19-576-cv

To Be Argued By:
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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NAACP CONNECTICUT STATE CONFERENCE, JUSTIN FARMER, GERMANO KIMBRO, CONLEY MONK, JR., GARRY MONK, and DIONE ZACKERY,
Plaintiff-Appellees

v.

DENISE MERRIL AND DANNEL MALLOY,
Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANTS DENISE MERRIL AND DANNEL MALLOY

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JURISDICTIONAL STATEMENT

Plaintiffs claim that the district court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357. Defendants contend that the district court lacked jurisdiction because the Eleventh Amendment bars this case. The district court denied Defendants' motion to dismiss on Eleventh Amendment immunity grounds on February 19, 2019, and Defendants timely filed their Notice of Appeal on March 7, 2019. Defendants claim on appeal that they are entitled to Eleventh Amendment immunity from suit because, even assuming that all of the facts pled in the Complaint are true, as a matter of law those facts do not establish a "substantial" or "plausible" federal claim that is sufficient to invoke *Ex Parte Young*. *See In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2d Cir. 2007); *Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014) (summary order). This Court therefore has jurisdiction over this appeal pursuant to the collateral order doctrine, which permits Defendants immediately "to appeal a district court order denying a claim of Eleventh Amendment immunity," notwithstanding the lack of a final judgment. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-46 (1993).

STATEMENT OF THE ISSUES

Whether Defendants are entitled to Eleventh Amendment immunity from suit because Plaintiffs failed to allege a substantial or plausible claim that Connecticut's legislative map violates one person, one vote, and therefore failed to satisfy the *Ex Parte Young* exception to the Eleventh Amendment.

INTRODUCTION

The one person, one vote principle requires that states must seek representational equality when designing their legislative maps. That is an objective and quantitative standard that simply requires states to ensure that each district contains approximately the same "number of inhabitants," without regard to whether or where they vote or own property. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124-31 (2016).

In achieving that goal for Connecticut's current legislative map, the legislature relied on facially neutral total population numbers from the United States census, which counts prisoners where they are incarcerated because that is where they live and sleep on a daily basis. Connecticut is not alone in taking that approach. To the contrary, ***every*** state relies on census data when drawing their legislative maps, and only four states adjust the numbers to count prisoners differently than the census. The use of unmodified census data for legislative redistricting is therefore the "norm" and "constitutional default," and it is a "plainly permissible" practice that "all 50 States and countless local jurisdictions have followed for decades, even centuries." *Id.* at 1126, 1132; *Davidson v. City of Cranston*, 837 F.3d 135, 144 (1st Cir. 2016).

Despite the near-universal practice that Connecticut has followed, and the Supreme Court's consistent and recent approval of it, Plaintiffs now claim that Connecticut's map—and by extension the maps of 45 other states—somehow is unconstitutional because the census counts prisoners in the district where they are incarcerated instead of their district of origin. That claim is based exclusively on Plaintiffs' subjective belief that, even though prisoners indisputably live and sleep in the district where they are incarcerated, they are not "actual" residents there for redistricting purposes because they do not have a sufficiently close personal connection to those districts, and do not receive what Plaintiffs view as "effective representation" from the legislators therein. Plaintiffs therefore ask the federal courts to overrule the legislature's reasonable and judicially approved exercise of its redistricting authority, and to mandate that Connecticut must redraw its map and count prisoners in their district of origin instead.

Regardless of what public policy merits Plaintiffs' preferred counting method may have—and those merits are for the legislature to debate—their claim simply has no legal basis in the United States Constitution. Indeed, not only did the Supreme Court expressly

approve Connecticut's approach in *Evenwel*, it repeatedly has made clear that the specific question about how to count prisoners and other temporary residents in the population base involves "fundamental choices about the nature of representation" with which courts simply have "no constitutionally founded reason to interfere." *Burns v. Richardson*, 384 U.S. 73, 92 (1966); *Gaffney v. Cummings*, 412 U.S. 735, 749-51, 754 (1973).

Permitting this case to proceed would directly conflict with these and other binding Supreme Court precedents. It also would improperly thrust the federal courts into an inherently political question that would require them to make endless subjective and fact-intensive judgments about what types and levels of political interest are sufficient to make somebody an "actual" constituent of a particular district, the extent to which specific groups and individuals actually have those interests and choose to express them to their legislators, and whether particular legislators are sufficiently responsive to those requests to satisfy the undefined (and undefinable) "effective representation" standard that Plaintiffs espouse. Not only is such an approach unworkable, it is contrary to decades of settled practice and settled law.

It is precisely for these reasons that the First Circuit rejected an identical prisoner-based claim in *Cranston*. In doing so, the First Circuit expressly held that the claim is "implausible" and foreclosed as a matter of law by the Supreme Court precedents discussed above. That decision was correct, and this Court should follow it.

STATEMENT OF THE CASE

This case is a constitutional challenge to Connecticut's legislative map. Defendants moved to dismiss on Eleventh Amendment grounds, and the district court (Eginton, J.) denied the motion in an unreported decision. JA35-JA46. Defendants timely appealed under the collateral order doctrine. JA47.

A. BACKGROUND

The legislature adopted the current legislative map in 2011. As has historically been the case, in calculating the population for each district the legislature relied on total population numbers from the census, which counts prisoners where they are incarcerated because that is where they live and sleep. *See* JA10-JA11, ¶¶ 2, 8. The Supreme Court expressly has held that such an approach is "plainly permissible" as a constitutional matter. *Evenwel*, 136 S.Ct. at 1126.

The Supreme Court has long required that maps drawn on the basis of census data must comply with the one person, one vote principle of the Equal Protection Clause. That principle requires representational equality among districts, which is an objective and quantitative standard that requires states to ensure that districts contain approximately the same "number of inhabitants," without regard to their voting status or property ownership. *Id.* at 1127-29.

