely cut off from the surrounding community. They cannot visit parks or libraries in Cranston, ride local public transportation, or use their temporary prison addresses to enroll their children in Cranston’s public schools.²⁰ For this reason, legislators who represent districts containing prisons generally do not treat people imprisoned there as constituents.²¹ For example, the Cranston City Councilman who represents the ward containing the ACI agreed that he could not think of any group of residents within his ward that is more isolated than

¹⁴ See *Davidson v. City of Cranston*, 188 F. Supp. 3d 146, 147 (D.R.I.), *rev’d on other grounds sub nom. Davidson v. City of Cranston, Rhode Island*, 837 F.3d 135 (1st Cir. 2016) (citing evidence that over 60% of ACI’s population was either serving a misdemeanor sentence or awaiting trial, and that less than 5% of ACI’s population came from Cranston).

¹⁵ R.I. Dep’t of Corrections, *supra* note 8, at 21.

¹⁶ *Id.*

¹⁷ *Id.* at 17. According to DOC, the average total length of an imposed sentence is 23.7 months. *Id.* But the time incarcerated people actually stay at ACI “is almost always shorter than the full sentence imposed, due to factors such as statutory good time (i.e., credit earned for good or industrious behavior) and earned time for program participation and completion (time deducted from sentence).” *Id.*; see also *Davidson*, 188 F. Supp. 3d at 147 (“The population of the ACI is transient. Inmates may be serving sentences or awaiting trial. According to Plaintiffs’ demographic expert, the median length of stay for those serving a sentence at the ACI is 99 days. The median stay for those awaiting trial is three days.”).

¹⁸ R.I. Dep’t of Corrections, *supra* note 8, at 17.

¹⁹ Br. of Plaintiffs-Appellees, *Davidson v. City of Cranston, Rhode Island*, No. 16-1692 (1st Cir. July 26, 2016), at 22.

²⁰ *Davidson*, 188 F. Supp. 3d at 147.

²¹ *Id.* at 148.

people incarcerated at the ACI and made no effort to talk to these persons, determine their interests, or advocate on their behalf.²²

For the reasons stated above, under Rhode Island law, incarcerated people remain legally domiciled in their pre-incarceration homes.²³ It makes no sense to count people for representational purposes where they cannot vote, have no ties to the local community, do not receive meaningful representation from elected officials, and do not legally reside.

Despite all this, in previous decades, the Rhode Island General Assembly has counted the more than 3,000 people imprisoned at the ACI as residents of their prison cells instead of their homes. In the context of the State's overall population and legislative district sizes, this creates a significant distortion of representation. Under the General Assembly's current district map, the ACI is in House Districts ("HD") 15 and 20. The populations of both districts are inappropriately inflated by the inclusion of hundreds or thousands of imprisoned people whose homes, both legally and practically, are elsewhere in the state. According to an analysis by the Prison Policy Initiative, 15% of HD 20's reported residents and 8% of HD 15's reported residents are actually people imprisoned at the ACI.²⁴ If incarcerated people were counted at their homes instead, HD 15 and HD 20 would likely be unconstitutionally underpopulated. For decades, imprisoned people have thus been used to artificially inflate Cranston's population for redistricting, even though they are denied participation in local civic life.

As a result, imprisoned people's home communities—where their families still live, where their children attend school, and where they themselves will likely return when released—have seen their voting strength and quality of representation diluted. This dilution of political power disproportionately harms the same Black and Latino families and communities who have already lost loved ones to mass incarceration, thus extending the racially discriminatory effects of decades of failed criminal justice policies into the political sphere.

II. The Special Commission on Reapportionment Can and Should Reassign Incarcerated Persons to their Home Addresses.

Despite public support for changing Census practices and counting incarcerated people at their home addresses,²⁵ the Census Bureau's population

²² Br. of Plaintiffs-Appellees, *Davidson v. City of Cranston, Rhode Island*, No. 16-1692 (1st Cir. July 26, 2016), at 23, 26.

²³ R.I. Gen. Laws § 17-1-3.1(a).

²⁴ Prison Policy Initiative, *Ending Prison Gerrymandering in Rhode Island* (Feb. 22, 2016), <https://www.prisonersofthecensus.org/factsheets/ri/RI.pdf>.

