No. 14-940

In The Supreme Court of the United States

SUE EVENWEL, et al.,

Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF AMICI CURIAE DIRECT ACTION FOR RIGHTS AND EQUALITY (DARE), EX-PRISONERS AND PRISONERS ORGANIZING FOR COMMUNITY ADVANCEMENT (EPOCA), VOICES OF COMMUNITY ACTIVISTS & LEADERS-NEW YORK (VOCAL-NY) AND VOICE OF THE EX-OFFENDER (VOTE) IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

DARE (Direct Action for Rights and Equality) is a grassroots membership-based organization in Rhode Island that organizes low-income families in communities of color for social, economic and political justice. The organization joined hundreds of low-income people of color to protest the city of Providence's most recent redistricting and the organization actively supported Rhode Island's successful 2006 voter initiative to re-enfranchise people on probation and parole. In 2010, DARE launched Rhode Island's campaign to end prison gerrymandering, an effort which has led to legislation twice unanimously passing the state Senate.

EPOCA (Ex-Prisoners and Prisoners Organizing for Community Advancement) is a grassroots membership-based organization in Massachusetts that works to create resources and opportunities for those who have paid their debt to society. The organization led a coalition of groups to successfully lead the Massachusetts legislature in passing a bipartisan resolution calling for the Census Bureau to change

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have given blanket consent to the filing of amicus briefs, and have filed letters of consent with this Court.

the usual residence rule and count incarcerated people at home.

VOCAL-NY (Voices Of Community Activists & Leaders-New York) builds power among people affected by HIV/AIDS, drug use and mass incarceration to create healthy and just communities. In 2009 and 2010, the organization was a leader in the successful statewide effort to pass New York State's historic law ending prison gerrymandering, which requires that incarcerated people are counted at home for state and local legislative redistricting purposes, and in 2011 was a successful intervener-defendant in state litigation that had challenged that law. VOCAL-NY has worked with the Yes We Count! coalition to reduce the "census undercount" in 2010 by encouraging low-income New Yorkers who are least likely to participate in the Census to fill out and return their forms and has campaigned in favor of policy reforms to strengthen our democracy, including non-partisan redistricting and expanding the electorate.

VOTE (Voice of the Ex-Offender) is a grassroots, membership-based organization in Louisiana that works to protect and expand civic engagement and voting rights of the people most critically impacted by the criminal justice system, especially formerly incarcerated persons, their families and loved ones. Some of VOTE's work includes voter registration drives that ensure that formerly incarcerated people register to vote once they are eligible and become active participants in democracy and criminal justice reform. VOTE was also one of the leading organizations

in the Make City Council Work For Us Campaign, which aimed to ensure that the New Orleans City Council truly represented the city of New Orleans and not just particular neighborhoods and interests by changing the city charter to create an appropriate number of council districts. VOTE has also campaigned to end prison gerrymandering.

SUMMARY OF THE ARGUMENT

Amici long have been concerned with the injustices that flow from the manner in which the Census Bureau currently tabulates incarcerated persons in the U.S. Census, and the resulting impact on redistricting – problems that have come to be known as "prison gerrymandering." Although the case before this Court does not directly address the constitutionality of prison gerrymandering, Appellants nonetheless have suggested that their argument for removing non-voting individuals from the population base used for redistricting somehow is buttressed by the effort to reform prison gerrymandering. *See* Opp. to Mot. to Dismiss or Affirm 8.

Appellants' suggestion is flatly incorrect. Indeed, amici and many other groups that oppose prison gerrymandering also strongly oppose Appellants' effort to require states to limit the population base to voters. Accordingly, amici submit this brief in order to clear away potential confusion and explain how the

issue of prison gerrymandering does and does not relate to the issues before the Court in this case.

Section I of the brief describes the problem of prison gerrymandering and outlines its factual and legal context. Specifically, it explains why treating incarcerated persons as "residents" of the prison where they are involuntarily detained, instead of their home communities, creates serious inaccuracies and distorts redistricting, whether or not the incarcerated persons are eligible to vote.

Section II explains why the rule proposed by Appellants – that only voters be included in the population base for redistricting – would not cure the problem of prison gerrymandering. Most importantly, the problems stemming from the miscount of incarcerated persons are the result of *where* they are counted for redistricting purposes – not *whether* they are counted. Creating a constitutional requirement to exclude non-voting populations from the population base used for redistricting would not correct the distortions that flow from the miscount of incarcerated persons, and in fact could exacerbate those distortions.

