

**BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF
PETITION CHALLENGING FELONY DISENFRANCHISEMENT LAWS IN THE
UNITED STATES**

CASE NO. P-990-06

**INTER-AMERICAN COMMISSION ON
HUMAN RIGHTS**

ONE-HUNDRED EIGHTY-THIRD PERIOD OF SESSIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE1

SUMMARY OF THE ARGUMENT2

ARGUMENT4

 I. “Prison Gerrymandering” Contributes to Disproportionate, Unequal Political Representation in the United States4

 A. Decennial Apportionment, Redistricting, and the Practice of Prison Gerrymandering5

 1. The Usual Residence Rule6

 2. The Scope of Prison Gerrymandering.....7

 B. Prison Gerrymandering, like felony disenfranchisement, is part of a long history of states using the criminal legal system to circumvent the promise of racial and political equality.....11

 1. Reconstruction and Jim Crow11

 2. The “War on Crime”12

 3. “The New Jim Crow”13

 C. The majority of incarcerated people are still legally or logistically unable to vote and thus cannot participate in the selection of representatives14

 D. Prison Gerrymandering facilitates partisan gerrymandering16

 E. The incarcerated population is generally not part of the community where they are imprisoned and are not fairly represented by elected officials in those districts18

 II. It Is Urgent for the IACHR to Condemn Prison Gerrymandering Because Efforts to Curb It through the Courts and Political Processes Have Largely Fallen Short.....19

 A. Administrative Advocacy19

 B. State-Level Legislation21

 C. Federal Legislation.....22

 D. Challenges in the Courts23

CONCLUSION.....24

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Calvin v. Jefferson County Board of Commissioners</i> , 172 F. Supp. 3d 1292 (N.D. Fla. 2016).....	24
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INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization founded in 2002 in Washington, DC. CLC advances democracy through law at the federal, state and local levels, fighting for every American’s right to responsive government and a fair opportunity to participate in and affect the democratic process. CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive and accountable government.

Since its inception, CLC has litigated or been involved in approximately 100 cases regarding voting rights, gerrymandering, and campaign finance and disclosure laws. Through this work, CLC seeks to strengthen the democratic process across all levels of government. CLC does not favor one of the nation’s political parties over any other party or unaffiliated voters. CLC’s mission is focused on—and its expertise is built on—laws, rules, and regulations affecting accountability in democratic institutions.

CLC believes that democracy works best when our voting maps are fairly drawn on a nonpartisan basis to ensure that Americans can participate meaningfully in the election of their representatives. Unfortunately, incumbents often rig the system to benefit themselves, their party, and special interest supporters by manipulating voting maps to dictate the outcome of elections. The result is dysfunction, mistrust, and public policies that ignore the will of the people. CLC regularly fights two common sources of discrimination in voting maps: partisan gerrymandering and electoral systems that under-represent people of color. CLC advances and supports legal cases that challenge discriminatory district maps, is on the front lines in the fight for fair redistricting practices in the states, and continues to promote voters’ rights to fair districts nationwide.

CLC also believes that our democracy works best when all citizens can vote without barriers. However, the estimated more than 70 million Americans who have had contact with the criminal legal system often face unique legal and logistical roadblocks to registering to vote, casting a ballot, and enjoying equal representation in government. Felony disenfranchisement practices prevent Black, Latino, Asian and Native American people and poor communities, who are disproportionately targeted by the criminal justice system, from making their voices heard through the political process. CLC's Restore Your Vote Program focuses on fighting the *de facto* and *de jure* disenfranchisement of the more than twenty-four million Americans with felony convictions. Likewise, our jail voting work seeks to make the right to vote accessible to incarcerated people who retain that right on paper, but are nonetheless rarely allowed to exercise it. Our experts in justice-involved voting rights work hand-in-hand with our fair redistricting experts to fight against the practice of prison gerrymandering, which compounds the harms of felony disenfranchisement by using displaced and politically silenced incarcerated populations to distort political power.

SUMMARY OF THE ARGUMENT

CLC supports the petition before the Inter-American Court of Human Rights (IACHR) to condemn the United States' practice of felony disenfranchisement. It presents this friend-of-the-court brief to illuminate and explain how the practice of prison gerrymandering exacerbates felony disenfranchisement's violations of international guarantees of democratic representation, political freedom, and equality. Indeed, the practice of prison gerrymandering is a distinct violation of those norms, which the IACHR should denounce in its own right.

The United States Census Bureau conducts a decennial census, the results of which are utilized to apportion legislative representation among the States and draw new districts for state

legislative and Congressional elections. In conducting that census, the Bureau counts prisoners where they are incarcerated rather than in their home communities; thus, the populations and corresponding representation of districts that contain prisons are artificially inflated while the home districts of incarcerated populations are undercounted. This practice—commonly called prison gerrymandering—contributes to disproportionate and unequal political representation for four reasons.

First, prison gerrymandering, like felony disenfranchisement, is part of a long history of states using the criminal legal system to circumvent the promise of political equality for Americans of color. Second, the majority of incarcerated people are legally or logistically unable to vote and thus cannot participate in the selection of representatives; thus, their inclusion in the population count in districts containing prisons serves only to increase the political power of non-incarcerated residents in those districts. Third, prison gerrymandering facilitates partisan gerrymandering, an interminable scourge on American democracy. Fourth and finally, much of the incarcerated population comes from communities far from the prisons where they are held. As such, incarcerated persons are not meaningfully represented by the officials elected by those communities.

