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**TESTIMONY BEFORE THE RHODE ISLAND
REAPPORTIONMENT COMMISSION
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The right to vote is the quintessential right underlying the democratic process. As a result, the Rhode Island ACLU has had a long interest in ensuring that decennial redistricting respects and studiously conforms to the core premise of the Fourteenth Amendment's equal protection clause, and that clause's counterpart in Rhode Island's Constitution. Because that right can be infringed by the dilution, as well as the denial, of the right to vote, malapportioned districts or any failure by the state to provide appropriate voting strength to racial minorities raise fundamental civil liberties concerns.

There are two topics in particular that are of special concern to us as the Commission goes about its work, and that we wish to address in our testimony. The first issue, and one we have raised during previous reapportionments, involves the state's obligation to provide a voice to Rhode Island's racial minorities through the redistricting process. We participated as a "friend of the court" in *Metts v. Almond*, the successful Voting Rights Act lawsuit that took place after the 2000 redistricting and that required a change in Senate district lines in Providence. We are confident that, as a result of that case, the Commission will be particularly sensitive to ensuring that legislative district lines are drawn with special attentiveness to giving racial minorities – both Latino and African-American – appropriate and fair representation in our General Assembly. We

will be monitoring the Commission's activities in this regard in the upcoming months and are hopeful that there will be no basis whatsoever for any claims of unfair line-drawing that has the effect of diluting the minority vote.

We wish to particularly focus our testimony on a second issue, and one that has only reached the public consciousness – and the consciousness of legislators – since the last reapportionment took place. That is the issue of prison-based gerrymandering. It is not a well-known issue, but it is a critical one. For geographical reasons, it is an especially critical issue in Rhode Island, because a failure to address it will place our state far outside the mainstream when it comes to prison-related malapportionment.

As you may know, Rhode Island currently gives extra representation to the people who live near the ACI. That is because past reapportionments have relied on U.S. Census data that counts people in prison as if they were all residents of Howard Avenue in Cranston. The Supreme Court's "one person-one vote" rule requires legislative districts to be redrawn each decade so that each district contains the same population and each resident is therefore given the same access to government. But this process fails when an underlying premise, such as the one involving the residency status of Rhode Island's prison population, is faulty. The resulting redistricting with skewed district populations is often referred to as prison-based gerrymandering. The impact is that the voting strength of the communities from which the inmates come is diluted, while the political influence of the city residents in which the prison is located is inflated.

The allocation of all prisoners to Cranston for redistricting purposes is particularly problematic and flawed because that premise is in direct conflict with state voting law, which explicitly provides that incarceration does not change a person's residence:

“A person's residence for voting purposes is his or her fixed and established domicile... A person can have only one domicile, and the domicile shall not be considered lost solely by reason of absence for any of the following reasons: ... Confinement in a correctional facility....”¹

Thus, even though inmates at the ACI are counted as residents of Cranston for redistricting purposes, they are statutorily denied the right to vote from there even if they want to.² This inconsistency is unconscionable.

We believe that Rhode Island should follow the example of other states that have recently taken action to end prison-based gerrymandering. For this redistricting cycle, New York and Maryland are counting incarcerated individuals at their home addresses. Similar legislation passed in California and Delaware, allowing both states to take the same approach after the 2020 Census. Massachusetts is set to ameliorate the effects of prison-based gerrymandering this year even without a comprehensive legislative solution, by using allowable population deviations in drawing its districts.

The need for remedying this problem in Rhode Island is heightened by our state's special status. We believe we may be the only state with just one prison complex. This fact combines negatively with the fact that Rhode Island legislative districts are smaller by population than in most states. According to Peter Wagner, Executive Director of the Prison Policy Initiative and the national expert on prison populations and redistricting, Rhode Island currently provides one of the most dramatic examples of how prison populations distort representation. Changes in the Cranston complex over the last 10 years may make the problem worse. He reports that if the entire Cranston prison complex was put within the same legislative district, 24% of that district would be incarcerated, all

¹ Rhode Island General Laws § 17-1-3.1.