Finally, Section III explains that the problem of prison gerrymandering may implicate Equal Protection concerns for reasons entirely distinct from the arguments advanced by Appellants. Appellants contend that the Fourteenth Amendment to the U.S. Constitution requires the Court to enshrine the goal of electoral equality above the goal of representational

equality. The constitutional arguments against prison gerrymandering, by contrast, require no judicial choice between the goals of electoral equality and representational equality, because prison gerrymandering cannot be justified by either theory of representation. Accordingly, to the extent they invoke the problem of prison gerrymandering as supporting their chosen Fourteenth Amendment theory, Appellants are relying on a false parallel.

ARGUMENT

I. INCARCERATED PERSONS ARE MISCOUNTED IN THE U.S. CENSUS, RESULTING IN PRISON GERRYMANDERING.

In conducting its decennial population count, the U.S. Census Bureau tabulates incarcerated persons as "residents" of the prison where they are involuntarily imprisoned. States and localities that use this Census Bureau data for redistricting purposes are counting incarcerated people in the wrong place – a practice commonly referred to as "prison gerrymandering." This practice results in serious population distortions in redistricting, and fails to reflect accurately the demographics of numerous communities throughout our country.

The problem flows from the Bureau's application of its "usual residence" rule, which defines an individual's residence as "the place where the individual

lives and sleeps most of the time,"[2] regardless of other factors relevant to determining actual residence. Because of this outdated rule and its flawed application in redistricting, some two million incarcerated people are being counted in the wrong place in the U.S. Census.

The nature of confinement at a prison strongly contradicts the notion that a prison is a "residence" in any normal sense of the word. Individuals confined at a prison are barred from interaction with neighbors and members of the community with which the Census Bureau combines them as "residents." They cannot visit local churches, schools or theaters, or patronize local businesses such as restaurants, grocery stores, gas stations and clothing stores. They cannot make use of parks, playgrounds, or public transportation, nor can they attend civic events in the community.

Even the children of incarcerated persons are often denied basic community services open to all other children whose parents actually reside in the community. For example, although Cranston, Rhode Island counts the population of the Adult Correctional Institutions (ACI) as "residents" of the city ward where the prison is located when apportioning ward

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

districts, a parent incarcerated at the ACI is not allowed to claim residency there to have his child educated in Cranston public schools.[3] The incarcerated parent is a "resident" only for purposes of padding the population base of the ward containing the prison, but not for any other purpose.

Similarly, incarcerated persons typically are barred from claiming residence at the prison location for other purposes, such as filing for divorce[4] or claiming diversity jurisdiction in the federal courts.[5] The fact that a prison is not a residence also has been underscored in decisions such as *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam) (plaintiff incarcerated in New York, but whose pre-incarceration residence was in California, lacked standing to challenge New York's laws disfranchising incarcerated persons because plaintiff could not rely on incarceration to claim residence in New York for voting purposes).

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[3] Pls.' Statement of Undisputed Facts No. 18, *Davidson v. City of Cranston, R.I.*, No. 1:14-cv-0091-L-LDA, ECF No. 23 (D. R.I. dated Aug. 6, 2015).

[4] Peter Wagner, *"'You don't live here (except on Census Day)' say local politicians"*, Prison Policy Initiative (Feb. 15, 2010), http://www.prisonersofthecensus.org/news/2010/02/15/divorce/#more-813.

[5] *Stifel v. Hopkins*, 477 F.2d 1116, 1121 (6th Cir. 1973) ("It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile.").

The involuntary nature of imprisonment also weighs strongly against the notion that a prison cell can be a residence. Persons convicted of crimes do not choose to join the community where their prison is located, which is an essential element of effecting a change of domicile. *See*, *e.g.*, *Mitchell v. United States*, 88 U.S. 350, 353 (1874); *Muntaqim v. Coombe*, 449 F.3d at 376 ("because physical presence in a prison is necessarily involuntary, an 'inmate of an institution does not gain or lose a residence or a domicile, but retains the domicile he had when he entered the institution'"). Incarcerated persons have no control as to where they will serve their sentences, and upon release from incarceration, they typically return to their home communities rather than remaining in the community where the prison is housed.[6]

Moreover, once assigned to a prison, incarcerated persons typically may be involuntarily and frequently moved to a different prison location if prison administrators so decide. For example, statistics in New York State show that the median time an incarcerated person has been at his or her current facility is just over seven months.[7] Thus, an incarcerated person's

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[6] Kirsten D. Levingston & Christopher Muller, Brennan Ctr. for Justice at NYU Sch. of Law, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at Their Home Addresses in the Next Census* 9 (2006), *available at* https://www.brennancenter.org/sites/default/files/legacy/d/download_file_36223.pdf.

