

No. 16-1692

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

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

Plaintiffs-Appellees,

v.

CITY OF CRANSTON, RHODE ISLAND,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

**BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC., LATINOJUSTICE PRLDEF, DIRECT ACTION FOR RIGHTS
AND EQUALITY, AND VOICE OF THE EX-OFFENDER
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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**STATEMENT REGARDING LEAVE TO FILE, JUSTIFICATION FOR
SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY
CONTRIBUTIONS**

The NAACP Legal Defense & Educational Fund, Inc., LatinoJustice PRLDEF, Direct Action for Rights and Equality, and Voice of the Ex-Offender file this brief as *amici curiae*, pursuant to this Court's July 28, 2016, order inviting *amici* briefs to be filed in this case. *See* Fed. R. App. P. 29(a), (c)(4).¹ *Amici curiae*, as organizations dedicated to promoting civil rights and racial equality throughout the United States, are uniquely situated to provide context and perspective on why prison-based gerrymandering dilutes the political power of communities of color and violates the Equal Protection Clause of the U.S. Constitution.

Pursuant to Federal Rule of Appellate Procedure 29(c), *amici curiae* state that no counsel for any of the parties authored this brief in whole or in part; neither the parties nor their counsel contributed money that was intended to fund the preparation or submission of this brief; and no person, other than the *amici curiae*,

¹ Although this Court's July 28, 2016, order invited *amicus* briefs to be filed in this case, out of an abundance of caution, counsel for *amici* sought the consent of defendant-appellant, the City of Cranston, to *amici*'s participation. According to the City's attorneys, the City has not responded to their inquiry regarding *amici*'s request for consent. The City's attorneys, however, indicated that they do not believe the City's consent is necessary, and that they would not object to *amici*'s filing of an *amicus* brief should an objection be raised. Again out of an abundance of caution, *amici* filed, with this brief, a motion for leave to file a brief as *amici curiae* in this case.

their members, or their counsel, contributed money that was intended to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(c)(5).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), *amici curiae* are non-profit organizations that have not issued shares or debt securities to the public, and they have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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INTEREST OF *AMICI CURIAE*

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”)—founded over 75 years ago under the direction of Thurgood Marshall—is the nation’s first civil rights and racial justice organization. An integral component of LDF’s mission continues to be the attainment of unfettered participation in political life for all Americans, including Black Americans. LDF has represented parties in numerous voting rights cases, including before the U.S. Supreme Court.² 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.³ LDF has urged the Rhode Island Legislature, in particular, to adopt legislation prohibiting prison-based gerrymandering.⁴

² See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

³ See, e.g., Letter from Leah C. Aden, Assistant Counsel, LDF, to Karen Humes, Chief, Population Division, U.S. Census Bureau (July 19, 2015), http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Re%20Residence%20Rule.pdf; Brief of the Howard University School of Law Civil Rights Clinic, *et al.*, as *Amici Curiae* Supporting Respondents, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff’d*, 133 S. Ct. 29 (2012), <http://www.naacpldf.org/document/fletcher-v-lamone-brief-naacp-legal-defense-and-educational-fund-inc-et-al> (“Howard Brief”); Decision/Order, Index No. 2310-2011, *Little v. LATFOR*

LatinoJustice PRLDEF (“LJP”)—formerly known as the Puerto Rican Legal Defense and Education Fund—is one of the nation’s leading nonprofit civil rights law firms. LJP’s continuing mission is to advance, encourage, and protect the civil rights of all Latinos/as,⁵ and to promote justice for the pan-Latino community. Since LJP’s founding in 1972, when it initiated a series of lawsuits seeking to create bilingual voting systems throughout the United States, LJP consistently has strived, in particular, to secure the voting rights of Latinos/as. To that end, LJP also has engaged in national and state-based efforts to end prison-based gerrymandering.⁶

(N.Y. Sup. Ct. Aug. 4, 2011), <http://www.naacpldf.org/document/order-granting-intervention> (“*LATFOR* Decision”).

⁴ Letter from Leah C. Aden, Assistant Counsel, LDF, to Cale P. Keable, Chairperson, Rhode Island House Committee on the Judiciary (Apr. 13, 2015), <http://www.naacpldf.org/document/letter-urges-rhode-island-house-committee-judiciary-pass-pending-legislation-ending-prison-> (“Rhode Island Letter”).

⁵ In this brief, the terms “Hispanic” and “Latino/a” are used interchangeably and, as defined by the U.S. Census Bureau, “refer[] to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.” Karen Humes, *et al.*, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, 1-2 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

⁶ *See, e.g.*, Letter from Juan Cartagena, President & General Counsel, *et al.*, to Karen Humes, Chief, Population Division, U.S. Census Bureau (Aug. 22, 2016), http://preview.latinojustice.org/briefing_room/press_releases/LatinoJustice_PRLDEF_Reply_Comment_Letter_to_US_Census_Proposed_2020_Decennial_Residence_Rule_and_Residence_Situations_81_Fed_Reg_42_577.pdf (“Letter from LJP”); *LATFOR* Decision.

Direct Action for Rights and Equality (“DARE”) is a grassroots, membership-based organization in Rhode Island that organizes low-income families in communities of color to advocate for and effectuate social, economic, and political justice. DARE joined together with hundreds of low-income people of color to protest the city of Providence’s most recent redistricting. In 2010, DARE also launched Rhode Island’s campaign to end prison-based gerrymandering.