Because perfect parity is not possible, the Supreme Court has established a safe harbor under which a map is deemed presumptively permissible as long as the population deviations between districts do not exceed 10% when measured by a facially neutral population baseline. *Id.* at 1124; *Burns*, 384 U.S. at 92.[1] When any deviations fall within that threshold, the map does not establish a prima facie case of discrimination, and the State has no obligation to justify it. *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306-07 (2016). To proceed in such cases, the challenger must allege other facts to demonstrate that the legislature acted with a discriminatory intent. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2314, 2324 (2018).

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[1] States are held to a stricter standard for Congressional redistricting. *See Mahan v. Howell*, 410 U.S. 315, 321-22 (1973).

Here, Plaintiffs do not dispute that Connecticut's map falls within the 10% threshold when measured by census data, and they do not allege that the legislature intended to discriminate against anybody, either in its reliance on census data or in drawing the districts.

Instead, despite decades of practice and precedents to the contrary, Plaintiffs claim that the Constitution now requires states to adjust the census numbers to count prisoners in their district of origin instead of where they incarcerated, even though that indisputably is where they live and sleep. Plaintiffs further allege that ***if*** prisoners had been counted in the manner that Plaintiffs prefer, only then would some districts exceed the 10% threshold, and only then would Plaintiffs be able to establish the prima facie case of discrimination that the Equal Protection Clause requires. JA26-JA27, ¶¶ 74, 75, 84. This claim is of course circular, as it assumes a counterfactual world in order to create the very constitutional violation that Plaintiffs complain of.

Plaintiffs identify three reasons why they believe the State's compliance with the 10% rule should be measured by Plaintiffs' own preferred population counting method instead of the population base that the legislature actually used.

First, because some prisoners cannot or do not vote in the district where they are incarerated, Plaintiffs claim that there are fewer voters in prison districts than in other districts. And because each vote carries more weight when there are fewer voters, Plaintiffs allege that residents in prison districts have more voting power than residents in other districts, thereby violating Plaintiffs' purported right to "electoral equality."[2] JA25-JA27, JA28, ¶¶ 69, 77-78, 91.

Second, Plaintiffs allege that prisoners do not have any "meaningful connection" to the town where they are incarcerated and have "no contact" with legislators in those districts, who allegedly do not represent prisoners in practice. JA11, JA28, ¶¶ 4, 5, 89-90. The result, according to Plaintiffs, is that legislators in prison districts have what Plaintiffs characterize as fewer "actual" constituents than legislators in non-prison districts, thereby violating Plaintiffs' right to "representational equality." JA11-JA12, JA26, JA28, ¶¶ 8, 78, 91.

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[2] As discussed below, the Supreme Court recently made clear that there is no such thing as an electoral- or "voter-equality mandate in the Equal Protection Clause." *Evenwel*, 136 S. Ct. at 1126; *see infra* at 19-20.

Third, Plaintiffs allege that various factors that are wholly unrelated to redistricting—including mass incarceration and the resulting construction of new prisons in rural and primarily white districts—have created a situation in which the impacts discussed above fall disproportionately on minority residents in urban districts. *See, e.g.,* JA18-JA22, JA25, ¶¶ 34-51, 71. However, Plaintiffs ***do not*** allege that the legislature intended to discriminate against those individuals, and instead allege only an unintended impact on them.

B. THE PROCEEDINGS BELOW

Defendants moved to dismiss on Eleventh Amendment grounds because Plaintiffs failed to allege a substantial federal claim for purposes of *Ex Parte Young*. In particular, Defendants relied on *Cranston*, *Burns* and *Evenwel* to argue that Plaintiffs' claim is insubstantial because: (1) the Supreme Court expressly has approved the approach that Connecticut has followed; (2) federal courts have no constitutional authority to second guess the legislature's choice about how to count prisoners; and (3) Plaintiffs' "effective representation" in particular is unworkable and contrary to established law. *See generally* Dist. Ct. Dkt. Nos. 14-1 and 24.

The district court denied Defendants' motion in a decision that contained virtually no relevant legal analysis, and that failed to in any way address Defendants' substantive legal arguments. Indeed, the district court did not even mention *Cranston* or *Burns* in its opinion, and did not engage in any meaningful analysis of *Evenwel* either.

Instead, the court summarily concluded at the end of its opinion that Plaintiffs alleged a denial of "fair and effective representation" based solely on the court's conclusory, unexplained and erroneous assertion that prisoners cannot vote in the district where they are incarcerated. JA46, citing Conn. Gen. Stat. § 9-14. The court provided no analysis to support its newfound "fair and effective representation" standard, or to explain what that standard means or how it should be applied. It also provided no support for its conclusion that voting status is even relevant to—much less dispositive of—the constitutional analysis, which *Evenwel* makes clear it is not.

Because Defendants are entitled to Eleventh Amendment immunity as a matter of law, they now appeal pursuant to the collateral order doctrine to protect that immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-46 (1993).

SUMMARY OF ARGUMENT

The Eleventh Amendment bars this case as a matter of law because, even assuming that the facts pled in the Complaint are true, Plaintiffs have not alleged a substantial claim that Connecticut's map violates federal law for purposes of *Ex Parte Young*. That is true for four reasons.

First, Plaintiffs' claim is foreclosed by *Evenwel*, in which the Supreme Court held that compliance with one person, one vote should be measured "solely by the number of inhabitants" in each district, and that it is "plainly permissible" for states to count those inhabitants using total population data "as measured by the decennial census." 136 S. Ct. at 1124, 1126, 1128-29, 1131. That "theory of the Constitution" identified in *Evenwel* is a purely objective and quantitative standard, and Connecticut's map indisputably complies with it. *Id.* at 1128.