It is urgent that the IACHR condemn prison gerrymandering now because efforts to curb it through the courts and political processes have largely fallen short.

Prison gerrymandering violates the internationally recognized political rights of incarcerated people and their home communities. The IACHR should consider how prison gerrymandering and felony disenfranchisement work together to strip individuals and their communities of their political rights and violate the promise of equal justice under law regardless

of race. International condemnation of both practices can provide a catalyst for the United States to finally end them and to honor its commitments to universal human rights.

ARGUMENT

I. “PRISON GERRYMANDERING” CONTRIBUTES TO DISPROPORTIONATE, UNEQUAL POLITICAL REPRESENTATION IN THE UNITED STATES

In the decennial census, the United States Census Bureau (the “Bureau”) counts prisoners where they are incarcerated rather than in their home communities.¹ Because U.S. states use that census data to redraw their legislative and congressional districts to equalize population across districts, the populations and corresponding representation of districts that contain prisons are artificially inflated relative to those jurisdictions that do not contain prisons. This practice is commonly called “prison gerrymandering” and it contributes to disproportionate, unequal political representation for four reasons.

First, prison gerrymandering, like felony disenfranchisement, is part of a long history of states using the criminal legal system to circumvent the promise of political equality for Americans of color. Second, the majority of incarcerated people are legally or logistically unable to vote and therefore cannot participate in the selection of representatives; thus, their inclusion in the population count in districts containing prisons serves only to increase the political power of non-incarcerated residents in those districts. Third, prison gerrymandering facilitates partisan gerrymandering, an interminable scourge on American democracy. Fourth and finally, much of the incarcerated population comes from communities far from the prisons where they are held. As

¹ In recent years the Census Bureau has provided data to the states, upon request, that corrects for prison gerrymandering, but most states continue to use data counting people where they are incarcerated. *See infra*, II.F.

such, incarcerated persons are not meaningfully represented by the officials elected by those communities.

A. Decennial Apportionment, Redistricting, and the Practice of Prison Gerrymandering

Every 10 years, the United States Census Bureau counts every resident in the country. The data generated by the census determines the number of seats each state has in the U.S. House of Representatives (the “House”), one of two legislative bodies in the U.S. Congress. The House has a fixed number of 435 voting members.² In a process called apportionment, each state is assigned a specific number of those 435 seats proportional to its population size.³ For example, following the 2020 Census, California, the most populous state in the United States, was apportioned 52 seats in the House.⁴ States with the lowest population counts only have one seat in the House.⁵ In short, political representation for one body of Congress is based on the population count conducted by the Census Bureau.

To elect U.S. Representatives, states are divided into single-member congressional districts. Pursuant to the Supreme Court’s longstanding “one person, one vote” jurisprudence, these districts must contain equal populations or residents.⁶ Each eligible voter may participate in electing a representative from the district in which they reside. Additionally, legislative districts of roughly equal population are similarly drawn within each state for the purpose of electing

² Non-voting members include the members representing the District of Columbia, Puerto Rico, and U.S. territories.

³ See *About Congressional Apportionment*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/public-sector/congressional-apportionment/about.html>.

⁴ California currently has 53 seats in the House, but due to population changes, this number will change to 52 in the next Congress. Kathleen Ronayne, *California Losing Congressional Seat for First Time*, ASSOCIATED PRESS (Apr. 26, 2021), <https://apnews.com/article/census-2020-government-and-politics-california-dd4a4f3ce3070231b0aecdc1cac3e97b>.

⁵ Currently, these states include Alaska, Wyoming, Montana, North Dakota, Vermont, and Delaware.

⁶ *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

officials to the state legislature.⁷ Despite the principle of “one person, one vote,” representation can still be manipulated by redistricting. Through a process known as “gerrymandering,” district lines are often drawn strategically based on racial or partisan demographics to make winning election easier—or at times, even guaranteed—for one party’s candidate or incumbent legislator.⁸ As explained below, prison gerrymandering is an additional tool in a gerrymanderer’s toolbox to undermine equal political representation.

1. The Usual Residence Rule

Because political representation relies on population numbers, how and where persons are counted based on residence is crucial. Depending on where district lines are drawn, certain communities—with certain political leanings—may benefit from an influx of population that artificially inflates their representation in government.

The United States Census Bureau counts people according to their “usual residence.”⁹ In 1790, the Census Act specified that people should be counted according to their “usual place of abode,”¹⁰ which the Bureau has interpreted to mean where people live and sleep most of the time.¹¹ In the case of incarcerated persons, the Bureau counts these individuals in the districts where they are incarcerated—not their home addresses. Accordingly, incarcerated people are not counted in

⁷ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

⁸ See Michael Wines, *What Is Gerrymandering? And How Does It Work?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/gerrymander-explainer.html> (explaining the process of partisan gerrymandering).

⁹ *Residence Criteria and Residence Situations for the 2020 Census of the United States*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf>.

¹⁰ Census Act of 1790, ch. 2, § 5, 1 Stat. 101, 103, https://www.census.gov/history/pdf/1790_Census_Act.pdf.

¹¹ *Id.*

their home districts but rather wherever the government chooses to confine them during their sentences.

