UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1692

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

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REPLY BRIEF OF DEFENDANT-APPELLANT CITY OF CRANSTON, RHODE ISLAND

Normand G. Benoit (#42903)
David J. Pellegrino (#1151403)
Robert K. Taylor (#92472)
PARTRIDGE SNOW & HAHN LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
(401) 861-8200
(401) 861-8210 FAX
ngb@psh.com
djp@psh.com
rkt@psh.com
Counsel for Appellant City of Cranston, Rhode Island

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RHODE ISLAND SESSION BILL

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I. THE LOWER COURT'S ORDER IS SUBJECT TO DE NOVO REVIEW.

The American Civil Liberties Union of Rhode Island, Inc. ("ACLU-RI"), Karen Davidson, Sylvia Weber, Eugene Perry and Debbie Flitman (collectively, "Plaintiffs") argue that, on this appeal from summary judgment, the standard of review is abuse of discretion. Appellees' Brief ("App. Br.") at 3. This is not correct.

The District Court's May 24, 2016 Memorandum and Order deciding the parties' cross-motions for summary judgment (the "May 24 Order") not only made a summary judgment determination on Plaintiffs' behalf, it also enjoined the City from engaging in the upcoming election process. Accordingly, the City has two avenues to appeal the May 24 Order. 28 U.S.C. §§ 2901, 2902. The existence of two avenues, however, does not prejudice the City by holding the District Court to a lesser standard of review.

The May 24 Order plainly ended the district court litigation "on the merits and [left] nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 204 (1999) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521–522 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945))). Section 1291 "does not limit appellate review to 'those final judgments which terminate an action . . . ,' but rather . . . the finality is to be given a 'practical rather than a technical construction.'" *Eisen v. Carlisle*

and Jacquelin, 417 U.S. 156, 170-71 (1974) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (internal cites omitted)).

After the May 24 Order, the only remaining act was for the City to comply by reapportioning its wards. The order was final for all practical purposes because, based on the District Court's findings of fact and conclusions of law, the City's apportionment was deemed unconstitutional. Plaintiffs implicitly acknowledge this in their conclusion, which asks that the lower court be affirmed and the case remanded for entry of judgment, not further proceedings. App. Br. at 41. Accordingly, the applicable standard of review of the District Court's May 24 Order resulting from cross motions for summary judgment is de novo. *See Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 61 (1st Cir. 2000) ("review of entry of summary judgment is de novo").

II. THE EQUAL PROTECTION CLAUSE DOES NOT PROHIBIT APPORTIONMENT BASED ON TOTAL POPULATION.

Plaintiffs contend that *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), has "no direct bearing on the instant case." App. Br. at 11. But in *Evenwel*, the Supreme Court unequivocally held that a districting plan based on total population – like Cranston's – is constitutional. 136 S. Ct. at 1123 ("a state may draw its legislative districts based on total population"). Plaintiffs' refrain that Cranston's population is "artificially inflated," App. Br. at 3, 6, 8, 41, ignores the fact that Cranston is using the same population baseline mandated for congressional

districts by the Constitution, U.S. Const. Art. I, § 2, and approved for state and local jurisdictions by decades of Supreme Court precedent. It is the Plaintiffs who would artificially deflate the population of Cranston by unconstitutionally demanding apportionment based on a favored subset of the whole, contrary to the duly adopted apportionment provisions of the Rhode Island Constitution and City Charter.

Plaintiffs' assertion that *Evenwel* "does not establish the proper way" to apportion representation, App. Br. at 10, merely points out the obvious: *Evenwel* affirmed that total population is one permissible basis for redistricting, but not the only one. States, cities and towns may, but are not required to, adjust total population numbers because jurisdictions may constitutionally make different "choices about the nature of representation" as long as they are not invidious. *Burns v. Richardson*, 384 U.S. 73, 92 (1966).[1] *Evenwel's* reference to the handful of states that have decided to adjust their total population to exclude non-citizen

[1] Plaintiffs mischaracterize *Burns* as suggesting that a jurisdiction's choice of total population apportionment may be "one the Constitution forbids." App. Br. at 34 (quoting *Burns*, 384 U.S. at 92). The quoted language from *Burns* cites *Carrington v. Rash*, 380 U.S. 89 (1965), which held that Texas could not prevent a bona fide resident from voting merely because he or she was a member of the armed services – a form of invidious discrimination not at issue in this case. Plaintiffs also mischaracterize *Burns'* comment that total population could be a "distorted reflection of the distribution of state citizenry." App. Br. at 15, 33. While population and citizens may be different and located in different places, jurisdictions may constitutionally decide to apportion based on either – as *Burns* itself and later *Evenwel* make clear.

prisoners, 136 S. Ct. at 1124, n.3, confirms that the Supreme Court meant the words "total population" literally, as the well-accepted baseline that jurisdictions could choose to modify (or not modify) through the political process. *Evenwel* not only has a "direct bearing" on this case, it requires reversal of the lower court's order.