² Under the Rhode Island Constitution, all persons being held on misdemeanor offenses or awaiting trial for any offense are entitled to vote.

but guaranteeing that Rhode Island would have the most dramatic instance of prison-based gerrymandering in a state legislative district in the country.

Federal law is clear that states are not required to blindly use the Census for state legislative districts.³ Although the statutory mandate⁴ for this Commission requires it to draw state legislative districts that deviate no more than 5% from the average district size “determined by the population reported in the federal census in 2010,”⁵ we believe the prison gerrymandering issue can be addressed by the Commission in conformance with that mandate.

In the past, the ACLU has testified in support of bills before the legislature, including a bill introduced by Sen. Metts this past year, S-341, that would count incarcerated people’s last home residence for redistricting purposes. As noted above, four other states have recently enacted such legislation.

Passage of a similar bill in Rhode Island would be the ideal solution, and we strongly recommend that the Commission urge the General Assembly to pass this legislation in order to fully resolve the prison gerrymandering problem. In the meantime, we wish to offer an interim proposal that we believe the Commission should adopt and that would greatly reduce the impact of prison-based gerrymandering in Rhode Island. The best short-term solution, we believe, would be to simply remove the prison population from the redistricting data.

³ *Mahan v. Howell*, 410 U.S. 315, 330-332 (1973), see also “States are Authorized to Adjust Census Data to End Prison-Based Gerrymandering, and Many Already Do”, available at <http://www.prisonersofthecensus.org/factsheets/adjusting.pdf>

⁴ House Bill 2011 – H 6096, signed into law by the Governor on 6/22/11

⁵ *Id.*, § 2(c)(2) “In no case shall a single state senate district have a population which varies by more than five percent (5%) from the average population of all senate districts as determined by the population reported in the federal census in 2010, and in no case shall a single state representative district have a population which varies by more than five percent (5%) from the average population of all representative districts as determined by the population reported in the federal census in 2010.”

Specifically, we believe the Commission should use the Census Bureau's Advance Group Quarters Summary File⁶ to remove the prison populations from total district population and from the calculation of average district size used in redistricting. The Census Bureau published the group quarters data, which includes prisons, specifically to aid redistricting efforts in states that wanted to avoid prison-based gerrymandering.⁷ Using this data to remove the prison populations would solve the majority of the problems posed by counting in a single cluster in Cranston the incarcerated people who come from all over the state. Mathematically, counting incarcerated people at the prison location has a larger vote dilutive effect than simply failing to count them at the correct home address.

We do not believe that using the Census's Advance Group Quarters Data to adjust the population data used for redistricting purposes conflicts with the Commission's statutory mandate to draw lines equally "as determined by the population reported in the federal census in 2010." The Census is taken in April 2010, but the only data reported in 2010 is the state-level counts used for apportionment which include the overseas military and federal employees. The local-level data typically used in redistricting, which does not include those populations, was published by the Census in 2011. Given that it is simply impossible to draw districts based on the data reported in 2010, it is clear to us that the

⁶ See Census Bureau's Advance Group Quarters Summary File available at http://www.census.gov/rdo/data/2010_census_advance_group_quarters_summary_file.html and Demos and Prison Policy Initiative press release "Advocates Hail Census Bureau's Release of Data to Assist in Correcting Prison-Based Gerrymandering", April 20, 2011, available at <http://www.prisonersofthecensus.org/news/2011/04/20/groupquartersreleased/>

⁷ "This decade we are releasing early counts of prisoners (and counts of other group quarters), so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale." Robert Groves, Director, U.S. Census Bureau, 2010 Census: The Director's Blog: So, How Do You Handle Prisons? (March 12, 2010). Available at <http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle-prisons.html>

General Assembly did not intend to mandate any particular dataset beyond a general reliance on recent federal census data. We therefore urge the Commission to use the Census's Advance Group Quarters Data in conjunction with other population data reported in the federal census. Using both data sets would bring the state closer to true population equality in redistricting.