Second, even if *Evenwel* is not dispositive, *Burns* and other redistricting precedents expressly prohibit the federal courts from interfering with the exact issue that Plaintiffs present. Those cases uniformly hold that the specific question about how to count prisoners in the population base involves "fundamental choices about the nature

of representation" that properly are left to the "political and legislative process," and with which courts have "no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92. Under *Burns* and its progeny, therefore, federal courts simply have no constitutional authority to second guess the legislature's judgment about how to count this unique population group for redistricting purposes.

Third, Plaintiffs' proposed "effective representation" standard in particular is a perfect example of why courts cannot and should not interfere in this area. If adopted, that standard would require courts to make endless subjective judgments about what types and levels of political interest are sufficient to make somebody an "actual" resident of a particular district, the extent to which specific groups actually have those interests, and whether particular legislators are sufficiently responsive such that their representation can be deemed "fair and effective" as a constitutional matter. The federal courts have neither the authority nor the competence to make those subjective inquiries, which conflict with the quantitative theory of the Constitution identified in *Evenwel* and depend on precisely the kind of political judgments about the nature of representation that *Burns* prohibits.

Fourth, even if the Court were to overlook all of these flaws, Plaintiffs' claim is insubstantial for the additional reason that Plaintiffs do not even attempt to allege or argue that the legislature acted with a discriminatory intent, either in its reliance on census data or in the manner that it drew the map. That failure is dispositive in its own right, as discriminatory intent indisputably is a necessary element of every one person, one vote claim under the Equal Protection Clause.

Plaintiffs' counterfactual claim that Connecticut's map exceeds 10% when measured by Plaintiffs' preferred population base does not compel a different result. The 10% rule is a tool by which challengers can establish a prima facie case of discriminatory intent. That rule makes sense when compliance is based on the population base that the legislature used. But when compliance is measured by a baseline that the legislature did not use—and that it had no reason to use given that the use of unmodified census data is the constitutional default that the Supreme Court repeatedly has approved—there is no basis for imputing the same presumption of discriminatory intent because any population disparities under Plaintiffs' formula by definition do not reflect what the legislature intended when it designed the map.

STANDARD OF REVIEW

This Court reviews the district court's ruling de novo. *See, e.g., Yong Chul Son v. Chu Cha Lee*, 559 F. App'x 81, 82 (2d Cir. 2014).

ARGUMENT

The Eleventh Amendment precludes suit against the State and its officials unless the State consents to suit, Congress abrogates the State's immunity, or the case falls within *Ex Parte Young*. Only the *Ex Parte Young* exception is implicated here. To invoke that exception, a plaintiff must allege a "substantial" claim that the conduct at issue actually violates federal law. *In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2d Cir. 2007); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 374 (2d Cir. 2005); *Shelton v. Hughes*, 578 F. App'x 53, 55 (2d Cir. 2014) (summary order). A federal claim is "insubstantial," and thus insufficient to invoke *Ex Parte Young*, if it is "implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit." *S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 133 (2d Cir. 2010). For the reasons discussed below, Plaintiffs' claim is insubstantial and implausible as a matter of law, and *Ex Parte Young* therefore does not apply.

I. *EVENWEL* EXPRESSLY APPROVED CONNECTICUT'S APPROACH AS BEING CONSISTENT WITH THE "THEORY OF THE CONSTITUTION"

The Supreme Court held in *Evenwel* that the "theory of the Constitution" requires that a state's compliance with one person, one vote should be measured "solely by the number of inhabitants" in each district, and that it is "plainly permissible" for states to count those inhabitants using total population data "as measured by the decennial census." 136 S. Ct. at 1124, 1126, 1128-29, 1131. That is an objective and quantitative standard that focuses exclusively on "numbers of people," and not on qualitative judgments about how close a connection each person subjectively feels toward the district. Connecticut's map indisputably complies with that theory of the Constitution identified in *Evenwel*, and Plaintiffs' claim is insubstantial on that basis alone.

In *Evenwel*, Texas used unmodified census data to measure the population of each district. 136 S. Ct. at 1124 and n.3, 1125. As here, the population deviations were within 10% when measured by that data, but exceeded 40% when measured by the plaintiffs' preferred "voter population" baseline. *Id.* at 1125. Echoing Plaintiffs' claim here, the *Evenwel* plaintiffs argued that a voter population baseline is

constitutionally required because a total population baseline dilutes the voting strength of residents in districts with the largest voting populations, in violation their claimed right to "electoral equality." *Id.*

The Supreme Court unanimously rejected the claim and upheld Texas' map. Two dispositive principles emerge from that holding.

First, the Court made clear that an individual's voting status and voting strength is not relevant to the one person, one vote analysis, as there is no such thing as an electoral- or "voter-equality mandate in the Equal Protection Clause." *Id.* Nor are other considerations such as whether or where a person happens to own property. *Id.* at 1128.

Rather, the "theory of the Constitution" is based is representational equality, which simply requires that each district msut have roughly the same "numbers of people." *Id.* at 1128-29, 1131. Further, those numbers of people "should be determined solely by the number of inhabitants" in each district, without regard to other considerations such as whether those inhabitants are eligible to vote for the representative in the district. *Id.* at 1127-29. The Court could not have been clearer in that regard: The "basis of representation" in this country is "[n]umbers, not voters; numbers, not property." *Id.* at 1128.

Under *Evenwel*, therefore, compliance with one person, one vote is measured by an objective and quantitative standard that focuses solely on the number of people who inhabit each district. The Court explicitly rejected the notion that the Constitution requires states to go beyond those objective numbers to consider other factors such as whether or where those inhabitants can vote or own property, or what their political interests are and where those interests subjectively may lie.

