

LETTER IN OPPOSITION TO SENATE BILL 619

TO: Hon. Paul Pinsky, Chair, and Members of the Senate Education, Health, and Environmental Affairs Committee

FROM: Campaign Legal Center and the undersigned organizations and individuals

DATE: February 19, 2021

RE: Senate Bill 619 – Opposing the Reinstatement of Prison-Based Gerrymandering in Maryland

We write to you today to express our firm opposition to the reinstatement of prison-based gerrymandering in Maryland and to urge you to reject SB 619.

Prison-based gerrymandering distorts our democracy by counting incarcerated individuals where they are in prison rather than their legal residency for the purposes of redistricting. In systems that permit prison-based gerrymandering, elected officials in jurisdictions that house prisons “represent” large populations of people—disproportionately low-income, people of color—who have no connection to the area, who cannot vote there, and who have no friends, family, or community of interest that can advocate on their behalf. Prison-based gerrymandering also artificially inflates the voting power of districts with prisons, while disempowering communities where the incarcerated individuals lived before and where they will ultimately return. The damage this inflicts on impacted people and their communities is enduring and difficult to reverse. Because districts are drawn decennially, these skewed population counts are locked in place for the next decade.

Maryland has long led the fight against this unjust practice. With the passage of the No Representation Without Population Act, Maryland became the first state in the nation to abolish prison-based gerrymandering in 2010, and it should not go back on that decision today. After Maryland ended prison-based gerrymandering in 2010, California, Colorado, Delaware, Nevada, New Jersey, New York, Virginia, and Washington State soon followed.¹ Other states, such as Michigan and Tennessee, now prohibit or discourage local governments from engaging in prison-based gerrymandering.² And hundreds of county and municipal governments across the country have also rejected prison-based gerrymandering.³ Maryland should not repeal its own law and slow the momentum of the movement it began.

The No Representation Without Population Act is just as vital for democracy today as it was in 2010. There are approximately 23,500 people in state and federal prisons in Maryland.⁴ The vast majority of these individuals are incarcerated in rural or suburban communities, which are often many miles away

¹ *Momentum Is Building to End Prison-Based Gerrymandering*, Prison Policy Initiative (2020), <https://www.prisonpolicy.org/graphs/momentum.html>.

² *Id.*

³ *Local Governments that Avoid Prison-Based Gerrymandering*, Prison Policy Initiative (Jan. 7, 2019), <https://www.prisonersofthecensus.org/local/>.

⁴ *Maryland Profile*, Prison Policy Initiative, (2018 data), <https://www.prisonpolicy.org/profiles/MD.html>. This figure excludes people incarcerated in local jails (approximately 11,000).

from their homes.⁵ Reverting back to prison-based gerrymandering would unjustly disempower urban communities and communities of color where these individuals are from, while compromising the overall accuracy of redistricting in Maryland.

First, reinstating prison-based gerrymandering would unjustly dilute the voting power of urban communities across the state. For instance, even though one-third of Maryland's incarcerated population is from Baltimore, 83% of the state's correctional facilities are located in rural or suburban communities outside of Baltimore.⁶ By contrast, 64% of the population of the First County Commission District in Somerset County was located in a large prison in 2010. "As a result, each resident in that district had 2.7 times as much influence as residents in other districts."⁷ Similarly, 18% of residents in County Commission District 2B were incarcerated in 2010, which "gave every four District 2B residents as much political influence as five residents elsewhere in the state."⁸ Repealing the No Representation Without Population Act would reinstate this unequal representation of urban communities that existed prior to 2010.

Second, repealing the No Representation Without Population Act would also disproportionately affect communities of color. There are significant racial disparities in Maryland's prisons: Black people make up 68% percent of Maryland's incarcerated population, even though they comprise only 29% percent of the total state population.⁹ Prior to 2010, many of Maryland's rural and suburban districts were built on Black "ghost voters," who counted towards the district's population for the purposes of redistricting, but could not vote due to their incarceration.¹⁰ This practice, in turn, denied many Black communities, where these individuals were from, fair representation. In many ways, these effects of prison-based gerrymandering harken back to the three-fifths compromise—abusing state power to disproportionately disenfranchise citizens of color and count them in a way that often inflates the power of predominantly white communities.¹¹ Maryland should not backslide into that dark history.