[7] State of N.Y. Dep't of Corr. Serv., *HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008*, at ii (2008),

(Continued on following page)

presence at a particular prison location on Census Day is not only completely involuntary, but subject to immediate and frequent change based on largely unfettered discretion of prison administrators.

In stark contrast to the realities of incarceration, British common law and virtually all states define residence as the place a person chooses to be without a current intention to go elsewhere. Indeed, most states, constitutions and statutes go even further, explicitly declaring that incarceration by itself does not change a residence.[8]

The misallocation of incarcerated people could be dismissed as a mere quirk of the Census Bureau, but the stark and significant racial disparities in who goes to prison, and where prisons typically are located,

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available at http://www.doccs.ny.gov/Research/Reports /2008/Hub_Report_2008.pdf.

[8] *See, e.g.*, Ariz. Const. art. VII, § 3; Colo. Const. art. VII, § 4; Minn. Const. art. VII, § 2; Mo. Const. art. VIII, § 6; Nev. Const. art. II, § 2; N.Y. Const. art. II, § 4; Or. Const. art. II, § 4; Wash. Const. art. VI, § 4; Alaska Stat. § 15.05.020(1) (2011); Cal. Elec. Code § 2025 (2011); Conn. Gen. Stat. § 9-14 (2011); D.C. Code § 1-1001.02(16)(E) (2011); Haw. Rev. Stat. § 11-13(5) (2011); Idaho Code Ann. § 34-405 (2015); Me. Rev. Stat. tit. 21-A, § 112(7) (2015); Mich. Comp. Laws § 168.11 (2011); Miss. Code Ann. § 47-1-63 (2011); Mont. Code Ann. § 13-1-112(2) (2011); N.H. Rev. Stat. Ann. § 654:2-a (2011); N.M. Stat. Ann. § 1-1-7(D) (2011); 25 Pa. Cons. Stat. § 1302(a)(3) (2011); R.I. Gen. Laws § 17-1-3.1(a)(2) (2011); Tenn. Code Ann. § 2-2-122(a)(7) (2011); Tex. Elec. Code Ann. § 1.015(e) (2011); Utah Code Ann. §§ 20A-2-101(2)(a), 20A-2-105(3)(c)(iii) (2011); Vt. Stat. Ann. tit. 17, § 2122 (2011).

compound its impact when states and localities draw legislative districts.

Analysis of 2010 Census data shows that Blacks are incarcerated at five times the rate of non-Hispanic Whites, and Latinos (including Hispanics) are incarcerated at a rate almost two times higher than non-Hispanic Whites.[9] These disparate rates of incarceration are combined with the enduring and troubling trend of building the prisons in communities that are very different demographically from the communities of people confined in the prisons.[10] When states and localities use these data for redistricting, it results in prison-gerrymandered districts, where Black and Latino incarcerated people are used to pad out districts to the benefit of predominantly White residents.[11]

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[9] Leah Sakala, Prison Policy Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (2014), *available at* http://www.prisonpolicy.org/reports/rates.html.

[10] Peter Wagner & Daniel Kopf, Prison Policy Initiative, *The Racial Geography of Mass Incarceration* (2015), *available at* http://www.prisonpolicy.org/racialgeography/report.html.