Voice of the Ex-Offender (“VOTE”) is a grassroots, membership-based organization in Louisiana that works to protect the voting rights of and expand civic engagement by the people most affected by the criminal justice system, especially formerly incarcerated persons and their families. VOTE is the lead plaintiff in *VOTE v. Louisiana*, No. 6499587 (La. 19th Jud. D. Ct. July 1, 2016), a class action lawsuit challenging Louisiana’s felon disenfranchisement law. VOTE also has campaigned tirelessly to end prison-based gerrymandering.⁷

Amici curiae have significant interests in ending the unconstitutional practice of prison-based gerrymandering and promoting the full, fair, and free political participation of Black and Latino/a people, and other communities of color.

⁷ See, e.g., Letter from Norris Henderson, Executive Director, VOTE, to Karen Humes, Chief, Population Division, U.S. Census Bureau (July 14, 2015), http://www.prisonersofthecensus.org/letters/VOTE_Prison_Gerrymandering.pdf.

INTRODUCTION

When redistricting, many states and local jurisdictions count incarcerated people as “residents” of the prison facilities in which they are involuntarily confined. That practice—“prison-based gerrymandering”—distorts our democratic system of government by transferring voting and representational power from areas without prisons to areas with them, without any legitimate justification. It also violates the Equal Protection Clause of the U.S. Constitution because it causes the weight of a citizen’s vote and his access to representation to be “made to depend on where he lives.” *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

The burden of the distortions caused by prison-based gerrymandering is unduly borne by people of color, and thus the practice is additionally suspect. As a result of the failed “war on drugs,” and other laws, policies, and practices effectuating mass incarceration, our nation’s prisons are disproportionately filled with Black and Latino individuals from predominantly urban communities of color. Instead of being counted in their mostly Black and Latino, urban home communities, the more than two million people now incarcerated across the United States are treated, for redistricting, as phantom “residents” of prison facilities that are frequently located in rural, largely white communities, from which they are physically segregated, and where they lack any “enduring tie[s].” *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). Prison-based gerrymandering thus

amplifies the votes of principally white individuals, who often live in rural communities, while diluting the votes of mostly Black and Latino individuals, who often live in urban areas. Like the shameful, and now unconstitutional, practice of counting Black people as three-fifths of a person for redistricting during slavery, prison-based gerrymandering perversely uses the bodies of incarcerated people of color to inflate the voting strength of white communities.

Prison-based gerrymandering also harms Black and Latino individuals in myriad other ways. Representatives of districts with an inflated imprisoned population often do not consider themselves accountable to the incarcerated population, whose residence is involuntary, often temporary, and segregated from the surrounding community. Instead, incarcerated individuals are more accurately and fairly represented by leaders in the communities of their permanent residence, where they are likely to have meaningful and longstanding ties. Prison-based gerrymandering thus disconnects incarcerated individuals of color from the officials best situated to advocate on their behalf. It also prevents incarcerated people of color from effectuating policies to overcome past discrimination and ameliorate systemic biases, like those underlying the failed “war on drugs” and mass incarceration. Representatives in areas with prisons have no incentive to end such policies because incarcerated people typically cannot vote in those areas, officials often perceive that communities with prisons tend to benefit economically

from their presence, and the urban areas where imprisoned people come from have diluted voting strength and less representation due to prison-based gerrymandering.

Because the practice of prison-based gerrymandering in the City of Cranston and across our country perverts the core principle of equal political participation undergirding our democracy, to the particular detriment of Black and Latino communities, this Court should not permit the City's practice to stand.

ARGUMENT

I. PRISON-BASED GERRYMANDERING IS A NATIONWIDE CONSTITUTIONAL PROBLEM OF STAGGERING MAGNITUDE.

A. Prison-based gerrymandering disconnects legislative districts from the people they are meant to represent.

Despite persistent opposition, the Census Bureau, in conducting its decennial population count, applies the so-called "usual residence" rule, under which it treats incarcerated people as "residents" of the prisons in which they are involuntarily confined on Census Day.⁸ States and local jurisdictions typically rely exclusively on Census data to draw legislative districts.⁹ But there is no federal statutory or constitutional mandate that they do so. To the contrary, the Supreme Court has held that jurisdictions may not rely upon Census data to redistrict where, as with

⁸ U.S. Census Bureau, Residence Rule and Residence Situations for the 2010 Census, U.S. Census 2010 (Sept. 22, 2015), https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html.

⁹ There are, however, some noteworthy exceptions, as discussed *infra* at 21-22 & n.33.

prison-based gerrymandering, that information is inaccurate and not tailored to local conditions. *Mahan v. Howell*, 410 U.S. 315, 320-21 (1973).

By using Census data that counts incarcerated persons at prisons during redistricting, many jurisdictions draw legislative districts that consist largely of prison populations—giving districts with prisons, despite having relatively fewer actual residents, the same number of representatives as districts without them.¹⁰ Yet incarcerated people are not truly “residents” of prison facilities, as they have no meaningful contact with the community surrounding them. Incarcerated people cannot use the parks or libraries in that community. They cannot attend the community’s schools, nor can their children.¹¹ And they cannot freely seek employment there. Moreover, because state prison sentences are typically two to three years long, and incarcerated people “are frequently shuffled between

¹⁰ Because numerous jurisdictions use the Census Bureau’s data to engage in prison-based gerrymandering, stakeholders have repeatedly challenged the Bureau’s use of the “usual residence” rule as applied to incarcerated persons. *See, e.g.,* Prison Pol’y Initiative, *A sample of the comment letters submitted in 2015 to the Census Bureau calling for an end to prison gerrymandering* (last visited Aug. 25, 2016), <http://www.prisonersofthecensus.org/letters/FRN2015.html>.