It is not true that *Evenwel* authorizes apportionment by total population only some of the time, depending on the "realities on the ground," as Plaintiffs suggest. App. Br. at 8, 30-32. This would be inconsistent with the Supreme Court's statement that total population apportionment "ensur[es] that each representative is subject to requests and suggestions from the same number of constituents." 136 S. Ct. at 1132. It is obvious that Cranston officials are "subject to" requests and suggestions from the prisoners at the ACI in the same way that they are "subject to" requests and suggestions from other citizen non-voters, documented and undocumented non-citizens, babies, nursing home residents, and out of state college students. As the national organization of the American Civil Liberties Union ("ACLU") itself correctly pointed out in the *Evenwel* amicus brief referenced by Plaintiffs, App. Br. at 10, n. 6, "'persons in prison,' which necessarily includes felons who may not be allowed to vote, 'like other individuals, have the right to petition the Government for redress of grievances.'" Brief for the American Civil Liberties Union and the ACLU of Texas as Amicus Curiae

Supporting Appellees, *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016) (No. 14-940) (the "ACLU Amicus Brief"), at 20 (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972)).

Cranston officials are also "subject to" requests and suggestions arising directly from the physical presence of the ACI population reported by the census – requests and suggestions that would not arise if the ACI were located elsewhere. If the ACI could be lifted up and moved from Ward Six to Ward One, for example, there is no doubt that the council member representing Ward One would suddenly be "subject to" a whole new set of concerns linked to the additional population of the ward. Total population apportionment is constitutional because the range of demands on government officials that may arise from the physical presence of people in their jurisdictions is unpredictable and constantly evolving. This is the true "reality on the ground" – not the alternate universe that Plaintiffs have constructed solely for purposes of this lawsuit.[2]

[2] Indeed, the ACLU Amicus Brief in *Evenwel* forcefully defended total population apportionment without regard to "representational nexus":

> [S]ince the framing of the United States Constitution, apportionment based on total population has been considered an acceptable way to put republican principles into effect.

ACLU Amicus Brief at 3.

III. CRANSTON'S APPORTIONMENT DATA IS ACCURATE.

Plaintiffs argue that jurisdictions may not rely on census numbers when "real-world conditions establish that those numbers are inaccurate." App. Br. at 16. This is true, but only up to a point. The cases cited by Plaintiffs to make this argument, App. Br. at 15-17, involve quantitative errors – bad numbers – not qualitative judgments about who deserves to be counted for purposes of apportionment. Plaintiffs' cases are irrelevant here, where there is no dispute that the census counts for Ward Six and Cranston are accurate in all material respects. App. Br. at 16-17.

For example, *Mahan v. Howell*, 410 U.S. 315 (1973), tested whether the apportionment of Virginia's representative and senate districts that deviated from total population in order to maintain political subdivisions was constitutional. The Supreme Court "reaffirm[ed] its holding that 'the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.'" *Mahan*, 410 U.S. at 324-25 (quoting *Reynolds v. Simms*, 377 U.S. 533, 577 (1964)). The Supreme Court also allowed Virginia to diverge from strict population *if* such divergence was "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 325 (quoting *Reynolds*, 377 U.S. at 579).

Although Plaintiffs proffer *Mahan* as a case for the proposition that a State or municipality "may not conclusively rely upon Census numbers," App. Br. at 16, the problem in *Mahan* was inaccurate reporting of data. *Id.* at 330-31. The Court found that Virginia's legislative plan resulted in population discrepancies because it counted military personnel in a district where they were not actually present. *Id.* *Mahan* is inapposite because it is undisputed that the ACI Population is within the geographical bounds of Cranston.

Plaintiffs' reliance on *Hartung v. Bradbury*, 332 Or. 570, 33 P.3d 972 (2001), is similarly misplaced. App. Br. at 17. In *Hartung*, the official census data placed a 2,000 person prison in the wrong census block. Not surprisingly, the court held that the Oregon Secretary of State could not simply ignore this "admitted error" in the location of the prison. *Id*. at 987.