As American society has become more mobile, the “usual residence” rule has been tested.¹² Certain classes of people are prone to having different areas of usual residence: students, members of the military, individuals who are institutionalized for medical or other reasons, and individuals who are incarcerated. In its definition of “group quarters,” the Bureau has tailored the usual residence rule to account for some of these nuances. In 1950, the Bureau began counting students at their school residences.¹³ On the other hand, in 1990, the Bureau began allowing federal workers located overseas to use their “home of record.”¹⁴ But the Census Bureau has not made appropriate adjustments for incarcerated people. Incarcerated people are more akin to federal workers than students in that they are best represented at their long-term home address rather than where they currently sleep. Indeed, they have been deliberately and non-consensually placed in prisons away from their home districts.¹⁵ Like federal workers abroad, most people who are incarcerated will return to their home communities. Unlike students, people who are incarcerated do not have the liberty to freely participate in the communities where they live and sleep most of the time. Nonetheless, the Census Bureau continues to count incarcerated individuals as “residing” in the district of their prison.

¹² David Hamsher, *Counted out Twice—Power, Representation & the “Usual Residence Rule” in the Enumeration of Prisoners: A State-based Approach to Correcting Flawed Census Data*, 96 J. CRIM. L. & CRIMINOLOGY 299, 307 (2006). See also Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 FORDHAM URB. L.J. 323, 339-47 (2018).

¹³ *Id.* at 307.

¹⁴ *Id.*

¹⁵ Ebenstein, *supra* note 12, at 339.

2. The Scope of Prison Gerrymandering

Prison gerrymandering is the practice of drawing districts using the raw Census data counting incarcerated people in the districts where they are incarcerated rather than in the districts where they are from.¹⁶ This practice inflates the population count in areas where prisons are built at the expense of communities where incarcerated persons reside prior to their confinement, and therefore distorts democracy. To make matters worse, the United States incarcerates the most people in the world,¹⁷ which means the decision of how to count the prison population makes a considerable difference in the data reported by the Census.

Because of mass incarceration in the United States, the effect of prison gerrymandering on political representation is substantial. One metric puts this point into perspective: “in 10 states, the incarcerated population is large enough to account for 1 or more [state] legislative districts.”¹⁸ Put differently, if the incarcerated populations in those states were compiled into one district, they could elect their own representative to the legislature.¹⁹

Prison gerrymandering matters because states typically incarcerate individuals far from their home residences. In Texas, for example, the majority of people incarcerated in state prisons were arrested in Harris or Dallas counties, but those counties hold no more than 2 percent of Texas’s state incarcerated population.²⁰ At the same time, Anderson County holds the most state

¹⁶ For advocacy efforts, data, and problem definition, see *Prison Gerrymandering Project*, PRISON POLICY INITIATIVE, <https://www.prisonersofthecensus.org>.

¹⁷ See *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (“The United States is the world’s leader in incarceration.”).

¹⁸ *Prison Gerrymandering: Political Power and Prisons*, TABLEAU, <https://www.tableau.com/foundation/data-equity/prison-gerrymandering>.

¹⁹ These states are Georgia, Texas, Mississippi, Louisiana, South Carolina, Oklahoma, Florida, Missouri, Pennsylvania, New Hampshire. *Id.*

²⁰ Joaquin Gonzalez, et al., *Prison Gerrymandering Report*, TEX. C.R. PROJECT 5 (2021), https://txcivilrights.org/wp-content/uploads/2021/04/Prison_Gerrymandering_Report.pdf.

prisoners, while less than 1 percent of its residential population is incarcerated.²¹ Thus, Anderson County’s population is artificially inflated for purposes of legislative apportionment by the presence of incarcerated individuals from other counties. This imbalance often has a predictable outcome; as the Texas Civil Rights Project concluded, “certain rural counties are significantly overcounted, other rural counties are ignored, and urban areas are undercounted.”²²

In Pennsylvania, one study analyzed not just the influx of population to districts with prisons, but also the deleterious effects on home districts, as well.²³ The study shows that “the location of prisons and jails shifts representation toward [w]hite populations and away from Black and Latino communities.”²⁴ This results not just in representational inequality, but also in vote inequality—whereby a white person’s vote is stronger due to the presence of prisons. The authors concluded that “prisons artificially inflate majority [w]hite districts’ populations while shrinking the average Black and Latino vote.”²⁵ Specifically, the authors found that over 100,000 Black residents in Pennsylvania are not equally represented in the legislature.²⁶ If incarcerated people were counted in their home legislative districts, at least four districts, three of which are located in Philadelphia, would become overpopulated relative to other districts in the state, in violation of the “one person, one vote” standard established by the United States Supreme Court.²⁷ And Philadelphia is not the only major city to lose its population (and thus representation) to faraway prisons; in Illinois, nearly half of those incarcerated in state prisons are from Chicago, but around

²¹ *Id.*

²² *Id.*

²³ Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REV. 417, 422 (2018).

²⁴ *Id.* at 428.

²⁵ *Id.* at 432.

²⁶ *Id.*

²⁷ *Id.*

90 percent are counted as residents of other, more rural parts of the state due to their confinement in downstate prisons.²⁸

Meanwhile, non-urban districts have become heavily populated with incarcerated people—so much so that some legislative districts would be wholly reformulated absent the prison population. For example, in Granville and Lumberton counties in North Carolina, incarcerated people make up more than 40 percent of the population.²⁹ Other places like Anamosa, Iowa—where Iowa’s largest prison formed 96 percent of Anamosa’s second ward—are even more extreme.³⁰ After receiving new data from the census, some counties in Wisconsin drew districts that were approximately 80 percent comprised of incarcerated people.³¹ Moreover, seven state senate districts in New York drawn after the 2000 Census met the minimum population threshold “only because they use prison populations as padding.”³²

Because of the size of the prison population in the U.S., the scope of prison gerrymandering is substantial. As explained below, this meaningfully distorts our democracy, subverting the promises of fair representation and racial and political equality.