Second, not only did the Supreme Court make clear that the one person, one vote inquiry is limited to ensuring that each district has the same "aggregate number of inhabitants," it also held that it is "plainly permissible" for states to count those inhabitants using total population data "***as measured by the decennial census***." *Id.* at 1124, 1126-28 (emphasis added). Indeed, the Court specifically emphasized that the use of census data is a "well-functioning," "uniform" and "settled practice" that "all 50 States and countless local jurisdictions have followed for decades," and that ***all*** states currently use "when designing . . . state-legislative districts." *Id.* at 1123-24, 1132. It also is the same data that the Supreme Court repeatedly has approved in the "overwhelming majority" of redistricting cases. *Id.* at 1124.

Importantly, in making these observations the Supreme Court specifically acknowledged that a small minority of states have voluntarily chosen to modify the census data in some way, including an even smaller minority of four states that have chosen to count prisoners differently than the census. *Id.* at 1124 and n.3. Despite acknowledging those potential alternatives, however, the Court pointedly refused to "upset" or "disturb" the other states' "unbroken practice" and "widespread and time-tested consensus" of using unmodified census data to measure population for redistricting purposes. *Id.* at 1132, quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) and *Burson v. Freeman*, 504 U.S. 191, 203-206 (1992).

As the First Circuit correctly held in *Cranston*, it simply is "implausible" that the Supreme Court would have made all of these observations and reaffirmations in *Evenwel*, upheld the constitutionality of Texas' map drawn on the basis of unmodified census data, and yet left room for Plaintiffs' claim that the mere use of that objective and non-discriminatory data somehow is *per se* unconstitutional. *Cranston*, 837 F.3d at 144.

Rather, the First Circuit correctly held that the "natural reading" of *Evenwel* is that it "approved the status quo of using total population from the Census" without the kind of adjustments for prisoners that the Supreme Court referenced in Footnote 3, and that the use of unmodified census data is therefore the "norm" and "constitutional default." *Id.* at 143-44. And although states arguably may choose to adjust the census numbers to count prisoners differently if they wish, the theory of the Constitution identified in *Evenwel* does not compel them to do so. *Id.* Any other conclusion would invite a judicial usurpation of the legislature's "paradigmatically political decision" about how to count prisoners in the population base, and would improperly turn one of the rare and infrequently used population adjustments that *Evenwel* briefly referenced in Footnote 3 into a universal and mandatory constitutional requirement. *Id.*

Evenwel thus forecloses Plaintiffs' claim in this case. Plaintiffs do not dispute that Connecticut's legislative districts contain approximately the same number of inhabitants when measured by total population data from the United States census. That is all that the theory of the Constitution identified in *Evenwel* requires.

II. THE FEDERAL COURTS HAVE NO CONSTITUTIONAL AUTHORITY TO OVERRULE THE LEGISLATURE'S CHOICE ABOUT HOW TO COUNT PRISONERS IN THE POPULATION BASE, ESPECIALLY FOR THE REASONS THAT PLAINTIFFS SUGGEST

Plaintiffs' claim is foreclosed by *Evenwel* for the reasons discussed above. If the Court concludes otherwise, however, Plaintiffs' claim still fails because Plaintiffs have not shown any legitimate reason for the courts to overrule the states' "widespread and time-tested consensus" of relying on unmodified census data. *Evenwel*, 136 S. Ct. at 1132.

To the contrary, the Supreme Court repeatedly has made clear that federal courts have no constitutional authority to address or decide the exact issue that Plaintiffs present. That is especially true here given that any interference in this case depends on the courts making the kind of subjective and inherently political judgments that Plaintiffs' "effective representation" standard requires, and given that Plaintiffs have not even attempted to allege that the legislature acted with a discriminatory intent when it designed the current legislative map eight years ago. Whether read independently or together with *Evenwel*, these flaws provide yet more reasons why Plaintiffs have not alleged a substantial federal claim as a matter of law.

A. *Burns* And Its Progeny Prohibit The Federal Courts From Interfering With The Legislature's Non-Discriminatory Choice About How To Count Prisoners In The Population base

The Supreme Court has long held that the task of drawing state legislative districts is a sovereign function of the States. *E.g. Growe* v. *Emison*, 507 U.S. 25, 34 (1993). The redistricting process is therefore solely "the duty and responsibility" of the state legislatures, and it involves "a complex interplay of forces" that are inherently political in nature and that are "exclusively for the legislature to make." *Perez*, 138 S. Ct. at 2324; *Burns*, 384 U.S. at 89. Federal-court review of redistricting legislation "represents a serious intrusion" on this "most vital of local functions." *Perez*, 138 S. Ct. at 2324. Federal courts must therefore "be sensitive" to the states' exercise of their discretion and "political judgment" in this area, and must give "substantial deference" to the "political decisions of the people of a State acting through their elected representatives." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Brown v. Thomson*, 462 U.S. 835, 847-48 (1983).

Such deference is required in all redistricting cases. But it is especially important in challenges based on the legislature's choice about how to count prisoners, aliens, transients, and other temporary

residents in the population base. In fact, the principle is dispositive in such cases, as the Supreme Court expressly has held that the question about how to count those unique population groups involves "fundamental choices about the nature of representation" with which courts have "no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92; *Gaffney*, 412 U.S. at 749-51, 754 (quotation marks omitted). Such decisions are instead political questions that properly are left to the "political and legislative process." *Gaffney*, 412 U.S. at 749. As long as the population base is facially neutral, therefore, the legislature's choice about how to count prisoners "offends no constitutional bar, and compliance with [one person, one vote] is to be measured thereby" absent allegations that the legislature deliberately chose that population base with the intent to discriminate. *Burns*, 384 U.S. at 92; *cf. Evenwel*, 136 S. Ct. at 1126 (affirming conclusion that states may use "any neutral, nondiscriminatory population baseline").[3]

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[3] The Fourth and Fifth Circuits have gone so far as to suggest that the legislature's judgment on such questions "may present a nonjusticiable political question" that courts are ***jurisdictionally*** barred from considering. *Accord Evenwel*, 136 S. Ct. at 1126 n.6, citing *Chen v. Houston*, 206 F.3d 502, 528 (5th Cir. 2000) and *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996).