[11] For example, after the 2000 Census, virtually all – 98% – of New York State's prison cells were located in state senate districts that were disproportionately white, undermining the representation of African-American and Latino communities. Peter Wagner, *98% of New York's Prison Cells Are in Disproportionately White Senate Districts*, Prison Policy Initiative (Jan. 17, 2005), http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/. Similarly, in Connecticut, 75% of the state's prison cells were in state house districts that were disproportionately

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The facts about incarceration and residence have led a former Director of the U.S. Census Bureau and distinguished scholar, Dr. Kenneth Prewitt, to observe that "[c]urrent census residency rules ignore the reality of prison life."[12] Additionally, Professor Justin Levitt has aptly observed that:

> It would be in keeping with the bulk of the Census Bureau's representational logic to tally incarcerated individuals in the communities to which they are most closely connected on Census Day. That location is not where they are involuntarily confined, but rather where their relatives and friends and support systems are often located, where their children may live, where they are most likely to return when they are released from incarceration, and where their inclusion will illuminate and not distort the snapshot of the true local community.[13]

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white. Prison Policy Initiative & Common Cause Connecticut, *Ending Prison-Based Gerrymandering Would Aid the African-American and Latino Vote in Connecticut* (2010), *available at* http://www.prisonersofthecensus.org/factsheets/ct/CT_AfricanAmericans_Latinos.pdf.

[12] Dr. Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D. Levingston, Brennan Ctr. for Justice at NYU Sch. of Law, *Accuracy Counts* (2004), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf.

[13] Letter from Professor Justin Levitt, Loyola Law School, to Ms. Karen Humes, Chief, Population Division, U.S. Bureau of the Census at 6 (July 20, 2015) (footnote and citation omitted), *available at* http://redistricting.lls.edu/other/2015%20census%20residence%20comment.pdf.

Two states – Maryland and New York – have already responded to the distortions caused by prison gerrymandering by enacting legislation requiring that incarcerated persons be counted as residents of their home communities rather than of the prison for purposes of redistricting – legislation that was in effect for the 2010 redistricting process.[14] Two more states have enacted similar legislation that will go into effect for the 2020 Census.[15]

For all these reasons, amici and many others have called on the Census Bureau to change its practices so as to tabulate incarcerated persons at their home residence instead of at the prison where they are involuntarily and temporarily detained. As explained below, however, this reform effort in no way supports Appellants' Fourteenth Amendment claims in this case.

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[14] *See* Md. Code Ann., Elec. Law § 8-701 (2015); N.Y. Legis. Law § 83-m (13)(b) (McKinney 2011). Although these laws call for most incarcerated persons to be reassigned to their home communities, they include exceptions, such as for incarcerated persons whose home residence is outside the state. A redistricting plan adopted in accordance with Maryland's reform law was challenged on one-person, one-vote grounds (among other legal challenges), and was unanimously upheld by a three-judge district court. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). This Court summarily affirmed. 133 S. Ct. 29 (2012).

[15] *See* Cal. Elec. Code § 21003 (2015); Del. Code Ann. tit. 29 § 804A (2010).

II. THE GOAL OF REFORMING PRISON GERRYMANDERING IS ENTIRELY DISTINCT FROM APPELLANTS' MISGUIDED GOAL OF EQUALIZING ELIGIBLE VOTING POPULATION AMONG DISTRICTS.

As noted above, Appellants have sought to bolster their arguments by suggesting that the goal of reforming prison gerrymandering somehow supports their argument for equalizing eligible voting population among districts. *See* Opp. to Mot. to Dismiss or Affirm 8. While the Bureau's current practices regarding tabulation of incarcerated populations can result in representational inequality, this is only because the incarcerated persons are being counted *in the wrong place* by states and localities when drawing district lines. The ultimate goal of reforming prison gerrymandering is not to eliminate incarcerated persons from the population count, but instead is to ensure that incarcerated persons are tabulated at the correct location – the home communities where their relatives and support systems exist and to which they will typically return on release from incarceration.[16]

The goal of Appellants' lawsuit is very different: it seeks to exclude non-citizens (and presumably other non-voters) entirely from the population count used in redistricting, even though non-citizens typically have ties with the location where they are counted that far exceed the ties of incarcerated persons to

[16] Levingston & Muller, *supra*, at 9.

the prison location. For example, unlike incarcerated persons who are counted in the prison location, non-U.S. citizens are counted in communities where they have strong actual ties to other members of the community. Indeed, they often reside and are counted in households that include family members who are U.S. citizens.[17] Unlike incarcerated persons, non-citizens and other non-voters are able to participate in the economic and civic life of the community where they are counted – they shop at grocery and clothing stores, gas stations and other establishments; attend religious services and support religious establishments; work and pay taxes in the community; and engage in civic and volunteer activities. None of these avenues for community engagement are available to the incarcerated persons who are counted as residents of the prison where they are housed.

