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Karen Humes  
Chief, Population Division  
U.S. Census Bureau  
Washington, DC 20233

Dear Ms. Humes,

The Brennan Center for Justice is writing to comment on the proposed 2020 Census Residence Criteria and Residence Situations published earlier this summer. We appreciate this opportunity to provide supplemental comments and applaud the Census Bureau for its continued careful consideration of the residence rules. However, we must ask you to reconsider the decision to continue the current practice of counting incarcerated persons at the facility they are located at on Census Day. Rather than continue the current practice, which has a distortive effect on representation, we urge the Bureau to adopt a rule that would count those people at their pre-incarceration addresses. In this regard, we wish to bring to your attention two matters that the Bureau may not have had before it when it drafted the proposed rule.

*The Limited Reach of the Proposed Voluntary Census Product*

First, the proposed voluntary reallocation of incarcerated persons to their pre-incarceration addresses at the discretion of states will not work for the simple reason that the option is not viable in every state. While the Bureau has offered to provide a data product that would allow states, if they wish, to reallocate incarcerated individuals to their pre-incarcerated addresses, the ability of states to take advantage of this option is limited in a meaningful number of cases because state constitutions either explicitly require use of Census data during the reapportionment and redistricting or have untested language that may require use of such data.

This reality means that the well-intentioned actions taken by the Bureau to provide datasets to allow states to reallocate prison populations would be for naught in a number of cases. Without a change to the proposed rule, these states, even if they wanted to, would be unable to reallocate individuals to their pre-incarceration addresses, absent going through the process of amending their state constitutions. The Massachusetts constitution, for example, specifically requires the use of Census data in its legislative re-apportionments, providing that:

Art. CXVII. Section I.

**The federal census shall be the basis for determining the representative districts for the ten year period beginning with the first Wednesday in the [fifth] January following the taking of said census.<sup>1</sup>**

Section II.

**Said federal census shall likewise be the basis for determining the senatorial districts and also the councilor districts for the ten year period beginning with the first Wednesday in the [fifth] January following the taking of such census.<sup>2</sup>**

This constitutional limitation is why the Massachusetts House and Senate passed a joint resolution that called on the Census Bureau to change the way incarcerated persons are counted.<sup>3</sup>

Four other states –Arkansas, Missouri, South Dakota, and West Virginia– have similar constitutional language mandating use of Census data for reapportionment. Six other states—Minnesota, Montana, Nevada, New Mexico, Rhode Island, and Utah—specifically tie reapportionment and redistricting to the conducting of the Census, at least implying a constitutional obligation to use Census data. We have included other state constitutions’ restrictive language in the attached appendices.

Given these constitutional restrictions, the interests of consistency also weigh in favor of a change to the rule. As you may be aware, several states have already reallocate their incarcerated population to pre-incarceration addresses, and it is likely that more will plan to do so for the redistricting that will take place after the 2020 Census. To allow for uniform treatment of the nation’s prison population, the residence rule should be changed to count incarcerated persons at their pre-incarceration address.

### *Census Bureau Precedents Supporting a Rule Change*

The Bureau’s own precedents also support a change to the residence rule as applied to incarcerated persons. Although the Bureau has said in the proposed rule that it believes that people who are incarcerated should be counted at the place where they live and sleep most of the time, we draw the Bureau’s attention to its prior position in litigation before the United States Supreme Court.

In a 1992 Supreme Court case, *Franklin v. Massachusetts*, 505 U.S. 788, 795 (1992), the state of Massachusetts challenged the Bureau’s decision to treat federal personnel deployed overseas as residents of their “home of record” (*i.e.*, in their home states) during the 1990 census. As a result, over 900,000 overseas federal employees were counted at their “home of record” and led to a

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<sup>1</sup> MASS CONST. art. CXVII, § I-II, *amended by* MASS CONST. amen. CXIX § 1-2.

