



## Testimony to the Montana Districting and Apportionment Commission in Support of Ending Prison Gerrymandering Using Reallocation

July 9, 2021

Thank you for the opportunity to submit testimony on this important topic today. My name is Dana Paikowsky, and I am testifying on behalf of the Campaign Legal Center in support of this Commission’s efforts to end prison gerrymandering in Montana using a reallocation approach.

Campaign Legal Center is a nonprofit, nonpartisan organization dedicated to protecting and strengthening the democratic process through the practice of law. CLC has participated in major redistricting and voting rights cases before the U.S. Supreme Court and federal and state courts across the country. CLC has also leveraged its expertise in these two areas to build a nationally recognized practice focusing on protecting the democratic rights of justice-involved individuals and justice-impacted communities nationwide.

Prison gerrymandering distorts our democracy by counting incarcerated individuals as residents of their prisons rather than as part of their home communities for the purposes of redistricting. Under electoral maps that engage in prison gerrymandering, elected officials in jurisdictions that house prisons “represent” large populations of people who have no connection to the area, who cannot vote there, who have no shared history or common political community there, and who have no friends, family, or community of interest that can advocate on their behalf. Because Native Americans are overrepresented in Montana’s prisons, prison gerrymandering disproportionately erodes the political power of Native voters in Montana and their communities.<sup>1</sup>

Reallocation is the most effective method for correcting the harms of prison gerrymandering, and we believe it is well within reach for this decade’s state legislative redistricting process.

Because some of the Commission’s implementation concerns are logistical or technical in nature, it is worthwhile to spell out what the process of reallocation looks like in real terms. At a high level, reallocation proceeds in three parts. First, a state must marshal data that identifies where incarcerated people were counted by the Census Bureau and their pre-incarceration addresses. Next, these pre-incarceration addresses must be “geo-coded,” allowing them to be mapped and entered into the software used in redistricting. Finally, once the geo-coded data is prepared, the state must make the necessary adjustments to the redistricting data it receives from the Census Bureau—subtracting population count from places where there are prisons and reallocating incarcerated people back to

---

<sup>1</sup> Arren Kimbel-Sannit, *Prison gerrymandering could impact Indian Country voters in Montana*, Great Falls Tribune (June 17, 2021) <https://www.greatfallstribune.com/story/news/2021/06/17/prison-gerrymandering-could-impact-indian-country-voters-montana/7729338002/>.

their home jurisdictions. After the process is complete, the corrected dataset is loaded into redistricting software and maps can be built on top of it that do not include prison distortions.

It is not necessary (and often not possible) for states to implement a “complete” reallocation, where 100% of the prison population is reassigned to their pre-incarceration home communities. This is because the pre-incarceration address data can be incomplete, incompatible with census data, or otherwise imperfect for the purpose of geo-coding. This problem, though, is not disqualifying. Both Maryland and New York—the only two states to undertake reallocation in 2010—encountered these issues, utilized different methods to address geocoding issues, and achieved a final reallocation rate between 70-80%.<sup>2</sup> And both of these reallocation schemes have since withstood legal challenge.<sup>3</sup>

Ending prison gerrymandering through reallocation also has support in law. The U.S. Court of Appeals for the Ninth Circuit, for example, has noted that “[i]f the State knows that the census data is underrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process.” *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992). In *Fletcher v Lamone*—a case evaluating the constitutionality of Maryland’s reallocation method—the court held that a state could “choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion.” 831 F. Supp. 2d 887, 894-95 (D. Md. 2011), *aff’d*, 567 U.S. 930 (2012).

Rather than focusing on the need for technical perfection in reallocation, Montana can and should focus on the easier task of developing the standardized, clear process for data correction that the Constitution demands. The resources to develop a constitutionally compliant correction process are readily available. Since 2010, New York, Maryland, and many other states have developed new infrastructure to implement their reallocation schemes, which has created a wealth of information and approaches for Montana to draw from.<sup>4</sup> Virginia has undertaken to implement its reallocation scheme in a span of just 30 days. Va. Code § 24.2-314. Non-profit organizations and others are also increasingly making resources and trainings available to individuals with core competencies to ensure they are ready to undertake this process for the first time.

The task of implementing reallocation becomes all the more feasible if the Commission focuses its efforts on reallocation for the purposes of drawing the state legislative maps, rather than trying to perfect it in time for federal congressional redistricting. This approach is sensible not only because the state legislative maps are those most affected by prison distortions, but also because the longer timeline for state legislative redistricting will allow the state more time to resolve any challenges that may arise.

The time to act is now. Even if its process does not yield a perfect or even preferable reallocation rate, Montana can and should implement this reform for this cycle’s state legislative redistricting. By doing so, Montana will not only correct for at least some prison-based distortions, it will also lay a foundation for better representation that it can build upon in 2030 and beyond.

---

<sup>2</sup> Erica L. Wood, *Implementing Reform: How Maryland & New York Ended Prison Gerrymandering*, Demos (2014) <https://www.demos.org/sites/default/files/publications/implementingreform.pdf>.

<sup>3</sup> *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 894–95 (D. Md. 2011), *aff’d*, 567 U.S. 930 (2012);

<sup>4</sup> The Editorial Board, *You’ve Heard About Gerrymandering. What Happens When It Involves Prisons?*, New York Times (April 11, 2021) <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html>.