²⁵ See Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526-28 (Feb. 8, 2018) ("Of the 77,887 comments pertaining to prisoners, 77,863 suggested that prisoners should be counted at their home or pre-incarceration address. . . . Four comments were in support of counting prisoners at the correctional facility.")

data for 2020 continues to inaccurately characterize incarcerated people as residents of their prison cells. However, as officials have been made aware repeatedly, Rhode Island is not obligated under federal or state law to use Census data without making appropriate adjustments and there is strong public support for an accurate count.²⁶ In the last redistricting cycle, two states adjusted the official 2010 Census data to reallocate imprisoned people to their home addresses, and courts upheld that process in both states.²⁷ Building on the success of these states, an additional 10 states and more than 200 local jurisdictions have since undertaken to adjust Census data to ensure that legislative redistricting maps treat incarcerated people as residents of their homes, not their temporary prison addresses.²⁸ In addition, numerous states adjust Census data in other ways when redrawing legislative districts.²⁹

This Commission should follow their example. Like the Legislative Reapportionment Commission in Pennsylvania—which elected this year to join the growing number of states rejecting prison-based gerrymandering³⁰—this Commission has the authority and ability to adjust decennial Census data to reflect the state’s population more accurately by counting incarcerated Rhode Islanders at their home addresses for redistricting purposes.³¹

In Rhode Island, state law on electoral residency, in combination with the Rhode Island Constitution’s mandate that General Assembly districts “shall be as nearly equal in population . . . as possible,”³² provide support for such a

²⁶ See, e.g., Testimony of Aleks Kajstura, Legal Director & Ginger Jackson-Gleich, Policy Counsel, Prison Policy Initiative, Before the R.I. H. Comm. on State Gov’t & Elec. (Mar. 1, 2021), <https://www.rilegislature.gov/Special/comdoc/House%20State%20Government%20and%20Elections/03-01-2021%20H-5285%20Prison%20Policy%20Initiative.pdf>; Letter from Leah C. Aden, Assistant Counsel, LDF, to Cale P. Keable, Chair, R. I. H. Comm. on Jud. (Apr. 13, 2015), <https://www.naacpldf.org/wp-content/uploads/RI-prison-based-gerrymandering-4.13.15.pdf>.

²⁷ *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge panel), *aff’d without opinion*, 567 U.S. 930 (2012); *Little v. N.Y. State Legislative Task Force on Demographic Research & Reapportionment*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011), available at [http://www.prisonersofthecensus.org/little/Decision and Order.pdf](http://www.prisonersofthecensus.org/little/Decision%20and%20Order.pdf), *aff’d without opinion*, 963 N.E.2d 787 (N.Y. 2012).

²⁸ Andrea Fenster, *How many states have ended prison gerrymandering? About a dozen!*, Prison Policy Initiative (Oct. 26, 2021), https://www.prisonersofthecensus.org/news/2021/10/26/state_count/.

²⁹ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 & n.3 (2016).

³⁰ Madeleine Carlisle & Sanya Mansoor, *‘We Are Standing up for Equal Treatment Before the Law.’ Pennsylvania Abolishes Prison Gerrymandering*, Time (Aug. 24, 2021), <https://time.com/6092470/prison-gerrymandering-pennsylvania-abolished/>.

³¹ See Nat’l Conf. of State Legislatures, *Redistricting and Use of Census Data* (May 26, 2021) (identifying Rhode Island as one of 17 states without any state constitutional or statutory requirements to use a particular “data source for legislative and/or congressional redistricting”).

³² R.I. Const. art. VII, § 1 (“The house of representatives shall be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible.”); R.I. Const. art. VIII, § 1 (“The senate shall be constituted on the

change in redistricting practices. Under Rhode Island law, “[a] person’s residence for voting purposes is his or her fixed and established domicile,” and such a domicile, once established, “shall not be considered lost solely by reason of absence” due to “[c]onfinement in a correctional facility[.]”³³ In other words, for electoral purposes, Rhode Island law defines incarcerated people as residents and domiciliaries of their pre-incarceration homes, not the correctional facilities where they are temporarily and involuntarily imprisoned. The Rhode Island Constitution’s stringent equal-population mandate for legislative districts, further, suggests that the substantial deviations in district population prison-based gerrymandering causes may not be constitutionally permissible.