B. Prison Gerrymandering, like felony disenfranchisement, is part of a long history of states using the criminal legal system to circumvent the promise of racial and political equality.

Prison gerrymandering, like felony disenfranchisement, is part of a long history of U.S. states using the criminal legal system to circumvent the promise of political equality for

²⁸ Sanya Mansoor & Madeleine Carlisle, *When Your Body Counts But Your Vote Does Not: How Prison Gerrymandering Distorts Political Representation*, TIME (July 1, 2021), <https://time.com/6077245/prison-gerrymandering-political-representation/>.

²⁹ *Id.*

³⁰ Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WILLIAM MITCHELL L. REV. 1241, 1245 (2012). This composition ended up granting some residents “twenty-five times as much political influence as other voters.” *Id.*

³¹ *Id.*

³² *Id.* at 1243.

Americans of color. It continues to have a disproportionate disempowering effect on Americans of color today.

1. Reconstruction and Jim Crow

Since the post-Civil War Reconstruction era, American states have used the criminal legal system to disenfranchise people of color and uphold white supremacy. In the Reconstruction Era (1865-1877), the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution were enacted to establish civil and political equality for Black Americans. However, the freedoms granted during the Reconstruction Era were not extended to all Americans. For example, the Thirteenth Amendment abolished slavery and involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted.”³³ This caveat allowed states to criminalize conduct targeting Black Americans and force them back into slavery—this time, in the form of incarceration. And the Fourteenth and Fifteenth Amendments, which recognized equal citizenship and protection under the law, lacked proper enforcement generally and also contained loopholes.³⁴ For example, the Fourteenth Amendment allowed states to deny the right to vote for “participation in rebellion, or other crime.”³⁵

In the post-Reconstruction era, states leveraged these loopholes to disenfranchise Black Americans. Disenfranchisement of people with criminal backgrounds was not a major phenomenon until the end of the Civil War, when the formal institution of slavery was ended and citizenship and suffrage were expanded to Black men.³⁶ In a concerted effort to prevent Black

³³ U.S. CONST. amend. XIII.

³⁴ Ebenstein, *supra* note 12, at 332.

³⁵ U.S. CONST. amend. XIV; *see also id.*

³⁶ Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. 1 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disfranchisement_History.pdf.

voters from gaining political freedom, some states—particularly those that had been part of the Confederacy during the Civil War—employed several methods to severely curtail access to voting. Those states pushed two simultaneous agendas that disenfranchised Black voters: first, they enacted discriminatory criminal laws that targeted Black citizens, and, second, they revoked voting rights for anyone convicted of those crimes.³⁷ These “Black Codes”—colloquially known as “Jim Crow” laws—criminalized basic aspects of the lives of Black Americans.³⁸ Simultaneously, between 1865 and 1880, more than a third of the country enacted broad felony disenfranchisement laws.³⁹ Taken together, these efforts led to mass disenfranchisement that persists today and disproportionately affects Black Americans.

2. The “War on Crime”

The Civil Rights Movement of the 1950s, 60s, and 70s, broadly ended *de jure* segregation and most forms of disenfranchisement. However, felony disenfranchisement—and the prison gerrymandering occurring in its shadow—were exempted from federal civil rights legislation and remain in effect in many jurisdictions, often in their original Jim Crow forms. Ironically, both disenfranchisement and counting individuals where they are incarcerated became an even more significant issue after the Civil Rights Era as new criminal legal policies in the United States created an explosion in prison populations.⁴⁰ The state and federal prison population expanded

³⁷ *Id.*

³⁸ Ruth Delaney et al., *Reimagining Prison Web Report: American History, Race, and Prison*, VERA INST., (2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (“All across the South, Black Codes were passed that outlawed behaviors common to [B]lack people, such as ‘walking without a purpose’ or ‘walking at night,’ hunting on Sundays, or settling on public or private land.”).

³⁹ Jeffery Robinson, *The Racist Roots of Denying Incarcerated People Their Right to Vote*, ACLU (May 3, 2019), <https://www.aclu.org/blog/voting-rights/racist-roots-denying-incarcerated-people-their-right-vote>.

⁴⁰ Wagner, *supra* note 30, at 1242-46.

from 196,441 in 1970, to 481,616 in 1985, to over 1.6 million people in 2008.⁴¹ Starting in the 1960s, there existed a pervasive notion—based in racist stereotypes and cultivated in response to the civil rights gains of the era—that Black Americans in urban centers were dangerous.⁴² As Black Americans gained some level of social and political freedom through the Civil Rights Movement, politicians sought to limit those achievements.⁴³ U.S. Presidents Lyndon B. Johnson and Richard Nixon declared “law and order” and a “war on crime,” catalyzing a fervor that informed an era of punitive policing and sentencing, which in turn led to the disproportionate targeting, criminalization, and incarceration of Black and Latino individuals.

3. “The New Jim Crow”⁴⁴

By the 1990s, the racial composition of prisoners in the United States shifted from majority white to majority Black. Today, incarceration is a “defining feature of American society,” with the United States maintaining the highest incarceration rate in the world.⁴⁵ And, although they commit crimes at the same rate as white Americans, Black Americans are overrepresented among those who are incarcerated. Despite their 13% share of the total adult population in the U.S., Black Americans make up 35% of the prison population.⁴⁶ In state prisons, Black Americans are incarcerated at nearly five times the rate of white individuals, and Latino people are 1.3 times more likely to be incarcerated than non-Latino people.⁴⁷

⁴¹ Delaney et al., *supra* note 38.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

⁴⁵ Remster & Kramer, *supra* note 23, at 418.

