



Statement by Henry Klementowicz, Senior Staff Attorney, ACLU-NH  
Senate Election Law and Municipal Affairs Committee  
House Bill 50  
January 31, 2022

I submit this statement on behalf of the American Civil Liberties Union of New Hampshire (“ACLU-NH”)—a non-partisan, non-profit organization working to protect civil liberties throughout the state for over 50 years. I appreciate the opportunity to testify in opposition to HB 50, the proposed reapportionment of the state’s House of Representative Districts.

In this testimony, we raise a number of areas of concern with the proposed map. Specifically, our concerns with 1) prison gerrymandering, 2) potential racial gerrymandering in Nashua, and 3) partisan gerrymandering.

**I. Prison Gerrymandering**

As you know, the Census Bureau counts anyone incarcerated in your jurisdiction as part of your resident population. However, you may not be aware that this practice can distort representation in your districts or that local governments across the country are already taking steps to avoid these problems.

Because the Census counts someone incarcerated at a correctional facility as if that were their home, when states, cities, school boards, or other local governments use Census data on institutionalized persons to redistrict, any district with a correctional facility will have fewer actual, vote eligible residents than will districts without prisons. This gives extra representation to the residents of districts with prisons and dilutes the representation of residents where prisoners live and often intend to return. For example, in a jurisdiction where each district contains 4,000 people, a decision to include a 1,000-person prison in one district will mean that every three residents of that district will have as much representation as four residents elsewhere.<sup>1</sup>

For example, Concord Ward 3 is 30.5%<sup>2</sup> incarcerated, which means that residents in that district have more political representation than residents in other districts. Luckily, the solution to this problem is simple. These numbers mean that each group of 70 actual residents in the

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<sup>1</sup> People incarcerated on a felony in New Hampshire are not eligible to vote. The New Hampshire State Prisons almost exclusively house people serving time on a felony.

<sup>2</sup> The plan currently assumes Concord Ward 3 will have 4397 residents. As of November 5, 2021, there were 1341 people incarcerated in Ward 3. Currently, Ward 3 has one representative, and shares two representatives as part of a floterial district.



district was given as much representation as 100 residents in districts without prisons. To avoid prison gerrymandering, governments can remove correctional facilities from their redistricting data prior to drawing new districts and count them in their home communities. Doing so will allow you to create districts that each contain the same number of actual, vote-eligible Concord residents, so that the residents of every district will have equal representation in their local government. Importantly, the practice of removing prisons from redistricting data prior to drawing districts is also consistent with New Hampshire law, which states that a prison cell is not a residence for voting purposes. RSA 654:2-a, I.

To remedy this malapportionment, the Committee should choose to count incarcerated residents of New Hampshire in their home communities—not where they are incarcerated.

## **II. Potential Racial Gerrymander in Nashua**

Section 2 of the Voting Rights Act of 1965 prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in a designated language minority group.<sup>3</sup> In *Thornburg v. Gingles*, 478 US 30 (1986), the Supreme Court set forth the standard for determining when apportionment plans violate Section 2. In that case, the court examined a plan that included six multi-member districts, and struck it down as violative of Section 2 because the plan impaired the ability of Black citizens to elect representatives of their choice.

The proposed plan would apportion 27 representative seats for the City of Nashua, by making nine three-member districts (one for each ward). It is unclear to us whether the City has drawn a majority-minority district but if it hasn't, that means that there could be as few as zero majority-minority districts out of 27 in a city where over 13%<sup>4</sup> of the population identifies as Hispanic or Latinx. By contrast, if drawing single member districts, the Committee may be able to create more majority-minority seats.

While we understand this Committee's desire to keep wards whole pursuant to the New Hampshire Constitution, complying with state law is no defense to violating the Voting Rights Act. *See* U.S. Const. Art. VI, para. 2. As communities of color become an increasingly large part of our vibrant and diverse state, their growing political power (and that of Hispanic and Latinx voters in particular) must be considered as this Committee completes its work. This Committee must examine its plans and consider whether it is unfairly and unlawfully diluting the power of minority voters, or it risks the possibility of a Section 2 lawsuit.

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<sup>3</sup> <https://www.justice.gov/crt/section-2-voting-rights-act#sec2>

<sup>4</sup> <https://data.census.gov/cedsci/profile?g=1600000US3350260>



### **III. Partisan Gerrymandering**

Our analysis of the proposed plan reveals that it builds on and increases the partisan tilt towards Republicans in a way that is unfair.<sup>5</sup> The partisan lean of the median seat under this plan would go from R -0.05 to R +.069, and the plan would increase the number of GOP leaning seats by 9.6 percent, from 196 to 214. *Id.*

### **IV. Conclusion**

Districts should respect fair districting principles without targeting “safe” and predictable results or having to take partisan sides. Voters should pick their politicians, and not the other way around. Redistricting is a solemn, constitutional obligation for this committee, and the voters of New Hampshire deserve better.

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<sup>5</sup> <https://www.aclu-nh.org/sites/default/files/aclu-analysisreport-sh.pdf>