¹¹ *See, e.g.,* Sara Mayeux, *Rhode Island mayor: Prisoners count as residents when it helps me, not when it helps them*, Prison Pol’y Initiative (Mar. 31, 2010), <http://www.prisonersofthecensus.org/news/2010/03/31/rimayo/> (daughter of man incarcerated in Cranston denied enrollment in Cranston’s public schools).

facilities at the discretion of [prison] administrators,”¹² it strains credulity to think that imprisoned people establish a meaningful “residence” in the numerous prisons in which they are temporarily detained.¹³

Given the involuntary and often temporary nature of incarceration, it is not surprising that “[u]pon release the vast majority [of incarcerated people] return to the community in which they lived prior to incarceration,”¹⁴ and where, even while

¹² Letter from Peter Wagner, Executive Director, Prison Policy Initiative, to Karen Humes, Chief, Population Division, U.S. Census Bureau, 3 (July 20, 2015), http://www.prisonersofthecensus.org/letters/prison_policy_frn_census_july_20_2015.pdf.

¹³ As of 2008 in New York, for example, the median time that an incarcerated individual remained at a particular facility was only 7.1 months. Letter from LJP, at 3. In Georgia, the average incarcerated individual has been transferred four times, and will stay at any one facility, on average, only nine months. *Id.*

The experiences of imprisoned people demonstrate that a prison cell is a far cry from home. For example, Nick Medvecky was incarcerated in federal prison for twenty years and, in that time, he “was incarcerated in over a dozen different prisons in seven different states”—with “[a]ll of these sites ... chosen by the prison system, not [him]self.” Alison Walsh, “*Over a dozen prisons in several different states*”: Letter to Census Bureau describes temporary nature of incarceration, Prison Pol’y Initiative (Aug. 5, 2016), http://www.prisonersofthecensus.org/news/2016/08/05/comment_15/. Only one address remained consistent throughout Medvecky’s incarceration: his *home* address. *Id.*

¹⁴ Kenneth Prewitt, *Forward, Accuracy Counts: Incarcerated People & The Census*, Brennan Ctr. for Justice (April 8, 2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf (“*Forward*”).

in prison, many incarcerated people remain residents under state law.¹⁵ As former Census Bureau Director Kenneth Prewitt put it, the “usual residence” rule blatantly “ignore[s] the reality of prison life.” Prewitt, *Forward*.

B. Prison-based gerrymandering distorts the building blocks of our democracy.

Prison-based gerrymandering enables a district with a prison to elect the same number of representatives as a purportedly same-sized district without a prison, even though the prison-containing district has fewer actual constituents and eligible voters. This causes not only theoretical mathematical issues, but also fatal constitutional problems, not to mention significant adverse policy consequences.¹⁶

¹⁵ See, e.g., Letter from Justin Levitt, Professor, Loyola Law School, to Karen Humes, Chief, Population Division, U.S. Census Bureau, 2-3 (July 20, 2015), <http://redistricting.lls.edu/other/2015%20census%20residence%20comment.pdf> (“Levitt Letter”) (referencing 28 state laws, including Rhode Island’s, that “explicitly provid[e] that incarceration does not itself” change legal or electoral residence).

¹⁶ The argument against prison-based gerrymandering does not mean that noncitizens should be omitted from the total population count in their places of actual residence. “Regardless of whether they are eligible to naturalize or choose to do so, noncitizens who live in the United States have a deep stake in their communities’ government, just as citizens do.” Brief of the Leadership Conference on Civil and Human Rights, *et al.*, as *Amici Curiae* in Support of Appellees, *Evenwel v. Abbott*, No. 14-940, at 28-29 (U.S. Sept. 25, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/10/Redistricting.Evenwel.amicuswith-Leadership-Conference-on-Civil-and-Human-Rights.pdf>. It is critical that all people, irrespective of their citizenship status, be counted as residents of the communities in which they live, work, and contribute, and where their interests will be represented.

Imagine, for example, that during redistricting, legislators using the “usual residence” rule draw four wards of roughly 100 people each, and each ward elects one representative to the city council. However, Ward 1 includes all 90 of the community’s incarcerated people, and boasts only 10 free residents. Ward 1 thus has 10 actual residents for each of the other ward’s 100. As a result, Ward 1’s actual constituents wield 10 times more political clout than residents in the city’s other three wards, simply because of where they live. As this example shows, prison-based gerrymandering “results in serious population distortions in redistricting,” and in elective districts that “fail[] to reflect accurately the demographics of numerous communities throughout our country.”¹⁷

Due to the “usual-residence” rule used by the Census Bureau and “its flawed application in redistricting, *some two million incarcerated people*” across the United States “are being counted in the wrong place.” Brief of DARE, at *6 (emphasis added). According to the Bureau’s 2002 estimates, there are “more than twenty counties in the United States where more than one-fifth of the population is actually comprised of prisoners.” Dale E. Ho, *Captive Constituents: Prison-Based*

¹⁷ Brief of *Amici Curiae* Direct Action for Rights and Equality, *et al.*, in Support of Affirmance, *Evenwel v. Abbott*, No. 14-940, 2015 WL 5719754, at *5 (U.S. Sept. 25, 2015) (“Brief of DARE”).