⁴⁶ Note that this statistic is based on data from 2016. Delaney et al., *supra* note 38. As of November 2021, the Federal Bureau of Prisons reported over 38% of the prison population as Black.

⁴⁷ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

At the same time, new prisons have emerged at rapid rates, mostly in predominantly white, non-urban areas. Throughout the 1990s, 245 prisons were constructed in rural and small-town communities, which equates to one new prison being opened every fifteen days.⁴⁸ Given the racial makeup of convicted Americans and the location of correctional facilities, the “prison boom” moved non-white populations from urban communities to prisons located in suburban and rural white communities.⁴⁹ Today, that shift remains the same; a disproportionate share of correctional facilities are located in rural areas, while a disproportionate share of incarcerated people are from urban areas.⁵⁰

- C. The majority of incarcerated people are still legally or logistically unable to vote and thus cannot participate in the selection of representatives.

The impact of these trends on prison gerrymandering is compounded by the fact that most incarcerated people cannot vote.⁵¹ Only residents of Maine, DC, Vermont, and Puerto Rico, as well as some residents of Alabama, Mississippi, Tennessee, and Alaska, depending on the specifics of their convictions, retain the right to vote while serving prison time for felony convictions.⁵² Seventeen states disenfranchise some or all people while they are in prison for a felony offense; another seventeen impose voting restrictions on people who are in prison or on parole or probation.⁵³

⁴⁸ Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer and Meda Chesney-Lind eds., 2002), https://www.prisonpolicy.org/scans/huling_chapter.pdf. Prisons are not conveniently placed in Rural America. Rather, they are seen as a crucial tool for economic growth in rural communities. Whether prisons actually deliver economic promise remains an open question. *See id.*

⁴⁹ Remster & Kreimer, *supra* note 23, at 424.

⁵⁰ Sonya R. Porter, John L. Voorheis & William Sabol, *Correctional Facility and Inmate Locations: Urban and Rural Status Patterns*, Working Paper No. 2017-08, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/working-papers/2017/adrm/carra-wp-2017-08.pdf>.

⁵¹ *Id.*

⁵² *Voting Rights for People with a Felony Conviction*, NON-PROFIT VOTE, <https://www.nonprofitvote.org/voting-in-your-state/voting-as-an-ex-offender/> (last accessed Feb. 2, 2022).

⁵³ *Id.*

Thus, by and large, the incarcerated population is disenfranchised; all told, an estimated 1.31 million Americans are incarcerated without the right to vote, accounting for nearly one quarter of the population disenfranchised for a felony nationally.⁵⁴

Even incarcerated people who do have the right to vote do not have adequate access to ballots.⁵⁵ Incarcerated voters face unique barriers to understanding their eligibility, registering to vote, requesting absentee ballots, and casting ballots.⁵⁶ Even in states with universal enfranchisement, very few eligible incarcerated people vote.⁵⁷

Because of the way criminalization policies deliberately target Black and Latino Americans, people of color are overrepresented in the criminal legal system and disenfranchisement rates have a correspondingly disproportionate impact on people of color. Many states purposefully designed their felony disenfranchisement laws to maximize their impact on Black voters and minimize disenfranchisement of white voters.⁵⁸ Nationally, one in sixteen Black Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-Black Americans.⁵⁹ In Tennessee and Wyoming, disenfranchisement rates among Black Americans exceed 20% of the adult voting age population.⁶⁰ In Tennessee, disenfranchisement of the Latino population exceeds 10%.⁶¹

⁵⁴ Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT 8 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

⁵⁵ Dana Paikowsky, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 835 (2019) at 843-48.

⁵⁶ *Id.*

⁵⁷ Ariel White and Avery Nguyen, *How Often Do People Vote While Incarcerated? Evidence from Maine and Vermont*, 84 UNIV. OF CHICAGO J. OF POL. NO. 1, 568-572 (2022).

⁵⁸ Giovanni Padilla, *Disenfranchisement of People with Felony Records and the Racial Discrimination Behind It*, 26 PUB. INT. L. REP. 111, 125-127 (2020).

⁵⁹ Uggen, *supra* note 54, at 4.

⁶⁰ *Id.* at 11.

⁶¹ *Id.* at 18.

Felony disenfranchisement coupled with the denial of representation is a double injustice.⁶² Through prison gerrymandering, not only are incarcerated person denied the right to vote, but they are used to artificially bolster other people’s voting power. And such lack of representation is not just a form of punishment inflicted upon the incarcerated person—it affects their entire home district. Because the United States criminal legal system disproportionately targets people of color, the impact of that double disenfranchisement falls heaviest on communities of color, who bear the burdens imposed by a historic legacy of policies designed to strip them of power.

D. Prison Gerrymandering facilitates partisan gerrymandering.

Partisan gerrymandering, the drawing of district lines to benefit one political party, is a serious and largely unchecked problem for American democracy.⁶³ As a result, legislative elections are often determined not by the will of the people, but the will of the map drawers—typically the same legislators who are standing for election (or reelection). By “packing” voters of one party into a single district or “cracking” them among many, politicians can manipulate the likely outcomes of elections for partisan gain. Unfortunately, gerrymandering has proven difficult to curb through the courts and through the political process. The Supreme Court’s 2019 decision in *Rucho v. Common Cause* held that federal courts are powerless to adjudicate partisan gerrymandering claims, which effectively authorized new levels of partisan gerrymandering in the 2020 redistricting cycle.⁶⁴ Attempts to address partisan gerrymandering through the political process have likewise failed at the national level; the Freedom to Vote John R. Lewis Act, which

⁶² See generally Hamsher, *supra* note 12.