Thus, Appellants' proposal that districts should be apportioned by equalizing the number of eligible voters in the population base would not alleviate the problem of prison gerrymandering. Consider the examples of Maine and Vermont, where incarcerated persons remain eligible to vote, but must vote absentee ballots in their home communities rather than in

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[17] *See* Joanna Dreby, Ctr. for Am. Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* 1 (2012), *available at* https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamilies_execsumm.pdf.

the location where they are incarcerated.[18] Under Appellants' approach, incarcerated persons in Maine and Vermont would be included in the population base of the prison community for redistricting purposes because they are included in the Census Bureau's population tally, and they are eligible to vote. But they would not be included in the population base for redistricting in the home communities where they actually cast their ballots, because the Census Bureau does not include them in the population count in their home communities. Appellants' rule of electoral equality using Census Bureau data would thus result in a nonsensical attribution of incarcerated populations to communities where they cannot vote, while excluding them from the population count in the communities in which they actually do vote.

In contrast to Maine and Vermont, many states deny the franchise to persons serving sentences for conviction of a felony, and in these states, Appellants' proposed rule also fails to solve the problem of prison gerrymandering. An example of prison gerrymandering in Cranston, Rhode Island illustrates this point, and shows the difficulty of distinguishing voting from non-voting populations among incarcerated populations in Census data.

In Rhode Island, the sole state-run facility for adult incarcerated population is the Adult Correctional

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[18] *See* Me. Rev. Stat. Ann. tit. 21-A, § 112(14) (2015); Vt. Stat. Ann. tit. 17, § 2122(a) (2015).

Institutions (ACI), located in Ward Six in the city of Cranston. The Census Bureau counts this population as "residents" of Cranston, and Cranston in turn has assigned this population entirely to Ward Six for purposes of drawing City Council and School Committee districts. Many incarcerated persons at the ACI remain eligible to vote because they are either awaiting trial or were sentenced on misdemeanors rather than felonies; but as with the voting-eligible incarcerated persons in Maine and Vermont, these individuals are required to vote absentee from their home communities, which are overwhelmingly located outside Ward Six of the City of Cranston.[19] Census data, however, do not distinguish between pre-trial and sentenced populations, and thus do not distinguish between voting-eligible and non-eligible incarcerated persons. Accordingly, to the extent Appellants seek to rely on voting-eligible population as the basis for drawing electoral districts, this would be completely unworkable in a setting such as the ACI in Cranston, where the pre-trial and sentenced populations are indistinguishable in the Census data.

All of this illuminates a core fact: the goal of reforming prison gerrymandering is not at all comparable to Appellants' goal of entirely excluding non-voters from the population base. The goal of reforming prison

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[19] *See* Pls.' Mem. Supp. Pls.' Obj. Def.'s Mot. Summ. J. and Pls.' Cross-Mot. Summ. J. 11-12, *Davidson v. City of Cranston, R.I.*, No. 1:14-cv-0091-L-LDA, ECF No. 21-1 (D. R.I. dated Aug. 6, 2015).

gerrymandering seeks to count incarcerated persons properly as residents of their home communities, not to completely exclude non-voters from the population base.[20] Accordingly, Appellants cannot support their arguments by relying on false analogies between prison gerrymandering reform and their improper goal of entirely excluding non-voters from the redistricting calculus.

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[20] In counting incarcerated people at the location of the prison, the Census Bureau makes two distinct errors that affect redistricting: 1) it fails to count incarcerated people where they reside, and 2) it counts incarcerated people at the location of the facility. A city or county has the power only to correct the second part of the Bureau's miscount – assigning people to the wrong location – and not the first part – failing to assign them to the correct location. Accordingly, some local redistricting authorities adjust population data, to the extent their jurisdiction permits, by removing incarcerated people from the population base for redistricting, because the Census Bureau incorrectly counted them as if they were residents of that location. *The Census Count and Prisoners: The Problem, the Solutions, and What the Census Can Do*, at 4 (Oct. 22, 2012) (statement of Ben Peck, Senior Legislative and Policy Associate, Demos), *available at* http://www.demos.org/sites/default/files/publications/BenPeck_Testimony_PrisonBasedGerrymandering101212.pdf. This data limitation with respect to incarcerated persons in no way suggests that non-voters should be disregarded in redistricting, when such persons have close ties to the community where they are actually counted and cannot even theoretically be counted at some other location by the Census Bureau.

