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SOUTHERN COALITION
*for* SOCIAL JUSTICE

**VIA ELECTRONIC MAIL**

August 31, 2016

Karen Humes, Chief
Population Division, U.S. Census Bureau, Room 6H174
Washington, DC 20233

**Re: Proposed "2020 Census Residence Rule and Residence Situations"**

Dear Ms. Humes,

The Southern Coalition for Social Justice ("SCSJ") offers this submission in response to the Census Bureau's request for public comment on the proposed Residence Rule and Residence Situations for the 2020 Census, 81 FR 42577 (June 30, 2016). Currently more than 2 million people are incarcerated in the United States and every one of them is outside of their home communities on Census day. Continuing the practice of counting incarcerated persons in the locations where they are incarcerated not only disproportionately harms certain communities, but it also ensures that the 2020 Census will produce inaccurate data that will have long-lasting effects. Therefore, we urge you to count incarcerated people as residents of their home communities, rather than the locations of their correctional facilities.

SCSJ's two primary practice areas—voting rights and criminal justice reform—place the organization in a unique position to understand the harm created by the Census Bureau's policy of counting incarcerated persons where they are imprisoned. Throughout the years, SCSJ has been heavily involved in efforts to ensure fair and accurate redistricting policies, and we have witnessed firsthand how counting incarcerated persons as residents of their place of incarceration diminishes the voting strength of their home communities, while unjustifiably enhancing the voting strength of communities located near such facilities. Additionally, SCSJ's criminal justice reform focus area primarily involves work to reduce collateral consequences of incarceration such as obtaining gainful employment, housing, and the right to vote. Through our criminal justice work we have consistently seen that underrepresented communities, such as low income communities and communities of color—from which the prison population is disproportionately drawn due to over policing and racial profiling—lack access to important resources that help formerly incarcerated people reenter their communities. If incarcerated persons were counted in their home communities, those communities would be allocated more federal funding as well as other resources that are frequently tied to census numbers, and would be better able to elect officials to serve their communities.

### A. Incarcerated Persons Should Be Counted as Residents of Their Home Communities

Because of SCSJ's work and insights on the intersection between voting rights and criminal justice reform, we are opposed to the rule that counts incarcerated persons as residents of their

place of incarceration for the following reasons: (i) the rule will lead to less accurate census results, with a number of harms flowing from that reality, particularly in North Carolina and the south; and (ii) it is unnecessary and inconsistent with other rules.

*i. The Rule Leads to Less Accurate Census Results*

An accurate decennial census enumeration is critical for countless reasons, but it is particularly critical to (1) communities of color, whose members often suffer from disproportionate rates of incarceration—communities that may desperately need more federal funding linked to census counts; and (2) jurisdictions—from small towns up to the state level—who are charged with redistricting and rely upon census data for that task. When incarcerated persons are counted as residents of their place of incarceration, the census data does not accurately reflect the true voting population in the jurisdictions where prisons are located and does not accurately reflect the extent of need in traditionally underserved communities. Importantly, updating the residence rules by counting incarcerated persons as residents of their home communities would increase the accuracy of Census data, and would have a profound impact on representation in communities of color—particularly for African-Americans and Latinos who are stopped, arrested, and incarcerated at disproportionate rates, and often come from neighborhoods and communities that struggle to receive adequate funding to assist residents with meaningful reentry after incarceration. For instance, the high incarceration rate in North Carolina ensures that there are large tangible effects felt by a rule that counts incarcerated persons as residents of their place of incarceration. North Carolina is one of 32 states with an individual rate of incarceration that ranks higher than Turkmenistan, the nation with the second highest incarceration rate in the world after the United States. Specifically, there are approximately 66,000 people incarcerated in some form of facility throughout the state. In North Carolina, African Americans are disproportionately sent to correctional facilities, as opposed to other sentencing options. As a result, African Americans are 55% of the prison population even though they are only 22% of the total state population. By contrast, whites make up only 39% of the prison population, yet are 65% of the total state population. This means that because of the Census Bureau's proposed rule, African-American communities in North Carolina are more likely to have inaccurate census data and less representation than their white counterparts. If communities of color were afforded better, and more accurate, representation, they would have more power to effectuate meaningful change with respect to policies that affect their communities.