Alternatively, the Commission could conclude that the statutory language in H-6096 requires use of the census counts as released by the Bureau in 2010 for the purposes of setting ideal district size, but that the statute does not require the state to defer to the Bureau on the location of the prisons. The Commission can treat the non-local prisoners as the Bureau treats over-seas military personnel for allocating populations: at large. The prison populations would then not skew any individual legislative district.⁸

Below is a subset of the group quarters file in tabular form showing the census blocks that contain state and private prisons in Rhode Island, along with the populations counted within those facilities by the Census Bureau.

County	Tract	Block	Correctional Population	Facility Name(s)	Facility Type
Providence	010900	1014	350	Donald W. Wyatt Detention Facility	Private
Providence	014200	2023	86	High Security Center	State
Providence	014200	2025	908	Intake Service Center	State
Providence	014200	2030	82	Dorothea Dix Minimum Security Facility	State
Providence	014200	2037	1,043	John J. Moran Medium Security Facility	State
Providence	014200	2053	461	Minimum Security	State
Providence	014200	2055	310	Donald Price Medium Security Facility	State
Providence	014200	2061	105	Gloria McDonald Awaiting Trial and Medium Security Facility	State
Providence	014200	2072	438	Max Security	State

⁸ In the unlikely event the Commission nonetheless believes its statutory mandate constrains it from adopting these approaches, we believe it should ask the General Assembly to revise the Commission's mission as soon as it comes back in January to unambiguously allow the exclusion of the prison population from redistricting totals.

For the Commission's reference, we are also submitting electronic shapefiles of this data with our testimony, in ESRI and Maptitude formats.

We believe the solution we have suggested above, necessary in light of the absence of the adoption of the Metts legislation, is the simplest, fairest and most reasonable one under all the circumstances. But if the Commission disagrees for some reason and believes it cannot or should not remove the prison populations prior to redistricting, an alternative solution it could consider is dividing the prison complex into three pieces and overpopulating each district to minimize the impact.

This Commission is expected to draw House districts with an ideal district size of 14,034, and the Census reported the correctional population of the Cranston prison complex as 3,433. If the prison complex is split between three districts, each district would be 8% incarcerated. If each of those districts is drawn to contain 3 to 5% more Census population than the ideal district, the actual population of each district would be within 5% of the ideal district size. In this way, the districts would be within the 5% deviation required of the Commission regardless of which dataset is used.

In the state Senate, this same proposal is even simpler. The prison complex could be split between two districts, and the districts would only need to be drawn 1.2% over the ideal district size. Or the prisons could be split between 3 districts and the districts could be drawn to have a population deviation between -0.9% and +5%.

Massachusetts is taking a similar approach this redistricting cycle, as Massachusetts House Redistricting Committee Chairman Moran explains: "Where there

is a prison, you would keep it on the negative side and where there is not, you would keep it on the positive side.”⁹

To be sure, this is not the best interim solution from our perspective. On the positive side, it would limit the vote enhancement caused by the prison count in any individual district, and limit the corresponding vote dilution in other districts in the state. On the other hand, it would give Cranston more representation than its actual resident population warrants. And, of course, any such line-drawing would also have to be mindful of its potential impact on the minority populations concentrated in Providence in order to avoid creating separate vote dilution problems there. If done carefully, we assume it could nonetheless be achieved, though the potential unintended consequences provide another reason for the Commission to adopt the less complex approach of our first proposed solution.

Finally, no matter which interim solution is considered, we call upon the Commission to formally recommend to the General Assembly that it approve passage of the Metts bill as promptly as possible in order to ensure that Rhode Island does not continue to produce the most unfair and malapportioned prison-based districts in the nation.

We have taken the liberty of putting together a packet for Commission members with some general background information about this pressing issue. We hope that members will find it informative. We thank you in advance for your consideration of our views, and hope that our recommendations will be favorably considered.

⁹ Yawu Miller, *Redistricting Committee Supports Minority Districts*, *The Bay State Banner*, Vol. 47, No. 10, October 13, 2011. Available at <http://www.baystatebanner.com/local15-2011-10-13>