The First Circuit recently applied this principle to reject an ***identical*** prisoner-based claim in *Cranston*. In doing so, the First Circuit squarely held that federal courts have no authority to make the kinds of political judgments about the nature of representation that Plaintiffs' claim requires, and that Plaintiffs' arguments are instead properly directed to the political branches of state government. That holding was correct, and this Court should follow it.

In *Cranston*, the City divided its districts based on "the most recent federal decennial census." 837 F.3d at 137. As here, the population deviation was less than 10% when measured by census data, but would have exceeded 35% had the prisoners in one district been counted in their district of origin instead. *Id.* at 138. The plaintiffs argued that the inclusion of prisoners in the district where they are incarcerated violates one person, one vote because it: (1) "inflates the voting strength and political influence of the residents in [that Ward] and dilutes the voting strength and political influence of Plaintiffs and other persons residing outside of [the Ward];" and (2) deprives residents in other Wards of representational equality because inmates do not have ties to the Ward where they are incarcerated, and do not receive

representation from the legislator in that Ward. *Id.* at 139-40. Those are the exact same arguments that Plaintiffs make here. *Compare, e.g.*, JA11-JA12, JA25-JA26, JA28, ¶¶ 4-5, 8, 69, 77-78, 89-91.

The First Circuit rejected the claim, which it expressly characterized as "implausible," because the long-standing and judicially approved practice of counting prisoners in the district where they are incarcerated "easily passes constitutional muster" under *Burns*, *Evenwel* and other Supreme Court precedents. *Cranston*, 837 F.3d at 141-44. In addition to its interpretation of *Evenwel* discussed above, *see supra* at 21-22, the First Circuit identified two principles from *Burns* and other redistricting precedents that compel that conclusion.

First, the First Circuit correctly held that *Evenwel* left undisturbed the longstanding rule established in *Burns* and other cases that, as long as the 10% threshold is met based on a facially neutral population base, the population base "offends no constitutional bar, and compliance with [one person, one vote] is to be measured thereby" absent other allegations of discriminatory intent. *Burns*, 384 U.S. at 92; *see Cranston*, 837 F.3d at 142-43, citing *Brown*, 462 U.S. at 842, *Gaffney*, 412 U.S. at 745, and *Burns*, 384 U.S. at 88.

Second, and relatedly, the First Circuit held that *Evenwel* reinforced the well-established principle that "courts should give wide latitude to political decisions related to apportionment" that are not motivated by a discriminatory intent. *Id.* at 143. Citing *Burns*, the First Circuit specifically emphasized that such political judgments include decisions about whether and how to include prisoners and other groups of transient or temporary residents in the population base. *Id.*, citing *Burns*, 384 U.S. at 92. "[S]uch decisions, absent any showing of discrimination, 'involve[ ] choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" *Id.* at 143-44, quoting *Burns*, 384 U.S. at 92. Any other conclusion would improperly invite a judicial usurpation of what has "long been recognized as [a] paradigmatically political decision[], best left to local officials," about how to count prisoners in the population base. *Id.* at 144.

Notably, having determined that the relevant Supreme Court precedents compel that conclusion as a matter of law, the First Circuit noted in dicta that its decision was made all the more "obvious" by the political realities surrounding such claims. *Id.* Specifically, because

most districts do not have prisons, a clear majority of the population necessarily incurs the same kind of impacts that the plaintiffs in such cases complain about. That majority, which in turn elects a clear majority of the legislative body, "may reverse its own decision if it sees fit."[4] *Id.*

Cranston is of course not binding on this Court. But it is a recent and highly persuasive decision from another Circuit Court that is directly on point, and its reasoning is based on *Burns* and other Supreme Court precedents that are binding. This Court should follow it.

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[4] Plaintiffs argued below that residents in urban non-prison districts suffer greater impacts than residents in rural non-prison districts because they incur the "double punch" of having residents both "removed from Plaintiffs' districts ***and*** assigned to other districts." Dist. Ct. Dkt. No. 21 at 23 (emphasis in original). Even if that is true, it relates only to the degree of the alleged impact on those residents, and does not change the fact that residents in rural and primarily white non-prison districts still incur the same kind of impacts that Plaintiffs complain about. Indeed, Plaintiffs expressly conceded that point below. *Id.* at 4 (arguing that reliance on census data impacts "not only urban residents" and minorities, but also "persons residing in ***all*** other districts" that do not contain prisons) (emphasis in original). As in *Cranston*, therefore, if residents in non-prison districts throughout the state collectively wish to change the status quo, they can do so through the political process.

As in *Cranston*, the Connecticut legislature relied on facially neutral census data to draw the state's legislative map. The map indisputably falls within the 10% threshold when measured by that facially neutral data, and Plaintiffs do not allege otherwise. Nor do Plaintiffs allege that the legislature relied on that data with the intent to discriminate against any group. *See infra* at 42-47. In the absence of such allegations, *Burns* and its progeny make clear that federal courts simply have no constitutional authority to interfere with or overrule the legislature's time tested, judicially approved and eminently reasonable judgment about how to count prisoners in the population base.

B. Plaintiffs' Proposed Standard Conflicts With *Evenwel* And *Burns*, And Is Entirely Unworkable

Even if *Evenwel*, *Burns* and *Cranston* are not dispositive and the federal courts theoretically can second guess the legislature's choice on this issue in some circumstances, Plaintiffs' "effective representation" standard in particular is not a legitimate basis for the courts to do so. To the contrary, that standard squarely conflicts with the objective and quantitative theory of the Constitution identified in *Evenwel*, is unworkable, and depends on the exactly kind of judgments about the nature of representation that *Burns* and its progeny prohibit.