It is also important to have accurate census data for purposes of redistricting and complying with the "one person one vote" standard, under the Equal Protection Clause of the Fourteenth Amendment. "One person one vote" requires jurisdictions engaged in redistricting to create districts that are roughly equal in population. Some larger and well-resourced jurisdictions may be capable of adjusting federal census data to account for large non-voting populations in districts containing correctional facilities. However, many jurisdictions do not have that capability and rely on the census data as produced. Thus, they draw districts that, because of non-voting populations, have significantly different voting populations in different districts.

These districts are known as "prison gerrymanders." Importantly, this type of gerrymandering causes the votes of residents who live in districts with correctional facilities to have more weight than their fellow citizens who do not live in such districts. For example, suppose that a county commission has 5 districts and each district, properly apportioned, has one thousand voters, with one district having a prison population of 900. In the district with the prison population, there are actually only 100 voters who each cast a vote that is weighted 10 times more heavily than a voter in a different district. This is fundamentally unfair to the voters in the districts with a thousand voters, and is likely unconstitutional.

In North Carolina, we see this phenomenon in effect in several counties. For example, in Granville County, North Carolina the prison population constitutes nearly 55% of only one of the county's seven districts for the Board of County Commissioners - District 3. As of 2010, the prison population in District 3's Federal Correctional Complex was 4,587. With a total population of 57,532 for the county, the ideal size for each of the seven districts would be a little over 8,200 residents each. This means that less than half of the residents in District 3 have the same voting strength as the total populations in the other six districts. In other words, the non-incarcerated residents in District 3 have significantly more voting power than the residents in the other six districts. While the other six district commissioners serve the interests of approximately 8,000 constituents, the commissioner for District 3 only serves approximately 4,000 actual constituents. This lack of balance results from counting incarcerated persons as residents of the facility in District 3 and violates the "one person one vote" requirement.

Additionally, there are similar issues in other counties in North Carolina, such as Anson County and Pamlico County. In Anson County, there are three correctional facilities housed in one district for the Board of County Commissioners - District 6. The total prison population for the three facilities is 2,190. Based on the 2010 Census, Anson County's total population is 26,948. With seven districts, the ideal district size is approximately 3,850. This means more than half of people counted as residents of District 6 are incarcerated, and the other non-incarcerated residents (less than 50%) have the same voting strength as the full population in neighboring districts. Likewise, Pamlico County, North Carolina, has a census population of 13,144 with five districts electing the County Commissioners. The ideal district size is approximately 2,628. The State prison, Pamlico Correctional Institute and also the local facility, Pamlico County Jail, house a combined 619 prisoners and are located in the same district. Therefore, roughly 23% of the population counted within this district is incarcerated. Overall, many North Carolinians will continue to have their votes diluted by the rule that counts incarcerated persons as residents of their places of incarceration. Because voting is a fundamental right that must be enjoyed equally by all citizens, the Census must change this rule.

Giving some residents' votes more weight than others by counting incarcerated persons in this way violates the "one person one vote" requirement. At least one federal court has found such "prison gerrymanders" to be unconstitutional, even when jurisdictions rely on the data produced by the Census Bureau. *See Calvin v. Jefferson Cnty. Bd. of Comm'rs*, No. 4:15cv131, 2016 U.S. Dist. LEXIS 36121 (N.D. Fla. Mar. 19, 2016). Therefore, continuing to count

incarcerated persons as residents of their place of incarceration will expose many local jurisdictions around the country to lawsuits, and the financial burden that results from such litigation.

*ii. The Rule is Unnecessary and Inconsistent With Other Similar Rules*

The proposed rule is not necessary and is inconsistent with other census rules used by the Bureau. Notably, because of a desire for accurate census data, the Bureau proposed changes to the residency rules for military personnel deployed overseas. The Bureau opted to count relocated military personnel in their home communities since they "will be returning to their usual residence" after their temporary relocation ends, 81 FR 42579. The Bureau determined that deployed personnel should be counted as residents of their home communities because it is their "usual residence" where they spend most of their time because they are only temporarily removed from their home community and will likely return there once they are able, 81 FR 42579. This Bureau's decision regarding deployed personnel is inconsistent with the current rule regarding incarcerated persons. Just like deployed personnel, incarcerated persons are likely to return to their home communities once they are able. Indeed, this fact is cited in comments c74 (footnote 55), c88 (footnote 2), c119 (footnote 7), and c121 (footnote 23). If the Bureau has the capability to count military personnel in their home communities, they must likewise be capable of counting incarcerated persons in their home communities. Therefore, as in the case of deployed personnel, the Bureau should remain consistent and count incarcerated persons who are temporarily away from their homes as residents of their home communities.