⁶³ For a full discussion of the history of gerrymandering, see Brief of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, No. 16-1161, 2017 WL 4311107, (Sept. 5, 2017), available at <http://www.campaignlegalcenter.org/sites/default/files/16-1161bsacHistorians.pdf>.

⁶⁴ See e.g., *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019) (holding that partisan gerrymandering is non-justiciable in the federal courts).

would have outlawed partisan gerrymandering in the drawing of Congressional districts, was narrowly defeated in Congress in January 2022.⁶⁵ Meanwhile, today's technology, which includes sophisticated map drawing software and detailed data on the political leanings of voters and communities, enables politicians to draw more effective and durable partisan gerrymanders than ever before.⁶⁶

For political outcomes, the movement of people (and representation) from urban homes to rural prisons is important. Typically, rural communities tend to support the Republican Party and urban communities tend to support the Democratic Party.⁶⁷ Thus, racially and geographically polarized voting further frustrates the problem of prison gerrymandering. Counting individuals in their place of incarceration empowers white, non-urban communities that tend to lean Republican and disadvantages racially diverse, urban populations that tend to support Democrats. Thus, passively accepting the status quo of prison gerrymandering is an expedient way for partisans to further entrench themselves.

E. The incarcerated population is generally not part of the community where they are imprisoned and are not fairly represented by elected officials in those districts.

Prison gerrymandering leads to political misrepresentation, as districts with prisons receive a dramatic and artificial increase to their population numbers. At the same time, the communities where incarcerated people are actually from have their populations artificially deflated, resulting in a corresponding loss of representation. Most often, people sent to prison are being moved from

⁶⁵ See Carl Hulse, *After a day of debate, the voting rights bill is blocked in the Senate*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html>.

⁶⁶ Anthony J. McGann et al., *Gerrymandering in America* 87 (2016).

⁶⁷ Kim Parker et al., *What Unites and Divides Urban, Suburban and Rural Communities: Urban, Suburban and Rural Residents' Views on Key Social and Political Issues*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/urban-suburban-and-rural-residents-views-on-key-social-and-political-issues/>.

an urban, racially diverse district to a predominately white, rural district. Thus, voter inequality occurs because the inflation of majority-white districts gives those residents a stronger vote.

Incarcerated people have roots in their home communities that do not dissolve once they are moved to an out-of-district prison. In fact, legislators tend to view people who are from their district but incarcerated elsewhere as constituents.⁶⁸ Conversely, elected officials tend not to view non-local people incarcerated in their district as constituents.⁶⁹ The concept of constituency undergirds political representation, but also keeps people connected to their communities. Constituents, even non-voting individuals, have access to community resources and services from their representative. Indeed, other groups of people in America who are not eligible to vote, such as non-citizens and young people under 18, are still, for the most part, counted and provided with representation. Incarcerated people are the only group of non-voters denied equal representation in the legislature in this fashion.⁷⁰

Unlike other non-voting groups, such as non-citizens, and unlike other groups who could arguably be counted in multiple places, like some college students and military personnel, people who are incarcerated have little to no chance of interacting with, being part of, or feeling meaningfully connected with the communities where they are counted.⁷¹

II. IT IS URGENT FOR THE IACHR TO CONDEMN PRISON GERRYMANDERING BECAUSE EFFORTS TO CURB IT THROUGH THE COURTS AND POLITICAL PROCESSES HAVE LARGELY FALLEN SHORT.

For many years advocates, organizers, and attorneys have worked to reform the practice of prison gerrymandering in the United States. While those movements have made some progress,

⁶⁸ Remster & Kramer, *supra* note 23, at 421.

⁶⁹ *Id.*

⁷⁰ Remster & Kramer, *supra* note 23, at 417, 422.

⁷¹ *See id.*

they have been largely unable to curb the distortion of democracy caused by the practice. Advocacy with the Census Bureau has resulted in the release of group quarters data that enables states to draw new district lines without miscounting prisoners, but the raw data that will be used by most jurisdictions for redistricting still counts incarcerated people at the location where they are imprisoned. A handful of states have passed laws prohibiting prison gerrymandering, but the vast majority will still engage in the practice during this redistricting cycle. Bills have been introduced in Congress to end the practice nationwide, but none have yet passed. Because the U.S. political system has failed to protect the fundamental political rights of incarcerated people and their communities, it is urgent that the IACHR step in and condemn prison gerrymandering.

A. Administrative Advocacy

There has been a strong push for the Census Bureau to change its “usual residence” policy for incarcerated people to no avail. In 2016, there were a total of 77,863 public comments advocating for incarcerated people to be counted at their pre-incarceration addresses.⁷² Many commenters addressed the inflation of political power where prisons are located, and the deflation of political power in home communities.⁷³ Some commenters highlighted issues with the purpose behind the usual residence rule as well—namely that incarcerated people do not have “enduring social ties” to the community where they are incarcerated.⁷⁴

Despite the large volume of comments and the various reasons set forth therein, the Bureau intends to maintain its policy, arguing it is consistent with the definition established by the 1790 Census Act.⁷⁵ It asserts that, because the incarcerated population lives and sleeps most of the time

⁷² Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5527 (Feb. 8, 2018).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 5528.