Gerrymandering and the Current Redistricting Cycle, 22 Stan. L. & Pol’y Rev. 355, 359 (2011) (“*Captive Constituents*”).

Specific examples of the population distortions caused by prison-based gerrymandering abound:

- In Lake County, Tennessee, prisoners account for 88% of the “population” drawn into one county commissioner district. Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 How. L.J. 587, 603 (2011) (“*Unlocking Democracy*”).
- In Morgan County, Kentucky, the total “population” was said to be 13,948 people, though 1,664 (12%) of that population was incarcerated.¹⁸ The Census Bureau counted 611 African-American individuals as residents of the County, even though 593 (96%) of those individuals were incarcerated. Ho, Kentucky Testimony.
- In La Villa, Texas, up to 69% of the City’s population is comprised of incarcerated persons. Thompson, *Unlocking Democracy*, at 603.

The operation of the usual residence rule has even resulted in the creation of political districts that would not otherwise exist. For example, at one point, in upstate New York there were seven rural state-senate districts that would not have

¹⁸ Testimony of Dale E. Ho, Assistant Counsel, LDF, Hearing Before the Kentucky General Assembly Task Force on Elections, Constitutional Amendments, and Intergovernmental Affairs, 4 (Aug. 23, 2011), <http://www.naacpldf.org/document/dale-ho-testimony-kentucky-prison-based-gerrymandering> (“Kentucky Testimony”).

been large enough to qualify as individual districts without their prison populations. Ho, *Captive Constituents*, at 382. In the absence of prison-based gerrymandering, the district of New York State Senator Elizabeth O’C. Little, in particular, “face[d] an uncertain future”: her district had 13 prisons, “adding approximately 13,500 incarcerated ‘residents’” to its purported “population” without whom “it wouldn’t have enough residents to justify a Senate seat.”¹⁹

C. Prison-based gerrymandering transfers political power from diverse urban communities to largely white, rural areas.

Prisons are disproportionately located in rural areas, where the population tends to be predominantly white, especially as compared to that in urban areas.²⁰ Between 1995 and 2005—during the heyday of the “war on drugs” and the era of burgeoning mass incarceration—“a new rural prison ... opened on average every [15] days in the United States.”²¹ Only about 20% of the U.S. population resides in

¹⁹ Anthony Thompson, *Democracy Behind Bars*, N.Y. Times (Aug. 5, 2009), <http://www.nytimes.com/2009/08/06/opinion/06thompson.html>.

²⁰ Kenneth Johnson, *Demographic Trends in Rural and Small Town America*, Carsey Inst., Univ. of New Hampshire, at 24, fig. 17 (2006) (“[T]he proportion of the rural population that is non-Hispanic white (82[%]) is higher than in metropolitan areas (66[%]).”), <http://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=carsey>.

²¹ David Hamsher, *Comment, Counted Out Twice—Power, Representation, & the “Usual Residence Rule” in the Enumeration of Prisoners: A State-Based Approach to Correcting Flawed Census Data*, 96 J. Crim. L. & Criminology 299, 311 (2005) (“*Counted Out Twice*”).

rural communities, yet approximately 40% of incarcerated persons nationwide are imprisoned rurally.²²

As one example, although 66% of New York State's prisoners consider New York City their home, 91% are imprisoned outside of the City in upstate, predominantly rural areas. Ho, *Captive Constituents*, at 362. Following the 2000 Census, each of Florida's "ten largest cities lost representation [to rural areas] due to the Census Bureau's inmate enumeration method." Stinebrickner-Kauffman, *Counting Matters*, at 272-73.²³

Thus, by counting prisoners, who are almost always unable to vote at the prison's location while incarcerated (*infra* at 27-28), as "residents" of the rural areas where they are detained, prison-based gerrymandering significantly enhances

²² Ho, *Captive Constituents*, at 362; accord Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote"*, 11 Va. J. Soc. Pol'y & L. 229, 272 (2004) ("*Counting Matters*").

²³ The reality that incarcerated people tend to come from urban areas yet are detained in rural facilities is not isolated to New York and Florida. Cook County, Illinois, where Chicago is located, is home to 60% of Illinois's imprisoned population, but physically houses 1% of the state's prisoners. Ho, *Captive Constituents*, at 362. Los Angeles, California, is home to 34% of California's imprisoned population, but physically houses 3% of the state's prisoners. *Id.* Baltimore, Maryland is home to 68% of Maryland's imprisoned population, but physically houses 17% of the state's prisoners. *Ending Prison-Based Gerrymandering Would Aid the African-American Vote in Maryland*, Prison Pol'y Initiative (Jan. 22, 2010), <http://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf>.

the political power of white, rural residents, at the expense of untold numbers of city residents, who are disproportionately Black and Latino.

D. Prison-based gerrymandering dilutes the political power of all communities, including rural ones, without prison facilities.

Prison-based gerrymandering causes impermissible democratic distortions because it transfers voting and representational strength not only from urban to rural areas, but also from the parts of a community without a prison to the part of the same community with a prison. Ho, *Captive Constituents*, at 356.²⁴ When New York permitted prison-based gerrymandering, for instance, 50% of the people drawn into a city council ward in the small upstate community of Rome were incarcerated, meaning that the actual residents of that ward had twice as much influence over policies impacting Rome than did those living in other parts of the city. Wood, *Implementing Reform*, at 5.