"[S]tates are required to use the 'best census data available' or 'the best population data available' in their attempts to effect proportionate political representation." *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) (citation omitted). *See also Karcher v. Daggett*, 462 U.S. 725, 731 (1983) ("Adopting any standard other than population equality [for congressional districts], using the best census data available would subtly erode the Constitution's ideal of equal representation") (internal citations omitted). There is no question

that Cranston used accurate population data for its 2012 redistricting, and that the use of such data is constitutional.

IV. THE DISTRICT COURT'S FACT INTENSIVE NEXUS TEST IS A JUDICIAL QUAGMIRE THAT IMPROPERLY INTERFERES WITH THE POLITICAL PROCESS.

Tellingly, Plaintiffs' brief never once mentions "representational nexus" – the supposed Constitutional mandate invented and applied by the lower court with no hearing of any kind. Plaintiffs instead argue that the Equal Protection Clause requires counting only what they variously describe as an "ordinary constituent," App. Br. at 4, "actual constituent," App. Br. at 19, or "true constituent," App. Br. at 26, and that prisoners in the ACI do not meet this standard. But Plaintiffs' contrived definition of who must be counted is entirely circular. Prisoners are not "actual constituents" because, in Plaintiffs' opinion, they do not have "a constituent-representative relationship." App. Br. at 20.

Plaintiffs posit that people are "actual constituents" only when they compete for "access, representation, or redress of concerns." App. Br. at 20. By this definition, people who don't vote; don't contact their representatives; don't request government benefits; and rarely leave their apartments (or perhaps leave them only to work, shop and eat in nearby Massachusetts or Connecticut) are not "actual constituents" – but Plaintiffs count them anyway, as long as they are not prisoners. Plaintiffs' amorphous concept of "actual constituent" is unworkable and

not required by the Constitution. *Burns*, 384 U.S. at 92 ("we have been shown no constitutionally founded reason to interfere" with choices to include or exclude transients, temporary residents, aliens, or residents denied the vote for conviction of a crime). Adjustments to total population for apportionment purposes should be the result of the political process, not costly activist litigation.[3]

Plaintiffs dismiss the connection between the ACI and Cranston city government as "tangential." App. Br. at 24 n.14. This dismissive attitude illustrates why the lower court's "representational nexus" test is a judicial quagmire and beyond any standard pronounced under the Equal Protection Clause. Whether or not the connection of people to the government is "tangential" depends on arbitrary value judgments – e.g., are interests in good access roads and clean air and water important enough to create a "nexus" – and assumptions that are changeable and even manipulable. *See Burns*, 384 U.S. at 92 (apportionment based on "extent of political activity" is "susceptible to improper influences").[4] A

[3] Apportionment legislation addressing the State's prison population was introduced and recommended for passage by the Rhode Island Senate Judiciary Committee in 2016. *See* 2016 – S 2310. Thus, it is obvious the issue is being actively debated in the General Assembly. This democratic process should be allowed to unfold without excessive judicial interference.

[4] The possibility that officials may ignore requests and suggestions, as the lower court derisively (and incorrectly) suggested about Cranston, JA 454 (May 24 Order at 11), does not make those officials any less "subject to" to those requests. In any event, measuring representational nexus by how much time government officials

state or local jurisdiction that decides to apportion based on total population, rather than by arbitrarily giving preference to the interests of some and dismissing the interests of others, should not be second guessed by the courts.

Like the District Court, Plaintiffs also simply ignore numerous disputed issues of fact. As much as Plaintiffs protest that testimony by Cranston officials is "conclusory [and] self-serving," App. Br. at 36, that is a conclusion that should be based on an evidentiary hearing, which the District Court failed to conduct. There are also disputed issues of fact surrounding the median length of stay at the ACI,[5] the scope of Cranston services to the prison, and the District Court's finding that the inhabitants of Wards One through Five are under-represented. Specifically, there is absolutely no evidence supporting the Plaintiffs' and the lower court's implicit assumption that the inhabitants of Wards One through Five have the "representational nexus" required by the court in Ward Six. There is also no evidence to support the lower court's implicit assumption that ACI

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are spending on a particular group is unpredictable if not dangerous, as that measure can also be manipulated. *See Burns*, 384 U.S. at 92.