at the prison, that is their usual residence for counting purposes.⁷⁶ But the Census Bureau did pledge to release its data early enough so that states can count incarcerated individuals at their home districts if they choose to.⁷⁷ As of September 2021, the Census released data on group quarters as part of its 2020 Census Redistricting Data Files.⁷⁸ They also pledged to work closely with states and “offer a product that states can request, in order to assist them in their goals of reallocating their own prisoner population counts.”⁷⁹

Until 2010, the Census Bureau did not release data about group quarters—populations living in group settings—early enough for states to reconsider the count.⁸⁰ In 2011, the Census Bureau decided to release early data on group quarter counts, allowing states to reconsider how incarcerated individuals should be counted.⁸¹ Once the Bureau released the group quarters information earlier than usual, states like New York and Maryland were able to count incarcerated persons at their home addresses.⁸²

B. State-Level Legislation

To date, only twelve of the fifty U.S. states have passed laws prohibiting prison gerrymandering in some form.⁸³ Most of these reforms apply to both state legislative and

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *Group Quarters Population by Major Group Quarters Type*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=Group%20Quarters%20Population&tid=DECENNIALPL2020.P5> (providing data for group quarters, including “correctional facilities for adults”)

⁷⁹ Final 2020 Census Residence Criteria and Residence Situations, *supra* note 72, at 5528.

⁸⁰ Remster & Kramer, *supra* note 23, at 422-23.

⁸¹ *2010 Census Advance Group Quarters Summary File*, U.S. CENSUS BUREAU (Apr. 20, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-tps13.html.

⁸² *Id.*

⁸³ Cal. Elec. Code § 21003 (California); Colo. Rev. Stat. § 2-2-902 (Colorado); Conn. Public Act No. 21-13 (Connecticut); Del. Code tit. 29, § 804A (Delaware); Ill. Public Act 101-0652 (Illinois); Md. State Gov’t Code § 2-2A-01 and Md. Elec. Law Art. § 8-701 (Maryland); Nev. Rev. Stat. § 360.288 (Nevada); N.J. Stat. Ann. § 18A:13-8 and § 52:4-1.2; N.Y. Legis. Law § 83-m(13) (New York); Pa. Legislative Reapportionment Commission Resolution 4A (Pennsylvania); Va. Code § 24.2-314 (Virginia); Wash. Rev. Code § 44.05.140 (Washington).

congressional districts, but some only apply to legislative districts.⁸⁴ All these states achieved this reform through the passage of legislation, except Pennsylvania, where the change was made by an independent redistricting commission.⁸⁵ Although these efforts are important steps, there is still much more work to do. It takes dedicated advocacy over a sustained period of time to enact change in each individual state. To date, the political will for reform seems to be stronger in Democratic-controlled rather than Republican-controlled states, which means the rights of racial and political minorities remain subject to the whims of the majorities who might benefit politically from their disenfranchisement. For those reasons, even when advocates are able to achieve some success, in the absence of reforms at the federal level, state-level reforms will lead to an inconsistent patchwork of policies.

C. Federal Legislation

Despite several attempts, reform efforts on the federal level have yet to succeed. In 2013, a proposed House bill provided that “individuals in prison shall, for the purposes of a decennial census, be attributed to the last place of residence before incarceration.”⁸⁶ A similar bill was also introduced in 2009.⁸⁷ In the 2019-2020 Congressional Term, legislators in both the House and Senate introduced the Correct the Census Count Act, which attributed individuals in prison to their last residence before incarceration.⁸⁸ However, neither version of that Act progressed through the legislative process.

⁸⁴ See Garrett Fisher, Taylor King & Gabriella Limón, *Prison Gerrymandering Undermines Our Democracy*, BRENNAN CTR. FOR JUST. (Oct. 22, 2021), <https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy>; *Reallocating Inmate Data for Redistricting*, NAT'L. CONF. OF STATE LEGISLATURES (Dec. 14, 2021), <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx>.

⁸⁵ Pa. Legislative Reapportionment Commission Resolution 4A.

⁸⁶ H.R. 1537, 113th Cong. (2013).

⁸⁷ H.R. 2075, 111th Cong. (2009).

⁸⁸ H.R. 3645, 116th Cong. (2019); S. 3481, 116th Cong. (2019).

The federal effort that came closest to succeeding was 2021’s For the People Act. The For the People Act provided that “for purposes of the apportionment of Representatives in Congress among the several States, the Secretary shall, with respect to an individual incarcerated in a State, Federal, county, or municipal correctional center as of the date on which such census is taken, attribute such individual to such individual's last place of residence before incarceration.”⁸⁹ The U.S. House of Representatives passed the For the People Act in March 2020; however, the companion bill in the Senate dropped the provision ending prison gerrymandering.⁹⁰ Regardless, in January 2022, the U.S. Senate failed to pass that bill in the face of a filibuster requiring 60 votes to overcome.⁹¹

D. Challenges in the Courts

While there may still be pathways to challenging to prison gerrymandering in the United States’ federal courts, a series of recent cases have cast doubt on whether the federal courts can be relied on to vindicate the representational rights of incarcerated people and their communities. In *Evenwel v. Abbott*, the U.S. Supreme Court held that it is permissible for states to equalize district populations by counting non-voters and voters alike—i.e., by using the total population data generated by the Census Bureau.⁹² That case did not directly address the constitutionality of prison gerrymandering, but the U.S. Court of Appeals for the Second Circuit has ruled that challenges to prison gerrymandering in federal court are foreclosed by the Supreme Court’s decision in *Evenwel*

⁸⁹ H.R. 1, 117th Cong. § 2701 (2021). The Section is based on an amendment to an earlier form of the bill. In the prior Congress, Representative Pocan proposed Amendment 87, which ends “the practice of prison gerrymandering whereby incarcerated persons are counted in Census population counts as residents of correctional facilities and not their most recent residence prior to imprisonment.” H.R. 1, 116th Cong. amend. 87 (2019).