III. THE PROBLEM OF PRISON GERRYMANDERING MAY IMPLICATE EQUAL PROTECTION CONCERNS, BUT THOSE CONCERNS IN NO WAY SUPPORT APPELLANTS' ARGUMENT FOR A CONSTITUTIONAL RULE EXCLUDING NON-VOTERS IN REDISTRICTING.

The problem of prison gerrymandering may implicate Equal Protection concerns in some circumstances. *See Davidson v. City of Cranston*, 42 F. Supp. 3d 325 (D. R.I. 2014). These Equal Protection concerns, however, in no way support the relief sought by Appellants in this case.

Appellants contend that the Fourteenth Amendment requires the Court to choose between two competing theories of equality under the Fourteenth Amendment – electoral equality and representational equality – and to invalidate a state's choice of representational equality if it conflicts with the goal of electoral equality. Under an electoral theory of equality, the Fourteenth Amendment is argued to protect the rights only of eligible voters and thus to require states to equalize the numbers of voters in each district.[21] Under a representational theory of equality, the Fourteenth Amendment is argued to have a broader scope that protects the rights of all persons, and thus to require states to equalize the numbers of persons in each district – without regard to often

[21] Br. for Appellants 26.

temporary or changing circumstances such as whether the person is eligible or registered to vote.[22]

Amici believe that the arguments for representational equality are much stronger than those for equality based on eligible voters,[23] but do not wish to duplicate the arguments being made by other amici on that score. In this brief, amici seek only to underscore the point that the practice of prison gerrymandering cannot be justified under either theory of representation. Accordingly, the arguments for reforming prison gerrymandering in no way require the Court to embrace Appellants' demand that electoral equality must be the sole touchstone for implementing the Fourteenth Amendment's one-person, one-vote requirement.

This point is well explained in *Davidson v. City of Cranston*. In *Davidson*, city residents are challenging a redistricting plan for city and school committee districts in Cranston, Rhode Island, which assigns the adult incarcerated population of the ACI in Rhode Island as "residents" of one ward in the City of Cranston. As noted by the district court in denying a motion to dismiss, "the case now before this Court

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[22] *Garza v. County of Los Angeles*, 918 F.2d 763, 773-74 (9th Cir. 1990).

[23] All federal appellate courts that have been asked to enshrine electoral equality above representational equality have ruled that the Fourteenth Amendment does not support that demand. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza*, 918 F.2d 763.

presents an alleged set of circumstances that appears to be justified by neither the principle of electoral equality nor of representational equality." *Id.* at 331. The court's opinion pointed out that, assuming Plaintiffs' allegations are true, "[c]learly, the inclusion of the ACI prison population is not advancing the principle of electoral equality because the majority of prisoners, pursuant to the State's Constitution, cannot vote, and those who can vote are required by State law to vote by absentee ballot from their pre-incarceration address." *Id.* Given the complaint's allegations that the incarcerated persons are unable to interact with elected officials or with the community where they are counted in any meaningful way, the court further noted that "the prisoners' inclusion in Ward Six does nothing to advance the principle of representational equality." *Id.*[24]

The *Davidson* ruling underscores that solving the problem of prison gerrymandering does not require the federal courts to choose an electoral theory of equality in preference to a representational theory of

[24] Surprisingly, one amicus brief supporting Appellants cites the *Davidson* decision as if it supports an argument requiring a rule of electoral equality in redistricting. Br. of the City of Yakima, Washington as Amicus Curiae Supp. Appellants, at 14 n.19. As the above discussion confirms, this is a complete misreading of the decision, which directly rejects the argument that reforming prison gerrymandering requires a court to choose between electoral equality and representational equality. This no doubt explains why the Appellants do not rely on *Davidson* as supporting their claims in this case.

equality. Reforming the practice of prison gerrymandering involves resolving the question of *where* incarcerated persons – whether or not they are eligible to vote – should be counted for purposes of redistricting under either an electoral or representational theory of equality. It certainly does not justify a constitutional rule elevating the goal of electoral equality above that of representational equality.

* * *

As noted in the Summary of Argument, amici are well aware that this case does not directly address the rationality or constitutionality of prison gerrymandering. The modest purpose of this brief is simply to explain that Appellants are relying on false parallels to the extent they invoke the problem of prison gerrymandering as supporting their argument for a Fourteenth Amendment rule excluding non-citizens or non-voters from the population base for redistricting.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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