1. *Plaintiffs' "Effective Representation" Standard Conflicts With The Theory Of The Constitution Identified In* Evenwel

As discussed above, *Evenwel* held that the theory of the Constitution requires that a state's compliance with one person, one vote should be measured "solely by the number of inhabitants" in each district, and not by other metrics such as those inhabitants' voting status or voting strength, property ownership, or personal ties and political interests. 136 S. Ct. at 1128-29, 1131. Plaintiffs ignore that holding and the extensive constitutional history upon which it is based.

Instead, Plaintiffs argue that a state's compliance with one person, one vote should be measured not by an objective count of the number of people who live and sleep in each district, but by subjective and case-by-case assessments about whether each individual has a sufficiently close and lasting personal connection to the district such that they can be deemed an "actual" constituent thereof, and whether each legislator actually provides "fair and effective" representation to all of those constituents. There is nothing in the text of the Constitution or in the caselaw interpreting it that even arguably supports such an amorphous and undefined legal standard.

In fact, the sole basis for Plaintiffs' claimed standard is the Supreme Court's passing use of the phrase "effective representation" in *Evenwel* and *Gaffney*, a phrase that Plaintiffs repeatedly pluck from the Court's opinions with no explanation or analysis. *See* Dist. Ct. Dkt. No. 21 at 9, 13, 14, 15, 16, 19, 21, citing *Evenwel*, 136 S.Ct. at 1132 and *Gaffney*, 412 U.S. at 749. When read in context, the Court's use of that phrase demonstrates that "effective representation" ***is not*** the legal standard by which compliance with one person, one vote should be measured. Rather, it is the "goal" and "basic aim" that the objective and quantitative "numbers of people" standard seeks to achieve.

Specifically, in *Gaffney* the Court addressed the question of whether "minor deviations from mathematical [population] equality" are sufficient to make out a prima facie case of discrimination under one person, one vote. 412 U.S. at 745. In concluding that they are not, the Supreme Court acknowledged that "effective representation" is the "basic aim" of legislative redistricting. *Id.* at 748-49. But it went on to expressly distinguish between that "goal" and the legal "standard" by which its attainment should be measured. *Id.* (stating that the "goal of fair and effective representation" should not be furthered "by making

the standards [for its achievement too] difficult to satisfy"). The legal ***standard*** that the Court used to measure compliance with the rule focused exclusively on numbers of people, and nothing else. *Gaffney*, 412 U.S. at 750-51; *accord Evenwel*, 136 S.Ct. at 1132.

To the extent that Plaintiffs rely on the Court's statement that the goal of effective representation should not be achieved through an "overemphasis on raw population figures," that does not help them. Dist. Ct. Dkt. No. 21 at 13-14, citing *Gaffney*, 412 U.S. at 749. To the contrary, that statement again refutes their claim when read in context.

Specifically, the Court stated that an "overemphasis on raw population figures" is not appropriate for the specific reason that "perfect census-population equality" is not required. *Gaffney*, 412 U.S. at 748-49. The Court's only point was to make clear that states have discretion to consider other "important interests" in addition to the "raw population figures," that one person, one vote does not require "displacement" of that "otherwise appropriate state decisionmaking," and that states should be given leeway to deviate from "perfect census-population equality" in order to accommodate the discretion that states are entitled to when designing their legislative maps. *Id.*

In other words, far from supporting the removal of legislative discretion that Plaintiffs request, the Court intended to ***enhance*** that discretion and to reinforce that federal courts ***should not*** get "bogged down" in these "political thicket[s]" and "intractable apportionment slough[s]." *Id.* at 749-50. As discussed above, *Burns* makes that point even more explicitly with regard to the question about how to count unique population groups like prisoners and other temporary residents.

Plaintiffs' reliance on *Evenwel* fairs no better. *Evenwel* used the phrase "effective representation" only twice, the first time to reinforce the statement in *Gaffney* discussed above; namely, that the "goal" of one person, one vote is to achieve effective representation, but the "standard" for measuring compliance is "total population alone." *Evenwel*, 136 S.Ct. at 1132, citing *Gaffney*, 412 U.S. at 750. Again, that objective and quantitative standard squarely conflicts with the subjective and qualitative standard that Plaintiffs espouse.

Evenwel's other reference to the phrase occurred at the very end of the opinion, where the Court stated in passing that using total population "promotes equitable and effective representation" by "ensuring that each representative is subject to requests and

suggestions from the same number of constituents." 136 S. Ct. at 1132. But that is just an example of how the standard promotes the goal. It does not in any way suggest that the Court intended—at the end of its opinion and with no explanation or analysis—to create an entirely new and undefined legal standard that bears no relation to the objective and quantitative standard that the Court adopted throughout the rest of its opinion.

2. Plaintiffs' Standard Is Unworkable And Requires Exactly The Kind Of Political Judgments About The Nature Of Representation That Burns *And Its Progeny Prohibit*

As previously discussed, *Evenwel's* "numbers of inhabitants" standard is an objective and manageable standard that states easily can follow, and it properly recognizes the "discretion" and "latitude" that states are entitled to in this area. *Cranston*, 837 F.3d at 143. Plaintiffs' proposed "effective representation" standard is the exact opposite. That standard would require federal courts to substitute their judgment for that of the legislature and make subjective and fact intensive judgments about what types and levels of political interest are sufficient to make somebody an "actual" constituent of a district, the extent to which individuals have those interests and express them to their

legislator, and whether particular legislators are sufficiently responsive such that their representation can be deemed "fair and effective" as a constitutional matter. There are no judicially manageable standards to enforce such a rule, and any standards that do exist depend on exactly the kind of judgments about the nature of representation that *Burns* expressly prohibits. These are yet more reasons why Plaintiffs' have not alleged a substantial federal claim as a matter of law.

