

The Peter Gruber Rule of Law Clinic

YALE LAW SCHOOL
127 Wall Street, New Haven CT 06511

March 10, 2021: Hearing before the Connecticut General Assembly Government Administration and Elections Committee

Natasha Brunstein, Law Student Intern, Peter Gruber Rule of Law Clinic at Yale Law School, Representing the Connecticut State Conference of the National Association for the Advancement of Colored People and the American Civil Liberties Union of Connecticut

Testimony in Support of S.B. 753 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 Natasha Brunstein, and I am a J.D. candidate at Yale Law School and a member of Yale's Peter Gruber Rule of Law Clinic. The Clinic represents the Connecticut State Conference of the NAACP and the ACLU of Connecticut. Our clients support S.B. 753, 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 an unconstitutional practice and remove a stain on Connecticut's democracy, one that has especially harmed this state's communities of color. In doing so, it would be joining ten other states—California, Colorado, Delaware, Illinois, Maryland, Nevada, New Jersey, New York, Virginia, and Washington¹—on a path that the Supreme Court has upheld as constitutional.

Passage of this legislation is especially vital this session, which is the last before the decennial redistricting process gets underway. If the General Assembly does not act, and no changes are made during the redistricting process, this discriminatory and unfair practice will be enshrined into law for another ten years. Because prison gerrymandering raises serious constitutional concerns, enactment of this legislation would not only remedy a clear injustice, but avoid 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,² 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

¹ See Aleks Kajstura, *Illinois legislature passes bill ending prison gerrymandering*, PRISON POLICY INITIATIVE (Jan. 13, 2021), <https://www.prisonersofthecensus.org/news/2021/01/13/illinois-hb3653/>.

² See PETER WAGNER, PRISON POLICY INITIATIVE, IMPORTED "CONSTITUENTS": INCARCERATED PEOPLE AND POLITICAL CLOUT IN CONNECTICUT 5 (2013), https://www.prisonersofthecensus.org/ct/report_2013.pdf [<https://perma.cc/8KSK-TWM9>].

power of urban Connecticut residents in comparison to that of the rural voters who benefit from 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, based on the population data used in 2010 for the redistricting process, 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 97.³ 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 59.⁴ Similar disparities exist in other districts around the state.

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 Black and Latinx, 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 artificially inflates the political voices of residents in rural white towns at the expense of other, diverse urban and suburban communities.

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.⁵ And indeed, the practice of prison gerrymandering may be subject to litigation and declared unconstitutional if this issue is not resolved and the practice continues in the maps adopted for the next decade.

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

The federal and state⁶ constitutions require 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

³ See Amended Complaint at 20, NAACP et al. v. Merrill, No. 3:18 cv-01094 (D. Conn. Oct. 15, 2019).

⁴ See *id.*

⁵ 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).

⁶ The Connecticut Constitution requires that legislative districts “be consistent with federal constitutional standards.” See Conn. Const. art. 3, § 5.

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]. 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

Thus, Supreme Court holdings and Connecticut both recognize that incarcerated people are not residents of the communities in which they are imprisoned. Data from Connecticut reflects these precedents. For example, the state’s predominantly urban, Black and Latinx prison population does not remotely resemble the demographic composition of the largely white, rural districts in which prisons are located. Indeed, as of the 2010 data, in Connecticut House districts 52 (Somers), 59 (Enfield), and 106 (Newtown), nearly the entire Black population is incarcerated; there are close to no Black residents if people who are incarcerated are excluded from the population totals of these districts. Furthermore, from 2017-2019, only 2.4% of incarcerated people returned to rural districts containing prisons after finishing their sentences. Incarcerated people are residents of their home community, and the federal and state constitutions require that they be counted there.

3. Prison Gerrymandering Unconstitutionally Makes Districts Unequal

The federal 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 The state constitution adopts the federal requirement.¹⁵

⁷ *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992).

⁸ *Evans v. Cornman*, 398 U.S. 419, 426 (1970).

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 supra* note 6.

When incarcerated people are counted at their true homes—their pre-incarceration addresses—there are nine Connecticut House Districts with 10% fewer people than the largest district, again based on the 2010 numbers used in the last redistricting process.¹⁶ That makes the current map presumptively unconstitutional. If prison gerrymandering is continued during the upcoming redistricting process, the same constitutional infirmities may be present. Thus, the passage of the bill you are considering today could right this wrong and prevent costly litigation in the future.

The Clinic previously represented the Connecticut State Conference of the NAACP, as well as the national NAACP and several Connecticut voters, in federal litigation arguing that the use of prison gerrymandering in the state was unconstitutional for the reasons above: that it unconstitutionally counts people in the wrong place, and results in unlawfully malapportioned districts. The district court denied the state’s motion to dismiss these claims,¹⁷ and the Second Circuit rejected the state’s appeal.¹⁸ This sent the case forward to discovery and trial, until the COVID-19 pandemic prevented full litigation with sufficient time before the election.

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.¹⁹ These bodies are required to make an “honest and good faith effort” based on “legitimate considerations” in order to draw a map that achieves representational equality.²⁰

Moreover, Connecticut’s practice is inconsistent with existing state law—which recognizes that incarcerated people remain residents of their home districts while they are imprisoned²¹—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.²² This is especially true for the upcoming cycle, as the Census Bureau plans to publish prison count data alongside redistricting data and help states in adjusting redistricting data to count incarcerated people at home.²³ 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

¹⁶ See Amended Complaint, *supra* note 3, at 24.

¹⁷ See *NAACP v. Merrill*, No. 3:18cv1094, 2019 WL 4917537 (D. Conn. Feb. 15, 2019).

¹⁸ See *NAACP v. Merrill*, 939 F.3d 470 (2d Cir. 2019).

¹⁹ Conn. Const., art. 3, § 6.

²⁰ See *Reynolds*, 377 U.S. at 577-79; *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973).

²¹ 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.”).

²² 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).

²³ See *Census Bureau will count incarcerated people in the wrong place once again in 2020 Census, continues to distort democracy*, PRISON POLICY INITIATIVE (Feb. 7, 2018), <https://www.prisonersofthecensus.org/news/2018/02/07/frn2018/>.

individuals, voters and non-voters alike.²⁴ 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.²⁵ We urge Connecticut to follow the path of the ten that have done away with prison gerrymandering and pass this legislation to preserve the principle of equal representation for all.

5. Ending Prison Gerrymandering Is Revenue-Neutral

Some legislators have inquired whether prison gerrymandering might impact municipal funding. The answer is straightforward: no, it will not. S.B. 753 is revenue- and funding-neutral and will not affect state funding to municipalities. The legislation mandates only one thing: corrected data must be used for legislative apportionment. The bill states only that the new data "shall be the basis for determining state assembly and senatorial districts, as well as municipal voting districts."²⁶ It will not alter state funding to municipalities in any way.

6. 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.²⁷ 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 are considering today would bring an end to this unconstitutional practice, and put our state in line with ten others like New York, Maryland, California, and Delaware, which have all passed legislation to count incarcerated people using their pre-incarceration addresses. We respectfully ask you to consider the unconstitutionality of prison gerrymandering and the disproportionate impact on minority communities, and to seize this last opportunity before redistricting to enact legislation ending this practice.

²⁴ *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (explaining that overemphasis on raw population figures may ignore important factors to acceptable representation).

²⁵ *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 890 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012).

²⁶ S.B. 753, § 1(d) (Conn. 2021).

²⁷ *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.").