This Commission therefore has both the legal authority and the practical ability to address the harms of prison-based gerrymandering. The Rhode Island DOC reportedly collects and maintains data identifying pre-incarceration home addresses for everyone who enters the correctional system.³⁴ This data would enable the Commission to correct for the misallocation of incarcerated people in Census data—and any correction would be better than none. Even if pre-incarceration addresses are not available or usable for all incarcerated Rhode Islanders, data from any proportion of incarcerated people will allow for a more accurate and legally sound redistricting plan than using entirely unadjusted Census data.³⁵ The Commission should obtain this data from the DOC and promptly process these adjustments.

* * *

For these reasons, we urge you to take the equitable and common-sense step of ending prison-based gerrymandering in Rhode Island’s legislative districts. Please feel free to contact Steven Lance at (347) 947-0522 or by email at slance@naacpldf.org with any questions or to discuss these matters further.

basis of population and the senatorial districts shall be as nearly equal in population and as compact in territory as possible.”).

³³ R.I. Gen. Laws § 17-1-3.1(a).

³⁴ Nina Keough & Marshall Clement, *Political Punishment: The Consequences of Felon Disenfranchisement for Rhode Island Communities* 10, Rhode Island Family Life Center (2004), <https://www.neighborhoodindicators.org/sites/default/files/publications/RI%20%20Consequences%20of%20Felon%20Disenfranchisement.pdf> (describing a 2004 analysis based on self-reported pre-incarceration home addresses for individuals in the Rhode Island correctional system, which the DOC collects upon entry and maintains throughout a person’s time in custody, and reporting that 88.2% of these addresses could be geocoded to a Census tract).

³⁵ See *Fletcher*, 831 F. Supp. 2d at 897 (“Because some correction is better than no correction, the State’s adjusted data will likewise be more accurate than the information contained in the initial census reports, which does not take prisoners’ community ties into account at all.”).

Sincerely,

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NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. Consistent with its mission, LDF has participated in national and state-based efforts to end prison-based gerrymandering, which, as explained herein, significantly and impermissibly weakens the political power of communities of color.³⁶ LDF has urged the Rhode Island Legislature, in particular, to adopt legislation prohibiting prison-based gerrymandering.³⁷ LDF has been fully separate from the National Association for the Advancement of Colored People (“NAACP”) since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.

³⁶ See, e.g., NAACP Legal Def. & Educ. Fund, Inc., *LDF and Co-Counsel File Lawsuit Challenging Pennsylvania’s Prison-Based Gerrymandering Scheme* (Feb. 27, 2021), <https://www.naacpldf.org/press-release/ldf-and-co-counsel-file-lawsuit-challenging-pennsylvanias-prison-based-gerrymandering-scheme/>; Brief of *Amici Curiae* NAACP Legal Def. & Educ. Fund, Inc., et al. in Supp. of Pls.-Appellees & Affirmance, *Davidson v. City of Cranston, R.I.*, No. 16-1692 (1st Cir. Aug. 31, 2016), <https://www.naacpldf.org/wp-content/uploads/LDF-and-Civil-Rights-Groups-Amicus-Brief-in-Davidson-v.-Cranston.pdf>; Letter from Leah C. Aden, LDF, to Karen Humes, U.S. Census Bureau (Sept. 1, 2016), <https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Letter-to-Chief-Humes-of-the-Census-Bureau-0-1.pdf>; Letter from Leah C. Aden, LDF, to Sen. Martin M. Looney, Pres. Pro Tempore, Conn. Gen. Assembly (Apr. 13, 2016), <https://www.naacpldf.org/wp-content/uploads/LDF-Ltr-to-Sen.-Looney-re-SB-459-ending-prison-based-gerrymandering-4.13.16-00039897x9DDAC.pdf>; Brief of the Howard Univ. School of Law Civil Rights Clinic, et al., as *Amici Curiae* Supporting Respondents, *Fletcher v. Lamone*, No. 8:11-cv-03220 (D. Md. Dec. 2, 2011); Decision/Order, Index No. 2310-2011, *Little v. LATFOR* (N.Y. Sup. Ct. Aug. 4, 2011), <https://www.nyclu.org/sites/default/files/releases/order%2520on%2520intervention.pdf>.

³⁷ See, e.g., Aden, *supra* note 26.