The Rule of Law Clinic

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Representing the Connecticut State Conference of the National Association for the Advancement of Colored People

Written Testimony in Support of H.B. No. 5611
An Act Concerning the Counting of Incarcerated Persons for Purposes of Determining Legislative Districts

Madam Chair Flexer, Mr. Chairman Fox, and members of the Committee,

My name is Ashley Hall, I am a J.D. candidate at Yale Law School and a member of Yale's Rule of Law Clinic. The Clinic represents the Connecticut State Conference of the NAACP. The Connecticut State Conference supports House Bill 5611, which counts incarcerated persons at their homes for the purposes of legislative districting, rather than at the prisons where they are held. This bill would end a potentially unconstitutional practice and remove a stain on Connecticut's democracy, one that has especially harmed our state's African American community. In doing so it would be following several other states, including New York and Maryland, on a path that the Supreme Court has upheld as constitutional.[1]

The NAACP Connecticut State Conference, along with the national NAACP and five Connecticut residents, has brought suit in federal court to stop Connecticut's practice of prison gerrymandering, which violates NAACP members' Fourteenth Amendment rights to one person, one vote.[2] This legislation is an opportunity to remedy this injustice and at the same time put an end to what could potentially be lengthy litigation over the equal protection rights of Connecticut residents.

1. Connecticut's Prison Gerrymandering Dilutes the Voting Power of Urban Communities

Because people incarcerated in Connecticut disproportionately have permanent homes in the state's largest cities, but the state incarcerates them primarily in lightly populated, rural towns,[3] Connecticut takes political power and resources away from the urban districts where the families and communities of incarcerated persons live. In essence, prison gerrymandering dilutes the voting power of urban Connecticut residents in comparison to that of the rural voters who benefit from

[1] *See generally* ERIKA L. WOOD, IMPLEMENTING REFORM: HOW MARYLAND & NEW YORK ENDED PRISON GERRYMANDERING, DEMOS (Aug. 15, 2014), https://www.demos.org/sites/default/files/publications/implementingreform.pdf (comparing Maryland and New York legislation ending prison gerrymandering).
[2] *See* Complaint, NAACP et al. v. Merrill, No. 3:18 cv-01094 (D. Conn. June 28, 2018).
[3] *See* PETER WAGNER, IMPORTED "CONSTITUENTS": INCARCERATED PEOPLE AND POLITICAL CLOUT IN CONNECTICUT 5, PRISON POLICY INITIATIVE (2013), https://www.prisonersofthecensus.org/ct/report_2013.pdf.

having prisons located in their districts. When incarcerated persons are properly counted in their home districts, there is a noticeable deviation between the populations in state legislative districts in Connecticut.

For example, for every 85 residents of House District 59—a district which encompasses the towns of Enfield and East Windsor—there are more than 100 residents in New Haven's District 97.[4] In practice, this means that a resident of District 97 has to work more than 15% harder to make her voice heard in state politics than does a resident of District 59.[5]

The practice of counting incarcerated persons in prison districts exacerbates the effects of mass incarceration that negatively affect communities of color. Connecticut's prison population is largely African-American and Latino, and many people who are incarcerated are not eligible voters during their incarceration. Thus, the state disproportionately disenfranchises urban, minority citizens and then counts those disenfranchised individuals to amplify the political power of rural, white citizens. Simply put, the practice of prison gerrymandering inflates the political voices of residents in rural communities by forcibly moving and counting the bodies of incarcerated persons in a place they have not chosen to live.

The state's choice to use a redistricting practice that results in discrimination against urban residents in favor a group of rural residents is, at its core, precisely the type of practice the Supreme Court has found to be unconstitutional.[6] And indeed, the practice of Prison Gerrymandering may be declared unconstitutional if the legislature fails to act and litigation continues.

2. Connecticut's Prison Gerrymandering Unconstitutionally Counts People in the Wrong Place

The Constitution requires that incarcerated people be counted at their homes. Counting incarcerated people in prison districts rather than their home districts *undermines* fair representation. Incarcerated persons don't have a stake in towns like Enfield and Suffield, and they are not meaningfully represented by legislators from the districts where they are held. Further, they are separated from the surrounding community and are not able to fully engage in civic life. For example, they cannot utilize the public roads, frequent public parks, or have their children attend public schools in these districts.

Decades of Supreme Court precedent demonstrates why people confined in prisons are not truly residents of prison districts. Incarcerated people do not have "enduring tie[s]" or "some element of allegiance" to districts where they are counted.[7] Nor are they "just as interested in and connected with electoral decisions as . . . their neighbors" not held in prison.[8] The Court has held that "[m]ere absence from a fixed home, however long continued, cannot work [a] change [between domiciles].

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[4] *See* NAACP v. Merrill, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, at 19.
[5] *See id.* at 27.
[6] *See, e.g.*, Reynolds v. Sims. 377 U.S. 533, 567 n.43 (1964) (noting that statewide "legislative apportionment controversies are generally viewed as involving urban-rural conflicts," and that generally there is an "underrepresentation of urban and suburban areas"); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).
[7] Franklin v. Massachusetts, 505 U.S. 788, 804 (1992).
[8] Evans v. Cornman, 398 U.S. 419, 426 (1970).

There must be the *animus* to change the prior domicile for another."[9] But incarcerated people have been hauled to these districts—they've made no intentional decision to go there. Ultimately, they're not truly residents of the districts in which they are incarcerated.