An infamous example of the intra-community imbalances caused by prison-based gerrymandering comes from Iowa. Following the 2000 Census, the town of Anamosa was redistricted into four City Council wards of around 1,370 people each. Ho, *Captive Constituents*, at 362. Ward 2, however, held a state prison that

²⁴ See also Erika L. Wood, *Implementing Reform: How Maryland & New York Ended Prison Gerrymandering*, Demos (2014), <http://www.demos.org/publication/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering> (“*Implementing Reform*”).

detained more than 1,320 prisoners, none of whom could vote. *Id.* The town's redistricting plan thus gave the town's approximately 60 actual residents the same representational power as the over 1,300 people living in each of the other three wards. *Id.* at 362-63. The scheme also allowed a man who won only two write-in votes to be elected to Anamosa's City Council from Ward 2. *Id.* at 363.

Critically, representatives of inflated districts, like Ward 2 in Anamosa, are often unaccountable to the imprisoned population deemed to "reside" within their boundaries. When asked whether he considered incarcerated people to be his constituents, Anamosa's Councilmember from Ward 2 said: "'They don't vote, so, I guess, not really.'" Sam Roberts, *Census Bureau's Counting of Prisoners Benefits Some Rural Voting Districts*, N.Y. Times (Oct. 23, 2008), <http://www.nytimes.com/2008/10/24/us/politics/24census.html>. Likewise, a New York legislator representing a district containing thousands of incarcerated individuals asserted: "[g]iven a choice between the district's cows and the district's prisoners, he would 'take his chances' with the cows, because '[t]hey would be more likely to vote for me.'" Levitt Letter, at 4.²⁵

²⁵ See also Todd A. Breitbart, Comment, 2020 Decennial Census Residence Rule and Residence Situations, Docket No. 150409353-5353-01, at 2 (July 18, 2015), http://www.prisonersofthecensus.org/letters/Todd_Breitbart_comment_letter.pdf (legislators "do not offer the prisoners the 'constituent services' that they provide to permanent residents of their districts").

Imprisoned people, instead, are more accurately represented by leaders in the communities where “they left behind their families and friends, to which they will eventually return, and where they may once again be voters.” *Id.* For example, virtually all of Maryland’s legislators reported that “they would be more likely to consider persons from their district who are incarcerated elsewhere to be their constituents.” Howard Brief, at 7 (citing Representative-Inmate Survey, Senate Education, Health, and Environmental Affairs Committee, Bill File: 2010 Md. S.B. 400, at 22-28). This makes sense, given that these home district politicians are accountable to the families of incarcerated people, more likely to be attuned to and affected by the root causes of incarceration, and must absorb the costs of their incarcerated residents’ reentry.

In short, prison-based gerrymandering is not only wrong, but also unlawful, because the one-person, one-vote principle is meant to “prevent debasement of voting power and diminution of access to elected representatives,” *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), and prison-based gerrymandering causes both of these harms.

E. The Supreme Court repeatedly has held that distortions like those caused by prison-based gerrymandering are unconstitutional.

Prison-based gerrymandering “[d]ilut[es] the weight of votes because of place of residence.” *Reynolds*, 377 U.S. at 566. The Supreme Court has held that such residence-based distortions “impair[] basic constitutional rights under the

Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.” *Id.* (citations omitted).

In *Gray v. Sanders*, 372 U.S. 368 (1963), the Supreme Court struck down a voting scheme that assigned greater electoral power to less densely populated rural areas, to the detriment of urban voters. In so holding, the Court compared the urban-rural imbalance it invalidated to race-discrimination in voting: “If a State in a statewide election weighted ... the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?” *Id.* at 379 (citation omitted).

In *Reynolds*, the Court reiterated that “the fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.” 377 U.S. at 567. Debasing a citizen’s right to vote because of where he lives, the Court said, violates “the basic principle of representative government.” *Id.* Under the Equal Protection Clause, “the weight of a citizen’s vote cannot be made to depend on where he lives.” *Id.*

Prison-based gerrymandering runs counter to “[t]his ... clear and strong” command, *id.* at 568, and where (as here) the practice causes one-person, one-vote distortions, it must be held unconstitutional. Indeed, there are myriad examples of

districting schemes across the country that raise constitutional concerns because they pad districts with incarcerated populations to satisfy the Court’s general rule that population deviations among legislative districts within plus-or-minus 10% are presumptively constitutional. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983). To name just two:

- Following the 2000 Census, four Michigan senate districts and five house districts met federal minimum population requirements “only because they claim prisoners as constituents.” Heather Ann Thompson, *How Prisons Change the Balance of Power in America*, Atlantic (Oct. 7, 2013), <http://www.theatlantic.com/national/archive/2013/10/how-prisons-change-the-balance-of-power-in-america/280341/> (“*How Prisons Change*”).
- In Pennsylvania, “no fewer than eight state legislative districts would [fail to] comply with the federal ‘one person, one vote’ civil rights standard if non-voting state and federal prisoners in those districts were not counted as district residents.” *Id.*

The same is true here. “When Cranston drew its city ward boundaries in 2012, it included the entire prison population in Ward Six, where the [Adult Correctional Institution] is ... located.” Mem. & Order, ECF No. 35, at 2 (May 24, 2016). Cranston contends that “the total maximum deviation among the population of the six wards is less than [10%] percent.” *Id.* “However, if ... the prisoners are subtracted from Ward Six’s population, its total population is reduced to 10,209. Without the prison population, the deviation between the largest ward and Ward

Six is approximately 35%.” *Id.* at 2-3; *cf.* Br. of Pls.-Appellees 10, 19 & n.7 (calculating deviation as approximately 28%).