Specifically, relying on *Evenwel's* passing statement that using total population promotes "effective representation" by "ensuring that each representative is subject to requests and suggestions from the same number of constituents," Plaintiffs claim that prisoners do not meet this purported standard because they do not have a stake in some local policy debates and do not contact the legislators in those districts, who allegedly do not represent prisoners in practice. *See* Dist. Ct. Dkt. No. 21 at 9, 15-19, 21. To support that argument, Plaintiffs cherry pick certain local issues that prisoners allegedly have no interest in, most notably the schools. *See id.* at 16-17.

But for every local issue that prisoners allegedly have no stake in, there are countless policy debates—local and statewide—that prisoners unquestionably do have a stake in, and about which they can contact the legislators in the district where they are incarcerated if they wish.

For example, prisoners certainly have a strong interest in state and local issues that affect their incarceration. That includes issues related to prison conditions and prison reform, criminal justice reform, Department of Corrections staffing and policy, emergency services that respond to correctional facilities such as the State Police and local fire departments, health services provided in the facility, and the local water and sewer system upon which the facilities rely. Similarly, even if prisoners themselves do not use local amenities and infrastructure outside the facility, friends and family who visit the facility can and do use them. Prisoners therefore have an interest in ensuring that those amenities and infrastructure exist and are maintained. Legislators in the districts where correctional facilities are located are uniquely situated to be responsive to all of these concerns.

Further, putting aside these and other local issues, there are countless statewide issues that prisoners have just as much interest in as anybody else, including policy debates about things like the environment, taxes, healthcare, economic development, public benefits, and countless other statewide issues that prisoners may be concerned about both during and after their incarceration. Regardless of whether they choose to do so, prisoners are free to contact legislators in the district where they are incarcerated to discuss those issues. *See, e.g.*, *Evenwel*, 136 S. Ct. at 1132 ("representatives serve all residents, not just those eligible or registered to vote").

In claiming that prisoners do not receive "effective representation" because they have a stake in some of these policy debates but not others, Plaintiffs necessarily ask the courts to make subjective and inherently political judgments about which types and levels of political interest are important enough to count for constitutional purposes, and to make fact-intensive assessments about whether and to what extent specific individuals actually have those interests and choose to express them through requests and suggestions to their legislators. Plaintiffs provide no coherent explanation about how the courts could be expected

to make those kinds of case-by-case inquiries and assessments. And they cannot plausibly do so, as those are exactly the kinds of "political thicket[s]" involving questions about the "nature of representation" that federal courts simply have "no constitutionally founded reason to interfere" with. *Burns*, 384 U.S. at 92; *Gaffney*, 412 U.S. at 749-50.

That is especially true given that Plaintiffs' proposed standard is not limited to just prisoners. Indeed, if prisoners' alleged lack of interest in some local policy debates means they cannot be counted in the district despite the fact that they live and sleep there, that would mean that federal courts would have to make the same subjective, fact-intensive and case-by-case assessments about every other kind of temporary resident, such as college students, military personnel, individuals residing in mental health facilities, nursing homes or other long-term healthcare facilities, transient workers, migrants, and individuals residing in the district on temporary immigrant visas.

Further, if an individual's lack of interest in some local policy debates is enough to require their exclusion from the district, that means that federal courts would have to make the same assessments about other people who permanently live and sleep in the district but

who do not feel a close personal connection to it, are not politically active, do not use certain cherry-picked services, or who choose not to vote or make requests to their legislators. These inquiries that depend on "the extent of political activity" a person exhibits are precisely what the federal courts must avoid. *Burns*, 384 U.S. at 92.

Plaintiffs' complaint that some legislators do not visit or contact prisoners does not compel a different conclusion. *See* JA11, JA28, ¶¶ 5, 90. The possibility that legislators may ignore "requests and suggestions" from people in their district does not make those officials any less "subject to" those requests. *Evenwel*, 136 S. Ct. at 1132. Further, individuals have "no constitutional right to equal access to their elected representatives," and the Constitution plainly does not protect individuals from representatives who choose to ignore the inquiries they receive. *Id.* at 1132 n.14. Indeed, were it otherwise then ours would devolve into a system of government by litigation.

Nor is it an answer for Plaintiffs to suggest, as did the district court, that prisoners lack "effective representation" based on the erroneous assumption that prisoners are not residents of their prison location for purposes of voting. JA46, citing Conn. Gen. Stat. § 9-14.

First, and most importantly, *Evenwel* made absolutely clear that the "basis of representation" in this country is the "number of inhabitants" in each district, and "not voters" or voting status. 136 S. Ct. at 1127-29. Whether or where a person votes is therefore irrelevant to the constitutional analysis. Rather, as long as the person inhabits the district, it is appropriate to count the person there for redistricting purposes regardless of whether the person has the legal right to "participate in the selection" of the representative in the district. *Id.*

Second, it simply is not true that prisoners cannot become residents of the town where they are incarcerated for purposes of voting. Rather, § 9-14 provides that prisoners do not ***automatically*** lose their residence in another town for voting purposes, but provides that prisoners ***may*** become electors where they are incarcerated if they prove they are a "bona fide resident of [the] institution." Thus, if prisoners are or become eligible to vote and can satisfy that requirement, then they may vote where they are incarcerated if they wish to do so.

Ultimately, Plaintiffs ask the Court to impose an entirely new and unmanageable legal standard that no other court has adopted, to interfere with political judgments that properly are left to the legislature, and to invalidate an eight year old statewide legislative map, all based on a set of cherry-picked local issues that Plaintiffs claim prisoners have no interest in. The federal courts have neither the authority nor the competence to make the subjective and fact-intensive political judgments that are the basis for that extraordinary request.