Connecticut law *also* recognizes this. Under Connecticut law, incarcerated people do not lose their residency in their home districts while they're imprisoned.[10] And the small number of pretrial detainees or incarcerated persons who can still vote can only vote in the districts where they're from.[11] State law also makes this bill administratively easy, because the Secretary of State is already required to have the district of origin for each incarcerated person on hand.[12]

As Supreme Court precedent and Connecticut law both recognize, then, incarcerated people are not residents where they are imprisoned. They are residents of their home community, and the Constitution requires that they be counted there.

3. Prison Gerrymandering Unconstitutionally Makes Districts Unequal

The Constitution requires that states make their legislative districts as close to equal in population number as reasonably possible.[13] This helps ensure that every resident has an equal say in their government's actions, also known as "one person, one vote." Therefore, while the Constitution tolerates "minor deviations from mathematical equality," when the population difference between a state's largest and smallest legislative difference is greater than 10%, the districting scheme is presumptively illegal.[14]

When incarcerated people are counted at their true homes—their pre-incarceration addresses—there are currently nine Connecticut House Districts with 10% fewer people than the largest district.[15] That makes the current map presumptively unconstitutional. The passage of the bill you are considering today could right this wrong and prevent costly litigation.

4. Connecticut's Prison Gerrymandering Can Be Fixed

No federal or state law requires Connecticut to count incarcerated persons in the towns where their prisons are located when drawing state legislative districts. On the contrary, the choice to do so is made by the legislature's Reapportionment Committee and Reapportionment Commission.[16] These bodies are required to make an "honest and good faith effort" based on "legitimate

[9] *See* Mitchell v. United States, 88 U.S. 350, 353 (1874).
[10] *See* CONN. GEN. STAT. §§ 9-14, 9-14a (2018) ("No person shall be deemed to have lost his residence in any town by reason of his absence therefrom in any institution maintained by the state.").
[11] *See id.* § 9-14a.
[12] *See id.* § 9-46a.
[13] *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964).
[14] Gaffney v. Cummings, 412 U.S. 735, 745 (1973). *See* Brown v. Thomson, 462 U.S. 835, 842-43 (1983) ("A plan with [a maximum population deviation of more than 10%] creates a prima facie case of discrimination and therefore must be justified by the State.").
[15] *See* NAACP v. Merrill, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, at 6.
[16] CONN. CONST., art. 3, § 6.

considerations" in order to draw a map that achieves representational equality.[17] Other states, like New York, Maryland, California, and Delaware have eliminated prison gerrymandering.[18]

Moreover, Connecticut's practice is plainly inconsistent with existing state law—which recognizes that incarcerated people remain residents of their home districts while they're imprisoned[19]—and confirms that there is no legitimate consideration that justifies the choice to over-value the voices of rural residents over those of urban residents.

The legislature can easily use information it already has to count incarcerated persons as residents in their districts of origin and not their districts of incarceration.[20] And significantly, the Supreme Court has held that states are constitutionally obligated to modify census data when reliance on that data fails to provide "fair and effective representation" for all individuals, voters and non-voters alike.[21] Further, the Supreme Court has explicitly acknowledged the constitutionality of legislation that dictates incarcerated persons be counted as residents of their home communities instead of as residents of prisons, upholding Maryland's law.[22] We urge Connecticut to follow the path of states like Maryland and New York that have done away with prison gerrymandering and pass this legislation to preserve the principle of equal representation for all.

5. Conclusion

A basic constitutional principle of representative government is that the weight of a particular individual's vote should not be determined by where he or she lives.[23] But counting incarcerated people as residents of the towns in which their prisons are located results in just that: the artificial inflation of the political power of rural citizens and the dilution of the votes of urban residents.

The bill you're considering today would bring an end to this unconstitutional practice, and put our state in line with others like New York, Maryland, California, and Delaware, which have all passed legislation to count incarcerated people using their pre-incarceration addresses. We respectfully

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[17] *See* Reynolds, 377 U.S. at 577-79; Mahan v. Howell, 410 U.S. 315, 324-25 (1973).

[18] *See* CAL. ELEC. CODE § 21003 (West 2019) (directing state to count incarcerated persons as residing at their last known address for purposes of Congressional, state legislative, and Board of Education redistricting); DEL. CODE. ANN. TIT. 29 § 804a (2019) (same for purposes of state legislative redistricting); MD. CODE ANN., STATE GOV'T § 2-2A-01 (West 2013) (same for purposes of state legislative redistricting); MD. CODE ANN., ELEC. LAW § 8-701 (West 2013) (same for purposes of congressional redistricting); MD. CODE ANN., LOCAL GOV'T § 1-1307 (West 2013) (same for purposes of local and municipal redistricting); N.Y. LEGIS. LAW § 83-m (McKinney 2018) (same for purposes of state and local legislative redistricting).

[19] *See* CONN. GEN. STAT. §§ 9-14, 9-14a (2018) ("No person shall be deemed to have lost his residence in any town by reason of his absence therefrom in any institution maintained by the state.").

[20] *See* CONN. GEN. STAT. § 9-46a (2018) (directing that when an incarcerated person is released, the Secretary of State—who possesses the necessary information—must promptly notify the registrar of the released prisoners' municipality of origin). *See also id*. (former felons may have their voting rights automatically restored *only* if they reside in their municipality of origin).

[21] Gaffney v. Cummings, 412 U.S. 735, 749 (1973) (explaining that overemphasis on raw population figures may ignore important factors to acceptable representation).

[22] Fletcher v. Lamone, 831 F. Supp. 2d 887, 890 (D. Md. 2011), *aff'd,* 567 U.S. 930 (2012).

[23] Reynolds, 377 U.S. at 566-67 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race.").

ask you to consider the unconstitutionality of prison gerrymandering and the disproportionate impact on minority communities, and to pass this legislation.