<sup>2</sup> *Id.*

<sup>3</sup> S. Res. 309/H.R. Res. 3185, 188<sup>th</sup> Gen. Court (Mass. 2013-2014) (“Resolutions urging the Census Bureau to provide redistricting data that counts prisoners in a manner consistent with the principles of “One Person, One Vote.””)

loss of a Congressional seat in Massachusetts. The federal district court agreed with Massachusetts' argument that using "home of record" to apportion Congressional seats was arbitrary under the Administrative Procedure Act. However, in the Bureau's appeal to the U.S. Supreme Court, the Court agreed with the Bureau's position and held that using "home of record" information was consistent with the Census Bureau's historic standard and reflected a "more enduring tie of usual residence."<sup>4</sup> The Court further explained that usual residence, much as we urge here, means more than mere physical presence. It has been used broadly enough to include some component of allegiance or enduring tie to a place. "The first enumeration Act itself provided that 'every person occasionally absent at the time of the enumeration [shall be counted] as belonging to the place in which he usually resides in the United States.'<sup>5</sup> The Act placed no limit on the duration of the absence."<sup>6</sup>

A change in the residence rule would be consistent with the Bureau's prior position. People in prisons are absent from their homes, in the vast majority of instances, for a comparatively short and temporary amount of time. Depending on the crime committed, many average sentence lengths for federal prisoners can be about the same duration as an overseas deployment for military or U.S. civilian employees.<sup>7</sup> Overall, offenders released in 2009 spent an average of only 2.9 years in custody.<sup>8</sup> Their residence, in their mind, similar to military personnel and civilians, is where they have enduring personal and legal ties. States such as Nebraska have been able to capture this sentiment in a comprehensive definition of residence: "residence shall mean that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning."<sup>9</sup>

As stated in our initial comment, an incarcerated person's pre-incarceration address is considered to be one of the most robust predictors for where people in prison will return to upon release. People who are incarcerated not only have a demonstrated connection to their home communities, but they also have legal ties to their residence. It is for a similar reason that home of record is used to account for military personnel and civilian employees during Census Day, since it is expected that upon return from deployment, these individuals will return to their home address. A similar rationale should be used for people who are incarcerated.

<sup>4</sup> Brief for the Appellants at 17, *Franklin v. Massachusetts*, 505 U.S. 788, 795 (1992).

<sup>5</sup> *1790 Census Act*. CENSUS BUREAU. (last visited Aug. 29, 2016), available at [https://www.census.gov/history/pdf/1790\\_Census\\_Act.pdf](https://www.census.gov/history/pdf/1790_Census_Act.pdf).

<sup>6</sup> Kirsten D. Levingston and Christopher Muller, "Home" in 2010: *A Report on the Feasibility of Enumerating People in Prison at their Home Addresses in the Next Census*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW (Feb. 15, 2006), available at [https://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_36223.pdf](https://www.brennancenter.org/sites/default/files/legacy/d/download_file_36223.pdf)

<sup>7</sup> *Prison Time Surges for Federal Inmates*. THE PEW CHARITABLE TRUSTS. (NOV. 18, 2015),

<http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates>

<sup>8</sup> *Time Served: The High Cost, Low Return of Longer Prison Terms*. THE PEW CENTER ON THE STATES. (JUNE 2012),

[http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prison-timeservedpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prison-timeservedpdf.pdf)

<sup>9</sup> NEB. REV. STAT. § 32.116 (1994).

*Conclusion*

The Census is a complex and immense undertaking and should be consistent across all 50 states. This can be resolved by treating incarcerated individuals the same way the new residence rule would treat juveniles in treatment facilities or U.S. military personnel deployed overseas. Both of these groups will now be counted at their home addresses, recognizing the temporary nature of their location on Census Day. Modifying the residence criteria for incarcerated people will help prevent discrepancies and increase the accuracy in state population data, and address fair and just representation. For these reasons, we ask you to revisit the Bureau's decision about where to count incarcerated persons mentioned in the letter and consider adopting a new rule to count incarcerated individuals at their pre-incarceration addresses.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Li". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael C. Li  
Senior Redistricting Counsel  
Brennan Center for Justice

## Appendix A

### Other States Restrictive Language

In addition to Massachusetts, several other states have constitutional language that calls for the use of the Census as the basis for reapportionment. Two such state constitutions, Missouri and West Virginia, have been interpreted to require the use of Census data in reapportionment, which would seem to foreclose the use of the alternative dataset to re-allocate their incarcerated citizens to their pre-incarceration homes.

#### Arkansas

Article VIII, Section 2. One hundred members in House of Representatives — Apportionment.