Third, reinstating prison-based gerrymandering would compromise the accuracy of the population count, and thus redistricting, in Maryland. Because the average length of time served in Maryland state

⁵ Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. MICH. J. L. REFORM, 179, 187 (2015) (citing *Correctional Facility Locator*, Md. Dep't of Pub. Safety & Corr. Servs., <http://www.dpscs.state.md.us/locations/prisons.shtml>).

⁶ *Id.* at 186-87 (citing *The Right Investment? Corrections Spending in Baltimore City*, Justice Policy Inst. & Prison Policy Initiative 2 (2015), http://www.justicepolicy.org/uploads/justicepolicy/documents/rightinvestment_design_2.23.15_final.pdf).

⁷ *Id.* at 187 (citing Peter Wagner & Olivia Cummings, *Importing Constituents: Incarcerated People & Political Clout in Maryland*, Prison Gerrymandering Project, Prison Policy Initiative (Mar. 4, 2010), <http://www.prisonersofthecensus.org/md/report.html>; *Ending Prison-Based Gerrymandering Would Aid the African-American Vote in Maryland*, Prison Policy Initiative (2010), <https://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf>).

⁸ *Id.* (citing *Ending Prison-Based Gerrymandering Would Aid the African-American Vote in Maryland*, Prison Policy Initiative (2010), <https://www.prisonersofthecensus.org/factsheets/md/africanamericans.pdf>).

⁹ *Maryland Profile*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/MD.html>.

¹⁰ Garima Malhotra, *Maryland Ends Prison-Based Gerrymandering*, Brennan Ctr. (May 4, 2010), <https://www.brennancenter.org/our-work/analysis-opinion/maryland-ends-prison-based-gerrymandering>.

¹¹ See Andrew Marantz, *The Five-Fifths Clause*, Slate (Nov. 6, 2006), <https://slate.com/news-and-politics/2006/11/how-we-count-and-use-our-prisoners.html>; John C. Drake, *Locked Up and Counted Out: Bringing an End to Prison-based Gerrymandering*, 37 WASH. U. J. L. & POLICY 237, 238 (2011).

prisons is 2.5 years,¹² it makes no sense to count incarcerated individuals where they are in prison for the purposes of redistricting—which lasts an entire decade.

Even beyond these compelling substantive reasons for rejecting SB 619, a last-minute repeal of the No Representation Without Population Act would introduce unnecessary confusion into an already difficult redistricting cycle. Because of COVID-19 and unprecedented challenges in the 2020 Census, Maryland must circumvent new challenges that come with delayed releases of census data. Maryland’s existing process for apportionment has been tested and proven to work. In 2012, the U.S. Supreme Court affirmed Maryland’s authority to count incarcerated individuals at their previous known address for the purposes of redistricting under the No Representation Without Population Act.¹³ Maryland’s process for counting incarcerated people at their last known address also worked effectively in the 2010 redistricting cycle.¹⁴ There is no need to make last-minute changes to this lawful and administrable system.

Abolishing prison-based gerrymandering also has broad-based popular support. Over 99% of the comments from the public on the 2020 Census supported counting prisoners at their last known residence: “Of the 77,887 comments pertaining to [where] prisoners [are to be counted], 77,863 suggested that prisoners should be counted at their home or pre-incarceration address.”¹⁵

A decade ago, this legislature took bold action to uphold the principle of equal representation that lies at the heart of our democratic system. It chose to count incarcerated individuals where they should be counted—at their legal residence. And, by doing so, it corrected the distortion of representative power that disempowered urban communities and communities of color and undermined the accuracy of Maryland’s decennial redistricting. This legislature should not erase that progress. For these reasons, we urge the Maryland legislature to reject SB 619.

Respectfully submitted,

Campaign Legal Center

The following organizations and individuals join the Campaign Legal Center in opposing SB 619:

1. Job Opportunities Task Force
2. Out For Justice
3. Common Cause MD
4. Maryland League of Conservation Voters
5. ACLU
6. Center for Urban Families
7. H.O.P.E Baltimore
8. Reimagine Youth Justice Coalition
9. Rosalie A.Dance
10. Aging People
11. Men of JCI Maryland Correctional Facility

¹² Wood, *supra* note 5, at 187.

¹³ Fletcher v. Lamone, 831 F. Supp. 2d 887, 891 (D. Md. 2011), *aff’d*, 567 U.S. 930 (2012).

¹⁴ Wood, *supra* note 5, at 193.

¹⁵ See <https://www.federalregister.gov/documents/2018/02/08/2018-02370/final-2020-census-residence-criteria-and-residence-situations>.