Cranston’s use of prison-based gerrymandering is thus unconstitutional. As the Supreme Court has long recognized: “If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts,” which is constitutionally impermissible. *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 693-94 (1989); *see also* Mem. & Order, ECF No. 35, at 7 (May 24, 2016) (district court recognized it is “constitutionally unsustainable to draw district lines so that ‘the votes of citizens in one region would be multiplied by two, five, or 10 times for their legislative representatives’” (citing *Reynolds*, 377 U.S. at 563)).

A total population deviation such as in Cranston (between 28 and 35%)—and, in fact, any deviation larger than 10%—“creates a prima facie case of discrimination and therefore must be justified by the State.” *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). Cranston, however, cannot offer any legitimate state interest to justify its engagement in discriminatory prison-based gerrymandering; the practice, as a policy matter, makes no sense at all. *Supra* at 3-6. Especially given that prison-based gerrymandering also systematically dilutes the

representation of identifiable racial groups, *infra* at 17-29, and thus has a particular “taint of arbitrariness or discrimination,” *Roman v. Sincock*, 377 U.S. 695, 710 (1964), this Court should hold that Cranston is not entitled to engage in prison-based gerrymandering.

II. PRISON-BASED GERRYMANDERING DISPROPORTIONATELY HARMS VOTERS OF COLOR AND THE COMMUNITIES IN WHICH THEY LIVE.

A. Prison-based gerrymandering disempowers Black and Latino communities.

Black and Hispanic people are disproportionately incarcerated in our nation’s prisons. Nationwide, Black people make up 13.3% of the general population, but 37.7% of the federal and state prison population.²⁶ Hispanic people, who are 17.6% of the U.S. population, are nearly twice as likely to be imprisoned as are white people.²⁷ Yet, prisons typically are located in rural areas that tend to be overwhelmingly white. *Supra* at 9-11.

²⁶ U.S. Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Aug. 25, 2016); Federal Bureau of Prisons, Inmate Race (last updated Feb. 21, 2015), http://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

²⁷ U.S. Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/table/PST045215/00> (last visited Aug. 25, 2016); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Pol’y Initiative (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html>.

Many other facts demonstrate the deeply problematic relationship between race and our criminal system. For example, Black men are more than six times as

Today, there are more than 200 counties where the proportion of incarcerated Black people is over ten times larger than the proportion of Black people in the surrounding county. Levitt Letter, at 3 & n.5. Likewise, there are more than 40 counties where the proportion of Latino people in the incarcerated population is over ten times larger than the proportion of Latino people in the surrounding county. *Id.*

When combined with the racially disparate rates of incarceration, “the enduring and troubling trend of building ... prisons in communities that are very different demographically from the communities of people confined in the prisons” means that the vote dilution and other harms of prison-based gerrymandering uniquely fall on minority groups. Brief of DARE, at *10.²⁸ That is, “[t]he strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in

likely as white men to be incarcerated nationwide. Bruce Drake, *Incarceration gap widens between whites and blacks*, Pew Research Ctr. (Sept. 6, 2013), <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/>.

²⁸ Prison-based gerrymandering thus potentially violates not only the Equal Protection Clause, but also Section 2 of the Voting Rights Act, which prohibits any “voting ... standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. § 10301. Section 2, accordingly, prohibits voting practices—like prison-based gerrymandering—that have a dilutive “effect” on minority voting strength. *See Bartlett v. Strickland*, 556 U.S. 1, 10-11 (2009).

prison, while the inner-city” and largely minority “communities these prisoners come from suffer a proportionate loss of political power and representation.” Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, and Transforming Democracy 189-90* (2002).²⁹

The facts on the ground in New York illustrate exactly how the combination of disparate incarceration rates and prison-based gerrymandering can significantly dilute the political power of Black and Latino people relative to white people: 82% of the state’s prison population is Black or Latino, yet “98% ... of [its] prison cells are located in state Senate districts that are disproportionately White for the state.”³⁰ As a result, prison-based gerrymandering, when allowed in New York, inflated the population of largely white districts using the bodies of incarcerated people of color.

²⁹ That result is especially troubling given the well-documented and now commonly recognized racial and economic inequalities embedded in our criminal system. *See, e.g.*, Exec. Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* (2016), https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

³⁰ Peter Wagner, *98% of New York’s Prison Cells Are in Disproportionately White Senate Districts*, Prison Pol’y Initiative (Jan. 17, 2005), <http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/>; *see also* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755, 787 (2011).

The same distortions persist in New England. In Connecticut, for example, Black and Latino people make up only 19% of the state's population, but more than 70% of its prisoners.³¹ Nevertheless, 75% of the state's prison cells are located in disproportionately white state house districts. *Id.*

Rhode Island's prisons exhibit similar racial imbalances. Black people constitute 7.5% of Rhode Island's population, but 28.7% of its prisoners. Aden, Rhode Island Letter, at 1-2. Latino people comprise 13.6% of Rhode Island's population, but 19.6% of its prisoners. *Id.* at 2. Thus, the dilution of voting and representational power caused by prison-based gerrymandering is felt most strongly in communities of color in Rhode Island too.