The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the **population of said counties as shown by the Federal census next preceding any apportionment hereunder.**<sup>10</sup>

#### Missouri

In a case examining the constitutionality of St. Louis' 1952 senatorial redistricting, Missouri's Supreme Court has stated "It should be pointed out that Sec. 10, Art. III, 1945 Constitution, requires that the last decennial census shall be used for this purpose." *Preisler v. Doherty*, 284 S.W.2d 427, 475 (Mo. 1955).

Article III, Section 10. Basis of apportionment--alteration of districts reads:

**The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts.** Such districts may be altered from time to time as public convenience may require.<sup>11</sup>

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<sup>10</sup> ARK. CONST. art. VIII, § 2, (amended 1937).

<sup>11</sup> MO. CONST. art. III, § 10.

## South Dakota

Article III, Section 5. Legislative reapportionment.

The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. **Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census.** An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991. Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment.<sup>12</sup>

## West Virginia

West Virginia's constitution calls for the population "to be ascertained by the Census of the United States." In 1972 the State was sued to overturn a re-apportionment plan that reallocated college students from their college to their home, much in the same way that a state would use the alternative data set to reallocate incarcerated prisoners. That plan was found unconstitutional and the court held that "(m)aterial departures from the decennial United States census population counts in legislative apportionment statutes, in the absence of substantial justification, are presumptively unwarranted." *Goines v. Rockefeller*, 338 F. Supp. 1189, 1195 (S.D.W. Va. 1972).

Article VI, Section 4. Division of state into senatorial districts reads:

For the election of senators, the state shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided. Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county. **The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States.** After every such census, the Legislature shall alter the senatorial districts, so far as may be necessary to make them conform to the foregoing provision.<sup>13</sup>

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<sup>12</sup> S.D. CONST. art. III, § 5.

<sup>13</sup> W. VA CONST. art. VI, § 4.

## Appendix B

### States with Triggering Language

Some state constitutions have language that specifies that the reapportionment or redistricting is triggered by the Federal Census. Although these provisions do not clearly require the use of Federal Census data like Massachusetts, the language at least links the timing of redistricting to the Census. This ambiguity creates at least an unknown for some states that might be interested reallocating their prison population.

#### Minnesota

Article IV, Section 3. Census enumeration apportionment; congressional and legislative district boundaries; senate districts

**At its first session after each enumeration of the inhabitants of this state made by the authority of the United States**, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.<sup>14</sup>

#### Montana

Article V, Section 14. Districts and apportionment

**In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census**, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative districts and a plan for redistricting the state into congressional districts.<sup>15</sup>

#### Nevada

Article IV, Section 5. Number of Senators and members of the Assembly; apportionment

**It shall be the mandatory duty of the Legislature at its first session after the taking of the decennial census of the United States in the year 1950, and after each subsequent decennial census**, to fix by law the number of Senators and Assemblymen, and apportion them among the several counties of the State, or among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.<sup>16</sup>

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<sup>14</sup> MN. CONST. art. IV, § 3.

<sup>15</sup> MONT. CONST. art. V, § 14.

<sup>16</sup> NEV. CONST. art. V, § 5, (amended 1969).

## New Mexico

Article 4, Section 3. Number and qualifications of members; single-member districts; reapportionment.

Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary. The senate shall be composed of no more than forty-two members elected from single-member districts. The house of representatives shall be composed of no more than seventy members elected from single-member districts. **Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership.**<sup>17</sup>

## Rhode Island

Article VII, Section 1. Composition of the House of Representatives.

There shall be one hundred (100) members of the house of representatives, provided, however, that commencing in 2003 there shall be seventy-five (75) members of the house of representatives. The house of representatives shall be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible. **The general assembly shall, after any new census taken by authority of the United States, reapportion the representation to conform to the Constitution of the state and the Constitution of the United States.**<sup>18</sup>

## Utah

Article IX, Section 1. Dividing the state into districts.

**No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly.**<sup>19</sup>

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<sup>17</sup> N.M. CONST. art. IV, § 3 (repealed and reenacted 1976).

<sup>18</sup> R.I. CONST. art. VII, § 1, (amended by R.I. amend. Res. 184 and 193).

<sup>19</sup> UT. CONST. art. IX, § 1.