⁹⁰ H.R. 5746, 117th Cong. § 5003 (2021) (The Freedom to Vote: John R. Lewis Act).

⁹¹ See Trevor Potter, *Senate Vote on Voting Rights Failed, But the Fight Cannot Be Over*, CAMPAIGN LEGAL CTR. (Jan. 20, 2022) <https://campaignlegal.org/update/senate-vote-voting-rights-failed-fight-cannot-be-over>.

⁹² 578 U.S. 54, 64 (2016).

sanctioning the use of census total population data (which, of course, counts people where they are incarcerated).⁹³

Some legal scholars remain hopeful that there can be a path to challenging prison gerrymandering in the federal courts⁹⁴ based on *Evenwel*'s holding that non-voting people also have representational rights under the Constitution's Equal Protection Clause.⁹⁵ *Calvin v. Jefferson County Board of Commissioners*, a successful challenge to prison gerrymandering in federal district court in Florida, provides another potential blueprint.⁹⁶ However, the likelihood of a successful challenge in federal court remains uncertain. Additionally, it is reasonable to expect that the Supreme Court's unwillingness to remedy partisan gerrymandering in *Rucho* could reflect their approach to other types of map manipulation, including prison gerrymandering. However, at least one Court of Appeals has rejected the notion that *Rucho* renders prison gerrymandering claims non-justiciable by federal courts.⁹⁷

While the U.S. Constitution provides a baseline guarantee of certain rights, individual state constitutions may provide additional protections. For that reason, some observers see promise in challenging prison gerrymandering in state courts.⁹⁸ However, this strategy remains untested.

All told, the road ahead for challenging prison gerrymandering in the courts seems open, but far from a reliable approach to vindicate the representational rights of incarcerated people and their communities. Because efforts to curb prison gerrymandering through all political channels

⁹³ *Davidson v. City of Cranston, Rhode Island*, 837 F.3d 135, 141 (1st Cir. 2016).

⁹⁴ See, e.g., Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1509-1519 (2017).

⁹⁵ 578 U.S. at 73.

⁹⁶ 172 F. Supp. 3d 1292, 1323 (N.D. Fla. 2016).

⁹⁷ *Nat'l Ass'n for Advancement of Colored People v. Merrill*, 939 F.3d 470, 478 (2d Cir. 2019).

⁹⁸ Meredith Gingold, *States, the Final Frontier: How Minnesota's State Constitution Can Serve as New Ammunition in the Fight Against Prison Gerrymandering*, 105 MINN. L. REV. 368 (2021).

have largely fallen short, it is crucial for other bodies, such as this Commission, to address this issue.

CONCLUSION

Prison gerrymandering exacerbates felony disenfranchisement's egregious violations of international guarantees of democratic representation, political freedom, and equality. Moreover, prison gerrymandering is a distinct violation of those norms that the IACHR should denounce in its own right.

Prison gerrymandering undermines both incarcerated people and their home communities' equal ability to choose their representatives.⁹⁹ Currently, ten states have enough incarcerated people to form an entire legislative district, reflecting a severe lack of equal access to electing representatives. Moreover, prison gerrymandering results in power being shifted from urban communities and artificially concentrated in suburban and rural districts. Because voters in such districts are more likely to support a different party than the incarcerated population itself, this distorts political representation and the democratic process.

Prison gerrymandering also violates international treaties and declarations promising equality under the law.¹⁰⁰ This practice shifts votes from urban, non-white communities to rural,

⁹⁹ See, e.g., *Universal Declaration of Human Rights*, UNITED NATIONS, G.A. Res. 217 (III), Article XXI (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (““Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”).

¹⁰⁰ See, e.g., *American Declaration of the Rights and Duties of Man*, ORGANIZATION OF AMERICAN STATES, Art. II, Doc. OEA/ser.L./V./I.4 (1948), <https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm> (“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”).

white communities, and that population influx in majority-white districts gives more voting power to residents in those districts. Moreover, some localities have intentionally drawn district lines after census counts to use prison populations to inflate their districts. These actions are likewise targeted toward diluting the political power of incarcerated people and shifting such power to predominately white areas. Importantly, these imbalances are no coincidence; rather, throughout history, U.S. states have intentionally used the criminal legal system to diminish the political rights of Black people and communities of color. These political distortions are due to deliberate policies that criminalize people of color, place them in prisons far from their home districts, and strip them of their right to vote, while at the same time disproportionately disadvantaging their home districts.

The IACHR's condemnation of both felony disenfranchisement and prison gerrymandering would be a boon to the movement working to reform these laws. Because district lines are redrawn only once every ten years following the Census, in most U.S. states, it is too late to ensure that districts are drawn to give fair representation to incarcerated people and their home communities during this redistricting cycle. We have until 2030 to organize, litigate, and advocate to end the practice of prison gerrymandering before the next census. In that time, a movement led boldly by people directly impacted by the criminal legal system will continue pushing to finally rid our country of the scourge of felony disenfranchisement and prison gerrymandering. Action by the IACHR will buoy these efforts.

International solidarity against these racist, antidemocratic relics cannot come soon enough. We respectfully ask the IACHR to condemn felony disenfranchisement and prison gerrymandering in the United States.

Respectfully submitted,

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