Prison-based gerrymandering is especially harmful to Black and Latino communities at the local level because local elective districts have smaller total population numbers and the presence of a large prison can have a greater skewing effect. According to 2010 Census Data, as a result of the "usual residence rule" and its application to prison populations, in 161 counties more than half of the African-

³¹ *Ending Prison-Based Gerrymandering Would Aid the African-American and Latino Vote in Connecticut*, Prison Pol'y Initiative & Common Cause Conn. (2010), http://www.prisonersofthecensus.org/factsheets/ct/CT_AfricanAmericans_Latinos.pdf.

American residents are incarcerated.³² Likewise, one study found “208 counties where the portion of the county that was Black was at least 10 times smaller than the portion of the prison that was Black.” Wagner & Kopf, *Racial Geography*. In Brown County, Illinois, for example, all but five of the County’s 1,265 African-American individuals counted as “residents” of that community (a whopping 99.6%) are imprisoned. Hamsher, *Counted Out Twice*, at 315.

The localized harms of prison-based gerrymandering on Latino individuals are similarly stark. In 2010, for example, “there were 20 counties spread across 10 states where the Latino population that is incarcerated outnumbers those who are free.” Wagner & Kopf, *Racial Geography*. There are also “a substantial number of counties where the incarcerated populations are largely Latino but where Latinos are only a very small portion of the county’s non-incarcerated population[.]” *Id.* And “there are many counties”—dispersed throughout the country—“where virtually the entire Latino population is incarcerated.” *Id.*

In 2010, Maryland enacted its “No Representation Without Population Act”—prohibiting prison-based gerrymandering—to counteract these invidious

³² Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration* (July 2015), <http://www.prisonpolicy.org/racialgeography/report.html> (“*Racial Geography*”).

racial effects.³³ See *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 893 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012). The state acknowledged that prison-based gerrymandering disproportionately harmed minority communities, because “while the majority of [Maryland’s] prisoners come from African-American areas, the state’s prisons are located primarily in the majority white ... [d]istricts.” *Id.* The Act thus “empower[ed] all voters, including African-Americans, by counteracting dilution of votes and better aligning districts with the interests of their voting constituents.” *Id.* at 908 (Williams, J., concurring).

For the same reasons, and because such legislative efforts in Rhode Island have failed, this Court should not permit the City of Cranston’s use of prison-based gerrymandering to stand.

B. Prison-based gerrymandering harms communities of color not only by diluting their voting and representational strength, but also by impeding remedial redistricting and criminal justice reform.

Prison-based gerrymandering prevents the enactment of policies that benefit Black and Latino communities and encourages the entrenchment of laws that are harmful to them.

³³ Three other states—Delaware, New York, and California—and over 200 local jurisdictions also have acted to prevent prison-based gerrymandering. *Local Governments That Avoid Prison-Based Gerrymandering*, Prison Pol’y Initiative (last updated May 13, 2016), <http://www.prisonersofthecensus.org/local/>; Wood, *Implementing Reform*, at 7.

For instance, prison-based gerrymandering blocks communities of color from electing their candidates of choice and thus impedes efforts to remedy discrimination through redistricting. The case of Somerset County, Maryland is illustrative. Until 2010, Somerset voters had never elected an African-American person to serve in County government. Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 Wm. Mitchell L. Rev. 1241, 1246 (2012) (“*Breaking the Census*”). Following voting rights litigation in the 1980s, the County agreed to create one district in which Black voters comprised the majority of the population to provide them with the opportunity to elect their preferred candidates. *Id.* However, a prison was built in the district, and the 1990 Census was conducted after its first remedial election—leaving only a small African-American voting-eligible population in the district, and making it difficult for African-American voters to elect their candidates of choice. *Id.* Had the prison population not been included in the district’s population count, African-American voters would have had an opportunity to elect their preferred candidates. *See id.*

Prison-based gerrymandering also “incentiviz[es] opposition to criminal justice reforms that would decrease reliance on mass incarceration,” Ho, *Captive Constituents*, at 356—a systemic problem that inflicts significant harm on people of color, in particular. Since the political power of areas where prison facilities are located “depends in some measure on a continuing influx of prisoners, legislators

from prison districts have a strong incentive to oppose criminal justice reforms that might decrease incarceration rates.” *Id.* at 363-64. Due to prison-based gerrymandering, “political power is shifted from those communities most afflicted by crime to those communities most interested in gaining from incarceration—potentially at the expense of any alternative means of retribution, crime prevention, drug treatment, or rehabilitation.” Hamsher, *Counted Out Twice*, at 310; *see also* Andréa L. Maddan, *Enslavement to Imprisonment: How the Usual Residence Rule Resurrects the Three-Fifths Clause and Challenges the Fourteenth Amendment*, 15 Rutgers Race & L. Rev. 310, 326 (2014) (“Since apportionment is also about resources, the repercussions of moving money and power away from the hometown of the prisoner means less resources to foster the societal re-integration that he or she deserves.”). “The result is a positive feedback loop: mass incarceration results in districts where the representatives are incentivized to favor policies that favor even more mass incarceration.” Ho, *Captive Constituents*, at 364.