**B. Opposition to Other Census Comments**

The Census Bureau has received many public comments on the proposed rule that SCSJ believes is erroneous and misplaced. First, the argument made in comment c6 that the Voting Rights Act somehow requires incarcerated people to be counted in the location where they are incarcerated in order to protect rural communities of color is incorrect and does not reflect the reality of the redistricting process. While a heavily minority prison population in a rural county might allow map drawers to create a majority-minority district using that population, such a district would be a non-performing district and would not be compelled by the Voting Rights Act. In fact, voting rights advocates are concerned that districts that are drawn as majority-minority districts using prison populations may be held up as districts that comply with the Voting Rights Act, but on the other hand do not result in African-American voters being able to elect their candidates of choice.[1] Thus, this claim is clearly erroneous. Furthermore, this same comment's proposal that it would be too difficult for the Bureau to establish the residence of prisoners holds no weight considering that the Bureau already has protocol for establishing the residency of those without a permanent address. Also, the implication made in this comment

[1] *See* Ben Peck, *"The Census Count and Prisoners: The Problem, The Solutions and What the Census Can Do,"* Demos, Oct. 26, 2012, http://www.demos.org/publication/census-count-and-prisoners-problem-solutions-and-what-census-can-do; *see also* "*Counting inmates is issue in Miss. Redistricting*," Picayune Item (March 1, 2011), available at http://www.picayuneitem.com/2011/03/counting-inmates-is-issue-in-miss-redistricting/

that disparate treatment in counting these individuals is justified because they are "career criminals" does not address the systematic discrimination deeply embedded in our criminal justice system. It also fails to address the disproportionate number of minorities incarcerated for lower level, and some even first-time, offenses.

Second, the support for the proposed rule in comment c5 is not justified and attempts to divert attention away from the discussion of relief for underrepresented communities. The argument laid out in comment c5 that any proposed rule that would change the way incarcerated persons are counted is only "driven by activist groups who seek to gain politically" is unfounded. The claim that prison gerrymandering is an issue being touted for political gain insinuates that communities who have their members disproportionately incarcerated are due no relief from the unequal access to resources that accompany their underrepresentation. That is not the case. The purpose of accurately counting incarcerated people as residents of their home communities is 1) to ensure that the Bureau is providing an accurate population count, so that communities receive adequate federal funding for a host of purposes, including to support successful reentry for those involved in the criminal justice system after they have finished their sentence, 2) so that prison gerrymandering cannot be used as a tool to circumvent fair representation, and 3) so that districts can be fairly drawn in the most equitable way. Also, comment c5 took the position that updating the residency rules to accurately count incarcerated people in their home communities would add a "superfluous complexity" to the process. Again, as described above, the Census Bureau has already established procedures for counting persons in their home location, rather than their temporary location. Furthermore, the goal of the Census Bureau is to "count everyone in the right place" in order to create a "fair and equitable apportionment", 81 FR 42577, and any effort to achieve this goal is both necessary and deserved by the communities affected by the Bureau's count.

Comment c5 also makes the claim that New York, Maryland, and Delaware "continue to have difficulty accounting for all prisoners accurately" after having adopted the prison adjustment as proposed. This attempt to undermine the legitimacy of the growing movement to accurately account for incarcerated individuals is incorrect. In the past few years New York, Maryland, Delaware, and California passed laws to reallocate people in prison back to their home communities. The law will not be implemented in California and Delaware until after the 2020 census, so the claim that Delaware has had difficulties with the reallocation process is not founded on any actual implementation of the state's law. Both New York and Maryland have had cross-agency collaboration, from government offices to the private sector, in order to implement their new reallocation laws that led to 46,003 incarcerated individuals in New York and 17,140 incarcerated individuals in Maryland being successfully reallocated to their home communities. The number of successful reallocations in Maryland accounts for 77.7% of those incarcerated in Maryland. There were also an additional 6% of the prisoners that were removed from the redistricting dataset after being identified as out-of-state residents, which brought the total percentage of those successfully reallocated in Maryland to 83.7%. Those involved with the successful implementations of Maryland and New York's new laws agree that the best way

to streamline reallocation and continue improving the representation in their states would be for the Census Bureau to count incarcerated persons as residents of their home communities.

### C. Conclusion

For the foregoing reasons, SCSJ urges you to count incarcerated people as residents of their home addresses. Thank you for this opportunity to comment on the Residence Rule and Residence Situations as the Bureau strives to establish census procedures that guarantee accuracy and reflect demographic and societal realities.

Sincerely,

Anita Earls

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