[5] Mathematically, if the median length of stay is 99 days, half of the inmates are present in the ACI for longer than that amount of time. *See* JA 064-65 (Pls' Statement of Undisputed Fact at ¶¶ 20-21). Yet, Plaintiffs suggest that the stay is shorter based on an undefined "average." App. Br. at 5.

inmates have a greater degree of "representational nexus" with other communities than they do with Cranston.[6]

Federal courts are not the place to decide recurring battles over what "representational nexus" exists between people and the government and whether it justifies being counted for purposes of apportionment. While Plaintiffs assert that the lower court's "nexus" test is a "limited principle," App. Br. at 41, there is nothing limited about its rejection of decades of judicial deference to total population apportionment. Aside from the lower court here, and one other pre-*Evenwel* district court opinion, no federal court has ever held that the Equal Protection Clause mandates excluding people who are indisputably present in the district from being counted for purposes of apportionment. Numerous Supreme Court decisions have held the exact opposite: that equal protection means including people in the count, regardless of whether they live in an enclave, *see Evans v. Cornman*, 398 U.S. 419 (1970); have a particular employer, *see Davis v. Mann*, 377 U.S. 678 (1964); or are non-voters, *see Evenwel*. Federal courts should continue to promote inclusion, and not dictate value judgments about who is considered a "true" or "actual" person.

[6] The only evidence before the lower court on this point was that inmates are sent to the ACI from other jurisdictions. Plaintiffs presumably agree that an inmate's former physical presence elsewhere in Rhode Island does not prove a greater nexus to that former location than to Cranston. App. Br. at 15 ("someone's mere physical presence or non-presence in a jurisdiction does not conclusively indicate whether that person is a constituent").

Plaintiffs attempt to downplay the morass created by the lower court's nexus test by making the absurd claim that prisoners are "unique." App. Br. at 41. There is obviously no single kind of prison, and no single kind of prisoner. State, federal and county prisons will vary by geography, by population, and by community accessibility and involvement, and so will the "nexus" of their inmates. The "nexus" of each prisoner will also depend on the jurisdiction it is measured against; Plaintiffs have not disputed, for example, that ACI inmates' nexus to their state representatives may be different than their nexus to their City representatives. Furthermore, as noted above, Plaintiffs' indicia of an "actual constituent" in fact describes many people who for a variety of reasons do not live up to Plaintiffs' arbitrary ideal. Apportionment based on total population is far superior to the District Court's method of attempting to measure the "nexus" of people to the government.

Plaintiffs suggest that the Cranston City Council acted improperly because it "chose" to approve a districting plan based on census counts that are not disputed in any material way. App. Br. at 8. The City Council was simply following the City Charter, which since 1963 has required districting based on total population as counted by the census. The City Charter is consistent with the Rhode Island Constitution, which also calls for districting based on population. The City Charter and state Constitution reflect the political will of the citizens,

acting through their elected representatives. They should not be replaced by an arbitrary and virtually undefinable "representational nexus" requirement.

V. CONCLUSION

There is no constitutional basis for what amounts to a claim that people are only part of the population when they are not prisoners. Decades of Supreme Court precedent has approved apportionment based on total population, and the Constitution requires no more. The order below should be reversed and the case remanded for entry of judgment in favor of the City of Cranston.

CITY OF CRANSTON,
RHODE ISLAND

By Its Attorneys,

PARTRIDGE SNOW & HAHN LLP

/s/ David J. Pellegrino
Normand G. Benoit (#42903)
David J. Pellegrino (#1151403)
Robert K. Taylor (#92472)
40 Westminster Street, Suite 1100
Providence, RI 02903
(401) 861-8200
(401) 861-8210 FAX
ngb@psh.com
djp@psh.com
rkt@psh.com

DATED: August 2, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, David J. Pellegrino, hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,567 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)a and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman type style.

/s/ David J. Pellegrino
David J. Pellegrino (#1151403)
PARTRIDGE SNOW & HAHN LLP
40 Westminster Street, Suite 1100
Providence, RI 02930-7120
(401) 861-8200
(401) 861-8210 FAX
djp@psh.com

DATED: August 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on August 2, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Lynette J. Labinger, Esq., Labinger@roney-labinger.com

Adam Lioz, Esq., alioz@demos.org

Brenda Wright, Esq., bwright@demos.org

Sean J Young, Esq., syoung@aclu.org

Dale E. Ho, Esq., dale.ho@aclu.org

/s/ David J. Pellegrino
David J. Pellegrino (#1151403)

2807404_2/9806-4