As an example, “the two state senators in New York who led the opposition to efforts to reform New York’s harsh Rockefeller drug sentencing laws represented districts that [detained] more than 17% of the state’s prisoners.” *Id.* “The inflated populations of these senators’ districts gave them little incentive to consider or pursue policies that might reduce the numbers of people sent to prison

or the length of time they spend there.” Wagner, *Breaking the Census*, at 1244.³⁴ One “representative” candidly asserted that “he was glad that the almost 9,000 people confined in his district cannot vote because ‘they would never vote for me.’” *Id.*

Prison-based gerrymandering thus, itself, may prevent many jurisdictions from democratically prohibiting the practice. Although some states and localities have made progress towards prohibiting prison-based gerrymandering, *supra* at 21-22 & n.33, it is critical that where they have not, federal courts intervene to correct this constitutional problem. *See Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 2016 WL 1122884 (N.D. Fla. Mar. 19, 2016) (holding that county’s use of prison-based gerrymandering violated the Equal Protection Clause). Otherwise, prison-based gerrymandering and its pernicious effects are likely to remain entrenched. *See Thompson, How Prisons Change.*

³⁴ At a time when communities of color are demanding recognition that their lives matter, practices like prison-based gerrymandering that disincentivize the reformation of drug laws and mass incarceration must be curbed. *See Ho, Captive Constituents*, at 361 & n.31. And, as Justice Sotomayor recently acknowledged: “We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.” *Utah v. Strieff*, No. 14-1373 (U.S. June 20, 2016), slip op. 12 (Sotomayor, J., dissenting).

This is yet another reason why this Court should prohibit Cranston from using prison-based gerrymandering—it is a practice that reinforces the political disenfranchisement and mass incarceration of Black and Latino people.

C. The race-based harms of prison-based gerrymandering resemble the unconscionable three-fifths compromise.

Prison-based gerrymandering is particularly troubling when considered in light of our nation’s history. Arguably, “[t]here has only been one other instance in American history where disenfranchised, captive populations of people of color were used to artificially inflate political strength: the infamous three-fifths compromise [that was] enshrined in Article I, Section 2 of the Constitution” during slavery. Ho, *Captive Constituents*, at 362 (citing U.S. Const. art. 1, § 2, cl. 3, *amended by* U.S. Const. amend. XIV). Today, “[w]here people of color are inflating the population numbers of largely rural areas and shifting resources to those areas and away from the urban areas where those people of color are likely to return[,] the analogy to the Three Fifths clause is all the more compelling.” Thompson, *Unlocking Democracy*, at 602. This history offers still another reason to prohibit prison-based gerrymandering: it is “nothing short of perverse” that, as during slavery,

imprisoned people’s “bodies are used to over-inflate the population of a prison jurisdiction.”³⁵

In conjunction with the harms of prison-based gerrymandering, Black people today also disproportionately bear the brunt of felon disenfranchisement laws designed to similarly constrict the political power of communities of color. LDF, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, <http://www.naacpldf.org/files/publications/Free%20the%20Vote.pdf> (“*Free the Vote*”). These laws were passed after the Civil War and the end of slavery for the specific purpose of limiting the political power of newly-freed Black people. *Id.*³⁶ Many state legislatures tailored their felon disenfranchisement laws to revoke the voting rights only of those convicted of offenses thought to be most frequently committed by Black people. *Id.* Today, as intended, felon disenfranchisement laws collectively prevent 1.5 million Black males from voting, *id.*, “stripp[ing] one in

³⁵ Alison Walsh, *The Formerly Incarcerated and Convicted People’s Movement objects to being counted in the wrong jurisdictions* (July 27, 2016), http://www.prisonersofthecensus.org/news/2016/07/27/comment_14/.

³⁶ See also Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (May 10, 2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

every 13 black persons of the right to vote—a rate four times that of nonblacks nationally.”³⁷

Legislators’ use of Census Data that is based on the flawed “usual residence” rule for redistricting presumes that imprisoned people are represented by officials in the districts where their prisons are located. But felon disenfranchisement laws prevent incarcerated people of color with felony convictions from voting, including in the communities where they are detained. LDF, *Free the Vote*, at 3. Even in states like Maine and Vermont, where imprisoned people with felony convictions are permitted to vote, they must vote absentee at their home addresses.³⁸ Accordingly, incarcerated people have no meaningful way to hold accountable the officials who purportedly represent them under a prison-based gerrymandering regime.

³⁷ Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. Times (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html>; see also Christopher Uggen & Sarah Shannon, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, The Sentencing Project, 1 (July 2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

³⁸ See Voting While Incarcerated: A Tool Kit for Advocates Seeking to Register, and Facilitate Voting by Eligible People in Jail, Am. Civ. Liberties Union & Right to Vote (Sept. 2005), http://www.aclu.org/pdfs/votingrights/voting-whileincarc_20051123.pdf; The Sentencing Project, *Fact Sheet: Felony Disenfranchisement Laws* (2015), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf>.

In Rhode Island, people with non-felony offenses can vote by absentee ballot at their pre-incarceration domiciles. R.I. Gen. Laws § 17-1-3.1(a)(2).

Prison-based gerrymandering and felon disenfranchisement laws, which disproportionately harm Black and Latino individuals, thus work hand-in-hand to deprive people of color of their rights to full representation and an equal vote. Particularly in light of the broader legal and historical context, this Court should restore the promise of the Constitution's one person, one vote principle by invalidating Cranston's use of the plainly unconstitutional and racially discriminatory practice of prison-based gerrymandering.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 6,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in Times New Roman, a proportionally spaced typeface, and 14-point font.

Dated: August 31, 2016

/s/ Christina Swarns

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. Participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

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