C. Plaintiffs Do Not Allege Or Argue That The Legislature Acted With A Discriminatory Intent

Although Plaintiffs' claim is insubstantial for the reasons discussed above, the flaws in their claim are compounded by the fact that Plaintiffs do not even attempt to allege that the legislature acted with a discriminatory intent when it followed the longstanding and judicially approved practice of using facially neutral census data to measure the population of the state's legislative districts. That failure is dispositive in its own right, as discriminatory intent indisputably is a necessary element of every one person, one vote claim under the Equal Protection Clause. And even if it is not dispositive by itself, it certainly is dispositive when considered with the cases discussed above.

Specifically, one person, one vote claims are a type of discrimination claim under the Equal Protection Clause, and ***all*** claims under that constitutional provision require a showing of discriminatory intent. *Perez*, 138 S. Ct. at 2314, 2324-25; *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481-82 (1997); *Mobile v. Bolden,* 446 U.S. 55, 66-70 (1980). In the context of one person, one vote claims in particular, the courts have recognized two ways in which a challenger can make that showing.

First, under the 10% rule discussed above, if the challenger demonstrates that the population disparities between districts exceed 10% when measured by the legislature's chosen population base, that is treated as a prima facie showing of discriminatory intent that the government must rebut by providing a "satisfactory explanation" that the deviations were "grounded on acceptable state policy." *Brown*, 462 U.S. at 843.

Second, if any population disparities fall within the 10% threshold, then the map itself does not establish a prima facie case of discrimination, and the State has no obligation to justify it. *Harris*, 136 S. Ct. at 1306-07. To proceed in such cases, the challenger must allege

other facts that independently demonstrate that the legislature acted with a deliberate intent to discriminate against a particular group. *See, e.g., Perez*, 138 S. Ct. at 2314, 2324; *Mobile,* 446 U.S. at 66-70.

Plaintiffs have not alleged a discriminatory intent through either of these methods. Specifically, there is no dispute that Connecticut's map falls safely within the 10% threshold when measured by the facially neutral census data that the legislature actually relied upon, and Plaintiffs do not allege or argue otherwise. Plaintiffs also do not allege a single fact to independently demonstrate that the legislature deliberately acted with a discriminatory intent, either in its decision to rely on unmodified census data or in the manner that it drew the legislative map.[5] In the absence of such allegations, Plaintiffs have failed to allege a substantial federal claim as a matter of law.

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[5] Plaintiffs allege that factors unrelated to redistricting—including mass incarceration and the construction of new prisons in rural and primarily white districts—have resulted in a disparate impact on minority residents in urban districts. *See, e.g.,* JA18-JA22, ¶¶ 34-51, 71. But that is irrelevant, as disparate impact alone is not enough to establish a violation of the Equal Protection Clause. Rather, "[p]roof of racially discriminatory intent or purpose is required . . . ." *Reynolds v. Barrett*, 685 F.3d 193, 201 (2d Cir. 2012) (quotation marks omitted).

Plaintiffs seek to avoid that conclusion by arguing that the map exceeds the 10% threshold when measured by Plaintiffs' own preferred population base. That counterfactual claim fails for two reasons.

First, and most importantly, the legislature did not use Plaintiffs' preferred population base, the Constitution does not require it, and the courts have no constitutional authority to impose it for all of the reasons discussed above. It is therefore entirely irrelevant whether the map exceeds 10% when measured by Plaintiffs' preferred population base.

Second, even if the courts conclude that Plaintiffs' preferred population base is now constitutionally required, the fact that Connecticut's map exceeds 10% when measured by that new population base is not evidence that the legislature acted with a discriminatory intent when it designed the map more than eight years ago.

Specifically, the 10% rule is nothing more than a burden shifting tool that the Supreme Court has developed to assess whether a challenger has established a prima facie case of discriminatory intent. *Wright v. North Carolina*, 787 F.3d 256, 264 (4th Cir. 2015). Under that rule, when population disparities between districts exceed 10% when measured by the legislature's chosen population base, courts

presume that those discrepancies reflect a discriminatory intent and put the burden on the government to rebut that presumption by providing a "satisfactory explanation" that the deviations were "grounded on acceptable state policy." *Brown*, 462 U.S. at 843. Using the rule in that way makes sense if compliance is measured by the population base that the legislature actually used, because in that context any population disparities necessarily reflect what the legislature relied upon and intended when it designed the map.

By contrast, using the 10% rule as indicia of discriminatory intent makes no sense when compliance with the rule is measured by a different population baseline that the legislature did not use, that it had no reason to use given the decades of practice and precedents approving the population base it did use, and that a challenger seeks to unilaterally and retroactively impose more than eight years ***after*** the legislature designed the map at issue. Under such circumstances, any population disparities under the new formula by definition do not reflect what the legislature relied upon or intended when it designed the map, and therefore cannot be evidence of discriminatory intent.

Here, the legislature did not use Plaintiffs' preferred "prisoner district of origin" population base, and it had no reason to do so given that the use of unmodified census data was (and remains) the "constitutional default" that the Supreme Court expressly has held is "plainly permissible." *Evenwel*, 136 S.Ct at 1126; *Cranston*, 837 F.3d at 144. As a result, any violation of the 10% rule based on a retroactive application of an entirely different population base that Plaintiffs prefer is not evidence that the legislature acted with a discriminatory intent, and cannot be used as a basis for establishing a prima facie case of that basic element of Plaintiffs' claim. And because Plaintiffs do not allege any other facts to independently demonstrate that the legislature acted with a discriminatory intent—either in its reliance on census data or in the manner that it drew the legislative maps—as a matter of law Plaintiffs have failed to allege a substantial claim that Connecticut's map violates one person, one vote.

CONCLUSION

The Eleventh Amendment bars this case because Plaintiffs failed to allege a plausible or substantial claim that Connecticut's legislative map violates federal law for purposes of *Ex Parte Young*. The Court should therefore reverse the district court's order and remand to the district court with instructions to dismiss the case with prejudice.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 8,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

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CERTIFICATION OF SERVICE

I hereby certify that on this 13th day of May, 2019, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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